DEMOCRACIES
DEALING WITH SUSPECTED TERRORISTS

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INTRODUCTION

"Democracies have enemies, the point is how to treat them," this is the actual question that politics offers to law, as Giancarlo Montedoro highlighted; in fact, it is necessary to articulate *policies of justice*, "even if –he properly specified– the achievement of a higher level of security is not granted"[1] and it is necessary to avoid the fall of *enemy*'s respect that could be a possible consequence of a *just war* against *absolute enemies.*[2]

Western War on Terror runs the risks of hiding a quite fuzzy War on Terrorists or Enemy Combatant[3]. As Yale Professor, Bruce Ackerman, has pointed out this is neither exactly a war nor a common crime.[4] In fact, on one hand, in this scenario there is no classical political entity to fight (indeed, Al Qaeda can be regarded as a militarized NGO) and additionally, such a confused clash promises to be kind of an enduring element of destabilization for Western Countries. It is also interesting to observe that the concept of *enemy* does not have formal borders of definition so, the inescapable corollary of a belligerent approach is the risk for everybody to be the next suspected terrorist (however, a basic problem is that this peril has not been directly perceived by the generality of people, which are anesthetized by the fear for a *next* terrorist attack). On the other hand, politicians want new crimes of terrorism[5] to appear like their last effort against criminality, but in reality "they are still criminal laws and it is not terrorism to be subjected to punishment, but the terrorists"[6]. Moreover, crimes of terrorism are odd due to the particular connotation of the related conflict between Western Countries and the *jihad*, which is international and characterized by a political dimension.

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[1] G. MONTEDORO in G. MONTEDORO, M. FIOCCA, *Diritto alla sicurezza ed economia del terrore*, Roma, 2006, p. 183.
[2] Read Chapter 5, G. MONTEDORO AND M. FIOCCA, ibid.
[3] As interpreted by Professor Yoo for the Bush Administration, in a way that has enabled the executive to suspend the *Geneva Conventions* for suspected terrorists.
[4] As well, Fletcher wrote that "the concept of terrorism full up the gap that exists between crime and war" and that terrorist represents the bridge between the criminal and the enemy, an hybrid that participates in both the figures, as written in M. DONINI in *Diritto penale di lotta vs. diritto penale del nemico* in *Contrasto al terrorismo interno e internazionale*, Torino, 2006, p. 28, 71, quoting G. P. FLETCHER, *The Jurisprudential Foundations of Outlawing Terrorism*, 2006.
[5] Whose slogan recalls other American political campaigns like the 'war on drug' and the 'war on crime'.
[6] G. JAKOBS, *I terroristi non hanno diritti*, from a conference that took place in Frankfurt-Oder in May the 8th, 2005, as reported in *Contrasto al terrorismo interno e internazionale*, edited by R. E. KOSTORIS, R. ORLANDI, Torino, 2006, p. 4.

Norberto Bobbio remembered that the theory of a *just war* causes to assimilate it to a judicial procedure and ends up to a paradox: war can result *just* for both the parties, while – he added with laic skepticism – history taught that at war, the winner is not the right one but the strongest.[7]

Therefore, the first step to face even for an initial analysis about fair trial for suspected terrorists consists in giving up to the idea of a *Just War on Terror* that is a too vague and ambiguous concept to be linked to somebody that is expecting a fair trial whatever.

1. PERSON'S RIGHT TO DIGNITY

> "From a juridical point of view," "anyone that in some way offers allegiance to rules has the right to be treated like a person"[8] - ?

The major danger for a democracy is the degeneration of the application of a double standard, and it can easily take place when I come to consider *the* defendant *an* enemy; we cannot remove from him/her their inherent humanity, even if this tendency can sometimes be collateral to our system. In fact:

> Liberal attitude toward the others is characterized by both respect for them, openness to them, and obsessive fear for harassments. In short, the other is welcomed as long as his/her presence is not intrusive, and he/she is not the very other. Tolerance coincides with its opposite. In reality, my duty to be tolerant toward the other means that I do not have to approach too much to him/her, I do not have to enter his/her space; in brief, I have to respect his/her tolerance toward my excessive nearness. It emerges more and more as a central social human right of advanced capitalistic society, the right not to be harassed, or rather to remain in the security distance from the others. […].[9] Human rights are all right if rethought to include torture and emergency state. Democracy is all right if it cleansed from its populist excesses and limited to those that are mature enough to put it on practice.[10]

According to Zizek, some people of the modern global world are become victims of a process of abstraction.[11] As Hannah Arendt argued:

> "Human rights' concept fell through when individuals appeared without all their qualities and specific relations, except or their human quality."[12]

Paradoxically, as remarked by Zizek, I lose my human rights exactly when I am reduced to *a* human being 'in general', namely to the bear human prototype. In his

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[7] N. BOBBIO, *Il problema della Guerra e le vie della pace*, as quoted in G. MONTEDORO AND M. FIOCCA, ibid., p. 186.

