

# **A Comparative Analysis of Security as an Element of Constitutional Design: Is Global Terrorism Changing the Conditions of International Constitutional Law?**

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## **1. Introduction**

Security has been one of the most important political topics throughout the world in the last years. Every new terrorist action is communicated by mass media around the world, threatening and frightening people. These events and effects again lead to new political discussions as well as new legal consequences. Thus, security legitimizes various legal measures: fighting against terrorism, waging wars, limiting civil rights, collecting personal data, establishing new ways of international co-operation and so on. An end to these developments is not foreseeable. Security seems to limit constitutional guarantees. The migration and spread of anti-constitutional ideas are part of this process.<sup>1</sup>

The approach in this paper is designed the other way round: Not security but the constitution shall be the starting and finishing point. This paper analyzes the changing role of security in a constitutional context. What is the legal position of security in constitutions? How do terrorist attacks influence the constitutional dimension of security? The aim is to develop constitutional criteria to balance and limit the increasing importance of security in the constitutional design. Different constitutional perspectives, how to deal with security, shall be developed within a comparative approach.

## **2. Security as a (pre)condition of constitutional law**

Understanding security as defence against threats from primarily private actors who deliberately peril the security of constitutional institutions (national security)<sup>2</sup> as well as the constitutional guarantee of fundamental and human rights, like the right to life as well as the right to respect the physical and informational integrity of people (security of the individual), a certain amount of this kind of security is a prerequisite for all constitutions.

Without a minimum extent of this internal security towards threats to constitutional institutions and individuals, neither the necessary effectiveness of a constitutional order nor

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<sup>1</sup> Kim Lane Scheppele, *The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency*, in: Choudhry (ed.), *The Migration of Constitutional Ideas* 347-373 (2006).

<sup>2</sup> An interesting perspective to national security can be found in Sec. 198 of the Constitution of South Africa: "The following principles govern national security in the Republic: (a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life."

legislation can be guaranteed. Thus, security is a (pre)condition of constitutional law, but not the (historically developed) purpose of constitutions.<sup>3</sup>

In times of a civil war or a revolution, in which this minimum extent is not guaranteed, constitution does not “work” any more. Different situations are conceivable in which constitutional processes lead to some kind of constitutional failure or breakdown.<sup>4</sup> It is important to qualify a situation as constitutional emergency that there is an actual and substantive danger or a realised destruction of constitutional institutions.

In these situations it is not possible to uphold the all principles of a constitution. If democracy, human rights and the rule of law cannot be guaranteed because of security reasons, the most important task is to restore the constitutional power. Nevertheless, in these states of constitutional emergency the core of the fundamental principles of humanity have to be uphold, e.g. the prohibition of torture, some kind of democratic control and possibilities of legal protection. The dangers of states of emergency are developments which are leading away from democracy.<sup>5</sup> Consequently, times of emergency have to be restricted to actual danger. If the state of emergency is linked to a (permanent) war on terrorism, the potential threat of terrorism would legitimize a constitutional change away from crucial constitutional ideas.

If we are comparing different cases, we can observe different states of emergency:

The terrorist attacks of 9/11 did not effectively destroy constitutional institutions. Nevertheless these attacks created an actual and substantial threat to the US government. The attack on the US Department of Defence and the supposable attempted attack on the White House, showed a concretised threat to the system of the US constitution. Although it was not clear for some days, if there would be further attacks, the constitutional emergency finally did not last more than a week. The terrorists destroying of the World Trade Center showed an enormous and tragic effect on the security of the individual, but did not cause a constitutional emergency.

In comparison to 9/11 the terrorist attacks in Europe (Madrid 2004<sup>6</sup> and London 2005<sup>7</sup>) were not cases of constitutional emergency. The Spanish and British parliament, government and jurisdiction were still in power and not attacked. Of course these terrorist attacks showed

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<sup>3</sup> The process of constitutionalism in the 19th century did not primarily serve the realisation of the value “security” but the establishment of civil liberties and democratic facilities. Already before the origination of European constitutional states inner and outer security was guaranteed by absolutistic sovereignty. Nonetheless security has to be understood as a constitutional idea which has to be considered as a prerequisite of constitutions like other constitutional principles. Democracy without a minimum extent of security is just as little conceivable as the guarantee of human rights or the organisation of a constitutional state. Security therefore remains a constitutional idea that has to be considered in the constitutional context.

<sup>4</sup> See Ulrich Schneekener, *States at Risk. Zur Analyse fragiler Staatlichkeit*, in: Ulrich Schneekener (ed.), *Fragile Staatlichkeit. “States at Risk” zwischen Stabilität und Scheitern 9-40* (2006).

<sup>5</sup> Bruce Ackerman, *Before the next attack* 98 (2005).

<sup>6</sup> Train bombings in Madrid, March 11, 2004.

<sup>7</sup> Terrorist bombings hit Underground and a double-decker bus in London, July 7, 2005.

the instability in society and the limits of police measures. These tragedies are hard to deal with, but do not have the effect to undermine the constitution of the particular country. Nevertheless, the Spanish and British police forces could guarantee more than a minimum extent of constitutional security.

