HUMAN RIGHTS AND SECURITY:

TURKEY, UNITED KINGDOM AND FRANCE

THIERRY BALZACQ - YILMAZ ENSAROĞLU

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Türkiye Ekonomik ve
Sosyal Etüdler Vakfı
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Introduction

Discussions pertaining to the tension between the concepts of human rights and security have been led for a long time. Since security is also a human right, theoretically, such a tension and a discussion should not actually exist. However, the issue of security is mentioned more often in relation to the security of states. When the security of a state is in question, tension between the issues of human rights and security, and especially the 'national security' of nation-states, is inevitable. Thus, history abounds in examples of how states constrict human rights or try to legitimize the infringement of human rights by grounding their actions on security.

The aim of this report is to discuss, *in concreto*, the troubled relationship between security and human rights. This is done by comparing the situation in Turkey with two European Union (EU) member states, namely, France and the United Kingdom. To be sure, the tension between the concerns of nation-states and the rights and liberties of the citizens were regulated after World War II by means of various human rights documents, many of which Turkey initially signed but did not ratify.[1] During this process, Western governments displayed a considerable sensitivity about human rights. However, after 9/11, the sensitive approach to human rights in the West was also replaced in almost all countries, especially in the United States, United Kingdom, France, and Germany, by concerns related to national security. The new regulations devised in the West with the aim of ensuring security and the new laws that were enacted did not only seriously restrict human rights, but also undercut many rights that had been achieved after much contention. On the other hand, security concerns have been a priority for much longer in Turkey since the foundation of the Republic, and security has played a major role in the development of state policies and in legislative processes. Human rights have been disregarded for the sake of security, which was justified by reference to Turkey's 'special circumstances.'

Even though human rights have never been considered by states as more important or of bigger priority than security, it was 9/11 that appeared as a significant breaking point concerning the relation between security and human rights in Western democracies. After this date, Western democracies came up with new arrangements in order not to be subjected to similar attacks. For example, they started to openly violate some of the basic principles of human rights such as the ban against torture and low-key treatment from considerations of 'prevention of terrorism' or 'security,' or the ban against deporting refugees to countries where they could be tortured or maltreated (*non-refoulement*). Too many people were sent back to countries that entertained many risks in terms of human rights. As a result, the prevention of terrorism became the most significant political issue after 9/11. Thus, the Western governments, which deemed it in the past their moral responsibility to intervene in developing countries because of the breach of human rights, easily sacrificed the same human rights when their own security was at stake.

Human rights have never been considered by Turkey to be more important than security. Western countries' pre-9/11 sensitivity about human rights has never existed in Turkey. The domination of the security concern has resulted in a reduction of all political problems to security and public order right from the beginning. Therefore, it is not possible to associate security or anti-terror measures in Turkey or the terrorist attacks in the country with the 9/11 attacks in the West. One can even say that things have followed a reverse pattern in Turkey compared to the United States and Europe. In recent years, while Western countries were restricting human rights and increasing security measures in the name of the fight against terrorism, Turkey was improving human rights by amending its laws so that it could achieve harmonization with EU legislation. However, an interesting interaction is at work here: At a time when Turkey was enacting new laws improving and guaranteeing human rights as part of its EU accession process, the

1 Turkey initially signed some of these international human rights documents with some reservations and only recently ratified them in order to meet the Copenhagen political criteria and start EU accession negotiations.

negative developments that took place in Western countries have encouraged authoritarian circles and the security bureaucracy in Turkey to exert pressure on the government to reverse the reform process. As a result, the government abolished some recently introduced positive measures and replaced them with more restrictive provisions. The latest Anti-Terror Law (*Terörle Mücadele Kanunu*) and the Police Duties and Authorities Law (*Polis Vazife ve Salahiyetleri Kanunu*) are typical examples of this. Thus, it is not possible to say that 9/11 has been a turning point for Turkey as in Western countries. Extraordinary regimes that should have been exceptions to the rule had already become permanent and almost ordinary in Turkey; martial laws and states of emergency continued for years, a number of military coups were staged on the grounds of 'providing security,' and the fight against terrorism was adopted as the only mechanism to address the Kurdish problem, especially since the PKK became more visible after 1984. Thus security concerns based on internal and external threats shaped all government policies concerning key political issues. During the history of the Republic, security policies aimed at taming and controlling the society dominated the constitution, the laws and practices. Therefore, this report will not discuss the relationship between security and human rights in Turkey merely within the context of the fight against terror, but will instead discuss this relationship within the framework of the authoritarian state structure established by the republican elite in 1920s.

The post 9/11 arrangements and policies of Western democracies frustrated the advocates of human rights to a great extent. For example, Amnesty International (AI) claimed in its 2005 report that since the United States declared 'war against terrorism' after the 9/11 attacks, the United Kingdom has been violating and damaging human rights, the rule of law and the independence of judiciary.[2] The convergence between developing countries, which have been violating human rights systematically for years, and developed countries solidified the adverse approaches to human rights and liberties because this political shift encouraged the authoritarian leaders of many countries, especially Russia and Egypt, to legitimize their policies against human rights.[3] For example, hundreds of government opponents, especially members of the *Moslem Brotherhood*, Egypt's largest moderate Islamic opposition party, who have never participated in any incidents of violence and are known to support peace, were put under arrest as 'suspects' in Egypt after 9/11. The political dissidents, among whom were intellectuals, professors and medical doctors, were tried and punished in military or emergency security courts in violation of international humanitarian law.[4]

In previous years, Western countries used to criticize many countries including Turkey on grounds of their poor human rights records and did not find convincing the legal arguments made by the latter in justifying their policies on grounds of security. However, Western countries also began to perform similar practices after 9/11. 'Terrorist suspects' detained at the American Guantanamo Bay Army Base or the ones held by the United Kingdom at the Belmarsh Prison for an indefinite period and without any filed charges were subjected to similar or even much worse treatment in comparison to dissidents (or 'terrorists') in countries such as Turkey, Egypt and Zimbabwe. Moreover, all of this took place in United Kingdom, a country with a very established tradition in terms of human rights and liberties, and most importantly, at the time of a government which included ministers such as Robin Cook, Clare Short and Jack Straw, who came from students' rights, peace, trade union, anti-war, and anti-nuclear movements.[5]

The policies of the United Kingdom government dramatically influenced the views of other political parties, the media and also of society at large. Especially, the bitter incidents that took place in London on July 7th were used by the government and a part of the media to legitimize certain repressive laws. In August 2005, shortly after the bombings in London, Prime Minister Tony Blair declared a plan against terrorism consisting of twelve clauses. Although all of the terrorist suspects were British citizens, the plan targeted foreigners. Even though the "Terrorism Act" (2000) and the "Anti-Terrorism, Crime and Security Act" (2001), which were enacted in the previous years, were in force, the "Prevention of Terrorism Act", which allowed suspects to be kept under custody for a period of 90 days, was also sent to the Parliament in October 2005. The House of Commons declined the 90-day period; however, the custody period was raised from the previous 14 days to 28 days. In the meantime, 'praising and encouraging terrorism' was introduced as a new crime. In addition, attempts to reinforce this policy through laws related to ID cards and immigration were made. Amnesty International, which had already been criticizing the United Kingdom for having the toughest anti-terror laws in the world, also criticized the new laws, pointing out that they rolled back the existing liberties and paved the way for human rights violations.[6] In France, the National Commission for Computing and

2 Amnesty International Reports (2005). *United Kingdom: Human rights are not a game.* Available at: http://web.amnesty.org/library/Index/ENGEUR450432005.

3 Paul Hoffman (2004). "Human Rights and Terrorism." *Human Rights Quarterly.* Vol. 26, pp.932-955.

4 Human Rights Watch (2003) *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide: A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights.* March 25, 2003. Available at: http://www.hrw.org/un/chr59/counter-terrorism-bck4.htm#P202_39289.

5 *The Guardian* (12/05/1997). (Robin Cook's speech on the government's ethical foreign policy.) London.

6 *Amnesty International Reports* (2005).

Liberties (*Commission nationale de l'informatique et des libertés* - CNIL) has, on various occasions, warned the French government not to embark on radical approaches to the fight against terrorism that will hamper rights consolidated through centuries.

In short, the new anti-terror regulations in the West do not cause human rights to regress or be suspended only in these countries but also in the entire world. Moreover, the results of the implementation of these policies show that preventing terrorist attacks through repressive and prohibitive regulations, which violate human rights, is not possible. On the contrary, the new policies implemented with the aim of preventing terrorism or providing security have only fostered unprecedented tensions and polarization within societies.

This political shift in developed Western states had an adverse affect on Turkey, which has been making positive legal arrangements as part of the EU harmonization process. Since 2005, the government has begun to follow the Western example, introducing new restrictions in the face of the rising wave of terror in Turkey and the opposition of nationalist circles to EU reforms. The government used the post-9/11 repressive policies of Western democracies to legitimize new laws which roll back the human rights reforms. Thus, Western democracies, who had been criticizing Turkey for long years, have now become a negative role model.

The main line of argument followed here is that the fight against terrorism has fundamentally restructured the balance between freedom and security, so much so that the differences between EU and non-EU member states in this domain is now difficult to uphold. It must be noted, from the outset, that EU level *per se* is not examined in this paper, because this has been achieved in a previous paper written by Thierry Balzacq and Levent Korkut,[7] which also put forward policy recommendations. However, it is obvious that for a comprehensive understanding of the fight against terror in the three countries analyzed herein, the EU provides a powerful context.

The paper proceeds as follows: The first section examines the reform process in Turkey and provides a discussion of the relationship between human rights and security in light of recent legal and political developments in this country. The second section contrasts two EU countries (France and United Kingdom) from the perspective of the human rights-security relationship. In the third section, a set of policy recommendations will be put forward in order to maintain security in conformity with human rights.

7 Levent Korkut and Thierry Balzacq (2006). "Security Needs and the Protection of Human Rights in the Struggle Against Terrorist Violence: The Situation in EU and Turkey," available at: http://www.tesev.org.tr/eng/events/TESEV_CEPSWorkshopConclusionReport-Final-ENG.pdf

I. Human Rights and Security in Turkey

In order to accurately assess how meaningful the improvements in human rights protection in Turkey in recent years have been, one must first evaluate the root of Turkey's human rights question. At the outset, it should be noted that not only the process of drafting but also the substance of the 1982 Constitution crafted by the military junta which organized the *coup d'etat* on 12 September 1980 are anti-democratic. Although having gone through much transformation, this constitution, which is still in force, continues to be the biggest obstacle to the improvement of human rights and the democratization of the state in Turkey. It was with this constitution that the 'universal' concepts of human rights and democracy were 'localized', and rights and liberties were given a secondary status as they were subjected to the 'longevity of the state.'

A. A HISTORICAL ACCOUNT

Certainly, the problems in Turkey's legal structure have not started with and are not only products of the 1982 Constitution. Since the early years of the Republic, security has always been a priority in formulating government policies and many arrangements have been made that almost systematized exceptional methods of restricting rights and liberties. The table below provides a non-exhaustive list of such methods:

As the above table shows, in Turkey, the fight against terror cannot fully explain the relationship between security and human rights. Especially the Public Order Law, the Martial Law and the State of Emergency Law provide for regimes of exception that are based on a single parameter: security.

