

THE YALE JOURNAL OF WORLD PUBLIC ORDER

Volume 9, Number 1, Fall 1982

Security of the Person and Security of the State: Human Rights and Claims of National Security

Foreword

In modern times, governments almost invariably invoke the concept of national security to justify restrictions on the rights and freedoms of persons subject to their jurisdiction. The claimed threat to national security varies—external attack or subversion, internal unrest and violence, and economic crisis are commonly cited menaces. Sometimes, governments will claim multiple threats of a highly diffuse nature to justify wholesale suspension of the constitutional order.

Ironically, the power of the ideology of liberalism and human rights has led to the dominance of national security as the rationale for repressive measures. In the past, racial or religious superiority, divine right, or scientific authority were the dominant justifications for tyranny or repression. The triumph of liberalism as the accepted language of international discourse rendered these justifications rhetorically obsolete. Liberalism allows restraints on freedom only on the basis of widely shared and compelling public interest that transcends the particular interests or claims of the ruling elite. The concept of national security meets liberalism's requirements. It invokes the interests of the nation, the widest community under a government's jurisdiction, and it appeals to security, the most compelling of all public interests.

Modern constitutions and international human rights instruments recognize the legitimacy of governmental restrictions on personal freedoms when national security is genuinely threatened. In certain instances, governments perceive a true threat to national security and adopt reasonable ameliorative measures. In many cases, however, the threat is exaggerated or concocted and the restrictive measures are excessive or unwarranted. Differentiating among these situations has

proved to be a difficult task for both domestic judiciaries and international observers.

One major problem is informational. To evaluate the factual basis for a claimed threat to national security and to determine the reasonableness of restrictive measures, judges or observers must have access to reliable data on both the alleged threat and the actual measures employed by the government and its agents. Collecting this data is difficult for all but the national security branches of the government under scrutiny.

The concept of national security is, moreover, emotive and politically charged. Governments can easily manipulate public opinion through the selective release of information and appeals to popular fears and prejudices. Judges or international observers are often unwilling to question the authenticity of governmental factual claims on such sensitive matters. They may also be reluctant to evaluate the policy judgment of national security officials, particularly when the standards for assessing national security claims are indeterminate.

Finally, even if governmental claims are critically evaluated, securing a change in behavior when a government has staked its political program on a threat to national security can be difficult or impossible. For these reasons, national security has become the soft under-belly of liberalism and human rights.

In an effort to analyze current approaches to the evaluation of national security claims and related infringements on human rights, and to suggest improvements in these approaches, the Allard K. Lowenstein International Human Rights Law Project convened a symposium at the Yale Law School in April, 1982, entitled "Security of the Person and Security of the State: Human Rights and Claims of National Security." The Project posed the following questions to symposium participants:

1. What are the claims advanced by state officials when restricting the freedoms and liberties of individuals on the basis of a threat to national security, and what underlying circumstances are attendant to such claims?
2. What policy justifications reasonably may be offered to support derogations from human rights?
3. What restrictions should, in such circumstances, constitute a violation of human rights?
4. What, until now, has been the approach of domestic and international decision-makers to the analysis and resolution of contending national security and human rights claims?
5. What ought the appropriate response of the international community be?

Security of Person and State

The papers published in this issue of the *Yale Journal of World Public Order* are the product of that symposium.

Professor Tapia-Valdés' paper addresses the first of these questions. In developing a typology of the relationship between national security and human rights claims, Professor Tapia-Valdés distinguishes three types of national security policies: (1) an outward-oriented policy addressing itself to external threats of the traditional variety; (2) "national securitism," under which a broad range of national policies are directed at securing the nation from exaggerated external and internal subversive threats; and (3) an inward-oriented policy directed by the military and aimed at purifying the national life of alien moral and political influences. In a state with an outward-oriented national security policy, civil rights and liberties are effectively protected by the domestic constitutional order, and derogations from human rights norms are strictly confined. A government following a policy of national securitism is likely to retain the formal trappings of constitutionalism, but, because the executive branch is so dominated by national security concerns, only the courts are available to protect individuals from arbitrary actions, and then only in cases of extreme misbehavior. Finally, in a state pursuing an inward-oriented national security policy, pervasive violations of human rights are committed by an executive branch uncontrolled even by the courts; complaints about government behavior can be made only in international tribunals. Professor Tapia-Valdés argues that international fora are unlikely to prove effective in controlling human rights abuses in these latter circumstances, where, regrettably, they are desperately needed.

