

Has the balancing of rights given way to a hierarchy of values?

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The article aims to discuss the apparent drawing apart of the flexible mechanisms of the balancing of rights in favour of the more rigid mechanisms of the hierarchy of values, which places security at the top of the theoretical pyramid.

It identifies three indicators: normative, jurisprudential and doctrinal and investigates whether in these three areas a hierarchical idea of fundamental values, heavily skewed in favour of public security, is gradually emerging. From this perspective, the article examines some of the counter terrorism legislation introduced after the terrorist attacks in 2001 and 2005 with a view to verifying their impact on certain fundamental rights, above all with regard to their “permanence” which appears to have taken the place of the original temporary status. The same “test” is reserved for the position of the courts, with specific reference to the judgments of supreme and constitutional courts called upon to rule on violations of rights caused by the application of counter terrorism measures. The doctrinal indicator is provided by the debate concerning the use of torture, merely by way of example but in a manner relevant for the issue under investigation.

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I. INTRODUCTION

The failed attack on the Amsterdam-Detroit flight on Christmas Day 2009 not only led to an intensification of controls in airports, but also brought home in all its complexity the problem of security within so-called open society, which dramatically came to the fore on 11 September 2001 and has remained unresolved ever since. In fact, at the start of 2010 the governments of many countries (including Italy) engaged once again with the threat of terrorism and, above all, reopened the question regarding the effective forms of preventing (or combating) these attacks.

Today the most appropriate instrument for warding off the terrorist alert, at least for mid-air explosions, appears to be the body scanner, that is a machine which scans the human body with x-rays, thereby permitting the accurate “inspection” of travellers transiting through airport areas. Given the undoubted intrusiveness of the machine, its introduction has raised perplexities, if not genuine reservations, on several grounds expressed by various associations dedicated to protecting human rights as well as the privacy watchdog. For example, adopting moreover the opinion of the group which includes its European counterparts, the Italian watchdog has argued that respect for human dignity must in any case be guaranteed, which in this case, as can easily be imagined, is closely related to the question of privacy. By contrast, the Italian Minister for Foreign Affairs has responded to all the associations which objected to the violation of privacy that: «I understand the sacrifice», but it is a «sacrifice which it is worth making», because «the right not to be blown up is the precondition for all freedoms».¹

It is this assertion, or better the implications underlying it, that acts as a starting point for the reflections which will be developed in this article. It should be noted first and foremost that the Minister does not refer to the balancing which is usually carried out between fundamental values or between legal values of equal status that are equally fundamental for democratic society, but uses twice, and therefore with conviction, the term «sacrifice» (of a right: the reference is to privacy, but in actual fact it extends further); then when articulating his reasoning, with equal assertiveness, Minister Frattini identifies the precondition for the exercise of all rights: the right to stay alive, which the minister renders highly effectively with the expression «not to be

¹ Minister Frattini's interview was reported by many newspapers; *ex multis*: *L'Italia apre ai body scanner. Frattini: strumento più sicuro*, La Stampa, January 5, 2010, available at www.lastampa.it; *Il body scanner e la privacy: è polemica in Europa ma l'Italia dice subito di sì*, January 5 2010, available at <http://it.notizie.yahoo.com>; *Terrorismo: Frattini, sì a body scanner in aeroporti*, Il Corriere delle Alpi, January 5 2010, available at <http://trentinocorrierealpi.geloc.it>. In contrast to Frattini's opinion the Pope: M. Ansaldo, *Aeroporti, il Papa contro i body scanner. Possono offendere la dignità umana*, La Repubblica, February 21, 2010: www.repubblica.it.

blown up». This means that the government has a duty to respond to society's fears and to guarantee the utmost security.

It is clear that the minister is addressing the press and not presenting a report to a law conference, but let us consider the reasoning proposed on a technical level with a view to verifying whether it is merely an overstated aside or by contrast echoes a tendency present in the post 9/11 era.

His whole argument is premised on the idea of the primacy of the legal value of security over any other value. It stands at the pinnacle of the hypothetical formal scale of rights, and is prior to and hence stands above all other legal rights. Therefore, according to the way in which the issue concerned is framed, all other freedoms and all other rights, including fundamental rights, become weak, secondary and their exercise subordinate to other interests, all in the name of the goal of protecting the security of society. And this is irrespective of the circumstances of individual cases, given that the presupposition on which the minister's assertion is based always remains valid. Ultimately, the assertion skirts around the elementary and essential question which remains implicit but clear, that is: what freedom can be exercised by the dead? None. Therefore, above all we have to remain alive, giving up whatever is necessary to give up, even privacy or any other freedom the exercise of which would be impossible without this precondition (that is, remaining alive, guaranteed by security), and therefore a logical not to mention a legal *non sequitur*.

Before explaining the reasons why this logical presupposition is not convincing, it should be pointed out that in the development of the reasoning which we are examining here, on the one hand, the problem of the type of freedom which must be given up (or which we must be ready to give up) is not raised, and indeed it has just been mentioned that the reference to privacy is only incidental (though in this particular case it turns out to be closely related to another right of fundamental importance, that is human dignity), with the "principle of sacrifice" being generalised and referred to all rights. On the other hand however, in accordance with the way in which the issue is framed, the question of how much freedom must be sacrificed in the name of security is not even raised, with the result that the concept of reasonable proportion loses all significance (and besides it is difficult to have reasonable proportions in x-ray controls).

In taking note of the fact that so-called post modern society cannot do without forms of protection, including those which heavily limit the most fundamental freedoms, governments of the main liberal democratic countries in the post 11 September world therefore appear to conceptualise the relationship between two requirements, each worthy of protection according to the classical method of the balancing of interests, though they have made

efforts to identify, according to the criterion of reasonableness, a point of equilibrium between the guarantee of a collective requirement and the protection of other rights, which had previously been considered unquestionable conquests not simply of the law, but more fundamentally of human civilisation. Within the obsessive security perspective of governments, the flexible mechanisms which oversee the balancing of rights thus appear to be set aside in favour of the more rigid mechanisms of the hierarchy of values, which at least during its current stage (*post* 11 September) places security at the pinnacle of the theoretical pyramid.²

The reflections contained in this article are intended to verify whether this tendency is merely characteristic of the positions adopted by certain governments (the words of the Italian Foreign Minister in the example referred to have been confirmed by his colleague at the Interior Ministry³ and are supported by the whole government;⁴ similar declarations have been made by other members of the main European governments, not to speak of the American administration, the position of which is known to all) or whether it also manifests itself in other forums. At almost a decade from the attack on the Twin Towers it therefore appears to be appropriate to take stock of the relationship between freedom (rights) and security (authority), in order to ascertain whether, leaving aside the perhaps somewhat theatrical words of an authoritative representative of the governing majority, the classical and flexible mechanisms for weighing up rights actually leave space for a hierarchical idea of legal values which inevitably has repercussions on a fresh priority order of rights, as the expression and reflection of the values underpinning them, with the consequence of moving the border of security to a new boundary that is so far advanced as to encroach even upon the most intimate sphere of basic individual legal rights. It is not by chance that references are made to the sacrifice of the right on security grounds, rather than its limitation or mere restriction, but even a formal semblance is maintained and the language used refers to the balancing and weighing up, we are *de facto* left with the sensation that the idea of a hierarchy has passed.

With a view to subjecting the argument in question to scrutiny, it is suggested identifying three indicators, normative, jurisprudential and doctrinal. We shall

² From a perspective based on the general theory of law, Riccardo Guastini argues that “ponderation” consists in deciding a “mobile axiological hierarchy” between principles in conflict, see R. Guastini, *Ponderazione. Un’analisi di conflitti tra principi costituzionali*, *Ragion pratica* 151 ff., 158 (2006).

³ *Terrorismo, Maroni favorevole ai body scanner negli aeroporti*, *Romagna Oggi*, January 5, 2010: www.romagnaoggi.it.

⁴ *Terrorismo, dal governo sì ai body scanner. Matteoli: «Presto a Fiumicino e Malpensa»*, *ING*, January 5, 2010: www.adnkronos.com.

therefore investigate whether, in more or less declared terms, in these three areas a hierarchical idea of fundamental values heavily skewed in favour of public security is gradually emerging,⁵ which satisfies the duty to prevent and combat terrorist acts. In particular, the second section will examine some of the counter terrorism legislation introduced after the terrorist attacks in 2001 and 2005 with a view to verifying their impact on certain fundamental rights, above all with regard to their “permanence” which appears, given the continuing extensions, to have taken the place of the original temporary status, at least in those legal systems which have approved them on exceptional grounds. The third section will analyse the position of the courts, with specific reference to the judgments of supreme and constitutional courts called upon to rule on violations of rights caused by the application of counter terrorism measures. In the fourth section, the debate which has opened up within the academic literature concerning the use of torture will be revisited in summary form, merely by way of example but in a manner highly relevant for the issue under investigation. Finally, in the concluding section some summary remarks will be proposed focusing on the verification of the argument underlying the investigation and its results.

II. LEGISLATIVE PRINCIPLES OF COUNTER TERRORISM

Turning to the legislative situation, it should first of all be noted that whilst before 2001 various European states had already already specific counter terrorism legislation in order to pursue crimes of a terrorist nature related to the separatist cause of independence organisations or claims by extremist fringes arising within peculiar local contexts (consider, to name a few examples, the actions of the IRA in the United Kingdom and those of ETA in Spain, but also the political terrorism of the 1970s in Italy and Germany or Algerian terrorism in France), in the aftermath of the 11th September the insufficiency, or in any case inadequacy, of the legal instruments intended to combat internal subversion immediately became clear, with the result that institutional actors dedicated themselves to the task of revising and/or adopting *ex novo* measures that were adequate to face up to the unprecedented scope of the ancient threat, international Islamic terrorism. The vast majority of legal systems of Western countries therefore saw a blossoming of

⁵ The legal qualification of “security” is not considered herein i.e. whether it is a collective interest, right, principle or value.

legislation enacted *ad hoc* or resulting from amendments, at times even far-reaching, to the arrangements previously in force.⁶

Generally speaking, on every level the legislation introduced in order to prevent, combat and repress transnational terrorism was characterised by the heavy limitations that it placed on the main personal freedoms, above all with reference to arrest procedures and the duration of pre-trial custody,⁷ suspects'

⁶ For a comparative analysis of counter terrorism legislation allow us to refer to A. Vedaschi, *À la guerre comme à la guerre? La disciplina della guerra nel diritto costituzionale comparato* 504 ff. (2007).

⁷ It would appear highly questionable to extend the maximum limit of preventive detention, as many legislators have done, in order to deal with terrorism; the most important examples are the UK and France. In the United Kingdom, preventive detention may reach 28 days (the Government sought an extension to 42 days, see: www.official-documents.gov.uk/document/cm74/7482/7482.pdf). In France, the *garde à vue* may be prolonged up to 6 days, in case of a serious danger of an imminent terrorist attack against France or other countries; J. P. Pochon, *La lutte antiterroriste en France: état des lieux, L'Europe face au terrorisme* 61 ff. (2005) and D. Strass-Kahn, *Il faut récrire la loi Perben*, *Le Monde*, February 12th, 2004. See also Syndicat de la Magistrature, *Observations du Syndicat de la Magistrature sur la constitutionnalité de la loi portant adaptations de la justice aux évolutions de la criminalité*, www.syndicat-magistrature.org. Art. 17, *loi* 64-2006, amends art. 706-88, *code de procédure pénale* (c.p.p.) and provides for a double judicial review of detention (the first one after 48 hours and the second one after 96 hours). This amendment avoids incompatibility between French law and the ECHR, but it has not avoided criticism from scholars as well as from international organizations. See A. Teissier, *Garde à vue et droits de la défense*, *Rev. penit. dr. pén.* 30 ff. (2001) and A. Perduca, *Note sull'evoluzione del sistema di giustizia penale in Francia*, cit. 1013 ff. Art. 706-88 c.p.p. as amended by the *loi* Perben enables «juge des libertés et de la détention» to authorize, on request of the *procureur de la République*, two extraordinary extensions of 24 hours of preventive detention terms (when necessary due to special investigative purposes, the second extension can be authorized without the preventive examination of the suspected terrorist), or, if required by the complexity of the investigation, to authorize only one extension of 48 hours. Given that the ordinary term of preventive detention cannot exceed 24 hours, except the possibility of authorizing only one extension of 24 hours, “special” provisions for terrorist offences require doubling the maximum terms of the *garde à vue*, which increases from 48 to 96 hours (4 days). In spite of the criticism expressed by scholars about limitations disposed by counterterrorism law, the recent law 63/2006 amends the terms of preventive detention in order to extend the maximum limit even more. The parliamentary minorities challenged the constitutionality of that law before the Constitutional Council (*Conseil Constitutionnel*, dec. 2-3-2004, n. 492, which stated that the norms regarding the terms of the *garde à vue* are consistent with the Constitution «*sous réserve d'interprétation*», that is their constitutional legitimacy depends on the prevision of the judicial review of the detention). In other words, the French counterterrorism legislation provides an extraordinary prorogation of preventive detention which allows the judges to hold in custody a suspected terrorist for further 24 hours, renewable one time, if there is a serious risk of terrorist attack in France or abroad. Therefore, the limit of 96 hours, established by the *loi* Perben, has become of 144 hours. As a consequence the maximum term of the *garde à vue* has been raised from 4 to 6 days.

rights to a defence as well as the procedures for deporting foreign citizens; proposals to amend legislation aimed at increasing the maximum statutory penalties for terrorist related offences and the introduction of draconian rules governing imprisonment for these types of offence, leading to Guantanamo and the torture carried out there (see below section 4), were also quite widespread.