The Turkish Criminal Code, the Anti-Terror Law, the Law on the Organization and Procedure of State Security Courts and similar laws envisage sanctions and judicial bodies to maintain security. Unfortunately, there is no reliable and comprehensive data on the number of people who were apprehended, arrested and convicted under these laws. Due to the uncertainties in the definitions of the offenses, the authorities do not announce reliable data and NGOs are unable to carry out monitoring and reporting. For example, a columnist or an employee of a newspaper opposing state policies may be considered a 'terrorist.' However, in the reports of national and international human rights organizations, the same person may be considered a victim whose freedom of expression has been violated.

B. HUMAN RIGHTS – SECURITY TENSION IN TURKEY

The Republic of Turkey was established by soldiers on the remnants of an empire where different ethnic groups reflecting many religions, languages and cultures co-existed for centuries. Since this new state adopted the idea of creating a brand new nation consisting of peoples with different cultures by means of denying the entire past as its official ideology, it persevered to eliminate all differences to form a homogenous society. Naturally, many people objected to this project for different reasons. In the earlier years, the founding military cadre strived to establish the regime by imposing bans, exerting pressure, prosecuting dissenters through exile or even execution. Anyone who protested these practices as well as all political opponents were described as 'enemies.'[8] Consequently, this approach caused the concepts of security and defense or foreign security and domestic security to get mixed up.

8 Yılmaz Ensaroğlu, "28 Şubat Kurumsallaştı." Part of the interview under the heading: *Son Klasik Darbe: 12 Eylül Söyleşileri*. Aykırı Yayınları, İstanbul 2005. pp. 141 – 173.

Table 1. Main Anti-Terrorism and Security Related Laws in Turkey

Legislation	Arrangements
PUBLIC ORDER LAW (Law No. 765) 3 March 1925	Government was granted full powers to prevent religious fundamentalism and riots, prohibit conspiracies, provocations and publications threatening to disturb public order, peace and quiet. Liberty Courts (*Istiklal Mahkemeleri*) famous for imposing numerous death penalties against dissidents were established pursuant to this law.
TURKISH CRIMINAL CODE (Law No. 765) 13 March 1926	Human rights were restricted by reason of security through provisions on crimes against the state as laid down in Articles 141, 142 and 163. These articles were abolished with the Anti-Terror Law enacted on 12 April 1991.
MARTIAL LAW (Law No. 1402) 13 May 1971	Allowed the establishment of a military regime in the entire country or only in one region and granted exceptional powers to the commanders.
LAW ON THE ORGANIZATION AND PROCEDURE OF STATE SECURITY COURTS (Law No. 2845) 16 June 1983	Provided for the establishment of special courts authorized to try crimes committed against the state and the Republic. These courts were abolished on 16 June 2004.
STATE OF EMERGENCY LAW (Law No. 2935) 25 October 1983	Provided another emergency regime to be applied in case of a natural disaster, epidemics, grave economic crisis or violent acts disturbing public order. It was aimed to bring a more civilian regime of exception than the martial law after the 12 September coup. This regime granted special and extended powers to governors.
ANTI-TERROR LAW (Law No. 3713) 12 April 1991	Introduced a [illegible]
LAW ON COMPENSATION FOR LOSSES RESULTING FROM TERRORISM AND THE FIGHT AGAINST TERRORISM (Law No. 5233) 17 July 2004	Aimed to indemnify damages arising from terrorist acts and/or the fight against terrorism.
TURKISH CRIMINAL CODE (Law No. 5237) 26 September 2004	Introduced new offenses such as "making propaganda of the aims of a terror organization" (Article 220/8). Certain arrangements that were abolished with EU harmonization packages (such as Article 8 of the Anti-Terror Law) were re-introduced with minor amendments under this law.
CRIMINAL PROCEDURE LAW (Law No. 5271) 4 December 2004	Established "High Criminal Courts" to replace State Security Courts.
LAW FOR AMENDING THE ANTI-TERROR LAW (Law No. 5532) 29 June 2006	Amended certain provisions of the previous law, increased some of the penalties and expanded the powers of Law enforcement officers.

Having reduced all its political problems to the problem of public order and security through a militarist point of view, Turkey was governed for many years by emergency governments which committed serious human rights violations. Moreover, the emergency regime has to a large extent been transformed to a regular regime. It has lost its exceptional and transient character and become a permanent code. Emergency regimes were in force during almost 41 years of the total of 80 years since the declaration of the Republic until the annulment of the most recent state of emergency in 2002.[9] Similarly, martial law was in force in almost 26 of the 64 years of the period from 1923 to 1987.[10]

Essentially, the aim of the emergency regime was to convince the society that the country had to fight against foreign as well as domestic enemies, which has been largely achieved. This perspective based on security inevitably sanctified and glorified the state, while at the same time caused human rights to have a lesser significance in comparison to the state. Therefore, the fundamental function of judicial power -- ideally the most important mechanism in the protection of human rights -- has been safeguarding the interests and safety of the regime. Thus, an extraordinary utilization of the judicial power has become the practice in Turkey. The Independence Courts in the early years of the Republic, the Yassıada Court set up after the military *coup* of 27 May 1960, and the Martial Law Courts established immediately after the *coups* of 12 March 1971 and 12 September 1980 tried tens of thousands of political dissidents. Later, these courts were equipped with special powers and acquired a permanent status under the name of State Security Courts (*Devlet Güvenlik Mahkemeleri*, DGM). The State Security Courts were abolished with the enactment of Law No. 5170,[11] as per a

9 Emergency regimes were in force with different mandates during different periods in eastern and south-eastern Turkey. Initially, martial law was proclaimed after the military *coup* of 12 September 1980 and lasted until 1987. In the meantime, the Parliament passed the "State of Emergency Law" No. 2935 dated 25 October 1983, which provided the basis for the declaration in 1987 of a state of emergency upon the demand of the government and with the approval of the Parliament in order to prevent the attacks by PKK. The State of Emergency was extended 46 times with the approval of the Parliament and was abolished progressively from 1994 to 2002.

10 Yılmaz Ensaroğlu, "İnsan hakları ve güvenlik ikilemini aşmanın yolları," *Yeni Şafak*, 27 February 2007.

11 The law was titled "The Law for Amending Some Articles of the Constitution of the Republic of Turkey" and dated 7 May 2004.

requirement under the 8th EU Harmonization Package. However, in practice, this only indicated a change in name; the same cadres maintained the same work and fulfilled the same functions under the name of High Criminal Courts.

On the other hand, the dual nature of the judiciary in Turkey has often been pointed out as the biggest obstacle to judicial independence and rule of law. While their jurisdictions are the same, there are two distinct judicial bodies under the names of criminal courts and military criminal courts, which fall under the separate supervisions of the Supreme Court and the Military Supreme Court, respectively. This situation abrogates the principle of judicial unity and eliminates the right to be tried by neutral and independent judges. A similar dual structure also exists in the area of administrative judicial practices. Although a Council of State was present, the Military High Council of State was established after the military intervention of 12 March 1971.

Without doubt, problems related to the tension between freedom and security do not solely originate from the judiciary and the security bureaucracy. The relationship between the dominant bureaucratic state tradition in Turkey and politics significantly affects human rights. The demands for civil and political rights is incapable of surmounting the frame formed by this bureaucracy, and the politics that is overshadowed by the bureaucratic governing tradition is incapable of breaking this frame. The demand for political, religious, ethnic, cultural and other rights always run up against this wall. Political parties that claim to differ from each other when they are in opposition start resembling this structure (or each other), and the human rights related promises they make during their pre-election program turn into 'state realities', as soon as they are in the government.

C. THE APPROACH OF LAWMAKERS AND POLICYMAKERS

The human rights problem in Turkey is not merely legal but is one which has a social and cultural dimension as well. Suggesting that the society perceives human rights in a manner that reflects international standards is difficult. This is also the case for deputies, members of the government and public officials. Both the interviews made with the deputies appointed to the Parliament's Human Rights Investigation, Justice and Internal Affairs Committees[12] as well as the official minutes of these committees and the Parliament's plenary assemblies related to laws concerning human rights and security abound with unfavorable findings.

Doubtlessly, the knowledge, perspective and sensitivity of law makers and decision makers about human rights and the relationship between human rights and security may differ. In this regard, it will be more meaningful to discuss the legislation process from the view of human rights with a highlight on the effect/role of the security bureaucracy rather than dwelling on the affirmative or adverse approaches of the related parties.

Among the deputies in the Parliament who participated in the above-mentioned committees, very few have previously worked in the area of human rights or took a genuine interest in the subject. In spite of this fact, it should be stressed that although limited in number, there are still a few individuals in these groups who consider security a human right, and who, consequently, deem it not as a conflict or a tension but understand security as a component that compliments human rights such as the right to life. These deputies stated that being a deputy within the existing system is a very strenuous and time-consuming occupation, and that, therefore, Turkish deputies in general are not able to follow the latest developments in Turkey and abroad concerning human rights.

Theoretically, the legislative process in Turkey works as follows: The relevant ministry makes projections about a given problem by taking into consideration the priorities of the government and the programs and projects of other political parties, and then has the draft bill written. The draft bill is essentially prepared by bureaucrats, approved first by the Council of Ministers and then the Presidential Board of the Parliament, and subsequently sent to the relevant specialized parliamentary committee. Although law-making may look like a technical process, it is in fact a political activity on which political preferences play a significant role. However, deputies are usually not well-equipped enough to have informed opinions about the object of legislation. Thus, the status -- whether in government or in opposition -- of a deputy's party influences his/her attitude toward the draft bill: "the proposal of my government, my minister or my bureaucrat" or "let's approve it as it is" as opposed to "this is the government's proposal, let's block it."

As the party or parties in the government represent the majority, the drafts or proposals are usually accepted by the committees without any amendments and sent to the General Assembly. Furthermore, prime ministers, who are also the leader of their party, feel seriously disturbed if drafts or proposals are amended by deputies in their own party,

12 The minutes and reports of the Justice and Internal Affairs Committees of Parliament were examined within the scope of this study. In addition, deputies from the Human Rights Investigation and Justice Committees were interviewed, and informal discussions were led with almost ten deputies from the Human Rights Investigation, Internal Affairs, Justice, and Constitution Committees. The findings and evaluations in this section are based on these interviews. However, no references will be made to ensure confidentiality of the deputies.

whom they say "have to advocate a draft bill proposed by his minister or bureaucrat." Everyone has become so inured to this style of working that if a deputy of the incumbent party openly objects to the discussed draft or proposal, even the members of the opposition party find him/her out of place, criticizing him/her by saying, "How can you object to your own government's draft?" However, if, in the meantime, the public is informed about the issue and certain drawbacks concerning the draft bill or proposal are voiced, there is still a slight chance that the general assembly will intervene and set the problematic issue in order.

