

Privacy and Big Data

Blacklisting: the right to travel in the time of aviation terrorism

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I. Introduction

Since President George W. Bush declared the „war on terror“ during a speech in 2001, the international community introduced diverse attempts to combat terroristic threats.¹ Particularly, the possible damages caused by aviation terrorism are severe. Therefore, different international bodies and national states, *inter alia*, introduced the so-called blacklisting regime.

„Big data blacklisting is the process of categorizing individuals as administratively "guilty until proven innocent."“²

As the quote of Margaret Hu might connote, the blacklisting regime is facing different concerns regarding the guarantee of fundamental rights and basic freedoms. The following lines aim to briefly characterize the blacklisting regime and afterwards, examine different concerns of blacklisting.

II. Passenger rights in the time of aviation terrorism and the „war on terror“

Firstly, in order to examine the given issue reasonable, it is necessary to briefly define the right to travel. According to the meaning in the U.S.A., Richard Sobel defined the right to travel as a fundamental and broadly based personal, political and economic right.³ Therefore it contains the right for free domestic movement without governmental curtailment.⁴ A very important term of this definition is the word „domestic“. Alongside with the legal framework in the U.S.A., Germany and other European countries limit their right for domestic movement.⁵ In Germany, Art. 11 of the German „Grundgesetz“ stipulates the right for free domestic movement for every German citizen. However, although the constitutional right to travel cannot be fully taken into account considering aviation travelling, one can perceive the general intention of modern democratic societies to enable their citizen to move freely, wherever they want to go. The right to travel to other countries, particularly via plane certainly has to be treated differently. Besides the fact that different legal orders and frameworks apply in different countries, the possibility to travel via plane harbours diverse challenges and security risks to cope with. In this respect, one has to balance the general intention of a free movement and the fundamental rights and basic freedoms of everyone against the risks and challenges that come with the

¹ Text of George Bush’s adress to a joint jession of Congress and the American people, September 21st 2001; Link: <https://www.theguardian.com/world/2001/sep/21/september11.usa13>.

² Hu, Margaret; Big Data Blacklsiting; 67 Fla. L. Rev., 1735; 2015 (pp. 1747).

³ Sobel, Richard; The Right to Travel and Privacy: Intersecting Fundamental Freedoms; 30 J. Marshall J. Info Tech. § Privacy L. 639; 2014 (pp. 640).

⁴ Sobel, Richard; The Right to Travel and Privacy: Intersecting Fundamental Freedoms; 30 J. Marshall J. Info Tech. § Privacy L. 639; 2014 (pp. 639).

⁵ Decision of the German „Bundesverfassungsgericht“: BVerfGE 6, 32.

current possibilities of travelling around the world. Particularly, travelling with planes in times of aviation terrorism has become a huge issue since 9/11. According to the severe impacts of an plane accident or a terrorist attack, the concerns and the safety measures within an airport are supposed to be remarkably high.

Possibilities to ensure a safe and secure plane traffic, especially when it comes to the potential risks emanating from passengers sitting in the plane, are the so-called „No Fly Lists“ or „Blacklists“.⁶ The consequences for someone being listed on such a list might be imposed travel bans, frozen assets or the suspicion of being a terroristic thread by simply being associated with a certain group or organisation.⁷ These lists are established by either single national states or international and regional bodies, such as the UN and EU.⁸ Those lists contain names of individuals and groups and thereby designate them to be somehow related to terrorist attacks or organisations and as a consequence, ban them from travelling with a plane or put them underneath further and more intimate security checks.⁹ The blacklisting regime on the international level, concerning the EU, has been introduced by UN Security Council Resolutions, namely Resolution 1267¹⁰, Resolution 1333¹¹ and Resolution 1373, which contains general obligations and commitments to combat terrorism in the 21st century.¹² Certainly, to simply ban people from entering on an plane or freeze their assets is a very effective way for the respective government agency or international police organisation to prevent those who are presumably somehow related to terrorist groups, from basically doing anything regarding aviation travelling.¹³ However, on the other hand, this approach of preventing terrorist attacks raises diverse concerns according to its compatibility with formally guaranteed fundamental rights and basic freedoms. Particularly the fact that some of those listed on a blacklist are solely presumed to be related to terroristic groups seems to be highly questionable in consideration of the fundamental presumption of everyone being innocent until proven guilty.

