Interview with Federal Constitutional Court Vice President, Justice, Professor Winfried Hassemer – "The State is No Longer the Leviathan"

By Reinhard Müller[*]

[This interview, conducted by Dr. Reinhard Müller in Frankfurt, was originally published, in German, in the *Frankfurter Allgemeine Zeitung* (FAZ) on 22 April 2004. A professor at Frankfurt University, Winfried Hassemer has been Vice-President of the *Bundesverfassungsgericht* (BVerfG – Federal Constitutional Court) and chairperson of its Second Senate since April 2002. He teaches criminal law, which is also his specialty in the Second Senate. From 1991 to 1996 he served as the *Datenschutzbeauftragter* (Public Data Protection Ombudsperson) for the state of *Hessen*; thereafter he was elected to the Federal Constitutional Court, having been nominated by the Social-Democratic Party (*SPD*). This translation was made by German Law Journal Co-Editor, Florian Hoffmann, and Co-Editor in Chief, Russell Miller. We are very grateful to Dr. Reinhard Müller and the FAZ for allowing us to translate and publish the interview in German Law Journal.]

MÜLLER: Is the *Rechtsstaat* (state governed by the rule of law) ready for fight against terrorism?

Vice President Hassemer: As far as the legal prerequisites are concerned, I believe it is.

MÜLLER: Is this also true with respect to the criminal law in particular, for example, in relation to the objectives of punishment? Can suicide-bombers be deterred?

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Vice President Hassemer: Suicide-bombers probably can not be deterred. What would be an appropriate deterrent? It does not seem to me a question of the criminal law. They would not be deterred by a different criminal law either.

MÜLLER: And they also could not be re-socialized, could they? That, in any case, is one purpose of imprisonment.

Vice President Hassemer: Since suicide-bombers appear to be, in the main, ideologically motivated, they should, in principle, also be amenable to re-socialization; it would at least have to be attempted.

MÜLLER: You state that our current law is sufficient. However, there seems to be an extraordinary threat, and we are hearing calls for extraordinary legal instruments to deal with the situation. In some countries, including *Rechtsstaat* democracies, this is already happening. Catch phrases such as Guantanamo, or "preventive detention" as applied in the United Kingdom, spring to mind. Is there a danger that such developments might spill over to us, as is already apparent in some criminal trials?

Vice President Hassemer: One can never be safe from such danger. Yet, my impression so far has been that the courts which have had to deal with these issues have remained steadfast with respect to the European legal tradition. In my view, the fundamental question is how much violence, as well as how many infringements upon basic rights can still be absorbed by the law, and where that thin line is located beyond which we consider a threat to be insoluble by legal means. On that level, citizenship-based criminal law becomes law used to punish the enemy, and law, as such, becomes war.

MÜLLER: And are you occasionally concerned that in the current discussion, this line is beginning to be reached?

Vice President Hassemer: Yes, I am concerned. With the intensity of the threat growing, this limit is being tested. And, there are certainly now a good number of people who feel that the present threat is so close and so terrible that old inhibitions should be set aside.

MÜLLER: Then we should be particularly concerned if there was a terrorist threat in Germany?

Vice President Hassemer: I am constantly thinking about this. It is one thing to reflect on whether there is reason for concern. I would say that there is reason for concern. Yet, it is quite another thing to evaluate whether the limit is publicly and

effectively questioned. Here there is always the secondary phenomenon of public discussion on the limits of the rule of law. Spectacular occurrences such as the torture-incident in Frankfurt heat up that discussion.[1] Suddenly, people start asking: are we still sufficiently prepared? And do we not artificially weaken or blind ourselves?

MÜLLER: Is not the discussion on freedom and security based on premises which are no longer tenable today? Does the citizen still, as in an absolutist state, have to defend himself against public power? Or have the weights not shifted?

Vice President Hassemer: Yes, the weights have shifted. I believe, indeed, that the role of the state has changed in the perception of its citizens. The state is no longer the Leviathan, that is, an entity at once threatening and nurturing. The state has left that role behind. Instead, the state has become, so to speak, civilized. Citizens no longer see the state as a cause of risks, but see risks as originating outside of the state, from third parties. And they see the state as a possible partner, a potential ally in overcoming these risks. And I believe that this changes the discussion on freedom and security insofar as that which is being claimed is no longer freedom *against*, but rather security *from* the state. The role of the state has, hence, and on account of this tension between freedom and security, changed in both directions. One can certainly say of this tension between freedom and security that, at the present moment, the weight has shifted towards security; and an end of that shift is, in my view, not in sight.