The law-making process indicates that the legislative is entirely under the control of the executing power – which is the opposite of what is supposed to be. Drafts or proposals usually reach the relevant committee one day before the meeting. Consequently, deputies in the committee are obliged to discuss draft bills of great significance without even having the opportunity to read them beforehand. The working methods of the committees, the relationship among various committees and the relationship between specialized committees and the general assembly do not seem to be democratic, participatory or transparent enough. Before all else, the committee chairpersons and the acting group presidents are appointed by party leaders and the members are forced to elect these individuals through party-line votes. On the other hand, the members of the committees are selected by the groups of political parties at the parliament. Therefore, deputies do not have the power to decide on their own which regulation they will vote 'for' or 'against.' Most of the time, the deputies do not even have the opportunity to know what they accept or reject. Only if the chairperson of the committee is a democratic and liberal person does he or she call upon each member to speak and enable all members to participate in the discussions. However, in secondary committees, the groundwork of the draft or proposal is often left undiscussed.[13]

Although deputies theoretically have the right to prepare draft bills and propose them to the General Assembly in person, they are not allowed in practice to do so. Instead, they are asked to present their proposals to the party group first. If the group administration approves of the proposal, it is conveyed to the Presidential Board of the General Assembly. Otherwise, the proposal is withheld. Generally, almost all deputies of the ruling party/parties take part in the discussions of draft bills presented by the government because they do not have the chance to act against the disciplinary code of political parties. Whenever adverse attitudes gain strength during the committee meetings, the session is immediately adjourned, and the relevant minister or the acting group presidents meet with the deputies who raise an objection so that the 'objecting' deputies are soon 'convinced.'

It is noted that the bureaucracy works very attentively during the legislative process; if a new law contradicts with another law in force this observation is immediately expressed during committee meetings. However, when documents pertaining to human rights are in question, the same sensitivity and systematic approach does not exist. Although a recent amendment to Article 90 of the Constitution now establishes the supremacy of international treaties in the case of a conflict between them and national laws,[14] the legislative processes in Turkey are not monitored in order to determine whether they conform to human rights. Although it is claimed that the Turkish Parliament strives in general to implement the human rights conventions Turkey has ratified and the human rights standards stated in these documents, the actual practice proves the opposite. Moreover, the reservations Turkey has made to these documents present a major problem.[15]

It is difficult to say that human rights are taken note of during the discussion of draft laws and proposals related to security either at the specialized committees or the General Assembly. A serious restructuring is required to regulate the conformity of the legislative activities with human rights. While there exists the Human Rights Investigation Committee of the Parliament established with a special provision, essentially it is not a specialized committee but a committee designed for supervision. Furthermore, the committee performs its supervision duty by submitting study reports to the General Assembly and cannot supervise legislative activities.

13 The Presidential Board sends the drafts from the government and the proposals of deputies to the related committees. If the draft or the proposal is related to the working area of more than one committee or if it needs to be discussed by more than one committee, then the Presidential Board appoints a main committee and one or more secondary committees. Secondary committees usually study the draft or proposal and send their report to the main committee. It is the main committee that makes significant changes to the draft or proposal.

14 The following statement was added, through Article 7 of the "the Law for Amending Some Articles of the Constitution of the Turkish Republic" No. 5170 and dated 7 May 2004, to the last clause of Article 90 of the Constitution: "In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."

15 Turkey has ratified many international conventions on human rights with reservations. For example, on the United Nations conventions, Turkey has made a reservation to Articles 15/2-4, 16/1-c,d,f,g and 29/1 of the Convention on the Elimination of All Discrimination Against Women (CEDAW) and has made a declaration concerning Article 9/1 of the same convention; three statements and one reservation related to the International Convention on Political and Civil Rights and the International Convention on Economic, Social and Cultural Rights; and reservation to Articles 17, 29 and 30 of the Convention on Children's Rights. Similarly, Turkey has endorsed the European Council's European Social Charter with a reservation to Articles 2, 3, 5, 6, 8 and 15, and the European Convention on Human Rights with a reservation that this convention should not violate the clauses of the Turkish Law for Unity of Education.

In addition to its legislative power, the Turkish Parliament also has the task of supervising the executive/ administrative power. However, it fails to fulfill its political supervision duty. The biggest obstacle is that the head offices of parties select their deputy candidates and the ultimate arbiters in this process are the party leaders and their close colleagues. This situation puts a leash on the deputies' free will and prevents them from acting or even expressing themselves freely.

In this legislative process, the bureaucrat is the real 'actor,' and the bureaucracy has the entire initiative. The drafts or proposals sent to the committees are crafted by the members of the security bureaucracy who generally display an approach in favor of the 'security of the state' and who are defended by politicians. Especially when draft laws pertaining to security are deliberated, the 'conditions unique to Turkey' inevitably interfere and the political preferences of either the incumbent party or parties or the diverging ideas of the opposition parties are incapable of standing against the 'needs' stressed by the bureaucracy. It is not possible to point out a member of parliament who can act independently and take decisions freely during these processes. Furthermore, bureaucrats are more informed and equipped about the subject than the deputies themselves. Naturally, this situation causes the process of law-making, which has to be a totally *political* process, to turn into a fully *bureaucratic* procedure.

Almost all draft bills and proposals about security are prepared by the security bureaucracy. The relevant ministry collaborates with the officials of security institutions in crafting the wording of such documents. These official representatives actively participate in the meetings of specialized committees where the actual discussion about draft bills takes place. If the security bureaucracy expresses that the proposed regulations are, in fact, a 'requirement,' the representatives of the incumbent or opposition parties, including the members of the government, remain silent and refrain from making any objections. Consequently, raising an objection against any regulations proposed on account of security and doing this especially on the basis of human rights requires a lot of courage and the will to stand against the gravest accusations.

The deputies in specialized committees face certain problems in recognizing problematic draft texts as they are not well-equipped in the area of human rights and security policies. Besides, even when they do find certain aspects of draft laws to be against human rights or to contradict the laws in force, they are incapable of expressing any ideas which are not parallel to the party administration's dominant approach. By contrast, if specialists from bureaucratic or academic circles who take part in the meetings at the stage of drafting have the possibility of voicing their opinions, they are able to underline any conflicts or various other practices in other countries. Such interventions do not usually have any actual effect on the decisions. On the other hand, the security bureaucracy attend all committee and general assembly meetings concerning the draft bills and proposals that are directly or indirectly related to the issue of security either directly or through lobbying during the discussion and negotiation processes, and try to have the arrangements reflecting their approach made.

A striking example is as follows: During a committee meeting where a regulation for paying a premium to security officers who participate in police operations against smugglers[16] was being discussed, a deputy voiced his objection against such incentive practices, saying, "they already have certain rights as a consequence of their official job." Some of the security officers present at the meeting criticized him by saying, "Fighting against terrorists and smugglers on mountains and at the border is not as easy as talking here." Consequently, the meeting was terminated, and the regulations demanded by the security forces were immediately approved.

D. HUMAN RIGHTS AND SECURITY IN TURKEY IN THE LIGHT OF THE EU REFORM PROCESS

In order to accurately assess how meaningful the human rights improvements made in Turkey have been, especially in the last few years, one must first evaluate the root of this problem. First of all, one must note down that not only the drafting but also the content of the 1982 Constitution crafted by the military junta which conducted the 12 September 1980 coup have an authoritarian tone and sideline the democratic and liberal approach. Although having gone through much transformation, the current constitution is still the biggest obstacle to the improvement of human rights in Turkey and the democratization of the Turkish state because it was with this constitution that the concepts of human rights and democracy were localized, and rights and liberties were given a secondary status as they were subjected to the state and the authority.

The fact that problems related to human rights still exist in spite of the *harmonization* or *reform* packages Turkey has devised and declared - not to improve human rights but to meet the requirements of the EU's Copenhagen Political

16 Article 23 of the Law no. 5607 entitled "Law for Fighting Against Smuggling" and dated 21 March 2007 regulates the standards and methods concerning the premiums to be paid to informers and confiscators in the event of the seizure of smuggled goods.

Criteria - calls for attention. Although the reform packages that were crafted within the scope of the EU harmonization process brought along various favorable new arrangements, Turkey seems to be incapable of solving its human rights problems. In addition, these new laws have not been implemented as the bureaucracy strongly resisted implementing laws that were enacted by the legislative.

On the other hand, even a brief study gives the impression that the reform packages were drafted and accepted by the Turkish Parliament without sufficient preparation and without questioning in detail the types of arrangements needed to bring a radical and lasting solution to human rights problems in the country. Because although certain legal amendments were made as a result of the influence of various domestic opposition groups such as human rights organizations and international actors such as the EU, dismissing criticisms rather than finding durable solutions was regarded to be more important.

Certainly, these packages have enabled many significant positive arrangements. For example, the curtailment of the surveillance period including in the State of Emergency region; the elimination of regional discrimination in judicial practices; the granting individuals interrogated for offenses falling under the jurisdiction of the State Security Court the right to a lawyer starting from the first day of police custody; and the abolishment of capital punishment; as well as some new laws such as the "Press Law" and "Law on Associations" enabled liberties to expand significantly. However, a few cosmetic or regressive regulations such as the increase of the number of civil members of the National Security Council or the constriction of the freedom of expression through "the indivisible integrity of the state and the nation" and "the essential principles of the Republic" – criteria that do not exist in international human rights conventions – were also included in these packages.

When legal regulations carried out since June 1999 within the scope of EU harmonization are taken into consideration as a whole, the following is observed: the earlier amendments made in a number of articles of various laws had contradicted with others that had remained untouched. In the reform process, however, rather than amending selected provisions of certain laws, the laws were revised and re-enacted in their entirety. In other words, instead of "Laws for Amending Other Laws", well-organized laws such as the "Turkish Criminal Code", "Criminal Procedure Code", "Press Law" and "Law on Associations" were passed, and this alone was a positive development. However, neither the government nor the parliament has allowed a public discussion concerning these new laws and avoided debates with experts or relevant non-governmental organizations. Thus, after a short time, these laws were needed to be reconsidered and re-discussed due to serious shortcomings or contradictions they included.

Various amendments were made to the Anti-Terror Law through the harmonization packages in 2002 and 2003. Although these changes were considered to be insufficient by human rights organizations, when assessed as a whole they have been constructive in terms of alleviating the freedom-security tension. However, the increase in the intensity of violence in Southeastern Turkey in 2004 and the consequent open opposition of the security bureaucracy since 2005 to the harmonization packages on the ground that the packages have seriously limited their authority to fight against terrorism caused a breakage in the reform process.

Especially after the public statement of Hilmi Özkök, the Chief of General Staff at the time, on 5 August 2005 that "The Turkish Armed Forces (...) has been maintaining and is going to maintain its fight against the separatist terror organization in a determined manner in spite of its restricted authority,"[17] the discussions on whether the harmonization packages hedged the ability of the armed forces, causing them to become weak in the course of the fight against terrorism, gained steam. At the same time, the statements of Prime Minister Recep Tayyip Erdoğan during an advisory meeting he held with a group of intellectuals concerning the solution of the Kurdish question and later in Diyarbakır concerning the acknowledgement of 'the Kurdish question' caused the government to be besieged by the security bureaucracy through the support of the mainstream media and some opposition parties.

