Challenges, risks and threats for security in Europe

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ANDREAS KELLERHALS, TOBIAS BAUMGARTNER

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Taking Public Interests Seriously? Security as a Legitimate Aim in Constitutional Adjudication in Russia

ALEKSEI V. DOLZHIKOV

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I. Introduction

1. Statement of problem

Security is one of the widest and open-ended concepts. Each discipline focuses only on its particular aspects. Global constitutionalism recognizes security as a public aim that justifies interference with constitutional freedoms. At the same time security is a basis for broad discretion of governmental bodies. In constitutional adjudication, security is part of

the proportionality analysis, which requires to test the legitimacy of public objectives. Most often, the security issues arise in "hard" cases concerning the measures to combat terrorism, illegal migration, and other risks of the modern era. The proportionality principle itself has been studied in great detail[1] and is being considered as evidence for the emerging global constitutionalism.[2] At first glance the requirement of legitimate aim is a simple exercise for the courts and an easy test to pass for governments especially for introducing security measures. Therefore, this sub-principle of proportionality didn't receive proper attention in the doctrine.[3] Security analysis as a legitimate aim could fill this gap and bring added value to the academic discussion.

Although, how could the experience of the Russian Federation be useful in this context? Some doubts are cast upon it with regards to the explicit recognition of this country as a main threat of the Common Foreign and Security Policy in Europe. Russia has demonstrated during its transition period from a soviet system different models dealing with a balance between security and fundamental freedoms in constitutional adjudication. It evolved from taking a more liberal approach during the establishment of the Constitutional Court of the Russian Federation in the early 1990s to a more conservative model in its modern case-law. The main argument of the paper was put in the title by rephrasing Dworkin's famous metaphor on rights as trumps.[4] Constitutional adjudication as a guiding institution of the Russian legal system is characterized by overestimation of weight, which is attached to public interests. Moreover, when being

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[1] Barak Aharon, Proportionality: constitutional rights and their limitations, Cambridge: Cambridge University Press, 2012; Jackson Vicki C./Thushnet Mark (eds.) Proportionality: new frontiers, new challenges, New York: Cambridge University Press, 2017; Francisco Urbina J., A critique of proportionality and balancing, Cambridge: Cambridge University Press, 2017.

[2] Stone Sweet Alec, Mathews Jud, Proportionality balancing and global constitutionalism, Columbia Journal of Transnational Law, 2008, vol. 47, pp. 72–164.

[3] Gordon Richard, Legitimate Aim: A Dimly Lit Road, European Human Rights Law Review, vol. 7, 2002, no. 4, pp. 421–427; Engel Christoph, Das legitime Ziel als Element des Übermaßverbots. Gemeinwohl als Frage der Verfassungsdogmatik, In: Brugger (hrsg.) Gemeinwohl in Deutschland, Europa und der Welt, Baden-Baden: Nomos-Verl.-Ges. 2002, pp. 103–172.

[4] Dworkin Ronald, Taking rights seriously, Cambridge: Harvard University Press 1977, p. XI.

viewed as analogous to playing cards security is not even seen as a trump, but rather as a joker which is able to justify any wide interference with most fundamental individual freedoms. In this sense, the case-law of Russia can be relevant for the difficult strategic goal-setting of Europe itself, which faces such powerful internal enemies as right-wing populism and the denial of the fundamental values of liberal democracy. Thus, the aim of this paper is to provide an analysis of security as a legitimate aim in constitutional adjudication in Russia.

2. Paper structure

The structure of the paper is as follows. It starts in *the second section* with a short overview of the social context of security in Russia. Socialist tradition demonstrates that the overemphasizing of the importance of security and other public interests could lead to the serious violations of constitutional rights. *The third section* of the paper presents two methodological approaches to the balance between constitutional rights and security. The early case-law of the Constitutional Court of the Russian Federation reflects rare examples of trumping constitutional rights for security reasons. In this section the author also argues that the modern case-law of the Constitutional Court could be described as trumping public interest in general and security policies in particular over most fundamental individual freedoms. Finally, the *forth section* of the paper analyses different models of intensity of judicial review from minimum to maximum scrutiny. The core argument of this paper is that scrutiny of public aims should depend on several factors such as the need for ad hoc balancing in both an historical and social context; the status of the decision-maker; the importance of the right concerned; the subject-matter of the dispute; the need for budget funding; fact-finding and burden of proof; decision-making in good faith.

