Strasbourg, 28 October 2008

CDL-JU(2008)036
Engl. only

CoCoSem 2008 / 010

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with
the Constitutional Court of Armenia
and
the Conference of the Organs of Constitutional Controls of the Countries of Young Democracy

XIIIth YEREVAN INTERNATIONAL CONFERENCE

ON THE "FUNDAMENTAL CONSTITUTIONAL VALUES AND PUBLIC PRACTICE"

3-5 October 2008
Yerevan, Armenia

REPORT

"Rule of Law and State Governed by Law"

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Rule of Law and State Governed by Law

Genesis and Evolution of the Rule of Law – From Antiquity to the US Constitution

Contemporary democratic, law governed nation state, conforming to the concepts of the liberal and of the welfare state, is a an outcome of centuries lasting evolution.

Modern constitutionalism uses a vast array of terms[1] when expressing the idea that in a constitutional democracy all legal subjects, including state authorities and officials, when performing governance should be bound by the law. The rule of law is a sine qua non prerequisite to democratic and responsible government limited by the constitution within the modern nation state, on one side, and to the supranational governance within the integrated states and multilevel constitutional pluralism in Europe.

Within the comparative law context legal terminological notions reflect conceptually two basic variations of the principle – the law governed state and the rule of law. Those two might be identical to the layman, but scholars, committed to researching this area, usually consider the differences in their meaning.

The common connotation of the principle, regardless of its modifications, is the universal and equal binding force of the law for all physical and legal persons when exercising state governance or implementing fundamental human rights. But the terminological difference might be misleading. In the law governed state, the state is bound by the law, which it creates and implements by the governmental institutions. The rule of law requires equal compliance with legal norms by all legal entities, natural persons and the state itself, within its boundaries. If we, however, assume that, by virtue of state sovereignty, the law has primacy in the system of social control, we will see that, in the law governed state, the requirement for all legal subjects to be universally and equally bound by the law is a result of the implementation of the constitutional principle.[2]

Within the context of the main legal families, there is no doubt that, in terms of time and space, the genesis and evolution of the law governed state cannot be identified with the rule of law and vice versa.

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[1] The term law governed state is the closest equivalent of the German notion of *Rechtsstaadt*, respectively of the French concept of *etat de droit* and the English expressions *state bound by the law, state under law, legal state*, which are used in the translations of European constitutions, but remain unknown to British and American lawyers. Just the opposite, the rule of law has a relatively precise meaning in the common law systems, but in the continental civil law families it is translated somwtimes as governance of law, and also, although incorrectly, governance of the laws or through the law. Leaving aside the various trends in the doctrine, attributing different meanings to the notions, it is worth noting that terminology should be clarified and unified for the sake of clarity

[2] There are also other differences in literature. Theoretically, it is sustained that the rule of law is based upon the correlation between the independence and the dependence of the law upon the state, while the law governed state is a symbiosis between the state and the law. In the understanding of C. de Malberg the French version of the law governed state is expressed by the recognition of fundamental rights, which limit the state power, or the constitutional state as a guarantor of fundamental rights, see M.Rosenfeld, The Rule of Law and the Legitimacy of Constitutional Democracy, in Sothern California Law Review, v..74, 2001,1307-1351, 1319, 1332

The principle of the rule of law emerged and is predominant in the Anglo-Saxon common law legal family, while the nation state constitutions, belonging to the continental or civil law family, primarily use the notion of the law governed state. Within the context of the contemporary constitutional pluralism rule of law is the sole option for supranational level of constitutionalism for the EU is not and probably will never become a supranational state entity but union of states, while both options of the law governed state or rule of law can be used for within the nation state.

While the rule of law emerged much earlier in human civilization, the law governed state as a principle was established after the revolutions, which led to the advent of the first written constitutions in Europe. Going back to the antiquity, long before the forming of the contemporary legal families, roots of the rule of law concept can be traced while law governed state as a legal construct is unknown to the ancient Greek and Roman law systems.

The first ideas about the rule of law could be traced back to the antiquity and polis democracy in the ancient Greece. Aristotle relates the rule of law to justice, equality and governance, based on order. According to the author of Politics it is not fair for someone to rule more than he submits, but it is fair to govern, based on order. In the ancient Rome Cicero held that the observance of the laws was a pre-requisite to freedom, and that the laws should be drafted, using general rules and judges should apply the laws in deciding the cases and not create them.

