Università
Ca'Foscari
Venezia

Master's Degree
in Comparative International Relations

Second Cycle (D.M. 270/2004)

Final Thesis

The state of emergency in counterterrorism:

Assessing how the political discourse justifies emergency powers in France and in the United States

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Academic Year
2020/2021

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Abstract

Questa tesi mira ad analizzare come il discorso politico giustifica l'impiego di poteri emergenziali e l'estensione dello stato di emergenza nel contesto dell'antiterrorismo in Francia e negli Stati Uniti. Allo stesso tempo, indaga fino a che punto la narrativa politica può influenzare la percezione pubblica di sicurezza.

Lo stato di emergenza ha radici lontane che nascono nella figura del dittatore nella Repubblica romana, un'istituzione che è diventata un modello per studiare i poteri emergenziali. In tempi di crisi, il potere veniva accentrato nelle mani del dittatore per poter affrontare la minaccia incombente e ripristinare l'equilibrio in un periodo di tempo limitato. Successivamente, nella tradizione inglese ed americana iniziò ad affermarsi la sospensione dell'*habeas corpus* che permetteva all'esecutivo di detenere potenziali nemici senza doverne dimostrare la colpevolezza. Il suo ripetuto utilizzo nel tempo lo fece diventare una misura di emergenza riconosciuta dal diritto costituzionale inglese. Infine, lo stato di assedio francese è un'altra istituzione destinata a gestire situazioni pericolose per la sicurezza nazionale. Nato nella Francia rivoluzionaria, è stato inserito nella Costituzione solo nel 1958. Lo svilupparsi di questo strumento emergenziale attraverso i secoli ne ha codificato alcune caratteristiche valide ancora oggi: durata limitata nel tempo, principio di necessità e proporzionalità, meccanismi di controllo, e autorità conferita esternamente.

Considerato che il concetto di 'emergenza' non ha un significato univoco in tutti gli ordinamenti giuridici, la sua reale percezione varia a seconda dell'osservatore. Tuttavia, di consueto, viene identificata come una situazione che destabilizza l'ordine politico, minacciandone la sopravvivenza. Sembra che episodi violenti, come gli attacchi terroristici, tendano a garantire il supporto popolare alle misure adottate dal governo, anche quando queste eccedono i limiti di quanto è generalmente accettato. Ciononostante, lo stato di emergenza dovrebbe rispettare il principio di limitazione temporale, necessità e proporzionalità. In quest'ottica, al fine di prevenire abusi di potere, alcuni meccanismi domestici di supervisione devono essere mantenuti, come il controllo giudiziario e parlamentare che permettono di valutare la legalità delle misure emergenziali e il rispetto dello stato di diritto.

Nonostante la mancanza di una definizione di terrorismo globalmente accettata, gli elementi che lo caratterizzano si riconoscono in obiettivi civili, scopi politici e mezzi violenti ed intimidatori. Oltre ai regimi di emergenza, gli strumenti ordinari di antiterrorismo a disposizione degli Stati spaziano da interventi militari che prevedono l'uso della forza, operazioni di intelligence, misure finanziarie per bloccare l'accesso ai fondi dell'organizzazione in questione, fino a strategie comunicative volte

a contrastare la dimensione ideologica del terrorismo e interventi a lungo termine che mirano a colpire i fattori strutturali alla base della nascita di gruppi terroristici. Lo scopo dell'antiterrorismo è, quindi, di provvedere alla sicurezza di uno Stato e dei suoi abitanti. Tuttavia, mentre tradizionalmente il concetto di sicurezza era inteso come sicurezza territoriale, negli ultimi tempi si sta affermando il principio di sicurezza umana che mette al centro l'individuo e le sue libertà.

La problematica principale dello stato di emergenza applicato all'antiterrorismo è l'impiego di una misura temporanea per affrontare una minaccia permanente. Inoltre, l'uso crescente di poteri emergenziali per far fronte al terrorismo si deve alla tendenza dei governi di securitizzare la minaccia terroristica e, dunque, di presentarla come una priorità che necessita misure straordinarie. Infatti, il modo in cui la retorica politica presenta una minaccia è determinante nel definire quali saranno le risposte adottate per contrastarla. In particolare, questa dinamica di securitizzazione sembrerebbe gettare le basi per una potenziale e pericolosa normalizzazione dei poteri emergenziali invocati in situazioni ordinarie.

Negli Stati Uniti, il Presidente Bush reagì agli attacchi terroristici di Al-Qaeda dell'11 settembre 2001 dichiarando uno stato di emergenza nazionale che sbloccò una serie di poteri destinati alle misure di antiterrorismo. Da quel giorno, la dichiarazione di emergenza nazionale venne rinnovata da ogni Presidente anno dopo anno e continua a restare in vigore ancora oggi. La conseguenza più significativa e di lunga durata delle scelte di Bush nel periodo immediatamente successivo agli eventi fu la dichiarazione di "Guerra al Terrore" che comportò numerose azioni militari in Medio Oriente e guerre preventive, come quelle in Iraq e Afghanistan. Inoltre, si registrano perquisizioni senza mandato, tortura dei prigionieri e detenzioni illimitate senza processo dal 2001. Nonostante il perdurare dello stato di emergenza, la risposta statunitense agli attentati dell'11 settembre può considerarsi una sospensione 'informale' del normale ordinamento giuridico in quanto l'approccio americano consiste in una reinterpretazione della Costituzione e del diritto internazionale al fine di estendere e adattare la consueta applicazione della legge alle proprie necessità. Di conseguenza, le misure emergenziali vengono in questo modo incorporate nelle normali politiche di antiterrorismo.

La maggiore espressione dei poteri emergenziali deriva dallo USA Patriot Act che autorizza le autorità americane ad utilizzare metodi repressivi nella lotta al terrorismo. In particolare, le aree di intervento sono la sicurezza domestica, procedure estese di sorveglianza, riduzione dei limiti alle indagini, intensificazione delle sanzioni e il potenziamento delle procedure di intelligence. Si tratta di una legge largamente criticata a causa delle numerose denunce di abuso di potere e della violazione del diritto alla vita privata e alla libertà di parola. Inoltre, in assenza di supervisione da parte del Congresso e di un limitato controllo giurisdizionale da parte della Corte Suprema, il potere

dell'esecutivo non viene controbilanciato e il Presidente continua ad agire come comandante in capo delle forze armate.

Nel caso degli Stati Uniti, il rinnovamento dello stato di emergenza nazionale è sempre avvenuto sotto silenzio e con scarse spiegazioni, ossia la ripetizione del fatto che la minaccia terroristica continui. Tuttavia il metodo è cambiato nel corso delle varie presidenze: mentre Bush ha perseguito una politica del terrore, focalizzata sulla costante possibilità di un nuovo attacco e Obama ha cercato di ridimensionare questo approccio e evidenziare il rispetto per i diritti umani, Trump ha sfruttato le misure antiterrorismo per applicarle alle politiche anti-migratorie.

Infine, sebbene l'occorrenza di attentati terroristici di matrice islamica sia sensibilmente diminuita negli Stati Uniti, dai sondaggi d'opinione è emerso che la paura del terrorismo tra gli americani non sia svanita dal 2001. Inoltre, i cittadini americani sembrano essere più interessati al fatto che il governo non sia stato abbastanza duro con i terroristi che al godimento delle proprie libertà individuali.

D'altra parte, in seguito agli attentati di Parigi di novembre 2015, il Presidente Hollande dichiarò in tutto il territorio nazionale lo stato di emergenza che venne esteso sei volte nel corso dei due anni che portarono al suo termine il 31 ottobre 2017 quando venne sostituito da una nuova e controversa legge antiterrorismo. Tra i poteri conferiti ai Prefetti e al Ministro dell'Interno, si annoverano la possibilità di limitare la circolazione di individui e mezzi di trasporto in certi luoghi o fasce orarie, istituire delle zone di sicurezza all'interno delle quali è vietata la permanenza, la possibilità di chiudere qualsiasi luogo di riunione, e la possibilità di condurre perquisizioni domiciliari a qualsiasi ora previa autorizzazione delle autorità amministrative. In entrambi i casi, sono stati frequenti gli episodi di violenza arbitraria da parte delle forze dell'ordine e misure discriminatorie verso le minoranze religiose, in particolare i musulmani.

Al contrario degli Stati Uniti, lo stato di emergenza in Francia è regolato dalla Costituzione e da una legge del 1955. Questo significa che il ricorso a misure eccezionali e l'erosione della democrazia avviene in un contesto formalmente legale. Tuttavia, il Parlamento, al posto di svolgere dei controlli sull'operato del governo, ha agito come un'estensione dell'esecutivo legittimando tutte le sue scelte. Inoltre, la qualità del controllo giuridico è stata più volte criticata per i suoi bassi standard e il modo disomogeneo in cui è stato svolto.

Di fronte a numerosi casi di violenza ingiustificata, spesso non correlata a casi di terrorismo, e di numerosi errori da parte dei servizi di intelligence, il popolo francese organizzò varie manifestazioni in tutte le città del Paese per protestare contro le misure dello stato di emergenza e il

loro impatto sulla vita privata dei cittadini. Questa mobilitazione pubblica è stata tuttavia utilizzata dall'esecutivo per difendere la legalità delle misure emergenziali e dimostrare come il diritto di manifestare non sia stato sospeso. Ciononostante, i sondaggi d'opinione rivelano che la gran parte dei francesi tra il 2015 e il 2017 abbia sostenuto la permanenza dello stato di emergenza a causa della sensazione di paura della minaccia terroristica.

In entrambi i casi, la narrativa politica utilizzata nell'ambito del controterrorismo enfatizza la presenza costante ed imminente del pericolo terrorismo per giustificare l'applicazione di misure eccezionali e poteri emergenziali, manipolando così il senso di insicurezza del popolo. Infatti, grazie a questo diffuso senso di urgenza, il costo delle misure antiterrorismo e le conseguenti restrizioni alle libertà individuali risultano essere più tollerabili da parte della popolazione. La narrativa bellicosa che caratterizza la lotta al terrorismo fu inizialmente lanciata dal Presidente Bush e poi ripresa dal Presidente Hollande nel 2015. Questa associazione del terrorismo ad un conflitto armato permette di legittimare alcune operazioni che altrimenti sarebbero accettabili solo in un reale tempo di guerra. Inoltre, la narrativa politica ha creato una dicotomia tra bene e male, e "noi" verso "loro", che definisce le basi morali su cui si fondano le iniziative militari e le misure emergenziali che discriminano le minoranze religiose, soprattutto se musulmane. Questo è anche confermato dal fatto che l'analisi dei discorsi del Presidente americano e francese rivelano una particolare attenzione per la difesa dello stato di diritto e dei valori democratici, apertamente in opposizione alla morale violenta dei terroristi. Fintanto che il terrorismo sarà presentato in termini di crisi e come un fenomeno eccezionale, misure eccezionali come lo stato di emergenza continueranno ad essere considerate il giusto modo per affrontarlo. Tuttavia, questo approccio può rivelarsi controproducente in quanto contribuisce a polarizzare la società e discriminare le minoranze, creando delle potenziali fonti di radicalizzazione.

Sembra che l'affermarsi della correlazione tra terrorismo ed emergenza influenzi l'opinione pubblica che propende per l'accettazione di restrizioni alle proprie libertà in nome della sicurezza che lo Stato dovrebbe, così, essere in grado di garantire. Fino a quando il terrorismo sarà presentato come un atto di guerra in un contesto altamente politicizzato e permeato da una retorica incentrata sulla priorità del terrorismo, l'estensione delle competenze dell'esecutivo e l'uso dei poteri emergenziali saranno implementati più facilmente. In questo modo, tuttavia, si crea un precedente pericoloso che autorizza l'applicazione di poteri emergenziali in questioni ordinarie presentate come emergenze. Infatti, in entrambi i casi studiati, le disposizioni emergenziali sono state estese a situazioni ordinarie, giustificate in nome della sicurezza pubblica, ma molto lontane dagli iniziali motivi che hanno portato alla dichiarazione dello stato di emergenza. In quest'ottica, la narrativa

politica si è certamente dimostrata fondamentale nell'influenzare la percezione della minaccia terroristica e nel giustificare la continua estensione dello stato di emergenza sia in Francia che negli Stati Uniti.

Introduction

The present work aims at answering the question how emergency powers and extensions of the state of emergency applied to counterterrorism are justified in the political discourses of the United States and France. At the same time, this thesis attempts to investigate to what extent this political narrative influences the public's perception of security. The correlation between the government's presentation of a threat and the subsequent implementation of specific measures embedded in that rhetoric is worth studying because it is the way in which a threat is framed that determines the kind of response that is designed. In addition, the examination of public opinion is fundamental to understand the informal process through which some policies are legitimized while others are rejected. This link becomes even more relevant if applied to emergency powers employed in the fight against terrorism.

States of emergency are not a novelty in the international scenario. The current legal instruments are the result of years of development in different traditions, from the Roman dictatorship to the Anglo-American suspension of *habeas corpus* and to the French state of siege of the 20th century (Manin, 2008). Nonetheless, despite a huge availability of pieces of legislation aimed at regulating the implementation of emergency powers, they remain a much controversial topic due to their inherently wide scope that makes them prone to abuses.

Since they are to be employed in times of crisis, terrorism has become a triggering factor to declare a state of emergency, which would not be so problematic, if it were enforced for a limited period of time, as required by law. Conversely, it seems that there is a growing tendency towards an indefinite extension of periods of emergency and towards the integration of exceptional provisions into ordinary law. This phenomenon is a direct consequence of the depiction of the terrorist threat as an emergency which requires an extraordinary response. For this reason, it is important to investigate the political narrative surrounding terrorism and counterterrorism in order to find the root causes at the basis of policy decisions.

The first objective of the state of emergency is to guarantee national security and prevent further terrorist attacks. When the concept of security is involved, the first association is generally with territorial security, namely the protection of the physical territory of a State. In practice, this translates into measures to protect borders, check migrants, securitize major events and conduct searches. However, there exists not an univocal meaning of security. It can be understood as the safeguard of constitutional rights and national values – as many policymakers stress in their speeches – or it could refer to the protection of democracy itself. In the last few years, another

concept of security has emerged, namely human security, which encompasses a people-centered approach that prioritizes the safety of individuals.

The framing of security represents a fundamental issue for counterterrorism because measures are designed reflecting the priorities of the executive, which in turn are promoted through public speeches. In this context, human security is often disregarded in favor of intrusive counterterrorism operations that are often denounced because violating civil liberties and being discriminatory toward religious and ethnic minorities – especially when jihadist terrorism is involved. Generally, the main challenge for counterterrorism policies is to find a balance between the enhancement of citizens' security from terrorists and the respect of human rights. However, under a state of emergency, another dimension should be explored, namely the fact that counterterrorism should also guarantee the protection of a population from its government's excesses.

If on the one hand, the implementation of tough counterterrorism measures allow policymakers to praise the State's efforts through the evaluation of success based on number of thwarted attacks, arrested or killed terrorists, confiscated weapons and so forth; on the other hand, this quantitative approach neglects the psychological and human dimension of terrorism. What is relevant is that, generally, quantitative data is exploited in political speeches to support the extensions of emergency provisions by stressing their alleged effectiveness, and thus incentivizing their permanence. However, this way of framing the employment of emergency powers is detrimental because it contributes to alter the perception of the terrorist danger as a phenomenon that deserves special responses, among which the restrictions of civil liberties and arbitrary action in name of collective national security.

In this light, the analysis of public opinion concerning emergency measures should be an integral part of the study of emergency regimes. Citizens are the primary recipients of national counterterrorism policies as potential terrorists and, at the same time, are the main targets of terrorism violence. For these reasons, the evaluation of opinion polls results is fundamental in understanding the role that the population plays in legitimizing or delegitimizing certain measures and on the basis of which criteria. In this way, it becomes clearer to what extent political rhetoric and public response influence each other.

Previous studies suggest that declaring a state of emergency in the aftermath of deadly terrorist attacks has a positive effect on the population because the government proves responsive and the public feels reassured. At the same time, the literature assumes that this measure tends to become unpopular in the long-run. Considering the huge public debate surrounding emergency regimes and

the numerous denunciations of arbitrary abuses, we would expect emergency powers to be strongly opposed – which is only partially true. As a matter of fact, in the two case studies that will be analyzed thereafter, public mobilization emerged with the aim of protesting against extensions of the state of emergency and constant abuses of emergency powers beyond the extent of counterterrorism. However, in contrast, opinion polls depict a completely different scenario. People show a general appraisal of the government's initiatives in counterterrorism and even declare their willingness to accept tougher measures in the name of security. Consequently, this inconsistency will be worth investigating.

This thesis analyses two case studies. The first one deals with the United States response to the terrorist attacks of September 11, 2001. President Bush reacted by declaring a national state of emergency and exploited this legal framework to enact controversial antiterrorist measures. Since that day, the state of emergency has been renewed year after year by every president, drawing the country into a perpetual state of exception. The second case study focuses on France's adoption of the state of emergency between 2015 and 2017 as a reaction to the Paris terrorist attacks of November 2015. These two examples differ consistently between them under many aspects, which is positive for this research because it allows to conduct a comparative analysis and reason on the different ways in which policymakers present emergency counterterrorism measures and the way in which the public reacts. Indeed, national specificities like threat perception, power balance and legal structure play a major role in matters of national security. What is particularly evident in these two case studies is that while the United States employment of emergency legislation happens through an "informal" process (Addis, 2007), France officially recognize its adoption of emergency powers.

In order to answer the initial research question, two main methodological tools will be applied. First, public speeches of the political establishment – mainly Presidents, Prime Minister, and Interior Minister – will be analyzed in the second and third chapter. Second, opinion polls conducted on the French and American population will be presented.

Public speeches will function as key instruments to define the official narrative that was adopted in the United States and in France to frame counterterrorism and justify emergency powers. In the text, only the most significant excerpts will be reported and contextualized due to the high volume of available material. The integral texts of the discourses were retrieved online, either as visual material or as written transcriptions, in governmental websites or national archives. Ultimately, when not available in English, French statements were translated by me, trying to stay as closer as possible to the original text.

Opinion polls are the second tool employed in this analysis. They explore public's perceptions of security, the degree of appreciation of and trust in the government counterterrorism strategy and beliefs on emergency provisions. The surveys used in this thesis were conducted by the research centers Odoxa, Pew Research Center, and Institut français d'opinion publique and are retrievable online as open sources. The questionnaires submitted to the interviewed slightly differ among them because they were shaped on a nation by nation basis. In particular, among the ones submitted to French respondents, there are some questions much more focused on the state of emergency than American surveys. This is presumably linked to the fact that emergency powers in the United States were employed in an informal way, as previously explained.

In addition to the analysis of public speeches and opinion polls, other sources will be discussed like legal instruments, which will contribute to define the legal framework within which emergency powers operate; academic contributions, which study the theoretical aspects of emergency regimes and well present their controversies; and newspaper articles, used to reconstruct the facts of 9/11 and November 2015, and to introduce the wider public debate. All these instruments are functional to address the topic from different perspectives and to define the basic notions helpful to answer the research question. Furthermore, some quantitative data on counterterrorism achievements – when available – will be reported with the aim to understand whether the official political narrative is based on real facts or is manipulating them to convey a message policymakers would find more favorable.

This research presents also some limits. First, due to the huge amount of political discourses available, only a reduced selection will be dealt with. Nonetheless, a reasoned choice has been made. In the case of the United States, since the time range is very wide, amounting to twenty years, the vast majority of statements date back to the years of the Bush presidency, in the recent aftermath of the 9/11 attacks. However, some relevant statements by subsequent Presidents Obama and Trump are also reported in order to contextualize emergency powers on the basis of different priorities and historical moments. For the French case study, a temporal criterion was applied: speeches were chosen in correspondence with every extension of the state of emergency from 2015 to October 2017 when it ultimately expired. Second, surveys are not always completely trustworthy because opinions are influenced by many factors, or simply people are not willing to tell the truth. Nonetheless, with this in mind, they still represent a valuable tool to generally understand the perceptions of the population on counterterrorism emergency provisions. On the other hand, this aspect of opinion polls can at the same time be a starting point to reason on what people *perceive* as true from political speeches, contributing to the main topic of this research.

As far as the structure of this thesis is concerned, it consists of three chapters. The first one presents a literature review of existing studies with the aim of providing the basic tools to contextualize the following chapters. The main notions of emergency, counterterrorism, and security will be introduced and put into a wider theoretical framework. Then, the second and third chapters represent the case studies of this thesis. The United States and French experience will be explored and investigated more in depth, respectively. The theoretical notions provided by the first chapter will find a concrete application, with a particular focus on the analysis of policy speeches and opinion polls. Finally, the last section will discuss the conclusive remarks emerging from the case studies and will suggest some reflections for future research.

CHAPTER 1: An introduction to emergency regimes in the counterterrorism framework

Introduction

This chapter aims at introducing the key notions surrounding the state of emergency and its application to counterterrorism through the analysis of existing studies and of the relevant legal instruments. The goal is to provide all necessary tools to understand the wider debate, but also to present the main weaknesses and gaps that contribute to make this topic so controversial and worthy of research. The chapter is divided into three sections: the first one will identify the historical origins of the state of emergency through the presentation of different traditions; the second one focuses on the definition of this institution and its main features, relying both on international and national legal sources, and on academic contributions; the last one introduces the most significant concepts that will be at the basis of the analysis in the next chapters, namely the notions of terrorism, counterterrorism, and security.

