

# MINI CONFERENCE 2017 COURAGEOUS COURTS: SECURITY XENOPHOBIA AND FUNDAMENTAL RIGHTS



Venice Commission  
Joint Council on Constitutional Justice  
Karlsruhe, Germany  
19 May 2017



COUNCIL OF EUROPE



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**Venice Commission:  
Joint Council  
on Constitutional Justice**

**Mini Conference  
Courageous Courts: Security,  
Xenophobia and Fundamental Rights**

**Karlsruhe, Germany  
19 May 2017**

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# PROGRAMME

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## MORNING SESSION

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**Chair: Marjolein VAN ROOSMALEN, Co-President of the Joint Council on Constitutional Justice  
Legal Adviser, Council of State, Netherlands**

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**09:00- 09:30 - Tanja GERWIEN, Legal Officer, Division on Constitutional Justice of the Secretariat of the Venice Commission  
Introduction**

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**09:30-10:00 - Susanne BAER, Judge, Federal Constitutional Court, Germany  
Challenges to Constitutionalism: The Role of Constitutional Courts**

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**10:00-10:30 - Aida GRGIĆ, Lawyer, Registry, European Court of Human Rights  
The European Court of Human Rights' jurisprudence on issues relating to terrorism**

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**10:30-10:45 - Discussions**

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**10:45-11:15 - Eloy ESPINOSA-SALDAÑA BARRERA, Judge, Constitutional Tribunal, Peru  
Limits of Constitutional Interpretation on the issues of security and xenophobia. The Peruvian Case**

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**11:45-12:15 - Rodica SECRIERU, Chief Assistant-Judge, Constitutional Court of the Republic of Moldova  
Constitutional Courts as Democratic Consolidators: Insights from the Republic of Moldova after 25 years**

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**12:15-12:45 - Theodora (Dora) ZIAMOU, Council of State, Greece  
Safeguarding the constitutional position of foreigners does not pose a threat to Greek society: Lessons from the jurisprudence of the Council of State**

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# AFTERNOON SESSION

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**Chair: Jasna OMEJEC, Co-President of the Joint Council on Constitutional Justice**

**Former President of the Constitutional Court of Croatia**

**Member of the Venice Commission for Croatia**

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**15:00-15:30 - Mücahit AYDIN, Rapporteur-Judge, Constitutional Court, Turkey**  
**The state of emergency and the principle of non-refoulement**

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**15:30-16:00 - Ingrida DANĖLIENĖ, Secretary General, Constitutional Court, Lithuania**  
**Responding to threats to the rule of law and fundamental rights: the evolving powers of the Constitutional Court**

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**16:00-16:30 - Discussions**

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**17:00-17:30 - Sarahrose MURPHY, Executive Legal Officer to the Chief Justice, Supreme Court, Ireland**  
**Without fear or favour: Security, Rights and the Rule of Law in Ireland**

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**17:30-18:00 - Celestina IANNONE, chef d'unité et Guillaume ETIENNE, administrateur-juriste, de la Direction de la recherche et de la documentation Cour de justice de l'Union européenne**  
**Quelques exemples tirés de la jurisprudence récente de la Cour de Justice de l'Union européenne face aux défis de la crise migratoire et de la lutte contre le terrorisme**

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**Joint Council meeting,  
Constitutional Court, Karlsruhe, Germany  
19 May 2017  
Mini Conference**

# Introduction

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**W**elcome to our mini-conference. For those liaison officers that are attending the Joint Council for the first time, these mini-conferences are held every year after the Joint Council meeting, to give the Venice Commission's liaison officers the opportunity to share the experiences of their courts on the topic chosen for this event.

■ This year's topic is an important and challenging one and most constitutional courts, constitutional councils and supreme courts with equivalent jurisdiction – which I will now refer to as “Constitutional Courts” in the aggregate – will have had to make courageous decisions at some point during their existence.

■ Why is that? It is because these courts' jurisdiction consists of the power of securing the respect of the Constitution – which is the cornerstone of constitutional democracy, as Mr La Pergola, the first President and one of the founding fathers of the Venice Commission used to say. In other words, Constitutional Courts are entrusted with the task of securing the enjoyment of freedoms and rights through the observance of the Constitution.

■ It is true that the competences of these courts vary from one country to the next. Some have a limited scope of jurisdiction, making it difficult for them to become effective guarantors of the constitution in the long run. Others go so far as to have ex post control of the conformity of laws with the constitution and have the power to set aside laws found to be unconstitutional. And of course, there is the individual complaints procedure before some Constitutional Courts, which has proven over the years to be of great importance for the success of constitutional justice.

■ As Mr Grabenwarter said in his keynote speech at the 2<sup>nd</sup> Congress of the World Conference on Constitutional Justice, countries in which Constitutional Courts are able to carry out their tasks effectively, will at some point deal with questions of a political nature – because it follows from their competences. This occurs, for instance, when these courts are dealing with cases involving human rights or when they are annulling a law or some of its provisions by finding them unconstitutional - all of these issues involve political questions.

■ This then, unfortunately, can – and often does – lead to Constitutional Courts coming under political pressure. However, the extent to which the independence of these courts will be respected by other state powers will depend on the political and constitutional culture of the country concerned

■ Respect for the Constitutional Courts – and hence their independence – very much depends on this constitutional culture - which itself is influenced by a country's history and its Constitution.

■ It is, however, also influenced by other forces, for instance, threats to national security such as terrorism.

■ One of the first things noticed in the response of states to the 9/11 attacks – and which the Venice Commission noted in its 2010 Report on Counter-terrorism Measures and Human Rights – was that governments at both the national and international level stood firmly in favour of the rule of law and the cause of human rights, and called for restraint in order not to disproportionately impair the protection of human rights. But, concrete measures often lacked adequate concern by the authorities in charge, to strike a fair balance between security measures and human rights protection.

■ The tightening of legislation as a result of an act of terrorism may infringe fundamental rights that are enshrined in the constitution. Fear of terrorism has also led to an upsurge in racist and xenophobic incidents in Europe, leading to the discrimination of certain groups and so on.

■ Constitutional Courts, which are the guarantors of the constitution, will be and have been called upon to uphold the fundamental rights enshrined in the constitution. They are therefore also met with the resentment of those in power who might not agree with the balance struck by the Constitutional Courts between national security and the protection of fundamental rights.

■ The Venice Commission is aware that undue pressure on Constitutional Courts has increased and we have witnessed this over the past few years in our member States.

■ The Venice Commission tries to help Constitutional Courts that come under such pressure. We do so through opinions on constitutions or on the courts' legislation, through amicus curiae briefs, through formal or informal contacts with the authorities or through public statements and declarations.

■ The Venice Commission has strived, and will continue to help Constitutional Courts that come under undue pressure.

■ It is also important to remember that the World Conference on Constitutional Justice, which now has 107 member courts, can also offer its good offices in such situations, if it is requested to do so.

■ The World Conference has also introduced a special restricted session at its congresses – a stock-taking exercise – on the independence of Constitutional Courts, which provides the courts with the opportunity of presenting examples in which they came under pressure and to explain how they dealt with the situation.

■ The work of Constitutional Courts is important, and the wish for preserving an independent Constitutional Court must not only come from the society of the country concerned, but also from civil society, from academia, from the opposition, from the ombudsman, from the ordinary judiciary etc.

■ It is only when there are many actors working towards defending the Constitutional Courts against undue attacks that their criticism will be heard and yield positive results.

■ We are therefore pleased that this topic was chosen for today's mini conference and look forward to hearing about courageous courts!

**Tanja Gerwien**  
**Legal Officer, Division on Constitutional Justice, Secretariat of the Venice Commission**

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**Mini-conference  
Karlsruhe, Germany**

# Challenges to Constitutionalism: The Role of Constitutional Courts



Susanne BAER, Judge, Federal Constitutional Court, Germany

**A**fter 1945, and after 1989, there was a feeling that it had been done. The Declaration of Human Rights and the transition to democratic constitutionalism after the end of the cold war, with the fall of the wall that divided Germany, and separated West from East, are hallmarks of a victory of the belief in fundamental rights, democracy, and the rule of law. In fact, it was more than just belief. In the 20th century, we have seen the development of working democratic states, with courts that deserve that name. From a German perspective, one may see the history of the Federal Constitutional Court as paradigmatic: Rising from the horrors of Nazi Germany, judges who had been victims of discrimination themselves gradually restored trust in the law, a law which safeguards democracy, as the core element of constitutionalism. In your countries and contexts, you may look at your courts, or at your post-authoritarian constitution, or at a civil society that took it in its own hands to insist on constitutional democracy, and you may then want to tell that same story: that fundamental rights, democracy, and the rule of law have won.

■ Yet today, one may hesitate. Shall we still tell the story that way? Is it well founded, enough evidence around? I wonder. In fact, there is reason to worry. Democracy, fundamental rights, and the rule of law, in short: constitutionalism, is under attack. Since these attacks are strong and dangerous, it is not the time for cautious warnings. Quite to the contrary, it is time to act, because there is more than just pressure these days. In some places, constitutionalism does already crumble, and needs to be rebuilt. It is particularly worrisome that this happens in states which earned it to be seen as hallmarks of the victory of democracy, fundamental rights, and the rule of law, thus: constitutionalism.

It is also scary how fast this happens. In addition, it is extremely worrying that pressures build in many more contexts, and in many more or less subtle ways.

### **Attacks on Constitutionalism and Courts**

■ The countries in which constitutionalism has crumbled recently are rather well known. Notably, the people protested attacks on constitutional courts in rallies, as in Poland, and media has been reporting, although media attention is hard to attain or vanishes when attacks on constitutionalism appear to be rather formalistic modifications, as in changes of rules of procedure. However, the Venice Commission has reacted to worries with reports that detail the deterioration of the rule of law.

■ Also, attacks on courts are coupled with attempts to abuse the term democracy. It has been featured as a description of “illiberal” regimes, which is in fact a contraction in terms. Democracy without the protection of fundamental rights to ensure freedom of speech and the press as well as non-discrimination, for a start, does not deserve the name. In times in which the story being told and the term being used, become more important than things that happen, we need to prevent the term from being stolen. Similarly, there is decorative “constitutionalism”, which, in fact, is not one. Instead, leaders accept the decorum of a constitution, and even a court, yet there is no true checks and balances, no rule of law, and thus no constitutional democracy in place.

■ Also, there are key actors in many societies still featured as bound by the rule of law, who nonetheless “bend” the law, thus, in fact, break it. Attempts to defend this as economic or social or cultural necessity should be rejected clearly and swiftly. There is no justification for ignoring rules agreed upon to save a currency or market, or to block the entry of refugees, or to save a nation, or a culture, or an identity. We need to make sure that this is not called a “flexible” use of law or anything of the kind, but named as an abuse of the power at hand. No one should get away with it, nowhere. So, when there is a person in office that snaps at “so-called judges” who did their job, or when there are tabloids that call justices “enemies of the people” to pressure a court into not doing what constitutional courts have been designed to do: stop government, and if needed, even stop majorities before they crush others, we need to stand up against that. In the past, international courts have been attacked fiercely, as the ECHR or the International Criminal Court. They are particularly vulnerable and face too much resistance too often. There has already been a need to clearly counter those attacks. When national courts are under pressure, the need feels more imminent, yet it is the same. And it affects all of us. In Germany,



although the Federal Constitutional Court of Germany enjoys an extremely high level of trust by the people, we do also hear words that worry us, and we depend upon people who speak up against that. Yet these days, attacks on constitutional courts, and on constitutionalism, are nowhere unknown.

## **Attacks and Critique**

■ What we see when we get such news or hear such talk or face such acts are, again, attacks on fundamentals. It is not simply critique, and there is a need to carefully distinguish between the two. A critique of a decision and a critique of the reasoning of a particular ruling or of an argument used, thus a critical reaction to a particular act particularly of those courts that safeguard democratic politics and protect fundamental rights, is needed. Critical reconsiderations are an integral part of constitutionalism. In particular, constitutional courts themselves need to face criticism because of the structural task they have. Criticism often boils down to result oriented reminders of what we should or should not do. This is important.

■ In addition, there is criticism directed against the arguments courts use, and the reach of decisions, which indicates the power courts employ. And in fact, it is crucial to carefully listen to that. So courts need critics, and should listen carefully to them. But courts shall not be attacked, or bow to pressure. So it is well known that there are issues and times when more people are more critical of what courts do than on other issues and at other times. These days, such issues are fundamental rights and terrorism, xenophobia and racism, religious diversity and tension, and the troubling state of emergency rule. Again, critical reconsiderations are needed, also in reactions to court rulings. But attacks are inappropriate, particularly when constitutional courts deliver what they are meant to do.

■ As such, critics may pose challenges. However, this it is not the same as attacks on the basics. The talk and acts that need to worry us today are not just critical. Rather, they are attacks on the foundation of constitutionalism, with the intent to do away with courts that deserve the name. This happens when people, or governments, refuse to comply with rulings from the ECHR or reject the very idea of the ICC, which keeps happening. Then such fundamental rejection, which is different from critique, is not the problem of that one court alone. Rather, it is the problem of all who care for constitutionalism. When such courts are called into question as such, it is an attack on democracy, fundamental rights, and the rule of law, thus on the post 1945 and 1989 consensus. This is why we need to care. And eventually, this is why there is a necessity to act.

## Careful Analysis - Details Matter

■ To counter attacks and defend constitutionalism, we need to understand the arguments and strategies employed, to take them apart. There is a need to not only enjoy democracy, fundamental rights, and the rule of law, but to prepare and be willing to defend it. Such defence will only be understood by the people, including decision makers but most importantly, on the long run, with the people as citizens, if we are clear on their meaning: democracy, fundamental rights, and the rule of law.

■ So what is it we care about, as constitutionalism? What does the Venice Commission stand for and should strive to enact day after day? What is it exactly that drives you in your work for constitutional and supreme courts?

■ Key elements are democracy, fundamental rights, and the rule of law. In short, this is called constitutionalism. And be assured: constitutionalism is not a nationalist nor a Western or exclusively European or a German or any other nation's concept. Constitutionalism names the global understanding of the way to ensure that government works for the people, empowered by the people, with independent courts to ensure fair proceedings, from elections to forming a government and appointing judges to passing laws, and with an implemented guarantee of fundamental human rights, including dignity, liberty and equality, that even democratically elected majorities have to respect. As such, constitutionalism is based on institutions that do this job wisely. Without implementation, it becomes fake decorum.

■ To control government and possibly even stop majorities, constitutional courts are therefore important actors. In fact, they are indispensable. This is why meddling with access to such courts or with the appointment of judges to these courts or interfering with the way these courts work and decide, goes to the heart of the matter. It may be subtle to "only modify some formal rules", yet it is, in fact, an attack on the very fundamentals of constitutionalism itself. It is not subtle at all to have judges removed from office. It is also an attack on courts to refuse to install those who are properly appointed, or to fill empty seats. Again, there are many more or less subtle versions of attacks on constitutionalism.

## Reactions of Courts: Independence and Standing

■ As stated, there is a need that all of us react to such attacks, and defend democracy, and the rule of law. Yet more specifically, there is the complicated question of how courts should react, in rulings and beyond. Because they are targets, this may be particularly difficult. But because they are powerful actors to implement constitutionalism, it is also called for.

■ Regarding courts reacting to crises of constitutionalism, there may be two dimensions to consider: independence and standing. For courts that have a constitutional function, be it as a separate constitutional court or conseil, as in Austria, Germany, Poland, or more recently the UK, or as supreme court or tribunal, as in many other countries, both independence and standing matter. Obviously, these are interrelated, but point to different directions: Independence refers to institutional design, as the internal factors that shape a court, while standing refers to the institution's activity directed at and recognised by the audience and by observers, as its external side.

### Independence from Populism

■ To safeguard constitutionalism, particularly in times under pressure, a court needs to be sufficiently independent not only from politics, but also from popular sentiment and populism. This starts with the basics, such as power over resources, the budget, and in the history of courts, governments have often fiddled with that. However, independence also means power over procedural rules. Is this done by legislation, which, in fact, often means the government, or are internal procedures self-defined? By "only modifying procedure", you can turn a court into a lame duck. So beware.

■ Other factors are more complicated. Independence may also mean the freedom whether to take a case ("freie Annahme") or not. The German Federal Constitutional Court does not have this freedom, and it safeguarded us against the assumption that we make political choices. It forces us to decide more than 6000 cases a year, so it comes at a price. But the obligation to take every case also contributes to trust in a court as a legal, not a political institution.

■ Independence also means the freedom of priority, to decide on when to decide a case, and speed up urgent matters, and the freedom to publish and inform the press yourself. This has been taken for granted as a key factor of truly independent institutions. However, it has also been taken away from courts more recently. A dangerous event.

■ Necessarily, independence comes with people. Judges, or “Justices”, need to be protected against corruption, and against political pressure, and against a threat as to their life after office, and courts need to be protected against staffing with the incompetent. It matters who chooses and who can be chosen, and it matters that there are criteria and they are used. The Council of Europe has developed very good ideas on the issue, including diversity on the bench.

■ Finally, it matters what you imagine to be “the justice”, or the judge. Is this the old white upper class male, or does the bench somewhat mirror society? Is a good justice a celebrity for life, or a person serving society for a time? How close should the judges be to politics? In Germany, some features of our institutional design and the image of a good judge are incentives for consensus. Here, Hercules is not the calling. And additional factors matter.

### **The Standing of Courts**

■ Next to independence, standing matters to constitutionalism, and to courts. No power of the sword nor purse – so standing must be the source, the bone, and backup of what courts do. Then, what informs the standing of courts? What makes a court a good court, deserving our respect, support, and eventually, defence?

■ Again, institutional design matters. The obligation to hear all cases, yet to prioritise yourself seems to contribute to standing, as does access, types of proceedings, and options to decide. Again, when governments interfere on that level, and when types of cases are excluded from judicial review, one needs to worry.

■ In addition, standing is informed by political context. Traditionally, this has called for a focus on the separation of powers. Traditionally, we looked at presidents, parliament and government. However, and in light of the threats to constitutional courts around the world, we need to understand more than that. Political economy matters, as in how and what money drives politics. Social inequalities that shape a society matter, be they gendered, or racialised, or religious. In a patriarchal society, a court needs specific standing to defend equal rights in marriage equality, or family matters. In a racist context, a court needs particular courage to go against a populist call for excluding the other. And in religiously charged politics, a court needs a specific standing to rule against the normal majority. Thus, standing matters tremendously to take a decision that stops power, be it public or private, to protect constitutionalism, namely: fundamental rights, democracy, the rule of law.

## Rulings under Pressure

■ When constitutionalism faces pressure, and even attacks, the courts entrusted with its defence need independence and standing to eventually go against the flow, particularly the flow of populism. These days, there is, thus, a necessity to explain in public what courts do. However, throughout the history of constitutionalism, there are also rulings that exemplify attempts to defend constitutionalism against attacks, and may point to the courage it takes. Some of the more recent case-law of the German Federal Constitutional Court may illustrate the challenges. All press releases to these cases are provided in English as well, and Senate decisions will eventually be translated and available at the court's website. They address religious diversity, and the dangerous pressure to exclude "the other", as well as terrorism, and the danger to have "security" trump fundamental rights, in addition to the challenge of nation states embedded in larger legal orders and the dynamics of globalisation. Finally, the ruling on a request to prohibit a political party shows how a court deals with the political system directly, to defend democracy by protecting, under certain conditions, even its enemies.

## Religious Diversity and Equal Rights

■ In a secular state, yet predominantly Christian country and culture, cases that call for the presence of religious minorities, are always challenging. In particular, this is the case when those new to the scene claim fundamental rights, as immigrants, and those come to the court who are framed as foreign, different, exotic, and strange, and those bring cases that are more or less closely associated with one ethnicity, and nationalities, and politics, like Muslims in Germany, just like Muslims in many European countries these days, and when all of this happens with populist racism and xenophobia on the rise. Particularly then, a court needs to be independent and enjoy sufficient standing to defend fundamental rights. So when right wing populists marched the streets of Karlsruhe every week, and schools reported violent clashes over religion, and the headscarf had become a symbol of the illusion of homogeneity, of "us versus them", the German Federal Constitutional Court struck down a statute that privileged Christianity, and excluded women who covered their head for religious reasons from a teaching career (January 27, 2015)<sup>1</sup>. We needed, and still need, standing to do that. However, the Court also gained, again, the trust of the people to go against the flow when needed.

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1. *BVerfG*, Order of the First Senate of 27 January 2015 – 1 BvR 471/10, English translation of the decision available at: [www.bverfg.de/e/rs20150127\\_1bvr047110en.html](http://www.bverfg.de/e/rs20150127_1bvr047110en.html)

■ This happened again, also in the context of challenges that come with religious pluralism, and with critics from the other side, but nonetheless a clear stand for fundamental rights. There, the Court ruled on Good Friday (October 27, 2016)<sup>2</sup>, one of the highest Christian holy days of the year, traditionally protected by law in Germany. However, tradition cannot trump individual rights. Thus, we held that the legislator, as the democratically elected majority, may well choose to declare religious days a holiday. Yet, it has to respect the rights of those who enjoy the day off, yet do not observe the religious calling. Therefore, the applicant was granted the right to organise a party, and drink alcohol, if that does not disproportionately interfere with those in silent prayer.

### **Terrorism and Liberties**

■ Another line of jurisprudence that may illustrate the need for independence and standing for a constitutional court is the defence of fundamental rights in the efforts to prevent terror. This is a strong tradition of the German Federal Constitutional Court, and a clear hallmark of post 45 and post 89 constitutionalism, as a strong stance against categorising people on lists, against surveillance and the potential to abuse police and secret service information. However, a court that cares for standing shall also not be naïve. In a context in which terror does truly terrorise so many, one cannot stubbornly insist on doctrine, yet has to defend the basics and fine-tune, based on proportionality, what can be done. Therefore, in the ruling on the Federal Criminal Police Office (“BKA”; April 20, 2016)<sup>3</sup>, we struck down parts of a statute that gave disproportionate powers to the police in collecting data, and did not sufficiently define the limits of transmitting data to other countries. The ruling says that even via data, the state shall not ever lend a hand to human rights abuses anywhere. With this, the ruling is also an example of our attempts to be part of the world, and not in national isolation.

### **Embedded Constitutionalism**

■ Today’s reality of embedded constitutionalism, both in the region and its legal forms, like the EU and the Council of Europe, and in the world of the United Nations, as well as in close connection across the globe, is taken into account regularly these days. The German Federal Constitutional Court

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2. *BVerfG*, Order of the First Senate of 27 October 2016 – 1 BvR/458/10, Press Release in English available at: [www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-087.html](http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-087.html)

3. *BVerfG*, Judgment of the First Senate of 20 April 2016, of 20 April 2016 – 1 BvR 966/09, English translation of the decision available at: [www.bverfg.de/e/rs20160420\\_1bvr096609en.html](http://www.bverfg.de/e/rs20160420_1bvr096609en.html)

does interpret the national constitution in light of ratified international law, as interpreted by the competent courts. In addition, it more and more often deals with transnational matters. The Euro rulings are illustrations to the point.

■ In addition, and somewhat mirroring the Federal Police Office case, the Court had to decide that U.S. secret service information, the NSA selector lists, may not be given to a parliamentary committee because the governments interest in non-disclosure outweighs the interest in parliament to control the issue (October 13, 2016)<sup>4</sup>. However, the Court made sure that this does not limit the work of parliament in external or security matters as such. Indeed, the German Federal Constitutional Court does emphasise, in many rulings on European integration as well as on social security issues and more, that it is parliament at the centre of our democracy, not government. Again, however, you see a court fine tuning constitutional control, to balance the interests at stake, and protect its standing.

### **Defensive Democracy**

■ Finally, constitutional courts sometimes are confronted with the very broad political questions even more directly. In Germany, this was the case in the proceedings initiated by the State's Chamber, the Bundesrat, to prohibit the NPD, a neo Nazi party, in Germany. As a defensive, or sometimes called "militant" constitution, there is a clause in the Basic Law that allows for such an exceptional case (Art. 21 of the Basic Law<sup>5</sup>)<sup>6</sup>. However, this is not emergency rule or reasoning. Quite to the contrary. The quality of German constitutionalism, and of the Court watching over it, called for meticulous proceedings, with several days of hearing all sides, and the longest judgment ever given, with detailed discussions of all concerns raised in the context.

■ Finetuning the option to prohibit a political party, the Court was clear to denounce that party's politics, based on a concept of "people" that violates human dignity, and denies the fundamental equality of people, particularly targeting foreigners, migrants, religious and other minorities, and thus entirely unacceptable in a democratic society based on the protection of fundamental rights.

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4. *BVerfG*, Order of the Second Senate of 13 October 2016 – 2 BvE 2/15, Press Release in English available at: [www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-084.html](http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-084.html)
  5. Links to translations of the Basic Law and other legal sources are available at [www.bundesverfassungsgericht.de/EN/Verfahren/Rechtsquellen/rechtsquellen\\_node.html](http://www.bundesverfassungsgericht.de/EN/Verfahren/Rechtsquellen/rechtsquellen_node.html)
  6. *BVerfG*, Judgment of Second Senate of 17 January 2017, – 2 BvB 1/13, Press Release in English available at: [www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-004.html](http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-004.html)

■ Moreover, the Court explained that this party also disrespects the very basics of democracy, in calling for a specifically ethnic people to run the country. Such nationalist populism does not fly with a constitution that deserves the name. However, that party is not strong enough to really threaten our fabric. There is no prospect, to date, to achieve the aims sought. Thus, the Court denied the prohibition. The party is free to act. The judgment explains constitutionalism. It also takes a stand against those who are tempted to easily exclude its enemies. Or to paraphrase: When they do low, we go high.

### **The Courage to Act**

■ In sum, this may demonstrate, as do many other courts with their rulings in this world, that independence and standing are, particularly in light of the worrying threats to constitutional courts, indispensable ingredients of constitutionalism. If constitutional courts deserve the name, they need to be independent, enjoy standing, and be courageous to defend what we stand for. The Venice Commission is a collective that supports this cause, as do all of you. There is a need to find the courage to act.



# The European Court of Human Rights' jurisprudence on issues related to terrorism



Aida GRGIĆ , Lawyer, Registry of the European Court of Human Rights

**T**errorism is a scourge which has affected many countries. It has claimed the lives of many innocent people and it goes against fundamental democratic values and human rights starting with the right to life, which all States bound by the Convention have a duty to protect<sup>1</sup> .

— Governments, police, secret police and the courts have been at the forefront of fighting terrorism, but how can they do this and make sure they respect their own human rights obligations?

- Would it be right to torture suspects to obtain information?
- What about surveillance of telephone calls or email?
- Should a government be able to cancel elections, close down news papers or hold trials in secret?

— These are the kinds of questions the European Court of Human Rights has had to answer in its work of upholding the European Convention on Human Rights in the signatory countries. Indeed, the Court's very first judgment<sup>2</sup>, in 1960, *Lawless v. Ireland* concerned a man who had been detained in Ireland under special anti-terrorism powers.

1. Article 1 of the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002
2. *Lawless v. Ireland*, 332/57, 14 November 1960

■ As you will see, the Court's judgments show that States have to reconcile their actions in fighting terrorism with their duty to respect human rights.

■ Let me first of all point out that the Convention does give States some leeway to deal with what is regarded as emergency situations. This is found in Article 15, which allows States to derogate from certain obligations "in time of war or other public emergency threatening the life of the nation". Any measures can only be to the extent strictly required by the situation and have to be consistent with a State's other obligations under international law. We can find some very recent examples of States making use of Article 15 for instance in Turkey, following the failed coup d'état in summer of 2016, as well as in Ukraine, following the 2014 events in Crimea. Further examples might strike even closer to home, for instance, ever since the November 2015 terrorist attacks in Paris, there has been a state of emergency in France, which allows for certain special measures in the fight against terrorism, such as administrative searches, house arrests etc. It would appear that the said measures prevented as many as twelve terrorist attacks in that country in the past year.

■ However, even before invoking Article 15, States can restrict most Convention rights, in other words those which are not regarded as absolute, on certain grounds. This includes, but is not limited to, emergency situations, for example, a threat of an imminent terrorist attack. States enjoy what the Court has called a wide margin of appreciation, in other words, wide discretion, in balancing the rights of individuals against the interests of national security<sup>3</sup>.