[8] G. JAKOBS, ibid., p. 8.

[9] The writer went on specifying: "The same it happens for the emerging logic of humanitarian and pacific militarism. The war is acceptable as long as it aims at peace, democracy, and creation of conditions to distribute humanitarian aids. Perhaps, the same logic matches even more manifestly to democracy and human rights, isn't it?"

[10] S. ZIZEK, *Contro i diritti umani*, Milan, 2005, p. 31-33, as translated from the original version *Agains Human Rights*, 2005.

[11] S. ZIZEK, ibid., p. 67-70.

[12] S. ZIZEK, ibid., p. 58 quoting H. ARENDT, *Le origini del totalitarismo*, Milan, 1999, p. 415.

book *Against Human Rights*, Zizek issued: what about human rights of those excluded from the political community? What about human rights when they are useless as rights of those without rights and treated as no-humans?

Keeping in mind that no-humans[13] are unable to fulfill their rights with meaning due to their impotence, and that power's holders can dispose of law but not surely of juridical conscience, as suggested by Demandt, everybody can just persevere in relying upon the superior rule that he individuated in 'humanity'. Indeed, everyone's humanity can enable to judge and improve the legal orders and legal concepts through the democratic dialogue.[14]

In fact, to rebuff Zizek's provocative interpretation of our society, I should be able to distinguish criminal charge of terrorism from the defendant him/herself, so as to prefer 'criminal law of the fact' to the more biased 'criminal law of the author' (which increases its hazardousness when the suspected criminal has also political and ideological connotation).[15] Surely, the memories of the 9/11 terrorist attack on New York's World Trade Center and the Pentagon, 2001, the one in Madrid's in March the 11th, 2004, and of London in July the 7th, 2005, influence objectivity, and especially for that Western democratic States must ensure a fair trial to every suspected terrorist with no discrimination, otherwise "we are kind of becoming what we are supposed to be fighting"[16]. Will it involve being less effective against terrorism? Also, but this is the price to pay to live in an *open society* where the law aspires to be for every *person*, at least since the French Revolution[17].

'Person', as an "original reality", "stands at the origins of various forms of existence and is related to the concept of equal dignity among human beings, basic concept of modern democracy and liberal revolutions." In Gian Antonio Dei Tos's words:

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[13] Studying an explanation for the Holocaust, Hannah Arendt elaborated the distinction between proper human beings and other inferior beings that are deprived of their quality of humans (useless beings): a distinction that founds any double standard and the hegemony of a group over another. See H. ARENDT, *The Origins of Totalitarianism*, New York, 1979.

[14] A. DEMANDT, *Processare il nemico*, Torino, 1996, p. 157, 158.

[15] M. DONINI, ibid., p. 28.

[16] J. TRENTO (historian) in *Il mondo secondo Bush* (original title *Le monde selon Bush*), direct by William Karel, France, 2004.

17 *Déclaration des Droits de l'homme et du citoyen du 26 août 1789*: Art. 1er. – Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune. Art. 2. - Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression.

> From modernity, the path of the history has gradually come to be open to the extension of rights to all persons indistinctively, and nowadays democracies' effort is oriented to involve into the universality of the concept of human dignity to those who are still emarginated for the historical reason of their own weakness, fragility, or disappearance. Recognizing to a human being his/her condition of personal subject we go beyond the vision of a human as "auto-referential freedom" typical of the liberal and contractual anthropology, in order to open a reflection on the intrinsic vocation to the relation of love and friendship that founds on one side, the discovery of the radical sociality of human existence and on the other, the also radical openness to the Absolute. [18]

The term 'person' comes from the vocabulary of the old theater and its semantic origin comes from the Greek word *prôsopon*, the Etruscan one *phersu*, and the Latin one *persona*. *Prôsopon*, as Dei Tos observes, carries a double message; firstly, it recalls a visual communication (*pros*: in front of, *opè*: look, it means what is in front of our eyes, what is visible and so: our face, look, appearance) and secondly, the oral communication (*Prôsopon* is the name of the masquerade used by Greek actors that was, besides several functions and meanings, also an instrument of vocal amplification) hence, he concludes, "already the semantic root directs towards a hermeneutics of person that points to the relational character as the constructive feature of the personal identity".[19]

