

SECURITY VERSUS FREEDOM

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Abstract: *The affair Edward Snowden¹ and his disclosures of the practices of the US National Security Agency² have triggered a discussion on the relationship between security and freedom. The formula “as much security as possible and as much freedom as possible” obscures the problem. If we have to choose: Do we want to restrict security in favor of freedom or do we want to restrict freedom in favor of security?*

Fortunately, we do not have to choose. Reconciliation of security and freedom must be possible because both are part of the common good. If there seems to be a conflict, it can result only from a misunderstanding. Nobody can enjoy freedom if he is dead. Therefore, no claim to freedom can be regarded reasonable that conflicts with necessary measures for the protection of security. It is inherent to freedom that it is limited by the necessary protection of security.

Objections against collecting and storing personal data are nourished by the fear that collected data could be abused. But it would be unreasonable to stop the collecting and storing of data for the protection of security because no absolute guarantee against the abuse of such data can be given. If society, organized in the state, may require everyone to make his just contribution to the common efforts of militarily defending it when suffering from an unjust aggression by another state, and if it is therefore – at least in principle – the duty of everyone to risk life and limb in the course of such defence, it would be illogic to allege that there does not exist, again for everyone, the duty to risk his privacy for the protection of security.

The collection and retention of personal data even before any particular person has become a suspect can be a useful means for the prevention of terrorist acts and other crimes. If the traditional rules for data collection and retention are outdated, they have to be changed. If courts should fail to react to these developments, adaptation of the law would become a matter for the legislature.

Keywords: personal data, particular person, data collection and retention.

I. Introductory remarks

The affair Edward Snowden³ and his disclosures of the practices of the US National Security Agency⁴ have triggered a discussion in many countries, especially those where the national intelligence agencies have – or are said to have – cooperated with NSA.

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¹ See GLENN GREENWALD/EWEN MACASKILL/LAURA POITRAS, Edward Snowden: the whistleblower behind the NSA surveillance revelations" *The Guardian*, 10 June 2013.

² See JAMES BAMFORD, *Body of Secrets: Anatomy of the Ultra-Secret National Security Agency*, New York 2007.

³ See GLENN GREENWALD/EWEN MACASKILL/LAURA POITRAS, Edward Snowden: the whistleblower behind the NSA surveillance revelations" *The Guardian*, 10 June 2013.

⁴ See JAMES BAMFORD, *Body of Secrets: Anatomy of the Ultra-Secret National Security Agency*, New York 2007.

The spectrum of opinions is reflected in the headline of The Guardian of 10 June 2013 which reads “Edward Snowden hailed as hero, accused of treason”.⁵

I have no intention to specifically comment on the Snowden case. It is no more than a symptom. I want to go to the basic issue involved. It can be summed up by what I have chosen for the title of my paper: security *versus* freedom.

Of course, we all want to live in security and we all want to live in freedom. Those who don’t are either anarchists or lunatics or both. As I have already demonstrated fifteen years ago,⁶ they have no role and no right, not even in a pluralistic society.⁷ And if we accept that complete security and complete freedom cannot be had at the same time, we will all agree that we want to have as much security and as much freedom as possible.

So far, there is no dispute. However, the formula “as much security as possible and as much freedom as possible” obscures the problem. The problem starts as soon as we recognize that it might be necessary to give up, to a certain degree, security I favor of freedom or freedom in favor of security. Therefore, the formula has to be modified in one of two ways, into either “as much freedom as necessary and as much security as possible” or “as much security as necessary and as much freedom as possible”. Or, in other words, do we want to restrict security in favor of freedom or do we want to restrict freedom in favor of security?

Of course, some will not accept this alternative and allege that complete security is complete freedom or that complete freedom is complete security.⁸ I believe that this allegation has flaws both from the point of theory and of practice. Therefore, it seems that it is not realistic. And as long I have no proof to the contrary, I will dismiss it.

II. Security and freedom as aspects of the common good

In a pluralistic society especially, the state and its law – and, by the way, the international community in its various forms of organization and its law – can justify their claim to recognition by the various individuals only if they offer a sufficient equivalent. And it can be shown that this equivalent is the establishment and the preservation of the common good. The problem of security versus freedom must therefore be discussed in the framework of the common good.