In his legal doctrine St. Thomas Aquinas proposed a set of requirements, for the legal norms, should meet in order to be in compliance with natural law. They should reflect the common interest, justice, seen primarily as proportionate equality. Legal acts should be valid when issued by the legislature within its competence and should be promulgated so that all of them become known to all legal subjects.[3]

In the Anglo-Saxon family the laws aquired supremacy also by conforming to the requirement for compliance with the Magna Carta 4. This was centuries before Sir E. Coke proclaimed in 1610 in the Bonham case the principle that common law was superior and should be complied with as a prerequisite for validity of all legal acts5. He contributed by adding the supremacy of common law, the independence of magistrates when administering justice and the equality before the law.

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[3] F.Neumann,The Rule of Law, Heidelberg, 1986, 54 ;

I cannot help to bring here a real story which sounds like a joke. Before couple of decades a Polish colleague – compativist visited North Corea. On the border he was told by the border police officer that the national legal system consists of 3 categories of legal provisions. The first layer being all that are universally known, the second group which is familiar only to public and party officials higher than certain rank and the third group of rules stem from the will of the ruler. When my colleague asked how are the second and last group of rules enforced when their content is unknown the officer explained that each time when thereal situation concerns regulation by these categories of rules he has to give a telephone call to the superior in command who delivers the rule related to the concrete case.

[4] In 1368 the 42th law of Edward III stipulated that the Magna Carta "is applied and observed in all cases; and when there are other acts, which contradict it, the latter are deemed non-existent." A.E.Dick Howard, The Road from Runnymede, Magna Carta and Constitutionalism in America, Charlottesville, 1968, 9; During the reign of the Tudors the Magna Carta was not applied and the king did not strive towards compliance of his acts with it, see Idem, Magna Carta, Text and Commentary, Univ. Press of Virginia, 1999, 25

[5] See Bonham case of 1610, M. Cappelletti and W. Cohen, Comparative Constitutional Law, Charlottesville, 1979, 9-10.

In the age of revolutions the rule of law and the equality before the law led to the creation of institutional and procedural guarantees against absolute power and arbitrariness in the first written constitutions. Liberalism saw in the rule of law a universal tool for "taming" the state power to defend freedom.

During the English revolution J. Harrington enriched the idea of the rule of law in his work Oceania.[4]

Going back to the time, when the state constitutions in North America were drafted just before the Declaration of Independence was adopted by the Continental Congress in 1776, J. Adams saw the rule of law as a criterion to determine the form of government. The republic, he wrote, is a state, where government is carried according to the law, in contrast to the arbitrariness of monarchy, which is not an empire of law, but a personal regime.[5]

Law Governed State – Evolution and Substance

In Germany the principle of the law governed state emerged as an antipode of the police state. According to I. Kant understanding civil liberty balanced state power and derived from the laws. In his concept for a law governed state I. Kant included "the supreme measure of coordination between state structure and legal principles, to which reason binds us to strive through a categorical imperative ".[6]

The German doctrine of the Rechtsstaat was created by R. von Mohl in the first half of the 19th century and was related to the liberal tradition 7. Initially, the idea was based upon Kantian liberalism alone, but later it was developed as a principle, having its own substantive and procedural aspects. Thus, several basic forms emerge in the development of the law governed state in the last two centuries. The substantive (material) law governed state, which which was transformed from a liberal state in the 19th century to a welfare state in 20th and 21th century. The formal law governed state and the rule of law in its formal meaning may be positive or negative.

