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COUNTER TERRORIST LEGISLATION, INTELLIGENCE AND SECURITY AGENCIES AND HUMAN RIGHTS

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Abstract: The paper discusses the nature and characteristics of counterterrorist legislation and focuses in particular on the influence of some of its provisions on the work of security intelligence services and their role in the protection of human rights and freedoms. Solutions contained in the so-called counterterrorist legislation have significantly changed and expanded to a great extent the scope of operations, jurisdiction and methods of security intelligence agencies in such a way as to effect more efficient combating of terrorism on the one hand, but also so as to question the justification of these solutions, especially from the aspect of the existing international standards for the protection of fundamental civil rights and freedoms. The rather heated debate does not appear to be calming down and it is particularly intensive with respect to the nature and scope of legal powers vested in the security intelligence services, their justification and possible threat to civil rights and liberties.

Key Words: counterterrorist legislation, security intelligence services, human rights and freedoms, control, lawfulness

1. Introduction

Contemporary threats and challenges to security exert significant influence on the position and roles of all subjects of the national security systems of each state. One of such challenges and threats is the appearance of the so-called global terrorism. The battle against terrorism is fought in a number of fields, one of them being the adjustment of legal norms so as to enable more efficient combat against terrorism. Following in the wake of the terrorist attacks in the

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US on September 11, 2001, numerous legal acts have been passed with a general purpose to redefine the existing legislative solutions governing the most important issues related to security and intelligence agencies and police. These changes were particularly extensive in the US, Great Britain, and Australia, as the states in which modifications of the national legislation took a distinct turn towards thorough changes in the strategy of national and internal security.

2. Recent changes in the counterterrorist legislations of the US, Great Britain and Australia

Based on *The National Security Strategy*, *The National Strategy for Homeland Security and The National Strategy for Combating Terrorism*, the central part of the US counterterrorist legislation presents *US Patriot Act – **U**niting and **S**trengthenin **A**merica by **P**roviding **A**ppropriate **T**ools **R**equired to **I**ntercept and **O**bstuct **T**errorism – P.L.107-56,* signed by the former US President George Bush on 26th October, 2001 (Uniting and Strengthenin America by Providing Appropriate Tools Required to Intercept and Obstuct Terrorism 2009)[1]. Beside the Patriot Act, vitally important for prevention of terrorism in the US is the *Homeland Security Act* from 2002, as well as a range of other statutes that define measures and means of terrorism prevention in different spheres (transportation, health system, defence, etc.). The *Intelligence Reform and Terrorism Prevention Act* from 2004 is of great importance because it accurately outlines and offers innovative solutions with respect to 1978 *Foreign Intelligence Surveillance Act.* It broadens the investigative measures performed by security intelligence agencies with a view to provide national security and combat terrorism.

The Patriot Act served as legal grounds upon which the US institutions of executive power have significantly stepped up their operative strategies in the prevention of terrorism, especially in the US territory. For instance, the US Department of Justice, whose major task is the prevention of future terrorist acts against the US, concluded that the Patriot Act has a crucial role in the protection of Americans against terrorism. Basically, the Act is a more extensive and more strict version of the *Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132*, which served the United States as means of legalizing the policy of intimidation and punishing the states which sponsor terrorism and through which the new legal category was introduced – *Foreign Terrorist Or-*

[1] For the US Department of Justice whose major task is the prevention of future terrorist acts against the US, the Patriot Act has had a crucial role in the protection of Americans against terrorism (Bullock, at all, 2006)

ganizations/FTOs; the act prohibits financing such organizations, granting visas to their members or providing any other type of material assistence, and it also rehabilitated the death penalty (Perl, 2003). Speaking of the Patriot Act, from the point of view of analysis of investigative and criminal procedural actions related to uncovering and prosecution of persons suspected of having committed acts of terrorism, Chapter 10 is of particular importance, because it defines 146 various acts which facilitate the work of federal investigative organs and judicial bodies in preventing and detecting terrorist activity (Bullock at all, ibid).

