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Human rights in the context of counter-terrorism

Summary

On 15 December 2016 the Bulgarian Parliament adopted the Law on Counteraction Against Terrorism, which raised a number of questions during the discussions, related to the clarification of the precise balance between the rights of the individual person and the rights of society as a whole. Following a review of the interpretation of the protected rights by the European Convention on Human Rights (ECHR) within the judgments of the European Court of Human Rights (ECtHR) regarding terrorism, the report focuses on the main debatable issues provoking a discussion on the matters of the established competences of state authorities and their compliance with the standards on the protection of human rights and fundamental freedoms.

Keywords: terrorism, army, investigation, preventive measures, detention

I. Introduction

The increasingly frequent occurrence of terrorist acts¹ [1; 2; 3; 4; 5; 6] in recent years has logically directed public attention towards searching for the right balance between human rights and the interests of society as a whole², and, in this regard, towards the competences of state authorities in the sphere of counter-terrorism. In the context of globalization, advanced technologies and free movement of goods, capital, services and people, terrorism has become a global problem of modern society, and, undoubtedly, countering international terrorism cannot be a responsibility of a single country or a limited number of countries since it inevitably affects all humanity³ [7]. This fact makes it imperative that actions should be taken to develop the so called 'global' legislation⁴ [8]. The regulation of combating terrorism includes a series of acts both on an international level⁵ [9;

¹ For more details on the term 'terrorism' see: Гаврилин, Ю. В. и Смирнов, Л. В. Современный терроризм. Сущность, типология, проблемы противодействия. Москва, Книжный мир, 2003, с. 4–9; Eaton, Martin. Human Rights Standards and Framework Conditions for Anti-Terrorist Measures. European Standards and Procedures. – In: Benedek, Wolfgang, Alice Yotopoulos-Marangopoulos (Eds.). *Anti-Terrorist Measures and Human Rights*. Martinus Nijhoff Publishers, 2004, pp. 28–29; Марков, Румен. Наказателноправни аспекти на съвременния тероризъм. – *Съвременен право*, 2005, № 4, с. 22–31; Meisels, Tamar. *The Trouble with Terror. Liberty, Security, and the Response to Terrorism*. Cambridge University Press, 2008, pp. 7–29; Conte, Alex. *Human Rights in the Prevention and Punishment of Terrorism. Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand*. Springer, 2010, pp. 7–37; Кочои, С. М. Общеввропейское законодательство о борьбе с терроризмом и перспективы реформирования УК РФ. – *Совершенствование законодательства*, 2014, № 9, с. 1061–1069.

² In regard to the adoption of a new European Union Directive on combating terrorism, the rapporteur in the European Parliament Monika Hohlmeier (EPP, Germany) points out: 'We need to stop the perpetrators before they commit these acts rather than regretting the fact that there have been attacks... We have struck a good balance between improving security and strictly upholding fundamental rights because there is no point in having security without rights.' (<http://www.europarl.europa.eu/news/bg/news-room/20170210IPR61803>).

³ Ромашев, Ю. С. *Международное правоохранительное право*. 2-е издание. Москва, Норма, 2015, с. 66.

⁴ Powell, C. H. *The United Nations Security Council, terrorism and the rule of law*. – In: *Global Anti-Terrorism Law and Policy*. Second edition. Edited by Victor V. Ramraj, Michael Hor, Kent Roach and George Williams. Cambridge University Press, 2012, p. 19–43.

⁵ See: Rabbat, Paul. J. *The Role of the United Nations in the Prevention and Repression of International Terrorism*. – In: Wade, Marianne, Almir Maljević (eds.). *A War on Terror? The European Stance on a New Threat, Changing Laws and Human Rights Implications*. Springer, 2010, p. 81–106; Wahl, Tomas. *The European Union as an Actor in the Fight Against Terrorism*. – In: Wade, Marianne, Almir Maljević (eds.). *A War on Terror? The European Stance on a New Threat, Changing Laws and Human Rights Implications*. Springer, 2010, p. 107–170; Sieber, Ulrich. *Instruments of International Law: Against Terrorist Use of the Internet*. – In: Wade, Marianne, Almir Maljević (eds.). *A War on Terror? The European Stance on a New Threat, Changing Laws and Human Rights Implications*. Springer, 2010, p. 172–219.