Professor Tapia-Valdés' typology apparently does not apply to human rights infringements in Communist countries or in the countries of Asia and Africa where the traditions of liberalism are not deeply ingrained in the national culture. The inward-oriented national security type, which might be thought to apply to states in which human rights are pervasively repressed, is militaristic in nature. It aims at eradicating the insidious effects of the liberal tradition rather than imposing revolutionary change. "National securitism" is apparently a perversion of a liberal democratic state and does not extend to states without democratic traditions. We may gather from his footnotes that Professor Tapia-Valdés believes that the United States belongs to this category. But where do countries like Cuba and Singapore fit into this scheme? Such countries, too, often justify human rights infringements on national security grounds.

For Professor Adda Bozeman, it is countries apparently excluded

from Professor Tapia-Valdés' analysis—countries where Marxism-Leninism is the prevailing ideology, or non-Western states where the fundamentally European ideology of human rights and democracy is paid only rhetorical obeisance—which pose the most serious problems for the pursuit of policies favorable to civil and political rights. In her view, attempts to impose Western conceptions of human rights on such states are likely to lead to strategic confusion and counter-productive do-goodism. Indeed, she argues, propagating Western notions of democracy and individualism in countries like Singapore and South Korea may seriously undermine reasonable governmental efforts to achieve security through the reassertion of trusted values and institutions.

As Professor Bozeman recognizes, however, much of her argument is contrary to prevailing international legal trends: since the end of World War II, states increasingly have bound themselves in domestic law and international instruments to norms allowing limited derogations from human rights only where national security is genuinely threatened. Even if Professor Bozeman's advice were accepted and certain states designated as beyond the proper scope of these norms, the problem of applying the norms to Western states would remain. And while she may think Western power should not be engaged in the promotion of human rights in certain developing and Marxist-Leninist states, many of these same states have made themselves subject to the jurisdiction of international supervisory bodies. Thus, the problems of evaluating national security claims and human rights derogations remain compelling.

The next three authors evaluate the jurisprudence of three bodies that must reconcile national security and human rights claims. Professor Emerson's paper analyzes and criticizes the jurisprudence of the U.S. Supreme Court; Professor Schreuer's paper analyzes and generally applauds the decisions of the European Commission and Court of Human Rights; and Mr. Walkate's paper reviews the work of the United Nations Human Rights Committee in implementing the International Covenant on Civil and Political Rights. These papers recommend several devices that can aid judges or other decision-makers in the discharge of their responsibility to evaluate national security claims and restrictive measures.

One device is to impose on governments the burden of proof in demonstrating the existence of a specific threat to national security. Professor Emerson calls this an "equalizing principle" necessary to protect individual liberties against the pressure of a governmental claim of a

threat to national security. He suggests that the Supreme Court should view such claims by the executive branch with “a healthy skepticism,” given the propensity of governments to claim national security to protect the narrower interests of officials. Professor Schreuer notes that in the 1969 *Greek Case* the European Commission put the burden of proof on the Greek government to demonstrate the existence of legally prerequisite conditions for derogating from human rights norms, and suggests that governments invoking a national security threat should be required automatically to supply proof of the emergency. Mr. Walkate similarly concludes that the Human Rights Committee should require states to substantiate their claims of national security threat.