In order to systematically approach some concerns raised by this way of excluding or impeding some people from exercising their right to travel, the following part of this elaboration will firstly name the certain fundamental human right affected and afterwards, the issue the blacklisting regime raises regarding the respective human right.

Firstly, a frequently expressed concern about the regime of blacklisting is the presumed incompatibility of „No Fly Lists“ with the Right to a Fair Trial.¹⁴ The Right to a Fair Trial is enshrined in different international agreements and treaties, such as Article 6 of the European Convention on Fundamental Freedoms and Human Rights, Article 10 of the 1948 Universal

⁶ Hu, Magarete; Big Data Blacklisting; 67 Fla. L. Rev, 1735; 2015 (pp. 1775).

⁷ Sullivan, Gavin; Rethinking terrorist blacklisting; The Guardian, Fri. 10 Dec. 2010; Link: <https://www.theguardian.com/commentisfree/libertycentral/2010/dec/10/terrorist-blacklisting-un-report-human-rights>.

⁸ Hoffmann, Julia; Terrorism Blacklisting: Putting European Human Rights Guarantees to the Test; Constellations Volume 15, Number 4, 543; 2008 (pp. 543).

⁹ Sullivan, Gavin; Rethinking terrorist blacklisting; The Guardian, Fri. 10 Dec. 2010; Link: <https://www.theguardian.com/commentisfree/libertycentral/2010/dec/10/terrorist-blacklisting-un-report-human-rights>.

¹⁰ 1999, concerning the Taliban.

¹¹ 2000, concerning Osama Bin Laden and Al Qaida.

¹² Hoffmann, Julia; Terrorism Blacklisting: Putting European Human Rights Guarantees to the Test; Constellations Volume 15, Number 4, 543; 2008 (pp. 544).

¹³ Cameron, Iain; European Union Anti-Terrorist Blacklisting; 3 Hum. Rts. L. Rev. 225; 2003 (pp. 225).

¹⁴ Hoffmann, Julia; Terrorism Blacklisting: Putting European Human Rights Guarantees to the Test; Constellations Volume 15, Number 4, 543; 2008 (pp. 549).

Declaration of Human Rights and Article 14 (1) of the 1966 International Covenant on Civil and Political Rights.¹⁵

Article 6 of the European Convention on Fundamental Freedoms and Human rights lays down the following:

„In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.“

According to the various anchoring in different international agreements, the Right to a Fair Trial can be considered as one of the most important fundamental rights. Therefore, a raised concern about the compatibility of blacklisting with the Right to a Fair Trial has to be examined carefully. In order to fully exercise the Right to a Fair Trial, it is of essential importance for a petitioner or defendant to be able to fully access the respective materials and information that lead to a certain act by an authority. Transferred on the blacklisting regime, for the Right of a Fair Trial, it is absolutely necessary to know for what reason one is listed and thus not able to enter an plane, use his property and consequently being hampered from exercising his or her rights to travel. Moreover, it is simply not possible to provide a Fair Trial by an independent judicial authority, if the relevant information is not available, neither for the complainant, nor for the judicial authority itself. Regarding this necessity, particularly the access to the crucial information is not provided by the respective entities.¹⁶ The particular information leading to a registration on a blacklist, as well as the fact of being listed itself and overall the whole process itself are not accessible and comprehensible for the affected individual, since the decision is based on secret intelligence agency materials.¹⁷ In other words, he or she does not know whether there is an existing registration, let alone the information and reasons let to it.¹⁸ Admittedly, there has been an enhanced awareness of the lack of the ability to exercise the Right to a Fair Trial through recent EU case law decisions, which claimed their inability to provide a Fair Trial with effective judicial redress according to the lack of available information.¹⁹ However, the basic systematic problem that the decisive information is not available for the listed individual, as well as for the respective court, remains and therefore makes it questionable to consider the process of blacklisting and the opportunity for a petition to be removed from that list to be compatible with the Right to a Fair Trial.

