11 SEPTEMBER AND HUMAN RIGHTS

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Abstract:

The attacks of September 11 changed many things. The fight against terrorism became a political priority both at governmental and intergovernmental levels. Many givens of the post cold war era, such as priority of human rights, were reconsidered and a new balance was sought between security and rights. A liberal democracy must face the difficult question of what rights are enjoyed by those who seek to destroy a democratic system. This article outlines how the European Court of Human Rights approaches this question by presenting an overview of critical court decisions. The Court accepts that terrorism is contrary to human rights and democracy. It also accepts that States have the right to fight against terrorism in order to protect democracy. However, the fight against terrorism should remain within the confines of the rule of Law. The Court is against undermining or even destroying democracy on the ground of defending it.

The attacks of September 11 changed many things. They made the fight against terrorism a political priority both at governmental and intergovernmental levels. Many assumptions which were taken for granted in the aftermath of the cold war, such as priority of human rights, were reconsidered and a new balance was sought between security and rights.

President Bush spoke of an act of war and initiated a crusade of "good" against "evil". The war against "evil" is still continuing. The problem with it is that not only the enemy is not clear, but also the rules are not defined.

Many Western Governments took new action in order to combat terrorism effectively. The most draconian ones were adopted by the United States. On 25th October

2001, the Congress passed the "US Patriot Act". The Act sets out a vague and very broad definition of terrorism and of aiding terrorists. Someone may be guilty of aiding terrorism, for example, if he contributes to a charity which supports the general aims of any organization abroad that uses violence among other means in an effort to oppose US policy or interests. If the attorney general declares that he has "reasonable grounds" for suspecting any alien of terrorism, then he may detain that alien for seven days with no charge. If the alien is subsequently charged with any, even a wholly unrelated crime and the attorney general finds that "the release of the alien will threaten the national security of the US or the safety of the community or any person" he may be detained for six months, and then for additional six month periods so long as the attorney general continues to believe that his release would threaten national security or anyone's safety.

Moreover, the US Patriot Act relaxes other rules that protect individuals from unlawful investigation and prosecution. It greatly expands the government's power to conduct secret searches of the premises and property of individuals without informing them.

The US Justice Department altered many safeguards against unfair trial. It announced for example on 31st of October 2001, that it had the authority to monitor conversations between the accused and this lawyer, whenever, it is necessary according to the attorney general.

The most dramatic measure in the US is the establishment of military tribunals where any non-US citizen that is a suspected terrorist, including residents in the US, might be tried. The initial plan as originally announced provoked a very strong criticism in the US which led to a substantial change of the act.

However, even in its modified form, its shortcomings are evident. First of all, there is no right of appeal to a civilian court. An appeal is only possible to a panel of judges appointed by the military. Moreover, the ordinary rules of evidence would not apply. The military tribunal might declare a defendant's guilt even though not satisfied of

his guilt beyond a reasonable doubt. Its verdict, including death penalties, could be taken by a two-third majority.

Nevertheless, it is significant that Mr. Zacarias Moussaoui, the most important suspect of 11th September, is being tried in an ordinary court in Alexandria, Virginia, rather than a special tribunal.

The Bush Administration was not alone in adopting measures which would dispense of the normal safeguards of criminal justice system.

In December 2001 the United Kingdom passed the Anti-terrorism, Crime and Security Act. Under this act, aliens can be detained without charge or trial for an indefinite period of time. Individuals may be detained when the Home Secretary states that he reasonably believes and suspects a person to be a national security risk and a suspected international terrorist. The Home Secretary's suspicion may be based on secret evidence and then confirmed by a judicial body that can hold hearings in secret from which the detainee and their lawyer may be excluded, and base its decision on secret evidence.

To place suspects under detention without trial for an unspecified period of time is a radical measure whose lawfulness is questionable. In fact, the UK Government also accepted that the power to detain without trial for an indefinite period was not consistent with the European Convention of Human Rights and decided to derogate from its obligations under Article 5(1) of the Convention. Article 15 of the Convention permits the Contracting parties to derogate from their obligations under the Convention "in time of war or other public emergency threatening the life of the nation" and only "to the extent strictly required by the exigencies of the situation". The Court, in relation with a specific case, examines the compatibility of the derogation with the Convention.