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[4] The Political Works of James Harrington, Cambridge,1977, 161

[5] J.Adams reproduced the phrasing of J.Harrington, who took this expression from Aristotle: "Government of laws and not of men.", see J.Adams, Thoughts on Government, april 1776, Papers v., 4 , 87, http://press-pubs.uchicago.edu/founders/documents/, v.1 ch4s5.html

[6] И.Кант, Метафизика нравов, Учение о праве, Соч. т. 4, часть 2, Москва, 1965, 240
Not only this founding idea, but the whole system of concepts of I. Kant is based on the government being bound by the law to guarantee civil freedom. Thus the state is an association of people, based on laws and justice. Each law governed state is based on three principles – the freedom of each member of society as a human being, the equality of each person to the others as a legal subject and the independence of each member of the state as a citizen. Citizens take part in the creation of the laws directly or through representatives in order to submit voluntarily to the law, which they have created themselves, see R.Grote, Rule of Law, Rechtsstaat and " Etat de Droit " in Constitutionalism, Universalism and Democracy – a Comparative Analysis, ed. C.Starck, Nomos, Baden-Baden 1999, 269-365

[7] The expression was first used by C.Th.Welker in 1813 and R. von Mohl developed the idea in 1829; Regarding the history and development of the notion, see E.-W.Bockenforde, State, Society and Liberty, Studies in Political Theory and Constitutional Law, Berg, Oxford, 1991, 47-70; O. Kirchheimer, The Rechtsstaat as Magic Wall, in Politics,Law and Social Change, Selected Essays of O Kirchheimer, Columbia Univ. Press, New York, 1969, 429-452; R. Grote, Rule of Law, Rechtsstaat, and "Etat de droit", in Constitutionalism, Universalism and Democracy - a comparative analysis, ed. C. Starck, Nomos, 1999, 269-306; J-Y. Morin, The Rule of Law and Rechtsstaat Concept: A Comparison, in Federalism - in - the - Making, ed. by E. Mc Winney, J. Zaslove, W. Wolf, Kluwer, 1992, 60-85.

In the second half of the 19th century the concept of the formal law governed state evolved within the framework of the conservative theory of the Rechtsstaat. The principle of the law governed state was limited to a formal concept and the value neutral approach towards the state and the legal system only led to the supremacy of the acts of Parliament, which were to be observed by the bodies of the executive. The severance of the ties between legitimacy and legality reached its completion in the classic definition of F.J. Stahl, according to which the Rechtsstaat did not realize moral ideals and did not express the nature of state functions and governance, but is only the means, method and nature of their implementation.[8] However, value neutral rule of law might be used by an arbitrary government to shiled despotism with the law.

The principle of the formal law governed state was further developed and enriched by R. von Gneist Probably the most important of his innovations and contributions has been justification of administrative justice.

The practical implications of the conservative notion of the formal law governed state are related to upholding legality, but ignore the substance and values , which the law should meet. Further it limits the content of the principle to the procedure for adoption, observance and application of the laws, regardless of their content. The formal concept of the rule of law is nowadays supported by most representatives of legal positivism. According to J. Raz, the main task of the principle is to guarantee legal security in the actions of the state and other legal subjects, which can plan their activities, as long as the observance of laws increases the predictability of the results expected. Thus the principle of the rule of law has a negative function, since it protects citizens from the arbitrariness of despotic power9. According to J. Raz, the formal content of the principle pre-supposes characteristics of the law, through which it can effectively determine the conduct of legal subjects. Legal acts should not be retroactive, they should be clear, relatively stable and created in furtherance to sustainable, open and common procedural rules. At the same time, the enforcement of legal norms should not deprive the law of its ability to determine the conduct of legal subjects through deformations in the application of the law. Above all things, these features of the law relate to the independence and the impartiality of the judiciary, accessibility of legal protection to curb the violation of the law through the discretion of the institutions, administrating justice.[10] In this way the formal law governed state and the formal rule of law concentrate upon procedural requirements, prescribed in the laws and the means for enforcement, thus isolating legal acts from social values and principles. The formal meaning of the principle has been limited to guaranteeing of legality, legal security and the reasonable expectations of legal subjects, but has ignored the problem of legitimacy in the context of the law governed state.[11]

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[8] According to the definition of F.J.Stahl "the state should be governed by law. It should outline the limits of state action, as well as the sphere of freedom of citizens and should, forcefully, apply the moral ideals, but not more widely than what is established in the law. This is the concept of the law governed state, but not in the sense that the state governs the legal order without administrative goals and only protects the rights of the individual. This does not mean at all an aim or substance of the state, it only determines its type and character." F.J. Stahl, Rechts und Staatslehre, Bd. 11, 2 Hafte, 1856, 137

[9] M.L.F. Esteban, The Rule of Law in the European Constitution, Kluwer, 1999, 92