Complete different situations are observable in Afghanistan and Iraq. In these countries of the Middle East, the stability of the whole country is doubtful. In some regions of Afghanistan the institutional framework of the constitution is working; in other parts of the country the government is not able to control the country and to guarantee even a minimum extent of security.<sup>8</sup> In Iraq the government is not able to guarantee security in any part of the country and constitutional institutions, like the parliament, are actually threatened by terrorist attacks.<sup>9</sup>

These examples show the difference between the minimum extent of security that is required for each constitution as a durable standard and specific breakdowns of the constitutional security. They also exemplify the difference between a terroristic attack against constitutional institutions and against the civil population. The impact of a terroristic attack on a society has also be taken into account. Terrorist attacks implicate an organizational emergency, mental overload and a humanitarian catastrophe. But these aspects have to be separated from a constitutional state of emergency.<sup>10</sup>

Constitutional state of emergency means a restriction of constitutional rights.<sup>11</sup> Thus, a specific constitutional justification is necessary. The minimum extent of security cannot be guaranteed any more. This means a relevant impact on constitutional institutions – directly or indirectly.

### **3. Establishing security measures within the limits of constitutional law**

The extension of security measures within the political motivation and rationale to fight against terrorism has to consider the constitutional framework. If a certain minimum extent of security – as described above – is guaranteed, all legal developments have to be in accordance with the domestic constitution and transnational or international obligations.

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<sup>8</sup> See with regard to the constitutional development on Afghanistan: Michael Schoiswohl, *Linking the International Legal Framework to Building the Formal Foundations of a "State at Risk": Constitution-Making and International Law in Post-Conflict Afghanistan*, 39 Vand. J. Transnat'l L. 819-863 (2006).

<sup>9</sup> See CNN headline: Suicide attack kills 8 in Iraqi parliament cafeteria. POSTED: 3:48 p.m. EDT, April 12, 2007 (<http://www.cnn.com/2007/WORLD/meast/04/12/iraq.main/index.html>): BAGHDAD, Iraq (CNN) -- A suicide attack in Iraq's parliament building on Thursday killed eight people, including two Iraqi lawmakers, and wounded 20, U.S. and Iraqi officials said.

<sup>10</sup> See with regard to "state of emergency" in general Art 16 France const, Art 35 German basic law, Art 48 Greek constitution, Art 19a Hungarian constitution, Art 24 Irish constitution, Art 103 Netherlands constitution, Art 93 Romanian constitution., Art 92 Slovenian constitution, Sec. 37 South African Constitution, Art 76 South Korean constitution, Art 116 Spanish constitution;.

<sup>11</sup> State of Emergency with restriction of Liberties see Art 120 Est. const., Art 23 Fin const., Art 8 Abs 4 Hungarian const. Sec. 37 South African Const

Security measures as the increase of surveillance, the treatment of prisoners, the possibility of legal protection of the persons concerned, have to be conform to the constitution. The jurisdiction of the German constitutional court<sup>12</sup> gives interesting examples of a domestic constitutional struggle that counterterrorist measures has to meet constitutional requirements. Decisions to data screening of “Muslim sleepers”, electronic eavesdropping, European arrest warrant and the shooting down of aircrafts show that constitutional limits restrict the governmental possibilities to realize anti-terrorist measures. The German constitutional court has controlled governmental anti-terrorist measures within their constitutional limits:

Although the increased possibilities of electronic eavesdropping were already established in 1998 within a constitutional amendment, eavesdropping is an important anti-terrorist measure. Nevertheless, the decision of the German Constitutional Court was set up already in political times on fighting terrorism (March 3, 2004).<sup>13</sup> The Court declared the modification of the German Code of Criminal Procedure void, because of violating fundamental rights. The constitutional amendment was accepted by the court.<sup>14</sup>

The German constitutional court declared the German European Arrest Warrant Act, which transposed the Framework Decision of the European Union on the European Arrest Warrant in Germany, as unconstitutional and void. The European Arrest Warrant was also initiated before 9/11, but established on June 13, 2002 influenced by the attacks in the US. Moreover, the European Arrest Warrant is an effective and important tool in combating terrorism in Europe. The German Constitutional Court decided on July 18, 2005 that the German European Arrest Warrant Act<sup>15</sup> was unconstitutional because of a violation of fundamental rights regarding procedural rights and the citizen right not to be extradite.<sup>16</sup>

Another decision of the German constitutional court dealt with the shooting down of aircrafts in the case of a terroristic attack. Germany established such a possibility in the Air Security Act 2004. The decision declared the provision unconstitutional because of the fundamental right to life and the principle of the inviolability of human dignity regarding the possible death of innocent people.<sup>17</sup> To summarize this decision as *Oliver Lepsius*<sup>18</sup>

<sup>12</sup> <http://www.bundesverfassungsgericht.de>.

<sup>13</sup> Decision of the German Constitutional Court: BVerfG, 1 BvR 2378/98, 3.3.2004 ([http://www.bverfg.de/entscheidungen/rs20040303\\_1bvr237898.html](http://www.bverfg.de/entscheidungen/rs20040303_1bvr237898.html)).

