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# Counter-Terrorism: Correlating Security and Freedom

## 1. Introduction

The 9/11 terrorist attacks in New York and Washington, which came as a complete surprise to the USA and the countries of Europe, indubitably represent a turning point in the political and academic discourse on internal and international security. A number of European states have experienced acts of terrorism in the 1970s – these were acts of an endemic nature. At the turn of the twenty-first century, these crises subsided into the past, attracting insufficient attention in the public realm. However, the new threat facing the US, especially its domestic security – as the country, at that time, lacked experience in this field, and coupled with the shock – instilled a sense of helplessness among its political elites and the wider public. This led the US President to announce that his country was in a state of war with the new terrorism, the now infamous “War on Terror.” In a word, this was a sign that a new form of threat to the security of the state and its public was faced by the rule of law democracies and they lacked the knowledge on how to deal with it.

What is more, the 9/11 attacks made it abundantly clear that, in the globalized and unilateral world we have today, the spheres of internal and external security interweave and are closely linked together. This brought a clear message to American decision-makers: matters of security and combating terrorism cannot be solved with measures hitherto applied. A new type of menace requires a new response. President Bush postulated that this new form of threat requires a new paradigm of thinking on the right to war.<sup>1</sup> The terrorist attacks in Madrid in 2004 and in London the following year prompted individual countries to step up efforts to find solutions to the growing danger, placing that subject on the top of their political agenda.

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1 Memorandum from the US President G. Bush, *Human Treatment of Taliban and al Qaeda Detainees*, available at <http://www.fidh.org/IMG/pdf/memo11>, accessed 21 December 2015.

## 2. Security and Terrorism Discourse in the Wake of 11 September 2001

As already mentioned, the terrorist attacks of 11 September 2001 marked a significant watershed in academic research. Prior to these attacks, the investigation of terrorism was the sole domain of expert centers, government administration advisory bodies and the secret service while the main focus was on leftist, ethnic and sectarian terrorism. The terror attacks of 2001 shifted attention to the problem of international terrorism, generating increased funds for research, including academic investigation.

At the same time, the September attacks represent a turning point in the history of international terrorism. Violent, fear-inspiring attacks are, after all, an old phenomenon, but it is only the 9/11 that maps out a new stage on the path of its growth. The specific nature and size of these attacks introduced into public and academic discourse a new type of terrorism, one that is linked to Islam. Thus, after 2001 Islamic terrorism becomes an object of attention. Over the years, it gained a strong religious legitimation, which was created – according to Gilles Kepel – in the process of grass-roots “re-islamization” across the Arabic world and in the Islamized areas of Western Europe.<sup>2</sup> It must be added, of course, that this constitutes an abuse of Islamic religion and a highly instrumental approach to its religious tenets.

The phenomenon of Islamic terrorism is partly a consequence of global modernization which sees a clash between the traditional life-style (based on religion) and modernity (identified primarily with the Western culture). What is new about this type of terrorism is that it is not a method of reaching specific political goals but rather a strategy against a specified enemy. Certain new and hitherto unseen features seem to define it. Firstly, it is motivated by a strong religious message. Secondly, the perpetrators include mainly suicide bombers bent on killing and maiming the most number of people. Thirdly, they have at their disposal an effective system for generating vast funds. Fourthly, and most importantly, they have a new organization structure that is a flexible and global network.

The post 9/11 terrorist attacks had a mobilizing effect on Western states to undertake various counter measures. Among them were primarily the moves to change internal law in respect of state security and cooperation with other countries in order to combat terrorism. At this time, an international legal system comprising of procedures and institutions has been developed to safeguard against and to fight terrorism. It is made up of rules and regulations within the UN, the

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2 G. Kepel, *La revanche de Dieu. Chrétiens, juifs et musulmans la reconquête du Monde*, Editions du Seuil, Paris 2003.

Council of Europe and the European Union. What makes these regulations unique is the fact that they stress the need to comply with the basic standards in human rights protection, even with regard to the perpetrators of such acts.<sup>3</sup> However, despite the considerable legal output of the international community tackling the new threats a single definition of terrorism acceptable to most states is yet to be written. The lack of such a definition makes the undertaking of counter-terrorism measures by states more difficult, especially where it concerns human rights and liberties. And without it, addressing international terrorism has more in common with politics and political deference than with international law.