Now, the common good has three aspects: security, freedom and welfare. But which of them is the most basic aspect? In order to find out the answer we can proceed both historically or doctrinally. I shall do both.

A. Historical attempts to solve the problem...

The relationship between security and freedom has been discussed, in the course of modern times, as a special form of the relationship between law and freedom. The first to do so was Thomas Hobbes (1588-1679) who suffered from the traumatic experience of the English civil war and came to the conclusion that no security can be had without surrendering one’s freedom to the state.⁹ John Locke (1632-1704) who does not seem to have been equally traumatized by the civil war concluded that security does not require a

⁵ *The Guardian*, Online edition: <http://www.theguardian.com/world/blog/2013/jun/10/edward-snowden-revealed-as-nsa-whistleblower-reaction-live>

⁶ HERIBERT FRANZ KOECK, *Recht in der pluralistischen Gesellschaft*, Vienna 1998.

⁷ Cf. *ibid.*

⁸ Dicta like “The precondition to freedom is security” or “The precondition to security is freedom”, if taken to their extreme, are tantamount to these allegations.

⁹ Cf. THOMAS HOBBS, *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil*, London 1651.

full surrender of freedom, and that, therefore, man can reserve his freedom by retaining certain fundamental rights with which to interfere the state has been given no power.¹⁰

While this view is still the basis of modern catalogues of fundamental rights as they emerged during the eighteenth and nineteenth century and spread in the course of the twentieth, some writers considered a “state-free” sphere of fundamental rights as theoretically fuzzy and existentially unsatisfactory. It was their aim to reconcile freedom and law (and, for our ¹¹purpose, freedom and security). Jean Jacques Rousseau (1712-1778) did so by arguing that the decisions by the legislative body reflected the *volonté générale* and that the *volonté générale* was infallible. It therefore was everyone’s duty of to conform to the *volonté générale* which was to be considered the expression of his own better will. The German idealists, from Johann Gottlieb Fichte (1762-1814) up to Georg Wilhelm Friedrich Hegel (1770-1831) solved the problem by claiming that man was attaining his perfection by becoming a perfect citizen, a quality that included his absolute consent to the law of the state.¹² Here again, freedom and order (and, for our purpose: security) coincide.

B. ...and their weakness

However, all these latter theories presuppose that the legislator is always right and the dissident is always wrong. But insight and experience tells us that these theories are aloof from reality. They do not take into account the necessary limits of human perception (and, by the way, the possible limits of human morality).

III. Reconciliation of security and freedom

For this reason, legal action taken to set up security may unduly restrict freedom; and legal precautions in favor of freedom may unduly jeopardize security. It is therefore necessary to find the right balance between security and freedom. This brings us back to our starting point. Security and freedom have to be reconciled in such a way as to permit the enjoyment of both.

Such reconciliation between security and freedom must be possible because both are part of the common good. But since both security and freedom are part of the common good and since the common good cannot comprise conflicting values because the common good cannot be contradictory in itself, there cannot be a conflict between security and freedom if both are understood correctly. If, in today’s discussion, there seems to be such a conflict, it can result only from a misunderstanding, either a misunderstanding of security or a misunderstanding of freedom.

It is therefore necessary to examine more closely the correct extent of both notions.¹³

A. Security the precondition of freedom

I start from the premise that nobody can enjoy freedom if he is dead. Therefore, security first and foremost entails the protection of life. Such protection calls for not only repressive but also preventive measures. We can find an analogy on the international level. Chapter VII of the UN Charter speaks of “Action with Respect to Threats to the Peace,

¹⁰ Cf. JOHN LOCKE, *Two Treatises of Government*, 1st ed. published anonymously London 1689.

¹¹ Cf. JEAN JACQUES ROUSSEAU, *Du contrat social ou principes du droit politique*, Amsterdam 1762.

¹² See ALFRED VERDROSS, *Abendländische Rechtsphilosophie*, 2nd ed. Vienna 1963.

¹³ For a an extensive discussion of the issues involved prior the Snowden affaire see ANDREAS VON ARNAULD/MICHAEL STAACK (eds.), *Sicherheit versus Freiheit?* Berlin 2009; SIEGFRIED STROBEL/DIETRICH UNGERER (eds.), *Sicherheit versus Freiheit*, Karlsruhe 2011; and RÜDIGER VOIGT (ed.), *Sicherheit versus Freiheit. Verteidigung der staatlichen Ordnung um jeden Preis?* Wiesbaden 2012.