Now, after last century atrocities, based on the paradigm of *useless beings,*[20] perpetrated by normal citizens[21] to other human beings, it should be assimilated that any kind of "frontiers are surpassed concepts"[22], that there is no distance between any other person and me. But still, if it does not cost anything to me to write it, contrarily, it is very difficult to me to behave coherently because, as Mr. John Merrick, the Elephant Man (played by John Hurt), clearly stated in the homonymous movie: "people are freighted by what they don't understand"[23]. Therefore, the less I can

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[18] G. A. DEI TOS, *Etica, qualità, e umanizzazione in sanità*, Milan, 2006, p. 22-23.

[19] G. A. DEI TOS, ibid., p. 24. Remarkably, a person's relations express a character of the human not the being him/herself; of the contrary opinion is Jakobs, who wrote that "if the status of person was not translated into a social position, it would be insignificant for the society" G. Jakobs in *Die Strafrechtswissenschaft im 21. Jahrhudert,* in *Festschrift für Dionysios Spinellis*, vol. 1, edited by N. COURAKIS, Athene, 2001, p. 405, 560, as quoted by G. JAKOBS in *Contrasto al terrorismo interno e internazionale*, ibid., p 8.

[20] Read *supra,* note n. 13.

[21] In fact, as Hannah Arendt wrote about Adolf Eichmann in her reportage for the New Yorker of his trial in Gerusalem, if the acts were monstrous, the actor –at least the one at the bench- resulted ordinary, mediocre, neither demoniac nor monstrous. H. ARENDS, *The Life of the Mind*, New York-London, 1978, like in F. STELLA, ibid., p. 59-60.

[22] DON L. MILANI, in his letter wrote with his students to the judges with the title: *L'obbedienza non è più una virtù*, October 18th, 1965, edited by C. GALEOTTI in *L'obbedienza non è più una virtù e gli altri scritti pubblici*, Rome, 2002 (first edition 1998), p. 46.

[23] In *The Elephant Man*, directed by D. LYNCH in, United Kingdom, 1980.

understand the terrorists, the more he/she will be distance and different from me, and again whenever I see the ghost of the elephant, namely the ghost of the unknown, reflected into somebody, my fear will prevent me from thinking of he/she as a human being like me; paradoxically, he/she will become the projection of my shadow[24] for the reason that my fear will dull my eyes (emotional level), paralyzed my heart (sentimental level), and inebriate my mind (rational level), which will justify my conscience in the application of a double standard (citizen's law, enemy's law); instead, in reality nothing not even terrorists' discrimination between believers and infidels can justify my own application of a biased double standard.

In conclusion, equality is a practical daily exercise of patience and tolerance.

> What does patience mean? To support [*in the original sense of Middle English tolerate, put up with, from Old French* supporter, *from Latin* supportare, *from* sub- *'from below' plus* portare *'carry'*],[25] to stand and carry on contradiction [*that emerges from the encounter with others*]. It is not enough. In supporting it, the saint [*here sanctity refers to a perspective for everyone*] tolerates it. In the etymological sense […] to tolerate means to bring something up, to raise. The saint is the person that raises contradictions.[26]

This approach does not leave any space for denial of contradictions, of differences, in fact they exist as long as everybody is unique; moreover, they offer me the opportunity to practice sanctity, i.e., respect and tolerance towards the others. In order to avoid exploitations of the concept of valorization of contradictions, it has not to become a basis for groups' discrimination. In this way, as we are all different expressions of this humanity, so each of us is a human being with a right to dignity. Then again, the question returns to be a matter of testimony, that is, practical actions of tolerance, which will be easier achieved, as Hannah Arendt suggested, by stimulating our thinking and remembering capacity, namely, the human way to take root in this world where we arrive as strangers.[27]

2. Democracies in state of emergency

The rule applied by the judge [in hypotheses of

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[24] Naegeli wrote about projection of one's own shadows onto unidentified beings in the following terms: "One's own evil, that one fears and hates, is projected through a subconscious mechanism onto the other, the so-called scapegoat, and it is in him/her that the evil is hated, fought, and subdued." E. NAEGELI, *Il male e il diritto penale in Luciano Eusebi*, in L. EUSEBI, *La funzione della pena: il commiato da Kant e da Hegel*, Milan, 1989, p. 60. Indeed, the elephant itself "is the mirror that reflects everybody's imagine and completion." in *Il Mereghetti, Dizionario dei Film*, by P. MEREGHETTI, Milan, 2003 p. 659.

