

■ ARTICLES

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Constitutional Limits to Security

4th Vienna Workshop on International Constitutional Law

On 16th /17th May 2008, the Fourth Annual Workshop on International Constitutional Law took place on the top floor of the "Juridicum". The organizers Dr. Harald Eberhard, Dr. Konrad Lachmayer, Mag. Gregor Ribarov and Dr. Gerhard Thallinger invited experts on constitutional law from Austria to Argentina to talk about the very sensible topic of "security" and its constitutional aspects. The main questions were: What are the specific constitutional limits on security? How can security be achieved without restricting constitutional values like the rule of law or human rights, and can constitutional law itself help to guarantee security? Giving answers to these questions the lecturers concentrated on analyzing the current relation between constitutional law and security and discussed its future development.

For further information about the ICL-Workshop and publications see www.internationalconstitutionallaw.net.

I) SECURITY AND CONSTITUTION

A. Introduction

The first lecturer, *Konrad Lachmayer*, outlined the forces at play between constitutional law and the principle of security. At first, he analyzed the term security in order to set it in context with constitutional aspects. Generally speaking, security means the absence of different threats. Thus, one main element of security is the achievement of protection by locking out or reducing threats. Nevertheless security is not absolute and security-related measures cannot avoid threats for 100 per cent. So another important aspect is the confrontation with threats, which requires reaction. Moreover one should bear in mind that specific measures stabilise the society itself, e.g. people feel more secure, if there is more surveillance.

Speaking of constitutional aspects of security, *Lachmayer* focused on the relation between the state and individuals. According to him, constitutional law has two main functions in this relationship nowadays. First of all constitutional law is deemed an important instrument to legitimate the state to act in order to guarantee security for the society. Concurrently, constitutional law also limits the power of the state, which can be a possible threat for individuals as well, as exemplified in the misuse of powers or torture. Existing instruments avoiding

these threats are the system of "checks and balances" and liberal rights like freedom of expression.

Hence there is certainly a direct connection between security and constitutional law, which might be described in different ways. Firstly, security might be seen as a basic requirement for constitutional law. Secondly, the guarantee of security requires exceptions of the constitutional law especially in the "state of emergency". Another approach is that constitutional law is seen as the framework in which security is established.

In Lachmayer's view security tends to become more and more a part of constitutional law. The differentiation between categories of security like external/internal and preventive/repressive seems to be obsolete. Security in the sense of "the rule of law" and "the right to security" or "the right to human security" are the keywords of the future.

B. Security and terrorism

The lecturer, *Kirsten Schmalenbach*, sought to examine constitutional limits to security by analyzing the available remedies in the *Kadi*¹ case, where human rights take a secondary role in the Security Council's fight of international terrorism. The UN-Security Council declared terrorism as a major threat to international security and enacted a great number of resolutions, which required UN-member States to freeze the assets of individuals and entities affiliated with the Taliban and Al Qaeda. The names of these parties are listed in an annex to the SC resolutions. These resolutions, however, affect fundamental rights like the right to respect for property, the right to be heard and the right to effective judicial review. Thus, the guarantee of international security might lead to breaches of fundamental human rights. *Mr. Kadi* found himself on such a list annexed to the SC resolutions but no effective remedies to be "delisted". *Schmalenbach* gave an overview of the available remedies on national, European and UN levels.

Schmalenbach reminded that UN resolutions have to be implemented and enforced by UN-member states. Therefore legal remedies against the implementing measures are available within the municipal legal system. The success of the legal actions of the listed persons, however, depends largely on the position of UN-law within national law. Moreover one has to keep in mind, that all necessary information for the judgments of the national courts is very sensible data and under control of the Security Council. Thus, proper judicial review might not be possible on national level. On European level *Schmalenbach* referred to the CFI Judgment in the *Kadi* case as a "judicial tsunami". The CFI ruled that it has no jurisdiction to examine the compatibility of EC regulations implementing SC resolutions with fundamental rights protected by the EU, unless they violate *jus cogens*.² The CFI argued that UN-law prevails over Community law and therefore it has no authority to review indirectly SC resolutions. Nevertheless the CFI did

