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Human Rights in Times of Terror[1]

Is Collective Security the Enemy of Individual Freedom?

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Table of Contents

1 This comment is based on a speech the author held in Jerusalem on 28 November 2007.

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Abstract

I have chosen a subject that concerns our two states - Israel and Germany - and that time and again poses a challenge to our courts: the respect of human rights in times of terrorism. In Israel as in Germany there exists a firm consensus on the need to fight terror. In both states there is much controversy regarding the best way to conduct this fight. The question is raised whether collective security is the enemy of individual freedom. As **Aharon Barak** rightly stated: "Fighting against terrorism in an effective manner entails finding the right balance between security and public interests, on one hand, and the need to safeguard human rights and basic freedoms, on the other."[2]

This dilemma is well known to the Israeli legal system. Since its foundation, the state of Israel has been the target of threats to its existence and of terrible terrorist activities. Therefore the Israeli experience - not only in the legal-judicial field - is important for those, who are involved in the fight against terrorism. I have to thank my former colleague Aharon Barak, who informed me regularly, and with regard to my speech today, of the decisions of the Supreme Court concerning torture, the separation fence and other questions in this context.

A. The State's Reaction to Terrorism

Seven years after September 11, 2001, the tension between freedom and security is still of unbroken topicality. Not only have the terrorist attacks in Madrid and London shown that the danger of fanatical terror is everywhere. An attack on the German Railways, which was planned two years ago, but failed, has shown that the Federal Republic of Germany also is a target of Islamic extremist terrorists.

What motivates them is not the wish for retaliation for the war in Iraq. The targets of their attacks are the western-style secular democracies, which are based on the principles of human dignity, the fundamental rights and the

[2] *Aharon Barak*, Introduction: The Supreme Court and the Problem of Terrorism, in: *Israel Supreme Court* (ed.), Judgments of the Israel Supreme Court: Fighting Terrorism within the Law, 2005, 5.

principle of the rule of law. It is less the desire for violence but rather the intention to destroy these fundamental values that makes the fanatics spread fear and terror through their attacks on human lives.

In the western democracies, politicians are about to fall into this trap and to compromise the boundaries of human rights and fundamental freedoms. With a view to the threat posed by Islamic extremist fanatics, the politicians argue, that the European Convention on Human Rights[3] has to be seen in a different light. The post 9/11 legislation in France, the UK and Germany is justified on the ground that it is the overriding duty of any government to secure the safety of the people. There is one right that matters more than any other, and that is the right to life. Freedom in this context seems to be of minor importance.

Here, the vulnerability of the free and democratic state founded on the rule of law in times of crisis becomes evident. In the fight against terrorism, human rights and citizens' rights have been repealed in many places all over the world.

B. The Hunt for Terrorists in the Data Network

In early 2002, a law was enacted in Germany with the objective of combating terrorism.[4] The law aims to put an end to the activities of potential terrorists as early as possible. This is only the beginning. There is an unbroken line of political activism in the fight against terrorism. A whole series of laws and new suggestions to this effect have been (and are being) produced. The Federal Minister of the Interior, an advocate of rigorous precautionary measures, demands the employment of the Bundeswehr in domestic territory, the targeted killing of suspected terrorists and the surveillance of e-mail correspondence. A member of the German Bundestag calls for creating a register of converts to Islam, and the Federal Minister of Defence wants to be vested with the competence to order the shooting down of hijacked aircraft that are used as terrorist weapons.

If public protest arises, the respective suggestion is not pursued any further for the time being, because the government wishes to win favour

3 European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, 4 November 1950, 213 U.N.T.S. 222.

4 Gesetz zur Bekämpfung des internationalen Terrorismus, 9 January 2002, (Terrorismusbekämpfungsgesetz), Bundesgesetzblatt (BGBl.) I 361, 3142.

with the electorate. But political imagination comes up with new suggestions all the time.

Since 9/11, the competence of the security authorities has been expanded many times. In most cases, the respective measures are covert ones; they remain hidden from the citizens. They include computerised profile searches, the employment of undercover agents, acoustic surveillance of homes and the localisation of mobile phones. The persons concerned are not informed of the surveillance before or after the measure. They therefore cannot take recourse to a court for judicial review of the admissibility of the measure.