<sup>14</sup> In Germany the constitutional court is able to control constitutional amendments on an “Eternity clause” (Art. 79 para. 3 German Basic Law). See Nicolas Nohlen, *Germany: The Electronic Eavesdropping Case*, 3 Int. Journal of Const. Law 680-686 (2005).

<sup>15</sup> Decision of the German Constitutional Court: BVerfG, 2 BvR 2236/04, 18.7.2005 ([http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718\\_2bvr223604.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604.html)).

<sup>16</sup> See the critical comment of Simone Mölders, *European Arrest Warrant Act is Void – The Decision of the German Federal Constitutional Court of 18 July 2005*, 7 German Journal Law 45-57 (2006).

<sup>17</sup> Decision of the German Constitutional Court: BVerfG, 1 BvR 357/05, 15.2.2006 ([http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215\\_1bvr035705.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215_1bvr035705.html)).

<sup>18</sup> Oliver Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act*, 7 German Law Journal 761-776 (2006)

concludes in an article about this decision: The German constitutional court “again struck down a prominent anti-terrorism statute” and “there is no tendency in the judgement that the Court will lower either factual or normative requirements in order to justify infringements of civil rights in an emergency”.<sup>19</sup>

In a recent decision the German Constitutional Court declared preventive data screening of muslim sleepers unconstitutional, because of a serious infringement of human rights, especially because of the potential discrimination and the lack of a concrete terrorist threat.<sup>20</sup> Finally the German Supreme Court stopped German police to establish “online house search” as a method of fighting terrorism,<sup>21</sup> on formal grounds because of the absence of an act of legislation.

#### 4. Security within Constitutional Law – a status quo analysis

Analysing constitutional law shows that security is typically not established as a concept or principle in constitutions. Nevertheless, the term “security” is mentioned in most constitutions in different contexts.<sup>22</sup> Most of the analysed constitutions do not mention security in their preambles (if they have one).<sup>23</sup> Some constitutions formulate security as an aim or purpose of the constitution, like Switzerland<sup>24</sup> or Hungary<sup>25</sup>. A typical place to mention security in constitutions is the regulation about competences of the Parliament (legislative)<sup>26</sup> or the powers of the government.<sup>27</sup> The liability and the criminal responsibility of the president and the government can be related to the threat to national security.<sup>28</sup> To protect the Parliament the Norwegian constitution regulates a special criminal provision.<sup>29</sup> In federalist

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<sup>19</sup> Ibid, 775s.

<sup>20</sup> See Decision of the German Constitutional Court: BVerfG, 1 BvR 518/02, 4.4.2006; Gabriele Kett-Straub, Data Screening of Muslim Sleepers Unconstitutional, 7 German Law Journal 967-975 (2006).

<sup>21</sup> Decision of the German Supreme Court (BGH): 31.01.2007 - StB 18/06.

<sup>22</sup> See as an exception the constitution of the Czech Republic, where security is not mentioned. The term security is also mentioned in other context than internal and external security, as social security (many constitutions), legal security (Art. 9 para. 3 Spanish Constitution), security of man, animal and environment in the context of gene technology (Art. 120 Swiss Constitution).

<sup>23</sup> But see the constitutions of Brazil, Japan, South Korea and Spain, which mention security in their preamble. In the preamble of the US Constitution security is only mentioned in the context of liberty (“... and secure the Blessings of Liberty to ourselves and our Posterity ...”).

<sup>24</sup> Article 2 of the Swiss Constitution: “Purpose. (1) The Swiss Federation protects the liberty and rights of the people and safeguards the independence and security of the country.”

<sup>25</sup> Art. 6 of the Hungarian Constitution mentions security within the concept of a European security: “ (4) The Republic of Hungary shall take an active part in establishing a European unity in order to achieve freedom, well-being and security for the peoples of Europe.”

<sup>26</sup> Art. 80 Croatian Constitution; Sec. 75 No. 16 Argentinean constitution; Sec. 44. para. 2 South African Constitution; Art. 173 Swiss Constitution; Art. 10 Austrian Constitution.

<sup>27</sup> Art. 35 para. 1 char. h Hungarian constitution; Art. 185 Swiss constitution.

<sup>28</sup> Liability of Government: Art. 68 para. 2 France Constitution; Criminal Responsibility: Art. 102 Spanish Constitution.