II. Security in the Social Context of Russia

Security, like any public aim justifying the limitation of fundamental rights, cannot be understood outside the social context of certain society. For analysis of security in Russia one should take into account the survival of the socialist legal tradition.[5] For example, a recent public opinion survey conducted by the Levada Center, a major independent pollster showed that more than 70 % of Russian evaluate positively the historical role of Stalin who built policy by way of combating an "enemy of the people"[6] (Russian: vrag naroda). More specifically almost half of the citizens in 2019 think that the human sacrifices that people suffered in the Stalin era were justified by the great goals and outcomes that were achieved in the shortest possible time.[7] There are also the factors of the positive image portrayed of a bloody dictator who allegedly managed most challenges in internal and external security influences indirectly, the legal order, as well as constitutional adjudication.

Public opinion polls also indicated that security issues were less valued than issues adhering to social welfare. The main complaints of the majority of citizens (57%) regarding the current government is its failure to deal with rising prices and falling incomes. Only a small number of respondents (9%) believe that the government cannot ensure the security of citizens and protect them from terrorist attacks.[8] Therefore it can be deduced that citizens think government agencies are good at dealing with the main challenges to national security.

Using the analogy with the well-known metaphor of R. Dworkin, security and other public interests in Russia could be considered as a trump card

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[5] Manko Rafal, Survival of the socialist legal tradition? A Polish perspective, Comparative Law Review, 2013, vol. 4, no. 2, pp. 1–28; Uzelac Alan, Survival of the Third Legal Tradition?, Supreme Court Law Review, 2010 (2d), vol. 49, pp. 377–396.

[6] Goldman Wendy Z., Inventing the enemy: denunciation and terror in Stalin's Russia, New York: Cambridge University Press, 2011.

[7] Levada Center. <https://www.levada.ru/2019/04/16/dinamika-otnosheniya-k-stalinu/>

[8] Levada Center. <http://www.levada.ru/sbornik-obshhestvennoe-mnenie/obshhestvennoe-mnenie-2018/>

in their conflict with the private ones. Accordingly, the main argument here is that social context and the long-standing Russian tradition of deference to security measures presupposed the high priority of public interest in comparing the individual freedoms.

III. Rights as Trumps vs. Security as Trump

1. Rights as Trumps?

In his book "Taking rights seriously" and a little bit later in a separate article,[9] R. Dworkin makes the powerful argument pro-western constitutionalism of rights as trumps. "Rights, – in the view of legal philosophers, – are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole".[10] This argument is a reaction to the ideology of utilitarianism, which highlights the happiness and welfare of the community as a supreme goal of politics. From this point of view a communist system had tried both to utilize general welfare and to neglect individual rights as the founder of utilitarianism J. Bentham did.[11]

Accordingly, as an antithesis to the complete neglect of individual liberty in soviet time the art. 2 Constitution of the Russian Federation from December 12, 1993[12] (Constitution) should be interpreted, which stated that "the human being, its rights and freedoms are the supreme value. The recognition, compliance with and protection of the human rights and freedoms of the citizen are the duty of the State". This constitutional provision seems to be an idealistic declaration rather than a directly applicable rule, especially in the light of the very wide discretion given to

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[9] Dworkin Ronald, Rights as trumps, in: Kavanagg, Oberdiek (eds.), Arguing about law, London; New York: Routledge, 2009, pp. 335 - 344.

[10] Ibid. P. 335.

[11] Bentham Jeremy, Anarchical Fallacies; Being An Examination of the Declarations of Rights Issued During the French Revolution, in: Bowring (ed.) The works of Jeremy Bentham, vol. 2, Edinburgh, London, 1843, pp. 489 - 534.

[12] Russian Gazette [Rossiiskaia gazeta] of 25 December 1993.

the legislative power by general statutory clause (art. 55.3 Constitution). Under the latter "state security" among other public interests gives the power to the Federal Assembly of the Russian Federation to limit constitutional rights, although "only to the extent necessary".

Recognition of rights as trumps, particularly in the connection with national security, is extremely rare in Russian constitutional adjudication. One could find the application of such a liberal doctrine only in the early case-law of the Constitutional Court of the Russian Federation. An example of such is the Judgment of 14 January 1992 no. 1-P-U which concerned the creation by Decree of the Russian President of the Unified Ministry of State Security and Interior. The Constitutional Court holds that the activities of those agencies "are at the same time associated with real restrictions of constitutional rights … separation and mutual deterrence of state security and internal affairs organs provides a constitutional democratic system and is one of the guarantees against the usurpation of power".[13]

Now the assessment of the constitutionality of the actions of the Russian President aimed at ensuring security does not even become the subject-matter of constitutional proceedings. For example, in 2015 a resident of Sochi challenged a Presidential decree which, among other measures, prohibited rallying in order to protect security during the 2014 Olympic Winter Games. The Constitutional Court in its Decision of 17 February 2015 No. 266-O rejected the petition on procedural grounds arguing that the Decree of the Russian President had already ceased its operation by the time of the opening of proceedings and could not affect the constitutional rights of the applicant.[14]

In summation, The Constitutional Court more often doesn't trump the fundamental freedoms over the interests of security. More often it has utilized the ideology of judicial self-restraint giving significant deference to political decision-makers.

