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**REPORT**

**“HUMAN RIGHTS ORIENTED EVALUATION OF SECURITY  
LEGISLATION. METHODS, BENCHMARKS AND ACTORS”**

**by**  
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## **German Institute for Human Rights**

- The German Institute for Human Rights (GIHR) is an independent body that promotes and protects human rights.
- The GIHR is an accredited National Human Rights Institution (NHRI) in compliance with the UN „Paris Principles“.
- The GIHR contributes to the promotion and protection of human rights by means of policy advice, research projects, expert discussions and educational programmes.

## **Preconditions of contemporary security policy**

- Legislation under the impression of a permanent terrifying threat (terrorism)
- Uncertainty concerning the nature, structure and extent of the threat  
→ Uncertainty concerning the precise aim of new security measures

*“Against the call for so-called “tough measures”, few political leaders can find the strength and wisdom or indeed the support to fight terrorism while preserving the established human rights protective system. Repressive sirens will always call for “new” harsh measures to meet these “new” challenges from terrorism and few leaders have the toughness to `hold the fort` in such circumstances.”*

## **Central features of contemporary security legislation I**

- Preventive security and surveillance measures involving a great number of innocent persons
- Often secret operations of police and intelligence agencies
- Cumulative use of new technologies preventive security and surveillance measures involving a great number of innocent persons
- Often secret operations of police and intelligence agencies
- Cumulative use of new technologies

## **Central features of contemporary security legislation II**

- Use of „profiling“ as a basis for security measures
  - Profiling of persons, assumed to be potentially dangerous
  - Profiling of situations, assumed to be potentially dangerous
- Transnational Character of security measures

## **Human rights obligations and the rule of law**

Esp.

- Human dignity/core HR guarantees
- Right to liberty
- Prohibition of discrimination
- Right to privacy / data protection
- Proportionality of measures taken

*“The strength of a state based on the rule of law becomes apparent when the state respects basic principles even in dealing with its adversaries.”*

## **Proportionality**

- Legitimate purpose

- Effectiveness of the chosen measure
  - (immediate threat, which can be defined precisely enough?)
- Necessity (→ less intensive measure?)
- No disproportion between restriction and aim pursued

### Human rights-oriented evaluation

- Evaluation ex ante
- Evaluation ex post

### Evaluation ex ante

- General threat assessment
- Definition of the aim of a legal provision as precise as possible
- Selection of the least intensive measure
- Examination of the expected effects on human rights
- Analysis of the existing uncertainties concerning facts, prognosis and effects
- Introduction of the results in the explanatory memorandum of the draft law

### Evaluation ex post

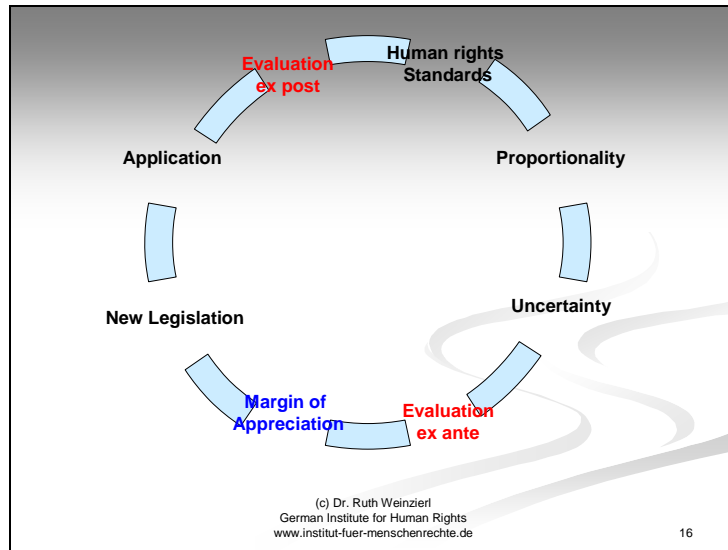
- Human rights control, e. g. through
  - Verification/challenge of the underlying facts, assumptions and prognosis
  - Information about the application of procedural safeguards in practice
  - Information about the interpretation of the law
  - Information about the cumulative effect of different measures
  - Information about the effectiveness
- Information to the legislator in order to allow fact-based readjustment, abolition or renewal of the law, where necessary

A duty to evaluate ex post and, where necessary, readjust legislation deriving from human rights and the rule of law?

