

## ■ BOOK REVIEW

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**Stefan Sottiaux, *Terrorism and the Limitation of Rights – The ECHR and the US Constitution*, Hart Publishing, 2008, ISBN 978-1-84113-763-6, xxviii + 443 pp.**

The author Stefan Sottiaux, who is a Visiting Professor in the law faculties at the universities of Antwerp and Ghent, describes in this book, which is based on his doctoral thesis, in an easy understanding way the challenge for governments to guarantee compliance with human rights and to provide national security at the same time. After 9/11 the question how to combat terrorism effectively became more important than ever before. Governments started to ask themselves how captured terrorists should be treated and all around the world seemingly fundamental rights were discussed to be at least in some special cases not applicable anymore. This shows the close relation between terrorism and human rights and underlines the often raised question if persons who are permanently acting contrary to human rights and whose purpose in many cases is to weaken democracies should be granted those mainly in democratic systems established rights.

In the first chapter of his study Sottiaux points out the differences between the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and the 1789 Bill of rights in the US Constitution. While the first mentioned document is of an international character the second one belongs to the national level. Furthermore the European Convention defines the various rights in a positive way but allocates different limitation clauses, such as a general prohibition of abuse of Convention rights, clauses specifying that governments may deviate from human rights during public emergencies threatening the life of the nation and "common limitation clauses" describing the conditions upon which a special right may be limited by the state. Thereafter an interference is only justified if it is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This "necessity test" a court has to obey when limiting human rights as well as the fact, that the European Convention is also stressing that no right is absolute shows the special characteristic of the European system, namely a method of balancing rights with other rights and interests such as security. Moreover a margin of appreciation is left to the contracting states and thus brings about a Complementarity regime with the primary responsibility of the domestic authorities.

The European system therefore is based on a flexible method, a balancing between the limiting measure and the aim pursued, a weighting of the drawbacks from interference with human rights and the specific threats a government has to deal with.

The US Constitution, on the other hand, uses a negative language by describing which rights the state is not allowed to interfere with. It furthermore does not contain special provisions for the limitation of rights and leaves it to the courts to develop methods to resolve conflicts between constitutional rights and public interests. Yet the Supreme Court has developed different tests to resolve the clash between rights and public interests. Constitutional disputes therefore are resolved through defining the scope of rights, not through balancing rights and security and thus a right receives absolute protection if it fits into the claimed category and receives no protection at all if it does not fall into that category. This shows that the US Constitution follows a categorical approach in limiting rights.

In the proximate five chapters Sottiaux analyzes selected rights, namely the right to freedom of expression (Chapter 3), the right to freedom of association (Chapter 4), the right to personal liberty (Chapter 5), the right to privacy (Chapter 6) and the right to a fair trial (Chapter 7). In each of these chapters he points out the specific limitations imposed for the purpose of fighting terrorism and lists as well as compares possible solutions found in the two systems mentioned above. In his study Sottiaux accurately dwells in the jurisprudence of the highest judicial bodies, the Supreme Court of the United States and the European Court of Human rights. Where appropriate he also mentions lower court decisions. At the first pages of the book, right after the Contents, all relevant cases are listed in a clearly arranged Table of Cases.

As far as the right to freedom of expression is concerned the European courts act more flexible than the US courts. They are able to "weigh the individual rights implicated by a limiting measure against the threat posed by terrorism and the difficulties of dealing with it". In contrast the US Courts with the adoption of the "Brandenburg test" created a strict rule not open to further balancing on a case-by-case basis. Under this test no further discretion is left to the courts and other decision makers. This makes it impossible to take into account special circumstances of terrorism before deciding over the limitation of the right to freedom of expression. Also with regard to the right to freedom of association, which is a very important right in this context because terrorist activities are most of the time planned by organizations, the Supreme Court has developed a constitutional doctrine named the "Scales test" under which a person can only be punished, if he or she intended to further the illegal ends of the organization. The European courts, on the other hand, more directly concentrate on the association itself, and combat the illegitimate activity of associations through proscription or dissolution. In *Vogt v. Germany* for example the European Court came to the result that the dismissal of a teacher of German and French just because of her active membership in the German Communist Party was not necessary in a democratic society. The Court argued that Mrs. Vogt's post did not involve any security risks and that the German Communist Party had not been proscribed by the Federal Constitutional Court.

Also with respect to the right to personal liberty, the right to privacy and the right to a fair trial Sottiaux comes to the result that the European Convention allows more flexibility whereas the US courts use fixed rules and categorical terms to limit human rights. Concerning the right to personal liberty for instance the court established a specific time-limit before which an arrested suspect must

be brought before a judge. As regards the right to a fair trial, examples for the US categorical interpretation are the Miranda rules, which regulate that the right to consult with counsel prior to questioning and to have a lawyer present during any questioning is an "indispensable" right. Sottiaux also refers to the trials by military commissions the US government has authorized in the war against terrorism. He points out that with the exception of one early decision "the Supreme Court has failed to enforce the basic fair trial rights of those brought before such commission". Two important cases mentioned by Sottiaux in that context are the Hamdan as well as the Yamashita case.

Sottiaux's book points out the differences between European and US courts' interpretation of special human rights and the possibilities in both systems to limit these rights to fight terrorism effectively. The book shows that the US courts follow a categorical approach whereas European courts are more flexible in deciding about the limitation of rights. Which system best reconciles rights guaranteed by the European Convention and the US Constitution and security in times of terrorism is not easy to answer. Sottiaux comes to the result that a flexible approach to human rights interpretation and application has advantages over a categorical approach which just allows all-or-nothing decisions and "may have the dangerous effect of inducing decision makers to circumvent the existing regime when confronted with a serious terrorist threat" (p. 151). One may add here that in general, the limitation of human rights is not at all the right way to fight terrorism. The fewer rights a person can rely on the more "terroristic" he will behave. Terrorism cannot be a reason to limit fundamental rights because that would be one of the goals of terroristic behaviour.

Until now there did not exist a clear composition drawing up the differences between the European Convention for the Protection of Human Rights and the Bill of Rights in the US Constitution with regard to terrorism-related limitations. With the current book Sottiaux filled that gap admirably and thus created a precious help for practitioners in that field of law. Although the book is written in an easy understanding way, basic knowledge about human rights in general should be acquired before reading Sottiaux's study.

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