<sup>29</sup> Article 85 Norwegian Constitution: “[Treason Against the Country] Any person who obeys an order, the purpose of which is to disturb the liberty and security of the Parliament [Storting], is thereby guilty of treason against the Country.”

constitutions security is mentioned in the allocation of the competences between Federation and the State.<sup>30</sup>

Security is also mentioned in the context of constitutional provisions concerning administration. In different constitutions there are provisions about police organisations<sup>31</sup> or the armed forces.<sup>32</sup> Furthermore, ineligibility and incompatibility clauses shall prohibit that security forces can take democratic offices.<sup>33</sup> In a few constitutions security services are mentioned.<sup>34</sup> In some constitutions National Security Councils have been established as advisory boards to the president or other governmental bodies.<sup>35</sup>

In the perspective of external relations security is mentioned in various circumstances: At first it is mentioned in a general perspective, as an aim of external affairs.<sup>36</sup> The consent to international treaties in the context of security is regulated e.g. in the South Korean constitution.<sup>37</sup> Another aspect is the transfer of sovereignty rights to international organizations with regard to security. Such constitutional provisions are regulated e.g. in Norway and Switzerland.<sup>38</sup>

Within the guarantee of basic, fundamental and human rights security is mentioned in two different perspectives. The first perspective lies within the context of personal integrity as a right to freedom and security. This right does not guarantee individual security but it is a liberal right that a state is not arresting people without special constitutional reasons.<sup>39</sup> An interesting example in this context gives the Constitution of South Africa: "Sec. 12 (2) Everyone has the right to bodily and psychological integrity, which includes the right (b) to security in and control over their body".<sup>40</sup>

<sup>30</sup> Art. 73 GG (German basic law), Art. 117 Italian Constitution, Art. 71 char. I Russian Constitution.

<sup>31</sup> Art. 40a Hungarian Constitution, Art. 205 South African constitution, Art. 104 Spanish Constitution, Art. 78a Austrian Constitution.

<sup>32</sup> Art. 79 Austrian Constitution; Art. 9 Bulgarian Constitution; Art. 5 South Korean constitution; Art. 58 Swiss Constitution; US. Const. Amendment II.

<sup>33</sup> Art. 70 Spanish Constitution.

<sup>34</sup> Art. 102 Croatian Constitution; Sec. 199 South African Constitution.

<sup>35</sup> See for example Art. 91 South Korean Constitution or similar Council of National Defense (Art. 91 Brazil Constitution, Art. 119 Romanian Constitution).

<sup>36</sup> See Art. 51 of the Indian Constitution: "Promotion of international peace and security. The State shall endeavour to (a) promote international peace and security"; see also Art. 124 Slovenian Constitution.

<sup>37</sup> Article 60 South Korean Constitution: "[Consent to Treaties]: (1) The National Assembly has the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security."

<sup>38</sup> Art. 93 Norwegian Constitution; Art. 140 Swiss Constitution.

<sup>39</sup> Art 5 European Convention of Human Rights, Sec. 7 Canadian Constitution, Art. 20 Estonian Constitution, Sec. 7 Finish Constitution, Art. 55 Hungarian Constitution, Art. 94 Latvian Constitution, Art. 23 Romanian Constitution, Art. 17 Spanish Constitution; see also the US Constitution - Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

<sup>40</sup> See the whole provision (Sec. 12 Constitution of South Africa): "Freedom and security of the person,

(1) 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; and (e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right -

(a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent."

The second perspective is the restriction to human rights. (National) Security is a classic restriction of fundamental rights in constitutions – but within the principle of proportionality. The European Convention of Human Rights provides national security and/or public safety as restriction on human rights for the right to respect private and family life (Art. 8 ECHR), the freedom of thought, conscience and religion (Art. 9 ECHR), the freedom of expression (Art. 10 ECHR) and finally, the freedom of assembly and association (Art. 11 ECHR). A lot of national constitutions also provide similar restrictions.<sup>41</sup> Another restriction provides the Swiss constitution in the context of Asylum.<sup>42</sup>

In conclusion, typical constitutional provisions regarding security are emergency clauses, allocation of rights and duties in a federalist state, the establishment of armed forces or police, provisions on foreign affairs and restriction to human rights. Only in some exceptional cases security is mentioned as a constitutional principle.<sup>43</sup>

### **5. Constitutional shift towards security – Security as a constitutional principle**

But constitutional law is not only the written part of a constitution but also constitutional reality, like the jurisdiction of the constitutional courts, the governmental constitutional practice or the constitutional culture of society. Within this perspective the constitutional role as mentioned above focused on the limitation of security. In stable constitutional societies security measures are undertaken by the parliament, the government and the enforcement authorities. If security measures violate constitutional principles, the individual can seek legal protection and the (constitutional) courts will limit the possibilities of official institutions within the constitutional framework.

The developments after the attacks of 9/11 and the global fight against terrorism did typically not lead to amendments of constitutions<sup>44</sup> but brought changes to the constitutional reality. The change of security influences the constitutional design and makes security a part of this constitutional design. A development from security as a constitutional minimum

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<sup>41</sup> See Art. 5a, 11, 19 Greek Constitution, Art. 19 para. 2 Indian Constitution., Art. 16, 17 Italian Constitution., Art. 31 Romanian Constitution, Art. 55 Russian Constitution, Art. 37, 42 Slovenian Constitution, Art. 37 South Korean Constitution.

<sup>42</sup> Art. 121 Swiss Constitution: “[General Provisions]. (2) Foreigners who endanger Switzerland's security may be removed from Switzerland by force.”

