Introduction

Today's terrorism has changed from an isolated and extra-ordinary event to an endemic and normally expected situation, even if it is unforeseeable when, where and how the new explosion of violence will take place. Thus, it is no longer an event encompassed in a definite time frame, after which a legal order will resume its normal course. It tends, rather, to last *sine die*, affecting individuals' daily life. Summing up, it can be defined as an ordinary time terrorism.

In this volume a group of international scholars, members of the International Association of Constitutional Law research group "Constitutions in the Age of the Internet", has devoted special attention to the following questions: What are the characteristics of ordinary time terrorism in normal circumstances? What risks imperil the Internet, which is put under stress by this kind of terrorism? What was – and what will be – the supranational lawmakers' reaction to this challenge in a state of law? What is the role of judges?

The Internet, challenged in the face of this new terrorism, has shown a dual, unprecedented and contradictory identity: a place for the exercise of all kinds of freedom, but also a field for terrorism-related crimes. This role involuntarily helps terror strategies, thus undermining the rights and freedoms of individuals online.

This Janus-faced situation has led to a two-edged regulatory response: promoting, on the one hand, and undermining, on the other hand, individuals' fundamental rights. The legislation of different countries affected by the various interventions looks schizophrenic: it states everything and its opposite. Indeed, the Internet as multiplier of the liberties has called for a regulation expanding rights and freedoms. Whereas the aptitude of the Internet to technically facilitate the commission of crimes, compared to what would happen in the material reality, has led, at the national and supranational level, to the adoption of regulation restraining the aforementioned spaces of freedom. One could consider the terrorists' recruitment, whose border with the right of association is very weak, because the crime is built on the model of crimes of "abstract danger". The latter term means a crime where the existence of the danger is merely assumed, while the infringement of security is not verified.

In the case of Internet the response of national and European lawmakers, as shown in several chapters in the book, favours security, by generally restricting fundamental freedoms, in violation of the precautionary and proportionality principles. These two principles constitute the legitimacy tests with which the model of the 'laws of fear' shall comply to protect the rule of law by avoiding an atypical regime of constant emergency.

Finally, it is worth emphasising the way the Internet is tailored by the creative

role played by the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) in reviewing the controversial relationship between the protection of personal data and the safeguarding of national security, drawn by the legislator. The symbolic cases, Digital Rights Ireland and Schrems, show how the ECJ broadly interpreted the scope of protection of the fundamental rights of privacy and data protection. In addition to this, Schrems gives the opportunity to discuss the new compromise resulting from the Privacy Shield. Its implementation does not seem to have resolved the uncertainties related to the level of protection provided by the US legal order and most notably by the Safe Harbor principles. We wish to clarify that this part of the discussion will basically be focused on the possible evolution of the digital privacy enforcement and on the exploration of the relevant constitutional issues raised in line with the supranational constitutional framework.

We have chosen a completely new bottom-up method. This is due to the specific theme – the new rights and the new forms of protection in the age of the Internet – which is a rapidly evolving field, and as such is susceptible to change day by day.

These are, thus, our scientific contributions to the development of Internet in a time of ordinary terrorism.

Giovanna and Oreste

Every Day's Terrorism

Giovanna De Minico

SUMMARY: 1. The New Face of Terrorism. – 2. The Law of Fear Today. – 3. About the Precautionality Principle. – 4. About the Proportionality Principle. – 5. The Exceptional and Temporary Nature of the Law. – 6. The European Law of Fear. – 7. The French Laws 'Relative à l'État d'Urgence'. – 8. The French Law 'Renforçant la Securité Intérieure et la Lutte contre le Terrorisme'. – 9. The Law of Fear Tomorrow.

1. *The New Face of Terrorism*

The latest generation of terrorism can assume the threatening face of a foreign fighter or that, apparently innocent, of a neighbour totally committed to his daily routines. It may be imported from distant grounds of violence or grow hidden in the social desert of a *banlieue*. It can target the traditional symbols of established powers or hit with irrational cruelty any moment of civil gatherings. It is a changing and polymorphic phenomenon, difficult to prevent and repress, that injects fear in everybody's mind due to the expectation that it can come back time and again.

Today's terrorism mutates its nature from an isolated and extra-ordinary event to an endemic and normally expected one, even if it is unforeseeable when, where, and how the new explosion of violence will take place. Thus, it is no longer an event encompassed in a definite time frame, after which a legal order resumes its normal course. It tends, rather, to last *sine die*, hanging over the daily life of the people.

Summing up, it can be defined as an ordinary time terrorism.

The recurrent nature of this event affects the work of the emergency legislator, which has to dwell upon the probability of the terrorist act happening on the basis of an *ex ante* prognosis. The legislator has to assess in advance what the chances are that the feared event may actually take place, in order to provide proper remedies for removing or reducing the citizens' fear.

It is precisely this fear that is at the origin of the "law of fear" expression, which is not a law generically aimed at preventing and repressing ordinary violence. It is, rather, a law generated by the special fear caused by the latest generation of terrorism: a fear that exerts a pervasive effect over the daily life of each person and that gives rise to a collective social alert.

The legislator has to face problems, which may even be old, but certainly require a completely new approach. The regulation to be laid down in order to determine and prevent the terrorist event in advance cannot be based on a fact that has already

occurred or on the *id quod plerumque accidit* criterion. The legislator must perform a probabilistic assessment of the risk of it taking place in the future.

In this chapter, which should serve as a general framework to the volume, we will focus on the basic issue posed by terrorism: to what extent can an emergency situation depart from the fundamental principles of the rule of law without compromising a return to the normal institutional order?

Our *iter procedendi* will be the following: the first step considers the model of the "law of fear", as sketched by American doctrine and now accepted also by the European legal culture. The second step entails an analysis of the Directive of the European Parliament and the Council 2017/541 'on combating terrorism', as well as of the French law 2017 'renforçant la sécurité intérieure et la lute contre le terrorisme'. The last step sets out our evaluation of the paradigm of the law of fear in respect of both its European legitimacy profile and its effectiveness. In this way our reasoning will come to a circular conclusion.

2. *The Law of Fear Today*

Let us have a closer look at the "law of fear" model. It owes its construction to Cass R. Sunstein. [1] In his opinion, this paradigm is utilized when the policy-maker intends to anticipate a dangerous event that is likely to happen, but is not certain. The aim thus pursued is to prevent the danger of a future event being converted into a reality.

Here, the legislator must move on the slippery slope of risk, involving both verifying and assessing the probability of it taking place. In this context, his task requires the mediation between opposing values: on the one side, there are the fundamental rights – freedom of speech, personal liberty, privacy, and so on – that may be legally squeezed in order to preserve the security of citizens. [2] On the other side, the opposite value is represented by the security of citizens, [3] which requires the prevention of the risk of terrorism. Indeed, the legislator is normally expected to balance constitutionally relevant and equivalent goods; but here these values are misaligned because of the different time of their coming into effect. In fact, a present and certain damage occurs to the fundamental freedoms, which are being compressed; by contrast, a future

[1] Cass R Sunstein, *The Laws of Fear* (Cambridge University Press 2005), in particular chapters 1-–2.

[2] Arianna Vedaschi and Gabriele Marino Noberasco, 'From DRD to PNR: Looking for a New Balance between Privacy and Security', in David D Cole, Federico Fabbrini, and Stephen Schulhofer (eds), *Surveillance, Privacy and Trans-Atlantic Relations* (Hart Publishing 2017), 67-–87.

