Herausgegeben von Marlene Straub

Menschen würde und die liberalen Grundwerte



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Marlene Straub (Hrsg.)

9/11, Menschenwürde und die liberalen Grundwerte

9/11, 20 Jahre später: eine verfassungsrechtliche Spurensuche



Vorwort

Der Schutz der Menschenwürde gilt uneingeschränkt. Nach den Anschlägen vom 11. September 2001 wurde jedoch vieles denkbar, sagbar und machbar, was vorher als unantastbar galt. Das diffuse Gefühl der Bedrohung hat zu Verschiebungen geführt: im öffentlichen Diskurs, in der Gesetzgebung und in der exekutiven Gewaltausübung.

In diesem Symposium zeichnen Autor*innen von vier Kontinenten nach, wie 9/11 ein Schlüsselereignis dazu diente, liberale Grundwerte zu untergraben. Die Auswirkungen sind noch heute zu spüren – in der Konstruktion verdächtiger Staatsbürgerschaften, in der Grenzsicherung, in dem Comeback der Theorien Karl Schmitts, und im Aufschwung autokratischer Politiker*innen. Doch die Beiträge in diesem Band zeigen auch, dass 9/11 zwar ein Katalysator war, aber die Abwendung von den liberalen Grundwerten und der Menschenwürde bereits vorher in vollem Gange waren. Doch nicht alle Beiträge sind pessimistisch: eine Perspektive aus Singapur stellt dar, wie Maßnahmen zum Schutz der nationalen Sicherheit aussehen können, wenn der Staat sich aktiv zu Solidarität verpflichtet, um gesellschaftlicher Spaltung entgegenzuwirken.

Dieser Band mit 9 Beiträgen ist nach dem Band "9/11 und die Überwachung im öffentlichen Raum" der fünfte in einer Reihe von sieben Bänden. Diese Buchreihe ist aus zwei Projekten des Verfassungsblogs hervorgegangen: Gefördert von

der Bundeszentrale für Politische Bildung konnten wir im Rahmen des Projekts 9/11, 20 Jahre später: eine verfassungsrechtliche Spurensuche sieben Blog-Symposien realisieren. Unser vom Bundesministerium für Bildung und Forschung gefördertes Projekt Offener Zugang zu Öffentlichem Recht hat uns ermöglicht, aus diesen Symposium Bücher zu machen. Dabei wollen wir den digitalen Ursprung dieses Buches nicht leugnen: mit dem QR-Code auf der rechten Seite gelangen Leser*innen direkt zum Blog-Symposium, und über die einzelnen QR- Codes, die den Beiträgen vorangestellt sind, zu den einzelnen Texten – eine Idee, die wir uns bei den Kolleg*innen vom Theorieblog abgeguckt haben. Über diesen kleinen Umweg lassen sich die Quellen nachvollziehen, die in der Printversion an den ursprünglich verlinkten Stellen grau gehalten sind.

Marlene Straub



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David Dyzenhaus

The Snake Charmers



A man lives in the house he plays with the snakes he writes he writes when it darkens to Deutschland your golden hair Margarete he writes and steps in front of his house and the stars glisten and he whistles his dogs to come

he whistles his ... [muslims] to appear let a grave be dug in the earth he commands us play up for the dance

I thought of these lines from Paul Celan's poem "Todesfuge" on reading two recent papers published on the website of Policy Exchange (here and here), a UK conservative think tank, which also hosts the Judicial Power Project, the publication medium of their two main authors, John Finnis and Richard Ekins, the Oxford legal scholars who are helping to drive the political agenda of the extreme right in the Conservative Party in the UK. This agenda is broadly similar to that of the Trump-dominated US Republican Party and Orbàn's Fidesz; hostile to refugees and to international law, and in particular to its regimes of international human rights. At the same time, it is nostalgic for a past when a white, male, and Christian group was dominant.

Finnis, Ekins and their co-authors argue in these documents that the UK has no duty in international law to admit refugees and indeed should be deploying the navy to forcibly prevent them from making their way to land, where they can put in motion the legal mechanisms that decide whether they are entitled to refugee status. The arguments are thus of a piece with their earlier claims in constitutional theory: that it is consistent with international law for the government to ignore its obligations under international law and

that judges overreach when they attempt to enforce the government's legal obligations under domestic as well as international law.

I had alluded to Celan's image of playing with snakes once before, in the introduction to my book Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar. In late Weimar, Schmitt was closely allied with the right-wing aristocrats who dominated the last federal cabinets of Weimar. They were deeply opposed to the Nazis. But they also wished to replace democracy with rule by a strong executive and to rescue Germany from the pluralist, cosmopolitan maelstrom of Weimar by restoring a strong sense of national, ethnic and religious identity to the political community. Schmitt played an important role in their successful attempt to destroy Germany's first experiment with liberal democracy by providing the "legal" arguments that gave them cover for their political agenda. I have used scare quotes for "legal" because these arguments were deeply dishonest. They provided what a British judge in a decision in our century described as a "thin veneer of legality" over the "reality" of "executive decision-making, untrammelled by any prospect of effective judicial supervision". ¹

The allusion to Celan seemed to me apt then, as does it now, because his lines can describe the fascistic intellectuals like Schmitt who played with the ideas that became lethal in the hands of the politicians who put them into action. There is only one difference, as I have indicated by substituting "muslims" for Celan's "jews". There is a change in the sense of who is the quintessential alien "other" in our midst, the vanguard of the hordes to come, who want to take

over "our way" of life both by breeding at a great rate and by bringing more like them from outside. Hence, we must consider taking steps against those already present to curb their pernicious and insidious influence, ideally steps that would cleanse them from our presence, and of course prevent in the meantime any more of them from getting in (see Finnis's essay).

Schmitt's does not figure at all, as far as I know, in the writings of the lawyers who publish on the Judicial Power Project website and in Policy Exchange. He does, however, figure large in the equivalent group in the US, notably in the work of Harvard Law Professor Adrian Vermeule, who embraces wholeheartedly Schmitt's political theory as well as his legal theory. But, as I have argued elsewhere, Finnis's and Ekins's arguments are driven by a Schmittian logic, one which regards the executive as the "guardian of the constitution", itself conceived as essentially a political manifesto which enshrines a vision of the substantive homogeneity of "the people" of the political community. These arguments endow the executive with almost magical powers, which is why Tom Poole, a prominent public lawyer, suggested some time ago that their Judicial Power Project is more aptly styled the "Executive Power Project".

One does not, that is, need Schmitt himself in order to make such arguments. They are the arguments that will be made by the group an historian of Weimar called "reactionary modernists", intellectuals who use the tools afforded to them in the modern era to rebel against it, seeking to bring about the restoration of an era in which rulers ruled by divine right over jurisdictions uncontaminated by

the "other". But since they must make their arguments in an era in which lip service to democratic elections is required, and since they cannot make their appeal to their in-group alone, the divine right gets displaced onto a strong executive which they hope will put in place some of the items on their agenda, and which will at the least start the process of undermining the rights that they regard as corrosive of a social solidarity that excludes the "other".

The return of the political

It is not, however, any surprise that in some places, notably the US, Schmitt looms large. In that country, his influence has had a curious trajectory, which has a lot to do with the aftermath of 9/11. Prior to the 1990s, Schmitt was not studied as a figure in his own right, except by a handful of political scientists and historians who treated Schmitt in an apologetic mode as an insightful critic of liberalism. In the 1990s, I participated in a second wave of scholarship, in which there was basic agreement that there is something to Schmitt's critique of liberal democracy, but we also exposed his understanding of politics as deeply flawed.

The reason for Schmitt's emergence from relative obscurity, and thus the third wave of Schmitt scholarship, is the resource he might offer when one is trying to understand the politics of the legal and political situation of post 9/11 America. In particular, Schmitt seems capable of explaining the way that exceptional or emergency measures get transmogrified into instruments of ordinary law. In contrast to the classical or Roman model of emergency powers in which the operation of ordinary law is temporarily suspended, in

order to authorise the executive to act outside of the law, the exceptional measures are brought within a legal order. This third wave sought to show that there are resources in a liberal democracy for responding to the threats to the rule of law that Schmitt diagnosed as fatal flaws in its theory and institutional design.

Vermeule typifies the fourth wave, which is like the first, except that it does not bother with apologetics since it revives with full force Schmitt's apocalyptic vision of an existential battle between friend and enemy. Another difference is that the scholars of the first wave were not lawyers and so not interested in translating their politics into the language of the law. Schmitt himself was notoriously bad at doing this. His major attempt, in a lecture to his fellow German constitutional lawyers in 1924, evoked such derision from his audience because of his ineptitude at the legal argument that he generally avoided such attempts thereafter. There is something interesting here.

Consider Vermeule's latest book, *Common Good Constitutionalism*, an elaboration of the argument for which I once criticised him on *Verfassungsblog*. The book is, at first sight, puzzling, as for the most part, it channels in sophomoric fashion Ronald Dworkin's theory of liberal constitutionalism in which judges must decide "hard cases" in terms of the moral principles that best justify the existing law. For Dworkin, interpretation consists of the interaction between two dimensions, "justification" and "fit", with the latter important because judges should not make all things considered moral judgments, untethered to the body of relevant law. But then it turns out that Vermeule's frequent refer-

ences to Catholic natural law theory in the page notes are behind his argument, which is that justification is not in terms of fit with the law, but with a body of allegedly timeless and universal principles that animate right-wing Catholics and Evangelicals in the US. He thus uses Dworkin to sanitize the political agenda of the religious right.

Ironically, his dropping of the dimension of fit is of a piece with his critique of the usual interpretive method of the legal right in the US, the various "originalist" methods which resist liberal constitutionalism by purporting to find illiberal content frozen in the law at a particular time. At least, the originalists claim to take the law seriously, even if the only difference between them and Vermeule is that they see the principles as time-bound when they speak as judges in their decisions, whereas Vermeule sees them as timeless, and thus as principles to which judges may appeal directly.

This really boils down to tactics, as demonstrated by the arguments made in the two documents about the UK's obligations under international law to refugees. In the first document, the authors rely on an argument, strange to UK legal culture, to the effect that the original meaning of the 1951 Convention relating to the Status of Refugees and it's 1967 The protocol is that the UK has no obligation to admit refugees under international law. This argument is then the basis for the second document, which justifies the use of armed force to prevent individuals from landing in the UK, where they would be entitled by existing law to assert the rights the lawyers claim in the first document the refugees do not have at law.

In one way, it does not matter that this cynical and cruel

argument flies in the face of legal doctrine, since its main purpose seems to be to lend the legitimacy of two Oxford Law professors to items already on the Conservative government's agenda. This is not a new phenomenon, though it is in tension with the substance of their earlier position. For they have argued in the past, not that international lawyers are mistaken as to the content of international law, but that, to the extent that such lawyers are right, it is consistent with the rule of law to ignore the content of international law because it is "defective law".

Of the five fulsome blurbs that adorn Vermeule's *Common Sense Constitutionalism*, one contains an insight. Sohrab Ahmari, himself a prominent ideologue of the extreme right in the US, says that the book is an "instant classic of scholarship" which "points us to a better alternative – one as vibrant and radical as the Western tradition". Ahmari points here to the real message of Vermeule and his fellow travellers across the Atlantic. As reactionary modernists, they are engaged in a revolt against the secular project of the Enlightenment tradition of the West, using the tools with which that tradition provides them.

As Russian tanks roll into the Ukraine, we should be wary of these "dreamers of the absolute" in our midst. They worship the executive because only a strong executive is capable of rolling back the cosmopolitan, human rights achievements of the latter half of the twentieth century. But such worship depends on maintaining in power the person at the head of the executive who shares at least the most important tenets of their version of the "common good". That requires not only freeing the executive from the constraints of

the rule of law, both internationally and within the nation state. It also requires that democracy be hollowed out in order to ensure that periodic elections return the right person to power.

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Charles Fried and Gregory Fried

Terror, Emergencies, Drastic Conditions and Democratic Constitutionalism



onstitutions establish governmental powers, but they U do not in themselves confer legitimacy, let alone constitute the body politic that alone can grant legitimacy. Nevertheless, democratic constitutions do not just organise the machinery of government and define the relations of the parts of the machinery to each other, but the relation of government to the individuals it governs, and they can enhance or corrupt the relations of citizens to one another, too. Constitutions are democratic in so far as the government is ultimately and effectively responsible and responsive to the people it governs as the source of sovereign legitimacy. In the words of Lincoln's Gettysburg Address, it is a government of the people, by the people and for the people. It is a liberal democratic constitution in so far it respects individuals not only in their authority to choose who shall govern them but individuals as distinct actors with claims and interests. that may not be unduly subordinated, not only to the government in general but also to the interests of any other individual or group of individuals. This is what is meant by the necessarily vague concept of individual sovereignty, even as an element of popular sovereignty. Many modern constitutions, certainly those of Western Europe and the Americas are of this sort.

