

**Effects of terrorism on the enjoyment of human rights
and fundamental freedoms in Portugal**

Portuguese Ombudsman contribution

(June 2018)

The Portuguese Ombudsman institution, in its capacity of national human rights institution fully in line with the Paris Principles and accredited with “A” status since 1999, hereby replies to the call for input received from the UN Human Rights Council Advisory Committee on *The negative effects of terrorism on the enjoyment of all human rights and fundamental freedoms*.

The current mandate holder, Maria Lúcia Amaral, took office in November 2017.

1. Background

Portugal has not been targeted by terrorist attacks. However, the 2017 National Report of Internal Security¹ states that Portugal may not be immune to this phenomenon, reference being made to the use of the country’s territory as a place of transit, logistical support or recruitment of jihadists. The terrorism threat to Portugal is considered to be *moderate*².

However, despite not being affected by terrorism as such, this country has been witnessing, in the past year of 2017, to an increase of organized criminality, especially on the fields of trafficking of human beings and smuggling of irregular immigrants, as well as on weapons and drugs trafficking³.

At the same time, despite the European context of increased radicalization, political extremism and populism, these trends have not been witnessed in the official Portuguese political

¹ Presented at the Portuguese Parliament and available at: <http://www.parlamento.pt/Documents/2018/Marco/RASI2017.pdf>

² National Report of Internal Security, 2017, p. 70.

³ National Report of Internal Security, 2017, p. 67.

arena, so far. In part, this is due to the constitutional prohibition of creation of fascist ideology-oriented parties⁴. Nonetheless, informal groups with fascist and extremist ideologies have developed dialogues with other European countries' similar organizations or political parties, and have made some demonstrations, especially within social networks⁵.

2. Legal restrictions to Human Rights motivated by fight against terrorism

Portugal, such as other European countries, has adopted or amended several legal acts, in the past five years, for the purpose of investigating, combating and preventing terrorism. Many of these acts were imposed by the Portuguese European Union membership, and are part of the measures enacted in the context of the European Area of Freedom, Security and Justice. Many of these legal acts and legal amendments have resulted in some restrictions to fundamental rights. One may point out some examples, which can be enumerated as follows:

1) Restrictions on the right to liberty

The Law on Combating Terrorism was amended in 2015⁶. These amendments were mainly aimed at widening the range of crimes related to terrorism and at provoking an anticipation of criminal protection. A paradigmatic example in this respect is the incrimination inserted in 2015, which has autonomously sanctioned the mere fact that someone travels or tries to travel to a State other than the nationality or residence State, for the purpose of training, providing logistical support or conducting instruction of other persons for the practice of terrorist acts (Article 4 (10)). It also punishes those who organize, facilitate or financially support these travels (Article 4 (12)).

⁴ Article 46, n. 4 of the Portuguese Constitution.

⁵ National Report of Internal Security, 2017, p. 71.

⁶ Law n. 52/2003 of 22 August, as last amended by Law n. 69/2015 of 24 June.



2) Restrictions to Procedural Guarantees

Criminal procedural guarantees also suffer several restrictions in cases of terrorism. One of such restrictions is expressly foreseen in the Constitutional text since 2001. Article 34 (3) of the Portuguese forbids entering at night into people's home, without their consent, except in cases of particularly violent or highly organized crime, including terrorism, and following a judicial authorization.

The Criminal Procedures Code⁷ also foresees several limitations to guarantees when terrorism charges are concerned. For example, Article 143 (4) sets forth that in cases of terrorism charges, the detainee cannot communicate, before the first judicial hearing, with any person, except his or her lawyer. On its turn, Article 174 exempts criminal police officers from obtaining prior judicial authorization for searches and inspections aimed at investigating crimes of terrorism, provided that there is sound evidence of the imminent practice of a crime that seriously endangers the life or integrity of any person. Finally, Article 215 (2) and (3) allow for longer pre-trial detention deadlines in cases of terrorism.

3) Restrictions to freedom of expression

The criminal punishment of terrorism had also some effects on restricting the scope of freedom of expression. In this context, some actions such as incitement (article 4, paragraphs 3 and 4 of the LCT) and terrorism apology (article 4, paragraphs 8 and 9 of the LCT) are criminally punished. Some legal scholars claim, however, that it is difficult to determine the cases in which the expression of a mere opinion constitutes an effective apology of terrorism acts. Some also claim that the criminalization of these acts may lead to an excessive intrusion on people's freedom of expression⁸.

⁷ Decree-Law n. 78/87 of 17 February, as last amended by Law n. 1/2018, of 29 January.

⁸ Pedro Caeiro, "Algumas Considerações sobre a dimensão substantiva do chamado «Direito Penal do Inimigo» e sua incidência na investigação criminal", available at <https://www.fd.uc.pt/~pcaeiro/2015%20Direito%20Penal%20do%20Inimigo.pdf>

4) Restrictions to property rights

Law n. 97/2017, of 23 August, regulates the implementation and enforcement of restrictive measures adopted by the United Nations or by the European Union into the Portuguese legal system. Thus, since August 2017, Portuguese internal legislation provides for a range of restrictive measures, including asset-freezing by suspects of involvement in terrorist activities. The new legal act sets forth the possibility of autonomous application by the Portuguese State of restrictive measures that have been approved by the UN or the EU (see Articles 6 to 8). In practice, Portugal has been able to rely on UNSC Resolution 1373 (2001) to make internal freezing lists of assets whenever it suspects that a person is involved in terrorism (see assumptions in par. 1 (c), 1 (d) of this Resolution).