[10] J.Raz, The Rule of Law and its Virtue, Law Quarterly Review, N 93, 1977, 196; for the differentiation between the formal and substantive material law governed state, see also P.Craig, Formal and Substantive Conceptions of the Rule of Law, in Public Law 1997, 467; R.S.Summers, A Formal Theory of the Rule of Law, in Ratio Juris, 1993, N.6, 127

[11] J. Raz turns the rule of law into an instrument and compares it to a good knife, whose basic benefit is to cut well. The good implementation of the principle of the rule of law requires qualities, which would guarantee the effective application of legal acts. The rule of law is the substantive value of the law and not its moral value, J.Raz, Op.cit., 225

Types of Law Governed State and Some conclusions

The debate in Weimar Germany added new dimensions to the nature of the law governed state.

From the standpoint of legal normativism, H. Kelsen challenged the meaning of the notion of the law governed state since every state represented a legal order and was based on the law. Every state, according to him and his followers, was governed by law, thus the use of the notion law governed state was a redundancy. The formalization of the notion and the approach of H. Kelsen, shared by H. Lasky in Great Britain, leads to the compatibility of the principle with all forms and types of state, including totalitarianism. That is how a conclusion is reached once again that the formal law governed state may justify despotism, when tyrannic power turns arbitrariness into law using value free approach to the rule of law. The formal law governed state gives a legal form to the implementation of the sovereign power, given that the government itself has submitted to the requirement to observe the law it has created. Sovereign power limits itself by the law, but the law is an expression of the power, not limited by democratic values and principles. The abiding of the laws by the state rationalizes governance, irrelevant from the values of democracy, which does not become more democratic under the requirement for the formal rule of law.[12] Ultimately, the rule of law might be transformed into a rule through law.

C. Schmitt's decisionism treated legal norms as a product of a political decision. His analysis of the hierarchy of the legal system goes outside legal positivism, which leads to perfection the formal law governed state and legal exegetics and finds its place under political science. C. Schmitt defined the law governed state as a mixed form of state, since it unites, in its constitutional system, the values of liberalism and democracy.[13] The perfect critique of the liberal law governed state, which C. Schmitt creates, does not guarantee, however, the preservation of the basic democratic values.

Totalitarianism marked the end of the Rechtsstaat, but long before that the reducing of this principle to legality shakes to some extent the foundations of the Rechtsstaat, by limiting democracies' capacity for self-defense against despotism and facilitating the establishment of dictatorial regimes in the period between the wars in Europe.

The liberal law governed state is, chronologically, the first prototype of the substantive law governed state. The essence of the rule of law reflects the liberal constitutional principles and supports the basic features of the limited, democratic and responsible government. The legal safeguards of human rights include judicial protection against legal acts, which are to be controlled by independent and impartial courts. Thus, in contrast to the formal law governed state, the government cannot take political decisions in a legal form, for pursuing the interests and benefit of the rulers, which are based on command of sovereign authority.[14]

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[12] According to M. Neumann's metaphor, the formal law governed state, which he calls the state of laws, puts people into the situation of domesticated animals or laboratory mice and the law turns into an instrument for laboratory tests, see M.Neumann, The Rule of Law and Law and Order: Between Rechtsstaat and Gezetzsstaat www.trentu.ca/~mneumann.rulepap.html , 4

[13] C.Schmitt, The Liberal Rule of Law, in Weimar Jurisprudence in Crisis, ed. A.Jackobson and B.Schlink, Univ. of California Press, 2001, 162

[14] See for more details Дж.Н.Мур, Верховенство права: обзор, в Верховенство права, Москва, 1992, 10-53, 13-15

The constitutional principles of the liberal rule of law include people's sovereignty, the separation of powers, representative governance, limited and responsible governance, the control for constitutionality of parliamentary legislation and the judicial control over administrative action and legal regulations drafted by the executive bodies. The protection of fundamental rights and the constitutionally limited governance involve ensuring opportunities for broad public discussion, fair criminal proceedings, guarantees for personal freedoms, the freedom of religion, freedom of expression, assembly and association, holding free, competitive, pluralist and fair elections at regular time periods, liability of officials for infringements of laws, protection of social rights and the right to a healthy environment, civic control over the army and the security services.[15]