1. Historical background of the state of emergency

The origins of the state of emergency can be recognized into three main cases: the Ancient republican Rome (439 BC–202 BC), the Anglo-American liberal tradition (17^{th}-18^{th} century), and the French state of siege (19^{th}-20^{th} century). The analysis will begin from the Roman dictatorship – an institution recurring in cases of invasions; it will continue presenting the practice of suspending the *habeas corpus* in England and the use of martial law during the American Civil War; finally, it will end with the French state of siege. It is useful to design an historical background in order to understand the evolution of emergency institutions in relation to changing political contexts and priorities. A sense of continuity can be perceived along these legal traditions which, thanks to the repetitive use of emergency measures, contributed to the consolidation of some features that overtime evolved into today's state of emergency and still characterize it.

While these experiences shaped the first characteristics of emergency powers, it is in the interwar period, between the First and the Second World War, that the actual process of transformation of constitutional democracies started, in parallel to the emergence of the dictatorial regimes in Italy and France. As a result, the paradigm of the state of exception provoked the evolution of occidental societies' political structure (Agamben, 2003).

1.1. Ancient republican Rome

The experience of the Roman dictatorship has become a model to study emergency powers. The narration starts from the legend of Cincinnatus who became a dictator in 439 BC by assuming absolute authority for sixteen days in order to defeat the enemy which threatened Rome, and eventually restored the previous order resigning from office. Despite relying on uncertain data due to flexible and no written rules giving that dictatorship was initially a customary institution, the study of the Roman institution of dictatorship has however contributed to the identification of some core features that still characterize the state of emergency (Manin, 2008).

First, the dictator enjoyed absolute powers; he could do anything necessary to put an end to the emergency and there was no other figure who could obstacle his decisions. It is not clear how far the undivided authority of the dictator could extend, but it was surely higher than that of magistrates. Since the kind of emergencies that were to be addressed in the Ancient Republican Rome were military, such as wars or invasions, it was deemed more efficient to have a quick and coordinated response, entirely led by one single person, the dictator (Manin, 2008; Fatovic, 2019). This observation is shared by Ferejohn and Pasquino (2004) who argue that the appointment of a dictator by the consuls in times of crisis simplified the management of imminent threats. As a matter of fact, the division of authority and the complex composition of the Senate could not be an efficient path to quickly face an emergency.

Second, the conferral of dictatorship could last only for a short period of time. This feature was considered fundamental in order to be consistent with republican principles. Indeed, the short-term duration of the office counterbalanced the concentration of powers into a single person. This time limit was generally set at six months. Since the dictator was appointed for a specific task in a specific time period, his appointment ceased to be valid automatically after the accomplishment of a given objective and the restoration of the previous status quo (Manin, 2008; De Wilde, 2012).

Third, dictatorship was externally conferred. Dictators were not self-appointed; consuls were in charge of nominating a person at the suggestion of the Senate in order to avoid popular opposition and the danger of the establishment of a kingship. The external conferral assured this and the approval by the citizens (Ferejohn & Pasquino, 2004; Manin, 2008, Fatovic, 2019).

Finally, dictatorship was regularly used over long periods of times; it was not an occasional practice as it is conceived today. This frequent and repeated use allowed the development of practices that became constitutional customs (Manin, 2008).

On the other hand, a different interpretation is suggested by the philosopher Agamben (2003) who does not see a correlation between the Roman experience of dictatorship and the modern state of emergency. He does not conceive the state of emergency as the manifestation of full powers – as it happened during dictatorship, but rather as a void of law. Consequently, the origins of this measure are to be found in another institution. In Roman law, there is *iustitium* which literary means suspension of law. While the dictator was a special magistrate chosen by the consuls who operated in a constitutional framework, *iustitium* produced a suspension of the legal order. For this reason, the state of exception cannot be interpreted through the paradigm of dictatorship, but is to be understood in terms of a void of law.

In addition to the formal powers of the Roman dictator, the role of informal constraints is to be highlighted in order to understand why the institution of dictatorship was never abused. De Wilde (2012) stresses the influence that moral duties, religious responsibilities, political incentives and public pressure exerted on the dictator's willingness to show his commitment to respect republican values and to prove trustworthy. In return for his service, the dictator would gains the trust of the Roman people and the subsequent possibility to pursue a political career beyond the initial six months.

To sum up, in times of crisis in Ancient Rome power was delegated by the consuls to a single person, the dictator, who was given the task of facing a threat and restoring the status quo and ordinary rights in a limited period of time. Accordingly with these characteristics, Ferejohn and Pasquino (2004) call the modern use of constitutional emergency powers "neo-Roman model" because they recognize them in nowadays practices.

1.2 The Anglo-American liberal tradition

The Anglo-American liberal tradition shares some of the elements already identified in the Roman dictatorship, as the external conferral of power and the short duration of emergency institutions, but at the same time sheds light on emergency powers and the mechanisms to control them.

During the Glorious Revolution of 1689, the British Parliament passed some acts aimed at suspending the *Habeas Corpus Act*. In presence of a threat to the State, these acts could authorize the crown to arrest and detain potential enemies without trial. The repetition over time of the suspension of *habeas corpus* until 1745 made it become part of English constitutional law that by the Eighteenth century was recognized as an emergency institution (Tyler, 2016). What is interesting to notice is that also in this case, similarly to the Roman dictatorship experience, the

monarchy was not autonomous in its decisions of detaining suspects without trial, but this power had to be conferred by an external body, namely the legislative. In this way, the emergency regime would be supported by people's consent and more importantly was not waged arbitrarily. In addition, the suspension of the *habeas corpus* and the limitation of liberties were justified on liberal grounds only because being temporary (Manin, 2008).

In this respect, Manin (2008) cites an authoritative English jurist, Dicey, according to whom the expression "*Habeas Corpus* Suspension Acts" is incorrect because these acts applied to arrests and detention only on the basis of a well-founded charge of treason. A suspension could not be motivated under general grounds. This was guaranteed by the principle of retrospective accountability that provided for the possibility of holding officials accountable for their behavior under the emergency once the suspension ended. In this way, unlawful conduct could be punished and previously detained people under a false charge of treason could either be released or brought to regular trial. It was thanks to the time limit that *ex post* controls were possible. In addition, such temporariness of the suspension and the threat of being legally sued could work as incentives to influence officials to act in accordance with the principles of the rule of law.

Turning to the American tradition, it was only during the Civil War that the suspension of the *habeas corpus* was adopted for the first time. In 1862, Lincoln unilaterally granted the military the suspension power to be used in case of necessity to protect military areas, sparking a harsh public debate on the lawfulness of his decision. However, also in this case, *ex post* controls by the courts and the Congress proved essential in assuring that suspensions were really required and that detentions were not arbitrary, but justified on solid grounds. Indeed, the short duration of the emergency enhances the fear of accountability that generally encourages the lawful use of emergency powers (Manin, 2008; Tyler, 2016).

It seems that the current US Constitution has been influenced in a complex way both by the English experience and the Roman republican ideas, through a direct knowledge of Roman histories and Montesquieu's writings about the separation of powers. Article I allows the Congress to suspend the *habeas corpus* under some circumstances, while Article II contains some provisions that can empower the President with special authority to deal with emergencies. He may, for example, become the commander in chief of the armed forces. In light of this, Ferejohn and Pasquino (2004) conclude that while this latter provision can find its origins in the republican structure of emergency powers (the dictator), the first article originates in the English suspension of the *Habeas Corpus* Acts.

1.3 The French state of siege

The state of siege has its origins in the Revolutionary France. It is a political institution destined to cope with dangerous situations to national security, regulated by two French laws passed in 1849 and 1878. The law of 1849 regulated the effects of the state of siege, while the law of 1878 determined the conditions for declaring it and its duration. It is worth mentioning that neither of the two was incorporated in the French Constitution of 1875. The 20th century saw a great and repeated use of this institution in France, especially during the First World War, which was shaped by the republican tradition. The state of siege was binding on the executive and declared by the parliament, namely the only one that could produce as well as suspend laws. The declaration of the state of siege entailed the transfer of public order mansions and law enforcement from civil officials to military forces who were allowed to infringe specific rights in order to pursue their tasks. Furthermore, military courts were in charge of judging all cases of offences against the safety of the Republic. Despite enjoying much more power than ordinary times, the military was still controlled by the government, while the Cabinet and the Prime Minister were under the control of the parliament, in accordance with the typically republican French parliamentary supremacy (Agamben, 2003; Feldman, 2005; Manin, 2008).

The legislation of 1878 introduced time limits regarding the duration period of a state of siege, which was to be set explicitly, and determined the conditions under which it could be declared, namely "in the event of imminent danger resulting from a foreign war or an armed insurrection" (Manin, 2008: 19). The legislature was in charge of checking whether the conditions that provoked the state of siege were still in place or not in order to either decide for a prolongation of the emergency or let its effects automatically decay (*ibid.*).

The French experience demonstrated that the state of siege was easier to declare than to lift. Between 1871 and 1876 it was repeatedly used, and although the legislation of 1878 brought some concrete elements to ensure that the state of siege would be a temporary and justified situation based on observable dangers, it continued to remain in place for a long time even after the end of the War until the end of the Third Republic (Agamben, 2003; Manin, 2008).

The state of siege was ultimately codified within the French Constitution of 1958 during the Fifth Republic under two articles. Article 16 dealt with emergency powers and determined the President's responsibility to declare an emergency in case of "serious and immediate threat" (Feldman, 2005: 1027). Article 36 regulated directly the state of siege that was to be declared by the Council of

Ministers. However, despite the introduction of these two articles, the state of siege continued to be enacted mainly under the provisions of the previously mentioned laws of 1848 and 1878 (*ibid*.).

From this introductory historical background, it can be affirmed that the insertion of an explicit time limit in written legislation proves that the importance of this feature has been recognized and improved since the first experiences in Ancient Rome. This is also true for the measures limiting arbitrariness. Consequently, the affirmation of the principle of time limitation and the recognized necessity of having control mechanisms for emergency powers have become permanent elements that characterize contemporary states of emergency.

2. Defining the state of emergency

This section aims at presenting the state of emergency in a broad perspective. The first part takes into consideration the relevant legal sources, international conventions as well as national constitutions, in order to define the legal framework into which this institution operates. While at international level there are some common guidelines about derogations in times of emergency, at national level there is much divergence among constitutions and much diversity about the directions they provide. Despite variations, this section will nonetheless try to identify the most common features that determine a state of emergency and explain them. In the second part, the academic debate will be investigated through the analysis of secondary sources that define the theoretical framework of reference. The debate concerning the state of emergency and its repercussions is quite various, for this reason different points of view will be examined. Finally, the principles of time limitation, necessity and proportionality, and the control mechanisms of emergency powers will conclude the section.

What is common to all legal and academic definitions of *emergency* is their vagueness. They are as broad as possible in order to include many potential emergencies and allow various interpretations. If on the one hand, the lack of an univocal definition makes the state of emergency suitable for a wide range of situations; on the other hand, this leaves room for arbitrary interpretations that could be abused in dangerous ways.

2.1 The legal bases

In legal terms, a clear definition of state of emergency does not exist. Concerning European constitutions, some of them do not even provide for an explicit recourse to the state of emergency, but vaguely mention “extraordinary circumstances” or “international crisis” as grounds to have access to emergency powers; this is the case of Western European States like Austria, Belgium,

Denmark, Finland and Switzerland. In the vast majority of cases, however, a distinction is made between situations of war and other kind of emergencies. Furthermore, those countries that have recently experienced authoritarianism, such as Hungary, Poland, Greece, Germany and Spain, tend to provide clearer distinctions and tend to deal also with natural disasters (Khakee, 2009).

However, despite the great variations from country to country, legal systems share some common bases. In general, emergency provisions could allow derogations from human rights protection, a shift of powers towards the executive, or the widespread use of armed forces. International standards become clearer when human rights law is concerned because there exist some provisions that allow derogations in times of crisis. In this light, some general requirements that are to be respected when declaring a state of emergency can be recognized: the principles of legality and proportionality, time limit, the respect for non-derogable rights, compatibility with other international obligations, non-discrimination, parliamentary oversight, and the defence of the rule of law. This means that states of emergency must always be foreseen by law, or by special decrees approved by parliaments, and must be limited in time. Furthermore, any measure must be proportionate to its scope, not discriminatory towards specific groups, respectful of non-derogable rights, and compatible with other international obligations. Finally, States should always safeguard democratic rights and institutions, and the right to address courts (Democracy Reporting International, 2020).

2.1.1 The regional and international level

At the international level, the starting point is Article 4 of the International Covenant on Civil and Political Rights that provides for a derogation clause "in time of public emergency which threatens the life of the nation" (ICCPR, 1966, art. 4.1). This same principle has been translated at regional level into Article 15 of the European Convention on Human Rights that foresees a derogation from the States' obligations "in time of war or other public emergency threatening the life of the nation." (ECHR, 1950, art. 15.1). Consequently, these two articles allow States, in exceptional circumstances, to derogate from assuring some rights and freedoms protected by the Conventions. However, as expressed in Article 5.2 (ECHR, 1950), some rights cannot be subject to derogation, namely the right to life, prohibition of torture, prohibition of slavery and forced labour, and no punishment without law. These are complemented by the prohibition of imprisonment due to the inability to fulfil contract obligations, the right to recognition as a person before the law, and the right to freedom of thought, conscience and religion included in Article 4.2 (ICCPR, 1966).

At the regional level, there is also the American Convention on Human Rights that contains a provision for the suspension of guarantees in Article 27. In its wording and structure it is very similar to the previous two, indeed States can derogate from their obligations under the Convention "in time of war, public danger, or other emergency that threatens the independence or security of a State Party" (American Convention on Human Rights, 1969, art 27.1). What is interesting to notice is that, unlike the other two Conventions, the American one openly refers to the fact that the derogation must respect a time period, limited to the persistence of the emergency, in addition to the principle of necessity, exactly "to the extent and for the period of time strictly required by the exigencies of the situation" (*ibid*.). In addition, the ICCPR and the American Convention on Human Rights share a non-discriminatory clause on the grounds of "race, color, sex, language, religion, or social origin" (ICCPR, 1966, art. 4.1; American Convention of Human Rights, 1969, art. 27).

According to an interpretation of the European Court of Human Rights (2020), the customary meaning of *public emergency* refers to a situation of crisis that endangers the population and the normal life of a State. Such crisis should be imminent and is to be considered exceptional in that ordinary laws are insufficient to guarantee public safety. Interestingly, the Court (2020) has not explicitly declared the necessity for the emergency to be temporary, unlike the Siracusa Principles (1984) according to which the derogation must terminate in the shortest time possible to restore the previous order.

In addition, there is agreement on the fact that the assessment of the occurrence of an exceptional situation is responsibility of national authorities, although they do not enjoy unlimited discretion since they are under higher supervision of the European Court of Human Rights and the UN Human Rights Committee. In this light, they assess whether the measures taken by a State were "strictly required by the exigencies of the situation" (ECHR, 1950, art. 15.1; ICCPR, 1966, art. 4.1) or whether they went beyond the principle of necessity and proportionality. Finally, in order for Articles 15 and 4 to apply, the concerned State must inform the Secretary General of the Council of Europe, under the ECHR, and the Secretary General of the UN, under the ICCPR, with an official notification to make the derogation public to all other States (Siracusa Principles, 1984; ECtHR, 2020).

2.1.2 The national level: constitutions

As far as Europe is concerned, there is great divergence between national constitutions. This is due to the fact that international law treaties do not provide for rules regulating the division of powers in

governments or the preservation of the rule of law. Consequently, significant differences in national legislations concerning emergency rules are witnessed.

There seems to be an increasing trend to employ legal instruments to cope with emergencies. As a matter of fact, the vast majority of constitutions include provisions that regulate the necessary preconditions to declare a state of emergency, the entities in charge of declaring it, information on time limits, derogable and non-derogable rights, and the extent of emergency powers. However, the legal management of emergencies does not assure the respect of the rule of law since available instruments, if not enough precise, could be arbitrarily interpreted and lead to abuses (Fatovic, 2019).

On the one hand, there are States that provide for a constitutional framework for emergency situations; on the other hand, other States do not define clear rules for a state of emergency or the transfer of special powers to a specific institution in times of crisis. This happens because some legal systems allow for specific measures to be put in place under extraordinary circumstances without being regulated by the constitution, instead emergency powers are regulated by ordinary law or unwritten customary rules. In constitutions, distinctions are usually made between situations of war, on the one hand, and other types of emergency, on the other. It has emerged from comparative research that no European constitution mentions directly terrorism as a condition to declare a state of emergency. What is more, in the vast majority of constitutions, parliaments are in charge of controlling emergency measures. In particular, national parliaments oversee the declaration of emergency by the government or by a president. The most common practice is the transfer of powers from the parliament to the government, or to the president, who have the right to issue new laws or decrees, which should however still be approved by the parliament in order to guarantee a balance of powers. Another contradictory element is the fact that there are few States with explicit rules regarding the prolongation and termination of the state of exception, which complicates the regulation of such institution (Khakee, 2009).

According to the study that Bjørnskov and Voigt (2018) conducted on 351 constitutions, nine out of ten countries have currently emergency provisions in their constitutions, which they therefore call *emergency constitutions*. As regards their origins, France is considered to be the first State to have introduced emergency provisions in its constitution in 1795. Since then, many countries, especially Latin American, influenced by France began to do the same. As a consequence, by 1850 twenty States had already an emergency constitution. This number continued to grow until 171 countries by 2013. Through their research, the authors identified six elements that should always be present in emergency constitutions to guarantee a clear application, namely the enumeration of the necessary

conditions for the establishment of a state of emergency, the actor in charge of declaring it, the agency empowered to end it, the mechanism to check the legality of the measures employed during an emergency, the entity authorized to exercise emergency powers, and the additional competences conferred to the government.

Research has also showed that over the years, in particular from 1950 to 2011, emergency constitutions have broadened the number of preconditions that justify a state of emergency and discovered that some conditions are mentioned to a larger extent than others – for example, national disasters are more widespread than economic emergencies. Moving to the power to declare, three scenarios could be possible. First, a constitution may provide the executive with the power to declare without needing any other approval. Second, more actors could be involved in the process of declaration and approval of an emergency, as the parliament. Third, a moderated approach could foresee the consultation of another body whose opinion is nonetheless not binding. In addition, in order to implement the separation of powers and avoid abuses, those constitutions that clarify the termination of the emergency period tend to establish either an automatic expiration established at the moment of its declaration or to appoint an actor different from the one exercising emergency powers, that is usually the legislature, designated to end it. Generally, the legislature and the judiciary are in charge of monitoring the measures adopted under an emergency. In certain cases, national courts can employ *ex post* controls on allegedly illicit actions undertaken during the state of emergency. As far as emergency powers are concerned, there is great heterogeneity among constitutions on the competences assigned to governments. They can vary from general provisions establishing that all necessary measures can be applied, to specific references, such as the introduction of new taxes, the suspension of elections, the increase in size of the army or the suspension of some rights (Bjørnskov and Voigt, 2018). However, what the executive cannot do is change permanently the constitutional system (Ferejohn & Pasquino, 2004). In short, the elements that most differentiate emergency constitutions are the conditions that admit a state of emergency, the set of rights that can be suspended, the role of the legislature in the declaration of a state of emergency, and the approval powers.

2.2 The academic debate

One of the most influencing scholars in the academic debate about the state of emergency is Giorgio Agamben who laid the basis of a theoretical framework. Agamben (2003) reasons on the vague terminology “state of emergency” which corresponds to the inner uncertainty of the concept. He prefers the term *state of exception*, conceived as the suspension of the legal order. In this way, the

word exception immediately points to a deviation from the ordinary. As regards the terminology in other languages, the most common are the following. In the German tradition it is referred to as *Ausnahmezustand* – corresponding to state of exception; in the English tradition as *martial law* or *emergency powers*, while in the French and Italian tradition as *state of siege* and *emergency regulation*, respectively. According to him, the state of exception is losing its meaning because it has become the ordinary; it is emerging more and more as an enduring form of government, erasing the borders between judiciary, legislative and executive powers. In particular, the powers of the executive are being extended to the legislative field through the release of decrees and provisions. Consequently, the executive will gain always more power at the expense of civil liberties that will be reduced in name of national security.

In the academic debate there is a contraposition between those scholars who conceive the state of emergency as part of the legal system and those who consider it extrajudicial. According to Agamben (2003), the state of exception is neither internal nor external to the legal system, which is a consequence of the ambiguity of its definition. If the state of exception entails the suspension of the legal order, it does not mean that law is completely abolished because somehow it is still regulated by constitutions or special decrees.

Ferejohn and Pasquino also try to provide a definition of emergency, namely "a situation that produces a grave disturbance of the political system or order, threatening its survival." (2004: 231). The customary threats to the life of a nation are wars, civil wars, invasions and terrorism. In these cases, the perpetrators of violent actions against the national order of a given country deliberately want to challenge or destroy it. Consequently, governments feel legitimated to do whatever is possible to contrast these threats, even suspending some citizens' rights or making massive use of secrecy. For this reason, emergency powers become often very problematic (*ibid*.).

A third voice is the one of Manin (2008) who identifies the state of emergency as a measure that allows States to face crisis or critical events. Generally, emergency institutions are characterized by three elements: the authorized deviation from higher order norms, the presence of special conditions that justify the necessary deviation from norms, and temporal limitations. This means that deviations from the normative order are allowed for a limited time and only in case of critical circumstances.

