



European Civil Liberties Network

## *Essays for civil liberties and democracy in Europe*

### **What's wrong with Europe?**

*Gus Hosein*

As a North-American in Europe I often find myself having to defend the indefensible. Frequently, even amongst colleagues and friends, I am called on to defend the American response to terrorism - the USA-PATRIOT Act, extra-ordinary rendition, Bagram and Guantanamo Bay prison camps, torture.

But so much is going wrong in Europe itself yet so long as Europeans can point to the problematic measures in the U.S. then no one is noticing that the European system isn't working that well either.

To be honest there are days where I despair for civil liberties outside of the U.S. Don't get me wrong: I'm not some 'rah rah America is great' person. I am no fan of a number of policy initiatives emerging from the U.S. since the 1990s. And of course there is the litany of legislation that deal with terrorism: USA-PATRIOT, Enhanced Border and Visa Security Reform Act, a variety of intelligence reform and homeland security legislation, and the REAL-ID Act to name but a few. All in their own ways chip away at civil liberties and enhance surveillance powers. And there is an equally bad list of policy initiatives: US-VISIT, Total Information Awareness, Computer Assisted Passenger Pre-Screening System, Secure Flight, TIPS, MATRIX, and countless other programmes and technologies that were proposed over the years.

At cocktail parties across Europe I overhear conversations about these awful programmes, practices and policies and I am expected to bow my head in shame. Indeed I do, but I do not despair about the U.S. In the U.S. there are institutions, agencies and organisations at work who are trying to minimise and fix the problems that are arising.

While my head is bowed with shame I usually grit my teeth and try to resist doing what inevitably happens: I lash out. And you, the reader, will have to bear with me as I lash out on paper: Europe is heading quickly into a legal abyss of fear and indifference.

#### **Europe's Fading Culture of Rights**

One of the largest differences between the U.S. and European public discourses is the lack of adequate scrutiny of the police actions by the state. This was not always so; for instance in the 1980s there were public demonstrations in the Netherlands protesting against the census. But we have not seen such public demonstrations lately against police powers in Europe; in fact most public demonstrations are usually in response, again, to the actions of America.

I am going to be a bit shrewd and blame the lack of public attention to civil liberties on the perception of international institutions. In the current debate in the UK on greater anti-terrorism powers we are told that the greatest civil liberty is the right to life; and that the European Convention on Human Rights is getting in the way of the Government's attempts to ensure that 'most basic civil liberty'. This is a dangerous logic. It is most dangerous because it creates a false conflict between the great UK Government as it tries to protect the lives of Britons and the ECHR that seeks to impose death and destruction upon Britain. And the public appears to believe it. By implementing the ECHR into British law in 1998 under the Human Rights Act, politicians have created an external outlet for blame. On top of that, trying to find justice within the ECHR process requires going all the way to the European Court of Human Rights, in Strasbourg. This process takes much patience and funding.

A similar situation arises in the regulatory regime for protecting personal data. For a long time Europeans have mocked the Americans for lacking an appropriate privacy-protection regime; the EU has a strong regime in the 1995 Directive on the protection of personal data in both the public and private sectors, while the U.S. only has such a law protecting the use of personal information in the public sector. Consistent surveys of the American people show that the vast majority are concerned with the use of

personal data by both industry and government.

In Europe there seems to be a complacency on the protection of personal data. There are no equivalent surveys. There is little public discussion on privacy. Instead regulators are entrusted and references to the 1995 Directive are considered sufficient. When the EU moved to transform privacy rules in order to enable communications surveillance the response from the general public was mute. Little debate occurred in the public domain because the decision was made at the EU and not in Member States, and also because the argument that prevailed in what little debate that was held was that if you have nothing to hide then you have nothing to fear. If such a proposal for indiscriminate surveillance was made in the U.S. there would be massive public outcry. To date the only significant outcry has emerged from what few non-governmental organisations there are, from some public regulators, the telecommunications industry and select European Parliamentarians.

There is no daily discussion of constitutional rights and values in European societies and this can be attributed to the fact that these are alien concepts. Data protection rules are EU-based and make us complacent while we rely on the law and regulators to protect our interests; and civil liberties are hardly protected by the ECHR even as a false dichotomy is created to place blame on the ECHR whenever a Government wishes to introduce problematic laws.

What is most lacking in Europe is the culture of rights. In the U.S. there is certainly public support for problematic laws but there is also the public discussion on rights and safeguards, innumerable court cases brought against the Federal Government, laws introduced to minimise intrusions upon the private lives of individuals, and countless studies conducted to point out troubles and flaws. Towns have even passed ordinances calling for refusals to comply with Federal agents using powers under the USA-PATRIOT Act. The sum of all of these actions is the constitution of the open society: people acting in order to question Government policy. In the U.S. not only do the avenues for such questions exist, but you have people pursuing them because of the culture of rights. In Europe there is a lack of such impetus to pursue these causes and I put this down to a lack of culture. (I can already hear the \*GASP\* sounds as the reader hears an American accuse the Europeans of lacking culture!) Of course this is a gross generalisation. In the UK there are public demonstrations against detention powers; Britons do feel as though there is something 'un-British' about ID cards, restrictions on habeus corpus, amongst other measures introduced recently. But there is no

denying that there is a significant difference to the public responses to the UK Government's policies than to the U.S. Government's policies.