[3] See: Stephen Sedley, 'Terrorism and Security: Back to the Future?', in David D Cole, Federico Fabbrini, and Arianna Vedaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar Publishing 2013), 13, and Federico Fabbrini, 'Privacy and National Security in the Digital Age. European and Comparative Constitutional Perspectives' (2015) 20 Tilburg Law Review, 5-–13.

and hypothetical advantage is expected with reference to security, which is strengthened. So the damage suffered by the holder of the right to privacy (to indicate just one of the rights in question) should be more than compensated for by the future (though uncertain) advantage provided to the holders of the right to security.

The legal decision concerning the risk, which is at the root of the "law of fear", appears to be a classic example of a political issue that entails an assessment without certainty and incontestability. In fact, if the evaluation parameter is modified, a decision contrary to the initial one would probably be reached.

This being the case, the evaluation of the risk is usually subjected to legal criteria, but a non-eliminable political discretion remains.

In the light of the above, chief judges – national and supranational, from the Supreme Court of the United States[4] to the European Court of Justice[5] – have been narrowing the discretion of the policy-maker in accordance with the precautionality and proportionality principles, which should guarantee a balanced coexistence between competing values.

3. *About the Precautionality Principle*

The legislator has to assess what the actual chances are that the risk will happen. It is an *ex ante* prognosis judgment of the threatened danger which is far from being a mathematical test. [6] In fact, the answer to this question depends on the level on the

[4] Just to quote the leading case: the US Supreme Court has clearly stated that emergency powers cannot be conceived as unlimited; *ex parte* Milligan (1866), 71 U.S. 2, Wall. 2 2; Korematsu v. United States (1944), No. 22, 323 U.S. 214. Moreover, it has elaborated a proportionality test to balance public interest with the individual freedom: Mathews v. Eldridge (1976) 424 U. S. 319; United States v. Salerno (1987) 481 U. S. 739, 746; Schall v. Martin (1984) 467 U. S. 253, 274-275, quoted in Hamdi et al. v. Rumsfeld, secretary of defense, et al. (2004), No. 03-6696.

[5] Court of Justice, Joined Cases C-293/12 and C-594/12 [2014] Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General and Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and Others (hereinafter: Digital Rights Ireland), [2014]OJ C175/6; Id., Case C-362/14 [2015] Maximillian Schrems v. Data Protection Commissioner, see in particular para. 33.

[6] Here we cannot summarize American literature which is an incomparable reference in this subject. We mention only those Authors who have described different features of this criterion. For the comparison of values misaligned in time, see: David E Adelman, 'Harmonizing Methods of Scientific Inference with the Precautionary Principle: Opportunities and Constraints' (2004) 34 Environmental Law Reporter, 10133. On the relativity of the criterion affected by the political perspective of the legislator, see: Daniel Bodansky, 'Deconstructing the Precautionary Principle', in David D Caro and Harry N Scheiber (eds), *Bringing New Law To Ocean Waters* (Martinus Nijhoff/Brill 2004), 381 ss.; Gregory N Mandel and James T Gathii, 'Cost-benefit Analysis Versus the Precautionary Principle: Beyond Cass Sunstein's Laws of Fear' (2006) 5 University of Illinois Law Review, 1037–1079; Oren Perez, 'Precautionary Governance and the Limits of Scientific Knowledge: A Democratic Framework for Regulating Nanotech-

ladder of risk at which the legislator has chosen to stop: what is the danger that he is prepared to take?

Such a decision will be influenced by two factors: the time and the social target of the decision. As to the first factor, one may assume that the lawmaker is more prone to meet a security demand when an electoral vote is imminent than in the absence of any such event. Restrictive measures may be adopted in this case in order to acquire the *electoris favor,* independently of the existence of an effective risk of a terroristic attack.

Passing to the second factor, i.e. the social target selected, the outcome of the decision is different depending on the category of persons whose interests are given priority. Rich people are inclined to accept higher security risks because they are unwilling to lose their liberties. In fact, not only are they the formal holders of these rights, they are also those who may effectively exercise them.

The reverse applies to poor people, who only enjoy a formal right to these liberties. Thus, they have little to lose in case of restrictive measures, demanding instead, and at least, that their security be assured. [7]

It is clear, therefore, that the time and the social target of the decision affect the position on the ladder of risk selected by the lawmaker. In turn, this will result in a different appreciation of the precautionality principle and a different balance between liberties and security.

The foregoing remarks lead to the conclusion that the outcome of the precautionality assessment is disputable, i.e. it is controversial.

In accordance with the precautionality principle, the legislator should lay down criminal offences based on danger, that is conducts whose realization doesn't require the actual happening of the criminal event: clearly, when the terrorist attack occurs, it would be too late and useless to intervene. It is equally true that the mere criminal intention isn't *per se* to be punished, when no protected value has been actually and concretely affected. Here the double principles of materiality and offensiveness are brought to the concept of the attempted crime. The latter must not be fully completed in every material element, but it should consist at least in fragments of material behaviour capable of offending the protected value, to put it at risk of being compromised.

Having said that, the first corollary coming from the precautionality principle implies that the legislator should abstain from typical legal assessments, namely he must not assume the existence of a risk regardless of its concrete evaluation. He should rather check by an *ex ante* prognosis the reasonable occurrence of the feared event. One con-

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nology' (2010) Bar Ilan University Pub Law Working Paper; also Noah Sachs, 'Rescuing the Strong Precautionary Principle from its Critics' (2011) 4 University of Illinois Law Review, 1285–1338. For a helpful discussion on the precautionary principle in the European context, see: Cristopher Hodd, Henry Rothstein, and Robert Baldwin, *The Government of Risk* (Oxford University Press 2004), in particular chapter 7.

[7] Conor Gearty, *Liberty and Security* (Polity Press 2013), 20-21 and 74.

sequence of this is that the *periculum* must be an imminent, serious, and great danger.

At this point the question is: which symptoms would be able to reveal the risk to the legislator? Or, in other words, which is the right moment for the legislator to act, without punishing the mere criminal intention? This issue will be dealt with when we analyse the concrete examples of criminal laws of fear.

4. *About the Proportionality Principle*

Given the insufficiency of the precautionality criterion, the legislator had to supplement it by means of the proportionality parameter. Pursuant to the proportionality principle, the cost suffered by a freedom that would be compressed must be compared with the benefits provided to security, the opposite value that would be favoured. [8]

The difference in weight between costs and benefits should suggest that judges set the proportionality not in the usual terms of equivalence, but in those of reasonable inequality: the advantage to the protected value (security), because of its uncertainty, must exceed the certain damage caused to the compressed right (the right to the freedom being attacked). [9] This asymmetrical balance can be clearly perceived if one considers that the compared goods are not aligned on the same temporal dimension: individual freedom, for example privacy, suffers damage here and now, while security will receive a future and uncertain advantage, depending on the occurrence of the feared event. So let's see if this 'asymmetrical balance' between the competing values has been respected in a key act of prevention against terrorism: the Data Retention Directive 2006/24. [10]

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[8] See, for instance: Gregory Mandel and James T Gathii, *Cost-Benefit Analysis versus the Precautionary Principle: Beyond Cass Sunstein's Laws of Fear*, 1044–1045 '[t]he difficulties inherent in application of cost-benefit analysis are now well described. A considerable literature (including some of Sunstein's own work) demonstrates that substantial challenges regarding (a) uncertainty, (b) valuation, and (c) temporal concerns render even rough application of cost-benefit analysis often impossible'. Opinion also of: Mark Geistfeld, 'Implementing the Precautionary Principle?' (2001) 31 Environmental Law Reporter, 11326–11333; David E Adelman, 'Harmonizing Methods of Scientific Inference with the Precautionary Principle: Opportunities and Constraints', 10131–10140; Matthias J Borgers and Elies van Sliedregt, 'The Meaning of the Precautionary Principle for the Assessment of Criminal Measures in the Fight Against Terrorism' (2009) 2(2) Erasmus Law Review, 171 ss. and Sidney A Shapiro, Elizabeth C Fisher, and Wendy E Wagner, 'The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy' (2012) 3 Wake Forest Law Review, 463 ss.

