The criminal response to the terrorist phenomenon. Critical paradigms for the Rule of Law

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Abstract

In this article we try to analyze various aspects relating to the topic of terrorism. We start by exploring the old form of terrorism, up to its modern form, transition within which some issues of particular relevance are highlighted: the evanescence of the subjects and targets involved with terrorist attacks; the transformation and extension of the object of interest to terrorism; the admixture between the political and religious nature of the attacks. In the same way, we try to show the change in the architecture of terrorist organizations. This global evolution of the phenomenon leads to feelings of insecurity and emergency on which new paradigms of power of the State and Law are founded. On that basis we focus on the possible collapse of the Rule of law which, with the justification to wage a war on terror and respond to the new security emergencies, turns into a State of Exception and Penal State, punitive and repressive, compressing the guaranteed legal and inalienable rights of each human being[3]*.*

Keywords: *Terrorism, Rule of Law, emergency, State of exception, criminal Law of the enemy*

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1. Terrorism in the first decades of the XXI century

Terrorism is not a modern issue. If we define terrorism in general terms, as the recurring and organized use of violence designed to produce widespread fear among subjects and/or dismay for the object[4], then terrorism is a very ancient practice indeed.

Terrorist events and terrorist groups, both politically and religiously motivated, have been present throughout history, albeit in a great variety of forms and modalities, within every kind of political regimes[5].

Then, during the modern era and up until the end of the last century, terrorist organizations and terrorist acts developed a rough uniformity of organizational structures, aims and execution procedures.

Considering the most recently active terrorist groups of the last decades we could mention, for example, Tupamaros in Uruguay, Brigate Rosse and Nuclei Armati Rivoluzionari in Italy, Forças Populares 25 de Abril in Portugal, Euskadi Ta Askatasuna in Spain, Baader e Meinhof's Rote Armée Fraction in Germany etc.

As said, this kind of terrorism developed a deeply centralized and territorial-based structure, and acted according to rather specific and uniform standards, such as: carefully considering the choice of targets, selecting subjects with highly symbolic value, aiming to subvert the constitutional apparatus of the State.

Nevertheless, starting from the September 11 attacks, we have witnessed a decisive paradigm shift.

As a matter of fact, in the last two decades terrorism has undoubtedly evolved[6], transitioning from what we could define as its 'classic' form to a new, much more

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[4] For a clear understanding of the terms involved in the discussion, it is useful to clarify from the outset what we mean when we use the words *target*, *subject* and *object*. The *target* is the direct, material asset that the act of violence hits or aims to hit. The *subject* is the individual (or the group of individuals) directly struck by the terrorist attack. The *object* is the (indirect) purpose that the criminal action aims to achieve. In the case of an incendiary attack against the headquarters of a Party seat during a meeting, for example, the seat is the target, those who are present in the meeting are the subjects and the (democratic) Constitutional State, which is being attacked in its fundamental principle of freedom of political expression, is the objective.

[5] For instance, we could mention the Sicarii Jewish sect (1st century B.C.), which was the extremist political faction of the Zealots; this nationalist and religious fundamentalist group fought against the Roman occupation of the Land of Israel and all the Jews who were willing to tolerate it. Sicarii treated submissive Jews the same way they treated the enemy invaders. In order to pursue their political and religious agenda, they systematically resorted to the strategy of terror: murder, pillage and arson. "At that time, the Sicarii engaged in a conspiracy against those who were willing to accept the submission to the Romans and they fought them in every way, as enemies, robbing their belongings, stealing their cattle and burning their houses."; "They claim that there was no difference between them and the enemies, as they had dishonorably renounced their freedom for which the Jews had fought so hard and they would rather be slaves under the Romans." Cfr. F. Giuseppe, *La guerra giudaica*, 6th ed., Milan: Mondadori, 2000, Book VII, Ch. 8.1., pp. 254-255. Other precedents we could cite are the political conspiracies in the Roman Empire (see V.A Sirago, *Trecentomila croci. Banditi e terroristi nell'Impero romano*, Como: New press, 2017) or in Renaissance Principalities; the various plots against all kind of despots throughout history are yet another example. The rise of the Modern State itself was accompanied by terrorist groups and acts. For a historical analysis of the evolution of terrorism, see G. Chaliand, A. Blin, *Storia del terrorismo. Dall'antichità ad Al Qaeda*, 1st ed., Turin: UTET, 2007.

[6] Here, the term *evolution* doesn't refer to a causal and linear development process which is implemented in order to meet specific goals, but rather to a random process of transformation, which is driven by purely accidental factors. For further details, see N. Luhmann, R. de Giorgi, *Teoria della società*, 11th ed., Milan: Franco Angeli, 2007, pp. 169 *et seq.*

complex[7] and articulated one. Such an evolution can be better understood through the analysis of a few crucial steps.

Among these there's the '*evanescence of the targets and subjects involved with terrorist attacks*', which is characterized by a high level of social perceptibility.

Of course, contemporary terrorist groups still have preferential targets and subjects that they would rather hit, even only in order to ensure a stronger media resonance. We are not trying to question the fact that a terrorist action would try to explicitly undermine its object, whatever that is, by directly hitting them. Instead, the term *evanescence* is meant to highlight the fact that we have witnessed a critical evolution: terrorists used to attack their object by choosing specific and highly symbolic targets and/or subjects (e.g. attacking the State by hitting an institution, the figure of the sovereign, the ruling party's historical seat or its leaders; attacking the Church by hitting its representatives or the most important places of worship), while nowadays they opt for targets and subjects whose profile is much more indefinite and evanescent. In other words, considering the functional link between criminal behavior and destabilizing intents, there has been a transition from attacks on targets and objects which were somehow linked to the subversive purposes, to attacks on unpredictable targets, against common people and against qualitatively and quantitatively undetermined subjects.

Therefore targets and subjects no longer play the key role that they used to hold until the end of the last century as they have taken on the connotation of mere moving or sitting targets.

Another crucial aspect in the evolution of terrorism involves the '*transformation and extension of the object*'.

As pointed out above, the main goal of the terrorist organized groups of the XXth century was political subversion. Namely, the State with its apparatus, in all its facets, was the object of all their efforts. However the wave of jihadist terrorist attacks, from New York, in 2001, to London, in 2017[8], has made very clear to anyone that terrorism has assumed a new international dimension[9]; that is the metamorphosis of the State object into a supranational object. As a matter of fact, current terrorism is no longer containable within the boundaries of a defined national or territorial frame of reference, but it has identified his new, more general object with the western World as a whole.

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[7] The word *complexity* is not intended as a synonym for complicated or difficult to understand, but is defined in Luhmann's terms, as the compound set of possibilities which produce meaning through communication. Therefore complexity as an excess of possibilities as compared to those which actualize. In this perspective the concept of meaning is closely connected to that of selection, which is the fundamental process needed to reduce complexity and to find your bearings in the endless range of possibilities. In order to attain meaning it is necessary to select some possibilities from the infinite set of those available. Once selected, possibilities can actualize. The concept of complexity is also tightly related to that of contingency, which refers to the possibility to choose differently among the endless array of possibilities.

[8] Including those of Madrid, London, Instanbul, Paris, Nice, Bruxelles, Manchester, Barcelona etc.

[9] It is possible to trace the evolution of terrorism by looking at its official definitions. In 1937 the League of Nation defined terrorism as all the "*criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public*"; but it should be noted that later, in its Common Position of 2001 (931/PESC), the Council of the European Union defined terrorist acts as "*intentional acts, which, given their nature or their context, may seriously damage a country or an international organization, as defined as an offence under national law, where committed with the aim of: seriously intimidating a population, or unduly compelling a Government or an international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization*".