Liberal democratic constitutions institute respect for individuals in different ways, but some lines are firmly and almost universally drawn. The penalty of death for the most

serious crimes is seen in many but not all liberal democracies – e.g. not in Japan or the United States – as crossing the outermost limits of what government may do to the individual in order to assure the safety and good order of society as a whole. Torture and mutilation, however, are almost universally condemned in properly liberal societies. But when government, betraving its own duly constituted role as an agent of society, turns to torture as a tool to inquire into, protect against and punish even the severest threats to itself and to individual persons, it runs up against an absolute limit of morality, decency, respect for the human person. We can dispute what exactly counts as torture. Is the death penalty an extreme form of mutilation? Are long terms of imprisonment torture, even under humane conditions? While these are conceptual questions worth asking in any decent society's effort to determine the limits of legitimate state power, what is essential is that we in principle hold the line against torture.

But invasions of privacy, temporary restrictions on the liberty of movement or of communication cannot be subject to such categorical limits. That is because these concepts are at their core controversial and subject to customary or legislated regulation. Nonetheless, they are not so variable as to be empty restraints. Quite the contrary: because they are variable relative to a people's customs, history and changing circumstances, it is important that their contours be made

precise through general rules, announced beforehand and even-handedly administered. This is the essence of the constitutional values gathered under the rubric of the rule of law in liberal democracy. Those constitutional values, in turn, depend upon a body politic committed to the respect for human personhood as the foundation of political legitimacy. Torture threatens that commitment.

Torture as the self-destruction of democratic legitimacy

In Because It Is Wrong: Torture, Privacy, and Presidential Power in the Age of Terror, we – father and son as co-authors, a law professor and a philosophy professor - argued that even in the face of terror and terrible threats, torture must remain taboo as an absolute wrong. We are willing to admit that there might be cases when we might forgive a lapse when individual actors face overwhelming pressure and trauma. But forgiveness is not ex post facto affirmation. What is at stake is that respect for personhood, even if embodied by the worst of persons, which serves as a fundamental philosophical tenet of liberal democracy and constitutional order. That is because torture violates personhood to the ultimate extreme, by reducing the person entirely to a body as a thing to be manipulated as the by-product of terrible agony. Even to defend against genuine threats, such as terror, that themselves go beyond the pale of humanity,

torture must be forbidden to governments, because a government that institutionalises torture as a feature of policy corrupts its own legitimating constitutionalism. To institutionalise torture, even in secret, means to create and implement the governmental departments, the military, intelligence, and even the medical units, as well as the training for these agencies – all dedicated to torture. To embark on such a project is not just to abrogate a philosophical principle of respect for persons, it is to inject the opposite principle, the degradation of persons, into the affective lives of hundreds, and then thousands, of government functionaries and this corruption will then radiate outward to all other spheres of governmental, civic, and private life. This selfinflicted corruption, as a misguided defence against terror that some have called the auto-immune disorder of democracies, will ultimately erode the pre-constitutional principles and the enacted constitutional norms that legitimise liberal democracies.

This is why we also argued that the Bush administration deserved absolute condemnation for its torture regime following the attacks of 9/11. This is not just because torture violates US and international law, which it categorically did in the way that the interrogation regime under the Bush administration operated, and not just because torture is a moral evil. It is also because torture corrupts the relationship between the state and the individual by undermining

the respect for persons and creating institutions that will promulgate a fundamental disrespect for persons in civic and private life. It is as persons that the people collectively provide the legitimising ground for governmental power, and any government that denies the integrity of persons, claims the right to torture as constitutionally lawful and trains its officers of the law to act on this policy, has in principle abolished the grounds for its own legitimacy and will go on to do so as a matter of fact in due course.

Torture as a harbinger of tyranny

Recent events have proven this worry correct. In our book, published in 2010, father and son disagreed about whether members of the Bush administration should be prosecuted, not just condemned, for violating the laws against torture. The father thought that such prosecution would destabilise constitutional democracy by introducing a cycle of tit-fortat revenge against outgoing presidents that would end up delegitimising the three branches of government in the eyes of the people and polarising the nation. The son thought that without some legal consequences for such an egregious violation of both laws and foundational political norms, future leaders would only be emboldened to enlarge their powers in defiance of constitutional governance and the principles of liberal democracy.

When Donald Trump first ran for president, he declared his faith in torture as an effective policy and his willingness to use it as an emblem of strength. His language, personal behaviour, and immigration policy promulgated the notion that brutality is strength. He has inspired millions of followers. After his election, hate crimes and racial attacks spiked, epitomised by the Unite the Right rally in Charlottesville, Virginia, where neo-Nazis and kindred extremists marched shoulder to shoulder and a counter-protester lost her life. The attack on Congress by a Trump mob on January 6, 2021, egged on by Trump's lies of a stolen election, together with his own attack on the constitution by attempting to reverse the electoral results on that day, were the crowning events of Trump's tenure in office. In four short years, and in order to consolidate his power as a leader unbound by constitutional and democratic norms, he had so exacerbated the polarisation of the country that the sinews uniting the body politic almost snapped.

The failure to mark the torture regime instituted by the Bush administration as categorically wrong, whether by prosecution or some other means, set a precedent. Respect for human personhood might no longer be a fundamental tenet of constitutional legitimacy and governmental authority; instead, dehumanisation and violence would constitute political strength and solidarity. If this trend continues to its logical end, the attackers of 9/11 will have succeeded in

using terror, both as a weapon of war and as an enduring trauma of the victim, as the acid to dissolve the legitimising norms of classical liberal democracy. Absent a fundamental respect for human personhood, constitutional government will be cast adrift to seek shelter in some other legitimation. such as the ethnonationalism running rampant across the world today, most obviously against Ukraine. But that alternative legitimation of constitutional structures will only corrode the rule of law and elevate the violence of a leader able to consolidate power on the basis of ethnonational, rather than human identity. If it teaches us anything, Putin's invasion of Ukraine should alert us to how dangerous capitulating to the civic, personal, and governmental pathologies introduced by terror can be – and that now is the time to stand firm and reject this slide into new forms of authoritarianism, or to call it by a more forthright name, neo-fascism.

Quinta Jurecic

Donald Trump's Post-9/11 Presidency and the Legacy of Carl Schmitt



In February, the Washington, D.C. news outlet Politico reported that before leaving office, President Donald Trump had "seriously considered issuing a blanket pardon for all participants in the Jan. 6 riot" to prevent them from being prosecuted – to the point of asking an advisor whether it would be possible to grant clemency to everyone holding up a Trump sign during the attack on the U.S. Capitol. Trump's advisors, according to Politico, counselled him against it. The president left office without attempting that particular expression of the chief executive's constitutional power to forgive.

The anecdote is vintage Trump, both menacing and absurd. It's also deeply telling as a reflection of how Trump conceptualised and exercised presidential authority, and of the unique nature of the danger he posed to democracy – and still poses, both as a potential frontrunner in the 2024 U.S. presidential election and as a figure of the continuing influence within America's Republican Party and around the world. I use the word *unique* advisedly. Trump is, and was, threatening democracy in large part because of the specifics of his approach to power. Evaluating the lasting effect of his presidency on the liberal democratic order requires understanding to what extent Trump's would-be successors have adopted that approach, and to what extent it remains particular to him.

Trump's Schmittian presidency?

Shortly before Trump's inauguration in 2016, I suggested that the president-elect might prove to be a chief executive in the mode of Carl Schmitt. Studies of the jurist came into fashion in the years after the 9/11 attacks as scholars turned to Schmitt's writings on the state of exception to make sense of the aggressive American response to the suddenly alleclipsing threat of terror. There's a serious argument to be had over whether the actions of the early Bush administration – for example, establishing Guantánamo Bay as a space where detainees could be held long-term outside the reach of normal legal protections - constitute a sovereign effort to "decide[] on the exception", drawing near the hole Schmitt locates at the heart of law, or perhaps something else ugly but more consistent with constitutional democracy. Trump, though, represented something different. If the early Bush years were characterised by legal interpretations that pushed the edges of executive and sovereign power, Trump's vision of the presidency was that of a man who had no interest in legal interpretation whatsoever. As he later said of the portion of the Constitution that spells out the details of presidential power, "I have an Article II, which allows me to do whatever I want."

This was Schmittian in the sense that it spoke to a vision of power without constraint, created by and embedded within the constitutional order but not beholden to it. This

vision, I'd argue, persisted throughout Trump's presidency in his many abuses of presidential authority. His use of the pardon power, in particular, is telling. The American Constitution provides the president with the vast and unregulated authority to "grant Reprieves and Pardons for Offenses against the United States" - a power that, in its monarchical origins, has conceptual echoes in Schmitt's concept of the exception as a manifestation of the sovereign ability to step outside the regular strictures of law. Trump seemed to delight in the pardon power as a space where he could act largely unchecked. According to one White House official, at a certain point in his presidency it became his "favourite thing". As with his proposal to pardon the insurrectionists after January 6, his gifts of clemency to associates prosecuted as a result of investigations into Trump's conduct are a striking example of how Trump used this power to undermine the rule of law.

Consider, too, Trump's reported offer to pardon law enforcement officials for illegally forcing out asylum seekers at the U.S.-Mexico border. Again and again, the president used language portraying the border as a physical space of exception and Schmittian emergency outside the normal structures of law – a space that, if breached, threatened the existence of the American state itself, and whose protection, therefore, requires muscular and immediate action unconstrained by law. Arguably, the Trump administration's inhu-

mane treatment of people crossing the border echoes Giorgio Agamben's concept of "bare life", the individual under the sovereign's control but not protected by or from that sovereign power.

Early in the pandemic, Agamben declared the efforts of governments seeking to respond to the coronavirus crisis to be a form of Schmittian tyranny, a means of reducing the masked citizenry to bare life. This argument was silly in March 2020, and it's silly now: the vast majority of officials implementing these restrictions, and people observing them, have been all too eager to cast them aside and return to some measure of "normal" life. But Agamben's fever dream is also telling as an account of what Trump did not do. Rather than leveraging the pandemic as a means of exercising aggressive power - like Hungarian Prime Minister Viktor Orbán, the darling of many of Trump's own acolytes on the American far right – Trump instead engaged in what David Pozen and Kim Lane Scheppele term "executive underreach". In other words, he proudly did nothing, or almost nothing. He denied that the coronavirus was a threat; he undermined his own administration's efforts to respond to the growing crisis; he encouraged his supporters to resist public health measures put in place by state and local authorities.

William Scheuerman has argued that Trump's catastrophic failure to lift a finger in response to the coronavirus complicates any characterisation of the 45th president as a

Schmittian. Rather than an advocate of the powerful state envisioned by Schmitt, in Scheuerman's view, Trump is ultimately a neoliberal more interested in dismantling state capacity than responding to real or imagined crises. It's certainly true that the Trump administration was stocked with conservatives eager to unravel the American administrative state. But I think this argument underestimates the role of sheer laziness in Trump's style of governance.

The example of the proposed pardons for January 6 rioters is instructive here. Trump reportedly floated the idea of mass pardons for those who sought to overthrow the government on his behalf. But people around him told him not to, and ultimately he didn't. His instincts echo in Schmitt, but he is ultimately not a person of particularly strong will. He liked the pardon power precisely because it allowed him to play at ultimate authority without having to jump through all the hoops created by the machinery of the modern American executive branch. Responding to the pandemic would have been hard, so he pretended it didn't exist. This fundamental pliability is also among the reasons that Trump's many efforts to overturn the 2020 election and hold onto power fell through. Enough people said no, and eventually, he both gave up and ran out of time.

Republican Heirs

This is not a reassuring story, despite the efforts of commentators on the American right to frame it as one. For one thing, Trump seems to be positioning himself to run again in 2024 – and if he does, he will almost certainly receive the Republican nomination for the presidency. For another, there's no guarantee that the next person in Trump's position will be quite so pliable.

Trump's many would-be heirs in the Republican Party are currently struggling to position themselves as either his national successor or as challengers from the right, standard-bearers of a Trumpism without Trump. This crop of politicians has been deeply influenced by the former president in style and substance. But they don't seem to be Schmittians in Trump's mould.

The most striking thing about these acolytes is how poorly they channel the man himself. Senators Ted Cruz, Tom Cotton, and Josh Hawley – all hard-right legislators who have moulded themselves more and more in the image of Trump – come off as awkward try-hards reading from the script set by Trump and yet, as the New York Times describes, "struggling to elicit the same emotional response." They're typical politicians, however, exaggerated their professed commitments, unlike Trump, whose appeal to his supporters and lack of care for the Constitution flowed from his self-presentation as something other than a politician.

