

Constitutional Limits to Security – An Introduction

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“We uphold our most cherished values not only because doing so is right, but because it strengthens our country and keeps us safe.”¹

I. Introduction – The Security Decade

The first decade of the new millennium can be understood as a security decade. The terrorist attacks of 9/11 are the symbol of the threat and the legitimation of the reaction of the international community to these attacks. However, security measures are rooted deeper in the developments of our time. The UN terrorist lists were introduced in the year 1999 before the attacks of 9/11.² These lists resulted in freezing the funds of individuals without a fair trial – without any trial.³ The terrorist attacks of London (2005) opened the (political) door to a European consensus on data retention all over Europe.⁴ The attempts to reach a European consensus on data retention started a year earlier, after the terrorist attacks in Madrid (2004).⁵ New forms of international terrorism and its

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¹ Barack Obama’s speech on national security on May 21, 2009; see <<http://edition.cnn.com/2009/POLITICS/05/21/obama.transcript2/index.html>>.

² See UN Security Council Resolutions 1267 (1999), 1333 (2000).

³ The developments of the last years have seen some positive changes. See especially the UN Security Council Resolutions 1730 (2006), 1735 (2006) and 1822 (2008).

⁴ Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks [2006] OJ L105/54; see also COM/2005/0438 final.

⁵ See the Draft Framework Decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services, or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences, including terrorism (Council document 8958/04, 28.04.2004) – <<http://register>.

symbol, the attacks of 9/11, created the political will to change the legal framework of societies all over the world. The emphasis was placed upon security, understood as a constitutional value equivalent to other values such as liberty. The “war on terror paradigm” was created.⁶

Although many crises were developing during the first decade of 21st century, the security debate has shaped the start of the new millennium. Climate change and the financial or economic crises also have important effects on societies, but the security challenge is affecting constitutional values in the most remarkable way.⁷

9/11 paved the way for the legal black hole⁸ of Guantanamo, the closure of which is yet to be achieved. Secret detention, waterboarding and their symbol, Abu Ghraib, left marks.⁹ Torture is breaking constitutional taboos¹⁰ but has become a regular tool in the name of security.¹¹ The deprivation of human rights and the infringement of human rights were discussed within the perspective of emergency powers.

A second example of depriving individuals of previously constitutionally guaranteed rights is the freezing of bank accounts without trial.¹² Ter-

consilium.eu.int/pdf/en/04/st08/st08958.en04.pdf> drafted after the terrorist attacks in Madrid (2004).

⁶ See M Rosenfeld, ‘Judicial Balancing in Times of Stress: A Comparative Constitutional Perspective’ in A Bianchi and A Keller (eds), *Counterterrorism: Democracy’s Challenge* (Hart Pub, Oxford and Portland 2008) 357, 392-94.

⁷ See KL Scheppele, ‘The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency’ in S Choudhry, *The Migration of Constitutional Ideas* (CUP, Cambridge 2006) 347-73.

⁸ See J Steyn, ‘Guantanamo bay: The legal black hole’ (2004) 53 ICLQ 1-15, see also the UN report from the 15 February 2006 on the situation of detainees at Guantánamo Bay <<http://daccessdds.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf?OpenElement>>.

⁹ Regarding the role of private military companies see C Lehnardt, *Dogs of War, Pussycats of Peace? – The Role of Private Military Companies in UN Peace Operations*, in this book, 43.

¹⁰ See J Kozma, *The Example of Torture: Are there any constitutional limits left*, in this book, 167.

¹¹ See LK Donohue, *The Cost of Counterterrorism. Power, Politics, and Liberty* (CUP, Cambridge 2008) 91-106.

¹² See K Schmalenbach, ‘Constitutional Limits to Security at the UN level’, in this book, 21; M Kötter, *Postponed Legitimation: A Security Governance Process*, in this book, 65; KL Scheppele, ‘The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency’ in S Choudhry, *The Migration of Constitutional Ideas* (CUP, Cambridge 2006) 347-73.

rorist lists are black lists which outlaw persons in their financial dimension. Again, there is neither a final trial nor a possibility to escape from an infinite “smart sanction”. Moreover, human dignity might be jeopardised, if the persons thus sanctioned do not have enough financial resources to survive.