[9] On some of the complexities here, see: Kent Roach, *The 9/11 Effect. Comparative Counter-terrorism* (Cambridge University Press 2011), 426; Robert Alexy, *Teoria dei diritti fondamentali* (Il Mulino 2011), 651-653.

[10] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105/54.

In brief, the basic philosophy of the Directive has been to change the negative duty imposed on the Internet Service Provider (ISP) and the communications operators. The previous prohibition to retain extrinsic data of phone conversations or Internet communications has been converted into the opposite obligation to store all data of any consumers for a long time in order to prevent future criminal offences.

This is the hard core of the rule.

The Court of Justice[11] declared invalid this regulation essentially for breaching the proportionality principle (Art. 52 of the EU Charter of Fundamental Rights).

The decision is particularly significant for our purposes for two reasons: firstly, it states in clear words which is the *minimum status* of the privacy; secondly, it admits that, without prejudice of such *minimum*, this fundamental right can be downgraded to account for the need for security, provided however that the fair balance between these two competing values is assured.

Let's follow the reasoning of the Supreme Judge.[12]

For what concerns the *mimimum*, the above right is deemed to be characterized by an indefectible content that may not be lowered for security reasons. Thus, the privacy cannot be compressed to such an extent to *de facto* result in a complete denial of the right. But this has been exactly what happened with the Directive, which in requesting the collection of all the extrinsic data of each citizen has created a permanent eye on the life of the entire European population.[13]

Hence security must not infringe a first essential feature: the adopted regulation may not affect the generality but only defined subjects.

The same request for specificity applies to the object and the methods of the collection process, which may concern only identified data, otherwise it is a trawling mechanism, and may be implemented only by means of well identified tools. The Directive, instead, was drawing the data from all means of electronic communication, the use of which is widespread and of growing importance in people's everyday lives.

Furthermore, privacy can be sacrificed in the presence of a serious and imminent threat to security, certainly not just because of a generic repression of organized crime. This feature is strictly connected to the judgment of the *ex ante* prognosis, as discussed above; the judge requests that the data collected belong only to persons who have a link, even if indirect, to terrorism. Instead, the Directive weakens the effective risk of terrorism to an extent that does not entail stretching the data collection to include everyone, even those above suspicion. Certainly Directive 2006/24 'contributes to the fight against serious crime', but 'does not require any relationship between the data whose retention is provided for and a threat to public security' and, as the European Court of Justice has noted, the retention is not restricted 'in relation

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[11] Digital Rights Ireland.

[12] Among several scholars, see: Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2015) 163–169, with wide references to jurisprudence.

[13] Digital Rights Ireland, para. 56.

'to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime', or 'to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection, or prosecution of serious offences'. [14]

Last but not least, privacy also requires that access to data is allowed only to certain public subjects that offer a guarantee of impartiality, the judge, and independent authorities. Whereas, the Directive has opened up generalized access also on the side of the beneficiary. [15]

In a comparative perspective the Directive went way beyond the American Foreign Intelligence Surveillance Act, [16] which has conditioned this bulk collection to three guarantees: the facts have to evidence that there are reasonable grounds for a person to be suspected of being a terrorist; these meta data have to be 'relevant' to the investigation, and, finally, the order in favour of the NSA's access is taken by a judge, even if a special one (the Intelligence Surveillance Court of Review).

Well, even these three *minimum* guarantees, [17] however insufficient, have not been inserted in the Directive in question.

Thus, the final step of the reasoning is completed when the judge links the minimum status to proportionality, considering it satisfied only when the progress of security to the detriment of privacy stops in front of the essential requirements of the latter.

To conclude, the European judge has stated that – in order to fight terrorism – a fundamental right, here privacy, can be limited only if its injury is equivalent to the benefits provided to security and in so far as the restrictive measures are strictly necessary. Therefore, the collection and storage of all kinds of data, on an ongoing basis, from each electronic device, and what is worse, referred to every person, i.e. also those not suspected of terrorist offences, are considered to be a massive and unreasonable intrusion into the private life of each European citizen.

We can fairly conclude, then, that the Court has found a deep disproportion in the Data Retention Directive, since no balance could be established between the right to privacy – erased, rather than merely limited – and the need for security, which was favoured even when not actually threatened.

Indeed, this approach is in stark contrast with the indifference that the European legislator has shown in Directive 2017/541, that will be analysed later.

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[14] Digital Rights Ireland, para. 59.

[15] Digital Rights Ireland, para. 62.

[16] 'Each application under this section [...] shall include [...] a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities': 50 USC. § 1861(b)(2)(A), in http://www.law.cornell.edu/uscode/text/50/1861.

[17] John C Yoo, 'The Legality of the National Security Agency's Bulk Data Surveillance Programs', UC Berkeley Public Law Research Paper No. 2369192, http://ssrn.com/abstract=2369192, 3–4.

An answer, although a partial one, to the lack of proportionality, can be found in Directive 2016/680[18] which regulates several fields; it provides stricter rules with regard to the purpose of data processing (Art. 1) and to the rights of data subjects (Art. 12), both elements have gained in determination: personal data have to be 'adequate and relevant for the purposes for which they are processed' and, in particular, 'not excessive and not kept longer than is necessary for the purpose for which they are processed', as well as 'processed only if the purpose of the processing could not reasonably be fulfilled by other means'.[19]

At the same time the Directive presents the same vices as the previous one: not limiting the time of data storage, not precisely identifying the substantial consistence of the authorities' right to access data, and not creating a binding link between data collection and a reasonable suspicion.

Moreover, it requires that data can only be transferred to countries that ensure an adequate level of protection (adequacy that has to be intended as equivalence, since the Court's Schrems decision).[20] It must be observed, however, that the Directive while apparently complying with the proportionality criterion set aside the adequacy requirement by introducing a broad exception to the latter, in case of 'the prevention of an immediate and serious threat to public security of a Member State or a third country'.

5. *The Exceptional and Temporary Nature of the Law*

After the preceding discussion on the precautionality and proportionality principles, we can proceed now to analyse two identity features of the "law of fear": the exceptional and temporary nature of its rules.

The former attribute implies that the discipline is authorized to derogate to the constitutional order without infringing the rule of law, provided that these derogations don't compromise the basis of the constitutional architecture.

The deviation from the constitutional order can touch the fundamental rights or the principle of the separation of powers; the discipline of the European Directive 2017/541 entails significant examples of derogation to the fundamental rights, while the French counter terrorism laws offer examples also in regard of the separation of powers.

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[18] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection, or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

[19] Directive 2016/680, Recital 26.

[20] Maximillian Schrems v. Data Protection Commissioner. See: Chapter 2 of Oreste Pollicino in this book for doctrine and bibliography.