A further element in this evolution of terrorism is the '*admixture between religious ideology and political purpose*'.

The success of jihadist terrorism has shown the indivisible contiguity and the interdependence between religious ideology and political purpose in fundamentalist organizations[10]. The classic and rigid differentiation between the two is simply no longer a useful key of interpretation for current terrorism. The rise of ISIS and the establishment of the Caliphate (June 2014), have brought fundamentalists closer to the objective of realizing an Islamic State based on the model of Mohammed and his successors, sclerotizing and unifying religious ideology and political purpose. In fact the aim of ISIS is to "*bring back Islam to its imaginary ideal of original purity*" and to "*establish a worldwide Caliphate, eliminating all those who disagree with its ideology*"[11].

The evolution of terrorism is also characterized by the '*morphological mutation of terrorist organizations*.

In fact, traditional rigidly centralized and hierarchically organized structures have given way to a new, decentralized, light, and horizontal kind of structure; flexible formations that proselytize and exchange information through the web. The terrorist organizations went from a unicellular structural dimension to a pluri-cellular dimension. In this kind of structure small groups and individuals (foreign fighters or lone wolves) play a key role.

However, this new fugitive and globalized version of terrorism poses a serious threat to the legal and political apparatus as a whole. If, in fact, as has been pointed out, a conflict between the need for social defense and the safeguard of the rights of individuals arises even when facing common criminal activity, that same conflict approaches a breaking point when terrorism is involved[12]. More specifically, on the one hand a State threatened by terrorism has the obligation to punish and prevent crimes which undermine its basic principles and the security of innocent citizens. On the other hand, it is aware that the fight against terrorism cannot justify the repression of those rights, Civil Liberties, values and principles which it is its own duty to protect (not only against terrorism) and which are the very foundation of its own existence.

Nevertheless, the high dangerousness and the absolute unpredictability of the current terrorist threat amplify the need for social defense to such an extent that new counter-measures, disguised as simple changes of law models related to the transformation of the phenomenon, may be introduced and undermine the principles underpinning the liberal model of the Rule of law.

2. Distinctive traits of a Rule of law

Many law history and constitutional theory books emphasize that the establishment of the Rule of law coincides with the French Revolution, even though in contemporary

[10] The different terrorist groups linked to the Jihad have many points of contention, but they all agree on the objective to reinstate an Islamic Caliphate, which should serve as a reference point for the whole Ummah. Their disagreements are mainly about modalities and timescales of implementation of said project.

[11] J. Stern, J.M. Berger, *Estado Islâmico. Estado de Terror*,1st Ed. Amadora: Vogais, 2015, p. 269.

[12] R. Bartoli, *Legislazione e prassi in tema di contrasto al terrorismo internazionale: un nuovo paradigma emergenziale?*, in Diritto penale contemporaneo, Milan, 30 March 2017, p. 2. Accessible at: https://www.penalecontemporaneo.it/d/5312-legislazione-e-prassi-in-tema-di-contrasto-al-terrorismo-internazionale-un-nuovo-paradigma-emergenz.

documents, as well as on the doctrinal and political front, there is no evidence of such term[13].

Apart from some doubts and fleeting prior use, this term emerges at the beginning of the nineteenth century along with the literature of early German liberalism[14]. More precisely, the first use of this term is attributed to the jurist Robert von Mohl, who, with a work published in 1832, coined the expression Rechtsstaat[15], later incorporated into European statutory laws with the formulas: *Rule of law, Estado de derecho, État de droit, Stato di diritto.*

In this regard, from a general point of view, Pietro Costa's approach heralds a distinction between history and prehistory of the Rule of law which is more faithful and respectful of the historical data.

In his view, history starts from the moment this lexical term becomes known. In contrast, prehistory refers to contexts and times in which "*even if it does not yet have a name, it already exists*"[16], namely, the time periods and spaces in which the basic outlines of a principle that will be later defined arise, are consolidated and made more explicit throughout Europe in the process which will lead the model known as the Rule of law. In other words, in keeping with this approach, there is the need to temporally place the French revolution (and even earlier the English one) within the prehistory period of the Rule of law model, in finding in the French revolution only its point of origin and not that of arrival.

As noted above, the term Rule of law seems rather vague and devoid of content and it reveals nothing, or almost nothing, to us about this model and the traits that distinguish it.

In fact, it only sketches a "*direction*" and, at most, a "*value*". This direction is opposite to that of the Machtsstaat and the Polizeistaat, and results "*in the reversal of the relationship between power and law*"[17]. The value, instead, consists in the suppression of all arbitrary activities attributable to the State and capable of affecting citizens.

These are the only indications that such term allows us to derive. If we want to find out more, we need to seamlessly look at the prehistory and history of the Rule of law.

Sovereignty, individual rights, principle of equality, are the traits that characterize such model and that political philosophy and jurists of the time considered and regarded as 'held together' by the concept of *state law*. The latter, in fact, becomes at the same time expression of sovereignty (no longer *rex facit legem*, but *lex facit regem*) and guarantee of equality towards recognition and access to rights. In effect, by breaking the tralatitious model, the French revolution "*frees the two fundamental sides*" of the new juridical-political model, i.e., sovereign law, on the one hand, and individual rights[18] on the other hand.

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[13] See, for example, R. Carré de Malberg, *Contribution à la Théorie générale de l'État*, 1st ed., Paris: Sirey, 1920, p. 489 (in the notes) and G. Burdeau, *Traité de science politique*, 1st ed., Paris: L.G.D.J, 1964, IV, p. 88. Both trace back the introduction of the Rule of law to the theory of the constitution adopted by the National Constituent Assembly of 1789.

[14] R. Bin, *Stato di diritto*, in Enciclopedia del diritto, Annali. Milan: Giuffrè, vol. 4, 2011, pp. 1149-1162.

[15] The original title of R. Von Mohl's work is: *Die Polizei-Wissenschaftnachden Grundsätzendes Rechtsstaat.*

[16] P. Costa, D. Zolo, *Lo stato di diritto, storia, teoria, critica*, 1st ed., Milan: Feltrinelli, 2002, p. 91.

[17] G. Zagrebelsky, *Il diritto mite*, 1st ed., Turin: Einaudi, 1992, p. 20.

[18] M. Fioravanti, *Lo stato moderno in Europa*, 1st ed., Rome: Editori Laterza, 2002, p. 18.

The first, replaces the multiplicity of powers typical of the *ancien régime*, while the second, equal for all people, oppose the historically privileges related to the condition and social class to which the citizens belong.

Thus, if on the one hand, the Declaration of Human Rights and Citizens of 1789 states in its Article 1 that "*men are born and remain free and equal in rights*", on the other hand, in full harmony with the enlightenment philosophy, the law establishes itself as an indispensable instrument for freedom and, progressively more, for rights.

Article 1 sets out what already exists and for which, a few decades later, a name would be found: Rule of law. It is from here that this model takes on its regulatory role. Starting from it, the law in a positivized form becomes the distinctive character of such model. Thus, a positive law that finds its starting point in individual freedom and (natural) rights.

Indeed, against all rules, the law is reworked in the enlightenment political philosophy in close relation with the freedom that Montesquieu defines as the "*(…) the right to do all that the laws permit; and if a citizen were allowed to do what they forbid, he would no longer have any liberty, because the others would all have the same power*"[19]. The individual is free because he is being guided by law within the space that the same law reserves to him. To this effect, freedom is not the absence of boundaries, but the pursuit of one's happiness in the best way possible, in the awareness that limits to our freedom are set by the boundaries *of the freedom of others*. Through the (natural) law, the individual is an entity capable of natural rights and, first of all, of a right to *freedom*. Precisely for this dominant philosophical view, in the 18th century the law began to be perceived as a means of safeguarding and consolidating the natural rights of freedom, equality and property. The promotion and strengthening of those rights, that with the Declaration of Human Rights and Citizens of 1789 are positivized, ensure that during the 19th and 20th centuries they are recognized in the various European constitutions.