[25] See the Oxford American Dictionary.

[26] From the article *Accogliere la contraddizione* in *Segno nel mondo* n. 20, Milan, December 15th/30th 2006, p. 20.

[27] A. ARENDT, *The Life of the Mind*, ibid., as quoted in F. STELLA, ibid., p. 65.

> emergency] looks at the present and the future not less than at the past. In fact, when one of these phenomena comes to trial, it is often still being carried out and threatens to keep on for a long time.
> MASSIMO DONINI[28]

At this point, coming closer to the institutional necessity of security, "it is important, on the procedural perspective, that the contrasting action against terrorism is carried out, as much as possible, by an independent judicial branch and it is essential, on the substantial perspective, to exclude typical solutions of society without political and juridical morality, which would award terrorists an important success that is the crisis of liberal-democracies by sweeping their slight constitutional balances"[29].

Times of emergency have always make a call for derogations and for that the legal system needs to find a new balance, without becoming sources of discrimination. The 79th U.S. Attorney General John D. Ashcroft said: "We stood the system on its head, but maybe for good reasons, it was a national emergency" and so now, democracies are already called to face a major risk because this bunch of *urgent* –in terms of legislative priorities– and *special* –in relation to the potential addressees– new laws are in U.S. Vice President Richard B. Cheney's words "a new normalcy, and I think -he affirmed- those would become prevalent features in our way of life",[30] but actually it sounds strange to mention 'normality' in relation to state of emergency, which claim to be by definition a temporary situation.

Unquestionably, emergency requires immediate answers and democracies' flexibility can already grant it, anyhow, as long as terrorism appears a quite permanent threat,[31] at least in the short and medium-period-analysis, it is prudent to consider new laws and derogations as a part of our legislative body rather than something I am exonerate from.[32] Indeed, as Italian Minister of the Interior Giuliano

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[28] M. DONINI, ibid., p. 24.
[29] G. MONTEDORO AND M. FIOCCA, ibid., p. 21.
[30] Both statements are taken from the documentary *Il mondo secondo Bush*, ibid.
[31] The first characteristic of the institutional fight against phenomena of emergency like terrorism, mafia, organized crimes, and institutional corruption, [where associative bonds among criminals are generally constant and lasting] is that it deals with phenomena 'structurally' permanent at the time of the judgment (even if more impermanent than the usual crimes of the classical criminal law). M. DONINI, ibid., p. 24.
[32] On the contrary, talking about his double standard, articulated in enemy's law and citizen's law, Günther Jakobs has recognized that these two different systems of law refer to two different logics absolutely incompatible, which have to remain separated so that the exception would not become the common rule; nevertheless, he admitted that enemy's law and citizen's law, like differentiated systems,

Amato said "if, with the aim of protecting our security, we put a limit to the freedom of somebody that we perceive different from us, we will consider that limit less restrictive"[33]. And at the end, unconsciously we are restricting also our liberties because subdivision into sharp alternatives –infidels and believers, terrorists and no-terrorists– reflects 'popular stereotypes' that construe criminals and victims different 'like the day and the night', contrarily to what the experience has reveled about complementariness and inter-exchangeability of these roles[34]: today's victim could be tomorrow's criminal, and a present perpetrator could have been yesterday's victim.[35]

Now, if the actual sense of insecurity originates from the threat caused by incomprehensible terrorist attack –above all the 9/11 terrorists attack– it has also been fostered by the Western War on Terror itself that, in fact, has incremented the clime of fear "in which everybody suspects about his/her neighbor and where people is frightened to talk freely."[36] As outlined by Bruce Ackerman, the result is the following cycle:

Threat → Fear → Repression

A gradual process where "every great attack can generate additional escalations of military force, police surveillance, and repressive legislation"[37] can lead to the point a democracy will deny itself, without being really conscious like boiling frogs[38]. Given that, actually each of us can and have the responsibility to prevent this cycle from having effect, on one side, by taking a stand for institutions'

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are not realistic projection. As explained in M. DONINI, ibid., p. 35. In conclusion, nothing protects me as a citizen to be accused of crimes of terrorism and consequentially, to be submitted to enemy's law.

