

# THE FIGHT AGAINST TERRORISM AND CIVIL LIBERTIES

We have learnt in the XXth century one thing : liberal societies have *enemies*, who want or plan to alter them in depth or to destroy their very foundations. The first duty of Governments is to identify, name and combat them in due time without abandoning our very principles, embodied in the rule of law.

Hence the issue of balancing.

## I - Past experiences of emergencies

## II - New challenges: The international dimension

## III - The political framework

## IV - The general consequences of emergency legislation for fundamental rights

## V -The restriction of fundamental rights for security reasons

- 1 - Four principles of action
- 2 - Four sensitive areas.

## VI - On the judiciary

## VII - Aspects of law and practice in Europe

- 1 - Administrative detention and undesirable aliens.
- 2 - Police detention
- 3 - Prosecution and trial.
  - A - Pre- trial detention
  - B - Defining terrorism
  - C - Specialized courts
- 4 - Extradition and “renditions”

## I- PAST EXPERIENCES OF EMERGENCIES

### 1) Wartime

- Administrative detention of enemy nationals and / or suspects
- Censorship
- Judicial self-restraint

### 2) Colonies or overseas possessions : disturbances or outright wars.

- France : Indochina, Madagascar, Algeria
- UK: Kenya, Aden, Cyprus, Palestine, Malaya.
  - Detention camps
  - Little judicial supervision

- Degrading treatment and/or torture.

3) Disturbances in some parts of the country:

Ulster, Basque country, Corsica.

4) Terrorism

Germany, France, Italy.

In all these cases the emergency was limited, in time or in space, even if in some cases it lasted a very long time.

## II - NEW CHALLENGES : THE INTERNATIONAL DIMENSION

2 trends:

- The development of internationally organized crime:

Drugs; trafficking of human beings (illegal immigration; prostitution); financial crime; weapons trade.

- International terrorism.

Hence the importance of two areas:

- a) International cooperation: intergovernmental agreements; police and judicial cooperation; the EU.
- b) Domestic judicial reforms and conduct, and their validity under international HR instruments (HR proper; international humanitarian law).

## III - THE POLITICAL FRAMEWORK : A GAME OF SEVEN

Governments; parliaments; public opinion; specific public institutions; the media; the judiciary; civil rights NGOs

- Governments are on the front line: they are urged to respond, to prevent, to “act”. Mistakes and errors are not easily forgotten. Undue haste is a permanent temptation in times of emergency. Hence ill-drafted instruments, bringing less legal certainty.
- Parliaments are less inclined to exercise properly their supervising role.
- Public opinion at large wants more security and is permeated by fear whenever terrorist attacks take place
- The police and the secret services want additional powers and express their impatience with judicial scrutiny.
- There is no need for me to underline the role of the press.
- Judicial scrutiny of decisions affecting fundamental rights is of paramount importance.
- The role of NGOs is more important than ever in gathering information, making it public and discussing the legality of what is done.

## IV - THE GENERAL CONSEQUENCES OF EMERGENCY LEGISLATION FOR FUNDAMENTAL RIGHTS

- Legislation introduced in response to a particular event and intended to be temporary soon enters the general law and loses its temporary character, permeating the legal order.
- The road to abuses : as a matter of practice, new habits take place, through acceptance or “toleration” : “roughing up” becomes torture ; beatings become killings ; deliberate humiliation becomes sadistic perversion ... The road to egregious abuses invariably starts with a few limited darts into qualified barbarity... An Abu Ghraib is bound to follow once you talk about the evil of your opponents and suspend international law in dealing with them, from whatever motive and for however laudable a short term goal (C.A. Gearty, “Terrorism and HR”, 2005 EHRLR,1, at 4).
- The executive, as well as public opinion at large, become accustomed to these restrictions. The latter influence the practice and, beyond it, the very culture of the police and the Administration, leaving marks difficult to erase or suppress, a more insidious trampling of rights. As Pr Megret, the author of this quotation, writes, all this threatens to subvert what decades of patient work intended to achieve (“Justice in times of violence”, EJIL 2003 327).

## V - RESTRICTION OF FUNDAMENTAL RIGHTS FOR SECURITY REASONS :

### 1 - FOUR PRINCIPLES OF ACTION

- The quality of the law:

A clear and precise legal basis ; sunset clauses ; periodic review ; avoidance of unseemly haste.

- The restriction of fundamental rights must be limited and in proportion of the situation with appropriate guarantees.
- Whenever feasible, they should be accompanied by compensatory measures.
- The issue of oversight is paramount.
  - Parliament (role of special committees: see in UK the JHRC).
    - Special independent committees (UK: Newton)
    - NGOs
    - *Judicial supervision*: JR, effective remedies. Overall, no law-free area, de jure or de facto, no total discretion or unfettered power of the executive, no “legal black holes”, to borrow the apt title of Lord Steyn’s FA Mann’s lecture.

Government impatience with the courts and JR is always a bad omen.