Breaches of the Peace and Acts of Aggression“. Threats to security equally warrant preventive measures.

1. Preventive measures and the case of doubt

a. Doubt about the threat

There will be few to dispute this conclusion. But there others who, even if they would agree with this conclusion in principle would challenge preventive measures in a particular case by arguing that a threat to security has not been established. This leaves us with the question of what to do in the case of doubt. Are preventive measures justified if there is a potential threat to security or only of there is an actual threat to security? This is a question that is well known to all of us albeit in a different field. If we go for a walk we have to decide whether or not we will take an umbrella. If rain is likely, it would be unreasonable to leave the umbrella at home. But is it unreasonable to take the umbrella if rain is not likely? Is it unreasonable to take precautions against a danger that is not likely but still possible? Do not all of us take out insurances to protect us against damages that are possible but not likely? Comparatively few houses and flats are burglarized, but most of us take out household insurance. Comparatively few cars are stolen, but many of us take out theft insurance. And if somebody would be inclined to argue that taking out insurance is not really a preventive measure: don't we use safety doors and anti-theft devices to protect our property against possible though statistically unlikely dangers? And in the area of health: don't we undergo all kinds of vaccinations against possible infections? And the precautions propagated by the World Health Organization against AIDS transmission also do not allow for the so-called reasonable risk.

These examples demonstrate that a risk taken in the case of doubt is not considered reasonable; and that the case of doubt is sufficient to warrant preventive measures.

b. Doubt about the effectiveness

But there others who, even if they would agree with this conclusion in principle, would challenge certain preventive measures by arguing that their effectiveness has not been established. This leaves us with the question of what to do in the case of doubt. Are preventive measures justified if their effectiveness is disputed? Let me give another example from the area of health. There is hardly any medicine the effectiveness of which is not disputed by a smaller or greater number of doctors. Does that mean that they should not be prescribed or that we should not take them? And if we read the package inserts of most medicines and the potential risks they involve, don't we still rate the risk for our health higher if not taking the medicine than if taking it?

These examples demonstrate that to take a certain measure in a case where its effectiveness is questioned by some and supported by others is considered to be more reasonable than to abstain from it. In the case of doubt, it is better to do something possibly effective than to do nothing.

2. Doubt no reason to refrain from preventive measures

It is therefore better to apply preventive measures against a threat to security even if it is doubtful whether there exists such an actual threat and even if it is doubtful whether the measures will prove effective.

B. The inherent limits of freedom

Now we turn to freedom. Here, I start from the conclusion just made that it is reasonable to take the necessary measures for the protection of security even if the threat to security and the effectiveness of the measures may be doubtful. Since it would not thus be reasonable to object against such necessary measures, there cannot be, at the same time, a

reasonable claim to freedom where such measures are concerned. Or, the other way round, no claim to freedom can be regarded reasonable that conflicts with necessary measures for the protection of security. Freedom may not be invoked as an exception where necessary measures for the protection of security are concerned. All freedom is limited by the necessary protection of security. This limitation is inherent to freedom and therefore does not constitute an interference with freedom that would be alien to its character; rather, it is inherent in the notion of freedom.¹⁴ It is therefore more correct to speak of limits of freedom than of limitation of freedom. The limits exist *a priori*; and to proceed on their basis is not a limitation in the strict meaning of the term.

We could leave it here because our conclusions that all freedoms are limited by what is necessary for security includes all aspects of freedom and does not except any of them. Yet, much concern seems to exist, in the context of the Snowden or NSA affair, with regard to what is called the right to privacy and, more particularly, to personal data protection.

1. The danger of abuse

We all agree that the abuse of personal data is a bad thing and should be avoided. But what constitutes an abuse of personal data? If I am a terrorist and access to my personal data is used to find out about me and my activities, either to prevent them or to bring me to justice, can I justly claim that such use of my data constitutes an abuse? If I am not a terrorist and not even a criminal offender and my data are used for indirectly finding out terrorists or criminal offenders by sorting me out on the basis of certain behavioral patterns, can I justly claim that such use of my data constitutes an abuse? What damage does a law-abiding citizen suffer from being found out as such?