The third example relates to the information age in which we are living. The right to a private life is pushed back. Modern technology provides unforeseen possibilities of surveillance. Intelligence is on the rise: policing, criminal investigation and prosecution, military activities and the fight against terrorism depend more and more upon intelligence.¹³

To summarize, the security developments are challenging the constitutional values, such as human rights, the rule of law and democracy. Security itself is established as a constitutional principle. Constitutional, Supreme and ordinary courts, as the guardians of constitutional values, have reacted to the new challenges – some slower than others, some more effective or more resolute.¹⁴ The role of the Courts in the protection of constitutional values was at stake. However, the wheels of justice grind slowly.

II. A Constitutional Law Approach

The rise of security as concept, principle and value in the political and legal discussion could be observed over the last few years. Constitutional values and security were understood to be on the same level of legal argumentation. Thus, the right balance between liberty and security has to be found. Franco Frattini, the former Vice-President of the European Commission, often referred to the need to balance freedom and security: “06.11.2007 – Counter-terrorism package: ‘Our goal remains preserving the right balance between the fundamental right to security of citizens, the right to life and the other fundamental rights of individuals, including privacy and procedural rights’ Franco Frattini ... said today as the Commission adopted a new package of proposals aimed at improving the EU’s

¹³ See K Lachmayer, ‘European Police Cooperation and its Limits: From Intelligence-led to Coercive Measure’ in C Barnard and O Odudu (eds), *The Outer Limits of the European Union* (Hart Pub, Oxford 2009) 89-118, 106-11.

¹⁴ See A Bianchi and A Keller (eds), *Counterterrorism: Democracy’s Challenge* (Hart Pub, Oxford and Portland 2008).

capabilities in the fight against terrorism.”¹⁵ Politicians are changing; the political rhetoric is not. Jacques Barrot is now the European Commissioner for the Area of Freedom, Security and Justice. He stated at a speech delivered on 10/11 November 2008 in Berlin at the “7th Congress on European Security and Defence” about “The Roadmap for European Security – how far, how fast?”: “Security and Freedom are two sides of the same coin. They are cannot be dissociated. Regulators must make sure that security enhancing measures are proportionate and respect fundamental values. Even beyond regulation, striking the balance between security and freedom is a permanent task for governments”¹⁶

However, the political strategy of balancing liberty and security is questionable when it comes to the legal application. Oliver Lepsius concludes this discussion on security with an important insight: “To speak of ‘balancing’ freedom against security is thus misleading. Security has become ambiguous in its meaning: As an empowering objective security constitutes a so-called “state purpose”, as a legal term it describes – in its respective definition – a legal good ... If a legal system wants to realize the ‘idea of security’, it has to further define and outline this hyper-positive idea on a lower, more tangible, level ... The dangers of such an approach, where precise definitions of “security” and “danger” are neglected in favour of a diffuse scenario of threat, risks and networks, lie in the loss of individual freedom and, more importantly, in such one of legal rationality.”¹⁷ The security debate has to be brought into legal terms and integrated into the legal system. It is not necessary to evoke a state of emergency when there is no reason for it.¹⁸ The national and international systems provide complex problem solution mechanisms which are able to deal with the evolving security challenges.

Furthermore Kofi Annan, former UN General Secretary, has to be mentioned: “I believe there is no trade-off to be made between human

¹⁵ See <http://ec.europa.eu/commission_barroso/frattini/news/archives_2007_en.htm>.

¹⁶ <<http://www.securitycommunity.eu/modules.php?name=News&file=article&sid=98>>.

¹⁷ O Lepsius, ‘Liberty, Security, and Terrorism: The Legal Position in Germany’, 5 GLJ 2004, 459.

¹⁸ See A Kligenbrunner, ‘Fighting Terrorism: The State of Emergency’, in this book, 89; P Riberi, Assessing Republican Wariness in times of Hazard and Turmoil, in this book, 189; B Ackermann, Before the next attack. Preserving civil liberties in an age of terrorism (Yale University Press, New Haven & London 2006).

rights and terrorism. Upholding human rights is not at odds with battling terrorism: on the contrary, the moral vision of human rights – the deep respect for the dignity of each person – is among our most powerful weapons against it.”¹⁹ This statement reflects a constitutional law approach. Typically, constitutional law has already made the decision in defining the relation between security and liberty. Liberty can be located on a constitutional level and is part of the constitutional framework in liberal democracies. Security is understood as a purpose of a state which has to be fulfilled by law within the framework of constitutional law. Leaving aside the emergency situation, which cannot easily be argued and which does not dissolve human rights and the respect for human dignity, the establishment of security structures shall not be balanced with liberty. On the contrary, security measures are limited by the constitutional framework.²⁰

This constitutional framework regulates the possibilities of restricting personal freedoms with regard to the principles of proportionality. Such a proportionality test demands that security measures be adequate and necessary. Further limitations of security measures regarding accountability and the rule of law have to be considered. And even if these requirements are fulfilled, security measures must only be allowed if the effect of these measures does not infringe too strongly upon the relevant human rights. Thus, security measures have to fulfil several criteria in order to be applicable. This perspective shifts the approach from a balancing one to one of limitation. Constitutional limits to security are still relevant and not to be abolished by a new kind of political rhetoric.