■ On the other hand, and to answer one of the questions I raised earlier, there are some rights which cannot be overridden, including the right not to be subjected to torture or ill-treatment, as provided for in Article 3. This is one of the rights which are considered absolute by the Convention and no derogation is possible under any circumstances<sup>4</sup>.

■ As will be shown in this presentation, the fight against terrorism does not give States carte blanche to interfere with the rights of those within their jurisdiction. Governments will always need to demonstrate that the measures that they have taken to combat terrorism were justified on one or more of the grounds set out in the Convention text, or as interpreted by the Court in its case-law.

■ Let's now take a look at some key cases involving issues related to terrorism.

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3. *Leander v. Sweden*, 9248/81, § 59, 26 March 1987

4. *Öcalan v. Turkey* [GC], 46221/99, § 179, CEDH 2005 IV and *A. and Others v. the United Kingdom* [GC], 3455/05, § 126, ECHR 2009

# 1 Prevention of terrorism

— In order to prevent terrorism, States may take measures that, for example, interfere with the right to respect for private life, freedom of expression or association, or the right to free elections.

— Article 8 of the Convention guarantees to everyone the right to respect for his or her private life. However, the fight against terrorism permits the use of special surveillance methods to collect information which might help prevent terrorist acts or aid in the arrest and prosecution of suspected terrorists.

— As early as the 1970s, the Court accepted that legislation granting powers of secret surveillance over mail, post and telecommunications was, in exceptional circumstances, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime (*Klass v. Germany*)<sup>5</sup>. More recently, in *Uzun v. Germany*, the Court found that the surveillance of suspected terrorists using GPS did not violate their right to privacy guaranteed under Article 8<sup>6</sup>. The Court was satisfied that domestic legislation provided for adequate safeguards to prevent the arbitrary use of such methods.

— On the other hand, in *Gillan and Quinton v. UK*, powers granted to the police under anti-terrorist legislation to stop and search people without any reasonable grounds to suspect them of an offence were found to breach the applicants' right to respect for their private life<sup>7</sup> as the discretion conferred on the police was too broad and was not accompanied by adequate legal safeguards against abuse.

— Let's look at freedom of expression, which is protected by Article 10.

— In the context of the prevention of terrorism, in a case against Turkey, the Court found that the conviction of journalists for publishing statements by suspected members of an armed terrorist group, which were seen as an incitement to violence, had not violated the journalists' rights under Article 10<sup>8</sup>. In another case, *Süreç v. Turkey* the weekly newspaper owned by the applicant had published strongly-worded readers' letters accusing the authorities of brutal acts of suppression in south-east Turkey. The applicant was convicted of dissemination separatist propaganda. Given the overall context of terrorism in which the texts had been published and the fact that they were capable of

5. *Klass and Others v. Germany*, 5029/71, 6 September 1978, Series A, No. 28, § 48

6. *Uzun v. Germany*, 35623/05, § 80, ECHR 2010 (extracts)

7. *Gillan and Quinton v. the United Kingdom*, 4158/05, § 87, ECHR 2010 (extracts)

8. *Falakaoğlu and Saygılı v. Turkey*, 22147/02 and 24972/03, §§ 29-37, 23 January 2007

stirring up violence and hatred, the Court found that the domestic authorities had given relevant and sufficient reasons for interfering with the applicant's freedom of expression and no violation of Article 10 was found<sup>9</sup>.

■ The Court reached the same conclusion in the case of *Leroy v. France*. In that case the applicant had published a caricature and a provocative caption about the attack on the World Trade Center in 2001 just a few days after the attack. He was moderately fined for complicity in condoning terrorism. The Court accepted that, given the timing of the publication, just two days after the attack, the applicant must have been aware of the impact it was likely to have and found no breach of the applicant's right to freedom of expression<sup>10</sup>.

■ On the other hand, in *Ürper and Others v. Turkey*, the authorities had suspended on several occasions the publication of newspapers under anti-terrorist legislation for relatively short periods of time (15-30 days). The foregoing was found to breach Article 10<sup>11</sup> because the ban in the applicants' case had been imposed not on particular types of article, but on the future publication of entire newspapers, whose content was unknown at the time the court orders were made. By employing a form of censorship, the domestic courts had, in the Court's view, imposed unjustified limitations on the crucial "watchdog" role of the press.

■ So what about the prevention of terrorism and the freedom of association, which is protected by Article 11, and which includes the rights of political parties and other organisations? Well, in *Herri Batasuna and Batasuna v. Spain* the Spanish government was found not to have violated that provision when it dissolved two political parties whose direct political aims were contrary to the democratic principles of that country's Constitution<sup>12</sup>. The domestic courts had already concluded that the political parties in question had been instrumental to a terrorist organisation strategy and that the acts and speeches of their members had not ruled out the use of force in order to achieve their aims.

■ In another case against Spain *Etxebarria and Others v. Spain* the ECHR also had the opportunity to examine the issue of terrorism in the context of the right to free elections. It found no violation of the Convention for the exclusion from taking part in an election of electoral groups which had been dissolved

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9. *Sürek v. Turkey* (no. 1) [GC], 26682/95, §§ 59-65, ECHR 1999-IV

10. *Leroy v. France*, 36109/03, §§ 36-48, 2 October 2008

11. *Ürper and Others v. Turkey*, 14526/07 et al., §§ 44-45, 20 October 2009

12. *Herri Batasuna and Batasuna v. Spain*, 25803/04 and 25817/04, §§ 94-95, ECHR 2009

on the grounds of their links with a terrorist organisation<sup>13</sup>. The dissolution of the groups had been proportionate to the aim of the protection of democracy and, given a lack of any arbitrariness on the part of the authorities, had not infringed the free expression of the opinion of the people.

## 2 Interventions seeking to stop terror attacks

— In order to stop terrorist attacks, States may use lethal force.

— As already mentioned, States are under an obligation to protect everyone's right to life, as guaranteed by Article 2, and this includes the lives of suspected terrorists. The use of lethal force in self-defence must be "absolutely necessary" if it is to be justified under that provision. For example, in the case of *McCann and Others v. the United Kingdom* the 1988 killing by British military servicemen of three members of the Irish Republican Army suspected of preparing a bomb attack was found to violate Article 2 since the operation could have been carried out without recourse to lethal force<sup>14</sup>.

— On the other hand, the death of hostages in a Moscow theatre due to a gas that was used to neutralise the hostage-takers was not found to be contrary to Article 2 in the case of *Finogenov and Others v. Russia*<sup>15</sup>. Although the gas was dangerous and potentially lethal, it had not been intended to kill. The gas had produced the desired effect on the terrorists, rendering most of them unconscious, had helped in the liberation of the rest of the hostages and reduced the likelihood of an explosion. However, in that case the Court found separately that Russia had failed to comply with its positive obligations under Article 2 as the operation to rescue some 900 hostages had been insufficiently prepared.

— The very recent case, *Tagayeva and Others v. Russia* is another good example of what the States are or are not supposed to do in the context of fight against terrorism. The case concerned the September 2004 terrorist attack on a school in Beslan. For over fifty hours heavily armed terrorists held captive over 1,000 people, the majority of them children. Following explosions, fire and an armed intervention, over 330 people lost their lives (including over 180 children) and over 750 people were injured. The applicants (over 400 people) had either been

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13. *Etxeberria and Others v. Spain*, 35579/03 et al., §§ 51-56, 30 June 2009

*Herritaren Zerrenda v. Spain*, 43518/04, § 43, 30 June 2009

14. *McCann and Others v. the United Kingdom* [GC], 18984/91, 27 September 1995, § 213, Series A no. 324

15. *Finogenov and Others v. Russia*, 18299/03 and 27311/03, ECHR 2011 (extracts)

taken hostage and/or injured in the incident, or were family members of those taken hostage, killed or injured. They made allegations of a range of failings by the Russian State in relation to the attack. The Court held that there had been a violation of Article 2 (right to life) of the Convention, arising from a failure to take preventive measures. The authorities had sufficiently specific information of a planned terrorist attack in the area, linked to an educational institution. Nevertheless, not enough had been done to disrupt the terrorists meeting and preparing; insufficient steps had been taken to prevent them travelling on the day of the attack; security at the school had not been increased; and neither the school nor the public had been warned of the threat. The Court also found that there had been:

1. a violation of the procedural obligation under Article 2, primarily because the investigation had not been capable of leading to a determination of whether the force used by the State agents had or had not been justified in the circumstances;
2. a further violation of Article 2, due to serious shortcomings in the planning and control of the security operation. The command structure of the operation had suffered from a lack of formal leadership, resulting in serious flaws in decision-making and coordination with other relevant agencies. T
3. a violation of Article 2 arising from the use of lethal force by security forces. In the absence of proper legal rules, powerful weapons such as tank cannon, grenade launchers and flame-throwers had been used on the school. This had contributed to the casualties among the hostages and had not been compatible with the requirement under Article 2 that lethal force be used “no more than [is] absolutely necessary”.

■ So what about the prevention of terrorism and the freedom of association, which is protected by Article 11, and which includes the rights of political parties and other organisations? Well, in *Herri Batasuna and Batasuna v. Spain* the Spanish government was found not to have violated that provision when it dissolved two political parties whose direct political aims were contrary to the democratic principles of that country’s Constitution . The domestic courts had already concluded that the political parties in question had been instrumental to a terrorist organisation strategy and that the acts and speeches of their members had not ruled out the use of force in order to achieve their aims.

### 3 Arrest and pre-trial detention of terrorist suspects of terrorism

— The arrest or pre-trial detention of suspected terrorists must be in conformity with their right to liberty and security, as guaranteed by Article 5.

— First of all, there must be reasonable grounds for suspecting someone of terrorism if his or her arrest is to be justified under that provision<sup>16</sup>. However, the police may frequently need to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting the source of the information in jeopardy, be revealed to the suspect or produced in court. The Court has therefore found that Article 5 § 1 of the Convention should not be construed so as to put a disproportionate burden on the authorities when taking effective measures to counter terrorism in order to discharge their duty under the Convention to protect life<sup>17</sup>.

— For example, in *A. and Others v. the United Kingdom*, the UK Government considered it necessary to create an extended power permitting detention of persons suspected that they were “international terrorists”. They issued a derogation notice under Article 15, in which they referred to the power to detain foreign nationals certified as “suspected international terrorists” who could not “for the time being” be removed from the United Kingdom. The Court ruled that the indefinite detention on national security grounds of foreign nationals suspected of terrorism, when those people could not be deported as they risked ill-treatment in the receiving State, was contrary to Article 5-1<sup>18</sup>. Britain’s derogation under Article 15 was found to have unjustifiably discriminated between British and foreign nationals and the Court thus did not accept it as valid justification.

— In general, the length of detention of a suspected terrorist – just like for any other person – should not exceed a reasonable time. For instance, in a number of cases against France, the pre-trial detention of detainees accused of belonging to a Basque terrorist organisation for between four and a half and almost six years was held to violate Article 5 § 3<sup>19</sup>.

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16. *Fox, Campbell and Hartley v. the United Kingdom*, 12244/86, 12245/86 and 12383/86, 30 August 1990, Series A no. 182, § 35

17. *O’Hara v. the United Kingdom*, 37555/97, § 35, ECHR 2001 X, *Sher and Others v. the United Kingdom*, 5201/11, 20 October 2015 (not final)

18. *A. and Others v. the United Kingdom* [GC], 3455/05, § 190, ECHR 2009

19. *Berasategi v. France*, 29095/09, 26 January 2012; *Esparza Luri v. France*, 29119/09, 26 January 2012; *Guimon Esparza v. France*, 29116/09, 26 January 2012; *Sagarzazu v. France*, 29109/09, 26 January 2012 and *Soria Valderrama v. France*, 29101/09, 26 January 2012

Furthermore, Article 5 § 4 guarantees the right of those suspected of terrorism to have the lawfulness of that detention reviewed speedily. The absence of such a review led to the finding of a violation of that provision in *M.S. v. Belgium*. The case concerned an Iraqi national suspected of having links with Al-Qaeda who had been detained in a closed transit centre pending deportation from Belgium<sup>20</sup>.

States must also respect the procedural guarantees of review. No violation of Article 5 § 4 was found in the previously mentioned case of *A. and other v. UK* concerning the withholding on national security grounds of material relevant to the lawfulness of the detention of foreign nationals suspected of terrorism<sup>21</sup>. In that case, the procedural requirement of review was satisfied as the non-secret material against five of the applicants had been sufficiently detailed to enable an effective challenge of the lawfulness of the applicants' detention.

Furthermore, in *Sher v. UK* the Court stated that Article 5 § 4 of the Convention cannot preclude the use of a closed hearing in which confidential sources of information supporting the authorities' line of investigation are submitted to a court in the absence of a detained terrorist suspect or his lawyer. What is important is that the authorities disclose enough information to enable a detainee to know the nature of the allegations against him and to have the opportunity to refute them, and to participate effectively in proceedings concerning his continued detention<sup>22</sup>.

## 4 Criminal proceedings against terrorist suspects

Just like anyone else facing criminal charges, those suspected of terrorism have the right to a fair trial, as guaranteed by Article 6.

In the first place, security or public order concerns cannot justify a violation of the right of the accused to remain silent and to not incriminate him or herself<sup>23</sup>.

In *Salduz v. Turkey* the Court found that a statement which the police had taken from a minor, who had been arrested on suspicion of aiding and abetting a terrorist organisation and had not been allowed access to a lawyer during police custody, could not be used as evidence against him<sup>24</sup>.

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20. *M.S. v. Belgium*, 50012/08, § 166, 31 January 2012

21. *A. and Others v. the United Kingdom* [GC], 3455/05, § 220-222, ECHR 2009

22. *Sher and Others v. the United Kingdom*, 5201/11, 20 October 2015 (not final)

23. *Heaney and McGuinness v. Ireland*, 34720/97, § 58, ECHR 2000-XII

24. *Salduz v. Turkey* [GC], 36391/02, §§ 62-63, ECHR 2008



■ The Court further developed this principle in a recent GC case *Ibrahim and Otherv. UK*, which concerned delayed access to a lawyer of persons suspected of involvement in bombs detonated on the London public transport system. The first three applicants were arrested but were refused legal assistance for periods of between four and eight hours to enable the police to conduct “safety interviews”. The Court recalled that the first stage of the Salduz test required the Court to assess whether there were compelling reasons for the restriction, while the second stage required it to evaluate the prejudice caused to the rights of the defence by the restriction, in other words, to examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair.

■ The criterion of compelling reasons was a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice were permitted only in exceptional circumstances, and had to be of a temporary nature and be based on an individual assessment of the particular circumstances of the case. Relevant considerations when assessing whether compelling reasons had been demonstrated were

1. whether the decision to restrict legal advice had a basis in domestic law and
2. whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them.

■ Where a respondent Government convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this could amount to compelling reasons to restrict access to legal advice for the purposes of Article 6. However, a non-specific claim of a risk of leaks could not.

■ The Court reiterated that in assessing whether there has been a breach of the right to a fair trial it is necessary to view the proceedings as a whole. The absence of compelling reasons does not, therefore, lead in itself to a finding of a violation of Article 6.

■ However, the outcome of the “compelling reasons” test was nevertheless relevant to the assessment of overall fairness. Where compelling reasons were found to have been established, a holistic assessment of the entirety of the proceedings had to be conducted to determine whether they were “fair” for

the purposes of Article 6 § 1. Where there were no compelling reasons, the Court had to apply a very strict scrutiny to its fairness assessment. The onus would be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice.

■ As regards the first three applicants, the Government had shown that there had been compelling reasons for the temporary restrictions on their right to legal advice and hence the Court found no violation. The fourth applicant was not suspected of having detonated a bomb and was initially interviewed by the police as a witness. However, he started to incriminate himself by explaining his encounter with one of the suspected bombers shortly after the attacks and the assistance he had provided to that suspect. The police did not, at that stage, arrest and advise him of his right to silence and to legal assistance, but continued to question him as a witness and took a written statement. He was subsequently arrested and offered legal advice. In his case the Government failed to prove the existence of compelling reasons for the restriction of his right to legal advice or to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice. Violation was found.

■ Coming back more generally to fair trial guarantees of terrorist suspects, the Court has held that use in criminal proceedings of statements obtained as a result of torture or any other form of ill-treatment renders the proceedings as a whole automatically unfair, in breach of Article 6 of the Convention<sup>25</sup>. This applies not only where the victim of the treatment contrary to Article 3 is the actual defendant, but also where third parties are concerned.

■ For instance, in *Othman v. UK* the Court held that the expulsion of an applicant from the United Kingdom to Jordan, where he had been convicted in his absence of terrorism, would violate his right to a fair trial because there was a real risk that evidence obtained through the torture of other people would be admitted against him in a retrial in Jordan<sup>26</sup>.

■ Another example is the case of *El Haski v. Belgium*, where a Moroccan national was arrested and prosecuted in Belgium for participating in terrorist activities. The Court found that the incriminating statements, which had been obtained from a witness in a third country, should not have been admitted into evidence by the Belgian courts without first ascertaining that the witness

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25. *Gäfgen v. Germany* [GC], 22978/05, § 187, 1 June 2010

26. *Othman (Abu Qatada) v. United Kingdom*, 8139/09, §§ 285 and 287, ECHR 2012

in question had not been subjected to treatment contrary to Article 3, as it had been claimed by the applicant<sup>27</sup>.

## **5 Treatment in places of detention of suspected or convicted terrorists**

— Suspected terrorists in pre-trial detention also have to be treated in a way which is not contrary to Article 3 and, as mentioned earlier, its absolute ban on torture and inhuman and degrading treatment. As early as 1978 in *Ireland v. UK* the Court found the use of certain interrogation techniques such as hooding, the deprivation of sleep, food and drink and the subjection to noise, to be incompatible with Article 3 in view of the intense physical and mental suffering they cause to the victims<sup>28</sup>.

— Convicted terrorists also enjoy the same protection from treatment contrary to Article 3 while in prison. For example, in *Frerot v. France* full body searches, including the most intimate parts of the person, to which a convicted terrorist was subjected after each prison visit for over two years have been considered to constitute degrading treatment<sup>29</sup>.

— On the other hand, in *Ramirez Sanchez v. France* the Court found no violation of Article 3 in the case of a dangerous international terrorist who had been sentenced to life imprisonment and kept in solitary confinement for eight years<sup>30</sup>. The Court decided that his overall conditions of detention had not been severe enough to amount to inhuman or degrading treatment as it took into account the physical conditions of the applicant's detention, the fact that he had not been in complete isolation, and also his character and the danger he posed.

— In the case of another detained terrorist, *Ocalan v. Turkey*, the Court found that the lack of communication facilities coupled with major difficulties of access to the prison for his family members amounted to inhuman treatment<sup>31</sup>. However, an increase in activities with other detainees and in the frequency of family visits was found to have made his subsequent detention compatible with Article 3.

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27. *El Haski v. Belgium*, 649/08, § 99, 25 September 2012

28. *Ireland v. the United Kingdom*, 5310/71, judgment of 18 January 1978, Series A no. 25, § 168

29. *Ireland v. the United Kingdom*, 5310/71, judgment of 18 January 1978, Series A no. 25, § 168

30. *Ramirez Sanchez v. France* [GC], 59450/00, § 150, ECHR 2006-IX

31. *Öcalan v. Turkey* (no. 2), 24069/03 et al., 18 March 2014

## 6 Expulsion and/or extradition of suspected or convicted terrorists

— Where there is a real risk of a suspected or convicted terrorist being subjected to ill-treatment in another State, the prohibition on a return to that country is absolute, regardless of his or her past offences or conduct<sup>32</sup>.

— For example, in *Saadi v. Italy* the Court ruled that enforcing a decision to deport a terrorist to Tunisia, where he had been convicted in his absence, would violate his rights under Article 3 since the Italian Government had not been provided with sufficient diplomatic assurances that he would not risk treatment prohibited by the Convention<sup>33</sup>.

— The Court has also been faced with cases where respondent States have extradited or deported suspected terrorists despite the Court's indication to the Government concerned under Rule 39 of the Rules of Court to refrain from doing so until it has had an opportunity to examine the merits of the applicant's complaints. For example, in *Trabelsi v. Belgium* the Court found a violation of Article 3 and Article 34 where, despite a Rule 39 indication by the Court, a Tunisian national was extradited from Belgium to the United States where he faced a potentially irreducible life sentence for terrorist offences<sup>34</sup>.

— Most recently, the Court has also had to deal with cases concerning the taking of citizenship of suspected terrorists. In its decision *K2 v. UK*, the Court examined the case brought by a naturalised British citizen, who had left the United Kingdom, got involved in terrorism-related activities in Somalia and was subsequently deprived of his UK citizenship by an order made by the Secretary of State for the Home Department. The Court recalled that an arbitrary denial of or revocation of citizenship might, in certain circumstances, raise an issue under Article 8 because of its impact on the private life of the individual. Two issues had to be assessed:

1. whether the revocation was arbitrary (which was a stricter standard than that of proportionality) and
2. what the consequences of revocation were for the applicant.

— In determining arbitrariness, the Court had regard to

- i. whether the revocation was in accordance with the law;

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32. *Saadi v. Italy* [GC], 37201/06, ECHR 2008

33. *Saadi v. Italy* [GC], 37201/06, § 147-149, ECHR 2008

34. *Saadi v. Italy* [GC], 37201/06, § 147-149, ECHR 2008

ii. whether it was accompanied by the necessary procedural safeguards, including whether the person deprived of citizenship was allowed the opportunity to challenge the decision before courts affording the relevant guarantees; and

iii. whether the authorities had acted diligently and swiftly. It found in the affirmative in respect of all three conditions and thus concluded that the revocation of his citizenship had not been arbitrary.

■ As to the consequences of the revocation, the Court noted that the applicant was not rendered stateless as he had obtained a Sudanese passport. Furthermore, he had left the United Kingdom voluntarily prior to the decision to deprive him of his citizenship; his wife and child were no longer living in the United Kingdom and could freely visit Sudan and even live there if they wished; and the applicant's own natal family could – and did – visit him “reasonably often”. Inadmissible under Article 8.

## 7 “Extraordinary renditions” of terrorist suspects

■ In recent years, certain States have been involved in what is called “extraordinary rendition” of suspected terrorists. Also known as “extrajudicial transfer”, it is a measure involving the transfer of people from one jurisdiction or State to another, for the purposes of detention and interrogation outside the ordinary legal system. It is absolutely incompatible with the rule of law and the values protected by the Convention because of its deliberate disregard of the guarantees of due process<sup>35</sup>.

■ In *El-Masri v. FYROM* the Court found a violation of Article 5 in the case of the unlawful detention of a German national of Lebanese origin who had been suspected to have links with terrorists. He had been handed over to agents working for the CIA operating at the time in “the former Yugoslav Republic of Macedonia”<sup>36</sup>. In that case, the Court also found a violation of Article 3 on account of the torture and inhuman and degrading treatment to which the applicant had been subjected while in detention.

■ Breaches of Articles 2, 3, 5 and 6 were also found in *Al Nashiri v. Poland*. The case concerned suspected terrorist, who had been handed over to CIA agents operating in Poland and had been detained at the US naval base in Guantanamo

35. *Babar Ahmad and Others v. the United Kingdom* (dec.), 24027/07, 11949/08 and 36742/08, § 114, 6 July 2010

36. *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], 39630/09, ECHR 2012

Bay following an “extraordinary rendition”<sup>37</sup>. In its judgment, the Court also required Poland to seek assurances from the US authorities that the applicant would not be sentenced to death as a result of his “extraordinary rendition”.

## 8 Final observations

Recent and past history demonstrate that States face serious challenges from terrorism and the violence it spawns and that they frequently need to take exceptionally stringent measures in response. As the Court stated in one of the aforementioned judgments, a State cannot be required “to wait for disaster to strike before taking measures to deal with it”<sup>38</sup>.

As has been shown in this presentation, in their fight against terrorism, States must strike a balance between their duty to protect national security and the lives of everyone within their jurisdiction and the obligation to respect other rights and freedoms guaranteed by the Convention.

When examining whether anti-terrorism measures comply with or violate the Convention, the European Court of Human Rights will look carefully at all the circumstances of the case. That kind of scrutiny, at European level, is to help make sure that the fight against terrorism and the protection of human rights can co-exist.

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This presentation is largely based on the CourTalks video entitled “Terrorism” available on the ECHR’s website. References to all mentioned cases can be found in the video, its script as well as in the Court’s Factsheet covering the same subject.

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37. *Al Nashiri v. Poland*, 28761/11, §§ 518-519, 24 July 2014

38. *A. and Others v. the United Kingdom* [GC], 3455/05, § 177, ECHR 2009

# Limits of constitutional interpretation on the issues of security and xenophobia

## The Peruvian Case

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Eloy ESPINOSA-SALDAÑA BARRERA,  
Judge, Constitutional Tribunal, Peru

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It is no secret for anyone that in the last years, particularly after September 11, 2001, a negative and unfair situation has arisen: the connection between the migrant status, even the refugees' status, with terrorism, or to say the less, with criminality. To this effect, migrants become, without any objective basis, in a more than potential risk for public safety or even for national safety.

Undoubtedly, this perception is based upon such spontaneous and unfortunate opinion, very common among certain authors, which leads to lack of trust to those who come from abroad, or with "the different one". Along with this misconception, we have the tendency of blaming the different one with regards to our own frustrations, limitations and deficiencies. Own mistakes or own responsibilities are not acknowledged. Rather, without any objective support, the one who is not the same as us is blamed for being a threat for attaining our own achievements or improving our personal, family or national situation.

This erroneous point of view is strengthened by disqualifying the other person, the migrant: like more than one author has stated, the migrant is considered as an intruder; a poor person willing to do anything to make a living, doing the job of those who come from that place, or placing at risk the integrity or rights of these people. A culturally inferior person, a criminal or suspected felon. Thus, gradually, and unfortunately in many cases, mistrust grows and becomes the humiliation of the other one, or even in hate.

■ And, as it has been said, xenophobia, nuisance or hatred for the immigrants, for those who are different, is only the consequence of prejudiced reactions of those who do not accept themselves or do not acknowledge their limitations and thus, blame without objective justification and uncontrollable fanaticism, others for being responsible for all ills within a society. The strange one is the enemy, and since there is a security crisis, the enemy foreigner is the criminal.

■ The aforementioned situation leads to criminalizing migrants for just being different, making them criminals without any reason, or at least, with no apparent reason. The intention is not to inflict punishment. Denigration and diminishing dignity of those who are different is sought through administrative or even government decisions which hide xenophobic feelings with the excuse of protecting public or even national safety.

■ Unfortunately, this has also happened in many States, wherein citizens of neighboring countries, or people who come from other areas within the same country, but far from the capital, are considered criminals by a sector of the population. This, leads to the promotion of drastic limitations against such migrants with no legitimate justification.

■ On the other hand, constitutional judges face a great responsibility, especially if he or she is part of a constitutional court or a high court. First, constitutional judges cannot forget that there is no public or even private activity in a Constitutional State that can contravene constitutional parameters. Hence, secondly, a decision cannot be considered according to law, if with no reasonable justification, not only rights of third parties are limited, but there is non-recognition of rights, and an infringement of human dignity.

■ It is therefore deemed appropriate that a constitutional judge has the duty to control and even reverse excesses. However, this brings us to the question about the guidelines and scope of such control, as well as the mechanisms available to this judge if there is no willingness to comply with his or her decision, based against political and non-actionable issues.

■ Let's say that to this respect, in comparative law, there are several alternatives to this effect. In North American law, "*Baker vs. Carr*" acknowledges the possibility of controlling political questions based upon matters of procedure, or upon matters of substance. This guideline has also been followed by the Inter-American Court of Human Rights in two cases: "*La Cantuta v. Peru*" and "*Barrios Altos v. Peru*".



■ In Europe, other techniques have been used for controlling political events or government actions. Even though these two terms are not synonyms, they both point in the same direction: the existence of decisions subject to judicial review. To this effect, there are those who want to use the balancing test, the protection of fundamental rights or other techniques.

■ Special mention deserves those who consider political events or government actions as discretionary acts of the Administration and, thus, applying for its control, the evaluation guidelines of administrative discretion.