This doesn't mean, of course, that the would-be Trump successors might not try to push the boundaries of sovereign power just as Trump did. But they are more constrained by political calculation. And this limitation is particularly crucial because it undercuts what writer John Ganz has called the "fascist structure" of Trumpism, the mystical connection of the charismatic leader with a pure, idealised, sovereign American people – even though these Americans are only a small and unrepresentative subset of the nation as a whole. They are the same people who, in the revanchist narrative, rose up to defend their country and their leader on January 6. Trump's embodiment of that connection is part of what I have in mind when I describe him as a Schmittian by instinct. He channels the energy and authority of the absolutely sovereign people, whose sovereignty has not been and cannot be diluted by legal structures, including the mechanics of an election that didn't turn out as they'd like. It's one of the many complexities of Trump's presidency that his actions were guided far more by self-interest than by any desire to actually serve even the minority of citizens who elected him and from whom he derived his legitimacy.

Trump's heirs lack this instinct. But they are still dangerous. The Republican politician with the best odds of succeeding Trump is perhaps Florida Governor Ron DeSantis, who boosted his national profile during the pandemic by refusing to take aggressive action to contain the virus and feeding anti-vaccine sentiment. In this, he is a model of the anti-government sentiment that Scheuerman identifies as having undercut Trump's Schmittian instincts: someone whose political appeal derives from his performance of hostility toward the state, trumpeting legislation that prohibits private employers from requiring covid vaccines and schools from requiring masks during the pandemic.

Necropolitics

This isn't a state of exception as Agamben feared, an expression of Foucauldian biopolitics. Rather, it's necropolitics. As the philosopher, Achille Mbembe writes in his essay of the same title, drawing on Schmitt and Agamben, "the ultimate expression of sovereignty resides, to a large degree, in the power and the capacity to dictate who may live and who must die." In the attitudes of politicians like Trump and DeSantis toward the coronavirus, this expression emerges as a dismissal of the lives of the vulnerable - essential workers, who can't stay at home to avoid the virus; disabled people, whose health conditions place them at particular risk; Black Americans and other members of communities whose historical mistreatment has resulted in health inequities driving disproportionately high rates of covid infection and death. The transformation into bare life is not equally distributed but focused on particular groups of people at the mercy of the sovereign's power to identify, in Mbembe's words, "who matters and who does not, who is *disposable* and who is not" (emphasis in original).

One way to read Trump's obsession with immigration and the U.S.-Mexico border is as a form of necropolitics, a way of locating the state of exception in the space of the frontier. The hostility toward cities in Trumpist politics, expressed most vividly in Trump's violent deployment of law enforcement against protestors demonstrating for racial justice in the cities of Washington, D.C. and Portland, Oregon, is arguably a further extension of this approach.

The Republicans shaping themselves in Trump's image have adopted this aspect of his politics even outside their approach to pandemic response. DeSantis has signed "antiriot" legislation that would – among other things – provide legal protections to drivers who hit protestors with their cars. During the racial justice protests of spring 2020, Tom Cotton called for the federal government to deploy the military in an "overwhelming show of force" to respond to "anarchy" in the nation's cities. As leaders on the American right try to employ the rhetoric of culture war as a means to electoral victory, there's no reason to think that this necropolitics will vanish anytime soon.

This style of politics does not undercut the American constitutional order in the way that a true Schmittian approach would. It does, though, work against efforts to affirm the

dignity and the voice of those whom that order has long excluded. In that sense, it is arguably an expansion of the post-9/11 necropolitics that swallowed up Muslims in America, among others, and limited the protections offered to them by the law in the name of security. While Trump's heirs may not want or be able, to push the limits of law in the manner of the former president, there will still be the problem of a right-wing minority now fired up and eager to leverage violence against those who they feel are not truly citizens or sovereign. The welcoming on the right of the January 6 insurrection, even after conservatives sought to crush the 2020 protests, shows the natural endpoint of this reasoning.

Sophie Duroy

The Cost of our Fear

Black Sites and the Erosion of our Values



espite their extraordinary character, Western responses to the attacks of 9/11 failed to bring the security Western populations demanded. Our fear, however, led us to support the erosion of our values, institutions, and laws beyond repair.

Following the attacks of 9/11, an important part of public debate in the West focussed on what would constitute an appropriate response. Apart from a few dissenting voices, most agreed that the scale of the attacks justified extraordinary measures both as a response and to prevent future attacks. Hence, 82 % of Americans initially supported the invasion of Afghanistan and, according to a 2007 Pew Research Center survey, only 29 % of Americans believed torture was never justified, with 43 % saying that the use of torture can be justified against suspected terrorists to gain key information sometimes (31 %) or often (12 %).

Following an attack, there is a general pattern according to which outsiders are blamed. The crisis then leads to heightened individual and group consciousness, i.e., an "us versus them" mentality. As violent crises are consensusgenerating events, in-group bias and group polarisation predict that, when the response adopted targets outsiders (or non-citizens), political leaders are likely to receive strong support from the electorate while incurring little political costs. Such was the case for most of the measures adopted by the Bush administration in response to 9/11, irrespective

of their actual effectiveness or legality, leading to a peak in public trust in government and to Bush's re-election in 2004.

Yet, another part of the US-led "global war on terror" developed as a response to 9/11 was kept secret even from those who supported torture and a reduction in civil liberties to achieve greater security. The CIA-led rendition, detention and interrogation programme, operated between 2002 and 2008, was to remain fully secret, forever. The programme was highly classified, conducted outside the US, and was designed to place detainee interrogations beyond the reach of both US and international law. It entailed the abduction and disappearance of detainees and their extralegal transfer on secret flights to undisclosed locations, followed by their incommunicado detention, interrogation, and abuse at the hands of the CIA or of other states' intelligence services.

The most classified parts of the programme were black sites: secret detention sites set up and operated by the CIA on foreign states' territories for the incommunicado detention and torture of suspected Al-Qaeda operatives. A hundred and nineteen men, suspected by the CIA to be affiliated with Al-Qaeda or the Taliban, were at some point held in one or more black sites. Victims who survived the torture were eventually transferred into US military custody at Guantánamo Bay, into another state's custody, or released.

How did a democratic government come to believe that black sites were a necessity? How did we, the "general public" in Western societies, come to believe that our security depended on the complete negation of the dignity of other human beings? What remains today of this dismantling of the legal and moral structures of society?

The liberty-security conundrum and our moral complicity

The existence of black sites rested on the security-liberty conundrum, that is, the assumption that security and liberty may be balanced, so that the protection of security might require the sacrifice of the rule of law and human rights. The debate on a trade-off between security and liberty had its heyday after 9/11. It is now embedded in political and legal discourse well beyond the United States. The liberty-security conundrum rests on many fallacies but, for present purposes, one is particularly salient: the proposed compromise is not a trade-off between the security and rights of the same person. It is rather a trade-off between the rights of a few (the *others*), for the alleged enhanced security of the general population (*us*) but in fact benefiting the executive power (*national* security).

Whereas this trade-off was already visible in the global response to 9/11 and further terrorist attacks in the West, black sites represent the paroxysm of this "othering". The

establishment of the CIA-led programme and its culmination in black sites required that terrorist suspects be considered *others*, less human than *us*, or at least less worthy of having their rights and dignity respected and secured. Suspected terrorists became disposable human beings, a potential source of information, and a mere means to the US' war on terror. In other words, for the purpose of gathering intelligence, the US government denied black sites' victims their inherent dignity as human beings.

In so doing, society as a whole became morally complicit. After all, was it not for *our* security and in *our* name that these acts were committed? Was it not to alleviate *our* fear of the *others* that *our* democratically elected governments denied their human dignity? In the trade-off discourse, security is understood as security against violent attacks, as well as the easing of anxiety or apprehension caused by the prospect of such attacks. When citizens fear an attack, they expect their government to act and respond. The more radical the response, the more it reassures the population psychologically – this phenomenon is called action bias.

However, this does not mean that the safety of individuals has benefited in any way from this governmental exercise of power. On the contrary, in exchange for such psychological reassurance, civil liberties could be compromised, the rule of law undermined, and security as a social good damaged. Hence, not only were Western populations morally

complicit by condoning the use of torture and other extralegal measures on *others* to enhance *our* security, but we also sacrificed our own rights and dignity in the process. Yet, lest one condone the underlying ideological justification that human beings are not all entitled to the same amount of dignity and rights, the obvious risk of the government also using its powers on *us* should only be an ancillary objection to such practices.

The objection that black sites were a secret policy does not have much purchase in excusing our moral complicity because black sites epitomise the post-9/11 counter-terrorism ideology. They differ from less secret measures, policies, and detention sites such as Abu Ghraib or Guantánamo Bay only in degree, not in nature. And more importantly, they rest on the same justification: the liberty-security conundrum and the othering and denial of the dignity of Muslim men.

Besides, revelations about the existence of black sites came as early as December 2002, less than a year after the first black site was established in Thailand and almost six years before the last one, in Afghanistan, was closed. Yet, as the numbers mentioned in the introduction show, these revelations did not give rise to a general uproar from the American population. Nor did it stop US allies from providing aid or assistance to the CIA. In fact, estimates for the number of states implicated in the CIA-led rendition, detention and

interrogation programme range from 44 to more than 65 in recent studies.

How did black sites even become a plausible response to 9/11?

I mentioned in the introduction of this blog the effect of violent crises on our perceptions. Several biases and heuristics affect how we perceive an attack and what we deem adequate responses. I will address two of these here.

Hindsight bias, which refers to individuals' tendency to overestimate an event's likelihood after they observe its occurrence, first tends to encourage tough responses to past attacks (here, 9/11) to avoid being blamed for a failure to prevent future threats. Hence, if the American population believes that 9/11 was more foreseeable than it really was, they deduce that not enough has been done to prevent it from occurring. Hindsight bias thus encourages extreme measures to "correct" previous failures and ensure that future attacks are thwarted.

Another reason for our misperceptions can be found in representativeness heuristics, the cognitive bias leading individuals to evaluate an event's probability by assessing how closely it relates to available data but ignoring the relevance of base rates in assessing probability. Representativeness heuristics are at the source of the "harbinger theory" identified by Robert Diab (pp. 99-100), according to which

"9/11 was the harbinger of a new order of terror, in which further attacks in North America are likely to occur at some point in the near future, on a similar or greater scale as 9/11, possibly, but not necessarily, involving weapons of mass destruction [...] And on this basis, earlier assumptions about the absolute limits of state force against individuals have come to seem untenable or imprudent."

If one believes that 9/11 could have been prevented had *more* been done, and that another 9/11 (or worse) is likely to happen, then it might seem that no response is too extreme. Said otherwise, in the immediate aftermath of an attack, anything – including black sites – can be perceived as a plausible, proportionate, and justifiable response.

The role of law, then, is to guard us against these misperceptions. By imposing strict limits on what can be done, including and especially in times of acute crisis, (international) law allows decision-makers to safeguard their own values and address the crisis lawfully and effectively. Trespassing the confines of legality to respond to a crisis is not only ineffective (as the US Senate Select Committee on Intelligence clearly stated with regard to the CIA programme); it also undermines the legality of the institutions of the state. State-sanctioned incommunicado detention and torture dissolve the very idea of the rule of law. Ideologically, state

policies resting on the belief that some individuals are less worthy of dignity and rights than others, corrode all the ethical, moral, social, and legal norms of society.

Black sites' legacy

The first and most pressing legacy of black sites is Guantánamo Bay: 39 men are still detained in Guantánamo today, and 24 of them passed through CIA black sites. When they have been charged, the torture that the CIA subjected them to in black sites makes it impossible to try them according to fair trial standards and yet, the continued violation of their rights and denial of their dignity persist.

The lack of meaningful accountability for black sites means that the harm to the victims and to the rule of law was never remedied. While human dignity is breached in fact, this breach must be remedied in law. But, in the post-9/11 world, the law was used to violate values rather than preserve them. Following the attacks of 9/11, whether torture was considered good or bad suddenly stopped depending on legal or moral considerations. Rather, the debate turned to whether it "worked", i.e., produced life-saving intelligence. This general acceptance by the American population of torture as a lesser evil in relation to the greater evil of terrorism is, in part, what distinguished the US war on terror from other instances of state torture or counterterror wars. The paradigm shift was embodied in the two

infamous Bybee-Yoo "Torture Memos" of 1 August 2002. The first authorised the use of "enhanced interrogation techniques" (EITs) amounting to torture by the CIA against suspected terrorists. The other complemented it by dismantling, through dubious legal interpretation, the prohibition of torture in US and international law, and finding a novel use of the necessity defence under US law "to avoid prosecution of US officials who tortured to obtain information that saved many lives". Torture was thus redefined so as to invite its use with impunity. Later memoranda (here and here) from the Office of Legal Counsel (OLC) reinforced this mentality by determining that the EITs were legal in part because they (allegedly) produced "specific, actionable intelligence" and "substantial quantities of otherwise unavailable intelligence" that saved lives.

