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THE IMPACT OF EU ANTI-TERRORISM SECURITY MEASURES ON THE RESPECT OF DEMOCRATIC VALUES

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Abstract

The issue of security seems to be the new concern of the political and social realms in this new millennium. If the 20th century brought about a revolution in terms of human rights, which new a tremendous development and recognition, in the past years it seems the focus of the future will be security and, more specifically, security from terrorism.

While we do not dispute the existence of terrorism in the modern capitalist world and the terrible potential outcomes of terrorist actions, with impact over thousands of innocent bystanders, we cannot support a point of view were the rule-makers, in an attempt to not miss a terrorist threat, aim to control everything.

This paper aims to analyze the balance, or lack thereof, and the compatibility between the new regulations intended to stop the possible advance of terrorism within the European Union and the Union's efforts to protect the fundamental rights and liberties of its citizens. The focus of the work will be mainly on the relationship between the people's right to security versus the people's right to privacy. Can we, or should we, prioritize human rights? Who will have the opportunity to decide which right is more important to respect and which one can be by-passed?

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We must not forget that the EU is a democratic organization, intrinsically founded on democratic principles and the respect of human rights (Treaty of the European Union, Art. 6, Maastricht: 1992). Experience has shown us that the borderline between excessive care towards protecting the citizens against any possible threat, on the one hand, and complete control of society and disregard for citizens' rights and liberties, on the other hand, is very narrow.

Keywords: Security, terrorism, European Union, human rights

Introduction

In order to analyze the relationship between the anti-terrorism security measures adopted at the European Union level and the Union's ability to preserve the fundamental rights and liberties of its citizens, we must take into account the evolution and the development of both the issue of human rights and the question of providing increased security on the European continent.

At the same time, the concepts we are using must be clearly defined, such as to avoid confusion. What is terrorism? What are the fundamental rights and liberties of citizens recognized at the EU level?

In the Explanatory Dictionary of the Romanian language, terrorism is defined as follows: "1. The entirety of the acts of violence committed by a group or an organization in order to create a climate of insecurity or to change the form of government of a state. 2. The systematic use of measures of violence and intimidation in order to achieve a political goal. 3. The deliberate and systematic use of violent means or of threats of a nature to cause fear and distrust, panic and insecurity, ignoring all and any humanitarian rules".

Webster's Dictionary identifies terrorism as the "use of terror and violence to intimidate, subjugate etc., especially as a political weapon or policy".

The international documents condemning terrorism avoid defining the term, since efforts in this direction have produced no results in terms of consensus of the members. Without expressly defining terrorism, in

Resolution no. 51/210 of 1999, the United Nations General Assembly referred to the prohibition of “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes”, as “in any circumstances unjustified, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them”.

The first definition of terrorism in an international treaty can be found in the International Convention for the Suppression of the Financing of Terrorism (United Nations General Assembly Resolution 54/109, December 9th, 1999). According to this document, terrorism comprises all acts “intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.” In spite of the mutually accepted definition of the phenomenon of terrorism and of the declared will of the states to participate in the anti-terrorist activities, by the middle of 2001, only 4 countries had ratified the convention (out of 22 needed in order to enter into effect). As a direct result of 9/11/2001, and the “new face” of terrorism, by the end of 2006, 155 states has become party to the Convention (Steiner, Alston and Goodman, 2008: 381), proving the general increased concern regarding global security and the truthful willingness of the states to collaborate on preventing and fighting against terrorism.

The European Union, through Council Framework Decision on Combating Terrorism, adopted in 2002 recognizes as “terrorist offences” certain acts “defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organization where committed with the aim of: seriously intimidating a population, or unduly compelling a Government or international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization” (Decision Art. 1). No actions were defined as being terrorist acts as such, in themselves, but only in the previously mentioned contexts.

In what concerns the fundamental rights and liberties of citizens, the European Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. The first express mention of fundamental rights in the Communities' official documents is found in the Joint Declaration of the European Parliament, the Council and the Commission, adopted in Luxembourg, on April 5th, 1977. The European institutions stressed the "prime importance they attach to the protection of fundamental rights", and undertake to continue to respect these rights.

However, it was only in year 2000 that the rights and liberties of European citizens were formalized and embedded into an official communitarian document supported by the European Parliament, the Council and the Commission.

