

FEAR & SECURITY

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IF WE COMPARE THE WORLD WE LIVE IN TODAY WITH the world as it was before the events of 11 September 2001, one can perceive that it has gone through very deep changes. Before September 11th, 2001 security was seen as a common good that states gave to citizens. State security meant protection of territorial boundaries, institutions, societal values as well as citizen protection. Politics and military power were seen as the legitimate means to protect the public from external interference and our right to security was assured without severe impacts on our fundamental rights and freedoms. Since September 11th, 2001, however, the matter has turned into something else entirely and our daily life looks very different today.

Some say that the root of all changes is fear: the fear of an enemy who does not adhere to the rules and has nothing to lose. Some identify, or have been led to identify, this enemy with terrorism that comes from faraway lands, and speaks a language that most of us do not understand. Some believe that in order to defend ourselves from such an enemy more intense controls and more invasive security measures are necessary, regardless if they are detrimental to our fundamental freedoms, or our democratic principles.

Fear has always been a close companion of mankind. Primitive men have looked for shelter and discovered fire because they were afraid of atmospheric phenomena and wild beasts. Fear accompanies babies taking their first steps and the beating heart of a first date. The internet was born as a result of the fear that a catastrophic phenomenon could interrupt the communications between military research centres. It really seems that fear is a necessary spark for the human intellect, which spurs men's capacity to find solutions and brings men on the way to progress. If this is true, why is fear no longer an inspiring companion, but instead has turned into the cause of restriction to our fundamental freedoms? Why does it not raise new ideas and progress anymore? Why has it become the cornerstone of our narrow-mindedness with respect to the *other*, to the *different one*?

The most immediate answer is that we are afraid to be afraid. We are afraid to face our enemy and discover that it is not exactly what we thought. Maybe we are already aware of what lies behind this irrational fear that makes us believe we are doing the best, whereas, instead, we are reducing our level of freedom and, in some ways, our possibilities for peace, equality, non discrimination and progress by repressing effective debate between Eastern and Western countries, as well as the inspiring of dialogue among cultures and faiths.

Since September 2001, the security-strategy wave has hit several states. Most of the Western nations, overcome by the emotional rush caused by the tragic attacks, have perceived the menace of Islamic terrorism as the most serious threat for, and violation of, fundamental rights and freedoms and, paradoxically, it is in the very fight to defend such rights that many states, in an uncritical manner, have given responses and adopted tools whose compliance with fundamental rights and freedoms is truly questionable. Through the adoption of measures facilitating personal data retention and transmission, and intensifying the monitoring of personal communications in particular, states have increased the risks of breaching the individuals' right to the respect of privacy. Furthermore, by extending the powers of the law enforcement services, and by imposing more restrictive legislation on the admission of foreigners, nations have put bona fide refugees and asylum seekers in serious danger. In this scenario it seems that citizens owe rights to the state, which clearly sounds like a paradox.

According to eminent scholars of law¹ fundamental rights and freedoms are owed to citizens by states, they determine the percentage of freedom that the members of a certain society have in relation to state power, thus limiting the size of self-existence and self-determination of every human being. Presently fundamental rights and freedoms are usually set out in constitutions and, therefore, have increased formal power. This means that they cannot be abrogated or changed by a formal law or any

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*“ I disapprove
of what you say,
but I will defend
to the death your
right to say it. ”*

VOLTAIRE

regulatory deed of the executive power, and that they lay down the limits and the legal framework within which state agents should act as it regards their relations with the citizens. In this sense, fundamental rights and freedoms have an interdisciplinary legal character, as they lay down the core rules of administrative law, criminal law, civil law, as well as overall procedural law.