The result of this process was that the legal obligations of the US were redefined so narrowly that there were hardly any to comply with anymore, and US officials could therefore almost truthfully proclaim that they complied with them. To quote George Orwell, "Nothing was illegal since there were no longer any laws". This distortion of the role of law eroded the very idea of human dignity and the rule of law, and the legal remedy never came. Instead, the legal justifications put forward in the OLC memos likely shaped the US' legal position more widely, including through the official, judicial, and academic practice of the drafters, fur-

ther undermining the normative strength and content of US and international law. Worse still, international law evolved to reproduce some of the trade-offs-based legal moves, notably through the legislative action of the UN Security Council. This globalisation of counter-terrorism then permeated the domestic laws of most states, entrenching the trade-off mentality deep into societies around the world.

The CIA rendition, detention and interrogation programme, and especially black sites, seemed so unconscionable and unacceptable after 9/11 that, even at the height of the crisis, it was to remain fully secret. Yet, it is still remarkable for the complete impunity of the perpetrators. By violating the rights and denying the dignity of the *others* and then failing to remedy it, we eroded our values, institutions, and laws. We will be paying the price for a long time and, crucially, we are no safer than we were on September 10, 2001.

Sofia Galani

Humans as "Bargaining Chips"



T t has been 20 years since the 9/11 attacks, and it is not L a cliché to say that they did change the counterterrorism landscape. What followed was a robust reaction on behalf of states that committed to fighting terrorism, often at the expense of human rights, especially of terrorist suspects (see, for example, Duroy, 2022, on the use of "black sites"). Against a backdrop of controversial practices, human rights bodies and scholars have been relentless in their calls for effective human rights safeguards for terrorist suspects (Nowak (ed.), 2018, Scheinin (ed.), 2013). What 9/11 and the subsequent events did however not change is the lack of a victim-oriented approach to terrorism. In fact, following the 9/11 attacks, it became more obvious that states are ready to sacrifice the human rights of victims in the fight against terrorism. This became particularly clear in hostagetaking situations, in which states face the dilemma of succumbing to terrorist demands for the sake of hostages or appearing defiant and ready to stop terrorists from attacking more civilians. This has prompted a debate on whether states are allowed under international human rights law (IHRL) to balance the human dignity and human rights of hostages with national security or the rights of future victims, which is worth revisiting 20 years after the 9/11 attacks.

Hostages as "bargaining chips"

Terrorist hostage-taking for the purposes of extorting ransoms, securing the release of fellow fighters or broadcasting political ideologies has been a threat since the early 1970s. The founding of Al-Qaeda and the rise in its affiliated groups, including Al-Shabaab and Boko Haram, as well as the proclamation of the Islamic State (IS) in 2014 marked a new era of brutality against civilians and spread the horror of hostage-taking to countries previously considered safe, such as France and Australia. While there has been a decline in terrorist hostage-taking incidents since 2015, the number of hostages has increased because terrorist groups opt for large targets making terrorist hostage-taking an everlasting concern.

Of all the manifestations of terrorism, the taking of hostages has by far the most profound impact on victims. Hostages are being objectified and used as "bargaining chips" by their hostage-takers in their effort to succeed in their demands. This practice deprives hostages of their inherent human dignity. Unlike bombings that mainly threaten the right to life, the captivity of a hostage can amount to a violation of almost every human right with a prolonged post-incident impact on the quality of life of the victim. Hostages face threats to their life, are subjected to ill-treatment (which might include beatings, rapes, deprivation of food and water, and psychological abuses), are de-

prived of their liberty and privacy, are forced to convert to Islam or get married (A/HRC/24/47). The longer a hostage-taking incident lasts, the more profound its impact is on the human rights of hostages. According to IHRL, a state has a duty to take appropriate measures to prevent the taking of hostages, if it knows or ought to have known of an imminent risk, to end a hostage-taking incident by releasing hostages, to investigate the incident and any loss of life during the attack or the rescue operation and to compensate the victims (Galani, 2021; Galani, 2019). Yet, in many incidents, and for the reasons explained below, states have chosen to take a strict stance, refusing to act upon their obligations and subjecting hostages to secondary victimisation.

Negotiations and concessions

By definition, hostage-taking is aimed at compelling a state to do or abstain from an act (Article 1, International Convention on the Taking of Hostages, 1979). As a result, negotiations are an integral part of hostage-taking and terrorist groups mostly seek to negotiate their terms in order to release hostages. Negotiating with or making concessions to terrorists, however, is considered a political decision. Therefore, there has not been international consensus on whether states should negotiate with or make concessions to terrorists. Domestic and regional Courts have also abstained from indicating to states whether to negotiate or

not (Almadani v Minister of Defense (2002); Finogenov and Others v Russia (2012); Tagayeva and Others v Russia (2017)). This has meant that state practice differs significantly, although states that refuse to negotiate usually rely on the same justifications: that negotiating with terrorists legitimises them or encourages them to continue their unlawful acts targeting more civilians (Miller, 2011). It is worth noting that all states have at some point negotiated with terrorist groups, which invalidates their own justifications (Powell, 2015). More importantly, the decision of states to negotiate or not and the way negotiations are handled can have a direct impact on the human rights of hostages. It is therefore urgent that they be approached as a human rights issue too. In the tragic incident of the Beslan School, for example, which was attacked by Chechen fighters, the refusal of the Russian authorities to start negotiations infuriated the hostage-takers who, on the second day, stopped giving food and water to the hostages, as well as allowing them to use the toilets. This had a dramatic impact on the hostages, especially on children, who started drinking their urine to quench their thirst, lost consciousness, hallucinated, had seizures and/or vomiting, and had to use buckets to relieve themselves (Tagayeva and Others v Russia (2017); Galani, 2019). In many other incidents in which states refused to negotiate, the victims were executed. The same holds true about concessions. While ransom payments are banned un-

der international law (measure 8 of UNSC Resolution 1989 (2011); UNSC Resolution 2133 (2014); UNSC Resolution 2199 (2015); UNSC Resolution 2253 (2015)), other concessions, such as prisoner swaps, could and should be considered as they are essential for the survival of hostages. While it used to be believed that terrorists treat hostages as their "capital" and the better they look after them, the more likely they are to succeed in their demands, this has changed, and terrorists employ violence against hostages as tool so that states are coerced into meeting their demands. Whether violence is employed or not, it is clear that hostages are dehumanized at the hands of their captors who treat them as "bargaining chips". States, on the other hand, that refuse to discharge their human rights obligations further deprive victims of their human dignity and rights. The argument of states that victims must be sacrificed for the future common good and the sake of others who might fall prev to terrorist groups has no legal justification. All humans are equally entitled to their human dignity and the dignity of hostages is not worth less than others who might fall victim in the future.

Rescue operations

Unlike negotiations and concessions, IHRL prescribes clearcut criteria for a human rights compliant rescue operation. More specifically, a human rights compliant rescue mission

should be accurately planned so as to minimise, to the greatest extent possible, recourse to lethal force; a state is required to take all feasible precautions to minimise incidental loss of life; and the primary aim of a rescue operation is to protect lives from unlawful violence, which means that states need to consider all available means to protect the life of hostages from the violence of their captors (Galani, 2021; Galani, 2019). Despite the legal clarity on the issue at hand, states have not always complied with these requirements in practice. Once again, states approach rescue operations as political rather than human rights decisions. It is a "power game" and states need to defeat terrorists at all costs. A botched operation can have a heavy political cost (see, for example, the failed American operation Eagle Claw for the release of the American embassy personnel in Tehran, Waugh, 1990). In practice, this makes states approach a rescue operation almost as a military-style operation. In incidents, such as the Beslan School siege and the In Amenas siege, heavy artillery, military helicopters and tanks were used, which cost the lives of hundreds of innocent hostages. Despite the heavy-handed responses of states, hostage-taking has not stopped being a threat. This reinforces the point that sacrificing hostages in the fight against terrorism has had no meaningful success. From a legal point of view, IHRL allows the right to life to be restricted only in clear-cut circumstances and the protection

of the right to life of future victims is not one of them (Galani, 2020). The approach of states to weigh the rights of hostages against national security or the rights of future victims has been a meaningless exercise which has deprived victims of their dignity and rights.

Terrorist suspects as "bargaining chips"

Before concluding, it is worth taking note of instances in which terrorist suspects have been used as "bargaining chips" by states in the fight against terrorism. The issue was examined in the "Bargaining Chip" case against Israel. The case was brought by Lebanese petitioners convicted of terrorism-related activities against the Israel Defence Forces (IDF) and South Lebanese Army, who challenged their ongoing detention following the completion of their sentences. Although there was no evidence of the prisoners posing threats to national security, the Israeli authorities refused to release them. They argued that there was an interest in detaining them, in order to exert pressure on the Hezbollah with whom Israel was negotiating the release of the Israeli army pilot, Ron Arad, who was captured in Lebanon in 1986 but whose whereabouts remain unknown. The Israeli Supreme Court concluded that the administrative detention was unlawful and Chief Justice Barak wrote that "[administrative detention] should not be extended to the detention of a person who is not regarded personally as

any danger to national security, and who is merely a 'bargaining chip'" (para. 741). Following the judgment, Israel was forced to release those prisoners who did not pose any threat to national security. A similar decision was taken by the Israeli Supreme Court with reference to the bodies of Palestinians killed by the IDF. Their bodies were kept by Israel, in order to be used as "bargaining chips" for future negotiations or to exert pressure on the families of the deceased to make arrangements that would prevent funerals from being used as rallies against Israel. The Israeli judges concluded that Israel cannot hold on to corpses for the purposes of negotiations at a time when there is no specific and explicit law that allows it to do so. The judgment, however, did not convince the government to refrain from keeping bodies as "bargaining chips" but rather led to the adoption of a new law that gives legal ground to this policy. These practices should also be condemned, as treating humans as "bargaining chips" objectifies them.

Conclusion

Despite the recent decline in successful hostage-taking incidents, hostage-taking has been used by terrorist groups for decades and will remain a threat. Its modus operandi involves the taking and suffering of innocents and over the years, terrorist groups have only become more brutal towards hostages whose only chance to survive is negotiations

or a rescue operation. Despite the tremendous impact of hostage-taking on the human rights of hostages, states have yet to approach it as a human rights matter. Whereas many times states lost sight of the human rights of terrorist suspects post-9/11, coordinated efforts put a spotlight on the matter and states faced accountability for their acts. Twenty years on, this has not happened in relation to the hostages, who states still appear willing to sacrifice in the name of the fight against terrorism. Thus, hostages are still being deprived of their human dignity and rights, both at the hands of their captors and because of state counterterrorism policies.

The blog post draws on findings of the author's monograph "Hostages and Human Rights: Towards a Victim-Centred Approach" (Cambridge University Press, 2021).

Emanuel V. Towfigh

Grenzen der Gleichheit

oder: Was Schlagbäume und Pushbacks über unser Verständnis der Gleichheit aller Menschen offenbaren



edeutung und Rolle von (Landes-)Grenzen waren in der Menschheitsgeschichte einem beständigen Wandel unterworfen. Die jüngere Vergangenheit und die globalisierte Welt der Gegenwart bilden keine Ausnahme. Zentrale These dieses Beitrags ist, dass die rechtlich sanktionierte, robuste Grenzsicherung heute eine fundamentale Ungleichheit in der Welt markiert, sie ist Reflex und Zeichen ungleich verteilter Ressourcen (wie Wohlstand und Sicherheit) - und perpetuiert gleichzeitig diese Ungleichheit. Dennoch ist Grenzen – wie sich in diesen Tagen angesichts des fürchterlichen Kriegs in der Ukraine in dramatischer Weise zeigt – auch eine Schutzdimension immanent. Grenzregime können daher in einer Gesellschaft von Freien und Gleichen nur als rechtliche Ordnungsinstrumente interpretiert und legitimiert werden, ihre Abschottungsfunktion ist gemessen an fundamentalen Gerechtigkeits- und Gleichheitserwägungen nicht zu rechtfertigen.

I. Grenzen in der (Rechts-)Wirklichkeit

1. Transzendenz der Grenze: Globalisierung, Welthandel, Kosmopolitismus

Ein Geist der Annäherung und Verständigung, "die Wende", prägte das Ende des 20. Jahrhunderts: Der Kalte Krieg wurde beendet, Abrüstungsabkommen unterzeichnet,

Deutschland wiedervereinigt, die Europäische Union erweitert und das Schengener Abkommen erlaubte die unbehinderte Durchreise vorbei an leeren Grenzhäuschen. Der Wunsch nach Abbau von Grenzen und Schlagbäumen, sowohl politisch als auch wirtschaftlich, war wichtiger Motor dieser Entwicklungen.

Ein florierender Welthandel sollte Wohlstand bringen, die WTO wurde gegründet mit dem Ziel, Handelshemmnisse abzubauen. Diese Entwicklungen gingen einher mit wachsender Globalisierung, enge wirtschaftliche Beziehungen zwischen nahezu allen Regionen der Welt brachten vielerorts Wohlstands- und Sicherheitsgewinne.

