Georgina Browes:
Legislating after a terrorist attack

Introduction:

I'm going to be asking: what's the danger of legislating in a post-extreme event world? And how does Europe in particular strive to retain its relevance at a time when an attack such as those recent and atrocious events in Paris, actually abets the rise of anti-immigration and Eurosceptic discourse – the antithesis of Europe and the European project?

Part 1:

So let's go back a few years – to the 9/11 terrorist attacks and what is arguably the catalyst of the modern domestic security debate. The political rhetoric immediately following the attacks used the atmosphere of fear pervading American – and European – society at the time, to rapidly push through a number of laws and regulations, greatly expanding the powers of government agencies. The most prominent and controversial of these was the USA Patriot Act which had – and has – significant consequences for civil liberties, lifted restrictions on communications surveillance, and expanded the definition of terrorism to give the FBI increased powers to access personal information.

But the US - of course - was not alone in pushing through legislation post 9/11 which encroached significantly on personal freedoms. After the bombings in Madrid and London, the EU adopted in 2006 its Data Retention Directive – harmonising member state legislation which required operators to store telecommunications data for up to 2 years, and to make this data available on request to law enforcement authorities. On first glance even the Patriot Act did not go this far, even if the NSA leaks have since shown just how far such inflated powers can, in actuality, take us.

As was the case with the Patriot Act in Congress, this rather disproportionate, certainly invasive, legal text moved remarkably quickly through the European legislative

process. The UK – then holding Council Presidency - did much to ensure a rapid adoption of the Directive in under a year. Then UK Secretary of State Charles Clarke was reported to have told Members of the European Parliament that if they failed to agree the measure he would make sure the Parliament would no longer have a say on any justice and home affairs matters. Furthermore, the UK drove this legislation through at European level knowing that the UK Houses of Parliament had previously blocked a similar mandatory data retention scheme from being adopted at national level.

So here is a Directive which not only did much to curb civil liberties – indeed went well beyond similar clauses in the already-notorious USA Patriot Act – but was also rushed through Parliamentary scrutiny and in a manner which undermined the democratic oversight due such a text. What is more, the European legislative sphere was used rather cynically by the UK as a means by which to develop wide-reaching anti-terrorist measures "via the back-door" so to speak. This act in itself undermined Europe's legal and democratic legitimacy, and – by minimizing the role of the European Parliament – contributed actively to the so-called "democratic deficit" at EU-level, so beloved by the Eurosceptic discourse.

Part 2:

So, has Europe abandoned all hope of striking a balance between individual liberties and national and regional security in its law-making, running rough-shod over the democratic legislative process as it goes?

Thankfully, I believe not.

Last year the European Court of Justice declared the Data Retention Directive invalid. In doing so, it made reference to the EU Charter of Fundamental Rights which became legally binding in Europe with the entry into force of the Treaty of Lisbon in 2009.

The Court's reference to the Charter of Fundamental Rights is particularly relevant. For the first time, the EU has a framework to safeguard and guide the promotion of fundamental rights throughout the EU. More than this, the EU now also has, as a result

of the Lisbon Treaty and in the form of the European Parliament, a fully-fledged co-legislator to actively promote and protect these rights. And whether cause or consequence, the Charter is intrinsically linked to the augmented presence of values and rights-based legislating at EU-level.

Part 3:

And the European Parliament seems to be taking its role as legislator on home affairs and justice issues seriously. For example, a legislative proposal published by the Commission back in 2011, which would oblige airlines to hand over to EU countries the data of passengers entering or leaving the EU, was put on the back-burner by MEPs who cited serious concerns relating to a lack of safeguards in the text.

Even after the atrocious attacks in Paris, MEPs have so-far resisted additional pressure from EU Member States to adopt the proposal quickly and without sufficient response to their concerns, as is now their legislative right.

What is more, it seems that a rights-based approach to security is beginning to permeate the European security discourse. Council President Donald Tusk, EP President Martin Schulz and Commission President Jean-Claude Juncker, all expounded on the need to avoid knee-jerk legislative reactions after the Charlie Hebdo attacks, and the need to consider the – perhaps conveniently ambiguous, but at least acknowledged – presence of a European values-system in any political or legislative response.

Conclusion:

And so to briefly conclude: rash decision-making may lead not only to a democratic deficit in the content of the legislation itself, but has also been used as an excuse to reduce democratic oversight. We must remain vigilant in protecting against this legislative reflex at EU-level. Greater visibility and presence for an evolving EU values-system will play a key role on the difficult road ahead.