1 Case T-315/01, *Kadi v. Council and Commission*, [2005].

2 Case T-315/01, *Kadi v. Council and Commission*, [2005] paras 225.

not question whether the relevant human rights norms constitute *jus cogens* or not.- In the meantime the ECJ ruled that Community Courts have jurisdiction to review measures adopted by the Community giving effect to resolutions of the Security Council of the United Nations and set aside the judgement of the CFI. In exercising that jurisdiction, it considered that the contested EC regulation infringed Mr Kadi's fundamental rights under Community law.³- On UN-level available remedies are very rudimentary, admitted *Schmalenbach*. As a consequence, the main question is whether there is a legal duty of the UN to establish a judicial review system. *Schmalenbach* supported this idea by giving following arguments: Firstly, the UN Charter provides for freedom and justice for individuals as its main aims. Following this it seems almost contrary to give persons listed on the annex of the SC resolutions no effective remedies. Secondly, the establishment of the two International Criminal Tribunals (ICTY and ICTR) is the very expression of the UN's conviction that all individuals accused of crimes are entitled to a fair trial before an independent tribunal established by law.

Finally, *Schmalenbach* pointed out that the legal duty of the UN to provide for a judicial review mechanism competent to review and lift targeted sanctions persist vis-à-vis its member States and it lies in their hands to insist on the establishment of a proper judicial review system.

II) PRIVATE MILITARY COMPANIES AND UN PEACEKEEPING

A. Introduction

Private military companies (PMCs) have been involved in peacekeeping operations since the 1990s. In the past few years, *Chia Lehnardt* explained, the security environment in fragile states has continued to grow more complex. Personnel of humanitarian organizations and international organizations frequently have become popular targets of attack. This development not only unveiled once again the lack of sufficient material and military support as a fundamental problem of the UN, but also increased step-by-step the demand for commercial security. Despite their mixed reputation PMCs have earned (*i.e.* in Iraq), they have been implicitly and explicitly accepted by NGOs, international organizations, and national governments. Numerous academics and practitioners perceive PMCs not only as a solution to the political, financial and institutional constraints on the UN's ability to respond quickly and efficiently to crises, but also as a welcome alternative to an inefficient, unaccountable and costly world organization. While dealing with the presence of PMCs in peacekeeping operations in general (functions in the context of peacekeeping operations PMCs have taken so far), *Lehnardt* focused on legal issues and essential questions raised by them.

3 Case C-402/05 P, *Kadi v. Council and Commission*, [2008].

B. PMCs carrying out the Security Council Mandate?

An administrative regulation, concerning the question of which functions under a Security Council mandate might be outsourced or not, appears to be missing. The lecturer further noted that PMCs had not only provided services in support of such a mandate, but also had carried out some of its more ancillary aspects constituting peace consolidating measures or post-conflict measures, e.g. the clearing of mines in Southern Sudan. If a peace mission operates in a non-benign environment and the robust use of force is integral to the operation such as maintenance of demilitarized areas through armed patrolling, the distinction between carrying out the mandate and providing armed "support" for the mandate on the other hand might be "accurate from a legal point of view, but rather artificial in practice", she critically noted.

C. The Status of Private Military Personnel under International Humanitarian Law

According to *Lehnardt*, the idea that PMCs must not engage in hostilities may underlie the delineation, between PMCs as carrying out or solely providing support for a mandate. To the extent such a distinction was made however, it is one which in practice could be extremely difficult to sustain, she pointed out and shaped the problem from an international humanitarian law perspective by citing the case in which the threshold of armed conflict is crossed.

Private military personnel not connected to the UN force do not have the status of combatants; consequently PMC personnel do not have the right to participate directly in hostilities. But armed defence of civilian persons or objects is in principle covered by the right to self-defence or defence of others, thus precluding domestic criminal liability of a personnel using force. *Lehnardt* tackled the very critical point: "However, the question what actions precisely are covered by the right to self-defence on the one hand, and what would constitute hot pursuit or direct participation on the other is difficult to answer, particularly in low-intensity conflicts with asymmetric warfare."