As can be expected, this makes for a highly complex situation in Europe. Human rights and liberties entrenched in the constitutional and legal tradition of the West – won in a long historical process in opposition to a strong state – have been an incontestable and inviolable canon of the political system. And it is the system which, in turn, underpins provisions in international law. Rights and liberties have become common in democratic states ruled by law, whereas threats to security have never been considered with due attention. In Europe, the Hobbesian *Leviathan*, symbolizing a strong state, was constrained by the constitution and resigned to the primacy of law and freedom.

Western states, in the understanding of Giovanni Sartori, have become consolidated democracies, in other words they are no longer in danger of reverting to authoritarian rule. In fact, Western states have gone even further. As advocates of the expansion of democracy, following the perspectives of Samuel Huntington and Francis Fukuyama, they believe that it is necessary and justified to overthrow despots in the name of freedom in other parts of the world. But not enough thought is given to the strategic or even tactical consequences of such moves. Warnings that the endemic anarchy, practically unavoidable, could be worse than the regimes of secular despots were largely ignored. Thus, one cannot but agree with the view held by the British theoretician of liberalism, John Gray, claiming that states should be free to choose their course of development and, as long as they do not represent a threat to others, even undemocratic regimes should be tolerated.<sup>4</sup>

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3 T. Aleksandrowicz, *Terroryzm międzynarodowy*, Oficyna Wydawnicza Łośgraf, Warsaw 2008, pp. 89–90.

4 J. Gray, *Heresies: Against Progress and Other Illusions*, Granta Books, London 2004, p. 91.

### 3. Liberties and Security in the Catalogue of Constitutional Rights

The new type of threats that emerged in the wake of 2001 represented a serious challenge to the democratic states of Northern America and Europe. In this new situation, states not only wanted but also had to strengthen their power and the effectiveness of counter-terrorism measures. The tenet which says “rights and liberties as much as possible while security as little as necessary” as a political directive in the fight against terrorism has become untenable. Terrorist threats necessitate more state power, among other things, in order to make state policies effective. But expanding state power does not conform to the liberal tradition upheld by democratic rule-of-law states. This creates a tension – a conflict between measures aimed at increasing safety and the ingrained tradition of the sanctity of rights and liberties. Thus, the question arises: what should be done (and in what way) in order to guarantee security to our citizens without a recourse to limiting their rights and liberties? In these circumstances, can a balance be maintained between liberty and security? Do we require liberty at all cost? On the whole, the question of how to maintain an appropriate proportion between freedom and security has been a primordial one, raised by political philosophy, by governments and the governed as well.

After 2001, these questions have found their way into mainstream political thought. In the legal, constitutional and political discourse the concept of security collided with the issue of individual, group, social and national freedom. Freedom has always been firmly embedded in the constitutional landscape of democratic states under the rule-of-law; the same cannot be said about security, although in modern constitutionalism, security is frequently treated as the constitutional right of an individual.

The connection between liberty and security was noted by Wilhelm von Humboldt, who maintained that security was the precondition of liberty.<sup>5</sup> John Stewart Mill, in turn, claimed in his philosophical work *On Liberty* that the power of the rulers, if uncontrolled, can give rise to tyranny and for this reason he placed a higher premium on freedom.<sup>6</sup> Benjamin Franklin is credited with saying “Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither.” This statement, much as a host of other views voiced by many political

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5 H. von Humboldt, *Ideen zu einem Versuch, die Grenze der Wirksamkeit des Staates zu bestimmen*, in, *Menschenbildung und Staatsverfassung. Texte zur Rechtsphilosophie*, Freiburg 1994, p. 94.

6 J. M. Mill, *On Liberty*, Kaplan Publishing, New York 2009.

thinkers, illustrates the complex nature of the relationship between freedom and security. But does this interdependence necessarily point to a hierarchy between the two? It transpires that this relationship is a highly complex one. Firstly, at a certain stage of state development both security and freedom have become the state's basic objectives. Secondly, the two notions are essentially diverse and often opposing. Thirdly, security is associated with the lack of threats, while freedom – with the generation of threats. And fourthly, the fulfillment of state tasks in terms of freedom is of an individualized nature, whereas tasks in terms of security – are implemented collectively.<sup>7</sup>

The opposition between the aims of fulfilling freedom and that of security within a state can produce a paradoxical situation. A state which aims to implement full security, needs to be omnipotent in all matters, thereby undermining freedom and, in this sense, indubitably, arousing the opposition between freedom and security.