Soon after it was passed, the patriot Act faced numerous criticisms, especially in its Chapter 2 which deals with measures of surveillance and possibilities for mutual exchange of gathered intelligence among the judicial system bodies which, at that, need not be relevant for the criminal proceedings. Doubts were voiced most loudly with reference to the extended powers of American security intelligence agencies (members of the 'intelligence community') providing for surveillance of the US citizens (White, 2006). The Act allowed arbitrary detention of immigrants, secret search of premises, wherein the law enforcement officials could search the premises in the absence of the owner or his awareness thereof, and it also leads to the increased use of the so-called *National Security Letters*[2] against US citizens and foreigners even where there is no reasonable doubt that they have committed the specific criminal act.[3]

Most criticisms of the Patriot Act came from the non-government sector and primarily concerned the below listed powers entrusted to FBI by this statute:

- Control of the Internet traffic (web page analysis and e-mail control) and other communications on the basis of a secret court warrant against all persons that have ever been suspected of terrorism for whatever reason;
- Interrogating persons without court warrants purely on the basis of indications that they may have connections with terrorists or that they assist terrorist either materially or in any other way;
- Entering private premises (apartments or offices) on the basis of secret warrants and secret search thereof, as well as taking away document of persons for whom there are indications that they may have connection with terrorism or other forms of serious crime;
- Detention of immigrants and foreigners who can be charged with violation of the Immigration Act and Visa Regimen. In the case of the decision of

[2] *National Security Letters* are a type of orders issued by the FBI in order to gather information from private subjects for the purpose of criminal prosecution. They were introduced in 1978 and normally require the existance of reasonable doubt and are subject to court supervision.

[3] For the analysis of the Patriot Act see: http://www.ratical.org/ratville/CAH/USAPA.html#PAanalysis

deportation, if the native states refuse to let such a person back in, such a person may be kept in detention endlessly, or for as long as the investigative organs (the FBI, e.g.) find it fit.[4]

General conclusion of expert audience and human rights organizations is that the Patriot Act presents unbelievable ignoring of federal law. Criticisms essentially concern powers that the Patriot Act gives to the investigative and criminal justice organs in the US, the exercising of which violates fundamental human rights and freedoms, most of all the right to freedom of speech and confession, right to privacy, right to a defence counsel in the course of a legal proceeding, the right to equal protection before the law, protecting from arbitrary investigations and arrests, etc. (Bullock at all, *ibid*).

Other counterterrorist acts passed by the US legislation have also shared the fate of the Patriot Act. As early as November 2001, the US president issues *Military Order,* which envisages treatment of foreigners considered to be members of (*Al-Qaeda* or to be otherwise engaged in terrorist activities. The act provides for detention of foreigners in facilities outside the US territory, who are court marshaled without any guaranteed of basic rights, envisaged not only international law, but also US law (non-existence of *habeas corpus* and other rights and procedural guarantees for the suspects). This practice was additionally reinforced by the *Military Commissions Act* of 2006, which more closely defined the jurisdiction of military commissions trying cases against *alien unlawful enemy combatants*, whereas the trial of US citizens remained within the jurisdiction of regular courts. However, experts have warned that deprivation of liberty (arrest and detention) of persons who live outside the US or who are not US citizens in any other way (by means of abduction or illegal transportation) apart from extradition or arrangement with the country concerned, can hamper international relations between the US and other countries and even jeopardize interests that are more significant that the interests of justice and prosecution of individuals (Perl, *ibid*). Example of such practices are abundant, ranging from prisons in Afghanistan in the period of US intervention and later, to Guantanamo, and criticism mostly concerns the treatment of prisoners accused of being members of global terrorist networks or their assistants (Chaskalson, 2008).

Non-existence of basic defence rights provoked a reaction of the US Supreme Court. Thus in the *Hamdan v. Rumsfeld* case, the Supreme Court took a stand that was highly critical of the regulations pertaining to work of military

[4] Compare: Patriot Act Perspective – (The American Civil Liberties Union/ACLU Files against Patriot Act, From Kevin Bohn, CNN Washington Bureau, July 30, 2003. – In: Jane A. Bullock, at all, ibid

commissions, emphasizing that proceedings before the Military Commission present violation of Section 3 of the *Geneva Conventions*, which provides for the minimum of standards for trials of prisoners taken in armed conflicts, as well as for their right to be tried before regular courts and granted all legal guarantees recognized among civilized nations (*ibidem*).