D. International Responsibility for Misconduct of PMC Personnel

If PMC personnel violate interests protected by international law (e.g. shooting indiscriminately at civilians), who bears responsibility for such acts: the UN, its member states, both, or none of them? It is particularly difficult to find a proper answer to that crucial question because of two reasons: first, relationships not between two, but three actors – the UN, states, and the PMC employee – must be considered. Second, there is virtually no case law on responsibility of international organizations and less practice than in the context of state responsibility from which principles can be drawn. Therefore, only cautious conclusions could be drawn about responsibility of the UN, *Lehnardt* claimed.

III) CONSTITUTIONAL STRUCTURES FOR THE LEGITIMATE PROVISION OF FREEDOM AND SECURITY BY THE STATE: A GOVERNANCE PERSPECTIVE

A. *Setting the Scene*

Matthias Kötter talked about deficits of legitimacy arising from security laws and measures and he outlined different ways to deal with the conflict between collective security and individual freedom, which states and international organisations equally must address: Starting from a purely legal analysis, he soon set the scene for a governance perspective.

At first, he looked at the problem from a traditional constitutional point of view. In order to be legitimate, all state action has to meet the constitutional specifications. , and above all, the democratic expectations of representation; hence, representation is the principle of legitimation. In this sense, he further concluded, state action was only legitimate if and as long as it executed the collective will and, by doing so, expressed collective autonomy. In most of the constitutional states the standards for security laws to be legitimate are individual human rights. Laws that do not meet these standards lack the necessary legitimacy.

Kötter sketched the problem related to legitimacy by describing the situation in Germany, where the judicial review of provisions on "acoustic surveillance of private living space" (the so called "Großer Lauschangriff") took almost six years, finally assessed intensive violations of human rights and annulled the relating legislative act. *Kötter* detects a massive lack of legitimacy for the period of review and noted that only actions taken by legislation in compliance with a certain pattern of guidelines – which had been set out by the recent ruling/ decision of the German Constitutional Court – could legitimate such a law for future enforcement.

B. *Postponed Legitimation: a Security Governance Process*

He calls that procedure a "process of postponed legitimation": according to his thesis, the adequate legitimation of security laws can only be achieved by different legislative and executive bodies interacting and evaluating the relevant law over a period of time. This process provides the answer to the problem of constitutional indisposition, because it takes into account the public perception of the precarious lack of legitimacy and formulates a decent strategy to meet with public legitimacy expectations by integrating various actors (courts, legislative bodies, jurisprudence and other disciplines).

The lecturer sees deficits of legitimacy arising with "security governance" in two dimensions: security measures of state security agencies cooperating with private actors (e.g. *police private partnerships*) shape a functional dimension, whereas security governance in transnational multi level regimes happens in a territorial dimension. In these fields no certain expectations and approved standards to legitimacy exist yet, often it is not even clear, whose legitimation expectations are to be met. *Kötter* then focused on processes of legitimation using governance

analysis – whose research subject is the provision of collective goods and governance actions by a plurality of social actors – as a tool to draw some conclusions for constitutional law and for the "process of postponed legitimation".

C. Case Studies

To illustrate the abstract problem, he alleged the example of United Nations Smart Sanctions against terrorist suspects: based on a number of Security Council Resolutions (on the fight against international terrorism), a *Sanctions Committee* was installed to compile and update a list of individuals being associated with Al-Qaida or the Taliban. The listing implicates the freezing of assets and travel bans. Since 2001, a number of cases of incorrect listings has been reported – often only due to misspelling of Arab names. For a long time, seeking for diplomatic protection (of their governments) had been the only "legal protection" open to listed people. Today it is possible to address the *Focal Point* of the *Sanctions Committee*, but there is still no right to an adequate decision, or to effective review.

No adequate transnational regulation or regime, and no legal protection have to be constated in *Interpol's* targeted tracing of people by photographs. *Kötter* argued that, in both cited cases of international security agencies, the institutional setting had been extended in order to improve the effectiveness of crime prevention and suppression without adding legitimation structures – the need for collective security provision seemed to overweigh what is permitted by law and therefore legitimate. According to *Kötter*, adequate structures of legitimacy are to be developed. Thus, his further question is: Who will provide these structures, and how, and to which aim? To find a proper answer he introduced the audience to governance analysis and promoted its means. Due to its trans-disciplinarily driven approach to establish a consistent set of terminology for different (governance) phenomena and perspectives governance analysis could interlink constitutional law and social sciences. *Kötter* understands legitimation as a governance process with a set of actors approving a legal norm or any other collectively binding act. Governance analysis distinguishes between two ways or models of legitimation: As long as the relevant act was created within a legitimate framework and procedure it is purely *input-based*. But legitimation can also be achieved by evaluating the predicted *output* of the act, or by permanently revaluating solely the possibility to approve the debatable norm. In the latter case, the norm can either prove its value or not.

