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Communication rights, democracy & legitimacy : the European Union

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TRANSITION IV

*The targeting of “possible” criminals or terrorists, profiling, and abandoning purpose-limitation all result in the throwing together of all kinds of data, from all kinds of public and private-sector sources, “hard” and “soft”, relating to suspects, witnesses, “contacts” and even victims. Such policies make the evaluation of this amalgamation of data impossible to assess or verify. Moreover (and as an inevitable consequence), they may deny those (seriously) affected by them any effective remedies.
(Council of Europe, 2008)*

Measures taken in the name of national security have long included the use of Information and Communication Technologies (ICT) to identify and monitor suspected criminals. With the declaration of a “war against terrorism” there seems to have come about the continuing erosion of data protection and a broadening of surveillance measures to include not just suspects but the public at large, while the effectiveness of these measures remains questionable (Keyder, 2008). The use of ICT has also made it possible to engage in so-called “dataveillance”, meaning the storing and monitoring of data traces that individuals leave behind when moving about in the “information society”, while computer-generated profiles are increasingly decisive for intelligence-based decision-making (Council of Europe, 2008). Another trend identified by the Council of Europe Commissioner for Human Rights is the increasing use of administrative law and sanctions instead of criminal ones in the effort of dealing with “trouble makers”, which entails a worrying lack of safeguards for targeted individuals concerning for example the standards of proof required or the admissibility of evidence (Idem). Clearly, policies and legal changes during the past eight years have led to a considerable onslaught on human rights guarantees all over the western world and are in the process of establishing a general culture which may not be very conducive to the protection of human dignity in the future.

Whereas there is no doubt that States have an obligation to protect their citizens from terrorist attacks, the balance between protective measures and the rights of individuals is a delicate one which cannot simply be decided by throwing “security” on one side of the scales. After all, the necessity of recognizing human rights lies in their vulnerability in times of conflict and crisis.

TRANSITION IV

As the Council of Europe Commissioner for Human Rights has pointed out:

States thus have the difficult job of balancing competing human rights interests. On the one hand, they must protect their population against terrorist threats, and on the other, they must safeguard the fundamental rights of individuals, including persons suspected or convicted of terrorist activities.

(Council of Europe, 2008)

Even if measures that intrude on human rights guarantees may be found necessary and proportional under circumstances of imminent threat, such measures ought not to be permanent replacements of procedures under “normal” circumstances. Yet, the question of when this “war against terrorism” could - if ever - be declared over remains elusive and an essentially discursive issue rather than a clear-cut legal determination. Nonetheless, this discursive construction has given great impetus to the already existing trends in law enforcement. These trends are now threatening to invest national legal systems with a permanent state of emergency and to turn the “information society” into a “surveillance society” that lacks sufficient safeguards for individuals who risk to be targeted even if no criminal offense has been committed.

In the previous sections it has become clear that the attacks of 9/11 and the subsequent declaration of a “war on terrorism” have substantially changed the political climate also in Europe and have cleared the way for a number of developments at EU level that threaten to undermine established individual rights and protection. Also when it comes to the public right to access to documents held by EU institutions, it seems that the “war against terrorism” has become somewhat of a slogan which can flag decisions of refusal of access for a much less rigorous judicial examination than would be desirable in the face of almost unfettered executive power. The following section will take a yet closer look at the role that (access to) information plays in the cases of those groups and individuals that have been blacklisted and whose financial assets have been frozen as a result of Resolutions of the UN Security Council and EU implementing measures. How the EU and its courts have dealt with this is not only an interesting case study for the investigation of the relationship between international and European law, but a vital testing ground for the robustness of European human rights guarantees, such as the right to a fair trial, in times of political pressure to override them for the sake of “security”.

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TRANSITION IV