

RESTRICTION OF CIVIL AND POLITICAL RIGHTS IN THE FIGHT AGAINST TERRORISM

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Abstract: The fight against terrorism is an issue that never loses its newsworthiness. Especially today with the strong development of terrorism and its spreading through the creation of new forms of terrorism, almost every country has been put in danger. That is why new methods and means are needed in the fight against terrorism, implementation of new legislation and its harmonization among countries. The purpose of this paper is to highlight the new guidelines within the strategy for combating radicalization and recruitment for terrorism adopted by the Council of EU and how these guidelines affect civil and political rights; to analyze the effects of the adopted laws which restrict civil and political rights at the expense of higher protection against terrorism such as the USA Patriot Act; to identify the new legal provisions of EU member states in the fight against terrorism; and to determine which civil and political rights are restricted and to what extent these new legal provisions limit civil and political rights of people, whether it is justified and whether it is aimed at achieving the most important goal, greater protection of citizens from potential terrorist attacks.

Keywords: civil and political rights, terrorism, USA Patriot Act, EU counterterrorism strategy, counter-terrorism legislation.

Introduction

Issues of human rights are omnipresent. The idea of human rights rests on the claim that each of us as a human being, regardless of our race, religion, gender, or age, is entitled to certain fundamental and inalienable rights – merely by virtue of our belonging to the human race. Whether or not such rights are legally recognized is irrelevant, as is the fact that they may or may not emanate from a higher natural law. (Wacks, 2006) Every person is entitled to these rights by birth and they are the same for all people worldwide. That is why human rights are irrevocable, which means that they are always valid and cannot be taken away. Their most important function is that of protecting citizens from state interference. Human rights as fundamental rights of each individual must be clearly defined in order to ensure adequate protection by the authorities in all societies. The acceptance of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights discloses the dedication of the United Nations to the universal conception and protection of human rights. Efforts for accentuating and protecting human rights are ongoing. That is why it is really important to determine which rights fall into the category of human rights, especially because human rights are widely spread and encompass many different areas of human coexistence.

Therefore, they can be classified into several groups: rights of a person; **political and civil rights**; social and economic rights and rights of third generations. We can distinguish two binding points of terrorism and human rights: Terrorist attacks as criminal acts that are directly aimed at violating human rights, including civil and political rights; and restriction of civil and political rights without any violation in the fight against terrorism. States have an obligation to protect all individuals within their jurisdiction and to provide them with protection as afforded by international human rights law. As “terrorism aims at the very destruction of human rights, democracy and the rule of law has a direct impact on the enjoyment of a number of human rights, in particular the rights to life, liberty and physical integrity.” (OSCE, 2014)

The topic that has been elaborated on in this paper is the need and extent of restriction of political and civil rights in combating terrorism, as well as past experiences of the EU and the USA regarding adopted legal framework that restrict political and civil rights as a tool for preventing terrorist attacks and detecting terrorists that have performed terrorist attacks.

The EU member states have adopted anti-terror laws in recent years, laws that limit civil and political rights during a state of emergency. Restriction of civil and political rights in anti-terror laws in the EU member states is displayed mainly through the extended procedures that the police and security services are able to undertake in case of a terrorist attack. This paper reflects more specifically on the Directive on the use of passenger name

record (PNR) data adopted by the Council of the EU; and the USA Patriot Act signed after the terrorist attacks in New York on 11th of September. In this paper particular attention is given to cases of abuse of the legal limitation of political and civil rights in the fight against terrorism, emphasizing the importance of avoiding such cases.

Civil rights and political rights

It is necessary to establish the place of civil and political rights in the human rights system.