Generally speaking, legitimation is always dependent on the specific principle of legitimating, i.e., to which aim the process (you mean the process of providing identification documents – if so, I think it is important to state in detail to what process of legitimating you are referring) has to be run through.

Both constellations of international security agencies' measures go beyond national law to relate to various structures of regulation. "But which legitimation expectations these structures would have to meet?" *Kötter* asked.

The basic rule for Security Council decisions is the representation of the UN members. But this standard may differ when measures have direct effect not only on states but also on individuals. Addressing the *Focal Point* of the *Sanctions*

Committee to demand for an internal review of the listing does not lead to substantial control and a decent decision by the Committee. The delisting still depends on the decision of one of the member states' government. *Kötter* underpinned his findings by applying the concepts of legitimating: the status-quo is insufficient, thinking of an *input-based* model, and from an *output-based* view, the regime simply has failed. He proposed the creation of a "Control Committee" to improve control and review. On an absolutely confidential basis, it should get access to information which has caused a listing, and when detecting mistakes, it should give delisting proposals to the *Sanctions Committee*.

Interpol (a transnational network of national security agencies, being considered an international organisation) in turn knows such a Control Committee. However, it has very few competences. The rules regulating Interpol's internal organisation and allocation of competences are soft law. The institutional uncoupling of transnational networks causes difficult problems of legitimacy, especially if it leads to autonomous actions that affect individuals' human rights. In the latter case, the regulatory framework had to provide normative standards for actions to generate legal certainty and make legitimacy possible. Following *Kötter* further, the soft law structures have to include at least provisions for functions and competences, substantive standards like privacy and data protection, and control mechanisms. He underlined that pure output was not enough; purpose alone could not sanctify the means – not even in the very successful cases of search warrants for pedophile suspects. From the perspective of "postponed legitimating" – presented at the beginning – he realized open legitimization expectations which would have to be met in the future, indeed in both cases of *Smart Sanctions* and *Interpol*. Here and there, additional regulation and especially structures for legal review installed along individual cases seem to be necessary.

IV) SECURITY VERSUS FREEDOM

Pablo Riberi, our guest lecturer from Cordoba, Argentina and *Petra Bard*, concentrated on specific issues in our legal order arising from the guarantee of security. In democratic legal systems, the main governing principles are protection of the human rights and the rule of law. The important legal question then arises: whether security, as a highly political aim, accounts adequately for the protection of human rights and the rule of law. Regarding the protection of human rights, *Bard* addressed an important issue, namely the trust of society in security-related legislative measures. Indeed the success of a measure highly depends on the trust of the society in its effectiveness. Further, *Bard* clearly stated that society gets used to specific measures very quickly, even if they interfere with human rights. But, once constitutional rights are abandoned, it is very difficult to regain them. For example: At airports it is already part of our everyday life to take off belts, shoes and jackets.⁴ How long will our society

4 See further on this issue the current discussion between the EU Commission and the EU Parliament about "body scanners" at airports; see EU Parliament, resolution of 23 October

accept this "you can leave your hat on approach"? Another sensible issue, which *Bard* mentioned, is the data exchange between states as a new form of technical control in liberal societies.⁵ *Bard* reminded us that the establishment of trust of the society in data protection is very important and helps to balance freedom and security.

Bard regarded the EU-Charter of fundamental rights as a symbol for giving freedom a new dimension. Although symbols are rarely used in law, the EU Charter entails strong instruments to implement and strengthen human rights (standards), also in the second and third pillar.

According to *Riberi* security should be seen as a collective right. Analyzing constitutional aspects of security *Riberi* chose a more theoretical approach and concentrated by guaranteeing security by limiting state power. In particular, he dealt with the relation between the executive, legislative, and judicial branches. Thus, limiting powers means limiting rights of one of these branches. But who is the limiting authority? And who is bound by it? Certainly, limiting is a question of legitimacy. Especially in state of emergencies the question arises: which branch should be legitimated to decide and limit the other branches? Do we want judges tutoring the parliament? *Riberi* observed that this is a question of trust to decide which branch is the stronger one in state of emergencies.

