

Herausgegeben von
Marlene Straub

Rechts staatlich keit

9 // 20
Jahre
später

Verfassungsbooks

ON MATTERS CONSTITUTIONAL

DOI: 10.17176/20230215-150536-0

Verfassungsblog gGmbH
Großbeerenstr. 88/89
10963 Berlin
www.verfassungsblog.de
info@verfassungsblog.de

Umschlaggestaltung Carl Brandt
© 2023 bei den Autor*innen



Dieses Werk ist lizenziert unter der Lizenz Namensnennung - Weitergabe unter gleichen Bedingungen 4.0 International. Weitere Informationen finden Sie unter <https://creativecommons.org/licenses/by-sa/4.0/>.

Diese Publikation wurde im Rahmen des Fördervorhabens 16TOA045 mit Mitteln des Bundesministeriums für Bildung und Forschung erarbeitet und im Open Access bereitgestellt.



Die Blog-Symposien wurden im Zuge des Modellprojektes „20 Jahre 9/11“ durch die Bundeszentrale für politische Bildung gefördert.



Marlene Straub (Hrsg.)

9/11 und die Rechtsstaatlichkeit

9/11, 20 Jahre später:
eine verfassungsrechtliche Spurensuche

Verfassungsbooks
ON MATTERS CONSTITUTIONAL

Vorwort

In den zwanzig Jahren nach 9/11 haben wir einen Prozess hin zur Normalisierung eines permanenten Ausnahmezustands erlebt, der Rechtsstaatlichkeitsmechanismen außer Kraft setzt. Selbst nach ihrer formellen Aufhebung bestehen die Ausnahmezustände fort, sei es durch neu geschaffene Gesetze oder Präzedenzfälle, die noch heute weitreichende und präventive Maßnahmen legitimieren. Dieser Zustand schwächt die rechtliche Kontrolle und Bindung an Kontrollinstrumente von staatlichen Institutionen nachhaltig.

In diesem Symposium – dem letzten in einer Reihe von sieben – befassen sich die Autor*innen aus unterschiedlichen Perspektiven mit der Erosion rechtsstaatlicher Schutzmechanismen. Der gemeinsame Nenner aller Beiträge ist die amorphe, womöglich fiktive und inszenierte Bedrohung durch den Terrorismus, die als zentraler Rechtfertigungsgrund dient, um rechtsstaatliche Garantien auszuhebeln. Die Autor*innen kontrastieren, wie die Befugnisse der Sicherheitsdienste ausufern, während die Kontrollfunktionen, die ihre Ausübung begrenzen sollen, geschwächt werden. Zeitgleich wird exekutives Handeln immer intransparenter – (vermeintliche) Sicherheitsbedenken werden über die Informationsfreiheit gestellt, was nicht nur die Kontrollmöglichkeiten der Zivilgesellschaft beeinträchtigt, sondern Individualrechtsschutz aushebeln kann. Wir lernen am Beispiel Israels, wie ein jahrzehntelanger, zur Regel geworde-

ner Ausnahmezustand die Justiz zu Komplizen gemacht hat, und am Beispiel Frankreichs, wie der stille Ausnahmezustand post-Bataclan einen Präsidenten nach dem anderen in Versuchung gebracht hat, ihn wieder und wieder zu verlängern.

Dieses Buch mit 10 Beiträgen ist nach dem Band „9/11 und die Privatsphäre“ der letzte 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 Projekts 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



Inhalt

On 9/11 and Three Natures of a Permanent State of Emergency <i>Emre Turkut</i>	13
Law's Fate under the US "War on Terror" <i>Richard Abel</i>	25
The Dilemma of Mild Emergencies that are Accepted as Consistent with Human Rights <i>Kent Roach</i>	41
Counter-Terrorism, the Rule of Law and the "Counter-Law" Critique <i>Phil Edwards</i>	54
The European Union and Preventive (In)Justice: The Legacy of the "War on Terror" <i>Valsamis Mitsilegas</i>	67
Die Entwicklung des informationellen Trennungsprinzips <i>Hannah Ruschemeier</i>	81
"When in doubt, detain!": Administrative Detentions and Emergency as a Permanent State of Mind in Israel <i>Suzie Navot and Guy Lurie</i>	97
The Other Legacy: States of Exception as New Ordinary Paradigms of Government <i>Stéphanie Hennette-Vauchez</i>	110

From the War on Terror to Climate Change: Democracies and The Four Emergencies of the 21st Century (So Far) <i>Alan Greene</i>	119
Staatsgeheimnisse und effektiver Rechtsschutz nach 9/11: Das Beispiel der extraordinary renditions vor den US-Bundesgerichten <i>Maria Stemmler</i>	131

Emre Turkut

**On 9/11 and Three Natures of a Permanent State of
Emergency**



It has now become commonplace to argue that the 9/11 attacks and the ensuing US “war on terror” have dramatically transformed the global security and counterterrorism paradigm. In the two decades since the drastic practices coming out of this new paradigm have often resulted in systemic abuse and a serious weakening of human rights. One particular consequence of the post-9/11-counterterrorism paradigm is there has been a rapid and global expansion of emergency powers – which have become, as Gross once described using the “timeless” words of Shakespeare, as “invisible as a nose on a man’s face, or a weathercock on a steeple”. It has become even more common in the post-9/11-era to view terrorist threats as creating a “permanent” emergency. This is not to say that the post-9/11 war on terror was new as far as the issues of states of emergency are concerned, but rather, as aptly put by Dyzenhaus, “all that is new is the prevalence of the claim that this emergency has no foreseeable end and so is permanent.”

In this post, I explore some of the multiple ways in which emergency powers have come to proliferate and take permanence around the world since 9/11. Drawing on a number of illustrative emergency case studies, I argue that – at least – three “natures” facilitated the contagion of a permanent state of emergency as generated by the events of that day.

1. The “trans-temporal” nature

In a Korean folk tale, there lives a terrifying monster that keeps growing as it eats all the metal scraps and iron around a village. Fed up by the destruction caused, people try to kill it in any way possible. Even when they throw it into a fire, the monster makes its way out, flies back to the village, its whole body aflame, and burns down all the houses. Villagers eventually understand that it cannot be killed, thus they name it “Bulgasari” (“impossible to kill”). Emergency powers may not easily be possible to kill, first and foremost due to their “trans-temporal” nature. This is patently evident in three ways:

First, exceptional national security/emergency powers are increasingly being incorporated into permanent law. Antiterrorism legislation is usually the key vehicle here. Israel and Turkey offer particularly interesting case studies in this regard, as they have large volumes of antiterrorism legislation that were first adopted as temporary emergency measures, but then became permanent features of the countries’ ordinary legal arsenal. What the post-9/11 counterterrorism paradigm additionally brought forward was a *brutalization effect* in authoritarian regimes across the world, i.e. empowering them to create a climate of brutal violence at the expense of fundamental freedoms. This is discernible in countries institutionalizing emergency regimes by *inter alia* adopting Orwellian counterterrorism laws paving the

way for massive human rights violations such as arbitrary detentions and enforced disappearances (such cases include Afghanistan and Egypt) or using the counterterrorism for vindictive and nefarious ends, including but not limited to, as an opposition and minority repression vehicle (such as in China and Russia).

Second, emergency regimes can easily shed their skin and transform themselves into different shapes. This is to say that what is terminated *de jure* might continue to exist *de facto* in legally dubious form and substance. Just to give one striking example, despite the fact that the state of emergency was lifted in Turkey's Kurdish southeast in December 2002, the rubric of "temporary security zones" introduced by the Turkish military in June 2007 – the legal basis of which comes from a 1981 law adopted by the 12 September military regime, enables the military forces to effectively occupy the area and exercise "quasi-martial law" exceptional and stringent powers. The declaration of such zones, as clearly exemplified by the increasing numbers of curfews and entry bans, regularly raises the spectre of past drastic emergency rule in these regions.

Finally, but most importantly, emergency powers tend to accumulate over a period of years. This shapes how states perceive future crises, and may eventually form a crisis mentality (or an emergency *raison d'état*). Even a quick tour of state of emergency practices reveals that states use their ex-

tensive experience with extraordinary powers and authority, granted and exercised during previous emergencies, as its starting point, and increasingly so. Consider, for example, how the *Kurdish minority* has borne the brunt of Turkey's post-coup state of emergency along with the *Gülen Movement* – a religious organization accused of masterminding the 2016 atted coup. They have suffered a massive crackdown marked by higher levels of political imprisonment, greater restrictions on freedom of assembly and association, and on electoral aspects of self-determination. Similarly, yet much less grave in scope, “community profiling” and “discrimination” concerns have been raised in the context of warrantless house raids and arrests of Muslims during France's state of emergency in the aftermath of the 2015 Paris attacks. Finally, consider how 9/11 gave rise to a unique security alliance between *Israel and India* that was based on their “contrapuntal geographies of threat” originating with Muslims (namely, *Palestinians and Kashmiri Muslims and Pandits*).

2. The “corrosive” nature

It is certainly nothing new to claim that emergency is not a friend of constitutions. While constitutions do regulate and attempt to limit emergency powers, states of emergency, once in place, pose some fundamental problems to the idea

of constitutionalism. In the end, the executive branch traditionally assumes a leading position in overcoming a crisis, which then leads to the gradual and/or total expansion of its power. And even more so in the post-9/11 era. Consider, for example, the adoption of “the *Authorization for Use of Military Force*” in the US – a joint congressional resolution authorizing the President to “use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001” – which arguably gave the President vast legislative authority to act as he saw fit in the global war on terror (on this, see *Hamdi v Rumsfeld*). So, as Scheppele strikingly noted, the US reaction to 9/11 was not based on a typical and sudden emergency, but rather involved measured responses with “much constitutional care [...] [followed] by ever-expanding justifications for the assertion of executive and unilateral power” in both domestic and foreign policies. Moreover, when national security is involved, domestic courts have also traditionally taken a *deferential attitude* towards the executive branch. Either they have tended to provide affirmative legal “cover” to legitimize the repressive measures or, at the very least, have totally abdicated their judicial duty to perform a meaningful legal review to assess whether the enacted emergency measures are proportionate and directly related to actual security needs. Against this backdrop, the

outcome is rather unsurprising. Based on ample evidence of actual practices, emergency regimes coupled with broad and vague anti-terrorism laws tend to be accompanied by gross and systematic human rights abuses.

Now how to eliminate this corrosive nature? This requires two measures on two levels that cumulatively get to the heart of the problem, namely enabling the three branches to participate together in the “common constitutional project”. First, at the domestic level, we need a new normative constitutional design, long advocated by Dyzenhaus as the *derogation model*, where parliaments (especially, parliamentary committees) are accorded the possibility to hear and provide a preliminary review of both the executive claims as to the existence of a state of emergency and any contemplated derogation measure. This vital information could then be shared with judges to ensure a proper and meaningful judicial review of emergency measures after properly authorized. Second, at the international level, long-standing loopholes in the international supervision of emergencies can be tackled by more political means. These loopholes include but are not limited to the hands off approach of human rights bodies and delay-ridden individual complaint mechanism that often fall short to address the long-term effects of emergency measures on human rights, the rule of law and democracy (for one, see the *PACE Resolution 2209 (2018)* aiming to strengthen the supervisory role

of the Secretary General of the CoE in derogation settings).

3. The “transformative” nature

But what about those cases that completely undercut the existing constitutional order and/or substantially modify the constitution? As Ferejohn and Pasquino famously argue, such an exercise is “no longer properly an exercise of an emergency power” at all, but rather amounts to “an exercise of constituent power”. In the Schmittian terminology, this corresponds to the institution of sovereign dictatorship – one that has the ability to both suspend the rule of law and create a new order in the name of the people as the ultimate enabler of sovereignty. Yet, the Schmittian “sovereign dictatorship” is a rather outdated concept as far as states of emergency operate today: democracy and the rule of law are entrenched across the world despite some contemporary problems, constitutions often regulate and limit the operation of emergency powers and there is hardly any real demand for extra-legal justifications for emergencies. But at the same time, an argument could be made Schmitt’s conceptualization of the permanent state of emergency as a claim for the constituent power – something Greene referred to as the transformative nature of a permanent state of emergency – is still awake today.

The Turkish post-coup emergency case is striking in this regard: what we have witnessed since 2016 in Turkey is that

President Erdogan and his government, having survived a vicious attempted coup, gripped a power of unprecedented strength and carried out highly elaborate and controversial policies to centralize political authority, using the state of emergency as an ideal tool to transform, rather than preserve, the underlying legal and constitutional order. The transformative nature of the Turkish post-coup emergency has clearly shown itself as what Ackerman defines as a “constitutional moment”: the country passed perhaps its greatest constitutional moment when the majority of the Turkish people voted in favour of a package of constitutional amendments in a referendum during the protracted post-coup emergency, under the thin and all-too-transparent veneer of constitutional legitimacy. It is undeniable that the dramatic constitutional transformation that Turkey has been experiencing since 2016 clearly demonstrates how a state of emergency can have long-lasting implications for the legal and political landscape of a country. However, besides some early cases, such as the Nazi regime in Germany, we know little about the dynamics of states of emergency that could lead to such authoritarian abrogation or transformation of the constitution. Had the Bush administration engaged in a more substantive constitutional project (a constitutional amendment to limit due process instead of a joint congressional resolution, recalling the lucid example shared by Albert and Roznai) in the immediate aftermath of the

9/11 events, the story would have been wholly different today. However, as an era of emergencies is set to bear down on us, as most recently exemplified by the COVID-19 pandemic or Russia's brutal invasion of Ukraine, the transformative potential of emergencies is something we should not take lightly. One recent proposal to resist this problem is what Albert and Roznai originally termed as the "emergency unamendability" aiming to disable, but not all together prohibit, the constitutional amendment procedure in extreme emergency conditions. But as for more extreme cases – for example, the Turkish post-coup emergency, where states of emergency are (mis)used as a veil of legitimacy for the social and political re-engineering of the state power – we clearly need more comprehensive and workable proposals.

Richard Abel

Law's Fate under the US "War on Terror"



More than 20 years after the US declared “war on terror” we must assess the damage it inflicted on the core values embodied in the rule of law and the success of efforts to defend them. This blog expands on my two 2018 books, *Law’s Wars* and *Law’s Trials*, to include the Trump and Biden administrations. The fate of the rule of law – whose *raison d’être* is to restrain the state from abusing its power – itself depends on politics. Party control of the executive and legislature (which in turn shapes the appointment of judges) was the single most powerful determinant of responses to the numerous abuses under all four administrations.

Bush and Obama

1. *Law matters*

The Bush administration sought to clothe its transgressions in legal garb by soliciting opinions from apparatchiki in the Department of Justice Office of Legal Counsel (OLC). Journalists’ exposure of the abuses at Abu Ghraib led to publication of some opinions. Despite the deeply flawed legal reasoning, lawyers could not be disciplined because of law’s inherent indeterminacy, and the opinions immunized those who implemented them.

2. Sunshine Is the Best Disinfectant

Despite the government's efforts to hide abuses, secrecy is never hermetic. Military Police in Abu Ghraib narcissistically uploaded photos of their crimes to the web. Legislation and adjudication are public. Congress can force disclosure by the executive. Whistleblowers expose superiors. Each leak encourages others. And hiding information perversely valorizes it.

3. As President Truman said, "The buck stops here"

There is dissent even within the executive. Bush's wife, mother and Defence Secretary urged him to close Guantánamo. The FBI refused to join the CIA in torture. High-ranking military officers invoked the Geneva Conventions. And it mattered *who* was president. Obama promptly ended torture, shuttered the secret prisons, and vowed to close Guantánamo (although frustrated by Congress).

4. The "People's House"

From Obama's first day in office, Republicans vowed to oppose every move and prevent a second term. Even when Democrats controlled Congress, they failed to block Bush's nominees, though they were more successful in extracting information from the CIA.

5. *The scales of justice*

The US betrayed its boast of “Equal Justice Under Law,” emblazoned on the Supreme Court pediment. After 9/11 it detained, abused, and deported hundreds of undocumented Muslims and forced tens of thousands of Muslim legal residents to register. Only non-citizens were subject to extraordinary rendition, detained in Guantánamo and secret prisons, tortured, tried by military commissions, or surveilled in the US. The US refused to let citizens be tried by foreign courts, exfiltrated those who committed crimes, and blocked foreign proceedings against CIA agents. It investigated friendly-fire incidents while exonerating US soldiers who killed foreign civilians. Yet local protests (especially when they obstructed military operations) could influence US tactics. Most Americans disregarded Edward Snowden’s revelations about NSA surveillance, confident it was preoccupied with foreigners.