The Charter of Fundamental Rights of the European Union (adopted on December 7th, 2000 in Nice), identifying the rights and freedoms of the citizens, together with the principles employed by the Union in this matter, is structured on six chapters, as follows: Dignity; Freedoms; Equality; Solidarity; Citizen's rights; and Justice. The EU Charter is a very complex document, which comprises individual and collective rights and liberties, social, economic and political rights and procedural rights of citizens, together with the fundamental rights and liberties recognized for all human beings. Among these rights and freedoms, are the citizens' rights to liberty and security, respect for private and family life, as well as the protection of personal data (specifically including the cases when personal data can be processed, "on the basis of the consent of the person concerned or some other legitimate basis laid down by law" (Art. 6), and that the compliance with the rules set must be ensured by an independent organism), which we will refer to hereinafter.

The potential terrorist threat against the European Union: Security measures imposed

The terrorist attacks on the American cities on September 11th, 2001 changed the world's perception regarding terrorism. The destructions were so unexpected, brutal, and synchronized that people all over the world realized that no one is safe from terrorism; no one enjoys special

protection against such an attack. As a result, the international community, including the European Union, started to devise and implement security measures that would provide a higher degree of security for their citizens.

EU's first response was very quick, materialized by the end of year 2001 into an action plan to fight against terrorism, adopted by the European Council and the establishment by the European Commission of a group of Scientific Experts in the battle against biological and chemical terrorism. At the same time, the Commission proposed that the Member States should freeze all funds belonging to 27 organizations and individuals suspected of financing terrorist activities.

In the following year, the Council of Ministers adopted two framework decisions, one establishing the European Arrest Warrant, and the other presenting "a common concept of terrorist offences", which all Member States must include in their legal system. According to the Council's Framework Decision on Combating Terrorism, the terrorist offences are:

- "(a) attacks upon a person's life which may cause death;
- (b) attacks upon the physical integrity of a person;
- (c) kidnapping or hostage taking;
- (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
- (e) seizure of aircraft, ships or other means of public or goods transport;
- (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
- (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
- (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
- (i) threatening to commit any of the acts listed in (a) to (h)".

The decision also set the minimum level of penal sanctions for this type of offences, to fifteen, respectively eight years in prison, depending on the seriousness of the offence and on the accused's willingness to cooperate with the state authorities.

In 2004, the Action Plan against Terrorism was restructured around seven major objectives:

1. to reinforce international efforts to combat terrorism;
2. to reduce terrorists' access to financial and economic resources;
3. to increase the capacity of the European institutions and Member States to investigate and prosecute;
4. to protect the security of international transport and set up effective systems of border controls;
5. to strengthen the coordination between the Member States and thus the European Union's capacity to prevent and deal with the consequences of a terrorist attack;
6. to identify the factors that contribute to the recruitment of terrorists;
7. to encourage third countries to engage more effectively in combating terrorism.

The attacks in Madrid in 2004 and those occurred one year later in the London subway, as well as many other attempts blocked by the law enforcement agencies indicate that the terrorist threat is, indeed, present in Europe, on European Union soil. The challenge in combating terrorism within the EU is especially difficult. While persons are free to travel anywhere across its territory, using their national, regular ID's, without the need of passports, in the absence of borders and customs, the law enforcement agencies are still nationally based. The Europol lacks the manpower and resources to cover the entire EU territory and cooperation between the national polices is still hindered by communication, logistics and infrastructure shortcomings. An increased burden is placed on the EU border Member States, as potential entry points of members of terrorist organizations. While air travel is certainly more rapid, usually, the terrestrial borders have a lower degree of security.

In the absence of a unitary security system and of the means to effectively prevent and fight against terrorism at the European Union level, it is understandable that the EU institutions (European Parliament, the Commission and the Council) focused on providing a stricter legislative framework, to be immediately transposed into national legislation, which to allow the law enforcement agencies to better control the situation through information.

However, the access to personal data, to private information of individuals, is a very delicate matter and abuses can easily happen. Some of the proposals of even draft decisions may infringe citizens' rights and freedoms. For instance, for several years now ,the European Union has concluded a bilateral agreement with the United States (dated May 2004), later followed by a similar agreement with Australia regarding the collection, processing and transfer of passenger name record (PNR) data by air carriers to the authorities of the destination country. Although the agreement with the US was annulled in May 2006 by a judgment of the Court of Justice of the European Communities, a new Interim agreement was signed and formally adopted by the EU Council on October 25th, 2006. A final bilateral agreement, in effect for seven years, was signed on July 23rd, 2007. Criticism regarding these agreements within the European Union is mainly based on concerns regarding the protection of personal data and the possible infringement on the people's right to privacy.