Finally, we ought to ask what needs to be done by a constitutional judge if his or her decisions are not complied with. In this case, it is usually said that such decisions (especially if they constitute public policies) are beyond his or her range of control. In this scenario, the constitutional judge must use the existing legal mechanisms for enforcing final judgments. If this is not viable, and should we be facing violation of rights or omissions which lead to violations of such rights, we can use more drastic techniques, which are well-known in Latin America, such as a decision declaring an unconstitutional state of affairs or even the approval of a structural induction. This last option must only be taken in emergency situations.



# Constitutional courts as democratic consolidators: Insights from the Republic of Moldova after 25 years

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**N**owadays constitutional courts are called to respond to a number of important challenges, especially when they face a growing number of limitations of human rights that are imposed by the states in order to ensure a better national security, fight against terrorism and fight against corruption.

■ It is a well-known fact that the fundamental role of a constitutional court is not limited to solving legal conflicts of constitutional nature, but mainly *to promote and protect the human rights as fundamental values, to secure the democratic principles and values, to ensure and to implement the rule of law*. However, it is impossible to ensure this fundamental goal without an independent Constitutional Court. Failing to ensure the independence of Constitutional Courts, democracy and the rule of law, the human rights will remain mere statements lacking any content.

■ The Constitutional Courts have emerged on the European continent following the two world wars that took place in Europe in the last century. The Constitutional Court of Moldova, similar to the Constitutional Court of Bulgaria, was instituted during the third wave of creation of constitutional courts in Europe – after the crash of the communist regime and disappearance of the Soviet Empire.

■ Creation of Constitutional Courts was preceded by brutal social experiments based on severe violation of human rights. Entire nations have experienced military occupation, organised famine, unjust convictions, and mass deportation, arbitrary nationalizations and total lack of any elements of political pluralism.

■ This common past of the European countries allows us to understand how important freedom, democracy, and human rights are. We understand better than other nations that the renunciation to totalitarian past does not resume to only the abolition of communist or nazi rhetoric, but consists in principal, in the development of different fundamental systems where **the person is the supreme value, and the key role of the State is to deliver justice.**

■ To this aim, one of the first steps taken by our countries following the proclamation of their independence was to adopt democratic constitutions, or to restore previous democratic constitutions, that would guarantee human rights and fundamental freedoms and protect citizens from abuses of the State.

■ **The fight for democracy is a daily fight.** The Constitutional Justice has to stop the abusive political will irrespective of its source – President, Government, and Parliament – even if consequently, the Constitutional Courts become the most exposed institutions in the state.

■ Modern societies face the danger of terrorism and different threats to national security. It is sufficient to remember recent attacks in Paris, Brussels and Istanbul Airport. This dictates a separated agenda for politicians and determines them often to solve these problems through restrictive methods, crossing the red line of human rights and fundamental freedoms, promising the society that they would *make order*. In this case, the Constitutional Courts are those who have the mission to say that this is not a remedy to enhance the security and eliminate terrorist threats. The Constitutional Courts are those that should declare that those who renounce to rights and freedoms in favour of security will end up to understand that they lost both.

■ We are aware that terrorism and different threats to national security undermine the functionality of a State, and the fight against these phenomena is not just an issue related to good governance, but is a matter that ensures State's survival. However, the fight terrorism and different threats to national security, as important as it is, should not generate the limitation of fundamental rights. The right to a fair trial is an indispensable value of the rule of law, and the attempt to ignore the human rights by invoking the need to construct a state based on the rule of law is equally wrong and dangerous.

■ The State has created the law, and the law is limiting the State, and this rule should not be violated without compromising both the notion of state as well as the notion of law. **The basis of democratic states is the law. The essence of law is freedom, since it is only freedom that defines the conditions that allow people to live together as free individuals.** For this reason, a key role in this process is played by the Constitutional Courts, which are called to remove the legal acts in contradiction with the Constitution.

■ Over the past decades, the constitutional justice in our countries has addressed an enormous range of legal and factual issues. **The constitutional justice is a unique and powerful instrument for promoting civilized values and democratic progress in such a way as to improve the lives of people.**

■ **Those who claim that the fight for security justifies violation of the Constitution, empty the notion of rule of law, compromising the legitimacy of this fight.** The role of Constitutional Courts of our states is not to admit the substitution of the rule of law with a police state.

■ Throughout the greatest part of the European continent there are functioning democratic systems. Nevertheless, even the countries where the democratic government it is considered to be safe and sound from time to time face anti-democratic derailments.

■ Today, the Constitutional Courts of our states are facing multiple challenges. I want to mention just a few examples from the case law of the Constitutional Court of the Republic of Moldova.

■ The hallmark of the soviet regime was the violation of human rights. Thus, the architects of the 1994 Constitution of the independent Republic of Moldova strove to ensure that human rights would be fully protected. Chapter 2 was entitled "Fundamental Rights, Liberties and Duties" and, in content, was comparable in many respects to the standard international documents on human rights, in particular the United Nations' Universal Declaration on Human Rights and the Council of Europe's Convention on Human Rights and Fundamental Freedoms.

■ In some important respects, however, the Constitution went further than the standard international documents on human rights. Indeed, Chapter 2 also protects the right to respect for one's dignity, the right to demonstrate and present petitions, the right of access to information held by the state, the right of arrested persons to be charged or released within 72 hours, the right to fair labor practices and the right to a healthy environment. Special mention is also made of children's rights.

■ The Moldovan Constitution has a general limitation clause, following the format of the European Convention, which allows the rights conferred to be taken away if factors such as public order, morality or the economy so dictate.

■ To help ensure that Chapter 2 was really effective, however, further constitutional provisions encouraged all courts when interpreting Chapter 2 also to regard relevant international human rights law and the European Court's case law.

■ The Constitution of 1994 has adopted the European model of constitutional jurisdiction based on Hans Kelsen's concept and individuals do not have direct access to the Constitutional Court.

■ Under the Constitution, the Constitutional Court obtained exclusive power to strike down any law on the grounds that it violated constitutional provisions, including provisions concerning fundamental rights.

■ A Constitutional Court only exists through the jurisprudence it creates. In the 22 years of its existence, the Constitutional Court of Moldova has generated a great deal of jurisprudence, depending on one hand of the pulse of public life at a certain stage, and on the other hand, of the value of judges at different stages and of their attitude towards democracy and freedom as fundamental values of Western civilization.

■ Between 1995-2001, the jurisprudence of the Court was marked by an admirable judicial activism. The modest jurisprudence from 2001-2010 reflects a decade of stagnation in the institution's development ("decorative constitutionalism"), when the Court annually adopted 20 to 30 decisions, most of which related to the Court's functional competence. After 2011, the Court has returned to an adequate judicial activism without which a Constitutional Court cannot fulfill its mission.

■ The 2011-2017 case-law reflects those fundamental changes that have occurred in the work of the Court. The way in which judgments were drafted and reasoned was reformulated, according to the European Court of Human Rights model. According to EU experts, the Constitutional Court judgments are motivated even *in extenso*. The Court has never departed from the case-law of the European Court of Justice, it is in line with relevant international soft law, and its decisions are fully in line with existing EU standards.

■ The jurisprudence of the Constitutional Court reflects the fact that the Court has never hesitated to give practical effect to general principles such as “democracy” and “rule of law”. At the same time, the Court has always pursued the aim of adopting solutions with practical impact (useful effect), not only for authorities, but also for ordinary citizens.

■ The CCM jurisprudence reflects the development of mechanisms for the protection of fundamental rights and freedoms, through the interpretation of the supreme law, and not by a classical legislative method. For instance, the possibility of controlling the constitutionality of the acts adopted by Parliament even before their publication in the Official Gazette (a priori control) has been opened exclusively on the interpretation of the Constitution. By the same procedure, the mechanism of the exception of unconstitutionality (referral to the CC by ordinary courts) has been unblocked, so that all the judges can act in case of necessity at the Constitutional Court.

■ By Judgment no. 2 of 9 February 2016 the Constitutional Court has provided a new interpretation of Article 135 (1) (g) of the Constitution and, in fact, extended the *ratione personae* constitutional jurisdiction beyond the list of qualified persons with the right to initiate the constitutional procedure. Following, in only one year the Constitutional Court received twice more applications from ordinary courts than in 20 years.

■ We have extensive jurisprudence useful to lawmakers and political actors, concerning the principles of national independence, institutional architecture, relations between state powers, resolution of constitutional legal conflicts between different state authorities, neutrality and the right of the state to defend itself against aggression, the fight against corruption and the rule of law. I will briefly refer to only a few of them.

## ■ 1. National security

### **Neutrality status and the occupied territory**

■ On 2nd of May 2017, the Constitutional Court delivered the judgment on the interpretation of Article 11 of the Constitution (Application 37b/2014<sup>1</sup>) on permanent neutrality of Moldova.

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1. Judgment no.14 of 02.05.2017 on the interpretation of article 11 of the Constitution

■ The Court stated that the neutrality of the Republic of Moldova is closely related to its historical background; the military occupation of its Eastern area was a determinant factor in proclaiming its neutrality in the Constitution. From a historical and constitutional point of view, neutrality has never been a goal in itself, but rather an instrument among many others that would allow the Republic of Moldova to meet its true objectives, among which the withdrawal of foreign troops from its territory, consolidation of its independence and restoration of its territorial integrity.

■ According to Article 11 of the Constitution, there are two distinctive characteristics of the permanent neutrality instrument of the Republic of Moldova. First, permanent neutrality means that the Republic of Moldova commits itself to stay neutral in any present or future conflict, irrespective of the identity of the belligerents, location and its onset. Second, the neutrality of the Republic of Moldova means that the Republic of Moldova does not admit the stationing of foreign military troops on its territory. This, however, does not impede the Republic of Moldova to make use of all its means to defend itself militarily against any aggressor and to prevent any act that is incompatible with its neutrality, which may be committed by the belligerents on its territory.

■ Article 11 of the Constitution stipulates that the “Republic of Moldova proclaims its permanent neutrality”. Although the second paragraph of the article specifies that the “Republic of Moldova does not admit the stationing of any foreign military troops on its territory”, since the Soviet occupation of the present territory of the Republic of Moldova (1944-1991) until now, in the Eastern part of the country there are still stationed occupation troops of the Russian Federation. Practically, the Soviet/Russian occupation has never stopped in the Eastern part of the country, although the independence of the Republic of Moldova has been proclaimed. The Russian Federation has recognized it, but withdrew its army only from the western part of the Moldovan territory (11% of the territory of the Republic of Moldova is still under occupation).

■ The Court stressed the fact that the Russian Federation did not withdraw its occupation troops from the Eastern region of the country, but on the contrary, has consolidated its military presence in the Transnistrian region of the Republic of Moldova, this constitutes a **violation of constitutional provisions regarding the independence, sovereignty, territorial integrity and permanent neutrality of the Republic of Moldova, as well as of international law.**



■ The Court mentioned that neutrality and independence are interdependent: the independence is both what neutrality seeks to protect and, given the state has to make decisions freely, it is a sine qua non condition of neutrality. To show credibility, a permanently neutral state has to prove a sufficient degree of real independence from other states. Only then will it be able to resist pressures during crisis and meet its obligations as neutral state.

■ The Court noted that inasmuch the Republic of Moldova remains under military occupation, the more relative are rendered its independence and autonomy, which are required by the status of neutrality.

■ The security of the Republic of Moldova should be ensured considering the geopolitical factors that exercise their influence in the South-Eastern European region and directly on the State.

■ Ensuring security and national defense means that the national interest may not be sacrificed in favor of another state, group of states or international organisations and in case of attacks against the components of its security, the State may keep them, including with the support of national and international armed forces.

■ The Court noted that the **Constitution is not a suicide pact**. Hence, if there is **any threat against fundamental constitutional values, such as national independence, the territorial integrity or the security of the state, the authorities of the Republic of Moldova are under the obligation to take all the necessary measures, including military to defend itself efficiently**.

■ Moreover, under the conditions of more and more obvious independent limited capacities of defense, an increased international cooperation, both bilateral and multilateral, is imperative.

■ It is obvious that neutrality does not constitute an obstacle in the defense policy of the Republic of Moldova. A too narrow interpretation, limiting very much the defense possibilities, would be a handicap for our country and its citizens. The purpose of neutrality is to enhance the security of the country and not to limit its defense capacity.

■ Moreover, neutrality cannot be applied to the aggressor, as **the state cannot abstain when it is aggressed**. Neutrality creates special rights and obligations, which as a rule, do not exist during peace times and which end with the conclusion of hostilities or when the war starts between a neutral state and one of the belligerents. The neutral state **enjoys the right to legitimate defense** (individual and collective) against an armed attack targeting the sovereignty and territorial integrity of the state.

■ **The Court ruled that stationing of any military troops or bases on the territory of the Republic of Moldova, managed and controlled by foreign states, is unconstitutional.**

■ **Article 11 of the Constitution should be seen as an instrument of protection, not as an obstacle in protecting the independence, democracy and other constitutional values of the Republic of Moldova.**

■ Moreover, the participation of the Republic of Moldova in collective security systems, such as the United Nations security system, peacekeeping operations, humanitarian operations, etc., which would impose collective sanctions against aggressors and international law offenders, is not in contradiction with the neutrality status.

## ■ **2. Human rights**

### **Free access to justice. Judicial control of acts related to national security**

■ The court noted that the administrative court as a legal entity aims to counter the abuse and excess of power by public authorities, to defend human rights within the law, to regulate the activities of public authorities, to ensure the rule of law (JCC no. 5 of 11.02.2014<sup>2</sup>, § 53).

■ The court also noted that article 4 of the law on administrative court provides the list of acts exempted from judicial control, and letter e) of the concerned article exempts the administrative acts concerning: national security of the republic of Moldova, application of curfew, emergency measures taken by public authorities to fight natural calamities, fires, epidemics, epizooties, and other similar phenomena (JCC no. 5 of 11.02.2014, § 54).

■ The court held that the issuance of administrative acts related to the national security of the republic of Moldova is determined by exceptional circumstances that could endanger state security and public order, these being issued with the aim to discover, pre-vent and remove the domestic or external threats that may cause damage to the social, economic and political legality, equilibrium and stability of the state that are necessary for the existence and development of the national state - a sovereign, unitary, independent and indivisible state, to the maintenance of legal order as well as of the climate for the unhampered exercise of the fundamental rights, freedoms and duties of

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2. Judgment no.5 of 11.02.2014 on the control of constitutionality of article 4 letter e) of law no.793- xiv of 10 February 2000 on the administrative court

the citizens, in accordance with the democratic principles and rules provided by the constitution (JCC no. 5 of 11.02.2014, § 55).

■ The court emphasized that the legality of administrative acts issued in exceptional circumstances has certain peculiarities, operating the so-called “crisis legality”. thus, the court accepts that, in case of exceptional circumstances which threaten the very existence of the state, public authorities can take the necessary measures to cope with such circumstances, even if doing so violates the law, due to the fact that safety of the public interest is the supreme law (*salus rei publicae suprema lex*) (JCC no. 5 of 11.02.2014, § 65).

■ The court held that the acts issued in exceptional circumstances are considered legal when these are aimed at protecting the public interest, and the means used are suitable for this purpose, even if the issue of such acts do not comply entirely with certain legal regulations that usually discipline the public administration activity (JCC no. 5 of 11.02.2014, § 66).

■ However, the court noted that the acts issued in exceptional circumstances have to meet **minimum requirements of legality** (principle of legality), which protect the public interest (JCC no. 5 of 11.02.2014, § 67).

■ The court held that the legality of such acts has to be assessed by the court in terms of their purpose, to wit the protection of the public interest, sanctioning the abuse of power by the public authorities (JCC no. 5 of 11.02.2014, § 68).

■ The court accepted that during the control by the court of the legality of such acts, the legislator may establish certain special procedural rules (JCC no. 5 of 11.02.2014, § 69).

■ The court also held that the court should determine whether certain conditions have 45 been cumulatively met, namely: existence of exceptional situation; existence of exceptional situation on the date the acts was issued; competence of the authority to issue the act; obvious impossibility of public administration to issue the act under normal conditions; purpose of issuing the act is the protection of a public interest (JCC no. 5 of 11.02.2014, § 70).

■ The court held that, although derogatory rules may be established in the particular context concerning the national security measures, however, the legal framework shall provide protection against arbitrary interferences of the public power on the rights and fundamental freedoms. otherwise, if in the light of legal provisions, the discretion of public authorities was devoid of any control, the law could essentially violate the preeminence of law (JCC no. 5 of 11.02.2014, § 73).

■ I have mentioned only some challenges of the Constitutional Court of Moldova in the field of security.

■ We are living in a period when the state and society is challenged by critical situations, especially in the field of human rights. In many European countries the political elites try to review the approach of human rights. There is a temptation to limit the human rights on security and other reasons.

■ In this context I want to mention the statement of former UN Secretary-General Kofi Annan. He stressed that:

**“We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights”.**

■ I am convinced that only free, vigorous and vibrant Constitutional Courts can give voice to the supremacy of human rights and meaning to democracy.

■ With these words, I would like to conclude by saying that the mission of constitutional judges is to ensure that **the values of the rule of law, democracy and respect for human rights are never emptied of their content** in our states, and the Constitutional Courts should enjoy the necessary independence to fulfill their fundamental mission.

# Safeguarding the constitutional position of foreigners does not pose a threat to Greek society: Lessons from the jurisprudence of the Council of State of Greece



Theodora ZIAMOU, Associate Judge, Council of State of Greece

## 1. The present role of European constitutions.

**C**onstitutions have a symbolic and educative function. They are the expression of the identity of the state and of the culture of the society they refer to. Nowadays there is rarely one single culture in one society; in this context constitutions do not articulate the demands of predetermined social identities but constitute themselves these identities, standing above the struggles of civil society. This unifying role of constitutions becomes all the more important under the present circumstances when many European states have lost their greatest unifier and pacifier, that is, economic growth and prosperity. The modern type of economic crisis brings to surface old problems of cultural minorities, group rights as well as the challenge to incorporate foreign actors into the society either temporarily or permanently. The constitutional treatment of persons foreign to the state and to the society is for every country a question of historical memories and national civilization. When this treatment is based on the qualities of understanding and kindness.

## **2. The role of the Council of State exercising constitutional jurisdiction**

■ The Council of State of Greece is the supreme court in constitutional as well as in administrative matters. It has the power to review laws and rule on constitutional issues as they arise, within the boundaries of its competence to review administrative action and decide cases. This means that the Court, when making its judgements, is aware of its task not just to tailor a remedy to fit the parties before it but rather to address the greater constitutional issues of its rulings. This judicial stance becomes apparent in the jurisprudence of the Council of State on alien and minority or group rights which concern relations among different cultures in the same polity. In such cases the Court has to calculate with threats arising from the action or non-action of other political communities or from the networks of interaction that cut across community boundaries. Thereby the living interpretation of the relevant constitutional provisions becomes the cornerstone of the Court's judgements.

■ Article 5 para. 2 of the Greek Constitution states that "all persons within the Greek State enjoy full protection of their life, honour and freedom, irrespective of nationality, race, creed, or political allegiance. Exceptions shall be permitted in such cases as are provided for by international law. Aliens persecuted for acts carried out in defence of their freedom shall not be extradited." This provision dictates that the principle of the rule of law is to be applied uniformly to all people on Greek territory, whether Greek citizens or aliens. Over the years the Council of State of Greece has made sure that aliens get compensation from the State when they fulfil the conditions established by law and that their social security rights remain intact even if there is an indication that an illegality is involved in the conditions of their entrance or stay in Greece. At the same time the Court has emphasized the obligation of the State to create the conditions for the undisturbed exercise of basic individual rights by aliens, like religious rights or rights to peaceful assembly and has contributed to the fight against xenophobic ideologies by sanctioning any behaviour that could be perceived as degrading or as an act of violence against foreigners. At the same time the Council of State has upheld the universal principle that the State's interests in retaining sovereignty and safeguarding security in both its internal and external relations has priority in the regulation of issues like the accordance of Greek citizenship, participation in municipal elections and election of Greek citizens of foreign ethnic origin to public office.

### **3. Uniform application of the rule of law principle: Equal rights against the Greek state**

■ Awarding compensation in times of severe economic crisis or securing pensions for all people that fulfil the relevant conditions set by law, constitute two of the biggest challenges faced by Greek courts in the present time. In the first case the Council of State refused to accept that the particular harm suffered by a minor alien, even in circumstances in which he acted illegally, is left uncompensated. This case concerns the right of an Albanian illegal immigrant to receive compensation from the Greek State for wrongful acts committed against him by state organs. This alien was a minor who was injured and incapacitated for life by a border guardian shooting in the air during a persecution expedition, while he was attempting to avoid controls and escape arrest near the borders of North-western Greece. The majority opinion in this case (Council of State Decision 877/2013) upheld the decision of the Court of Appeal and granted compensation to the illegal immigrant recognizing a 30% shared liability because of the reactionary behaviour of this alien during his persecution by the border police officers combined with the fact that he tried to enter Greece illegally. Remarkably enough there was a strong dissenting opinion in this judgement that supported the view that not even this degree of shared liability should be recognised to the detriment of this alien and that the case should be sent back to the Court of Appeal which ought to take a harder look at the facts of the case and decide whether, in the actual circumstances of the case at hand, the injury of the alien was inextricably linked to his attempt to avoid border controls but not to his attempt to enter Greece illegally.

■ In the same line of reasoning the Council of State ruled in Decision 539/2016 that the right of a Bulgarian woman to receive the pension of her deceased Greek husband was hindered neither by the fact that the alien did not hold a valid residence permit nor by the inability of the alien to prove that she fulfilled the conditions for legal residence. Although in general the rules governing the obligation of the State to search the legal residence of aliens claiming benefits from the State are to be implemented as a matter concerning the public order of the Greek State, the social rights of aliens in this case were accorded precedence. For the Greek Supreme Court, the fact alone that this Bulgarian woman did not possess a valid permission of residence when she got married in Greece to a Greek citizen, was not enough to set aside the constitutional rights that this woman enjoyed as a result of her marriage to a Greek citizen and of her cohabitation with him, which entitled her to all social and welfare benefits even after her partner's death.

#### **4. Undisturbed exercise of basic individual / group rights by aliens**

■ Aliens should be accorded the same basic individual rights as Greek citizens, as long as the laws of the state as well as the public order are respected. In the old but still remarkable Decision 3226/2000 of the Council of State, the revocation of the residence and work permit of a Muslim Pakistani as well as his registration in the catalogue of unwanted aliens, solely on the grounds of his participation in a publicly-held religious assembly of 3000 Muslims in Athens, were annulled by the Court, as it was held that this particular public assembly was neither forbidden prior to the event nor did it arise from the facts of the case that criminal actions or acts against the public order and security were committed during the assembly. The fact alone that this alien took part in a religious meeting of Muslims did not reach the degree of violation of the public interest that is required in order to revoke the residence and work permit of an alien living in Greece.

■ According religious – group rights to Muslims is of particular importance in Greece. It is generally accepted by the Court that the notion of “public interest” encompasses all interests of people residing in Greece. Laws 3512/2006 and 4014/2011 introduced a complete set of provisions that gave to Muslims living in Greece the possibility to exercise their religious duties in a way congruent with the general public interest, namely, by establishing a private-law legal body with the task to manage the function of a mosque, that was to be constructed in Athens. With Decision 2399/2014 of the plenary session of the Council of State, the state financing of the construction of a mosque in Athens was upheld on the grounds that it was well justified by the reasons given by the Greek State: The idea of the construction of a mosque derived from the obligation of the State towards the great number of Muslims, Greek or non-Greek, who are living in Greece but do not have a greater legal place of worship, to safeguard the exercise of their religious rights in unified way, as the main expression of their social life in Greece. The special circumstances that led to the enactment of the above Laws were held to justify this kind of differential but not preferential treatment of Muslims living in Greece. This differential treatment of Muslims was held not to contravene the Greek Constitution, because it did not entail any negative consequences for other religions or for people who are not members of other religions at all. A word should also be said here about the dissenting opinion in this case, which expressed concerns only as to the what-could-be-seen as preferential treatment of Muslims who did not ask themselves for such a mosque and who until then were not otherwise hindered in the exercise of their religious rights, having the use of 120 mosques all around Greece, albeit unauthorised ones.



## 5. The fight against xenophobic ideologies

■ Securing judicially the individual, social and group rights of aliens living in Greece is not enough. The Court has to contribute also to the creation of the mentality of “philoxenia” and fight against the ideology of “xenophobia”. In the unanimous Decision 518/2015 reached by the Council of State in plenary session the Court expressed its distrust against the xenophobic party of “*Chryssi Avgi*” (translated in English as “Golden Dawn”). Although the Court was cautious not to condemn this party openly (criminal proceedings against some of its members were at the time and are still in progress), it ruled unequivocally that the decision of the administration to discontinue the regular state financing of this party (to which all political parties are entitled on the basis of Art. 29 para. 2 of the Greek Constitution), which was authorised by law 4203/2013 in the case of party leaders who face criminal charges for organized crime and terrorism (especially against foreigners), was intended to protect the country and its democracy and was in accordance with the ECHR, the case-law of the Strasbourg Court of Human Rights and, of course, the Greek Constitution. The challenged administrative decision was deemed as a preventive administrative measure of temporary character which served the legitimate aim of preventing the channelling of public money to criminal activities and the support of organizations that present themselves as political parties in order to act against the Greek state and the public order. This measure did not go against the proportionality principle either, since it was not of criminal nature, the amount forfeited was to be returned in the case of criminal acquittal and in any case the election costs of the party (to which it was allowed to participate) could in any case be covered by other means.

■ In a previous case (Decision 1196/2011) the imposition by the National Radiotelevision Council of the administrative sanction of recommendation on a big TV-channel for characterising, during a journalistic program, police officers as “Philippinese” (in the sense of servants) in order to protest against the decision of the State to use police officers not for the fight against terrorism but for the private security of celebrities, was upheld by the Court on the grounds that distinguishing people by reference to a certain population group is unnecessary and by nature degrading for these particular foreigners and serves to reproduce stereotypes that should not be allowed by the constitutional culture of Greek society.

## **6. Retaining sovereignty in internal and external relations**

### **a) Awarding Greek citizenship to foreigners**

■ Notwithstanding the open-minded as well as open-hearted attitude towards foreigners, the core-character of the Greek State referring to the Greek nation, has to remain Greek. With Decision 460/2013, the Council of State (in plenum) ruled that the provisions of law 3838/2010 according to which the Greek citizenship is awarded to aliens on the basis of purely formal criteria (5-year legal stay of the parents of the alien in the country, 6-year attendance at Greek schools, non required continuous stay after graduation until the submission of the application), contravene the Greek Constitution. This is because from articles 1 par. 2 and 3 (principle of people sovereignty), 4 par. 3 (withdrawal of Greek citizenship), 16 par. 2 and 3 (right to education), 25 par. 4 (duty of social and national solidarity) and 29 par. 1 (right to vote) of the Greek Constitution follows that the existence of a genuine bond between the alien and the Greek state and society, which is based on elements passed from generation to generation with the assistance of smaller social groups (family) and organized state units (education), constitutes the minimum condition and limit for the award of Greek citizenship. The determination of the persons who constitute the notion of “Greek People” remains under the sovereign competence of the national legislator who is not limited by international law to determine the acquisition of Greek citizenship conditions and relevant proceedings, given the fact that there is not an individual right to citizenship. Furthermore, the regulations of Law 3838/2010 which grant to aliens who haven’t acquired the Greek citizenship, a limited right to vote and to be elected at the elections for the 1st Degree local authorities, do not comply with the articles 4 par. 4 (principle of equality), 51 par. 3 (the right to vote), 52 (free expression of the popular will) and 102 par. 1, 2 and 4 (local government agencies) of the Greek Constitution, given the fact that the “People” who legitimize the exercise of public authority deriving either from the State or from the local government, can only be composed of Greek citizens, namely of persons who have already acquired the Greek citizenship.