6. *Guantánamo Bay*

Proposals to transfer Guantánamo detainees to the US for trial, detention, or release were blocked by domestic objections. But some detainees deployed the powers of the weak, provoking punishment, engaging in self-mutilation and hunger strikes, attempting and committing suicide

7. Criminal prosecutions

Terrorism prosecutions resembled those for other crimes: appropriate charges, disclosure of exculpatory evidence, *juror voir dire*, timely proceedings, and zealous defence. In the rare trials, judges dealt fairly with disruptive *pro se* accused, excluded evidence tainted by torture, and carefully instructed jurors, who deliberated extensively, sometimes deadlocked by a single dissenter. But almost all prosecutions relied on material support statutes, which obviated the need to prove specific intent. Many accused were poor, members of racial minorities, ill-educated, and ignorant of the radical Islamist ideology allegedly inspiring them. The government exploited undercover agents and confidential witnesses, who gave or promised large monetary rewards, provided inoperable weapons, explained how to use them, and badgered accused into attempting criminal acts they might never have committed (and could not consummate). Yet entrapment defences never succeeded, and almost all were sentenced to long prison terms.

8. Habeas corpus petitions

After two Supreme Court decisions acknowledging that Guantánamo detainees could seek *habeas corpus*, the DC District and Circuit Court judges hearing petitions split into two camps, inhabiting incompatible normative and empirical universes. This produced many divided panels, *en*

banc rehearings, and appellate reversals; judges deployed inflated rhetoric, even attacking judicial brethren. Justice Scalia pronounced (without evidence) that *habeas corpus* would have “devastating consequences” and “almost certainly cause more Americans to be killed”. A Fourth Circuit judge declared that Americans’ “paramount right” was not liberty but the commander-in-chief’s unlimited power. Republican appointees dominating the DC Circuit effectively nullified the Supreme Court’s decisions, resisted deferring to trial judges as fact finders, and created a presumption that the government’s evidence was true. And Bush’s Military Commissions Act of 2006 stripped courts of *habeas corpus* jurisdiction.

9. *Military commissions*

Bush convened military commissions to minimize the procedural rights of Guantánamo detainees and secure conviction. But their performance has been a fiasco. The first five prosecutions targeted small fry. Plea bargains prevented the commissions from demonstrating that detainees were “the worst of the worst” (in Rumsfeld’s typical hyperbole) or showcasing the virtues of US justice. Most received short sentences. Torture precluded some prosecutions, rendered other accused incompetent to stand trial, lowered the likelihood of conviction, and reduced sentences. The politicization became obvious when the Pentagon replaced three

chief executives, and a fourth quit over torture. Six prosecutors resigned, the most aggressive becoming a defence lawyer. Commission judges completed tours of duty, were redeployed, or retired, compelling replacements to read immense records. Prosecutors illegally concealed evidence without suffering consequences. Defence lawyers had difficulty gaining and keeping the trust of clients who had been harshly abused in custody. The government repeatedly compromised lawyer-client confidentiality, sometimes deliberately.

10. Courts martial

The military harshly punished members who threatened or injured Americans, sentencing Chelsea Manning to 35 years for leaking classified information about civilian casualties in Iraq. But courts martial were far less effective in prosecuting those accused of causing such casualties. The fog of war obscured vision. Military investigators, inexpert and ignorant of local languages and cultures, delayed investigations, often losing what little evidence they collected. Soldiers share the *omertà* of all closed groups. They were trained to engage in behaviour that would be criminal off the battlefield and goaded by superiors to compete for and display their "kills". Law of war demarcations between permitted and prohibited behaviour are unavoidably ambiguous and applied by a true jury of the accused's peers – soldiers of at least equal rank,

usually with similar combat experience. Commanders can modify both charges and penalties. The few civilian prosecutions of military contractors or ex-military almost always ended in conviction and harsh sentences. By contrast, the likelihood of court martial convictions for war crimes varied inversely with the accused's rank: not one officer was convicted for the Abu Ghraib abuses.

11. Civil damages actions

Civil damages actions by “war on terror” victims confronted obstacles that defeated nearly every plaintiff. Judges split into two camps. Some saw victims’ rights as *more* essential when national security was threatened. Others belittled plaintiffs’ injuries as the “inevitable” tragedies of war, where “risk taking is a rule”, invented novel doctrines like “battle-field preemption”, and accused plaintiffs’ lawyers of waging “lawfare”. The US paid \$2 million to an American lawyer wrongly detained for two weeks based on a misread fingerprint but successfully moved to dismiss the claim of, Maher Arar, a Canadian wrongly rendered to Syria, where he was tortured for two years (his own government apologized and paid him Can\$10 million). Both courts and compensation funds were far more solicitous of and generous to US victims of terrorism.

12. Civil liberties

Whereas both the military and the CIA violated Muslim beliefs to interrogate and humiliate detainees, the domestic civil liberties record was more mixed. Business travellers won some privacy protections, while Muslims or non-citizens were ejected or excluded from air travel. Islamophobic efforts to block the construction of mosques generally failed, and courts invalidated efforts to legislate against Sharia.

Comparisons across these domains suggest two generalizations: courts were more protective of the rule of law when they functioned as shields rather than swords; and party affiliation (measured by the appointing president) strongly predicted whether the judge would uphold the rule of law in *habeas corpus* petitions, civil damages actions by "war on terror" victims, civil liberties violations, and electronic surveillance.

Trump and Biden

1. *Guantánamo*

Candidate Trump promised to "fill it up with more people that are looking to kill us". After the election he vowed to "load it up with some bad dudes". As president he revoked Obama's closure order, tweeting (falsely): "122 vicious prisoners released by the Obama administration from Gitmo

have returned to the battlefield.” Yet the US kept its promise to transfer Ahmed al-Darbi. And the Biden administration transferred two more, leaving 19 approved for release, 12 charged in military commissions and just seven law of war prisoners.

2. Military commissions

These stagnated or regressed. Lawyers for al-Nashiri (accused of bombing the USS Cole) sought to withdraw because of violations of lawyer-client confidentiality. The one remaining lawyer moved to abate the proceedings until the appointment of “learned counsel”, required in capital cases. The judge suspended the trial and retired shortly before it was revealed he had been appointed an Immigration Court judge by Attorney General Sessions – who supervised the military commissions! The DC Circuit nullified all his decisions. The Pentagon fired the Convening Authority for negotiating guilty pleas for the five High Value Defendants. The judge in that case retired and was replaced by one with just two years’ experience, who resigned after just eight months and was replaced by a judge with no death penalty or multi-defendant experience, who retired within a year; his replacement stepped down in less than two weeks when he “became aware of a significant personal connection to persons who were directly affected by the events of 9/11”. The next judge, whose appointment was delayed while he acquired the mini-

mum two years of experience, had to read more than 33,660 pages of transcripts and decide 100 pending motions. The fourth judge in the Abd al-Hadi al-Iraqi case resigned to take a fellowship at the FBI. The only case reaching closure was Majid Khan, who pleaded; after sentencing him to 26 years (one more than the minimum), seven of the eight jury members urged clemency in light of his torture, and the Convening Authority reduced his sentence to 10 years, making him eligible for immediate release. More than 20 years after being authorized, the commissions remain unlikely to hold their first trial in the foreseeable future.

3. Civil damages actions

Judges continued to favour terrorism victims and disfavour "war on terror" victims. The Trump administration removed Sudan from the State Sponsors of Terrorism list in exchange for paying terrorism victims \$335 million. The Biden administration proposed letting plaintiffs who successfully sued the Taliban for the 9/11 attack execute the judgment against half of the approximately \$7 billion in Afghan government assets frozen in the US after the Taliban victory.

4. Civil liberties

Trump declared that waterboarding "isn't torture" and threatened "a hell of a lot worse" because "torture works". He said Syrian refugees "probably are ISIS", declared that

those who burn an American flag (constitutionally protected speech) should face “loss of citizenship or a year in jail”, told police: “please don’t be too nice” with arrestees, threatened (illegally) to “deploy the U.S. military” if “a city or state refuses to take the actions that are necessary to defend the life and property of their residents”, called National Guard soldiers wounding journalists covering Black Lives Matter demonstrations “a beautiful sight”, and quoted a notorious racist Miami police chief: “When the looting starts, the shooting starts.” He promised that the Jan. 6 demonstration “will be wild” and exhorted the crowd: “[I]f you don’t fight like hell you’re not going to have a country anymore.”

5. Criminal prosecution

Trump claimed to be above the law, boasting during his campaign: “I could stand in the middle of Fifth Avenue and shoot somebody, and I wouldn’t lose any voters, OK?” He politicized the criminal justice system by pardoning his cronies Michael Flynn, Roger Stone, and Paul Manafort. He compromised the integrity of terrorism prosecutions and pardoned Blackwater contractors convicted of the Nisour Square massacre. Yet courts displayed fairness: reducing sentences for cooperation, releasing prisoners based on new evidence or inadequate assistance of counsel, showing leniency when released from mandatory sentencing guide-

lines or swayed by the defendant's mental health or rehabilitation.

6. Courts martial

Trump showed similar contempt for procedural justice in courts martial. Campaigning for president, he called Bowe Bergdahl a "dirty rotten traitor" who should be shot for alleged desertion and said Bergdahl's dishonourable discharge in exchange for a guilty plea was "a complete disgrace". A majority of the US Court of Appeals for the Armed Forces found Trump's behaviour "troubling" and "inappropriate". After Mathew Golsteyn was charged with killing and disposing of the body of an Afghan detainee, Trump said he would "be reviewing the case of a 'U.S. Military hero'", parroting language he had just heard on Fox News. When Golsteyn was punished administratively, Trump pardoned him, as well as Clint Lorance (convicted of murder), and reversed the demotion of Eddie Gallagher, acquitted of murder after an eye-witness changed his testimony at the last minute. Declaring "I will always stick up for our great fighters", Trump denounced the military hierarchy as part of "the deep state" and fired the Secretary of the Navy who had demoted Gallagher. He also pardoned Michael Behenna, convicted of murdering a prisoner.

7. Battlefield crimes

Trump resisted the constraints of the law of war. During his campaign he said he would “take out [ISIS] families”. Although he later acknowledged “that the United States is bound by laws and treaties”, he asked rhetorically: “Somebody hits us within ISIS, you wouldn’t fight back with a nuke?” Later he threatened to bomb sites “very high level & important to Iran & the Iranian culture”. The first counterterrorism action of his presidency (casually ordered over dinner at Mar-a-Lago) killed at least seven women and seven children under 14 (one of them Anwar al-Awlaki’s daughter). Trump eliminated Obama’s requirement of high-level interagency vetting of drone strikes, allowed the CIA to conduct them, and defined all of Somalia and three Yemeni provinces as “areas of active hostilities”, where some civilian deaths were acceptable. The military continued to deny such deaths, and Trump revoked an Obama requirement that the military disclose all those from airstrikes. He ordered the assassination of Iranian Major General Qasem Soleimani.

Conclusion

The most important lesson I draw from two decades of the US “war on terror” is that the fate of the rule of law – whose *raison d’être* is to restrain the state from abusing its power

– paradoxically depends on politics. Party control of the White House and Congress was the single most powerful determinant of responses to the numerous abuses described above. The strong correlation between the party of the appointing president and how a judge decided persisted, even intensified, during the Trump administration (according to my preliminary analysis of cases concerning immigration, the pandemic, and the 2020 election). Although some of his actions were so outrageous that even judges appointed by other Republican presidents balked at condoning them, most Trump appointees displayed slavish loyalty. The conclusion is clear: defenders of the rule of law must engage in politics, including the electoral process, especially now that the Republican Party has embarked on a fierce campaign to disenfranchise all those suspected of leaning toward the Democrats.

Kent Roach

**The Dilemma of Mild Emergencies that are Accepted as
Consistent with Human Rights**



Amid the pandemic and the war in Ukraine, Canada had a quiet emergency. On 14 February 2022, the federal government used the *Emergencies Act* for the first time since its enactment in 1988. It declared a public order emergency in order to respond to a three week occupation of Ottawa in front of the Parliament building and various border blockades. The government ended the emergency on 23 February 2022, after police had cleared the “freedom” occupation.

This was a mild and quick emergency, as far as emergencies go. Moreover, the Canadian government stressed that human rights would be protected because it was still bound by Canada’s constitutional bill of rights, the *Canadian Charter of Rights and Freedoms* (the Charter) enacted in 1982.

Mild emergencies that arguably respect rights are better than severe emergencies that do not. Nevertheless, there are still some reasons to be concerned about such use of emergency powers.

The first reason is that secrecy claims may prevent us from knowing whether the emergency was necessary or could have been avoided and whether rights, including equality rights, were truly respected during the emergency.

The second reason is that broad regulations banning public assemblies and their financing went well beyond Canada’s post-9/11 terrorism laws. In addition, the government’s claims of compliance with rights may never be tested in courts. This may increase the chance of emergency laws

migrating into the ordinary law, even though as I have argued elsewhere democracies after 9/11 brought their security laws and responses closer to the responses taken by non-democracies before 9/11.

The third reason is that the declaration of the emergency may be related to Canada's poor track record in taking far-right violent extremism seriously. As the late Ronald Dworkin reminded us after 9/11, it is a mistake to ignore questions of equality as democracies debate the appropriate balance between liberty and security.

Learning from the past

The Canadian experience demonstrates how a democracy can learn and improve on an unjust past. The Emergencies Act replaced the *War Measures Act* that had been used to intern both enemy aliens and Japanese Canadians in World War II. It was also used in October 1970 to declare martial law and suspend *habeas corpus* after two kidnappings by terrorist cells devoted to the separation of Quebec from Canada. It was not used after 9/11 raising some concerns that Canada's response was one based on a permanent emergency.

Section 3 of the Emergencies Act contains a fairly strict definition of an emergency as one that "seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority

of a province to deal with it". The public order emergency declared on Valentine's Day 2022 also had to constitute a threat to the security of Canada as defined in the *statutory mandate* of Canada's civilian security intelligence agency, the Canadian Security Intelligence Service (CSIS).

The enactment of the Charter in 1982, the creation of a civilian security intelligence agency in 1984 and the enactment of an Emergencies Act in 1988 requiring parliamentary authorization of an emergency, prohibiting internment on racial or religious grounds, and requiring after the fact parliamentary reviews as well as a public inquiry, can all be seen as beneficial responses to Canada's past overreactions to emergencies. They do not, however, guarantee that emergency powers cannot still be abused.

What we need to learn about this emergency but may never know

One limit of the inquiries triggered by sections 62 and 63 of the Emergencies Act is that they are limited to examining the federal government's actions, whereas the roots of the Ottawa occupation and the Windsor blockade are in failures of local policing, including planning for protests. There is no requirement that Ontario, which has ultimate jurisdiction over the local Ottawa and Windsor police, will call a similar inquiry. This is an omission given that emergencies are defined as something that exceeds the capacity of the province.

It appears that a lack of planning and perhaps faulty intelligence or assumptions caused the Ottawa police to allow the truckers to completely block a street opposite the federal parliament. Over three weeks, they became entrenched, erecting a sound stage and even a hot tub. These policing and planning failures are related to many other similar failures in Ontario, including the policing of the 2010 G20 demonstrations that resulted in over 1000 arrests and a subsequent \$16.5 million (Canadian) settlement of a class action for violation of Charter rights.

Intelligence links and failures with respect to far-right violent extremism

One issue that should be examined is whether CSIS failed to collect and share intelligence on whether there were links between the protest and far-right violent extremism. Canada's intelligence agency has been slow to accept far-right terrorism as a security threat, despite it claiming at least 25 lives in Canada since 2014. The focus appears to have remained on responding to terrorism inspired by al Qaeda and Daesh, begging uncomfortable questions about the social construction of terrorism among security actors.

Unfortunately, both the parliamentary review and the public inquiry that is required to be called within 60 days of the state of emergency ending may have difficulties getting

the answers they need from CSIS. Past national security inquiries have faced challenges in gaining access to classified material, and the Emergencies Act places deadlines on the work of the review bodies that may be unrealistic. The danger is that a quick review might miss classified information that may establish that the use of emergency powers was either unnecessary or could have been avoided.

The connections or lack of connections of the protests with far-right extremists need to be explored. On 14 February 2022, the RCMP seized a large cache of guns near the Coutts, Alberta border blockade and charged four people with conspiracy to commit murder. Alberta Premier Jason Kenney – who opposed the federal declaration of an emergency – nevertheless stated: “What we now know at Coutts, following an exhaustive investigation from the RCMP, is that there is, at least in that case, a small cell of people who wanted to take this in a very dangerous and dark direction.” There is also some evidence of support among the accused for a white nationalist state called Diagonlon that is to run diagonally from Alaska to Florida.