When the name of General Yaşar Büyükanıt, the Commanding Officer of the Ground Forces at the time, was mentioned in the interrogation process and the indictment in relation with the Şemdinli incidents,[18] the military reacted very sharply against Ferhat Sarıkaya, the Public Prosecutor who had drawn up the indictment. Consequently, no legal action was taken against Büyükanıt, but the public prosecutor was demoted. In the meantime, Sabri Uzun, the

17 See: Itır Toksöz and Volkan Aytar, "Güvenlik Gelişmeleri ve Basın Yansımaları: 2005'e Genel Bir Bakış," *Almanak Türkiye 2005: Güvenlik Sektörü ve Demokratik Gözetim*, TESEV Publications: Istanbul, 2006, pp. 245-246.

18 On 9 November 2005, a book store in the Şemdinli district of Hakkâri was bombed, leaving one dead and seven wounded. Three suspects, two of whom were non-commissioned officers, were arrested. The statement made about one of the arrested suspects by General Yaşar Büyükanıt, the Commanding Officer of the Ground Forces at the time, saying, "I know him, he's a good boy" was assessed as an attempt to influence the court. In the following days, it was claimed that the non-commissioned officers had also gotten involved in other unlawful incidents in the past and it was discovered that they had previously worked with General Büyükanıt.

Director of the Intelligence Bureau of the Security General Directorate, was removed from office as military forces felt disturbed by his remarks before the Parliament's investigation committee about the Şemdinli incidents. The Şemdinli indictment had actually provided a very important chance for bringing to light the human rights violations committed in the name of security and for holding accountable public officials involved in unlawful acts. The indictment claimed that the gendarmerie got involved in certain illegal practices during its intelligence operations. It was demanded that the local commander of the gendarmerie be punished, while the accusations against Büyükanıt were conveyed to the General Staff's Prosecutor's Office. The Şemdinli Indictment gave rise to a serious tension in the government's relationship with the military. The leading government authorities declared that any attempt to target the two institutions (the military and the judiciary) would prove futile because both were respectable institutions and the government had no intention of claiming a position in the dispute between them. However, the government could not maintain this fundamentally faulty attitude and a judicial inquiry was opened against the prosecutor upon the Minister of Justice's order. Soon after, Prosecutor Sarıkaya was demoted (removed from office by the Supreme Council of Judges and Prosecutors.) The issue was not, however, a dispute between the military and the judicial authorities, as the government claimed it to be. Rather, it was essentially whether the army is subject to the supervision of legal and judicial authorities. Once again, Turkey lost an opportunity to sustain the rule of law.

After these developments, the government prepared a draft bill that included fundamental amendments in the Anti-Terror Law and sent it to the Presidential Board of the Turkish Parliament in April 2006. The Justice Committee, the main committee entrusted with the task of finalizing the draft, convened on 2 and 10 May 2006 to discuss the draft. When the minutes of these meetings are studied, it can be observed that members of the committee -- most of whom are lawyers -- made emotional speeches, stating that they are against terrorism, instead of basing the discussion on devising anti-terror regulations within the boundaries of general codes of law. During this meeting, deputies of opposition parties complained that "the decrees of the National Security Council concerning the concept of the fight against terrorism did not find a place in this law." The following objection brought forth by a deputy from an opposition party is full of lessons about both the place/role of the security bureaucracy in legislative activities and the perspective of law-makers as well as the level of their democratic and political culture:

> "If you do not accept the proposals concerning the fight against terrorism, the proposals of the ones who have had years of experience in fighting against terrorism, and if you are offering your own suggestions instead, then these are proposals of political nature. In that case, the changes brought with this law are not amendments in the Anti-terror Law. This is in fact a new pardon and a political decision. And it is the AKP government that is taking this political decision."[19]

Another statement by the same deputy was also striking: "Will Turkey always find out that all the amendments on which Turkey or the Turkish institutions have not reached an agreement are made by the Prime Ministry?"[20] The government's approach was not much different from that of the opposition. Cemil Çiçek, the Minister of Justice, who represented the government during the meeting, said the following to convince the committee members: "This issue has been brought to the government because the state needs it. It's a state requirement. Does that mean anything to you?"[21] In this meeting, Minister Çiçek pointed out that they had been trying to establish a balance between security and freedom, but other than that, the issue of freedom has not been touched on. Later, during the meeting held on 10 May 2006, a few committee members expressed that "this new arrangement is about the balance between liberties and security," and openly expressed their approach in favor of liberties. They stated their concerns that the draft bill would debilitate the rule of law and give way to practices against human rights, and that unlawful acts and operations would be carried out for the sake of fighting against terrorism. They also asserted that the draft meant reverting to previously abolished regulations and that it was an unjustifiable and illegal attack against freedom.[22]

After the "Law for Amending the Anti-Terror Law"[23] was enacted on 29 June 2006, many claimed that liberties were put at stake for the sake of security. The law defines 50 criminal acts stated in the Turkish Criminal Code as an "act of terrorism" if they are committed "as part of the activities of a terrorist organization." In addition, penalties given to the press are increased and judges and public prosecutors are authorized to cease the publication of periodicals for as long as one month. The same law reduces to one the number of attorneys suspects can hire, and authorizes judges to prevent suspects from seeing their attorney for 24 hours. Moreover, judges are authorized to appoint a state official to attend suspects' meetings with their attorney.

19 Turkish Grand National Assembly Directorate of Official Reports, Justice Committee, 2.5.2006, Group: Kenan, p. 6 (Orthographical mistakes are not the author's).

20 Turkish Grand National Assembly Directorate of Official Reports, Justice Committee, 2.5.2006, Group: Emin, p. 2

21 *Ibid.*, p. 5

22 Turkish Grand National Assembly Directorate of Official Reports, Justice Committee, 10.5.2006, Group: Filiz, p. 1

The same law allows security officials who are suspects in a criminal case to have three attorneys, who can receive fees higher than the set standards, and to have these fees be covered by the state. Similarly, it strengthens the state protection provided for security officials, public prosecutors and judges who are suspects, and allows public officers who work in the area of fight against terrorism to bear arms even after they retire. Most importantly, it authorizes security officials to aim at and shoot suspects after giving a warning.

The last surprise to appear during the 2006-2007 legislative year was the "Proposal to Amend to the Police Duties and Authorities Law", submitted by several members of parliament from the ruling party. During the discussions about this proposition, a member of parliament said the following at the Justice Committee:

> "This work has been done by law enforcement, the gendarmerie and other relevant departments, and a draft Police Duties and Authorities Law consisting of 52 articles was prepared. But it will take a long time for this proposition to become a draft, be discussed at the Parliament, and receive approvals from the committee and the grand assembly. (...) In order to alleviate this delay, some provisions of a previous draft have been revised and brought before the committee, similar, not identical mind you, to the original draft."[24]

As a striking example of how security bureaucracy can work to increase their mandate through new laws, this proposition was based on the reason that the facilities of the police have become inferior to that of the terrorists due to technological advances.

As discussions continued on 28 May 2007, the words of a committee member clearly outline how the opinions and approaches of the law enforcement bureaucracy are perceived and to what extent they are heeded by law makers:

> "...Truly, as the honourable Captain just said, if we are to know if the opinions of the gendarmerie and law enforcement were taken during the discussions of this proposition or the draft from where this proposition was taken, and if taken, how they were taken, Mr. President, we can facilitate the discussions on this issue expeditiously. So, on the basis of procedure, I request obtaining the opinions of our friends from the gendarmerie or law enforcement."[25]

During these discussions, very few members expressed the need to balance security measures with basic individual rights and freedoms, and emphasized the requirement to enforce security within the power of the law. However, opinions stating that the demands of law enforcement were in violation of the law were quickly met with objections: "Why don't we trust these law enforcers? Their job is to provide our security."[26] More importantly, some members were more fervent than law enforcement officers themselves as they asserted that the latter cannot fulfill their duties since their authority has been limited.

This law is a significant reversal in human rights since it allows measures typical of totalitarian and authoritarian regimes. For example, while the Code of Criminal Procedure requires a reasonable suspicion and a judge order to be present for searches, this law eliminates not only the need for a judge order, it also grants a wide discretion to the police. Accordingly, the police can now require proof of identity and conduct personal searches without a judge order, and can even apprehend suspects.

While taking fingerprints and photographs had only been permissible within a criminal investigation and within certain limitations, this law allows taking fingerprints and photographs in firearm license, passport, citizenship and asylum applications. Provisions relating both to interception, searching and requiring identity, and to obtain and use fingerprint information without the higher governance of a judge are grave dangers to personal freedom and security.

Finally, the "Law for Amending the Police Duties and Authorities Law" eliminates the prerequisites for monitoring and intelligence and gives the police the authority to monitor anyone without a judge order or a scheme of intelligence collection. More importantly, granting generous authority to use firearms to law enforcement, this law poses a serious threat on the right to life.

An issue that warrants further attention is the shift from the liberal policies adopted by the Justice and Development Party (*Adalet ve Kalkınma Partisi*, AKP) between their election in late 2002 and late 2004 to a more security-oriented policy as of 2005. The significance of the current administration's EU perspective cannot be overlooked. AKP's efforts to obtain from the EU a negotiation date led to a rapid correction of the problems identified in the EU progress reports

24 Turkish Grand National Assembly Directorate of Official Reports, Justice Committee, 27.05.2007, Group: Serdar, pp. 2-3.

25 Turkish Grand National Assembly Directorate of Official Reports, Justice Committee, 28.5.2007, Group: Fatma, pp. 1-2. (orthographical mistakes are not the author's)

26 Turkish Grand National Assembly Directorate of Official Reports, Justice Committee, 28.5.2007, Group: Sabiha, p. 5

towards full compliance to Copenhagen criteria. During that period, the public opinion in Turkey was in great support of the EU project. However, domestic and international political developments, tensions between the EU and Turkey, and changes in government in several EU member states has led the government to change its policies or lose its motivation.

Members of parliament from the AKP point out that the approaches and opinions of their party, the government, and the committee members with regard to legislative work would generally overlap in the previous years. While the focus was on the individual rights and freedoms, complaints to the effect of "We have lost our authority; it will be a struggle to provide security" from certain institutions caused a major breakpoint and interrupted the process. These members of parliament also claim that the objections of the main opposition party, the Republican People's Party (*Cumhuriyet Halk Partisi*, CHP) and certain institutions, such as the army, the judiciary almost always overlap. They emphasize that certain opinions of the Prime Minister have changed in time, and that "subsequent changes to the Turkish Criminal Code and the Code of Criminal Procedure to relieve the pressure from some institutions have caused the first breakpoint."[27] These members of parliament claim that the breakpoints escalated the tension and caused their party to retreat further and, while their party initially did not prioritize security over human rights, the process forced them to act in contrast to their principles.

27 These opinions are gathered from interviews conducted by the author of this section, Yılmaz Ensaroğlu, with members of the TGNA Human Rights Investigation Commission and Justice Commission in Ankara in May-June 2007. The interview notes are on file with the author.