*“Duties to monitor and readjust institutionalise learning processes as a necessary complement of legislative powers to enact new security legislation despite uncertainties concerning underlying facts and effects of legislation.”*

### Legislation on the basis of a high degree of uncertainty

- Underlying facts: Uncertainty about the nature, structure and extent of terrorism
- Underlying prognosis: Uncertainty about the future development of criminal and terrorist methods and structures
- Effect of the measures taken on human rights: Uncertainty about the effect of technical developments and international cooperation



### HR-oriented evaluation in practice I

Preventive

- surveillance measures

e.g.

- Telecommunication data retention
- Public video surveillance
- Fingerprint mining

Effectiveness?

Immediate threat, which can be defined precisely enough?

Disproportion?

### HR-oriented evaluation in practice II

Cumulative use of new technologies

e.g.

- + Mining of passenger data
- + Fingerprint mining
- + GPS
- + Video surveillance

Is the new law on telecommunication data retention in conformity with basic human rights principles?

### HR-oriented evaluation in practice III

Use of profiling

e.g. (Computer-aided) selecting of persons for enhanced law enforcement

scrutiny along criteria like national origin, religion, sex...

Effectiveness?

In accordance with the prohibition of discrimination?

Disproportion?

### HR-oriented evaluation in practice IV

**Transnational character of security measures**

e.g.

- Common EU-databases
- Exchange of PNR-data with US

Necessity?

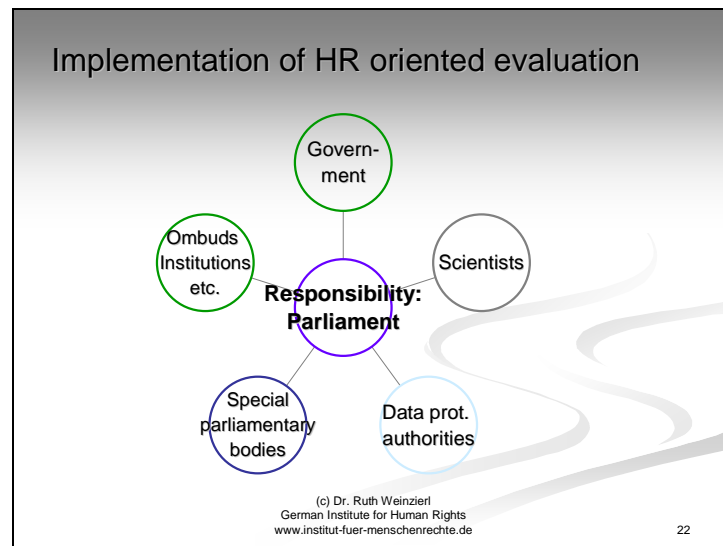
Data protection standards in other States / the EU?

Access to judicial control?

Misuse of the personal data in other states?

## HR oriented evaluation – actors

- Responsibility: Parliament
- Implementation: different actors
- Support/information: Government
- Support: Data protection authorities, Ombuds institutions etc.
- Methodology/support: Scientists



## Misuse of sunset and evaluation clauses

- Use as a means to reach a political compromise on law not in conformity with human rights
- Use of evaluation clauses instead of thorough evaluation ex ante
- Evaluation without methodical approach: use as a platform to promote government plans for new “tough measures“
- Evaluation as a ritual without the political will to challenge the conformity of legislation with human rights standards

## Evaluation ex ante-practical problems

- Political pressure
- Time pressure
- Government leading in information/knowledge
- Handling of demands of secrecy
- Lack of transparency
- Lack of a professional support structure within the parliaments

## Evaluation ex post-additional practical problems

- Lack of information about the precise aim and underlying facts, assumptions and prognosis
- Lack of relevant data
- No agreement about actors, criteria and procedures
- No methodic approach

## **Main points**

- Human rights-oriented evaluation of security legislation in cases of a high degree of uncertainty is a duty deriving from human rights and the rule of law.
- Parliaments are responsible for the evaluation.
- Methodology and a professional support structure is needed for the realisation.

## **References**

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- **Ruth Weinzierl**

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