As it was previously mentioned, human rights have passed through 3 generations: **the first generation** was primarily negative civil and political rights as developed in the 17th and 18th centuries by English political philosophers like Hobbes, Locke, and Mill. They generally prohibited interference with the right-holder's freedom; **the second generation** consists of essentially positive economic, social, and cultural rights, such as the right to education, food, or medical care; **the third generation** of human (solidarity) rights are primarily collective rights that include the right to social and economic development and the right to participate in and benefit from the resources of the earth and space, scientific and technical information (which are especially important to the Third World), the right to healthy environment, peace, and humanitarian disaster relief. (Wacks, 2006) This classification clearly shows that civil and political rights are considered as human rights and belong to the first generation of human rights. Civil and political rights must be codified in order to provide greater protection of these rights, although many democracies around the world have no formal guarantees of civil and political rights because they are often considered as natural rights. Thomas Jefferson in 1774 in the "Summary of the Rights of British America," wrote that "free men invoke their rights as derived from the rights of nature, and not as a gift of their chief justice." In addition, the categories of civil and political rights are not the same and that is why it is useful to make a distinction between them.

Civil rights include:

- Providing physical integrity and security of people and making sure people have not been forced into labor;
- Protection against discrimination (based on gender, religion, race, sexual orientation, etc.); □ Equal access to health care, education, culture, etc.

Political rights include:

- Natural justice (procedural fairness) in law (such as the rights of the accused, including the rights to a fair trial; due process; the right to claim damages or remedy);
- Individual political freedom, including rights of individuals (freedom of thought and conscience, freedom of speech and expression, freedom of religion, freedom of the press, freedom of movement) and the right to participate in civil society and politics (freedom of association, the right of assembly, the right to petition, the right to submit an application, the right to vote etc.).

As to the question of which civil and political rights may be restricted, according to the European Convention on Human Rights, there are rights that are absolute rights and cannot be restricted under any circumstances, while others may be legally limited. Torture, discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status are prohibited no matter the circumstances. They cannot be restricted. But there are also conditional rights. Right to respect private and family life, freedom of expression, freedom of assembly and association, freedom of thought, conscience and religion, freedom of the media, may all be restricted in the interests of national security or public safety, in order to prevent disorder or crime, or to protect health or morals, or to protect the rights and freedoms of others.¹

¹ See Articles 3, 8, 9, 10, 11 and 14 of the European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13, Council of Europe.

Restriction of civil and political rights in EU

The European Union member states are committed to jointly fighting terrorism and providing the best possible protection for its citizens. To this end, in 2005 the Council adopted the EU counter-terrorism strategy. The strategy is focused on four main pillars: prevent, protect, pursue and respond. The second priority of the EU counter-terrorism strategy is the protection of citizens and infrastructure and the reduction of vulnerability to attack. In this area, on 21 April 2016 the Council of the EU adopted a **Directive on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime**, which is a perfect example of restriction of civil and political rights in combating terrorism. Passenger name record (PNR) data is personal information provided by passengers and collected and held by air carriers. It includes information such as the name of the passenger, travel dates, itineraries, seats, baggage, contact details and means of payment. The Directive aims to regulate the transfer from the airlines to the member states of PNR data of passengers of international flights, as well as the processing of this data by the competent authorities. The Directive establishes that PNR data collected may only be processed for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. (Council of the EU, 2016)

The new rules create an EU standard for the use of such data and include provisions on:

- the purposes for which PNR data can be processed in the context of law enforcement (pre-arrival assessment of passengers against pre-determined risk criteria or in order to identify specific persons; the use in specific investigations/prosecutions; input in the development of risk assessment criteria);
- the exchange of such data between the member states and between member states and third countries;
- storage (data will initially be stored for 6 months, after which they will be masked out and stored for another period of four years and a half, with a strict procedure to access the full data);
- common protocols and data formats for transferring the PNR data from the air carriers to the Passenger Information Units; and
- strong safeguards as regards protection of privacy and personal data, including the role of national supervisory authorities and the mandatory appointment of a data protection officer in each Passenger Information Unit. (Directive EU 2016/681)

In the implementation of this Directive, EU member states should be particularly cautious, primarily due to the poor experience with a previous similar directive that was in force for 8 years. It is about the Data Retention Directive (Directive 2006/24/EC) which obliged the member states to store all telecommunications data of citizens, including location data, for a minimum of 6 months and 24 months at the most. Under this Directive the police and security agencies were able to request access to details such as IP address and time of use of every email, phone call and text message sent or received. On 8 April 2014, Data Retention Directive was invalidated by the Court of Justice of the European Union for violating fundamental rights.