As far as the Unite Kingdom is concerned, its counterterrorist legislation consists of a number of more prominent acts: *Terrorism Act 2000*, *Anti-terrorism, Crime and Security Act* 2001, *Prevention of Terrorism Act* 2005), and *Terrorism Act* 2006. Other important documents include *Countering International Terrorism: the United Kingdom's Strategy* of 2006 and *Counter-Terrorism Bill 2008* (for more detail, see Berriew&Carlile, 2008). As for the role of the UK's Ministry of the Interior in combating terrorism, the above listed acts and documents define MI5 as the security agency primarily responsible for combating terrorism in the UK territory, together with MI6, GCHQ and the *Joint Terrorism Analysis Centre – JTAC*. They are obliged to protect British interests, resources and British subjects from this global threat in keeping with the existing legislation.[5] An analysis of Britain's counterterrorist acts shows that security agencies were entrusted with significantly expanded powers with respect to investigation, detention and treatment of suspects in terrorist cases and other criminal acts related with it. Hence criticism of British counterterrorist legislation mostly concern the broad definition of terrorism, which includes even situations in which verbal support is offered to the armed resistance against the regime, and applies even to those who organize mass rallies as a form of protest against the government. The debate was especially heated with respect to provisions of Terrorism Acts 2000 and 2006, which substantially broadened the powers of security agencies (Hammerton, 2008).

Similar situations occurred in other states that passed counterterrorist statutes. In Australia, the key role in the prevention and suppression of terrorism was assigned to *Australian Security Intelligence Organisation – ASIO*. Namely, ASIO is in charge of realization of activities defined in the *National Counter-Terrorism Plan* and a new set of acts which deal with suppression of global terrorism. These statutes, as well as ASIO Act of 2002, granted ASIO broader powers related to forced entry, surveillance, storage of data pertaining to terrorist activities, search of premises, control of mail, tapping and recording telephone calls, intercepting electronic mail, control of computer data, secret surveillance of persons and the use of tracking devices on their vehicles, detention

[5] Compare: Countering International Terrorism: The United Kingdom's Strategy, July 2006, the Internet 10/09/2008, www.intelligence.gov.uk/agencies/~/media/assets/www.intelligence.gov.uk/countering%20pdf.ashx.

for 48 hours without reasonable doubt that they have committed acts of terrorism, inluding children, and the power to interrogate persons in the absence of their legal counsels. These provision have turned ASIO into an agency of law enforcement in the sphere of suppressing „politically motivated violence", espcecially terrorism (Bajagic, 2008). However, as in the case of the US and its security services, Australian counterterrorist legislation, and primarily provisions of the 2005 Anti-Terroris Act, as well as measures envisaged for Australian security intellignece agencies following September 11 were severly criticized by Janny Hocking. The criticism mostly concerns detention of persons for 48 hours and their interrogation in the absence of legal counsels. For instance, power of detention involves abolition of a person's right to remain silent, that is, to refuse to answer certain questions during detention and in the absence of the legal counsel. Hocking warns that the government proposed the establishment of new categories of terrorist offences, based on the British Counter-Terrorist Act 2000, and suggested that the persons suspected of being members of terrorist organizations should be deprived of their property. Finally, the government outlined extensive and unprecedented powers for the state prosecutor or another delegated minister to ban or prosecute by means of declaration and without a court trial such organizations as the minister himself may find threatening to the security. This process of executive prohibition will then create new related offences, such as membership in and support of such organizations and these will be treated as criminal offence (Hocking, 2003).