Aber auch die globalen Umweltprobleme – vom "sauren Regen" und dem Waldsterben über die Zerstörung der Ozonschicht durch übermäßigen FCKW-Ausstoß, zuletzt die Fragen des Klimaschutzes – transzendieren Grenzen. Es sind Menschheitsaufgaben, die nicht innerhalb von Landesgrenzen oder von Nationalstaaten beherrschbar sind. Oftmals treffen die Auswirkungen andere, meist vulnerable, Menschen und Regionen (Katastrophen wie 2021 im Ahrtal zeigen gleichwohl, dass das längst nicht immer so sein muss); spätestens die Sekundäreffekte (Flucht, Migration, Wiederaufbau) treffen dann aber alle.

Dieser – zugegeben leicht romantisierende – Schnappschuss soll hier weniger (in Wahrheit natürlich sehr viel komplexere) historische Erzählung sein, sondern mehr das politische Lebensgefühl spiegeln, das die Entwicklung im neuen Jahrtausend ernüchtern sollte.

2. Renaissance der Grenze: Abschottung, Autarkie, neue Nationalismen

Die Anschläge vom 11. September 2001 forcierten in vielerlei Hinsicht eine weitere Wende, mit Auswirkungen weit über die Grenzen der USA hinaus. Sie bildeten den Auftakt zu einer neuen, wachsenden Bedrohung durch terroristische Anschläge, die nicht mehr auf einen konkreten, meist regionalen Konflikt begrenzt waren, sondern örtlich und zeitlich unberechenbar immer wieder die "westliche Welt" oder den "globalen Norden" erschütterten. Anschläge in Madrid, London, Nizza, Berlin – es konnte überall passieren, und es passierte überall. Für Europa bedeuteten diese Anschläge gleichzeitig das Ende einer langen Zeit des Friedens: Eine Generation, geprägt durch den friedlichen Fall des "Eisernen Vorhangs", sah sich plötzlich einer neuen Bedrohung gegenüber, von Gewalt geprägt und unberechenbar. Aus Fukuyamas Ende der Geschichte wurde Huntingtons Kampf der Kulturen.

Eine erste Reaktion auf diese neuartige Bedrohung war der hilflose Versuch immer strengerer nationaler Sicherheitsgesetzgebung und Abschottung, auch unter Inkaufnahme der Einschränkung von Grund- und Menschenrechten. ¹

Grenzen wurden geschlossen, Staaten zur "Achse des Bösen" erklärt, die Schengen-Regeln partiell ausgesetzt, nationalstaatliche Interessen zunehmend in den Vordergrund gestellt. Der Populismus erstarkte.

Slogans wie *America First* drücken eine weit verbreitete Sehnsucht nach Abgrenzung gegenüber anderen aus, nach wirtschaftlicher Autarkie, nach Sicherheit durch Zuwendung zum Bekannten und Ausgrenzung des Fremden. Die ungleich verteilten Wohlstandsgewinne und die tiefdunklen Schattenseiten des globalisierten Kapitalismus tragen ein Übriges dazu bei, protektionistische und nationalistische Populismen zu beflügeln – nicht die Zähmung der globalen Wirtschaft oder eine gerechtere internationale Ordnung sind diesen Narrativen zufolge das Ziel, sondern eine Rückkehr zum *status quo ante*.

Mit den Neonationalismen und protektionistischen Ansätzen wurde auch ein neuer Wettbewerb der Systeme entfacht. Der Welthandel, einst Symbol der Öffnung in der Welt und sichtbarer Ausdruck ihrer Interdependenzen, wird in diese Abgrenzungsdynamik hineingezogen: Handelskriege und neue (Straf-)Zölle werden zunehmend als Mittel in zwischenstaatlichen Wirtschaftsbeziehungen eingesetzt. Die zuvor erfolgte Annäherung kehrt sich um, alte Feindbilder werden reaktiviert, zum Schutz der eigenen (nationalen) Interessen Allianzen aufgekündigt (Brexit) und neue Barrieren errichtet. Landesgrenzen schließen sich, Menschen wer-

den aufgrund ihrer Herkunft unter Terrorverdacht gestellt. Die globalen Bemühungen um eine gemeinsame Bewahrung der natürlichen Lebensgrundlagen werden im Windschatten des Wirtschaftsnationalismus zum Kollateralschaden des neuen Denkens in Landesgrenzen. Das Bedürfnis nach individuellem Schutz vor einer diffusen Gefahr und nach Abschottung um des eigenen Wohlstands willen führen zu einer Renaissance der Grenze.

II. Zweck von Grenzen

Grenzen sind keine Naturgesetze, sondern rechtlich sanktionierte, menschliche Fiktionen – damit letztlich Rechtsinstrumente zur Verhaltenssteuerung. Wie jede staatliche Maßnahme müssen auch sie sich rechtfertigen lassen. Das erfordert zunächst, dass sie einem legitimen Zweck dienen. Was als "legitim" gelten darf, ist eine äußerst heikle, ungeklärte Frage. Für die hiesigen Überlegungen mögen ein Maßstab wie der Kant'sche Imperativ oder der Harsanyi/Rawls'sche Schleier des Nichtwissens praktikable Operationalisierungen darstellen: Welcher Vereinbarung von Zwecken, welcher Geltung von Normen und welchem Einsatz von Mitteln würde jeder Mensch vernünftigerweise zustimmen – wenn er nicht wüsste, in welche Situation, in welche Stellung und Rolle, er auf Erden hineingeboren würde? Anders: Was halten Menschen für sich selbst für angemes-

sen – und kann daher als verallgemeinerbar für alle Menschen Geltung beanspruchen?

Eines der zentralsten Prinzipien der grundgesetzlichen Werte- und Rechtsordnung – und darüber hinaus freiheitlich-demokratischer Ordnungen – ist das der der Gleichheit aller Menschen. Der (formale) aristotelische Gleichheitsgedanke, wonach Gleiches gleich und Ungleiches ungleich zu behandeln ist, prägt den Rechtsdiskurs. Mit Hilfe des Rechts wurden zahlreiche Privilegien zugunsten der Gleichheit über Bord geworfen: Die Ständeordnung etwa wurde überwunden; und für das Grundgesetz erkämpften die im Parlamentarischen Rat beteiligten Frauen, insbesondere Elisabeth Selbert, mit dem besonderen Gleichheitssatz des Art. 3 Abs. 2 GG, die ausdrückliche Gewährleistung auch der privatrechtlichen Gleichberechtigung von Mann und Frau. ²

1. Verteidigung von Ressourcen und Wohlstand

Grenzen – und die Notwendigkeit, sie robust zu schützen – manifestieren, dokumentieren, markieren hingegen auch heute noch bestehende Ungleichheiten und zeigen so ein ethisches Dilemma auf: Während Teile der Welt in Freiheit und Frieden leben dürfen, sind andere von Krieg und Terror geschüttelt, auch Wohlstand ist sehr ungleich verteilt. Ob ein Mensch in Frieden und Wohlstand oder aber in

Krieg und Armut lebt, ist jedenfalls im wortwörtlichen Ausgangs(zeit)punkt weder Gegenstand einer Entscheidung, die in irgendeiner Weise beeinflusst oder gar bewusst getroffen werden kann noch eigener Leistung zu verdanken: Es ist vom Zufall der Geburt und Herkunft abhängig, in welchen Verhältnissen ein Mensch aufwächst. ³

Die weltweiten Migrations- und Fluchtbewegungen sind ein offensichtliches Zeichen dieser fundamentalen Ungerechtigkeit. Nach Angaben des UNHCR waren Ende 2020 82,4 Millionen Menschen auf der Flucht vor Krieg, Konflikten und Verfolgung – und solange Menschen um ihr Überleben bangen oder gar kämpfen, wird es solche Fluchtbewegungen geben. Hinter dem Schleier des Nichtwissens wird daher gelten: Jeder Mensch würde zum eigenen Überleben (ob nun Lebensgefahr durch Krieg, Despoten oder Mangel droht), aber wohl auch für ein zukunftsfähiges Leben für sich und die Kinder die gewohnte Heimat verlassen und Zuflucht in anderen Ländern, Regionen, Kontinenten suchen – was die abfällige Rede von "Wirtschaftsflüchtlingen" oder von der "Einwanderung in die Sozialsysteme" besonders zynisch und bigott erscheinen lässt.

Dieser Ungleichheit begegnen Staaten reflexartig vornehmlich mit Abschottung – seit ehedem, aber seit "9/11" noch einmal mit besonderer Verve. Ob eine Grenzmauer zwischen den USA und Mexiko zum "Schutz" vor Flüchtlingen oder die Sicherung der EU-Außengrenze durch Pushbacks

und mit teilweise militärischen Mitteln durch die europäische Grenzschutzagentur Frontex: an den Grenzen wird der Zugang zu Wohlstand und Sicherheit kontrolliert und reguliert. Gleichzeitig handelt es sich bei diesen Grenzen um fiktive und willkürliche, jedenfalls geschichtlich kontingente Regeln. Sie sind zufälligen historischen Ereignissen geschuldet, oft das Ergebnis von Verhandlungen am grünen Tisch oder auf dem Reißbrett eingezeichnet, ohne Rücksicht auf gewachsene Strukturen und kulturelle Entwicklungen. Sie sind keine in Stein gemeißelte Notwendigkeit. Und doch entstehen durch sie Staaten, an ihre Existenz werden Rechtsfolgen geknüpft, mit beinahe absoluter Wirkung. Dabei sind sie bei einer Betrachtung der Welt aus der Höhe nicht einmal sichtbar: Wälder und Wiesen, Straßen und Bahnlinien, brechen an Landesgrenzen nicht abrupt ab, sondern "überwinden" diese mühelos.

Auch die Staatsangehörigkeit ist so zum Werkzeug der Abschottung, der Gewalt und Erniedrigung geworden. ⁴ Den durch feudale Vorrechte geprägten, längst überwunden geglaubten Zuständen ähnlich, ⁵ manifestiert sich auch in der Staatsbürgerschaft die Zufälligkeit der mit der Herkunft verbundenen Chancen. Sie entscheidet willkürlich über Inklusion oder Exklusion. Damit geht eine im Antidiskriminierungsrecht oft angeprangerte Essentialisierung einher: Staatsangehörigkeit beziehungsweise Geburtsort werden zu einem essenziellen, den Menschen definierenden Merkmal.

Die Fiktion der Grenze zeitigt reale, handfeste Folgen. Sie ermächtigt Staaten, darüber zu entscheiden, unter welchen Voraussetzungen ihr Staatsgebiet betreten werden kann, aber auch, wer es verlassen darf. Die Ausreisebeschränkungen der DDR etwa oder die allgemeine Mobilmachung in der Ukraine derzeit, die es Männern verwehrt, das Land zu verlassen, manifestieren ebenfalls eine Form der Exklusion durch Grenzen, die Ungleichheit aufrechterhält. Von der Staatsangehörigkeit hängen Grundrechtsschutz oder Visabestimmungen ab. Menschen, die in der Hoffnung auf ein besseres Leben ihre Heimat verlassen, scheitern an diesen – für sie ob der ihnen entgegentretenden organisierten Staatsgewalt unüberwindbaren – Grenzen und lassen im schlimmsten Fall ihr Leben.

2. Gewährleistung von Ordnung und Sicherheit

Bei alledem dürfen wir einen zweiten Zweck von Grenzen – gleichsam die andere Seite dieser Medaille – nicht aus dem Blick verlieren. Jede menschliche Organisation ist kompartementalisiert, in Abteilungen, Bereiche, Regionen, Zellen, Teile, horizontal und/oder vertikal gegliedert, und diese Gliederung bedingt Grenzziehungen (die freilich oft genug Anlass zu Konflikten bieten). Die Grenze ist damit elementares Merkmal jeder menschlichen Ordnung.

Die vollständige Abschaffung sämtlicher (Landes-) Grenzen, wie sie Joseph H. Carens als essenziell für eine gerechte

soziale Ordnung hält, ⁶ berücksichtigt nicht in ausreichendem Maße, dass Grenzen neben Wohlstandssicherung, Abschottung und Ausgrenzung weiteren Aufgaben dienen. Sie erfüllen eine Organisations- und Schutzfunktion, indem sie der Einteilung in Jurisdiktionen dienen und die territoriale Integrität eines Landes schützen können.⁷ Sie begründen das Gewaltmonopol eines Staates und können in einer Welt mit Autokraten und Despoten Freiheit und Sicherheit garantieren, Hort für Geflüchtete sein. Hunderttausende ukrainische Flüchtlinge verlassen derzeit ihr kriegsgeschütteltes Land und können mit dem Grenzübertritt nach Polen, Rumänien, der Slowakei und Ungarn zumindest Leib und Leben retten. Ihnen eröffnet sich ienseits der Grenze ein durch die Genfer Flüchtlingskonvention oder nationale Aufenthaltsgesetze auch rechtlich begründeter Schutzraum, in dem sie der ganz akuten Gefahr der russischen Invasion entkommen können. Auch Corona hat gezeigt, dass Grenzen etwa bei der Eindämmung einer Pandemie eine wichtige Ordnungs- und Schutzfunktion zukommen kann.