[33] During the Minister's conference at Catholic University of the Sacred Heart in Milan, May 14th, 2007 - from the article *Amato lancia l'allarme: terrorismo sottovalutato*, written by K. BIONDI for *Presenza* n. 3, Milan, May-June 2007.

[34] G. FORTI, *L'immane concretezza*, Milan, 2000, p. 262.

[35] E. A. FATTAH, *Understanding Criminal Victimization*, Canada, 1991, as quoted by G. FORTI, ibid., p. 262.

[36] M. RATNER, *Moving towards a Police State (or Have We Arrived?)*, Center for Research on Globalization, Montreal, November the 30th 2001, *www.globalresearch.com*, like quoted in F. STELLA, ibid., . 122.

[37] B. ACKERMAN, ibid., p. 94.

[38] "The boiling frog story states that […] if a frog is placed in boiling water, it will jump out, but if it is placed in cold water that is slowly heated, it will never jump out. The story is generally told in a figurative context, with the upshot being that people should make themselves aware of gradual change lest they suffer a catastrophic loss. Often it is used to illustrate a slippery-slope argument. For example, many civil libertarians argue that even minor increases in government authority, which may seem less noteworthy, make future increases in that authority more likely: what would once have seemed a huge power grab, the argument goes, now becomes seen as just another incremental increase, and thus appears more palatable. In the boiling-frog allegory, the frog represents the citizenry, whilst the gradual heating of the water represents the incremental encroachment of government." In *http://en.wikipedia.org/wiki/Boiling_frog#_note-3*

transparency[39] and respect for the rule of law during activities of prevention, and on the other, raising the voice against derogations to fair trial. At the end, it is again a practical exercise of fear and anger control and tolerance that daily we face, for instance, watching at criminal TV reports.

First of all for our family and ourselves, we have to take the distance from *insecurity ideology* (which is literally the mere logic of a thought, in this case a thought of permanent fear) and rather be conscious of both current potential risks: of awful terrorists attack and of hysteric legislation derogating civil liberties.

> We are conscious –wrote Aharon Barak, Israel's Supreme Court chief justice– that that decision will not make easier to deal with the reality of terrorism. [It] is the destiny of democracy that not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.[40]

3. A POSSIBLE CRIMINAL JUSTICE FOR DEMOCRATIC INSTITUTIONS' ENEMIES: LAW OF FIGHT

> The open system does not protect from conflicts but through the conflicts, exactly like the immunization system does not protect from the disease taking it apart from the body but including it within itself.
> GIANCARLO MONTEDORO[41]

Terrorism and the other threats of the global risk society offer a challenge to traditional criminal law, "nowadays, in fact, exist anti-system forms of terrorisms that prejudicially neglect the doctrine of fundamental rights, besides democracy and State of law"[42]. However, the analysis point of departure and return should remain the person and his dignity.

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[39] In 1764, already Cesare Beccaria warned about the use of secret accuses: "unhappy are the men when have reached this sign: without clear and stable principles that can lead them, they wander mislaid and fluctuating in the huge sea of opinions, always busy to save themselves from monsters, who threaten them; they overpass the present moment always grieved for the uncertainty about the future […]." He also pointed out the importance to have public trials and proofs "because opinions, which are maybe the only cement of societies, impose a stop to force and passion, so that citizens can say they are not slaves but protected people, feeling that inspires courage and that is a tribute to a sovereign that understands his/her true interests." C. BECCARIA, *Dei delitti e delle pene*, Milano, 8th edition, 2000., p. 58.

[40] The historical Israel's Supreme Court 1999-case about coercive methods of interrogation of suspected terrorist by agents of the secret service, as quoted in F. STELLA, ibid., p. 232. Anyway, it is significant to highlight that soon after the sentence left "the possibility that a member of the security service who honestly believed that rough interrogation was the only means available to save lives in imminent danger could raise this defense."

[41] G. MONTEDORO in G. MONTEDORO, M. FIOCCA, ibid., p. 232.

[42] M. DONINI, ibid., p. 71.

Now, the phenomenon of terrorism entails specific legislation, and sometimes also derogations, but also the criminal law needs to remain a criminal law about the fact in order to prevent the affirmation of a criminal law of the author that will be an enemy's law imbued with prejudice due to the inconvenient position of the accused.