In ancient times, individual freedom was a real state and not a legal safeguard, as the words of Aristotle “in turn, to rule and be ruled”² may well prove. The road to legal safeguarding of fundamental rights and freedoms has been a long one. Today the right to life, freedom of thought, conscience and religion, freedom from torture or cruel, inhuman or degrading treatment, and the principles of precision and non-retroactivity of criminal law, except where a later law imposes a lighter penalty, are recognised by national constitutions as fundamental human rights that cannot be derogated. For other fundamental rights, including the right of movement, of assembly and to privacy,

derogation is only permitted in special circumstances defined in international human rights law as is incorporated in national laws. In this case derogation must be of exceptional character and carefully weighted. Any such measures must be strictly limited in time and substance to the extent required by the exigencies of the situation, and subject to regular review. Derogations must be consistent with established national and international procedures and mechanisms. Considering the essential importance of human rights and fundamental freedoms in a free and open democratic society, states must ensure that any measures restricting human rights in response to criminal actions and terrorism strikes a fair balance between legitimate national security concerns and fundamental freedoms that is fully consistent with their international law commitments.

Discussions regarding the conflict between security and freedom inevitably fall on a biased, statist view, which takes for granted that the state provides security and, by extension, we must choose between security and freedom. Politicians, legal experts and public opinion are more and more frequently divided when the right to security of persons is in conflict with the right to exercise fundamental rights and freedoms.

The question of balancing state security and safeguarding fundamental freedoms is crucial and in finding the answer we must not forget that the *Universal Declaration of Human*

Rights of 1948³ recognises that all the power resides and emanates from the people. Moreover, the *Human Development Report* of 1994⁴ states clearly that global security should deal with economic development, food, health and environmental issues. This is the path that states should follow together to combat the old problems of misuse of power by the strong on the weak, social differences, wars and destructions. However, the intensification of cooperation between states which have different standards on the issue of fundamental rights and freedoms puts them at risk. Especially when certain confidential and private data are communicated between states which have different levels of

data protection, or when extradition or transfers between states are facilitated to the detriment of the guarantee of non liability to the death penalty, to torture or other inhuman treatment or deprivation of the right to a fair trial which must be given to every individual. In addition, the international dimension of the phenomenon can be a menace for the free movement of people and potentially the right of



asylum, in particular when certain states are considered as a possible shelter for potential criminals. All this clearly may well encourage discriminatory attitudes vis à vis people belonging to certain religious beliefs or to certain nationalities.

Most Western countries consider themselves among the ‘good ones’ for a reason: because they believe in universal values, which emerged during the Enlightenment and developed into the inalienable rights of every human being. States do need to fight any actual threat to homeland security with all means available to democracies under the rule of law as, in doing so, they are not only defending their physical integrity, they are, above all, defending their core principles of democracy.

To alleviate the fog around the debate on security and fundamental freedoms a more dynamic starting point must be adopted. This starting point must be the concept of freedom in its many forms. In doing so, analysis of both the *pro-security* and the *pro-freedom* arguments is crucial. The concept of security is empty if it is not accompanied by freedom. Essentially, we are safe if we are not vulnerable to potential or actual harm from others, if we are free to act without the occurrence of illegitimate violence. State violence is no better than other forms of violence if it omits to protect individual freedom. This key point must be stressed.

If nations give up their moral high ground by collaborating with those systems that legitimate the use of violence in the name of (inland) homeland security, democracies lose in the fight for fundamental freedoms. If states change our way of living by abolishing civil liberties and creating an atmosphere of constant fear, they fall into a trap. If nations give up their respect for human dignity and rule of law by using confessions made under torture – even in third countries – they cancel centuries of fights for the recognition of fundamental rights and freedoms.

The conflict is a conflict of ideals. The defeat of *pro-security* arguments is evident from the beginning, since they are grounded on the assumption that obscure and self-illuminated bureaucratic or political powers, may create security. As a matter of fact, this only transfers the sources of insecurity. It is clear that no one would feel safe if secret services under the noble mask of the fight for homeland security – gather information about our political activities, sexual orientation or health status. On the other hand, we have *pro-freedom* arguments that provide us with a more uncertain terrain. Freedom is the core issue. The proof of this is plain, as even when we weigh it against the concept of security, we do so in order to ascertain what the most balanced position is. We don't want freedom to be utilised against freedom. Thus, we must put it under some restraints. Defending the rule of law is a political, ideological, and moral obligation. Pragmatically, and historically speaking, it is the best way to defend security. Nevertheless, we must also remember that a law that is not able to protect individuals from harm, whatever the source of such harm and whatever the origin of this law's inefficiencies may be, amounts to nothing.