From today's perspective, we are dealing with freedom when coercion is absent, and with security – when our life, body, privacy and freedom are not endangered. To guarantee security in freedom today means decidedly more than to effectively guarantee public order. What is more, fulfilling these tasks in the area of security should take place in such a manner so as not to curb the rights and freedom of the people. Security without freedom leads to authoritarian or totalitarian rule. Freedom, however, requires a certain dose of security: in order to live in freedom, we need security. Currently, the relationship between freedom and security is yet more complex than before, making Benjamin Franklin's opinion untenable, as the two values are difficult to hierarchize. With this in mind, let us turn to Karl R. Popper who believed that we can achieve security through freedom: "We must plan for freedom, and not only for security, if for no other reason than that only freedom can make security more secure."<sup>8</sup>

The complex relationship between freedom and security is evident when the two values are implemented in governance. However, it is worth noting that in the process of their implementation the state behaves differently. In terms of security, state tasks would amount to protecting legal goods in the area of private relations and on preventing the interference of other agents into the citizens' matters. This implies an active role of the state and its institutions as expressed in its legislative, judiciary and administrative activity.

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7 Ch. Gusy, *Gewährleistung von Freiheit und Sicherheit im Lichte unterschiedlicher Staats- und Verfassungsverständnisse*, in: *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer*, Berlin 2004, p. 155.

8 K. R. Popper, *The Open Society and Its*, Princeton University Press, Princeton 1994.

From the perspective of freedom understood mainly in negative terms, the state is not required to be particularly active – it should just refrain from reacting, or act in such a way so as not to interfere into or restrict the activity of members of the public. But even if the law allows for imposing limits on our freedom, these limits inherent in the provisions in place should not constrain the very essence of freedom. In the latest interpretations, the so-called doctrine of positive obligations requires state organs to act while at the same time maintaining a balance between individual and collective interests in terms of exercising their right to freedom. States are obliged to facilitate the effective use of the rights and freedoms that the individual is entitled to by creating an appropriate legal system.

The history of the development of modern states has noted periods of exceptional tension between the guaranteeing of security and freedom. The expectation that the state would achieve both goals was met with varying degrees of success. In practice, more often than not, states would subordinate everything to security. In other words, we are dealing with the primacy of security over other areas of public life. The deviational nature of this superiority becomes evident in authoritarian and totalitarian regimes.

The problem of a relationship between the two values reemerged in the aftermath of the 9/11 attacks but this time it was approached differently. Exacerbating the complexity of this relationship is the fact that human rights and liberties are addressed by almost all state constitutions whereas security is sometimes overlooked. It is often difficult to speak of the right to security, and when it does take place it needs to be drawn from a broader interpretation of constitutional regulations.

Historically speaking, security as a right appeared for the first time in documents defining the natural rights of a human being arising from the human being's innate dignity. The need to protect this right was the motivation behind the authors of the *American Declaration of Independence* and the *French Declaration of the Rights of Man and of the Citizen*. Article 2 of the *French Declaration* reads: "The goal of any political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance against oppression." Subsequently, security as a right and a certain value was included in the French Constitution of 1793. Ideas embedded in the American Constitution and French Declaration have profoundly influenced European constitutionalism. In European liberal constitutional thought of the nineteenth century, the issue of security, next to freedom, was vitally important. It has to be underlined, however, that security at that time was interpreted as legal security which was to guarantee protection against the abuse of power and individual freedom. An outstanding Polish researcher, Brunon Hołyst, frames the matter

unequivocally, when he states that security is a basic human right, but at the same time adds that it can be fulfilled only as long as there is social and political understanding of the ethical and moral responsibility of both the state and society.<sup>9</sup>

Currently, in many European states constitutional or legal rules refer to security as an obligation of state authorities and, at the same time, as individual or people's rights. We must note, however, that this is not rendered *expressis verbis* in all basic laws. Often the right to individual security must be derived from a wider interpretation of constitutional provisions.