As a summarizing definition of emergency, Fatovic (2019) proposes "a significant departure from a state of normalcy, triggered by an extreme event that is highly disruptive or threatening to the established order." The real perception of an emergency lies nonetheless in the eyes of the observer

and this determines the response criteria. It has emerged that violent episodes, like terrorist attacks, tend to guarantee civil support to governments' reactions, even when exceeding ordinary rules, because national security becomes the priority. Some of the exceptional measures encompass censorship, reinforced tools of surveillance, unlimited detention, curfews, and others, which would be badly accepted in normal times. Furthermore, the state of emergency has been justified by the belief that a rigid commitment to the respect of the rule of law would render governments' response inefficient (*ibid*.).

The concept of emergency entails the adoption of powers that represent an exception to the ordinary constitutional government. It means that the government derogates from its normal form, and this deviation must be justifiable. In practice, a state of emergency entails a shift of competence from the legislative and the judiciary to the executive. At the same time, the civil and political rights of the population of a given country are reduced (Ferejohn & Pasquino, 2004; Bjørnskov & Voigt, 2020). Indeed, two aspects of emergency rules are usually particularly problematic: safeguarding the balance of powers and protecting human rights and the rule of law because there is a strong tension between emergency powers and the principles of democracy and human rights (Khakee, 2009).

Ferejohn and Pasquino (2004) recognized the tendency of advanced democracies to use ordinary legislation in place of constitutional powers to tackle emergency situations. This trend could be justified by the emergence of a new model of emergency powers, the *legislative model*, which operates through the promulgation of ordinary decrees that delegate special authority to the executive for a limited time period. It means that nowadays emergencies can be tackled effectively without invoking constitutional emergency powers, but just through ordinary policies. Unlike constitutional emergency powers that empower the executive with a difficult-to-control authority, the legislative model seems more flexible and easier to be supervised. It is the legislature that recognizes the emergency, drafts the powers to deal with it and monitor their use. In addition, these powers must be temporary and once the emergency ends, the suspension of rights will be resumed. One of the advantages of the legislative model is the possibility to adapt norms to the circumstances, while constitutional provisions cannot be changed.

2.2.1 The principle of time limitation

As seen so far, the principle of time limitation has always been present in emergency institutions since Ancient Rome and has established itself as one of the main features that justify emergency

powers and individual freedoms limitations in times of crisis. In order to assure its respect, some international bodies have officially declared its relevance.

The Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) has recently affirmed that emergency legislation must be temporary and should be subject to parliamentary checks, in his words "a state of emergency – wherever it is declared and for whatever reason – must be proportionate to its aim, and only remain in place for as long as absolutely necessary." (OSCE, 2020). All participating States to the OSCE undertook in 1991 the binding commitment not to use states of emergency to undermine the democratic constitutional order or to destroy fundamental human rights (*ibid.*).

According to the Venice Commission (2020), constitutions should foresee a time limit for emergency periods, which can potentially be renewed. However, states of emergency cannot be prolonged for indefinite times since, by definition, they should be exceptional, thus temporary. It is usually the role of the parliament to decide upon the extension of the state of emergency, which must always be justified and linked to the persistence of a threat. Consequently, emergency decrees will lose their legal effects with the end of the state of emergency. The Commission has additionally expressed in some of its opinions the fear that the longer a state of emergency, the higher the risk of distancing from the real need of a suspension of the ordinary legislation.

2.2.2 The principles of necessity and proportionality

The principle of necessity refers to the requirement of continuously evaluating the need for emergency measures, while proportionality refers to the fact that measures must be proportionate to the intensity of a threat and must not affect people's rights and freedoms beyond what is needed (Venice Commission, 2020). Despite the centrality of the principle of proportionality in emergency situations, it is often overlooked. Indeed, in the case of terrorism for example, inquiries are often conducted in a rough way and in a hurry provoking "collateral victims"; at the same time, the adopted measures are often characterized by a higher degree of violence and suspicion (Saint-Bonnet, 2017).

On the other hand, Agamben (2003) suggests a different interpretation of the principle of necessity. According to him, the state of exception itself is an expression of necessity in that it fills a gap in Public Law. Since ordinary measures are unsuited to cope with emergencies, new exceptional norms managed by the executive must be applied. Consequently, the state of emergency becomes necessary, producing a space in which law is still in force but its ordinary application is suspended.

However, the concept of necessity remains ambiguous because it is the result of subjective evaluations based on beliefs and future objectives of those who determine it.

2.2.3 The control of emergency powers

The Venice Commission (2020) underlines the importance of the presence of domestic control mechanisms like parliamentary and judicial oversight in constitutions in order to prevent abuses by national authorities. This principle is also recalled in the Council of Europe Recommendation 1713 (2005), affirming that the use of exceptional powers must be subject to parliamentary supervision to guarantee the prevalence of the rule of law. As regards parliamentary oversight, one mechanism of check may be the necessity of a parliamentary approval before the executive can declare a state of emergency. Furthermore, many parliaments are in charge of checking whether the existing conditions still represent an emergency, and of investigating the correct or incorrect use of emergency powers by the executive. The frequent statement about the prohibition of dissolving the parliament under states of emergency in constitutions is indeed functional to the survival of this control measures, to guarantee the endurance of democracy. The second mechanism is judicial review, namely the role of domestic courts in checking the legality of emergency measures and restrictions, and deciding upon the lawfulness of a declaration of state of emergency. Moreover, courts should also guarantee the access to fair trial and the respect of citizens' human rights (Venice Commission, 2020). However, despite the presence of these controls, one of the key features of the state of emergency remains the blurred boundaries between the acts of the executive and those of the legislative, creating confusion in the separation of powers and leaving wide room for abuses (Agamben, 2003).

The role of the parliament is considered the most efficient supervisor method. Indeed, Khakee (2009) agrees that the parliament is considered the best protective mechanism since it is prohibited to dissolve it. The most common practice under a state of emergency is the transfer of powers from the parliament to the government, or president, who has the right to issue new laws or decrees, which should however be always approved by the parliament in order to avoid arbitrariness and guarantee a balance of powers. In addition, the fact that the constitution cannot be altered during a state of emergency guarantees the possibility to restore the previous legal order after the end of the crisis.

According to Ferejohn and Pasquino (2004), there are two ways to check emergency powers: a mechanism of *ex ante* control and a mechanism of *ex post* control. The first type originates in the Roman model according to which the agency declaring the emergency – the Senate – is different

from the agency exercising emergency powers – the dictator. In today's terms, this can be translated into a Constitutional Court or parliament charged of declaring an emergency, and a President or Prime Minister authorized to use emergency powers. This mechanism is useful to control possible abuses because from the beginning there is a division between two entities who have different tasks. The second type sees the same agency responsible to declare the emergency and to exercise special powers. Such agency is therefore directly accountable to courts that judge the actions carried out during the crisis.

According to another perspective, a check against possible abuses of powers is the rule of law itself, which is generally associated to social justice, good governance and individual rights. It provides a normative framework opposed to arbitrary ruling to guarantee objectivity in times of emergency. In particular, three requirements are aimed at limiting arbitrariness: the public promulgation of legal acts, the general application of law irrespective of discriminations, and the avoidance of retroactive law. What is more, the preservation of the rule of law depends upon external factors, namely fair judicial bodies maintaining legality. Independent courts should always monitor the legitimacy of the executive's actions and guarantee access to a fair trial. Nonetheless, under a state of emergency, courts could be replaced by military tribunals that are less rigid on the respect of human rights and more incline to please the government for the higher scope of security (Fatovic, 2019).

Although control mechanisms are designed to limit the extent of possible abuses, recent research suggests that the declaration of a state of emergency due to terrorism leads to an increase in repressive policies towards the civil society, especially in presidential democracies, civilian autocracies and military dictatorships; to a lesser extent this involves also parliamentary democracies. This tendency increases if associated with a high number of casualties and a constitution that makes it easy for the executive to call a state of emergency. Consequently, it seems that limitations to freedom can be somehow justified in the name of security, namely to contrast terrorism. However, empirical research has proved that higher levels of freedom determine higher levels of security; a declaration that contributes to question the real effectiveness of the state of emergency as a counterterrorism measure (Bjørnskov & Voigt, 2020).

3. The state of emergency applied to counterterrorism

This last section focuses on the state of emergency used in the framework of counterterrorism measures. The analysis will now shift towards the efforts to define terrorism and counterterrorism. Despite the fact that legal instruments do not provide a globally accepted definition of terrorism due to cultural and political stalemates, some recurrent elements have furnished a customary framework

to identify terrorist acts. In addition, this lack of a single definition of terrorism hampers the effectiveness of counterterrorist efforts, which vary from legal and military strategies to cultural and social initiatives. Since terrorism should be considered a "threat to the life of the nation" under international law in order to establish a state of emergency, the link between territory and terrorism will be investigated with the support of Rapoport's four waves and a reasoning on the evolution of the concept of security and its public perception. Finally, the criticalities concerning the application of a short duration measure, as the state of emergency, to a permanent threat, as terrorism, are explored.

3.1. Terrorism: looking for a definition

The origins of the term *terrorism* seems to date back to the eighteenth century when it was used in reference to the state of terror of the Jacobin reign, during the French Revolution. Since then, a debate has emerged trying to define the concept of terrorism, which mirrors moral, political, religious, and ideological differences over the perception of the legitimate or illegitimate use of violence. In the nineteenth century, national laws identified terrorism with political offences that were thus prosecuted as ordinary crimes. It was only after September 11, 2001, that States began to feel the urgency of legally framing the concept of terrorism and establishing adequate measures at international level. Consequently, a long period of discussions and efforts to find a definition of terrorism began, but a conceptual stalemate prevented the achievement of a comprehensive consensus. There is nonetheless a general basic agreement on some elements characterizing terrorism, clearly deducible from available international and regional legal instruments (Saul, 2019).

Conversely, according to Amnesty International (2017), because of the lack of a commonly agreed definition of terrorism, the development of vague and self-made definitions by single States and international bodies has created general confusion and left room for abuses. The consequences of this lack of consensus are negatively affecting the measures taken to contrast it. According to the principle of legality, laws should be precise enough in order to clearly identify a criminal offence, without risking deliberate interpretations. Face to this inconsistency, States generally tend to adopt measures that empower the executive and restrict freedoms.

One of the most important Conventions on terrorism is the 1999 International Convention for the Suppression of the Financing of Terrorism that provides a definition of terrorism in Article 2, which affirms as follow:

> "Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: […] (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." (ICSFT, 1999, art. 2)

Today, this is one of the most ratified treaties against terrorism, although it gained momentum only after the 11th September 2001 attack. It concerns especially the fight against terrorism financing, which means the supply of financial and other resources to terrorists, but it also indirectly includes a definition of terrorism. From the quoted article we can extract some basic information in order to identify which elements characterize a terrorist offense. First, the criminal act must have the purpose to inflict harm to individuals who are not actively involved in the hostilities, namely civilians. Second, such act should have either political objectives that influence governments' behavior or should be aimed at spreading terror among the population. In this last point, we can therefore recognize a psychological feature among the scopes of terrorists.

At European Union level, the Council Framework Decision of 13 June 2002 on combating terrorism summarizes terrorist offences under the following terms:

> "Offences under national law, which given their nature or context, may seriously damage a country or an international organization where committed with the aim of: (a) seriously intimidating a population, or (b) unduly compelling a Government or international organization to perform or abstain from performing any act, or (c) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization." (Council Framework Decision, 2002)

This last definition confirms the elements already seen in the previous citation: civilian targets, political aims, and the use of violent and intimidating means. Therefore, despite not having a globally accepted definition of terrorism per se, we can conclude saying that the available legal instruments create a framework of reference in which common features referred to terrorism can be recognized.

The achievement of a comprehensive legal definition of terrorism would conceptualize the specificities of this crime compared to others and above all would maximize transnational

cooperation and establish adequate provisions. However, on the other hand, it is also true that an absolute and rigid legal definition could have some backlashes as regards human rights protection. Indeed, terrorism would risk to involve that use of violence which can be justified in terms of protection from authoritarian regimes, such as national liberation movements. Despite moral and political divergence, we can count on legal and academic sources to define a broad context on which the complexity of terrorism can be studied under different perspectives (Saul, 2019).

3.2. The instruments of counterterrorism

There are currently 19 international legal instruments aimed at preventing terrorist acts, which have been elaborated in the framework of the United Nations since 1963. However, despite constituting a legal framework of reference, most of these provisions reacted to single specific terrorist attacks and did not try to find a common response to terrorism as a unitary threat. In particular, they regard civil aviation, the protection of international staff, the taking of hostages, the nuclear material, the maritime navigation, explosive materials, terrorist bombings, the financing of terrorism, and nuclear terrorism. Furthermore, in 2000 Member States tried to agree on a *Draft comprehensive convention on international terrorism*, which however never entered into force because of a lack of global agreement (UNSC Counterterrorism Committee).

As previously seen, if one of the elements that characterizes terrorism is the use of violence against civilians for political objectives, counterterrorism must be an act that aims at providing security – political, psychological and physical – to noncombatants. However, when employing counterterrorism, States may be able to restore the order and prosecute terrorists, but they could also risk losing their legitimacy. Indeed, many practices that are considered illegal, like torture, are often abused in times of emergency to respond to terrorism (Lewis, 2017). In this regard, the role of the public is fundamental in legitimizing, or delegitimizing, counterterrorist measures. Citizens' participation in counterterrorism efforts contribute to uphold the legality of the government's operations, which are accompanied by a huge degree of political rhetoric in public speeches, and to enhance the work of security agencies through cooperation. This is possible, however, only when there is a certain level of trust on the government and on the police that usually derives from accountability and transparency (Skoczylis, 2017).

The starting point to frame counterterrorism efforts within a global scenario is the UN Global Counterterrorism Strategy that was adopted by the General Assembly in 2006 and is revised every two years in order to keep it updated. This Resolution contains four main fields of action: (1) Measures to address the root causes of the spread of terrorism, (2) Measures to prevent and combat

terrorism, (3) Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations, and (4) Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism (UNGA, 2006). The existence of this international instrument is fundamental in defining the limits within which Member States can act in the fight against terrorism, namely in respect of human rights and the rule of law.

Generally, counterterrorism approaches can be divided into coercive, proactive, persuasive, defensive and long-term. Coercive counterterrorism is the expression of hard power and of the State's use of force. In this category, terrorism is either considered a crime, which is dealt with criminal law, or as an act of war, which entails the use of violence and the onset of a military struggle – as in the case of the War on Terror. Proactive counterterrorism consists in the prevention of terrorist attacks. In this regard, the role of intelligence, domestic police, and border controls are essential in gathering information to foil plots. The persuasive strategy appeals to counterterrorist propaganda to address the ideological dimension of terrorism and in particular terrorists' constituencies; it is a peaceful measure based on communication. Defensive counterterrorism entails preventive measures like target hardening and the monitoring of people and money flows, and mitigating measures that occur in the aftermath of an attack and aim at improving the resilience of citizens and providing psychological support. Ultimately, long-term counterterrorism addresses the root causes and structural factors of radicalization. Among these measures, we find the promotion of human rights, education, development, gender balance, environmental and human security. In order to be successful, counterterrorism cannot rely solely on legal or military instruments; the inclusion of social, political, economic and cultural options would disentangle the terrorist phenomenon from the narrative of emergency (Crelinsten, 2014).

In the political narrative, the success of counterterrorism policies is measured applying a quantitative approach. On the one hand, counterterrorism is considered successful when the number of civilian casualties is lower than the amount of the previous year. This means that the government has succeeded in lowering the number of deaths from terrorist attacks. On the other hand, when tougher counterterrorism measures are employed, their success is evaluated on the basis of thwarted plots or terrorists arrested or killed (Nalbandov, 2017).

3.3. Terrorism as a "threat to the life of the nation"?

Through the analysis of international conventions, we have seen that terrorism is considered a "threat to the life of the nation" allowing States to derogate from some of their obligations. This association implies that there is a physical and material danger for a State. However, legal

instruments do not explain in which way terrorism represents a threat for nations. In this context, academic literature despite disagreements provides some inputs to reason on the link between terrorism and territory. In particular, Rapoport's (2004) classification of terrorism in four waves allows for a consideration of the changing motives and strategies behind terrorist acts, and consequently stimulates debate about the evolution of challenges and State's responses, together with the concept of national security.

The first wave of terrorism is the Anarchist era that took place between 1880 and 1914. In this period, terrorists exploited violent acts, as political actors' murders, in order to trigger a revolution that would overturn monarchies in favor of a new political order. This phase extended to Europe and the United States, and ended with Archduke Franz Ferdinand's assassination in June 1914. In this case, territory – understood as the development of a political identity – was a fundamental element in the anarchist strategy based on the emergence of new territorial institutions that would substitute the previous State. The second wave called Anti-colonial covered the years 1920-1960 that were characterized by the process of decolonization. The dominant ideology was nationalism, which spurred violence that was addressed to the creation of new sovereign nation-states. Territory is inherently bound to anticolonial groups' struggle for self-determination, which is the right to an independent State, hence a territory. The third wave interested the years between 1960 and 1990, in which political ideas merged into nationalist motives, known as the New Left. This wave saw the emergence of the first transnational groups who engaged in armed secessionist insurgencies combined with leftist extremism. One of the key constants of this period was the seizure or the creation of States as the main fulfillment of national liberation. The fourth and current wave, which started in the 1990s, represents a significant change in motivations. Such terrorism is indeed based on religious grounds. From the point of view of Europe and the United States, the Islamic extremism is a case in point. However, this wave is characterized also by other forms of religious extremism as the Christian, Jewish or Buddhist. The link of this Religious wave with territory is less evident because it seems that spiritual concerns exceed territorial interests. However, there have been some terrorist groups that retained territory as a fundamental asset to enhance organizational capabilities and manage resources (Rapoport, 2004).

Al-Qaeda, itself, was a territorial-based organization in its origins, grounded on a pan-Islamic ideal. It initially established territorial goals, starting from the resistance against the occupation of Afghanistan and moving towards the partnership with other States' governments in order to expand its organizational capabilities. Such interest in territory becomes even more clear focusing on the Islamic State, which openly longs for the establishment of a territorial caliphate. Despite the

persistence of a religious and immaterial dimension in the beliefs of this group, it is undeniable that they still operate into an earthly context (*ibid.*).

This analysis about terrorists' concern for territory is a matter of disagreement for some scholars, in particular Saint-Bonnet (2017) who stresses the abstract dimension of jihadism. According to him, jihadists destabilize States without really threatening their existence. The ability of terrorists is to attack the conceptual fundaments of States, making them unable to protect individuals and make them feel safe. For this reason, jihadists can be defined "enemies of modernity" because they aim at destroying the basic idea of State as the entity that provides protection, in order to replace it with a theocracy in which only God can assure security. As a matter of fact, jihadists interpret security as the certainty to access Heaven, which is in opposition with the concept of physical integrity. In this sense, according to him, it is ambiguous to characterize terrorism as a threat to the life of the nation since it does not really threaten the existence of the State, despite causing many victims and material damages, but it questions the ideological figure of the state institutions by endangering its power (*ibid.*).

From the perspective of Saint-Bonnet (2017), today States are faced with an asymmetric war against terrorism: they apply territorial measures to fight a group that relies on an immaterial strength, ideology. Jihadists have been able to put into crisis the modern perception of States as entities that should protect the physical integrity of their citizens, leading them to doubt about the State's real powers. Historically, in order to guarantee security, a State should have a peaceful internal space, and safe borders defended from external threats. Indeed, one of the features of sovereign States is the control over a territory, which distinguishes them from non-state actors, like terrorist groups. The establishment of frontiers determining an internal and an external space permits to contextualize wars between States, in opposition to religious wars that do not know physical borders. What is more, these two dimensions clearly frame violent individuals into two classes: criminals as internal threats and enemies as general external threats. In this way, these two categories can be dealt with available legal instruments, namely criminal law and the law of war, respectively. However, terrorists do not follow this pattern because they do not fit into one of these two categories. In addition, the Islamic State's organization cannot be described with the State model: this is one of the reasons why law experts have difficulties in determining its nature in legal terms. According to him, the groups of Al-Qaeda and the Islamic State do not interpret territory in terms of national, cultural or political identification because they gather transnational members who do not share the same nationality or place of residence because they represent a universal community grounded on religious beliefs. Most importantly, the caliphate is in opposition with the

modern State in that it does not aim at protecting its people as modern States do. On the contrary, its members are ready to sacrifice their lives and become martyrs to accomplish the mission of the organization. In the modern world, globalization has contributed to erase any borders and the world has become a limitless theatre for this new form of war that involves the jihadists and those who want to defeat them (*ibid*.).

Another contrasting opinion is the one of Fatovic (2019) according to whom it is rare that an emergency can affect the whole country and threaten the existence of the nation as a whole. While feelings of insecurity are generalized in times of crisis, the concrete threats to individuals and spaces are localized. In particular, terrorist attacks have uneven impacts on a State; some areas are more affected than others.

To sum up, terrorism is customary understood as a threat to the life of the nation in that it deliberately challenges the political system of a State and launches violent attacks against civilians. The territorial meaning of such danger, conceived as life opposed to death – or destruction in the case of nations, is heavily contested because on the one hand, it seems that religious terrorism is grounded on an abstract idea of caliphate, but at the same time it cannot be denied that jihadists still operate across territories and aim at establishing a state-like organization albeit embodying contrasting principles to modern States. The characterization of terrorism as a threat that could damage a State in territorial terms influences governments' reactions and the countermeasures they adopt. In this sense, an instrument like the state of emergency, which is framed into a territorial context, responds to this specific understanding of terrorism limited to national security without tackling other dimensions that contextualize this emergency in a globalized world.