Therefore, the revolutionary climate does not affect the perception of law in the enlightenment sense, but it endorses it. In fact, with the Declaration mentioned above, the law definitively abandons the key logic of revelation, based on the idea of a harmonious complex of facts, rules and principles existing before the legislator and from which the prince/ruler/lord is released and mere depositary, to embrace the logic of creation. Indeed, from then on, medieval law is superseded by the concept and image of law in the modern sense, i.e. law conceived as an act of sovereign will, aimed at the implementation of individual (natural) rights and to which the State sovereignty is submitted.

This modern concept of law allows to better substantiate the "*direction*" and "*value*" referred to above and which the term 'Rule of law' suggests, and that this model proposes to pursue and guarantee. The direction, diametrically opposed to the Machtsstaat and the Polizeistaat, consists in the principle that sovereignty is not an end in itself but finds its existence and purpose solely in the function of creating a law capable of guaranteeing rights to the individuals on terms of complete equality. It is therefore obvious that this represent an inversion of the power-right relationship with regard to past forms of State. The centrality of sovereign power is now replaced by the centrality of individual rights recognized by the State through the law.

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[19] C.L. Montesquieu, *Lo spirito delle leggi*, 1st ed., Milan: Biblioteca Universale Rizzoli, 1989, Vol. I, Book XI, p. 308.

As to the value of the abolition of the State's arbitrariness on citizens, this is made possible by submitting sovereignty to the law itself through the *principle of legality*. To this effect, the principle of legality expresses a concept of law as "*supreme irresistible regulatory act*" against which no other stronger right can be invoked, whatever the form and foundation. Namely, it expresses a concept of law understood as supreme regulatory act which cannot be prevailed "*neither by the power of exception of the King and his administration, even if justified by higher reasons of State, or by the disapplication by the courts or the opposition by individuals in the name of a higher right or special rights*"[20].

Today, the Rule of law, in its current formulation, is called to face the terrorist emergency, or rather to write a new page of its history. The answer to this threat can be adequate if and only if it respects the paradigms peculiar to this model, briefly outlined above.

On this basis, it is clear that if the emergency response to terrorism, justified as a result of changes to paradigms due to the evolution of the phenomenon, is too pervasive in terms of sovereignty[21] (hence in terms of law and principle of legality) and above all restrictive of individual rights and principle of equality, not only does it distort the original Rule of law model by corrupting the direction and value mentioned above, but it puts at risk the entire system.

3. War on terror

In 1748 about the conditions where political freedom realizes Montesquieu, upheld that it "*consists in the security, or at least in the opinion that everyone has got of his/her security*"[22]. And as the threats to security come from public and private charges, citizen's freedom depends on the quality of the penal laws[23].

Many years later, in 1789, The Declaration of Rights recognizes the right of security among the natural inalienable rights. In 2000, The European Union rules the Union citizenship in the Charter of Fundamental Rights, emphasizing the individual as the center of its action and building up around him/her a space of freedom, security and justice.

Therefore, security has deeply marked the analysis and drawn jurists' attention on western juridical progress, until on 11th of September 2001, this big structure of guarantees and freedom rights (at security level) collapses, likewise The Twin Towers in New York. On September 11 the West enters a new historical-political modern phase. From that date onwards, you can assume easily the beginning of what some authors call "*the century of insecurity*"[24]. And if insecurity becomes an intrinsic element of our society, all what we have theorized until now about law and about state, will falter. The fear of the present and the total impossibility to build a 'safe' future refer to extant juridical categories of uncertainty in a pre-state phase and they falter the firm

[20] G. Zagreblesky, *op. cit.*, p. 24.

[21] In being possible in extreme cases to recognize the legal sovereignty of the security policies.

[22] C.L. Montesquieu, *op. cit.*, vol. II, Book XII, Ch. II, p. 5.

[23] *Ibidem.*

[24] A. Baldassarre, *Diritti Umani, Biopolitica e Globalizzazione*, 1st ed., Milan: Giuffré Editore, 2006, p. 7 *et seq.*

foundations of the rule and of the fundamental rights, that, up to now, had stood for both a not to be ignored juridical horizon to build up a Rule of law and the only prospect to which political power was linked in order to limit the consequences.

Thus, the cornerstone principles of Constitutional State and of pluralist and representative democracy are called upon a new challenge: to go over and to make relevant again the general theory of law and of state.

On September 11th 2001, the global disaster comes to life in a spectacular and sensational way that nobody would have ever been able to imagine. It's hard to remember an image of the same incisiveness and immediacy to point out an epochal change of the world history. In a few seconds one of the tallest buildings built by man, a giant with a height of over one hundred floors collapses, submerging the streets with a mound of rubble and clouds of dust.

The collapse of The World Trade Center denounces to Americans and to the whole world a clear reality: nobody is out of danger in the world society of risks.

Nothing real or symbolic could have been more sensational than what they have planned that evil day. Two civilian airplanes were turned into weapons of mass destruction and weapons of symbolic one: the pulverization of The Twin Towers kills thousands of lives, brings the nation to its knees and stucks the whole world on television.

That terrorist attack was the beginning of a new page of history, whose first lines tell us about the collapse of the capitalism icons and, more generally, of the hard and fast cultural and juridical basis until then unquestioned on which U.S.A. and the whole western world was based. The strongest military power of the world had been hurt and slumped into a deep distressed on its own ruins. Since that moment, a new feeling is born: the expectation of terrorism.

After that attack, the Congress of The United States of America authorizes the President Bush to use: "*all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons*"[25]. Thus, war on terrorism began.

With a deep sense of insecurity and fear for the future, already present in modern society and sharpened by terrorist attacks of new generation, war re-emerges as a possibility of acting daily at social and political level. And it's a war that involves everybody both because it has been promoted by U.S.A. that is at the head of a coalition made up by NATO state members or not NATO ones and also because this war has got undetermined borders and actions not planned beforehand; so, it involves all of us because everyone could be under attack. You can fight war on terrorism on a global front that affects and orients choices, attitudes, personal and social behaviors and it reintroduces in everyday speech the distinction between *we* and *they;* all this stokes up suspicions and feeds wariness of what is different from our own religion and culture.

The globalization of terrorist danger is the globalization of the expectation of terror, of the attack everywhere you are. This expectation affects the relationship both of the individual and of the community with law and brings forward the stability of the public order and destroys the guarantees of security, freedom and justice on which Constitutional State is built up.

[25] Authorization for Use of Military Force, Pub. L. N. 107-40, 115 Stat. 224, 2001.

War on terrorism is the answer that this century of insecurity offers in order to isolate or to eliminate the expectation of terror and the danger of terrorist attacks. It is an answer that is full of the features of emergency and of 'despair'; it is an attempt to check both the danger of new terrorist wounds, and also the danger of a drift of the west juridical-political cornerstones.

But what kind of war is war on terrorism?

Since the Second World War, war has made up part of everyone's lives either because people experienced it or because people spoke of it. Thus, it has become part of everyday life and you can live it as a probable possibility that marks the changes of the world. By this time, it is common to listen to people speaking about 'war on poverty', 'war to hunger', 'war on criminality'. The substantive war, therefore, with an adjective that defines the scope, reveals not only an occasional political choice of action, but also a real model of government. Therefore, war becomes the means that governors of different States use to justify and legitimate their *governance*[26].

So, after The Twin Towers attack, terrorism and war on terrorism are included in the emergency issues, and politics and its choices of governance justify their actions on the base of 'security question' to face. And the government actions are authorized in order to limit the consequences of the expectations of terror.