In the Polish 1997 Constitution, we find the concept of security in several articles. Article 5, for instance, speaks of the security of the citizens, which is seen as one of the state's basic tasks; and in Articles 26 and 126 – of the security of the state – as the general social weal, for the protection of which limits on the rights and liberties of individuals are allowed.

But as Dariusz Dudek rightly notes, “the security of a state has only *prima facie* higher value over the value of a human being's individual existence; this does not imply, that in each and every case and in all conditions it deserves absolute protection as a matter of utmost importance. On the contrary, the matter should be weighed carefully and responsibly.”<sup>10</sup> Article 135, in turn, refers to the National Security Council, an advisory body to the President, competent in matters regarding the state's internal and external security. It is worth noting also, that the provisions of the Polish Constitution mention ecological security. In line with Article 74 Polish public authorities are required to pursue policies which ensure ecological security. As an aside, let us note, that the constitutionalization of security in Poland has a long tradition: the Government Act of 3 May 1791, Chapter 2, reads as follows: “Above all, we desire to preserve and do preserve sacred and intact the rights to personal security, to personal liberty, and to property, landed and movable, even as they have been the tide of all from time immemorial...”

The Constitution in force in Spain, in line with Articles 9(3) and 17(1) guarantees the right to security as well as legal security to its citizens. It is also worth pointing out that the preamble of the Spanish Constitution sees security as the basic premise, value and objective guiding the Spanish sovereign in establishing the political system. In the constitutions of Austria, Bulgaria, and the Netherlands, security is addressed as a task and duty of public authorities. The Dutch Constitution of 28 March

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9 B. Hołyst, *Bezpieczeństwo. Ogólne problemy badawcze*, Wydawnictwo PWN, Warsaw 2014, p. 12.

10 D. Dudek, *Bezpieczeństwo Rzeczypospolitej jako wartość konstytucyjna*, in: *Bezpieczeństwo Polski. Historia i współczesność* L. Antonowicz, T. Guz, M. R. Pałubka (eds.), Wydawnictwo KUL, Lublin 2010, p. 183.

1814, Article 20(1) states that the security of the existence of its population is in the care of the authorities. In the Federal Constitutional Law of the Republic of Austria of 1 January 1930, one can read that the laws and implementation in terms of security and public order lie in the competences of the Federation. The Constitution of the Republic of Bulgaria of 12 July 1991 states that the security of the individual is the supreme political principle (Preamble), and national security is the goal of its foreign policy. Security as a right was encapsulated in the Constitution of Finland on 11 June 1999. Article 19 says that the citizens have the right to social security, and Article 7, that everybody has a right to life, personal freedom, inviolability and security. The Portuguese Constitution, likewise, formulates the right to freedom and security in Article 27(1). Similarly, in the Constitution of the Republic of Cyprus of 16 August 1960 (Art. 11(1)), in the Constitution of Romania of 21 November 1991 (Art. 23(1)), and in the Constitution of the Republic of Slovenia of 23 December 1991 (Art. 34). In the Constitution of Malta of 21 September 1964 (Art. 32(a)), it is specified that everybody has a right to freedom and personal security. The well-known German constitutionalist, Josef Isensee is of the opinion that the German basic law of 1949 frames security as a basic right – Grundrecht auf Sicherheit.<sup>11</sup> This is not an interpretation that is shared across the board as it is not stated explicitly in the Basic Law. Let us mention, however, that in the original version of the Basic Law presented by the Parliamentary Council, in Article 3, the term “security” was used in connection with a discussion on safeguarding basic rights.

#### 4. Counter-Terrorism Policies: The Clash Between Freedom and Security

Rights and freedoms are constructed in such a fashion so as to protect citizens from the interference of state organs. Nonetheless, counter-terrorism measures undertaken by the state, especially the indirect ones, consist in laying a legal groundwork for enabling this very interference. Accordingly, freedom in the negative sense (freedom from something), the protection from state intervention into individuals’ private sphere, as well as freedom in the positive sense (freedom to), understood as the possibility to act freely (often called participatory freedom) are both undermined. In the face of a terrorist threat, the state is obliged to act effectively not only indirectly but also directly. Thus, a specific dependence occurs between freedom and security. Under the rule of law, this connection between rights and liberties on the one hand,

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11 J. Isensee, *Das Grundrecht auf Sicherheit. Zu den Schutzpflichten des freiheitlichen Verfassungsstaaten*, De Gruyter Verlag, Berlin 1983.



and security on the other, makes the undertaking of measures with a view to preventing and fighting terrorism by state organs and institutions extremely complex.