Das Ansinnen, sämtliche Grenzen zu öffnen und freie Migration zu ermöglichen, kann daher mit Blick auf die ordnende und schützende Wirkung von Grenzen nicht der Königsweg sein. Im Ergebnis würde dies zu Unordnung und Chaos an den Zufluchtsorten führen. Damit einhergehende Wohlstandsverluste und Destabilisierung – bis hin zum Verlust der Fähigkeit, "rettende Ufer" bieten zu können – würde

niemandem nützen. Die Idee oder Forderung freier Migration könnte allerdings einen Anreiz für die wohlhabenden Staaten darstellen, sehr viel ernsthafter als bisher dazu beizutragen, dass Wohlstand und Teilhabe überall auf der Welt erreicht werden.

III. Rechtfertigung von Grenzen

Es bleibt damit festzuhalten, dass in freiheitlichdemokratischen Rechtsordnungen und gemessen an philosophisch-ethischen Maßstäben wie dem Schleier des Nichtwissens eine Ausgestaltung von Grenzregimen zur Begründung und Aufrechterhaltung einer Ordnung legitim ist, die Abschottung zu einer darüber hinausgehenden Wohlstandsverteidigung indessen nicht zu rechtfertigen vermag.

Bestehende Grenzen stellen daher eine Aufforderung dar, auf eine gerechtere Welt hinzuarbeiten und die Ungerechtigkeit entschieden(er) abzubauen. Durchlässigere Grenzen und ein liberaleres Staatsangehörigkeits- und Zuwanderungsrecht sind nicht nur wirtschaftlich etwa wegen des demographischen Wandels erstrebenswert, sondern fundamentaler, weil sie die Menschheit auf dem Weg zu gleichwertigeren, für alle Menschen würdigen Lebensverhältnissen voranbringen. Aus Art. 72 Abs. 2 GG ist das Postulat vertraut, dass auch gesellschaftlicher Zusammenhalt gleichwertiger Lebensverhältnisse bedarf – gerade weil

das Versprechen der Gleichheit ein tragender Pfeiler der freiheitlich-demokratischen Ordnung ist.

Menschen fliehen nicht aus freien Stücken. Sie fliehen, weil die Lebensverhältnisse in ihrer Heimat unerträglich geworden sind, weil Gewalt und Hunger sie vertreiben. Auf der Flucht leben sie von der Hoffnung auf ein Leben in Frieden und Sicherheit, ohne Angst um ihre Existenz. Die Rechtsidee der Grenze sollte nicht zu einem tödlichen Hindernis werden, an dem Menschen ertrinken oder erfrieren.

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Ilya Somin

Does the Threat of Terrorism Justify Migration Restrictions?



Since the beginning of the War on Terror in 2001, and especially since the rise of ISIS and the Syrian Civil War, beginning in 2011, Western nations have adopted various policies barring migrants and refugees based on fear of terrorism and other security threats. These range from US President Donald Trump's anti-Muslim travel bans to restrictions adopted by various European countries in the wake of the Syrian refugee crisis of 2015.

As I write these words in March 2022, European nations have adopted a much more open attitude towards refugees fleeing Russia's brutal invasion of Ukraine. But a similar anti-migrant backlash could potentially occur in this case, as well, especially if the crisis goes on for a long time.

In both Europe and the United States, fears of terrorism and violence have been exploited by anti-immigrant nationalist political movements. They were a key theme of Donald Trump's campaign in 2016, and also repeatedly used by European nationalist movements, such as the AfD in Germany, the National Front in France, and Viktor Orban's nationalist government in Hungary, among others. Such tropes were even used in countries like Poland and Hungary, where the number of Muslim and Middle Eastern migrants was very low.

Concerns about terrorism are, to some extent, understandable. But the actual risk of terrorism caused by migrants is extremely low. And that risk can be mitigated by methods other than barring large numbers of refugees fleeing horrific violence and oppression. Indeed, accepting such refugees can actually help combat terrorism more than further it. It can also help reduce other security risks. Barring migrants for the sake of achieving marginal reductions of already very low risks might be justified if restrictions imposed few or no morally significant costs. But, in fact, barring migrants fleeing oppression and war is a grave wrong. It inflicts enormous harm, violates human rights against unjust discrimination, and is also inimical to concepts of dignity prominent in modern European and international law iurisprudence.

The risk of terrorism by migrants is low

The risks of terrorism by migrants are low and can potentially be mitigated further by "keyhole" solutions that address the problem by means less draconian than the complete exclusion of migrants.

The risk that an American will be killed by an immigrant terrorist in a given year is so infinitesimal that it is actually several times lower than the risk that he or she will be killed by a lightning strike during the same timeframe. Over a 40-year period, the number of Americans killed by terrorist entrants from any of the five majority-Muslim countries covered by Donald Trump's 2017 "travel ban" order was zero. The risk in European countries was comparably low, 2 also

in the same general ballpark as common everyday dangers. Even if these risks were to increase several-fold as a result of expanded immigration, they would still be extremely small.

Whether immigration increases the risk of terrorism at the margin at all is actually disputed by experts. Some studies find no effect on terrorism rates, even when migration increases from Muslim-majority nations and countries that themselves have terrorism problems. Others conclude that while immigration generally does not increase terrorism, increased migration from nations with high terrorism rates can also modestly increase the risk in the destination country. An analysis of European data from 1980 to 2004 concludes that increased immigration does not result in increased terrorism rates caused by the immigrants themselves, but *does* lead to an increase in terrorism by domestic right-wing terrorists hostile to migrants.

If this last finding is sound, it suggests a pathway by which immigration does indeed significantly increase terrorism. But it would be perverse to restrict migration for the purpose of limiting terrorist attacks generated by right-wing nativists. It would also set a dangerous precedent. By yielding to terrorist demands, it could incentivize more terrorism by other groups seeking to influence public policy. If the tactic is proven effective for right-wing nationalists, left-wing radicals, radical Islamists, and others would be encouraged to adopt it, as well. Historically, successful tactics pioneered

by one set of violent extremists are often imitated by others.

There are some ways in which migration restrictions can actually increase terrorism risks and undermine efforts to combat terrorist organisations. First, they may feed into the propaganda of terrorist groups, claiming that the West is hostile to Muslims, Arabs, or other groups targeted for migration restrictions. Second, allowing migrants from areas controlled by terrorist groups or hostile anti-Western regimes to come to the West reduces the number of people and resources under those entities' control, thereby weakening them. Finally, social science evidence suggests that having a large Diaspora in liberal democratic societies can help promote liberalisation in the migrants' home countries, thereby potentially weakening the grip of oppressive anti-Western rulers. One mechanism for such effects is the spread of liberal ideas from migrants to their friends and relatives who remain in their countries of origin. These are among the reasons why ISIS hailed Trump's 2017 travel ban as a "blessed ban". If your supposed effort to fight terrorism is praised by the terrorists themselves, it may be time to reconsider.

Why terrorism-based migration restrictions cause harm

Even if migration increases terrorism risks only slightly, it might be argued that is still enough to justify restricting it, at least in the case of migrants from nations that may seem to pose relatively higher risks. After all, even one terrorist attack is one too many. But this analysis implicitly assumes that migration restrictions have few or no costs, or at least none that destination country governments are obliged to consider

In reality, barring migration has enormous costs, for both migrants and destination countries. The cost to the former is obvious. Barring or severely restricting migration from nations with repressive governments and powerful terrorist movements inevitably consigns hundreds of thousands of people to lives of oppression and poverty, and sometimes even to death.

There are also large costs to destination countries. Among other things, immigrants – including those from poor and oppressed nations – make disproportionate contributions to scientific innovation, and are also disproportionately likely to become entrepreneurs. To take just one dramatic recent example: the developers of the first two successful Covid-19 vaccines approved by the US government were immigrants or children of immigrants from majority-Muslim nations – precisely the sorts of countries Western nativists advocate targeting for migration restrictions. Had these individuals or their parents been forced to remain in their countries of origin, it is likely vaccines would have taken longer to develop, and hundreds of thousands more

people would have died in the pandemic – vastly more than have ever been killed by migrant terrorists.

Statistically, it is likely that at least a few of the migrants barred by terrorism-inspired migration restrictions would have also made major scientific or other innovations if given the chance. Even one or two such lost opportunities could easily outweigh any acts of terrorism prevented by the restrictions many times over. And, obviously, even less exalted migrants who merely do ordinary jobs also make important contributions to our economies. Economists estimate that the elimination of migration restrictions throughout the world would roughly double the world's GDP. That's a staggering amount of new wealth that would benefit natives of receiving countries, as well as immigrants.

American and European citizens also suffer from the negative civil-liberties effects of immigration restrictions, such as increased racial profiling used by enforcement agencies (which necessarily impacts citizens who belong to the same racial or ethnic groups as illegal migrants, or even just look like they do). In thousands of cases, US authorities have even mistakenly detained or deported citizens whom they mistook for illegal migrants.

The injustice of migration restrictions

Restricting migration to prevent small increases in terrorism is also unjust for reasons that go beyond consequentialist considerations. Imagine that migrants from Nation A have higher terrorism rates than natives Nation B, but the vast majority of residents of both are not terrorists. Perhaps 1 in 100,000 migrants from A is a terrorist, which is true of only 1 in 1 million residents of B – a ten-fold difference vastly greater than what we observe in real life! Still, barring all or most migration from A into B means imposing severe restrictions on the liberty of many thousands of people merely because they happened to be born to the wrong parents, in the wrong place.

We readily see the injustice of such measures in the domestic context. I live in the state of Virginia, which borders West Virginia, a significantly poorer state with a much higher crime rate than our own. But virtually everyone agrees that it would be unjust to bar migration from West Virginia to Virginia, merely because migrants from the former maybe more likely to commit violent crimes than native-born residents of the latter.

Similarly, in the US, young black males, on average, have higher crime rates than members of many other ethnic groups. White males, in turn, are disproportionately likely to become domestic terrorists. Native-born whites were also disproportionately represented among those who attacked the Capitol on January 6, 2021, in an attempt to overturn the results of the 2020 elections. It does not follow, however, that we would be justified in imposing severe re-

strictions on the freedom of movement of either black males or white males as a group. In both cases, it would be deeply unjust to restrict the freedom of large numbers of people merely because they happen to be members of the same racial or ethnic group as others who have committed various crimes and misdeeds. The same point applies to potential immigrant groups singled out for exclusion merely because others born in the same place have a disproportionate propensity to commit acts of terrorism.

Such discrimination based on ethnicity or national origin stands also in tension with European and international law rights to "human dignity". Theories of dignity take many different forms. But none of them is easy to square with consigning large numbers of people to lives of poverty or oppression simply because they come from the same region or the same ethnic group as a small number of terrorists.

If differences in crime rates or terrorism rates do not justify racial, ethnic, or regional restrictions on domestic freedom of movement, the same point applies to international migration. There is nothing morally special about international borders, that justifies discrimination on the basis of morally irrelevant characteristics such as parentage or place of birth. And that is especially true when – as is often the case – the discrimination is in part motivated by racial, ethnic, or religious bigotry. In Chapter 5 of my book *Free to Move: Foot Voting, Migration, and Political Freedom*, and

other writings, I respond in greater detail to claims that migration restrictions can be justified on the grounds that particular racial or ethnic groups are the true owners of given territories, and therefore have a right to exclude members of other groups. I also address arguments that national governments have a right to exclude because their rights analogous to those of owners of private homes or members of a club. Here, I will merely mention that such arguments, if applied consistently, have dire implications for natives, as well as migrants. If the majority ethnic group of France has a right to exclude non-French people, why not the majority ethnic group of the province of Ouebec, the state of Texas, or Scotland? Perhaps Quebecers should be allowed to bar Anglophone Canadians, and Scots to bar the English. And if national governments are truly analogous to homeowners or club members, it follows that they can restrict the speech, religion, and liberties of their citizens, much as a homeowner can restrict the range of views expressed and religions practised in her house.

The case for terrorism-based immigration restrictions is further weakened by the availability of alternative ways to reduce the danger. Because terrorism risks from migration are already so low, it may be very difficult to reduce them still further. However, tapping the vast new wealth created by immigration can potentially pay for extensive new security and counterterrorism operations, if necessary. In

Chapter 6 of *Free to Move*, I describe how shifting the resources currently devoted to enforcing American immigration restrictions could easily pay for many thousands of additional police officers. Social science research indicates that increasing the number of cops on the streets can significantly reduce violent and property crime, whether perpetrated by immigrants or natives, thereby greatly improving public safety. Such increases can also be coupled with measures to reduce police abuses and racial profiling. If necessary, we can also use some of the funds saved on immigration enforcement and wealth generated by increased migration to finance additional counter-terrorism operations.