Of course, the objections against collecting and storing personal data do not come from a concern that the authorities are enabled to distinguish between good and bad people, good and bad taken as an abbreviation for being or not being law-abiding. The objections are nourished by the fear that collected data could be abused in some manner, for instance in connection with employment or with health insurance, or, at least for the purpose of selective advertising.¹⁵

I cannot decide whether this fear – based on the assumption that data collected and stored by government agencies are likely to get into wrong hands – is justified. But if this should be the case, this is not a question of data collection and storage but of their abuse. Such abuse has to be prevented as well as possible; and this means that all reasonable precaution has to be taken that such data may not be abused in any way. I know the counter-argument, namely that even the strictest precautionary measures are not sufficient to absolutely exclude any abuse; and that, therefore, the only possible way of absolutely excluding data abuse is to exclude data collection at all.

2. The risk of abuse to be accepted

This, of course, reminds me of similar objections which have been raised in the past or are still being raised against certain forms of machine driven traffic. But though it

¹⁴ Cf. NOAH STAHL, *Freedom Versus Security: The False Alternative*, 2006, <http://the-undercurrent.com/freedom-versus-security-the-false-alternative/>

¹⁵ Cf. BERND GREINER, *9/11. Der Tag, die Angst, die Folgen*, Munich 2011; CONSTANZE KURZ/FRANK RIEGER, *Die Datenfresser. Wie Internetfirmen und Staat sich unsere persönlichen Daten einverleiben - und wie wir die Kontrolle darüber zurückerlangen*, Fischer Taschenbuch 2012; MARITA NEHER, *Albtraum Sicherheit. Interessen und Geschäfte hinter der Sicherheitspolitik*, Frankfurt/Main 2013. Cf. also DEBATEWISE. WHERE GERAT MINDS DIFFER, *Security vs. Liberty*, <http://debatewise.org/debates/2663-security-vs-liberty/>, a summing up all the “yes points” and the “no points”

was impossible to guarantee that sparks emitted by the railroad engines may never set in fire the crops on the field railroads were constructed; and though it is impossible to guarantee that no car will cause an accident, highways and automobiles are still built for the easy and speedy transfer for persons and goods. Equally, while nobody can guarantee that there will be no more plane crashes in the future, still most of us consider it reasonable to use an airplane for bridging long distances in a short time. We can learn from these examples that it would be unreasonable to stop the collecting and storing of data for the protection of security because no absolute guarantee against the abuse of such data can be given. The only reasonable conclusion is that those who collect and store data have the obligation to do their utmost in order to prevent their abuse. Here as in any other connection, we have to recall the legal principle *abusus non tollit ius*, i.e. that he who has a right does not lose it because it is or, all the less, because it might be abused.

Concededly, there may be some data which, while not indicative for a terroristic or otherwise illegal conduct, may still be embarrassing for the person in question. This could be so in all cases where the data disclose facts or acts which would not be acceptable to everyone. We may think here, for example, of special sexual inclinations and preferences which are part of one's privacy in the original meaning of the word. But this can't be helped because security as a social good in which all have an interest (and which, in fact, is the first and foremost value of the common good) rates higher as the interest of any particular person in not being embarrassed.

If society – even pluralistic society –, organized in the state, may require everyone to make his just contribution to the common efforts of militarily defending it when suffering from an unjust aggression by another state, and if it is therefore – at least in principle – the duty of everyone to risk life and limb in the course of such defence, it would be illogic to allege that there does not exist, again for everyone, the duty to risk his privacy for the protection of security.¹⁶

IV. The need to adapt to new developments

When speaking up against data collection and storing being done in a way that may be necessary for the protection of security, often national laws, and, more particularly, national constitutions and the fundamental rights catalogues contained therein are invoked. Here again, the fundamental right to privacy plays a central role. This right, and in connection with it the protection of personal data, has also been given attention by constitutional courts. Their decisions sometimes seem to indicate that the protection of personal data is so high a value, and intrusions upon this right have to be so strictly excluded, that the value of security has to give way.