Without seeking to dwell on individual arrangements, but in order to give an idea of the impact of the measures introduced after the tragic events of the 11th September not only in the United States but also in Europe, it is sufficient to note that the British Anti-Terrorism, Crime and Security Act 2001⁸ (ATCSA) was immediately branded «the most draconian legislation Parliament has passed in peacetime in over a century».⁹

From an analysis of the different legislative schemes adopted by individual parliaments with a view to combating the terrorist threat, whilst different distinctions do emerge, certain common features are nevertheless clear; as mentioned above, all legislation has a significant impact on fundamental rights, i.e. heavily restricts the most essential personal freedoms.

By way of example, and simply to illustrate some of the tendencies which appear to be most dangerous, it should be pointed out that criminal codes or special legislation have been updated through the introduction of new offences intended to target manifestations of terrorist activity with an international dimension, including those of a merely ancillary nature, and such legislation is often drafted in very general, if not rather vague, terms. The United States legislation is emblematic,¹⁰ but one might also mention that

⁸ Part IV, ATCSA 2001, declared inconsistent with Articles 5 and 14 of the ECHR by Law Lords, was repealed by PTA 2005. See: Editorial, *Terror laws have not impressed*, New Law Journal, January 16th, 2004, 44 ff.; M. Zander, *The Anti-Terrorism Bill-what happened?*, New Law Journal 1880 f. (2001); A. Tomkins, *Legislating against terror: the Anti-Terrorism, Crime and Security Act 2001*, Public L. 205 ff (2002). On the fundamental differences between ATCSA 2001 and the previous counterterrorism laws see Editorial, *Anti-terrorism, Crime and Security Act 2001*, Criminal L. Rev. 159 f. (2002); J.L. Black-Branch, *Powers of Detention of Suspected International Terrorist under the United Kingdom Anti-Terrorism, Crime and Security Act 2001: dismantling the cornerstones of a civil society*, 27 European L. Rev. 19 ff. (2002); H. Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A proportionate Response to 11 September?*, 65 The Modern L. Rev. 724-762 (2002).

⁹ A. Tomkins, *Legislating against terror: the Anti-Terrorism, Crime and Security Act 2001*, Public Law 205 ff. (2002). On the role played by counter terrorism legislation in the dynamics of the constitutional order of the United Kingdom see J.O. Frosini, S. Pennicino, *La lotta al terrorismo nella patria dell'habeas corpus. Evidenze del dinamismo costituzionale britannico* forthcoming.

¹⁰ See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism*, cited as USA Patriot Act (Pub. L. 107-56), passed in the aftermath of terrorist attack of September 11th 2001, in order to identify and punish those who committed or aided to commit the terrorist attacks against the Twin Towers. With regard

from the United Kingdom,¹¹ both being focused on the figure of the terrorist and that of terrorist organisations, rather than actual criminal conduct, which is in fact described in terms that are not always sufficiently specific.¹²

In this regard, and again in order to underscore the most worrying aspects of the legislation under examination, in the British experience for example, the expansive intention behind the definition of terrorism is particularly evident where it is considered that the conduct of any person who wears items of clothing or other articles in a public place «in such a way or in such circumstances» as to arouse reasonable suspicion that he is a member or even simply a supporter of one of the organisations proscribed by the Secretary of State due to its terrorist goals is of criminal relevance.¹³ On this point, leaving aside the questionable involvement by government in the definition of a criminal offence, since it is a governmental organ which identifies the proscribed associations,¹⁴ there are doubts over the constitutional compatibility of the prosecution of a person on the basis of elements which

to the definition of “terrorism”, the Patriot Act does not quote the Anti-Terrorism and Effective Death Penalty Act 1996 (AEDPA), Pub. L. 104-132, § 303 (a) 110 Stat. 1214 and it does not clarify the meaning of «international terrorism». As stated before, the Patriot Act simply defines who is deemed to be a terrorist and which organizations are deemed to be terrorist organizations. See sec. 411-412, Patriot Act and M. Ratner, *Center for Constitutional Rights*, www.ccr-ny.org.

¹¹ The definition of «terrorism», adopted by Terrorism Act 2000 (TA), was not amended by the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), passed after the terrorist attacks of 2001, nor by Prevention of Terrorism Act 2005 (PTA; see sec. 1 art. 1. The insertion of the term «racial», as provided by the CTA 2008, does not change the scope of definition. On the extreme wideness of the meaning of terrorism, provided by TA 2000, see: S.H. Bailey, D.J. Harris, D.C. Ormerod, *Civil Liberties* 566 ff. (2001). On TA 2000 see: H. Fenwick, *Responding to 11 September: Detention without Trial under the Anti-Terrorism, Crime and Security Act 2001*, in L. Freedman (ed.), *Superterrorism: Policy Responses* 80 ff. (2001). On the repressive nature of that law see: J.J. Rowe, *The Terrorism Act 2000*, *Criminal L. Rev.* 527 ff. (2001); C. Walzer, *Terrorism and Criminal Justice: Past, Present and Future*, *Criminal L. Rev.* 311 ff. (2001). From a diachronic point of view see S.H. Bailey, D.J. Harris, D.C. Ormerod, *Civil Liberties*, cit. 566 f. (2001).

¹² Indeed, the antiterrorism law is characterized by the remarkable extension of its scope: sec. 4, art. 1 specifies that terrorist activities are those committed in or outside the United Kingdom, and that «b) a reference to any person or to property is a reference to any person, or to property, wherever situated, c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and d) the government means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the Kingdom...».

¹³ Sec. 13 TA 2000: «A person in a public place commits an offence if he: a) wears an item of clothing, or b) wears, carries or displays an article, in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organization...».

¹⁴ Part II sec. 3 TA 2000.

do not (necessarily) entail the violation of or danger to a legal value protected under the legal order, but which rather appear to be a mere expression of the individual's personality. The wearing of specific items of clothing may in fact be the simple manifestation of one own religious beliefs, a right which is moreover expressly protected under Article 9 ECHR,¹⁵ but, according to the wording of the provision concerned, it would become – ready within the context of the particular circumstances (assessed by the competent authorities and not sufficiently specified by Parliament) – an element suggesting involvement in terrorist militancy.

In any case, leaving aside the assessment of such subjective questions, the tendency to use a drafting technique characterised by the generic or highly elastic formulation of the offence has the result of leaving the legislative definition indeterminate, thereby maintaining a very broad discretion to the authority responsible for deciding on the identification of a dangerous individual and the drafting of the relative charge.

The preoccupation due to the broad margin of discretion left is even further justified if the restrictions on personal freedom that result from the evaluation or decision of the competent authority are taken into account.

Again by way of example, in the United States if a person charged with terrorist activities is not a U.S. citizen, he is classed as a certified alien, which permits the authorities to subject the foreign citizen to preventive custody, even without the immediate formulation of a specific count of charge, and even with the prospective that the custodial measure ordered against him may be of lengthy duration.¹⁶ The certification is based on the existence of mere «reasonable grounds» that the suspect is engaged in terrorist related activity or, in a yet more generic sense, that pose a threat to national security. The generic

¹⁵ According to many scholars the European Convention on Human Rights was incorporated by Human Rights Act 1998; see G.F. Ferrari, *La Convenzione europea e la sua incorporation nel Regno Unito*, Dir. pub. comp. ed eur. 131 ff. (1999); *contra* S. Grotz, J. Beatson, P. Duffy, *Human rights. The 1998 Act and the European Convention* (2000).

¹⁶ Patriot Act, sec. 412. Within 7 days from the beginning of detention, the suspected terrorist must be charged with a criminal offence or removed from United States; when the removal proceeding is unlikely in the reasonably foreseeable future and the alien continues to represent a threaten for national security of the United States or the safety of the community or any person, he may be detained for additional periods of up to six months. After this period, the Attorney General shall decide, in his discretion, that the certification should be revoked and the alien may be released, unless such release is otherwise prohibited by law. The counterterrorism legislation in force before the introduction of Patriot Act prescribed the preventive detention of a suspected terrorist only during removal proceeding; Supreme Court held that «detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings»: *Reno v. Flores*, 507 U.S. 292, 306 (1993).

nature of the legislative definition combined with the absence of any requirement for particular rigour in the decision therefore entails an evaluation that is inevitably highly discretionary.¹⁷

All this appears to be even more serious if the guarantees (or rather the lack of guarantees) contained in the special legislation are taken into account; indeed, the Patriot Act does not in fact provide for any form of defence prior to a detention order, since the foreign citizen suspected of terrorist acts does not have the right to a hearing, nor to produce evidence in support of his innocence; rather, the only right that is granted to him is that to request, after 6 months in custody, a review of the measure restricting his personal freedom.¹⁸

This is not to speak of the legislation regulating the conditions for arrest, detention and prosecution of suspected terrorists laid down by the Detention, Treatment and Trial of Certain Non Citizens in the War Against Terrorism,¹⁹ an order which, as is well known, authorises the President of the United States to prosecute foreigners suspected of being members of *al Qaeda* or otherwise involved in terrorist activity before military tribunals if there are «reasonable grounds» to believe that he is engaged in international terrorism.²⁰ It should be noted that this measure permits the adoption of measures which highly restrict personal freedom and the right to a defence even where there is no threat to national security, when it is simply in the interest of the United States to subject an individual to the measures stipulated in the order. The unprecedented but now notorious figure of the enemy combatant – that is an

¹⁷ See sec. 412 that confers to the Attorney General the power to hold in custody as «certified alien» a person when there are «reasonable grounds to believe» that he is engaged in terrorist activity.

¹⁸ From a critical perspective see R.N. Jonakait, *A double due process denial: the crime of providing material support or resources to designated foreign terrorist organization*, 48 New York Law School L. Rev. 125 ff. (2005). See also M.T. McCarthy, *Usa Patriot Act*, 39 Harv. J. on Legislation 439 ff. (2002); the Author seems to justify limitations on fundamental rights, pointing out the relevance of the legislative control on the Executive. On this point see the hearings before the Senate Judiciary Committee: Department of Justice Oversight: Preserving Our Freedoms While Protecting Against Terrorism: Hearings, www.usdoj.gov/ag/terrorism/aftermath.html. Cfr. L. Pegoraro and S. Pennicino, *Seguridad y libertad hacia la búsqueda de un difícil equilibrio: los derechos de los extranjeros*, Revista Europea de Derechos Fundamentales 17 ff. (n. 6, 2005).

¹⁹ The Declaration of Nation Emergency by Reason of Certain Terrorist Attacks was approved on September 18th 2001; Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism was passed on November 13th 2001: L. 66 Fed. Reg. 57, 833 n. 222, President of United States Military Order.