3.3.1 The evolving concept of "security"

The classic conception of security is the one related to the military protection of the nation-state, internally and externally. This interpretation originates from the realist theory based on the idea that the original task of a State is the protection of its territory and population from military aggressions in a context of perpetual competition among States. Indeed, in history we find enemies that aimed at conquering territories or achieving political aims through the occupation of foreign soil: all threats that required the protection of borders and the employment of military means. However, today's risks have broadly changed due to the dynamics of globalization and of increasing interconnection. Consequently, also the concept of security has evolved, trying to adapt to the current challenges, among which there is modern terrorism (Saint-Bonnet, 2017; Hirsch Ballin et al., 2020).

Since September 11, 2001, the debate about security policies has been reframed into different terms than internal and external security, leaving space for new conceptions, namely economic, ecological and human security. Three dimensions of security can be identified: the substantive dimension – representing the kind of security that policies must guarantee, the reference dimension – referred to the target of security policies as the State, the society or individuals, and the geographical dimension. What is relevant for this analysis is the last one. Geographic boundaries cannot explain the actions of terrorist groups because they are transnational: non-state actors transcend the logics of States' borders. Security therefore has become an inter-state concept, not limited to the national territory of a State. Furthermore, the heterogeneity of terrorist groups, the advancement of technology and the growing privatization of security make it more difficult to identify the origins of a threat, which becomes unpredictable, both in geographical and temporal terms (Hirsch Ballin et al., 2020).

The concept of security is evolving also at the United Nations level. The organ in charge of guaranteeing international peace and security is the UN Security Council. Despite the fact that an explicit definition of security was never provided, it can be derived from the UN Charter. Since the Charter was written in the aftermath of the Second World War, the traditional understanding of security was linked to territorial integrity, namely the absence of conflicts between States. Article 2(3) reads: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" and Article 2(4) "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." (UN Charter, 1945, Article 2). This notion started to evolve together with international changing circumstances. Indeed, attention shifted to human security. In this case, a definition is provided by the General Assembly resolution 66/290 (2012), namely "The right of people to live in freedom and dignity, free from poverty and despair.". It is a people-centered approach devoted to the protection and empowerment of people whose survival is under the responsibility of governments, showing a growing interest in individuals rather than States in international law.

Another element that influences the perception of security and danger is the role of emotions, both from the perspective of terrorists and citizens. The former rely on propaganda and social media to generate affiliation, while the latter are affected by their governments' behavior. The Islamic State terrorist group exploits communication technologies to subjugate its members pushing on religious inclinations and feelings of frustration and fear to spur violence. On the other hand, governments when promoting policies that enhance mutual trust and peace in the population create social

cohesion and sense of security in the society. For this reason, the implementation of measures aimed at territorial protection must be connected to other dimensions. Indeed, "security is a social construct: it is the result of a process in which an actor is able to convince an audience that a referent object is threatened and has to be protected." (Hirsch Ballin at al., 2020: 28).

As just mentioned, the decisions of a government are essential in influencing the reactions of a society. In particular, the declaration of a state of emergency has a psychological effect on the population. In the aftermath of a violent episode, the announcement of an emergency measure reassures those citizens who have been deeply disturbed by terrorism. The importance of collective emotions should not be minimized: a public management of the crisis in psychological terms is fundamental to strengthen national social cohesion and institute a sense of security in the population. This contributes to give credit to the argument that security is not an objective reality, but a perception (Saint-Bonnet, 2017).

In light of this evolving concept of security, it is suggested that the planning of counterterrorist policies should not limit to the national territory, but should focus on a broader regional and international level. The elusive nature of terrorism impedes governments to find adequate univocal responses, such as judicial or political measures that are not enough to contrast it (Saint-Bonnet, 2017; Hirsch Ballin et al., 2020).

3.4. The dilemma of a permanent threat

Ferejohn and Pasquino (2004) recognize two features of modern emergencies: the fact that today's emergencies cannot be limited in time or space and the fact that it is not clear what kind of powers are needed to tackle an emergency. As for the first point, the authors suggest to create an emergency regime parallel to the ordinary one in order to clarify those missing geographic and temporal boundaries. For the second point, it seems that contemporary democracies exercise more intermediate and *ex post* controls on emergency powers. According to them, modern international terrorism poses a threat to public safety that cannot be circumscribed to a time period or a geographical space as could happen for a danger in Ancient Rome. For these reasons, the Roman model cannot efficiently apply to modern circumstances. This is also true for the republican tradition: if the suspension of rights in times of emergencies was controlled by the courts, in modern times a flexible legislative model could be more appropriate.

As Manin (2008) declares, it is not possible to recognize clear margins of the terrorist threat; its nature cannot have a defined beginning and a clear end. In addition, the current danger has a

transnational character which exacerbates the problem of employing emergency measures, designed for national threats. This is also why the concept of national security should be revised. Furthermore, in order to be consistent with constitutional values, the emergency paradigm should be temporary since it is a deviation from ordinary norms. However, the terrorist threat is an uncertain danger which will last for a long time and this creates a fundamental inconsistency. Consequently, Manin shares with Ferejohn and Pasquino the idea that new legislations could be a successful way to counter terrorism without deviating from norms.

As long as terrorism is considered an emergency, emergency powers will be considered the appropriate measure to cope with it. However, there is evidence proving that terrorism should be considered a long lasting threat. In particular, three elements partake to this hypothesis: history, organizational structures, and technology. First, it seems that terrorists operate on a regular basis attacking a range of countries in the same time period. Second, as far as Al-Qaeda is concerned, the organization has a decentralized structure in which participants enjoy great autonomy. The 2003 American invasion of Iraq has caused the dispersion of radical activists which renders their identification and defeat more difficult. Finally, thanks to technology also the smaller groups can have access to weapons of mass destruction that contribute to make these groups more and more violent and dangerous (Manin, 2008).

As we have seen, the expiration of an emergency should determine the return to the previous order. However, extraordinary measures seem to last longer than needed, provoking debates about the growing normalization of the exception. As a matter of fact, terrorism is not a definite threat; it is endless. While specific terrorist groups can be defeated, terrorism per se is a phenomenon that will never be eliminated. The risk is that the periodic use of emergency powers can accustom individuals to lower levels of freedoms by indefinitely renewing provisional laws creating instability in the legal order. This means that a state of emergency, despite being temporary, can still have repercussions on political decisions in the aftermath of its termination. There is evidence, indeed, that many governments have exploited unstable situations after a state of emergency expiration to implement unpopular reforms like the deregulation of business, or the reduction of investments for social services (Fatovic, 2019).

A very recent study conducted by Bjørnskov & Voigt (2020) investigated the consequences of a state of emergency in 79 countries with Western-style constitutions. The main results highlight that in the aftermath of a significant number of terrorist attacks in a given country emergency regimes are more likely to be declared, except for election years because it is an unpopular measure. In addition, richer countries are less likely to declare a state of emergency, while poorer countries with

right-wing legislatures and a presidential form of government are more likely to declare. Then, governments have been witnessed to become more repressive towards civil and political rights in light of terrorist acts. Ultimately, it seems that there is high probability for countries already under a state of emergency to face further violent attacks; a probability that declines in presence of a strong civil society. These findings demonstrate that there is a correlation between the declaration of a state of emergency, repressions of civil rights - especially physical integrity - and further cases of terrorist attacks.

3.4.1 The normalization of the exception

Since September 11, 2001, and the beginning of the global War on Terror the scholarly debate has focused on the growing tendency of the extraordinary to become the norm, referred to as the normalization of the exception. Many scholars agree that states of emergency are becoming widespread and above all worryingly permanent (Fatovic, 2019).

According to Amnesty International (2017), an alarming trend is emerging in Europe: the declaration and prolongation of states of emergency in response to terrorism are becoming more and more frequent. In addition, emergency powers and measures are being permanently included in ordinary criminal law, eluding the temporal limit which should characterize exceptional circumstances. Consequently, that situation of "public emergency threatening the life of the nation" (ECHR, 1950, art. 15.1) seems to have become perpetual.

Agamben (2003) already in 2003 began to theorize the consolidation of the state of exception as the norm. In his opinion, we live in an effective state of exception from which it is impossible to escape or to go back because the elements that compose the rule of law are deeply challenged: the concepts of State and law do not correspond anymore to their original meaning. The provisional effacement of borders between the legislative, executive and judiciary powers, whose balance is fundamental for the well functioning of a democratic government, risks to become an enduring practice in ordinary times. In this way, a specific feature of states of emergency would become embedded in normal polity. In addition, the establishment of a permanent state of exception would represent an exacerbation of the state of fear that is thought to characterize modern societies.

The growing use of emergency regimes to cope with terrorism is also due to the tendency of securitizing the terrorist threat. Securitization involves the framing of political issues or tensions as threats to security by governments, transforming them into priorities and allowing for the employment of extraordinary tools (Hirsch Ballin et al., 2020). What is more, this concept of

securitization together with the ideal of the War on Terror are legitimizing some measures that endanger human rights and seem to damage individual freedoms beyond the principles of necessity and proportionality. Among them, the most common are the large use of secrecy, prolonged detentions without trial, reduced freedom of expression due to the ban on public demonstrations, and excessive surveillance of minority groups (Amnesty International, 2017). As regards this last point, some emergency measures tend to affect mainly members of some specific ethnic or religious groups, in particular Muslims or Middle East individuals (Fatovic, 2019).

Since the state of emergency and emergency powers employed as counterterrorism measures directly affects citizens' life, this international tendency to embed emergency measures into ordinary national law and to prolong states of emergency for indefinite times, which has been called normalization of the exception, has triggered many concerns that have translated into an intense public debate.

Conclusion

This chapter has outlined the main characteristics of the state of emergency and its application in the counterterrorism framework. The legal as well as the academic debate present many limitations due to the absence of a comprehensive definition of terrorism and the broad understanding of the concept of emergency that determine the inability to design effective laws and tools to fight terrorism. Furthermore, the disjunction between a temporary institution and a permanent threat makes the state of emergency a seemingly inappropriate instrument to cope with international terrorism. Finally, harsh implications for fundamental human rights and civil liberties contribute to generate criticism, which is further fostered by the growing tendency to normalize exceptional powers.

In light of the concepts explained in the chapter, one of the questions that arises is how policymakers justify the adoption of emergency powers and the extension of states of emergency in the counterterrorist context given that they entail the restriction of civil liberties and a wide range of abuses, and the fact that they should be temporary. The literature seems to tell us that the declaration of a state of emergency in the aftermath of a terrorist attack has a comforting effect on the population. However, it should be investigated whether this initial positive response is preserved in the long-run or whether the perception of security, changing over time, influences also the general appraisal of counterterrorism emergency provisions. In particular, since emergency regimes should be declared only in case of imminent danger, it would be meaningful to understand how the

political narrative shapes the perception of the terrorist threat in order to justify the extended use of exceptional measures.

CHAPTER 2: The United States case study

Introduction

The United States case study of counterterrorist emergency powers is quite peculiar. Despite an official declaration of national emergency, the US response to terrorism since 9/11 can be considered an *informal* suspension of normal processes (Addis, 2007). Indeed, the low attention of the general public to the nature of emergency powers (Mastor, 2008: 64) and the government's wide range of action determined the transformation of emergency measures into ordinary counterterrorism practices. The confirmation is provided by the fact that declarations of national emergencies seem to be rather frequent in the US, like the national emergency linked to the 9/11 attacks, which has been renewed for 20 years now and is at the basis of the War on Terror.

This chapter will present the United States resort to emergency powers in reaction to the terrorist attacks of September 11, 2001. The first part will be devoted to the recalling of the 9/11 attacks and the provisions taken by the government in its aftermath, in particular the passing of the USA Patriot Act. A brief excursus into American counterterrorism strategy will follow in order to contextualize the exceptional measures adopted in the framework of the national state of emergency. In this regard, its legitimacy will be investigated through the analysis of American legal instruments and the presence - or absence - of judicial checks on the executive's conduct. Then, after the presentation of these basic elements, research will focus on the central discussion of the issue, namely the public debate surrounding abuses of emergency powers and the justifications provided by the political narrative to justify their use, which will be done with the support of some public speeches' excerpts. Finally, some data on US counterterrorist activity and results of opinion polls conducted on American citizens will be discussed to assess the effectiveness of emergency measures and to evaluate the potential correspondence between political discourse and people's perceptions.

1. Background

1.1. The attacks of 9/11 and its aftermath

In the morning of September 11, 2001, four coordinated terrorist attacks were carried out by the terrorists of Al-Qaeda. A first airliner, which had been hijacked, crashed into the North Tower of the World Trade Center, followed by a second airliner that collided against the South Tower. Later that morning, a third hijacked airliner hit the Pentagon, while the fourth one fell in a field in

Pennsylvania - even if it was destined to the White House. Overall, 2977 people died on that day (National Commission on Terrorist Attacks Upon the United States, 2004).

The 9/11 attacks provoked a general shock, not only in the United States, but globally; however, they were not a surprise. Indeed, Islamist extremists had already warned the country that they would have acted to kill a large number of Americans. Furthermore, despite the gathering of much intelligence data concerning potential big plans to attack the United States, domestic security agencies were not successfully prepared due to the underestimation of the threat. As a matter of fact, international terrorism was not a priority of the government before 2001 and the organizational capabilities of Al-Qaeda, guided by Osama bin Laden, were widely underestimated. As a consequence, no efforts were made to improve national security policies and design an efficient counterterrorism strategy on the national soil in view of a potential large-scale attack (*ibid*.).

In his address to the nation from the Oval Office on September 12, 2001, President Bush adopted a high degree of rhetoric in reaction to the attacks. In particular, the sentences "Terrorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America" and "America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world" present a narrative of 'good' versus 'evil' that will lay the basis for the war on terror. After an empathic introduction, President Bush clearly reveals that he would put in place the emergency response plan and mobilize the military. In addition, he warned terrorists that searches to find them had begun (NBC News, 2001).

The most meaningful speech was held on September 20 in a joint session of Congress and the nation. It was in this occasion that President Bush officially adopted the narrative of the war on terror, declaring first that "On September the 11th, enemies of freedom committed an act of war against our country", and continuing with an even stronger sentence, "Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated." With these words, the President declared war on every kind of extremisms in the world and already implied the fact that the American fight against terrorism will potentially never end. In addition, he explained the tools that the State would use to fight the global terror, namely diplomacy, intelligence, law enforcement, weapons and financial channels - in short, any resource at their disposal (Bush, 2001a).

This belligerent rhetoric was fundamental in marking a new approach towards international terrorism, which will influence the post-9/11 counterterrorist policies worldwide. In the case of the United States, this narrative was used not only in the military context, to justify foreign

interventions abroad - especially in Afghanistan and Iraq - but also to justify domestic counterterrorism provisions that extended the reach of criminal legislation, enhanced emergency powers and endangered human rights (Hafetz, 2012).

Concerning the provisions taken in the aftermath of the 9/11 attacks, four steps were fundamental in defining the legal framework within which the President, endowed with special statutory powers, would operate.

First, on September 14, 2001, President Bush issued Proclamation 7463, declaring the national state of emergency - officially, 'Declaration of National Emergency by Reason of Certain Terrorist Attacks' - and signed the Executive Order 13223 that called to active duty the reserves of the armed forces and conferred additional power upon the Department of Defense and the Department of Transportation. Bush's written Declaration reads as follows: "A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States." (Bush, 2001b; HSDL, 2001).

Second, on September 18, under the Authorization for Use of Military Force and by means of the War Powers Resolution, the Congress authorized the chief executive, namely the President, 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 future attacks (Congress, 2001).

Third, on September 23, 2001, President Bush declared another national emergency to implement financial measures aimed at addressing the terrorist threat. Under the International Emergency Economic Powers Act, he issued Executive Order 13224 to prevent terrorist funding. In practice, the US government is authorized to freeze the assets of designated foreign individuals or US citizens that provide support to terrorist organizations or are somehow related to terrorism, by blocking all property and all attempts of transactions. The notice of designation was published in the Federal Register and the designated individuals added to the list of Specially Designated Nationals (Department of State, 2001).

Finally, on November 16, 2001, President Bush, in compliance with his previous declaration of national emergency, issued Executive Order 13235 that allowed the Secretary of Defense to launch military construction projects as long as they are considered necessary to support the use of armed forces - a special authority that would in any other way be authorized by law (Federal Register, 2001).

Overall, following the 9/11 attacks, the Congress passed more than 130 pieces of legislation related to that event and 48 bills, while more than 260 government organizations were created or reorganized. With respect to key legislation and counterterrorism reforms, significant decisions were taken. First, the biggest change was represented by the introduction of the USA Patriot Act: Preserving Life and Liberty, which aimed at facilitating the exchange of information among different agencies and enhancing investigation methods. Some of its provisions were renewed in 2005, 2009, 2011, and again with the USA Freedom Act of 2015. Second, the Department of Homeland Security was created in 2002, becoming the third largest department of the country. Third, President Bush authorized the highly controversial Terrorist Surveillance Program that allowed the National Security Agency to wiretap without warrant communications by email and by telephone of those people - both into and outside the United States - allegedly connected to Al-Qaeda, and later to terrorism in general. As a result of public criticism concerning secret surveillance, this program was amended and became the Foreign Intelligence Surveillance Act (FISA) that could target only non-American citizens outside the US territory, whose validity was extended several times until its current expiration in 2023 (EPRS, 2018).

1.2. The USA Patriot Act: the expression of emergency powers

The Patriot Act can be considered the better expression of US emergency powers. However, accordingly with the country's application of an informal process, the powers conferred to the government were not attributed to the Patriot Act, but to the US Constitution. This reinterpretation of executive constitutional powers contributed to depict the Patriot Act as an instrument of ordinary law, setting a new criterion for what is considered 'normal' in the fight against terrorism (Kayani, 2020: 165).

On 24 and 25 October 2001, the House of Representatives and later the Senate adopted the law known as USA Patriot Act, which stands for Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism, promulgated by the President on the 26th. It allows American authorities to use repressive methods in order to fight terrorism, justified by the ultimate goal of security. The Patriot Act, in addition to the production of a new corpus of laws, modifies fifteen federal laws, among which the ones related to immigration, banking, and to the Foreign Intelligence Surveillance Act of 1978 - FISA. The main areas of intervention are the enhancement of domestic security, surveillance procedures, the reduction of limits to investigations, the intensification of sanctions, and the improvement of intelligence procedures (Mastor, 2008; Gerspacher, 2020).

The USA Patriot Act is widely criticized for its controversial, and sometimes ineffective, provisions (Piret, 2008; Tien, 2014) and because it clashes with some fundamental rights and six amendments of the Constitution that traditionally enjoy vast protection. Among the most contested provisions there is section 213 which allows authorities to conduct searches in people's houses without the need to inform them. This is considered inconsistent with the fourth amendment that prohibits unreasonable searches and seizures. Additionally, according to human rights activists, it seems that this measure has been abused many times since 2001, in cases not related to terrorism, infringing the right to private life. Second, the definition of terrorism provided by section 802 is considered too vague. Indeed, domestic terrorism is recognized as any activity that endangers human lives on the national territory and that is aimed at intimidating the population or affecting the government through mass destruction, killings and abduction. It is evident that this definition can apply to a wide range of situations, including political opposition or any kind of demonstration, which collide with the first amendment forbidding the Congress to approve laws that reduce the freedom of speech (Mastor, 2008).

On July 21, 2005, the House of Representatives as well as the Senate on the 29th approved the extension of the application of the Patriot Act's measures. The application of some provisions was supposed to be permanent and expire at the end of the year. However, on March 9, 2006, the President signed the Patriot Act Improvement and Reauthorization Act that made a great number of temporary measures become permanent - among them, the much criticized section 218 authorizing secret house searches. In this way, the USA Patriot Act has become the representation of a new and permanent legal order (Mastor, 2008).

2. The counterterrorist framework in the United States

2.1. The American counterterrorism strategy

It was only in the 1960s and 1970s that terrorism became a target of American policymakers. Up to that point, US foreign policy was confronted with enemies recognizable in nation-states, rather than ideologies. The first experience with international terrorism dates back to 1972, in what will be known as the Munich Massacre. After that episode, the term 'counterterrorism' made its first appearance in US political debate. Terrorism arrived also in American soil in February 1993 when a truck bomb exploded in a parking garage in New York City, killing six people and leaving thousands injured. Thanks to the FBI criminal investigation, the guilty party was arrested and convicted in US Federal Court. In the 1990s, the counterterrorism strategy of the United States consisted only of investigations, prosecution of terrorists and immediate retaliatory measures such

as missile airstrikes, with any consideration for long-term measures like prevention. This changed after September 11, 2001, when the American counterterrorism program underwent a radical change (Jacobs, 2017).

Following the 9/11 attacks, the United States needed to design a new counterterrorism strategy that could face the adaptability of terrorist groups, enhancing a preemptive approach for national security. Indeed, since 2001 US counterterrorism has been based on a paradigm of prevention. George W. Bush's program was founded on three pillars: protecting the nation, killing alleged terrorists, and eradicating state-sponsored terrorism. The US reaction abroad - covert operations combined with military actions in Afghanistan and Iraq - marked the new era of American counterterrorism. Domestically, in November 2002, Bush's proposal for a new organization was met and the Department of Homeland Security (DHS) was created through the Homeland Security Act to boost the coordination of national counterterrorist policies. In addition, changes in the bureaucratic system were needed. In 2004, the Reform and Terrorist Prevention Act was signed and the Director of National Intelligence was created. Beyond this, the most significant tools of counterterrorism were provided by the Patriot Act, which improved the government's capabilities to track individuals and allowed FBI surveillance without prior judicial approval. Indeed, major changes happened within the FBI which transformed from a law enforcement agency into a counterintelligence and counterterrorism agency (*ibid.*).