None of the points made above proves that terrorism threats can *never* justify immigration restrictions. Imaginative academics and others can always come up with hypothetical scenarios where immigration restrictions are the only way to prevent massive atrocities by terrorists. But it does suggest there should be a strong presumption against such restrictions, based on both consequentialist and intrinsic moral considerations.

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Daniel Sprick

Repression by Law

The Delayed Legacy of the War on Terror in China



Zhang Xuezhong was released by the police after just one day of questioning on May 11th 2020. Just two days before, he had published an open letter to the delegates of the soon-to-convene National People's Congress, urging them to adopt a new and, in his words, a "real" constitution. He even included a draft of his own for their perusal, which opened in Article 1 with two sentences that may have been an inspiration from Germany: "人的尊严不可侵犯。尊重和保护人的尊严是一切国家权力的义务。- Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlicher Gewalt". His appeal disappeared from Chinese social media, but luckily, he did not. Unlike many others in China, who stood up for liberal values and democratic transformation.

China did not need 9/11 to further restrict civil and political rights, but it surely did jump onto the bandwagon in using the legitimising force of counterterrorism to intensify its repressive policies. The impact of these measures was mostly confined to the Muslim minority in Xinjiang and amounted to horrible suffering that has been the subject of many human rights reports, which increasingly oscillate between the verdict of genocide or crimes against humanity.

Unlike other jurisdictions, China did not add terrorism to its arsenal of national security crimes immediately after 9/11. Terrorism remained a crime of endangering public security, grouped together with hijacking and arson, among

others. This artificial definitional demarcation between public and national security had become even more blurry and finally obsolete after China experienced its own terrorist trauma. When a group of assailants from Xinjiang randomly attacked people in the Kunming train station on the evening of March 1st 2014, using long-bladed knives to kill 29 and wound more than 140 before they were stopped in the early morning of the next day. The Chinese public was shocked and thus the regime had its own 9/11 moment.

While terrorism became a matter of national security in the aftermath of the Kunming attack, this still did not significantly alter China's long-established practice of suppressing civil and political rights. China's so-called "People's War on Terror" did, however, have a stifling impact on the ability to practice Islam in China (and especially in Xinjiang) and is, when discussed in the context of counterterrorism and human rights, therefore best be characterized as a significant encroachment of religious freedoms, as protected under international human rights law and brought China's human rights record to a new low point in the 21st century. China, however, rather bluntly draws a direct line from "distorted religious practices" to extremism and terrorism, which ultimately made religion the main target for China's counterterrorism measures.

Repression and terrorism between national and public security

China's criminal and police laws are crowded with repressive instruments that give the regime far-reaching capabilities to suppress civil and political rights. Terrorism only plays a minor role when it comes to core individual liberties such as the freedoms of thought, expression, assembly or association. Core crimes that are employed for this purpose are sedition, as well as the subversion of state power, which falls within the category of national security. Until the understanding of terrorism fundamentally shifted after the Kunming attack of 2014, terrorism was not considered a crime that could actually threaten the state's integrity. Even the revision of China's criminal law immediately after 9/11 did not alter this approach, but mainly implemented the UN SC-Resolution 1373 of September 2001, by criminalising (financial) support of terrorism (Art. 120 1 Chinese Criminal Law, "CCL") or money laundering for terrorist causes (Art. 191 CCL). Terrorist acts were still not a stand-alone crime, whereas the dangerousness of organising or participating in a terrorist group fell in the category of public security.

The regime regularly charges prominent Chinese dissidents like the late Nobel Peace Prize recipient Liu Xiaobo or the human rights lawyer (维权律师) Xu Zhiyong with the almighty but vaguely worded crime of subversion of state power (Art. 105 CCL), which carries a minimum penalty of 10 years imprisonment for the alleged "ringleaders". Even

the act of "instigating" the subversion of state power can amount to 5 years in prison. The direct link to the speech of this crime can, *inter alia*, be seen in the Supreme People's Court ("SPC") interpretation for handling cases of the punishment of crimes and illegal behaviour that may obstruct the fight against COVID; anyone who exploits the pandemic for fabricating or spreading rumours can in serious cases be charged with subversion of state power.

The catch-all criminal law provision in the area of suppressing speech is, however, the notorious crime of "picking quarrels and provoking trouble (寻衅滋事, Art. 293 CCL)". This offence is often used to punish people, who openly express their anger about the regime or complain about injustice and repression. Just recently, China corroborated that it considered many of these cases sensitive, when they suddenly disappeared from the SPC's database, *China Judgment Online*, which was meant to establish comprehensive transparency in China's judicial system.

The only prominent case, in which a political dissident was charged with the crime of leading a terrorist organisation was that of Wang Bingzhang, a pro-democracy organiser and activist since the early 1980s. It may not have been a coincidence that he was charged with terrorism in 2002, after his abduction from Vietnam, as China may have been testing the waters for using this crime on political dissidents just shortly after 9/11. International criticism may have

quelled this approach, and China henceforth resorted to its well-tested offences of subversion or picking quarrels.

In the field of suppressing violent and non-violent separatist activism, China also has other powerful legal tools for criminal prosecution. The most prominent being the crime of sedition (分裂国家罪 - "Crime of Splitting the State"), which can also warrant life imprisonment and was, for example, used on the 2019 Sakharov Prize laureate and Uyghur academic Ilham Tothi.

China apparently saw no lacuna in its laws for handling violent acts that caused widespread terror in society, which would have easily been on the terrorist spectrum of offences in other jurisdictions. A prime example is the long list of bombings that occurred in China since the early 2000s and targeted residential, commercial, party and government buildings with sometimes a high number of victims. China's criminal law had no issue in meting out strict punishments, and sometimes the death penalty, without resorting to the concept of terrorism.

In China's view at the time, terrorism should remain a problem of the international arena, even though it had started to rebrand violent separatism in Xinjiang as terrorism in 2002, while explicitly stressing the international character of this terrorism on Chinese soil. Clearly, this step served to legitimise China's suppression of separatism in

Xinjiang with the international momentum singling out Islamic terrorism as the biggest threat to global security.

This approach fundamentally changed after the Kunming attack. While still with an international dimension, as the attackers were allegedly on their way to join the IS in Syria, China now saw itself faced with a serious threat of homegrown terrorism and started to adapt its legal capabilities accordingly. Not only did the vague but powerful National Security Law of 2015 now explicitly mention the fight against terrorism (Art. 28) but, more importantly, China enacted a comprehensive Counterterrorism Law (CTL) in 2016, which now identifies terrorism as an overarching threat to national, public and personal security (Art.1). This law also provided China with its first legal definition of terrorism:

"In this law, terrorism means any advocacy or act that, by means such as violence, destruction or threat, causes panic in the population, endangers public security or infringes upon personal or property rights or compels state organs or international organisations, with the purpose of realising political, ideological or other goals." (Art. 3 CTL)

The inclusion of non-violent "advocacy" in this definition was widely criticised in Chinese legal academic circles, but it only echoes the global trend to push the reaches of criminal

law farther away from the violence of a terrorist attack with the effect of criminalising behaviour that may be conducive to terrorism but that cannot yet be directly linked to the actual preparation of a terrorist attack. Accordingly, China's criminal law was amended in 2015, introducing five new terrorism-related crimes. One covers acts of making preparations for terrorist activities (Art. 120 II CCL), whereas the other four crimes look at mostly non-violent behaviour that further precedes a terrorist attack and establish a direct link between extremism and terrorism (Art. 120 III-VI CCL), such as possessing material that propagates extremism. By blurring the demarcations of national, public and personal security in its counterterrorism measures, China elevated the dangerousness of vaguely terrorist-related behaviour and thereby further broadened its already powerful capabilities for the suppression of non-violent activism.

Counterterrorism and the suppression of religious freedoms

Just like in the political realm, China's legal system and practices provided a wide range of instruments to suppress religious practices even before its counterterrorism laws came into place. Between the constitutional limit of protecting only "normal religious practices" (Art. 36), the mighty administrative supervision by China's State Administration of Religious Affairs and the criminalizing of "heretic cults",

China already had a tight grip on religious life in its territory. China's counterterrorism frenzy did, however, bring a new quality of suppression, specifically targeting Muslims and particularly those living in Xinjiang. The regime sees its main task in rooting out "distorted religious teachings", by firmly pursuing its historic endeavour of sinicizing religion, as the CCP's Central Committee recently reiterated in one of the many documents commemorating its 100-year anniversary in 2021.

Most repression in China is legalised, though it may be more accurate to categorise a portion of these legal measures as part of the prerogative state in the sense of Ernst Fraenkel. It is therefore possible to corroborate at least some of the horrific first-person accounts from Xinjiang by simply looking at the laws. For being subjected to the now notorious camp system, which China calls and paints as Vocational Education and Training Centers, the law provides four main routes. To name only one, the CTL has established a measure called "assisted education" (Art. 28), which may be applied to those who were "instigated or seduced" to partake in terrorist or extremist activities. According to the law, it is not necessary to actively seek proximity to extremist networks, but it may suffice to be subjected to an environment that can be perceived by the authorities as conducive to extremism, which evidently allows for highly arbitrary decisions by the competent public security organs.

The catalogue of unlawful extremist behaviour is nonexhaustive and very openly reveals its target of longestablished religious practices in Xinjiang. Without substantial safeguards to protect this minority against the securitisation and criminalisation of their everyday life, it is at the discretion of the police to decide whether conduct is, e.g., considered as compelling someone to (financially) support a religious institution, as a "generalisation" of the *Halāl*-principle, as wearing a Nigab, having an "abnormal" beard or giving a child a name that is "glorifying" religion is extremist. The Xinjiang Implementation Measures of the CTL (2018) also give a glimpse into the content of the abovementioned forms of "education", which shall encompass legal knowledge, vocational skills, ethical thinking, mental health, progressive culture, scientific knowledge, and guidance on correct religious teachings, while Chinese (Mandarin) is to be used throughout the educational measures (Art. 45). This list does certainly not fully reflect the practices described in former inmates' accounts; a subtext that this Chinese version of de-radicalisation treats its cases as backward religious fiends of modern Chinese civilisation, who need to be resolutely led away from religious teachings that interfere with "normal production and life", is evident (Art. 3 Xinjiang De-Radicalisation Regulations, 2017).

Final remarks

The suppression of civil and political rights in China takes many forms. Counterterrorism was never needed as a fig leaf to introduce new policies that would undermine human dignity, and further limit rights and freedoms, particularly not after 9/11. When China however discovered the mighty narrative of a War on Terror after Kunming in 2014, the repression went far beyond the confines of limiting some civil and political rights, but spiralled into spheres of gross human rights violations and landed possibly in the purview of the gravest crimes international law has vet brought forth. In addressing obvious human rights concerns, China however firmly stands by its narrative that it is terrorism, which is the real danger to human rights, and therefore compels the state to use every force necessary to maintain security and protect its citizens. This approach is perfectly in line with China's consequentialist concept of human rights, which focuses on (economic) development as the basis for the (material) well-being of the (majority of the) Chinese people. According to the many recently published Chinese White Papers on human rights and its political system, the "people's happiness (人民幸福)" is the ultimate vardstick for the successful protection of human rights and should be measured in terms of overall development and the achievements of China's economic, social, cultural, environmental and security policies. A constitutional legal transfer from Germany

to China may be desirable in the eyes of liberal academics and pro-democracy activists, but respecting and protecting human dignity is far from being a guiding principle for the authorities in the People's Republic of China.

Li-ann Thio

Securitisation and Solidarity in Singapore after 9-11

The Pre 9-11 Securitised Approach Towards Law and Order



The aftermath of 9-11 ushered in a shockwave of global terrorism which did not leave Singapore untouched. However, it was not the impetus for heightened securitisation; rather, it validated the pre-existing securitised approach towards public order, running parallel to the criminal justice framework. Article 149 of the Constitution authorises the passage of anti-subversion legislation which bypasses the ordinary processes of law and due process through a notwithstanding clause, immunising the validity of that legislation where it violates stipulated fundamental liberties.

The primary security law is the Internet Security Act (ISA), whose roots are in the colonial era 1948 Emergency Regulations and other antecedents, where the primary concern was to ensure communist terrorists failed "to make Singapore a Cuba." It authorises the extraordinary power of detention without trial of persons acting in a manner prejudicial to security.

Akin to anti-terrorist legislation which carves exceptions to the rule of law and erodes civil liberties, the ISA places the state above law in the name of existential necessity. A 1989 constitutional amendment truncated judicial review to procedural matters, although article 151 provides various procedural rights to ISA detainees, such as being told the grounds and factual allegations for detention, and rights of representation before an Advisory Board (AB) headed by a

Supreme Court Justice. If the AB advises against continued detention, the government needs to secure the President's independent decision to concur. This is a weaker form of protection than that associated with an open criminal trial.