The more preventive action is intensified in an effort to enhance the country's internal security by methods such as computerised profile searches, undercover agents and electronic surveillance (eavesdropping). The focus has been put on combating crimes, while the use of judicial controls designed to protect suspects have been reduced. One should bear in mind that modern methods of surveillance do not merely monitor those suspected of being criminals.

Take, for example, the computerised profile searches in the aftermath of September 11. Using a rather abstract set of criteria (which boiled down to young, male Muslims who travelled frequently and had studied a technical subject), the data from a large number of people who have never before been in trouble with the police and who cannot be qualified as troublemakers or dangerous, is being ′filtered′.

This all shows that computerised profile searches and electronic surveillance may even bring uninvolved outsiders to the attention of the public prosecutor. The more instruments of investigation are expanded to encompass uninvolved outsiders, the sooner the category of (concrete) suspicion loses its legitimate, limiting power.

A law that was recently adopted by the Bundestag permits the retention of communication data.[5] The law obliges all telecommunication companies to store the connection data from telephone, e-mail and internet traffic for six months. This law implements a European Union directive.[6] However, two European Union Member States have brought an action

[5] Gesetz zur Neuregelung der Telekommunikationsüberwachung und anderer verdeckter Ermittlungsmaßnahmen sowie zur Umsetzung der Richtlinie 2006/24/EG, 21 December 2007, BGBl. I, 3198.

[6] Directive 2006/24/EC of the European Parliament and of the Council, O.J. L105/54 (2006).

before the Court of Justice of the European Communities to have the directive declared void.

This law irritates not only computer freaks. It is criticised, with rare unanimity, above all by journalists. They fear their professional confidentiality and for the protection of their sources. In the Federal Republic of Germany, no scandals have been brought to light by public prosecutors; they have always become known to the press by its informants. In the future, informants could be intimidated by such laws, which would prevent them from revealing information to the press. It is obvious what this would mean for the control of state authority.

C. A Right to Security

Let there be no doubt about it: protection against crime and terrorist attacks is part of the responsibility of the state. Under the regulative idea of the social contract, the desire for security justifies the necessity of the state. Humans join together for the mutual protection of their lives, freedom and property within a state system, and place themselves under the rule of government. They refrain from taking matters into their own hands, in favour of the state's monopoly on the use of force. Legal certainty and legal protection are accordingly necessary elements of the authorisation and legitimation of public power.

In contrast to the European Convention on Human Rights the German Constitution[7] does not recognise a right to security. Despite the silence on this issue by the Constitution, the state has an obligation to take action for the security of its citizens stemming from the overall rationale of the Constitution, especially from the principle of the rule of law (Rechtsstaatsprinzip) and the right to life. Accordingly, the Parliament and the government who are attempting to counter the danger of terror, are fulfilling an assignment substantiated by the Constitution.

D. Prevention versus Liberty

The question of whether terror should be combated is not controversial. What is controversial, however, is *how* this should be done.

[7] Grundgesetz, 23 May 1949, BGBl. I 1, latest amendment, 28 August 2006, BGBl. I 2034.

How can we find a balance between the security needs and the human rights of those suspected of terrorist activities?

The conflict between collective security and individual freedom raises the question: which of these two principles takes priority? In view of the new dimension of terrorism and of the danger for the life and limb of many people, the historian Quentin Skinner argues that the primacy of security is a concept that is evident. Juridical methodology rightly warns of regarding any concept as evident. For in most cases, concepts which claim that certain insights are obvious, have no informing function. They only convey the spirit of those who created or operated them. To those who take decisions, these concepts merely serve to solve their problem on the basis of common sense, whatever common sense may mean. In the interpretation of such maxims, one unknown is usually replaced by another unknown.

Neither domestic security as an aim of the state nor the individual freedom rights are to be conceded primacy from the outset. The German Federal Constitutional Court has enshrined both interests – the security needs and the human rights of those suspected of terrorist activities – in the principle of the rule of law. The Court points out the mutually opposing interests harboured by this very constitutional principle.[8] Yet, highlighting its Janus-faced nature does not get us very far. The main question is still left unanswered – namely whether and how a balance can be struck between these opposing principles. Since an either/or decision is out of the question, the need for collective security and the individual right to freedom must somehow be placed in relation to each other.