The rules in question, being an exception to general principles, must be strictly interpreted and, above all, have default validity over time. So, when the state of emergency ends, the special regime comes to an end and the ordinary course of events is resumed.

The law of fear entails a temporary discipline, whose validity lasts for the time strictly necessary to face an extraordinary situation so that, when the urgency ceases, the institutional order can go back to its original status.

This means that, after the entering into effect of the sunset clause, the emergency law should not be extended except in extreme cases.

The temporary nature of the law is so relevant that the Italian Constitutional Court [21] – like other Supreme Courts, such as the French Conseil constitutionnel and the Supreme Court of the United States – has deemed it fit to admit heavy restrictions to liberties precisely on the grounds of their short duration in time. Thus, serious offences to protected rights have been tolerated, although they were not mere derogations, if the Court had defined them in such terms in order to overcome cases of patent constitutional illegality.

Nothing else has justified the lenient attitude shown in such cases but the brevity of the compression of the involved rights.

Actually, our Court, while duly finding the existence of constitutional breaches, has failed to sanction them in its ruling, reserving the right to do so in case of future *sine die* extensions of the restrictive measures. [22]

The question then arises as to whether the amnesty granted to otherwise illegal measures would still apply in situations of danger of an ongoing nature. Would it still be admissible to impose on the citizens a continuous sacrifice of their liberties, without knowing if and when it would come to an end?

It is our opinion that the time element may not be upgraded from a circumstance mitigating the sanction to a factor making legal an *ab initio* illegal rule, especially if a constitutional breach is involved.

Furthermore, if what is temporary becomes definitive, if the terrorism risk turns into a stable connotation of our daily life, then a law limited in time is *de facto* converted into a permanent regime.

In view of this situation, it should not be possible for the Courts to actually suspend an unconstitutionality decision using a variety of legal devices offered by their respective national systems: the infringement of the Constitution should be immediately declared, with the ensuing annulment of the vitiated law. [23]

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[21] See Italian Constitutional Court, 1 February 1982, n. 15, which is the symbol decision of the announced illegitimacy but not ordered. Its critical comment can be found in (1982) *Giur. cost.*, I, 82 ss.

[22] The above quoted decision states that: 'l'emergenza, nella sua accezione più propria, è una condizione certamente anomala e grave ma anche essenzialmente temporanea. Ne consegue che essa legittima sì misure insolite, ma che queste perdono legittimità se ingiustificatamente protratte nel tempo'.

[23] A more in-depth analysis of this subject can be found in Giovanna De Minico, *Costituzione, Emergenza e Terrorismo* (Jovene 2016), 182-186.

The exception would, otherwise, replace the general rule and the compression of freedom pursuing an uncertain advantage in the future would no longer be compensated by the temporary nature of an unbalanced regulation.

6. *The European Law of Fear*

Our analysis can now proceed considering whether and to what extent the European legislator has complied with the precautionality and proportionality principles: in particular, our attention will be focused on Directive 2017/541.[24] This Directive does not mark year zero with respect to crimes having terrorist objectives. The regulatory process started with the Framework Decisions of 2002 and 2008,[25] but Directive 2017/541 may not be equated to them in view of the different criminal policy pursued. In the two preceding acts, the balance between security and liberty did not entail unreasonable sacrifices from either of the two competing values; by contrast, in our opinion the same does not apply in the case of Directive 2017/541.

In comparison to the above Decisions, Directive 2017/541 is the expression of a counter terrorism policy that is security oriented even if security is not effectively threatened, it is insensitive to the principle of non-discrimination on grounds of race and religious belief, and pays scarce attention to the specificity, exhaustivity, and materiality requirements laid down by European law in regard to criminal conduct. We explain the reasons on which this opinion is based in the following remarks.

The Directive aims to strengthen the fight against terrorism through criminal legislation. So, it has sketched new criminal offences, such as public provocation to commit a terrorist offence (Art. 5), recruitment for terrorism (Art. 6), travelling for the purpose of terrorism (Art. 9), terrorism financing (Art. 11): just to recall some of the new crimes.

That said, we observe that the act presents three different aspects of doubtful European legitimacy.

a) The conduct relating to the new offences is not described in such a way as to clarify exactly what the forbidden behaviours are, because the Legislator utilizes the purpose of the conduct to distinguish a legal action from an illegal one; moreover, he abstains from properly typifying such purpose, as exemplified by Art. 3, para. 2, Let. c).

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[24] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, O.J. L 88/6, 31.3.2017 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0541&from=IT.

[25] Council Framework Decision of 13 June 2002 on Combating Terrorism (2002/475/JHA) (O. J. *L* 164/3, 22.6.2002), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0475&from=IT, modified by Council Framework Decision 2008/919/JHA of 28 November 2008 Amending Framework Decision 2002/475/JHA on Combating Terrorism (OJ *L* 330,21, 9.12.2008) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0919&from=IT.

Thus, a conduct described in generic terms is followed by an equally unspecified purpose of the conduct, which may lead to untenable results; for instance, the Directive could permit the punishment of 'people who attacked the military infrastructure of dictatorial regimes even if in the interest of preserving or restoring […] democratic values'.[26]

The Directive appears, therefore, to be both deficient and excessive[27] at the same time. Indeed, on the one hand, it omits to typify the conduct and, on the other hand, it dilutes the terrorist purpose to such an extent that an acceptable conduct could be punished as a crime.

b) The situation of illegality becomes more acute when the European legislator makes recourse (actually with a certain levity) to the model of the offence based on the criminal intention, while the materiality principle of the European criminal law (Art. 49 Charter of Fundamental Rights of the European Union, hereinafter CFR)[28] would have required a "type" of offence based on the conduct. As a consequence of this choice, the Directive reserves a determining role for the emotional element, which becomes the qualifying factor of a conduct that otherwise could be deemed lawful or absorbed into a crime of a lesser gravity.[29]

One may think, for example, of a person who performs acts aimed at 'facilitating travelling for the purpose of terrorism' (Directive Art. 10). The illegality of this incriminating provision is of immediate evidence considering that the criminal purpose is confined to the mind of the presumed offender. As a matter of fact, the intention is not established here *per relationem*, i.e. it is not tied to concrete and current indications to be found in the real world; rather it remains confined to the inner life of the involved person. Save for the introductory remarks,[30] it does not seem that the Di-

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[26] Meijers Committee, *Notes on an EU Proposal for a Directive on Combating Terrorism*, 16 March 2016, https://free-group.eu/2016/03/17/meijers-committee-notes-on-an-eu-proposal-for-adirectve-on-combatng-terrorism/.

[27] *Contra*: Eugenia Dumitriu, 'The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism' (2004) 5 German Law Journal, 602, offers a view in favour of the European legislator: 'The Framework Decision adopts a horizontal approach of terrorism and establishes synthetic and precise definitions satisfying the requirements of legal safety the European Union and its Member States must respect'. With regard to the preparatory work of the Directive see the detailed report of the FREE Group, *Terrorism: EDRI Recommendations for the EP Report on Terrorism*, 31 March 2016, https://freegroup.eu/2016/03/31/terrorism-edri-recommendations-for-the-ep-report-on-terrorism/.

[28] CFR [2012] OJ C 326/391.