Were adequate resources given to collecting intelligence, including through human sources and electronic surveillance? Unfortunately, we may never know. Claims of secrecy – both those that are legitimate and self-interested – remain a barrier to ensuring that national security agencies are held accountable for both what they do and fail to do.

The importance of respecting equality in security and policing responses

Many criticized the police for accepting the “freedom” occupation and blockade for over three weeks, when they take more aggressive stances against Indigenous land blockades and protests by racialized people against police violence. This compounded the equality problem if a lack of adequate intelligence about the danger of far-right violent extremists using the occupation contributed to the policing failure that allowed the Ottawa occupation to last three weeks.

Ignoring equality creates a risk that both the police and the law will be viewed as illegitimate. As I have argued elsewhere, inequality in the application of Canadian anti-terrorism law risks making it “enemy criminal law” that is directed or is reasonably perceived to only be directed at those inspired by Daesh, but not at the far-right. Such a result would be in contrast to the rule of law and both formal and substantive equality.

Adding equality to the security/liberty equation is not only as Professor Dworkin reminded us normatively correct, but it can also result in a more nuanced and constructive debate about the security debates that democracies have been having since 9/11. For example, it may be that attempts by the police to communicate with the “freedom” protesters are a good strategy for future protests. Criticisms of the police for chatting and even negotiating with some of the

protesters may be unfair, so long as the police maintained their necessary political neutrality. Such an approach is to be welcomed, but it should be applied equally, including to protests by racialized and Indigenous groups.

The danger of relying on executive claims of consistency with human rights

The federal government stressed that it was bound by and respected the Charter during the emergency. A number of civil liberties are challenging the government in court arguing that the Ottawa occupation did not satisfy the legal requirements of an emergency as defined in section 3 of the Emergencies Act. They are also arguing that the two emergency orders which created very broad new crimes of unlawful public assembly and financing unlawful public assemblies are contrary to the Charter. The emergency regulations build upon and expand post 9/11 terrorism financing laws. They apply not to listed individuals or groups, but to those engaged in unlawful assembly and those who finance them.

The court hearings are scheduled for June of this year, but the federal government is attempting to have the challenges dismissed as moot, given that the emergency has ended and no one was charged under the emergency regulations. This

litigation approach, however, undercuts claims of consistency of rights. In Canada, the courts are the ultimate arbitrator of rights. As I have argued elsewhere, the only place where executive or legislative interpretations can be decisive, and even then for only five years at a time, is when the controversial ability of legislation to enact laws notwithstanding fundamental freedoms, legal and equality rights in the Charter is invoked. The derogation or override clause was not used. Its use would have undermined the government's strategy of suggesting that it respected the Charter.

This litigation challenging the emergency and the two emergency regulations should be allowed to proceed on the merits, even though the emergency has ended, and the regulations have expired. Even if the courts dismissed claims of mootness on the basis that emergencies may occur again and are evasive of review, both claims of national security confidentiality and Cabinet confidences may prevent a reviewing court from going beyond the public record about why the emergency was called and why the emergency orders were necessary. For example, it may never be known what role, if any, President Biden's call to Prime Minister Trudeau a few days before the emergency was called may have played.

The dangers of expanding on post-9/11 offences and financial sanctions

The emergency crime of unlawful public assembly was written very broadly. It went beyond Canada's post-9/11 definition of terrorism by including all interference with critical infrastructure and the movement of goods and service. The Canadian Supreme Court has upheld the definition of terrorism as consistent with the Charter, but interpreted it to better respect human rights. Because no one has been charged under the emergency crime of unlawful public assembly, courts may never be able to interpret it or determine whether it is consistent with human rights. At the same time, it may influence future law reform.

The regulations that prohibited the financing of unlawful assemblies also built upon and expanded post 9/11 laws against terrorism financing. There are grave concerns about both the fairness and efficacy of terrorism financing laws promoted by the United Nations and others after 9/11.

The emergency financial regulations may have been effective but in potentially problematic ways. One Parliamentary proceeding has revealed that the RCMP gave financial institutions names of the truck owners that were parked in Ottawa, as well as the names of "influencers of illegal assemblies". Alas, the RCMP did not explain how it determined

who was an “influencer”, a term not contained in the emergency regulations and more often associated with celebrities rather than criminals. This raises the question, also seen in post 9/11 terrorism financing, of reliance on perhaps faulty intelligence to define the targets of financial sanctions. We know from the post- 9/11 experience that innocent people have been targeted by terrorist financing laws. There remains a lack of clarity about how one could obtain redress for being wrongly targeted for financial sanctions such as the freezing of bank accounts that were done during Canada’s short emergency in February 2022.

Conclusion

If the courts decide the ongoing Charter challenge, Canada will benefit from review of an emergency by all three branches of government, given that the Emergencies Act wisely requires both Parliamentary review and the appointment of a public inquiry to examine the circumstances that led to the emergency and the measures taken during the emergency. This may strike some as overkill, but it would help ensure that Canada will continue to learn from its uses of emergency powers.

In the face of increased public polarization and the harms of climate change, there is a danger that governments may use emergency powers more and more. Ordinary citizens may lose their ability to be shocked, alarmed or vigilant

about possible government overreach in an emergency, especially when they are assured by experts that the measures taken are consistent with their rights. This makes it only more important that democracies critically evaluate and learn from their emergencies.

Emergency laws that are seen as consistent with human rights may be seen as a good precedent and template for the future. They may have a greater chance of migrating into the ordinary law and becoming permanent than those that explicitly derogate from rights and as such shock the public. In short, new emergency laws may expand security laws that democracies have already expanded since 9/11.

Phil Edwards

**Counter-Terrorism, the Rule of Law and the
“Counter-Law” Critique**



“Counter-law”, as theorised by Richard Ericson, involves “using law against law”: the use of legal resources “to erode or eliminate traditional principles, standards, and procedures of criminal law” and facilitate pre-emptive policing interventions in areas such as counter-terrorism. This, Ericson argues, threatens the rule of law, defined as the principle that “[p]olice and citizens alike should know what is and is not legally authorized [...] to ensure a predictable environment in which to make rational choices about rule-governed behavior”.

Should the image of “law against law” be discounted as a polemical gesture to add weight to a liberal critique – or can it be grounded in a defensible theoretical model of the Rule of Law? Such a model will be outlined, and its features contrasted with twenty-first-century developments in British counter-terrorist legislation – developments which, it will be argued, exemplify “counter-law” tendencies and make the Rule of Law more relevant than ever.

1. Rule of Law: Minimal, maximal or neither?

Ericson’s definition of the Rule of Law (hereafter RoL) echoes Hayek’s formulation: “[G]overnment in all its actions is bound by rules fixed and announced beforehand.” The content of those rules is entirely undefined: a state under the RoL may impose any combination of duties and freedoms on its citizens, or on different groups of its citizens.

All that is required is that everything the state does is first enacted into law.

Spelt out, this minimal definition of the RoL does not seem particularly desirable. It is highly permissive, but at the same time highly restrictive – so much so as to make deviations and trade-offs inevitable. The question would not be whether government conduct falls short of the RoL but how often, in what ways and with what costs and benefits.

Other definitions of the RoL go considerably further than Hayek’s. Bingham’s widely-cited definition of the RoL includes provision for the protection of fundamental human rights and state compliance with international law, as well as stipulating that laws should be intelligible, apply equally to all and bind the government as well as its citizens. This has been criticised as excessively wide-ranging; Raz criticises Bingham’s definition as “an assembly of diverse principles, with diverse rationales behind them”, arguing that “the law, to be just or legitimate, or fundamentally good, should conform to more than one moral principle or doctrine”.

Raz for his part offered two alternative extended definitions of the RoL. His 1979 definition combines a formal definition in terms of the properties of laws themselves (which should be clear, stable, publicised, prospective and general) with a set of principles of procedural justice. In 2019, Raz again cited the necessary formal properties of laws, then

added a set of provisions relating to the reasonableness of government decisions. Ironically, both of Raz's own definitions are vulnerable to a critique similar to his own. Each of the two definitions is, arguably, not a singular doctrine but a pair of principles, with the first group of stipulations defining good laws in formal terms and the second defining the proper administration of justice and good governance respectively.

The multi-dimensionality which Raz decries in Bingham's definition of the RoL – and which, to a lesser extent, can also be identified in Raz's own definitions – makes compliance with the RoL difficult to achieve: the more internal complexity the concept is understood as having, the more likely it is that government action will depart from one or the other aspect of it. Once again, the RoL is defined in such a way as to make trade-offs inevitable, reducing the force of any critique which would make departure from the RoL an evil in itself.

In short, the RoL represents either a procedural restriction on government, or a set of principles whose partial or total realisation is conducive to greater government legitimacy. In both cases departures from the RoL are easy to justify on other grounds (e.g. for reasons of public safety), meaning that the RoL cannot be invoked as a stand-alone ground for critique.

2. A third alternative: The formal rule of law

It may be possible to rescue the RoL as a ground for critique by using a purely formal definition, akin, though not identical, to the first half of Raz’s two pairs of principles. The definition proposed here draws (like Raz’s definitions) on Lon Fuller’s eight “principles of legality”. Fuller argues that laws should be general, be publicised and be prospective in effect; should not be unintelligible, mutually contradictory, impossible to obey or so changeable as to be impossible to identify; and should exhibit “congruence between the rules as announced and their actual administration”, to be secured primarily through excellence in legal drafting, interpretation and administration.

I have argued that Fuller’s eight principles can be summed up as the principles that laws should be universal, knowable and followable, and that the RoL also requires a fourth principle of justifiability. In fact, the eight principles reduce to two. Generality, publicity, intelligibility, stability over time and congruence of official action are factors of knowability: only if all these requirements are met is it reliably possible for any individual, in any situation, to ascertain what laws effectively apply to them. Knowability thus entails comprehensiveness: there can be in principle no social situation, and no group of people, not covered by any law.

Secondly, the requirements of prospectivity, non-contradiction, and possible obedience are factors of

followability. Followability entails freedom of choice to follow a law (or not to do so): if the requirement of followability is to be met, an individual's social existence may not be structured to the point where no margin of choice remains, nor may obedience to law generally be secured oppressively, through actual or threatened coercion.

Justifiability is not a separate principle but an implication of the first two. If following the law's commands is a free choice (followability) based on knowledge and comprehension of the law (knowability), it must be possible to explain the applicability of a law to a given person in a given situation, and for the explanation to be rationally challenged. If law-compliant behaviour is not to be secured by force, it must also be the case that a rational challenge will, in some cases, succeed, and the law be amended accordingly.

Like Raz's models, this formal model of the RoL does not encompass every standard to which the law in a just society would conform. However, it does not go as far as Raz's argument that the RoL "has no bearing on the existence of spheres of activity free from governmental interference", to the point that "[t]he law may [...] institute slavery without violating the rule of law". These assertions run counter to the requirement of followability: a freely followable law must guarantee some "spheres of activity free from governmental interference", while a law to enslave rational and previously free citizens is one that could only be secured by oppressive

force.

The formal model does, however, omit most of Bingham’s desiderata, including the fundamental liberal requirement of equality before the law: while it must be possible for each individual in a society under the RoL to ascertain and choose to follow the laws applicable to them, there is no requirement that the same laws apply to all. The formal RoL is thus compatible with a high degree of social stratification – and, as such, with “very great iniquity”, at least if that word is used in the archaic sense of “want or violation of equity”. It grounds only a weak universalism: discriminatory treatment of different groups is compatible with the RoL thus defined, for as long as those groups accept their treatment as just.

However, the formal RoL is arguably better suited than either the minimal or maximal models to be used as grounds for critique. Whatever its other defects, any society operating under the RoL must have laws that can be known and can be followed (and can be justified in response to challenge); defects from any of these properties are identifiable as short-falls from the RoL.

3. Counter-law and counter-terrorism: Preventive offences

Contemporary counter-terrorist legislation in the UK is based on the Terrorism Act 2000. While the 2000 Act’s definition of terrorism has remained largely unchanged, a se-

ries of additional Acts of Parliament have since been passed, in response to the September 11th 2001 attacks and subsequent terrorist attacks in the UK. Multiple new offences have been created, many of which can be seen to violate the requirements of knowability and followability. Examples include the groups of offences classified as *inchoate* (offences of attempt or encouragement), *preparatory* (otherwise lawful conduct in preparation for the commission of an offence) and *situational* (offences defined in terms of a state of affairs).

Inchoate counter-terrorism offences can involve long and speculative causal chains: it is an offence under the Terrorism Act 2006 to state that a terrorist act is worthy of emulation, if the person making the statement intends, or is reckless as to the possibility, that hearers should be encouraged to commit or instigate terrorist acts. This offence has since been joined, under the Counter-Terrorism and Border Security Act 2019, by the offence of expressing an opinion or belief indicating support for a proscribed organisation, recklessly as to the possibility of others being encouraged to share this support. To commit either of these offences does not require that anyone is in fact encouraged in these ways, let alone that any terrorist act takes place.

The key *preparatory* offence in UK counter-terrorism legislation is the catch-all offence of “preparation of terrorist acts” under the Terrorism Act 2006, covering “any conduct

in preparation for giving effect to [the] intention” to commit a terrorist act. Given that the goal of counter-terrorist legislation is preventive rather than reactive, the preparation offence makes it possible to criminalise actions which were harmless and otherwise lawful, on the grounds that the offender possessed an intention which these acts would – if they had not been interrupted – have realised in the commission of acts of terrorism.

Situational counter-terrorism offences, lastly, are offences where a guilty act is inferred from a state of affairs, elevating what might more usually constitute circumstantial evidence to an offence in its own right; an example is the offence of possessing information likely to be useful to a person committing or preparing an act of terrorism (Terrorism Act 2000). This offence has been expanded by the Counter-Terrorism and Border Security Act 2019 to include having viewed any such information over the internet.

Given the crucial importance of the offender’s – unrealised – intention in making out the elements of offences, offences like these are neither knowable nor followable. A law prohibiting the commission of any act which might subsequently be presented as having been preparatory to what might have been a future act of political violence is not a law whose scope can reliably be known. Similarly, a law prohibiting any statement which could be presented as tending to encourage support for one of a designated list of groups

(even if no such encouragement had taken place) is not a law that can freely be followed: it enjoins either silence or the affirmative act of a disclaimer.

Instead of the classical requirements of “guilty act” and “guilty mind”, these offences share two unusual and complementary characteristics. The acts brought to trial are not themselves harmful and could potentially be proved against a wide range of people, many or most of whom would have carried them out without criminal intent. When charges such as these are brought, the prosecution attests not only to the factual element of these offences but to the correct interpretation of the facts. These are “ouster” offences: the criminal court is “ousted” from its role of determining guilt by the public prosecutor, being presented with offences defined in such a way that only one verdict is possible.

This degree of latitude is only available to the prosecution because – secondly – these are terrorist offences, subject to their own body of legislation. What this means, however, is that not merely intent or recklessness but a specific guilty mental state has been assumed: the defendant is suspected of intending to carry out, or intending to threaten to carry out – or welcoming the possibility of others carrying out or threatening to carry out – one of the broadly defined disruptive acts listed in s2 of the Terrorism Act 2000, for the broadly-defined purposes listed in s1. The factual elements of the various offences look quite different if this assump-

tion is not made: if the prosecutor is persuaded that the suspect is a harmless fantasist whose professions of innocence can be trusted, no terrorist intent can be inferred and no terrorist charges brought.

4. The Rule of Law: How to use

Counter-terror legislation has created a catalogue of offences offering enormous scope for prosecutorial discretion, allowing for individuals to be convicted on the evidence of having committed innocuous acts. Moreover, in an extraordinary irony, suspicious acts and individuals qualify to be considered as “terrorist” on the basis of an act of more or less speculative inference— which is itself an exercise of prosecutorial discretion.

The Rule of Law, I have suggested, requires that the law be a reliable and non-oppressive guide to how citizens should act: as such, the laws governing every citizen must be rationally knowable and voluntarily followable (and, by extension, open to rational challenge and justification). These tendencies in counter-terrorist legislation clearly run counter to the RoL thus understood. Every move away from knowable and followable laws is a move away from the RoL – and towards a landscape in which police discretion determines not only who will be put on trial but who will subsequently be found guilty. Conversely, every move in this direction can be resisted by reference to the RoL, if this is un-

derstood as neither a technical desideratum nor a broad set of liberal ideals, but as the simple requirement that citizens should be able to know, understand and choose to follow the laws that apply to them.