Back in Weimar Germany H. Heller supported the view about the welfare law governed state.[16] His system of ideas, including the analysis of the Weimar Constitution, presupposes interaction among the legal values, principles and norms and the objective laws of society, the ethical bases, the moral and other social norms. It is this approach, which allows us to outline the links between the social, political and legal substance of the constitutional principles, including the principle of the law governed state.[17] The stability of constitutional democracy is determined by the functioning of the welfare law governed state, based on the strive for social justice and social equality and individual dignity. The legal order encompasses full fledged system of second generation –economic and social rights as well as social safeguards and social benefits icluding medical care and pension funds. The growing social differentiation increases the responsibility of the state in the field of social coordination.[18] The participation in government involves the recognition of the equal right of individuals and their associations, being aware of their short-term and long-term interests in the formation of the substance of legal acts, which are product of the common will of the members of society. Enhancing legitimate expectations by including social security is probably the most important value added effect of the social (welfare) state to the substantive rule of law. The short overview of the evolution of the law governed state and the rule of law allows us to mark the forms of the rule of law, types and patterns of the law governed state Historically they include:

- A pre-modern (nasciturus) phase, preceding the emergence of the nation state, where, as from ancient times, the different elements of the notion of the rule of law are justified;
- The early law governed state and the rule of law, introduced in the first written constitutions;
- The formal law governed state and the formal rule of law during the second half of the 19th century;
- The liberal law governed state and the liberal rule of law during the 20th century;
- The welfare law governed state in the 4th generation of written constitutions, created after the end of World War II in Europe.

Rule of law in the nation state and beyond within the emerging supranational constitutional legal orders like the EU.

The main trend in the substative principle of the law governed state and the rule of law evolution is the expansion of their meaning by extending the scope of characteristics. However, increasing

[15] Ibid., 28-47
[16] D.Dyzenhaus, Legality and Legitimacy, C.Schmitt, H.Kelsen and H.Heller in Weimar, Oxford, 1997 169-216
[17] H.Heller, The Decline of the Nation State and its Effect on Constitutional and International Economic Law: The Nature and Structure of the State, in Cardozo Law Review, N 18, 1997, 1139 - 1216
[18] D. Dyzenhaus, Op.cit., 18

of criteria or the standards in the international hard and soft law to be met by the national constitutions in order to introduce the principle of the welfare law governed state narrows diminishes the number of countries, that meet those conditions.

The administration of criminal and civil justice ensures the legitimate monopoly over violence, which in constitutional democracies belongs to the state alone. Weberian definition of the state as the sole monopoly of legitimate coercion, excludes pluralism or disperssion of violence between paramilitary association and guarantees that citizens willresolve their conflicts through peaceful legal means, observing fundamental rights, the Constitution, international human rights instruments and the parliamentary laws. To introduce pluralism in the area of law enforcement by coercion and permit violence to be excercised between para military formations striving to achieve domination or balance in law enforcement instead of legitimate state monopoly coercion is per se the end of constitutional democracy, rule of law and modern democratic nation state.

The politically responsible government and the legal liability of the state and state officials for violations of rights are substantive features of the law governed state. Of course, the pre-requisites for achieving the fair justice in the context of the rule of law are the principles of independence, impartiality and fairness of the judiciary. The independence of judiciary should ensure the fair law enforcement, any pressure upon magistrates' work and acts on the part of state authorities, political parties, officials or physical persons has been prevented. No doubt telephone justice and absolute adherence to the " gramophone" or phonograph justice formula [19] within the civil law family judiciary does not comply with the essence of the rule of law.

The principles of the law governed state and the rule of law after World War II are founded on the primacy of international law, on the binding force and direct application of international treaties into domestic law and on the compliance of domestic legal order with the generally acknowledged norms and principles of international law. Constitutions and constitutional legislation are designed in consonance with the international and European standards established in the international hard and soft law based on the common democratic European constitutional heritage.

Concluding Remarks

With constitutional democracy triumph during the last decades of the 20th century, rule of law has become a common denominator among the principles entrenched in the new constitutions.

Besides the traditional obstacles practical enforcement of the rule of law or rechtstaat has to cope with new challenges. Three of them deserve special attention.