[29] For a wide study see: Unione delle Camere Penali Italiane, *Osservatorio Europa, Osservazioni sulla Nuova Proposta di Direttiva per la Lotta al Terrorismo Com (2015)625 della Commissione europea del 2 dicembre 2015*, http://www.camerepenali.it/public/file/Documenti/Osservatorio%20Europa/2016-04-22---Doc-OssEuropa--Commento-proposta-direttiva-lotta-al-terrosismo.pdf.

[30] See European Commission, COM(2015) 625 final 2015/0281 (COD) Proposal for a Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism, http://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-625-EN-F1-1.PDF: 'The aim of the provision is to oblige a Member State to criminalize the act of travelling to another country, if it can be demonstrated that the intended purpose

rective requires concrete elements connecting a person to a terrorist plan or actual circumstances that evidence the terrorist purpose of the travelling. In the absence of such elements the conduct should be considered lacking in criminal relevance.

So, normal behaviours, such as taking a chemistry course or buying fertilizer, could become illegal in the light of the actor's *mens rea* (Art. 7 'Providing training for terrorism'); it follows that the person's alleged intention plays an even greater role in defining the *actus reus* and, what is worse, this intention is not deducible from material and objective elements. It follows that in the field of terrorism there is a great risk that the authorities may infer such an intention from ideologies and religious beliefs. In this way, the definition of criminal offences does not appear to be clearly delineated, as required by the European legality principle (Art. 49 CFR).

Thus, the Directive can be reasonably criticized [31] for surrendering to discriminatory temptations against Muslims. If the *mens rea* is what differentiates a legal conduct from an illegal one, the judge does not have factual elements from which to draw the criminal intention. An interpretative tendency does inevitably prevail towards the 'author's type' of crime, meaning that the existence of a crime is not inferred from facts, but rather from the presumed offender belonging to an ethnic group or professing a religious creed. In this way a dangerous trend is favoured towards the subjectivation of the type of crime. [32] Hence the same conduct can be classified in opposite terms, depending on the identity of its author; it will be considered generally legal, unless attributable to certain minorities which are presumed to be guilty on the ground of a hidden criminal intent: 'because the *actus reus* does not make the difference, the person's alleged intention (*mens rea*) plays an even greater role'. [33]

c) To carry on with the analysis of the Directive, we have to underline that the Directive not only prefers the attempted offence to the implemented offence (Art. 3 and following), but even anticipates the threshold of illegality to the planning phase of a conduct, going further than the normal criminal law has ever done. Indeed, the General Approach issued by the EU Council had stressed that 'criminalisation of conduct at an unwarrantably early stage should be avoided', [34] but the Directive didn't comply with this guideline.

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of that travel is to commit, contribute to or participate in terrorist offences as defined in Article 3, or to provide or receive training for terrorism as defined in Articles 7 and 8'.

[31] Amnesty International, The International Commission of Jurists, The Open Society Justice Initiative and The Open Society European Policy Institute, *Joint submission regarding the European Commission's proposed draft Combatting Terrorism Directive*, February 2016 http://www.amnesty.org/en/documents/ior60/3470/2016/en/.

[32] See for helpful survey of the Italian doctrine: Giovanni Fiandaca and Enzo Musco, *Diritto penale. Parte generale* (Zanichelli 2014), 508.

[33] So the Meijers Committee, *Notes on an EU Proposal for a Directive on Combating Terrorism* (see footnote No. 26), 4.

[34] Council of the European Union, *Conclusions on Model Provisions, Guiding the Council's Criminal Law Deliberations, 2979th JHA Council Meeting*, 30 November 2009, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/111543.pdf.

It's worth noting that the Meijers Committee and the Council had requested the existence of a strict link between the conduct and a serious and immediate harm. In other words, the forbidden behaviours had to be capable of causing a real danger of potential terrorist offences.

The legislator has proved to have more respect for the materiality requirement of the conduct solely when describing the crime of 'Public provocation to commit a terrorist offence' (Art. 5), the final wording of which no longer shares that of the model of the crimes of presumed danger. Indeed, while the conduct envisaged in the original text merely consisted of divulging messages with a view to encouraging the commission of terrorist offences, without mentioning its likelihood of 'causing a danger that one or more such offences may be committed', the final wording precisely demands what was excluded by the original one. In fact, the provision requires a specific causality link between the spreading of an apologetic message and the actual promotion of a terrorist attack. Thus, the inseparable connection is recreated which must tie the provocation to commit a crime to the active push to commit it by the addressees of the message; this dispels the suspicion that the legislator is prepared to punish a mere criminal intention devoid of any offensive capability.

Nonetheless the original text of the proposal has only been partially corrected. The legislator has excluded that said conducts be held *per se* dangerous, since they require an *ex facto* assessment and cannot be the object of a typical legal evaluation; but the proposal has left still undefined the borderline distinguishing the freedom of speech from the apology of a terrorist crime. This last criminal conduct is described in a manner so vague that it becomes applicable even to the activity of a reporter excessively praising terrorist deeds. Similarly, the prohibition would also apply to the diffusion of messages that may be considered to denigrate the victims of terrorism, although involving words and images that could be censured only for offending the dignity of said victims: 'such messages and images may also include those denigrating victims of terrorism'.[35] Consequently, nothing would prevent a State from holding that such conducts are sufficient to materialize an apology crime, even in the absence of any concrete risk to security.[36] This is not a hypothetical risk because the European legislator has failed to request that the appreciative message be suitable to create a serious and current risk of repetition of the celebrated crime.

The amendment to the initial text has done little to set a clear border between the freedom of speech[37] and the provocation to commit a crime,[38] nor has the norm

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[35] Meijers Committee, *Note on an EU Proposal for a Directive on Combating Terrorism* (see footnote No. 26), 5.

[36] One can consult the opposite proposal of the FREE GROUP, *Terrorism: EDRI Recommendations for the EP Report on Terrorism*, 31 March 2016 https://free-group.eu/2016/03/31/terrorism-edrirecommendations-for-the-ep-report-on-terrorism.

[37] We have to see the opposite opinions of Rosario Serra Cristóbal and Germán M. Teruel Lozano respectively in this book (chaper 3, page 45 anche capter 8, page 135).

[38] See the critical remarks of Stef Wittendorp, 'Incitement to Terrorism and the Regulation of Free

gained in specificity since the European legislator has deferred this task to the national level. Actually, during the parliamentary proceedings, and in particular within the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) Commission, this wavering attitude has been the subject of critical remarks for its 'chilling effect on freedom of speech'.[39]

7. *The French Laws 'Relative à l'État d'Urgence'*

We turn now to examine, in general terms, the counter terrorism policy pursued in France, highlighting its doubtful compatibility with the principles of proportionality and precautionality which represent common values of modern constitutionalism.

Loi 2015/1501[40] has provided an opportunity not only to adapt the French policy to the changed nature of terrorism, but also to keep it in line with the times, bearing in mind that the Internet has replaced the communication tools traditionally used to spread terrorist strategies, as well as to incite and train to execute them.[41]

Let us note the formal features characterizing this law. It is an extra-ordinary law, as it is based on the state of emergency previously declared by a government decree;[42] an ordinary law, since according to the case law of the Conseil constitutionnel it did not need to be legitimated by a specific constitutional norm,[43] which has not pre-

Speech' (Explosivepolitics.com, 12 June 2016) http://explosivepolitics.com/blog/incitement-to-terrorism-and-theregulation-of-free-speech.

[39] LIBE Commission, whose words have been quoted in the draft of Meijers Committee, 'Notes on an EU Proposal for a Directive on Combating Terrorism' (see footnote No. 26), 5.