Secondly, alongside with the Right to a Fair Trial goes the Right to be Heard and the Right to be Informed. The Right to be Heard commits the respective agencies to provide the listed individual with the burdening evidence and giving them the opportunity to explain their

¹⁵ Sullivan, Garvin and Hayes, Ben; Blacklisted: Targeted sanctions, preemptive security and fundamental rights; ECCHR; 2010 (pp. 27).

¹⁶ Sullivan, Garvin and Hayes, Ben; Blacklisted: Targeted sanctions, preemptive security and fundamental rights; ECCHR; 2010 (pp. 26f.).

¹⁷ Hoffmann, Julia; Terrorism Blacklisting: Putting European Human Rights Guarantees to the Test; Constellations Volume 15, Number 4, 543; 2008 (pp. 547).

¹⁸ Sullivan, Gavin; Rethinking terrorist blacklisting; The Guardian, Fri. 10 Dec. 2010; Link: <https://www.theguardian.com/commentisfree/libertycentral/2010/dec/10/terrorist-blacklisting-un-report-human-rights>.

¹⁹ Sullivan, Garvin and Hayes, Ben; Blacklisted: Targeted sanctions, preemptive security and fundamental rights; ECCHR; 2010 (pp. 81). & Hoffmann, Julia; Terrorism Blacklisting: Putting European Human Rights Guarantees to the Test; Constellations Volume 15, Number 4, 543; 2008 (pp. 549).

perspective and provide relieving facts.²⁰ Controversially discussed is the issue of the certain moment one has to be given the opportunity of provide his point of view. On the one hand, it would somehow contradict the whole system of blacklisting, if one would be informed about investigations concerning him as soon as they started. Presumably, the results of those would not be very meaningful, since the suspicious could remove all incriminating facts. However, in any case, one has to be informed as soon as possible after the registration on a blacklist about the fact that he or she is listed in order to be able to provide relieving evidence.²¹ Regardless the particular moment of notification for the individual, the listed ones yet do not have the opportunity to make direct representations to the UN Sanctions Committee in order to question the respective decision which blacklisted them.²² In turn, this lack of accessible information to challenge the information cannot be considered as compatible with the fundamental Right to be Heard.

Additionally, the Right to be Informed is closely connected to the Right to a Fair Trial and requires the full access to any relevant information due to the registration process.²³ As outlined already, individuals are not provided sufficient information neither by the respective investigating agency nor the UN Sanctions Committee.²⁴ However, although there has been some information made accessible for the blacklisted ones, especially the decisive reports of intelligence agencies and therefore the crucial reasons for the listing are not available for the individuals.²⁵

Furthermore, besides the Right to a Fair Trial, severe accusations due to the blacklisting regime are made in regard of the consistency with the principles enshrined in Article 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, namely the Right to Judicial Review and Effective Remedy. In order to comply with the Right to Judicial Review, the relief requires to be effective and exercised by an independent and impartial judicial body.²⁶ According to this, neither the UN Sanctions Committee nor the EU Council can be considered independent in the respective manner, since they are the responsible authorities for the blacklisting process.²⁷

The above-examined concerns about the compatibility of the blacklisting regime and the fundamental human rights all have a common ground. On the one hand, the mentioned fundamental rights and freedoms are formally guaranteed by several international agreements and treaties. Regarding the paperwork, one benefits from versatile and inevitable rights guaranteed in order to protect the mentioned freedoms and rights, and in case there occurs a presumed violation of those, one can access effective judicial review. Theoretically, this sounds

²⁰ Sullivan, Garvin and Hayes, Ben; Blacklisted: Targeted sanctions, preemptive security and fundamental rights; ECCHR; 2010 (pp. 28).

²¹ Sullivan, Garvin and Hayes, Ben; Blacklisted: Targeted sanctions, preemptive security and fundamental rights; ECCHR; 2010 (pp. 28).

²² Sullivan, Garvin and Hayes, Ben; Blacklisted: Targeted sanctions, preemptive security and fundamental rights; ECCHR; 2010 (pp. 28).

²³ Sullivan, Garvin and Hayes, Ben; Blacklisted: Targeted sanctions, preemptive security and fundamental rights; ECCHR; 2010 (pp. 29).