Later on, President Obama pursued the same objectives as Bush, with the only difference being that he adopted a more balanced approach and focused on destroying the network of Al-Qaeda. Obama campaigned in favor of civilian trials for suspected terrorists and proposed the closure of Guantanamo detention center. During the Obama presidency, a huge use of drones was recorded, mainly for targeted killings, in Yemen, Pakistan, Somalia and Afghanistan. His counterterrorism strategy was primarily aimed at killing Osama bin Laden, which eventually happened in 2010. While the international approach to counterterrorism changed, if compared to the previous presidency, at national level much remained the same. However, the coercive and violent interrogation methods previously used were banned by Obama and substituted with new rules carried out by a group of professionals (*ibid.*).

Since 9/11 the main steps of American counterterrorism strategy can be summarized in six steps: the USA Patriot Act of 2001, the establishment of the Department of Homeland Security in 2002, the Intelligence Reform and Terrorism Prevention Act of 2004, the achievement of the EU-US Terrorist Finance Tracking Programme of 2010, the EU-US Passenger Name Record agreement of

2012, and the creation of the National Vetting Center in 2018 that improves the process of identification for people entering the US (EPRS, 2018).

During the past two presidencies, consensus has emerged regarding the belief that the US should limit its military action and presence abroad, investing less in hard power and putting more efforts in capacity building, intelligence and diplomacy in order to be able to create a more sustainable counterterrorist strategy over the long-run. However, the maintenance of some troops in strategic locations could prove successful in preventing the organization of foreign attacks on US soil. In addition, resources are to be equally distributed between counterterrorism efforts and other issues of national security. Unlike Trump's administration that was characterized by the withdrawal from international treaties and institutions, President Biden is rebuilding multilateral alliances as an integral part of the US strategy for national security. The current presidency is also engaged in dealing with the growing phenomenon of domestic terrorism, characterized by white supremacists and far-right extremists. As a matter of fact, following the insurrection of January 6, 2021, the current risk is that the US could become a recipient for violent extremists. Its counterterrorism strategy must, therefore, adapt to these new challenges (Levitt, 2021).

2.2. The legal instruments at the basis of emergency powers

The United States does not own a separate regime for emergencies. However, the President can declare a national emergency which potentially gives him access to 136 statutory emergency powers. At the time of February 2020, 32 national emergencies were active in the United States, including the one declared after the 9/11 events (Kemp, 2021).

Under the National Emergencies Act of 1976, "With respect to acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency." (US Code, chapter 15). In addition, in order to enjoy emergency powers, the President must officially specify which powers he wants to use either in the declaration of national emergency itself or in an executive order, and report to Congress every six months. Ultimately, unless the President renews it or the Congress decides otherwise, the state of emergency expires after a year (*ibid.*).

The Constitution of the United States, unlike the vast majority of European constitutions, does not directly provide for exceptional regimes. Despite not mentioning the possibility of declaring a state of emergency, Article 1(9) of the Constitution establishes the possibility to suspend the *Habeas Corpus* in case of rebellion or invasion, when public security requires it. Thus, in cases of

emergency, the Congress is authorized to adopt exceptional measures to restore the order. Generally, it is the Supreme Court that exerts its control on such measures. This means that in counterterrorism, federal authorities can invoke emergency powers which serve as a starting point for the adoption of special provisions (Mastor, 2008; Hafetz, 2012).

We can adopt the terminology of Adeno Addis (2007: 328), Professor of Public and Constitutional Law, who refers to the US government response to 9/11 as an "informal" suspension of normal processes. Since the Congress did not suspend the *Habeas Corpus* under Article 1 of the Constitution and the US did not derogate from its international obligations under the ICCPR, the American approach is based on a reinterpretation of the Constitution, statutory law and international law. It means that "ordinary processes are essentially drained of ordinary meaning in the name of applying them to perceived new conditions or circumstances." This informal suspension is embodied by the rhetoric of the war on terror by which the US has either considered the normal legal system inappropriate to deal with the exceptional nature of jihadist terrorism or has extended the customary meaning of existing laws to adjust them to its actions. However, at the same time, the war paradigm is not fully applicable to the fight against terrorism. First, while conventional wars do have a recognizable end, the war on terror will arguably never end, as President Bush himself declared on September 20, 2001. Therefore, understanding the fight against terrorism as a war means living in a perpetual state of crisis which justifies the adoption of exceptional measures. Second, from a legal point of view, a reallocation of powers between the legislative and the executive has occurred. Consequently, the President as Commander in Chief has quite exclusive authority over counterterrorism matters; in particular, the Congress authorization is not needed to carry out controversial measures such as wiretapping, ill-treatment of detainees or detentions without trial. This approach entails the transformation of emergency measures into ordinary counterterrorism practices.

2.3. Legitimacy of the state of national emergency

2.3.1 Congressional oversight

Since it is the Congress to empower the executive with emergency powers and to control their use, it would seem a democratic and highly checked process. However, in the case of the United States, the Congress has become a supporter of exceptional powers, contributing to the normalization of their prolonged use (Kemp, 2021). Since the state of emergency is in place, the Congress has never met to discuss its developments and whether to put an end to it (Goitein, 2019).

The role of the Congress is fundamental because it is the only judiciary organ that has access to classified documents that would allow it to exert an effective control on the executive's conduct, unlike courts that can only judge specific cases *ex post*. However, instead of fulfilling its task of legislating, the Congress has preferred to delegate exceptional authority in matters of national security to the executive without providing sufficient and regular oversight (Feingold, 2021).

While presidents must renew the state of emergency every year otherwise it expires, the Congress should review each emergency every six month; this has never happened since 9/11. In addition, the executive has neither reported to the Congress the amount of dollars spent by the President to exercise emergency powers, which is required by law. In 2003, President Bush delegated this task of reporting to the Secretary of Defense. However, some years later, the Defense Department declared that it had never received such records. Finally, the Pentagon has even ceased to publish the regular updates on the number of National Guard and Reserves operating overseas, which was a requirement of the 2001 provisions (Korte, 2017).

Since 9/11 the US President has behaved like a military leader, supported by the Congress that allowed limitations of individual rights in the name of national security through emergency powers. In addition, courts do not counterbalance the power of the executive since many judges were appointed exactly from the ruling party, assuring in this way the endorsement of the judiciary. As a consequence, under the lead of the executive and the military, the whole system becomes permeated with a sense of urgency that leans towards a general acceptance of emergency powers as the new normal (Piret, 2008).

In a speech in December 2016, regarding the administration's management of counterterrorism, President Obama admitted the low commitment of the Congress to review emergency powers. Since the last authorization for waging war released by the Congress dated back to 9/11, President Obama asked for a revision of that power in order to act in respect of the rule of law and accordingly to the changed nature of the terrorist threat. In his words, "Democracies should not operate in a state of permanently authorized war. That's not good for our military, it's not good for our democracy." However, the Congress has always refused to do it (Obama, 2016).

2.3.2 Judicial review

In cases of national emergency, the Supreme Court of the United States has historically avoided exerting judicial review of military decisions, considering them a competence of the President in the role of Commander in Chief. On the other hand, in those cases in which the Court claimed its

jurisdiction on military decisions, it confirmed the government's position, rejecting the arguments of the claimant. After 9/11, however, the Supreme Court has made a great effort to check the legality of counterterrorism measures introduced by the executive and the legislature, even though they still do not provide a comprehensive review (Gross, 2008).

In confirmation of these changing trends, it must be said that, in some cases, the Supreme Court intervened due to the violation of human rights and the absence of effective review. In particular, in 2004, it expressed its opinion in three cases related to the detainees of Guantanamo, in which the Court reaffirmed the principles of the due process and set a minimum standard for the protection of prisoners' rights. This means that despite having previously justified the war on terror, the Court confirmed the right of prisoners at Guantanamo to resort to federal courts. Guantanamo is a territory under the jurisdiction of the United States where the detainees should have access to courts on the basis of the *habeas corpus* (Mastor, 2008). However, between 2005 and 2006, the Congress voted for two laws, the Detainee Treatment Act and the Military Commissions Act, depriving the detainees of Guantanamo the possibility to resort to the *habeas corpus*, circumventing in this way the Court's jurisprudence which affirmed that laws and the Constitution must be respected also in times of emergency (Detainee Treatment Act, Sec. 1001-1006, 2005; Military Commissions Act, 2006).

What is more, the designation of captured Al-Qaeda fighters as "illegal enemy combatants" rather than prisoners of war deprived them of the rights and protections granted by the Geneva Convention in order to have access to military tribunals and indefinite detention. This was considered unconstitutional since it actually suspended the Bill of Rights and the writ of *habeas corpus* (Piret, 2008).

It is interesting to note that the harshest critics came from district judges who declared some provisions of the USA Patriot Act unconstitutional. In particular, the provisions obliging suppliers of internet services to communicate to the FBI the personal data of their clients, the gathering of personal information like email addresses or visited websites, and the practice of wiretapping without warrant were considered in violation of the first and fourth amendments of the Constitution as well as the principle of separation of powers (Mastor, 2008).

3. The public debate in the United States

A public debate related to the emergency regime in counterterrorism was not as intense as in European countries. Criticism comes mainly from independent agencies as the Privacy and Civil

Liberties Oversight Board, non-governmental organizations as the American Civil Liberties Union, and human rights organizations as Human Rights First. As regards newspapers, among the most critical there are The Atlantic, USA Today and the Washington Post. Finally, as previously seen, the Congress seems to have renounced its role as a place for discussion in counterterrorism matters.

Interestingly, opposition to some exceptional provisions came from local communities. In 2003, the application of the Patriot Act was refused by some States like Alaska and Hawaii which were joined, in 2005, by more than 400 local communities that rejected to apply some provisions therein (Mastor, 2008). The fact that criticism comes from local communities and local courts, as previously seen, is significant because it contributes to support the assumption according to which the Congress and the Supreme Court have become embedded into that narrative of emergency that the executive supports.

3.1. Abuses of power

Since 9/11 a wide range of abuses of power has been recorded due to the growing powers of the presidency under the umbrella of the national state of emergency and the diminished work of oversight by courts and especially by the Congress, as previously explained.

While the tradeoff between freedom and security is generally the justification that policymakers provide to make extraordinary measures more acceptable, it must be noticed that the initial costs of lower standards of judicial protection are paid only by a minority of the society, generally Arabs and foreigners. Consequently, the vast majority of Americans will enjoy an apparent feeling of security, while minorities will be the targets of arbitrary treatment (Piret, 2008).

According to the American Civil Liberties Union, the abuses of power in the US since 9/11 can be mainly recognized into warrantless wiretapping, torture, kidnapping and detention, growing surveillance, general abuses of the Patriot Act, government secrecy, political spying, abuse of material witness statute, and attacks on academic freedom.

After 9/11 Bush took advantage of the state of emergency to adopt some measures that were not authorized by the Congress, justifying them as inherent constitutional powers. Among them, he launched a program of warrantless wiretapping and torture and sent an excessive number of reservists and members of the National Guard in Iran to fight a war that was not directly related to the terrorist attacks. As a matter of fact, the correlation between powers invoked by the President and nature of the emergency is not a requirement of the National Emergency Act, which however leaves room for potential misinterpretations and abuses (Goitein, 2019).

As regards abuses of power in the aftermath of 9/11, the extraordinary nature of the Patriot Act allowed wiretapping and secret searches without warrant on the basis of vague evidence. Furthermore, proof of torture during interrogations and degrading treatment of detainees at Guantanamo Bay and other secret prisons is available. This behavior was considered unconstitutional and illegal under the UN Convention Against Torture and the International Covenant on Civil and Political Rights since prisoners in Guantanamo are under the US control, thus these provisions should apply. However, according to the US interpretation that, as previously declared, tries to expand the customary meaning of existing laws to justify its decisions, the ICCPR would have no extraterritorial application and the US Constitution would not guarantee rights to alien unlawful combatants (Piret, 2008).

According to the American non-profit organization Human Rights First (2021), the Congress authorization to the military use of force against the terrorists of 9/11 has transformed into an ever-expanding conflict. This has resulted in human rights abuses as torture, permanent detention, military tribunals and unlawful drone strikes. As a result, this strategy is deemed to have contributed to undermining US credibility as an international defender of human rights and democratic values, while on the other hand providing terrorists with motives to recruit supporters. The organization claims that since US strength lies in its ideals, they should be exalted also in national security matters.

Some other contested emergency counterterrorism measures were drone strikes and ill treatment of prisoners. The use of drone strikes during Obama's Presidency was harshly criticized due to the number of civilian casualties and their violent nature that could not be justified with intelligence gathering to prevent further terrorist attacks. In addition, moral questions regarding the effectiveness and the legitimate use of counterterrorist measures by the US government arose (Jacobs, 2017: 183-184). International lawyers and intellectuals from around the world reacted to the Bush administration’s treatment of prisoners condemning the US for the creation of a parallel legal system that did not respond to international law obligations and to the commitment of human rights protection. The risk was that the US could undermine the rule of law and give rise to the same authoritarian system that it was fighting (Piret, 2008).

3.2. Counterterrorism measures denounced to be ineffective

One of the consequences stemming from a politicized connotation of national security is the presumption that extraordinary responses on the part of the executive are essential to address a threat. Consequently, convinced by this rhetoric that has marked the post-9/11 era, the general

public will not challenge discriminatory or immoral measures and lower levels of civil rights protection. Furthermore, some evidence shows that such tough responses often result in counterproductive outcomes that harm communities without providing counterterrorism achievements.

American Presidents, starting from Bush, have always reiterated that the war on terror is not a war against Islam. Indeed, already in his first speech to the nation, President Bush affirmed that "The enemy of America is not our many Muslim friends. It is not our many Arab friends. Our enemy is a radical network of terrorists and every government that supports them." (Bush, 2001a). This line of thought was, later, pursued by President Obama, "We cannot turn against one another by letting this fight be defined as a war between America and Islam. [...] We must enlist Muslim communities as some of our strongest allies rather than push them away through suspicion and hate." (Obama, 2015).

Nonetheless, despite this firm commitment, American Muslims claim to be targets of stricter surveillance and discriminations. Alimahomed-Wilson (2019) confirms the fact that foreigners are still perceived as threats to national security and are, therefore, treated accordingly. In particular, from her analysis of 113 cases of contacts between the FBI and US Muslims, it emerged that stereotypes guide the intelligence efforts of the FBI that does not act upon evidence of criminal activity, but on the basis of who engages in apparently common behaviors such as travelling, worship, taking photos or joining associations. In this light, the author coined the term "racialized state surveillance" in reference to those State's practices that contribute to depict Muslims as potential terrorists who need to be closely monitored. In addition, differently from the aftermath of 9/11 when foreign Muslims were the main targets of surveillance, more recently it is US Muslims to be mostly inquired.

The Nationwide Suspicious Activity Reporting Initiative seems to have further polarized the society and created a climate of suspicion. This project aims at involving American citizens in the reporting of suspicious activities to local law enforcement who will share information with the Department of Homeland Security and the Federal Bureau of Investigation (Department of Homeland Security). However, Julia Harumi Mass and Michael German (2013), who work for the non-profit organization American Civil Liberties Union, denounced the fact that the widely publicized "if you see something, say something" campaign contributed to erode citizens' privacy and liberties and to persecute some racial and religious minorities. As a matter of fact, the vast majority of accusations received concerned innocent activities that were considered a potential threat to security by citizens. The evident consequences of this initiative are two. On the one hand, it has brought to light the fact

that the American population has been heavily influenced by the 9/11 events and even more by the subsequent political narrative highlighting the presence of a permanent threat for the United States. Indeed, citizens have become suspicious of one another, particularly of aliens. On the other hand, this program was a failure in terms of counterterrorism results since many reports were useless and security centers ended up being flooded with unnecessary material that hindered the regular fulfillment of activities.

Mass telephone records have also been accused of being useless and in breach of the right to privacy. Several reviews of the National Security Agency's program reported that this practice does not provide valuable intelligence since collected data is too much to discern and, consequently, key knowledge is often missed. The Privacy and Civil Liberties Oversight Board report on the telephone records program (2014) was able to demonstrate its weakness and controversial nature through the analysis of classified documents. In particular, the Board claimed not to have "identified a single instance involving a threat to the United States in which the telephone records program made a concrete difference in the outcome of a counterterrorism investigation." (*ibid.*: 11) and concluded that "the government has [not] demonstrated that the program materially enhances security to a degree that justifies its effects on privacy, free speech, and free association." (*ibid.*: 167). Therefore, besides having intrusive impacts on individual rights, the collection of mass telephone records did not prove to generate special results that could not have been achieved without the recourse to the National Security Agency.

In 2015, as a result of growing criticism and lack of concrete counterterrorist achievements, the Congress reformed Section 215 of the USA Patriot Act - concerning mass surveillance of Americans' telephone records - and substituted the mass collection of telephone data with a narrower program, namely the Call Detail Records which should guarantee a targeted surveillance. However, after three years of active functioning, this program was abandoned by the National Security Agency due to a huge imbalance between its value and its risks (Center for Democracy and Technology, 2019). Indeed, in its last report, the Privacy and Civil Liberties Oversight Board (2020) declared that "On balance, the privacy and civil liberties impacts, combined with the program's costs, outweighed the program's national security value." (*ibid.*: 68). In addition, considering the advancement in technology, the Call Detail Records is soon to be considered obsolete due to the increased reliance of terrorists on non-phone and encrypted communications.

Executive Order 13224 has been criticized for its vagueness and difficulty to be challenged. Evidence regarding the motives for designating a person is often classified and, thus, impossible to examine. Moreover, Americans whose designation proved to be mistaken had their reputation

significantly damaged. Many cases of erroneous appointments were recorded after 9/11 and targets declared to have lost their jobs and to suffer from the stigma of having been publicly labeled as terrorist supporters. No wonder, the vast majority of designations were addressed to Muslims and even Muslim charities which were suspected of recycling charitable donations in favor of terrorist organizations. Following many complaints and some courts' declarations of unconstitutionality, Presidents Obama and Trump adopted a more moderate approach, trying to avoid controversial designations (Goitein, 2019).

Ultimately, the emergency provisions contained in the USA Patriot Act were found to be applied beyond counterterrorism. In particular, Section 213, which allows law enforcement agencies to conduct searches without warrant, was employed in issues related to drug crimes rather than terrorism investigations. An analysis of the 2013 report of the Administrative Office of the US Courts has revealed that in that year a total of 11129 requests of 'sneak and peek' searches was recorded, but only 51 were used for terrorism, which means 5%. This is a tendency that has been growing since 2001. As a matter of fact, between 2001 and 2003 the searches amounted to 47, compared to 3970 requests between 2009 and 2010 - of which only 37 for terrorism cases - and compared to the 6775 of 2011 - of which 31 related to terrorism. This proves that the original application of emergency measures has expanded into ordinary matters (Tien, 2014).

4. Assessing the impact of political discourse

4.1. An analysis of public speeches

Not only did 9/11 provoke a general trauma, but it also generated profound shifts both in the perception of and response to terrorism. Political debates started to depict terrorism as an emergency and an existential threat to the United States. Due to this persistent sense of urgency, the costs of preventive homeland counterterrorism became more tolerable, including restrictions of civil liberties and invasive security checks. Ten years after 9/11, that sense of urgency slightly decreased; however, policymakers still advanced the narrative according to which significant steps to fight terrorism had to be taken (Jackson, 2011).

The belligerent narrative since 9/11, known under the name of 'War on Terror', legitimized some measures that are usually applied to armed conflicts. Among them, there is the detention of individuals recognized as enemy combatants, prosecuted by military commissions for war crimes. These exceptional measures were normalized under a war paradigm applied to counterterrorism, which justified decisions taken beyond the ordinary justice system. Courts contributed to the

affirmation of this narrative, or at least did not challenge it. Indeed, they declared the detention of terrorist suspects a legitimate power in wartime (Hafetz, 2012).

What is interesting about the US case is that the American presidency does not frame counterterrorism measures into an official emergency paradigm - even if presidents are often adopting exceptional powers - but present them as part of the ordinary responses in times of war. What is more, this approach contributed to gain public and judicial support while hiding emergency provisions behind the creation of a legal framework legitimized by the law of war. However, the danger of such a prolonged practice is that it becomes apparently less exceptional and runs the risk of being extended beyond counterterrorism in order to apply to every threat perceived as such by the United States (Addis, 2007; Hafetz, 2012).

After its declaration on September, 2001, the National Emergency with Respect to Certain Terrorist Attacks was renewed every year by each President with the same vague justification, reading as follow: "Because the terrorist threat continues, the national emergency declared on September 14, 2001, and the powers and authorities adopted to deal with that emergency, must continue in effect beyond [date]" (Bush, 2002). The only different expression was used by President Trump in his continuations of the national emergency who provided at least a small explanation, namely "The authorities that have been invoked under that declaration of a national emergency continue to be critical to the ability of the Armed Forces of the United States to perform essential missions in the United States and around the world to address the continuing threat of terrorism." (Trump, 2020).

The declaration of national emergencies in the US has become so common and frequent that it does hardly provoke any effects and is neither worth reporting in the media given the lack of mentions in the vast majority of newspapers. The oldest emergency currently in effect has been in place since 1979 when President Jimmy Carter declared it during the Iranian hostage crisis. This practice has grown stronger over the years and today it is so consolidated that it is often argued that America is living under a perpetual state of emergency (Korte, 2014).