[40] Loi n° 2015-1501 du 20 novembre 2015 Prorogeant l'Application de la Loi n° 55-385 du 3 avril 1955 Relative à l'État d'Urgence et Renforçant l'Efficacité de Ses Dispositions, in JORF n° 0270 du 21 novembre 2015, Texte n° 1, http://www.legifrance.gouv.fr/eli/loi/2015/11/20/2015-1501/jo/texte.

[41] Marc Rees, 'Vers une nouvelle loi renseignement pour 2020, année de péremption des boîtes noires', (NextInpact.com, 2019) https://www.nextinpact.com/news/107819-vers-nouvelle-loi-renseignement-pour-2020-annee-peremption-boites-noires.htm.

[42] Décret n° 2015-1475 du 14 novembre 2015 Portant Application de la Loi n° 55-385 du 3 avril 1955', Journal officiel "Lois et Décrets" (JORF) n° 0264 du 14 novembre 2015, texte n° 44, https://www.legifrance.gouv.fr/eli/decret/2015/11/14/2015-1475/jo/texte.

[43] Conseil constitutionnel, Décision n° 1985-187 DC du 25 janvier 1985, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1985/85-187-dc/decision-n-85-187-dc-du-25-janvier-1985.8162.html; more recently see: Décision n° 2015-527 QPC du 22 décembre 2015, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-527-qpc/decision-n-2015-527-qpc-du-22-decembre-2015.146719.html, in which the Supreme Judge stated that: '[c]onsidérant que la Constitution n'exclut pas la possibilité pour le législateur de prévoir un régime d'état d'urgence; qu'il lui appartient, dans ce cadre, d'assurer la conciliation entre, d'une part, la prévention des atteintes à l'ordre public et, d'autre part, le respect des droits et libertés reconnus à tous ceux qui résident sur le territoire de la République'.

vented the launch of an aborted revision of Art. 36 of the French Constitution during the Hollande Presidency;[44] a temporary law, as it was destined *ex lege* to last for a predetermined period of time; an exceptional law, because it derogated to the normal regime concerning the division of powers and the fundamental freedoms; finally (and again), an extra-ordinary law, because its ultimate goal was the return of the legal order to its normal institutional status as soon as possible after the emergency.[45]

While the law in question should have been in line with the above essential traits, one can easily see that things took a substantially different path: it has become a permanent law, being successively prorogated *sine die* and making normal and stable the emergency regime regardless of the existence of a real danger to be faced.

Let us see now how little its rules regarding the division of powers and liberties conform to the proportionality and precautionality principles. The two points will be examined jointly in order to provide the reader with a unitary picture.

Under Law 2015, as under that of 1955, the task of applying the restrictive measures is distributed between the top political authority, the Minister of the Interior, and its territorial administrative agent, the Prefect, to the detriment of the judiciary order. However, differing from the preceding model, it has extended the powers granted to them and reduced the procedural safeguards.

The Minister of the Interior is entitled to impose a forced residence on a person if he has 'raisons sérieuses de penser que son comportement constitue une menace pour la sécurité et l'ordre publics' (Art. 6, co. 1). Such a measure, which is adopted without hearing the interested party, is neither decided by a judge nor subject to review *ex post* in a proper judicial proceeding. Furthermore, with regard to the precautionary criterion, it is not founded on solid proofs, susceptible to be verified under objective parameters; the presence of vague indications may be sufficient for the Minister to assume that the behaviour of a person represents a serious and imminent threat to security. Thus, Law 2015 constitutes an attack on liberties, not so much because it introduces new restrictive measures, but because of its implementation modalities and for its disregard for the precautionality principle.

A confirmation of the above remarks is offered by the day and night searches, which may be decided by the Prefect without the previous authorization of the judge. They may concern also objects found during the search, for example a computer, the data contained in it (which can be copied), or that assembled in a cloud accessible through the computer.[46] These searches permit the acquisition of a full picture of a

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[44] Projet de Loi Constitutionnelle de Protection de la Nation, n° 3381 du 23 décembre 2015, Leg. XIV http://www.assemblee-nationale.fr/14/projets/pl3381.asp.

[45] G Agamben, *Stato di eccezione* (Bollati Boringhieri 2003), 34.

[46] Copying data from a pc was declared unconstitutional by the Constitutional Council, Décision n° 2016-536 QPC du 19 février 2016, JORF n° 0044 du 21 février 2016, texte n° 27, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-536-qpc/decision-n-2016-536-qpc-du-19-fevrier-2016.146991.html. In its reasoning the Council, levelling this measure to a seizure, declared that a war-

person, looking into his personal and professional life, past and future, individual and family or social life; they may also involve someone who has been in contact with the presumed terrorist just by chance. This unrestricted day and night intrusion into the private life of a person not only concerns his usual residence, as would be appropriate, but also the properties occasionally attended by anyone whose conduct may raise a possible threat to security (Art. 11, para. 1).

At the expiry of the six month term, this law has been continuously prorogated – a mechanism converting *de facto* a temporary into a definitive act – up to Law 2016,[47] which has strengthened the apparatus of restrictions and formally upheld a theory sustained by the Conseil constitutionnel:[48] namely, the sufficiency of a mere 'lien opérationnel et fonctionnel'[49] between the restrictive measures and a generic situation of danger, not necessarily to be identified in the terrorist risk which was at the origin of the declaration of an emergency.

This theory is dangerous for democracy, as it may legitimate restrictions to liberties in order to prevent riots in no way connected with terrorism. Actually, the ultimate goal of the law appears to be to avoid the police, already heavily committed to counter terrorism, from being diverted from their primary task. Consequently, any social movements – be it groups of fans, ecologists, *sans papiers*, trade unionists – capable of increasing tensions or adversely affecting an already unstable situation had to be *a priori* prohibited, regardless of the existence of a conduct concretely offensive to the public order.

It is thus admitted that liberties can be sacrificed in a precautionary and anticipated way, as well as in respect of an undetermined mass of subjects, not necessarily suspected of terrorism,[50] just to avoid a deterioration of a public order situation.

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rant instead of a simple administrative order was needed to access the data, in consideration that the independence and impartiality of the judge guarantee the lawfulness of this measure limiting a fundamental right. Only with the Loi n° 2017-1510 some significant guarantees were assured: the copy of the data or the seizure of the pc can happen in the presence of the judicial police; none can access data before a warrant is granted.

[47] Loi n° 2016-987 du 21 juillet 2016 Prorogeant l'Application de la Loi n° 55-385 du 3 avril 1955 Relative à l'État d'Urgence et Portant Mésures de Renforcement de la Lutte Antiterroriste, in JORF n°0169 du 22 juillet 2016, Texte n° 2, https://www.legifrance.gouv.fr/eli/loi/2016/7/21/INTX1620056L/jo/texte.

[48] Conseil constitutionnel, Décision n° 1985-187 DC du 25 janvier 1985, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1985/85-187-dc/decision-n-85-187-dc-du-25-janvier-1985.8162.html; lastly, Décision n° 2015-527 QPC du 22 décembre 2015, cit.: '[c]onsidérant que la Constitution n'exclut pas la possibilité pour le législateur de prévoir un régime d'état d'urgence; qu'il lui appartient, dans ce cadre, d'assurer la conciliation entre, d'une part, la prévention des atteintes à l'ordre public et, d'autre part, le respect des droits et libertés reconnus à tous ceux qui résident sur le territoire de la République'.