### 2 - FOUR SENSITIVE AREAS

- Torture and other illegal treatment
- Detention
- Prosecution and trial
- Privacy

## **Torture and other illegal treatment**

a) A precedent: Ulster, 1971. The Compton Report; The Parker Report. Lord Gardiner's dissent. The lessons for today (see note).

b) Recent developments :

- In the US:

- the disclosure of Government legal memoranda seeking to justify coercive interrogation of US-held detainees.

- Expulsion, "rendition" or transfer of prisoners to countries where torture is routinely used.

- Ill- treatment at the Abu Graib prison and subsequent prosecution.
- The ABA Report on torture

- In Britain:

- Statement of the Home Secretary before the European Parliament on the relaxation of the case law of the ECHR prohibiting expulsion or extradition to countries where there is a serious risk of treatments prohibited by Art. 3 (in *Chahal v UK*, 1996, the Court rejected the Government's position according to which the effect of Art 3 should be qualified in cases where the States sought to deport an alien on national security grounds). A Dutch case is now pending before the Court, in which the UK Government has been granted leave to intervene.
- In a 2004 judgment the CA held that before SIAC materials alleged to have been obtained by torture of a third person were admissible unless torture was committed by or connived at by UK officials. The HL later struck down this judgment (Oct 2005).
- The attempt to mitigate the likely consequences of extraditions to countries which use torture by the signature of agreements or "memorandums of understanding" according to which the requesting or receiving State undertakes not to subject the surrendered person to prohibited treatment (Lebanon, Lybia, Jordan,Algeria). The UN HR Commission's special rapporteur on torture, Mr Nowack and the European Commissioner of HR have criticized such conduct
- In a case decided on June 14, 2006, *Jones v Saudi Arabia*, the HL denied jurisdiction in a claim brought by 4 UK citizens to seek redress against authors of torture, officials of a foreign State, committed against them. It upheld the principle of sovereign State immunity.

## **Detention**

### a) Administrative detention

Used in the USA, and in Britain, 2001-2005. One of the most coercive deprivations of liberty by an act of the executive. Issues:

- scope of statutes allowing it;
- definition of persons who might be detained.

- length
- remedies. Judicial scrutiny.

In Britain, the HL struck down, in a judgment of Dec 16, 2004, the statute allowing administrative detention of certain aliens on grounds of lack of proportionality and discrimination.

#### b) By the police after arrest

- Necessity of a legal basis
- Issues:
  - Maximum length
  - Judicial oversight. Possibility to challenge its legality before a judge
  - Régime: communication with counsel.

#### c) Pre - trial detention

- Possible restriction of the rights of prisoners under the ECHR: access to and contacts with counsel; interception of communications with counsel; special places in jail;

### **Prosecution and trial**

#### a) Grounds:

Drafting new offenses.

- terrorism. Issue of definition
- “association de malfaiteurs” in French law.
- New offenses linked with terrorism :
  - Inflammatory speech : inciting to, glorifying of.
  - aiding, abetting, allowing use of means by terrorists
  - banning of certain associations
  - closing troublesome places of worship.

#### b) Special or specialized courts

- The Diplock courts in Ulster
- The French experience

#### c) Issues relating to evidence.

- Admissible evidence. Originating from torture or ill treatment of a third person ; or from telephone tapping (excluded in UK ).
- Relaxation of the rule according to which the accused and counsel must be shown all evidence used against them. Under the ECHR case law there may be other competing interests: national security; protection of witnesses or of sources of information.

Principles to be applied: necessity; proportionality; guarantees.

### **Privacy**

#### a) Collection and use of personal data.

- Which authorities may collect and use them ?

- For which purposes ?
- Safeguards and guarantees:
  - right of access and rectification
  - maximum length of conservation
  - circulation (domestic and international) of collected data
  - updating (error, acquittal, death, amnesty)
  - *Oversight by independent authority*

b) Surveillance of communications

Same basic issues. Remedies; Scope of JR.

c) Other

Ex: CCTV.

## VI - ON THE JUDICIARY

1) Courts have a *constitutional mission*, dictated by two components of the rule of law:

- separation of powers
- limitation of power, hence the accountability of the executive and of legislature through JR.

They must not surrender these constitutional duties.

2) The role of courts in time of crisis has been sometimes less than glorious.

See, for the UK, HL *Liverside v Anderson*, 1942 and Lord Atkin's lonely dissent: "Amid the clash of arms the laws are not silent"; for the USA *Korematsu v US* (332 US 214) on the internment, during the war, of Americans of Japanese origin. In 1984 a federal district court overturned K's conviction on the ground that the Government had "knowingly withheld information from the courts when they were considering the critical question of military necessity". Judge Patel said that the case "stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental institutions from close scrutiny and accountability" ; for France, the Algerian war.

3) The culture of deference is in retreat, as shown by the recent decisions of the HL (see supra) on administrative detention and on torture), the US Supreme Ct decision in *Rasul v Bush* and *Hamdi v Rumsfeld* (2004) affirming the jurisdiction of the US courts to review the legality of administrative detention, even in times of emergency, and the case law of the ECHR in extradition or expulsion cases.

