

TERRORISM, CONSTITUTIONALISM, SOVEREIGNTY

The notion that the liberal democracies of the world are to find new solutions in order to avert the threat of terror or at least to effectively decrease it, has become commonplace since 9/11. The foundation of this argument rests upon the generally accepted idea that, since it is the prime obligation of each state to defend the lives, safety and assets of all of its citizens and since terror attacks aiming at randomly selected groups of citizens threaten these interests, the state is obliged to protect its citizens even if the measures applied restrict other important moral interests. Therefore, the argument continues, only naive people or human-rights-absolutists would insist on maintaining the level of protection of human rights which is usual and expected during more peaceful times. The assumption, then, is that the life and safety of citizens can only be defended if the state restricts certain individual rights.

It is not only the irrefutable reasoning of this basic statement that makes this argument a conclusive *prima facie*. Who would ever like to appear to be endorsing the idea that risking other peoples' lives is an acceptable price to pay in exchange for ensuring the lack of restriction of the rights that are so dear to one's heart? Taking a closer look at this discussion on the same level of abstraction, however, raises more questions than it can answer. Even though we (as most people) do not dispute that when sufficiently severe reasons arise, the exercise of all human rights can be restricted, we should also note that the above reasoning (it would perhaps be more appropriate to say way of thinking) says nothing about the relations which would explain how having less freedom yields greater safety. *Prima facie* nothing supports the theory that liberal democracies would be more vulnerable to terrorism than the regimes, which restrict or do not consider human rights at all.¹ Therefore, a sensible dispute has to start with identifying the features, which make a society or a government especially vulnerable to terror threats. Secondly, the danger which terrorism has to the life of society and the operation of the state needs to be analysed thoroughly. Only after the completion of such an analysis can a sensible discussion proceed to the solutions to these threats and the possible effects of such threats on individual rights and the usual order of democratic

political processes. Therefore, any discussion over the answers to the threat of terror and their affect on constitutionalism (individual rights, rule of law, separation of powers, etc.) must be based on the analysis of the real nature of terrorism.

Naturally, I do not have the opportunity to conduct this analysis here, not only because of the limited space of the present article, but also because of the lack of the information available. However, I would like to make one or two quite general comments in relation to what makes a society vulnerable and what outcome this has on the success of fighting terror. Following these comments, I would like to briefly discuss a recently published text on general constitutional reform, which stirred fierce debate. Finally, I would like to consider the presumptions that serve as the basis of typical state responses and to try to reformulate these presumptions. A reformulation of presumption, of course, yields a modification of conclusions as well.

If we momentarily look at the terrorist attacks or the conflicts that use terrorist measures which occurred over recent years with the biggest impacts and casualties (such as New York, Bali, Moscow, Riyadh, Madrid, Casablanca, Beslan, London, the Israeli-Palestinian conflict, etc.), we find that, below a superficial general similarity, there are only substantial differences. The context of these attacks shows no similarities in terms of the political system, cultural background, and political concept of the societies in question. Among these societies, there are liberal democracies, oligarchic systems with significant democratic features, theocratic monarchies and secular dictatorships. There are places where terrorism arises from local conflicts that can be well defined and other places where the relation is not that obvious and direct. Among the countries in question, some of the wealthiest and the most effective states in the world can be found along with developing societies struggling with an elongated structural depression as well as poor and dysfunctional states. This suggests that it is extremely difficult, if at all possible, to identify the general political circumstances that provide a context that is particularly conducive to the occurrence of terrorist attacks. If we look at the circumstances of these attacks in the

strictest sense, we might come to the trivial conclusion that terrorist acts can be most easily carried out in an environment where a large number of persons that are not related to one another meet on a regular basis and where it is impossible to track every person's (or even the majority of the persons') movements, i.e. metropolitan public transportation, crowded streets and busy locations. But these conditions are characteristic of modern urban living and not of liberal democracies, and one can hardly imagine how these basic conditions can be changed without the sorts of deep alterations to the modern way of living that are, of course, not desirable nor seriously considered by anyone.