²⁰ Schwartz argued that the Presidential order allowing detention of a suspect if there are «reasonable grounds» to believe that he is engaged in international terrorism refers to a concept unknown to the legal scholars: H. Schwartz, *Il trattamento giuridico dei terroristi internazionali da parte degli Stati Uniti*, www.associazionedeicostituzionalisti.it/dibattiti/vicendeinternazionali.

individual involved in terrorist activity against the United States or its interests abroad, who is captured outwith the federal territory in a war-zone and who, at least initially, did not appear to have been granted any rights (see below section 3) – may be traced back to the same order (and its implementing measure, the executive order), in clear violation of international law,²¹ as well as the very same federal legislation which is as a rule applied to criminal trials.

It is evidently clear from the above that, despite the guarantees contained in the 5th Amendment, U.S. counter terrorism measures legitimate restrictions on personal freedom without due process guarantees²², a right which as is known the case law of the Supreme Court also guarantees to foreigners, irrespective of whether they lawfully entered the federal territory.²³

Indefinite detention and without any guarantee of effective constitutional scrutiny of the charge formulated is not specific to the United States, but has also been introduced into other legal systems, such as for instance the United Kingdom.²⁴

Returning to the general level and continuing to trace out the tendencies common to all principal counter terrorism legislation, it must be noted that police powers are being expanded practically everywhere, always to the detriment of the guarantees of those under investigation.²⁵ Again recently, with complete disdain for the right to a defence, British legislation introduced post-charge questioning, namely interrogation not accompanied by the right to silence and the principle that no person may be required to incriminate himself,²⁶ and identification measures have been stepped up, with the result

²¹ See Department of Justice Memorandum for Alberto R. Gonzales, Counsel to President and William J. Haynez, General Counsel of the Department of Defense, *Application of Treaties and Law al Qaeda and Taliban Detainees*, January 2002, www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf. See also S.D. Murphy, *Contemporary practice of United States Relating to International Law*, 98 Am. J. of International L. 349 ff. (2004) and D. Jinks, *September 11 and the Laws of War*, 21 Yale International L. J. 112 ff. (2003). With respect to humanitarian law see: R. Gabor, *Interesting Time for International Humanitarian Law: Challenges from the "war on terror"*, World Affairs 279 ff. (2003).

²² On violations of due process clause see S. Sinnar, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens under Usa Patriot Act*, 55 Stanford L. Rev. 1420 ff. (2003).

²³ See *Zadydas v. Davis*, 533 U.S. 678 (2001).

²⁴ See para. III.

²⁵ See note 7.

²⁶ See CTA 2008, sec. 22, (2)-(5) A judge of the Crown Court may authorise the questioning of a person about an offence (a) after the person has been charged with the offence or been officially informed that they may be prosecuted for it, or (b) after the person has been sent for trial for the offence, if the offence is a terrorism offence or it appears to the judge that the offence has a terrorist connection. (3) The judge (a) must specify the period during which questioning is authorised, and (b) may impose such conditions as appear to be necessary in the interests of justice, which may include conditions as to the place where the questioning is

that police officers may take fingerprints and non intimate biological samples.²⁷ Moreover, one cannot avoid remembering that British legislation also permits the police officer to arrest «without a warrant a person whom he reasonably suspects to be a terrorist». Rather than being based on precise criminal conduct, the power of arrest therefore appears to be grounded on the mere reasonable suspicion that a given individual collaborates with terrorist organisations.²⁸

In parallel with the extension of policing powers, intelligence agencies charged with the acquisition and evaluation of information relating to national security have also been granted more powers,²⁹ with the resulting expansion of the forms of control and of the “attention” directed at the general public, and not only suspected individuals.³⁰ From this perspective it is fully clear that certain

to be carried out. (4) The period during which questioning is authorised (a) begins when questioning pursuant to the authorisation begins and runs continuously from that time (whether or not questioning continues), and (b) must not exceed 48 hours. This is without prejudice to any application for a further authorisation under this section. (5) Where the person is in prison or otherwise lawfully detained, the judge may authorise the person’s removal to another place and detention there for the purpose of being questioned.

²⁷ See CTA 2008, sec. 10, amending sec. 61 e 63, Police and Criminal Evidence Act 1984.

²⁸ See sec. 41(1): «A constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist». Sec. 40 deems as terrorist the person who commits a criminal offence punished by TA 2000 as terrorist offence or is engaged in inciting, preparing or carrying out terrorist offences. A person commits a terrorist offence if he belongs or professes to belong to a proscribed organisation (sec. 11-12); if he invites another to provide money or other property and intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism (sec. 15); if he uses money or other property for the purposes of terrorism (sec. 16-18); if he provides instruction or training in the making or use of weapons (sec. 54). C. Walker, *Blackstone’s Guide to the Anti-Terrorism Legislation* 118 ff. (2002). The discipline of arrest warrant has been emended by Serious Organised Crime and Police Act 2005 (SOCPA), which considerably broadens investigative and police powers. Indeed, SOCPA prescribes preventive detention for attempts to commit an «arrestable offence», as well as a «non-arrestable offence».

²⁹ With regard to German law, see law n. 1390/2002, that strengthened the role of *Bundesamt für Verfassungsschutz* and of *Bundesnachrichtendienst*; see also law n. 415/2001, that created the Financial Security Committee. From a general point of view on the German model of counterterrorism legislation see W. Brugger, *May Government Ever Use Torture? Two Responses From German Law*, 48 Am. J. Comp. L. 661 ff. (2000).

³⁰ Sec. 215 (a)(1) del Patriot Act , that states: «The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution...». This provision was reauthorized up to February 28, 2010.

aspects of counter terrorism legislation, perhaps those which are “incidental”, encroach on the freedoms of all and not only of suspected terrorists. In other words, the behaviour, habits, preferences, choices and lifestyle of any individual are subject to investigative attention, and may become indications of presumed criminal potential of an individual who dresses in a particular way, reads certain books, visits certain websites, etc.

Against this backdrop, it is not therefore difficult to conclude that at the start of the 21st Century not only basic freedoms, but also the highest constitutional principles, namely the presumption of innocence, the right to a defence, personal freedom and even the “meta-value” of human dignity are placed under heavy stress due to the continuing initiatives by the public authorities to place significant limits on them.

The cases mentioned are just some examples of counter terrorism legislation, which considered overall turns out to impinge ruthlessly on personal freedoms. In this context it can be argued that, analysing the legislation adopted over the course of the last decade with the goal of satisfying the collective requirement of public security, the preventive and repressive intention of the state (i.e. the public authorities) to the detriment of individual freedoms is clear; it can therefore be asserted that, when confronted with a choice between freedom and security, lawmakers tend to guarantee the latter to the detriment of the former. Freedom, and along with it some of the fundamental rights (for example the right to a defence) which make up the DNA of democracies (and mark them out from other types of regime), appear to have been sacrificed in the collective interest. In effect, in some of the examples referred to, lawmakers do not appear to be trying to strike a balance between interests that are equally worthy of protection as rather giving in to the sacrifice of a right or personal freedom in order to guarantee the legal value regarded as predominant in the post modern era: security.

Leaving aside the specific restrictions placed on the exercise of individual rights, which are in any case not negligible given the scope of the limits and considering the *genus* of the guarantee infringed, the legislative landscape, sketched out here through examples, therefore appears to be characterised by a tendency which sees the gradual consolidation of the logic of security to the detriment of the pro-rights approach, also in those legal systems that are still governed by ordinary institutional arrangements. And it must also be remembered that, in contrast to the United States of America which, following the serious attacks of 11 September 2001, formally proclaimed a national state of emergency³¹ (but did not suspend *habeas corpus*), almost all³² of

³¹ Presidential Declaration of National Emergency by Reason of Certain Terrorist Attacks. Patriot Act USA, passed as emergency legislation, has been annually reauthorized since 2005 to nowadays. The proposed bill HR 1467 (Safe and Secure America Act of 2009) aims

the European countries have on the other hand preferred to avoid a state of constitutional emergency, even though it is contemplated under most constitutions and is accompanied by significant changes to ordinary institutional arrangements as well as the introduction of measures which significantly limit freedoms.³³ In spite of this, the very same Western countries have however reviewed their respective criminal legislation in very far-reaching terms, which has brought with it the risk of drifting towards (and sometimes straying over) the bounds of constitutional legitimacy.

From this perspective, it must therefore be noted that, at least on the basis of legislation, that whenever a society, including a democratically mature society, feels that it is exposed to danger, the requirements of Order prevail over legal guarantees and the legal system tends to give in the necessity, regardless of whether any emergency has been formally declared. The failure to declare an institutional state of emergency and not to make the state of emergency explicit is not in fact always positive and reassuring, above all if the legal system does not continue operating in business as usual mode. In fact, in the long term it will be necessary to come to terms with the consequences of having accustomed our legal systems to tolerating “exceptional arrangements” in otherwise normal circumstances. And this applies not only to the civil law countries which, as mentioned above, have amended existing legislation (indefinitely) in “proclaimed” ordinary circumstances, but also the common law countries which have by contrast preferred to adopt special legislation, initially temporary, but continuously extended and destined to become consolidated.³⁴

Ultimately, looking beyond the differences between the approaches, what appears to emerge is a trend in one direction: the existence of emergency legislation in the absence of any formal (or worse, actual) state of emergency, and which is therefore adopted or extended in the absence of the related guarantees, including first and foremost its temporary nature and *a priori* the mandatory evaluation that it is necessary in view of the actual state of danger, which is now presupposed and taken for granted, also in relation to the future.

to repeal some provisions of Patriot Act and to accord reauthorization to others (until 2019). Another aspect that must be stressed is the heterogeneity of civil liberties infringed by Patriot Act. See O. Fiss, *Law Is Everywhere*, 117 Yale L.J. 257 ff. (2008).

³² The United Kingdom was the only European State to issue a declaration of derogation to ECHR; the declaration was soon retired due to the decision of Law Lord on Antiterrorism Act 2001.

³³ A. Vedaschi, *À la guerre comme à la guerre? La disciplina della guerra nel diritto costituzionale comparato*, cit., 263 ff. and G. de Vergottini, *Guerra e Costituzione* 199 ff. (2004).

³⁴ G. de Vergottini, *Il bilanciamento fra sicurezza e libertà civili nella stagione del terrorismo*, in Centro Studi di Geopolitica Economica, *Sicurezza: le nuove frontiere* 106 ff. (2005).

III. DECISIONS OF SUPREME COURTS AND CONSTITUTIONAL COURTS IN THE AGE OF SECURITY

The examination of the role played by supreme and/or constitutional courts in the terrorism emergency is particularly interesting and very suggestive for the purposes of this study. In effect, the hypothesis mooted in the introduction and now under discussion cannot fail to address the findings of case law, given that it is precisely from the solutions handed down in hard cases that are from time to time placed before these courts that the actual relationship between the couple of freedom and authority (security) appears. In other words, it is thanks to constitutional review that, albeit before the court of last resort, it is possible to reposition the touchstone for the level of guarantees of rights and freedoms and to draw the appropriate conclusions regarding the relations between the guarantee of freedom and the recognition of countervailing interests considered to be worthy of protection (security).

Whilst it may be true that, at least in democratic systems, these courts must oversee the respect for constitutionally guaranteed rights and, moreover, when carrying out this task the constitutional and supreme court justices have not limited themselves to a mere defensive or rearguard action, so to speak, but rather, and especially in recent decades, have sought to enforce the legal rights of individuals, and have even ended up creating unprecedented rights or in any case rights which are not expressly mentioned in fundamental texts, it may also be surmised or hoped that the same courts will not shrink back from their task during situations that are emergencies, or considered to be such, but by contrast precisely on account of the emergency will remain on high alert since the emergency – which is moreover assessed as such at the discretion of the executive – permits the distortion of rights up to the limit of completely sacrificing them. From this last perspective the importance of these courts' judgments is entirely clear, as well perhaps also, more generally, as the trends in the decisions of the courts in modern democracies when confronted with the threat of international terrorism. It is easy here to refer to the judgments on arrests without any precise counts of charge, the legality of indefinite detention without trial, the violation of the most elementary rules of the right to a defence, although one could also mention the case law of the Israeli Supreme Court on so-called targeted killings.³⁵ In effect, given the sensitivity of the issues involved, constitutional review of (some of) the most controversial aspects of the legal instruments devised in order to prevent and combat international terrorism does not amount to a “mere” control of constitutionality, but rather makes it possible to ascertain the solidity of the rule of law, which in this difficult situation – that of an emergency – is under

³⁵ See HCJ 769/02 *The Public Committee against Torture in Israel v. The Government of Israel*.

threat. To this end, mindful of the profoundly different legal and political contexts, it appears to be useful if not to compare, then at the very least to consider the reactions of some of the courts called upon to rule on the very serious violations of the principal freedoms and fundamental rights and, ultimately, to establish whether the exercise of public powers occurred in accordance with the framework established by the rule of law.