Valsamis Mitsilegas

The European Union and Preventive (In)Justice

The Legacy of the “War on Terror”



1. The preventive turn in European security policy: counter-terrorism as a catalyst

Starting with responses to 9/11, counter-terrorism efforts have acted as a catalyst for the furthering of European integration in the field of security. Each successive wave of terrorist attacks has led to the adoption of further legislation at EU level and to the proliferation of EU security structures, with counter-terrorism acting as a legitimising tool for the emergence of the EU as a strong internal and external security actor. Responses to 9/11 have led to the adoption of a number of key legal instruments in EU Criminal Law, including of the Framework Decision on the European Arrest Warrant, of the Framework Decision on combatting terrorism, of the Decision establishing Eurojust and of the EU-US Agreements on Extradition and Mutual Legal Assistance – while legal bases outside the then third pillar were used to implement the UN Security Council Resolutions on terrorist sanctions within the EU, and to conclude an agreement with the US on the transfer of Passenger Name Records (PNR). Subsequent responses to terrorist attacks have expanded the EU *acquis*, by focusing predominantly on a data-driven counter-terrorism response. Reactions to the London bombings led to the adoption of the controversial Data Retention Directive, now annulled by the CJEU, and to growing calls for the securitisation of migration, including via the use of EU migration databases. Later responses to

the Paris and Brussels bombings led to the intensification of data exchanges, including through the legal adoption of the concept of interoperability of EU databases, and to the expansion of the criminal and surveillance law on terrorism, under the justification of the fight against “foreign fighters”.

The expansion of the EU counter-terrorism *acquis* has signified what I have called the *preventive turn in European security policy*. This preventive turn is a reflection of what has been framed within the context of domestic criminal law as “preventive justice”. It places criminal justice within the framework of the “preventive state”,¹ transforming criminal law into “security law”. Preventive justice is understood here as the exercise of state power in order to prevent future acts which are deemed to constitute security threats. There are three main shifts in the preventive justice paradigm: (i) a shift from an investigation of acts which have taken place to an emphasis on suspicion; (ii) a shift from targeted action to generalised surveillance; and, underpinning both, (iii) a temporal shift from the past to the future. Preventive justice is thus forward rather than backward looking. It aims to prevent potential threats rather than punishing past acts and in this manner it introduces a system of justice based on the creation of suspect individuals on the basis of on-going risk assessments (see Mitsilegas, 2017). The present analysis will outline the three main strands of this EU paradigm of preventive justice – criminalisation, border control and

surveillance – and examine the extent to which the resulting rule of law challenges essentially render it a paradigm of preventive injustice.

2. Preventive criminalisation: Anticipatory criminal law and the blurred boundaries between criminal and administrative law

A key example of preventive justice has been the shift to anticipatory criminal law. Criminal offences are created for harm which is increasingly remote from the core criminal activity. The evolution of the three waves of EU criminal law on terrorism demonstrates the expansion of this preventive paradigm. The 2002 Framework Decision on terrorism introduced a broad definition of terrorist harm, while introducing also the concept of a terrorist organisation. Its 2008 successor broadened criminalisation, including by criminalising public provocation to commit terrorist offences, which initiated the debate on the appropriate extent of criminalisation of glorification of terrorism. The 2017 EU Terrorism Directive expanded criminalisation further by introducing a number of criminal offences aimed to prevent the mobility of “foreign fighters” – including offences related to travel and its facilitation, also by third parties. The temporal and *ratione personae* expansion of criminal law are remarkable here – criminal law is geared not against the commission of a terrorist act itself, but against everyday activity which may occur way in advance and which does not necessarily result

in the commission of an actual terrorist crime. In this manner, the targets of criminal law move from perpetrators of criminal offence to suspects.

This trend is confirmed by the growing blurring of boundaries between criminal and administrative law on counter-terrorism. Take the example of the imposition of sanctions to suspected terrorists via listing. The response of the CJEU to the UN Security Council listing system in the *Kadi* litigation is well-documented.² However, it must be observed that the Court resorted to a model of procedural justice without questioning the principle of the sanctions regime. It is noteworthy that the Court has declined to rule on whether terrorist sanctions constitute in reality, by virtue of their severity and duration, criminal and not administrative sanctions, requiring the application of higher criminal justice safeguards.

3. Preventive border control: Externalisation as border security

A questionable legacy of the responses to 9/11 which has been reinforced since has been the securitisation of migration, and the treatment not only of migrants but also of mobility as such as a security threat. This approach has led to the shift from border control to border security on both sides of the Atlantic. The preventive aims of border security

are clear: to stop undesirable third-country nationals reaching the border. In EU law, a key component of this preventive agenda has been the establishment of large-scale immigration databases, a number of which (such as the VIS and the ETIAS) target third-country nationals specifically in advance of travel. A second element has been the securitisation of these databases, by enabling access to them not only by immigration, but also by law enforcement authorities. At the same time, criminal law databases (such as the European Criminal Law Information System – ECRIS) have now been expanded to include data of third-country nationals. These developments reflect a preventive security agenda premised on the maximum connection and exchange of personal data – the EU legislation on the interoperability (here and here) of EU databases (regardless of their purpose) is a decisive shift in that direction.

4. Preventive surveillance: Pre-emption and prediction as a public-private partnership

Perhaps the most emblematic reflection of the preventive justice paradigm has been the shift towards the mass surveillance of everyday life, including via the co-option by the state of the private sector. Surveillance covers a wide range of everyday activity and focuses on the flows of people, money, and data, as well as on the growing monitoring of online activity. Well-established models of privatised law

enforcement in the field of anti-money laundering law have been gradually complemented by new requirements by private providers to monitor mobility and the flows of passengers (airlines under PNR law), to routinely report financial flows (under the TFTP requirements), to retain and transfer content and metadata to state authorities (communications providers under data retention law) and to moderate and remove harmful content online (via the Regulation on terrorist content online and now under the DSA). These developments raise a number of questions as to both the role of private providers and the place of the citizen in a democratic society – questions which become more acute in view of the reach of preventive surveillance in all areas of everyday life, from which individuals cannot be realistically expected to opt out from.

5. Blurring the boundaries of legality: Preventive (in)justice as a rule of law challenge

The preventive turn in European security policy poses a number of challenges to a wide range of fundamental rights, including the principle of legality in criminal law, effective judicial protection, privacy, data protection and freedom of expression. The purpose of the present analysis is not to examine these challenges in detail, but to evaluate critically the challenges that the EU paradigm of preventive justice pose on the rule of law – both in terms of how the law is

being produced, and in terms of how the law is being implemented. The emergency nature of the 9/11 responses appears to have been normalised in the evolution of preventive security policy, with initiatives blurring the boundaries of legality, challenging fundamental legal and constitutional assumptions and thus leading to preventive injustice.

Public/private

As seen above, a key element of the EU paradigm of preventive justice has been the central role of the private sector in delivering state security objectives. A wide range of private actors have been co-opted and have increasingly been asked to assume state-type functions. In particular – and as evidenced by the new measures on removal of online content, e.g. the DSA – private actors are now being asked to undertake fundamental rights assessments of their decisions. This change in the role of the private sector poses fundamental rule of law challenges for both private companies and their customers. To what extent can the state reasonably expect the private sector to provide justice to citizens in the same way as the state, in cases when private decisions affect fundamental rights? And, from a citizens' perspective, to what extent is there an effective remedy or redress against an act by a private actor? Current legislative measures do not provide satisfactory responses from a rule of law perspective. They raise the question of the adequacy

of EU law standards placed within the global operating field of internet giants and of the relationship between hard and soft law, legislation and self-regulation, in providing a fundamental rights and rule of law compliant framework.

Legal/technical

Recourse to technology has been instrumental in the development of the EU preventive agenda. The use of big data, AI and algorithms take centre-stage in the development of new EU systems and initiatives to pre-empt and predict. A key question (which has been raised strongly in the debate on removal of online content but extends into other surveillance practices) is the extent to which reliance on technology – especially without human intervention – provides effective protection of fundamental rights and can grant an effective remedy to affected individuals. Attention should also be paid into the negative rule of law consequences of the framing of preventive initiatives as technical and not legal issues. A key example in this context has been the evolution of the EU interoperability framework. There, from the outset, the Commission has claimed that the issue is technical and not legal, and thus does not require additional legal scrutiny. The final shape of the interoperability legislation ([here](#) and [here](#)), entrusting control to an EU agency (EU-lisa), which is not a fundamental rights agency but a single-agenda IT agency with limited accountability, is a further reflection of

this trend. The reliance on technology should not obscure the need for real – and additional – rule of law safeguards in the development of new mechanisms of prevention.

Internal/external

The EU is not alone in the development of its model of preventive justice, which has evolved in a global context. The development of EU responses in a global context has raised a number of rule of law issues: (i) in terms of how EU law has been adopted in the first place and (ii) in terms of the extent to which EU law adopted in synergy with global actors is compliant with internal EU fundamental rights benchmarks. Two examples are illustrative of these tensions. The first one involves the relationship between the EU and the United Nations Security Council (UNSC) – an executive body whose legitimacy to legislate is questionable. The EU has transposed the UNSC system of terrorist sanctions, which caused controversy and has led to the intervention of the CJEU (*Kadi I* and *Kadi II*). However, the EU continued to rely on the UNSC and legitimised the expansion of its criminal law regime on terrorism without an impact assessment, through the pre-existing UNSC and Council of Europe standards. Thus, EU legislation challenging the principle of legality is imported from and via an external executive body with limited accountability.

The development of PNR standards constitutes a further example of problematic law-making. The EU response was initially promoted by unilateral US actions post-9/11. Three controversial agreements on the transfer of PNR data were signed with the US, leading also to EU agreements with Canada and Australia. The CJEU has struck down the EU agreement with Canada, a ruling which arguably applies to the two other agreements and demonstrates how problematic this preventive paradigm of surveillance is for fundamental rights. Nevertheless, undeterred, after the Paris attacks, the EU has used the “foreign fighters” justification to internalise the preventive paradigm by adopting a far-reaching, legally controversial EU PNR Directive which is currently under challenge before the CJEU. Fundamental rights concerns notwithstanding, the EU has further emerged as an external actor within the auspices of ICAO, with the aim to standardise and globalise the PNR transfer paradigm.

Citizens/suspects

The final word in this analysis is devoted to the direct impact that the emerging paradigm of preventive justice has on the citizen. We are moving steadily to a landscape where citizens are increasingly treated as suspects. Criminal law intervenes in an ever earlier stage, disconnected from the commission of the core criminal offence. Heavy sanctions are

imposed through executive listing on the basis of suspicion. Individuals increasingly face guilt by association, through assisting individuals deemed dangerous. The presumption of innocence is being replaced by a presumption of potential dangerousness. Nowhere is this trend better exemplified than in the field of preventive mass surveillance – where populations are being constantly monitored and profiled. This shift has been well-documented by the CJEU, which is trying to maintain fundamental rights and rule of law benchmarks on mass surveillance in spite of the fierce resistance by Member States’ executives. It is worth reminding ourselves that the CJEU has reminded us that the interference of systematic and continuous data retention with the rights to privacy and data protection is very far-reaching and must be considered to be particularly serious, as the fact that the data is retained without the subscriber or registered user being informed is likely to cause the persons concerned to feel *that their private lives are the subject of constant surveillance*.³

References

1. See *inter alia* Albrecht, *La Politique Criminelle dans L’État de Prévention, Déviance et Société* 1997, Vol. 21, 123.
2. See *inter alia* Mitsilegas, *EU Criminal Law After Lisbon*, 2016, ch. 9.
3. Joined Cases C-203/15, *Tele2Sverige*, and C-698/15 *Watson Tele2 Sverige and Watson*, para. 100. Emphasis added.

Hannah Ruschemeier

Die Entwicklung des informationellen Trennungsprinzips



Die Bedrohungen des internationalen Terrorismus nach 9/11 haben es intensiviert, den Datenaustausch der Sicherheitsbehörden untereinander zu optimieren (dazu bspw. die Begründung des Untersuchungsausschusses Breitscheidplatz, S. 3). Diese unterliegen entsprechenden verfassungsrechtlichen Beschränkungen. Die Grenze des „informationellen Trennungsprinzips“ gibt schon begrifflich Aufschluss über seinen Inhalt: ausgerichtet an Informationen bezieht es sich nicht mehr auf den organisatorischen Anknüpfungspunkt der Institutionen, und ein Prinzip ist kein Ge- oder Verbot. Es schafft flexible Vorgaben für die Zusammenarbeit von Polizei und Nachrichtendiensten, die erhoffte klare Einordnung als Verfassungsprinzip blieb aber bisher aus. Die Gesetzgebung schien dem Credo der Prävention durch Massenüberwachung zu folgen, wodurch die Trennung als Grundregel zunehmend durchlässiger zu werden scheint. Diese Entwicklungen bieten wichtige Anhaltspunkte zum Verständnis der administrativen Sicherheitsarchitektur in Deutschland.

Grundlagen des Trennungsgebots als Ausgangspunkt

Polizei und Nachrichtendienste sind behördlich voneinander getrennt. Dieses Trennungsgebot gründet in den unterschiedlichen Aufgabenbereichen und Kompetenzen beider Institutionen. Die organisatorisch-administrative (keine gemeinsame Behörde, keine Geheimpolizei oder Geheim-

dienst mit polizeilichen Befugnissen) und personelle Trennung (keine gemeinsame Beschäftigung von Beamt*innen) sind überwiegender Konsens.

Durch die unterschiedlichen Aufgaben und abgegrenzten Befugnisse sollen Nachrichtendienste und Polizei allerdings auch nur eingeschränkt Informationen austauschen. Die Nachrichtendienste dürfen keine Ziele der operativen Gefahrenabwehr verfolgen, sondern betreiben informationelle Aufklärung über Gefahren für das gesamte Gemeinwesen. Sicherheitspolitische Erkenntnisinteressen sind typischerweise abstrakt, die Befugnisse zur Datenerhebung und -verarbeitung der Nachrichtendienste sind äußerst weit und allgemein formuliert (vgl. § 8 BVerfSchG). Polizeiliche Tätigkeit zur Gefahrenabwehr hingegen erfordert konkrete Eingriffsbefugnisse, die wiederum entsprechende Ermächtigungsgrundlagen voraussetzen, welche mit der Intensität der Grundrechtseingriffe durch Ausübung des staatlichen Gewaltmonopols korrespondieren. Folge dieser Differenzierung ist, dass auch die Datenverarbeitung unterschiedlichen Vorgaben unterliegt und die fachliche und föderale Trennung damit eine grundrechtliche Relevanz für den Datenschutz entfaltet. Daraus folgt der Grundsatz, dass kein gemeinsamer Datenaustausch zwischen Polizei und Nachrichtendiensten stattfinden darf: „Wer (fast) alles weiß, soll nicht alles dürfen; wer (fast) alles darf, soll nicht alles wissen“ (Gusy). Einschränkungen sind in Ausnahmen zulässig.

Datenaustausch zur Terrorismusbekämpfung

Übergeordnet verfolgen sowohl Polizei als auch Nachrichtendienste das Ziel, für Sicherheit zu sorgen, wofür zahlreiche Befugnisse zur Verfügung stehen. 2006 wurde das Antiterrordateigesetz (ATDG) als Teil des Gemeinsame-Dateien-Gesetzes erlassen, um eine Datengrundlage zu schaffen, die Polizei und Nachrichtendienste gleichermaßen nutzen können. Die Antiterrordatei (ATD) ist eine Verbunddatei, auf die 38 verschiedene Sicherheitsbehörden zugreifen können (§ 1 Abs. 1 ATDG). Zweck der Datei ist es, eine Grundlage für den Datenaustausch zu Personen und Sachverhalten, die mutmaßlich mit terroristischen Aktivitäten in Verbindung stehen, zu ermöglichen. Bereits im Jahr 2013 erklärte das Verfassungsgericht wesentliche Teile des ATDG für verfassungswidrig. Anstatt die Befugnisse zu beschränken, änderte der Gesetzgeber zwar die mit dem Grundgesetz nicht vereinbaren Normen, aber führte vor allem auf Betreiben der Nachrichtendienste den neuen § 6a ATDG ein, der die sogenannte erweiterte Datennutzung erlaubt. Durch dieses Data Mining mittels computergestützter Datenanalyse sollen verdeckte Zusammenhänge durch die Verknüpfung verschiedener Informationen hergestellt werden, die zu sicherheitsrelevanten Erkenntnissen führen (dazu bereits hier). Dies führt zu einer gemeinsamen Datennutzung von Polizei und Nachrichtendiensten, sowohl in Form der Datenabfrage nach §§ 5, 6 als auch im Wege des Data Minings nach

§ 6a ATDG. Die verfassungsrechtlichen Anforderungen an den Datenaustausch hat der Gesetzgeber zweimal verfehlt, eine Änderung der neuen Fassung des ATDG ist derzeit wohl nicht in Planung.