Across Europe, in particular, the debate on whether fundamental rights and freedoms may be compromised for the sake of the common good is still very animated. Yet, behind this debate lies the more complex question of who protects Europeans' fundamental rights and how.

In the European Union, the risk to fundamental rights posed by the adoption of measures to fight terrorism are all greater since democratic and juridical controls are still very inadequate in the current institutional equilibrium.

Basic freedoms are often guaranteed in national constitutions. At a continental level the *European Convention for the Protection of Human Rights*⁵ is frequently used to uphold the rights of the individual over the power of the state. The EU has its own *Charter of Fundamental Rights*⁶, though the partial defeat of the European Constitution means that it is not yet fully binding.

These various layers offer Europeans a degree of fundamental rights and freedoms protection denied to most of their fellow human beings around the world. But they can also lead to confusion. Which court has the authority to decide which rights can be claimed by a given individual? And then, to which higher court can that individual appeal? And what should happen if conflicts emerge between rights defined at national, EU, or pan-European levels?

It is not difficult to imagine a problem arising one day when the European Court of Justice in Luxembourg – long the highest court within the EU – will have to judge fundamental rights cases. By then the EU may well have

joined the European Convention on Human Rights, so if the plaintiff objects to the judgement, he or she may still appeal to the European Court of Human Rights in Strasbourg – and the Luxembourg judges will have to get used to deferring to an even higher judicial authority.

Do Europeans need all these different sources and layers of fundamental rights protection? As long as Europe remains a complex political entity that respects both diversity and common values, the answer is yes. This multiplicity allows different cultural traditions to emphasise different rights and freedoms, whilst reinforcing common values such as the freedom of conscience and religion, which is more strongly protected in Europe than in almost any other part of the world.

So protection of fundamental rights and freedoms needs to be co-ordinated but its multiplicity maintained. Without co-ordination, regional variations and conflicting jurisdictions will scrape off the rights of all Europeans. Sharing the responsibility for fundamental rights between different courts and sources of law ensures that hard-won rights cannot be easily eroded. The balance between freedom and security in Europe today cannot be determined by a single government, but requires a debate involving all those responsible for Europe's common heritage of fundamental rights. The protection of fundamental rights and freedoms, as the beginning and the end of any political decision, will allow us to have at least a rational criterion for decision-making.

¹ Amongst others: Augusto Barbera, Gustavo Zagrebelsky, Peter Haberle and Josef Isensee.

² Aristotle, *Politics*, VI, 2.

³ *The Universal Declaration of Human Rights* was adopted by the General Assembly of the United Nations on 10 December 1948. Following this historic act, the Assembly called upon all Member countries to publicize the text of the *Declaration* and «to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories.»

⁴ *The Human Development Report* of 1994, published in the context of the United Nations Development Programme, introduced a new concept of human security, which equates security with people rather than territories, with development rather than arms. It examined both the national and the global concerns of human security. The Report sought to deal with these concerns through a new paradigm of sustainable human development, capturing the potential peace dividend, a new form of development co-operation and a restructured system of global institutions. New York-Oxford, Oxford University Press, 1994.

⁵ *The European Convention for the Protection of Human Rights*, also known as the *European Convention on Human Rights*, effective as of 3 September 1953, was adopted under the auspices of the Council of Europe on 4 November 1950 to protect human rights and fundamental freedoms in Europe. All Council of Europe member states are party to the *Convention*.

⁶ *The Charter of Fundamental Rights of the European Union* was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000. ■