The imposition on governments of the burden of proving the existence of a national security threat adequate to justify restrictions on freedoms and the evaluation of such claims with “healthy skepticism” are jurisprudential measures with a sound basis in policy. After all, the invoking government is likely to be the only entity that systematically can gather information on threats to national security. Proving the absence of a security threat is not only epistemologically difficult; it may be a practical impossibility for outside observers or plaintiffs challenging restrictive measures. Yet the Supreme Court, as Professor Emerson points out, has often adopted just the opposite approach to national security claims by the U.S. government. Similarly, in international discourse outside of the bodies discussed in these papers, the burden of establishing the vacuity of those claims is often placed on critics of government claims of national security. Reversing this tendency would appear to be fundamentally important to the development of an effective jurisprudence of national security claims.

Another approach to evaluating national security claims is suggested by Professor Schreuer and Mr. Walkate and was urged in symposium discussion by Professor Thomas Franck and others. That approach is to monitor strictly compliance with the procedural requirements of international instruments. Professor Schreuer suggests that non-compliance with the notification requirements of the European Convention should provide *prima facie* evidence of governmental bad faith. He also proposes the establishment of a permanent supervisory mechanism over parties derogating under the Convention. Mr. Walkate urges that the Human Rights Committee demand scrupulous fulfillment of the procedural requirements of the Covenant.

One advantage of this procedural emphasis is that it requires governments to detail the reasons for restricting human rights as well as the precise limits which have been placed on freedoms. This enables indi-

viduals to conform their conduct to the local law and limits the discretion of subordinate officials. Furthermore, the interplay between the dissemination of such information and global political forces opposed to human rights infringements may cause a more rapid lifting of the restrictions. Finally, as Professor Franck noted during symposium discussion, an important advantage of monitoring compliance with the procedural requirements of human rights instruments is that such monitoring need not involve human rights bodies in criticizing fundamentally the political systems of states invoking national security justifications. Monitoring procedural compliance enables human rights bodies to transcend the ideological gulf between Communist and non-Communist states, and thereby enhance, it is hoped, the observance of human rights norms in the former. Monitoring of procedural compliance also allows human rights bodies to finesse difficult substantive questions of when it is legitimate to invoke a national security claim and what freedoms legitimately may be infringed by invoking governments.

These substantive questions are, nonetheless, at the heart of the national security and human rights problem and cannot be resolved merely through the application of jurisprudential and procedural devices. Symposium participants thus also focused their attention on defining a security threat justifying human rights derogations and on delineating which rights could be limited in particular circumstances. Professor Alan Dershowitz noted that, at least in theory, one could imagine a proportional scale of national security threats and legitimate human rights limitations; the more severe the threat, the harsher allowable deprivations could be. Framers of the international human rights instruments have confined this scale at its extremes by defining the minimum national security threat required to justify any derogations from the rights provided and by delineating certain rights which under no circumstances may be infringed. This approach was generally approved by conference participants, although specific inadequacies were identified. As Professor Schreuer points out in his paper, the European Commission and Court of Human Rights have found it somewhat difficult to apply the requirement of the European Convention that there be present a "public emergency threatening the life of the nation" to justify derogations from specified rights. The United Nations Human Rights Committee seems to have had similar difficulties applying the analogous provision in the International Covenant. The most difficult case appears to be Northern Ireland, where the security threat is palpable but does not threaten the life of the entire nation, that is, the United

Security of Person and State

Kingdom. The working definition of the national security threat justifying derogations will likely evolve along the lines suggested in Professor Schreuer's paper as actual cases arise.

The task of defining non-derogable rights has also proved to be a continuing one. As governments devise new ways to terrorize their citizenry, international law responds by defining new non-derogable rights. Kamal Hossein's paper discusses important recommendations in reports by the International Commission of Jurists and the International Law Association based on analyses of current practices in states of emergency or exception.