### **b) Allowing indirect foreigners’ participation in public office**

■ Apart from tightening the conditions of according Greek citizenship, the Council of State had the opportunity to examine the conditions for the participation of ethnic foreigners in public office. The 5th Section of the Hellenic Supreme Administrative Court (Council of State), in major composition, had the occasion to give an opinion on admission requirements to Jewish Communities,

in the exercise of its competence to elaborate on two draft presidential decrees concerning the proposed regulations of the Jewish Communities of Athens and Larissa (Opinions No. 171-2/2010). The Court delivered its advisory opinion taking into account Statutes 2456/1920 and 4837/1930 on Israelites' Communities, which stipulate that such communities are public law associations and exercise public authority under the supervision of the Greek State, since they act in the public interest while pursuing the purely religious goals of the organization of a religious community (minority), of relevant charities and of the education of Israelites' children. Such public-law associations enjoy also tax privileges and have the capacity to issue administrative acts in their given area of action. In accordance with standing jurisprudence, dated as early as 1932 and based on the constitutional principles of religious pluralism and equality as well as of neutrality and impartiality of the State towards all religious (ethnic) communities (minorities), the Court repeated its position that the public-law character of such bodies is not unconstitutional and is in agreement with the case-law of the European Court of Human Rights, since the same public-law organization applies also to East-Orthodox churches, Metropoles and monasteries (as a consequence of the constitutional principle of non-separation between State and Church) and finally also to the Muslim Moufti associations. (Mouftis are considered civil servants since they are accorded the judicial function to apply Islamic law on Greek territory). Although it is not stated in Opinions 171-2/2010, it is understood that the Israelites governing the Jewish communities may not be of non-Greek nationality and this would not be contrary to the Greek Constitution which, in principle, reserves the right of equal access to public office only to Greek citizens. This is because the same applies also for the Moufti, who is according to law (Statute 1920/1991), a Greek Muslim and is appointed and removed from office via presidential decree. According to Council of State Decisions 466/2003 and 1333/2001, a Moufti can only be appointed by the Greek state; the election of the Moufti by the Greek Muslims themselves can not be allowed since such a direct election by the people would go against the Greek constitutional system of appointment of civil servants by the Greek state itself. It would also contravene the international law treaties governing the relations between Greece and Turkey, which dictate the equal treatment and full equalization of Greek members of the Muslim minority with the rest of the Greeks.

■ At the moment, the Greek Constitution does not support the separation between Church and State and therefore, for reasons of equality of treatment, the public-law organization is the legislatively preferred form of organization for all religious communities (of all ethnic origins) operating in

Greece. However, the 5th Section of the Hellenic Supreme Administrative Court expressed the opinion that, in order to avoid the creation of relations of dependence and cross linkage with state authority and until a uniform regime of religious communities and churches is established, the form of private-law association, in cases not hindered by Greece's international-law commitments, should be considered as the optimum legislative choice. The organizational form of private-law association is mostly suited to a modern democratic state based on the principles of religious equality, neutrality and impartiality, which require the organization and function of religious communities according to unified rules that secure their autonomy and exclude their dependence and relation with state power.

### **7. The contribution of the Council of State in fostering unity in Greek society**

The rejection of xenophobic ideologies has always been apparent in Greece's national policy and in the jurisprudence of the Council of State. In the Greek Court itself is the one thing that brings together cosmopolitan democratic party-politics and different judicial approaches, giving a unanimous response to those who doubt Greece's place in Europe. Of course, in order to do that and at the same time maintain law and order in the society, the State has to sustain its character as a State composed primarily of Greek citizens. In our constitutional system there is no place for the natural law of a national group protecting its national identity by distinguishing itself from other societal groups with the ultimate aim to legalise its prejudicial treatment against others. Co-existing with people from different cultures does not alter the national and cultural identity since it cultivates respect for human dignity and puts the person's needs in the centre of all controversies or arguments. Stereotypes and prejudice are not signs of thinking individuals and it is a shame to project to foreigners the fear and menace that we feel ourselves from the challenges of globalisation, of natural disasters, of the economic crisis. We are not threatened by the "others" – we will be threatened by them once we begin to accept exceptions to the protection of their rights.

# The state of emergency and the principle of non-refoulement: The example of Turkey

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Mücahit AYDIN, Rapporteur-Judge,  
Constitutional Court, Turkey

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**1** Last year, my colleague Mr Koksal made a presentation here on the topic of migration. I will further elaborate on this topic since it continues to be a hot issue both in Turkey and in Europe. And it is very much in line with the subject of the mini conference.

■ Today I will focus on the principle of non-refoulement and the challenges against it during the state of emergency in Turkey.

■ In general terms, principle of non-refoulement prohibits a state from returning aliens to a country in which they would face a real risk persecution, torture or ill-treatment.

■ Similarly, under well-settled case-law of European Court of Human Rights, the absolute nature of Article 2 and 3 forbids expulsion of such persons to a country where exists a real threat of death penalty or torture.

■ And this is also the legal regime in Turkey. Article 55 of the Law numbered 6458 states that those about whom substantial grounds exist for believing that they would face death penalty and torture in the receiving country cannot be deported.

■ Such claims are subject to judicial review and some procedural safeguards exist to ensure that those persons are not deported before such claims are addressed. Under article 53 of the Law 6458, persons in question can appeal

against deportation orders at administrative courts and upon the appeal deportation is automatically suspended.

■ If they are not satisfied with the judgment of the administrative court, they can lodge an individual application to the Constitutional Court, and the Court, under article 49 of the law numbered 6216, may also order stay of execution of the deportation order until the judgment reached on the merits.

■ So far the Court rendered many stay of execution orders in this scope.

■ At the moment, the Greek Constitution does not support the separation between Church and State and therefore, for reasons of equality of treatment, the public-law organization is the legislative

**2** Now let me provide some general information about the situation in Turkey for last couple of years.

■ First, Turkey is recently suffering from intense attacks of terrorist organizations, PKK and DAESH or ISIS. Just to name two of them, in January 2017, in the New Year's Eve, ISIS attacked a night club in Istanbul, 46 people killed, most of them were foreigners. In March 2016, PKK made an attack in Ankara, in the heart of city, 38 people killed, 120 of them wounded.

■ Besides that, Turkey faced an influx of migrants from Syria and northern Iraq, about 3 million. And many terrorists, either members of PKK or ISIS infiltrated from borders during this influx.

■ Also, Turkey has experienced a heinous and very costly coup attempt by FETO terrorist organization in July 15. Right after, the government proclaimed the state of emergency, and issued many emergency decrees. Thousands of members of security forces, military, police and others are dismissed.

■ In short, Turkey became very susceptible to terrorist attacks after what it has experienced recently.

■ And the issue of aliens considered to be threatening public and national security reached a very sensitive point.

■ In this environment, the government brought an exception to the automatic suspension upon appeal rule with the emergency decree numbered 676. Accordingly, persons related to terror or those considered to be threat for public order or national security, will be deported upon an administrative order. And the appeal to administrative court will not stop the deportation process automatically. Also, an interim measure by the administrative courts

may not be effective because the court has 7 days to address such requests, and the argument of the relevant administrative authority must be obtained also.

■ Therefore practically, the migration authority, may deport any alien before the deportation order is reviewed by judiciary.

**3** Against this background, those persons resorted directly to the Constitutional Court against deportation orders also requesting interim measure. The court received many applications in that regard and issued many interim measures. In those decisions the Court developed its case law and provided some general principles. And the Court's case-law is pretty much in line with the case law of European Court of Human Rights.

■ The court first noted that positive obligation of the state under right to life and prohibition on torture requires that an effective legal remedy exists against deportation orders. And in order to be an effective remedy, deportation process must be automatically suspended upon appeal against the order. If automatic suspension does not exist, it cannot be regarded as an effective legal remedy.

■ The court therefore stated that challenging deportation orders on the ground of national security or terror before administrative courts does not constitute an effective legal remedy, and therefore those person may directly apply to the constitutional court against deportation orders. Upon such applications, the court will examine both the request on interim measure and allegations of violation.

■ The court also stated, however, a mere allegation that the applicant faces risk of death penalty or torture will not be automatically suffice to issue an interim measure. In order for an interim measure, the allegations must have a credible basis must be arguable. (Applications: 2015/3941 and 2016/22418).

■ So far, the court ordered interim measures for vast majority of applications and the total number is about 200.

■ In short, the Constitutional Court employed interim measure mechanism in order to provide effective protection for persons facing the risk of death or torture upon deportation to their country. In other words, the court substituted the lack of suspension mechanism with directly involving in the process.

■ The court also provided principles for reviewing the merits of such applications. If applicants made arguable allegations that prompts further inquiry, then it is upon the Court to make a thorough examination of the circumstances in the receiving country and the situation of the applicant based on all relevant information and documents, not only those presented by the applicant. In that regards, reports of international organizations play a crucial role. Therefore, in a way the burden shifts from the applicant to the Court to make a thorough inquiry.

■ So far, the Court found violation on merits on one occasion. Indeed it is very recent and the decision has not been published yet. In this case, an Uzbek citizen at the age of entered to Turkey legally in 2009 at the age of 25 and requested asylum stating that he was subject to persecution in his country because he was involved in opponent youth movement and also practiced his religion Islam. The applicant is granted the status of temporary refugee by the United Nations, and he was ordered by Turkish authorities to stay within the limits of the city of Gaziantep. He married in Turkey and had no kids. In 2015, he was caught in a border town between Syria and Turkey in a car with Syrian plate, with no id card on him. Following, the authorities considered that he was trying to cross Syrian border illegally and therefore a deportation order was issued on the ground of national security. The applicant challenged this order before the competent administrative court, but it was rejected based on the assessment of security authorities. The applicant applied to Constitutional Court stating that ill-treatment and torture is widespread in Uzbek prisons and he would face death or torture if he expelled.

■ The Constitutional Court held that those allegations had a credible basis, therefore it was upon the administrative court to examine the situation in Ozbekistan and the particular situation of the applicant. But the administrative court failed to address those credible allegations relying upon assessments of security forces. The Constitutional Court thus found a violation of ill-treatment ban in this case (2015/18582).



# Responding to threats to the rule of law and fundamental rights: the evolving powers of the Constitutional Court

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Ingrida DANĖLIENĖ, Secretary General, Constitutional Court, Republic of Lithuania

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**T**he rule of law is perceived as a fundamental principle, which generally implies the supremacy of law in all the areas of the functioning of the state and constitutes the foundation of the Constitution and the constitutional legal order<sup>1</sup>. Constitutional courts perform the essential function of ensuring the supremacy of the Constitution within their national legal systems, as well as of guaranteeing the rule of law as inseparable from the supremacy of the Constitution. It is the Constitution which has to safeguard and protect human rights, and ensure that all human rights are implemented without discrimination (“individualisation” is identified as the new feature of constitutionalism of the XXI<sup>st</sup> century law).

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1. The Implementation and Protection of the Principles of the Rule of Law in Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine. The Constitutional Court of the Republic of Lithuania, 2016. Available at: [www.lrkt.lt/data/public/uploads/2016/12/31449\\_konstitucinis\\_teisines\\_valstybes.pdf](http://www.lrkt.lt/data/public/uploads/2016/12/31449_konstitucinis_teisines_valstybes.pdf)

■ I will present a few guiding principles from the case-law of the Constitutional Court of Lithuania, in which the principle of the supremacy of the Constitution and the principle of a state under the rule of law<sup>2</sup> have had fundamental importance for the development of the powers of the Constitutional Court, mostly in response to serious threats to the rule of law and fundamental rights.

**First principle: no legal act would have the immunity from constitutional control.**

■ The Constitutional Court attributed to its competence four types of legal acts which are not expressly mentioned in the Constitution (Article 102 and Article 105) and whose compliance with the Constitution is investigated by the Constitutional Court.

■ First, Lithuania is among a few countries where the Constitutional Court has been given a formal role in the constitutional amendment procedures.<sup>3</sup> Though this is not expressly established by the provisions of the Constitution, the Constitutional Court is vested with the powers to review the constitutionality of the constitutional amendments with regard to not only the procedural, but also substantive aspects of constitutionality thereof (meaning laws adopted by the Seimas or by referendum, amending the Constitution).<sup>4</sup>

■ In its rulings of 24 January 2014 and 11 July 2014, the Constitutional Court identified the expressly established and implied substantive and procedural limitations on the alteration of the Constitution.

■ The Constitutional Court declared:

“The Constitution is an integral act; therefore, any amendment thereto may not create any such new constitutional regulation under which one provision of the Constitution would deny or contradict another provision of the Constitution, so that it would be impossible to construe such provisions as being in harmony; any amendments to the Constitution may not violate the harmony of the provisions of the Constitution or the harmony of the values consolidated by them.”

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2. In the Lithuanian Constitution and official constitutional doctrine, the term “a state under the rule of law” is used to express the idea of the rule of law.
  3. The European Commission for Democracy through Law (Venice Commission). *Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice*, 2015. Available at: [www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)002-e)
  4. In the ruling of 24 January 2014. Available at: [www.lrkt.lt/en/court-acts/search/170/ta850/content](http://www.lrkt.lt/en/court-acts/search/170/ta850/content)

■ Accordingly, the Constitutional Court held that no amendments to the Constitution may be adopted that would destroy the innate nature of human rights and freedoms, democracy, or the independence of the state,<sup>5</sup> thus identifying the unamendable fundamental constitutional values or the “eternal clauses”. The Constitutional Court stressed that, if interpreted otherwise, the essence of the Constitution itself would be denied<sup>6</sup>:

“if the Constitution were construed in a different way, it would be understood as creating preconditions for putting an end to the restored “independent State of Lithuania, founded on democratic principles”, as proclaimed by the Act of Independence of 16 February 1918”. The substantive limitations imposed on the alteration of the Constitution are equally applicable to the Parliament and in the event of the alteration of the Constitution by referendum.

■ Constitutional courts must, therefore, safeguard the constitutions against those laws amending the constitutions that violate the essence of the constitutions themselves. There are no alternative means of ensuring that the constitution is amended in compliance with the procedure prescribed by the constitution and that the fundamental values enshrined in the constitution are respected<sup>7</sup>.

■ The doctrine of the constitutionality of constitutional amendments also plays an important preventive role, e.g. by preventing clearly unconstitutional referendums – the Central Electoral Commission may not register an initiative to hold a referendum, which clearly contradicts the Constitution (examples of impossible referendums in Lithuania – with regard to re-introduction of the death penalty, with regard to separate obligations arising from the membership of Lithuania in the EU, radical changes in the form of governance, etc.).

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5. See Constitutional Court ruling of 11 July 2014. Available at: [www.lrkt.lt/lt/teismo-aktai/paieska/135/ta24/content](http://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta24/content)

6. Žalimas, D. The Openness of the Constitution to International Law as an Element of the Principle of the Rule of Law. In: Constitutional Court of the Republic of Slovenia - 25 Years. International Conference Commemorating the 25th of the Constitutional Court of the Republic of Slovenia, BLED, 23 June 2016. Available at: [www.us-rs.si/media/zbornik.25.let.pdf](http://www.us-rs.si/media/zbornik.25.let.pdf)

7. National Report of the Constitutional Court of the Republic of Lithuania to the XVIIth Congress of the Conference of European Constitutional Courts “Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles”. Available at: [www.confeconstco.org/reports/rep-xvii/lituanie\\_EN.pdf](http://www.confeconstco.org/reports/rep-xvii/lituanie_EN.pdf)

■ Thus constitutional control of the constitutionality of constitutional amendments, both on substantive and on procedural grounds, is considered to be a way to ensure the supremacy of the Constitution, which is a fundamental requirement for a democratic state under the rule of law.

■ The principle, according to which no legal act may be immune from constitutionality control, applies to other legal acts not expressly mentioned in the Constitution as well. According to constitutional doctrine, the purpose of the constitutional judicial control, as a constitutional institute, and the contextual meaning of the constitutional provisions that consolidate it, determine the powers of the Constitutional Court to investigate the compliance of all legal acts adopted by referendum with (first of all) the Constitution,<sup>8</sup> just as determines its powers to review the constitutionality of constitutional amendments, adopted by referendum.

■ The third type of legal acts which are subject to constitutional control and which are not expressly mentioned in the Constitution are legal acts of an individual character (individual acts). The Constitutional Court investigates the compliance of individual acts with the Constitution and laws. For example, in its ruling of 30 December 2003, the Court noted that the Constitutional Court enjoys the powers to investigate the compliance of acts of the President of the Republic with the Constitution and laws irrespective of whether these acts are of an individual or normative character (whether they are of one-off (ad hoc) application or of permanent validity also).<sup>9</sup>

■ The fourth type of legal acts which are subject to constitutional control and which are not expressly mentioned in the Constitution is considered in the context of the ruling of 28 September 2011.<sup>10</sup> In this ruling, the Court established its powers to review the constitutionality of sub-statutory acts of the Seimas (i. e. the State Family Policy Concept approved by a Resolution of the Seimas). This act expressed the will of the Seimas regarding the future legal regulation of certain social relations and formed the basis for preparing and adopting the corresponding legal acts.

■ The Court also established its powers to review the constitutionality of sub-statutory acts of the Seimas and the Government in the ruling of 24 September 2009.<sup>11</sup> The Court took into account the specificity of the Seimas Resolution as not a normative, but a programme document, reflecting the legislature's will on

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8. The ruling of 28 March 2006. Available at: [www.lrkt.lt/en/court-acts/search/170/ta925/content](http://www.lrkt.lt/en/court-acts/search/170/ta925/content)

9. Available at: [www.lrkt.lt/en/court-acts/search/170/ta1245/content](http://www.lrkt.lt/en/court-acts/search/170/ta1245/content)

10. Available at: [www.lrkt.lt/en/court-acts/search/170/ta1112/content](http://www.lrkt.lt/en/court-acts/search/170/ta1112/content)

11. Available at: [www.lrkt.lt/en/court-acts/search/170/ta1287/content](http://www.lrkt.lt/en/court-acts/search/170/ta1287/content)

certain political tendencies; the Court took into account the specificity of the Government's Conception which does not consolidate the legal regulation (legal norms) that directly influences the legal relations. The Court acknowledged that the mentioned acts should be assessed in the aspect of the constitutionality of their content, based on the grounds of which law-making procedures should take place.

■ The constitutional doctrine on non-immunity of legal acts from constitutional control is based on the concept of the integrity of the Constitution, as well as on the principles of the supremacy of the Constitution and a state under the rule of law, on the hierarchy of all legal acts, as well as on the other constitutional imperatives.

### **Second principle: impermissibility of overruling the power of the final act of the Constitutional Court.**

■ The Constitutional Court has consistently held that the power of its decisions may not be overruled by repeatedly adopting an analogous legal act. According to paragraph 2 of Article 107 of the Constitution, "the decisions of the Constitutional Court on the issues within its competence according to the Constitution shall be final and not subject to appeal".

■ The constitutional prohibition on overruling the power of a final act of the Constitutional Court is one of the means to ensure the supremacy of the Constitution and the rule of law. Therefore, if an analogous legal act were adopted in disregard of the said prohibition, such an act could not constitute a legal basis for acquiring any legitimate expectations, rights, or legal status.

■ The Constitutional Court may also declare the unconstitutionality of all of the consequences of the application of a legal act which was adopted in violation of the prohibition on overruling the final acts of the Constitutional Court, even if those consequences had appeared before the act of the Constitutional Court, which concluded that there was an overruling of their previous act, was adopted. Although the Court's power to annul the legal power of the legal act that is in conflict with the Constitution and also the legal consequences that were caused by the said legal act and which emerged prior to the adoption of such a decision of the Constitutional Court is treated as an exception. This exceptional situation

(in addition to some other exceptional situations) is decided by the Court on a case-by-case basis.<sup>12</sup>

### **Third principle: harmonisation of the provisions of the Constitution with international law and the law of the European Union.**

■ In the Rule of Law Checklist, adopted by the Venice Commission, compliance with international law and, in particular, with human rights law, is enlisted as one of the elements of the principle of legality.<sup>13</sup>

■ The Lithuanian official constitutional doctrine has explicitly recognised the principle of respect for international law (*pacta sunt servanda*) as an element of the principle of the rule of law. The constitutional principle of respect for international law leads to the openness of the Constitution towards international law. The constitutional principle of respect for international law is supplemented by the principles of an open, just, and harmonious civil society and the geopolitical orientation of the state, which imply the integration of the State of Lithuania into the community of democratic states.

■ This openness gives rise to certain implications. Firstly, international law is perceived as the minimum necessary constitutional standard for national law. Secondly, the openness of the Constitution to international law provides the basis for the constitutional presumption of the compatibility of international law with the Constitution. Thirdly, it gives rise to the duty of the Constitutional Court, when interpreting the provisions of the Constitution, to pay regard to the international legal context (the duty of consistent interpretation). The three constitutional justice cases demonstrate the importance of the consistent interpretation of the Constitution with international law for protecting human rights on the national level and strengthening the rule of law<sup>14</sup>: the ruling

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12. What is taken into account by the Court in these situations please see, for example, the decision of 19 December 2012. Available at: [www.lrkt.lt/en/court-acts/search/170/ta1039/content](http://www.lrkt.lt/en/court-acts/search/170/ta1039/content). In the ruling of 27 May 2014, the Court indirectly applied authority to recognise all the consequences of a legal act violating the prohibition to overrule the power of the final act of the Constitutional Court as being in conflict with the Constitution. Available at: [www.lrkt.lt/en/court-acts/search/170/ta857/content](http://www.lrkt.lt/en/court-acts/search/170/ta857/content). Another two rulings of the Court on the situation when the Seimas had violated the prohibition to overrule the power of the final act of the Constitutional Court: the ruling of 30 May 2003 (available at: [www.lrkt.lt/en/court-acts/search/170/ta1244/content](http://www.lrkt.lt/en/court-acts/search/170/ta1244/content)) and the ruling of 24 December 2002 (available at: [www.lrkt.lt/en/court-acts/search/170/ta1214/content](http://www.lrkt.lt/en/court-acts/search/170/ta1214/content)).

13. The European Commission for Democracy through Law (Venice Commission). Rule of Law Checklist, 2016. Available at: [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e)

14. *Ibid.*

concerning the constitutionality of the death penalty (ruling of 9 December 1998)<sup>15</sup>, the already mentioned ruling concerning the constitutionality of the State Family Policy Concept (ruling of 28 September 2011)<sup>16</sup> and the ruling concerning criminal responsibility for genocide (ruling of 18 March 2014)<sup>17</sup>.

■ In addition, the constitutional protection of international obligations is consolidated in the Lithuanian constitutional doctrine, formulated in relation to the constitutionality of constitutional amendments which has been mentioned earlier.<sup>18</sup> According to this doctrine, the adoption of constitutional amendments incompatible with international obligations is not allowed as long as these obligations are not renounced in accordance with the international legal norms. In this way, the international obligations of Lithuania become an essential part of legality, as an element of the principle of the rule of law (and the minimum necessary constitutional standard for national law, in particular, in the sphere of human rights).

■ Thus, this friendly approach on the constitutional level towards international commitments, especially in the field of human rights, is tightly interrelated with the aspirations to protect democracy and the rule of law as the core elements of the constitutional identity of Lithuania.

■ However, examples of an unfriendly approach towards international commitments may be found in the constitutional jurisprudence of some other countries as well, which in this manner (and as laid down in the Rule of Law Checklist) constitutes threats to the rule of law. As an example of an unfriendly approach, the decision of 14 March 2014 of the Constitutional Court of the Russian Federation may be provided – it recognises that the agreement between the Russian Federation and the so-called “Republic of Crimea”, located in the territory of Ukraine, is an international treaty, as well as that the so-called “Republic of Crimea” has the status of an international legal entity, is in clear contradiction with provisions of international law. The decision breaches numerous fundamental principles of international law, including the territorial indivisibility of Ukraine.

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15. Available at: [www.lrkt.lt/en/court-acts/search/170/ta1135/content](http://www.lrkt.lt/en/court-acts/search/170/ta1135/content)

16. Available at: [www.lrkt.lt/en/court-acts/search/170/ta1112/content](http://www.lrkt.lt/en/court-acts/search/170/ta1112/content)

17. Available at: [www.lrkt.lt/en/court-acts/search/170/ta853/content](http://www.lrkt.lt/en/court-acts/search/170/ta853/content)

18. The ruling of 24 January 2014, related to the constitutional status of the Central Bank of Lithuania, is one of the most recent examples of the harmonising type of internalisation of European Union law.

■ Other examples of an unfriendly approach and non-compliance with the Rule of Law Checklist - another decision of the Constitutional Court of the Russian Federation. In its judgment of 14 July 2015, the Constitutional Court of the Russian Federation assumed the power to declare the judgments rendered by the European Court of Human Rights against Russia as “unenforceable”. This position was codified in the statutory provisions, and the first judgment concerning the impossibility to execute the judgment of the European Court of Human Rights (in the case of Anchugov and Gladkov v. Russia concerning the disenfranchisement of prisoners) was adopted on 19 April 2016.

## **Conclusions**

■ The reviewed powers of the Constitutional Court are implied powers, strengthened specifically by means of its jurisprudence. They are developed in the gradual process of interpretation of the Constitution and stem from the Constitution as an integrity.

■ These implied powers show that the Court is the main guardian of the legal order based on the supremacy of law and the Constitution as the supreme law, ensuring the foundations of a state under the rule of law and other related constitutional values established in the Constitution.

■ The evolution of the powers of the Constitutional Court is based on the principle that under all circumstances the supremacy of the Constitution and the rule of law cannot be compromised. The Constitutional Court must, therefore, have all of the powers, which are necessary to fulfil this purpose.



# Without Fear or Favour: Security, Rights and the Rule of Law in Ireland

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Sarahrose MURPHY, Executive  
Legal Officer to the Chief Justice  
of the Supreme Court of Ireland

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**“The world is indeed full of peril, and in it there are many dark places, but still there is much that is fair, and though in all lands love is now mingled with grief, it grows perhaps the greater.”<sup>1</sup>**

## Introduction

— The topic of our mini-conference ‘Courageous Courts: Security, Xenophobia and Fundamental Rights’ is multi-faceted. It reflects the times we live in, and the unprecedented challenges we face in a rapidly changing world. Issues associated with migration, tension between States, repercussions of the economic crisis, Brexit and concerns in relation to populism, threaten our key values: human rights, democracy and the rule of law.

— Among the core challenges faced by States is terrorism: a growing concern, in light of the increasing plight of terrorist attacks in recent years and months. Terrorism impacts significantly on the human rights of those directly affected, and has wider implications for civil society, jeopardising peace and security and

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1. J.R.R. Tolkien, *The Fellowship of the Ring* - Haldir, referring to hope in times and places of darkness and terror.

threatening social and economic development.<sup>2</sup> Counter-terrorism measures are employed in order to safeguard the security of States and their citizens, and to promote and protect human rights and the rule of law.

■ However, as noted in the Report of the Parliamentary Assembly of the Council of Europe Committee on Political Affairs and Democracy on 'Combating international terrorism while protecting Council of Europe standards and values':

"The fight against terrorism must be reinforced while ensuring respect for human rights, the rule of law and the common values upheld by the Council of Europe. It should be underlined that combating terrorism and protecting Council of Europe standards and values are not contradictory but complementary."<sup>3</sup>

■ Constitutional Courts are tasked with striking the delicate balance between these ideals in carrying out their roles as guardians of the Constitutions.

## **E**xtraordinary Government

■ The universal recognition of human rights does not mean that such rights cannot be limited under any circumstances. Article 15 of the European Convention on Human Rights permits the governments of States, in exceptional circumstances to derogate, "in a temporary, limited and supervised manner from their obligation to secure certain rights and freedoms under the Convention."<sup>4</sup> Thus, for example, in November 2015, France notified the Secretary General of the Council of Europe that it was derogating from the Convention in the wake of the terrorist attacks in Paris in 2015.

■ Ireland is not a stranger to this issue, bearing in mind that in *Lawless v. Ireland*,<sup>5</sup> the first case before the European Court of Human Rights, the Court found that the Government of Ireland was justified in declaring that there was a public emergency threatening the life of the nation when, in light of the steady and alarming increase in terrorist activities perpetrated by the

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2. As noted in Office of the United Nations High Commissioner for Human Rights 'Human Rights, Terrorism and Counter-terrorism, Fact sheet no. 32, available at: [www.ohchr.org/Documents/Publications/Factsheet32EN.pdf](http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf)
  3. Combating international terrorism while protecting Council of Europe standards and values' Doc. 13958, 26th January 2016, Report, Committee on Political Affairs and Democracy.
  4. European Court of Human Rights, Factsheet: Derogation in time of emergency (February 2017). Available at [www.echr.coe.int/Documents/FS\\_Derogation\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf)
  5. *Lawless v. Ireland* (No. 3) [1961] ECHR 2.

unlawful Irish Republican Army ('IRA') and its dissident groups in 1956 and 1957, it called into effect special powers of detention without trial.<sup>6</sup>

■ Subsequently, in *Ireland v. the United Kingdom*,<sup>7</sup> the first inter state case to be adjudicated upon by the ECtHR, it found that an emergency in accordance with Article 15 existed when, from August 1971 until December 1975, authorities in Northern Ireland carried out extrajudicial powers of arrest, detention and internment in respect of members of the IRA.