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[13] Herald of the Constitutional Court of the Russian Federation [Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii]. 1993. no. 1. (in Russian).

[14] Unpublished, available at <http://doc.ksrf.ru/decision/KSRFDecision189324.pdf> (in Russian).

2. Security as Trump

The most remarkable feature of constitutional adjudication in Russia in recent years is the exaggeration of the public interests over the constitutional rights. A general observation regarding the increasing importance of public interests can be found in the dissenting opinion of judge A.L. Kononov (Judgment of 19 December 2005 No. 12-P). He pointed out what was clearly a negative point, "[a] tendency of excessively wide use of the term "public" as a justification for intervention of the government in freedom … [and other] spheres of personal interests of citizens and of corporations. A position when public grounds justify and cover any restriction of principles of freedom… poses doubtless threat for all individual rights".[15]

Trumping security as public interests represents the so called Beslan Case (Decision of 19 February 2009 no. 137-0-0).[16] The case involved the anti-terrorism legislation which prohibits the negotiations on the political claims of terrorists. The victims of terrorist attack of school no. 1 in Beslan in September 2004 argue that such a statutory rule limits the right to life, freedom and personal integrity. The Constitutional Court of the Russia holds that the prohibition of negotiations «aims at the prevention of terrorism threats, and consequently at the protection of security and of the life of individuals, i.e. conforms with constitutionally recognized values and couldn't be seen as violation of constitutional rights of applicants… assessment of legality, reasonableness and utility of actions of administrative bodies and its officials during the anti-terrorist operation in particular the chosen strategy of combating a terrorist attack (the use of force or negotiations) as well as tactics for organization and conducting of negotiations with terrorists are outside the jurisdiction of The Constitutional

[15] Herald of the Constitutional Court of the Russian Federation [Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii]. 2006. no. 1. (in Russian).

[16] Unpublished, available at <http://doc.ksrf.ru/decision/KSRFDecision18743.pdf> (in Russian).

Court". This decision not only reaffirmed the paramount value of security but also demonstrated the ideology of judicial self-restraint, which became a very popular technique in constitutional adjudication.

3. Security as an abstract concept

The Beslan case represents the abstract character of security. Due to self restraint the ideology of the Constitutional Court had issued only the decision on admissibility, but not the judgment on merits. The court gave in that decision no detailed interpretation of the security concept. The decision on such a terrible massacre of most unprotected group is only 3 pages (1490 words). The Court also initially decided not to publish it in any officially periodicals. Of course, one could access the decision via the official website of The Constitutional Court or via legal databases. However without proper transparency the vague content of security is unacceptable and could lead to the risk of serious constitutional rights violations. Quite an opposite approach was used for constructing the security concept used for The European Court of Human Rights in case Tagayeva and others v. Russia,[17] which also involved the same Beslan tragedy. A Judgment (on merits and just satisfaction) of 13 April 2017 included the detailed argumentation on more than 134 pages (89239 words). In addition to the interpretation of the security concept, the Court has also chosen the ideology of judicial activism.

IV. Intensity of Judicial Review

The difference of methodology to security from earlier to late decisions of the Constitutional Court of the Russian Federation, as well as the quite opposite approach to this public interest in the case-law of the European Court of Human Rights, demonstrate the issue of the intensity of judicial review. There are varying degrees in reviewing the regulatory measures

[17] Tagayeva and Others v. Russia, nos. 26562/07 and 6 others, 13 April 2017, in: Reports of Judgments and Decisions. 2017 (extracts).

in cases concerning national security.

Levels of scrutiny have been found in the case-law of the US Supreme Court during Roosevelt's "New Deal".[18] This era was connected with government intervention in various spheres of society. The US Supreme Court has pointed out some spheres where the scrutiny of governmental measures should be increased (for example, in the discrimination of vulnerable groups). The doctrine usually distinguishes three levels of scrutiny: a test of rational basis, intermediate scrutiny, and strict scrutiny.[19] In other words, there is a minimum, intermediate, and maximum intensity of judicial review.