As regards the justifications provided by Presidents and the political establishment in general, many commonalities in their way of presenting the fight against terrorism can be noticed. Since Bush's presidency, the persistence of the terrorist threat and the potential occurrence of another attack on US soil have always been highlighted. However, while Bush's speeches were characterized by a policy of terror, Obama's public addresses were mainly devoted to the upholding of the rule of law and the respect of human rights. In addition, he tried to slightly downgrade the terrorist threat, officially recognizing that terrorists "don't pose an existential threat to our nation", and that it would

be risky to give them a power they do not hold (Obama, 2016). On the other hand, Trump's approach toward the war on terror was mainly based on Islamophobia and on the exploitation of counterterrorism measures to advance its anti-immigration policies.

Four years after 9/11 President Bush in a speech at the National Defense University declared that "Our country is still the target of terrorists who want to kill many, and intimidate us all. We will stay on the offensive against them, until the fight is won." (Bush, 2005). This is the rhetoric that he has adopted throughout his presidency, supporting the need for emergency and enhanced measures to be taken in the fight against terrorism.

This narrative did not change much during the years. In his speech at MacDill Air Force Base in Florida in December 2016, President Obama commented upon the counterterrorist strategy pursued during his mandate. Like Bush, he also stressed the permanent nature of the terrorist threat, "For eight years that I've been in office, there has not been a day when a terrorist organization or some radicalized individual was not plotting to kill Americans. [...] We know that a deadly threat persists." (Obama, 2016).

In addition to the emphasis on the continuity of the terrorist threat, another characterizing element of policy speeches is the justification of foreign interventions in the name of national security and of freedom. In particular, the dichotomy of good (Americans) versus evil (terrorists) provides the moral grounds for military operations. However, a side effect of this narrative is that it provoked further discriminations towards ethnic minorities and created an environment of suspicion between the American population.

A significant statement that well summarizes this concept was pronounced by President Bush in a speech at the Pentagon On March, 19, 2008, "The battle in Iraq is noble, it is necessary, and it is just." (Bush, 2008). According to his words, the fight in Iraq was just on the basis of this dichotomy, justified by the fact that the United States embodies those values that terrorists do not. Furthermore, on the same occasion, the President proudly declared: "Because we acted, the world is better and the United States of America is safer." (*ibid.*). This expression, linked to whatever US counterterrorist action, was extensively repeated in many more speeches, highlighting once again the rightfulness of American actions.

Applying a similar strategy, President Obama in 2016 praised the sacrifice of US' armed forces who fought in Afghanistan, laying the basis for the continuation of the military efforts since "it is because of [the soldiers'] service and sacrifice that we have been able, during these eight years, to protect our homeland" (Obama, 2016). Then, since the American military efforts abroad were

considered to be successful, Al-Qaeda was declared to have become "a shadow of its former self." (*ibid*.). From this excerpt, it is clear that according to President Obama, the sacrifice of the American military was necessary to guarantee the security of the American people and will presumably still be required in the endless war against terrorism.

4.2. Counterterrorism achievements: data analysis

Due to the lack of official and reliable data concerning the US counterterrorist activity, information comes mainly from the media and research centers. However, as a consequence, the annual counts result to be largely variable. If we add the fact that media and political discourses tend to present a narrative charged with misconceptions linked to the 9/11 trauma, the terrorist threat will always appear distorted to the general public.

A group of researchers has tried to challenge six myths of terrorism in America, based on available open-source quantitative data. According to them, the political narrative suggests that terrorist attacks are on the rise as well as deaths and injuries, that terrorism is internationally based and stemming from organized networks, and that it is jihadist-inspired and perpetrated by Arabs. Their research shows attacks are decreasing and mainly carried out by individuals acting alone. Furthermore, those terrorists posing a threat for the US are more frequently home-grown and far-right extremists (Silva et al., 2019).

The above mentioned elements are also at the basis of the US counterterrorism strategy. Indeed, the attention of American counterterrorism efforts is mainly directed outwards, coherently with the general belief generated after 9/11 that the threat is foreign. However, data shows that the vast majority of jihadist terrorists operating in the US are precisely American citizens or legal residents. According to up-to-date research, 83% of terrorists are US-born or naturalized citizens and permanent residents versus a share of 17% of non-residents or of unknown status. This means that radicalization of these individuals happened within the United States, not abroad, questioning the effectiveness of those counterterrorist policies that target aliens and are directed outwards (New America, 2021a).

What is more, a careful analysis of empirical data makes it possible to adopt a critical stance towards some political counterterrorism decisions. A perfect example is the Trump Travel Ban of 2017, adopted in the context of counterterrorism, which prohibited entry in the US from seven Muslim countries, namely Iran, Iraq, Syria, Sudan, Libya, Yemen and Somalia, which was later amended excluding Iraq and Sudan, and inserting Chad, Venezuela and North Korea (New

America, 2021a). Considering terrorists' origins, it emerges that none of the terrorists committing lethal attacks in the US came from the countries excluded by Trump; therefore, the counterterrorist justifications provided by the President do not hold. This demonstrates how a political narrative based on racial or religious biases impacts counterterrorism choices, which result to be unsuccessful if not based on empirical data. In addition, the influence of political narrative in matters of security as counterterrorism is also evident looking at people's response. Indeed, influenced by the dominant narrative that terrorists are internationally-based, 79% of Americans approved air strikes and visa controls as part of the State counterterrorist strategy (Silva et al., 2019: 316).

Considering the list of the 81 countries most affected by Islamist terrorism between 1979 and 2019, the United States ranks thirty-first with 48 recorded terrorist attacks and 3114 number of deaths (Reynié, 2019). Given the low number of terrorist attacks and victims in a range of forty years, it would seem that the American counterterrorism apparatus has been successful in preventing terrorism. However, due to the lack of governmental data on the number of thwarted plots, it cannot be claimed with certainty if this was due to counterterrorism efforts or to a lower occurrence of attacks.

According to the data provided by the Federal Bureau of Investigation and the Department of Homeland Security (2021), it seems that between 2015 and 2019 around 846 terrorists were arrested on US soil, divided by year as follows: 211 in 2015, 229 in 2016, 186 in 2017, 113 in 2018, and 107 in 2019. The vast majority of them were charged federally, while the minority was charged with local charges. Unfortunately, this data does not distinguish among the groups of terrorists.

4.3. Surveys: opinion polls

Mueller and Stewart (2018) argue that the driving force for exceptional counterterrorism measures is public opinion. In this perspective, the process leading to policy decisions would be bottom-up rather than initiated by politicians. Recent opinion polls show that American fear of terrorism since 9/11 has not vanished. There are some specific historical moments in which this fear diminished and confidence in the government's counterterrorism abilities rose, for example after the killing of Osama bin Laden in 2011, but it was just a temporary trend. The same happened with the popular perception towards civil liberties. Restrictions were widely accepted as far as security could be guaranteed; however, after the scandal of Edward Snowden about data collection, opinions changed and the prevailing view became that the government had exaggerated concerning individual freedoms restrictions and privacy violation. However, also this one was a temporary dynamic.

Indeed, many American came back to the primary idea that the government had not been tough enough on terrorists.

On the other hand, popular fear of terrorism seems not to correspond to the occurrence of terrorist attacks since 9/11, which have significantly declined. In addition, since 2001 on average only six Americans per year are killed by Islamist terrorists and it seems that no cells have developed on American soil. Media and political attention to terrorism has declined since 9/11, even if policymakers have continued to remark the enduring nature of the terrorist threat. However, while some provisions like security guards should act as evidence of the State's efforts in counterterrorism, in some cases they may produce the opposite effect, namely reinforce the perception of suspicion (Mueller & Stewart, 2018).

International terrorism remains among the main fears of Americans. However, recent episodes suggest that domestic terrorism, represented by extremists and white supremacists, is becoming much more dangerous and urgent. Indeed, between 2018 and 2019 white supremacists caused more deaths than any other crime. This is a tendency that is believed to increase throughout 2021 on the wave of 2020 political turmoil. The problem is that the implementation of controversial measures to provide security from national threats is barely accepted, contrary to what happens with foreign threats (Miroff, 2021).

The rise of domestic terrorism is confirmed by the data collected by New America, a US think tank based in Washington. In the post 9/11 era, until today, 114 people have been killed by far right terrorists, while 107 were victims of jihadists. However, while jihadists attacks have been sporadic between 2002 and 2021, recording the deadliest attack in Orlando in 2016 with 49 deaths and 53 wounded, far right episodes have been regularly and constantly growing in time with the most significant event in 2019 in El Paso. Ultimately, today's jihadist threat to the United States is much more limited than 21 years ago and it mostly derives from lone actors within the country. On the other hand, new ideologies are rising which pose a threat to national security (New America, 2021b).

According to a survey conducted by the Pew Research Center in March 2020 on 1000 US adults, terrorism remains a top priority for 73% of Americans, ranking second after the spread of infectious diseases, considered a major threat to the nation for 79% - justified by the spread of Covid-19. Concerning cooperation with other countries in matters of terrorism, 80% of the population deems it very important. Older people perceive a higher degree of terrorism-related danger. As a matter of fact, 62% of youngsters versus 80% of over 50 consider terrorism a major threat (Poushter & Fagan,

2020a). Another survey conducted by the same research center some months later, in September, investigates the differences in the perception of threats to the country between the general public and foreign policy experts. Concerning terrorism, it emerges that only 14% of US international relations scholars perceive it as a major threat compared to 69% of citizens: a significant difference of 55 percentage points (Poushter & Fagan, 2020b). This comparison between common citizens and experts is particularly significant because it sheds light on the fact that the vast majority of the population is really affected by the political discourse, while experts who have access to a wider range of sources can ponder, on the basis of facts, the information they receive.

In order to place counterterrorism in perspective, we need to go back in time and verify the responses of past opinion polls. In 2018, 73% of Americans deemed that defending the country against future attacks should be a priority for the President - Donald Trump at the time - and the Congress. Compared to the first survey of this kind in January 2002, when the share of Americans considering terrorism a major threat was 83%, the number slightly decreased, remaining nonetheless quite consistent. Another relevant discovery concerns the relation between protection from terrorism and enjoyment of civil liberties. Since 2004 US citizens seem to have been more concerned about the fact that the government's counterterrorism measures were not tough enough to protect the country than about their individual rights. Indeed, between 2014 and 2016, the number of 49% of Americans believing that antiterrorism policies had not gone far enough remained stable, while the share of people declaring that the measures had gone too far in restricting civil liberties rose from 29% in 2004 to 33% in 2016. This trend reversed only in 2013 after the revelations of Edward Snowden on surveillance (Gramlich, 2018). On the other hand, in 2019, terrorism dropped from the first to the fourth position in the list of public's policy priorities with a share of 67% - the lowest since September 11, 2001 - preceded by economy, health care and education which gained momentum (Bialik, 2019).

According to Jackson (2011), the low resilience of Americans is also due to the government's expectations of perfection from the homeland counterterrorism strategy. Failed or thwarted terrorist attacks have been presented as failures, stimulating further pressure to security agencies and spreading further insecurity among the population. Indeed, such an attitude towards risk elimination rather than risk management contributes to damage Americans' confidence in the government's ability to provide security. At the same time, this gives an advantage to terrorists who will rejoice in their failed attacks, considering them a success.

CHAPTER 3: The French case study

Introduction

In the last decades, especially after 9/11, European countries have moved towards a framing of counterterrorism strategies on emergency grounds. This narrative has extended from the EU level to single States, triggering a growing tendency towards the securitization of the terrorist threat. However, this phenomenon is not costless. The application of emergency powers and measures entails direct challenges for human rights, the rule of law and the level of accountability of decision-making processes (Mitsilegas, 2021). France has reacted to the 2015 Paris attacks by declaring the state of emergency on the entire territory, which underwent six extensions until November 2017 when a new anti-terror law was adopted and the state of emergency expired.

This chapter will focus on France's recourse to emergency powers and legislation to enhance national security in reaction to terrorist attacks. After a brief report of the events occurred between 2015 and 2017, the legal basis providing for the state of emergency will be investigated, ending with some reflections concerning its legitimacy. Then, the argumentation will focus on the public debate surrounding the concerns related to the state of emergency; in particular, a section will be devoted to the notifications of abuses of power and civil mobilization. Afterwards, the focus will shift to the justifications provided by policymakers for the numerous extensions, reported with the help of a selection of public speeches. The last section will be devoted to the presentation of some quantitative data concerning counterterrorism achievements and terrorist occurrences, aiming at assessing whether factual information corresponds to the narrative reported by policymakers. Finally, opinion polls will be discussed to outline the French opinion on security and emergency powers.

1. Background

1.1. January 2015 - October 2017: the two-year state of emergency

France in 2015 witnessed some of the most dramatic terrorist attacks in its territory of the last decades, with the peak in November when the Paris attacks happened - the deadliest since World War II. At the beginning of the year, on January 7, two gunmen attacked the Charlie Hebdo offices, a satirical magazine, killing twelve people and some others in the next days during their escape. The rationale behind this attack was an alleged revenge against the satirical cartoons of Prophet Mohammed. In reaction to this offence, prime minister Manuel Valls announced a strengthened

program to combat terrorism, consisting of greater surveillance, reinforced security equipment and hundreds more intelligence officers and police. Furthermore, preventive measures to reduce the danger of radicalization among the youngsters, mainly in poor suburbs, prevent contacts between religious fundamentalists in prison and detect cyberterrorism were implemented (Willsher, 2015).

On January 13, 2015, Prime Minister Manuel Valls held a tribute to the victims of the attacks in the National Assembly, illustrating the future challenges of France and restating the survival of the Republic's fundamental values confronted with terrorism, namely democracy, the rule of law, freedom of expression and laïcité. In Manuel Valls words, "It was the spirit of France, its light and its universal message that the attackers tried to destroy. But France remains on its feet." (Valls, 2015). Furthermore, terrorism was framed into a warfare narrative, "France is at war with terrorism, jihadism and radical Islam." (*ibid*.).

Later that year, on the night of 13 November 2015, coordinated terrorist attacks took place around Paris. Gunmen and suicide bombers hit simultaneously the Bataclan concert hall, a stadium, restaurants and bars, leaving 130 dead people and hundreds injured (BBC, 9 December 2015). On that same night, President Francois Hollande declared a state of emergency on the entire territory, announcing the first immediate measures to be adopted as border controls, partial bans on circulation and searches without warrant. The last declaration of this kind was made in 2005 on the occasion of the riots in the suburbs of Paris; however, in that case, it concerned only some areas of the city. Conversely, the last state of emergency that touched the whole territory was in 1961, within the framework of the Algerian War (Le Cain, 2015).

In his first speech to the French population, François Hollande defined the attacks "*une horreur*", a horror. This first approach to the country was characterized by an emotional tone and an appeal to popular unity and to trust security forces and authorities. Indeed, he recalled that, "In these difficult moments, we must show compassion and solidarity. But we must also show unity and calm. Faced with terror, France must be strong." and "There is dread, but in the face of this dread, there is a nation that knows how to defend itself, that knows how to mobilize its forces and, once again, will defeat the terrorists." (Hollande, 2015a).

On the other hand, some days later, on November 16, in a joint session of both houses and parliament, President Hollande adopted a tougher stance. This time, the Paris attacks were described as "an act of war" by the President who officially declared "France is at war" (Hollande, 2015b); a definition that echoed President Bush's speech after the 9/11 events. As a matter of fact, a response arrived not only nationally from the judicial system through the adoption of the state of emergency

and exceptional powers, but also externally from the military through intensified strikes in Syria (De Sakutin, 2015).

Such belligerent rhetoric was used by the government to justify the application of the state of emergency. As long as law is politicized and terrorism is framed as an act of war, the use of emergency powers by modern states and the extension of the executive's field of responsibility in a context of fear and anxiety will be supported and easier to accept (De Massol De Rebetz & Van Der Woude, 2020). Indeed, this narrative of "war" functions as a facilitator to make tougher measures and possible infringements of individual freedoms more acceptable. This is particularly true if declared in the aftermath of a deadly terrorist attack when the population is still traumatized and frightened (Gerspacher, 2020).

Since "any extension of the state of emergency beyond twelve days must be authorized by law" (French Constitution, Art. 16, 1958), on November 20, the Senate voted for a three-month extension of the state of emergency. In addition, some of the provisions of the 1955 Act were modified in order to better face that situation: house arrest was extended to anyone suspected of posing a threat to public order and electronic tags were introduced; allegedly dangerous associations and groups could be disbanded; press and radio control was instead withdrawn; and websites inciting acts of terrorisms should be blocked by the Minister of the Interior (Gouvernement, 2015).

Internationally, being party to the International Covenant on Civil and Political Rights (ICCPR) and to the European Convention on Human Rights (ECHR), France sent an official notification to the UN Secretary General concerning derogations from Article 9, protecting the right to liberty and security of people and prohibiting arbitrary arrest and detention; Article 12 stating the right to freedom of movement, and Article 17 concerning the right to privacy and family life (ICCPR, 1967). Another official communication of the state of emergency's declaration and derogation from the ECHR under Article 15 was sent to the Council of Europe's Secretary General (Council of Europe, 2015).

As regards the legal responses, in addition to the declaration of the state of emergency, in December 2015 the French government tried to modify the Constitution in order to remove the time limitation principle for states of emergency and consent the deprivation of French citizenship to dual nationals guilty of terrorism. Despite ultimately being rejected by the parliament, Hollande's reform proposal contributed to pave the way for the process of normalization of the exception (Kelly, 2020). On the other hand, five UN Special Rapporteurs raised concerns about the new legislation on electronic surveillance adopted in November 2015 due to "the lack of clarity and precision of several

provisions of the state of emergency and surveillance laws" (OHCHR, 2016). This law expands the power of the executive in terms of metadata gathering and analysis without prior authorization or judicial review. Consequently, warnings of "excessive and disproportionate restrictions on fundamental freedoms" arose (*ibid*.).

Between 2015 and 2017, six extensions of the state of emergency were implemented. Since November 2015, the French state of emergency has been extended a total of six times, making it the longest in France's history, almost two years. As just seen, the first declaration dates back to November 14, 2015, right after the deadly Paris attacks. The second phase foresaw an extension of three months starting from 26 February 2016. Third, justified by the need to secure the upcoming events of Euro 2016 and Tour de France, a further extension was approved on May 26, 2016. Then, when the state of emergency was supposed to be lifted, the Nice attacks happened. At that point, on 22 July 2016, it was renewed for a period of six months and, after a brief suspension, administrative searches were reintroduced. The fifth extension was approved in December 2016, aiming at allowing the regular progress of elections. Ultimately, the last extension lasted until October 31, 2017, to be substituted by the new anti-terror law on 1st November (National Assembly, 2017).

1.2. 2017: the new anti-terror law, a permanent state of emergency?

On 1st November 2017, at the expiration of the last extension of the French state of emergency, President Emmanuel Macron engaged in its replacement through a new anti-terror law, Law No. 2017-1510, which is officially called "Law reinforcing internal security and the fight against terrorism". It had been approved by the Parliament in October with 415 votes in favor, 127 opposed and 19 abstentions. The justification provided by the government for this law was that it "ensure[s] the security of the French while leaving enforcement agencies the ability to operate", embedding some of the tough measures of the state of emergency into ordinary law (De Sakutin, 2017). Law 2017-1510 was intended to guide a safe and controlled exit from the two-year long state of emergency and to guarantee a balance between an efficient counterterrorism strategy and the respect of individual freedoms (De Massol De Rebetz & Van Der Woude, 2020).

The main provisions of the state of emergency that have become law are four. The first one allows local prefects to establish protection perimeters around big events, like concerts or sport events, with the possibility for security forces to frisk people and check vehicles accessing this patrolled area. The second provision allows the government to close places of worship where radical and violent ideas related to terrorism are promoted. This must be preceded by a notification in the preceding 48 hours so that the people responsible for the concerned place can object this decision in

front of an administrative court. Third, the government can impose some monitoring measures on those individuals who represent a serious threat, among them the restriction of movement and the obligation for the concerned individual to appear in the local police station once a day in order to keep track of him/her. Ultimately, security forces can, under approval of a judge, conduct searches of any place in case of a terrorist suspect. In addition, further measures have been added in order to make the prevention of terrorism more efficient, namely identity checks around ports and airports by security forces within a 10-kilometre radius, the possibility to conduct administrative investigations on officials upon suspects of radicalization, the introduction of a new legal system regulating wireless communications interceptions, and the creation of a new crime establishing 15 years of prison for parents inciting their children to join terrorism (Gouvernement, 2021).

Unlike under normal circumstances, the process to adopt the new law was initiated via Article 45 of the Constitution that allows an accelerated procedure on emergency grounds. It means that only one lecture is made in each assembly, reducing the time available to debate on the topic and carefully analyze the text. What is more, the striking number of votes in favor prevents the possibility of having a fruitful debate and to question the text. However, it seems that, when dealing with sensitive matters as terrorism, policymakers are more incline to adopt a strong position to assure public order, even if this happens at the expense of individual rights. An imminent and evident response for the population is needed because in case of lack of trust in the government, the effectiveness of counterterrorist measures could be hindered as opinion polls generally confirm (De Massol De Rebetz & Van Der Woude, 2020).