1. There is no intention here to deny that, when called upon to rule on counter terrorism legislation, constitutional or supreme courts have toned down – albeit in an abnormal fashion – the obsession with security of governments, often supported by their respective parliamentary majorities.

In the relevant judgments the courts have always reiterated the protection of fundamental rights, including first and foremost the right to personal freedom and to a fair trial.³⁶ In fact, in assuring protection for these rights, which is guaranteed not only under international law but also internal law, the courts have on various occasions emphasised that the relative legal systems do not discriminate between citizens, foreigners and stateless persons, but by contrast guarantee to all the *habeas corpus* along with the right to of appeal an impartial court against restrictions to or deprivations of freedom. Often the discriminatory scope of the legislative provisions under review has not satisfied the test of the proportionality between the measures adopted and the facts of the case, with the courts ruling the legislation to be irrational and objecting to the different treatment reserved respectively to foreigners and to citizens.³⁷

More specifically, that is within the ambit of the declarations of principle seeking to reassert the existence of the rule of law, the so-called Guantanamo case law has re-established a certain degree of legality in what had initially

³⁶ See *Hamdi v. Rumsfeld* at 25: «It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad». J. O'Connor in delivering the opinion of the Court states also: «We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails». See also [2004] UKHL 56, at 31 (6) «Since the right to personal liberty is among the most fundamental of the rights protected by the European Convention, any restriction of it must be closely scrutinised by the national court and such scrutiny involves no violation of democratic or constitutional principle».

³⁷ Consider the Law Lords decision that, declared Part IV ATCSA 2001 incompatible with sec. 15 ECHR and found an implicit contradiction between the extremely harsh treatment reserved to aliens and the treatment reserved to people of British nationality, with regard to the same criminal conduct and given the reasonable grounds to believe that the suspect is a terrorist (or is engaged in terrorist organization).

appeared as a legal black hole. Without doubt the U.S. Supreme Court³⁸ is to be credited with having recognised the jurisdiction of the federal courts over the Guantanamo base, initially denied by the District Court of Columbia.³⁹ In order to guarantee the right to a hearing in a court of law also to foreign citizens captured abroad and detained in the U.S. base in Cuba without any specific counts of charge being made, the Court⁴⁰ rejected the objection of extra-territoriality raised by the government, finding that it did not apply to the Cuban base, that is for an area left indefinitely under American control and therefore subject to the «complete jurisdiction» of the national courts⁴¹. In fact, in concluding this reasoning, the Supreme Court revisited general principles and specified that the right to *habeas corpus* and the resulting right to seize the courts in order to complain of any abuses by the authorities in order to request compensation for damages suffered must be guaranteed not only to citizens but also to foreigners who – due to actions by the government «in violation of the law of nations or of a treaty of the United States» – have been subjected to custodial measures, albeit enforced in military facilities located outwith the national territory.

The question concerning the problems in striking a balance between the requirements of public security and the right to personal freedom clearly

³⁸ *Rasul et al. v. Bush* and *Al Odab et al. v. United States* (n. 03-334 & 343, 72 LW 4595, June 28, 2004). On constitutional decisions concerning “Guantanamo cases” see H. Schwartz, *Il trattamento giuridico dei terroristi internazionali da parte degli Stati Uniti*, cit.; A. Barak, *Democrazia, terrorismo e corti di giustizia*, Giur. cost. 3385 ff. (2002); M. Bouchard, *Guantanamo. Morte del processo e inizio dell'apocalisse*, *Questione giustizia* 1005 ff. (n. 5, 2003); F. Lanchester, *Gli Stati Uniti e l'11 settembre 2001*, in www.associazionedeicstituzionalisti.it/dibattiti/vicendeinternazionali/; R. Dworkin, *Corte Suprema e garanzie nel trattamento dei terroristi*, *Quad. cost.* 905 ff. (2005); T.E. Frosini, C. Bassu, *La libertà personale nell'emergenza costituzionale*, in A. Di Giovine (ed.), *Democrazie protette e protezione della democrazia*, cit., 91 ff.; For a complete analysis of Supreme Court decisions, with particular attention to dissenting opinions see G.F. Ferrari, *La Corte Suprema degli Stati Uniti nei terms 2003/2004 e 2004/2005*, *Giur. cost.* 4150 ff. (2005).

³⁹ The District Court of Columbia dismissed petitions of habeas corpus filed by next friends of Guantanamo prisoners for lack of jurisdiction. The District Court invoked *Eisenrager*, 339 U.S. 763 (1950), and stated that the aliens, captured abroad and detained in a territory on which United States exercises no sovereignty authority, were not entitled to the privilege of *habeas corpus*; see D.M. Amann, *Guantanamo*, 42 *Columbia Journal of Transnational L. Association* 263 ff. (2004).

⁴⁰ The Court underlines the difference between the *Eisenrager* scenario and the case of Guantanamo detainees (see supra footnote 3) and considers the specific circumstances of their detention: they were not charged with any offence, nor entitled to legal assistance. Moreover, they were held in indefinite detention at a military base controlled *de facto* by United States military forces.

⁴¹ See art. III, Treaty between U.S. and Cuba del February 23th 1903; see also art. III of Defining Relations with Cuba Agreement, May 29th ,1934, United States of America Treaty Series, n. 418 and n. 866.

emerged in the Hamdi case.⁴² Again as a matter of principle, the Court stated that the “state of war”, which justifies the attribution of exceptional powers to the government, cannot (and must not) amount to a «blank check»⁴³ made out to the President. Following this logic, but moving down to a practical level, the Court identified the point of equilibrium between national security and individual freedom: on the one hand, in the name of common defence, certain procedural guarantees have been subject to some (temporary) restrictions required by the dangerous circumstances, whilst on the other hand, the core rights of the individual subject to measures that restrict his personal freedom must always be safeguarded and, specifically, the right to due process of law must be guaranteed, at least as regards its minimum content. Therefore, weighing up the interest of the government in preventing and combating terrorist crimes against the right to a defence of the individual subject to the measure restricting his personal freedom results, in the first instance, in a sacrifice of the rights of the individual captured on the battlefield; on the other hand, once the urgency imposed by the conflict has passed, the right to a defence, which was initially limited (sacrificed), must be reactivated (re-born), at least with regard to minimal procedural guarantees.

In fact, it may summarised, these guarantees move from the non-existent to an inalienable minimum. The justification exudes deference for the Bush Administration, which is clear not only in its explicit declarations, but also in the reluctance and caution shown by the Court which – except the limit of the requirement that a court of law must have jurisdiction – recognises broad discretionary powers to the government in the fight against terrorism. The compelling need for security seems, at least in this initial stage of case law, to prevail over constitutional guarantees, which if anything are assured at a later stage and at a minimum level.

The relationship between freedom and security apparently appears to have been re-balanced thanks to the Hamdan judgment.⁴⁴ The Supreme Court was again confronted with a case concerning the jurisdictional aspect of the fight against terrorism and again sanctioned the actions of the Bush Administration. In the absence of an express authorisation by Congress, the Court found that the establishment of military commissions under the terms of the executive

⁴² *Hamdi v. Rumsfeld*, n. 03-6696, June 28, 2004.

⁴³ See *Hamdi v. Rumsfeld*, (03-6696) 542 U.S. 507 (2004). J. O'Connor in delivering opinion of the Court states: «We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. *Youngstown Sheet & Tube*, 343 U.S., at 587».

⁴⁴ *Hamdan v. Rumsfeld* 548 U.S. (2006). See N.K. Katyal, *Hamdan v. Rumsfeld: the Legal Academy Goes to Practice*, 120 Harv. L. Rev. 66 (2006) and J.G. Calabresi, G. Lawson, *The Unitary Executive Jurisdiction Stripping and the Hamdan Opinion: a Texasist Response to Justice Scalia*, 107 Co. L. Rev. 1002 (2007).

order of November 2001 in order to prosecute civilians suspected of international terrorism was unconstitutional.⁴⁵

This second phase of the Guantanamo case law was much appreciated in the academic literature which greeted the re-awakening of the justices even with enthusiasm. In fact, from the tone of its judgment it appears that the Court had not found any other alternative and could not exempt itself from ruling unconstitutional the order on the military commissions, although it promptly suggested an exit route to the government: legislative cover. This approach taken in the judgment is puzzling: the Court appears almost to be sorry that it had to intervene. Moreover, the authoritative dissenting opinions of Justices Thomas, Scalia and Alito should not be disregarded because they lay bare the Court's difficulty in ruling the order unconstitutional and the division which opened up regarding the balancing between security and freedom.

Finally, the case law of the Court appears to have reached its pinnacle in the Boumediene case,⁴⁶ in which the Court recognised that prisoners from Guantanamo had the right to *habeas corpus*. The Court applied the adequate and effective test and, contrary to the trial and appeal courts, found that the remedies provided for under the Military Commissions Act, that is an appeal to the Combatant Status Review Tribunals, could not be regarded as replacements for an action for *habeas corpus*, which however had to be guaranteed also to the petitioners. This decision was also very hard-fought; it is sufficient to recall the dissenting opinions of Roberts and Scalia.⁴⁷ Moreover, in the end the apparent resoluteness of the majority appears however to be toned down by the reference to the closure of the facility, namely where it is stated that: «certain accommodations can be made to reduce the burden habeas corpus proceeding will place on the military», without completely annulling it (which the Court cannot allow).

2. Leaving aside the admittedly significant dissenting opinions, a reading of the decisions concerned would appear to show that thanks to the Supreme

⁴⁵ The AUMF does not provide for military committees with jurisdictional functions. The creation of such authority cannot be derived implicitly from general principles because the Supreme Court has stated that the AUMF is not a «sweeping mandate» to the President. The Court underlines that antiterrorism provisions are inconsistent to international law as well as to national law (see Uniform Code of Military Justice, art. 36). In fact, the Executive Order infringes the due process rights, also accorded by Uniform Code of Military Justice. On this point see N.W. Smith, *Evidence and Confrontation in the President's Military Commissions*, 33 *Hastings Constitutional L. Quarterly* 93 ff. (2005).

⁴⁶ *Boumediene v. Bush*, 552 U.S. 1 (2008). M. Anderson, *Boumediene v. Bush: Flashpoint in the Ongoing Struggle to Determine the Rights of Guantanamo Detainees*, 60 *Me. L. Rev.* 235 ff. (2008).

⁴⁷ The dissenting opinion accuses the majority of stating a decision that «the Nation will live to regret». Both Chief Justice Roberts and Justice Scalia criticize activism of the Court.

Court enemy combatants now enjoy the right of *habeas corpus*, which means that they may challenge the measures restricting their personal freedom before a court of law, and that during the course of the trial in which they are prosecuted they may benefit from the guarantees of due process.

Indeed, after the Boumediene case, given the enthusiastic reading throughout most of the academic literature, one could even doubt the existence and specificity of the so-called category of enemy combatant, which by contrast appears to be endowed with a «special passive force»⁴⁸ that is sufficient in order for it to remain intact. In fact, even today there are still ghost prisoners detained in a black hole which has, at least in part, been legalised.

Turning to a different aspect of the judgments referred to above, it emerges that the Supreme Court has displayed a broad (and perhaps excessive) deference to the executive both when hiding behind procedural aspects as well as through its frequent references when developing its reasoning to the political depth of the questions relating to the emergency (perhaps overstating the legal ramifications)⁴⁹.

The missed opportunities include the Padilla case,⁵⁰ in which the Supreme Court, almost with relief, rejected the appeal filed by a detainee on a procedural technicality and was able to avoid entering into the merits of the question.⁵¹ However, Padilla was not the only judgment in which it avoided fundamental questions; in fact, there has been a general tendency in the Guantanamo judgments to avoid ruling specifically on the fundamental question. Evidence of this assertion can be found in the passage in the Hamdi judgment in which Justice O'Connor states that the Court has not been called upon to judge whether or not the President of the United States has the power to detain enemy combatants indefinitely.