Now let's try to understand better what are the characteristics and the limits of this war.

The terrible massacre gave rise to this 'new war'; first, the American Administration and then the Member States of the coalition take sides against the Islamic State (ISIS) in order to defeat terrorism. The result so far has been the death of tens of thousands of civilians and the beginning of a never-ending escalation of terrorist attacks causing as a consequence the increase of hate, suspicion, violence and fanaticism.

But has it been the clearest and the most far-seeing move or has it been a sign of weakness from the West? Or has it been a sign of surrender as regards the values of rationality and civilization on which its juridical-political tradition is based and that should have been safeguarded from terrorist barbarism?

In fact, the war on terror no longer sees a state-centric security paradigm in which country threatens country, we have today taken a different step towards a post-state security paradigm, leaving behind the once typical belligerent state centric intimidations which we were once accustomed to.

The terrorist catastrophes are neither locatable nor they can be ascribed to a specific person that acts.

They are either predictable, or manageable temporally, nor at spatial level and they can't entail a determined and planned action of a targeted attack. The terrorist danger is indirect and uncertain as well as the response that the fight against terrorism will use to seek its achievements. In fact, fear and anxiety caused by the terrorist attack of 2001 is based on its absolute spatial and temporal unforeseeability and on the sensation that your neighbor could be your enemy. From that moment, the presence of many Muslim migrants in our cities has been considered as 'a home threat'. Since then war originated from this indeterminable situation shows no borders both because it doesn't recognize state sovereignties to fight and because you can fight everywhere inside or outside the State without any distinction. The new war on terror is therefore different from those of

[26] J. Simon, *Il governo della paura. Guerra alla criminalità e democrazia in America*, 1st ed., Milan: Raffaello Cortina Editore, 2008, p. 343 *et seq.*

the first modernity because it is accepted by the lack of knowledge. Nowadays, in the century of insecurity, that is called the second modernity[27] by some critics, war on terrorism sees the idea of security losing its ontological meaning and it has forced to look for new ways to restore the lost order. This order can't have classic patterns of attack and defense because it is threatened by the expectancy of terror and it moves in a limbo of uncertainty[28].

So, the massacre of September 11th 2001 and its worldwide consequences have caused a strong shock to the strongholds of the west classic thought, letting the weakness of security emerge as it has been stated until that moment.

The first result of the reactive war on terrorism and the limit of this perspective has been the decline of the international relations that has produced three substantial changes linked each other inside the birth and the evolution of the war on terrorism: 1. Failure to comply with the international law and its denial, as well as sanctioned by the ONU Charter (come into force on October 24th 1945), where the prohibition of war gathers prominence of fundamental rule; 2. The reconsideration of war as a means to solve international controversies in order to guarantee and defend the order of the world security; 3. The boundless feature and the terrorist connotations of the new wars[29].

According to the first bullet point, war on terrorism becomes the only practical way. It legitimates itself as lawful and just in contrast with a kind of utopian vision of the international juridical text that, on the contrary, considers war as a kind of *extrema ratio* to use only in self-defense cases.

In the second point, war becomes a means of law and of guarantee of order above the same law and of its uncritical implementation. Then, war should overcome the juridical form and should stand with strength for the substance of security.

In the third point war should aim at contrasting the terrorist act, but, assuming itself the boundless and never-ending feature of violence, as well as the terrorist act that should aim at destroying it.

These three characteristics of the war on terrorism show the limits of the choice made by the states in order to solve 'the expectancy of terror'.

On these terms, war on terrorism denounces its failure, because it seems to be the right answer terrorism was waiting for. It increases the problems it claims to solve, because every act of war will foment hatred of the terrorist organizations that will exploit those attacks to recruit new followers ready to fight the west.

Abu Bakr al Baghdali the new leader of ISIS, considered died in a raid of 2016, in a recent audio file broadcasted worldwide, incites his followers to "*destroy every tyrant*" that is "*inside and outside the territories of the Islamic State*", because "*the blood of the killed militiamen in Siria and in Iraq couldn't have been shed in vain*"[30].

Thus, the *new* war is neither a war of conquest any more nor of defense; it is neither oriented to the invasion or to the colonization of new territories, nor to a real prevention

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[27] U. Beck, *Conditio Humana. Il rischio nell'età globale*, 1st ed., Bari: Editori Laterza, 2008.

[28] *Ibidem.*

[29] L. Ferrajoli, *Guerra e terrorismo internazionale. Un'analisi del linguaggio politico*, in *Potere e Violenza. Guerra, terrorismo e diritti*, Edited by F. Ruggeri, V. Ruggiero, Milan: Franco Angeli, 2009, p. 78 *et seq.*

[30] Website: *Isis diffonde nuovo audio di Al Baghdadi: "Parla anche di Corea del Nord"*. [Consulted on 28.09.2017]. Accessible at: http://www.repubblica.it/esteri/2017/09/28/news/isis_nuovo_audio_al_baghdadi_corea_nord-176773197.

of enemies' attacks. It seems to have only one aim: to justify the existing power even overcoming the rule. In fact, it gets profits from the consolidation of inequality. Under this aspect you can consider it as a preventive war or as a preventive strategy of political and economic self-determination that could bring forward the supremacy of the West Powers. The criterion that it follows seems to be the protection of reality that considers the West Power above every other power; and this protection is realized using violence, the *bellum omnium*, retaliations and the overcoming of any normative text which is respectful to the foundations of Constitutional State.

War on terrorism, so, legitimizing and expressing of its own as just has taken on some particular features that are very similar to those that characterized the war against criminality in America in the sixties. It seems as if criminality, politics and governance are intertwined giving rise to the skeleton of the new war. Based its legitimation on fear and uncertainty, it proceeds towards undiscovered routes by law, which becomes an instrument at the service of fight action and loses the force of the principle and of the fundamental rule that leads the activities of State Administrations.

We are talking about a war that, besides having the characteristics of what we have inferred so far, has a deep feature of emergency and exception.

In other words, on behalf of emergency and exceptional situations, State Administrations are called to take decisions beyond law, or rather, they are called to write a new chapter of Law: 'the law of emergency', applicable in the state of exception.

In this contest of alert and panic, any decision that answers the supposed criterion of effectiveness with regard to the fight against terrorism, is presented as a necessary thing, beyond the fact that it is juridical legitimate and, as such, law conforms with the conflict.

From this viewpoint, arrests, detentions, the dead, retaliations, sweeps and the violations of the fundamental human rights are justified in the name of security and justice.

Military missions and the Al Qaeda chase and the war against ISIS are the deepest representations of a war which is not fought using airplanes and weapons any more by now, but it uses new punishment instruments and fight ones to divert the juridical rule for specific scopes; law is called to force itself in response to the State's needs. Consequently, there is not a Rule of law but the law of State.

A lot of these straining and juridical changes caused by war on terrorism undoubtedly are making our society less democratic and less safe. Probably after the terrorist attacks, it would have been better taking the opportunity to do a global police operation in collaboration with the police of different countries and world secret services in order to find out the culprits, arrest them, define a map of terrorist organizations and cut themselves off. Nevertheless, they have chosen another method that overlooks the limits and the risks that a drift of law and order should protect.

4. State of exception

A saying goes: 'too many times the urgent doesn't leave time to the important'.

So 'the urgent called terrorism' justifies and keeps on justifying the decisions of the Administrations that outclass the importance of positive law.

At the time when governments, by virtue of severe and serious contingencies, take political decisions without any support by a principle or an existing legal system, we face a particular nuance of political power known as state of exception.

It allows 'to rise up' above the law and to act to overcome the emergency. But a governor should be allowed to act in the best interest of the country even if this had to constitute a breach or infringement of rights laid down specifically.