## // Without fear or favour"

■ Members of the Irish judiciary, when appointed, swear a declaration pursuant to the Constitution, in open court in the Supreme Court, promising to exercise their judicial office "without fear or favour, affection or ill-will towards any man"<sup>8</sup> and to "uphold the Constitution and the Law".<sup>9</sup>

■ The tumultuous history of the Irish State has meant that judges of the Supreme Court, which is the final court of appeal in Ireland, and exercises the judicial review functions of a constitutional court, have been required to carry out their role, in the spirit of this declaration, in a State which "has seen a continuous struggle between the rule of law, and states of exception, beginning with the period under the colonial power of Britain up to more recently when it grappled with paramilitary groups stemming from the Northern Ireland conflict."<sup>10</sup>

■ Shakespeare wrote that "What is Past is Prologue"<sup>11</sup>, and in considering the present threats to the rule of law and fundamental rights in constitutional democracies, there is merit in looking at the past.

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6. Conferred upon Ministers of State under the Offences Against the State Act 1939, as amended by the Offences Against the State (Amendment) Act 1940.

7. *Ireland v the United Kingdom* (5310/71) [1978] ECHR 1.

8. *Bunreacht na hEireann*, Article 34.6.1.

9. *Ibid.*

10. B Vaughan and S Kilcommins, *Terrorism, Rights and the Rule of Law* (Routledge, 2013) at 12.

11. *The Tempest*, William Shakespeare, Act 2, Scene 1.

## The Past

When Ireland was under the rule of Britain, violence employed for political ends in the rebellions of the 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> century,<sup>12</sup> and during the War of Independence (1919-1921)<sup>13</sup> meant that extraordinary and special provisions outside of the ambit of ordinary law were adopted to maintain social order.<sup>14</sup>

The Irish Free State was founded in 1922 as an autonomous dominion of the British Empire. However, there were those who refused to accept the legitimacy of the State, due to the six counties in Northern Ireland remaining part of Britain under the Anglo-Irish Treaty. A Civil War took place from 1922 to 1923, ending in a victory for the Free State forces.<sup>15</sup>

In a plebiscite held on 1 July 1937 the people of Ireland enacted a new Constitution, called *Bunreacht na hÉireann* in the Irish language, which replaced the 1922 Constitution of the Irish Free State, and renamed the State 'Ireland', a "sovereign, independent and democratic State".<sup>16</sup> The Constitution can be amended only by national referendum.

Paramilitary groups, primarily the Irish Republican Army continued to carry out armed campaigns in pursuit of a united Ireland from 1939 to 1945, from 1956 to 1962, and from the 1970s when there was a resurgence of paramilitary activity stemming from political violence and civil disturbances in Northern Ireland, which spilled into the Republic of Ireland.

Time does not permit a comprehensive outline of the periods of history in which the security of the nation was threatened, but a mention of certain periods illustrates the backdrop against which it became necessary to take emergency measures in Ireland.

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12. Including the rebellions of 1798 (United Irishmen led by Wolfe Tone), 1803 (led by Robert Emmett), 1848 (Young Ireland), 1867 (Fenian groups in Ireland and America) and 1916 (The Easter Rising of the Irish Volunteers and the Citizens Army); and later the War of Independence 1919-1921.

13. Fought between the Irish Republican Army and the British security forces in Ireland.

14. See B Vaughan and S Kilcommins, *Terrorism, Rights and the Rule of Law* (Routledge, 2013), and Hogan and Walker, *Political Violence and the Law in Ireland* (Manchester University Press, 1989).

15. Fought between the anti Anglo-Irish Treaty faction of the Irish Republican Army and their ex-colleagues in the Army of the Irish Free State.

16. The Constitution of Ireland, Article 5.

## Security in the Constitution

— As in other Constitutions, the Irish Constitution makes provision for extraordinary circumstances. Article 38.3.1 of the Constitution, provides for the establishment by law of “special courts...for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of Justice, and the preservation of public peace and order.”<sup>17</sup> This was the foundation for the Special Criminal Court, Ireland’s non-jury court established to deal with terrorist offences, and now also certain offences involving ‘organised crime’.<sup>18</sup>

— Article 28.3.3 of the Constitution gives constitutional immunity to “any law enacted by the *Oireachtas* (Parliament) which is expressed to be for the purpose of securing public safety and the preservation of the State in time of war or armed rebellion”.<sup>19</sup>

## Fundamental Rights

— At the same time, the Constitution of Ireland robustly protects human rights. A significant proportion of the Constitution is devoted to the protection of fundamental rights,<sup>20</sup> and it expressly confers on the High Court, the Court of Appeal and the Supreme Court the power to review the constitutionality of legislation.

— A declaration of unconstitutionality by the High Court, Court of Appeal, or the Supreme Court amounts to, in the words of former Supreme Court judge, Mr. Justice Henchy, a “judicial death certificate”.<sup>21</sup> The power of judicial review

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17. The Special Criminal Court was established under Part V of the Offences Against the State Act 1939 to deal with terrorist and subversive offences. It was initially established under the Offences Against the State Act 1939, to prevent the IRA from undermining Ireland’s neutrality during World War II and the ‘Emergency’. The current Special Criminal Court dates from 1972 and was intended to handle cases relating to the ‘Troubles’ which had just begun in Northern Ireland.. Its jurisdiction has evolved to include certain ‘organised crime’.

18. The Special Criminal Court was established under Part V of the Offences Against the State Act 1939.

19. As amended by the First Amendment of the Constitution, passed on 2nd September 1939, following which an emergency was declared under. The need for the amendment arose in light of the imminent outbreak of World War II and the desire of the Government of Ireland to remain neutral, in circumstances where doubt existed as to whether “time of war” could encompass a conflict in which the State was not a belligerent.

20. Articles 40 to 44 of the Constitution of Ireland.

21. *Murphy v. Attorney General* [1982] IR 241 at 307.

and the fundamental rights provisions of the Constitution have generated a rich source of constitutional jurisprudence.<sup>22</sup>

■ The Irish Courts have found that in addition to the rights expressly referred to in the Constitution, Article 40.3 of our basic law guarantees personal rights not explicitly referred to in the Constitution.<sup>23</sup>

## Offences Against the State Act 1939

■ With the threat of war in 1939, Ireland wished to remain neutral, and ensure that any campaign of the IRA would not compromise this aim. A state of emergency was declared in 1939,<sup>24</sup> and the Offences Against the State Act, 1939 was passed by the Oireachtas (the Irish parliament) to protect state security. The IRA was immediately proclaimed an illegal organisation.<sup>25</sup>

■ The 1939 Act, as amended, creates a number of offences relating to the activities of unlawful organisations.<sup>26</sup> The 1939 Act and its subsequent amendments were enacted to deal with terrorism from a domestic perspective, and the State's response to international terrorism was enhanced by the enactment of further, more recent, legislation.<sup>27</sup>

■ The 1939 Act also provides for the extraordinary measures of a Special Criminal Court,<sup>28</sup> and powers of internment without trial "in time of war or national emergency."<sup>29</sup>

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22. As observed by Denham CJ in 'Some Thoughts on the Constitution of Ireland at 75', 'Conference on 'The Irish Constitution: Past Present and Future' (Royal Irish Academy, Dublin, 2012).

23. As first identified by Kenny J in the High Court, and upheld by the Supreme Court in *Ryan v. Attorney General* [1965] IR 294.

24. Emergency Powers Act 1939 was passed. It lapsed on 2nd September 1946, although the state of emergency was not rescinded until 1976 when a fresh state of emergency was declared arising out of the Northern Ireland conflict, which was rescinded in February 1995 following the IRA ceasefire.

25. Section 19. It had been declared illegal in the Irish Free State in 1936.

26. Offences Against the State Act, 1939, Part III. The 1939 Act establishes the concept of an unlawful organisation and sets out activities which render an organisation unlawful, such as engagement in, promotion or encouragement of treason, advocating or attempting the violent alteration of the Constitution, raising an unlawful military or armed force. The Government may by order declare an organisation to be unlawful by means of a suppression order.

27. More recently enacted legislation to deal with terrorism includes the Criminal Justice (Terrorist Offences) Act 2005, and the Criminal Justice (Terrorist Offences)(Amendment) Act 2015

28. Offences Against the State Act 1939, Part V.

29. Offences Against the State Act, 1939, Part VI.

■ The Special Criminal Court was established via Government proclamation and Part VI of the Offences Against the State Act 1939, providing for the power of internment, was activated.

### *Internment and The State (Burke) v Lennon*

■ It has been noted in respect of legislation of an emergency character, that the Irish Courts have “not been prepared always to accept unquestioningly [such] legislation justified by reference to the threat from terrorism.<sup>30</sup>”

■ The first major constitutional case which arose under the 1937 Constitution was the 1939 case, *The State (Burke) v. Lennon*, which tested the internment provisions of the Offences Against the State Act 1939.<sup>31</sup>

■ In that case the brother of the applicant, who was interned without trial under Section 55 of the 1939 Act, under a warrant issued by the Minister of State on the grounds that the Minister was satisfied that he was engaged with activities calculated to prejudice the preservation of the security of the State, petitioned the High Court for an order of *habeus corpus*.

■ Internment of members of the IRA took place in Ireland during the Second World War, and later during the 1956 to 1962 campaign of the IRA.

■ Not only was the *habeus corpus* application successful and the applicant released, Gavan Duffy J. declared Part VI of the Offences Against the State Act, 1939 under which the applicant had been detained and interned, unconstitutional. He took into account Article 9 of the Irish Constitution, dealing with citizenship; personal liberty, which he referred to as “one of the cardinal principles of the Constitution, proclaimed in the Preamble itself;<sup>32</sup> and the fundamental rights enshrined in Articles 40 to 44 of the Constitution, including the right to personal liberty. Gavan Duffy J stated:

“Article 40... guarantees that no citizen shall be deprived of liberty, save in accordance with a law which respects his fundamental right to personal liberty, and defends and vindicates it, as far as practicable, and protects his person from unjust attack... In my opinion, a law for the internment of a citizen without charge or hearing, outside the great protection of our criminal jurisprudence and outside even the special Courts, for activities calculated

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30. See Hamilton ‘The Delicate Balance between Civil Liberties and national Security’ South African Judges Commission, Mozambique August 2006.

31. [1940] 1 IR 136.

32. *Ibid* at 143.

to prejudice the State, does not respect his right to personal liberty and does unjustly attack his person.... In my opinion, the saving words in the declaration... cannot be used to validate an enactment conflicting with the constitutional guarantees. The Constitution, with its most impressive Preamble, is the Charter of the Irish People and I will not whittle it away."<sup>33</sup>

■ An appeal to the Supreme Court was unsuccessful on a jurisdictional based on a preliminary issue regarding jurisdiction.

■ The practical consequences of the decision are significant, as following the decision in *State (Burke) v. Lennon*, the Government felt that it had no option but to release all of the other persons interned under the provision. Shortly afterwards, in December 1939, a Magazine Fort at Phoenix Park, Dublin, which was the Defence Forces' main ammunition depot was raided by the IRA in a military style operation and over one million rounds of ammunition were stolen by over 50 men using four lorries.<sup>34</sup> The Government believed that the main suspects included many of the internees who were released following *The State (Burke) v. Lennon*.<sup>35</sup>

■ In response, the *Oireachtas* passed the Offences Against the State (Amendment) Bill, 1940, which contained similar powers, but slightly different wording. The President of Ireland sent the Bill to the Supreme Court under Article 26 of the Constitution, which provides for the referral by the President of a Bill passed by both Houses of the *Oireachtas* (parliament) to the Supreme Court, before signing it into law, for a decision as to its constitutionality.<sup>36</sup>

■ In *Re. Article 26 and the Offences Against the State (Amendment) Bill*<sup>37</sup> the Supreme Court upheld the constitutionality of the Bill, noting that a number of pre-1937 Acts provided for internment, and finding that the detention of persons provided for in the Bill was not in the nature of punishment but of preventive justice, being a precautionary measure taken for the purpose of preserving the public peace and order and the security of the state. Thus it did not contravene the provision of Art. 38 of the Constitution providing that no person be tried on any criminal charge save in due course of law. As a result of the Supreme Court's decision, the 1940 Act was granted immunity from further constitutional challenge.

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33. At pp. 154 to 155.

34. See Hogan G in *The Origins of the Irish Constitution 1928-1941* (Royal Irish Academy 2012) at 680.

35. Report of the Committee to Review the Offences Against the State Acts, 1939-1998 ?\*2002), para 4.22.

36. *Re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] 1 IR 470.

37. [1940] 1 IR 470.



■ Of course, these two cases must be viewed in their historical context.<sup>38</sup> However, they illustrate that at an early stage in the life of the state, the Irish Courts were already tasked with adjudicating on a matter of constitutional importance, in courageous cases concerning the security of the State in which fundamental rights considerations were engaged.

## **D** *amache v. Director of Public Prosecutions*

■ A more recent consideration by the Supreme Court of the constitutionality of a provision of the Offences Against the State Act, 1939, in the context of international terrorism, was the 2012 decision of *Damache v. Director of Public Prosecutions*.<sup>39</sup>

■ The case involved an Algerian-born Irish citizen, Ali Carafe Damache, who was arrested on suspicion of being involved in an international terrorist conspiracy to murder the Swedish cartoonist Lars Vilks whose cartoon depictions of the prophet Mohammad as a dog had provoked a negative reaction from Muslims in various countries. A search of Mr Damache's home was conducted on foot of a search warrant issued under Section 29 of the Offences Against the State Act 1939 ('the 1939 Act'), as amended,<sup>40</sup> which permitted a member of *An Garda Síochána* (the Irish police) of a certain rank to issue a search warrant in respect of the investigation of certain offences in circumstances which were not urgent, and where that member was directly involved in the criminal investigation in respect of which the search warrant was issued.

■ The dwelling home of the applicant was searched on foot of a warrant issued under Section 29(1) of the 1939 Act, and *Gardaí* seized a number of items from the applicant's home, including a mobile phone. The applicant was ultimately charged with sending a menacing message by telephone.<sup>41</sup> The applicant brought judicial review proceedings in the High Court seeking a declaration that Section 29(1) of the 1939 Act was unconstitutional as it permitted a member of the *Gardaí* who had been actively involved in a criminal investigation to determine whether a search warrant should issue in relation to that investigation.

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38. Supra note 24 at 694.

39. [2012] IESC 11.

40. Section 29(1) of the Offences Against the State Act 1939 as inserted by section 5 of the Criminal Law Act 1976.

41. Under section 13 of the Post Office (Amendment) Act 1951 (as amended by the Communications Regulation (Amendment) Act 2007).

■ The High Court dismissed the applicant's claim. In doing so it found that the legislative provision in question was "one which met the test of proportionality." The Court stated:

"While no formal evidence was adduced in this case which would suggest that evidence was about to be destroyed by the applicant or his wife, the security demands of countering international terrorism are of quite a different order to those which apply in what might be described as routine criminal offences. Serious injury and harm can be unleashed at any point in the globe by terrorists who can avail of modern technology to devastating effect. The fact was amply borne out by the attack on the World Trade Centre on 11th September, 2011, and many other terrorist acts before and since. The international terrorism of the modern age is a sophisticated computerised and fast moving process where crucial evidence may be lost in the absence of speedy and effective action by police authorities."<sup>42</sup>

■ On appeal, the Supreme Court held that Section 29(1) of the Offences Against the State Act, 1939, was unconstitutional.

■ Denham CJ noted that the *Oireachtas* may interfere with the constitutional rights of a person, but in doing so its actions must be proportionate.<sup>43</sup> She applied the proportionality test, adopted from Canada, and first enunciated in Ireland in the case of *Heaney v. Ireland*<sup>44</sup>, namely:

"The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:

- (i) Be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- (ii) Impair the right as little as possible;
- (iii) Be such that their effects on rights are proportionate to the objective ..."<sup>45</sup>

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42. [2011] IEHC 197.

43. *Ibid*, note 26 at para. 52.

44. [1994] 3 I.R. 593 at p. 607.

45. *Ibid*.

■ The Chief Justice found that “at the core of this case [was] to be found the principle of the constitutional protection of the home”<sup>46</sup> under the Constitution, which provides, under Article 40.5 that “[t]he dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law”<sup>47</sup> which, she noted “means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution.”<sup>48</sup> The place for which the search warrant was issued was the applicant’s home.

■ Further, the Court found that “[i]n the process of obtaining a search warrant, the person authorising the search is required to be able to assess the conflicting interests of the State and the individual person”<sup>49</sup> and that in this case, “the person authorising the warrant was not independent.”<sup>50</sup>

■ The decision had significant practical implications, such as trials collapsing, suspects not being charged, and fast-tracked applications to the Court of Criminal Appeal to ascertain whether convictions under Section 29 of the Offences Against the State Act 1939 were unsafe.<sup>51</sup>

■ As in the aftermath of *The State (Burke) v. Lennon* more than 70 years earlier, Damache “[f]or many observers... resulted in the appalling vista of criminals... now walking free due to a ‘technicality’.”<sup>52</sup>

■ However, as noted by the Hardiman J. in a subsequent case, “Given the constitutional provisions in other jurisdictions to which [the Court had] referred and the case-law which these provisions have generated, it is unlikely that any European or American lawyer would be surprised at the result in Damache.”<sup>53</sup>

## **E** xtradition and *The Attorney General v Damache*

■ This brings me to a final case which is, in my view, an example of a ‘courageous’ decision, which illustrates issues which have come before the Irish Courts in the context of international terrorism and extradition.

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46. Supra note 26 at para. 39.

47. Article 40.5 of the Constitution of Ireland.

48. *Ibid* at para. 55, echoing Henchy J. in *King v. Attorney General* [1981] I.R. 233 at p. 257

49. *Ibid* at para. 54.

50. *Ibid*.

51. See ‘The Damache case and ‘Potential Catastrophic Consequences’, IHRC and Law Society 10th Annual Human Rights Conference, Topic: The Irish Constitution: Criminal Justice and Human Rights, paper by Mark Lynam BL.

52. *Ibid*.

53. *DPP v. Cunningham* [2012] IECCA 64.

■ In the 2015 case of *Attorney General v. Damache*<sup>54</sup>, the U.S.A. sought the extradition of Mr Damache to face trial for two offences relating to international terrorism:

1. conspiracy to provide material support to terrorists; and
2. Attempted identity theft to facilitate an act of international terrorism.

■ Mr Damache challenged his extradition on several grounds. It was alleged that Mr Damache met a U.S. citizen Ms Colleen LaRose (a.k.a Jihad Jane, who was convicted and sentenced to 10 years imprisonment for terrorism-related crimes) online, and told her that he was a devoted jihadist living in Ireland, and he wanted to travel to Pakistan to fight against U.S. and allied troops. It was alleged that Mr Damache, Ms LaRose, and others formed a plan to develop a European terror cell, under which a group would travel to an Al Qaeda training camp in Pakistan to train, before returning to Europe to carry out attacks.

■ Mr Damache made a number of arguments, many of which were rejected by the High Court, and which are outside the scope of this short presentation.

■ In the High Court, Donnelly J. noted that, taking an overview of the entire case presented by Mr Damache, it [was] possible to divide his objections into two separate headings:

- (1) that he would be subjected to inhuman and degrading treatment (protection from which is viewed as an absolute right); or
- (2) that he would be subjected to violations of other fundamental rights (which are fundamental, but not absolute, and would therefore require him to establish a flagrant violation of such rights).<sup>55</sup>

■ Some of his arguments related to the prison conditions in the U.S.A., in the Administrative Maximum, Florence Colorado (ADX), in which, the Court was satisfied, there was a real risk he would be imprisoned, due to the seriousness of the international terrorist offences of which he was suspected.

■ In respect of one of Mr Damache's arguments concerning his fundamental rights, the Court rejected a submission that the conditions of detention of Muslim prisoners at the ADX are such that his surrender would violate his constitutional right to respect for his religion as guaranteed by Article 44.2.1 and 44.2.3 of the Irish Constitution, in addition to Article 9 ECHR. The Court

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54. [2015]IEHC 339.

55. *Ibid.* at para 6.4.1.

was satisfied that Muslims incarcerated in the ADX are allowed to practice their religion, albeit with some restrictions, and it was not satisfied in the circumstances that there were substantial grounds to believe that the conditions at the ADX amounted to an egregious breach of religious rights.<sup>56</sup>

■ However, the Court accepted Mr Damache’s contention that the conditions of incarceration at the ADX, which involved “prolonged isolation within a cell, limited ability to communicate with other inmates, limited telephone and other contact with family and friends, restricted interaction with staff and professional people and minimal out of cell time within small out of cell recreation space” would breach the constitutional requirement to protect persons from inhuman and degrading treatment and to respect the dignity of the human being.

■ The Court rejected the State’s submission that the decision of the European Court of Human Rights in *Babar Ahmad & Ors v. The United Kingdom*<sup>57</sup> was sufficient to deal with the issue of inhuman and degrading treatment. In *Babar Ahmad*, the European Court of Human Rights dismissed the claims of a number of applicants who were arrested in the United Kingdom, and were the subject of extradition requests by the U.S.A. in respect of international terrorism offences. They had argued that if extradited and convicted they would be held at ADX Florence, a the same super-max prison as at issue in *Damache*, and subjected to Special Administrative Measures (SAMs) in violation of Article 3 ECHR.

■ In *Damache*, the Irish High Court stated:

“Insofar as this Court is being asked to apply a standard of protection to such an individual’s constitutional rights that would fall foul of his or her constitutional right to protection from such inhuman or degrading treatment within this jurisdiction, this is rejected. To hold otherwise would be an abrogation of the duty of the judiciary to uphold the Constitution insofar as there is an obligation to protect the individual from such inhuman and degrading treatment. The question that this Court must resolve is whether the conditions at the ADX to which there is a real risk that Mr Damache will be subjected violates his constitutional right to protection from inhuman and degrading treatment.”<sup>58</sup>

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56. *Ibid* at para. 11.8.

57. Applications Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10th April, 2012) (2013) 56 E.H.R.R. 1, [2012] E.C.H.R. 609.

58. At para. 11.10.2.

■ In circumstances where the Court came to its decision on the basis of a breach of the Constitution, it was unnecessary to consider whether there had been a breach of Article 3 ECHR rights, and Mr Damache was released.

■ It should be noted that an appeal was brought by the Attorney General was brought in respect of the refusal to surrender, which was complicated by the fact that Mr Damache was arrested in Spain, and that an appeal by the Director of Public Prosecutions is currently before the courts in relation to another aspect of the decision.

## Courageous Courts

■ A commentator writing an article on the decision of the United States Court of Appeals for the Ninth Circuit in *State of Washington v. Trump*<sup>59</sup> referred to the decision as “An extraordinary act of judicial courage”,<sup>60</sup> which “exemplified the rule of law in a democratic society” displaying “the judicial courage our era requires.”<sup>61</sup>

■ The United States Supreme Court has since granted a stay on the injunctions in part, reinstating part of the controversial executive order which was at the centre of that decision, pending a full determination later this year.<sup>62</sup> Perhaps, given the public outcry regarding the Executive Order, the Supreme Court decision is equally ‘courageous’.

■ For there to be ‘courageous courts’, to use the theme of our conference, there must necessarily be judges who behave independently and impartially, guarding human rights and the rule of law “without fear or favour”,<sup>63</sup> even when it might be unpopular to do so.

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59. *State of Washington and State of Minnesota v. Trump*, No. 135105, D.C. No 2:17-cv-00141, which concerned Executive Order 13769 “Protecting the Nation From Foreign Terrorist Entry Into the United States” which *inter alia*, banned for 90 days the entry into the United States of individuals from seven countries.

60. J Matz ‘An extraordinary act of judicial courage: inside the latest travel ban court opinion’, *The Guardian*, 10th February 2017.

61. *Ibid.*

62. *Trump v. International Refugee Assistance Programme* 582 US (2017).

63. The Constitution of Ireland, Article 34.6.1.

■ The article on decision of the Ninth Circuit to which I just referred noted that “[i]t isn’t every day that a federal court cites *Ex parte Endo*, the 1944 United States Supreme Court decision which invalidated the detention of loyal, law-abiding Japanese-Americans during the second world war. But these aren’t ordinary times.”<sup>64</sup>

■ It is in times like this that the work of Constitutional Courts becomes most important.

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64. *Ibid.*





# Quelques exemples tirés de la jurisprudence récente de la Cour de justice de l'Union européenne face aux défis de la crise migratoire et de la lutte contre le terrorisme



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**L'**Union européenne, et ses Etats membres, font face depuis peu au défi considérable d'assurer la sécurité des citoyens européens dans le contexte d'une crise migratoire internationale, et d'une recrudescence d'actes terroristes multiformes, sans précédents en Europe qui, dans un environnement mondialisé et un contexte de libre-circulation des personnes et des biens, offrent un terrain favorable à une montée en puissance de la xénophobie et à la tentation de l'adoption, au niveau national, de législations ou de comportements discriminatoires.

■ 2. Les crises migratoires et la survenance du terrorisme au cœur des capitales européennes sont désormais autant d'enjeux, ou de fléaux, dont la prise en compte, l'encadrement et la lutte doivent se faire, et ce sans pour autant nuire à leur efficacité, dans le respect des valeurs communes de l'état de droit, de la

démocratie et des droits fondamentaux. Sans prétendre à l'exhaustivité, examinons quelques problématiques récentes, ou moins récentes, dont la Cour, ou le Tribunal, ont été amenés à se saisir dans le contexte de ladite crise migratoire et de la lutte menée par les Etats membres et l'Union européenne contre le terrorisme.

■ 3. Une précision s'impose cependant à titre liminaire: les cas de figure dans lesquels le Tribunal et la Cour sont susceptibles de juger de ces aspects sont par nature limités à l'état du droit de l'Union dans ces matières, aux voies de recours disponibles dans l'ordre juridique de l'Union, tant pour les Etats membres que pour les personnes directement concernées, et, en tout état de cause, à l'aléa factuel de la survenance de situations potentiellement litigieuses qui, en général, trouvent d'abord matière à s'exprimer dans l'ordre juridique national. Le contentieux relatif à ces questions est donc éparse, quelque peu éparpillé entre différentes compétences exercées par les Etats membres et l'Union; il est, à certains égards, multiforme, tant sur le plan du fond que de la procédure, mais est, en tout état de cause, moins prolifique, que celui de la Cour européenne des droits l'homme en la matière et dont la Cour de justice elle-même se nourrit de la jurisprudence.

■ 4. On ne peut ensuite aborder ce sujet sans rappeler que les instruments européens élaborés en la matière ne peuvent être pleinement efficaces que dans le contexte d'une confiance réciproque réelle et effective entre les Etats membres de l'Union européenne. Le respect par tous des standards internationaux et européens en matière de droits fondamentaux constitue donc un préalable nécessaire à la mise en œuvre desdits instruments, à leur efficacité, et dès lors à la crédibilité générale des politiques en matière de sécurité publique. En ce sens, la dynamique de l'Union européenne rejoint les objectifs du Conseil de l'Europe et de la CEDH.

■ 5. Il convient ensuite de préciser que parler des liens entre sécurité, xénophobie et droits fondamentaux impose par ailleurs une légère contorsion des principes et bases juridiques qui gouvernent ces matières en droit de l'UE, cela est notamment lié au fait que les dimensions internes et externes, et dès lors les compétences correspondantes dans l'ordre juridique de l'Union, entrent potentiellement en concurrence dans ces matières.