[49] Xavier Domino, 'Conclusions du Rapporteur Public', audience du 11 décembre 2015 http://www.journaldujour.re/IMG/pdf/293083035-conclusions-rapporteur-public-audience11122015.pdf; Mélina Elshoud 'État d'Urgence & Juge Administratif' (2016), 1 Le Journal de Droit Administrative, http://www.journal-du-droit-administratif.fr/?p=511.

[50] Maria Francesca De Tullio, 'Internet and Non-nationals: Is the Net a Tool for Inclusion or Exclusion?', especially pp. 00, in this book.

Hence, operational needs contribute to the regression of the rule of law into a regime of terror, where the restriction of liberties changes from an exceptional rule to an ordinary one; the incrimination based on mere suspicion replaces the necessity for a robust apparatus of evidence; the presumption of abstract dangerousness prevails over the assessment of a concrete offensive conduct; the constitutional safeguards are frozen *sine die*; Parliament is kept out of any decisions on terror, which are concentrated in the hands of Government; and the latter enjoys immunity from the control of the ordinary judge, as a result of the reductive interpretation of Art. 66 of the French Constitution by the Conseil constitutionnel. [51]

Making normal and definitive a legal system initially qualified as exceptional and temporary: [52] this has been the effect of Law 2017/1510, [53] as we will see in the next section.

8. *The French Law 'Renforçant la Sécurité Intérieure et la Lutte contre le Terrorisme'*

In this section we will examine Loi 2017/1510, a normative model aimed, as the preceding laws, at strengthening 'la Securité Intérieure et la Lutte contre le Terrorisme'; however, unlike the emergency regulations previously considered, this law is characterized by the fact that it makes recourse not to extra-ordinary and temporary rules, but to ordinary and definitive ones.

Let's examine its ideological assumptions first and then delve into its content.

As far as its nature is concerned, the law is neither special nor temporary; rather, it is a common law *tout court*, thus designed to remain in force indefinitely. This radical shift of nature is only due to a political concern: to allow the State to return to institutional normality.

In this way, the law implements President Macron's promise [54] not to extend the

[51] Conseil constitutionnel, Décision n° 2015-527 QPC du 22 décembre 2015, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-527-qpc/decision-n-2015-527-qpc-du-22-decembre-2015.146719.html.

[52] Wanda Mastor and François Saint-Bonnet, 'De l'Inadaptation de l'État d'Urgence Face à la Menace Djihadiste' (2016) 3 Pouvoirs, 64; Stéphane Pierré-Caps, 'Constitutionnaliser l'état d'urgence?' (2016) 1 Civitas Europa, 150-–153; Denis Salas, 'La Banalisation dangereuse de l'état d'urgence', (2016) 3 Études, 38-–39 and Mission Internationale d'Enquête, 'Mesures antiterroristes contraires aux droits humains. Quand l'Exception devient la règle' (2016) Rapport, https://www.fidh.org/IMG/pdf/rapportfrance-hd1_def.pdf, 27-–32.

[53] Loi 2017-1510 du 30 octobre 2017 Renforçant la Sécurité Intérieure et la Lutte contre le Terrorisme, JORF n° 0255 du 31 octobre 2017.

[54] Emmanuel Macron, 'Discours du Président de la République aux Préfets', 5 September 2017, http://www.prefectures-regions.gouv.fr/ile-de-france/content/download/36702/247580/file/05.09%20-%20Discours%20du%20Pr%C3%A9sident%20de%20la%20R%C3%A9publique%20aux%20Pr%C3%A9fets.pdf.

state of emergency, adopted for the first time in 2015 and extended six times since then. A central question arises though: has the President's promise to revoke the *état d'urgence* really been kept?

On the one hand, the law aims at identifying a proper balance between safety and fundamental rights. Consequently, it does not make the state of emergency a prerequisite, which is no longer renewed, unlike the previous law models. Rather, it acknowledges the existence of an *ordinary time* terrorism as a given fact.

The expression *ordinary time* terrorism is used here to stress the ordinary and permanent nature that terrorism has acquired, being no longer something exceptional or temporary. Indeed, terrorism cannot be seen as a separate and single event, but as a series of interlocking actions taking place through time and space. This is a fact and the law has grasped it perfectly. As a result, the French legislator has pragmatically avoided any *fictio iuris* (legal fiction) and has treated terrorism for what it really is: a current emergency, which therefore does not need to be declared by an extraordinary act of the Council of Ministers.

However, if the existence of terrorism is not denied – being indeed at the basis of the new law – what is under discussion is the choice of normalizing the state of emergency, turning its exceptional regulation into a general and ordinary discipline.

The fundamental rights of the citizens – already compressed by the previous laws – are once more flouted and restrained on the ground of fear. [55]

What emerges is far from being a promising scenario. The absence of time restrictions and the introduction of additional limitations on freedoms are bound to exacerbate tensions even more.

From now on, for instance, the law enables the closure of places of worship; and home detention measures – through changing their name into *individual surveillance measures* – remain in force substantially unchanged, if not worse.

New expressions are coined to replace old ones, as in the case of house searches now renamed 'visits' (Art. 4). The latter – which have nothing to do with doctors – are always conducted by a prefect, who is allowed to search places and houses or to seize computers and all their contents. And this is not based on the presence of strong evidence, but on merely vague allegations linked to terrorist acts by a weak connection.

We have to add another consideration: the expiry of the *état d'urgence* annuls the guarantee of its judicial review, which had as its object the formal declaration of the

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[55] Marc Rees, 'Les nouvelles technologies dans le projet de loi anti-terroriste' (NextInpact.com, 18 September 2017), https://www.nextinpact.com/news/105186-les-nouvelles-technologies-dans-projet-loi-anti-terroriste.htm; Jean-Baptiste Jacquin and Julia Pascual, 'Le gouvernement choisit la surenchère sécuritaire pour sortir de l'état d'urgence' (LeMonde.fr, 25 September 2017, http://www.lemonde.fr/police-justice/article/2017/09/25/le-gouvernement-choisit-la-surenchere-securitaire-pour-sortir-de-l-etat-d-urgence_5190725_1653578.html; Julien Lausson, 'Terrorisme: la nouvelle loi française alarme des experts en droits de l'homme de l'ONU' (Numerama.com, 27 September 2017) http://www.numerama.com/politique/293193-terrorisme-la-nouvelle-loi-francaise-alarme-des-experts-en-droits-de-lhomme-de-lonu.html.

emergency, that is no longer present in this case, even if the restrictions to the fundamental rights were already in place.

This remark sheds light on the most controversial question of the law: the role of the judge. According to Art. 66 Fr. Const.,[56] any restrictions on fundamental freedoms should be submitted to the *ex ante* or *ex post* control of an ordinary judge, at least according to the Fathers of the Fifth French Republic:[57] in fact, the expression 'la liberté individuelle' was meant to encompass the entire category of fundamental rights.

By opting for a restrictive interpretation supported by the Conseil constitutionnel,[58] the 2017 Legislator has only given the ordinary judge control over personal freedom, while all other freedoms fall under the competence of the administrative judge. Clearly, because of its constitutional collocation, the ordinary judge offers greater guarantees of impartiality; by contrast, the administrative judge is less autonomous and independent from the Executive power and therefore a less suitable candidate to accomplish this judicial review.