The fact that this new bill normalizes the concentration of powers in the hands of the executive and weakens judicial oversight has provoked a wide range of criticism by right parties and human rights groups who oppose its arbitrary nature that, according to them, would jeopardize the rule of law and endanger human rights. In this respect, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ms. Fionnuala Ní Aoláin, paid a visit to France in May 2018 in order to assess the country's practices in its fight against terrorism. According to her, the new law could represent a dangerous consolidation of the state of emergency and exceptional powers into ordinary French law. In particular, greater concern was expressed for the effects that provisions like security perimeters, house arrests and individual surveillance as well as the prioritization of administrative measures could have on the protection of human rights and liberties. For this reason, the Special Rapporteur called for frequent parliamentary reviews and checks aimed at guaranteeing access to justice and monitoring the correct use of extended powers (OHCHR, 2018).

2. The counterterrorist framework in France

2.1. The French counterterrorism strategy

Unlike other European countries, France had built its counterterrorism apparatus well before 9/11. The first step dates back to 1963 with the creation of the State Security Court, established after the Algerian War, to condemn radical supporters of the Secret Organization Army of French Algeria. In 1986 it was dismantled to be substituted by the judicial specialization principle based on derogatory procedural rules to investigate terrorism-related cases within the Trial Court of Paris, which is still working. In that same year, the terrorist offence was recognized by the French Criminal Code, followed by the financing of terrorism and the apology of terrorism. In addition, since 1986 France was considered to have passed more than 14 laws in the framework of counterterrorism (De Massol De Rebetz & Van Der Woude, 2020).

Today, France is considered one of the main targets of terrorism in Europe, mainly but not only connected to jihadism. At the same time, France is also a source of new recruits to Iraq and Syria, constituting one of the biggest threats for the country. Its counterterrorism strategy has a long reputation of being a successful model since France did not experience any terrorist attacks for a long period, from 1986 to 2012. The strength of this model lies in its flexibility: antiterrorist measures are constantly evolving in order to adapt to changing circumstances and threats. What characterizes the French counterterrorism apparatus is the possibility to adopt emergency powers, the centralization of terrorism management in the capital city, an effective cooperation between intelligence services and the judiciary, and finally the active involvement of the civil society in reporting suspects (Bartolucci, 2017).

Despite the positive reputation of French counterterrorism, many measures are criticized for being discriminatory towards religious minorities and in breach of human rights. Nonetheless, French society seems to offer a permissive environment in which collective security is prioritized over individual liberties. Yet, human rights organizations and civil liberties defenders would not agree. Indeed, the harsh measures against Muslims, religious sites and more generally against individual freedoms have been repeatedly denounced. As a consequence, the implementation of repressive measures risks to further polarize a society that has already some problems concerning Muslim and Arab integration, resulting in mistrust towards security forces and lack of cooperation from a segment of the society (*ibid*.).

The French counterterrorism apparatus consists of a great number of institutions engaged in sharing information with the aim of thwarting and reacting to terrorist attacks. Among them, the primary actors are the police, the intelligence services, the judiciary, the army and the government itself. First, the intelligence services work both at national and international level. Within France, the General Directorate for Internal Security monitors dangerous individuals and oversees the social networks in order to discover potential sources of radicalization that could lead to a terrorist attack. Abroad, it cooperates with international allies to identify the training camps where terrorist plots are organized. Second, in case of attack, emergency services represent the immediate tactical response. They are composed of specialized units who have been trained to intervene as quickly as possible in the place of the attack; for this reason, they are deployed everywhere in the national territory. Third, justice is centralized and specialized. In the immediate aftermath of a terrorist attack, the prosecution office envoys the investigators of the judicial police on the scene who talk with witnesses, arrest the suspects and collect data. The first phase of the legal proceeding is led by the prosecutor which, however, takes several years. Then, it is the examining magistrate who eventually decides who is to be indicted (Tellier, 2018).

2.2. The legal instruments at the basis of emergency powers

In the French jurisdictional system, the state of emergency is allowed by Article 16 of the Constitution and by Law No. 55-385 of 3 April 1955.

Article 6 of the Constitution reads as follows:

> "Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council." (French Constitution, 1958).

In this case, the President of the Republic obtains special powers, the so called emergency powers, both executive and legislative. This Article establishes a temporary period of emergency aimed at preserving democracy and restoring the normal functioning of the State. In order to apply the provisions of the Article, two conditions must be met. First, the threat must be serious and immediate, mining the independence of the Nation and the integrity of its territory; second, the correct functioning of the public authorities must be interrupted. The Constitution does not provide for a time limit. However, after the constitutional revision of 23 July 2008, it has been

established that after 30 days of exceptional powers being in place, the Constitutional Council is reunited in order to examine whether the original conditions that justified the exception are still present or not (Vie Publique, 2019).

Law No. 55-385 of 3 April 1955 defines the state of emergency, its application in case of an imminent threat to the public order, the way in which it extends the government's powers and the restrictions to certain civil liberties. Among the most significant provisions, Articles 5, 6-1, 8 and 11 allow prefects to prohibit the circulation of people in specific areas, to suspend public assemblies, to close public spaces as theatres or religious places, to requisition private property and to take people into temporary custody (Légifrance, 2021).

This Law, which was initially designed for the Algerian War, was modified several times in recent years to better suit the counterterrorist objective. In particular, "*la loi du 20 novembre 2015 relative à l'état d'urgence*" changed some provisions of the original Law of 1955. It requires the Parliament to be regularly notified; it revised the rules leading to house arrest; it authorizes the dissolution of associations that embody serious harm to public order; it allows prefects to order searches in any place (Vie Publique, 2021).

2.3. Legitimacy of the state of emergency

The state of emergency is often cause for concern because it can be easily abused, affecting individual liberties and the respect for the rule of law. The rule of law is commonly defined as an institutional system in which public authorities are subject to law. On the other hand, the state of emergency is an exceptional regime in which the balance of power is overturned in favor of the executive who is bestowed with extended powers (Vie Publique, 2021). In addition, considering that between 2015 and 2017 France has systematically derogated from its international obligations under the European Convention on Human Rights and the International Covenant for Civil and Political Rights, the maintenance of guarantees like parliamentary or judicial reviews becomes essential to protect the rule of law and human rights (Vauchez, 2018).

The state of emergency was voted both by the Senate and by the National Assembly and in neither case was declared unconstitutional. Indeed, it is exactly for this reason that it is so criticized: the erosion of democracy happens through a formally legal procedure (Bozinovic, 2017: 24). Despite the fact that the application of the state of emergency in France respected constitutional provisions in terms of legal norms and procedures, the instrumental role of law in the prolongation of its duration entailed some concerns.

2.3.1 Parliamentary oversight

In December 2016, a report on the parliamentary control of the state of emergency was released by the French Commission on Constitutional Law, Legislation and General Administration of the Republic that recorded the development of emergency measures and their achievements, the role of the parliament and of the judiciary, and some recommendations related to good practices to be implemented. On 26 November 2015, when the state of emergency was expanded after its first adoption twelve days before, a new article (4-1) was inserted in the 1955 Law. It provides that the National Assembly and the Senate must be promptly notified about the measures taken by the government during the state of emergency, while further information can be asked ín the context of control and assessment of these measures. The Law Commission, additionally, is in charge of periodically evaluating their coherence and recording potential judicial consequences as well as appeals. The integration of an explicit parliamentary control was aimed at counterbalancing the exceptional measures conferred to the executive power by obliging the government to keep the parliament informed and keep track of its actions (National Assembly, 2016).

The instruments upon which parliamentary review was conducted were several. First, the direct source of information was constituted by the government itself, as seen in the previous paragraph. Second, a quantitative research was made through statistical data concerning the number of measures put in place and some details about their development, provided by the Ministry of the Interior and the Ministry of Justice. This kind of information was also available to the public, representing the only channel spreading official communications regarding the state of emergency. Third, the organization of regular meetings among Parliamentarians and the Prime Minister allowed the maintenance of continuous updates and a transparent communication (*ibid*.: 25-26).

According to this official interpretation, the presence of a parliamentary control functioned as a guarantee of legitimacy for an exceptional period. However, scholars have highlighted a different reality, much more controversial.

The 1955 Act contains a provision according to which it is the parliament that has the power to authorize or deny an extension of the state of emergency. In France, the parliament approved up to six prolongations until November 2017. What is interesting and controversial about the role of the parliament during the period of emergency is that it should have acted as a counterbalance to the executive, enacting checks on the government's activities; however, it rarely happened. Instead, the parliament behaved more as a continuum of the executive, never opposing the proposals of extension. In addition, the decision-making process has been the object of harsh criticism since it

seems that parliamentary debates occurred upon arbitrary evidence and data of very poor quality. In this process, the parliament decided on the basis of the Council of State's opinion, which in turn had previously received information from the government: a cycle that always sees the executive on the top of this process. Even though everything happened in an ostensible legal framework as required by law, parliamentary oversight did not really contribute to improving the decisional process and ensuring neutrality (Vauchez, 2018).

2.3.2 Judicial oversight

The state of emergency was subject also to judicial reviews. The issue of judicial oversight is particularly sensitive to states of emergency because measures authorized by the 1955 Act - house searches, house arrest, closure of worship places, security perimeters, and so forth - are administrative. This means that they do not need to be previously authorized by the judiciary; however, only where necessary, namely in case of criminal offences, an *ex post facto* control on the legality of the action can be applied by judicial courts. If an administrative search is not considered sufficiently justified, the court can decide to revoke the seizures, consistently with the task of the judicial court to investigate the legality of police searches (National Assembly, 2016).

In this regard, since judicial review was central in the arguments of policymakers justifying the extensions of the state of emergency as well as Law 2017-1510, some researchers of the University Paris Nanterre collected 775 court decisions of the kind previously mentioned in order to evaluate the real level of scrutiny performed by courts. Already in December 2015, the Council of State - the French supreme administrative court - officially determined that a triple test had to be applied in order to verify whether the measures at issue had been appropriate, necessary and proportionate. Despite its tough position on the highest possible standard of scrutiny to be adopted, research proved that in the vast majority of cases a lower standard was applied, often unevenly across the country and influenced by the investigations of intelligence services. Thus, there is no evidence of a real high standard of proportionality checks granting judicial review of exceptional measures (Vauchez, 2018).

The ordinary institutional balance is reversed: an increasing intertwining of criminal and administrative law is raising concerns as far as human rights protection is involved. When repression and prevention seem to overlap, the independence of police powers from judicial oversight raises concerns about the discretion of their activities and the consequences for human rights protection and rule of law preservation. In a context like the French society in which ethnic and religious minorities and migrants feel alienated, police bestowed with extended powers are

dangerous. Most importantly, the lack of judicial oversight on measures like house searches and house arrests without warrant becomes particularly problematic in case of highly politicised misconceptions. Consequently, complaints of violence and abuses of power permeate the work of police, who end up embodying a questionable kind of justice (Vauchez, 2018; Gerspacher, 2020).

3. The public debate in France

3.1. Abuses of power

The French state of emergency has been widely criticized due to the reduction of judiciary overview, in favor of the executive, and also due to numerous complaints of abuses of powers, arbitrariness and disrespect of individual liberties.

Amnesty International (2017) studied the French state of emergency and denounced the controversial use of extraordinary powers by the executive. In particular, the application of search powers and administrative control measures seem to have been widely and disproportionately abused. Hundreds of people have been traumatized by violent night searches - often in presence of children - and by assigned residence, which in 99% of cases resulted wrong. Indeed, data shows that less than 1% of house searches proved to be terrorism-related. In addition, further evidence of misused emergency measures lies in the investigation of people, mainly political and environmental activists during the COP21 in Paris, under any charge related to terrorist suspects; rather, the government exploited the state of emergency provisions to ban public demonstrations and avoid disorders - motives that go well beyond the original motivation at the basis of the state of emergency's declaration. In light of these episodes, human rights organizations were not the only ones to raise concerns about abuses of power; UN bodies intervened too. In May 2016, the UN Committee against Torture (2016) stated that the excessive use of force in search operations "could constitute an infringement of rights ensured under the Convention" and that "any victim of excessive use of force during such search operations is able to file a complaint, that an inquiry is conducted, that prosecution, as applicable, is pursued and that perpetrators are punished". In addition to environmental and political activists, exceptional administrative powers were applied also to sporting events and migrant management. Prefects exploited the state of emergency to apply exceptional measures to matters of ordinary public order, unrelated to terrorism, which they could not have done in normal times. This demonstrates how far the two years of state of emergency went from the counterterrorism objective (Vauchez, 2018).

In a previous report, Amnesty International (2016) presented some testimonies of abuses of power by the police through some interviews from individuals who had been wrongly subjected to searches or to assigned residence. What emerges is that some measures seemed more punitive than preventive - inconsistently with the principles of necessity and proportionality - and that ethnic and religious minorities, mainly Muslims, were largely targeted. In particular, night searches, authorized by prefects, happened without prior notice and on the basis of vague grounds. The violent attitude of the police caused many material damages in private houses, and even in public spaces as mosques and restaurants, as well as psychological harm due to the use of handcuffs, firearms as a means of intimidation and beating. These operations as well as assigned residence were mainly based on limited information collected by intelligence services that, however, was often incomplete and weak. As a consequence, many mistakes were recorded and, therefore, very few criminal investigations were launched.

The results of these operations had a high impact on individuals, on their right to private life and freedom of movement, but scarce achievements in terms of counterterrorism goals. Among the most serious impacts, victims of wrong measures experienced long-term fear, dismissal from work, and hostile reception by neighbors (Amnesty International, 2016).

Due to the securitization approach to counterterrorism, a logic of "self" and "other" developed. The main targets of preventive measures are Muslims and migrants, designed as potential sources of insecurity in the society, namely terrorists. The criticality of such an approach lies in the fact that they were targeted on the basis of what they could potentially do, rather than on what they actually do (Bogain, 2020).

According to a recent study conducted by Bogain (2020) on online comments during the state of emergency, it was discovered that the majority of users placed individual liberties and rights in the second place after security in counterterrorism. In their opinion, too much respect for rights would result in limiting state action and, thus, hindering security. This mental attitude creates a permissive environment for policymakers to overlook the respect for human rights because justified by the ultimate need to fight terrorism and grant safety. However, on the other hand, a minority of readers challenged the dominant conception of emergency and state security to enhance human security. Their arguments supported democratic values and social cohesion to fight terrorism, which according to them arises from inequalities and oppression.

3.2. Civil mobilization

Since the French state of emergency proved controversial, it has spurred an active public debate among intellectuals as well as public mobilization in the streets, both questioning its necessity due to the availability of a wide range of antiterrorist legislation consisting of 22 laws passed since 1986 and in terms of risks for civil liberties and human rights.

In January 2016, thousands of protesters marched in major French cities against the government's proposal to extend the state of emergency and against the proposal of deprivation of citizenship for people condemned for terrorist activities. The demonstrators claimed that the state of emergency limited civil liberties in the name of a potential security that struggles to manifest and that the emergency measures were discriminatory and arbitrary. In addition, the declarations of Prime Minister Valls concerning the willingness of the executive to adopt all necessary means until the fight against terrorism will be over worried the citizens about the possibility to extend the state of emergency indefinitely (Malterre, 2016).

On occasion of these manifestations, Camille Bordenet (2016), journalist for *Le Monde*, reported the emergence of a civic emergency council - "*Conseil d'urgence citoyenne*" - that gathers the opponents of the state of emergency and of the constitutional reform suggested by Hollande. The ambition of this council was to bring together a wide range of actors, from legal experts to historians, artists, social workers and many more, to foster a debate on the nature of the state of emergency and on potential alternatives to it. In particular, the group aims at establishing local committees in charge of patrolling the work of the government and drafting a series of legislative proposals.

What is noteworthy is that the government has used these protests in its favor. Indeed, in several speeches, policymakers underlined the presence of protests to demonstrate that the right to protest and the freedom of association were not being reduced by the state of emergency. On the last day before the lift of the state of emergency, on October 31, 2017, President Emmanuel Macron reported that "During the period of the state of emergency, more than 10 events or demonstrations were organized in Paris every day; this freedom to express oneself, to march and to complain was preserved, as was France's democratic vitality." (Macron, 2017). The same was stressed by The Minister of the Interior Cazeneuve the previous year, "The freedom to protest, [...], clearly remains the rule in our country, as everybody has been able to witness in the last few weeks on the occasion of several social movements." (Cazeneuve, 2016a).

4. Assessing the impact of the political discourse

4.1. An analysis of public speeches

As time progressed, the original reasons behind the declaration of the state of emergency started to vanish. Policymakers conveyed new messages at every renovation of the emergency and every time the narrative changed, progressively moving towards a politicization of the exceptional measures.

In the immediate aftermath of the Paris attacks, on November 16, 2015, President Francois Hollande in his speech before a joint session of Parliament explained the reasons why the state of emergency was to be extended from the initial 12 days to three months, namely because, despite including the two exceptional measures of police searches and house arrest, "The law which governs the state of emergency of 3 April 1955 cannot really match the kind of technologies and threats we face today." (Hollande, 2015b). Thus, according to the President, emergency legislation was needed to design an adequate response to the new challenges posed by jihadists since the old ones were no more suitable for modern threats. However, at the same time, he stressed the need to "go beyond the emergency situation." (*ibid*.), alluding to the temporary nature of the state of emergency, and to act against terrorism within the limits imposed by the rule of law.

While the first extension was justified by the willingness to react promptly to the attacks and to prevent new ones, by January 2016 the situation had not changed. Policymakers claimed that the danger of another attack was still very high; therefore, the state of emergency needed to be extended.

On January 24, 2016, the Minister of the Interior Bernard Cazeneuve released an interview to the broadcast *C Politique*. In response to the journalist asking about a second potential extension of the state of emergency, Cazeneuve declared that, "As long as there is an imminent threat, we need the state of emergency" (Cazeneuve, 2016c). Afterward, in order to support his affirmation, he recalled the fact that not all terrorists of the November 13 attacks had been caught and listed a series of quantitative data regarding the goals achieved thanks to the state of emergency. Ultimately, despite stressing the need for the state of emergency to be renewed, he reiterated the fact that it must be a temporary tool; an affirmation that sounds contradictory in light of his previous statement that the terrorist threat will last indefinitely.

By April 2016, the grounds for a new prolongation were extended to normal gatherings as sport events, in that case Euro 2016 and Tour de France, which is a motive very far from the provisions

of the 1955 Law. This means that in its third extension emergency powers were employed to control a regular event rather than being directly linked to terrorism.

Indeed, the third extension was officially justified on the basis of ensuring full security on the occasion of major events hosted by France in the summer of 2016. On April 20, 2016, Prime Minister Valls declared in an interview for France Info that "The state of emergency cannot be permanent, but on the occasion of these big events [...] we have to prolong it." (Valls, 2016a). This stance was confirmed on the same day during the Council of Ministers, where it was argued that "In a context of unprecedented terrorist risk, fostered by repeated threats by terrorist groups [...], the organization of the European Football Championship in France from June 10 to July 10, 2016, will need a particularly high degree of mobilization." (Council of Ministers, 2016). Consequently, the state of emergency was deemed the right instrument to manage big events and be able to guarantee high levels of security.

In July 2016, in an interview with *TF1* e *France 2*, President Hollande confirmed that there would not be other prolongations of the state of emergency after its expiration due on July 26. The state of emergency was kept in place until "We were sure that the law could give us the means that enable us to prevent the terrorist threat effectively." (Hollande, 2016). Therefore, since the Parliament had voted a law that would provide the right policy instruments to implement administrative checks of certain individuals, the state of emergency could be lifted.

However, on that same day of the interview, France was struck by a new terrorist attack in Nice. Consequently, President Hollande failed to fulfill his promise because the first response of the government was to provide for the fourth extension of the state of emergency. Despite proving unsuccessful in avoiding the attack, the state of emergency was considered once again the right instrument to be implemented. As Bozinovic (2017) remarked, having been attacked on Bastille Day, in which France celebrates its role as human rights champion, the State did not engage in investigating why security measures failed, but first pushed forward the state of emergency as a means to protect the ideal of French democracy. Indeed, in the aftermath of the attack it was several times highlighted that "France is targeted because it is a great democracy, which embodies universal values." (Valls, 2016b). In this light, it would seem that the extension of the state of emergency was justified more by a fight for democracy than by reasons of national security as it was originally conceived.

The fifth extension was the longest one with a duration of seven months until July 2017. The main concern for the retention of the state of emergency was the upcoming elections and the need to

secure their development. Being the expression of a democratic State, “This period of election campaign [...] can unfortunately constitute a context of risk of attacks, enhanced by those who want to strike at the heart of our democratic values and republican principles.” (Cazeneuve, 2016b), as Prime Minister Cazeneuve explained to the National Assembly in December 2016.

The last extension of the state of emergency was aimed at facilitating the transition to a new presidency and covering those months that were devoted to the elaboration of a new antiterrorist law that would ultimately determine the definitive expiration of the state of emergency on November 1, 2017. Indeed, during the Council of Ministers of June 2017, the Minister of the Interior Collomb declared that “Before considering an exit to the state of emergency, it is necessary to previously equip the State with new legal means of ordinary law which permit to better prevent the terrorist threat beyond the state of emergency.” (Collomb, 2017).

On the day before the expiration of the state of emergency, President Macron delivered a speech at the European Court of Human Rights, stressing the urgency to dismiss the state of emergency due to its growing ineffectiveness since 2015. In his words, “Yet the state of emergency has unfortunately not prevented several attacks in our country! The state of emergency is no longer effective! The state of emergency is no longer proportionate nor suitable. To those who consider that we must lift the state of emergency without making any other changes, I would say that they too are mistaken.” (Macron, 2017).