Carl Schmitt (1888-1985), a jurist and German political philosopher, was among the first that examined state of exception[31] and pointed out a clear distinction between legality and legitimacy; this distinction is strictly connected to the sovereign's political decisional autonomy, concerning the possibility to declare it.

In fact, state of exception represents a kind of possible parallel reality as to the Constitutional State; according to Schmitt[32], it is a miraculous evidence that could reside in a space between natural law and positive law, acquiring a connotation which is not juridical but pre-juridical. In this perspective, Schmitt even denies the phrase 'rule of law', because it should be an obstacle to the complete realization of the "*miracle of exception*" by means of the sovereign power/will.

But, at this point, having regard to the recognized prevalence of state of exception on law, whenever the existence of an emergency to solve occurs, it is questionable whether it can substitute its character of exception with that of normality, proper of positive law. That is, if state of exception can substitute the rule of law in a certain way. According to Schmitt this possibility could happen. It could happen that exception became normality and as a consequence, rule.

Thus, state of exception recognizes full powers to the Sovereign (or to the governor) who can state the existence of itself and carry out all the acts he thinks right to overcome it. So, he has got full decisional margin. In fact, the sovereign choices can't be obstructed either at political level (because they are the expression of the highest political organ), or at juridical level. So, there is an interval of law suspension, a kind of *vacuum* that, having the character of exception and, consequently, beyond the scheme of order and predictable and foreseen law, enables the Sovereign a very extended margin of discretion to the point that he can decide what will be suspended and what will be saved in the given order; and he can do this because the same law recognizes this power.

Therefore, emergency and exception speak out the possibility of an excessive political power compared to the juridical one. For this reason, as already stated, exception brings the State back to a pre-juridical dimension, where law doesn't determine the social order but the sovereign's power and authority that acts in order to preserve and maintain itself and its people.

Thus, exception creates the paradox according to which "*authority shows it doesn't need law to create law*"[33]; moreover, it can't be obstructed in its acting, because it is independent and falling in the political sphere which is different from the juridical one; and finally, because its power is always legitimized and recognized by law. For this reason, exception is lawlessness which is after all law.

Santi Romano (1875-1947), a jurist, magistrate and Italian politician, questioning on the application of the military Criminal Code in cases of sieges and recognizing them as a condition of necessity, so of exception and emergency, stated that necessity: "*acts precisely at this point: changing the regular order of competencies, giving governmental powers that didn't fall under its authority otherwise. There will be a governmental*

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[31] C. Schmitt, *Teologia politica*, in *Le categorie del 'politico'*, edited by G. Miglio, P. Schiera, 1st ed., Bologna: Il Mulino, 1972. Italian translation of *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, München-Leipzig: Duncker & Humblot, 1934.

[32] *Ivi*, p. 61 *et seq.*

[33] *Ivi*, p. 40.

competence of its own, which is extraordinary and exceptional, but it is always given by a source of law, and as a consequence, it is not an actually unlawful invention of others' competences"[34].

Today, emergency, of which state of exception is the result, is often one of the most common practices used by political power to justify its control and its authority at decisional level.

Giorgio Agamben, an Italian philosopher, declares that we have got to the ultimate expression of state of exception on a global scale. This determines that law and, in the specific, juridical norm can be contradicted through the (violent) practice of the governmental power, which is always represented as an advocate for law even if it fails internationally, externally, and it maintains a state of permanent exception, internally[35].

Nowadays state of exception is a dominant political instrument that governments attempt to address the emergencies that they have to face. From this point of view, it is an exemplary example the enactment of the Patriot Act on November 13th 2001after the Twin Towers attack by the President of The United States of America George W. Bush. In it is applied the infinite detention and the submission to trial by military commissions of the suspects of terrorist actions. Guantanamo, a prison built up in the military base, is still the effect of the exceptional 'juridical' consequences of the *military order.* Inside the prison there are in detention alleged terrorists, the so-called 'the fighting enemies', in total encroachment of International Law, who have never been brought to regular and fair trial.

Judith Butler, an American philosopher, examines this aberrant reality and the new methods of control and detention that spread out from Guantanamo[36]. According to Butler, this kind of models of detention and control reproduce the developing of power strategies at a global scale. So, they, are the celebration of the exercise of official authority through the total control, management and submission of individuals or people, considered dangerous on the basis of criteria of presumption and prevention, as well as on economic and ethnic considerations. It would be a new form of totalitarianism, which the western countries would be inclined to and it is manifested through preventive criminalization of any individual or ethnic groups considered potential and alleged advocates of social disorder. In this regard, Bauman, a Polish sociologist and philosopher, develops the concept of "totalitarian solutions" in cases where some human beings are classified in redundancy or unnecessary[37]. The first example that comes to mind are the policies of treatment and containment of migration flows, where the exceptions applied to individuals to whom is recognized the status of not-citizen, become rules that are accepted and shared.

In Italy, the Identification and Expulsion Centers (CIE), established by Turco Napolitano Act on immigration in 1998 are centers of detention where subjects without residence permits live. When they were established (at first called CPT), they were considered a 'novelty', an innovation in political and legislative scene. In fact, any form of detention hadn't ever been previously covered towards individuals till after they have

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[34] S. Romano, *Sui decreti legge e lo stato d'assedio in occasione del terremoto di Messina e Reggio Calabria* (1909), in Id., *Scritti minori*, 1st ed., vol. I, Milan: Giuffrè, 1990, p. 367.

[35] G. Agamben, *Stato d'eccezione*, 1st ed., Turin: Bollati Bornghieri, 2003, p. 111.

[36] J. Butler, *Vite precarie. Contro l'uso della violenza in risposta al lutto collettivo*, 1st ed., Rome: Meltemi, 2004, p. 73 *et seq.*

[37] Z. Bauman, *I campi: Oriente, Occidente, Modernità*, Edited by M. Flores, *Nazismo, fascismo, comunismo. Totalitarismi a confront*, 1st ed., Milan: Bruno Mondadori, 1998, pp. 15-35.

committed a crime. In the centers CIE, instead, subjects are actual prisoners, even though legal obligations that fall likewise within the emergency and security polices for the treatment of migration flows, classify them as guests.

In France, just over a year ago, former president François Hollande proposed to introduce into the French Constitution the state of emergency and the possibility to revoke the citizenship to people condemned for terrorism. On the one hand, such a proposal – subsequently withdrawn following a no consensus and numerous differences in the House – aimed at developing government powers as regards state of emergency and as a result an increase in the powers of police in case of 'strong threat' for national security; on the other hand, it aimed at revoking the French citizenship to whoever had been convicted for crime constituting a serious attack against the life of nation.

Thus, the new security measures about terrorism, and the urgent decreeing on immigration and more generally, the policies of dealing with emergency determine new forms of power and control and new procedures for exemptions and exceptions of the positive law, in particular, of criminal law. Then, in some cases as Guantanamo, they have accepted that prisoners were judged by military commissions, making completely inconsistent the role of the ordinary judiciary.

The preventive and presumptive decision on the danger of some subjects or ethnic groups primarily from police loses its provisional measure to become rule. Moreover, the powers of police are proceeding with a recognized autonomy that let them circumvent the intervention of the body in charge that is responsible for those statements and the following measures to apply: the judiciary. The *longa manus* of government's executive power, that's the police, strengthens while jurisdiction and law weaken.

Emergency makes its own way; it becomes law.

So, in the contemporary world, governmental power frequently issues laws of 'emergency' legitimizing and immunizing itself, through the instrument of exception. Such an instrument let the administrations confine themselves in a space of autonomy that enables the political sphere to act without considering what has been established by legal obligations. In addition, as government power is the expression of legal recognition, state of exception seems to be a paradox: it is law that is not law.