E. The Means of the Rule of Law

Judges cannot restrict themselves to describing the conflict of values between security and freedom in nice-sounding phrases. They must solve the conflict and in doing so, they must specify their criteria. If the Constitution and the legal measures available merely highlight the abstract aim but not how it can be achieved, there is nothing for it but to list those aspects which need to be taken into account when reconciling rival principles.

The Federal Constitutional Court examines the question along the lines of the rule-of-law criteria of clarity and definiteness of statutes, of

[8] Bundesverfassungsgericht (German Federal Constitutional Court), BVerfGE 57, 250, 276.

suitability, necessity and appropriateness. The Israel Supreme Court, which had to deal, very concretely, with the issues of torture and of the security fence, performs its review according to similar principles. In the judgments of both courts, the principle of proportionality of the measures taken or planned plays an important role.

The anti-terror measures drawn up need to be examined with regard to the following questions:

- Are they actually suitable for successfully combating fanatical terrorism?
- Is the resulting loss of freedom out of all proportion with the severity of the intervention?
- Might the intended measures result in unwanted side effects?

These three questions are by no means all the conceivable questions which could be asked. But the main question is, whether the post-9/11 legislation has in fact made us safer. The suitability and proportionality of the instruments that are used in the fight against terrorism must be reviewed strictly. The planned measures must be examined to find out whether they are at all suitable for successfully combating fanatical terrorism and whether the loss of freedom that goes with them is proportionate to the security gained by them, not forgetting the undesired incidental consequences.

The new legal instruments that have been introduced to combat illegal drug traffic and other forms of organised crime urge us to give special attention to these questions because these questions often play a very subordinate part in everyday judicial work. In the Federal Republic of Germany, telephone surveillance has resulted in a profusion of information and language problems. The profusion of information also applies to computer searches. In her latest data protection report, for instance, the Commissioner for Data Protection of the state North-Rhine/Westphalia, critically comments in her assessment of the computer search that has been carried out in the wake of 9/11, that through computer search, thousands of innocent citizens have come into the focus of police attention, and have been made subjects of police checks, without any measurable success in the search for potential Islamic extremist terrorists.

F. Fighting Terrorism Within the Law

In Israel, as in Germany, it is the task of the judges to protect human rights against excessive demands for security. The Israel Supreme Court

decided that interrogators cannot use torture in order to protect the people against a "ticking bomb" situation and that the security fence, in some parts, is illegal. With regard to torture, the Israel Supreme Court emphasised in accord with international treaties, that the use of cruel, inhuman and degrading treatment is prohibited. "These prohibitions are 'absolute'. There are no exceptions to them and there is no room for balancing."[9] That means: no room for the principle of proportionality.

The Federal Constitutional Court has decided that acoustic surveillance of the home must not encroach upon the core area of private life. According to the Federal Constitutional Court, this results from the inviolability of human dignity. In a manner that is comparable to the line of argument of the Israel Supreme Court regarding torture, the Federal Constitutional Court emphasises the following: a weighing according to the principle of proportionality is out of the question here.[10]

The Federal Constitutional Court has repeatedly restricted encroachments on the freedom of the press and the secrecy of telecommunications. According to the Federal Constitutional Court, such encroachments are only justified if they serve to prosecute a crime of considerable importance and if there is a concrete suspicion. There must also be sufficiently secure indications that a connection exists between the person who is affected by the surveillance measure and the person charged with a crime.[11]

As concerns electronic profile searches, the Federal Constitutional Court has decided that they are only compatible with the fundamental right to informational self-determination "if there is a concrete danger to important objects of legal protection such as the existence and security of the Federal Government or of a state, or to the life, limb and freedom of a person. In advance of acts averting danger, electronic profile searches are out of the question."