From the above considerations, one preliminary trivial consequence can be drawn. Technological solutions, better coordination, collection and exchange of information together with more effective regulations and institutional reforms may bring limited results (which would be an achievement on its own), but the factors that make modern societies vulnerable to terrorism can hardly be averted by technical or institutional instruments. A realistic policy cannot be viable unless it begins by accepting the fact that in the near future we have to live with the threat and reality of terrorist attacks. The success of long-term strategies that last for generations largely depends on the attitude of governments towards this reality: whether they decide to face it, prepare their societies for it and what they will do to handle the continuous feeling of threat, even if it is reasonable.²

This conclusion leads to the second part of the discussion.

CONSTITUTION AND STATE OF EMERGENCY

Recently, Bruce Ackerman, a well-known American constitutional lawyer, formulated proposals as to how liberal democracies should adapt their constitutional systems to the constant threat of terrorism. His proposals, which have generated fierce debate, are primarily tailored to the American Constitution, but his ambitions are more general. In his view, the solution that he proposes should be employed in all liberal democracies.³ First, I should note that, although I do not share Ackerman's analysis and conclusions, his undertaking is respectable from both a moral and intellectual point of view because he reflects on real problems and does not hesitate to re-examine established dogmas. There is one more reason why I find his paper notable. His propositions explicitly aim to avoid the situation where a constitutional govern-

ment slips into a permanent (though not explicitly declared) state of emergency in which the erosion of individual rights and other constitutional guarantees is irreversible. Consequently, Ackerman's proposal tries to isolate the periods of emergency to secure a "constitutional interval" in order that the Executive complies with rule-of-law requirements. The purpose of this solution is to avoid the violation of the integrity of the system of rights and guarantees.

Ackerman's proposal is of primary importance for my argument since his analysis begins with an assessment of the social impact of terrorism and terrorist threats and the institutional reactions that are tailored to hypothetical mass psychology effects. He begins by defining the threat that terrorism poses to the *state*, which is quite distinct from the obvious threat that terrorism means to society. He points out that the frequently evoked war-analogy is fundamentally mistaken. As opposed to a foreign invasion or a civil war, terrorist attacks, including more devastating ones than the 9/11-attack, do not jeopardize the existence of the state. Troops do not march in, take power and set up oppressive institutions. Only victims and debris remain, and the Executive should cope with this problem anyway. Thus, according to Ackerman, terrorism challenges the political authority of the state but not its existence. Its aim is to destroy public confidence in the operability of the state by constantly inducing the feeling of menace in society. In this way terrorism undermines state control within its boundaries. According to Ackerman's vision, within a relatively short period of time large-scale, persistent attacks will take place, which will totally undermine the power of direction and the legitimacy of the Executive. The constitutional system must be reformed in order to enhance the ability of the Executive to sustain public's confidence in its operability. Measures introduced right after a terrorist attack must aim to prevent the outbreak of panic. This reassurance rationale, as Ackerman calls it, differs from the extraordinary measures introduced during a time of war, since the latter are justified by the idea of the protection of the existence of the state.

What reforms are justified by the reassurance rationale in Ackerman's view? While the exact details of the proposal are not necessarily known, the general concept can be evaluated without closely examining. In case of a terrorist attack, Legislature would declare state of emergency. During this period the Executive could take measures without the usual checks and balances, including the general guarantees in case of detaining individuals (habeas corpus, judicial review, the right to defence, reasonable suspicion). Ackerman elaborates with regard to the latter

competence. The purpose of the presumably mass preventive detentions (when the authority would not have to justify the ground for reasonable suspicion) is to show the citizens that the Executive is in its place. It acts and takes effective measures to capture and neutralize the perpetrators and their abettors in order to prevent another attack from occurring in a short period of time. In order to guarantee that the state of emergency does not remain in place for an unlimited period of time, Ackerman proposes that its upholding be conditioned upon a sufficient majority of the political elite and the Legislature deeming it necessary. Ackerman would introduce the system of system of the supermajoritarian escalator. A majority vote would be required to continue the state of emergency for the first two to three months, then a sixty-percent vote would be required to extend the emergency two more months, followed by a seventy percent vote that would be required for the next two months, and eighty percent thereafter. According to Ackerman, this solution ensures that the state of emergency is upheld only as long as it is justified. He obviously places more confidence in the balance of the political process than in judicial review. The actions of the Executive would not be scrutinized judicially during the emergency. However, he would preserve some of the substantial limits, e.g. the absolute ban on the torturing of detainees.