Such laws consolidate the powers of a strong executive, which in Singapore operates within the context of a dominant party parliamentary system and may facilitate authoritarian modalities of control. The parliamentary executive, as the sovereign who determines the exception in this case, controls 83 of 93 elected seats. Thus, the ruling People's Action Party government, which has been in power since Independence in 1965, can easily secure the two-thirds parliamentary majority needed for constitutional amendments under article 5(2).

The ISA regime originally allowed the government to take swift, prophylactic action against instigators of ethnic unrest, communist propaganda and espionage. 9-11 signalled the inauguration of a distinct security threat in the form of religiously motivated terrorism, specifically violent Islamic extremism. This has been identified as the dominant terror threat today, by the Internal Security Department (ISD), operating under the Ministry of Home Affairs (MHA).

Religious terrorism to the fore: Preventive detention as a necessary but insufficient response

In December 2001, 15 persons, all members of Singapore's Malay-Muslim community, were arrested under the ISA for involvement in a bomb plot, targeting sites in Singapore like the US and British Embassies and Yishun MRT Station. 13 of the detained belonged to a Singapore cell of the radical Jemaah Islamiyah (JI) terrorist group, which had close links with Al-Qaeda and seeks to establish an Islamic Caliphate (*Daulah Islamiyah*) in Southeast Asia. While the physical threat of violence was intercepted, the government treated as an imperative the need to address the psychological and pneumatic harm this discovery inflicted upon social cohesion in the world's most religiously diverse, multi-racial secular democratic polity.

While resorting to the ISA was seen as necessary, it was an insufficient response to the aggravated security threat posed to social cohesion, threatening to erode the "high trust society", integral to Singapore's evolving model of communitarian constitutionalism. This moderates statist values through a greater commitment to participatory democracy and promoting "dialogue, tolerance, compromise and placing the community above self" pursuant to sustaining what might be considered the constitutional civil religion of racial and religious harmony. ⁴

In addition to detention orders or restriction orders issued under the ISA which may be renewed after an initial two-vear period, the government has adopted a rehabilitative approach in seeking to deradicalise persons detained for religious extremism-related reasons, and to reintegrate them into society. As the Law Minister stated: "We give them religious rehabilitation, we don't throw away the kevs." Security is not simply bare survivability and stability but related to sustaining the on-going Singapore project and the imperative of maintaining racial and religious harmony. This resonates with Singapore's commitment to relational constitutionalism, whose goal is to secure "the relational well-being of individuals and groups and to preserve sustainable relationships", allowing citizens "to maintain their distinct identities, while being unified by a national identity and a shared commitment to the common good."6

While terror breeds fear, distrust and alienation, inimical to social solidarity, a rehabilitation-oriented approach towards religious terrorism is an exercise in hope. Rather than demonising the terrorist as an "outlaw" or inveterate enemy of state and society, rehabilitation views the terrorist as a misguided prodigal son of sorts, but one who might possibly return to the fold and be reinstated as a responsible full member of society.

The securitisation of law and normalisation of exceptions to due process which diminish human rights observance and qualify the rule of law may certainly impair human dignity, in its liberal-humanistic conception as an individual-oriented norm predicated on the intrinsic worth of individuals with autonomist dispositions. However, there are variable conceptions of human dignity beyond the rights discourse. This essay reflects upon how the human dignity of individuals who would be shunned for their anti-social beliefs and conduct may be vindicated by the Singapore process of "detention, rehabilitate and release". This involves using a mix of hard and "soft" law methods and public-private partnerships in a comprehensive approach towards rehabilitation.

To strengthen social resilience, concerted efforts have been directed at building friendly relations between different ethnic and religious groups through dialogical processes and interactive projects, ⁸ in a city-state where the Chinese compose 76 % of the population of 5.7 million and where the Malay minority, 99 % of whom are Muslims, ⁹ are recognised by article 152 as having indigenous status, accompanied by a government duty to care for their interests. The delicacy of religious sensitivities and inter-group relations is compounded not only by the historical trauma of the 1960s race riots, but also the geo-political vulnerabilities of being a "red dot in a sea of green", a secular multicultural democracy in a Malay archipelago, as a former Indonesian president disparagingly coined.

Differing treatment: Political opponents and religious extremists

Political constitutionalism emphasizes resort to political processes and public avenues to secure government accountability. This is a key feature of the public law landscape but its limits were manifest when in 1987, 16 people were arrested under the ISA for an alleged Marxist conspiracy "to subvert the existing social order with a view to establishing a socialist state." Only one opposition politician spoke for the detainees in Parliament, calling them "innocent young idealists", but this did nothing to change the harsh treatment they received.

The European Parliament and US Congressmen were among international protesters who called for their release. Many doubted the existence of an internal Communist threat and saw this as an exercise in curbing political dissent and the welfare activism of the alleged conspirators, including some church workers who had apparently infiltrated the Catholic church, law society and theatre groups. 9 of the detained later recanted confessions that they acted under the instructions of a former student leader exiled in the UK to destabilise Singapore. The detainees' homes and offices were raided but no incriminating literature nor weapons were found. This remains an unhappy episode in Singapore's history.

A markedly different approach was adopted towards the JI detainees, ¹¹ where the Malay community suffered suspi-

cious distrust after the exposed bomb plots. Notably, former critics of the ISA regime from the liberal West now lauded Singapore's efforts to combat religious terrorism, where they too had adopted approaches against terrorist threats that circumvented due process concerns e.g. the Guantanamo Bay detention camp, to address heightened security concerns.

First, the government took pains to consult Malay community leaders, informing them about the JI arrests before this was made public.

Second, to promote transparency and to alleviate concerns, a white paper entitled The Jemaah Islamiyah Arrests and the Threat of Terrorism (Cmd 2 of 2003) was issued and extensively debated in Parliament. 12 This contained evidence of the bomb plots and cast the Singaporeans involved as a "small and isolated group" manipulated by foreign Muslim terrorists exploiting ties of Islamic brotherhood and the deferential respect the community accords its religious teachers. It emphasised that most local Muslims were "moderate, tolerant and law-abiding". The government has consistently urged the broader community to reject Islamophobia and to "covenant to ourselves" never to allow xenophobia to undermine minority protection and religious freedom. The consistent messaging has been that this is a Singaporean rather than Malay/Muslim problem. Social cohesion and religious harmony is a public good and

citizens were encouraged to notify the authorities if they came across extremist religious teachings or clandestine activities.

Third, in seeking to neutralize radical teachers and foreign terrorist operatives, the government underscored the importance of safeguarding the legitimate religious practices and peaceful activities of Singaporean Muslims. The community was urged to take the lead in self-regulating religious education. Subsequently, an asatizah recognition scheme and code of conduct was adopted for all Muslim religious teachers, administered by the Islamic Religious Council of Singapore, created under the Administration of Muslim Law Act.

Comprehensive rehabilitation and rebuilding solidarity: A public-private partnership

As correcting misguided religious beliefs involves theological questions, beyond the competence of a secular government, the ISD partnered with the Religious Rehabilitation Group (RRG), a group of volunteer religious scholars, launched in April 2003. These volunteers regularly engage with Muslim detainees to understand their mindset, to build trust and so to correct their misinterpretation of key Islamic concepts. The goal is to help them appreciate the possibility of living as good Muslims in a secular democracy like Singapore. Over time, they have earned the trust of many of the

detainees and the Muslim community at large, ¹³ as they receive no government funding and work with but not for the MHA. Their work has extended to community outreach programmes. The RRG has engaged eschatological understandings, challenging jihad as armed conflict, in relation to matters like views that the Syrian conflict was the precursor to endtime prophecy (Yaumul Qiyamah). They urged Muslims not to be "emotionally manipulated by religious rhetoric" which distorts the "genuine message of Islam." They have also produced manuals to debunk false ISIS narratives.

To counter extremism, the MHA in tandem with religious rehabilitation also arranges for detainees to receive psychological counselling; social rehabilitation to facilitate reintegration into society upon release is promoted, such as through regular family visits. ISD officers have worked to facilitate job placements for released detainees, and arranged for teenaged detainees to continue their education, and indeed, improve their academic performance, so they can be gainfully employed and have a future. The Inter-Agency Aftercare Group (ACG), an informal network of Muslim associations, also provides emotional and financial support to the families of detainees. Family members also receive religious counselling to ensure they are not radicalized to prevent a second generation of terrorists from being formed and to keep recidivist rates low. Thoughtful gestures like providing pocket-money for detainees' 'children motivates the detainee to rehabilitate, knowing that their families' welfare is taken care of

In a Report commemorating the 20th Anniversary of ISD's Operations Against Jemaah Islamiyah in Singapore, a JI detainee reportedly expressed sentiments consistent with the statement at page 23 that all detainees were treated with "dignity and respect", such as having regular doctor visits and being provided with halal food to meet religious dietary requirements.

Realistically speaking, rehabilitation only works if there is voluntary cooperation, to enable the state to conclude a detainee will not reoffend. It is fair to say that the ISD's rehabilitation approach has achieved some success, insofar as only 4 of the 56 JI members detained since 2002 remain in detention.

With more teenagers being detained for picking up terrorist ideology via the internet and planning terrorist-related activities, the ISD has taken to assigning them mentors to help them develop social skills as part of the rehabilitation process, paying special attention to their identity, mental resilience and critical thinking skills, to help them discern radical rhetoric online. After release, mentors remain in touch and operate as a positive influence in the lives of those formerly detained. As the nature of the terrorist threat evolves, the ISD has adjusted its rehabilitation approach.

The RRG now has female counsellors to advise female detainees, after a woman was arrested for terrorist-related activities in 2017. When an adolescent Indian Protestant male was detained in 2021 for planning knife attacks at a mosque, the first instance of what has been dubbed "far-right extremism", the ISD worked with the National Council of Churches of Singapore to identify a suitable Christian counsellor for him.

Where detainees are not Singaporean nationals, they are deported, as in the case of 27 Bangladeshi workers in 2016. Where Singaporeans are concerned, the government adopts a proactive, holistic approach in seeking to preserve national security, unity and solidarity through rehabilitation, emphasising the responsibilities of all citizens to be vigilant and to actively preserve racial and religious harmony through social interaction and building relationships, as part of the communitarian compact. Remaining a united people would thwart the terrorist goal of driving a sharp wedge between "us" and "them".

A worthwhile trade-off: liberty versus second chances?

While extensive preventive security powers may damage respect for rights and human dignity, particularly where accountability mechanisms are weak, human dignity can also be secured by redemptive projects to rehabilitate detainees, reintegrating them into society with prospects for a decent

life. As the Law Minister put it, the first female detainee, a 22-year-old kindergarten teacher had planned to go into an ISIS warzone. Preventive detention laws are not meant to be primarily punitive; by permitting preemptive, early intervention, the prospects of correcting radical ideology are enhanced. The teacher was detained, rehabilitated, and released, such that she was alive today and had "the prospect of carrying on with her life, achieve her full potential".

Thus, rehabilitation and deradicalisation of individuals detained under the ISA may be seen to compensate for their loss of liberty "by addressing the roots of the detainee's radical terrorist inclinations, thus helping them to move forwards in life and to reintegrate successfully into society". ¹⁴

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- 8. See the work of the Inter-Racial and Religious Confidence Circle (IRCC) which operates at constituency level to build networks and trust between religious, ethnic and community groups: https://www.ircc.sg/. Religious leaders under the supervision of a junior minister even adopted a Declaration on Religious Harmony in 2003 as a united exercise in shared values: see Li-ann Thio, "Constitutional 'Soft' Law and the Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony". [2004] Singapore Journal of Legal Studies, 414-443.
- 9. Para 2, Singapore National Report, Universal Periodic Review, A/HRC/WG.6/38/SGP/1 (11 Feb 2021) at G2103144.pdf (un.org)
- 10. Teo Soh Lung v Minister for Home Affairs [1989] 1 SLR(R) 461 at [20].
- 11. A total of 36 people were arrested in December 2001 and August 2002, most of whom were JI members.
- 12. Wong Kan Seng, Threat of Terrorism (Motion), 75 Singapore Parliament Reports, 20 Jan 2003 at col. 2036 Search parl.gov.sg
- 13. The RRG has a helpline and mobile app and relatives of schoolboys who were beguiled by ISIS propaganda have voluntarily alerted the RRG to obtain religious counselling for their relatives: "Religious counsellors save two secondary schoolboys from further radicalization", *Today*, 24 June 2017.
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Die Menschenwürde derjenigen, die die Menschenwürde Anderer elementar verletzen, ist ebenso unverletzlich wie die ihrer Opfer. Doch im öffentlichen Diskurs, in Gesetzgebung und Praxis wird sich nicht an diese Maxime gehalten. Es stellt sich die Frage, wie ein Staat sich von seiner Abkehr von liberalen Grundwerten rehabilitieren kann. Gibt es Wege aus dem zur Norm gewordenen Notstand?