On the other hand, as far as the frequent reference to the essentially political nature of the question of the emergency is concerned, evidently with a view to recognising that the executive enjoys broad discretionary powers, it must first and foremost be pointed out that the fundamental premise on which the

⁴⁸ G. Romeo, *Inter arma silent iudices? L'habeas corpus al tempo della lotta al terrorismo*, Dir. pubbl. comp. ed eur. 1811 (2008).

⁴⁹ R.M. Chesney, *National Security Fact Deference*, 95 Virginia L. Rev. 1361 ff. (2009).

⁵⁰ *Rumsfeld, Secretary of Defence v. Padilla* (03-1027, 72 LW 4584, June 28, 2004).

⁵¹ This argument is clearly expressed in Justice Stevens' dissenting opinion. J. Stevens stated that is important to decide on the questions raised from this case because nothing prevent Executive to authorize once again *sine die* detention, without charging suspect with a specific criminal offence. The dissenter underlines that the spontaneous cessation of Executive illegal conduct does not make less important to decide on the fundamental issues regarding the fight against terrorism. Some scholars, however, consider "courageous" the decision of District Court: see A. Lewis, *Security and Liberty*, R.C. Leone, G. Anrig Jr. (eds.), *The War on Our Freedom* 57 (2003).

entire matter is based, that is the fact that there is an emergency, or better its evaluation, is a decision left exclusively to the government administration. In fact, when it cannot defer in this manner, the Court appears to be sorry and takes on a justificatory tone towards the government. Consider the passage from the Hamdan judgment in which, in finding the relevant provisions to be unconstitutional, the Court asserted that it would have displayed complete deference towards the President had it proven that the procedures regulated by the Uniform Code of Military Justice were impractical; however, in the case before the Court, the government did not provide any indication that this was the case and therefore, without wishing to underestimate the terrorist threat, it ruled that the legislation in question was unconstitutional.

The complete deference to the public authorities is not however characteristic only of the case law of the U.S. Supreme Court, but it is a position that is commonly accepted. As regards this presupposition for anti terrorism measures – namely situation of *de facto* emergency which justifies the adoption of measures that heavily restrict personal freedom and privacy and which also entail the acceptance of significant exceptions to the right to a defence – both national and supranational courts always restate the consolidated theory of the “margin of appreciation”. As regards the logical premise that the public nature of the perception of the dangerousness of the terrorist risk is not amenable to review before the courts, on the supranational level the European Court of Human Rights leaves this evaluation to the states whilst, on a national level, the supreme courts recognise that governments have exclusive competence over this question, being considered to enjoy a privileged position regarding this type of evaluation.⁵²

It is easy to suppose that, from the very same “privileged” position, in the event of doubt the very same governmental bodies may take all steps considered necessary in order to guarantee security, even over-interpreting the

⁵² As an example, we may consider the decision expressed by the Law Lords on December 16th, 2004, on sections 21 and 23 ATCSA 2001 claimed to be in contrast with art. 5 and 14 CEDU. In the grounds of the decision, in the part concerning the existence of a clear and present danger situation, allowing a compression of personal freedoms guaranteed by art. 5 CEDU, under the derogative procedure provided for by art. 15 of the same convention, the Law Lords - sharing the same approach of the Strasbourg Court - recognize the competence of the Government, declaring that the appreciation of the effective danger has to be left to political responsibility. The only dissenting opinion is expressed by Lord Hoffmann who - reminding all the situations of danger occurred in the UK during its history and without underestimating the danger of fanatic groups – does not figure out a coincidence between terrorist danger and vital threat to the nation. See A. Tomkins, *Readings of A. v. Secretary of State for Home Department*, Public L. 259 ff. (2005). On the deference of British Courts and the exception of a decision contrary to the security policy of the executive, see A. Benazzo, *L'emergenza nel conflitto tra libertà e sicurezza* 64 ff. (2005).

real factual situation. Moreover, not only the existence, but also the scope and duration of the presumed danger are left for evaluation by the government. And even with regard to these aspects, given the nature of governments, it must be presumed that there will be a (natural) tendency to restrict freedoms in the name of Order not so much for as short a time as possible, but rather for as long as is necessary (see the indefinite detention in Guantanamo). Therefore, from whichever perspective it is considered, the margin of appreciation granted to the public authorities is very broad and essentially uncontrolled, at least with reference to the discretionary evaluation of the danger and its scope.⁵³

Not only is a broad margin for decision making left to the public authorities when evaluating the need for a measure, as well as its scope and duration, but considerable margin for action is also granted in other specific areas. Consider the reduction of the burden of proof *de facto* granted by the Supreme Court to the Bush Administration. Indeed, the tendency to lower the standard of proof accepted has been generalised, at least in terrorism cases. Moving over to Europe, when considering whether to adopt or order an extension of a control order, for example the British legislation⁵⁴ – despite the invasive limitations on personal freedom resulting also from non-derogating orders⁵⁵ –

⁵³ The Israeli Supreme Court, on the contrary, has shown great resolution in affirming that: «[the Justices] are aware that this judgment of ours does not make confronting that reality any easier. That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open. At times democracy fights with one hand tied behind her back. Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her and her spirit, and allow her to overcome her difficulties», see HCJ 5100/94 *The Public Committee against Torture in Israel v. The State of Israel*, 53(4) PD 817, 845.

⁵⁴ The Act provides for two types of orders: derogating (which imply obligations inconsistent with art. 5 CEDU) and non-derogating (which does not imply obligations inconsistent with art. 5 CEDU). Both those orders impose – according to Prevention Terrorism Act 2005 (PTA), that repealed Part IV of ATCSA 2001 - to suspected terrorist limitations on civil liberties. See D. Bonner, *Checking the Executive? Detention without Trial, Control Orders, Due Process and Human Rights*, European Public L. 64 ff. (v. 12, 2006).

⁵⁵ On reasonable grounds that suspect is engaged in terrorist activity or that the order is necessary to protect national security, the orders may impose, for examples, these obligations: a requirement on him to co-operate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means; a prohibition or restriction on his use of specified services or specified facilities, or on his carrying on specified activities; a requirement on him to give access to specified persons to his place of residence or to other premises to which he has power to grant access; a requirement on him to report to a specified person at specified times and places. See sec. 1, par. 4, PTA 2005. Several international organizations defending human rights strongly opposed to these *orders* and expressed criticism on PTA 2005, see *Human Rights*

does not appear to draw inspiration from the classical and rigorous standard of “beyond all reasonable doubt” typical of the British criminal law tradition, but rather appears to align itself with the so-called standard of the “balance of possibilities” from private law proceedings and which is essentially intended to release the Secretary of State, at least broadly speaking, from the requirement of proving the accusations made against an individual suspected of terrorism.⁵⁶

3. At least until the Boumediene case, each of the judgments mentioned had its antidote: the 2005 DTA neutralised the Rasul decision; the 2006 CSRTs bypassed the Hamdi judgment; and finally, after the Hamdan judgment, Congress adopted the 2006 MCA.⁵⁷ And perhaps the Boumediene judgment

Watch, Commentary on Prevention of Terrorism Bill 2005, March 1st, 2005 and Amnesty International, *Submission of 14 October to the UK Parliament's Joint Committee on Human Rights in connection with the Committee's inquiry into the subject of "counter-terrorism policy and human rights"*, October 2005, EUR45/050/2005. See also Joint Committee on Human Rights, *Prevention of Terrorism Bill*, Report of the 2004-2005 session, HL 68 e HC 334.

⁵⁶ Non-derogating control orders are issued by the Secretary of State on judicial permission except in cases of urgency, as stated by sec. 3, par. 1, a-b, PTA 2005, on the grounds of a reasonable suspect that the individual bound by the order is either a suspected terrorist or the order is considered necessary for the purposes of national security. Non-derogating control orders have effect for 12 months and can be renewed for the same period on one or more occasion at discretion of the Secretary of State. It is possible to file an application for judicial review against eventual renewals. Derogating orders can be issued by the Courts on an application by the Secretary of State where there is evidence enough to establish that the individual is or has been involved in terrorism-related activity (if an emergency occurs and justifies a derogation from the whole or a part of Article 5 of the Human Rights Convention and the obligations imposed are or include those set out in the designation order as provided by sec. 4, par. 3, PTA 2005). Such obligations must be subsequently confirmed after an immediate preliminary hearing in the presence of the individual in question and cease to have effect at the end of a period of 6 months although the court, on an application by the Secretary of State, may renew them for a further period of 6 months where the same conditions still exist. Those obligations may thus be renewed indefinitely after judicial scrutiny.

⁵⁷ 28 USC 2241, as last modified by Pub. L. 109-366 of October 17, 2006 (see <http://codes.lp.findlaw.com/uscode/28/VI/153/2241>). The statute regulates the judgments against «unlawful enemy combatants», a residual category of «lawful enemy combatants» which has been at the centre of a bitter debate between the Chamber of Deputies and the Senate; some objectionable decisions have eventually been taken, like, for instance, the admissibility in court of statements obtained by torture, if given before the Detainee Treatment Act was passed (2005) and where a military court finds the statement reliable and possessing sufficient probative value and the interests of justice would best be served by admission of the statement into evidence (§948r). The statute also offers a definition of “torture” which encompasses some common practices of the Secret Service

neutralised itself with the final reference to the proper deference which appears to mark out explicitly the limits of review by the Court (and therefore on the guarantee of freedoms) and expand the role of the public authorities (and therefore of their ability to adopt invasive measures in the name of security).

More generally, when reading the reasons given for some of the judgments (not only of the U.S. Supreme Court but also certain judgments of the Israeli Supreme Court⁵⁸) one gains the impression that they take care to make all the right noises when talking about principles, but hardly practice as they preach, depending on the particular problems, on the actual facts of individual cases. To express it in clearer terms, the reasoning appears to be directed at the quest for a magic point of equilibrium between rights which deserve protection but are in conflict, and as part of this effort the Court's attention to making assertions of principle which may act as precedents is clear. On the other hand however, whether one's attention is directed towards the narrow decision or whether one seeks to draw up a medium (to long) term balance of the results of the case law, one cannot fail to note that legislation (or parts thereof) remains in force which heavily restricts personal freedom or again, with regard to individual cases, executive action of questionable constitutionality in a state governed by the rule of law is legitimised (despite reasserting the related principle). It is sufficient to mention the Israeli practice of targeted killings: although the Court does in theory reiterate the superior status of the law,⁵⁹ however in specific cases the government decides on the assessment of the situation of danger, on the question as to whether the person concerned is a terrorist (an evaluation also reserved to the government, however generally on the basis of suspicions based on evidence), on the assumption that the armed forces are not able to arrest and press the relative charge (on which the government again decides), and the Court accepts that a trial and eventual conviction may be replaced by immediate execution, designating the eventual collateral damage (e.g. death or injury of innocent people) as losses "on security grounds". In the specific case the predominance

agents in questioning suspected terrorists (See A. Cassese, *Gli USA, la tortura e lo Stato di diritto*, *La Repubblica*, October 18, 2006: www.repubblica.it).

⁵⁸ See, as an example, HCJ 2056/04 *The Beit Sourik Village Council v. The Government of Israel*, 58(5) PD 817, 861: «There is no security without law. Satisfying the provisions of the law is a component of national security». See also HCJ 5100/94 *The Public Committee against Torture in Israel v. The State of Israel*, 53(4) PD 817.

⁵⁹ See HCJ 769/02 *The Public Committee against Torture in Israel v. The Government of Israel* «...the State's struggle against terrorism is not conducted "outside" of the law. It is conducted "inside" the law, with tools that the law places at the disposal of democratic states».

of the national security interest over the life of the suspected terrorist and the safety of his family is evident.

Moreover, without wishing to negate or diminish the important role played by the Court in reasserting the minimum insuperable limit beyond which the law may not be sacrificed in the name of order, even in emergency situations, it would however appear that there is a tendency – although the assertions of principle refer to balancing or reference is otherwise made to the search for a fair point of equilibrium between the different and opposing interests in play, that is the requirement of national security and the government's concerns to guarantee it fully as against the freedom of individuals enshrined in the text of the Constitution – for the dynamic aspect of the reasoning to be whittled down to the mere guarantee of a hard core (that is of the minimum limit), to the benefit of security and the prerogatives of the government.