> Already, "in a certain sense, criminal law, which is the most authoritarian and intolerant arm of the legislature, can be seen as a punitive answer that tends to exclude a criminal, before eventually working on his/her resocialization; criminal law with the segregation of those people take them apart from social normality and so fights them, treating them 'in a certain measure' as enemies."[43]
> "That the criminal law is *also* that, nobody has ever doubted. Exactly for that reason the guaranty stream has developed: to define limits to punitive power."
> But the real danger is the "normalization of criminal law of fight."
> "The *novum* of the present European and international law consists in the fact that the idea of fight and the effort to a corresponding practice are expressively put into criminal law or at least laws that gather criminal law in defining security strategy." Therefore, "it is not any more just a goal of policy of the legislative branch but of bonds for interpreters and for those that apply law and that enforce rules."[44]

Thus, as long as a specific legislation is considered necessary, the analysis comes to focus on limits of legitimacy of this new category called 'law of fight', which stands for regulations that more and more comes from legislative branch, national and international, in response to people's calls for security and that are directed to fight a diffuse and latent criminal phenomenon itself from a political point of view.

The risk of criminal law of fight to become a sort of criminal law of enemy highlights more than ever the importance of the presumption of innocence.

- European Convention of Human Rights, art. 6.2: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- Italian Constitution, art. 27^2: "The defendant may not be considered guilty until sentenced."

Thus, any suspected criminal or accused has the right to be considered innocent by a Court (that administrates the justice "in the name of the people" art. 101^1, Italian Constitution) and thus to receive a fair trial (as art. 111^1 of Italian

[43] Donini added that generally "criminal law presume –often wrongly- that there is not public responsibility for the crime and that the answer relies on its author. […] Consequently, criminal trial takes into discussion a person rather than judge just the fact." M. DONINI, ibid., p. 38-39.

[44] M. DONINI, ibid., p. 30. The author elaborated the distinction between enemy's law and law of fight, giving preference to the second because the later is not directed against the criminal itself but it is more concentrated on the event. He considered the prior one an expression of force, i.e., illegitimate. However, he also strongly underlines the importance to individuate clear limits to the law of fight in order to avoid contaminations of judicial procedure with political attitudes.

Constitution ensures everybody[45] "Justice must be administrated by fair trials defined by law").

The constitutional model, expression of a *jurisdictional culture,* as named by Massimo Donini, refers to the judicial phase and required specifically to the judge to remain *super partes*. "In fact, it is psychologically and logically impossible to maintain a position of independence between those fighting against a phenomenon (police and prosecutor) and those indicted, and contemporary perform an active function for the same program of fight": the more the judge comes closer to the accuser's position, the less fair the trial will be, and the already delicate criminal law of fight will transform into enemy's law.[46]

As a result, *jurisdictional culture* bans judges from using ordinary criminal law and procedure with intent to fight, but also imposes checks of legitimacy on the unordinary law of fight to ensure the respect of the principle of the fair trial.[47]

Different is the prosecutor's position, as Donini specified:

> The public prosecutor, on the contrary, can legitimately participate in the fight that, on a social perspective, criminal law as an instrument contributes to enforce via the investigative phase": "preliminary phase, research of suspected criminals, insurance of proofs, neutralization of *in itinere* criminal phenomena, they represents dynamic moments of 'fight', and as they are all legally regulated the law itself, in this phases, shares the function," especially because "these operation 'reasoning' is designated to be introduced to the judge during juridical checks of investigation and during the trial itself; and exactly here it is fundamental to have a judge that has preserved a *super partes* role.[48]

The scenario is even more complex when a crime deals with terrorism. Here more than anywhere, prevention and investigation often become one thing only:

> General prevention and repression of crimes are activities necessarily complementary and interdependent. […] Material coming from operations aimed at discovering crimes helps to integrate knowledge of criminal phenomena, necessary premise of every investigative actions; on the other side, it is right during activities of prevention that many consumed crimes come to light.[49]

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[45] Italian representatives are so tied up with the principle of the fair trial that disposed the application to the Italian Army's Team participating in the operation "*Enduring Freedom*" of the only *military criminal code*, with the exclusion of the *military procedural code* and the *law of the judicial system of war* (legge sull'ordinamento giudiziario di guerra), as recalled by MONTEDORO in G. MONTEDORO, M. FIOCCA, ibid., p. 26,27. In addition to this, also prisoners of war and civilians' rights are protected on an international basis by the *Third and the Fourth Geneva Conventions* (1949) that respectively guarantee both the presumption of innocence and the right to a legal trial with all its corollaries. On this point, particularly controversy is U.S. classification of suspected terrorists as enemy combatants with intent to relegate these prisoners to a black hole of domestic and international law.