III. The German Example: Protecting Constitutional Values

Germany was not shocked by a terrorist attack on its own territory in the last decade. However, the German experience of the 1970s and the

¹⁹ UN Secretary-General Kofi Annan, Statement to conference “Fighting Terrorism for Humanity: A Conference on the Roots of Evil,” 22 Sept. 2003. This citation is based on Verena Zöller, ‘Liberty Dies by Inches: German Counter Terrorism Measures and Human Rights’ (2004) 5 German Law Journal No. 5 (1 May 2004) – Special Edition, Footnote 1.

²⁰ K Lachmayer, A Comparative Analysis of Security as an Element of Constitutional Design: Is Global Terrorism Changing the Conditions of International Constitutional Law?, Online Paper presented at the VIIth World Congress of the International Association of Constitutional Law (see <http://www.enelsyn.gr/papers/w8/Paper%20by%20Dr.%20Konrad%20Lachmayer.pdf>)

prohibition of terrorist attacks by the police within the last five years have created a political understanding of the global fight against terrorism. Thus, the German legislature began, as a reaction to 9/11, to introduce various measures to fight terrorist activities. Moreover, the new technical possibilities with regard to surveillance led to a further strengthening of police measures.²¹

As a consequence of all the new legal possibilities for police and law enforcement, the German Constitutional Court was challenged to decide whether or not these measures were in conformity with the constitutional values represented in the German constitution. The German Constitutional Court made remarkable decisions in the context of security. However, in most of the cases, the Court did not conclude that these measures were generally forbidden, but that they must be restricted to very important and severe cases and must be complemented with different legal guarantees. As an absolute limitation of security measures, the Court considered human dignity as the basic value, which is the fundament of German Constitutional Law in Art. 1 of the German Basic Law.

In a recent decision, the German Constitutional Court declared as void the legal basis for police intrusion into private computers using Trojan horses on the Internet. The Court created a new fundamental right within the system of basic rights to guarantee the integrity and confidentiality of computer systems.²² Within this new fundamental right, the legislator has to restrict the possibilities for installing Trojan horses. The German constitutional court created, with regard to the principle of proportionality, a long list of criteria which have to be fulfilled in order to use this police technique.

Another important decision of the German Constitutional Court dealt with the shooting down of aircrafts. The Court concluded that the legislative provision concerned is “incompatible with the fundamental right to life and with the guarantee of human dignity to the extent that the use of armed force affects persons on board the aircraft who are not participants in the crime. By the state’s using their killing as a means to save others, they are treated as mere objects which denies them the value that is due

²¹ See also M Kötter, *Postponed Legitimation: A Security Governance Process*, in this book, 65.

²² BVerfG (German Constitutional Court), Judgement 27. Februar 2008 – 1 BvR 370/07; 1 BvR 595/07.

to a human being for his or her own sake.”²³ Thus, there is no possibility of the state to determine in a general provision the shooting down of aircrafts.

Further decisions of the German Constitutional Court dealt with automatic data proceeding of car licence numbers with regard to search warrants,²⁴ electronic eavesdropping²⁵ and dragnet investigation.²⁶ The German Constitutional Court did not ban the different techniques in general,²⁷ but the Court severely restricted the use of the various techniques by the state. The principles of legal certainty, proportionality and legal protection are stressed as major restrictions to the further extent of police measures. The protection of constitutional values, such as human rights and the rule of law, are favoured by the Court, which limits the possibilities of security measures in Germany.

The German Constitutional Court also dealt with the implementation of European measures, such as the European arrest warrant²⁸ or the data retention directive.²⁹ The Court demands that the German legislature adopt European law in a way that is in full conformity with German constitutional law. Thus, the Constitutional Court, as part of a European network of courts, plays a crucial role in limiting European attempts to introduce new police measures.

In conclusion, the German example offers an important and interesting insight into how far a constitutional court can deal with security questions from a specific constitutional perspective. Although the German Constitutional Court is famous for its active (self-)understanding of the role of constitutional courts and its value-based approach, the limitation of security by the constitutional framework is conceptualised as a role model for other countries and constitutions.