In my view, even *prima facie*, there are three fundamental problems with Ackerman's view that are in part addressed by his critics. First, the moral justification of the limitations is very problematic; second, there is a serious mistake in his institutional design; and finally, his distrust of judiciary institutions makes him insensitive to the role that judicial review plays in interpreting the substantial limits he wishes to preserve. David Cole, who is one of his critics, points out the insufficiency of his moral justification. As we saw, Ackerman justifies the extraordinary authorisation of Executive powers and detaining a large number of individuals without reasonable suspicion by invoking a rationale of reassurance. This interest entails maintaining people's confidence in the operability of the Executive. However, it is not clear, and it is even doubtful that the assumed safety of the presumed majority of society justifies such grave intrusion.⁴ It could also be argued that the psychological effect of the mass preventive detention presumed to be had on majority of the population is ambiguous. Why should we think that locking up thousands of people without individualised suspicion strengthens the per-

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ception that the Executive is in its place and in control of the situation? It is plausible to assume that initially this impression will develop in the public. Though, if mass preventive detentions do not lead to capturing the real perpetrators and their abettors (which is likely since Ackerman does require individualized suspicion as a precondition of detentions), then the public will perceive mass preventive detentions as they are: a series of steps displaying force that are independent of the legitimate aim of capturing terrorists.⁵ It could also lead to the quick erosion of public confidence in the Executive.⁶ This argument also shows that any justification that is based on the reassur-

ance rationale is inherently mistaken. In the long run, confidence in the Executive and the political establishment cannot be separated from the substantive performance of the Executive in these fields. Every measure that serves to uphold public confidence without effectively solving the problems is counter-productive in the long run. (Mass preventive detentions do not primarily aim to fight terrorists effectively but to create the facade of effective counter-activity.) Only those measures are supposed to avert danger effectively can be justified from moral and practical points of view. Consequently, the reassurance rationale, which is independent from the real considerations of counter-terrorism, is unacceptable.

Setting aside this most fundamental, moral counter-argument, Ackerman's proposal regarding the institutional design seems to be gravely mistaken. Ackerman focuses his attention on preventing the abuse of emergency powers and their eternal expansion with the inflation of war-rhetoric. Thus, he accommodates the possibility of the further extension of the state of emergency to a minor yet gradually increasing element of the Legislature. He places all his confidence in a small element of the legislation that would be able to pose an obstacle to the aimless expansion of the state of emergency even in the time of general war psychosis. We have no reason to doubt that such an element will exist,⁷ though it is questionable how effective it will be in a situation that Ackerman fears. Suppose that the majority of the legislature and the majority of the society are still dominated by the shock generated by a terrorist attack that killed thousands of people. The state of emergency is extended over and over again according to the supermajority required. However, at a certain point, 21% of the members of the legislative branch do not deem further extension necessary. Let us assume, for the sake of this example, that a majority

in the legislature and most of society disagree with them, but even so they manage to bar the further extension of state of emergency. If they stick to their position, they would manage to end the emergency period. At the same time, Ackerman's proposal does not give any indication as to how much time should lapse between the end of an earlier state of emergency and the introduction of a new one. This is not an incidental deficiency. Ackerman clearly states that the introduction of the state of emergency needs to be tailored to the necessities of the real world. If the Constitution requires that, again for the sake of the hypothetical scenario, one year must pass before introducing the state of emergency again, this, naturally, would not discourage terrorists from making another devastating attack. If the state of emergency cannot be introduced as a response to another attack, this scheme would not make much sense. If there is no such rule in the Constitution, going back to our example, nothing can bar the majority (or the supermajority required for first vote) of the Legislature to introduce a new state of emergency one day after 21% of the representatives denied the extension. And since we assumed that the majority of society agreed with upholding extraordinary measures, the Legislature would not have to weigh the negative political consequences. Thus, the system of the supermajoritarian escalator that is regarded by Ackerman as a constitutional silver bullet has no retentive force in cases when it would be mostly needed.