As Bozinovic (2017) claims, the application of the state of emergency has been progressively normalized through its numerous extensions. It was first justified under the national security rationale, and then, under the willingness to secure major events, and finally, as a means to defend democracy. This brief excursus into different excerpts of political speeches has confirmed this assumption.

Placing this reasoning into a wider framework, it seems that the guiding principle common to the list of justifications is the concept of securitization, more than security. This process of identifying even normal situations as threats, taking advantage of the citizens’ widespread feeling of insecurity, contributes to the perception of exceptional powers as normal and appropriate means to face every case of public disorder, supported by political discourses.

This observation is exemplified by the paradox between the parades organized after Charlie Hebdo attacks in the name of freedom of speech and the popular acceptance of counterterrorism exceptional measures that reduce some of those individual and democratic liberties previously defended by the crowds. This example clearly shows how attacks on freedoms are

considered wrong only if perpetrated by terrorists. When it is the State to authorize restrictions on movement or assembly, it becomes acceptable because the political narrative demonizes and securitizes only certain threats (Bozinovic, 2017).

4.2. Counterterrorism achievements: data analysis

The day after the end of the state of emergency in France, the government released a detailed report of the achievements of 23 months under an emergency regime. Since 14th November 2015, 5 terrorist attacks took place on French soil provoking 92 victims; 13 attempted attacks began before the intervention of the security forces causing some casualties, while 32 attacks were thwarted - 13 of which just in 2017. Looking at administrative searches, 4469 searches were authorized; the vast majority of them - 3594 - happened during the first two extensions of the state of emergency until May 2016. Thanks to these operations, 625 weapons were seized, 78 of which were considered heavy weaponry. On the other hand, the house arrests have been 754 overall, 41 of them were still in force on 31 October 2017. Finally, 19 Islamic religious sites were closed and 75 security zones were designed. Intelligence services were enhanced, amounting to 4400 officers at the end of 2017 as opposed to 3300 in 2014 (Ministère de l'Intérieur, 2017). Of all the searches, only 23 cases were related to terrorism, 1000 resulted in criminal investigations, while 646 people were detained (De Sakutin, 2017).

Concerning this data and the fact that very few searches resulted in terrorism-related cases, this can have a negative impact on the credibility of the police and on the effectiveness of counterterrorism measures. In addition, it seems that searches based on little or no evidence, which ultimately did not lead to any investigation, contributed to fuel resentment among those being searched. Individuals who were targeted in their neighborhood or community are subjected to long-term humiliation even when the search operation failed (Gerspacher, 2020).

According to the French government, these official statistics were enough satisfying to prove the effectiveness of the state of emergency and the need for a tough anti-terrorism law which would preserve some of the emergency provisions. However, looking more in depth to these numbers that appear so impressive, it would be safe to say that the state of emergency seems to have failed in terms of concrete counterterrorism achievements. Among the most significant failures, we can include the 4469 searches, which is one of the most invasive measures, that eventually led to only 23 cases related to terrorist activities. In addition, even though 32 attacks were said to be prevented, it is also true that 18 succeeded, provoking some victims - considering that 13 were blocked in the making. Nevertheless, we can only reason on the available data, not knowing whether under

ordinary law the same results could have been achieved, or whether better or worse performances would have occurred.

What is more, governmental reports give us the possibility to draw some conclusions also about the effectiveness of exceptional measures throughout the two-year state of emergency, analyzing data by period. Concerning house arrests, between 14 November 2015 and 25 January 2016, 350 house arrests were recorded. This number fell to 72 during the second extension of the state of emergency to grow slightly to 82 in the third phase. Later on, during the fourth extension, house arrests surged to 115 in reaction to the Nice attack to stabilize at 89 in the fifth phase (National Assembly, 2017). From this data it can be assumed that emergency powers were successful only in the aftermath of the Paris terrorist attacks. Indeed, in the long run, the number of measures and achievements started to decrease gradually. This kind of evidence should act as further proof of the fact that states of emergency are designed to last temporarily otherwise they will lose their efficacy. It can also be concluded that, in light of these results, further extensions of the state of emergency are no more dictated by counterterrorist motives, rather by mere political grounds.

Taking a look at more recent developments, according to the last report on France released by the US Department of State (2020), in 2019 the terrorist threat in France remained high, even though lower than in 2015 when it reached its peak. Nonetheless, French law enforcement remained active: at least four attacks were thwarted and 12 individuals linked to Islamic terrorism arrested. As declared in the new French National Intelligence Strategy for the period 2019-2024, counterterrorism remains the government's top priority, consisting of threats coming from overseas to France, threats inspired by terrorist organizations, and groups vulnerable to Islamist radicalization.

4.3. Surveys: opinion polls

If on the one hand the declaration of a state of emergency could reassure the population and enhance social unity, on the other hand it could provoke the polarization of the society and create a permanent state of fear due to an increased deployment of police and security forces. While a traumatized and frightened population is inclined to accept and even support emergency measures, human rights supporters are more prone to detect violations and denounce abuses of power by the executive (Gerspacher, 2020).

Since counterterrorism is mostly rooted in preventive actions and this willingness to prevent any risky activity at the earliest stage possible could result in wrongful measures, a high level of

cooperation between the society and police forces is fundamental to guarantee testimonies, activities of reporting and so forth. Being bestowed with extended powers, the police are often subjected to excessive violence, repression and discrimination. This behavior, however, damages the relationship with the citizens who lose confidence in the government and the police. As a result, they will avoid cooperating with the police due to the fear of being victims of unjustified assaults, mining the success of counterterrorist measures. In particular, house searches and arrests seem to disproportionately affect some ethnical groups rather than others, mainly Muslims, resulting in the loss of cooperation and support by some fundamental sections of the society who could be essential in the signaling of potential radicalizations. This concept applies also to the closure of mosques that alienate those communities who lose their place of worship (Gerspacher, 2020). In this regard, as reported by Amnesty International (2016) in one of its interviews, French Muslims feel unfairly targeted and do not support anymore the country's counterterrorism strategy as declared by Elias, one of the interviewed, "if emergency measures were effective in fighting terrorism, Muslims would support them. But they are ineffective, they antagonize Muslims instead." (Amnesty International, 2016: 7).

In June 2016, when the state of emergency had already been extended three times, the *Institut français d'opinion publique* - Ifop - conducted a survey over 1003 French people to understand their opinion about the state of emergency and its efficacy. Results show that the population was very divided: 53% of respondents did not consider the state of emergency effective in contrasting new terrorist attacks and terrorist networks, while 58% deemed it unsuccessful in guaranteeing public order. Nonetheless, only 14% wished to have it removed, while 38% agreed to keep it in place and 48% - the majority of respondents - wanted it to be even strengthened (Ifop, Les Français et l'état d'urgence, 2016).

According to a survey conducted by Odoxa among 1020 people in 2017, 57% of French were favorable to the project of the new anti-terrorist law since six out of ten people felt insecure, especially in public spaces like public transports (65%), train stations and airports (61%). What is interesting is that 52% of French do not trust the government in its efforts to protect them from the terrorist threat; the opinion of the population is quite divided in this respect. Six French out of ten - 60% - believe that the state of emergency has succeeded in reducing the terrorist risk. In addition, 88% support the heavy presence of police forces on a daily basis and agree to equip them with tear gas and weapons (81%). All opinion studies reveal that the vast majority of citizens are ready to limit their freedom if their security is better assured. Indeed, 62% believe that the anti-terrorist law will damage their freedoms, but still 85% declare that it will enhance security (Odoxa, 2017).

Compared to 2017, a new survey of 2020 records a higher percentage of French (74%) who do not trust the government to protect them against terrorism. After the assassination of Samuel Paty, the feeling of insecurity increased among the citizens. For four years, since 2016, citizens' trust in the government remained stable - more than 40% of the population agreed. However, following another terrorist episode, mistrust and widespread insecurity increased up to three out of four French people. Among the causes of fear of the citizens, right after incivility, the assaults by security forces rank second with 79% (Odoxa, 2020).

Considering a wider perspective on the evolution of French's feeling towards terrorism, starting from November 2015 the percentage of French who considered the terrorist threat "high" has remained stable and consistently high with a peak of 99% after the Paris attacks up to December 2018. Between 2019 and 2021, in absence of big organized attacks with casualties, the percentage has decreased with the lower rate in July 2021 (75%) - the same as in the aftermath of the New York attacks in 2001. The only exception was recorded in October 2020 when the Nice stabbing happened (96%) and caused three victims (Ifop, 2021: 6).

Dividing answers between "total high" - which consists of "very high" and "quite high" - and "total low" - which consists of "very low" and "quite low" -, the 75% of those interviewed considered the terrorist threat high (18% very high, 57% quite high), while 25% estimated it low (22% quite low, 3% very low). It seems, thus, that even in absence of major terrorist attacks in recent times, terrorism still represents a significant concern for the vast majority of French citizens (*ibid*.: 5).

A sectoral analysis of responses permits to go more in depth of this analysis, understanding which social categories were more affected by the terrorist threat last year. While there is hardly any difference between females and males, divergences become more evident when it comes to groups divided by age; in particular, the higher the age, the higher the concern. Indeed, an average of 80% of those interviewed having more than 35 years old consider the terrorist threat high, with a peak of 88% among the over 65-year old. On the other hand, this percentage lowers to an average of 61% among those who are younger than 35 years old (*ibid*.: 8).

These data seem to suggest that the oldest categories of society tend to be more worried about terrorism than younger people. Previous studies confirm this tendency of older people to show higher terrorism fear than younger categories (Boscarino et al., 2003; Elmas, 2020). This assumption is based on the vulnerability perspective, according to which as people grow older, they perceive themselves weaker and physically vulnerable: a feeling that translates into higher levels of fear of crime and terrorism. Nonetheless, it does not exist a straightforward connection between age

and fear that can be considered universally valid. Indeed, the intersection with other variables like sex, education, economic status, and religious and racial affinity play a role in determining the public's perception of fear and vulnerability (Elmas, 2020).

Despite having been harshly criticized, the state of emergency proved extraordinarily popular both at the political level and at public opinion level. This high rate of public acceptance of exceptional measures in a democratic country like France is generally considered unusual and even "anomalous". It seems that for the vast majority of the population democratic values and exceptional legislation can coexist (Bozinovic, 2017: 14). The opinion polls conducted during the two-year state of emergency highlighted a vast support for this measure. This enthusiasm for emergency measures was accompanied by the society's approval for aggressive and repressive policies, limiting liberties and enhancing the state power in the name of security. This happens in particular when terrorism is constructed as a source of danger that requires special security practices. However, as a consequence, such public support contributed to construct a general framework that legitimized and normalized the application of exceptional powers to counterterrorism. In this way, since terrorism ranks high in the list of priorities, citizens demonstrated their readiness, and even willingness, to accept stronger measures and authorize the executive to strengthen national security at the expense of human security (Bogain, 2020).

Conclusion

A comparison of the two case studies and a discussion of results

This thesis has attempted to investigate how policymakers justify numerous extensions of states of emergency in the context of the fight against terrorism in France and the United States. In addition, the extent to which people's perception of security was influenced by the official public narrative was also explored.

In light of the contents of this work, as a general consideration, public speeches stress the imminent and constant nature of the terrorist threat in order to justify extensions of the state of emergency and further uses of emergency powers. In addition, a contradiction emerged. On the one hand, the civil society participates in manifestations and protests against emergency powers, accused of curtailing civil freedoms. On the other hand, opinion polls show a general appreciation of the government's action in counterterrorism, implying that at the end citizens are willing to renounce some liberties if the government can assure them security. In order to clarify these assumptions, a comparative analysis of the outcomes of the two case studies will follow.

From the analysis of public speeches, it has emerged that both French and American policymakers adopt a warfare narrative when talking about terrorism. This framing was officially introduced in the international scenario by President Bush after the 9/11 attacks, and was relaunched by President Hollande after the Paris attacks of November 2015 when he declared, "France is at war" (Hollande, 2015b). The American War on Terror legitimized some measures that usually apply only to armed conflicts, while in France this rhetoric had a softer impact; nonetheless, military actions were undertaken also by France with strikes in Syria.

In both cases, a division between "us" and "them" was created. This was very clear since President Bush exclaimed, "Either you are with us, or you are with the terrorists." (Bush, 2001a). Such framing resulted, however, in a domestic political order dominated by suspicion, discrimination, and intolerance. In particular, foreigners and Arab Muslims were the targets of enhanced surveillance controls and police violence. In this regard, opinion polls revealed that, due to emergency counterterrorism measures, ethnic and religious minorities felt discriminated and lost confidence in the government. In addition, French Muslims openly admitted that this kind of initiatives discouraged them to cooperate with the police for fear of being unfairly accused of some crimes. Also in the United States, foreigners and mainly Muslims are perceived as threats to national security and are closely monitored because seen as potential terrorists. This affirmation

shows that, in this case, there is a discrepancy between the message that policymakers try to convey and the perceptions of the public. Despite numerous public declarations concerning the fact that the war against terrorism is not a war against Islam, the actual implementation of counterterrorism measures do not mirror this narrative, shedding light on a different reality. As a consequence, from this case it seems that the public is more influenced by the concrete actions of the police and surveillance agencies than by the words of peace and inclusion towards Islam that the government preaches.

This narrative between good and evil, "us" and "them", is stressed also in those frequent political speeches in which the democratic values of the United States and France are praised and enhanced if compared with the brutal and violent values of the terrorists. In every speech about counterterrorism, policymakers highlight the superiority of democracy and of democratic institutions.

The most interesting outcome is probably linked to the different perception of the state of emergency that the government itself has and conveys to the public. While the United States operates through an informal suspension of normal processes (Addis, 2007), France follows a formal legal procedure. Despite an official declaration of national emergency, American policymakers avoid talking about emergency powers; Bush did not even mention it in his first speech after the 9/11 attacks. Critics did not oppose emergency powers as such, but only the fact that counterterrorism measures were violating human rights. This generally low attention for the emergency nature of these measures determined their transformation into ordinary counterterrorism practices. On the other hand, France has acted within an openly declared contest of emergency, which was approved both by the Senate and the National Assembly. However, in this case, it was so criticised exactly because the erosion of democracy was happening through a formally legal procedure. This differentiation is very significant in that it proves how also emergency powers are shaped by the political narrative, determining a certain reaction of approval or disapproval in the population. In this light, it can be assumed that the United States has already taken a step further in the normalization of emergency powers, while France still appears to preserve some appearance of legality. Consequently, twenty years after 9/11, the American population has become accustomed to the emergency paradigm to which they are exposed. This is confirmed by the lower number of academic contributions concerning counterterrorism emergency provisions that has been published in the last few years - compared to the huge amount of material spread in the aftermath of the event and throughout the Bush presidency – together with a low media coverage of emergency powers,

and the uncontested support for the executive's decisions in counterterrorism matters by the Senate and the Supreme Court.

The normalization of emergency powers under a political narrative based on securitization was evident in both case studies. The examples provided in the chapters prove that counterterrorist measures were extended to normal gatherings in France, as the Euro 2016, Tour de France and COP21, and to ordinary criminal issues, like drug crimes, in the United States. This process of identifying even normal situations as threats, taking advantage of the citizens' widespread feeling of insecurity, contributes to the perception of exceptional powers as normal and appropriate means to face every case of public disorder, supported by political discourses.

As regards opinion polls, an interesting outcome should be reported. It has emerged that the oldest shares of the population are the ones most affected by the fear of terrorism. If for the United States a generational explanation could be provided, this does not apply to France. On the one hand, if we want to support the theory that political speeches have an effect on people's perception of security, then we could argue that the generation who lived the September 11, 2001, events and was exposed to Bush policy of terror is, twenty years later, still influenced by that narrative according to which the terrorist threat is imminent and constant. This assumption may be valid considering that the youngsters of 2001 are the adults of today who grew up in the aftermath of a traumatic event and assimilated the fact that terrorism ranks high in a scale of priorities. On the other hand, the Paris attacks of 2015 are too recent to adopt the same explanation. Consequently, this must be justified by psychological research on the vulnerability perspective which claims that the older the person, the higher the level of fear of crime and terrorism (Elmas, 2020). Nonetheless, at the same time, the political narrative could still have some influence: the availability of a high-choice media environment allows citizens to actively decide on which channels of information they rely on. On the one hand, while the youngest shares of the population make a wide use of online sources – mainly through social media or general online search – and have therefore access to a broader range of international news which expose them to more perspectives, the older generations generally rely on more traditional channels of communications, like television, radio and newspapers, or on the broadcast of policymakers' official speeches. In this light, if the political discourse frames terrorism as a high priority and a threat to be worried about, the older public can be considered the one to be more likely exposed to this perspective (Dubois & Blank, 2018). However, on the other hand, it is also true that, if we consider just social media, research has shown that they create the so called "echo chambers", which refer to a situation in which users will continue to find and share information that reinforces their beliefs, provoking political polarization and misinformation. As a

result, information looked for in social media can be highly biased, despite varying a lot across social media platforms (Cinelli et al., 2020), until citizens are not used to being exposed to diverse media (Dubois & Blank, 2018).

Before concluding, some room should be devoted also to the discussion of major outcomes of the single case studies.

As explained in this thesis, the US adoption of emergency powers to counter terrorism represents a peculiar example. The American presidency does not frame counterterrorism emergency measures into an official emergency paradigm, but present them as part of the ordinary responses in times of war. This is reflected by the political narrative which avoids mentioning the exceptional nature of the presidential powers. This, however, could have negative consequences in the long run. The approach of the United States, which should be an exception, sets a negative precedent that can be exploited by non-democratic States in dangerous ways; in particular, with reference to military provisions like ill treatment of prisoners or preventive wars on weak basis.

The outcomes of the "if you see something, say something" campaign could represent a good example to understand the extent to which the population has been influenced by the post-9/11 narrative of the Bush presidency. It demonstrates how citizens have become suspicious of one another, particularly of aliens and Arab Muslims. As a matter of fact, the vast majority of denunciations concerned common activities that Americans considered a potential threat to security because carried out by foreigners. This sheds light on the efficacy of the influential narrative on the persistence of the terrorist threat.

Another significant outcome is related to the different perception of domestic and international terrorism in the United States, which determines counterterrorism strategies. Despite the growing emergence and dangerousness of domestic far-right terrorism, the political discourse seems to be still very focused abroad. As a consequence, international terrorism continues to rank high among the main fears of Americans. In addition, the demonized image of international terrorists makes the acceptance of tough and controversial measures easier, while the implementation of the same techniques applied to domestic terrorists is barely accepted due to the fact that they are American citizens and should embody democratic values. This is also why the myth that terrorists are foreign – while data show that the vast majority is US citizens – is so widespread and hard to dismiss.

As regards the second case study, in spite of an intense public debate, characterized by both theoretical issues and civil mobilization, French opinion polls seem to suggest that the vast majority of the population was favourable to the persistence of the state of emergency. This is curious

because literature claims that on the long run emergency regimes tend to become unpopular. However, surveys from 2015 to 2017 have always displayed a high degree of appreciation for this measure. The dominant political narrative justified extensions on the basis of an imminent and constant terrorist threat which may have contributed to create a sense of urgency and permanent fear around the terrorist phenomenon, which was further emphasized by a regular report of thwarted plots, arrests and general counterterrorism achievements. It is this tendency toward securitization that could explain why the great majority of French continued to support the state of emergency, although it entailed reduction of civil liberties and intrusive measures.

The French state of emergency was lifted after six extensions between 2015 and 2017. However, the emergency paradigm did not really end with the expiration of the state of emergency because a new law, Law 2017-1510 was passed by the Parliament - with a great majority - and embedded some of the tough measures of the state of emergency into ordinary law. Actually, this shift does represent a sort of crystallization of emergency provisions which will be easily accessible through the implementation of this new law.

France is considered to provide a permissive environment in which collective security is prioritized over individual liberties. However, tough counterterrorism measures proved detrimental because they tended to provoke a further polarization of the French society already characterised by problems of Muslim and Arab integration. This resulted in mistrust towards security forces and lack of cooperation, which represents a missed opportunity for French counterterrorism efforts. Indeed, counter-radicalization should start exactly from the Muslim community itself.

It is noteworthy to mention that the government has used civilian protests in its favour. Indeed, in several speeches, policymakers underlined the presence of protests to demonstrate that the right to protest and the freedom of association were not being reduced by the state of emergency. While civilian mobilization should have represented an active opposition to the government, it was instead exploited to denounce the fact that those criticisms were pointless. This could happen due to the weak checks on the executive. As a matter of fact, parliamentary and judicial oversight should have acted as a counterbalance to the executive, enacting checks on the government’s activities; however, it rarely happened. Conversely, these organs behaved more as a continuum of the executive, never opposing the proposals of extension. This functioning provided for an apparently lawful process of governing since checks on the executive were present, but in reality they had little democratic value because they embodied endorsement for the government’s initiatives.

Some questions, unfortunately, remain unanswered. Are emergency powers really becoming the new normal to face ordinary situations of crisis? According to existing studies, it would seem that common threats are increasingly being securitized and designed as emergencies that require enhanced responses. The case studies examined in this thesis have also highlighted this tendency in the framework of counterterrorism. However, it would be interesting to conduct a comparative analysis on different policy areas to gain a wider perspective on this topic beyond terrorism and test this assumption. A second question is to what extent and in which other contexts beyond terrorism a condition of widespread fear determines the willingness to sacrifice civil liberties and human rights protection in name of collective security, as it happens under a state of emergency.

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