<sup>43</sup> Art. 144 Brazilian Constitution: “[Public Security] Public security, which is the duty of the State and the right and responsibility of all, is exercised to preserve public order and the invulnerability of persons and property, by means of the following bodies. ...”; see also Art. 57 of the Swiss Constitution: “Security. (1) The Federation and the Cantons ensure, within the framework of their powers, the security of the country and the protection of the population. (2) They coordinate their efforts in the field of inner security.”

<sup>44</sup> But see Art. 73 para. No. 9a German basic law, which set up a federal powers: „combat dangers of international terrorism within the Federal Criminal Police Office in cases, which concerns several states (Länder), or the competence of the state (Land) authority is not recognizable or the highest state authority request the transfer of competences” (translation of the author; “die Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalpolizeiamt in Fällen, in denen eine länderübergreifende Gefahr vorliegt, die Zuständigkeit einer Landespolizeibehörde nicht erkennbar ist oder die oberste Landesbehörde um eine Übernahme ersucht“) Terrorism is not typically mentioned in constitutions. Already before the attacks of 9/11 the Chilean Constitution (Art. 9) and the Spanish constitution (Art. 13, Art. 55).

requirement (security limited by constitution law) to security as a constitutional principle (security balanced by constitutional law) in the context of international constitutional law (multi-level constitutionalism) is observable.

Security as a principle means that the constitutional system (with regard to the constitutional norms, the constitutional jurisdiction and the acting of constitutionally authorized institutions) allocates security a new and stronger constitutional dimension and in this way equal to other constitutional principles. Security also changes within the constitutional context. While the traditional understanding of security was only guaranteed as a minimum requirement of constitutional law and constitution has limited security, the constitutional status of security changes towards an orientation of constitution with security as an important objective. Thus, security becomes a constitutional principle which constitutes the norm and legitimation for the legislator.

An example therefore is the constitution of the European Union as expressed in the treaty of the European Union. Understanding the primary law of the European Union as constitutional law,<sup>45</sup> also allows analysing constitutional developments at a European level. The European Union raises the area of freedom, security and justice to a main objective of the constitution.<sup>46</sup> Thus, security can be qualified as an equal principle besides freedom and justice. In this case security is not limited by constitutional principles but has to be equally balanced with these principles.

Within the European Union a lot of contemporary legislative act show the strengthening of security, while the deepening of other constitutional principles is still not realized. The third pillar of the European Union focuses on police and judicial cooperation in criminal matters.<sup>47</sup> The Framework Decision on combating terrorism intends to harmonize the criminal offences, penalties and jurisdiction regarding terrorism.<sup>48</sup> The Directive on telecommunication data retention<sup>49</sup> “aims to harmonise Member States’ provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by

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<sup>45</sup> Otto Pfersmann, *The new revision of the old constitution*, Int. Journal Const. Law 383-404 (2005); Harald Eberhard / Konrad Lachmayer / Gerhard Thallinger, *Über Inhalt und Methode des Internationalen Verfassungsrechts als Wissenschaftsdisziplin*, in: Harald Eberhard / Konrad Lachmayer / Gerhard Thallinger (eds.), *Reflexionen zum Internationalen Verfassungsrecht* (2005).

<sup>46</sup> Art 2 Treaty of the European Union.

<sup>47</sup> See Art 29ss Treaty of the European Union; see also Moica den Boer, *New Dimensions in EU police co.operation: The Hague milestones for what they are worth*, in: de Zwaan / Goudappel (eds.), *Freedom, Security and Justice in the European Union. Implementation of the Hague Programme 221-232* (2006).

<sup>48</sup> Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).

<sup>49</sup> Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.



each Member State in its national law.”<sup>50</sup> Further extensions of security within the concept of the European Union are organizational one like the foundation of the European Police Chiefs Task Force<sup>51</sup>, the Situation Center (SitCen)<sup>52</sup>, the European Union counter-terrorism coordinator<sup>53</sup> and the enlargement of the competences of Europol.<sup>54</sup>

Whereas the strengthening of security is steadily developed, the other constitutional principle, freedom, human rights, justice, rule of law and democracy, are not substantially improved. The EU member states did not create the possibilities and necessary changes to establish adequate provisions: The jurisdiction of the ECJ in the third pillar of the European Union is still limited;<sup>55</sup> the possibilities of the European parliament are little. The Charter of Fundamental Rights of the European Union<sup>56</sup> is still not obligatory.

Another example is still the absence of the Framework Decision on data protection<sup>57</sup> within the police and judicial co-operation in criminal matters. Although the negotiations are already for more than one and a half years, the danger of a non-sufficient data protection still exists and the end of the negotiations is not foreseeable.<sup>58</sup> Only the establishment of the European Union Agency for Fundamental Rights<sup>59</sup> is a positive signal, even though the competences of the agency are modest.

In conclusion, the European Union establishes security as an equivalent constitutional principle. The other principles are “only” balanced with security. The restrictions within the European Unions constitutions are very rare. The topic of human and fundamental rights is

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<sup>50</sup> Art 1 Data Retention Directive.