### **The Lack of Culture Hurts the Law**

While Europe rests on its laurels of having created legal regimes such as the Council of Europe's ECHR and the EU's Data Protection Directive, many of the promised rights and protections are being eroded not only by Government policies but also by the lack of a strong rights culture. It is not enough to claim privacy as a constitutional right, as essential to democracy, and to leave it at that hoping that no further incursions will arise. No constitutional right, nor any moral right for that matter, is absolute.

Within the European Convention on Human Rights, the right to privacy is 'balanced' against many other considerations, on the following condition developed by the European Court of Human Rights: intrusions on privacy must be considered necessary in a democratic society and thus they must be deemed proportionate.

Society's attitudes thus become the barometer of privacy as a fundamental right. What is 'proportionate' and 'reasonable' is unclear. There was a time when we thought that capital and corporal punishment were reasonable and proportionate when the crimes were severe enough or the public wanted vengeance, retribution, and entertainment. Generally, this is no longer the case. But there was also a time when we believed that national databases were problematic, that mass surveillance of communications was disproportionate and unreasonable. Yet we now see these systems and practices spreading.

In December 2004 the EU established a rule that would require all European citizens to have their fingerprints compulsorily taken in order to get a passport. These fingerprints will then be verified at border entry points in the EU and, probably, while abroad. This will lead to the collection of fingerprints of 450 million individuals. As Europeans grow more accustomed to submitting their fingerprints for access to borders they are less likely to be offended when their own home governments require their fingerprints for more general purposes.

Previously we collected fingerprints of criminals, or collected information on suspects; now European societies seem less obsessed with due process, and many argue that they are willing to forego liberty in the name of security. Some schools in the UK are collecting fingerprints from children when they borrow library books; the public outcry was again

minimal and the privacy regulator even acquiesced to this collection. In the U.S. when a school began using radio-ID tags on students it was national, and even international news and the school was embarrassed into halting the programme. As a result in the U.S. students are learning that they must not be tagged and U.S. society and thus U.S. law is likely to see this as disproportionate. In the UK where fingerprinting is taking place in libraries, and across the EU where Governments will hold the fingerprints of all residents, it is likely that though there may be initial resentment, with time this will be seen as acceptable, reasonable, and proportionate. And when even greater intrusions are incurred, the Courts will say that people were willing to accept fingerprinting in schools and at borders, so subsequent policies will not be seen as unreasonable.

Five years ago we would never have pursued many of these policies and systems. I now worry most about what will happen five years from now, looking back and looking forward: what will we think is reasonable, proportionate, and necessary in a democratic society when we have given up so much already with such little struggle?

### **Moving on**

As someone who works in what is called the 'civil society'-sector in Europe I am amazed whenever I look at the differences between the U.S. and Europe. In the U.S. there are countless non-governmental organizations that are well funded on just about any and every topic area. I wouldn't be surprised if there was a well funded NGO on the protection of rights of rare moss in forests of north-western states of Oregon and Washington. In Europe the landscape is dismal. And this is reflected in contemporary civil liberties struggles.

Whenever a new law is passed in the U.S. that tries to regulate free expression there is usually a mad rush by policy experts, law organisations, civil liberties organisations, and other institutions to take the case to the Courts. Arguably the perception in the U.S. is that this is the moment at which the true debate begins because there is a lack of trust in the legislative process.

In Europe, once a law is passed this is usually the end of the debate. The actors and resources required to take the case further are too few and too far between.

My friends and colleagues across Europe may not appreciate my characterisation of European civil society organisations and I welcome their comments.

It is my belief that Europe is failing to establish adequate safeguards on the ever-increasing powers of the state because Europe relies on external institutions and lacks a culture of rights. With these two weaknesses there is a lack of civil society participation and as a result we lack the ability and resources to properly conduct campaigns and take policies further when politics fails.

And politics is failing at an increasing rate. Many of our most intrusive laws are not being decided within national legislatures but are now being established and agreed upon at international institutions. This is the act of 'policy laundering', where national executives seek laws internationally so as to bring them back to national parliaments as an 'international obligation'. At these international institutions there is limited debate and practically no oversight, particularly on policing measures.

Policy Laundering is far too commonplace in Europe. Governments are seeking a variety of policies through the various European inter-governmental institutions, such as the European Union and the Council of Europe. Fingerprint databases, trans-border sharing of data for policing, communications surveillance, and immigration policies are only some of the policies being decided outside of national scrutiny.

So my European colleagues may not appreciate my characterisation of European civil society organisations, but even if we were to agree that some NGOs have a significant presence in their own countries dealing with their own governments' policies, these same NGOs are not particularly adept at dealing with these international institutions.<sup>1</sup> So as policy-making moves international, civil society in Europe is failing even more so.

This is why the European Civil Liberties Network is so essential. The pooling of intellectual and strategic capacities from NGOs across Europe is an absolute necessity whilst Governments co-operate on establishing invasive policies in unaccountable circumstances. High profile and necessary action to question problematic policies and appeal to legal relief are essential for the preservation, maintenance and enhancement of a culture of civil liberties in Europe.

As ever, resources remain a significant challenge and this is where I am sceptical. There are so many policies, so many institutions, so many forums and yet so few members of civil society with so little funding and capacity to counter what is going on. A radical shift in European civil society funding is perhaps needed; otherwise it will continue to be an

embarrassment in comparison to the U.S. landscape. And so long as that continues it is likely that European civil liberties and political discourse are also likely to be the butt of my jokes and the continued cause of my despair.

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#### **Footnote**

1 There are of course honourable exceptions like *Statewatch* which has worked at the European level since its formation in 1991.

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