[46] M. DONINI, ibid., p. 43-44.

[47] Idem, p. 44-45.

[48] Idem, p. 44-45.

[49] L. A. D'ANGELO, F. ROBERTI, *Le unità antiterrorismo nel sistema dell'efficienza investigativa*, in *Le nuove norme di contrasto al terrorismo*, edited by A. A. DALIA, Milan, 2006. 107-108.

Thus, since operations of both intelligence and security police are fundamental to prevent terrorist attacks it is essential, at this point, to define how can the relative information access to the trial, where the matter is not one of prevention but of personal responsibility ("Criminal responsibility is personal" Italian Constitution, art. 27[1]).

4. INTELLIGENCE INFORMATION AND RIGHT TO A FAIR TRIAL IN THE ITALIAN COUNTERTERRORISM LEGISLATION

> Justice want that the accused go on trial, be defended, and be judged and that all the other matters, although more important, be put aside.
> HANNAH ARENDT[50]

In Italy, police agents' role changes according to the assigned function: administrative or judiciary. Administrative police *–polizia con funzioni amministrative–* is articulated into many different specialized groups, one of those is the security police *–polizia di sicurezza–*, which works to prevent crimes from occurring (art. 1, *T.U. of public security* r.d. n. 773/1933 e following modifications).[51] On the other side, there is the judicial police *–polizia giudiziaria–* that according to art. 55 of the *criminal procedural code* (cpp) has the duty:

- To receive and seek notice of crimes (informative task);
- To prevent further consequences and seek out the authors (investigative task);
- To take the necessary acts to ensure sources of proof and to apply criminal law, namely to verify the criminal event by way of trial (insurance task).

Indeed, in accordance with art. 109 of the Constitution "the judiciary directly commands the judicial police." Therefore, thought police remain under the 'organic' dependence of the executive without regard for the function, the judiciary function is carried out by police under the direction of the public prosecutor (art. 56 cpp) and under the surveillance of the general prosecutor of the Court of Appeal (art. 17 disp.

[50] In *La banalità del male*, like quoted by MOROSINI, *Senso comune per stabilire chi è terrorista?* In *www.diritto&giustizia.it*, 2001, as mentioned in M. MONTEDORO, M. FIOCCA, ibid., p. 205.
[51] P. TONINI, *Manuale di Procedura Penale*, 7th ed., Milan, 2006, p. 106-107.

att.).[52]

Statute n. 144 of the 27th July 2005 (then law n. 155, 31st July, 2005, *Urgent measures for the contrast to international terrorism*) has on one side strengthened investigative capacities (art. 5: Antiterrorism Unit), which are the main activity of intelligence against 'worst crimes'[53] of terrorism, and on the other, it has aimed at reducing those administrative tasks that improperly past legislature ascribed to police as substitute of an unsuccessful public administration (art. 17: Rules on the use of judicial police).[54]

Even before, with the first Italian regulation specifically dedicated to international terrorism (d.l. n. 374 October 18th, 2001), the government stated:

> Article 5[5]: "In any case elements obtained by way of preventive operations cannot be used on trial."

And then in December 15th of the same year, the parliament passed the above d.l. into law n. 438 (*Urgent dispositions for the contrast to international terrorism*) specifically with some modifications, among other, for art. 5[5]:

> "In any case elements obtained by way of preventive operations cannot be used on trial, except for investigative goals. In any case activities of preventive interceptions […] and information acquired though the same activities, cannot be mentioned in investigative documents, or become object of examination, or even be divulgated in any other way."

Basically, the law, taking into consideration the community's serious dangers coming from terrorism, and the intrinsic difficultly to individuate crimes of terrorism, allows investigative operations also on the supposition that the crime has not been accomplished jet, so that little clues can be enough to give reason for investigation. However, this exposition of a high potential number of subjects to investigative intrusions is balanced by the legislator with: prosecutor's check, predetermined term, prescription of a formal kind of document (decreto), and above all uselessness of the gathered material, in any case.[55]

Specifically, when intelligence information comes from *the Service for Information and Security* the law (n. 801, October 24th, 1977) has prescribed (since

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[52] Idem, p. 108.