■ 6. Les questions de lutte contre le terrorisme relèvent d'abord des compétences des Etats dans l'Espace de liberté, sécurité et justice (ci-après l'«ESLJ») aux fins de l'harmonisation législative et de la coopération technique. Au vu de l'origine de certaines menaces, la lutte anti-terrorisme doit cependant être également envisagée sous l'angle de la sécurité externe et de la politique étrangère et de sécurité commune de l'Union (ci-après la «PESC»).

7. La prise en considération des questions relatives à la sécurité intérieure de l'UE ne peut en effet se faire sans prendre en compte les outils les plus pertinents relevant de la politique étrangère de sécurité commune, telles que les mesures restrictives, sur lesquels la CJUE exerce, par exception, un réel contrôle de légalité. Malgré des bases juridiques différentes dans les traités – et dès lors des procédures d'adoption qui se démarquent, en matière de PESC notamment, de la procédure législative ordinaire<sup>1</sup> - ce double objectif de coordination des politiques de l'Union européenne relevant de l'ELSJ (Titre V du TFUE) et de la PESC (article 21, paragraphe 2, al. a) et b), TUE<sup>2</sup>) et de sauvegarde des droits fondamentaux dans un environnement dégradé sous-tend désormais la plupart des initiatives, politiques ou législatives, récentes de l'Union européenne<sup>3</sup>.

8. La Stratégie de sécurité intérieure pour 2015-2020 de l'Union européenne<sup>4</sup>, adoptée par conclusions du Conseil le 16 juin 2015, fixe les priorités renouvelées de l'UE en matière de sécurité intérieure dans le respect des principes

1. Pour une illustration générale en matière de mesures restrictives individuelles adoptées par l'Union, voir C-130/10, *Parlement européen c. Conseil*, arrêt du 19 juillet 2012, ECLI:EU:C:2012:472. Pour un commentaire: voir «L'objectif de sécurité entre PESC et ELSJ: quelques réflexions à partir de l'affaire C-130/10 (C.J.U.E., 19 juillet 2012, *PARLEMENT EUROPEEN C. CONSEIL*)» par Isabelle Bosse-Platière dans *L'identité du droit de l'Union européenne: mélanges en l'honneur de Claude Blumann*, 2015, p. 59-75; voir également «La Cour de Justice de l'Union européenne et les mesures restrictives dans le cadre de la lutte anti-terroriste. Quelles évolutions après Lisbonne?» par Cécile Rapoport dans *La dimension extérieure de l'espace de liberté, de sécurité et de justice après le Traité de Lisbonne*, Bruylant, 2013, *Rencontres européennes*, p.136 à 154; «Le rattachement de la lutte contre le terrorisme à la PESC ou comment la Cour de justice déroule son fil d'Ariane ...» par Géraldine Bachoué Pedrouzo, CNRS, ELSJ, Réseau universitaire européen, 24 juillet 2012, disponible sur: [www.gdr-elsj.eu/2012/07/24/cooperation-judiciaire-penale/le-rattachement-de-la-lutte-contre-le-terrorisme-a-la-pesc-ou-comment-la-cour-de-justice-deroule-son-fil-d-ariane/](http://www.gdr-elsj.eu/2012/07/24/cooperation-judiciaire-penale/le-rattachement-de-la-lutte-contre-le-terrorisme-a-la-pesc-ou-comment-la-cour-de-justice-deroule-son-fil-d-ariane/)
2. Article 21, TUE: «2. L'Union définit et mène des politiques communes et des actions et œuvre pour assurer un haut degré de coopération dans tous les domaines des relations internationales afin: a) de sauvegarder ses valeurs, ses intérêts fondamentaux, sa sécurité, son indépendance et son intégrité; b) de consolider et de soutenir la démocratie, l'État de droit, les droits de l'homme et les principes du droit international ...». Voir notamment le premier rapport sur les progrès accomplis dans la mise en place d'une Union de la sécurité réelle et effective (communication de la Commission COM(2016)670 du 12 octobre 2016). Voir également la résolution du Parlement européen du 17 décembre 2014 sur le renouvellement de la stratégie de sécurité intérieure de l'UE (2014/2018(RSP)).
3. Voir notamment le premier rapport sur les progrès accomplis dans la mise en place d'une Union de la sécurité réelle et effective (communication de la Commission COM(2016)670 du 12 octobre 2016). Voir également la résolution du Parlement européen du 17 décembre 2014 sur le renouvellement de la stratégie de sécurité intérieure de l'UE (2014/2018(RSP)).
4. Document du Conseil n° 9798/15 du 10 juin 2015. Voir également l'extrait des conclusions du Conseil européen des 26 et 27 juin 2014 concernant l'espace de liberté, de sécurité et de justice et certaines questions horizontales connexes (2014/ C 240/05). Journal officiel UE C 240/13 du 24 juillet 2014, ainsi que la résolution du Parlement européen du 17 décembre 2014 sur le renouvellement de la stratégie.

de l'état de droit et des droits fondamentaux. Tout en rappelant que la sécurité nationale demeure de la seule responsabilité de chaque Etat membre<sup>5</sup> (Art. 4, paragraphe 2, TUE<sup>6</sup>), le Conseil de l'Union européenne a fixé parmi les toutes premières priorités de son action future: la lutte contre le terrorisme et son financement, contre la radicalisation et le recrutement, tout en renforçant la sécurité des frontières, l'utilisation «pertinente» de bases de données, la lutte contre la cybercriminalité et la grande criminalité, ainsi que le renforcement du système de gestion intégrée des frontières extérieures de l'UE.

■ 9. Dans la droite ligne des principes relatifs aux droits fondamentaux de l'UE rappelés à l'article 6 TUE<sup>7</sup> et à l'article 67 TFUE<sup>8</sup>, le Conseil y rappelle

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5. Voir 10ème considérant.

6. Article 4, paragraphe 2, TUE: «L'Union respecte l'égalité des États membres devant les traités ainsi que leur identité nationale, inhérente à leurs structures fondamentales politiques et constitutionnelles, y compris en ce qui concerne l'autonomie locale et régionale. Elle respecte les fonctions essentielles de l'État, notamment celles qui ont pour objet d'assurer son intégrité territoriale, de maintenir l'ordre public et de sauvegarder la sécurité nationale. En particulier, la sécurité nationale reste de la seule responsabilité de chaque État membre.»

7. Article 6, TUE: «1. L'Union reconnaît les droits, les libertés et les principes énoncés dans la Charte des droits fondamentaux de l'Union européenne du 7 décembre 2000, telle qu'adaptée le 12 décembre 2007 à Strasbourg, laquelle a la même valeur juridique que les traités.

Les dispositions de la Charte n'étendent en aucune manière les compétences de l'Union telles que définies dans les traités.

Les droits, les libertés et les principes énoncés dans la Charte sont interprétés conformément aux dispositions générales du titre VII de la Charte régissant l'interprétation et l'application de celle-ci et en prenant dûment en considération les explications visées dans la Charte, qui indiquent les sources de ces dispositions.

2. L'Union adhère à la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales. Cette adhésion ne modifie pas les compétences de l'Union telles qu'elles sont définies dans les traités.

3. Les droits fondamentaux, tels qu'ils sont garantis par la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales et tels qu'ils résultent des traditions constitutionnelles communes aux États membres, font partie du droit de l'Union en tant que principes généraux.»

8. Article 67, TFUE: «1. L'Union constitue un espace de liberté, de sécurité et de justice dans le respect des droits fondamentaux et des différents systèmes et traditions juridiques des États membres.

2. Elle assure l'absence de contrôles des personnes aux frontières intérieures et développe une politique commune en matière d'asile, d'immigration et de contrôle des frontières extérieures qui est fondée sur la solidarité entre États membres et qui est équitable à l'égard des ressortissants des pays tiers. Aux fins du présent titre, les apatrides sont assimilés aux ressortissants des pays tiers.

3. L'Union œuvre pour assurer un niveau élevé de sécurité par des mesures de prévention de la criminalité, du racisme et de la xénophobie, ainsi que de lutte contre ceux-ci, par des mesures de coordination et de coopération entre autorités policières et judiciaires et autres autorités compétentes, ainsi que par la reconnaissance mutuelle des décisions judiciaires en matière pénale et, si nécessaire, par le rapprochement des législations pénales.

4. L'Union facilite l'accès à la justice, notamment par le principe de reconnaissance mutuelle des décisions judiciaires et extrajudiciaires en matière civile.»

notamment la détermination de l'UE à renforcer son action contre les menaces terroristes dans «le plein respect des droits de l'homme et de l'Etat de droit» (4ème considérant), en insistant sur «la nécessité de respecter et de défendre les droits, libertés et principes énoncés dans la Charte des droits fondamentaux de l'UE, au sein de l'UE et dans le cadre de toutes les actions menées pour créer et maintenir un espace de liberté, de sécurité et de justice» (13ème considérant), en assurant notamment «le plein respect des droits fondamentaux, notamment pour ce qui est de la vie privée, de la protection des données à caractère personnel, de la confidentialité des communications, et des principes de nécessité, de proportionnalité et de légalité pour toutes les mesures prises pour protéger la sécurité intérieure de l'UE» (14ème considérant).

■ 10. Dans le contexte de l'arrivée massive de migrants sur le territoire des Etats membres, le respect de ces principes prend une dimension particulière non seulement dans le contexte de la lutte contre le terrorisme, mais également au regard des principes gouvernant l'entrée ou la sortie du territoire des Etats membres de l'Union, les procédures d'asile, et la protection des demandeurs, ou la coopération judiciaire dans l'espace Schengen (mandat d'arrêt européen). La question de la mise en œuvre stricte des instruments existant sous l'angle de la lutte contre la xénophobie se posant également.

■ 11. Examinons tout d'abord le cadre législatif pertinent, en droit de l'Union, en matière de lutte contre la xénophobie et les discriminations fondées sur la race ou l'origine (1). Nous nous intéresserons ensuite à quelques instruments spécifiques, et à la jurisprudence s'y rattachant, relevant de la coopération judiciaire entre Etats membres de l'UE, tel que le mandat d'arrêt européen (2) et ceux relevant de la lutte contre le terrorisme (3). On s'intéressera à cet égard aux instruments d'harmonisation des législations pénales adoptés en matière de lutte contre le terrorisme et son financement et aux mesures restrictives individuelles adoptées aux mêmes fins au titre de la politique extérieure de sécurité commune. Quelques développements non exhaustifs seront enfin consacrés au respect des droits fondamentaux en matière d'asile, de visas et de réadmission, et aux exceptions fondées sur le maintien de l'ordre et de la sécurité publics (4).

## **1. Le cadre général constitué par les instruments de l'UE en matière de lutte contre la xénophobie, le racisme et les discriminations fondées sur l'origine ou la religion**

■ 12. L'agence des droits fondamentaux de l'Union européenne (FRA) a relevé dans son dernier rapport<sup>9</sup> que «des membres de groupes de minorités ethniques avaient continué en 2016 à faire l'objet de profilage ethnique discriminatoire de la part des forces de police dans le contexte du regain de tension dû aux attentats terroristes dans des Etats membres de l'UE.» La FRA y soulignait que cette pratique était contraire à la convention des Nations Unies sur l'élimination de toutes les formes de discrimination raciale, à l'article 14 (interdiction de la discrimination) de la CEDH et à la jurisprudence pertinente de la Cour de Strasbourg.

■ 13. Si ce constat se pose au stade de la mise en œuvre des politiques pénales de répression et de prévention en matière de lutte contre le terrorisme par les Etats membres, ce dont la Cour européenne des droits de l'homme est régulièrement saisie, la Cour de justice de l'Union européenne n'a cependant pas été, pour sa part, amenée à en juger directement dans le contexte de la mise en œuvre des politiques relatives à la sécurité intérieure, et notamment en matière de lutte contre le terrorisme. Les questions relatives à la xénophobie, au racisme et aux discriminations fondées sur l'origine font cependant bien évidemment l'objet d'une législation européenne spécifique dans le cadre général de l'action de l'Union pour la protection des droits fondamentaux et des droits de l'homme<sup>10</sup>.

■ 14. La législation en vigueur dans ce domaine repose notamment sur la décision-cadre 2008/913/JAI du 28 novembre 2008 sur la lutte contre certaines formes et manifestations de racisme et de xénophobie au moyen du droit pénal<sup>11</sup>, la directive 2000/43/CE du 29 juin 2000 sur l'égalité raciale<sup>12</sup>, et bien évidemment sur la Charte des droits fondamentaux de l'Union européenne, notamment ses articles premier (dignité humaine), 10 (liberté d'expression)

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9. Comblent l'écart entre les politiques et la réalité: Rapport sur les droits fondamentaux 2016, Avis de la FRA, 2017, p.10: la FRA suggère notamment que les Etats membres dispensent systématiquement des formations sur la législation en matière de lutte contre la discrimination aux agents chargés de l'application de la loi, afin de leur permettre de mieux comprendre les partis pris inconscients et de remettre en cause les stéréotypes et préjugés. La FRA avance également que cela permettrait le renforcement de la confiance du public dans la police. Disponible sur: <http://fra.europa.eu/fr/press-release/2017/comblent-lecart-entre-les-politiques-et-la-realite-rapport-sur-les-droits>

10. Voir notamment les rapports de l'Agence des droits fondamentaux de l'Union européenne (FRA): Mettre en évidence les crimes de haine dans l'Union européenne: reconnaître les droits des victimes, FRA, 2012; Rapport sur les droits fondamentaux 2016, Avis de la FRA, FRA, 2016, disponibles sur: <http://fra.europa.eu/fr>

11. JOUE L 328/55 du 6.12.2008.

12. JOUE L 180/22 du 19.7.2000.

et surtout 21 qui interdit toute discrimination fondée sur le sexe, les origines ethniques, la religion, l'orientation sexuelle ou un handicap<sup>13</sup>. L'UE s'est dotée d'une législation détaillée<sup>14</sup> qui aborde la discrimination dans diverses situations, obligeant les Etats membres à recourir au droit pénal pour lutter contre le racisme et la xénophobie, pour combattre, par exemple, l'incitation publique à la violence et à la haine contre les personnes pour les motifs en cause. Si la Cour européenne des droits de l'homme a développé une riche jurisprudence soucieuse de défendre fermement le respect de ces droits tels que reconnus par la CEDH<sup>15</sup>, la Cour de justice de l'Union européenne n'est généralement saisie de telles questions que de manière incidente, dans des contextes parfois assez éloignés du maintien de l'ordre et de la sécurité publique ou de la lutte contre le terrorisme. On signalera a minima, à ce titre, et bien que la question posée soit, à notre avis, un peu éloignée de la problématique qui nous intéresse au titre de la présente contribution, une affaire préjudicielle en cours (C-668/15 *Jyske Finans A/S c. Ligebehandlingsnaevnet*) portant sur la compatibilité avec l'interdiction de discrimination directe ou indirecte, prévue par la directive 2000/43/CE relative à l'égalité raciale et ethnique, d'une règle interne d'un établissement de crédit visant à assurer le respect de la directive 2005/60/CE relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux et du financement du terrorisme, en vertu de laquelle un demandeur de prêt s'étant identifié au moyen d'un permis de conduire indiquant un lieu de naissance en dehors d'un État membre, de l'Islande, de la Norvège, de la Suisse ou du Lichtenstein se voit automatiquement demandé de fournir une preuve d'identité supplémentaire.

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13. Voir également l'article 14 CEDH et l'article 1 de la convention des Nations Unies sur l'élimination de toutes les formes de discrimination raciale.

14. L'article 19 TFUE prévoit que le Conseil, statuant à l'unanimité conformément à une procédure législative spéciale, et après approbation du Parlement européen, peut prendre les mesures nécessaires en vue de combattre toute discrimination fondée sur le sexe, la race ou l'origine ethnique, la religion ou les convictions, un handicap, l'âge ou l'orientation sexuelle. Une proposition de directive relative à l'égalité de traitement (mise en œuvre du principe d'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle) afin de garantir une protection uniforme contre les discriminations est en discussion au Conseil depuis 2009. Dans l'attente de l'obtention de l'unanimité requise pour son adoption, le droit de l'Union reste dès lors marqué par une hiérarchie des motifs de discrimination dépendant de chaque législation spécifique.

15. Voir par exemple en matière d'agressions racistes: *Natchova et autres c. Bulgarie*, n°43577/98 et 43579/98: arrêt de la Chambre du 26 février 2004, arrêt de la Grande Chambre du 6 juillet 2005; *Bekos et Koutropoulos c. Grèce*, n°15250/02, 13 décembre 2005; *Sesic c. Croatie*, n°40116/02, 31 mai 2007; *Angelova et Iliev c. Bulgarie*, n°55523/00, 27 juillet 2007; en matière de crimes motivés par la religion de la victime: *Milosevic c. Serbie*, n°44614/07, 14 décembre 2010; en matière de crimes motivés par les opinions politiques de la victime: *Virabyan c. Arménie*, n°40094/05, 2 octobre 2012.

■ 15. Les instruments élaborés par l'Union européenne dans le cadre de l'Espace de sécurité, de liberté et de justice, tant en matière de coopération judiciaire en général que plus spécifiquement en matière de lutte contre le terrorisme, promeuvent le respect des droits fondamentaux et se font, en toute logique, le relais de la lutte contre la xénophobie, le racisme ou les discriminations fondées sur l'origine ou la religion, comme le fait également la Cour lorsque l'occasion d'en juger se présente à elle. Rappelons cependant une nouvelle fois que l'action de l'Union européenne, et de la Cour, dans ces domaines s'insère dans l'espace que les Etats membres ont bien voulu leur laisser<sup>16</sup> et que la situation de la CJUE à cet égard trouve à s'expliquer par le fait que les questions de sécurité intérieure demeurent essentiellement dans le champ des compétences des Etats membres, de sorte que la Cour est in fine rarement amenée, par la voie du recours en manquement ou du renvoi préjudiciel par exemple, à se prononcer sur les questions de discrimination raciale dans le contexte du maintien de l'ordre public et de la sécurité.

## **2. Le mandat d'arrêt européen: mise en œuvre et respects des droits fondamentaux**

■ 16. Le mandat d'arrêt européen (ci-après le «MAE») n'est pas en lui-même un instrument spécifiquement élaboré aux fins de la lutte contre le terrorisme mais constitue un instrument plus général de lutte contre la grande criminalité transfrontalière sur le territoire de l'Union.

■ 17. Le mandat d'arrêt européen est une procédure judiciaire transfrontière simplifiée de remise aux fins de l'exercice de poursuites pénales, de l'exécution d'une peine ou d'une mesure de sûreté privative de liberté. Un mandat émis par une autorité judiciaire d'un pays de l'Union européenne est valable sur l'ensemble du territoire de l'UE. Il a remplacé les longues procédures d'extradition qui existaient entre les pays de l'UE et mit un terme au problème du «phénomène de cliquet» en vertu duquel les décisions de justice d'un Etat ne pouvaient recevoir exécution sur le territoire d'un autre Etat, alors que rien n'obligeait l'Etat requis à y procéder. Lorsqu'elles exécutent un MAE, les autorités sont tenues de respecter les droits procéduraux des suspects et des personnes poursuivies, tels que le droit à l'information,

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16. Voir, par exemple, dans cet ordre d'idées, le paragraphe 2 de l'article 1er de la décision-cadre 2008/913 qui précise que «les Etats membres peuvent choisir de ne punir que le comportement [raciste ou xénophobe] qui est soit exercé d'une manière qui risque de troubler l'ordre public, soit menaçant, injurieux ou insultant», critère alternatif critiqué par l'Agence des droits fondamentaux de l'UE (L'impact de la décision-cadre relative à la lutte contre le racisme et xénophobie sur la visibilité des crimes de haine, FRA, Rapport, 2012, p.30)



le droit de faire appel à un avocat et, éventuellement, à un interprète, conformément aux dispositions de la législation du pays où l'intéressé a été arrêté<sup>17</sup>.

■ 18. L'article 1er, paragraphe 3, de la décision-cadre 2002/584/JAI du Conseil<sup>18</sup> du 13 juin 2002 relative au mandat d'arrêt européen et aux procédures de remise entre États membres, disposant que «[la décision-cadre] ne saurait avoir pour effet de modifier l'obligation de respecter les droits fondamentaux et les principes juridiques fondamentaux tels qu'ils sont consacrés par l'article 6 TUE», la Cour de justice a été amenée à rendre plusieurs arrêts relatifs aux conditions de remise entre États membres des personnes recherchées, au regard notamment des risques éventuels, ou avérés, de violation de leurs droits fondamentaux dans le pays d'émission du MAE. La question sous-jacente, mais essentielle, étant bien évidemment celle de savoir si la force du principe de reconnaissance mutuelle en droit de l'Union trouve une limite dans une rupture de la confiance que doivent se porter les États membres de l'Union européenne en raison d'une atteinte potentielle aux droits fondamentaux qu'ils sont présumés respecter.

■ 19. Dans ses décisions préjudicielles C-404/15 et C-659/15 PPU *Pal Aranyosi et Robert Caldaru* (arrêts du 5 avril 2016)<sup>19</sup>, la Cour a conclu, en se référant à la jurisprudence de la Cour EDH<sup>20</sup>, que la décision-cadre 2002/584/JAI (articles 1er, paragraphe 3, 5 et 6, paragraphe 1) devait être interprétée en ce sens que, «en présence d'éléments objectifs, fiables, précis et dûment actualisés témoignant de l'existence de défaillances soit systémiques ou généralisées, soit touchant certains groupes de personnes, soit encore certains centre de détention en ce qui en ce qui concerne les conditions de détention dans l'État membre d'émission, l'autorité judiciaire d'exécution doit vérifier, de manière concrète et précise, s'il existe des motifs sérieux et avérés de croire que la personne concernée par un mandat d'arrêt européen émis aux fins de l'exercice de poursuites pénales ou de l'exécution d'une peine privative de liberté courra, en raison des conditions de sa détention dans cet État membre, un risque réel de traitement inhumain ou dégradant, au sens de l'article 4 de la Charte des droits fondamentaux de l'Union européenne, en cas de remise audit État membre» (point 104). La Cour a précisé que l'autorité judiciaire d'exécution devait reporter sa décision sur la

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17. Pour une présentation du dispositif, voir: La lutte contre le terrorisme dans le droit et la jurisprudence de l'Union européenne, Nicolas Catelan, Sylvie Cimamonti et Jean-Baptiste Perrier, Laboratoire de droit privé & de sciences criminelles, Presses Universitaires d'Aix-Marseille, 2014, p. 105-125.

18. JOUE L 190/1 du 18.7.2002.

19. ECLI:EU:C:2016:198

20. Voir *Bouyid c. Belgique*, n°23380/09, 28 septembre 2015 et *Torreggiani et a. c. Italie*, n°43517/09, 8 janvier 2013.

remise de la personne concernée jusqu'à ce qu'elle obtienne les informations complémentaires lui permettant d'écarter l'existence d'un tel risque. Si ce risque ne peut être écarté dans un délai raisonnable, cette autorité peut alors décider de mettre fin à la procédure de remise.

■ 20. Comme on le sait, cette solution n'a pas émergé spontanément, elle est le résultat d'une longue séquence jurisprudentielle entre la Cour EDH et la CJUE quant à la portée de la présomption réfragable de respect des droits fondamentaux initialement reconnue par la Cour EDH dans l'affaire *Bosphorus* (n°45036/98, arrêt du 30 juin 2005), d'abord dans le champ du droit d'asile en matière de réadmission<sup>21</sup>, puis dans le champ du mandat d'arrêt européen<sup>22</sup>, quant à l'obligation notamment d'examiner non seulement les éventuelles défaillances systémiques de l'Etat requis mais également les situations individuelles des personnes concernées au regard des droits potentiellement menacés au cas d'espèce.

■ 21. Au regard des problématiques de discrimination, on notera que cette jurisprudence est d'autant plus intéressante qu'elle précise qu'il revient à l'autorité judiciaire d'exécution de s'assurer de l'absence de défaillances touchant notamment «certains groupes de personnes». La précision est d'autant plus pertinente que ne figure plus dans le texte de la déclaration-cadre 2002/584/JAI la clause de non-discrimination qui figurait à l'article 3, paragraphe 2, de la convention européenne d'extradition du 13 décembre 1957, aux termes duquel les Etats refusent traditionnellement l'extradition s'il y a de sérieuses raisons de croire que la demande a été présentée aux fins de poursuivre ou de punir un individu pour des considérations de race, religion, de nationalité ou d'opinions politiques<sup>23</sup>.

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21. voir les arrêts de la Cour EDH: *MSS c. Belgique et Grèce*, n°30696/09 du 21 janvier 2011 et *Tarakhel c. Suisse*, n°29217/12 du 4 novembre 2014; de la CJUE: C-411/10, *N.S. c. Secretary of State for the Home Dpt* du 21 décembre 2011, EU:C:2011:865, et C-394/12, *Abdullahi c. Bundesasylamt*, du 31 janvier 2014, ECLI:EU:C:2013:813, de la CJUE.

22. C-396/11, *Radu*, arrêt du 29 janvier 2013, ECLI:EU:C:2013:39, et lesdits arrêts C-404/15 et C-659/15 *PPU Pal Aranyosi et Robert Caldaru* du 5 avril 2016.

23. Problématique reléguée à un simple considérant de la décision-cadre 2002/584/JAI: «(12) La présente décision-cadre respecte les droits fondamentaux et observe les principes reconnus par l'article 6 du traité sur l'Union européenne et reflétés dans la Charte des droits fondamentaux de l'Union européenne, notamment son chapitre VI. Rien dans la présente décision-cadre ne peut être interprété comme une interdiction de refuser la remise d'une personne qui fait l'objet d'un mandat d'arrêt européen s'il y a des raisons de croire, sur la base d'éléments objectifs, que ledit mandat a été émis dans le but de poursuivre ou de punir une personne en raison de son sexe, de sa race, de sa religion, de son origine ethnique, de sa nationalité, de sa langue, de ses opinions politiques ou de son orientation sexuelle, ou qu'il peut être porté atteinte à la situation de cette personne pour l'une de ces raisons.»

■ 22. On remarquera enfin que la Cour a également bien pris le soin de rappeler qu'«en toutes circonstances, y compris dans le cas de la lutte contre le terrorisme et le crime organisé, la CEDH interdit en termes absolus la torture et les peines et traitements inhumains ou dégradants, quel que soit le comportement de la personne concernée» (point 87). Ceci nous donne l'occasion d'aborder la question du respect des droits fondamentaux dans le cadre de la lutte contre le terrorisme, tant au regard des mesures adoptées au titre de l'ELSJ que de celles adoptées dans le cadre de la PESG.

### **3. La lutte contre le terrorisme et la protection des droits fondamentaux**

■ 23. Pour mettre en œuvre les objectifs et les politiques de l'Union, les traités mettent à disposition des institutions et des Etats membres un certain nombre d'outils juridiques. Dans la mesure où l'approche de l'Union européenne en matière de lutte contre le terrorisme est globale, et recourt autant aux politiques internes qu'externes, tous ces outils peuvent être le support de son action. Selon le domaine de compétence dont ils relèvent – espace de sécurité, de liberté et de justice, rapprochement des législations, politique étrangère et de sécurité commune – et dès lors de leur régime juridique, leur portée varie<sup>24</sup>.

#### **- Coopération judiciaire en matière pénale et rapprochement des législations en matière de lutte contre le terrorisme**

■ 24. Différentes directives et réglementations ont été adoptées aux fins de la lutte contre le terrorisme sur la base des articles 67 TFUE (ex-61 TCE et 29 TUE) ou 83 TFUE (ex-31 TUE) relatifs à l'ESLJ, ou plus largement au titre du rapprochement des législations (article 114 TFUE). On distingue généralement les réglementations programmatiques/techniques de la réglementation spécifique visant à développer la coopération judiciaire. On peut citer, par exemple, le règlement (UE) n°98/2013 du 15 janvier 2013 sur la commercialisation et l'utilisation de précurseurs d'explosifs<sup>25</sup>, les projets de la Commission sur la révision de la directive 91/477/CEE du 18 juin 1991 relative au contrôle de l'acquisition et de la détention d'armes<sup>26</sup>, la directive (UE) 2015/849 du 20 mai 2015 relative à la prévention de l'utilisation du système financier aux fins

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24. Pour un panorama complet et un historique, voir *La lutte contre le terrorisme dans le droit et la jurisprudence de l'Union européenne*, Nicolas Catelan, Sylvie Cimamonti et Jean-Baptiste Perrier, Laboratoire de droit privé & de sciences criminelles, Presses Universitaires d'Aix-Marseille, 2014, p. 41

25. JOUE L 39/1 du 9.2.2013.

26. JOUE L 256/51 du 13.9.1991, telle que modifiée le 21 mai 2008 par la directive 2008/51/CE du Parlement européen et du Conseil (JOUE L 179/5 du 8.7.2008)

du blanchiment de capitaux ou du financement du terrorisme<sup>27</sup>, ou encore l'adoption d'une initiative en juin 2016 aux fins de la prévention de la radicalisation conduisant à l'extrémisme violent<sup>28</sup>.