Informationelles Trennungsprinzip als case law?

Das informationelle Trennungsprinzip ist eng mit der Rechtsprechung des Bundesverfassungsgerichts zur ATD verbunden. Das Gericht hat in diesem Kontext den Terminus entwickelt; die Grundlagen waren aber in der vorherigen Rechtsprechung bereits angelegt. Begrifflich hat das Verfassungsgericht das Trennungsprinzip von einer informationellen Ausprägung des Trennungsgebots abgegrenzt.¹ Die ATD ist an sich zulässig, da die Nachrichtendienste besonders hochrangige Rechtsgüter schützen, unterliegt aber strengen Kompensationspflichten des Gesetzgebers im Rahmen der Kontrolle der Verhältnismäßigkeit: es bedarf einer hinreichend bestimmten Eingriffsschwelle und verfahrensrechtlicher Kontrollmechanismen. Die ATD muss im Kern auf eine Informationsanbahnung beschränkt sein und darf eine Nutzung der Daten zur operativen Aufgabenwahrnehmung nur im Ausnahmefall zulassen. Ein planmäßiger Informationsaustausch und dadurch weitergehende Verschmelzung polizeilicher und nachrichtendienstlicher Tätigkeit, muss weiterhin ausgeschlossen bleiben.

Grundrechtliche Herleitung

Das nachrichtendienstliche Trennungsgebot ist trotz zwischenzeitlicher politischer Bestrebungen nicht explizit im Grundgesetz verankert, sondern in den Gesetzen der Nachrichtendienste normiert (vgl. §§ 2 Abs. 1 S. 3, 8 Abs. 3 BVerfSchG). In verschiedenen Landesverfassungen ist das Trennungsgebot ausdrücklich geregelt (Art. 83 Abs. 3 SächsLVerf, Art. 11 Abs. 3 BbgVerf, Art. 97 ThürVerf).

Die Herleitung des Trennungsgebots aus Rechtsstaats- und Bundesstaatsprinzip oder aus den Grundrechten war streitig, die praktische Relevanz ist inzwischen gering. Die Konturen ergeben sich nach den Entscheidungen des Bundesverfassungsgerichts aus dem Grundsatz der Verhältnismäßigkeit als Ausfluss des Grundrechtsschutzes: das Grundrecht auf informationelle Selbstbestimmung begründet das informationelle Trennungsprinzip. Die staatsorganisatorische Einbettung thematisierte das Gericht nicht mehr. Ausgangspunkt ist die Gefahr, dass die durch Nachrichtendienste erhobenen Daten, die wiederum nicht den strengeren Ermächtigungsgrundlagen der operativen Tätigkeit unterliegen, für den Verwaltungsvollzug genutzt werden, von der Polizei aber nicht selbst hätten erhoben werden dürfen. Die „andere Richtung“ ist die Nutzung von polizeilichen Daten, die nicht für nachrichtendienstliche Zwecke bestimmt sind.

Grundrechtseingriff

Das informationelle Trennungsprinzip grundrechtlich zu verorten, überzeugt auch vor dem Hintergrund der dogmatischen Konstruktion des Rechts auf informationelle Selbstbestimmung in der weiteren Rechtsprechung des Verfassungsgerichts. Denn das Recht auf informationelle Selbstbestimmung ist Gefährdungs- und Vorfeldschutz. Für die Intensität des Grundrechtseingriffs sind die konkreten Nachteile oder Nachteilsgefahren maßgeblich, die aus der *Datenverwendung* resultieren können. Durch den Datenaustausch zwischen Nachrichtendiensten und Polizei erweitern sich die potenziell negativen Konsequenzen, da die Polizeibehörden mit erheblichen, konkreten Eingriffsbefugnissen ausgestattet sind. Dass den Nachrichtendiensten operative Befugnisse fehlen, schützt die Betroffenen dann *nicht mehr*, wenn geheimdienstliche Informationen im Gefahrenabwehrrecht genutzt werden können, ohne dass die strengeren Eingriffsschwellen greifen.

Die dennoch erheblichen Grundrechtseingriffe der geheim operierenden Nachrichtendienste und damit korrespondierenden fehlenden Schutzmöglichkeiten für Betroffene sind nur aufgrund des *besonderen Einsatzfeldes* der Geheimdienste gerechtfertigt – also der begrenzten Konsequenzen der Informationsverwendung im operativen Bereich. Allerdings überzeugt die Differenzierung nach den

Konsequenzen der Datenverwendung nur für die Auslands-tätigkeit des BND und weniger für die Verfassungsschutz-behörden des Bundes und der Länder. Im Urteil zur BND-Fernmeldeüberwachung stellt das Bundesverfassungsge-richt auch explizit auf die Besonderheiten der *Auslandsauf-klärung* selbst ab, diese fordert keine nachprüfbaren Ein-griffsschwellen, da Zweck die Filterung und Informations-weitergabe und nicht der Einsatz im Rahmen eigener opera-tiver Tätigkeit im Inland ist. Inländische Kommunikations-daten müssen ausgesondert und gelöscht werden. Jüngst stellte das Gericht auch klar, dass es eingriffsintensive Maß-nahmen der Nachrichtendienste gibt, die denselben Anfor-derungen wie polizeiliche Maßnahmen unterliegen, wenn diese für sich genommen und nicht erst durch Folgeeingrif-fe eine erhebliche Eingriffsintensität aufweisen.

Zweckbindungsgrundsatz

Dies führt zum zweiten Argumentationsstrang, der Zweckbindung und -änderung von Datenerhebung und -weiterverarbeitung. Nachrichtendienste und Polizei ver-folgen durch ihren divergierenden Aufgabenzuschnitt unterschiedliche Zwecke. Unterschiedliche Zwecke wieder-um fordern grundsätzlich getrennte Datenbestände.² Die Zusammenführung von Daten, die aus unterschiedlichen Gründen erhoben wurden, in einer Verbunddatei führt zu einer Zweckänderung und bedarf einer gesonderten

Ermächtigungsgrundlage. Maßstab ist die hypothetische Datenneuerhebung. Die durch eine andere Behörde erhobenen Daten dürfen nur dann von einer Behörde verwendet werden, wenn sie diese selbst rechtmäßig erheben könnte. Zudem erzeugt die Verknüpfung der Daten untereinander selbst erst neue Verdachtsmomente und erhöht durch diese mehrstufigen Analyseschritte die Eingriffsintensität. Hinzu kommt, dass die Grundrechtseingriffe heimlich erfolgen, woraus Abschreckungseffekte folgen können. Selbst wenn die Nachrichtendienste das Data Mining nur zur informatorischen Aufklärung nutzen, können daraus Erkenntnisse mit erheblicher Persönlichkeitsrelevanz erzeugt werden, die ein „Gefühl des unkontrollierbaren Beobachtetwerdens hervorrufen und nachhaltige Einschüchterungseffekte auf die Freiheitswahrnehmung entfalten“.

Kritik

Die Trennung zwischen Vorfeldaufklärung der Nachrichtendienste und operativer Gefahrenabwehr wird zunehmend schwieriger, wie sich am Anwendungsfall des Datenaustauschs zeigt.

Die ATD reiht sich in eine lange Liste sicherheitspolitischer Kompetenzerweiterungen, die den verfassungsrechtlichen Anforderungen nicht entsprechen (BND-Urteil, Bestandsdatenauskunft I und II, BKA-G, Rasterfahndung,

zur Kritik bereits hier). Neben der Tendenz, überschießend Kompetenzen auszuweiten, steht vor allen der technische und tatsächliche Nutzen in Zweifel. Die von den Kritiker*innen des Trennungsgebots geforderten zeitgemäßen Antworten auf globale terroristische Bedrohungen sind nicht mit einer linear steigenden Kompetenzausweitung und dem Einsatz von mehr Technik gleichzusetzen. Bereits die Rasterfahndung war weitestgehend wirkungslos; das Data Mining der ATD kam nie zum Einsatz, da „die erweiterten Auswerte- und Analysefähigkeiten nach § 6a ATDG derzeit in der ATD technisch nicht umgesetzt [werden kann..] und mit dem aktuellen ATD-Softwarekern auch nicht realisierbar sind“. Zwar wurde die ATD zunächst fleißig mit Daten befüllt, die aber aufgrund der veralteten Software nicht ausgewertet wurden. Es handelt sich damit um gesetzlich festgeschriebene Überwachungsbefugnisse auf Vorrat.

Diese Umstände drängen die Frage auf, was besorgniserregender ist: die extensive Ausweitung gesetzlicher Befugnisse ohne hinreichende Berücksichtigung verfassungsrechtlicher Vorgaben oder die defizitäre technische Infrastruktur der Sicherheitsbehörden, die es scheinbar unmöglich macht, gesetzlich geschaffene Möglichkeiten auch umzusetzen. Letzteres wird vor allem dann problematisch, wenn es um verfassungskonforme, gebotene und sicherheitsrelevante Instrumente geht. Rechtlich formuliert spielt die technische Realisierbarkeit und ihre Grenzen in der Rechtset-

zungspraxis eine zu geringe Rolle (siehe auch das unrühmliche Beispiel der gravierend mangelhaften Umsetzung des OZG), was sich konsequenterweise auch auf die Bewertung der Grundrechtsrelevanz auswirken muss. Nicht umsetzbare Befugnisse zur Datensammlung sind schon nicht geeignet, den Zweck – Verbesserung des Informationsaustauschs zur Bekämpfung terroristischer Gefahren – zu erreichen; sie sind jedenfalls nicht erforderlich.

Die Sorge um eine zunehmende Verwischung der Grenzen zwischen Polizei und Nachrichtendiensten ist nicht auf den Datenaustausch beschränkt, sondern bezieht sich auch auf die Ausweitung der Eingriffsbefugnisse im operativen Bereich. Die „drohende Gefahr“ des bayerischen PAG zielt ausdrücklich auf eine Kompetenzerweiterung im zeitlichen Vorfeld der Eingriffsschwelle der konkreten Gefahr.³ Auch personenbezogenes „Predictive Policing“ kommt in Deutschland auf Bundesebene im Rahmen des § 4 FlugDaG zum Einsatz, was aufgrund der fehlenden Konnexität zwischen den gesuchten Gefahren des weiten Katalogs des § 4 Abs. 1 Nr. 1-6 und den erhobenen Flugdaten verfassungsrechtlich unzulässig sein dürfte. Durch die anlasslose Datenerhebung ist der Flug Gelegenheit und nicht Grund der Datenerfassung.

Der zunehmende Ausbau der Befugnisse beschränkt sich auch nicht auf die polizeiliche Seite, sondern gilt auch für die Nachrichtendienste. Durch Zugriffsmöglichkeiten auf die Vorratsdatenspeicherung erhielt der bayerische Verfas-

sungsschutz polizeiliche Befugnisse, diese wurden im Urteil vom 26.4. 2022 für verfassungswidrig erklärt, dazu auch hier. Gegen die Neufassung des G-10 Gesetzes, welches den Einsatz der „Quellen-TKÜ-plus“ (zur Verfassungswidrigkeit auch hier) erlaubt, sind ebenfalls mehrere Verfassungsbeschwerden anhängig. Das Gesetz erlaubt unter anderem allen Nachrichtendiensten, Smartphones und PCs mit sogenannten Staatstrojanern zu infiltrieren.

Diese kumulierte Ausweitung der Eingriffsbefugnisse führt zu einer engmaschigen Regelungsdichte und erhöht die Gefahr additiver Grundrechtseingriffe, zu Eingriffen die einzeln betrachtet noch verfassungskonform sein können, in der Gesamtschau aber die Schwelle der Verfassungswidrigkeit überschreiten. Diese schleichende Aushöhlung der Freiheitsrechte wird weniger wahrgenommen als aktuelle plötzliche Ereignisse.

Internationale und europäische Dimension

Das Problem extensiver Überwachungskompetenzen macht nicht an Staatsgrenzen Halt. Der Datenaustausch zwischen verschiedenen Sicherheitsbehörden geht über die innerstaatliche Ebene hinaus und ist längst ein globales Phänomen. Interpols Cyber Fusion Center (Global Complex for Innovation) in Singapur, das seit 2014 in Echtzeit und rund um die Uhr mittels Data Mining Auffälligkeiten in Daten sucht,

die unter anderem durch Geheimdienste zur Verfügung gestellt werden oder offen im Internet verfügbar sind, steht exemplarisch für den staatenübergreifenden Datenaustausch der Sicherheitsbehörden. Auch die Europäische Kommission erkennt diese Problematik an: Im Entwurf zum *Artificial Intelligence Act* ist ein Verbot der Nutzung biometrischer Echtzeit-Fernidentifizierungssysteme (Gesichtserkennungssysteme) in öffentlich zugänglichen Räumen zu Strafverfolgungszwecken in Art. 5 I (d) vorgesehen. Art. 5 II-IV des Verordnungsentwurfs normiert zwar (zu) weitreichende Ausnahmen, bezeichnend ist aber, dass der Unionsgesetzgeber die Gefahr bei der Nutzung ausschließlich durch Sicherheitsbehörden verortet.

Wie es weitergehen sollte...

Bisher steht den potenziellen Beeinträchtigungen einer großen Anzahl an Betroffenen durch einen Datenaustausch von Polizei und Nachrichtendiensten wohl kein nachweisbarer Gewinn an Sicherheit gegenüber. Die Kompetenzerweiterung der Sicherheitsbehörden auf den unterschiedlichen Ebenen von Bund und Land erschwert den Blick auf das Gesamtausmaß der Überwachungsbefugnisse in Deutschland. Erste *empirische Erhebungen* sollen eine bessere Datengrundlage schaffen. Diese erscheint leider notwendig, da bisher die verfassungsrechtlichen Argumente allein nicht

auszureichen scheinen. Die Forderung, keine neuen Gesetze zu erlassen, bis klar ist, welche bestehenden überhaupt verfassungskonform sind, wäre der erste Schritt in die richtige Richtung. Auch die gemeinsamen Lagezentren von Polizei und Nachrichtendiensten sollten auf gesetzliche Grundlagen gestellt werden. Die Nutzung effizienter Technik im Rahmen grundrechtskonformer Verfahren und Kontrollmechanismen durch die Sicherheitsbehörden auszugestalten ist anspruchsvoll, aber nicht unmöglich.

References

1. Britz, in: Hoffmann-Riem/Brandt (Hrsg.), *Offene Rechtswissenschaft*, 2010, S. 561.
2. Gusy, *GSZ* 2021, 141 (143).
3. Zur Verfassungswidrigkeit Ruschemeier, *KrimJ* 2020, 122.

Suzie Navot and Guy Lurie

“When in doubt, detain!”

*Administrative Detentions and Emergency as a Permanent
State of Mind in Israel*



Israel recently saw a bout of terror attacks, including three assaults in a single week in late March 2022, and more since, which overall took the lives of 19 victims. Three terrorists in the fatal attacks were Palestinian Israeli citizens, who *allegedly* exhibited support for ISIS. The Israeli Government, in an attempt to curb the violence, decided among other steps to administratively detain without trial not only suspected possible terrorists from the Occupied Territories (as it regularly does) but also possible suspects among Israeli citizens (at the time of writing, the security establishment *reportedly* detained 19 Israeli citizens, as well as 109 Palestinians in the West Bank, after these attacks).

These detentions illustrate a general phenomenon in Israel. Since its inception, Emergency has become a permanent state of mind in Israel,¹ a phenomenon akin to what some commentators have feared would result from the emergency steps taken by Western governments in the aftermath of the 9/11 terror attacks: the normalization of emergency measures.² This normalization sees everyday reality (rightly or wrongly) as an emergency justifying harsh rights-infringing measures. While some commentators thought this pathology would result from the nature of current emergencies, such as the threat of terrorism,³ this state of mind is already decades-old in Israel. The use of administrative detentions without trial is a good example of this mindset, as they are utilized as a regular means of government: when

in doubt, the Israeli government detains.

A (very) short history of emergency law in Israel

Israel was born in war, as many other states. In its first legislative act, the Law and Administration Ordinance of 1948, enacted days after the state's inception and under hostile invasion by neighbouring states, Israel incorporated British mandatory law (stating that the law in force in the land as of May 14, 1948, will remain in force), along with its mandatory emergency regulations, into Israeli law. To these harsh colonial measures, which included the authorization of the authorities to administratively detain without trial, military censorship over media, and military closure of areas, the legislative act also added the authorization for the Legislature to declare a "state of emergency". When the Legislature declares such a "state of emergency", the government is thereby authorized to enact emergency regulations that have the power of primary legislation. Five days after the state's inception, the Israeli legislature declared a state of emergency. This state of emergency remains in force to this day, over seven decades since.