The third problem relates to Ackerman's scepticism regarding the courts' power of review (in centralized systems, constitutional courts). During a state of emergency Ackerman would not guarantee the judicial review of administrative decisions in relation to detentions, though, at the same time he would sustain some substantial limits as to the treatment of detainees. He explicitly names the prohibition of torture, but he also suggests that there are other limits as well. However, as his critics, Laurence Tribe and Patrick Gudridge point out, in practice the issue of such absolute prohibitions come up as classifying certain practices, such as revoking sleep or broadcasting bad and loud music as torture. Evidently, it is not possible that a single act can regulate fully all cases that may evolve in the future. It is precisely for this reason that a judicial review, which can decide on borderline cases by making distinctions and applying analogies on a case-by case basis, is necessary. Judicial review makes the abstract moral principle of prohibition of torture applicable in individual cases.⁸ Consequently, the operation the judicial system is indispensable in a state of emergency.

The statement relating to the prohibition of torture raises a more general problem regarding Ackerman's proposal. His reform plan seems to start from the naïve supposition that a state of emergency can be perfectly separated from times of "normal" constitutionalism — I referred to this concept by using the term "constitutional interval". This premise is evidently untenable. As the example above shows, the application of extraordinary measures and their limits in those special periods presumes a use of phrases that must be interpreted. The course of interpretation is dependent on the conceptual apparatus developed in earlier phases of constitutional development, the period of "normal" constitutionalism. If we do not want to end up with the result that Ackerman explicitly refuses whereby during a state of emergency, the Executive has unlimited discretion to act as it wishes, then we must accept that the two periods cannot be hermetically separated from each other.

The three problems (surely, many others could be brought up) I pointed out in relation to the Ackerman proposal all point in the same direction. My general conclusion is that, even in the case of a great threat such as terrorism, the subtle texture of constitutionalism that evolved over a long period of time should be modified step by step and with the utmost care. Countering terrorism is indeed a special state function that requires applying very special measures. Some of these may make it necessary to provide the state with authorisations that we would otherwise be cautious to provide for example collecting information). At the same time, however, the possibility of judicial review and judicial remedy must be guaranteed. Constitutional amendment as an ultimate solution is not a necessary and suitable measure to trace these changes.

STATE OPERABILITY

State reactions to terror threats can be described most generally as steps taken to extend state operability. The possibilities of state operability in relation to liberal democracies are restricted from the "inside" by procedural rules of the rule of law, basic rights guaranteed by the constitution and the balances within systems with different branches of powers. International law, treaties and institutes can be considered as factors that restrict and define from the "outside". (From the non-legal point of view, the available resources, the interests of groups in society and international relations also restrict operability.) It has clearly been the case in the United States since the

9/11-attack that governmental aspirations have been heading in the same direction both from the “inside” and the “outside”. The Executive power was extended as largely as possible from the inside at the expense of the other branches of power and in detriment to individual rights, while neglecting the restrictions posed from the “outside” by the system of international institutions. I would like to point out that, though I am opposed to each of these trends, such a reaction is understandable because when a nation, especially if it is a superpower, is so violently provoked, all of society’s instincts as well as those of the political class are receptive to the sorts of arguments that are similar to the one that George W. Bush once expressed: it is not needed to plead before any international instances in order for a state to protect the security of its citizens. However, I would like to devote the final section of this paper to describing the presumptions behind these typical state reactions and point out why they are, in my opinion, wrong.