Schmitt, for his part, as seen, solves this paradox and this coexistence, treating the coexistence law/exception inside the same juridical ambit, considering the exception an integral part of rules, where the rule is called to govern the predictability of events while exception the unexpectedness of the same ones.

But this analysis finds some opponents who think emergency, through state of exception, can be transformed in the decision-making excessive power of the governments at the expense of legislative power and defense of fundamental rights, namely that state of exception can suffocate the rule of law, breaching its guarantees. War on terrorism has introduced and justified stricter criminal measures against 'enemies'. Several exceptional practices of control outside the law have stabilized as a rule, "*the opportunity and the means, through which the extralegal exercise of the state power justifies itself indefinitely, setting itself as a more or less permanent factor in the political life (...)*"[38].

It seems that in emergency, guarantees and fundamental rights have been suspended in the name of a sovereign and authoritative authority that punishes any

[38] J. Butler, *op. cit.*, p. 90.

person who may oppose it. Thus, more and more oppressive criminal measures and the limitation of civil rights are the combination on which state of emergency is based. In the insecurity century, they cling on the miracle of exception.

The emergency policy, in response to widespread sense of fear and uncertainty for future, strengthens the powers of governmental administrations.

They ask for protection, certainty that specifically don't seem even to come through the application of punitive and securitarian regimes. Constitutional state will be replaced with punitive state that through the means of punishment refers to *extra legem* authoritative legitimations. But now the result doesn't seem to be that hoped. The level of distrust in the political action and fear towards any threats to the order both inside and outside don't seem to derive benefit from this new governmental set-up, which however, doesn't seem to be able to guarantee the institutional order. Fear asks for security, but fear policies, instead of activating right means of answer, denounce their crisis, they look like destabilized by a short circuit trigged off between legislative power and executive one, between rule of law and state of exception. In that way, fear amplifies as well as mistrust and violence; it becomes widespread common fear which has lost the role to unify people and address the State towards forms of rational order and opportunities of freedom inside law (guarantor of security). Nowadays, common fear becomes the herald of passions, tensions, feelings which haven't anything to do with the enlightenment reason that is the base of the modern rule of law. They are feelings that 'they can be tricked easier' and for this reason they can deal with them not so much through the legitimation of order as originally conceived but through new policy needs of democracies. After all, not to soothe this fear is useful to political power in order to get much more authority and exercise an unlimited control.

Maybe it would be necessary a reconsideration of these forms of government. Politics of today establishes itself through the instrument of exception which becomes repression, but any punitive rush failed to demonstrate the invulnerability of institutions, the first and fundamental element to build a social stability again.

5. The criminal law of the enemy

In times of crisis, where the terrorist threat is in ambush, everyone is called to prevention. The bigger the treat is the more anyone is called to react and the action has a preventive and presumptive character (as above-said). On the basis of this reasoning, governments work to increase the approval of a majority so that everybody accepts the restrictions of personal freedoms and in some cases, the clear breaches of international law, on behalf of a higher interest of protecting the country. The infinite and indefinite expectancy of a terrorist attack supports the *governance* of the 'state of prevention', apparently addressed to protect the foundations of the Rule of law. Prevention means anticipating at the present the possibility that something will happen in future without having the certainty of it. Preventively the powers of police increase out of all proportion. Controls, searches, interceptions, the mapping of web researches, security cameras and detentions in cases of alleged affiliation with terrorist organizations increase; the gap friend/enemy foments suspect again. With the expression *Racial profiling* they mean that some subjects of the same ethnic group or religion are highly suspected and, therefore, a greater control is required for them. The necessity of a greater attention pushes exception beyond the limits of law and justifies the restriction of freedom on the basis of the presumption of guilt whose research is sometimes prejudicial and indiscriminate.

But it often happened that the terrorist profile didn't correspond to what one could have expected after the distorted mass media communication. He wasn't an irregular immigrant, without residence permit, he wasn't a refugee in need or a poor needy person. Most of times these individuals have citizenship and regular residence permits of the country where they live (their families are sometimes settled down from generations).

Then, it was a neighbor, in some cases as it would say 'of good family'. All these increases on the one hand, mistrust and on the other, it strengthens the necessity to be all controlled[39]. In a kind of a modern Big Brother, everyone accepts to be watched because among all people a threat could hide. And everyone accepts that the guarantees of law, first of all the presumption of innocence, as defined in Article 11 of the Universal Declaration of Human Rights of 1948, as the right to be given a fair trial (think of juridical and human aberrations committed in Guantanamo) change into the direct opposite, that is, into the presumption of innocence and into the restrictions of fundamental freedoms and into trials without any guarantees for the accused person, waiting for the indefinite frantic searches can support or rebut the presumption itself.

Perhaps in the end, in the society of 'could be' it's only necessary to demonstrate the possibility of a terrorist attack – whatever this would mean – to justify a conviction[40].

So, in times of emergency as repeatedly stressed, Rule of law denounces its legal incapacity for managing terrorist threats and it is forced to draw back distributing its powers in different fields, as politics, accepting they are almost completely subverted as well as enforced in exploiting modality and highly repressive one. In the new political economic emergency dimension Constitutional State[41] plays the role which constitutes more an obstacle than an incentive, that's the reason why its powers are subjected to a fast and continuous erosion.

In fact, the insecurity society reconsiders and weakens the old sovereignty: international, transnational, intermediate, supranational bodies wear away and hoard the spaces of traditional governmental institutions, foreshadowing the image of a State that becomes a simple institutional order of security[42].

Then, administrative-governmental structures are born; they are in power. It seems to die, instead, the State-identity incapable of keeping step with a completely different world that isn't built on the rational-economic-juridical-political scheme anymore.

Forms of social 'counter-power' are established and the primary form of political-juridical organization plays the role of mere complementarity and subsidy of administrations.

Constitution state that is State-identity changes into State of exception that is State-function, promoting the decline and the crisis of the old form of social regulation, making still more problematic both the democratic national self-government and the protection of the fundamental rights as well as they were defined at the dawn of modern society.

Thus, global changes cause a decline of the old Constitutional State seen as the set of state machinery and institutions that guarantee order, control and protection of rights

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[39] U. Beck, *Conditio Humana. Il rischio nell'età globale*, *op. cit.*, p. 170 *et seq.*

[40] *Ivi*, p. 173.

[41] In this regard, the Constitutional State is to be understood as the highest expression, as well as the modern evolution, of the Rule of Law.

[42] J.C. Paye, *La fine dello stato di diritto*, 1st ed., Rome: Manifestolibri, 2005, p. 42 *et seq.*

of those people who are new modern free rational independent citizens. Nowadays, the rights guaranteed are emptied and reduced as a mere legacy of the past.

In this scene, State is powerless to a frantic reversal of roles and the right, which it exercised and which constituted its power and control instrument, loses its function of guarantee. State right moves towards new juridical forms, mainly case-law, administrative or private ones that reflect the decay of State. Constitutional State that is depersonalized, delocalized and shattered, now changes into internal administration then international body. It is a fact that it sees the increase of power of technical bodies for managing and monitoring inside, *authorities*, and the increase of judicial and parajudicial powers which represent new forms of neo corporate control of global society.

The old combination of Constitutional State and law with which it was in power and it administered the law, goes down; so, a new phase of managing the order through Administrations is born.

The supremacy of law that is the expression of the abstract general will be enough to answer to emergencies of modernity. In fact, it is important that the normative abstractness has an 'operating arm' that supports and satisfies citizens 'needs.

In fact, the new challenges of the globalized world and the new tasks to which the State is called to act, need a functional and organizational system that characterizes its 'activities on the ground'.