The reasons for this permanent emergency are varied: Israel saw several wars, confronted terrorism for many years, occupied populated territories following the 1967 Six-Day War, dealt with uprisings of the occupied Palestinians, and saw waves of horrific suicide bombings in the past three

decades. In the face of these challenges, the permanent state of emergency was seen as a necessity.

The legal apparatus of emergency in Israel is quite intricate, but it may roughly be divided into four elements:

1. **The emergency constitution:** The power of the government to enact emergency regulations that have the force of primary legislation, based on the unending state of emergency declared each year by the legislature, is today embedded in sections 38-39 of the Basic Law: the Government (section 38 empowers the legislature to declare a state of emergency with a maximum duration of a year, but also empowers the legislature to re-declare this state of emergency again and again, and to this date it has invariably done so).
2. **The colonial legacy:** Colonial British mandatory emergency legislation is still in force, such as the Public Health Ordinance of 1940 (recently used in the Covid-19 outbreak; see [Hostovsky Brandes on Israel](#) and [Grogan](#) for an international overview) and the Defence (Emergency) Regulation of 1945. The latter Emergency

Regulation is the basis for the operation of the military censorship over media in Israel, it allows for the military closure of areas, and is particularly used for deterrence and punishment in the West Bank, to seize and confiscate property, to enforce curfews and closures, and for house demolitions.

3. **Emergency legislation dependent on a declared state of emergency:** Emergency legislation that is dependent on the Legislature's unending declaration of a state of emergency includes particularly the Emergency Powers (Detention) Law of 1979, which *inter alia* grants the Minister of Defence the power to administratively detain a person without trial.

4. **Permanent emergency legislation:** Emergency legislation that is not dependent on the declared state of emergency, which includes, for instance, the Counter-Terrorism Law of 2016.

Emergency state of mind

The existence of a legal apparatus targeting emergencies is not exceptional in Western democracies.⁴ However, the unending nature of the legislature's declaration of a state of emergency in Israel has resulted in an irregular emergency state of mind in Israeli decision-making. Policy-makers resort to harsh emergency measures as a matter of routine. For instance, the government regularly applies censorship over the media, for even benign occasions such as a recent summit with Arab leaders (where a mix-up revealed the unsuccessful censorship). These measures are readily available, without any need for parliamentary prior authorization or other similar parliamentary oversight common in other Western democracies.⁵ The necessary powers are already granted in emergency legislation, or as in the case of the emergency regulations enacted by the government in the first few months of the Covid-19 pandemic, available due to the unending declaration of a state of emergency.

The ease of use of emergency measures (unencumbered by prior specific parliamentary authorization) is just one reason for this emergency mentality. It has resulted in the use of emergency regulations on issues unrelated to security threats, such as economic regulation, enacted in the 1970s and 1980s through emergency regulations.⁶ In effect, the emergency state of mind has primed policy-makers to take harsh rights-infringing steps beyond democratic debate,

when perhaps recourse to less harmful measures would have been sufficient. The case of administrative detentions is a case in point.

Past (ab?)use of administrative detentions

Administrative detention without trial (or, preventive detention) is intended to prevent future danger to public security. It has been a controversial measure, but is nonetheless used in security contexts not only by Israel, but also by other Western countries.⁷ Israel has utilized administrative detentions from its inception, first based on mandatory British emergency regulations, and later based on its own laws. Already in 1948, the Israeli High Court of Justice looked askance at administrative detentions, which were used both against dissident Jewish militant groups and against Palestinians. While the Court stood on the formalities of the rule of law and mentioned the irregularity of detention without trial, in the face of the War of 1948, it allowed their continued deployment (e.g, in the case of HCl 7/48 *Al Karbotli v. Minister of Defense*, 1949). In years to come, as Israel dealt with Palestinian uprisings and terror attacks in and from the Occupied Territories, administrative detentions there became a regular feature of maintaining Israeli control and security (today legally relying on the Warrant on Security Ordinances [Consolidated Form] [Judea and Samaria] [no. 1651], 2009).

In Israel proper, administrative detentions came to be used sporadically, today legally relying on the aforementioned Emergency Powers (Detention) Law of 1979. As mentioned, this emergency law stays in force only so long as the state of emergency declared by the legislature stays in force. The law empowers the Minister of Defence to detain a person for six months and to periodically extend this detention for additional periods of six months, if he believes that reasons of national and public security necessitate his detention. The detention must be confirmed by a president of a District Court within 48 hours of an arrest, and the decision can be appealed before a Supreme Court justice. The courts have consistently allowed this measure, while emphasizing its extreme nature and its limitation to extraordinary cases and circumstances.⁸

However, these legal checks, important as they are, cannot replace the defunct parliamentary approval mechanism. Since the state of emergency is permanent, the government may immediately respond to any violent conflagration or moral panic with administrative detentions without trial. It has no need to go through the process of a parliamentary declaration that a state of emergency now exists, to justify using such extraordinary extreme measures.

The current administrative detentions

It is difficult to say if the current administrative detentions are indeed necessary or are an abuse of power. We are not privy to the evidence. But the quick turn of events suggests an automatic reaction from policy makers, and perhaps even moral panic, since the Prime Minister published his intent to use administrative detentions a day after the second terror attack in this bout of violence. The emergency state of mind was already there, its powers a low hanging fruit. While each and every administrative detention faces legal scrutiny, the state of emergency that allows recourse to these powers remains un-scrutinized.

The security establishment in Israel has thus come to rely on the easy option of administrative detentions without trial. So much so, that when the Minister of Justice recently proposed the enactment of a new Basic Law providing due process rights during interrogation and in criminal proceedings, enshrining the constitutional right to a fair criminal trial, the draft bill was proposed to apply only prospectively, probably so as not to endanger the constitutionality of the Emergency Powers (Detention) Law. In other words, the emergency mentality compels Israeli policy-makers to see the constitutional right to a fair trial as an obstacle.

The emergency state of mind that relies on administrative detentions was seen also a few months ago, when in the face of a rising crime rate in Israeli-Palestinian society,

the Israel Police Commissioner suggested the use of administrative detentions, to curb “regular” crime. In that case, policy-makers did not follow. Earlier still, last summer, it was published that the Minister of Defence used administrative detentions in the face of violence of Palestinian Israelis during a conflagration of violence between Israel and the Gaza Strip.

This recurring possibility of the use of administrative detentions – and their possible migration from fighting terror to other fields – shows just how pervasive the emergency state of mind is in Israel, and how problematic it is. This pervasiveness may be seen in other contexts, such as the problematic temporary legislation enacted since 2003 limiting the unification of families, which was justified by security threats.⁹ Since, as Oren Gross puts it, in times of emergency “the temptation to disregard constitutional freedoms is at its zenith, while the effectiveness of traditional checks and balances is at its nadir”¹⁰, the fear of human rights abuse from this pervasive emergency state of mind is particularly acute, and not only in the context of administrative detentions.

References

1. This article draws from Suzie Navot, *Emergency as a State of Mind: the Case of Israel*, in: *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law*, Auriel/Beaud/Wellman (eds.), 2018.

2. Agamben, *State of Exception*, 2005, 85-87 (trans. Kevin Attell).
3. Ackerman, *The Emergency Constitution*, 113 *Yale Law Journal* 2004, 1029.
4. Gross/Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, 2006.
5. See, e.g.: Bjørnskov/Voigt, *The Architecture of Emergency Constitutions*, 16 *International Journal of Constitutional Law* 2018, 101; Ferejohn/Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 *International Journal of Constitutional Law*, 2004, 210.
6. Mehozay, *Between the Rule of Law and States of Emergency: The Fluid Jurisprudence of the Israeli Regime*, 2016.
7. See, e.g., Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 *Arizona Journal of International and Comparative Law*, 2001, 721.
8. Navot, *supra* note 1.
9. Lapidoth/Friesel, *Some Reflections on Israel's Temporary Legislation on Unification of Families*, 43 *Israel Law Review*, 2010, 457.
10. Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 *The Yale Law Journal*, 2003, 1011, (1027).

Stéphanie Henneke-Vauchez

The Other Legacy

*States of Exception as New Ordinary Paradigms of
Government*



The 9/11 attacks triggered a new practice of and renewed interest in emergency powers. Without doubt, the United States were at the forefront of the enhanced exercise of such powers: not only did the Patriot Act of 2001 soon come to epitomize the frame if not the substance of governments' response to the terrorist threat, it also immediately redefined the demarcating line between norm and exception. Vice-president Cheney's words at the time left no ambiguity: "Homeland security is not a temporary measure just to meet one crisis. Many of the steps we have now been forced to take will become permanent in American life [...]. *I think of it as the new normalcy.*" Since then, the US response to terrorism has come to be seen as having led to a new era of "permanent global state[s] of emergency" (Scheppele, p. 354). This has indeed transformed not only the texture of domestic law and policy in numerous countries but indeed, of international law (Vedaschi & Scheppele). In their 2004 study of the features of governments' responses to situations of crisis, John Ferejohn and Pasquale Pasquino even identified the global increased reliance on emergency powers as a "new model" of government (2004, p. 210, p. 216).

After terrorism, the pandemic: The Groundhog Day of states of emergency

Since the beginning of 2020, the unfolding Covid-19 pandemic has certainly served as a vivid illustration of the force of this new model: regardless of their varying legal status (some constitutional, others legislative), emergency regimes have been declared in over 100 countries from Japan to Morocco, Portugal to Serbia and Malaysia. Nevertheless, two years into the pandemic, the question as to their legitimacy, reliability and desirability remains very acute. As of March 2022, millions are being reconfined in several cities and provinces of China; Canada remains on a path of endless extensions of the state of emergency and for the past two years, France has alternated between periods of a full and an alleviated application of the (brand-new) sanitary state of emergency (SOE) – without ever reverting back to the ordinary legal state of affairs.

In fact, although there are others, France is a very interesting example of the many issues and challenges raised by normalized SOEs. While much of the population, inside and outside the country, is still sighing in relief after the 2022 presidential election, which once again brought the extreme right very close to accessing power, it should be kept in mind that this was actually the second presidential election in a row to formally take place under a state of emergency (SOE). Indeed, France has been governed under

a SOE for more than half of the time that has elapsed since the one declared by former President Hollande during the fateful night of the terrorist attacks in the Bataclan and the *Stade de France* on 13 November 2015. Over the course of six legislative extensions, that anti-terrorist SOE remained in force for just short of two years. And it was only lifted, on 1 November 2017, after another piece of legislation made four of the main extraordinary powers previously exclusive to a SOE permanent features of ordinary administrative law. It is therefore highly relevant that when the Covid-19 pandemic affirmed itself as a global threat less than three years later, the executive branch chose once again to address it by means of a SOE. As the existing legislative framework has become tainted by counterterrorism due to its prolonged application between 2015 and 2017, the choice was made to create an *ad hoc* brand-new *sanitary* SOE. Largely modelled on the 1955 SOE Act that served as the legal basis for the 2015-17 anti-terrorist SOE, the 2020 Act creating the sanitary SOE essentially designs a regime of enhanced powers for the executive. Even though most of the ensuing restrictions have now come to an end (these have included: three nationwide stay-at-home orders, an 8-months nationwide curfew, numerous closures of schools, places of worship, stores and malls, museums and theatres, bars and restaurants, as well as a host of other measures such as bans on public gatherings and demonstrations, or the requirement

of proof of immunity or vaccination status to access certain venues), the legal framework of the sanitary SOE remains essentially in force – albeit under a slightly mitigated regime. It is the SOE’s Groundhog Day.

SOEs tamed by the rule of law framework: An enemy from within?

It is hardly disputable that such prolonged and repeated experiences of the SOE raise prime constitutional and democratic concerns. This is certainly the case if and when they are used by disingenuous governments to accentuate and affirm their autocratic compulsions and calculations. In Europe, “autocratic opportunism” has been denounced in Orbán’s Hungary and Duda’s Poland. But the truth is that the routinization of emergency regimes raises equally tough and stringent questions in established democracies, if only because that is where they appear more strongly as yet another illustration of those “abusive” forces that threaten the ideal of liberal constitutionalism from the inside (Landau, p. 189). In the face of this new globalizing reality, two main lines of inquiry are in order. One is empirical in nature. The vast program of comparative constitutional research that lies before us as the flurry of emergency regimes that emerged in the face of the pandemic is slowly receding but only succeeding thanks to a previous wave of exceptionalist anti-terrorism legislation, necessitates a lot of precise and detailed data collection. The impressive quantity and

quality of the studies already gathered in previous *Verfassungsblog* symposia is invaluable – and update and follow up (what is the situation one or two years later?) constitute both a challenge and a meaningful goal.

Another more theoretical direction for drawing lessons from the conjoined legacy of 9/11 and the pandemic in terms of the routinization of SOEs. It may well be that it calls for a revisitation of the available frameworks in constitutional theory for reflecting on governments' response to situations of crisis. Regardless of its historical and theoretical importance, it seems that the Schmittian model of the state of exception fails to account for some of the core features of contemporary SOEs. Essentially articulated around a concept of "suspension" of the legal order and the figure of a sovereign who, once he has decided on the exception, effectively governs above and beyond the law, this model does not correspond to the intensely – and indeed carefully – juridical nature of most contemporary SOEs. Analyzing the ways in which counter-terrorism measures in the US have effectively culminated in a counter-insurgency paradigm, Bernard Harcourt insists that what is most remarkable about practices such as extra-judicial killings, for instance, rests not in their generalization but rather in the fact that they have come to being *legally defined and authorized*. The ways in which a host of legal and political actors in France have come to describe the repeated SOEs not as derogations or suspensions

of the rule of law but rather as compatible therewith or even necessary thereto, rest on comparable semantic landslides.

This discourse surrounding the SOE conveys the notion that a new, ruleoflaw-compliant, “soft” form of emergency regime has come to replace the brutal and antidemocratic state of exception of old. Arguably, this discursive shift has been enabled, if not caused by, the rise and indeed global success and imposition of the rule of law paradigm in the 20th century. As it progressively affirmed itself as the preferred legal form of democracy, it has constrained the ways in which liberal democracies address situations of crisis and contributed to thwarting the Schmittian model. As it rests on the notion that (all) state action ought to respect the rule of law, it has tendentially delegitimized rules, institutions and regimes of exception. Not that it has eradicated them (since 9 constitutions out of 10 worldwide include emergency provisions!); rather it has affirmed its ambition to tame and constrain them. Hence a renewed conceptual focus for comparative constitutional law is necessary for states of emergency: the rule of law’s claim to taming the exception must first be assessed against the empirical reality. Only then, in light of the institutional, judicial or other possible failures and shortcomings, can the discursive move be critically deconstructed and analyzed as deceptive.

Alan Greene

From the War on Terror to Climate Change

*Democracies and The Four Emergencies of the 21st Century
(So Far)*



From terrorism and economic crisis, to COVID-19 and climate change; the first decades of the 21st Century have seen democracies lurch from crisis to crisis, implementing legal and political responses to tackle the threat at hand. Many of these ostensibly emergency responses have, however, become permanent, raising profound challenges to the legitimacy of both the constitutional norms impacted by the emergency response, and the emergency response itself. This plea to emergency must, however, be interrogated; particularly in instances where the emergency response becomes permanent. Ultimately, what is key to understanding permanent emergencies is not the threat but the decision-maker that claims such an emergency exists.

Permanent emergencies?

While not the beginning of the global counter-terrorism response, 9/11 certainly accelerated it. The early years in the aftermath of 9/11 were dominated “the harbinger theory” of terrorism. This assumed that the attacks on the World Trade Centre and Pentagon were but the beginning of a new era of terrorism on a hither before unimaginable scale, with each attack getting progressively worse. Only an extremely aggressive, pro-security response could prevent this, and an extremely aggressive, pro-security response was what the world got. From military invasions and drone

strikes to extra-ordinary rendition, torture, and the still-open Guantanamo Bay, the burden of the most extreme counter-terrorist measures fell on those outside the protection of the US Constitution; for whom human rights and the rule of law did not apply to. These extra-legal responses were complemented at home with a legal counter-terrorist apparatus that facilitated interferences with human rights, and developments international law and other states' domestic law around the world.

To describe this legal and military response to 9/11 as “unpalatable” would be an understatement. What this response demonstrates is that emergencies are conceptualised as requiring states to sacrifice the very constitutional values that give states their identity — human rights, the rule of law, democracy. Yet these sacrifices are ultimately justified (or excused) on the basis that they are temporary. Once the threat is defeated, normalcy can be restored and the powers relinquished. Barely a month had passed since 9/11, however, before then US Vice-President Dick Cheney referred to the “new normalcy” as the Patriot Act was introduced, and a new era of permanent counter-terrorist powers was born. For Cheney, the status quo *ex ante* was not to be restored; this status quo *was the problem*. Its restoration had to be resisted; the status quo had to be transformed.

