

A Tale of Two States: Rule of Law in the Age of Terrorism

di Giovanna De Minico*

(published at <http://www.verfassungsblog.de/tale-two-states-rule-law-age-terrorism/#.VNeX0Lk5DIU>)

Legal framework

Let's consider the most significant anti-terrorism measures recently announced by some of the member States and by the European Union.

Well before the French facts, the [UK proposed](#) to isolate the suspects of terrorism, withdrawing and confiscating them the passport in order to avoid them to enter and go outside the country. This is in line with the aggressive policies of both the [Regulation of Investigatory Powers Act 2000](#) and of the [Anti-terrorism, Crime and Security Act 2001](#).

France, though declaring to stay apart from the American [Patriot Act](#), does not seem substantially to take distance from it, as [Hollande announced that he wants to close the online websites suspected of being fomenting terrorism](#). Not even the United States - responsible for the distant and pervasive control of our private life - has adopted a measure of such gravity, suffocating the freedom of speech and thought. It rather relies on the [market place of ideas](#) as an undefeatable antidote against the violence spreading germs.

[Germany has announced](#), together with the suspension of the ID card, based on the English model, other measures aimed to reinforce the dialogue between police and intelligence, upholding a demand for cooperation raised by multiple European voices.

European Union seems to have set definitely aside the very strong *querelle* between privacy and security with regard to the subject-matter of PNR, i.e. the personal number record of passengers. This is an ID of single passengers which put together miscellaneous data of various nature, from the personal data to the

information about how they paid, what they have eaten, which newspaper they have asked for on board or incidentally their sanitary requirements. Clearly, these data, if properly cross-examined, could be very useful to find out their political or religious thoughts.

The duty to collect this new mountain of data would be imposed on the air carriers for a number of years (yet to be defined precisely); and what is more incompatible with the rule of law is the fact that such measure applies to passengers regardless of their inclusion in a suspects' list. This issue is not new to the European Union. Actually, it dates back to a [Directive proposal of 2011](#), which was rejected by the [Libe Commission in 2013](#) for being in contrast with privacy and has been brought up again by the [European Council in August 2014](#). These days, it seems to be back into the agenda of the European Parliament after the meeting of the interior Ministers recently held in Place Beavau. The debated issue now is focused only onto the number of years of the data keeping, because all the resistances of the privacy supporters, the ones which fired up the debate at the Libe Commission, seem now to have been set aside in the name of security.

Let's ask ourselves if this mass recording is necessarily for prevention reasons. My opinion is that the demand for public security is not sufficient to justify such action; in fact, keeping this massive amount of information, applying indiscriminately to all the passengers, makes the investigations slow, ill-timed and, often, *inutiliter data*. Prevention measures, due to their anticipatory character, must be very timely and focused on well selected targets, otherwise they risk to be effective when an event has already occurred.

The well known criticism related to privacy violations, disproportionate control, lack of protection against discrimination, departure from the constitutional presumption of innocence, remain standing. Furthermore, the objection of the ineffectiveness of the remedy to fulfill the security aims,

already raised towards the NSA's acquisition of the online metadata, could apply also to the PNR.

Key considerations

After having highlighted the ongoing legal framework, let's focus on the "State of Terror" on the one side, and the "State of Law" on the other: what they want and how they intend to achieve it.

a) The State of Terror wants to spread the feeling of a chilling fear that makes men feel alone and without protection by the State of Law. In this situation of weakness, the citizen is ready to surrender his freedom in return of the promise of security, which however no Government could ever completely ensure. To sum up, terrorism has proven to have well understood the lesson of *divide et impera*.

b) The State of Law should respond by educating its community to the values of legality, tolerance and solidarity. Its duty, in the time of fear, is an ethical rather than a police one; it has to make the people come out from their isolation and facilitate their social and political inclusion. This action requires concrete actions by the political decision-maker.

To the fear, which is the first result of terrorism, the State has to respond with the wisdom of a legislator, which should not act under the pressure of understandable emotional feelings. Any measures have to comply with the principles of [proportionality](#) and [precaution](#), otherwise not only they risk to be erased by the European or national Supreme Courts, but they will prove to be meaningless. The recent episodes are evidence that the full-eyed controls, i.e. the online data collection of the real and virtual movements of the terrorists, [have not been able to avoid their criminal actions](#): controlling everyone is equal to controlling no one.

In a long time perspective, the European Parliament should make recourse to [article 83 TFUE](#) to give a common definition of the crime of terrorism and enact serious, quick and effective measures. This is permitted by article 83; and it is very much to be regretted that this competence conferred on the European Parliament has not been exercised so far.

Last but not least, there is a device at the disposal of the State of Law: a cultural action aiming to include heterogeneous people while respecting their diversities. By contrast, the melting-pot method followed so far, that tried to uniform the different ideologies, failed because of the lack of a common values.

The State of Law has not to use the usual categories of the prevalence of Right over Tort, West over Islam; it should rather develop the cohabitation of the opposites by sharing what we Europeans are still denying to the foreign people: the social rights. A State of Law, which shows itself severe in the rules but generous in the co-division of welfare, will be able to compete with the State of Terror. The latter reclutes its followers between the desperates, those who feel to be abandoned by the hosting State.

In the light of the above the foreigners could choose between a proposal of violence and isolation, made by the State of Terror, and one of cohabitation and solidarity, made by a new European State of Law.

** Giovanna De Minico is professor of Constitutional Law at the Federico II University of Naples, Director of the Interdepartmental Centre Hermes, coordinator of the International research group on "The Constitutions in the age of Internet", approved by the International Association of Constitutional Law. She is author of several essays and books, including a recent monograph: 'Internet. Regole e anarchia [Internet. Rules and Anarchy]' (Jovene: Naples, 2012). For further details see her university web page: <https://www.docenti.unina.it/links/visualizzaLinks.do?idDocente=474.94f56414e4e414445204d494e49434f444d4e474e4e36335334354638333952&nomeDocente=GIOVANNA&cognomeDocente=DE%20MINICO>*