1. Maximum intensity of judicial review

Maximum intensity of judicial review of regulatory measures has its source in the activist ideology of the courts. Such a kind of judicial review is used so that courts can scrutinize public policies chosen for security reasons. For example, in a landmark US case, decided in 1879 by The Circuit Court for the District of California, a so-called technique of smoking out of hidden legislative intent was used.[20] Ho Ah Kow v. Nunan concerned San Francisco regulations that allowed for the cutting of the hair of prisoners. Although a formal purpose of that regulation was sanitary security, the challenged rules were targeted only on immigrants from China. At that time Chinese men traditionally had to keep their hair long. The court holds the regulation unconstitutional and has smoked out de facto the discriminatory intent of San Francisco lawmakers trying to prevent migration from China.

Maximum intensity of judicial review is a rare technique for courts in Russia today. There are few cases in which the Constitutional Court used

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[18] United States Supreme Court, decided April 25, 1938 "United States v. Carolene Products Co.", In: United States Supreme Court Reports, 1938, vol. 304, p. 144.

[19] Chemerynski Erwin, Constitutional law: principles and policies, New York: Aspen Publishers, 2006, p. 477.

[20] 9th Circuit Court, D. California, decided 07.07.1879, Ho Ah Kow v. Nunan <https://law.resource.org/pub/us/case/reporter/F.Cas/0012.f.cas/0012.f.cas.0252.pdf>.

purpose scrutiny. An example is the case of Avanov, which concerned the requirement for Russian citizens to apply for a travel passport only in place of their permanent residence but not in place of temporary residence.[21] In the case of Russian citizen Avanov who has permanent residence in Tbilisi (Georgia), he tried to apply for travel passport in Moscow where he actually resided. The trial court rejecting the complaint of Avanov came to the absurd conclusion that Russian citizens should apply for travel passport outside of Russia, i.e. in the Republic of Georgia. The Constitutional Court had found that "the procedure of travel passport issuance only at a place of residence is discriminatory... Circumstances preventing a citizen's exit from the Russian Federation are mainly examined by territorial internal affairs bodies at the citizen's place of residence. It is determined only by the purpose of rationalizing their activities". Consequently, the Constitutional Court had recognized that the comfort of an administrative agency is an illegitimate aim for restricting constitutional rights.

The European Court of Human Rights sometimes exercises scrutiny of the illegitimate aim of the Russian Government. In the Judgment from May, 19 2004 «Gusinsky v. Russia» The Strasbourg Court found that criminal proceedings against Russian oligarch Gusinsky were a restriction of his right to liberty and were used for the illegitimate aim of the acquisition by a state-controlled corporation of the applicant's private media company. As the European Court of Human Rights stated "it is not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies ... applicant's prosecution was used to intimidate him".[22] It's self-evident that scrutinizing the hidden intent of the public authorities required the independence of the court and judicial activism.

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[21] <http://www.ksrf.ru/en/Decision/Judgments/Documents/1998 January 15 2-P.pdf> (In English).

[22] Gusinskiy v. Russia, no. 70276/01, § 76, ECHR 2004-IV.

2. Minimum intensity of judicial review

However, in the absolute majority of cases in The Constitutional Court of the Russian Federation, government bodies didn't have any difficulty in the legal reasoning of the legitimacy of security policies. In particular in the Judgment of 19 April 2010 no. 8-P, concerning the abolition of the jury trial for persons accused of terrorism crimes, The Constitutional Court recognized the wide discretion of the legislative. The minimum intensity of the judicial review allowed security policies, despite the explicit textual basis in art. 20.1 of The Russian Constitution, to transform the possible participation of the jury in the cases of terrorists into a statutory right. In the view of The Constitutional Court the right to trial by a jury "is not one of the fundamental inalienable rights and belongs to everyone from birth … this right – unlike the right to an independent and impartial court or presumption of innocence is not included in the main scope (core) of the constitutional right of access to court".[23]

Another Judgment of the Constitutional Court of 28 June 2007 no. 8-P, concerning the legislative ban on returning to a family for burial a series of bodies killed during terrorist attacks, also showed considerable respect for the approaches of political organs to ensure national security.[24] The Constitutional Court had stated that "…the interest in fighting terrorism, in preventing terrorism in general, in specific terms and in providing redress for the effects of terrorist acts, coupled with the risk of mass disorder, clashes between different ethnic groups and aggression by the next of kin of those involved in terrorist activity against the population at large and law-enforcement officials, and lastly the threat to human life and limb, may, in a given historical context, justify the establishment of a particular legal regime… Action to minimise the informational and psy-

[23] Collected Legislation of the Russian Federation [Sobranie Zakonodatelstva Rossiiskoi Federatsii] (SZ RF). 2010. no. 18. Item 2276 (in Russian).