In this context it is important to note the implementation of a number of UN Security

Council Resolutions in the EU that contained a list of persons associated with the AlQaeda network and the Taliban whose assets had to be frozen and the consequences they had on the human rights and liberties. Yassin Kadi and the Al Barakaat International Foundation, whose names were included in the list, challenged Regulation No. 881/2002 before the European General Court. They argued that

Regulation No. 881/2002 violated **their right to a fair hearing, their right to property, and their right to effective judicial protection**. Even though the General Court found that the Regulation was valid, the Court of Justice found the resolution to be invalid in EU law. This meant that the approach followed by the European General Court ran counter to the constitutional principle that all EU acts must respect fundamental rights and an international obligation that is in breach of those constitutional principles cannot form part of the EU legal order. ((Lenaerts, 2014) Soon after the decision was announced, the European Commission issued a summary containing the reasons for the inclusion of Kadi's name in the list and gave an opportunity to him to comment on those reasons. Kadi sent his comments to the Commission requesting disclosure of the evidence supporting the allegations in the summary but the Commission in its response stated that the judgment did not require it to disclose further information and included Kadi's name in the list by adopting Regulation No. 1190/2008 which Kadi successfully challenged before the European General Court. The Commission, the Council and the UK brought an appeal against the ruling of the European General Court. The European Court of Justice

dismissed the appeals and upheld the General Court's annulment of Kadi's EU designation on the grounds that none of the reasons given in the UN's summary for linking Mr. Kadi with terrorism were substantiated. After the ruling in Kadi's case, the effective proportion of fundamental rights has further been developed in subsequent cases before the European Court of Justice. In the joined cases of Hassan and Ayadi² and the case of Othman³, again a breach of the right to be heard, the right to an effective remedy and the right to property was determined. Hassan, Ayadi and Othman claimed the annulment of Regulation 881/2002, and their claims were accepted by both courts. Sixteen months after Kadi's judgements, the Council adopted Regulation 1286/2009, which repealed Regulation 881/2002 and introduced a higher level of legal certainty for persons and entities designated as associated with Osama Bin Laden, Al Qaida and the Taliban.

Restriction of civil and political rights in the USA

Restriction of civil rights and liberties in the USA during times of major national military crisis starts with the Quasi-War with France at the end of the 18th century and continues with the Civil War, World War I, World War II, and the Cold War. During the Cold War, new federal intelligence agencies were established and expanded. Further, those already in existence, the FBI in particular, grew vastly stronger than they had been during previous crises. Although the creation and expansion of those agencies would have occurred regardless of the Cold War, the degree to which they expanded was undoubtedly greater than if the crisis had never occurred. That is relevant because it means that the footprint of the federal intelligence agencies after the Cold War was greater than if the crisis had not occurred. Additionally, the crisis reflected growing reliance on forms of electronic surveillance, such as wiretapping, bugging, and the monitoring of international communications. In the latter years of the Cold War and in the years after, the growth of technologies of mass surveillance was extraordinary. As a result, their significance was most clearly reflected in the current —"War on Terror". In every crisis in American history, including the —"War on Terror," policymakers and the public demonstrated a similar fear-based response to threats to American national security. In each, those fears led people to accept restrictions on their civil liberties that usually exceeded any limitations justifiable by the threat posed (Fairman, 2009). That is also the case with the USA Patriot Act signed by USA president George W. Bush after terrorist attacks in New York on 11th of September.