Rather than celebrating these triumphs, where they have been achieved, rather than appreciating the steps which case law appears to have made along the road of freedom guarantees, rather than making efforts to read the arguments and the relative decisions in their best light, that is in a sense that allows us to see that they have recognised the fundamental right that is supposed to be guaranteed, albeit only at a minimum and basic level, it is therefore appropriate and perhaps necessary to push further in the search for the missing step which the courts do not feel they are able to take, either out of deference towards the relevant executive, out of caution, or due to the impossibility of the circumstances. It is therefore useful to examine individual cases with a view to verifying whether freedom (and ultimately the Constitution) could be guaranteed in a fuller and more comprehensive sense. To this end it is appropriate to read behind the lines of judgments (in certain cases, such as in the United States, the majority argument) and to question whether the structure of the reasoning is strictly consistent with the narrow decision; similarly, it is also important not to overlook the dissenting opinions not only because they give an idea over whether or not there is consensus over the guarantee of a certain right, but also because they reveal the position which (within a given historical and legal context) the Court has regarding a given question (in the case of this study, the relationship between freedom/dignity and security).

This reading, which is surely less comfortable and also less natural for commentators who, as has been noted, tend to see the positive aspects which can be drawn from the sentences, is however fundamental both because it requires the courts to reflect on their judgments and, where appropriate, over the course of time to review/improve the positions previously adopted, and also because this permits the courts to measure the external “temperature”. They listen to the arguments of governments, which interpret the position of civil society (in the case of fear-based terrorism, this also includes the

irrational positions of society), that is whatever burning issues there are in the eyes of the political community within any given difficult historical context. The government responds to these requirements with legislative measures, which may also be unconstitutional or located at the limits of constitutionality. It is necessary that this interpretation given by governments to the needs of society, or better the constitutionality of the answers to these needs, be reviewed by commentators. Legal experts must verify, using a critical approach, the correctness of the interpretation concerned along with its prerequisites, and above all must also verify its compatibility with constitutional law, or better with the reference constitutional framework.

By taking for granted the factual situation underlying the measures of doubtful constitutionality, or by leaving them *in toto* to the mere discretionary evaluation (which could also become arbitrary) of the administration, analysts risk starting late and on the wrong foot. By contrast, it is necessary to start questioning the actual existence (and/or permanence) of a state of extreme danger which justifies, within certain limits, measures which significantly limit the principal human rights.⁶⁰ And also where this fact (the very serious danger) would justify the introduction of exceptional measures, these should always respect the constitutional context, failing which the measures will not be compatible with the rule of law.

Accordingly, by maintaining a high level of alert not only towards the dangers of terrorism but also towards the risks of counter terrorism approaches, constitutionalism is able to remain vigilant and ready to rein in the over-zealous actions of governments which – above all when they act, as is generally the case in emergency situations (or situations presumed to be such), bolstered by the presumed consent of the body politic whose needs/obsessions they are interpreting – may be inclined, almost out of natural inertia, to take action beyond the confines of constitutional law, and hence outwith the reference legal framework.⁶¹

IV. THE ADMISSIBILITY OF TORTURE IN DEBATES WITHIN THE ACADEMIC LITERATURE

The analysis relating to the third indicator, that of the academic literature, calls for a few introductory remarks. Over this last decade, confronted with numerous cases reported by the principal human rights associations, it has been noted that so-called inhumane practices (the expression is sufficiently explicit to permit us not to enter into details) are largely carried out not only

⁶⁰ See Privy Council report on terrorism: *Privy Counsellor Review Committee Anti-terrorism, Crime and Security Act 2001 Review*, December 18th 2003, on www.privycouncil.gov.

⁶¹ M. Luciani, *Costituzionalismo irenico e costituzionalismo polemico*, Giur. cost. 1642 ff. (2006).

by countries commonly regarded as authoritarian or by dictatorships, but also in democratic climes or, in any case, are directly or indirectly used also by leading representatives of the Western world, although preferably abroad (so-called torture outsourcing). It is sufficient to recall the detention regime at Guantanamo and Abu Ghraib, as it is hard to forget the images broadcast on the main national news sources.⁶² Alongside these well known examples, one could add those of the secret CIA prisons spread throughout the world and exposed on various occasions by several human rights organisations, or one might recall the extraordinary renditions to countries in which torture is commonly used⁶³.

Therefore, considering the actions of governments, exposed on various occasions by human rights organisations, it cannot be denied that the problem of torture and, more generally, of the inhumane and degrading practices is back on the popular agenda. Indeed, the debate on the moral and legal legitimacy of torture and/or practices that are inhumane and certainly run contrary to human dignity has even been (re)opened (as shown by Dershowitz's theory theory which will be discussed below).

Considering the pervasive and generalised condemnation of the abuses in Guantanamo and Abu Ghraib, regarding which as is known various investigations are in progress, with the intention of guaranteeing the supreme goal of public security, discussions have returned to the possibility of using so-called enhanced interrogation techniques and investigative methods which had for some time thought to have been overcome in the evolution of human civilisation, not to speak of legal evolution. Until a short time ago, the net refusal of democracies to use these means in fact appeared to be guaranteed and absolute, both in moral as well as legal terms and, limited to this latter aspect, i.e. its impossibility under law, not wrongly so given the numerous and solemn international documents which, without any shadow of doubt, outlaw torture always, in all circumstances, and in any emergency situation in war or peacetime.⁶⁴

⁶² All the major newspapers from the U.S. (like *The Washington Post* and *The New York Times*) and worldwide (in Italy, the *Corriere della Sera* and *La Repubblica*) paid special attention to the issue of torture (see V. Zucconi, *Torture, mille foto contro il Pentagono*, *La Repubblica*, May 4, 2004: www.repubblica.it).

⁶³ CIA's most-favoured destinations for *outsourced torture* are Jordan, Egypt, Philippines etc.; while the case of the U.S. CIA has been discussed so far, the case of Canada could also be considered and some European Countries are satisfied with diplomatic assurances to authorize extradition: see the Report of the Observatory of Human Rights; see B. Herbert, *Outsourcing torture*, *International Herald Tribune*, February 12-13, 2005.

⁶⁴ Art. 4, par. 1-2, International Covenant on Civil and Political Rights, New York, 1966; art. 27, par. 2, American Convention on Human Rights, San José de Costa Rica, 1969; art. 15, par. 1-2, European Convention on Human Rights, Roma, 1950.

However, these certainties collapsed along with the Twin Towers. The cultural climate which established itself after 2001, entirely focused on the logical priority of public security interests, led to a loss of enthusiasm in the fight to uphold human rights, including fundamental rights; alternatively to put things the other way around, the 9/11 attacks raised the level of tolerance towards restrictions on the personal freedoms of all, and not just of terrorist suspects, going so far – step by step – as to end up contemplating, if necessary, the sacrifice of fundamental human rights, that is discussing whether to use techniques that were useful on security grounds but the compatibility of which with human dignity was questionable.⁶⁵

In this new scenario the recourse to torture is no longer a taboo, or a removed concept on the grounds that it runs contrary to human dignity, nor a method that may not be used by democracies, since it is incompatible with democracy, or better (i.e. worse) it is no longer compatible for all and/or it can no longer be taken for granted that it is for all.⁶⁶ In fact, the debate on this has been reopened. And here the reference is not only to public opinion which, according to recent opinion polls, would in certain circumstances be willing to accept torture, but specifically the open society of commentators: academics from the most authoritative American universities have been debating these issues.

These academics also include people like Alan Dershowitz⁶⁷, a professor of law at Harvard Law School, who considers that torture should be institutionalised, i.e. legalised, so that it can be regulated. Essentially, acknowledging that torture exists and is widely practised also by the United

⁶⁵ J. Alter, *Time To Think About Torture*, November 5, 2001, in www.newsweek.com; according to Alter, legalizing physical torture is contrary to American values, but to fight terrorism «we need to keep an open mind about certain measures ... , like court-sanctioned psychological interrogation. And we'll have to think about transferring some suspects to our less squeamish allies, even if that's hypocritical», where evidently the issue of extraordinary renditions is in the spot light again. Apart from this explicit admission, the willingness of considering questionable practices as feasible is further stressed in the subtitle: «It's A New World, And Survival May Well Require Old Techniques That Seemed Out Of The Question». See, from a critical perspective: O.Z. Bekerman, *Torture – The Absolute prohibition of a Relative Term: Does Everyone know What is in Room 101?*, 53 Am J. Comp. L. 743 ff. (2005).

⁶⁶ See G. Frankenberg, *Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty*, 56 Am. J. Comp. L. 403 ff. (2008).

⁶⁷ A.M. Dershowitz, *Why Terrorism Works* (2002). A.M. Dershowitz, *The Public Must Know If Torture Is Used*, March 15, 2003, at 9; A.M. Dershowitz, *Warrant Would Make Those Using Torture Accountable*, *Fin Time*, June 8, 2002, at 8; A.M. Dershowitz, *Yes, It Should Be "On the Book"*, *Boston Globe*, February 16, 2002, at A15; A.M. Dershowitz, *Want to torture? Get a Warrant*, S.F. *Choron*, January 22, 2002, at A19; A.M. Dershowitz, *The Torture Warrant: a Response to Professor Strauss*, 48 N. Y. Law Sch. L. Rev. 275 ff. (2003-2004).

States⁶⁸, Dershowitz concludes that it should be permitted by law, at least for borderline cases, i.e. those which may concern the so-called ticking bomb scenario.⁶⁹ In establishing the legality of torture and regulating the procedure for its use, the legislative provision must, again according to Dershowitz's argument, be combined with a judicial "guarantee", given that torture must be used only where a warrant is issued by a court, thereby avoiding a situation in which any police officer or a zealous low-ranking functionary may make a decision in a legal vacuum.⁷⁰

Dershowitz's position is not convincing either on the merits or as regards the method; in fact, it may be challenged on various grounds.

First and foremost, regarding the merits, there is no "legal vacuum" on this issue; on the contrary, in democratic systems, the law does deal with torture and expressly and absolutely prohibits it in any form, irrespective of the facts of the case, that is independently of the situation of danger or necessity.⁷¹

Leaving aside the legal impossibility, the presupposition on which Dershowitz develops his reasoning is already weak and questionable in logical terms. Dershowitz says: torture exists and is practised, therefore we need to regulate it in order to contain it. The fact that something exists does not necessarily mean that it has to be regulated, nor less that a permissive stance should be adopted (it would be like saying: given that in certain circumstances a crime is in any case committed, it is therefore pointless to regard it as such, but it is better to regulate it and, albeit in exceptional circumstances, legalise it). If anything, the proposed reasoning should be: given that inhumane practices are quite widespread in prisons in which terrorist suspects are detained, and given that there are secret prisons where it is not clear what the detention arrangements are, then the competent authorities should carry out greater controls "on the front line" whilst providing clear instructions from behind with the intention of reiterating the prohibitions and sanctions resulting from eventual violations. There is no doubt that if the competent authorities are the instigators of the torture, then it is not the reasoning brought against the practice but rather the rule of law and its solidity in an emergency that is called into question.

⁶⁸ A.M. Dershowitz, *Why Terrorism Works*, cit., 134 ff.

⁶⁹ In Dershowitz's words: «...if we ever confronted an actual case of imminent mass terrorism that could be prevented by infliction of torture we would use torture, (even lethal torture), and the public would favor its use ...» and «The first is the safety and security of a nation's citizens. Under the ticking bomb scenario this value may be thought to require the use of torture, if that were the only way to prevent the ticking bomb from exploding and killing large numbers of civilians. ...», in *The Torture Warrant: a Response to Professor Strauss*, cit., 277 and 292. See too A.M. Dershowitz, *Why Terrorism Works*, cit., 151.

⁷⁰ A.M. Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age* (2002).

⁷¹ International Convention Against Torture, New York, 1984, ratified by the U.S.