4) Government impatience with courts, domestic or international, is not a new phenomenon. It only becomes more visible or audible in certain

situations. The choice for the courts is not between excessive deference and “judicial activism”, but between abdication and responsibility.

## VII – ASPECTS OF THE LAW AND PRACTICE IN EUROPE

### 1) *Administrative detention and undesirable aliens*

#### A – Britain

##### a) Characteristics:

- New legislation introduced, sometimes in haste (2000, 2001, 2005).
- Parliamentary, judicial and other scrutiny
  - i. Parliament: JHRC
  - ii. Other : the Newton Committee (Independent review)
  - iii. Judicial : the two HL judgments on the admissibility of evidence obtained through torture(2005) and on administrative detention (2004).

##### b) The law:

- 2001 Act. Administrative detention (i e without charge) of foreign nationals believed to be a risk for national security and suspected to be a terrorist (See, for definitions, Art. 21 of the 2001 Statute) Impossibility to deport or extradite them. Appeal to SIAC. The system of “special advocates”, who has access to closed material but cannot talk to the accused.
- Its use : circa 16 persons detained.
- The HL decision: lack of proportionality + discrimination.
- Result : the 2005 Act. List of 15 measures.

House arrests ; prohibition of mobile phone ; limitation of access to Internet and of contacts with third persons ; electronic surveillance ; police permitted access at any time; limitation of access to work ; curfew. Violation of these rules leading to prosecution. Procedure: upon the prior permission of a judge. In case of emergency, immediate decision and matter referred to the judge within 7 days. Sunset clause 1 year.

**B- France. :** see note.

### 2) *Police detention*

#### A - Main issues

- a) **Grounds.**
- b) **Maximum length. Special rules for terrorism**
- c) **Presence of counsel. Id.**
- d) **Recording.**

#### B - Examples of legislation

##### **Spain:**

Special rules apply to terrorism. If a judge from the *Audiencia Nacional* (the national court which has exclusive jurisdiction here) decides that the individual will be deprived of communication during his interrogation by the police, that person may not choose his counsel

(the Bar Council will do so) and the latter may not have access to the file or to the person before the interrogation by the judge begins.

Once this measure is lifted, the individual may choose his counsel, who shall have access to the file - unless the judge decides that the procedure will be secret.

Maximum duration in terrorism cases: 5 days. After 3 days, upon the decision of a judge  
No recording.

### **Germany**

No special rules for terrorism. Counsel may attend interrogation by the police but without access to file. No recording.

### **France**

No recording. Special rules apply to terrorism. Maximum duration: 6 days, if authorized by prosecutor after 2 days and judge after 4 days. Presence of counsel allowed after 96 hours.

### *3) Prosecution and trial*

A - Pre-trial detention

#### **France:**

Decided by a judge distinct from the investigating magistrate (juge d'instruction). Person detained may at any time ask to be freed. Appel to the court of appeal.

No maximum length for terrorism In fact, lasts a long time.

In case of acquittal or of charges dropped, right to integral compensation of all loss caused by detention. This has led to courts awarding substantial sums to persons accused of terrorism and acquitted.

B- Definition of terrorism.

See note.

C- Specialized courts

### **Spain**

Yes: *Audiencia nacional*, created in 1977. National jurisdiction. 6 investigating magistrates and 4 trial divisions, each composed of three judges. No jury. Appeal on points of law to the Tribunal supremo. Specialized prosecution service (10 persons).

This court has also jurisdiction on other crimes. Its members belong to the judiciary and are appointed under the ordinary rules: by the General Council of the judiciary for sitting judges and by the Government for prosecutors, upon the presentation by the Chief national prosecutor

### **France**

The Paris court has exclusive jurisdiction to deal with terrorist cases. This applies both to the “juges d’instruction” (6) and to prosecutors, who are specialized and work full time on terrorist cases.

It does not apply to trial judges. No jury. All these judges and prosecutors are appointed according to the ordinary rules.

#### 4) *Extradition and “renditions”*

##### a) Extradition

- Under domestic law as well as under European treaties and other instruments, terrorist crimes are not considered as political offenses and their authors may therefore be extradited.
- In view of the abolition of the death penalty in Europe and of the ratification of the 6<sup>th</sup> Protocol to the ECHR extradition to a country where there is a possibility that the extradited person be submitted to the death penalty is usually subordinated to the existence of sufficient guarantees of the requesting State that the death penalty will not be applied
- The same applies when there is a substantial risk of treatments contrary to Art 3 ECHR.
- Certain European countries, e.g. Britain, have negotiating agreements with certain countries in order to allow the extradition to them of “undesirable aliens” ( see supra).

##### d) “Renditions”

A recent report of the Parliamentary Assembly of the Council of Europe contains a number of information on this practice and on the participation of a number of European Governments. AI, HRW, the ICJ and the Association for the prevention of torture have published recently a joint statement: “12 steps to end renditions and secret detentions in Europe”.

France is not mentioned in the countries listed in the Marty Report.