USA Patriot Act is a law that gave new powers to the U.S. Department of Justice, the National Security Agency and other federal agencies on domestic and international surveillance of electronic communications; it also removed legal barriers that had blocked law enforcement, intelligence and defense agencies from sharing information about potential terrorist threats and coordinating efforts to respond to them. The law is intended to help government agencies detect and prevent possible acts of terrorism, or sponsorship of terrorist groups. USA Patriot Act comprises 10 titles including: Enhancing domestic security against terrorism; Enhanced surveillance procedures; Anti-money-laundering to prevent terrorism; Border security; Removing obstacles to investigating terrorism; Increased information sharing for critical infrastructure protection; Improved intelligence; etc (107th US Congress, 2001).

But the Patriot Act raised concerns among civil liberties groups and other critics surrounding the data privacy rights of U.S. citizens, concerns that were heightened significantly in 2013, when NSA contractor Edward Snowden leaked information showing that the agency was using the law to justify the bulk collection of data about millions of phone calls. Among the Patriot Act's more controversial provisions is the ability to intercept Internet messages, included among the sections in Title II. Flowing out of the government's ability to legally tap telephone lines in certain cases, the USA Patriot Act permits the interception of all messages that are "relevant to an ongoing criminal investigation." Among its other surveillance-related authorizations, the act also allowed authorities to: compel organizations to provide access to "any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities;" and to engage in so-called roving wiretaps, which allows surveillance on a target without specifying the device to be tapped (Rouse, 2016).

² See *Joined Cases C-399/06 P and C-403/06 P, Hassan and Ayadi v Council of the European Union and the Commission of the European Communities* (3 December 2009).

³ See *Case T-318/01, Omar Mohammed Othman v Council of the European Union and the Commission of the European Communities* (11 June 2009)

Opponents of the law have criticized its authorization of indefinite detentions of immigrants; the permission given law enforcement officers to search a home or business without the owner's or the occupant's consent or knowledge; the expanded use of National Security Letters, which allows the Federal Bureau of Investigation (FBI) to search telephone, e-mail, and financial records without a court order; and the expanded access of law enforcement agencies to business records, including library and financial records. Since its passage, several legal challenges have been brought against the act, and federal courts have ruled that a number of provisions are unconstitutional. ("Patriot Act", n.d.) Also, critics say that the Patriot Act allows investigators to use spying and terrorism as an excuse for launching foreign intelligence wiretaps and searches. They point to the fact that the number of intelligence wiretaps now exceeds the number of criminal taps. Since these probes are conducted in secret, with little oversight, abuses could be difficult to uncover. Civil liberties groups say one antidote would be to require that the Justice Department release more information about foreign intelligence investigations. (Abramson and Godoy, 2006)

Although it's difficult to measure the achieved results of the USA Patriot Act, some analysts claim that USA Patriot Act had success in identifying and arresting terrorists who have committed terrorist attacks, but showed no results in preventing terrorist attacks.

Conclusion

Restriction of civil and political rights is justified when it is in the name of national security, because the community rights overcome the individual rights. Noninfringement of restricted civil and political rights in terms of overdraft and abuse is crucial.

Any effort to prevent terrorist radicalization on the Internet (such as regulating, filtering or blocking online content deemed to be illegal under international law) should be in compliance with international human rights standards and made according to the rule of law, so as not to impact unlawfully on the freedom of expression and free flow of information. Security measures should be temporary in nature, narrowly defined to meet a clearly set-out legitimate purpose and prescribed by law. These measures should not be used to target dissent and critical speech.

(Akdeniz, 2010)

Counterterrorism measures vary across countries, but countries must make even greater effort to increase cooperation in adopting a legal framework in combating terrorism and unification of some of the basic notions related to terrorism. For example, the fact that there is no unified definition of the notion of "terrorism" is very much incomprehensible and unacceptable.

Also, countries must be very careful about the level of restriction of civil and political rights in the fight against terrorism because a significant restriction, especially to the freedom of speech may drive people toward extremist ideologies. More restrictive counterterrorism legislation may be generating negative impacts that weaken the global fight against terrorism, in the sense of isolation of the communities which could lead to a rise in terrorism. The biggest challenge for governments is to find ways of countering the threat of terrorism without weakening civil and political rights, which many consider to be the best defense against violent extremism.

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