This permanent transformative effect is not unique to the 9/11 emergency response. Economic crises also mirror

this aversion to restoration of the status quo *ex ante*, with the pre-existing financial regulations – or lack thereof – being integral to the global crash triggered by the US subprime mortgage crisis in 2008. The risk of such crises occurring again are framed as requiring not just permanent reforms, but permanent reforms that shift economic decision-making away from democratically accountable actors to unelected technocrats.

Yet the 21st century has also taught us that not every emergency response results in a permanent emergency. In contrast to the permanent counter-terrorist powers enacted in the aftermath of 9/11, the emergency powers introduced in various states across the world in response to COVID-19 seem much more susceptible to lapsing. Indeed, the opposite may have been the case in certain instances as some states “rushed to normalcy”, lifting lockdown measures before it was wholly safe to do so due to economic and other political pressures. Meanwhile, of the four emergencies of the 21st century, climate change has, by far, the most catastrophic potential to destroy lives. And yet the emergency response to this apocalyptic calamity has been strong on rhetoric but weak on action. The legal, political, economic, and societal changes needed to tackle climate change are not temporary and defensive; they are permanent and transformative – indeed, they are arguably revolutionary. But they are permanent and transformative changes that democ-

racies have not yet demonstrated a willingness to implement.

Emergencies and necessity

What explains the permanence of some emergency responses, the temporariness of others, and the complete absence of still others? If there is a common thread that knits together these four emergencies, it is the idea of necessity. This is the notion that the state has no choice but to take the course of action it does, or that it must choose the lesser of two evils by sacrificing fundamental values in order to stave off a more catastrophic outcome. This idea of necessity means that emergencies have a degree of objectivity hard-wired into them.

But some emergencies are more objective than others. The existence of a lethal virus is easier to prove than the existence of a threat from a clandestine, amorphous terrorist group. Likewise, a virus may spread according to predictable mathematical models whereas the activities of a terrorist group are unpredictable, or heavily reliant upon intelligence that may itself be inaccurate. As such, the necessity of the response, like the nature of the threat, may suffer from varying degrees of subjectivity. Other political factors may influence the decision-making process too. A government emasculated in the aftermath of a terrorist attack may feel the need to react or “do something”. Or it may be the case that

a threat such as terrorism is no longer seen as something that can be defeated but one to be “managed”. As such a response to a counter-terrorist emergency may be framed as being permanently required. A further factor contrasting pandemic emergency powers to terrorism is that unlike counter-terrorist powers, lockdown measures could not be applied solely to a “suspect community” and, as such, democratic forces may work to keep pandemic emergency powers temporary. This subjectivity may also fuel the decision to end the emergency response. The decision to lift lockdown measures varied from state to state with some more conservative governments averse to large state expenditure more inclined to lift lockdown measures sooner. This does not mean that such lockdown powers do not pose any permanent risk to constitutional norms, however. The fact that many states introduced these emergency powers without the “quarantining effect” of a formal declaration of a state of emergency meant that existing constitutional norms were recalibrated to permit these powers. While such powers were necessary to confront a virus that has killed over six million people worldwide, this recalibration may potentially provide precedent for similar powers to be introduced in future for a “less objective” emergency.

Subjective forces are also seen clearly in economic emergency responses. A government ideologically pre-disposed to favour a smaller state in economic terms may be keener

to enact austerity in response to a financial crisis. It may also claim that the state has no choice but to take these measures, notwithstanding the fact that on economic issues, it is impossible to get to the point whereby everybody agrees with opposing sides of the political spectrum often arguing for responses that are the polar opposite to each other. Meanwhile, the economic impact of the steps needed to halt catastrophic climate change in the future may be too politically unpopular now for politicians accountable to today's electorate to take, notwithstanding their undisputed necessity as claimed by the scientific community.

Who decides?

From terrorism and economic crisis, to COVID-19 and climate change; the first decades of the 21st century have seen democracies lurch from crisis to crisis, implementing legal and political responses to tackle the threat at hand. Many of these ostensibly emergency responses have, however, become permanent, raising profound challenges to the legitimacy of both the constitutional norms impacted by the emergency response, and the emergency response itself. This plea to emergency must, however, be interrogated; particularly in instances where the emergency response becomes permanent. Ultimately, what is key to understanding permanent emergencies is not the threat but the decision-maker that claims such an emergency exists.

This does not mean that emergencies are wholly subjective, however. Instead, a key lesson to take from these four emergencies is that while there should be a degree of objectivity to the existence of an emergency, and *who* decides this is also of fundamental importance. In this constructivist sense, there is an objective reality but powerful subjective forces affect the degree to which we perceive this reality and, in turn, the degree to which others may shape and frame our perception of this reality.

Focusing on the decision-maker is paramount and invariably, it is the executive tasked with this decision. The executive is best placed amongst the three branches of government to react swiftly and is also best placed to process information that cannot be revealed public. In turn, deference to the executive from the other branches of government to the executive in an emergency may be tempting. Certainly, this is the case in national security crises, with the aftermath of 9/11 mirroring a pattern seen in previous security crises across the world. It was due to this phenomenon of executive supremacy that Clinton Rossiter famously referred to emergencies as “Constitutional Dictatorships”.

These inherent subjective factors affecting the decision to implement an emergency response – and indeed the decision to end it – do not undermine the possibility of scrutiny. In fact, it demonstrates the opposite: it underlies the importance of effective scrutiny of the executive’s claims. In turn,

one must resist the claim by Carl Schmitt that “Sovereign is he who decides on the exception” – that the exceptional powers necessary to distinguish friend from enemy and ensure the requisite stability of the legal order is a power that cannot be regulated through law. Emergencies, in fact, have lots of law.

Deference therefore should not mean complete abdication of the constitutional obligation to hold the executive to account politically as is the constitutional duty of the legislature. Nor does deference mean abdication of the constitutional duty to ensure the executive acts lawfully, as is the responsibility of the judiciary. Claims to executive supremacy need to be justified so far as it is possible to do so. This is arguably even stronger in non national security emergencies such as pandemics where there is no reason to assume that much of the information the executive is using to make its decisions cannot be disclosed for security reasons, or economic crises where there is a strong case to be made that the executive should itself be inherently sceptical of relying on secret, insider information as to the health of the economy.

Finally, it also means that where all three branches fail to act in response to an objectively imminent disaster such as climate change, the ultimate holders of power in a democracy – the people – may have to hold all constituted powers to account. But emergencies of one kind have a nasty habit

of triggering emergencies of another. Pandemics can beget economic crises which can beget national security crises. Catastrophic climate change has the potential to beget all three. Climate change will inevitably result in some form of emergency response. It remains to be seen what such powers will entail and, indeed, what world we will be left with afterwards.

Maria Stemmler

Staatsgeheimnisse und effektiver Rechtsschutz nach 9/11

*Das Beispiel der extraordinary renditions vor den
US-Bundesgerichten*



Staaten haben Geheimnisse, die sie nach ihren innerstaatlichen Rechtsvorschriften vor einer Veröffentlichung schützen. Werden die entsprechenden Informationen im Rahmen eines Gerichtsverfahrens benötigt, stellt sich die Frage, ob und inwiefern sie im Prozess verwertet werden dürfen. Besonders problematisch ist die Geheimhaltung, wenn sich das Verfahren um gravierende Menschenrechtsverletzungen dreht, die von staatlichen Stellen verübt worden sind. Hier kann die Geheimhaltung die justizielle Aufarbeitung staatlichen Unrechts beeinträchtigen oder gar ganz verhindern und den individuellen Anspruch auf effektiven Rechtsschutz leerlaufen lassen. Der vorliegende Beitrag zeigt anhand von zwei Verfahren, die Betroffene der von der CIA nach 9/11 durchgeführten *extraordinary renditions* vor den US-Bundesgerichten angestrengt haben, welche schwerwiegenden Auswirkungen der staatliche Geheimschutz auf den effektiven Rechtsschutz haben kann.

I. Grundlage: *United States v. Reynolds, et al.*, 345 U.S. 1 (1953)

Der Umgang mit Staatsgeheimnissen im US-amerikanischen Zivilverfahren wird im Kontext der *extraordinary renditions* vor allem durch die Entscheidung *United States v. Reynolds* des US-Supreme Court aus dem Jahr 1953 geprägt. In diesem Verfahren ging es um die Schadensersatzklagen dreier Witwen, deren Ehemänner den Absturz eines Flugzeugs der US Air Force nicht überlebt

hatten. Sie verlangten dafür die Herausgabe des offiziellen Unfallberichts, was vom zivilen Leiter der Air Force unter Berufung auf ein entsprechendes Privileg verweigert wurde. Die Air Force gab unter anderem an, dass sich das Flugzeug auf einer streng geheimen Mission befunden habe und die Vorlage des Berichts die nationale Sicherheit, die Flugsicherheit und die Entwicklung hochtechnischer und geheimer militärischer Ausrüstung ernsthaft beeinträchtigen würde.

Der Supreme Court ordnete die relevanten Fragen trotz verfassungsrechtlicher Anklänge dem Beweisrecht und dort dem „privilege which protects military and state secrets“ zu, also einem Privileg zum Schutz von Militär- und Staatsgeheimnissen. Dieses Privileg stehe der US-Regierung zu und müsse durch die Leitungsperson der zuständigen Abteilung, nach tatsächlicher, persönlicher Prüfung, geltend gemacht werden. Das Gericht müsse sodann entscheiden, ob die Berufung auf das Privileg sachgemäß sei. Eine Geheimhaltungsbedürftigkeit könne sich schon aus den Umständen eines Falls ergeben, sofern die Vorlage des Beweismittels die begründete Gefahr der Aufdeckung militärischer Informationen berge, die zum Schutz der nationalen Sicherheit geheimzuhalten seien. Das Gericht solle in diesen Fällen die Sicherheit nicht dadurch gefährden, dass es auf einer Untersuchung der Beweise – auch nicht durch das Gericht allein, *in camera* – bestehe.

Im konkreten Fall ging der Supreme Court aufgrund der erstinstanzlichen Verhandlung davon aus, dass an Bord des verunglückten Flugzeugs geheime elektronische Geräte getestet werden sollten. Die Bedeutung solcher Geräte für die Verteidigungsfähigkeit sei ebenso bekannt wie ihre Geheimhaltungsbedürftigkeit – insbesondere in der gegenwärtigen politischen Lage. Es könne angenommen werden, dass sich im Unfallbericht Hinweise auf solches Gerät finden würden. Grundsätzlich müsse das Vorgehen des Gerichts an der Erforderlichkeit des fraglichen Beweismittels für das Verfahren ausgerichtet werden. Aber selbst die größte Erforderlichkeit könne die Anwendung des Privilegs nicht verhindern, wenn das Gericht überzeugt sei, dass Militärgeheimnisse auf dem Spiel stünden. Wenn die Erforderlichkeit des Beweismittels zweifelhaft sei – wie in der vorliegenden Konstellation, in der die überlebenden Besatzungsmitglieder als Zeugen angeboten worden waren, müsse sich das Privileg ohne weitere Prüfung durchsetzen.

Beruft sich die US-Regierung heutzutage auf das *state secrets privilege*, spiegelt das Prüfprogramm der Gerichte weitgehend das Vorgehen des Supreme Court in *Reynolds* wider. In einem ersten, zumeist unproblematischen Prüfungsschritt werden die formalen Voraussetzungen der Berufung auf das Privileg geprüft. Häufig reicht der*die Leiter*in der zuständigen Abteilung dafür nicht nur eine öffentliche Begründung der Geheimhaltungsbedürftigkeit der Beweismit-

tel ein, sondern fügt noch eine ausführlichere Erklärung hinzu, die nur das Gericht sehen darf. Im zweiten Prüfungsschritt entscheidet das Gericht über die Geheimhaltungsbedürftigkeit der Beweismittel. Hier besteht die Möglichkeit, dass sich das Gericht die fraglichen Beweismittel *in camera* vorlegen lässt und sich ein eigenes Bild von ihrer Schutzbedürftigkeit macht. In aller Regel verlassen sich die Gerichte allerdings auf die Erläuterungen der US-Regierung und schließen sich deren Einschätzung zu wesentlichen Teilen an. Im dritten Prüfungsschritt muss das Gericht schließlich entscheiden, ob das Verfahren ohne die zu schützenden Beweismittel fortgeführt werden kann. Ist dies nicht der Fall, wird die Klage abgewiesen. An dieser Stelle können besondere Verfahrensvorkehrungen eine Rolle spielen, mit denen geheimzuhaltende Informationen vor einem Bekanntwerden geschützt werden, während mit ihnen in Zusammenhang stehende, nicht schutzbedürftige Informationen verwendet werden können. Beispiele sind die Nutzung von Decknamen für bestimmte Informationen in Befragungen oder die Schwärzung von Dokumententeilen.

II. Zwei Beispiele aus dem Bereich der extraordinary renditions

Fragen der staatlichen Geheimhaltung und des effektiven Rechtsschutzes haben sich nach 9/11 in besonders eindrücklicher Weise im Rahmen von Verfahren zu den sogenannten *extraordinary renditions* gestellt. Als *extraordinary rendition*

wird eine Praxis der USA unter Federführung der CIA verstanden, bei der festgenommene Terrorverdächtige heimlich von einem Land in ein anderes verbracht werden, um dort von lokalen Sicherheitskräften in örtlichen Gefängnissen oder von der CIA selbst in außerhalb der USA liegenden Geheimgefängnissen brutal gefoltert und verhört zu werden. Vereinzelt *extraordinary renditions* wurden schon durch die Clinton-Administration durchgeführt, nach 9/11 nahm die Praxis neue Ausmaße an.

Die von *extraordinary renditions* Betroffenen haben auf unterschiedliche Weise versucht, auf dem Rechtsweg eine Form von Genugtuung zu erwirken. Einige von ihnen haben vor US-Bundesgerichten Personen und Unternehmen auf Schmerzensgeld verklagt, die an ihrer Verschleppung und Misshandlung beteiligt gewesen sein sollen. Dass dabei nicht die USA als Staat, sondern einzelne Personen verklagt wurden, ist den Besonderheiten des US-amerikanischen Staatshaftungsrechts geschuldet. Im Folgenden wird eins dieser Verfahren mit Fokus auf die abschließende Entscheidung des Berufungsgerichts näher beleuchtet. Darüber hinaus wird die Problematik des *state secrets privilege* im Rahmen eines selbständigen Beweisverfahrens zu den *extraordinary renditions* nachvollzogen.

1. *Mohamed, et al. v. Jeppesen Dataplan, Inc., and United States, 614 F.3d 1070 (2010)*

Einen Versuch an den *extraordinary renditions* Beteiligte zivilrechtlich zur Verantwortung zu ziehen, unternahmen 2007 Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah und Bisher Al-Rawi. Sie alle machten geltend, von Agenten der CIA in jeweils unterschiedlichen Konstellationen von einem Land in ein anderes verbracht worden zu sein und dort entweder von den lokalen Behörden oder der CIA brutal misshandelt und verhört worden zu sein. Ihre Klage richtete sich gegen das Unternehmen Jeppesen Dataplan, Inc., ein Tochterunternehmen des Boeing-Konzerns. Jeppesen Dataplan soll Flugzeuge, Crews sowie die notwendige fliegerische und logistische Unterstützung für Hunderte von Flügen im Rahmen der *extraordinary renditions* zur Verfügung gestellt haben.

Die Kläger in *Jeppesen* konnten ihr Vorbringen auf eine Vielzahl von öffentlichen Quellen stützen. So verwiesen sie auf Äußerungen verschiedener Spitzen der US-Administration, in denen viele Details des Programms erläutert wurden und sogar kooperierende Staaten und von den Maßnahmen Betroffene namentlich genannt wurden. Die *extraordinary renditions* von Mohamed, Agiza und Al-Rawi wurden zudem vom Berichterstatter des Europarats Dick Marty im Juni 2006 (Council of Europe, Parliamentary Assembly, Doc. 10957) als spezifische Beispiele doku-

mentierter *renditions* aufgeführt und unter Rückgriff auf unterschiedliche Informationen näher beschrieben. Im Martyr-Bericht vom Juni 2007 (Council of Europe, Committee on Legal Affairs and Human Rights, Doc. 11302 rev.) wird überdies Jeppesen als der üblicherweise von der CIA für die *extraordinary renditions* genutzte Luftfahrt Dienstleister bezeichnet und seine Beteiligung an der Verschleierung der Flugrouten von durch die CIA genutzten Flugzeugen näher beschrieben.