State operability can be discussed from two perspectives. In the judicial sense it is usually connected with sovereignty and means the unrestricted right to appoint and implement state politics both in the field of domestic and international politics. From this approach, operability is increased if there are fewer national and international rules and institutions restricting the state’s competence to decide. The other approach, which I would call the substantive approach, links operability to the effective enforcement and implementation of state policies. From this point of view, operability is increased if state policies can effectively achieve those goals that justified their introduction. So, while the first approach concentrates on the circumstances that ensure that the state can follow whatever policies it wants to, the second one concentrates on the circumstances that presumably allow state policies to achieve the expected results.⁹

It seems that the approach of the national political leaders in terms of terror aversion and international politics in general is totally dominated by the first of the approach. To be more precise, they appear to be thinking that the materialization of the first and the second desire are the same, i.e. that state policies would lead to the desired result if there were fewer restrictions in determining such policies. In reality, however, the conditions of the achievement of these two goals can be identical only among special and highly unrealistic presumptions. The circumstances among which these two sorts of desires are the same are “Vestfalian”:¹⁰ the basis of this view is a (Vestfalian) concept of sovereignty in which each state in itself constitutes a closed unity and has a

jurisdiction restricted by nothing from the inside. Furthermore, it pictures nation societies and economies that are connected only in a reduced way, by moderate interstate movement of population, capital, etc. Among these circumstances, it is possible that the lack of (outside) international restrictions is the main condition of the effectiveness of nation state. (Though, it is a presumption even among Vestfalian conditions that inner restrictions of state power would decrease the effectiveness of state policies). But because of the density of relations between the modern industrial societies and their convergence, there is such a level of interdependence between the leading economic powers and in general the states integrated into a global economy that, without appropriate interstate coordination, none of the national politics in these countries could be efficient.¹¹ In practice, this means that the price of the effectiveness of state policies is coordination, i.e. restrictions of the freedom of decision on a state level. The restriction of sovereignty can lead to effective and more successful state policies among mutual interdependence.¹² In addition, strategic cooperation ensuring long-term predictability and planning implemented through the system of international institutions is sure to guarantee better results than ad hoc coalitions based on the collision of momentary interests that overestimate international participants based on rapidly changing considerations, which, as a result, will only generate the next centre of crisis.¹³

Naturally, these connections appear on different levels concerning each international participant. The bigger a country’s military and economic power, the bigger its inner market is, the more indirect are the ways through which the consequences of mutual interdependence appear, elongating the duration of the period until the ability to delegate the disadvantages arising from the lack of coordination of others. Therefore, the urge to restrict the freedom of decision of the state will be smaller. If we try to interpret the international conflicts and ruptures of the recent years, we can come to the conclusion that the United States is following a unilateralist policy since 9/11 (and partially even prior to that date) not because of some sort of ideological obligation, but simply because it could do so on a short-term basis. Similarly, middle-sized European powers insist on keeping international frameworks because they sense the effects of the lack of coordination in a more direct way.¹⁴ However, I am of the view that the present experience of the fight against terrorism supports the fact that even the leading military and economic power of the world cannot

ignore these relations. Among these interdependent relations, successful state politics (especially in the case of a global undertaking) can be executed through strategic coordination and, consequently, the partial restriction of state sovereignty. It is possible, though, that recent conflicts and crises concerning the system of international institutions will help to realize this perception.¹⁵