> "A general situation of threat such as has existed without interruption with regard to terrorist attacks since 11 September 2001, or tense situations in foreign policy, are not sufficient for

9 The Israeli High Court of Justice, HCJ 5100/94 *The Public Committee Against Torture in Israel v. The State of Israel*; reprinted in: Judgments of the Israel Supreme Court: Fighting Terrorism within the Law, 43.

10 BVerfGE 109, 279.

11 BVerfGE 107, 229.

> a court order of an electronic profile search. Instead, there must be concrete facts that indicate that terrorist attacks are being planned or carried out."[12]

In these decisions, the Federal Constitutional Court has also pointed out the side effects of the security measures. It argues as follows: if citizens are to expect state agencies to listen in on their communication, the naturalness of the use of modern communication technologies is endangered. But also the quality of the communication in a given society is impaired, if the spread of the investigation measures leads to risks of misuse, and to a feeling of being kept under surveillance. The legal precautions created to protect the individual are also of benefit to the confidence of the general public.[13]

In its decision on electronic profile searches, the Federal Constitutional Court states: "Whoever cannot assess with sufficient certainty which information in certain areas are known to his or her social environment, and whoever is not in a position to reasonably assess what possible communication partners know about him or her, can be considerably impeded in his or her freedom to plan and to decide out of his or her own self-determination."[14]

> "Individuals are affected the more intensively in their freedom that flows from fundamental rights the less they have given grounds for state encroachment. Apart from this, such acts of encroachment can have intimidating effects, which can impair the exercise of one's fundamental rights. […] such a deterrent effect must be avoided not only in order to protect the individual. It also impairs the common good because self-determination is a basic condition for the functioning of a free and democratic polity. The naturalness of behaviour is endangered if the spread of investigation measures contributes to a feeling of being kept under surveillance."[15]

12 BVerfGE, 115, 320.
13 BVerfGE, 107, 229, 328.
14 BVerfGE, 115, 320, 342.
15 BVerfGE, 115, 320, 354 – 355.

As is generally known, a democratic political culture lives on its citizens' participation and their willingness to speak their minds. This requires courage. If state security authorities assess the inhabitants of the country according to biometric criteria, if they draw up data profiles of them and if they record their activities – such as, for instance, the books that they borrow, such courage is lost. Martin Kutscha hit the nail on the head when he said: "Wherever a climate of surveillance and spying prevails a free and democratic process cannot take place."[16] With such strategies, a body politic does harm to itself. It loses its credibility as a modern constitutional state.

G. A Classical and Necessary Dispute

The experience that has been gained in the prosecution of the Red Army Faction terrorists in the Federal Republic of Germany should serve as a warning against resorting to symbolic policies. At that time, the struggle against the terrorism of the Red Army Faction was seen as a question of the Federal Republic's fate and very survival. The political system reacted with measures all passed at breakneck speed, which chiefly signalled activity but hardly tackled the root of the problem. Yet despite their low practical value, the legislative measures still proved extremely persistent.

In spite of this experience, the domestic policymakers, the security authorities and the public prosecutors have been almost insatiable in their striving for more and more new instruments and responsibilities. This professional enthusiasm, which results from the task that must be done, can only be kept at bay by counterforces. In a state under the rule of law, judges, lawyers and Ministers of Justice are the natural antagonists of those who are responsible for domestic security. The dispute between these groups of professionals is, as Martin Klingst points out, "as classical as it is necessary."[17] The continued existence of our state founded on the rule of law also depends on the members of the judiciary not letting themselves be swayed in their spirit of opposition and in their faithfulness to the fundamental rights.

Let us give Aharon Barak the last word:

16 *Martin Kutscha*, Mit Riesenschritten auf dem Weg in den Überwachungsstaat, Das Sicherheitspaket der Bundesregierung: Schutz oder Gefährdung der Demokratie?, Frankfurter Rundschau, (7 November 2001).

17 *Martin Klingst*, In der Sicherheitsfalle, Zeit Online, 44 (2001) available at http://www.zeit.de/2001/44/200144_1._leiter.xml (last visited 8 August 2008).

"This is the destiny of a democracy it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one arm tied behind its back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of its security stance. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties."[18]

[18] HCJ 5100/94 *The Public Committee against Torture in Israel v. The State of Israel*, 53 (4) PD 817, 854.