If a state has legitimately invoked a national security threat and is not derogating from non-derogable rights, the task of determining the legitimacy of limitations on rights and freedoms becomes even more difficult. Concepts like proportionality and strict necessity have proved useful to the European Commission and Court of Human Rights. Professor Dershowitz implied that deprivations could be analyzed dimensionally: on the vertical axis, one determines the degree of infringement of the rights of persons targeted by the government, while on the horizontal axis, one examines whether the infringements are excessive in terms of the breadth of the population sectors subjected to them. Beyond that, symposium participants generally believed that close attention to contextual factors was the best advice they could offer to observers responsible for analyzing and evaluating national security claims and human rights infringements.

Professor Kevin Boyle's paper examines in depth the situation in Northern Ireland and the response of British governmental organs and of the European Commission and Court of Human Rights to human rights abuses. Professor Boyle highlights the special importance of effective international human rights agencies in situations in which domestic courts are subject to the control of the majoritarian branches of government. He also outlines a relatively new problem in human rights protections in times of civil strife, the control of police use of deadly force. Professor Boyle made a particularly interesting point during symposium discussion: when civil strife is present, effective human rights protections are also effective anti-terrorist measures. To maintain popular support and inhibit terrorist recruitment, governments must resist the employment of harsh and degrading measures. Professor Boyle's point suggests that effective international human rights norms, by inhibiting governments from responding to pressure for harsher anti-terrorist measures, may themselves make for more ef-

fective anti-terrorist policies. Human rights and law and order thus need not be in opposition; rather they are complementary policies.

As Professor Leon Lipson noted in symposium discussion, concentration on derogations under states of emergency may lead observers to overlook permanently derogating states. These states derogate from human rights not to cure any temporary national security threat, real or imagined, but because their basic organization and ideology requires such derogations. Professor Jordan Paust's paper examines just such countries. He argues that only states whose politico-ideological processes match those of a democratic society legally may invoke limitations on rights and freedoms. Moreover, he finds that such documents as the Universal Declaration of Human Rights give this requirement rather specific content. One-party states, for example, would not meet the requirement he identifies.

Professor Bassiouni's paper proposes strengthening the enforcement of human rights norms by establishing international criminal sanctions for human rights violators. Professor Bassiouni reviews the process by which criminally-sanctioned international norms develop and suggests that certain human rights norms are at the stage where criminalization might emerge. Nonetheless, he urges, caution should be exercised lest criminalization occur in the absence of effective enforcement mechanisms. He suggests the development of mechanisms to enforce narrow classes of violations, perhaps on a regional basis, before official conduct is made criminal. Mr. Hossein suggests an alternative enforcement mechanism; the creation of a new multilateral credit facility that would condition loan approval on ratification of and compliance with the International Covenant on Civil and Political Rights.

In light of the papers and discussion at the symposium, what areas might fruitfully be explored better to understand the relationship between national security and human rights? One important connection deserving examination is the relationship between human rights norms and police expertise regarding the suppression of security threats. Professor Boyle alludes several times to the empirical results of measures adopted by the security forces in Northern Ireland, but most symposium participants were ill-equipped to judge the efficaciousness of various police practices. Clearly, human rights specialists need to be able to demonstrate that human rights protections are consistent with efforts to maintain civil order. Even more important, human rights specialists might be able to enlist security experts in the struggle for effective human rights protections.

It seems unlikely, after all, that states in most areas are soon going to

Security of Person and State

surrender the degree of sovereignty necessary for truly effective human rights protections. Other approaches must be explored. Perhaps conscientious security officials share Professor Boyle's view that human rights and effective security policies are mutually supportive. The regularization of police work and the inculcation of respect for human rights might create important bulwarks against certain repressive measures. As Professor Leon Lipson noted, the most important human rights document in most countries is the code of criminal procedure. Perhaps a future symposium will explore in greater detail the relationship between effective security measures and human rights protections.

Michael A. Jacobs, Chairperson,
Allard K. Lowenstein International
Human Rights Law Project, 1981-
82