The nature of the measures undertaken by governments boils down to the change of regulations defining the competencies of the secret service and police with regard to collecting and storing personal information. This calls for amending the law in accordance with the constitution. However, we must remember that in a democracy this is a particularly sensitive issue, as it places a state's internal security and the question of freedom on the top of the political agenda.

For the most part, the support and acceptance of the public for anti-terrorism measures depends on the time and degree of the terrorist threat. Fear and a sense of peril immediately after a terrorist attack generate social support for more intense anti-terrorism measures and procedures. As more time elapses after the attack, the public is more reluctant to support these moves. Those voters who are unequivocally convinced about the primacy of freedom over security will continue to believe that the measures and procedures of control and surveillance over society carry important risks. They tend to be in favor of maintaining rights and liberties and against subjecting them to limitations.

The public is ready to support regulations defining special measures with regard to the protection of critical infrastructure against terrorist attack, but to a lesser degree approves of such regulations which directly deal with people: for instance, baggage checks, wiretapping or being profiled in the public realm. The measures and procedures employed in countering and fighting terrorism are nothing but the scanning of the public by means of various criteria. The knowledge and information thus acquired is vast and dangerous. On the one hand, it enables the police and secret service to interfere in politics. On the other hand, the world of politics is tempted and often yields to the desire of acquiring and taking advantage of the stockpile of information in their struggle for power or in their attempt at maintaining their grip on it.

Still, another element must be taken into account: namely, the fact that terrorism and the fight against terrorism are two mutually exclusive categories. Etymologically, the term terrorism is derived from the Greek, *treo* – to tremble, to be afraid, or the Latin *terror* and *terreo* – fear, trepidation and instilling fear. Contemporary media amplify concerns about the terrorist threat causing even greater fear and shock. Terrorism defines the threatened majority and profiles the individual or minority as a threat. If anti-terrorism measures and procedures undertaken are constructed on the principle of exclusion following the criteria of ethnic, religious, racial or cultural profiling, this may lead to the discrimination of certain communities, and in consequence to the radicalization thereof. Even

though state organs need authorization for taking up effective counter-terrorism measures, the definition of these measures and their application requires the utmost equanimity as this effectiveness may breed new unwanted risks.

Governments apply a broad and general concept of terrorism, as the term is not precisely defined. In these circumstances counter-terrorism measures at the disposal of governments can have a wide range of usages. For instance, they can be employed to prosecute political adversaries or they criminalize activities designed to implement the right to self-determination. An example of the instrumental use of these measures was the conduct of Prime Minister Jose Maria Aznar's government in Spain when following the 2004 terrorist attack in Madrid, right before the general election, it attempted to put the blame on ETA, despite the fact that the intelligence service had information pointing to members of the Al Qaeda as the perpetrators of the act.

All these elements together affect the proper relationship between freedom and security. For the most part, it is because changes to terrorism laws have yet to catch the public's attention. Although the amendments introduced to existing laws are of a temporary nature the expiry date is being put off by governments, without being debated publicly. When these legal changes finally spark off a public debate, it turns out that understanding complex legal issues, which refer to intricate technical matters, is very difficult for somebody not well versed in these matters. Besides, there is not enough transparency surrounding the changes to laws with regard to countering terrorism. More often than not, the debate resembles a discourse between the government coalition and opposition, or a professional discourse between academics and experts. The quality of the discourse among professionals, including representatives of science, administration or the secret services is often not of the highest quality. As for the political debate, it frequently provokes violent conflicts between the participants but they concern general issues rather than the complex legal details, which are necessary for the police and other special forces to undertake anti-terrorism actions.