<sup>51</sup> Established at the European Council of Tampere (1999); it is a top-level forum for interpersonal communication among the police forces of the member states of the European Union See Hoek van Holland, *European Police Co-operation in the Union s mutual fight against the illegal trafficking of drugs*, Master Thesis at the Erasmus University Rotterdam, February 2007, p. 44

([https://ep.eur.nl/scripts/bitstream/2105/3934/1/Dorine\\_vreugdenhil.pdf](https://ep.eur.nl/scripts/bitstream/2105/3934/1/Dorine_vreugdenhil.pdf)).

<sup>52</sup> The situation center (SitCen) is an advisory board of the Council of the European Union and provides strategic analysis of the terrorist threat based on intelligence from Member States' intelligence and security services and, where appropriate, on information provided by Europol. The SitCen is established without legal foundation; only in the general programme of the European Union strengthening freedom, security and justice in the European Union, the Hague Programme (2005/C 53/01).

<sup>53</sup> See again the general programme of the European Union strengthening freedom, security and justice in the European Union, the Hague Programme (2005/C 53/01).

<sup>54</sup> For example the enlargement of the operational competences to participate in joint investigation teams. See the Europol Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, OJ 312 , 16.12.2002, 0002 - 0007 and the Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA); see also Decision of the management board of 20 March 2007 laying down the rules governing the arrangements regulating the administrative implementation of the participation of Europol officials in Joint investigation Teams (2007/C 72/16). See also Conny Rijken/Gert Vermeulen, *Joint Investigation Teams in the European Union. From Theory to Practice* (2006).

<sup>55</sup> See Art. 35 Treaty of the European Union.

<sup>56</sup> The Charter of Fundamental Rights of the European Union, 2000/C 364/01;

[http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>57</sup> Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, 4.10.2005 - COM(2005) 475 final.

<sup>58</sup> See the second opinion of the European Data Protection Supervisor on the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (2007/C 91/02), OJ C 091 , 26.04.2007, p. 9-14.

<sup>59</sup> Regulation (EC) n° 168/2007 establishing a European Union Agency for Fundamental Rights, <http://fra.europa.eu/fra/index.php>.

often proclaimed but is not realized in the same dimension as security. In a similar process, the democratic legitimation and the rule of law is not developed with regard to security cooperation.<sup>60</sup>

Comparing the development in the European Union with the United States shows, that the constitutional impact of the political and legal reaction to the terrorist attacks on 9/11 are remarkable. The development of security towards an independent constitutional principle can also be noticed in U.S. developments. Security as a constitutional principle gets a stronger legitimated effect in legislation and law enforcement. Thus, constitutional principles have to be put in balance but do not show the same limits for security any more. Constitutional acting of the government of the United States also points in this direction.<sup>61</sup>

In the US constitution the security dimension is not formulated explicitly. Nevertheless the security dimension of the constitution is developed within the dealing of the constitutional institutions with security. Especially the US legislation developed a lot of new security measures. The most important and renowned examples are the USA Patriot Act and the Homeland Security Act. Moreover, the specific situation of the detainees in Guantanamo Bay showed the problematic developments in the United States after 9/11.

Different developments and court decisions in the last years show the balancing within the different constitutional principles. The priority of security as a constitutional principle is already bound to the other constitutional principles. Different court decisions cut the security approach back. In the case *Hamdan vs Rumsfeld*<sup>62</sup> the US Supreme Court made clear that fundamental procedural standards have to be considered for Guantanamo's detainees. Nevertheless, the US Supreme Court did not answer a lot of questions. The enactment of the Military Commissions Act<sup>63</sup> – as a response to the courts judgement – legalizes various problematic aspects and did not establish a solution to consider the rule of law and human rights in an adequate way.<sup>64</sup> Security remains still an equal principle within the US constitution.

The USA Patriot Act was criticized because of its limitation of civil liberties, but the impact was even more far-reaching, the broad possibilities of surveillance also have implications on democracy, the possibilities to have a public debate on various questions. Within the process of reauthorization of the Patriot Act leads to the establishment of various so called "civil liberties protections".<sup>65</sup> Nevertheless, the US Patriot Act was prolonged and

<sup>60</sup> See Neil Walker, *The pattern of transnational policing*, in: Newburn (ed.), *Handbook of policing* 131s (2003).

<sup>61</sup> See Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 *Internat. & Comp. Law. Quarterly* 1-15 (2004).

<sup>62</sup> US Supreme Court, 29.6.2006, *Hamdan vs. Rumsfeld*, 126 US 2749 (2006). See also the prior cases of *Hamdi vs Rumsfeld* 542 US 507 (2004) and *Rasul vs. Bush* 542 US 466 (2004).

<sup>63</sup> Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

<sup>64</sup> See for example Michael C. Dorf, *The Orwellian Military Commissions Act of 2006*, 5 *Journal of International Criminal Justice* 10-18 (2007).

<sup>65</sup> See USA Patriot Improvement and Reauthorization Act.

different human rights problems remain. Maybe, in some question a balance between human rights and security was found - a balance.

Thus, Security is established as a constitutional principle, which is balanced with other constitutional principles, but not restricted within the constitution any more. Within these developments from a constitutionally limited security towards a constitutionally accepted and intended security, especially constitutional courts play a decisive role to constrain or partly inhibit such development processes.