10; 11], and also within separate regional organizations⁶ [12]. In accordance with the trends in the development of this type of criminal activity, and the attempts at the establishment of an efficient legislative basis on an international, as well as on a regional scale – at the level of the European Union, on 15 December 2016 the Bulgarian Parliament adopted the Law on Counteraction Against Terrorism (LCAT) (State Gazette № 103 of 27 December 2016). The need for the adoption of this law is justified within the motives by the nature of terrorism being one of the most serious violations of the universal values of human dignity, freedom, equality and solidarity, respect for human rights and fundamental freedoms, and also one of the most serious violations of the principles of democracy and the state governed by the rule of law⁷ [13], as well as by the conclusions for increased risk of terrorist attacks in the Republic of Bulgaria due to the country's participation in the world anti-terrorist coalition. This act has once again posed the question of the limits to which individual rights extend, and the rights of the remaining part of society begin.

II. The standards of the European Convention on Human Rights (ECHR)

The fundamental objectives of the Law on Counteraction Against Terrorism, in accordance with Art. 1, include the protection of the rights of citizens, legal persons, the state and society from terrorism, and as a main principle, applicable in carrying out the activities provided for by the act, Art. 2 states: 'respect for and guaranteeing human rights and fundamental freedoms'. Comparing the two texts, it becomes obvious that the LCAT regulates as a *fundamental principle* the values of the state governed by the rule of law⁸ [14], and the basis of the *purpose* is 'the public interest doctrine'. The question is whether the end justifies the means. The Republic of Bulgaria, as a party to the European Convention on Human Rights, is obliged to guarantee the human rights and fundamental freedoms within the meaning and scope determined by the European Court of Human Rights (ECtHR).

⁶ See: Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism (<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015PC0625>).

⁷ As suggested by Kevin Boyle, 'In a democratic society the very purpose of emergency security measures is to protect people and their human rights and fundamental freedoms.' See: Boyle, Kevin. Terrorism, States of Emergency and Human Rights. – In: Benedek, Wolfgang, Alice Yotopoulos-Marangopoulos (Eds.). *Anti-Terrorist Measures and Human Rights*. Martinus Nijhoff Publishers, 2004, p. 101.

⁸ Regarding the Canadian Bill, which established broad competences of the Prosecutor General in relation to combating terrorism, see Hamish, Stewart. Rule of Law or Executive Fiat? Bill C-36 and Public Interest Immunity. – In: *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*. Edited by Ronald J. Daniels, Patrick Macklem, and Kent Roach. University of Toronto Press, 2002, p. 217–237.

In a number of judgments, the ECtHR identifies the permissible limits of violation of human rights, including the cases where this is necessary for the protection of national security and public order. In regard to the application of Art. 3 of the ECHR, the ECtHR emphasizes that this provision proclaims one of the most fundamental values of a democratic society, and even in the hardest situations, as in combating terrorism and organized crime, the Convention *absolutely prohibits torture and inhuman and humiliating treatment or punishment* (judgments on the cases *Labita v. Italy*, *Saadi v. Italy*, *Ireland v. the United Kingdom*, *Frérot v. France*, *Dikme v. Turkey*, *Chahal v. the United Kingdom*, *Jalloh v. Germany*, *Aksoy v. Turkey*, *Assenov and others v. Bulgaria*, *Ivan Vasilev v. Bulgaria*, etc.). The requirements of the investigation and the indisputable difficulties typical for the fight against terrorism, cannot justify the limitation of the protection that must be ensured with regard to the physical integrity of individuals (judgments on the cases *Ribitsch v. Austria*, *Dikme v. Turkey*, *Tomasi v. France*, etc.). The statement of the ECtHR is categorical that, in contrast to most of the provisions of the Convention and of Protocols 1 and 4, Art. 3 does not contain exceptions and its violation is not allowed under Art. 15, § 2, even: (1) in the event of a *threat to the nation's existence* (in this sense are the judgments on the cases *Labita v. Italy*, *Selmouni v. France*, *Jalloh v. Germany*, *Assenov and others v. Bulgaria*, *Ivan Vasilev v. Bulgaria*, etc.); (2) depending on the victim's conduct (*Labita v. Italy*, *Jalloh v. Germany*, *Chahal v. the United Kingdom*, etc.); (3) depending on the character of the offence attributed to the person, with respect to which measures have been implemented in breach of the prohibition (*Brogan and others v. the United Kingdom*, *Labita v. Italy*). As a necessary guarantee for the rights proclaimed within the ECHR, the ECtHR considers the normative establishment and factual implementation of efficient control by the national courts in cases of detention by state authorities. The obstacles associated with the investigation of terrorism, including the large number of suspects who impact the completion of a police or judicial investigation, cannot serve as grounds for relieving the authorities of their obligation under Art. 5, It. 3 of the ECHR, and, where appropriate, the authorities should develop forms of judicial control that are adequate in the concrete circumstances, but also comply with the Convention (judgments on the cases *Chahal v. the United Kingdom*, *Demir and others v. Turkey*, *Dikme v. Turkey*).