²⁴ Hoffmann, Julia; Terrorism Blacklisting: Putting European Human Rights Guarantees to the Test; Constellations Volume 15, Number 4, 543; 2008 (pp. 546).

²⁵ Sullivan, Garvin and Hayes, Ben; Blacklisted: Targeted sanctions, preemptive security and fundamental rights; ECCHR; 2010 (pp. 30).

²⁶ Sullivan, Garvin and Hayes, Ben; Blacklisted: Targeted sanctions, preemptive security and fundamental rights; ECCHR; 2010 (pp. 32).

²⁷ Sullivan, Garvin and Hayes, Ben; Blacklisted: Targeted sanctions, preemptive security and fundamental rights; ECCHR; 2010 (pp. 32).

marvellous for individuals. On the other hand, the objective of social security and the prevention from terroristic attacks occupy the other side of the scale. In particular, if it comes to terroristic threads accorded to the aviation industry, the damage resulting from those in case they are „successfully“ performed is enormous. Therefore, the argument of terroristic prevention usually seems to outweigh rights of the individual by far. This general observation can also be transmitted to the blacklisting regime. The huge theoretical threat of terroristic attacks undermines the individually guaranteed rights. Especially alarming is the fact that this undermining and violation of fundamental rights seems to occur systematically and on regular basis when it comes to blacklisting of suspicious people.

Besides the legal objections, one can detect the potential abuse of those blacklists to achieve political goals and undermine criticism. For instance, the Kurdish Workers' Party PKK has been blacklisted by the EU in 2002.²⁸ Furthermore, US Republicans tried to blacklist WikiLeaks as a terrorist organisation.²⁹ Regardless, how one judges these two examples in detail, both of them are highly controversial discussed in an international context. While one could consider the PKK as an terroristic organisation, another could mention their right for self-determination. However, this elaboration certainly does not want to assess the affairs of Wikileaks and PKK, but these matters may raise the awareness of the possibility for political abuse of the blacklist regime. In Particular, if the regime itself and the contained processes are that opaque.

III. Conclusion

Taking all the outlined concerns into account, the blacklisting regime seems to lead individuals in a „Kafkaesque“ situation.³⁰ Once an individual is listed, the available methods for either gaining information about the blacklisting process itself or efficiently challenge the listing decision seems to be obscure. Summarized, this „Kafkaesque“ situation can hardly be considered sufficient, regarding the fundamental principles of a Right to a Fair Trial and Right to be Heard and Informed. In Particular, because the mentioned principles are not meaningless paperwork but fundamental elements of a modern and democratic society, the compliance of the blacklisting regime as a whole with the legally binding principles needs to be enhanced. A further risk of such an opaque situation is the potential abuse and arbitrariness of the system. This hardly can be accepted by the international community. However, one has to admit that the potential damage caused by a terrorist attack is extremely severe. Therefore it certainly is necessary to provide possibilities and regimes to cope with those challenges. But, even though a single individual might has to accept restrictions or special treatments within a security check at an airport, it is unlawful and not acceptable if fundamental Human Rights of crucial importance are violated systematically and without adequate juridical redress for the affected. As a conclusion, the right to travel currently faces enormous challenges, particularly when it comes to aviation travelling. Regardless, whether the blacklisting regime is suitable for facing those challenges, it certainly needs to be improved in a manner that forecloses systematic human right violations. Although the „war on terror“ is one of the most important challenges in

²⁸ Sullivan, Garvin and Hayes, Ben; Blacklisted: Targeted sanctions, preemptive security and fundamental rights; ECCHR; 2010 (pp. 48).

²⁹ Sullivan, Gavin; Rethinking terrorist blacklisting; The Guardian, Fri. 10 Dec. 2010; Link: <https://www.theguardian.com/commentisfree/libertycentral/2010/dec/10/terrorist-blacklisting-un-report-human-rights>.

³⁰ Hoffmann, Julia; Terrorism Blacklisting: Putting European Human Rights Guarantees to the Test; Constellations Volume 15, Number 4, 543; 2008 (pp. 548).

the 21st century, we cannot and should not extend the means infinite. Basic freedoms and fundamental rights need to be respected, even though concerning the „war on terror“.