V) SECURITY AND TORTURE – ARE THERE ANY CONSTITUTIONAL LIMITS LEFT?

According to Art 3 of the ECHR, no one should be subjected to torture or to inhuman or degrading treatment or punishment. The prohibition of torture is "absolute" in the sense that no circumstances may justify torture. *Julia Kozma* addressed the issue whether there are any constitutional limits to torture. From a legal point of view the question is to be answered with a strict "no". However, public security has been mentioned many times as a justification for torture measures. In comparison with other human rights, interferences with human rights in the name of public security are typical. Thus, could there be circumstances under which exceptions from the absolute nature of torture are justified? Thinking of international terrorism, examples where torture might be justified are rather easy to find. *Kozma* tried to explain why there are no constitutional limits left as far as torture is concerned and why therefore the public security argument is not applicable. First of all, the legal wording does not allow any exceptions. Further, *Kozma* argued that exceptions from torture might open "Pandora's box". What is meant by that *Kozma* demonstrated by sharing her experiences with "torture cases" in her function as assistant to the UN-special rapporteur on torture, coming to the conclusion that torture can never contribute to security in

2008 on the impact of aviation security measures and body scanners on human rights, privacy, personal dignity and data protection, P6_TA(2008)0521.

5 The importance of data protection is in the centre of attention again after the latest data-scandal at the T-Mobile Germany, which has lost the data of around 17 million T-Mobile Germany customers.

our society. On the contrary, the guarantee of the prohibition of torture is a form of security, *Kozma* pointed out.

VI) RÉSUMÉ

All lecturers demonstrated that deployment of security-related measures is not only a question of political will, but also raises a number of legal issues that need to be addressed before implementing them. Unresolved legal tensions might especially be triggered by interference with constitutionally guaranteed rights. In terms of "prohibition of torture" *Kozma* made clear that exceptions of the absolute nature of this human right in order to achieve security certainly do not make us safer. To establish constitutional limits to security *Lachmayer* suggested to "reconceptualize" security in constitution, because old categories do not work any more. In assessing the constitutionality of security measures *Bard* pointed out that it is fundamental for a functioning democracy that constitutionally-guaranteed rights are not overruled. Further the legal challenge is not only to balance different interests but also to establish the value of trust to the society at large.

To deal with deficits of legitimacy arising whenever the conflict of collective security and individual freedom has to be addressed by states or international organisations, *Kötter* argued for additional regulation on transnational level and more effective structures for legal review. Governance analysis' perspective could be very helpful to understand the process and to consider all relevant actors and structures of regulation. "However, the more binding regulations we have, the closer this perspective gets to a constitutional law approach", *Kötter* stated to close the "constitutional circle".

The discussion whether or not states should delegate more functions to the private sector is also one about lending legitimacy. *Lehnardt* observed a deeply rooted aversion inside and outside the UN with commercial military actors. According to *Lehnardt*, this aversion is behind the reason that PMCs are unlikely to play a greater role in the foreseeable future. Apart from questions of law or operational feasibility, *Lehnardt* identified the really crucial one: What would be left of an international community which outsources the first promise of the UN Charter to private companies?

The following are the main theses which might be drawn from the Workshop: Firstly, there is an urgent need to balance security interests with constitutional norms, when these constitutional norms tend to be restricted too easily. The lecturers showed that there are many constitutional uncertainties within the current concept of security, as constitutionally-guaranteed rights are not respected adequately. However, the guarantees of human rights – in the context of data protection, prohibition of torture, and the right to be heard are themselves a specific form of security intended to protect the society as a whole. Looking into the future, the lecturers agreed that constitutional aspects have to gain more importance in the sense that constitutional values and constitutionally guaranteed rights are to be strengthened.

Provided with reading materials containing useful background information on the relevant issues of security research, the participants were well equipped to

elaborate on the legal and political problems in context. Bringing together academics, practitioners and students, the workshop served as a perfect forum for an open discussion on the critical relationship between security and the central constitutional principles of democracy and individual freedom.

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