It is to be noted that almost at the same time, Turkey, after the constitutional changes it has made with regard to detention period, withdrew its derogation from Article 5.

In France new laws were enacted to strengthen security in public places and expand police powers to search private property, including cars, without warrants.

In Germany, Interior Minister Otto Schily has proposed loosening regulations on phone taps and the monitoring of e-mail and bank accounts, giving investigators rights to pry without any stated suspicion. Mr Schily stated that "the principle of protecting the people's personal data must not stand in the way of fighting crime and terrorism" (Herald Tribune, 6 December 2001).

The European Union created a pan-European arrest warrant and tried to reach a common definition of "terrorist crime" which triggered a strong reaction from a group of 70 distinguished lawyers, judges and academicians in Europe who signed a petition saying that "Democratic rights should not become the collateral damage of the war against terrorism".

Such developments give rise to a number of concerns with regard to human rights and the rule of law.

The sole aim of any criminal trial is to decide whether those who are accused of crimes are actually guilty of them. However, the measures adopted claim that suspicion is tantamount to guilt.

Another reason for concern is all such measures mainly target aliens. Human rights law does not permit any distinction between citizens and aliens. The European Convention of Human Rights does not speak of citizens, but rather of "everyone within the jurisdiction" of Contracting States.

The new measures adopted after 11th of September presuppose that the inherent dangers of terrorism permit a lower standard of protection for anyone who might be thought to be connected to terrorism. This is the "new balance" that was struck between security and human rights after 11th September. According to this new balance, rights and freedoms of the accused can diminish in proportion to the danger the crime they are accused of poses to security.

Such an approach of trading off fundamental rights and freedoms with security is, in my opinion, wrong and dangerous. The traditional safeguards provided to the accused in criminal justice cannot be different according to the risk the suspect poses to security. This is a question of rule of law rather than security.

It is true that terrorism creates special problems for human rights law. Terrorism itself is a threat to democracy and the rule of law. It must therefore be possible for democratic States governed by the rule of law to protect themselves against terrorism. Human rights law must be able to accommodate this need.

On the other hand, it is also true that terrorism incites States to take repressive measures which are not compatible with the rule of law and which may undermine the very foundations of a democratic society. Therefore, response to terrorism has to strike the right balance between the need to take protective measures and the need to preserve fundamental rights and freedoms without which there is no democracy.

A liberal democracy must face the difficult question of what rights are enjoyed by those who seek to destroy a democratic system. On a more general level, the issue involved is whether a liberal democracy can protect itself against threat of terrorism without abandoning the values on which it is based.

Let us now see how this question is answered by the case-law of the European Court of Human Rights.

First of all it must be underscored that some compromise between the requirements of defending a democratic society and individual rights is inherent in the convention's system. (Klass judgment)

In Klass v. Germany (1978) judgment the Court expressed the view that "Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime."

In Glasenapp v. Germany decision (1984), the Human Rights Commission based itself on the link between human rights and democracy which exists in the preamble of the Convention and stated that the protection of democracy should be seen as the protection of human rights.

If we examine the trend of the Strasbourg organs' case-law in respect of compatibility of measures taken by the Governments in their fight against terrorism with the Convention provisions, we find that a more tolerant attitude was adopted in the early years. In Klass judgment, for example, both the Commission and the Court accepted that the States have some special pressing needs in order to be able to fight effectively against terrorism and therefore a more flexible interpretation of the Convention's provisions is permissible. Klass was a case concerning secret surveillance of communication (Article 8). The Commission applied this principle also to the maximum duration of custody period (Article 5 § 3) in the Brogan v. United Kingdom decision where it reached the conclusion that under normal circumstances, the custody period before the suspect is brought to the judge should be maximum four days. However, under exceptional circumstances, this period can exceed four days.

The Court did not share the Commission's line of reasoning. It said that too broad interpretation of Article 5 § 3 would undermine the very right protected.

Indeed, such an exception to Article 5 § 3 would leave it to the discretion of the national authorities to decide whether there are exceptional circumstances. Moreover, it would lead to a modification of Article 5 § 3.