The governmental Administration therefore, becomes the State itself whose operativeness and decision-making ability substitutes law and they become necessary in order to suddenly cover up the breaches of a system which can't respond to the ongoing changes any more. Thus, it becomes a direct projection of what in the past was the sovereignty force.

There is more. State-function, by virtue of the key role that governments recognize it and reckoning that the best answer to threats is repression, is tending to become criminal State.

Loic Wacquant, a French sociologist, as regards security policies, observes that through them punishment policies are taken into account. They are fomented by: "*an alarmist speech unless catastrophist about insecurity, fostered by war images and broadcasted until the saturation of commercial media of big political parties and by professionals of maintaining order*"[43].

To this end, war on terrorism is the slogan that anticipates the governmental choices of exception and opens its way to criminal State and to that form of right known as *criminal law of the enemy*.

Günther Jakobs, a German jurist, has been the first who theorized this specific branch in 1985. According to Jakobs, the entire criminal justice system is subdivided into rules referring to the "*traditional*" criminal law, that is, that one enforceable to offenders and the "*not-traditional*" system where there are dispositions that should be legitimized only in case of "*legal necessity*"[44]. From his point of view, two different forms

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[43] L. Wacquant, *Punire i poveri. Il nuovo governo dell'insicurezza sociale*, 1st ed., Rome: DeriveApprodi, 2006, p. 18. Original book title: *Punir les pauvres. Le nouveau gouvernment de l'insécurité sociale*. Marseille: Agone, 2004.

[44] G. Jakobs, *Kriminalisierung im Vorfeld einer Rechtsgutverletzung*, in "ZstW", 97, 1985, p. 751 *et seq.* See A. Gamberini, R. Orlandi, *Diritto penale del nemico? Una analisi sulle condizioni della giuridicità*, in *Introduzione a Delitto politico e diritto penale del nemico. Nuovo revisionismo penale*, 1st ed., Bologna: Monduzzi, 2007, pp. 109-129.

of criminal law should coexist, on the one hand, the *Bürgerstrafrecht*, the criminal law of the citizen, on the other hand, the *Feindstrafrecht*, the criminal law of the enemy; they provide for two different sanction levels because they are addressed to two different subjects: the citizen and the not citizen, lumped together only because they have broken the rules of criminal law. The first one is guilty of having breaking the rules of criminal law but without disowning the state power which is the source and as a consequence, without intentions of subversion of the established order; the second one is guilty not only of having breaking the criminal law but also not to recognize the sovereignty of the state order and so, he 'deserves' to be 'pilloried' in order that he can't undermine the State any more.

The repressive system should be different in this last case as regards the 'ordinary' cases, because it hasn't the function to restore the broken order with crime commission, but to protect the social order and the internal security of State. For this reason, it can be an element of prevention. Therefore, the State could act against its 'enemies' through repressive preventive instruments in order to wipe out those who are not only 'traditional offenders' but also some 'subverters of order', some 'enemies', precisely.

Then, Jakobs keeps on his analysis through a clear distinction between what is inside and outside the established order and consequently between citizen and not citizen. The last assumes the shape of an *alien*, outside the order, and as such, he should be pursued as an enemy[45].

By virtue of this opposition, a new figure emerges; this is recognized or not by law at the same time. It is recognized because it can be the target of repression forms that can get to also to war actions; it is not recognized because the subject is considered 'something else' from the recognition of the principle that whoever, in virtue of the intrinsic quality of human being, is a bearer of fundamental and inalienable rights.

The distinction is not only about legal status but also about punishments inflicted. For the citizen, they will inflict punishments that are in proportion to the crime itself, as a reintegration for the damage suffered by society and its consociates. For the enemy, punishment will have a preventive exemplary function that protects the state order; for this reason, they will be able to inflict it even before the real crime was committed in order to guarantee the established order.

Protective custody, deprivation of freedom and whatever is necessary to prevent and punish subversive endeavors will be instruments which the penal system can use in order to eradicate any terrorist and subversive attempt[46].

In the condition of a state of necessity at legal level, the State will be able to enact all the appropriate security measures in order to protect its internal order and beat the enemy threat. Before the State there is a subject, an offender to whom no forms of protection and no rights will be recognized. The reason of an unlimited punitive action is recognized not only in the necessity to neutralize the enemy but also to prevent the national legislation falters as regards its stability and sovereignty[47].

Although Jakobs theorized the penal law of the enemy much earlier than the outbreak of the war on terrorism, his analysis is now taken in great consideration and it is at the root of the continued self-legitimization of repressive policies that are peculiar of the penal State.

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[45] *Ibidem*.

[46] *Ivi*, p. 123.

[47] A. Caputo, *Introduzione, Verso un diritto penale del nemico?*, in *Questione Giustizia*, Fascicolo Quarto, Milan: Franco Angeli Editore, 2006, pp. 623 *et seq.*

In fact, one of the most characteristic elements of this war is the strengthening of the repressive and punitive methods. In the aftermath of the massacre of the Twin Towers and under the excessive power recognized against terrorism, the President of the United States of America, George W. Bush was given the opportunity to jail any subjects suspected to be an *enemy combatant*.

According to Jakobs's theory, here is one of the cases where the respect for the rights guaranteed can be evaded during a trial. The prime concern to defend the legal system and its social order oversteps the right. The government claims its autonomy and puts into operation a set of strategies for their implementation. Public prosecutors see their role extended by virtue of emergency and not by rule, despite the application of criminal law doesn't cover the allocation of the emergency powers to a person who is called upon to implement it.

The showmanship of violence, crisis, emotivity, emergency become a single body throughout the exception that allows the issuing of acts by government bodies which replace the law in force.

The *Declaration of National Emergency by Reason of Certain Terroristic Attacks* is the result of emergency that allows G.W. Bush to issue the *Patriot Act* on November 11th, 2001, and the *President Issues Military Order*, Order and Instructions for the military Commissions asked to judge the suspects of terrorist activities or of activities that are against national order. So, emergency becomes law.

From that moment on, the extraordinary production of instruments to prevent, block, punish the enemies, *the foreign fighters*, the terrorists or whoever threats the order has multiplied worldwide. The governments have pushed for a legal production of emergency that felt outside the criteria of judicial production, which are the holders and the guarantors of the absolute principles to protect human beings[48].

Therefore, they try to legitimize the war as a model of production of order and the criminal law of the enemy, as a necessary instrument to face up the threat that comes from 'criminal enemies' whose crimes or presumptions of crime have to call the governments to a severe answer, regardless of the rules of national and international law. War and war criminal justice replace the Constitutional State and they wear new forms where the political power substantiates. We are witnessing the new political system that through external pressures which don't come from the established order, takes on itself the possibility to delete the legal status of the individual and to act by virtue of its authority. The result is a deep vacuum, a blackout of the establishment plan of the allocations of power inside the State that determines a deep crisis of the Constitutional State and the blind rise of a State of exception that has not solved the emergencies for which it has been imposed.

6. Conclusions

In this article we tried to analyze various aspects relating to the topic of terrorism. We started by exploring the old form of terrorism up to its modern form, transition within which some issues of particular relevance were highlighted:

[48] For example, the new Italian anti-mafia code equalizes mafia men, stalkers, swindlers to terrorists. It has a vast discretional and preventive character, giving to Prosecutors the possibility of actions not on the basis of an unappealable judgement but on the basis of preliminary measures for the protection of goods of Public Administrations.