As a third example the counter-terrorist acts of Russia shall be mentioned. Within the problematic developments of Russian constitutionalism in general, the fight against terrorism became part of Russian re-conception of their constitutional design. A new federal law "On counteracting terrorism" was signed into law on 6 March 2006 and published on 10 March (Federal law No. 35-F3).<sup>66</sup> This federal law gives far-reaching possibilities within so-called anti-terrorist operations and regulates the involvement of the armed forces in anti-terrorist operations. Another measure which is enabled by this law is the shooting down of airplanes.<sup>67</sup> Other organizational measures, like creation of a new National Counterterrorism Committee, a new government body tasked with coordinating all federal-level antiterrorism policies and operations, accompany this anti-terrorism strategy. These short impressions on the Russian counterterrorist situation illustrate a little the problematic developments in Russia. Further reactions against these developments in Russia are not known.

All three examples (European Union, United States and Russia) show that constitutions are not limiting security anymore. Security is accepted as a constitutional principle – equal to other principles, like democracy of human rights. Within this analysis a recent trilateral meeting of EU, US and Russia on counter-terrorism on the 4.4.2007 seems interesting to mention.<sup>68</sup> The Vice-President of the European Union Frattini said, "The area of justice, freedom and security is a striking illustration of the positive cross-fertilization between internal and external policies. Cooperation and partnership with our strategic partners is an

<sup>66</sup> <http://www.legislationline.org/legislation.php?tid=46&lid=6207>.

<sup>67</sup> See Art. 7 of the Russian Federal Law on Counteraction of Terrorism: "Suppressing Terrorist Acts in the Air.  
1. The Armed Forces of the Russian Federation shall use their weapons and military equipment in the procedure established by normative legal acts of the Russian Federation for the purpose of removing the threat of a terrorist act in the air or for the purpose of suppressing such terrorist act.  
2. if an aircraft does not react to radio commands of ground control centers to stop violating the rules of using the airspace of the Russian Federation and (or) to radio commands and visual signals of the aircrafts of the Armed Forces of the Russian Federation sent to intercept it, or refuses to follow radio commands or visual signals not explaining the reasons for it, the Armed Forces of the Russian Federation shall use their weapons and military equipment for preventing the flight of the said aircraft by way of forcing it to land. If the aircraft does not obey the demand to land and there is a real danger of the loss of life or the onset of an ecological catastrophe, the weapons and military equipment shall be used for preventing the flight of the said aircraft by way of destroying it.  
3. Where there is reliable information about the probable use of an aircraft for committing an act of terrorism or about the occupation of an aircraft and, with that, all measures required under the circumstances for its landing have been taken and there is a real danger of the loss of life or the onset of an ecological catastrophe, the Armed Forces of the Russian Federation shall use their weapons and military equipment for preventing the flight of the said aircraft by way of destroying it."

<sup>68</sup> [http://www.eu2007.de/en/News/Press\\_Releases/April/0404BMITrilateral.html](http://www.eu2007.de/en/News/Press_Releases/April/0404BMITrilateral.html).

essential element of our strategy. We aim at promoting the rule of law, democracy, respect for human rights, and security for our citizens.”<sup>69</sup> Whereas the first aspect of Frattini’s conclusion describes the recent developments very well, the latter aspect seems doubtful. Nevertheless, the equal mentioning of security shows that not only the constitutional design has changed but also the political understanding of security.

## 6. Developments towards a security constitution

Furthermore, another development is possible which is already observable by single actions but becomes especially relevant by the continuation of the establishment of security as a constitutional principle. Security should become a principle under several principles and it should have a priority status in the constitution which advances other constitutional principles. In this case the constitutional design changes from an equal balance of different principles towards a dominant position of security within the constitution. Such a constitution has to be qualified as a security constitution.<sup>70</sup> The constitutional principles like democracy and human rights step back if it is required by the primary target of the constitution, namely the maintenance of security. Security becomes a constitutional condition – even more it becomes constitutional reality. Such constitutions typically characterise unethical regimes that guarantee national security but do not guarantee the security of individual person. The security constitution becomes instrument of certain institutions and is not suited as a primary instrument for the organisation of a democratic society. Approaches thereto are the systematic allowance respectively the non-prevention of torture, the elimination of elections for security reasons. In conclusion: within a security constitution security goes first.

Security as a leading principle of a constitution does not only pose a threat to liberty but also to equality, non-discrimination and social balance. The establishing of security measures starts with privacy, but cannot stop with controlling the people. These developments have implications on religious freedom, freedom of expression and the public debate on political topics.

Thus, establishing a security constitution is finally a question of militant democracy.<sup>71</sup> If the constitutional system itself is establishing a security constitution (at least with consent

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<sup>69</sup> [ibid.](#)

<sup>70</sup> See for example the Constitution of China. The importance of security in the Chinese Constitution is noticeable: “Article 28 [Public Order] The State maintains public order and suppresses treasonable and other criminal activities that endanger State security; it penalizes actions that endanger public security and disrupt the socialist economy and other criminal activities, and punishes and reforms criminals.”; “Article 54 [Integrity of the Motherland] It is the duty of citizens of the People’s Republic of China to safeguard the security, honor, and interests of the motherland; they must not commit acts detrimental to the security, honor and interests of the motherland.”