■ 25. Dans le domaine particulier de la coopération judiciaire en la matière, on citera notamment la toute récente directive (UE) 2017/541 du 15 mars 2017 relative à la lutte contre le terrorisme<sup>29</sup> remplaçant la décision-cadre 2002/475/JAI du 13 juin 2002<sup>30</sup>, pierre angulaire des mesures de justice pénale des États membres destinées à lutter contre le terrorisme. Cadre juridique commun à tous les États membres, cette directive met à jour la définition harmonisée des infractions terroristes en vigueur jusqu'alors, servant de référence pour l'échange d'informations et la coopération entre les autorités nationales compétentes. Cette définition du terrorisme avait déjà été étendue aux infractions de «provocation publique à commettre une infraction terroriste», au «recrutement pour le terrorisme» et à «l'entraînement pour le terrorisme» par la décision-cadre 2008/919/JAI du 28 novembre 2008<sup>31</sup>, elle est désormais élargie aux faits de recevoir un «entraînement au terrorisme», de «voyager à des fins de terrorisme» ou de faciliter de tels voyages. La directive intègre désormais également l'infraction spécifique de financement du terrorisme issue de la législation anti-blanchiment. Tous ces instruments imposent aux États membres de prendre toutes les mesures nécessaires pour que soient considérés comme infractions terroristes lesdits comportements dans l'ordre interne.

■ 26. Si la Stratégie sur la sécurité intérieure 2015-2020<sup>32</sup> rappelle sans ambiguïté que le renforcement de la prévention des attentats terroristes et de la radicalisation doit se faire en protégeant les «valeurs par la promotion de la tolérance, de la non-discrimination, des libertés fondamentales et de la

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27. JOUE L 141/73 du 5.6.2015. Pour une présentation du dispositif, voir: La lutte contre le terrorisme dans le droit et la jurisprudence de l'Union européenne, Nicolas Catelan, Sylvie Cimamonti et Jean-Baptiste Perrier, Laboratoire de droit privé & de sciences criminelles, Presses Universitaires d'Aix-Marseille, 2014, p. 90-103.

28. Voir Commission européenne, Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions, Soutien à la prévention de la radicalisation conduisant à l'extrémisme violent, COM(2016), 379 final; pour une présentation de la problématique de la radicalisation violente, voir également: La lutte contre le terrorisme dans le droit et la jurisprudence de l'Union européenne, Nicolas Catelan, Sylvie Cimamonti et Jean-Baptiste Perrier, Laboratoire de droit privé & de sciences criminelles, Presses Universitaires d'Aix-Marseille, 2014, p. 72-89.

29. JOUE L 88/6 du 31.3.2017.

30. JOUE L 164/3 du 13.6.2002.

31. JOUE L 330/21 du 9.12.2008.

32. Document du Conseil n° 9798/15 du 10 juin 2015.

solidarité dans l'ensemble de l'Union européenne» (point 18, 3ème tiret), il est intéressant d'observer, à propos de la provocation publique, que l'article 2 de la décision-cadre 2008/919/JAI précisait déjà que celle-ci «n'a pas pour effet d'obliger les Etats à prendre des mesures contraires aux principes fondamentaux relatifs à la liberté d'expression».

■ 27. La nouvelle directive (UE) 2017/541 explicite à ce propos (10ème considérant) les circonstances dans lesquelles la provocation peut être considérée comme rattachable à l'infraction de terrorisme mais envisage également les modalités de suppression des contenus en ligne sur Internet constituant de telles provocations publiques à la commission d'actes terroristes, dans le respect des principes de nécessité, proportionnalité et de recours juridictionnel effectif.

■ 28. Plus explicite encore, le 35ème considérant de la nouvelle directive<sup>33</sup> rappelle désormais longuement que celle-ci respecte, et doit être mise en œuvre par les Etats membres, dans le plein respect de tous les droits fondamentaux potentiellement concernés par la lutte contre le terrorisme, concernant tout aussi bien la liberté d'expression, la liberté d'association, la liberté de circulation, la présomption d'innocence, le principe de légalité des peines que «l'interdiction générale de toute discrimination fondée sur la race, la couleur, les origines ethniques ou sociales, les caractéristiques génétiques, la langue, la religion ou les convictions, les opinions politiques ou toute autre opinion.»

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33. «(35) La présente directive respecte les principes reconnus par l'article 2 du traité sur l'Union européenne, ainsi que les droits et libertés fondamentaux, et observe les principes consacrés notamment par la charte, y compris ceux énoncés dans ses titres II, III, V et VI concernant, entre autres, le droit à la liberté et à la sûreté, la liberté d'expression et d'information, la liberté d'association et la liberté de pensée, de conscience et de religion, l'interdiction générale de toute discrimination fondée notamment sur la race, la couleur, les origines ethniques ou sociales, les caractéristiques génétiques, la langue, la religion ou les convictions, les opinions politiques ou toute autre opinion, le droit au respect de la vie privée et familiale et le droit à la protection des données à caractère personnel, les principes de légalité et de proportionnalité des délits et des peines, qui englobent également les exigences de précision, de clarté et de prévisibilité en droit pénal, la présomption d'innocence, ainsi que la liberté de circulation telle qu'établie à l'article 21, paragraphe 1, du traité sur le fonctionnement de l'Union européenne et dans la directive 2004/38/CE du Parlement européen et du Conseil. La présente directive doit être mise en œuvre dans le respect de ces droits et principes, compte tenu également de la convention de sauvegarde des droits de l'homme et des libertés fondamentales, du pacte international relatif aux droits civils et politiques et d'autres obligations en matière de droits de l'homme découlant du droit international».

29. Si la Cour de justice a été récemment amenée à se prononcer, dans le cadre de différentes demandes de décisions préjudicielles (C-157/15, *S. Achbita et a. c. G4S Secure Solutions*<sup>34</sup> C-188/15, *Asma Bougnaoui et a. c. Micropole SA*<sup>35</sup>, arrêts du 14 mars 2017) en matière de discrimination fondée

34. ECLI:EU:C:2017:203. Dans cette affaire, la Cour a été amené à interpréter les notions de discrimination directe et indirecte dans le cadre de l'application de la directive 2000/78/CE du Conseil, du 27 novembre 2000, dans le contexte du licenciement d'une employée portant le voile islamique et de l'interdiction établie par une règle interne d'une entreprise privée, par souci de neutralité à l'égard de sa clientèle, du port de tout signe politique, philosophique ou religieux sur le lieu de travail. La Cour a notamment rappelé que la directive 2000/78/CE entend par «principe d'égalité de traitement» l'absence de toute discrimination directe ou indirecte fondée, entre autres, sur la religion. La notion de religion doit être interprétée comme couvrant tant le fait d'avoir des convictions religieuses que la liberté des personnes de manifester celles-ci en public. La Cour a constaté que le règlement de l'entreprise en question traitait, et avait été appliqué, de manière identique, à tous les travailleurs de l'entreprise, en leur imposant notamment, de manière générale et indifférenciée, une neutralité vestimentaire et que dès lors, ledit règlement n'instaurait pas une différence de traitement directement fondée sur la religion ou sur les convictions, au sens de la directive. La Cour a indiqué par ailleurs qu'il ne pourrait y avoir une différence de traitement indirectement fondée sur la religion que s'il était établi que l'obligation que contenait le règlement aboutissait, en fait, à un désavantage particulier pour les personnes adhérant à une religion ou à des convictions données. Une telle différence de traitement n'est pas constitutive d'une discrimination indirecte si elle est justifiée par un objectif légitime et si les moyens de réaliser cet objectif étaient appropriés et nécessaires. A cet égard, la Cour a relevé que la volonté d'un employeur d'afficher une image de neutralité vis-à-vis de ses clients, ce qui se rapporte à la liberté d'entreprise reconnue par la Charte des droits fondamentaux, est légitime, notamment lorsque seuls sont impliqués les travailleurs en contact avec la clientèle. L'interdiction du port visible de signes de convictions politiques, philosophiques ou religieuses est par ailleurs apte à assurer la bonne application d'une politique de neutralité, à condition que cette politique soit véritablement poursuivie de manière cohérente et systématique.
35. ECLI:EU:C:2017:204. Dans cette affaire, la Cour a été amenée à répondre à une question posée par la Cour de cassation française, dans le cadre d'une procédure de licenciement d'un employée, quant à savoir si la volonté d'un employeur de tenir compte du souhait d'un client de ne plus voir les services fournis par l'une de ses employées qui porte un foulard islamique peut être considérée comme une «exigence professionnelle essentielle et déterminante» au sens de l'article 4, paragraphe 1, de la directive 2000/78/CE. Selon la Cour, il appartient à la Cour de cassation de vérifier, à la lumière des conditions relevées dans l'arrêt *G4S Secure Solutions* (voir ci-avant note de bas de page n°34), si le licenciement de l'intéressée était fondé sur le non-respect d'une règle interne prohibant le port visible de signes de convictions politiques, philosophiques ou religieuses. En l'absence d'une telle règle interne, il convient de vérifier si la volonté de l'employeur de tenir compte du souhait d'un client de ne plus voir ses services fournis par une travailleuse qui porte un foulard islamique serait justifiée au sens de l'article 4, paragraphe 1, de la directive, selon laquelle une différence de traitement prohibée par la directive peut ne pas constituer une discrimination lorsqu'en raison de la nature d'une activité professionnelle ou des conditions de son exercice, la caractéristique en cause constitue une exigence professionnelle essentielle et déterminante, pour autant que l'objectif est légitime et que l'exigence est proportionnée. La Cour rappelle à ce propos que ce n'est que dans des conditions très limitées qu'une caractéristique liée, notamment, à la religion peut constituer une exigence professionnelle essentielle et déterminante, cette notion renvoyant à une exigence objectivement dictée par la nature ou les conditions d'exercice d'une activité professionnelle et ne couvrant pas des considérations subjectives, telles que la volonté d'un employeur de tenir compte des souhaits particuliers du client.

sur la religion dans le contexte de la mise en œuvre de la directive 2000/78/CE du 27 novembre 2000 sur l'égalité de traitement en matière d'emploi et de travail<sup>36</sup>, et que la Cour a également été amenée à quelques reprises à se prononcer sur la décision-cadre 2002/475/JAI relative à la lutte contre le terrorisme et à la position commune 2001/931 dans le cadre de renvois préjudiciels en matière de droit d'asile (voir ci-après paragraphe 50 et suivants, C-57/09 et C-101/09, *Bundesrepublik Deutschland c. B et D*<sup>37</sup>) ou de financement d'organisations considérées comme terroristes par l'Union européenne (C-158/14, *A e.a. c. Minister van Buitenlandse Zaken*, arrêt du 14 mars 2017<sup>38</sup>), elle n'a pas, en fait, encore été amenée à aborder ces questions sous l'angle combiné de la lutte contre le terrorisme et de la violation des droits fondamentaux relatifs à la non-discrimination, raciale ou du fait des origines.

■ 30. C'est d'avantage dans le contexte particulier de la lutte contre le terrorisme international et de l'élaboration par l'UE, sous la PESC, de listes nominatives de personnes physiques ou morales considérées comme liées au terrorisme, aux fins de l'adoption de mesures restrictives (gels d'avoirs) à l'encontre de ces personnes, que la violation de certains droits fondamentaux a été soulevée devant la Cour de justice et le Tribunal et a été sanctionnée par ces dernières.

36. JOUE L 303/16 du 2.12.2000.

37. ECLI:EU:C:2010:661.

38. ECLI:EU:C:2017:202. Dans cette affaire, dans le contexte d'une procédure juridictionnelle administrative ouverte par des personnes qui avaient fait l'objet d'un gel de leurs avoirs sous le droit néerlandais (arrêt de sanctions de 2007) du fait d'actes de financement et de leur participation à l'organisation des LTTE aux Pays-Bas, les LTTE étant considérés comme une organisation terroriste par l'Union européenne au titre de la Position commune 2001/931 et du Règlement n°2580/2001 (ces personnes n'étant pas elles-mêmes individuellement désignées sous cette réglementation), le Conseil d'Etat des Pays-Bas souhaitait savoir, inter alia, si les actes de violence attribués aux LTTE au Sri Lanka par le Conseil de l'Union européenne au titre du règlement d'exécution n°610/2010 pouvaient être considérés comme ayant été commis par des forces armées en période de conflit armé en sens du droit international humanitaire (conventions de Genève de 1949 et protocoles additionnels sur le droit des conflits armés) et des exceptions prévues par les conventions internationales en matière de lutte contre le terrorisme (convention internationale pour la répression des attentats terroristes à l'explosif, convention internationale pour la répression des actes de terrorisme nucléaire, convention du Conseil de l'Europe pour la prévention du terrorisme, convention internationale contre la prise d'otages, convention internationale pour la répression du financement du terrorisme) et dès lors ne pas être considérés comme des activités terroristes. La Cour a conclu que la Position commune 2001/931 et le Règlement n°2580/2001 ne s'opposait pas à ce que des activités de forces armées en période de conflit armé, au sens du droit international humanitaire, constituent des «actes de terrorismes» au sens de ces actes de l'Union et que dès lors, les activités des LTTE visées aux termes du règlement d'exécution n°610/2010 pouvaient constituer des actes de terrorisme, et que ceci n'affectait dès lors pas la validité dudit règlement et des actes antérieurs ayant conduit à l'inscription des LTTE comme organisation terroriste par l'Union européenne.

## - **Le respect des droits fondamentaux dans le cadre de l'adoption et de la mise en œuvre des mesures restrictives individuelles relevant de la PESC**

■ 31. Rappelons tout d'abord le principe selon lequel les mesures adoptées au titre de la PESC ne relèvent normalement pas de la compétence de la Cour de justice de l'Union européenne. L'article 275 TFUE confère cependant une compétence à la Cour pour contrôler le respect de l'article 40 TUE<sup>39</sup> et se prononcer sur les recours formés dans les conditions de l'article 263, quatrième alinéa, TFUE<sup>40</sup> concernant le contrôle de la légalité des décisions prévoyant des mesures restrictives individuelles contre des personnes physiques ou morales adoptées par le Conseil sur la base du titre V, chapitre 2, TUE.

■ 32. Examinons les législations en cause avant de relever, dans la jurisprudence propre à ces instruments, quelques exemples en matière de protection des droits fondamentaux, la jurisprudence n'ayant cessé de s'affiner depuis l'adoption, à l'issue des attentats du 11 septembre 2001, des premiers instruments communautaires dédiés à la lutte contre le terrorisme.

■ 33. Différents régimes de mesures restrictives coexistent dans la législation européenne en matière de lutte contre le terrorisme international.

■ 34. La position commune 2001/931/PESC du 27 décembre 2001 relative à l'application de mesures spécifiques en vue de lutter contre le terrorisme permet tout d'abord l'adoption, sur la base de l'article 215 TFUE<sup>41</sup>, aux fins notamment du gel de leurs avoirs financiers, de listes de personnes, groupes

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39. Article 40 TUE: «La mise en œuvre de la politique étrangère et de sécurité commune n'affecte pas l'application des procédures et l'étendue respective des attributions des institutions prévues par les traités pour l'exercice des compétences de l'Union visées aux articles 3 à 6 du traité sur le fonctionnement de l'Union européenne.

De même, la mise en œuvre des politiques visées auxdits articles n'affecte pas l'application des procédures et l'étendue respective des attributions des institutions prévues par les traités pour l'exercice des compétences de l'Union au titre du présent chapitre».

40. Article 263, 4ème alinéa, TFUE: «Toute personne physique ou morale peut former, dans les conditions prévues aux premier et deuxième alinéas, un recours contre les actes dont elle est le destinataire ou qui la concernent directement et individuellement, ainsi que contre les actes réglementaires qui la concernent directement et qui ne comportent pas de mesures d'exécution».

41. Suite à l'adoption du traité de Lisbonne, la Cour a clairement rattaché l'adoption de mesures restrictives individuelles en matière de lutte contre le terrorisme, considéré comme une menace à la paix et à la sécurité internationale, à l'article 215 TFUE relevant de la PESC (article 21 TUE) et non à l'article 75 TFUE relatif à l'ESLJ (*Parlement c. Conseil*, C-130/10, arrêt du 19 juillet 2012), conduisant à écarter le législateur européen du processus décisionnel relatif à l'adoption de ces mesures, la Cour restant pour sa part compétente en la matière au titre de l'article 275 TFUE pour juger de la légalité des mesures restrictives en cause dans le cadre de recours individuels en annulation; voir note de bas de page n°1.



et entités impliquées dans des actes de terrorisme, dont la définition est identique à celle initialement retenue par la décision cadre 2002/475/JAI (voir ci-avant paragraphe 25), établies sur la base d'informations précises ou d'éléments de dossier qui montrent qu'une décision a été prise par une autorité compétente, judiciaire ou une autorité équivalente, compétente en matière de lutte contre le terrorisme<sup>42</sup>.

■ 35. En toute logique, la Cour s'est également d'abord assurée que ces mesures, de nature conservatoire<sup>43</sup>, étaient bien «prévues par la loi, ... adoptées par une autorité compétente et présent[aient] un caractère limité dans le temps»<sup>44</sup>. Aux termes de la position commune 2001/931, les personnes désignées disposent du droit de voir leur inscription sur la liste réexaminée tous les six mois<sup>45</sup>, le Conseil étant tenu par ailleurs, avant tout renouvellement des mesures les concernant, de communiquer à ces personnes les projets d'exposés des motifs modifiés les concernant, dans des délais adéquats, pour leur permettre, dans un souci de respect du principe du contradictoire et du droit d'être entendu, de formuler leurs éventuelles commentaires et dès lors de faire valoir utilement leur point de vue.

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42. Article 1, alinéa 4: «La liste à l'annexe est établie sur la base d'informations précises ou d'éléments de dossier qui montrent qu'une décision a été prise par une autorité compétente à l'égard des personnes, groupes et entités visés, qu'il s'agisse de l'ouverture d'enquêtes ou de poursuites pour un acte terroriste, ou la tentative de commettre, ou la participation à, ou la facilitation d'un tel acte, basées sur des preuves ou des indices sérieux et crédibles, ou qu'il s'agisse d'une condamnation pour de tels faits. Les personnes, groupes et entités identifiés par le Conseil de sécurité des Nations unies comme liées au terrorisme et à l'encontre desquelles il a ordonné des sanctions peuvent être incluses dans la liste. Aux fins du présent paragraphe, on entend par «autorité compétente», une autorité judiciaire, ou, si les autorités judiciaires n'ont aucune compétence dans le domaine couvert par le présent paragraphe, une autorité compétente équivalente dans ce domaine». Pour un commentaire, *La lutte contre le terrorisme dans le droit et la jurisprudence de l'Union européenne*, Nicolas Catelan, Sylvie Cimamonti et Jean-Baptiste Perrier, op.cit., p. 200-211. Pour un exemple d'autorité considérée comme non compétente en la matière, voir T-341/07 *Sison (II)*, arrêt du 30 septembre 2009, ECLI:EU:T:2011:687, points 106-107.

43. T-37/07, arrêt du 2 septembre 2009, *El Morabit c. Conseil*, ECLI:EU:T:2009:296, point 40: «Le principe de la présomption d'innocence ne s'oppose pas à l'adoption de mesures conservatoires, qui ne constituent pas des sanctions et ne préjugent aucunement de l'innocence ou de la culpabilité de la personne visée par celles-ci»;

44. T-49/07, arrêt du 7 décembre 2010, *Sofiane Fahas c. Conseil*, ECLI:EU:T:2010:499, point 64.

45. Position commune 2001/931, Article 1er, paragraphe 6.

36. Dans les affaires *PMOI* (T-256/07 du 23 octobre 2008, point 144<sup>46</sup>) et *Stichting Al-Aqsa* (C-539/10 P du 15 novembre 2012, points 66 à 77<sup>47</sup>), la Cour et le Tribunal ont admis qu'une décision de gel d'avoirs de nature administrative, et pas nécessairement judiciaire, satisfaisait à cette exigence. Le Tribunal de l'Union européenne a également admis qu'une décision d'une autorité compétente d'un Etat tiers pouvait satisfaire à cette condition (*LTTE*, T-208/11 et T-508/11, arrêt du 16 octobre 2014, point 136<sup>48</sup>) à la condition que la réglementation pertinente de l'État tiers en cause assure une protection des droits de la défense et du droit à une protection juridictionnelle effective équivalente à celle garantie au niveau de l'Union, tout Etat non membre n'étant pas soumis, par définition, au principe de coopération loyale ou aux dispositions de la Charte des droits fondamentaux de l'Union européenne, ni nécessairement soumis à la CEDH (point 138).

37. Le Tribunal s'était attaché, dès 2006, dans l'affaire T-228/02 *OMPI*<sup>49</sup>, et ce non sans un certain courage – les attentats du 11 septembre 2001 étaient en effet encore très présents dans les mémoires –, à protéger les droits procéduraux des personnes concernées en considérant les droits en cause, au titre de la protection des droits de la défense, comme étant liés les uns aux autres: le Tribunal a considéré que la garantie des droits de la défense contribuait à assurer le bon exercice du droit à une protection juridictionnelle effective de même qu'un rapport étroit existait entre le droit à un recours juridictionnel effectif et l'obligation de motivation. C'est principalement dans les affaires T-47/03<sup>50</sup> et T-341/07 *Sison*<sup>51</sup>, T-256/07 *PMOI (I)*<sup>52</sup>, T-284/08 *PMOI (II)*<sup>53</sup> et C-27/09 *P PMOI (II)*<sup>54</sup>, T-348/07 *Stichting Al-Aqsa*<sup>55</sup> et C-539/10 P *Stichting Al-Aqsa*<sup>56</sup> que le Tribunal et la Cour ont développé cette jurisprudence.

38. Le contentieux de la position commune 2001/931 a ainsi conduit le Tribunal et la Cour à sanctionner le Conseil à différentes reprises pour violation

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46. ECLI:EU:T:2008:461

47. ECLI:EU:C:2012:711

48. ECLI:EU:T:2014:885

49. T-228/02, *OMPI*, op. cit., point 89.

50. T-47/03 *Sison*, arrêt du 11 juillet 2007, ECLI:EU:T:2007:207.

51. T-341/07 *Sison (II)*, arrêt du 30 septembre 2009, ECLI:EU:T:2011:687.

52. T-256/07 *PMOI (I)*, arrêt du 23 octobre 2008, ECLI:EU:T:2008:461.

53. T-284/08 *PMOI (II)*, arrêt du 4 décembre 2008, ECLI:EU:T:2008:550.

54. C-27/09 P *PMOI (II)*, arrêt du 2 décembre 2011, ECLI:EU:C:2011:853.

55. T-348/07 *Stichting Al-Aqsa*, arrêt du 9 septembre 2010, ECLI:EU:T:2010:373.

56. Affaires jointes C-539/10 P et C-550/10 P *Stichting Al-Aqsa*, arrêt du 15 novembre 2012, ECLI:EU:C:2012:711.

des droits de la défense<sup>57</sup>, du fait notamment du défaut de communication préalable des éléments à charge à l'appui du renouvellement d'une mesure de gel d'avoirs<sup>58</sup>, pour violation de l'obligation de motivation<sup>59</sup> ou du droit à un recours juridictionnel effectif<sup>60</sup>, en ce que l'absence de communication des éléments de preuve pertinents n'avait pas permis à la personne visée, ainsi qu'au Tribunal, de vérifier que les décisions attaquées n'étaient pas entachées d'erreurs manifestes d'appréciation et que la motivation desdites mesures était suffisante.

■ 39. Deux arrêts du Tribunal, dans les affaires *Hamas*<sup>61</sup> et *LTTE*<sup>62</sup>, qui ont sanctionné en 2014 le Conseil pour ces mêmes motifs et qui portaient notamment sur les modalités du renouvellement par le Conseil, à l'occasion des réexamens semestriels opérés, des mesures initialement adoptées, font aujourd'hui l'objet de pourvois<sup>63</sup> du Conseil devant la Cour, et sont actuellement en délibéré. Trois autres affaires (T-316/14 *PKK c. Conseil*, T-643/16 *Gamaa Islamiya Egypte c. Conseil* et T-289/15 *Hamas c. Conseil*) sont pendantes devant le Tribunal.

■ 40. Terrain de la célèbre jurisprudence *Kadi*<sup>64</sup>, l'Union européenne a également adopté en 2002 une législation permettant de transposer en droit de

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57. T-228/02, *OMPI*, arrêt du 12 décembre 2006, ECLI:EU:T:2006:384, points 137, 162; T-47/03 *Sison*, op. cit., points 184, 214; T-284/08 *PMOI (II)*, op. cit., point 47; C-27/09 P *PMOI (II)*, op. cit., points 66, 75. Pour un commentaire, voir «protection des droits de la défense dans le cadre des mesures de gel de fonds imposés par l'Union européenne», Lucette Defalque, Emilie Schwaller, Liber Amicorum François Glandsdorff et Pierre Legros, 2014, p. 819-820, 835-847; voir également La lutte contre le terrorisme dans le droit et la jurisprudence de l'Union européenne, Nicolas Catelan, Sylvie Cimamonti et Jean-Baptiste Perrier, op. cit., p. 165-168, 170-172;

58. T-228/02, *OMPI*, op. cit. points 126, 130-132; T-47/03 *Sison*, op. cit. points 177-179.

59. T-228/02, *OMPI*, op. cit., points 143-146, 164; T-47/03 *Sison*, op. cit., points 198, 215; T-256/07 *PMOI (I)*, arrêt du 23 octobre 2008, ECLI:EU:T:2008:461.

60. T-228/02, *OMPI*, op. cit., points 155, 165; T-284/08 *PMOI (II)*, op. cit., points 77-78; T-47/03 *Sison*, op. cit., point 225.

61. T-400/10, *Hamas c. Conseil*, arrêt du 17 décembre 2014, ECLI:EU:T:2014:1095.

62. Affaires jointes T-208/11 et T-508/11, *LTTE c. Conseil*, arrêt du 16 octobre 2014, ECLI:EU:T:2014:885.

63. C-79/15 P, *Conseil c. Hamas* et C-599/14 P, *Conseil c. LTTE*.

64. Pour une rapide bibliographie des articles et ouvrages dédiés à ces affaires: «La Cour de justice de l'Union européenne et la PESC – L'affaire *Y. A. Kadi*», Jean-Jacques Kasel, dans La Cour de justice de l'Union européenne sous la présidence de Vassilios Skouris (2003-2015): *liber amicorum* Vassilios Skouris, 2015, p.337-347; «La Cour de Justice de l'Union européenne et les mesures restrictives dans le cadre de la lutte anti-terroriste. Quelles évolutions après Lisbonne?», Cécile Rapoport, op. cit., p.158-163; «*The Kadi II Judgment of the general court: The ECJ's Predicament and the Consequences for Members States*», Armin Cuyvers, *European Constitutional Law review*, 7, *Cambridge Journals*, 2011, p.481-510; «Primauté du droit international et protection des droits fondamentaux. A propos de l'arrêt *Kadi* de la Cour de justice des Communautés européennes», Jean-Paul Jacqué, *L'Europe des Libertés*, n°27, Septembre 2008;

l'Union les sanctions adoptées par le Conseil de sécurité des Nations unies et son Comité des sanctions<sup>65</sup>. Par une position commune 2002/402/PESC et un règlement (CE) n°881/2002 du 27 mai 2002 instituant des mesures restrictives à l'encontre d'Ousama Ben Laden, Al Qaida et les Taliban<sup>66</sup>, l'Union européenne s'est dotée de la législation lui permettant de mettre en œuvre les mesures restrictives individuelles adoptées par l'ONU par les résolutions 1267 (1999), 1333 (2000) et 1390 (2002).