Consequently, while the decision to revoke the endless state of emergency by normalizing it may be accepted, the above choice should have been supported by the softening of the restrictions to the fundamental freedoms, once justified by their temporary character. Thus, the new law was expected to ease measures limiting freedoms and to reinforce the guarantees of judicial review, yet none of this has taken place.

It is hard to avoid feeling that France, albeit in a surreptitious way, is acquiring the traits of a 'police state'. Ironically, the country of the *Revolution* is gradually moving away from modern constitutionalism, the first foundations of which model it laid.

Is it really the institutional normality President Macron had promised to restore?

9. *The Law of Fear Tomorrow*

It is now time to turn to some conclusive remarks.

In brief, it has emerged from the foregoing that the current standard of law of fear has opened the door to very significant breaches to the constitutional order. It is,

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[56] Art. 66 para. 2: 'L'autorité judiciaire, gardienne de la liberté individuelle, assure le respect de ce principe dans les conditions prévues par la loi'.

[57] See the speech of Charles de Gaulle, 'Discours prononcé Place de la République à Paris', 4 septembre 1958, http://www.charles-de-gaulle.org/pages/l-homme/accueil/discours/le-president-de-la-cinquieme-republique-1958-1969/discours-prononce-place-de-la-republique-a-paris-4-septembre-1958.php.

[58] To analyse the whole *cursus* of the Conseil constitutionnel on Art. 66 Fr. Cost, read Bertrand Louvel, 'Auditions sur le projet de loi constitutionnelle n° 395 (2015–2016)', adoptée par l'Assemblée nationale, de protection de la Nation, mardi 1er mars 2016, Leg. XIV, http://www.senat.fr/compte-rendu-commissions/20160229/lois.html#toc2t.

To see a symbolic decision on a restrictive interpretation of Art. 66 see: Conseil constitutionnel, Décision n° 2015-527 QPC du 22 décembre 2015, quoted above.

therefore, worth considering if there are any remedies that could bring the emergency regimes back to legality without changing the constitutional framework.

a) *De iure condendo,* a valid remedy could be found by bringing the Legislator in Europe – both at the national and the EU level – back to respecting the principles of precautionality and proportionality, which should be taken into account especially in situations of danger to rights and democracy itself.

Any legislative innovation should comply with these principles. Apart from their political and ethical value, the principles of precautionality and proportionality can be already drawn from the existing Constitutions as well as from the EU Charter. In the contrary case, the regulation would be illegitimate, as widely illustrated above, but also ineffective because controlling everyone is like controlling no one. A preventive action could be truly effective if it is aimed and targeted at specific objectives.

b) Another remedy could consist of having the emergency regime periodically reexamined by the legislator; the prorogation of the regime could be made subject to progressively qualified and growing political majorities. This proposal, advanced by Ackerman [59] for the US system, could be applied in principle also to the European legal systems.

Scholars consider that a growing qualified majority rule in parallel to the progressive extensions of the state of emergency constitutes a guarantee against abuses of the emergency powers. Actually, the necessary consent of the minorities to prorogation proposals is amply justified by the importance of the decision to be taken. The aim of the said guarantee is to avoid that rule of law system from becoming 'un état de droit de necessité', [60] where temporary deviations from the ordinary legality tend to be converted over time into a stable extra-ordinary legality and lead to the introduction of a new political and legal order replacing the preceding one: a kind of atypical normality.

If the aim of the Executive is to stabilize the emergency, i.e. to make permanent what should remain temporary, the consent of the minorities is indispensable and its importance grows the more the emergency approximates to a definitive status. Thus, normalizing the state of emergency, which is in any case an event to be discouraged, requires a level of awareness and an aggregation of consents far greater than those sufficient to support a government.

Looking at the issue from a different point of view, it is reasonable also to assume

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[59] Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press 2006), 116–121.

[60] Stéphane Pierré-Caps, 'Constitutionnaliser l'état d'urgence?' (2016) 31 Civitas Europa, 153. Also see: Dominique Dyzenhaus, 'L'état d'exception', in Michel Troper and Dominique Chagnollaud (eds), *Traité internanational de droit constitutionnel, Vol. II, Distribution des pouvoir* (Dalloz 2012), 751–752, where the Author says that: '… lorsque la menace est considérée d'une durée indéfinie, comme c'est le cas avec le terrorisme international à la Al-Qaed, il manque à la déclaration de l'état d'exception l'un de ses traits essentiels: l'anticipation de sa fin. Un état d'exception permanent semble être une contradiction dans les termes. Si les conditions sont telles que l'ordre politique et juridique doit être reconfiguré indéfiniment, c'est le nouveau normal, pas un état d'exception'.

that a public debate outside the secret rooms of government powers and voting within elected Assemblies would either strengthen the idea that the exceptional regime has to be maintained or unmask an attempt to establish a police state. This alternative is properly unravelled by means of a parliamentary debate and the extended involvement of the political-representative pluralism. Only large and growing majorities can ensure a correct decision over keeping or eliminating the state of emergency.[61] Nonetheless, Ackerman's proposal appears difficult to be implemented as it would require constitutional amendments to the legislative procedures laid down in the Member States' Constitutions.

c) In conformance with the principle of the division of powers, each political body should comply with its institutional mandate. On the legislative side the decision-maker should strictly observe the rule of law requirements – proportionality, precautionality, necessity, and due process – in writing the laws of fear.

Should the legislator fail to perform this task, national Supreme Courts should play an active role. Their excessive tolerance towards the Legislator has permitted temporary emergency regulations to be converted into a definitive model, legal derogations to rights to evolve into heavy breaches of the mandatory statute of fundamental rights, proportional and precautionary measures to be turned into unreasonable and discriminatory norms governed by absolute presumptions. From our perspective, in contrast, the Supreme national and supra-national Courts should conduct a strict judicial review of the laws of fear to make the above requirements effective. Otherwise, why would the legislator comply with these binding parameters if the Authority, entrusted with their enforcement, prefers a light control?

In general, the effectiveness of the constitutional order is based on the fact that derogatory measures do not subvert the core of such order. Here, our reasoning goes back to the starting point: the emergency legislator has been given a mandate to preserve the endangered legal system. This is the genetic limit of any derogatory laws, the overcoming of which entails the violation of the same legality which the emergency legislation has to defend. The extraordinary law has its own natural limit in bringing the system back into balance, which has been temporarily altered and threatened by the state of danger. In order to do so, the derogatory power has to be limited in time, so as to ensure the reversal to a normal state, avoiding the occurrence of irreversible breaches to the established order. Such breaches would alter the core of both the fundamental principles and the liberties of the constitutional order, preventing the system to resume its original identity.

It's time to sum up: the measures of prevention must not be *extra-ordinem* but compatible with the system. The emergency power, despite being exceptional, still remains a constituted power subject to the requirements of the rule of law. This

[61] Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (see footnote No. 59), 117.

power does not write on a blank blackboard, because there is a constitutional framework to be respected. The emergency must be kept within the boundaries of the rule of law, otherwise the introduction of an exceptional law would disguise a new legal-political order, aiming to illegally replace the existing one. [62]

In conclusion, the fundamental rights and the guarantees of democracy must be defended especially in times of crisis. Otherwise, when the crisis is over, there would be a return to an abnormal reality, achieved by the sacrifice of liberties and democracy. However, these two values represent the ultimate *ratio* of the emergency legislation.

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[62] Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton University Press 1948) 314, where the Author underlines that: 'No sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself'.