<sup>71</sup> See Kent Roach, *Anti-Terrorism and Militant Democracy. Some Western and Eastern Responses*, in: Sajo (ed.), *Militant Democracy* 171-207 (2004).

of the majority of the people) the constitutional courts – as far as they exist – have to prevent these developments to guarantee the democratic constitutional concept.<sup>72</sup>

## **7. Security limits to a democratic constitution – the constitutional minimum**

The comparing constitutional analysis of security respectively the understanding of security should not be limited to the changes or the development of security in its constitutional dimension. The change of security in the beginning of the 21<sup>st</sup> century displays not only in the changed political rhetoric but also in the extension of stately (and private) capacities to act. They are in the area of conflict towards the changing of the constitutional design, the cooperation of democracy, human rights, governance and the rule of law. Thus, the significance of the constitutional interfaces between security and central constitutional principles should be refined. The paper brings forward the argument that certain main points as transparency, responsibility, proportionality, subsidiarity and effective legal protection are not maintained - security as a constitutional principle becomes more important and it runs the risk that a constitutional development towards a security constitution cannot be held up:

How can an individual citizen obtain legal protection, if he/she is not informed of the sovereign intervention in his rights? What are the effects for a democratic society, if it cannot verify the threats of national security named by the state and also not the personal security of the individual? To what extent is it possible to correspond to the norms of good governance, if internal and external supervision opportunities interfere with each other due to security considerations? Should or could individual states themselves determine the necessary security measures or is a transnational or international cooperation better suited? Are human rights impaired in their value by increased security considerations if the proportionality of the measures cannot be examined any more?

Security research includes all forms of society as well as their environment and culture. Thus, the legal general conditions, which have an influence on the social interactions and which partly coin or change them, are essential. A legal security analysis is not only a question of specific police papers but pervades the whole legal system that exerts a controlling influence on the conditions and the mechanisms of security within the social environment. Thus, legislation can be reconstructed out of a security oriented perspective.

The emphasis of this analysis acts on the assumption that security has effects on the constitutional design. The changes of “security” that have to be pointed out, based on changes in the understanding and the consciousness of security, have an effect on basic constitutional principles. The interaction of different constitutional principles has changed through the alternation of the international understanding of security within the previous

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<sup>72</sup> As democracy does not only mean that the majority decides but also that the minority has the possibilities to participate in the public political debate and in the election, a security constitution also threatens democracy.

years. Furthermore, the already made changes provide a perspective on the influence that can be expected with future changes of security towards the constitutional design.

Due to already made changes of the constitutional design by a reassessment of security questions concerning the limitations of security arise. In a second step, the analysis of a security development within the constitutional context follows constitutional conditions, which should be seen as limitations of security. Within the tensions of different constitutional ideas as democracy, human rights, governance, constitutional state and the splitting of task in a multi-level-system, concepts are developed through which security has to be defined within the constitutional design. In these different fields in which security, respectively the further development and the change of it, leads to tension. Essential constitutional principles can be spotted and should not be undermined by current security developments.

In connection with democracy it has to be pointed out to the necessity of transparency as a prerequisite of democracy which tension towards security has to be emphasised. The relativisation of the principle of proportionality by international security development in the field of human rights constitutes the main difficulty. Concerning the rule of law or the constitutional state the principle of effective legal protection can be seen as essential. In context with governance the principle of responsibility or accountability has to be emphasised.

Thus, it should be proved that the current security developments can conflict with basic aspects of central constitutional principles like transparency, proportionality, responsibility, effective legal protections and subsidiarity. When considering the different constitutional principles in the constitutional design the said aspects make demands to limit security. Only this can guarantee that extensions of capacities to act, collection and transfer of data as well as the enlargement of international and transnational cooperation in the field of security correspond to the constitutional basics and do not become an independently dominating criterion of the constitutional principle of security.

## **8. Conclusion**

The relevance of security in the constitutional design is changing. As the German constitutional court exemplifies the traditional role of security is a limitation by constitutional law. The contemporary constitutional developments show a shift from security as a constitutional (pre)condition to a constitutional principle. The European Union, the United States and Russia are different examples of similar development, accepting security as an equal constitutional principle. The problem of these developments is the danger of a security constitution, which establishes security as a leading constitutional principle. The constitutional ideas of democracy, human rights and rule of law are at risk. Thus, the establishing of security as a constitutional principle has to meet constitutional minimums of

transparency, proportionality, responsibility and effective legal protections. Without the effective guarantee of these aspects constitutional law – within its core ideas – is not sustainable. The internationalization and increasing interrelations of constitutional law within an international constitutional network is chance and risk to this constitutional challenge. If “war on terror” is also a “war on ideas”,<sup>73</sup> it will be important to know, which (constitutional) ideas are more important than others.

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<sup>73</sup> Dominic McGoldrick, From ,9-11' to the ,Iraq-War 2003'. *International Law in an Age of Complexity* 196s (2004).