3. Critical Survey of Some Provisions of Counterterrorist Legislation and Their Practical Implementation

Changes in the strategy of national security were somewhat expected, bearing in mind the devastating effects of the terrorist attack on the US and the fact that the methods of perpetration, motives, consequences and goals of this terrorist attack gave a new dimension and meaning to contemporary terrorism and made it a global phenomenon. Provisions of the so-called counterterrorist legislation have to a great extent modified and widened the scope of operation, jurisdiction and methods of intelligence and security agencies in a way which, on the one hand, promotes more efficient combating of terrorism, but, on the other hand, questions the justification of such provisions, especially for the aspect of the existing international standards related to protection of fundamental civil rights and freedoms. The ensuing heated debate does not appear to be calming down and it is particularly intensive with respect to the nature and scope of legal powers vested in the security intelligence services, their justification and possible threat to civil rights and liberties.

Numerous criticisms that were addressed to some of the solutions in the anti-terrorist legislation primarily pointed out that the implementation of such provisions had initiated the practice of seriously eroding the basic rights and freedoms and the practice of giving priority to national security in such a way as make the requirement for consistent protection and respect of basic civil rights and freedoms appear relative. On the other hand, another danger of such practices was noticed, and that is a latent need to regard such a state of affairs as normal. In other words, there is a tendency to legalize arbitrary actions of security services and police that is to turn their extensive legal powers, introduced with a general purpose to efficiently oppose the current terrorist threat, into a model for future practice of security intelligence agencies. The critics of counterterrorist legislation draw our attention to the fact that even new terminology is used to that effect (resembling Orwell's 'newspeak'), thus giving new names to certain measures which, from the point of view of international law are undoubtedly unacceptable, so as to conceal their true nature. Thus, for example, kidnapping becomes '*extraordinary rendition',* whereas the use of torture, cruelty and inhumane treatment is referred to as '*coercive interrogation'*.[6] Furthermore, the conflict with terrorism becomes a war, leading to the use of corresponding terminology. The war against terrorism, according to Chaskalson, was conceived not only as a war against nations, but also against organizations or persons considered to be the enemy. There are two concepts of war: one against a nation and the other against terrorists. No state or terrorist were specified. The entire world is a potential battlefield (Chaskalson, ibid). Besides, it was pointed out that most of these acts were typically passed in exceptionally short periods of time, without the necessary debate that should have preceded them and bypassing the gradual lawmaking procedures (Haubrich, 2003).

Numerous sholarly and scientific debates among authors have also provided a pretty clear picture of the essential problem stemming from specific solutions provided for in the anti-terrorist legislation. For instance, P.A.J. Waddington has emphasized that criticisms offered by liberal authors and advocates of civil rights frequently lacks firm grounds, that their fear of counterterrorist legislation is ungrounded, and that their pessimism is inspired by potential danger, and not actual practice. Besides, according to him, civil liberties were violated on a number of occasions in the past due to the need that states respond with more repression to various threats, but that did not lead to serious jeopardizing of basic rights and freedoms that would derive from nor-

[6] This was the topic dealt with at the International Conference on the Rule of Law held in Chicago in 2006 (see, Robinson, 2006)

malization of such practices (Waddington, 2005). Waddington's claim that experiences from the past inspire optimism is, however, based on an analysis of experiences limited to the phenomenon of the so-called domestic terrorism. Contemporary societies, according to Dirk Haubrich, are facing a new phenomenon, the so-called transnational terrorism. The terrorist attacks of September 11 present the first case of transnational terrorism in which a state was attacked by non-state subjects. Aims of this form of terrorism are clear. They involve mass destruction, large numbers of civilian casualties and spreading fear (Haubrich, 2006). The reaction of some states to the outburst of transnational terrorism was very fast and thus adversely influenced the existing practice of civil rights and freedoms protection. The adoption of numerous regulations related to counterterrorist activities lead to a very realistic threat, not a latent one, according to Waddington, affecting fundamental civil rights and freedoms. Besides, the implementation of such provisions in practice gave devastating results. Haubrich gives alarming information that in the 2001 – 2005 period, 895 persons were arrested on the basis of suspicion that they were connected with terrorism or terrorist organizations. Out of this number, only 23 were convicted, whereas 496 were set free with no charges against them (Ibid).