In the context of Art. 3 of the ECHR, the imposition of death penalty after an unfair trial with the real possibility that the death sentence will be enforced, is considered inhuman treatment by the ECtHR on the case *Öcalan v. Turkey*, as the judgment focuses on several principal aspects: (1) the investigation of terrorist offences poses particular problems to authorities, however, *the investigating bodies have no freedom to arrest suspects for interrogation without effective control by the courts* each time the bodies state the issue is related to terrorism; (2) Art. 6 usually requires the provision of a lawyer as early as the initial stages of police

interrogation and the right of the accused to communicate with his or her lawyer, without their conversation being recorded, is a part of the basic requirements of a fair trial, and is derived from Art. 6, It. 3 (c) of the Convention; (3) *the right to a lawyer may be limited, if there are substantial reasons for that, and it is important whether, in the light of the proceedings as a whole, the restriction has deprived the accused of a fair hearing.*

Taking into account the need to protect the public interest, the ECtHR points out that countries enjoy the so-called 'wide margin of appreciation', i.e. a wide freedom of prioritization between the rights of individual persons and the interests of national security (*Leander v. Sweden*), but also that the fight against terrorism does not allow states the possibility for interference with the rights of persons located within their jurisdiction. In the event of an argument on violated rights under the ECHR, governments have to prove that the counter-terrorism measures undertaken by them, are justified by at least one of the grounds provided for in the Convention or in the interpretations the ECtHR formulates in its judgments.

The analysis of the practice of the ECtHR leads to the conclusion that, regardless of the difficulties related to the prevention and investigation of terrorist acts, any person suspected or accused of preparation or participation in a terrorist act should be guaranteed the right to a fair trial and, with respect to any such person, the prohibition of torture or inhuman or degrading treatment or punishment is fully effective. Sharing these democratic values of the state governed by the rule of law, is the most powerful prevention against the popularization of the radicalization of society, at the basis of which usually stays the marginalization of its individual members due to their perception of injustice.

III. The legal framework within the Law on Counteraction Against Terrorism

The adoption of a special act on counter-terrorism, which sets out specific rules and measures applicable to this type of anti-social behaviour, excluding the general rules of other laws regulating the fight against crime, logically focuses the attention on the compliance of these particular rules with the minimum standards in the field of human rights protection.

Granting competences to armed forces, which are generally not competent to safeguard public order and to investigate crimes, to carry out in peacetime a number of actions affecting fundamental rights and freedoms, raises doubts about their capability in two respects: (1) in connection to the lack of qualification and experience to perform the corresponding actions while observing the law, and (2) in relation to the practical assessment of the question of the availability of data indicating that a concrete person is involved in the preparation or execution of a terrorist act. The evaluation concerning the availability of data indicating that

a particular person is involved in the preparation or execution of a terrorist act has to be conducted in the following cases: (1) verification of the identity of a person unless the check is carried out at a control point or by the security of strategic sites or critical infrastructure sites; (2) detention of a person by a military service officer; (3) a search of a person, checking of personal belongings, luggage, vehicles, ships, aircraft, containers, and (4) checking of premises without the consent of the owner or occupant or in their absence. At the process of evaluation of these data, there are no guarantees typical of criminal proceedings (such as a court sanction), nor are any specific requirements regarding their contents present, which may result in arbitrariness⁹. Upon detention of a person, the LCAT provides for only two competences of the military service officers: to immediately notify the authorities of the Ministry of Interior (MI), and to hand over the person to them upon their arrival. There is no obligation for the military service officers to provide the detainee with the opportunity to contact a defence counsel, similar to Art. 72, para. 5 of the Ministry of Interior Act. This could also create prerequisites for a violation of fundamental rights and freedoms¹⁰.