On the occasion of the European Commission meeting in Brussels, on November 6th, 2007, one of the measures proposed was to establish an EU-wide system for the exchange of Passenger Name Records (PNR), a proposal that all air carriers make these data available to specialized national agencies, for all flights coming to or leaving the EU, because "the conception and planning of terrorist attacks involves traveling by air"³ . In addition to being an assumption, the particular reason indicated seems far too weak to justify the retention of personal data and the huge costs involved by this initiative.

³ Speech by Mr. Stefano Signore, Member of Cabinet of Commissioner Franco Frattini from DG Justice, Freedom and Security, European Commission, [http://www.euforumrj.org/readingroom/Terrorism/Speech %20Signore.pdf](http://www.euforumrj.org/readingroom/Terrorism/Speech%20Signore.pdf);

Directive 2006/24/EC of the European Parliament and of the Council (March 15th, 2006) on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC⁴ establishes the obligation to retain data “to the extent that those data are generated or processed by providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying the communications services concerned”. The obligation extends over unsuccessful call attempts. The categories of data to be retained (Art. 5) are: data necessary to trace and identify the source of a communication, concerning fixed network telephony and mobile telephony, as well as Internet access and e-mail, regarding the calling telephone number; the name and address of the subscriber or registered user; or the user ID(s) allocated, the user ID and telephone number allocated to any communication entering the public telephone network and the name and address of the subscriber or registered user to whom an Internet Protocol (IP) address, user ID or telephone number was allocated at the time of the communication, as well as the data necessary to identify the destination of a communication.

With respect to mobile telephone calls, the data collected will incorporate the “number(s) dialed (the telephone number(s) called), and, in cases involving supplementary services such as call forwarding or call transfer, the number or numbers to which the call is routed and the name(s) and address(es) of the subscriber(s) or registered user(s). The personal data of the recipient of Internet communications should also be retained by the Internet Service Providers, together with all the data necessary to “identify the date, time and duration of a communication”.

Other categories of data include: the date and time of the log-in and log-off of the Internet access or e-mail service, based on a certain time zone, together with the IP address, whether dynamic or static, allocated by the Internet access service provider to a communication, and the user ID of the subscriber or registered user; data necessary to identify the

⁴ Directive on privacy and electronic communications, concerning the processing of personal data and the protection of privacy in the electronic communications sector, adopted on July 12th, 2002;

type of communication; the telephone or Internet service used; data necessary to identify users' communication equipment or what purports to be their equipment.

The data thus collected will be retained for a period between six months and two years. In case of "particular circumstances" of a Member State, this period can be extended, subject to the prior approval of the Commission.

The text of Directive 2006/24/EC stated the obligation of the Members States to transpose it into national legislation by September 15th, 2007, at the latest, accompanied by the obligation to enforce its dispositions starting with March 15th, 2009, at the latest, provided that the Council and the Commission are informed regarding the postponement if the application and the Member State publishes its declaration in this sense in the Official Journal of the European Union. The Netherlands, Austria, Estonia, the United Kingdom, Cyprus, Greece, Luxembourg, Slovenia, Sweden, Lithuania, Latvia, the Czech Republic, Belgium, Poland, Finland and Germany, amounting to more than 2/3 of the EU Member States (25 at the time), expressed their intention to postpone the application of the Directive until March of this year.

Impact of anti-terrorism security measures on citizens' rights and freedoms within the EU

The grounds for all these unpopular security measures adopted by the European Union is presumed to be the desire for the security of the citizens. But the question is if security can be provided while respecting the rest of the rights and liberties the citizens had enjoyed and should enjoy in the future. All international documents issued by the EU institutions, with a view to increased security measures explicitly state the limitations, the boundaries between which these new measures shall apply. All specifically mention the Union's commitment to preserving human rights and citizens' freedoms.

However, there are certain human rights that are almost inevitably affected by the acts of monitoring, control and processing of personal data by state or international authorities or institutions. At present, the right most affected by the anti-terrorism security regulations is the right

to privacy. At the Commission meeting in Brussels, in November 2007, Vice-President Franco Frattini emphasized that the goal of the European Union “remains preserving the right balance between the fundamental right to security of citizens, the right to life and the other fundamental rights of individuals, including privacy and procedural rights”, which would indicate that no hierarchy of rights and freedoms is intended. In fact, the Vienna Declaration of 1993 disclaimed any priority of rights.