²³ Press release no. 11/2006 of 15. February 2006, Judgment of 15. February 2006 – 1 BvR 357/05 – <<http://www.bverfg.de/en/press/bvg06-011en.html>>.

²⁴ BVerfG (German Constitutional Court), Judgement 11. March 2008 – 1 BvR 2074/05, 1 BvR 1254/07.

²⁵ BVerfG (German Constitutional Court), Judgement 3. March 2004 – 1 BvR 2378/98 u. 1 BvR 1084/99.

²⁶ BVerfG (German Constitutional Court), Decision 4. 4. 2006 – 1 BvR 518/02.

²⁷ See also regarding the use of GPS surveillance BVerfG (German Constitutional Court), Decision 12.04.2005 – 2 BvR 581/01 and video surveillance BVerfG (German Constitutional Court), Decision 23. 2. 2007 – 1 BvR 2368/06.

²⁸ BVerfG (German Constitutional Court), Decision 18.07.2005 – 2 BvR 2236/04.

²⁹ BVerfG (German Constitutional Court), Decision 28. 10. 2008 – 1 BvR 256/08.

IV. Conceptualizing Security in Constitutional Law

The presented approach toward a constitutional limitation to security should not lead to the impression that security is not part of constitutional law itself. However, constitutional elements refer to security in different ways. Thus, different forms of security are part of the constitutional concepts. This does not mean that security shall be located within the constitutional values itself, but it has to be understood within its relation to the constitutional values. Three forms of the relation of security and constitutional values shall be exemplified here. These examples refer to human rights, the rule of law and democracy as the basic values of international constitutionalism.

Within the human rights debate, security is regularly understood as a limitation of human rights, and the necessity of allowing security measures is only understood in a proportionate way. However, human rights also include a positive understanding of security.³⁰ This does not derive from a right to liberty and security (as guaranteed in Art. 5 ECHR), but in the positive state obligations to guarantee certain aspects of human rights, also against measures of other individuals. Thus, international human rights courts or committees have developed a so-called right to security.³¹ The state shall, to a certain extent, protect individuals from the interference of other individuals. This right to security does not provide a general state duty to prohibit crimes in general. On the contrary, specific (and not general) measures to protect the right to life are concerned. This

³⁰ See M Kettemann, 'Harmonizing International Constitutional Law and Security: the Contribution of the Concept of Human Security', in this book, 109.

³¹ See e.g. ECtHR, *Osman*, RJD 1998-VIII. 3124 (116); UN Human Rights Committee *Bwalya v. Zambia* No. 314/1988, §6.4; CCPR-9-1 468/1991, *Angel N. Olo Bahamonde v. Equatorial Guinea*, 20 October 1993 CCPR-2-3-a / CCPR-7 / CCPR-9-1 / CCPR-9-2 / CCPR-9-3 Communication : 1250/2004; *Sundara Arachchige Lalith Rajapakse v. Sri Lanka* views of 14 July 2006; Communication: 1159/2003; *Mariam Sankara on her own behalf and of behalf of her husband, Thomas Sankara and her children, Philippe and Auguste Sankara* views of 28 March 2006; Communication : 1124/2002 *Walter Obodzinsky (deceased) and his daughter Anita Obodzinsky v. Canada* : views of 19 March 2007; Communication: 859/1999; *Luis Asdrúbal Jiménez Vaca v. Colombia*: views of 25 March 2002; Communication : 613/1995 *Parties : Anthony Leehong v. Jamaica* views of 13 July 1999; Inter-American Court of Human Rights. Case of the "Mapiripán Massacre" v. Colombia, Judgment of September 15, 2005. (Merits, Reparations, and Costs).

concept shows a security dimension of human rights which has to be understood in its limited scope and cannot serve, as it seems to be understood in the political debate, as a legitimation of a new kind of restriction of human rights. Moreover, an important area of application of the right to security is related to specific situations, in which the right to life is threatened by the state, and the link between the state and the criminals cannot be proven. In such cases, the right to security still remains as a right to be protected from the state and not only by the state.

The Rule of Law refers primarily to the restriction of the state by law. The state shall be bound by a legal act, by judges, by the establishment of accountability and by further legal measures. However, an immanent part of the rule of law, especially in the English tradition,³² is the establishment of law and order. The concept of the rule of law immanently builds upon the idea of law which first, has to be established and second, has to be enforced effectively. If the rule of law is to have any relevance, law and order must be guaranteed to at least a certain minimum standard. Thus, rule of law, which restricts the exercise of power, has a precondition in a minimum standard of law and order. However, when this minimum security (law and order) is established, law enforcement is restricted by the rule of law.