II. Counter-Terrorism in EU Member States: The Cases of United Kingdom and France

The previous section examined how Turkey's counter-terrorism strategy disrupts basic human rights. Of course, some may argue that these developments are radical, compared to what is happening in EU countries. They are not. In what follows, it is shown that these policies display the same patterns: derogations from the rule of law, non-proportionality of security measures and lack of strong legislative monitoring. The following section will study two EU countries which are regarded as the most active in the fight against terrorism, namely United Kingdom and France. The basic idea is that counter-terrorism makes it difficult for EU countries to demand that Turkey comply with human rights standards when they find themselves using the same policy tools. The presentation of each country's strategy was organized around seven items: A) Legal and Political Developments; B) Prevention of Radicalization; C) Intelligence; D) Police Investigation and Prosecution; E) Aliens Law; F) Control Mechanisms; and G) Balancing Human Rights Protection and Security Provisions.

THE UNITED KINGDOM

A. LEGAL AND POLITICAL DEVELOPMENTS

For the United Kingdom, the terrorist threat is not new. What has changed, however, so the argument runs, is the nature and density of the threat. Whereas before the Irish Republican Army (IRA) was seen as the main source of threat, the threat now comes primarily in one form: 'Islamic threat.' To address the problem, UK relies on an incredibly embroidered package of legislations. After 9/11, the most ambitious counter-terrorism strategy legislation was drafted in 2003, under the name of CONTEST. Cut to the bone, the aim of CONTEST is to tackle terrorism on four different but complementary fronts: *preventing* terrorism by coming to terms with radicalization of individuals; *pursuing* terrorists and those who sponsor them; *protecting* the public, key national services and United Kingdom interests overseas; *preparing* for the consequences. In this light, budgets allocated to this policy have greatly increased, doubling in the lapse of 7 years. It is thus expected that by 2008, counter-terrorism, intelligence and resilience expenditures will reach £2bn.[28]

B. PREVENTION OF RADICALIZATION

United Kingdom pays much attention to the prevention of the so-called radical Islamism, as extremism is seen as the first step towards terrorism (although the government acknowledges that individual implication into extremism does not always lead to terrorism action or support).[29] The fight against radicalization is organized around two poles, external and internal. Externally, United Kingdom pursues a reform agenda in the Muslim world including, granting scholarships to Muslim students to improve economic, social and political conditions of their countries of origin. It promotes a proactive information campaign in order to change the negative perception of United Kingdom's policies overseas.[30] However, this policy raises two problems. First, it is not clear whether aid to Muslim countries has increased in the last years, so the United Kingdom's true commitment to development in these countries cannot be accurately assessed. Second, 'soft power' policy usually takes a long time to bear fruits, and hence does not immediately translate into a fast drop of the terrorist threat. Internally, working hand in hand with Muslim communities, thanks to a large consultation with British Muslims, the government has set up a broad

28 UK Home Department, *Countering International Terrorism: The United Kingdom's Strategy*, London, July 2006, p. 1-3.

29 *Ibid*, p. 10.

30 *Ibid.*, p. 11-12, 16.

array of instruments to isolate the radicals from their communities. Since 2003, the Mosques and Imams National Advisory Board and several forums against extremism and Islamophobia were established and various meetings took place between the government and Muslim citizens.[31] Local Muslim communities, seen as partners, took part in the elaboration of a 27-point program to curb radicalism.

The fight against radicalization is not restricted to inter-cultural dialogue. It has a more repressive side, too. Internally, terrorist organizations are under permanent pressure. The "Terrorism Act 2000" draws up a list of terrorist organizations, most of them international, banned from operating on United Kingdom soil. At the time of writing, 44 international and 14 Irish terrorist organizations were forbidden.[32] The "Terrorism Act 2006" extends the grounds for proscription - including non-violent organizations who glorify terrorism -, permitting to add two supplementary groups to the list of banned organizations. Adhering to one of the organizations listed (including ETA and IRA), supporting them by any means or inviting to support thereof, organizing a meeting or wearing any clothing or article in such a way "as to arouse reasonable suspicion that he is a member or supporter of a proscribed organization"[33] likewise constitute offences under the 2000 Act. But the scope of the 2006 Act is wider and tougher. Two more offences are added to the list. First, the preparation of terrorist acts. The aim here is to ease and speed the prosecution because it removes the burden of proving conspiracy (agreement with other co-defendants). Second, training offered to would-be terrorists or suspects is banished.[34]

One of the most innovative strategies against terrorist organizations is the dispossession of financial means. Indeed, United Kingdom recognizes that the cost of undertaking bomb attacks is relatively low, but a substantive financial support is needed for surrounding activities like training, recruiting, traveling, etc.[35] The Terrorism Act 2000 enrolls all terrorist property for seizure, whether it is "used for terrorist purposes, direct proceeds of acts of terrorism, and proceeds of acts carried out in connection with terrorism."[36] Other deeds are also labeled as offences, like fund-raising for terrorist purposes, use of terrorist resources or money laundering. The "Anti-Terrorism, Crime and Security Act 2001" pushed this logic even further, as it enables the seizure of any cash on *suspicion* that it is terrorist cash, the confiscation of which after the first 48 hours depends on the validation of a judge.[37] Between 2001 and July 2006, terrorist organizations have been dispossessed of £1,462,000 comprising cash seizure, forfeited funds and freezing assets.[38]

The Terrorism Act 2006 introduced a new if controversial concept of "encouragement of terrorism." The bill condemns anyone who makes a statement that could be understood as direct or indirect encouragement or inducement to commission, preparation or instigation of acts of terrorism. However, the scope of the concept is wide, probably too wide: the assertion made need not be purposely; a reckless affirmation understood as encouragement is equally punishable.[39]

C. INTELLIGENCE

As the prevention of terrorism depends to a great extent on information gathering, the Terrorism Act 2000 contains a stipulation on population vigilance. According to section 19, the person who suspects that another has committed a terrorist offence (money laundering, use of terrorist money, funding terrorist purposes...) based on information gathered in a professional activity has a duty to disclose that information to a constable. The offense foresees the reversal of the burden of proof and 5 years imprisonment.[40] The Anti-Terrorism, Crime and Security Act 2001 pushes investigation powers ahead: police and security services are allowed to request personal information held by public authorities (e.g. school, medical, tax and bank records) even in the absence of suspicion or offence. Further, the same bill demands that communication providers keep customer records, on a basis set in agreement with the Home Office.[41]

31 *Ibid*, p. 14-15. Rudie Neve *et al.*, *First inventory of policy on counterterrorism*, p. 34.
32 Home Office, *Proscribed terror groups*, http://www.homeoffice.gov.uk/security/terrorism-and-the-law/terrorism-act/proscribed-groups?version=4 (accessed May 23rd, 2007).
33 Terrorism Act 2000, Section 13.
34 Meryem Aksu *et al.*, *Strafrechtelijke antiterrorismemaatregelen in Nederland, het Verenigd Koninkrijk, Spanje, Duitsland, Frankrijk en Italië*, The Hague, Wetenschappelijk Onderzoek- en Documentatiecentrum, 2006, p.17.
35 Home Department, *Countering International Terrorism*, p. 20.
36 Meryem Aksu, Ybo Buruma, Piet Hein van Kempen, *Strafrechtelijke antiterrorismemaatregelen*, p.12.
37 *Ibid*, p. 14-15.
38 Home Department, *Countering International Terrorism*, p. 21.
39 Terrorism Act 2006, section 1.
40 Meryem Aksu, Ybo Buruma, Piet Hein van Kempen, *Strafrechtelijke antiterrorismemaatregelen*, p.10, 12.
41 *Ibid*, p. 14.

The transformations brought by the fight against terrorism have lead to institutional restructuring. The intelligence and security agencies (label for the Security Service MI5, the Secret Intelligence Service SIS, and the Government Communications Headquarters GCHQ) were urged to collaborate with each other within a new structure: the Joint Terrorism Analysis Centre. Created in 2003, it brings together people from the three above-mentioned agencies plus the Defence Intelligence Staff. It interconnects agencies tasked with the collection, exchange and storage of information on the capacities, activities and intentions of terrorist organizations.[42]

D. POLICE INVESTIGATION AND PROSECUTION

The bills enacted since 2000 have striven to fill in the apparent legislative gaps which prevented the police from charging and prosecuting potential or actual terrorists. They thus tended to cover additional offences and extend the reach of existing bills. Thus, the 2000 Act establishes special powers for the arrest, detention and prosecution of terrorist offences. In this context, arrest and period of detention were exceptionally widened. For example, under Section 41, a constable may arrest a person suspected of being a terrorist without a warrant and detain him or her for a period of 48 hours. The person can be detained incommunicado if the officer believes that contact with the outside environment may harm evidence or any person, alert accomplices, hinder the recovery of property or the prevention of a terrorist act.[43] This detention period may be extended up to 7 days thanks to the granting of a warrant by a judge. Having doubled meanwhile, the detention period without charge has been extended to a maximum of 28 days in 2006. The government first proposed to allow for a 3-month long detention, a proposal which was rejected by the House of Commons.[44]

Table II. UK Police Terrorism Arrest Statistics (11 September 2001 - 31 December 2006)

Out of 1166 arrests:

- 1126 arrests under the Terrorism Act 2000
- 40 arrests under legislation other than the Terrorism Act, where the investigation was conducted as a terrorist investigation

Source: UK Home Office, Security, Terrorism and the Law, Website of the UK Home Office (online) http://www.homeoffice.gov.uk/security/terrorism-and-the-law/ (accessed May 23rd, 2007).

The 2000 legislation extends police powers in two directions. First, police is granted the power to stop and search any individual or vehicle provided he/she has an authorization covering a specific area. Such authorization must be confirmed by the Home Secretary within 48 hours and may last maximum 28 days.[45] Second, intelligence services are provided with the ability to offer evidence to the court in terrorism cases in the form of a testimony by a high-ranking police official. However, 'hearsay evidence' only serves as a complement of proof. Evidence legally gathered by foreign intelligence services is also admitted - even that gathered under torture (please see below, Section G).[46]

E. ALIENS LAW

London has identified most terrorist organizations outside the United Kingdom territory. Unsurprisingly, then, immigration and asylum regimes have been strengthened and access or residence rules have been toughened. The numerous laws passed have worsened the status of migrants. First, the "Aliens Law" foresees the deportation of foreign nationals who are thought to pose a threat to the United Kingdom. By the same token, alien individuals can be excluded from the United Kingdom (i.e. not allowed to visit). This exclusion goes so far as to establish a list of unacceptable behaviour of non-United Kingdom citizens within or outside the United Kingdom. These cover, *inter alia*, the diffusion of statements (oral or written) which glorify terrorist violence, seek to provoke such acts or foster hatred. Between the entry into force of the law and July 2006, 36 foreign nationals have been excluded and 38 have been detained pending deportation.[47] The problem, however, is that the evidence required under the deportation and exclusion mechanisms abide to much lower thresholds than that required by the courts.

42 Rudie Neve *et al.*, *First inventory of policy on counterterrorism*, p. 46-47.
43 Meryem Aksu *et al.*, *Strafrechtelijke antiterrorismemaatregelen*, p. 10; Terrorism Act 2000, section 41.
44 Rudie Neve *et al.*, *First inventory of policy on counterterrorism*, p. 75.
45 Meryem Aksu *et al.*, *Strafrechtelijke antiterrorismemaatregelen*, p. 12.
46 *Ibid*, p. 15; Rudie Neve *et al.*, *First inventory of policy on counterterrorism*, p. 77.
47 Home Department, *Countering International Terrorism*, p. 12, 18.