In the legal proposals put forward by governments in the area of fighting terrorism diverse solutions can be found. They usually come in the form of complex packages of amendments concerning several laws, which should be analyzed together. In Germany the updating of the law in this regard included seventeen acts, several regulations, together encompassing more than a hundred provisions.<sup>12</sup> In Poland, likewise, a dozen or so acts were amended. Polish politicians have for

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12 B-S. Kreitz, *Innere Sicherheit – Das ideale Wahlkampfthema?*, Universitätsdrucke Göttingen, Göttingen 2012, p. 70.

many years been announcing plans for the enactment of an anti-terrorism law and another one concerning the control over police operations, but so far no specific bills have been put forward.

Judging by the practice in many countries so far, amending terrorism law legislation usually goes too far and touches on issues concerning the political system. This was the case with the first and second anti-terrorism packages in Germany, where critics concluded that, the changes amounted to a rejection of the rule of law and were moving the country in the direction of a preventative state (*Präventionsstaat*).<sup>13</sup> In Poland, a similar amendment drew a critical judgment from the Constitutional Tribunal, while the most recent attempt at adjusting the same law attracted a wave of criticism from the opposition.

It transpires that only rule-of-law democracies with their constitutional courts are in a position to assess whether the means and procedures suggested by governments and approved by parliaments fall within the constitutional norms which regulate human rights and liberties. Both the German and Polish constitutional courts deemed many regulations to be at odds with these norms and recommended appropriate amendments to some of them. In the same way, the European Court of Human Rights found that the Terrorism Act 2000 in the UK allowed for measures that were incompatible with human rights and infringed on the right to privacy.<sup>14</sup> Generally speaking, however, international institutions find it difficult to adjudicate in these matters on account of the already mentioned lack of a precise definition of terrorism. In the same way, the potential for reacting to acts of terrorism on the part of international institutions is much curtailed, as is their ability to pass judgments on counter-terrorism measures that states employ.

Thus, as can be seen, counter-terrorism measures undertaken by governments touch on the specific relationship between freedom and security, which in a way resembles a self-regulating system. A correlation between freedom and security would amount to the following: offering more entitlements to one side is accompanied by more or less entitlements on the other side.

## 5. Conclusion

To conclude, one may accept that freedom and security in the context of combating terrorism do not necessarily have to conflict with each other. Freedom and

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13 S. Huster, R. Karsten (eds.), *Vom Rechtsstaat zum Präventionsstaat*, Suhrkamp Verlag, Frankfurt am Main 2008.

14 Gillan and Quinton v. United Kingdom, The European Court of Human Rights, application no 4158/05, 12 January 2010.

security in a democracy are among its most treasured values and important tasks, and as such they should mutually complement each other.

In order to maintain an appropriate relationship between rights and freedom versus security in the context of fighting terrorism the appropriate conditions should be put in place. Firstly, the quest for adopting a definition of terrorism in international law should be encouraged. Secondly, drafts of internal law amendments addressing the fight against terrorism should be more transparent. Thirdly, constitutional courts in rule of law democracies should adjudicate whether these amendments comply with the constitution. Fourthly, civil supervision over anti-terrorist measures employed by the police and intelligence service should be ensured. The best guarantee of preserving the correlation between freedom and security is the operation of accountability in political systems.<sup>15</sup>

All things considered, however, it must be underlined that these measures are only designed to counteract and fight terrorism but do not in any way stamp out the causes of terrorist acts. The eradication of terrorism is a much broader and complex matter. It would require instituting global policies and the cooperation between states to remove the material and subjective conditions contributing to the emergence of terrorist activity. John Gray rightly notes that in this respect a coalition of like-minded states must necessarily include Islamic states.<sup>16</sup> We must prevent the further drifting apart of the Islamic and Western worlds, as well as the continuing radicalization of the relationship between the two on the political, economic and cultural arena. Only a broad-based alliance between the two worlds can provide the underpinnings of a new international order, whereby different cultures and political systems would coexist free from terrorist threat.

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15 A. Sroka, *Rozliczalność w badaniach jakości demokracji (na przykładzie Polski i Hiszpanii)*, Wydawnictwo Elipsa, Warszawa 2014.

16 J. Gray, *Heresies: Against Progress and Other Illusions*, Granta Books, London 2004, p. 90.

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