MÜLLER: Does this also mean that certain basic rights are no longer that important to citizens; take, for example, those on *Datenschutz* (data protection)? Have some of the rights which were initially, and with good reason, interpreted as negative (liberty) rights, changed their character in light of today's circumstances?

Vice President Hassemer: On the face of it, it would, indeed, seem as if some rights, such as those relating to data protection, are no longer seen as indispensable basic rights. One may recall, in this context, the discussions in the 1980s, which led to the creation of data protection ombudspersons, and of a fundamental right to *informationelle Selbstbestimmung* (informational self-determination). If one attempts

[1] Referring to a notorious incident in 2002, in which the Frankfurt Chief of Police was accused of having used improper methods – potentially amounting to torture -- on the main (and only) suspect of the abduction of Jacob von Metzler, son of the owner of a well-known Frankfurt private bank, in order to extract a confession on the whereabouts of the boy. The latter was subsequently found murdered, and the suspect, Magnus Gäfgen, was tried by the Frankfurt District Court and sentenced to life-imprisonment later that year; it was during the trial that his defense team alleged improper conduct by the Police-Chief, triggering a criminal investigation, as well as widespread discussion of the issue.

to transpose those discussions onto today's plane, one finds that the circumstances have changed significantly. I do not think that the citizenry would take to the streets today to demonstrate for a right to privacy or to data protection. I also believe that the nature of privacy as such has changed. Watching, for example, some television programs, one has the impression that a good number of people actually take pleasure in relinquishing at least aspects of their privacy. There ought to be public debate on why this is so. But these changes are an undeniable fact, take only, for example, our current use of public or cellular phones. What was previously considered to be privacy, notably an intimate space surrounded by social taboos, has fundamentally changed. I am not saying that it has necessarily changed to the worse, but it has changed.

MÜLLER: Speaking of telecommunications, is this also true with regard to electronic eavesdropping?

Vice President Hassemer: Yes, these are tectonic changes. The issue is not merely one of risk perception, social control, or security, but also of a changed attitude of individuals to their environment.

MÜLLER: You just said that you merely acknowledge these changes, rather than judge them. Yet, as a Justice of the Federal Constitutional Court, one has to say "stop" at some stage. On the other hand, of course, this changed perception surely does influence the law.

Vice President Hassemer: What we are talking about here is, so to speak, not yet a judicially settled area. If people deal with their privacy in a different manner, this will certainly eventually have some bearing on how we define informational self-determination; however, there are still a good many further steps to be taken before we can think about interfering in constitutionally guaranteed basic rights. That said, it is, of course, true that a changed attitude toward privacy is, in time, bound to give the basic right to informational self-determination a different color. Yet, this does not have anything to do with security or control, but with intimacy and its visualization.

MÜLLER: Is there a danger that Karlsruhe[2] interprets basic rights with too great an emphasis on the individual?

Vice President Hassemer: The danger that basic rights are subjectivized is certainly present. There is, however, the inverse danger that basic rights are too much seen

[2] Seat of the Federal Constitutional Court (the Editors).

from a community perspective. During the Nazi-era, the individual was precisely sidelined in favor of the community, and, with it also (individual) basic rights. Danger looms on either extreme. Yet, I believe that the Federal Constitutional Court has not succumbed to that danger. It has consistently held that, on one hand, the individual has a right to be left alone, and that, on the other hand, as social animals, the individual's rights are qualified by the rights of others.

MÜLLER: The Federal Constitutional Court is not bound by its own precedent. Yet, at the same time, it has to care for the coherence of the law across time. Is this a big tension?

Vice President Hassemer: It is a big tension, and a big problem. We have a tradition, which presupposes codification. One ought not bind oneself strictly to precedent, as one would thereby proactively help to bring about an inflexible petrification of the law. One has to have the possibility to change the jurisprudence, and we have time and again done so.

MÜLLER: And what does this mean for the parliament? Should the circumstances change, must it follow the Court's decision and wait until the case reaches Karlsruhe again?

Vice President Hassemer: No, the parliament must act on its own, and it must respond to social change. And in doing so, it does not have to ask the Federal Constitutional Court for prior permission. The parliament is, itself, an interpreter of the constitution.