Moreover, the "Anti-Terrorism, Crime and Security Act 2001" allows the detention of non-UK citizens for an indefinite period if the Home Secretary believes that the individual is a suspected international terrorist or poses a threat to national security. This rule has been repealed and replaced by a system of control orders under the "Prevention of Terrorism Act 2005". It defines a control order as:

> a last resort measure, to address the threat from an individual where prosecution is not possible and, in the case of a foreign national, where it is not possible to deport him or her due to our international human rights obligations (in particular, when there is a real risk of torture).[48]

The orders have a preventative purpose - to drive away individuals from terrorist involvement through a set of restrictions. These restrictions could include electronic tagging, limits on the use of certain items or communications, interdictions of meeting people, travel bans and curfew. During the confirmation procedure, the defendant and his/her lawyer may be excluded from the hearing in case of secret evidence. Finally, the "Immigration, Asylum and Nationality Act 2006" introduced additional measures on counter-terrorism. It sets out that appeals against deportation are only acceptable based on human rights grounds; registration as a British citizen depends upon a good character test and the threshold for deprivation of British citizenship is lowered.[49]

F. CONTROL MECHANISMS

Checks on counter-terrorism development do exist, mostly exercised by the Parliament. The Home Office, for instance, answers questions posed by the Parliament that closely monitors its actions. Moreover, an independent reviewer has been appointed (Lord Carlile of Berriew). His main task lies in the evaluation of the anti-terrorism legislation and implementation and to confirm it to human rights standards. His reports, based on consultations with relevant organizations, command a great authority and represent the basis of Parliament's work of questioning the executive.[50] However, so far, it has proven rather inefficient in toning down UK's most intrusive counter-terrorism policies.

G. BALANCING HUMAN RIGHTS PROTECTION AND SECURITY PROVISIONS

In UK, civil liberties have increasingly been considered as liability to the development of counter-terrorism activities. The government has therefore tended to deepen the opposition between human rights and security provisions. To put this point otherwise, calling for a war against terrorism has enabled the executive to justify exceptional measures and the necessary limitations on civil freedoms. Although the government maintains that the 'respect for international law and human rights standards must be an integral part of its efforts to counter terrorism,'[51] some members of the government and of the shadow cabinet have questioned United Kingdom's loyalty to human rights conventions. The then Home Secretary, for instance, "declared that the incorporation of the European Convention on Human Rights to British Law is one of the biggest mistakes of Blair's government first mandate."[52] This explains why United Kingdom remains the only state party to the European Convention on Human Rights (out of 47 member States) to derogate from the convention on counter-terrorist grounds.[53]

At least five fundamental freedoms have been profoundly challenged by anti-terrorist policies. In fact, Scotland Yard's 'shoot-to-kill' doctrine adopted after the terrorist attack in the London Underground represent its most extreme menace. One innocent victim was not enough to suspend the practice.[54] Second, legal provisions have hampered the principle of *habeas corpus*. United Kingdom allows the detention of individuals without any charges for 28 days, the highest figure in Europe. When looking at table IV, it is striking to note that about 60 percent of the people arrested are released without charge, somewhat institutionalizing arbitrary arrests and detentions. Human Rights Watch points to a persecution resentment strongly affecting Muslim communities. Indeed, hundreds of Muslims experienced a stay in jail before being released without a charge.[55] Even more striking is the fact that, of the 1166 persons arrested, only 40 have been convicted for terrorist offences (so far). This amounts to barely 3.5 percent of the people who have been in police custody under terrorist suspicions.

48 *Ibid.*, p. 19.

49 Home Department, *Countering International Terrorism*, p. 19.

50 Rudie Neve *et al.*, *First inventory of policy on counterterrorism*, p. 30.

51 Home Department, *Countering International Terrorism*, p. 9.

52 Anastassia Tsoukala, 'La légitimation des mesures d'exception dans la lutte antiterroriste en Europe', in *Cultures et Conflits*, n° 61, 2006, p. 42.

53 Human Rights Watch, Country Studies: The Human Rights Impact of Counter-Terrorism Measures in Ten Countries. March 2003. http://hrw.org/un/chr59/counter-terrorism-bck4.htm#P306_71146 (accessed May 10th, 2007).

54 International Federation of Human Rights, *Counter-Terrorism versus Human Rights: The Key to Compatibility*, No. 429/2, October 2005, p. 25.

55 Human Rights Watch, *Briefing on the Terrorism Bill 2005. Second Reading in the House of Lords*, London, November 2005, p. 15.

Table III. Main Counter-Terrorism Laws in the United Kingdom

Piece of Legislation	Relevant Norms
TERRORISM ACT 2000	Definition of terrorism Terrorist organizations Membership Terrorist property Investigations Counter-terrorist powers
ANTI-TERRORISM, CRIME AND SECURITY ACT 2001	Property seizure Immigration and asylum (deportation, entry) Race and religion offences NRBC threats & strategic infrastructure protection Aviation protection Police powers (stop and search) Retention of communications data
PREVENTION OF TERRORISM ACT 2005	Control orders
TERRORISM ACT 2006	Encouragement of terrorism Terrorist training Preparatory acts Proscription of organizations
IMMIGRATION AND ASYLUM ACT 2006	British citizenship registration and deprivation Appeals against deportation Refugee Convention interpretation

Sources: Home Department, Countering International Terrorism, p. 19; Meryem Aksu, Ybo Buruma, Piet Hein van Kempen, Strafrechtelijke antiterrorismemaatregelen; Terrorism Act 2006.

Table IV. Police Terrorism Arrest Statistics in the United Kingdom (11 September 2001 - 31 December 2006)

Of the total 1166 arrested:

- 117 charged with terrorism legislation offences only
- 104 charged with terrorism legislation offences and other criminal offences
- 186 charged under other legislation including murder, grievous bodily harm, firearms, explosives offences, fraud, false documents
- 74 handed over to immigration authorities
- 3 on police bail awaiting charging decisions
- 1 warrant issued for arrest
- 12 cautioned
- 1 dealt with under youth offending procedures
- 10 dealt with under mental health legislation
- 4 transferred to Police Service of Northern Ireland custody
- 2 remanded in custody awaiting extradition proceedings
- 652 released without charge

Of those charged:

- 40 convictions to date under the Terrorism Act
- 180 convicted under other legislation, including murder, grievous bodily harm, firearms, explosives offences, fraud, false documents
- 98 at or awaiting trial
- 4 at or awaiting trial for non-terrorism related offences only

Source: Statistics compiled from police records by the offices of the National Coordinator for Terrorist Investigations. They are subject to change as cases go through the system.
UK Home Office, Security, Terrorism and the Law, http://www.homeoffice.gov.uk/security/terrorism-and-the-law/ (accessed May 23rd 2007)

Third, the latest piece of legislation against terrorism puts freedom of expression at risk. Indeed, the interdiction of "encouragement to terrorism" is so vaguely formulated that it covers a variety of verbal and non-verbal manifestations. Furthermore, the so-called speech offence establishes a strong link between violence and speech. In other words, even an inoffensive critical speech may be construed as a call for violence. On the other hand, even a reckless speech may be regarded as a glorification of terrorism.[56]

Fourth, the right to a fair trial is challenged in many instances due to the need to protect evidence, intelligence information, their sources or methods. The extension of the detention period stands as a first case: the judicial authority has the discretion to carry out the hearing in the absence of the person to whom the application relates. Furthermore, the officer who initiated the application can also withhold the information upon which the trial is based, from the suspect and his lawyer.[57] The confirmation of the control orders constitutes a second example reproducing the same pattern: closed hearings to consider secret evidence. Moreover, this confirmation procedure requires evidence whose quality is well below that required for a criminal conviction.[58] Finally, deportation awaits alien defendants against whom there are not sufficient evidence. The House Joint Committee on Human Rights has raised concerns about the control orders regime's respect for due process. The government and the Court of Appeals have failed to alleviate the Committee's worries.[59]

Fifth, Human Rights Watch has questioned the restrictions to the absolute ban on torture espoused by the government since 2001. Torture is not allegedly perpetrated by United Kingdom officials or within United Kingdom territory. But, in practice, the government may rely on evidence obtained under torture abroad to indict suspected terrorists. Fortunately, the House of Lords unanimously overruled that practice in its judgment of December 8th, 2005, holding that evidence gathered under torture was non-receivable.[60]

Another challenge to the ban on torture arises from the deportation of aliens to countries perpetrating such inhuman treatment. The UN Convention Against Torture which United Kingdom ratified almost 20 years ago, clearly enounces that "no State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[61] To circumvent this international commitment, United Kingdom has sought 'diplomatic assurances' - i.e. promises by host governments that a particular person will not suffer torture upon return. The problem with those 'good will' memos lies in their poor respect. Past experiences of deportation under diplomatic assurances have ended up in gross violations of the agreements - and ruthless abuses of human rights. At least three states with a known inclination for torture have already agreed on diplomatic assurances with United Kingdom: Jordan, Lybia and Lebanon.[62] As of July 2006, two persons have been deported to Algeria, and 26 others were waiting for deportation. No follow-up has been required by the United Kingdom.

FRANCE

On several occasions, France has been hit by terrorist attacks. Terrorist activism started in the 1970s and reached a peak in 1985-6. Between 1986 and 1996, 23 bomb attacks occurred which were linked to Islamic movements. Since then, no other terrorist event took place, which is largely due to the dismantling of networks plotting bomb explosions at the Eiffel Tower (1994), at the *Stade de France* (1998 - world soccer championship), in the Christmas fair in Strasburg (2000) and against the US Embassy in Paris (2001).[63]

56 *See Ibid.*, p. 4-13.

57 Meryem Aksu *et al.*, *Strafrechtelijke antiterrorismemaatregelen*, p.11.

58 *Ibid.*, p. 16.

59 The following excerpt of the Joint Committee's latest report is particularly telling in this respect: "In the Committee's view, the Government could do much more to overcome the main obstacles to criminal prosecution, notably by allowing use of intercept material. The Committee also notes Lord Carlile's emphasis on the need for an exit strategy from control orders and considers that the most effective strategy would be a variety of measures to facilitate criminal prosecution. The Committee is reinforced in this view by the disappearance of three people subject to control orders, which shows their limitations as a means to protect the public. And the Government's claim that these people do not pose a threat to the public because they were not planning to commit terrorist acts in the UK raises questions about whether control orders are being used for the purposes for which Parliament was told they were necessary, namely to protect the public from the risk of harm by suspected terrorists (paragraphs 50-62)." Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007*, March 4, 2007, http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/59/59.pdf (accessed May 22, 2007).