NOTES

1. In the past few years more terrorist attacks with the biggest impact and casualties occurred in partially or totally suppressor states (i.e. the Russian Federation, Saudi Arabia, Morocco, Egypt) rather than in liberal democracies.
2. Of course, identifying and politically handling the deeper reasons of terrorism is one of these. I take it for granted that discussions on the deeper social and political reasons of terrorism will not result in a more tolerant attitude towards terrorism. I do not need to go further than mentioning the fact that legitimate political aims and real violation of interests can lead to use of unacceptable means, especially if other available means prove to be ineffective and reduced. The ineffectiveness of these means, however, does by no means refer to the illegality of the underlying aims and interests. This does not mean, of course, that the background of terrorism is always made up of acceptable aims and real injuries. These reasons, however, cannot be discussed here.
3. Bruce ACKERMAN, "The Emergency Constitution." *Yale Law Journal* 113 (March, 2004).
4. David COLE, "The Priority of Morality: The Emergency Constitution's Blind Spot." *Yale Law Journal* 113 (June, 2004). Laurence Tribe and Patrick O. Gudridge raise a partially similar problem. They contest that the purpose of the reassurance rationale is only, or at least most importantly, the state of emergency. According to them, Ackerman does not pay attention to the case of objectively justified restlessness: "In the end, lack of public tranquillity may reflect that there is no adequate reason for tranquillity." Secondly, public pressure in case of justified restlessness can be favourable since the Executive is more inclined to take all the necessary measures. Laurence TRIBE – Patrick O. GUDRIDGE, "The Anti-Emergency Constitution." *Yale Law Journal* 113 (June, 2004), p. 1812.
5. Cole rightly refers to the fact that the Ashcroft-raids that took place weeks and months after 9/11 (just like the Palmer-raids following WW1) lead to arresting thousands of people, but only three of them were indicted. Two of them were acquitted and serious procedural problems arose in the case of the only person who was "sentenced". COLE, *ibid.*
6. A further problem pointed out by Cole is that the proposed authorization is counter-productive from another aspect. If, as is plausible, the assumed terrorists have a specific (religious, ethnic etc.) social background and the same social group would be disproportionately affected by the detentions, the measures would probably have an adverse impact. Not necessarily because the targeted group, due to their alienation, would become the supporters of terrorism, since this correlation is indirect and distant. However, as an immediate consequence of such action the expected co-operation of the members of the targeted social group would increase as well.
7. Ackerman, who addresses his proposal to all liberal democracies of the world, bases his argument on the operation of the U.S. Congress. He is boldly insensitive to the largely different consequences (such as the party system or discipline required by legislative fractions) generated by differing systems of legislative elections.
8. "The Anti-Emergency Constitution", p. 1823.
9. Applying another differentiation, it can be said that the legal approach focuses on the legal output, while the substantive approach focuses on the actual outcome.
10. Quotation marks are used because the totally unrestricted national sovereignty is evidently an ideal that has not become a reality even during the period referred to as Vestfalian. (See, e. g., Stephen KRASNER, *Sovereignty: Organized Hypocrisy*. Princeton, N.J.: The University Press, 1999.)
11. The convergence of societies and their mutual interdependence, of course, do not eliminate clashes of interests between these states. The existence of these clashes of interests makes the cooperation of sovereign states more difficult.
12. In this approach, the integration of European nation states does not seem as the implementation of an ideological concept or a utopia (as the critics and fans declare alike), but as a strategic adaptation to the circumstances of mutual interdependence. In the European economic and social space getting more and more united, it is definitely true that state-level goals can only be achieved effectively by interstate coordination. (See Andrew MORAVCSIK, "Conservative Idealism and International Institutions." *Chicago Journal of International Law*, Autumn, 2000.)
13. As it can be seen from the example of American foreign policy, such politics led to the regional overestimation of first Iran, then Iraq and at the moment Pakistan (and Uzbekistan).
14. Differences in the capabilities and possibilities, of course, do not explain every difference. In this context, the standpoint of the critics of international law with a realistic view seems more convincing. (See, Andrew

MORAVCSIK, "Taking Preferences Seriously: A Liberal Theory of International Politics." *International Organization* 51:4, Autumn, 1997, pp. 513–553.)

15. In the third part of this paper I focused on rather the outer limits of the freedom of decision of the state, but I think that similar connections can be discovered in the sphere of inner constitutionalism, the balances among the branches of powers and the enforcement of individual rights. During times of threat, the instinctive reaction of state leaders is the suspension of procedural guar-

antees, the restriction of open political criticism, for example, by suppressing freedom of speech and parliamentary control. At the same time, empiric observations suggest, that restricting public deliberation and criticism (whether on an individual or institutional basis) results in more feeble decisions and in the end decreases the effectiveness of state politics. Therefore, the statement that the gradual decrease of restrictions of the executive power leads to more effective politics can never be taken as correct in a long-term period.