Again in logical terms, just as the premise, so too the goal of Dershowitz's thinking – that is the objective which the introduction or torture or better its legal regulation should achieve – is not convincing. According to Dershowitz, regulating the use of torture means limiting its use. But the exact opposite might occur, that is that when confronted with a situation of danger, police officers could be pushed to use all options theoretically available, and in fact it is not inconceivable that under pressure to resolve the case the officers themselves might stretch the interpretation of the ticking bomb mass terrorism case, which is evidently a text-book example that will be difficult to encounter as described.⁷² Moreover, it cannot be excluded that the introduction/injection into the fabric of the law of rules legitimising these practices may encourage similar interpretations through analogy, thereby permitting the use of torture also beyond the limits of the ticking bomb scenario. In fact, the very logic underlying the reasoning challenged here should lead us to support the use of torture also to combat other very serious offences (consider for example a paedophile who is keeping children prisoner in an unknown location who will be destined to die of hunger if the hiding place is not disclosed).⁷³

Last but not least, on a practical level, there is not even any interest in discussing the risk of possible errors by the government⁷⁴, to which countries in which the death penalty is in force are rather accustomed.

Finally, the method used by the Harvard professor, which appears to seek to neutralise the question of the connection between practices that are degrading for human dignity and democratic values on a formal-procedural level, is not persuasive. In Dershowitz's argument, a conditional normative position and a judicial warrant guarantee accountability, visibility, record-keeping, standards and limitations, and from the perspective proposed this is sufficient to justify torture. The centre of gravity of the argument is moved, or we could say completely thrown off balance, in methodological terms also when Dershowitz examines the various instruments of torture. In this regard, when debating with other lawyers he refers to the opinion of those, such as professor Marcy Strauss, who do not declare their opposition to the use of a truth serum, whilst it is an instrument completely opposed by others, such as Silverglate, who consider it to be the worst form of non lethal torture since it

⁷² See M. Saif-Alden Wattad, *The Torturing Debate on Torture*, 29 N. Ill. U. L. Rev. 1 ff. (2009). The Author argues that the ticking bomb scenario is «not only [a] hypothesis, but primarily [a] forced, demagogical scenario that purports to create fear and instability in the public opinion, and thus to urge the adherence to torture activity» (p. 36).

⁷³ The case German police agent Wolfgang Daschner who declared that he tortured a kidnapper to obtain information about kidnapping is quite remarkable.

⁷⁴ An incredible mistake proved to be the case of Canadian engineer Arar who was imprisoned and tortured in Syria on warrant of the U.S. with the cooperation of Canada.

deprives individuals of their own free will. However, even when surveying the instruments of torture with a view to selecting those considered most appropriate, Dershowitz claims that the important issue is «to institutionalize these preferences and debate and decide them openly and with accountability, rather than by often emotional personal biases».⁷⁵

The theoretical debate, the legislative provision and a judicial warrant are, according to this theory, necessary and sufficient in order to safeguard the principle of legality. However, it may be objected that the content of the debate, the law and the relative controls fall beyond the purview of the political authorities of a state governed by the rule of law.

In any case, leaving aside the objections which may be made – on logical or legal grounds, not to speak of on moral grounds – to the argument in question, which has moreover already been comprehensively criticised by Marcy Strauss⁷⁶ and others,⁷⁷ it is important for our present purposes to point out that, at least within a certain part of the academic literature, torture is no longer a rejected notion, but an issue about which debates can be held in very authoritative forums. Indeed, the rejection of this type of practices is not unanimous; however, those who propose theories for institutionalising torture and others who, whilst not supporting its legalisation are nonetheless ready to accept its application, are still only a minority. This latter is the rather hypocritical position of those, such as Floyd Abrams and Harvey Silverglate, who accept the recourse to (non lethal) torture where this may be necessary, i.e. where it is intended to prevent massacres of innocent civilians, but do not accept that the use of such practices should be

⁷⁵ A.M. Dershowitz, *The Torture Warrant: a Response to Professor Strauss*, cit., 289.

⁷⁶ M. Strauss, *Torture*, 48 N.Y. Law Sch. L. Rev. 201 ff. (2004). See also R.A. Posner, *The Best Offence*, New Republic, September 2, 2002, at 28. Cfr. S.F. Kreimer, *Too close to the rack and the screw: constitutional constraints on torture in the war on terror*, 6 U. Pa. J. Const. L. 278 ff. (2004). Marcy Strauss, after contesting the vagueness of the concept of torture and stressing how the definition is therefore problematic, criticises Dershowitz's theory from different perspectives: in her opinion torture is always immoral, useless or poorly effective in practice, often legally excused as a mean for self-defence or as "the ends that justify the means". There is also a trend in case-law, supported by some scholars, on the possibility of using torture for other purposes than the admissibility of evidence before the courts (which would be manifestly unconstitutional as a breach of the 5th Amendment), namely for the purposes of prevention, with no link to judicial proceedings. In such cases, the formal layer of the principle of due process of law would not be undermined, while the substantial layer could be.

⁷⁷ S.F. Colb, *Why is Torture "Different" and How "Different" is It?*, 30 Cardozo L. Rev. 1411 ff. (2009); G. Frankenberg, *Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty*, cit., 403 ff. and M. Saif-Alden Wattad, *The Torturing Debate on Torture*, 29 N. Ill. U. L. Rev., cit., 1 ff.

recognised and regulated under American law.⁷⁸ The theories propounded by the legal advisers of the Bush Administration, the so-called “not-on-my-people” and “not-in-my-back-yard”, read together suggest that what is prohibited in the United States is permitted abroad, provided that it is not applied to U.S. citizens.⁷⁹ In the final analysis, it is acceptable to torture foreign citizens abroad. Guantanamo, Abu Ghraib, the CIA’s black sites and finally the extraordinary renditions prove that these are not merely theoretical and abstract discussions. In contrast to the arguments discussed above, all of which are focused on whether it is legitimate/appropriate to codify torture formally, these last positions (which as mentioned above are advanced mainly by lawyers close to the American government) appear to combine the theoretical legal approach of the former view with the practical approach of the latter and, rather than formalise general coverage for torture, prefer to use interpretation and invent justifications tailored to individual requirements and designed to justify the use of inhumane or degrading practices.⁸⁰ Today this approach, at least in certain quarters, appears to be predominant.

⁷⁸ In this regard the words from Abrams appear emblematic: «In a democracy sometimes it is necessary to do things off the book and below the radar screen»: citation from A.M. Dershowitz, *Why Terrorism Works*, cit., 151. On the same note A. Keyes, see debate on torture between Keyes and Dershowitz, available at www.renewamerica.us/show/transcripts/02_02_04akims.htm (last visited Oct. 15, 2003). Also see J.T. Parry, *Torture Warrants and the Rule of Law*, 71 *Al. L. Rev.* 885 ff., especially at 887 (2008). The Author upholds the *ex post* approach: «I worry that an *ex ante* approach such as a torture warrant could encourage abuse and dilute the fragile force of the ban on torture both in national and international law and practice. By contrast, I think that the inherent uncertainty of the *ex post* approach (what Dan Kahan calls «prudent obfuscation») would deter officials considering torture and allow rare exceptions at the same time that it maintained the general rule of no torture».

⁷⁹ See note 80.

⁸⁰ Diane Beaver, top legal adviser of the Bush administration (staff judge advocate), in a report of 2002 about the interrogation techniques to be used in Guantanamo argued the compatibility with international and domestic law of practices like stress positions, solitary confinement for up to thirty day, deprivation of light, interrogation lasting twenty-four hours, removal of clothing, use of detainees individual phobias, exposure to cold weather or water, use of wet towels and dripping water to induce the misperception of suffocation, making the detainee believe death or severe pain was imminent for his family etc.: S.D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 98 *Am. J. of Int. L.* 826 (2004). Again in 2002 Jay S. Beebe, Attorney General in the U.S. Department of Justice’s Office of Legal Counsel, in a legal memorandum drafted for the White House General Counsel Alberto R. Gonzales, argued that the prohibition of torture only applies, outside of the federal territory, to gross violations (like the amputation of a body part, the loss of an organ, the disablement of a physical function, or a long-lasting psychological damage) and that the responsible individual can oppose their good faith (their non-awareness of having tortured); furthermore, the staff assisting the President of the U.S.A. in the exercise of his constitutional power of non respecting the prohibition of torture cannot be prosecuted and sanctioned. See S.D. Murphy, *Contemporary Practice of the United*

The recourse to legal formalisms of various types, and the intense work with the government's legal advisers, supported by neo-conservative doctrine,⁸¹ offer an important element for reflection: once it was darkened cells that were sought out for torture, not only physically dark but also conceptually distant from humanity, because torturers were aware that they were doing something profoundly wrong, which in fact ran radically contrary to life in society and legal sentiments; however, in the post 9/11 world torturers today expect to operate in broad daylight, that is within the framework of the law and with the approval of public opinion, which should feel reassured by the proactive approach of the police and the intelligence agencies.⁸²

More generally, the debate summarised above has not been limited to the confines of academia, since torture, formerly a morally rejected and legally outlawed concept has now been resurrected, to the point that it no longer appears to be a logical *non sequitur* or legal impossibility. The re-emergence of inhumane practices has occurred along various tracks: first of all, a restrictive interpretation has been adopted in order to circumvent the boundaries of the classical concept; in parallel, specific and highly questionable practices have been hived off from the general category of torture and placed under other categories, with less odious names and which are supposedly legal, such as enhanced interrogation techniques and anti-resistance methods in order to convince even the most tenacious prisoners to cooperate. Moreover, an expansive interpretation is adopted, if not one that creates derogations, exceptions and excuses which are created on an *ad hoc* basis; for example, it is argued that self-inflicted pain is not torture, and therefore a prisoner who is obliged to remain standing for hours on end or who is subject to other so-called self-inflicted treatment is not considered to have been tortured. Finally,

States Relating to International Law, cit., 824. On the Conditions of detainees at Guantanamo see also: *Guantanamo v. Economic and Social Council-Commission on Human Rights, Situation of Detainees at Guantanamo Bay*, doc. E/CN.4/200/120, February 15, 2006, par. 46, published also in Int. Legal Materials 716 (2006).

⁸¹ It must be stressed that President Obama started his presidency with the promulgation of three executive orders on counterterrorism measures, in order to change policies promoted by his predecessor President Bush. See D. Barak-Erez, *Terrorism Law between The Executive and Legislative Models*, 57 Am. J. Comp. L. 877 (2009). The Author thinks that «this choice highlights the involvement of the executive branch in the creation and shaping of U.S. anti-terrorism law». In doing so, President Obama creates a executive model, as opposed to the legislative one, which is characterized by the choice of promulgating antiterrorism measures through the executive branch.

⁸² See A. Liese, *How Liberal Democracies Contest the Prohibition of Torture and III-Treatment when Countering Terrorism*, 5 J. Int'l L. & Int'l Rel. 17 ff. (2009); the Author underlines the relativism of human rights, considering the domestic and international perspectives. See also J. Ip, *Two Narratives of Torture*, 7 Nw. U. J. Int'l Hum. Rts. 35 ff. (2009).

and paradoxically in order to escape the hypocrisy and illegitimacy, there are calls to legalise torture: Dershowitz's theory.

A similar logical-argumentative mechanism – constructed on the restrictive and minimal interpretation of the concept (that is of the classical idea of torture) and, in parallel, on the reformulation in a broad and permissive sense of the exceptions (for investigative practices that are in any case highly questionable) – has been applied in foreign policy in order to legitimise the concept of war. Also the prohibition on the *ius ad bellum* (i.e. on wars of aggression) has been subject to a restrictive interpretation as against the expansive interpretation applied for exceptions to the prohibition (self defence); and this has reached the point that, where it is no longer possible to speak of peace-keeping, peace-building, peace-making or peace enforcement missions, theorists have ended up arguing in favour of the legitimacy of preventive wars or even resurrecting the concept of just war.