60 Meryem Aksu et al.,*Strafrechtelijke antiterrorismemaatregelen*, p.16.

61 UN Convention against Torture, Article 3.

62 Human Rights Watch, *Dangerous Ambivalence: UK Policy on Torture since 9/11*, London, November 2006, p. 21-24.

63 Rudie Neve *et al.*, *First inventory of policy on counterterrorism*, p. 18.

A. LEGAL AND POLITICAL DEVELOPMENTS

The first piece of legislation was introduced in 1986. Response to an actual offensive in fact constitutes the French way to fight terrorism. Indeed, the so-called French model is characterized by a pragmatic approach resting upon adaptation according to the development of a specific menace.[64] In France, contrary to United Kingdom, the adoption of anti-terrorism legislation cannot be analyzed as the mere result of 9/11. For that reason, it will be rather difficult to leave policy developments prior to 2001 out of our study. Moreover, the 2001 bills tend to deepen and prolong that of 1986, thus maximizing the existing framework.[65]

B. PREVENTION OF RADICALIZATION

While preventing the upsurge of radicalism, the government focuses on Muslim communities that are believed to contain the seeds of extremism. There is a debate between French intelligence agencies as to the basis of radicalism, whether it recruits among the most devout Muslims or rather among the most silent ones. The state has not, however, waited for the resolution of the debate to promote a moderate Islam. A dialogue was launched in 2002 with the Muslim community, known as the *Conseil Français du Culte Musulman*, to discuss issues such as political relations, construction of mosques, control of *halal* meat, imam training and the education of spiritual councilors both in the army and in prisons. The latter receives an acute attention since much extremist recruitment goes on in prisons.[66] The main goal of the French Islamic Council is to monitor Muslims' links to foreign governments (Morocco, Algeria, Saudi Arabia).

The main policy objective of France's counter-terrorism is to curb radicalization. It is the fight against radicalization which explains, to a great extent, the controversy around the headscarf ban. On another level, the fight against radicalization undertaken daily through different policies, among which is the control of mosques. As the DCRG Police Chief stated in March 2000:

> Our work consists of operational work on people in the mosques. (...) We are criticized for seeing Islam as a security problem. (...) That Muslims practice their religion is normal and that's fine. On the other hand, I am capable of deciding whether people represent a threat to public order. It's my job. And as a terrorist act has to be commissioned by a *Fatwah*, delivered by someone qualified to do so, we are interested in people who have that power.[67]

A straightforward link has been established between radical Islamism and the suburbs due to their high concentration of immigrants (*Français issus de l'Immigration - FII*). Intelligence services (*Renseignements Généraux* - RG) and the police forces have multiplied local units to increase their capacities of intervention and information-gathering.[68]

C. INTELLIGENCE

The French preference for human intelligence is a key feature of its policy against terrorism. The anti-terrorism law of January 23rd, 2006,[69] grants specific capabilities to investigators. First, the transport sector is the first aimed by this measure: movements are controlled, especially those of individuals traveling to certain countries (such as Iraq, Pakistan, Syria, Iran). Airline, rail and shipping companies must provide personal data to the state. Second, the use of technology is made available: internet and communication providers should keep all connection data for a year; video surveillance is substantially expanded; investigators have access to authorities' records (such as registrations, passports, residence permit files).[70]

This new piece of legislation brings in significant changes regarding the use of technology for intelligence. The new law makes a shift from labor intensive intelligence to technologically driven devices including, *inter alia*, 'dragnet research' and profiling.

64 See Didier Bigo, Colombe Camus, *General Overview of the French anti-Terrorism Strategy. NCTB Project*, The Hague, Wetenschappelijk Onderzoek- en Documentatiecentrum, 2006, p. 1.

65 Meryem Aksu *et al.*, *Strafrechtelijke antiterrorismemaatregelen*, p. 35.

66 Rudie Neve *et al.*, *First inventory of policy on counterterrorism*, p. 33-36.

67 DCRG: Direction Centrale des Renseignements Généraux – Central Department for General Intelligence
Laurent Bonelli, 'The Control of the Enemy Within ? Police Intelligence in the French Suburbs (banlieues) and its Relevance for Globalization', in Didier Bigo and Elspeth Guild, *Controlling Frontiers. Free Movement Into and Within Europe*, Burlington, Ashgate, 2005, p. 198.

68 *Ibid*, p. 198-201.

69 Law No. 2006-64.

70 *Ibid*, pp. 54-55.

D. POLICE INVESTIGATION AND PROSECUTION

The French counter-terrorist policy, instead of elaborating a regime of exception (like other states have done since 9/11), tackles the problem in a procedural way. This entails specific procedures, from investigation to prosecution, to address terrorism. The "1986 Anti-Terrorism Law" sets out a definition of terrorism and lays down a list of 39 offences linked to terrorism in the Penal Code. Concomitant to this definition of offences rests a subjective element: the intent of the suspect to perpetrate an offence "in relation with a personal or collective venture whose aim is to cause a serious disturbance to public order by means of intimidation or terror."[71] This means that objective and subjective elements (offence *and* intention) necessary to characterize an act as terrorist are conflated. The same bill creates a particular section within the Paris jurisdiction - the Anti-Terrorism Fight Central Service (SCLAT) - whose unique aim is to follow terrorism cases. Initially backed by four investigating magistrates, the 2006 Act raised this figure to 8 judges centralizing files on terrorist activities.[72]

Additional legislative developments followed two paths: additional offences were added to the Penal Code and police investigatory powers were increased. This transformation takes several forms. First, police custody without a warrant was extended from 48 to 96 hours in 1986. Likewise, lawyer intervention was postponed to the 72nd hour of custody. The latest law of 2006 deferred such custody to 6 days and the visit of a lawyer to the 96th hour. Moreover, detainees are not informed of their right to remain silent.[73] Second, penalties regarding acts of terrorism are augmented. Participation to a criminal conspiracy is incorporated to the Penal Code in 1986, as are the participation in a terrorist organization and the hiding of a terrorist in 1996. After 2001, the acts foresee the confiscation in part or in total of the property of indicted terrorists and criminalize the financing of terrorist groups. Finally, the 2006 Act hardened penalties for masterminds of terrorist plots and for assistance to such plots. Terrorist criminals also risk forfeiture of civic, civil and family rights, prohibition of certain professional activities or area banishment under the Penal Code.[74]

Investigating authorities, for their part, were conferred more room for manoeuvre. Indeed, before 2001, only random identity checks were allowed. A special procedure was also put in place for major witnesses. The 2001 Act extends investigatory powers by adding a disturbing list of new measures available to police forces: car searching, preventive search of airplanes and vehicles, search capacities for private security agents, and inclusion of hearings of anonymous witnesses as evidence for prosecution. Launched in 2001, the ability to home search and seizure without the owner's consent during a preliminary enquiry was widened. Preliminary investigations were created, for an indefinite length, during which searches may be carried out secretly; police has the right to tap phone lines, filter networks, set microphones and cameras. Finally, the bill gives rise to wide-ranging procedures to freeze assets.[75]

E. ALIENS LAW

Non-French citizens and ethnic minorities have been acutely targeted by law enforcement agencies, above all those of Muslim obedience living in the suburbs. Aliens' rights have been curtailed in the name of anti-terrorism protection. The law now requires a longer lapse of time before the naturalization request. Moreover, naturalized convicted terrorists risk losing the French nationality; whereas aliens face banishment from the French territory, permanently or for a period of 10 years. Discrimination against aliens in France similarly hits minorities. Since the rhetoric aims at fighting against terrorists within and outside the country - because it is believed that religious radicalization finds a fertile soil in France - minorities are the first target. Law enforcement squads are regularly accused of acting on a *faciès* (facial aspect) basis. Localized in special zones, the methods used by special investigation and police units (brutality combined with a stream of insults) provoke much resentment in the French suburbs.[76] To be sure, the 2006 Act was in the pipeline before the London attacks in July 2005 and addresses naturalization. Drafted by the then Minister of Interior, Nicolas Sarkozy, it forces foreign nationals to wait 2 years before they apply for French nationality. Naturalized persons convicted of terrorism within 15 years following their naturalization may be deprived of French nationality (as opposed to 10 years under previous law). Foreigners who are convicted for terrorism may be banned from French territory permanently or for a period of maximum 10 years.[77] The problem with these measures is that they transform suspicion into routine and, as a consequence, breed social incohesion.

71 Criminal Code, Article 421-1.

72 Didier Bigo, Colombe Camus, *General Overview of the French anti-Terrorism Strategy*, pp. 9,11, 54.

73 *Ibid*, p. 10 ; Meryem Aksu *et al.*,*Strafrechtelijke antiterrorismemaatregelen*, p.39.

74 Meryem Aksu *et al.*,*Strafrechtelijke antiterrorismemaatregelen*, pp. 35-40.

75 *Ibid.*

76 Ligue Des Droits De L'Homme, *Bilan d'une législature sécuritaire : cinq années de recul de nos libertés*, May 2006, http://www.ldh-france.org/media/actualites/recuLsecuritaire.pdf (accessed May 27th, 2007).

77 *Ibid*, p. 40 ; Didier Bigo, Colombe Camus, *General Overview of the French anti-Terrorism Strategy*, p. 54.

F. CONTROL MECHANISMS

Few checks on anti-terrorist legislation and implementation exist within the French political system. This is due to the fact that the Parliament's enactment of law proposals by the executive has an automatic form. The 2006 Act however provides for a review of the most sensitive measures through a *'rendezvous'* clause: an evaluation by the Parliament in 2008. But only Articles 3 (random identity controls), 5 (conservation of communication data) and 8 (movement controls and their registration) are being directed at.[78] An independent body, the National Commission for Computing and Liberties (CNIL), is entitled to give non-binding advice on matters relating to personal data filing and use. In this context, it has frequently raised doubts concerning the relevance of compiling data on movements on the territory.[79]

Table V. Main Counter-Terrorism Laws in France

Piece of Legislation	Relevant Norms
ANTI-TERRORISM LAW (Law No. 86-1020)	Definition of terrorism Increased penalties Postponement of lawyer intervention Random identity checks
LAW NO. 96-647	New offences: conspiracy to commit terrorism, membership, hiding terrorist
LAW ON EVERYDAY SECURITY (Law No. 2001-1062)	Development of investigator powers - car and house search, preventive search of transport confiscation of property Extension of terrorist offences and link with intention
LAW PERBEN II (Law No. 2004-204)	Secret procedure for preliminary investigations
LAW NO. 2006-64	Postponement of custody and lawyer access Incommunicado detention Longer sentences Clause on naturalization and loss of nationality Movement controls, video surveillance Access to authorities files for investigators Forfeiture of rights Banishment of convicted aliens

Source: Meryem Aksu et al., Strafrechtelijke antiterrorismemaatregelen, pp. 35-40

G. BALANCING HUMAN RIGHTS PROTECTION AND SECURITY PROVISIONS

As in United Kingdom, the political discourse in France has tilted the balance between security and liberty - in favor of the former - to promote exceptional measures against terrorism. Yet by all standards, it seems that French citizens have faced less human rights violations than the British. It is then logical that the barrier between provision of security and human rights protection started to wane and that the French legislator began to enact borderline rules. These regulations affect several areas of fundamental freedoms.