The preventive measures applicable to persons for whom data is available, on the basis of which a reasonable assumption can be made that they carry out activities constituting a terrorist threat, are within the competences of the authorities having the powers typical for the prevention and investigation of criminal offences – the Ministry of Interior and the State Agency for National Security (SANS).

⁹ There must be reasonable grounds to suspect someone of terrorism in order to justify his or her arrest. In its judgment on the case *Fox, Campbell and Hartley v. the United Kingdom*, the ECtHR notes, ‘The fact that Mr Fox and Ms Campbell both have previous convictions for acts of terrorism... although it could reinforce a suspicion linking them to the commission of terrorist-type offences, cannot form the sole basis of a suspicion justifying their arrest in 1986...’ At the same time, the ECtHR recognizes the need not to interpret Art. 5, § 1 (c) in such a manner as to put disproportionate difficulties for national authorities in taking effective measures to counter terrorism (*Murray v. the United Kingdom*, *O’Hara v. the United Kingdom*, *X, Sher and others v. the United Kingdom*), and on the case *Murray v. the United Kingdom* the ECtHR states that ‘...the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity’. The conditions of extreme tension in which the arrests in Northern Ireland were carried out, were recognized by the ECtHR as a legitimate consideration justifying the manner of performing the entry and search of the applicants’ home as well as the recording and storage of personal data of the arrested person and even of other persons present at the place and time of the arrest – these actions were not considered disproportionate to the intended purpose.

¹⁰ In its judgment on the *Emrullah Karagöz v. Turkey* case, the ECtHR accepts that ‘...the applicant’s transfer to the gendarmerie command after being placed in pre-trial detention escaped effective judicial review... handing a remand prisoner over to gendarmes for questioning amounts to circumventing the applicable legislation on the periods that may be spent in police custody... all the safeguards that should be provided during questioning, especially access to legal advice, were rendered inoperative.’

The legitimate purpose of the measures (prevention of a person's involvement in terrorism, or of the threat of committing a terrorist act) and the instruction of Art. 3 of the LCAT lead to the conclusion for regulation of preconditions for utilization by the respective bodies of means, proportionate to the objective pursued¹¹. Given the nature of these measures¹², however, the question is raised whether the envisaged appeal of the acts through which measures are taken (orders of the Chairman of SANS and the Chief Secretary of the MI) before the Supreme Administrative Court, and the comparatively long period for the trial scheduling (14 days), are a sufficient guarantee for the timely resolution of the issues concerning the limitation of the rights of persons, as far as the measures are applied to 'a person for whom data is available, on the basis of which a reasonable assumption can be made that he or she carries out activities constituting a terrorist threat' (Art. 24, para. 1), i.e. a matter which is within the scope of criminal procedure, and it is criminal judges who can make the most accurate judgement. Observing the provisions of the ECHR depends both on the legal framework and on the possibility for an adequate factual assessment of the existence of a 'reasonable assumption' since the rights granted by the special anti-terrorist legislation to the police to stop and search persons without reasonable suspicions of crime, are recognized by the ECtHR as a violation of the applicants' right to privacy¹³. The discretion granted to national authorities must be accompanied by appropriate guarantees against abuse.

Only the main problematic issues related to the adopted Law on Counteraction Against Terrorism have been addressed above, due to the impossibility to analyse thoroughly all debatable matters within a single report. Some of them have been discussed by MPs who have adopted the act, but most of the concerns about the lack of sufficient guarantees for the fundamental rights and freedoms are related not only to the scarce legal framework on some issues, but also to problems that are entirely in the sphere of its practical implementation.

¹¹ In its judgment on the *Klass and others v. Germany* case, the ECtHR accepts that in a democratic society, under exceptional conditions, the legal competences of even secret tracking of correspondence and telecommunications, are necessary in the interests of national security and/or for the prevention of disorder or crime, and in the *Uzun v. Germany* case the ECtHR accepts that the surveillance of terrorist suspects via the Global Positioning System (GPS) is not a violation of the right to privacy under Art. 8.

¹² According to the LCAT, the following measures can be applied: prohibition of change of the place of residence without authorization; prohibition of leaving the boundaries of the Republic of Bulgaria without authorization; prohibition of visiting certain locations, areas and sites without authorization; prohibition of leaving a particular settlement without authorization; prohibition of contacting certain persons without authorization; periodic attendance in a regional office of the Ministry of Interior and signing before a police officer; deprivation of passports or substitute documents and prohibition of issuing new ones.

¹³ *Gillan and Quinton v. the United Kingdom*.

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