This can be explained by the fact that the use of personal data originally was a means of repression against persons who were suspected of having been involved in a criminal offense. Today, the use of personal data has become a means of prevention of terrorist acts and other crimes even before any particular person has become a suspect. In the context of crime prevention, the old rules about data collection and retention have

¹⁶ See OTTO DEPENHEUER, *Selbstbehauptung des Rechtsstaats*, Paderborn 2007. – This approach also underlies the Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC", EU Official Journal. April 13, 2006. The data is required to be available to "competent" national authorities in specific cases, "for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law".

become obsolete.¹⁷ If the best way to sort out terrorists is to have society at large run through a security program, it is not reasonable to make the application of this program dependent on the existence of a sufficient suspicion against everyone.

If the traditional rules for data collection and storing are outdated, they have to be changed. Often, no change in the law as it is written down will be necessary. Where the restrictions imposed on data handling have been worked out by the courts – and here, as I said, mainly by the constitutional courts¹⁸ – in interpreting fundamental rights it is up to the courts to adapt their interpretation to the requirements of new developments. If courts should fail to react to these developments, adaptation of the law would become a matter for the legislature.

The present campaign against collection and storage of data in the combat against terrorism has taken on features of social hysteria.¹⁹ Lack of sound information and naivety can only partly explain such hysteria. There can be little doubt that it is also fuelled by those for whom security is not the primary goal; there has always existed a certain inclination the intelligentsia to self-doubt and to doubt in the institutions of state and law or, to put it more clearly, an inclination to anarchism. Of course, these people only constitute a minority, and their opinion is not the opinion of the public at large. But public opinion and published opinion often differ; and the media rarely live up to their obligation of fair and comprehensive information. And the fact that Snowden was granted temporary asylum in Russia is an indication – not so much of this country's high standards in the area of human rights but – of the Kreml's satisfaction that the present debate might weaken the United States defensive strength.²⁰

The present situation would be a matter to laugh about were it not a matter to be pathetic. Security, our all security, is too important to take the situation lightly. It is no consolation that terrorist acts made possible by an imbalance between the demands of real security and imagined freedom will hit also those who are directly or indirectly responsible for not taking all the measures necessary for the preservation of security.

¹⁷ This applies in particular to the storage of data before there is an imminent danger in a concrete situation. It is necessary to differentiate between two notions which so far have been considered to denote the same thing, namely “imminent danger” and “exigent circumstances”. The latent threat of terrorism may not be an imminent danger in the traditional meaning of the term, but it certainly constitutes exigent circumstances.

¹⁸ See, e.g., the decision of the German Constitutional Court, BVerfG, 1 BvR 668/04, stating that „Maßnahmen der Gefahrenabwehr, die in die Freiheitsrechte der Bürger eingreifen, setzen eine konkrete Gefahrenlage voraus. Die Strafverfolgung knüpft an den Verdacht einer schon verwirklichten Straftat an. Solche Bezüge fehlen, soweit die Aufgabe darin besteht, im Vorfeld der Gefahrenabwehr und Strafverfolgung Vorsorge im Hinblick auf in der Zukunft eventuell zu erwartende Straftaten zu treffen. Deshalb müssen hier die Bestimmtheitsanforderungen spezifisch an dieser Vorfeldsituation ausgerichtet werden. [...] Die Norm muss handlungsbegrenzende Tatbestandselemente enthalten, die einen Standard an Vorhersehbarkeit und Kontrollierbarkeit vergleichbar dem schaffen, der für die überkommenen Aufgaben der Gefahrenabwehr und der Strafverfolgung rechtsstaatlich geboten ist.“

¹⁹ Fortunately, this hysteria is not as wide-spread as the present discussion in some countries could make believe. It is significant that WIKIPEDIA articles on telecommunication data retention have appeared only in German, English, Suomi, French, Dutch and Swedish, while WIKIPEDIA articles on Dragnet (*Rasterfahndung*) have appeared only in English, German, French and Euskara (Basque).

²⁰ A more superficial explanation of the Russian move is given by ZACHARY KECK, Why Did Putin Grant Edward Snowden Asylum? Revenge, in: *The Diplomat*, August 6, 2013, <http://thediplomat.com/the-editor/2013/08/06/why-did-putin-grant-edward-snowden-asylum-revenge/>, who argues that “Putin was handed a golden opportunity to extract payback against all the Congressional and U.S. officials who have been harshly critical of his human rights record, and he took it.”