Many of the cases concerning terrorism have involved detention issues under Article 5 of the Convention. Paragraph 1(c) of Article 5 requires "reasonable suspicion of having committed an offence". In Fox, Campbell and Hartley v. United Kingdom (1990), the Court expressed the view that "the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by Article 5 § 1(c) is impaired."

However, Article 5 is not the only article involved in cases of terrorism. In an Irish case where the applicants were arrested on suspicion of serious terrorist offences, the Court has concluded that "the security and public order, concerns of the Government, cannot justify a measure which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6 § 1 of the Convention" (fair trial). (Heaney and Mc Guinness v. Ireland, 21.2.2000)

Article 3 prohibiting torture and inhuman or degrading treatment is absolute in nature, i.e. no derogation may be made in respect of Article 3 as it enshrines one of the most fundamental values of democratic society. The absolute nature of Article 3 is irrespective of the victim's conduct or difficulties faced by States protecting its citizens against terrorist violence. In Tomasi v. France (1992) judgment the Court states that "The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals".

Freedom of expression (Article 10) cases have a particular importance for Turkey as they concern the application of Turkish laws with respect to terrorism such as Article 312 of Turkish Criminal Code or Anti-Terror Law No. 3713.

In a group of 13 cases against Turkey, the applicants had all been convicted and sentenced to imprisonment and a fine because of the articles they wrote or published or speeches they made. Most of the charges included disseminating separatist propaganda contrary to Article 8 of Anti-Terror Law (Sūrek and Özdemir v. Turkey (no. 1) (8.7.1999) and 12 other judgments delivered on the same day).

These judgments reflected clearly the difference of assessment of freedom of expression between the Turkish Courts and the Court in Strasbourg.

Turkish Courts limit themselves to the examination of the content of the speech. For the Human Rights Court what is important is the result of the speech. the Court considers whether the speech in question really involves a threat to society and whether the means is commensurate with the aim. If there is no sufficient link between the words used and a real possibility of resulting violence, the protection offered to the individual by the Convention prevails.

Out of 13 cases mentioned, the Court found a violation in 11 of them. In these cases, the Court decided that despite the aggressive language employed, they did not amount to incitement to violence or armed revolt. In two cases, the Court concluded that the expressions such as “the fascist Turkish army” or “the hired killers of imperialism” constituted an appeal for bloody revenge. It was “hate speech” and “glorification of violence” and the interference involved in these two cases was proportionate to the legitimate aim pursued. Therefore, in these two cases the Court found no violation.

A State confronting terrorism may make a derogation under Article 15 of the Convention which refers to “public emergency threatening the life of the nation”. However, such a derogation does not provide a general exemption from Convention requirements. First of all, Article 15 derogation may not be issued in respect of Articles 2,

3 and 7 of the convention. Moreover, derogation is permissible only "to the extent strictly required by the exigencies of the situation". Therefore, the Court examines the proportionality of the measures taken under such a derogation. This test was found to be satisfied in respect of powers of extended detention (4 days) in Northern Ireland (Brannigan and McBride v. United Kingdom). The Court took into account the limited scope of derogation and the existence of basic safeguards against abuse.

In contrast, the Court did not find the derogation issued by the Turkish Government to be in compliance with the requirements of Article 15. The Court was not persuaded that the exigencies of the situation necessitated the holding of the applicant on suspicion of involvement in terrorist offences for 14 days or more in incommunicado detention without access to a lawyer, doctor or relative. (Aksoy v. Turkey) The absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him.

In conclusion, the Court accepts that terrorism is contrary to human rights and democracy. It also accepts that States have the right to fight against terrorism in order to protect democracy. However, the fight against terrorism should remain within the confines of the rule of Law. The Court is against undermining or even destroying democracy on the ground of defending it.

The measures adopted after 11 September, however necessary they may be for an effective fight against terrorism, carries certain risks in this respect. The Court said in Klass judgment that States "may not, in the name of the struggle against terrorism, adopt whatever measures they deem appropriate".

It is important that we respect human rights and the rule of law not only in good times but also in terrible times because we are battling against terrorism so that we can maintain a society in which we enjoy individual rights and freedoms, the rule of law, goals which we cherish and terrorists abhor. To discard those values, devalues us too.

It is true that a democracy must often fight terrorism with one hand tied behind its back. It is so, because individual liberties are vital to the society we are trying to preserve.

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