Violation of international standards in the sphere of protection of basic rights and freedoms has thus become practice brought about by certain provisions of counterterrorist acts, which has been confirmed by examples given by many authors, including the one offered by Haubrich. It suffices to be reminded of the shocking video recordings of the US soldiers torturing prisoners in Abu Ghraib in Iraq, showing utterly inhumane and inhuman cruelty and ill treatment. Comparatively mild reaction of the US authorities following the publication of these recordings (suspension of the soldiers involved in torturing the prisoners) did not give an impression of determination to oppose such practices in an adequate manner. Furthermore, numerous decisions of the US president, as well as those made by the most senior representatives of political and military establishment, directly encouraged the practice of coercive interrogation and denial of obligations imposed by international law, thus supporting the practice an extreme instance of which was manifested in the torture used against the inmate of the Abu Ghraib prison (Paust, 2007).

Legitimacy of counterterrorist legislation was not questioned only because of obvious violations of international law norms protecting civil rights and freedoms. Its legitimacy can also be considered questionable with respect to its efficiency in combating terrorism. In other words, with respect to its basic motive, the reason and purpose of adopting such counterterrorist acts. This leads us to the military base of Guantanamo in Cuba and the practice of Bush administra-

tion in this facility which gave rise to a lot of criticism, controversies and debates. It is a common knowledge that the US authorities have turned this military camp into a detention center for aliens arrested under suspicion of being connected with terrorism. Over the past few years, during Bush's 'war against terrorism', a little more than 800 people were detained in this camp. The practice of the US authorities confirmed the absence of the prisoners' elementary rights (no right to defence, absence of *habeas corpus* and other procedural rights and guarantees), the use of torture, inhumane and degrading treatment of the prisoners and absence of time limits for their detention without pressing charges upon them. Such measures are not only seen by many as disputable from the points of view of ethics and international legal norms that prohibit such conduct, but also from the point of view of the efficiency of their use. According to Foley, the US policy applied in Guantanamo (and in other detention camps) has basically been completely inefficient because, due to the guidelines that it was based upon, it ended up with a too extensive definition of terrorism and lead to inhumane treatment in the course of investigation and forced confessions on the basis of which many innocent people were detained, and the very investigation of terrorist threat rendered utterly imprecise (Foley, 2008). The rules were not introduced to prevent abuse, torture and inhuman treatment. On the contrary, such practices derived from these rules and were encouraged, so it became the very purpose of the Guantanamo camp to ensure that the detainees are kept as far as possible from all the principles underlying the rule of law, as far as possible from any legal protection, at the mercy of the victorious arbiters (Lord Steyn, 2003). Some optimistic feeling, however, stem from the fact that one of President Barac Obama's first decisions in January 2009 was to close down the Guantanamo base.[7]

4. Conclusion

It is a fact that states, in an attempt to efficiently oppose terrorism by modern and acceptable strategies, both politically and legally, often have to face two conflicting goals of combating terrorism: 1) to protect citizens against terrorist actions, which implies limiting freedoms of terrorist organizations, groups and individual terrorists and enabling the state organs to work within law; and 2) to

[7] The decision ruled that detaining people in the Guantanamo military base was contrary to the principles and values underlying the American society, and speaking about his decision to close down the camp Obama pointed out that the US would be efficient in combating terrorism, but only in the manner that complies with these values and principles. See: http://www.guardian.co.uk/world/2009/jan/22/hillary-clinton-diplomatic-foreign-policy;
For decision, see: http://image.guardian.co.uk/sys-files/Guardian/documents/2009/01/22/draft_order_closure_of_guantanamo_bay.pdf