5) Restrictions to Privacy

Portugal has also enacted legislation aimed at *preventing* terrorist activities. In this respect, in 2015 a Bill was approved with large majority in the Parliament, which enabled the Intelligence Services of the Portuguese Republic to access to citizens' communications metadata. However, following a request of preventive constitutionality review made by the President of the Republic, the Portuguese Constitutional Court declared the Bill to be unconstitutional⁹. The Court considered, on one hand, that the Constitution only allowed restrictions to the right to privacy of communications in the context of criminal procedures, that not being the case of preventive activities developed by the Intelligence Services (Article 34 (4)). On the other hand, the Court considered that the act did not foresee enough guarantees regarding the respect of private life of personal data holders. In 2017, however, a new act was enacted with the same purpose. It is currently in force and enables the Intelligence Services of the Portuguese Republic to have access to communication and internet metadata in the

⁹ Ruling 403/2015 of 27th August 2015. Available at: <http://www.tribunalconstitucional.pt/tc/acordaos/20150403.html>



context of its activity aimed at preventing terrorism¹⁰. Contrarily to its predecessor, this new act sets forth several guarantees for the access to personal data, such a mandatory judicial authorization. However, its constitutionality is still controversial due to the above mentioned Article 34 (4) of the Portuguese Constitution. The Constitutional Court is still analyzing its constitutionality (at the date of June 2018).

6) Restrictions to Immigration, Asylum and Acquisition of Nationality

Like other Member-States of the European Union, Portugal has also added, in its immigration, asylum and nationality laws, legal clauses aimed at responding to the terrorist menace.

a) The Portuguese *Immigration Law*¹¹ foresees, in several provisions, special measures to those who represent a danger to public order or national security, especially in cases where there are enough evidence of the involvement in terrorist activities. That is the case of visa cancellation (Article 70 (1) (d)), non renewal of temporary residence permit (Article 78 (2) (d)), denial of permanent residence permit (Article 80 (1) (b)) and loss of long-term resident status (Article 131 (10)). Moreover, an amendment made to the law in 2012 has restricted the right to remain in Portuguese territory in cases where there is a reasonable suspicion of terrorism. Before such amendment, Article 135 foresaw an absolute prohibition of expulsion to several categories of foreigners on the grounds of protecting their fundamental rights to family unity and private life: that would be the case of those who were born in Portuguese territory and were residing there; those who were parents and were effectively in charge of minor children residing in Portugal, and those who resided in Portugal since they were less than 10 years old. None of these persons could be expelled, for any reason whatsoever. The 2012 amendment inserted exceptions to this absolute right to remain in the territory. Such exceptions are grounded, amongst other reasons, on the purpose to fight against terrorism. Thus, if someone is considered to represent such a menace, he or she may be expelled, regardless of being in one of the situations explained above.

¹⁰ Organic Law n. 4/2017, of 25 de August.

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b) Portuguese *Asylum Law* sets forth the same limits to the attribution of refugee status and subsidiary protection that would result from the 1951 Geneva Convention on the Status of Refugees and the Qualification Directive of the EU¹². Thus, those who represent a menace to public order or national security (here included terrorist threats), are not granted with these statuses (Article 9). Conviction for having committed a serious crime and being, at the same time, a danger to public order and national security are also grounds for loss of international protection status (Article 40 (5)). These grounds also may justify detention of an asylum seeker on temporary centres, as foreseen in Article 35-A.

c) Finally, the Portuguese *Nationality Act* was amended in order to encompass clauses aimed at protecting the national community from potential members who may represent a terrorist threat¹³. The 2015 amendment inserted an exception for those who gather all requirements to become Portuguese citizens through naturalization, but may represent a danger to national security or defense, for their involvement in activities related to the practice of terrorism. The new clause prevents these candidate from acquiring Portuguese nationality through naturalization (Article 6 (e)). The same ground is also established as a ground for opposition of the acquisition of nationality through marriage, civil partnership, or adoption (Article 9 (d)). However, one must highlight that loss of citizenship can only occur in case of the holder's renouncement.

7) Restrictions to the National Citizens' Guarantee of no Extradition from the Portuguese territory

Finally, the global aim of fighting against terrorism and criminal cooperation in the EU Area of Freedom, Security and Justice, justified an amendment made to the Portuguese Constitution. Until 1997, the Basic Law established an absolute prohibition of extradition of Portuguese citizens from the national territory. However, due to integration on the European

¹² Directive 2011/95/EU of the European Parliament and of the Council of 13 december 2011, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

¹³ Law n. 37/81 of 3 October, as last amended by Organic Law n. 8/2015 of 29 July.



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Area of Freedom, Security and Justice, and some of the legal acts adopted in this context (such as the European Arrest Warrant), the Constitution was reviewed in order to encompass some exceptions. Thus, currently, Article 33 (3) allows for exceptional extradition of Portuguese nationals "in cases of terrorism and organized international crime".

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