First for foreign policy and later for domestic policy, always in the name of the supreme value of national security and the safety of citizens, lawyers with varying degrees of proximity with the public authorities, i.e. advisers from the law firms working for the White House, although also authoritative scholars, have flocked to the assistance of the instigators and perpetrators of inhumane practices.⁸³ Evidently, this assistance is not a façade for sadism, but the conviction that one interest, namely national security, should prevail over other interests, values, rights and even over human dignity. The efforts to bring the practices necessary in order to guarantee this supreme interest under the control of the law are grounded on this conviction that one legal interest is predominant compared to others. However, this clearly amounts to a legal fiction aimed at presenting only an apparent cohabitation with a practice that is in reality incompatible with democracy, and this irrespective of the perspective from which it is considered – i.e. under a restrictive interpretation, an expansive-creative interpretation or statutory regulation subject to review by the courts. In fact, torture amounts to the very negation of democratic methods, and this would remain so even if its use were proceduralised and even if, which is not the case, there were no explicit prohibitions.

V. CONCLUDING REMARKS

The discussion in the above paragraphs ultimately leads us to reflect on the relationship between force (authority) and rights (freedom) and, more specifically, encourages us to question the limits on the use of force by the authorities on those who are subject to those authorities, that is on the ever shifting confines of their own “sphere of command”. In effect, the counter

⁸³ See note 80.

terrorism measures pose an essential question for democracies: up to what point may, and in certain circumstances must, ephemeral political authorities impinge (even in very far reaching ways) on the most elementary freedoms in the name of guaranteeing collective interests, such as public safety and, ultimately, national security?

Where addressing this question, both Parliament when enacting legislation but also the Courts when called upon the rule on cases brought before them seek a point of equilibrium between the requirements of public security and the guarantees of rights and freedoms. Evidently, this inquiry, which already under ordinary institutional arrangements is hardly simple, becomes even more arduous in the heat of an emergency.

However, in order to draw some conclusions from the investigation carried out above it is useful to evaluate the outcome of the analyses conducted as a whole following the three focuses selected.

An examination of the legislation adopted in order to prevent and combat international terrorism clearly shows the tendency of the public authorities to allow security requirements to predominate over those of freedom (see above section 2). At the same time – given the general recognition of the role which the Courts⁸⁴ have played – the obsession of governments with security, supported by their respective parliamentary majorities, has not however always been reined in (and even where it has been this has only been an abnormal occurrence) within the case law of the very same courts. As is clear from the U.S. experience, the courts have in fact shown broad deference towards the executive, both by hiding behind procedural aspects as well as frequently referring in the arguments in support of their decisions to the political depth of the questions relating to the emergency (see above section 3).

Accordingly, over the past decade, at least with reference to the question of international terrorism, the legislative record clearly illustrates the efforts made to guarantee security interests, a tendency which – despite the formal references to a balancing of interests – is to some extent confirmed in the case law, with the courts being extremely cautious before challenging the tendency for one interest to predominate over others. Accordingly, the main institutional actors in some of the most important democracies appear to draw inspiration for their actions from a hierarchical scheme that is inclined to order the interests in play rather than balance them.

This tendency then found fertile ground in that part of the academic literature which justifies practices foreign to the liberal-democratic tradition, such as torture. In presenting security, and the guarantee of security, as a prerequisite

⁸⁴ See Israel Supreme Court decision on separation fence: HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel*, and see too German Federal Constitutional Court decision on the guarantee of human dignity in the case of hijacking BvR 357/05.

for the exercise of all other freedoms which would appear to be meaningless were the former not guaranteed, this branch of the literature asserts that there is in fact a hierarchical juxtaposition of legal interests arranged in such a way as to place security at the pinnacle of this theoretical pyramid (see above section 4). However, even the academic writings within constitutional law circles which does not propose legalising degrading practices and does not justify torture in any way appear to have abandoned the traditional standpoint that seeks to balance or weigh up the legal interests which deserve protection and have rather been converted, either more or less explicitly, to a hierarchical scheme which recognises the primacy of security over other rights.

Moreover, the rigid hierarchical juxtaposition of the interests, and inevitably of the values underpinning them, which would appear from this study to be progressively emerging albeit with some let-ups (i.e. with some con more back in favour of balancing), in the post 9/11 era brings with it the risk of undermining the bases for democracy and introducing elements typical of authoritarian democracy.

In other words, the hierarchy of values vertically ordered under security appears to be hardly compatible with the model of liberal democracy accompanied by the pluralism of values and a strong guarantee of rights and freedoms, the exercise of which may be limited – also to the detriment of freedoms – thanks to balancing techniques, but only for limited periods of time and in any case subject to a proportionality test that is incompatible with the total sacrifice of one of the constitutional values in play.

Indeed, this very proportionality test which, on the presumption that there is a chronic emergency, now increasingly appears to be establishing itself in minimalist terms (i.e. as consisting in a mere recognition of the so-called hard core of rights) is perhaps starting to cause dissatisfaction or otherwise to raise doubts that the exception may be becoming the rule. All of this makes us question the solidity of the system, because a democracy that is levelled down for long periods of time exclusively to the security emergency ends up no longer being a democracy and, worse still, almost without realising it.

Broadening our perspective, the outcome of the investigation conducted following the three focuses highlighted above shows that democracies, including those with long and consolidated traditions, are highly uneasy where they must engage with the problem of the compatibility of emergency measures with the principle of the liberal tradition and perhaps, at root, with the values of an ethical-social nature rooted in the very soul of those democracies. In fact, at times the constitutional guarantees have appeared to

be subject to such strong tension as to question their solidity, not only on an internal level.⁸⁵

Based on the assumption that the most credible indicator of the level of maturity reached within advanced liberal democracies is given by the actual exercise of constitutionally recognised rights, it may be asserted that this aspect takes on particular importance in emergency situations. That is to say it is the situations of institutional stress resulting from circumstances of acute social danger, such as those represented by international terrorism, which offer a particularly revealing test for measuring the development of democratic maturity and, ultimately, for assessing the nature of those self-proclaimed democratic systems and their solidity.

An ongoing or infinite emergency is at odds with the limit of the temporary applicability of measures which impose heavy limits on freedom; similarly, a limitation that is so far-reaching as to throw into doubt the survival of a constitutionally guaranteed right or to ensure its respect within its essential core (which is besides very difficult to define) contradicts the principle of proportionality. Similarly, the taking for granted of the very existence of an emergency contrasts with the requirement of necessity and, in recent years, rather than maintaining an animated and high level of attention towards the existence of the emergency and the principles mentioned above, there has been a tendency to believe *ex ante* (when enacting legislation) and/or *ex post* (when reviewed by the courts) in the idea of accepting the existence of an emergency as a given fact and to conduct discussions on the balancing of interests only as a formal backdrop and as a framework for choices that are increasingly oriented towards the primacy of security in substantive terms.

Pursuing this line of reasoning, the situation which should be considered here, and which will be discussed below, is one of apparent constitutional normality (or rather, where not state of emergency has been declared) in which however certain circumstances of presumed serious danger induce the political authorities to place heavy limits on freedom, with the goal of pursuing the guarantee of an interest that is placed at risk precisely by the anomalous situation. Such legislative initiatives which are presumed to be highly penalising and to have a heavy impact on standards of “quality of democratic life” are supported by (and not imposed on) the majority of citizens. In sharing the goal of pursuing the greatest desirable satisfaction, if not a guarantee in absolute terms, of the interest in security (considering it to underpin the right to life itself and also freedom more generally – the introduction referred to it as the prerequisite for every other right) the public

⁸⁵ Consider the strict construction of aggressive war and the loose construction of limited exceptions (war of self-defence): see *supra* par. IV.

gives the authorities a mandate to intervene with measures that strongly limit and instruments which infringe basic personal freedoms.

In the above example, the majority (if not even a broad and compact majority) has accepted the delegation (with a free vote in elections) on the government to choose from the possible options, at its discretion, those considered the best and as the most effective for achieving the desired result. In fact, for some particularly topical issues, such as security, the citizens of this hypothetical society have cast their vote precisely on the basis of a programme which already pre-announced the political action, explaining it and articulating it at least in general terms, if not referring to the adoption of specific special measures (e.g. more severe penalties for certain offences or even highly invasive investigatory preventive measures, such as – to be provocative here – torture). Therefore, in the example under consideration, the very same citizens not only accept a political result in advance that is extremely draconian within a given area to which particular priority is attributed, but rather call on the authorities to take those specific restrictive decisions (which are therefore not suffered, but on the contrary are consciously endured or otherwise regarded as concerning others, with the intention of enjoying greater rights or those rights to which a greater value is attributed). Paradoxically, if the authorities do not satisfy this priority requirement of society, they would be betraying their mandate and would be called to answer for this as a matter of political responsibility, paying the consequences in the next election.

At this juncture it is necessary to ask ourselves whether a significant proportion of society (admittedly a majority) give its political representatives a mandate that is so broad as to enable it to sacrifice, or even only heavily limit, the legal rights underpinning democracy and values such as that of human dignity⁸⁶? In advanced democracies this is not possible, since the majority cannot do so within the limits of the Constitution. Similarly, neither can the minority (i.e. those citizens who do accept the importance of the value guaranteed or which the guarantee pursues, namely security, which is then the prerequisite for freedom and in our example the precondition for the right to life, yet do not agree with the restrictions) be forced to accept similar limitations under a majoritarian logic resulting from the ordinary procedures

⁸⁶ *Contra* G. Bognetti, *The Concept of humanity dignity in European and US constitutionalism*, in G. Nolte (ed.), *European and US Constitutionalism* 85 ff. (2005). In particular, having underlined the different role human dignity plays in the United States with respect to Europe he states that human dignity «does not allow for the existence of legal rights – be they called “natural” or “inalienable” or “inviolable” or otherwise – of universal application. Nor does it accept the idea that there is a “human dignity” that requires a fixed set of equal and minimum legal treatments for a member of the species under all possible circumstances» (p. 103). Cfr. J.Q. Whitman, *Human Dignity in Europe and United States: the social foundations*, in G. Nolte (ed.), *European and US Constitutionalism*, cit., 108 ff.

of democratic representation. The value of human dignity, its constitutional recognition (whether explicit or implicit), the respect for it, its constant exercise and an effective guarantee of it must always, in every situation and in any circumstances, whether an emergency or not, be safeguarded as a premise (not only legal but, more fundamentally, logical), that is as the prerequisite for any other value. To put it bluntly, the elementary logic of “first stay alive” cannot be applied to mature democracies because the “way we remain alive” is more important. Personal dignity is a value which must prevail over life and therefore over the absolute guarantee of security.⁸⁷

In fact, regarding the question of security which part of the academic literature has postulated as a fundamental right, it should be pointed out that democracies require their own citizens to defend their native land, a principle that is generally manifested through specific constitutional provisions; therefore, the state may require its citizens to risk their life in the name of freedom, and the other values guaranteed under a given political-legal order etc., when called to arms and obliged to go to war. Applying a similar logic, it can be argued that the very same democracies may ask the same community to accept the risks to which the open society of democratic states cannot fail to expose itself in order to remain such. Or in slightly clearer terms: rather than give up freedoms and the values rooted in the DNA of democracies, democratic systems must accept running risks on security grounds when facing the threat of international Islamic terrorism. To claim that complete security may be guaranteed would be tantamount to betraying the democratic soul of that system of government, that is giving in to terrorism, the scope of which is (also) that of laying bare the authoritarian tendency within democracies. Legislating in the name of guaranteeing the maximum possible security brings with it the risk of denying some of the essential features of democratic orders and casting doubt on fundamental values such as human dignity.

Against this perspective it may be concluded that when the problem is raised, that is in an emergency, and (whether) the balancing of rights must give way to their hierarchical ordering entirely to the benefit of the ultimate value over which the political authorities cannot and must not ride roughshod, then the value cannot be sacrificed, cannot be disposed of by the majority, and hence political representatives cannot be authorised to limit it. Human dignity⁸⁸ is precisely that intangible meta-value also for the democracies which are

⁸⁷ This not an absolutist position, but a response obtained from an axiological based test: Z.R. Calo, *Torture, Necessity, and Supreme Emergency: Law and Morality at the End of Law*, 43 Val. U. L. Rev. 1609 ff. (2009).

⁸⁸ A. Ruggieri and A. Spadaro, *Dignità dell'uomo e giurisprudenza costituzionale*, in V. Angiolini (ed.), *Libertà e giurisprudenza costituzionale* 221 ff. (1992).

founded on a pluralism of rights, which inevitably re-proposes the Kantian categorical imperative that always excludes the use of a person as an means, regardless of the end.