ensure the maximum of democracy, human rights and freedoms while lawfully exercising power (Perl, ibid). This is where some justified criticism comes from with respect to certain counterterrosit acts in some states. Namely, we cannot help worrying about provisions contained in some of these acts and the ensuing practices. It is perfectly clear that a state has to defend itself from terrorism and the threats it poses. There can be no doubt about it. However, the way in which some countries want to oppose this threat inevitably gives rise to the question whether an overtly free interpretation of the need for efficient response to terrorism conceals possibilities for extending the powers of security and intelligence agencies in a way that seiously jeopardizes civil rights and freedoms both at present and in future? Based on the above stated, it can be concluded that this fear is quite realistic. The fact that leading political and economic powers were the first ones to introduct such practices is of particular concern. Paradoxically, these are the very democracies in which there is traditionally the rule of law. What appears to be certain is that the term terrorism used in rhetoric of some politicians is gradually taking the meaning of the word 'enemy' in authoritarian states, in which this phenomenon is used to expand their own power at the expense of human rights. On the other hand, the rhetoric of such individuals with respect to human rights and the need for their protection has become an ideology concealing numerous motives that have nothing to do with true protection of citizens and their rights and liberties. This can be supported by words of Michael Ignatieff, who, in his more than inspirational study on human rights, says that nowdays we intervene on behalf of human rights more than ever, but our interventions sometimes make things worse. He claims taht instead of upholding human rights, out interventions may use the legitimacy of human rights as a universal basis for foreign policy (Ignatieff , 2006).

The threat that can be recognized with respect to counterterrorist legislation, jurisdiction and methods of security service and intelligence agencies, in the field of human rights derives from the ever more conspicuous domination of national priorites over individual security which, in the contemporay world, is accounted for by the need to efficiently oppose terrorism as a global social evil. The ratio between the efficiency of state and rights (particularly human rights) thus gains a new dimension in which the law itself justifies the need for efficiency by increasing power (expanding powers) of intelligence and security agencies and reducing legal restrictions of their activities. Certainly, it remains to be seen whether this phenomenon will induce changes in the role of these services and to what extent, as well as whether it may lead to departure from principles and values that the rule of law and democracy imply, above all consistent respect and protection of civil rights and freedoms.

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ANTITERORISTIČKO ZAKONODAVSTVO, OBAVEŠTAJNO-BEZBEDNOSNE SLUŽBE I LJUDSKA PRAVA

Rezime

Primena pojedinih zakonskih rešenja usvojenih u najznačajnijim izvorima tzv. antiterorističkog zakonodavstva pokazala se u praksi kao izuzetno kontraverzna, naročito na polju njihove primene u radu obaveštajno bezbednosnih službi, gde su mnoga pomenuta rešenja u značajnoj meri dovela u pitanje sopstvenu opravdanost sa stanovišta zaštite osnovnih prava i sloboda građana. Rešenja tzv. antiterorističkog zakonodavstva su u značajnoj meri promenila i značajno proširila delokrug rada i nadležnosti i metode obaveštajno bezbednosnih službi i to na način kojim se, s jedne strane, afirmiše efikasnija borba protiv terorizma, ali, s druge strane, dovodi u pitanje opravdanost ovih rešenja naročito sa aspekta postojećih međunarodnih standarda za zaštitu osnovnih prava i sloboda građana. Veoma žustra polemika koja se tim povodom povela ne jenjava ni dalje, a naročito intezivna je ona polemika koja se odnosi na prirodu i širinu zakonodavnih ovlašćenja obaveštajno bezbednosnih. Rasprave po tim pitanjima vode se kako unutar naučne i stručne, tako i u okvirima šire javnosti.

Summary

Implementation of certain legal provisions contained in the so-called counterterrorist legislation has, in practice, turned out to be highly controversial, especially with respect to activities of security intelligence agencies, which in turn has raised the question of their justification with respect to civil rights and freedoms. Solutions contained in the counterterrorist legislation have significantly changed and to a great extent expanded the scope of operations, jurisdiction and methods of security intelligence agencies in such a way as to effect more efficient combating of terrorism on the one hand, but also so as to question the justification of these solutions, especially from the aspect of the existing international standards for the protection of fundamental civil rights and freedoms. The heated debate does not appear to calm down and it is particularly intensive with respect to the nature and scope of legal powers vested in the security intelligence services, their justification and possible threat to civil rights and liberties.