Democracy as a concept restricts security measures by virtue of the necessity for (democratic) legitimation. Security concepts have to be accepted by the parliament, just as the democratic legislature and the administrative institutions which enforce the law, have to be responsible for this legislation. Again, constitutional bodies such as the parliament require a certain amount of security to make them effective. Within this security standard, it is necessary that security measures are legitimate.³³

In conclusion, security plays an important role within the constitutional principles which shall, in effect, limit security. This seems to be a paradox, but it is not. It clarifies that security is a concept which is relevant on different legal levels. However, security cannot be understood as a single concept, but must instead be distinguished on each level. Within the political security debate, the different legal (and constitutional) levels

³² AW Bradley / KD Ewing, *Constitutional and Administrative Law* (13th ed., Harlow, Pearson Education 2003) 96.

³³ See M Kötter, *Postponed Legitimation: A Security Governance Process*, in this book, 65.

and the different functions of security are often confused. Security is a precondition to the functioning of a state and the functioning of a constitution. However, this does not transform security to the foundational status of the constitution, but rather refers to the minimum standard of security which must be acquired to establish a functioning legal system.³⁴ When this minimum standard has been reached, security has to be understood as one of many different state objectives, which can only be fulfilled within the constitutional framework, which restricts the means of reaching these state functions. The debates on terrorism did not provide enough plausibility to warrant a departure from this constitutional framework. Although it was often invoked in argument, a state of emergency did not actually occur.

V. International Security Networks and International Constitutional Law

Security is not only organized nationally. Although the predominating domestic security strategies are designed to fight against terrorism as well as organized and other forms of crime, the relevance of international, supranational and transnational cooperation in the field of internal and external security (home affairs and military affairs) has increased.³⁵ Within the context of these developments, the migration of anti-constitutional ideas is significant.³⁶

Recent developments have shown a reaction to the globalization of international criminal organization and terrorist networks: The international community and various states reacted to new threats by establishing an international security network. Bilateral and multilateral treaties were ratified to intensify data exchange. International and supranational organisa-

³⁴ K Lachmayer, *A Comparative Analysis of Security as an Element of Constitutional Design: Is Global Terrorism Changing the Conditions of International Constitutional Law?*, Online Paper presented at the VIIth World Congress of the International Association of Constitutional Law (see <<http://www.enelsyn.gr/papers/w8/Paper%20by%20Dr.%20Konrad%20Lachmayer.pdf>>)

³⁵ See P Bárd, *You Can Leave Your Hat On. Freedom, Security and Justice – Where is the Emphasis?*, in this book, 135.

³⁶ KL Scheppele, 'The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency' in S Choudhry, *The Migration of Constitutional Ideas* (CUP, Cambridge 2006) 347-73.

tions established, for example, action plans on terrorism. The relevance of constitutional values within these developments seems to be limited. However, international constitutional law can serve as a framework for these international security developments. Judicial dialogue between different constitutional and supreme courts and the reaction of international human rights courts and committees are important to the integration, establishment and implementation of these constitutional values on an international and European level.

The security decade has almost reached its end. After several years dominated by the security debate, the re-entry of the rule of law into the debate can be observed. The main reasons for this change are the reactions of the courts to the developments of this past decade. After a while, and in different judgments, the courts began to restrict security measures step by step. Different decisions, such as the Kadi judgement³⁷ of the European Court of Justice or the Judgement of the US Supreme Court in *Hamdi vs Rumsfeld*³⁸ showed a clear attempt to strengthen the rule of law. However, the problems of the relation between constitutional law and security measures cannot be solved with any finality. New challenges, especially in the fields of surveillance and intelligence, are waiting to be dealt with in the courts.

These proceedings shall give an overview of the recent developments and challenges to constitutional law. Moreover, it shows that constitutional law can limit security measures and that the developments of international law, European law and constitutional law in its comparison must come together to find adequate solutions in times of international constitutional law.

³⁷ See ECJ, C-402/05 P and C-415/05 P, *Kadi*, 3. 9. 2008; see also K Schmalenbach, 'Constitutional Limits to Security at the UN level', in this book, 21; M Köster, *Postponed Legitimation: A Security Governance Process*, in this book, 65.

³⁸ See *Hamdi v Rumsfeld*, 542 US 507(2004); see also *Rumsfeld v Padilla*, 542 US 426 (2004); *Rasul v Bush*, 542 US 507 (2004).

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