■ 41. C'est, à nouveau, avec un certain courage que la Cour, sous l'étendard de la protection des droits individuels, a sanctionné en 2008, puis à nouveau le Tribunal, en 2010, la Commission d'une application pour le moins trop automatique des mesures restrictives obligatoires adoptées par le Conseil de sécurité des Nations unies sur le fondement du Chapitre VII de la Charte des Nations Unies selon une procédure interétatique critiquable au regard du respect des droits individuels, exigeant que le Tribunal exerce un contrôle «en principe complet» de la légalité de l'ensemble des actes communautaires au regard des droits fondamentaux faisant partie intégrante des principes généraux du droit communautaire, et ce malgré la nature PESC des actes en cause et la primauté de la Charte des Nations unies sur le droit de l'Union<sup>67</sup>.

■ 42. La procédure d'adoption des dites «sanctions» au niveau du Comité des sanctions du Conseil de sécurité de l'ONU n'offrant pas de pleine garantie du respect des droits fondamentaux procéduraux, la Cour a estimé qu'il revenait aux institutions concernées de faire respecter les droits individuels et fondamentaux - droits de la défense<sup>68</sup>, droit à un recours juridictionnel effectif et droit de la propriété<sup>69</sup> - des personnes concernées dans le cadre de la procédure d'adoption au niveau européen des mesures en cause.

■ 43. Le Conseil prit acte de l'arrêt *Kadi I* du 3 septembre 2008 et modifia la législation de base (Règlement (UE) n°1286/2009 du 22 décembre 2009),

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65. Pour un commentaire, voir La lutte contre le terrorisme dans le droit et la jurisprudence de l'Union européenne, Nicolas Catelan, Sylvie Cimamonti et Jean-Baptiste Perrier, op. cit., p. 47.

66. JOUE L 139/4 et 139/9 du 29.5.2002.

67. Pour un commentaire, voir «Protection des droits de la défense dans le cadre des mesures de gel de fonds imposés par l'Union européenne», Lucette Defalque, Emilie Schwaller, Liber Amicorum François Glansdorff et Pierre Legros, 2014, p. 808-816; voir également La lutte contre le terrorisme dans le droit et la jurisprudence de l'Union européenne, Nicolas Catelan, Sylvie Cimamonti et Jean-Baptiste Perrier, op.cit., p. 169-170.

68. C-402/05 P, *Kadi*, ECLI:EU:C:2008:461, point 352.

69. C-402/05 P, op. cit. points 369-370. Pour un commentaire, voir également La lutte contre le terrorisme dans le droit et la jurisprudence de l'Union européenne, Nicolas Catelan, Sylvie Cimamonti et Jean-Baptiste Perrier, op.cit., p. 186-187.

ce règlement, adopté après l'entrée en vigueur du traité de Lisbonne, faisant explicitement référence (9ème considérant) à la Charte des droits fondamentaux et au droit à «un recours effectif, à accéder à un tribunal impartial, le droit de propriété et le droit à la protection des données à caractère personnel», obligeant notamment la Commission à communiquer sans délai aux personnes concernées, en leur permettant de présenter des observations, les exposés des motifs adoptés à New York par le Comité des sanctions.

■ 44. Cette nouvelle procédure maintenant cependant la compétence «liée» de la Commission vis-à-vis des décisions du Comité des sanctions, et sa dépendance à l'égard de celui-ci dans les réponses qu'elle était susceptible de donner aux demandes d'information complémentaires du requérant, le Tribunal a, à nouveau, sanctionné la Commission pour l'adoption desdites mesures restrictives au niveau européen, dans un arrêt du 30 septembre 2010 (affaire T-85/09) du fait du respect «purement formel» par la Commission des droits de la défense, de l'absence d'accès aux éléments de preuve retenus contre le requérant et de la faiblesse des éléments d'information ayant conduit à son inscription sur la liste onusienne, d'un défaut de motivation et dès lors l'absence de toute protection juridictionnelle effective (voir notamment point 171). L'approche du Tribunal sera à nouveau confirmée par la Cour de Justice le 18 juillet 2013 dans son arrêt *Kadi II* rendu sur pourvoi, détaillant notamment les obligations de la Commission au regard du respect desdits droits fondamentaux procéduraux<sup>70</sup>.

■ 45. Cette jurisprudence audacieuse, visant à trouver un équilibre entre la préservation de la paix et la sécurité internationale et la protection des libertés et droits fondamentaux, a très concrètement entraîné une révision sensible, quoique encore probablement éloignée d'un véritable contrôle juridictionnel, des procédures liées à l'adoption (amélioration des exposés des motifs), l'information et au réexamen des mesures adoptées à New York, par la création notamment d'un médiateur auprès du Comité des sanctions, en charge de faire remonter les demandes de radiation des intéressés et conduisant, dans certains cas, à l'issue d'un certain délai, les Etats membres de l'ONU à ne plus être obligés d'appliquer la sanction.

■ 46. On peut donc constater que la Cour de justice de l'Union européenne veille activement au respect des droits fondamentaux en matière de lutte contre le terrorisme. A ce sujet, c'est peut-être sur le terrain de la toute

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70. C-584/10 P, C-593/10 P et C-595/10 P *Kadi (II)*, ECLI:EU:C:2013:518, voir notamment points 111, 114, 115, 116, 121.

récente législation adoptée par le Conseil, par la décision (PESC) 2016/1693 du 20 septembre 2016 concernant des mesures restrictives à l'encontre de Daech et d'Al Qaida, en autorisant désormais l'établissement de listes UE «autonomes» en matière de terrorisme, sur le modèle des autres régimes de sanctions, géographiques, déjà adoptés par le Conseil (Syrie, Iran, Ukraine, etc.), permettant de s'affranchir d'une décision préalable du Comité des sanctions des Nations unies ou d'une «autorité compétente» nationale aux termes de la Position commune 2001/931, que la question du respect des droits fondamentaux se posera peut-être à nouveau.

■ 47. En s'ouvrant la possibilité de se détacher de la «tutelle» d'une décision préalable adoptée par une autorité tierce, comme c'était le cas jusqu'alors en matière de lutte contre le terrorisme, le possible contentieux qui résultera de ce nouveau régime relèvera alors pleinement de la riche jurisprudence de la Cour relative aux mesures restrictives géographiques «autonomes», et notamment, en termes de respect des droits de la défense, du contrôle strict de l'erreur manifeste d'appréciation, de l'obligation de motivation et de preuve<sup>71</sup>

■ 48. C'est enfin sous l'angle de la protection des droits fondamentaux en matière de droit des réfugiés qu'un dernier exemple en rapport avec la lutte contre le terrorisme peut utilement illustrer le débat de la nécessaire protection des droits fondamentaux dans le cadre de la mise en œuvre de politiques liées à la sécurité publique suite à la recrudescence, dans le contexte de la crise migratoire à laquelle l'Union européenne fait face, de la menace terroriste.

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71. Voir par exemple *C-220/14 P, Ahmed Abdelaziz Ezz e.a. c. Conseil*, arrêt du 5 mars 2015, ECLI:EU:C:2015:147 et *T-256/11, Ahmed Abdelaziz Ezz e.a. c. Conseil*, arrêt du 27 février 2014, ECLI:EU:T:2014:93 ; *T-187/11 Mohamed Trabelsi ea. c. Conseil*, arrêt du 28 mai 2013, ECLI:EU:T:2013:273; *T-516/13 et T-224/14 CW c. Conseil*, arrêts du 30 juin 2016, ECLI:EU:T:2016:587 et ECLI:EU:T:2016:375; *T-133/12, Mehdi Ben Ali c. Conseil*, arrêt du 2 avril 2014, ECLI:EU:T:2014:176 et *T-200/14, Mehdi Ben Ali c. Conseil*, arrêt du 14 avril 2016, ECLI:EU:T:2016:216. Pour un panorama en la matière, voir «Protection des droits de la défense dans le cadre des mesures de gel de fonds imposés par l'Union européenne», Lucette Defalque, Emilie Schwaller, Liber Amicorum François Glansdorff et Pierre Legros, 2014, p. 795-855; voir également «Coresponsabilité de l'Union et de l'ONU dans le gel des fonds: quelle place pour le juge de l'Union européenne? Quelques repères autour d'un contentieux foisonnant», Géraldine Bachoue Pedrouzo, *Revue des affaires européennes*, 2015/4, p. 667-697. Pour quelques commentaires de la jurisprudence spécifique de la Cour au sujet des régimes géographiques autonomes pour la Syrie, l'Iran et la Côte d'Ivoire: «Présomptions et contrôle des motifs dans le contentieux des mesures restrictives: développements et (in)certitudes jurisprudentiels (CJUE, 21 avril 2015, *Anboubia c. Conseil*, aff. C-605/13 P et 630/13 P)», Freya Clausen, *Revue des affaires européennes*, 2015/2, p. 409-417; «*Individual sanctions and fundamental rights standard: Bamba*», *Common Market Law Review*, 2013 *Kluwer Law International*, p.1119-1132; «Cour de justice et tribunaux de l'Union européenne – 2012», Denys Simon, *Annuaire français de droit international*, volume 58, 2012, p. 773-811.

**- Absence d'automatisme du lien entre l'appartenance à une organisation terroriste et les cas d'exclusion du statut de réfugié.**

49. La Cour a en effet été amenée à interpréter l'article 12 de la directive 2004/83/CE du 29 avril 2004 concernant les normes minimales relatives aux conditions que doivent remplir les ressortissants des pays tiers ou les apatrides pour pouvoir prétendre au statut de réfugié ou les personnes qui, pour d'autres raisons, ont besoin d'une protection internationale, et relatives au contenu de ces statuts<sup>72</sup>. Pour la Cour, au titre de l'examen des conditions relatives à l'obtention du statut de réfugié établies par la directive 2004/83/CE, c'est le principe de l'examen individuel de l'implication de la personne concernée dans la commission d'éventuels actes terroristes qui doit prévaloir sur toute qualification automatique éventuellement tirée du statut terroriste, sous la position commune 2001/931 notamment, de l'organisation à laquelle l'intéressé a pu appartenir.

50. Dans les affaires C-57/09 et C-101/09, *Bundesrepublik Deutschland c. B et D*, arrêt du 9 novembre 2010<sup>73</sup>, la Cour a ainsi clairement rappelé que la seule circonstance que la personne concernée a appartenu à une organisation inscrite sur la liste constituant l'annexe de la position commune 2001/931 en raison de l'implication de cette organisation dans des actes de terrorisme ne constitue pas «automatiquement une raison sérieuse de penser que cette personne a commis un crime grave de droit commun ou des agissements contraires aux buts et principes des Nations unies» (point 99) et «ne saurait avoir pour conséquence automatique qu'elle doive être exclue du statut de réfugié» en vertu des points b) et c) de l'article 12, paragraphe 2, de la directive 2004/83/CE<sup>74</sup> (point 88).

72. JOUE L 304/12 du 30.9.2004.

73. C-57/09 et C-101/09 *Bundesrepublik Deutschland c. B et D*, arrêt du 9 novembre 2010, ECLI:EU:C:2010:661, ECLI:EU:C:2009:285.

74. «2. Tout ressortissant d'un pays tiers ou apatride est exclu du statut de réfugié lorsqu'il y a des raisons sérieuses de penser:

[...] b) qu'il a commis un crime grave de droit commun en dehors du pays de refuge avant d'être admis comme réfugié, c'est-à-dire avant la date d'obtention du titre de séjour délivré sur la base du statut de réfugié; les actions particulièrement cruelles, même si elles sont commises avec un objectif prétendument politique, pourront recevoir la qualification de crimes graves de droit commun;

c) qu'il s'est rendu coupable d'agissements contraires aux buts et principes des Nations unies tels qu'ils figurent dans le préambule et aux articles 1er et 2 de la Charte des Nations Unies.

3. Le paragraphe 2 s'applique aux personnes qui sont les instigatrices des crimes ou des actes visés par ledit paragraphe, ou qui y participent de quelque autre manière.»

■ 51. La Cour a considéré, en l'absence de «relation directe entre la position commune 2001/931 et la directive [2004/83] quant aux objectifs poursuivis», qu'il n'était pas justifié qu'une autorité amenée à examiner les cas d'exclusion du statut de réfugié se fonde uniquement sur l'appartenance de l'intéressé à une organisation figurant sur une liste adoptée en dehors du cadre que la directive 2004/83/CE a elle-même instauré, dans le respect de la convention des Nations unies du 28 juillet 1951 relatif au statut des réfugiés (point 89). Dans le même ordre d'idées, la Cour observe que la «décision-cadre [2002/475], à l'instar de la position commune 2001/931, a été adoptée dans un contexte autre que celui de la directive, lequel est essentiellement humanitaire» et que dès lors, «l'acte intentionnel de participation aux activités d'un groupe terroriste, qui est défini à l'article 2, paragraphe 2, sous b), de ladite décision-cadre et que les États membres ont dû rendre punissable dans leur droit national, n'est pas de nature à déclencher l'application automatique des clauses d'exclusion figurant à l'article 12, paragraphe 2, sous b) et c), de la directive, lesquelles présupposent un examen complet de toutes les circonstances propres à chaque cas individuel» (point 93).

■ 52. La Cour a donc conclu fort logiquement à la nécessaire appréciation par l'autorité concernée des situations propres à chaque individu, après un examen individuel au cas par cas, au regard des conditions établies par la directive elle-même et non sous un autre instrument adopté à d'autres fins. La Cour a également conclu que l'exclusion du statut de réfugié ne pouvait résulter que d'une prise en considération de la commission par l'intéressé, au sein de l'organisation terroriste en cause, d'un crime grave de droit commun ou d'agissements contraires aux buts et principes des Nations unies<sup>75</sup>.

■ 53. La Cour admet que, dans le cas où l'intéressé a occupé une position prééminente dans l'organisation concernée, l'inscription de celle-ci sur une liste telle que celle établie aux fins de la mise en œuvre de la position commune 2001/931 peut être prise en compte au stade de la vérification de la commission par ladite organisation du type d'actes visés par l'article 12 de la directive (point 90), et que dans le cas où ces actes sont avérés, s'il peut être présumé que l'intéressé a une responsabilité individuelle dans la commission des actes perpétrés par l'organisation, il reste néanmoins nécessaire d'examiner l'ensemble des circonstances pertinentes avant que ne soit adoptée une décision d'exclure ladite personne du statut de réfugié (point 98).

■ 54. Appartiennent cependant à ces «circonstances pertinentes» les cas dans lesquels le demandeur a déjà été pénalement condamné pour

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75. Voir points 91, 94 à 97, 99.



participation aux activités d'un groupe terroriste. Dans l'affaire C-573/14 Mostafa Lounani, dans le cadre d'une question préjudicielle posée par le Conseil d'Etat belge<sup>76</sup> la Cour a en effet été amenée à préciser son interprétation des conditions d'exclusion du statut de réfugié de la directive 2004/83/CE et à détailler les conditions de l'examen individuel à effectuer par l'autorité concernée.

■ 55. Selon la Cour, la circonstance que l'intéressé a «été condamné par les juridictions d'un Etat membre du chef de participation aux activités d'un groupe terroriste, et que cette condamnation [était] devenue définitive, revêt, dans le cadre de l'évaluation individuelle à laquelle doit procéder l'autorité compétente, une importance particulière» (point 78).

■ 56. La Cour a conclu en conséquence que l'article 12 de la directive 2004/83/CE devaient être interprétés en ce sens que «des actes de participation aux activités d'un groupe terroriste, tels que ceux pour lesquels a été condamné le défendeur au principal, peuvent justifier l'exclusion du statut de réfugié, alors même qu'il n'est pas établi que la personne concernée a commis, tenté de commettre ou menacé de commettre un acte de terrorisme. Aux fins de l'évaluation individuelle des faits permettant d'apprécier s'il existe des raisons sérieuses de penser qu'une personne s'est rendue coupable d'agissements contraires aux buts et aux principes des Nations unies, a été l'instigatrice de tels agissements ou y a participé de quelque autre manière, la circonstance que cette personne a été condamnée, par les juridictions d'un Etat membre, du chef de participation aux activités d'un groupe terroriste revêt une importance particulière, de même que la constatation que ladite personne était un membre dirigeant de ce groupe, sans qu'il soit nécessaire d'établir que cette même personne a elle-même été l'instigatrice d'un acte de terrorisme ou qu'elle y a participé de quelque autre manière.» (point 79).

■ 57. Si la protection des droits fondamentaux, et la lutte contre l'arbitraire, implique qu'aucun mécanisme tiré de la législation relative à la lutte contre le terrorisme ne permette l'exclusion automatique du bénéfice du statut de

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76. Arrêt du 31 janvier 2017, ECLI:EU:C:2017:71, s'agissant d'un citoyen marocain à qui le Conseil du contentieux des étrangers avait accordé le statut de réfugié en Belgique après avoir été pourtant condamné dans ce pays pour participation active dans l'organisation d'une filière d'envoi de volontaires en Irak et soutien logistique à une entreprise terroriste par le biais notamment de «services matériels ou intellectuels», le Conseil d'Etat belge était saisi d'un recours en cassation administrative émanant du Commissaire général aux réfugiés belge contestant la décision du Conseil du contentieux des étrangers qui avait considéré que les agissements de l'intéressé pour lesquels il avait été pénalement condamné n'avaient pas atteint le degré de gravité requis pour être qualifié d'«agissement contraire aux buts et principes des Nations unies» au sens de la directive 2004/83/CE.

réfugié aux termes de la directive 2004/83, ce statut ne saurait cependant offrir une protection aveugle aux terroristes dont les agissements ont été constatés à l'issue d'un procès équitable et d'une condamnation définitive.

■ 58. On ne peut clore cette intervention sans accorder quelques développements à la question du respect des droits fondamentaux dans le champ plus large de la législation générale, et des mesures mises en œuvre, en matière d'asile, de visas et de réadmission, au regard notamment des exceptions tirées de motifs relatifs au maintien de l'ordre et de la sécurité publique.

#### **4. Asile, visas, réadmission, ordre public et droits fondamentaux**

■ 59. La vague migratoire en cours a créé de nouveaux défis liés à la protection, au respect et à la mise en œuvre des droits fondamentaux, et exacerbé les défis existants. L'arrivée de plus d'un million de réfugiés et de migrants dans l'UE a en effet exercé une pression considérable sur les systèmes d'asile nationaux et entraîné un risque de violation des droits de l'homme, en suscitant notamment des réactions xénophobes dans l'UE. Traiter de «sécurité, xénophobie et droits fondamentaux» sous l'angle de l'activité de la Cour de justice impose dès lors de dire également quelques mots au sujet des questions d'asile et de reconduite aux frontières dans l'espace Schengen. En effet, par définition, le migrant, du fait de sa précarité et de ses origines, peut voir non seulement ses droits fondamentaux menacés mais être également victime de discrimination et de xénophobie.

■ 60. L'UE a fixé une série de règles et de stratégies en matière de visas, de frontières et d'asile, de même que de lutte contre la migration irrégulière. La Charte des droits fondamentaux de l'UE prévoit le droit d'asile (art. 18) et interdit notamment les expulsions collectives et les mesures d'éloignement ou d'expulsion s'il existe un risque pour la vie ou de préjudice grave pour les personnes concernées (art. 19)<sup>77</sup>. L'interdiction du refoulement est également reflétée à l'article 78 TFUE. Les droits fondamentaux doivent donc être tout particulièrement respectés dans le contexte des demandes d'asile, afin de les faciliter, et ce notamment dans le contexte du règlement Dublin (UE) n°604/2013 du 26 juin 2013<sup>78</sup> qui donne à l'Etat membre dans lequel le migrant est arrivé, à défaut de satisfaire à d'autres critères plus pertinents (lien familiaux, etc.) la

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77. y compris en haute-mer (Cour EDH, *Hirsi Jamaa et a. c. Italie*, n°27765/09, arrêt du 23 février 2012)

78. JOUE L 180 du 29.6.2013.

compétence pour traiter sa demande d'asile, et in fine traiter des reconduites aux frontières.

■ 61. Ce qui vaut pour le mandat d'arrêt européen en matière de respect des droits fondamentaux vaut également en matière d'asile (C-411/10, *N.S. c. Secretary of State for the Home Dpt* du 21 décembre 2011 et C-394/12, *Abdullahi c. Bundesasylamt* du 10 décembre 2013<sup>79</sup>), la Cour a jugé que la réadmission du demandeur d'asile vers un Etat membre n'est pas autorisée si l'ordre de réception présente des risques systémiques de ne pas respecter ses droits fondamentaux (voir ci-avant paragraphe 19). Cette solution s'aligne donc sur les solutions traditionnelles dégagées par la Cour EDH en matière d'éloignement, en cas de refus de la demande d'asile, ou d'extradition, vers un Etat tiers dans lequel existe un risque réel que la personne en cause soit soumise à un traitement inhumain ou dégradant.

■ 62. Inversement, la législation en faveur de la protection des droits fondamentaux des demandeurs d'asile ne doit pas être instrumentalisée, ou favoriser la commission de troubles à l'ordre public. Dans l'affaire *JN* (C-601/15 PPU, arrêt du 15 février 2016)<sup>80</sup>, la Cour a jugé que le placement en rétention d'un demandeur d'asile conformément à l'article 8, para. 3, al. 1, e) de la directive 2013/33 pour des motifs de protection de la sécurité nationale et de l'ordre public n'était pas contraire aux articles 6 (liberté et sûreté) et 52 (nécessité et proportionnalité, prévision légale des exceptions) de la Charte des droits fondamentaux, et contribue également à la protection des droits et des libertés d'autrui (points 53 et suiv.). L'existence de telles clauses relatives à l'existence éventuelle d'une menace à l'ordre public ou à la sécurité publique, telles que définies par la Cour<sup>81</sup>, offre un garde-fou utile dans l'hypothèse d'une menace terroriste parmi les demandeurs d'asile arrivés récemment sur le sol européen.

■ 63. En tout état de cause, la Cour a rappelé dans cette affaire qu'une atteinte à la sécurité nationale ou à l'ordre public ne saurait justifier le placement en rétention d'un demandeur d'asile qu'à la condition que «son comportement individuel représente une menace réelle, actuelle et suffisamment grave, affectant un intérêt fondamental de la société ou la sécurité intérieure

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79. Voir notes de bas de page n°20, 21, 22, 23.

80. ECLI:EU:C:2016:84.

81. Concernant la notion «d'ordre public», voir C-554/13, *Zh. Et O*, arrêt du 11 juin 2015, ECLI:EU:C:2015:377, point 60; C-373/13 H. T., arrêt du 24 juin 2015, ECLI:EU:C:2015:413, point 79; concernant la notion de «sécurité publique», voir C-145/09, *Land Baden-Württemberg c. Panagiotis Tsakouridis*, arrêt du 23 novembre 2010, ECLI:EU:C:2010:708, points 43-44.

ou extérieure de l'Etat membre concerné» (point 67). Bien évidemment, les autorités nationales compétentes doivent vérifier préalablement, au cas par cas, que le danger que les personnes en question font courir à la sécurité nationale ou à l'ordre public correspond au moins à la gravité de l'ingérence que constitueraient de telles mesures dans le droit à la liberté de ces personnes (point 69-70). Bien évidemment, dans l'optique de notre sujet aujourd'hui, ce type de situations ne laisse aucune place à d'éventuelles considérations basées sur l'origine stricto sensu (raciale, religieuse ou autre) des personnes concernées.

■ 64. La prise en compte de ces impératifs de maintien de l'ordre public apparaît enfin également en matière d'obtention, et de refus, de visas. Dans l'affaire C-544/15 *Sahar Fahimian*<sup>82</sup>, la Cour a été récemment amenée à se prononcer sur la directive 2004/114 du 13 décembre 2004<sup>83</sup> relative aux conditions d'admission de ressortissants de pays tiers à des fins d'études et sur un refus d'admission du fait de l'invocation d'une menace à la sécurité publique tirée des liens présumés de la demanderesse avec une entité iranienne faisant l'objet des mesures restrictives du Conseil de l'UE en rapport avec le programme nucléaire iranien.

■ 65. La Cour a jugé que les autorités nationales disposaient, s'agissant de ressortissants d'un pays tiers, d'une large marge d'appréciation pour apprécier si les conditions de la directive était remplies, y compris dans le simple cas d'une menace «potentielle» et du recours à des «pronostics» du comportement «prévisible» de l'intéressé<sup>84</sup>, limitant en conséquence le contrôle juridictionnel afférant à l'absence d'erreur manifeste, dans le respect bien évidemment des garanties procédurales fondamentales d'impartialité et de motivation (point 46).

■ 66. Ceci clôt ce panorama. La protection des droits fondamentaux dans le cadre tant de l'Espace de Liberté, Sécurité et Justice que de la Politique Etrangère et de Sécurité Commune est primordiale pour la Cour de Justice de l'Union européenne, elle l'est plus encore au regard de l'impératif essentiel de lutte contre le racisme et les discriminations à raison des origines. En tout état de cause, c'est un équilibre qui doit à chaque fois être trouvé entre les impératifs de la sécurité de tous et la protection des droits individuels. Comme

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82. C-544/15 *Sahar Fahimian*, arrêt du 4 avril 2017, ECLI:EU:C:2017:255

83. JOUE L 375 du 23.12.2004.

84. Voir également C-84/12, *Rahmanian Koushkaki*, arrêt du 19 décembre 2013, ECLI:EU:C:2013:862, points 56-60.

toute institution publique, il revient à la Cour de défendre l'intérêt général tout en parvenant à des solutions équilibrées, justes et proportionnées. N'oublions pas, comme la Cour l'a précisé dans l'arrêt sur renvoi préjudiciel C-601/15 PPU *J.N. c. Staatssecretaris van Veiligheid* en justice du 15 février 2016, que la protection de la sécurité nationale et de l'ordre public contribue, en elle-même, également à la protection des droits et libertés d'autrui, toute personne ayant droit, conformément à l'article 6 de la Charte, non seulement à la liberté mais également à la sûreté<sup>85</sup>.

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85. Voir C-293/12, *Digital Rights Ireland e.a.*, ECLI:EU:C:2014:238, point 42.



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# Joint Council on Constitutional Justice

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In order to steer cooperation between the constitutional courts and the Venice Commission, the Venice Commission established the Joint Council on Constitutional Justice (JCCJ), which is composed of members of the Venice Commission and the liaison officers, appointed by the constitutional courts. The JCCJ has a double presidency, which means that its meetings are co-chaired. One of the chairs is a member of the Venice Commission, elected by the Commission at a plenary session and the other is a liaison officer, elected by the liaison officers during the meetings of the JCCJ. The mandates of the two co-chairs run for two years each. The constitutional courts and councils and supreme courts with constitutional jurisdiction participating in the Joint Council thus have a very strong role in determining the Venice Commission's activities in the field of constitutional justice.

The geographical scope of the Joint Council covers the Venice Commission member states, associate member states, observer states and states or entities with a special cooperation status which is equivalent to that of an observer (South Africa, Palestine). Within the JCCJ, all participating courts – whether from member or observer states – benefit from the same type of cooperation. The European Court of Human Rights, the Court of Justice of the European Union and the Inter-American Court of Human Rights participate in the Joint Council as well.

The meetings of the JCCJ usually focus on the publication of the Bulletin on Constitutional Case-Law, the production of the CODICES database, the Venice Forum (Classic, Newsgroup, Observatory) and on the cooperation with regional and linguistic groups of constitutional courts as well as the World Conference on Constitutional Justice.

The meetings of the JCCJ are generally followed by a “mini-conference” on a topic in the field of constitutional justice, chosen by the liaison officers during which they present the relevant case-law of their courts (e.g. “Courageous Courts: Security, Xenophobia and Fundamental Rights” in 2017).

The JCCJ meets once a year, at the invitation of one of the participating courts (May 2017: Karlsruhe, Germany). Every third year the JCCJ meets in Venice, either before or after a plenary session of the Venice Commission.



# The Venice Commission

**T**he Venice Commission – the full name of which is the European Commission for Democracy through Law – is an advisory body of the Council of Europe on constitutional matters. Its primary role is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. It also contributes to the dissemination and consolidation of a common constitutional heritage and provides “emergency constitutional aid” to states in transition.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.



COUNCIL OF EUROPE



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