From the historical point of view, the first human rights and liberties to be spelled out were the civil and political rights, individual rights focused on two main issues: personal liberty, in the broad sense, including the freedom of thought, expression or religion, together with the right to life or liberty; and the protection against abuses of the state. Some scholars argue that these are the only true human rights because they derive from natural law, from the mere fact of being human, not from any particular relation to a state (Higgins, 2006:96). They do not in any way depend on a person’s position, actions or beliefs. Both the United Nations Declaration Universal Declaration of Human Rights (1948) and the United Nations International Covenant on Civil and Political Rights (1966) recognize first generation rights and fundamental human rights.

Second generation rights are the social, economic and cultural rights that can be enjoyed either individually or as a group. They refer, among other topics, to the right to education, the right to health care, the right to work, the right to a pension, or the right to participate to a community’s way of life. Unlike civil and political rights, this type of rights require the state to take positive action in order to guarantee its citizens the minimum standard of social and economic conditions that is essential to human dignity. These rights are codified in the International Covenant on Economic, Social and Cultural Rights (1966), and also in Articles 23-29 of the Universal Declaration of Human Rights (1948). The main criticism brought against the recognition of second generation rights is that they are difficult to enforce and may remain in the stage of aspirations, rather than becoming reality.

Third generation rights are a special category, because they refer to the acknowledgement of collective rights, rights belonging to a certain community, a society or a people and “are intended to acknowledge the continuous evolution of human rights doctrine” (De Richard and Burns,

2006:197). Some of these collective rights are: the right to peace, the right to a healthy environment, the right to sustainable development or the right to clean air.

The right to privacy, or the freedom to enjoy privacy and private life, which is our interest point in this paper seems to fit better into the first generation rights. Privacy means being apart, being separated. It means the freedom of being alone. The right to security can be either an individual or a collective right, since both the person and groups can find themselves in danger at one point or another. When we speak about anti-terrorism and counter-terrorism measures, we undoubtedly mean to protect the citizens' collective right to security and safety.

Following this line of argument, we could claim that privacy is a natural human right, recognized and protected before the emergence of the collective right to security. Hence, it should not be traded off for the latter.

Virtually in all international documents concerned with the issue of human rights and freedoms, the right to privacy and the right to security (usually meant in the individual aspect) are mentioned together. This is the case also with European Parliament Resolution of April 12th, 1989 adopting the Declaration of fundamental rights and freedoms, which states in the Preamble that "measures incompatible with fundamental rights are inadmissible". It is the legislators' task to design a legal framework that can provide security without adversely affecting human rights and/or citizens' freedoms.

Conclusions

Are we facing a choice between security and privacy? We argue that a choice is not necessary. Privacy becomes an issue only when security involves identity. And this can be avoided through the legal means. We disagree with Hobbes's conceptions about human nature and with the idea that humans' fear of death is the driving force of creating societies. We believe that the social contract can be an agreement between partners, without the need for people waiving sovereignty, their rights and freedoms, just to enjoy security?

Another issue that can be debated is the legitimacy of the EU security measures aimed at counter-terrorism. The question is pertinent when we analyze the fact that 16 out of 25 Member States chose to postpone the application of Directive 2006/24/EC, after it had been adopted at the level of the European Parliament and the EU Council.

It is imperative that counter-terrorism is not used as an excuse to undermine or justify violations of human rights and international humanitarian law standards. The United Nations expressed concerns regarding specifically to the increased security measures adopted by the EU. In this sense, the Special Rapporteur on terrorism and human rights under the UN Commission on Human Rights stresses the importance of clearly defining the elements of terrorist crimes and “what is truly terrifying”. At the same time, attention is drawn to the fact that terrorist incidents are sporadic and are generally caused by small groups, and, therefore, “care should be taken to ensure that measures taken are necessary to apprehend actual members of terrorist groups or perpetrators of terrorist acts in a way that does not unduly encroach on the lives and liberties of ordinary persons” (Koufa, 2004).

Excessive monitoring of communications, travel habits etc., in a way, treats all people as potential terrorists. This goes against the legal principle of the presumption of innocence and could seriously damage the trust relation between the citizens and the state. While the European Commission speaks about greater citizens’ participation to the elaboration and implementation of public policies, the other EU institutions impose legal regulations that will create a gap between the citizens and the Community.

Attention must be given to the balance between the right to security and the right to privacy. The compatibility between certain measures and the legal foundation of the EU must be analyzed. And guarantees must be provided for the citizens in case of possible abuse on the basis of anti-terrorism regulations.

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