The first conflicting domain is the ban on arbitrary detention. The 2006 legislation broadened the period for preventive custody without charge, giving all leeway to the police forces to act as they deem it necessary. Moreover, the possibility to be kept incommunicado during four days raises serious concerns about the likelihood of ill-treatments, as both judicial oversight and legal counsel lack. The Paris Anti-Terrorism Unit, for instance, led 93 operations during the year 2005, arresting about 1,000 suspects. In November 2005, Nicolas Sarkozy lauded the achievements since 2002 in the battle against terrorism: Out of the 367 persons questioned, 100 have been indicted and imprisoned, 50 -- among whom 12 were hatred-glorifying imam -- have been expulsed for administrative reasons.[80] Looking carefully at those figures, however, a distortion clearly appears. Not all suspects are questioned (1,000 arrests in one year against 367 persons questioned in 3 years), which shows a strong preference for arrests notwithstanding the gaps of corresponding charges. Further, these data also reveal the high price paid by inhabitants of the suburbs who are

78 *Ibid*, p. 55 ; Loi No. 2006-64 du 23 Janvier 2006, Articles 3, 5 and 8.

79 Didier Bigo, Colombe Camus, *General Overview of the French anti-Terrorism Strategy*, p. 63.

80 Didier Bigo, Colombe Camus, *General Overview of the French anti-Terrorism Strategy*, pp. 43-44.

overburdened by police arrests and searches, and the systematical withdrawal of their arrests from official statistics: According to the 2007 Report of Europol, France arrested 342 suspects in 2006 with relation to terrorism offences. Among those, 139 persons were linked to the so-called Islamic terrorism; others had ties with separatist or left-wing spheres of influence.[81] Moreover, the right to due process is put under pressure by certain provisions of the latest bills. The suspect may not be informed of his/her right to remain silent upon arrest. In addition to the ignorance of the right not to cooperate with police, the suspect may be deprived of a legal assistance during 4 days. It appears that during these 96 hours of detention, suspects face a great risk of acting against their defense. Moreover, the provision for the hearing of anonymous witnesses impedes a proper defense and opens the door to weak quality proofs. In 2006, 21 persons were tried on terrorist charges and all have been convicted. Actually, the sentences did not convict people for killings but rather for conspiracy to prepare a terrorist activity in conjunction with other charges. One person was condemned to 20 years imprisonment, five others to 17 years, with an average of about 9 years.[82]

Finally, the right to privacy is, in many ways, potentially infringed by recently adopted investigation techniques. The ample research powers allotted to investigators since 2001 enable them to scrutinize a very broad series of data. The hazard introduced by these research devices lies in their random character. Police forces can basically control a considerable amount of everyday deeds: For example, preventive search in planes or vehicles, car search, house secret search and tapping or video recording, movement controls of cars and other transportation means as well as their passengers, video surveillance of public spaces. The most puzzling clauses sit in the preventive aspect of the search, as well as their random feature, as they may produce severe drawbacks. In this light, CNIL has warned the government of the dangerousness of the scale of these techniques and their computer recording. Indeed, it fears that putting data records and video records at the disposal of the police without the consent of a judge is "likely to outline in a systematic and permanent way a large part of the population in its movements and in some actions of daily life."[83] The computer processing of these data furthermore exposes systematic private information to the malevolence of computer hackers.

COMPARISON BETWEEN UNITED KINGDOM AND FRANCE

The major difference between France and United Kingdom lies in their experience with terrorism. United Kingdom's peculiarity -shared with Spain- is that they are the only European states that have been hurt by large-scale terrorist attacks after 2001. France has been hit regularly by the so-called Islamic terrorism for the past 20 years. These experiences shaped two distinct anti-terrorist blueprints. The French policy was initiated to respond to a terrorist upsurge in 1986 and followed a pragmatic path since then, aiming at improving the capacities laid down by the cornerstone 1986 Act. United Kingdom's policy developments are more in line with the international context. These diverging experiences have implications in terms of objectives and approaches: United Kingdom will more likely target aliens *and* more likely intervene abroad, whereas France is rather inward-looking and concerned by insecurity in the suburbs.

Despite dissimilar rationales, a variety of convergences in operational methods can be identified. First, they both pay much attention to the prevention of terrorism and the fight against extremism. In addition, both countries favor partnerships with the Muslim community to marginalize radicals, including a special attention to coach imams working in prisons. Second, technology is increasingly used for investigation in both states. France used to rely on human intelligence in the past, but recent laws offered intelligence services extensive capabilities to use new technologies in their enquiries. The French model based on human intelligence is incrementally being replaced by a model of 'technology intelligence' (allowing for techniques such as profiling and alleviating field enquiry) used in most Western countries. Third, France and United Kingdom tackle aliens' issues through trying to restrict naturalization regulations and their stay or entry on national territory. Applicants for citizenship now have to wait longer (in France) or pass an array of tests (in United Kingdom). Convicted terrorists will face banishment, deportation or loss of nationality depending on the country where they originally come from. Fourth, discrimination against citizens or Muslim minorities is massive in both countries. Muslim communities have paid a high price for the terrorist activism of a tiny fraction. Muslims are much more likely to be arrested than other individuals. In France, this trend displays a disproportionate burden on the inhabitants of suburb - where most Muslims live. This leads to a self-fulfilling policy: Based on the overrepresentation of suburb population in police statistics, the government views them as a permanent menace to state security.[84] As a consequence, the strain on the 'enemy within' the state increases social polarization and largely imperils social cohesion (which in turn may breed defection and insubordination).

81 EUROPOL, EU Terrorism and Trend Report 2007, The Hague, March 2007, p. 14.

82 *Ibid.*, p. 15-17.

83 Didier Bigo, Colombe Camus, *General Overview of the French anti-Terrorism Strategy*, p. 63

84 *Ibid.*, p. 44.

If France's social unity liquefies under the fire of counter-terrorist policies, in United Kingdom it is human rights that find themselves under intense strain. The government has indeed not hesitated to take the measures it deemed necessary to impose public security, irrespective of their proportionality. The most critical issues consist in the following: 1) The detention period without warrant (28 days after the Parliament refused to enact 3 months) is the longest in Europe; 2) The ban on torture has suffered severe infringements with regard to deportation or evidence hearing; 3) The right to life comes after public safety according to the shoot-to-kill doctrine of Scotland Yard; 4) The right to a fair trial is breached by the permit of closed hearings which exclude the defendant's presence; and 5) Freedom of speech faces restraints due to the 'encouragement of terrorism' clause. United Kingdom, by contrast, presents more complete checks on human rights transgression than does France. In London, an independent reviewer drafts regular reports on counter-terrorism policy and the state of human rights protection. His reports help the Houses in their oversight of the executive's actions. So far, the procedure performed well and both Houses have already sanctioned government for its abuses. Despite the Houses' disapproval, however, the government has not managed to drastically reduce its human rights violations. It is on the contrary pressing for more limitations on liberty. In France, checks on government are less efficient but the latter has shown a higher, if at surface, commitment to live up to its human rights commitments.

III. Conclusion

This paper started with one aim in mind: To review the developments of security policies in a comparative perspective - Turkey, United Kingdom, and France - and assess the extent to which they impact human rights and civil liberties. Thus, this paper has argued that the tension between human rights and security originate mainly from the fact that the concept of security is often perceived as the security of the state. However, in our view, security should come after human rights. To put it otherwise, the state is a service instrument that secures all rights and liberties of individuals including the right to security. Therefore, speaking about the security of the state without mentioning the security of an individual (or individuals) will infer that states also have rights. In other words, states do not have rights *per se* but duties and responsibilities, and the security of the state is primarily a tool that is employed to safeguard the security of the individual. Therefore, the concept of security as well as the perception of security must be equipped to human rights. In sum, a state-centered approach to security must be abandoned in order to amplify human-centered security policies.

In fact, many would have us believe that the seriousness of the threat justifies 'exceptional measures' that are neither proportionate nor in compliance with human rights and civil liberties. This is a perilous posture for liberal democracies. The trouble, in fact, is that measures promoted by the three countries examined above may, if not checked carefully, undermine the values that EU considers crucial to its own identity. This, without doubt, will be a serious policy failure, perhaps more serious than the terrorist threat itself.

The security of the states has always been considered more important than the security of citizens. Therefore, the states have taken extraordinary measures and made exceptional arrangements when they perceived a threat against their security. While the United Kingdom, France and other Western countries laws restricting human rights for the sake of their fight against terror mostly after 9/11, in Turkey the relationship between human rights and security seems to have been problematic right from the beginning. In fact, Turkey has been governed by extraordinary regimes for years, on the grounds of security. These regimes aggravated, facilitated and led to the permanence of human rights violations. Extraordinary regimes have almost become the rule in Turkey. They are not exceptional and temporary anymore; they have rather become a permanent rule. However, in recent years, while Turkey changed its policy by improving its legislation and practices to secure human rights as part of the EU harmonization process, the United Kingdom and France started to move in the other direction. The developments in Western countries, especially in these two countries, had a negative impact on the process in Turkey. While Turkey had made improvements under the influence of the West, and especially the EU, in recent years, the regression in human rights protection in the EU urged Turkey to become introvert once again and to return to its security-oriented model. The proponents of the supremacy of security in Turkey cite the negative precedent set by the EU and Western democracies when faced with demands for enhanced liberties.

IV. Policy Recommendations

FRANCE AND UNITED KINGDOM

- France and United Kingdom should make clear that the measures undertaken do not result in social incohesion. In this context, the prevention of radicalism must not become an opportunity for law enforcement authorities to target minorities.
- To be a democracy comes with huge responsibilities. France and UK should therefore take appropriate steps in order to avoid that their policies do not give a disastrous example to Turkey or any other third country.
- In France, CNIL should be given more means to act as swiftly as possible in the best interest of citizens. Its recommendations should be given a binding effect.
- The United Kingdom government should be cautious not to undermine its reputation as far as human rights are concerned.
- The law of exceptions passed in France and United Kingdom should be limited in time.

TURKEY

- In order to transform state security into human security, individuals should be enabled to exercise their rights to participate in the government and to hold it accountable. This can be possible only if the relationship between the parliament and the government improves and the former has power and authority over the latter, and the government over all administrative organizations including the ones responsible for security.
- Radical reforms in Law on Political Parties and Elections Law should be undertaken to eliminate the control of the leadership of political parties over the selection of candidates who run in parliamentary elections. This would enable members of parliament to express their views freely and vote in accordance with their own opinions.
- The draft bill and proposals should be sent to the Parliament, and consequently, to the relevant committee in due time to give committee members the opportunity to duly study them. In the meantime, non-governmental organizations and the public should be enabled to actively participate in the legislative processes and a mechanism should be created to facilitate such participation.
- The Parliament should be restructured so that it can supervise the conformity of laws with human rights. To this end, at the minimum the Human Rights Investigation Committee could be given the duty to inspect the conformity of draft bills and proposals with international human rights documents Turkey is party to.
- Law enforcement and judicial officers should be trained to ensure that they observe human rights in performing their duties.
- Law-enforcement officers who breach the laws and violate human rights should not be provided with impunity. Especially, effective investigation mechanisms should be established and maintained for officers involved in torture and extrajudicial killings. The trials of these officers should be transparent and effective.