Nichtsdestotrotz wurde die Klage bereits während der Schriftsatzphase in zwei Instanzen abgewiesen und vom Supreme Court nicht zur Entscheidung angenommen. Nach ihrer Einreichung trat die US-Regierung dem Verfahren bei, berief sich auf das *state secrets privilege* und beantragte die Abweisung der Klage. Das Berufungsgericht entschied anhand von *Reynolds*. Es prüfte das bekannte dreistufige Schema und stützte sich dabei auf zwei vom Leiter der CIA eingereichte Erklärungen zur Geheimhaltungsbedürftigkeit der fraglichen Informationen. Die US-Regierung benannte vier Kategorien von zu schützenden Informationen, nämlich hinsichtlich der Fragen, ob Jeppesen oder ein anderes Unternehmen die CIA bei geheimen nachrichtendienstlichen Tätigkeiten unterstützt habe und ob die CIA bei solchen Aktivitäten mit ausländischen Regierungen kooperiert habe, sowie Informationen zum Umfang und zur Durchführung des Programms zur Inhaftierung und Befragung

von Terroristen durch die CIA und alle weiteren Informationen zu geheimen CIA-Operationen, die nachrichtendienstliche Aktivitäten, Quellen oder Methoden offenbaren könnten. Das Berufungsgericht kam zu dem Schluss, dass zumindest einige der fraglichen Informationen Staatsgeheimnisse darstellten. Ihre erzwungene oder ungewollte Offenlegung während des Verfahrens würde der nationalen Sicherheit erheblichen Schaden zufügen. Zudem seien die den Forderungen der Kläger zugrundeliegenden Tatsachen derart von diesen Geheimnissen durchsetzt, dass spätestens bei der Frage nach der Rolle Jeppesens und einer mit dieser einhergehenden Haftung jeder Versuch Jeppesens, sich gegen die Ansprüche der Kläger zu verteidigen, ein nicht zu rechtfertigendes Risiko der Aufdeckung von Staatsgeheimnissen in sich trage. In Anbetracht dessen sei die Klage abzuweisen.

2. *United States v. Husayn, aka Zubaydah, et al.*, 142 S.Ct. 959 (2022)

Eine andere Fallkonstellation repräsentiert das Verfahren *United States v. Husayn, aka Zubaydah*, zu dem der Supreme Court im März diesen Jahres eine Entscheidung veröffentlichte. Zayn al-Abidin Muhammed Husayn, genannt Abu Zubaydah, befindet sich seit 2002 in US-Gewahrsam und wurde währenddessen mehreren *extraordinary renditions* unterzogen. Dabei wurde er auch in Polen in einem Geheimgefängnis der CIA gefoltert und verhört, was unter anderem

durch den Marty-Bericht vom Juni 2007 bekannt wurde. Der Europäische Gerichtshof für Menschenrechte verurteilte Polen 2014 deswegen einstimmig wegen einer Vielzahl von Verstößen gegen die Europäische Menschenrechtskonvention (*Husayn (Abu Zubaydah) v. Poland*, Appl. no. 7511/13 (2014)). Schon vor dem Urteil des EGMR hatte Abu Zubaydah über seine Anwäl*innen in Polen die Strafverfolgung polnischer Staatsbürger beantragt, die in seine Misshandlung involviert waren. Die Ermittler*innen ersuchten die USA um Informationen, was unter Verweis auf die nationale Sicherheit verweigert wurde. Nach der Verurteilung Polens durch den EGMR baten sie Abu Zubaydahs Anwäl*innen, ihnen Beweise vorzulegen.

Abu Zubaydah und sein Anwalt beantragten in der Folge vor einem US-Bezirksgericht die Durchführung eines Beweisverfahrens zur Unterstützung eines ausländischen Ermittlungsverfahrens. Sie baten um die Erlaubnis, die beiden Psychologen, die die Verhör- und Foltermethoden der CIA entwickelt und angewendet hatten, zu ihrer Befragung vorzuladen und zur Beibringung von einer Reihe von Dokumenten zu verpflichten, die Informationen zu dem Geheimgefängnis in Polen, zu der dortigen Behandlung Abu Zubaydahs und zu einer möglichen Kooperation mit den polnischen Behörden liefern könnten. Dies wurde vom Bezirksgericht gewährt. Die US-Regierung trat dem Verfahren bei, machte eine Verletzung des *state secrets privilege* gel-

tend und beantragte die Aufhebung der Beschlüsse des Gerichts. In einer Erklärung trug der Leiter der CIA vor, dass das Befolgen der gerichtlichen Anordnungen durch die beiden Psychologen die Kooperation Polens mit der CIA bestätigen oder widerlegen würde und dass eine Bestätigung der nationalen Sicherheit der USA erheblichen Schaden zufügen würde. Das Bezirksgericht wandte *Reynolds* an und hielt zwar die Existenz des Geheimgefängnisses in Polen nicht für eine schutzbedürftige Information, erachtete das *state secrets privilege* jedoch in anderer Hinsicht für einschlägig und wies den Antrag auf das Beweisverfahren in der Folge ab. Das Berufungsgericht stellte fest, dass das *state secrets privilege* drei Kategorien von Informationen nicht erfasse: Die Tatsache, dass die CIA ein Gefängnis in Polen betrieben habe, Informationen zu den dortigen Haftbedingungen und Verhörmethoden sowie Details zu Abu Zubaydahs Behandlung während seines Aufenthalts.

Der Supreme Court nahm das Verfahren auf Antrag der US-Regierung zur Entscheidung an und entschied gestützt auf *Reynolds*, dass der Antrag auf Durchführung des Beweisverfahrens zurückzuweisen sei. Er stimmte der US-Regierung zu, dass auf inoffiziellem Wege bekannt gewordene Informationen auch weiterhin dem *state secrets privilege* unterfallen könnten. Vorliegend habe die US-Regierung plausibel gemacht, warum eine Bestätigung der Existenz des fraglichen Gefängnisses der nationalen Sicherheit er-

heblichen Schaden zufügen könnte. Ihre Erläuterung, dass ausländische Geheimdienste wichtige Informationsquellen darstellten, die nach einer solchen Bestätigung möglicherweise weniger kooperationsbereit seien, sei nachvollziehbar. Hinsichtlich der Informationen zur Behandlung Abu Zubaydahs in dem Geheimgefängnis urteilten insgesamt sechs Richter*innen, dass Abu Zubaydahs entsprechender Bedarf nicht sehr hoch sei, da große Teile dieser Informationen bereits anderweitig erhältlich seien.

III. Kontrovers: Der Umgang mit „offenen Staatsgeheimnissen“

Das Verfahren Abu Zubaydahs zeigt besonders anschaulich, dass die Verwertung bereits bekannt gewordener staatlicher Geheimnisse in den Verfahren vor der US-Zivilgerichtsbarkeit umstritten ist. Sowohl das Bezirksgericht, als auch das Berufungsgericht hatten verfahrensrelevante Informationen identifiziert, deren Öffentlichkeit nach ihrer Beurteilung einen Schutz durch das *state secrets privilege* entbehrlich machte. Das Mehrheitsvotum des Supreme Court schloss sich dagegen der Argumentation der US-Regierung an und stellte fest, dass bekanntgewordene Informationen weiterhin dem *state secrets privilege* unterfallen könnten, solange keine offizielle Bestätigung vorliege.

Deutliche Worte für die Gegenansicht finden sich im dissentierenden Sondervotum des konservativen Richters Neil Gorsuch, dem sich die liberale Richterin Sonia Sotomayor

angeschlossen hatte. Er erklärte, dass die Frage, ob die CIA ein Gefängnis in Polen betrieben hat, kein Geheimnis mehr darstelle, und verwies dafür auf den knapp 700 Seiten langen Bericht des US-Senatsausschusses zu den Geheimdiensten über die Haft- und Verhörmethoden der CIA im Rahmen der *extraordinary renditions* von 2014 (Senate Select Committee on Intelligence, S. Report 113-288), den Martyr-Bericht von 2007, die Feststellungen des EGMR zur Inhaftierung Abu Zubaydahs in Polen und ein Zeitungsinterview, in dem der ehemalige Präsident Polens die Existenz der CIA-Anlage in Polen bestätigte.

Mit einem engeren Verständnis des Geheimhaltungsbedürfnisses ist jedoch in absehbarer Zukunft – zumindest auf der Ebene des Supreme Court – nicht zu rechnen, wie sich aus dem von fünf Richter*innen getragenen Mehrheitsvotum und einem Sondervotum von Richter Thomas ergibt, dem sich Richter Alito angeschlossen hatte und das im Verhältnis zur US-Regierung ein noch deutlich zurückhaltenderes Vorgehen des Gerichts forderte. Für die Aufarbeitung der *extraordinary renditions* durch die US-Zivilgerichtsbarkeit ergibt sich hieraus ein paradoxes Bild: Obwohl die *extraordinary renditions* zu weiten Teilen öffentlich bekannt und belegt sind, führt die aktuelle Rechtsprechung in der Regel zu einem Rechtsschutzausschluss.

IV. Das Problem der „illegalen Staatsgeheimnisse“

Ein weiteres Problem, das die beiden Beispielsverfahren aufwerfen, ist der Umgang mit Geheimnissen, die illegale staatliche Handlungen zum Gegenstand haben. Die von der CIA im Rahmen der *extraordinary renditions* verwendeten Methoden verletzen nicht nur internationale Menschenrechtsnormen, sondern dürften auch gegen Regelungen des US-amerikanischen Rechts wie beispielsweise den Torture Act (18 U.S.C. § 2340 *et seq.*) verstoßen. Hier stellt sich die Frage, ob das Interesse an der Sanktionierung möglicher Rechtsverstöße – sowohl aus dem Blickwinkel der Gewaltenteilung als auch dem des individuellen Rechtsschutzes – zu einer Relativierung des Geheimhaltungsbedürfnisses führen sollte.

Von den US-Bundesgerichten wird die Problematik zwar angesprochen, eine Modifizierung ihrer Rechtsprechung geht damit allerdings nicht einher. So betonte der Supreme Court in *Abu Zubaydah*, dass er weder Terrorismus noch Folter dulde, aber im vorliegenden Fall nur über eine beweisrechtliche Streitigkeit zu entscheiden habe. Das Berufungsgericht in *Jeppesen* stellte fest, dass der vorliegende Fall einen schmerzhaften Konflikt zwischen den Menschenrechten und der nationalen Sicherheit in sich trage und die Abweisung der Klage sowohl individuelle als auch strukturelle Nachteile mit sich bringe. An die Stelle des Rechtsmittels könnten jedoch andere Formen der Abhilfe treten wie

Entschädigungszahlungen der Exekutive oder der Erlass entsprechender Regelungen durch die Legislative.

Derartige Vorschläge zeichnen sich dadurch aus, dass sie nicht auf etablierte alternative Lösungswege verweisen können, sondern nur auf mögliche Optionen der anderen Gewalten. Der von den Betroffenen angestrebte Rechtsschutz wird so durch eine vage Hoffnung auf anderweitigen Ausgleich substituiert, deren Realisierung nicht absehbar ist und sich ihrer Einflussphäre weitgehend entzieht.

V. Ungenutzt: Besondere Verfahrensvorkehrungen

Wie bereits erwähnt, können die US-Bundesgerichte besondere Verfahrensvorkehrungen treffen, mithilfe derer Verfahren fortgeführt werden, in denen Staatsgeheimnisse eine Rolle spielen. Diese Vorkehrungen dienen dazu, geschützte Informationen geheimzuhalten, während mit diesen im Zusammenhang stehende, nicht schutzbedürftige Informationen verwertet werden können. Die Frage nach adäquaten Schutzvorkehrungen spielte zwar in beiden Beispielfällen eine Rolle, tatsächlich verwendet wurden sie jedoch in keinem.

In *Jeppesen* entschied das Bezirksgericht, dass die mögliche Bedrohung der nationalen Sicherheit durch eine Fortsetzung des Verfahrens auch besondere Verfahrensvorkehrungen ausschliesse; das Berufungsgericht führte den von ihm angenommenen, kaum trennbaren Zusammenhang

zwischen geschützten und ungeschützten Beweismitteln in diesem Verfahren für seine Ablehnung an. In *Abu Zubaydah* sprachen sich mit Kagan, Sotomayor und Gorsuch drei Richter*innen unter Verweis auf Erfahrungswerte für eine Fortführung des Verfahrens unter Schutzvorkehrungen aus, um die Behandlung Abu Zubaydahs im fraglichen Zeitraum ermitteln zu können. Vier Richter*innen urteilten hingegen, dass die fraglichen Beweisanträge derart eng mit der Lage des Gefängnisses verbunden seien, dass Schutzvorkehrungen keine adäquate Lösung böten. Im Zusammenspiel mit dem ohnehin die Abweisung fordernden Sondervotum Thomas' versagten sie somit eine Fortführung des Verfahrens.

VI. Die De-facto-Einschätzungsprärogative der Exekutive

In Verfahren, in denen die Anwendung des *state secrets privilege* im Raum steht, wird von den US-Bundesgerichten üblicherweise betont, dass die Entscheidung über das Vorliegen eines schützenswerten Staatsgeheimnisses allein ihnen vorbehalten sei und nicht zugunsten der Exekutive aufgegeben werden dürfe. Gleichzeitig stützen sich die Gerichte regelmäßig wie in den hier untersuchten Beispielfällen für ihre Entscheidung auf die Einschätzungen der Exekutive, ohne deren Wahrheitsgehalt durch eine Einsichtnahme in die fraglichen Beweismittel zu überprüfen. Zur Begründung wird in Urteilen immer wieder ausgeführt, dass die Exekutive – im Gegensatz zu den Gerichten – über die entsprechen-

de Expertise verfüge, um die möglichen Konsequenzen einer Offenlegung von Informationen abschätzen zu können.

Wie Gorsuch in seinem Sondervotum anmerkt, gab es in der Vergangenheit allerdings Fälle, in denen die Exekutive das Argument des Schutzes der nationalen Sicherheit zur Verfolgung anderer Interessen missbraucht hat. Zu diesen Fällen zählt ironischerweise auch *Reynolds*. Als der fragliche Unfallbericht Jahrzehnte später veröffentlicht wurde, enthielt er keine Staatsgeheimnisse, sondern nur Belege für die Fluguntauglichkeit des abgestürzten Flugzeugs und zahlreiche Fehler bei seiner Bedienung. *Reynolds* müsste danach eigentlich als klarer Beleg für die Notwendigkeit einer kritischeren Handhabung der Angaben der Exekutive und die Einsichtnahme in fragliche Beweismittel verstanden werden. Stattdessen dient die Entscheidung weiterhin zur Begründung einer vertrauensvollen Übernahme von Behauptungen der Exekutive durch die Gerichte.

VII. Fazit

Das Berufungsgericht in *Jeppesen* betonte, dass Entscheidungen, in denen das *state secrets privilege* die Abweisung einer Klage schon zu Beginn des Verfahrens verlangt, eine Seltenheit seien. Für die von Betroffenen der *extraordinary renditions* angestrebten Verfahren lässt sich dies nicht bestätigen. In den hier behandelten Beispielfällen wiesen die Gerichte die Klage bzw. den Antrag schon zu

Beginn ab und den Betroffenen wurde effektiver Rechtsschutz verwehrt. Dies ist umso bemerkenswerter, als die Gerichte keine der hier näher beleuchteten Alternativen zur Abweisung nutzten. Insbesondere durch eine andere Behandlung von „offenen Staatsgeheimnissen“ oder die Verwendung von besonderen Verfahrensvorkehrungen hätten rechtsschutzfreundlichere Ergebnisse erzielt werden können. Indem die US-Rechtsprechung keine Ausnahmen für Staatsgeheimnisse über illegale staatliche Aktivitäten vorsieht und weitgehend den Angaben der Exekutive zur Geheimhaltungsbedürftigkeit folgt, manifestiert sie einen eindeutigen Vorrang von angeführten Sicherheitsbedenken gegenüber menschenrechtlichen Belangen.

In den vergangenen zwanzig Jahren haben wir einen Prozess hin zur Normalisierung eines permanenten Ausnahmezustands erlebt, der Rechtsstaatlichkeitsmechanismen vorübergehend außer Kraft setzt. Dieser Zustand schwächt Konstrukte der rechtlichen Kontrolle und Bindung von staatlichen Institutionen nachhaltig. Der gemeinsame Nenner ist in jedem Fall, dass die Gewährleistung der öffentlichen Sicherheit als zentraler Rechtfertigungsgrund angeführt wird, um die mit der Rechtsstaatlichkeit einhergehenden Grundrechte auszuhebeln.