1. the current 'evanescence' of the subjects and targets involved with terrorist attacks, with consequent little interest on the part of the bodies responsible for responding to the emergency, compared to those who will commit the terrorist act, and the impossibility of knowing where the attack will take place; in the 'first-generation' terrorism both the subjects and targets held symbolic and strategic importance;

2. the transformation and extension of the object of interest to terrorism: it go from a national, delimited, governmental form of terrorism, to an object that takes the forms of undefined, supranational territory, not containable within the boundaries of a State, but excessive with respect to them; a terrorism that, just like the society within which it develops, assumes global and all-encompassing connotations from both the space-time and cultural point of view;

3. the admixture between the political and religious nature of the terrorist attacks represents a 'novelty' in today's terrorism, which involves an overlapping of these two purposes of claim that did not exist in the past;

4. the terrorist organization goes from a verticality of power and execution, generally unicellular, to a mainly horizontal, flexible and multi-cellular organization, within which is no longer important the role of the organization considered in its entirety, but that of the individuals, of the fighters, of those who, after having been trained for the purpose, spread all over the world, disseminating terror;

In the light of this summary, it is worth underlining:

5. the existence of two emerging needs in relation to the evident social insecurity: on the one hand, the need to defend the individual and his fundamental rights, even though he himself may be regarded a terrorist, and, on the other hand, the need to protect the established order. In fact, the terrorist emergency pushes the request for resolution as far as justifying some paradigms of order which strain the principles underpinning the Rule of law;

6. we have thus analyzed the evolution of the Rule of law and the elements upon which it is founded: sovereignty, individual rights and principle of equality, held together by the concept of State law. The issue that arose next was to understand that the response to terrorism can be valid only if conducted within the bounds of these paradigms, so as not to risk the collapse of the Rule of law;

7. finally, we focused on the possible collapse of the Rule of law which, with the justification to wage a war on terror and respond to the new security emergencies, turns into a State of Exception and Penal State, punitive and repressive, with no regard for the guaranteed legal and inalienable rights of each human being.

At the end of this work, we would like to emphasize the risks that can be expected if the emergency response continues to be implemented as it has been up to now.

Following the attack on the Twin Towers (11/09/2001), the terrorist emergency reappeared, highlighting the incapacity of government administrations to permanently and radically deal with it.

In this 'managerial confusion', law becomes the experimentation field for politics, and the expectations placed in it that were once certainties, have now become instability certainties that elicit fear responses.

Politics thus directs its attention towards the indefinite and contingencies, shedding its image of instrument of order through the application of statutory rights, which survive time and guarantee inalienable spaces for the protection of the individual. Politics, like the uncertainties that it is called upon to manage, seems unstable and

produces and uses legal – not legal instruments where what was originally lawful can become unlawful in the temporal space of a future open to every possibility.

In the world society, namely, that in which the law loses its role as protector of the rights and liberties of citizens, politics becomes the place where any decision can be made at any time with global repercussions. Moreover, it becomes the ground for applying the administrative powers for handling emergencies.

The politics system, therefore, develops security projects and mandates to the law, or rather, to the law enforcement agencies, the application of these projects.

The demands for treating fear are addressed to politics, which in an act of prevarication and in order to overcome the paradigms of the Rule of law, mandates the tasks of preventive policing and order maintenance to the functional areas of its governing bodies. These tasks are achieved through the use of the law, which has thus become the legal arm of the exercising-State. The old idea of sovereignty now survives in the governmentality technique[49], no longer in the hands of the sovereign State, of the law-State, but of governors, bureaucrats and police. However, the law, even though in the hands of the new policing arbiters takes on a violent and repressive role against social disorder, is nonetheless unable to respond to the renewed stability requirements of the new global community and generates a regulatory chaos unable to subdue the feelings of fear, precariousness and insecurity.

The law, therefore, is replaced by politics which, in turn, is strengthened through the police; a stage that reveals the final collapse of sovereignty as we know it and its definitive fall into the hands of the new 'security managers'. The old concept of Rule of law is thus renewed through police practices that are often violent practices applied without a clear legal agenda, for the sole (infective) purpose of pulling the wool over the eyes of the new global individual hungry for security.

Consequently, the community's fear of terrorism is being used to justify the purposely orchestrated 'technique of repression' and the administration of the emergency. The State-entity, which has already become exercising-State, now becomes, in a society of insecurity, State of exception and the exception turns into forms of administration of human existence which violate the absolute human rights.

The violence generated in this shift does not create security, but merely reports the failure of the premises of modernity.

In fact, the ideas for dealing with the emergency do nothing more than show the semantic emptiness of the concept of security. The security policies that then arise from this illusion are nothing more than 'unfeasible' policies and generate 'the new enemy'.

In the light of this final stage, we will now try to understand what is the impending 'emergency risk'.

In the name of security are construed events and situations represented as *emergency*. Politics then determines what is to be considered an emergency, urgent, extraordinary, exceptional, and which is not. Once established what 'is not part of the order', emergency measures to avert the threat will be issued and legitimized and the law will be called to legally manage the emergency.

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[49] Governmentality is the name given by Michel Foucault to the form that power assumes when it begins to be largely involved in activities of social control. On this point, see M. Foucault, *Poteri e strategie. L'assoggettamento dei corpi e l'elemento sfuggente*, edited by P. Dalla Vigna, 1st ed., Milan: Mimesis, 1994, p. 75 *et seq.*

Deciding on an event and construe it as an emergency becomes a dangerous instrument of power for new administrations. Representing a situation as an emergency outlines the emergency itself and justifies decisions and emergency measures; but the decision is political.

In this way, a circular relationship is established between decision and event (safe, unsafe, exceptional, and ordinary etc.), legitimizing policy measures and practices to channel the event.

The risk of the emergency is that the law loses its hold, becoming in turn a mere emergency executive of political decisions.

The security policy introduces the enemy, outlines his features, draws the emergency, construes the exception and uses the law as an instrument to deal with it. In this way, the law loses its role of guarantor and sees thwarted, nullified and dismissed all the principles of public policy, State sovereignty and individual freedom.

Consequently, the law risks turning into security law, or the law of the enemy, namely, a law that directly takes on the political task of the emergency defense against the threat, the enemy. A law that becomes political, a policy that becomes police force.

But the emergency decided outside the law is politics. In this way, the law becomes an instrument (of power) for organizing and legitimizing a new order. A security order that imposes violence, repression and prevention on blind basis.

Social complexity is filtered through the easy, hasty, dichotomous distinction of safe/unsafe, friend/enemy, inside/outside the order, citizen/immigrant, Christian/non-Christian. This excludes the possibility of a useful and radical political construction of problems, leading to a drastic and barbaric reduction of the legal and cultural complexity, thus reducing the chances to act, choose, and social development.

In the background remain the human rights, which become a mixture of fear, precariousness and instability.

The fight against terrorism becomes itself terrorism, in contempt of the basic principles of the Rule of law and of the basic principles ensuring individual fundamental rights.

Arundhati Roy, a female Indian author, declares:

"*I know perfectly well that on 11 September 2001 something terrible happened, which changes the definition of war, development, wealth, and happiness. Something of which all countries in the world are hostages. But we must try to understand why this happened. I see that there is an increasingly scary gap between the first and the third world. I see that there is greater resentment. I also see that from this gulf between the two worlds and from this planetary injustice, the Taliban and people like them (...) draw their strength. But if Bush says that 'if you're not with us, you are with the terrorists' it does not solve anything (...). And all the beauty of human civilization lies between these two fundamentalisms. And yes, I think they are two forms of terrorism*[50]".

It would perhaps be the case of rereading recent history, not on the basis of emotional response, which all too often is at the root of new forms of political policing, but on the basis of rationality that would perhaps lead us not to deny absolute and essential rights which are the ID of human civilization.

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[50] M. Moncada Di Monforte, (extract from) *Guerra al terrorismo? Dalle utopie umanistiche al razionalismo tecnologico*, 1st ed., Rome: Armando Editore, 2003, p. 202.

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