[24] SZ RF, 2007, no. 27, Item 3346 (in Russian).

chological impact of the terrorist act on the population, including the weakening of its propaganda effect, is one of the means necessary to protect public security".

The concept of an enemy of the people who survived in public opinion since Stalin's era seems to be decisive for the legislative stigmatization of NGOs which received financing from foreign governments or from international funds. The Constitutional Court in the Judgment of 8 April 2014 no. 10-P agreed with the vague interpretation of the concept of political activity of groups, which, combined with its funding from foreign sources, leads to the special legal status of NGOs as a foreign agent. The Constitutional Court held that "everyone's right of association and freedom of activity of public associations are not absolute… realizing law-making powers belonging to him, the federal legislator must care about granting citizens maximum wide opportunities for use of the right of association and freedom of the activity of public associations guaranteed by the Constitution of The Russian Federation and at the same time establish such rules that, not infringing upon its very essence, would make for attainment, on the basis of the balance of private and public elements, of constitutionally-significant goals, including the ensuring of public order and security".[25]

In this sense, security is no longer even a trump card, but rather a joker in a pack of playing cards.

3. Factors of intensity of judicial review

There are several factors that influence the intensity of judicial review. International tribunals sometimes list such factors. In the Judgment of 26 May 1993, which dealt with emergency measures combating terrorism in Northern Ireland, it was stated that in exercising its supervision the European Court of Human Rights "must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation,

[25] <http://www.ksrf.ru/en/Decision/Judgments/Documents/2014 April 8 10-P.pdf> (in English).

the circumstances leading to, and the duration of, the emergency situation" (para. 43).[26] Hence, the intensity of judicial review over governmental actions will depend on the importance of the fundamental right concerned, and the historical and temporal conditions of interference with this right.

The factors that influence the intensity of judicial review can be found in case-law of national courts. In the decision of 22 February 2002, regarding the measures taken to combat illegal migration, the England and Wales Court of Appeal pointed out such factors as: 1) greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure; 2) unqualified rights due to their great importance require more scope for deference; 3) greater deference will be due to the democratic powers where the subject-matter at hand is within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts; 4) greater or lesser deference depends on whether the subject-matter is within the expertise of political bodies (for example, macroeconomic policy) or courts (for example, the protection of human rights) (para. 83–87).[27] Consequently, the intensity of judicial review depends on the branch of government that adopted the challenged instrument, the importance of the constitutional right concerned, the assignment of the subject of the dispute to the prerogatives of a particular body, as well as the possibilities for expert assessment of the relevant facts.

An example of a sliding scale in the intensity of a judicial review based on the difference in the subject-matter demonstrates the two cases of restricting the political rights of Russian citizens who have a stable relationship with foreign states. In the Decision of 4 December 2007 no. 797-O-O, security reasons allowed The Constitutional Court to show deference to the legislative deprivation of the electoral rights of Russian citi-

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[26] Brannigan and McBride v. the United Kingdom, Judgment, 26.05.1993 – 258-B.

[27] International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158.

zen Kara-Murza, who is also a citizen of the United Kingdom.[28] In a similar case, the unconstitutionality of the legislative restriction of participation in the work of election commissions to a citizen Malitsky, who had a residence permit in Lithuania, was recognized. In the Judgment of 22 June 2010 no. 14-P The Constitutional Court had emphasized the fact that " the existence of a residence permit does not lead to the granting for its holder of the political rights of a citizen of a foreign state... Although even granting those persons a certain scope of political rights does not at all mean the inevitable change of their status in relation to the country of their citizenship".[29]

V. Conclusions

In summation, taking into account the above-mentioned case-law and the analysis of the decisions of The Constitutional Court of the Russian Federation, the following factors regarding the intensity of judicial review can be defined: ad hoc balancing between rights and security in historical and social contexts; the status of the decision-maker restricting constitutional rights and its place in the separation of powers; the importance of the right in the hierarchy of constitutional values; the subject-matter of the dispute, including its attribution to the pure political or justiciable questions; the need for budget funding; fact-finding and burden of proof; decision-making in good faith, including the fair procedures and the quality of the reasoning.

[28] SZRF. 2007. No. 52. Item. 6533. (In Russian).
[29] SZRF. 2010. No. 27. Item. 3552. (In Russian).