In the emerging democracies constitutional design of the rechtsstaat confronts underdeveloped legal culture on the part of the rulers and ruled. Due to the lack of active civil society and perceptions like legal nihilism and fetishism the living rule of law is abunds with unenforcible provisions and ineffective law enforcement. These defects of the rule of law might be cured gradually and the treatment might take generations that have lived their life in a constitutional democracy.

[19] The metaphor of phonograph justice was coined by F.Neumann. The picturesque expression connotes the the prohibition of the judge made law and limitation imposed on judges within civil law family countries to enforce the laws adopted by the parliaments without interpretation. Laconically stated in each case the juge is supposed to play the tune that has been printed in the disc by the legislator., See F.Neumann, The Democratic and the Authoritarian State, Free Press, New York, 38

One of the most fascinating events in contemporary global age is the emergence of multi level constitutionalism. Constitutional monism of the nation states is supplemented with supranational constitutional dimension by gradual constitutionalization through establishing international and European standards of constitutional democracy. Within European context two variously shaped and encompassing different sets of nation member states supranational constitutional streams evolve − Council of Europe, ECHR and jurisprudence of the Strasbourg court of Human Rights on the one side and the EU constitutional order for its member states on the other side.

In contrast to federations multilevel constitutionalism is not hierarchically structured like supremacy of the nation state constitutions within the national legal system. For the time being and in the foreseeable future integration through law and economic integration have not scheduled emergence of European super state neither EU would be transformed in omnipotent statal entity identical to that of the nation states. Primacy of the EU law and validity of EU standards will be guaranteed not by supremacy of a written formal supranational constitution but by contrapunctual constitutionalism where conflicts between the constitutional orders and harmony is achieved by the same democratic constitutional values and principles shaped by the common European constitutional heritage after the Westphalian peace treaty.

Like in contrapunctual music harmony is achieved only if different melodies are composed in one key so contrapunctual constitutionalism resolves and avoids conflicts by foundation of the national and supranational levels on the same set of democratic constitutional values and principles with the each one contents being modified and adapted to its respective constitutional orders.

In a constitutional pluralism rule of law transcends the *rechtsstaat* and the rule of law within the national legal system which is supplemented by the rule of law beyond the nation state on a supranational and international law level. The conflicts between different legal orders are unavoidable but the mechanisms for their resolution are built, negotiated and agreed upon in order to peacefully overcome them.

Terrorism and transnational crime pose the most formidable threat to the rule of law in contemporary constitutional democracies. The constitutional democracies confront actual dilemma that they have to preserve and protect the principle of the rule of law and constitutional democracy with the established procedures and instruments of the rule of law from individuals or groups that do not recognize the very fabric of the principle but aim to destroy democratic societies built on the rule of law. Indeed there has not been agreement between scholars and politicians on the content of terrorism neither there has been a legal definition of this term in any international law instrument. However, considering some of their implications terrorism and the rule of law are diametrically opposites. While on the one side of the antinomy lie values like predictability, security and legitimate expectations of people on the other side the goals are to be achieved by intimidation, fear, insecurity and unexpected harms to physical persons in order to exert pressure on government. While the constititions and the rule of law aim to limit coercion and resolve conflicts peacefully terrorism and transnational crime resort to unlimited coercion in order to achieve their goals.[20] Rule of law is an universal and integral principle and once it is suspended it or unrestricted violence to the criminals without observing fair trial, presumption of

[20] One of the best liberal definitions of constitutionalism emphasizing the constitutions role as frame of government was offered in the second half of the 19 century in the US by John Potter Stockton " The constitutions are chains with which men bind themselves in heir sane moments that they may not die by a suicidal hand in the day of their frenzy.", J.E.Finn, Constitutions in Crisis, Oxford University Press, 1991, , 5

innocence etc. is imposed, then the guarantee that the government and law enforcement would not become criminals themselves, standing on one and the same path with the criminals, will wither away. Leaving the rule of law ground to protect it though legitimated by the reason of state, constitutional dictatorship or limited emergency formulae transforms the law enforcement into criminal activity. Constitutional democracies and the principle of rule of law seem to be ill equipped to defend themselves against terrorist and international crime threats with the legal means of peaceful conflict resolution.