[53] The law talked about 'worst crimes' (*delitti più gravi*) and more than one has contested this expression for being vague; on the topic: L. A. D'ANGELO, F. ROBERTI, ibid., p. 110 and following; P. L. VIGNA *Nuovo assetto e nuovi compiti della polizia giudiziaria*, in *Contrasto al terrorismo interno e internazionale*, ibid., p. 135 and following.

[54] P. TONINI, ibid., p. 110.

[55] L. BAUCCIO, *L'accertamento del fatto di reato di terrorismo internazionale, aspetti teorici e pratici,* Milano, 2005, p. 284-285.

the creation of this intelligence service in 1977) that the Service should generally not establish direct relations with the judicial authorities, and that should rather line up eventual collaborations about procedural investigation exclusively through judicial police's mediation, as described by art. 9 of last cited law.[56]

Anyhow, according to a pronunciation of a Milan judge for preliminary hearing (*giudice per le indagini preliminary*- gup):

> It has to be removed from the case file the so-called source of intelligence, namely, the "numerous data coming from 'informative' or not more accurate 'investigative' acquisitions, or from acquisitions gathered though 'contests of international cooperation'" and so on, […] for the reason that "a judge's decision cannot be reduced to a ratification of reports e notes whose foundation and content cannot be verified." In fact, "intelligence activities are performed out of the rules of the procedural criminal code and consist into a bunch of information, notices, inputs, without the application of a predetermined acquisitive and selective system far from operators' discretional opinions." (January 24th, 2005) [57]

Giancarlo Montedoro synthesized the principle as follow:

> No state of emergency can justify illicit limitations on the right to one's own defense, and consent to the use of sources whose characters and origin are unknown, and finally determinate violations of the fair trial.[58]

Therefore, the fair trial is one for everybody, also for suspected terrorists, and this democracy's value is clearly stated by art. 111 of the Italian Constitution inspired by art. 6 of the European Convention on Human Right:

> Article 6
> (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> (3) Everyone charged with a criminal offence has the following minimum rights:
>
> - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> - (b) to have adequate time and the facilities for the preparation of his defence;
> - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

[56] M. L. DI BITONTO, *Raccolta di informazioni e attività di* intelligence, in *Contrasto al terrorismo interno e internazionale*, ibid., p. 258-259.
[57] Doctor Forleo, as quoted in L. BAUCCIO, ibid., p. 355-357. The judge provided a similar reasoning for the so-called 'open sources', i.e., journalistic information or information obtained though the web.
[58] G. MONTEDORO, M. FIOCCA, ibid., p. 205.

- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 111 [Legal Proceedings]
(1) Justice must be administered by fair trials defined by law.
(2) Trials are based on equal confrontation of the parties before an independent and impartial judge. The law has to define reasonable time limits for the proceedings.
(3) In criminal trials, the law provides for timely and confidential information of the accused regarding the nature and reasons of charges brought against them; they are granted the time and means for their defense; they have the right to question those who testify against them or to have them questioned; those who may testify in favor of the accused must be summoned and examined under the same conditions granted to the prosecution; any evidence in favor of the accused must be acknowledged; the accused may rely on the help of an interpreter if they do not understand or speak the language of the proceedings.
(4) In criminal trials, evidence may only be established according to the principle of confrontation between parties. No defendant may be proven guilty on the basis of testimony given by witnesses who freely and purposely avoided cross-examination by the defense.
(5) The law defines in which cases evidence may be established without confrontation between the parties, either by consent of the defendants or as an effect of proven misdemeanor.
(6) Reasons must be stated for all judicial decisions.
(7) Against sentences and measures concerning personal freedom delivered by the ordinary or special courts, appeals to the curt of cassation are always allowed regarding violations of the law. These provisions may be waived only in the case of sentences pronounced by military courts in time of war.

In conclusion, terrorist attacks can be prevented by police and intelligence's operations hopefully always more coordinated and wisely regulated[59], and simultaneously everybody can make terrorism weaker and weaker becoming conscious of the indispensable value of the Rule of Law; finally, together with Giancarlo Montedoro's words:

> Western Countries will not get lost just if the State of Law does not reveals itself as a simple pretext to prime wars, but as the resolutive method to solve current political-religious conflicts.[60]

[59] Many voices have called so far for the extension to terrorism issue of procedural instruments already experimented against mafia related crimes, especially with reference to the establishment of a super prosecutor's office like the already existing *Superprucura Antimafia* and the related *National Direction Antimafia*, like purposed by Doctor Stefano Dambruoso, Prosecuting attorney in Milan. G. MONTEDORO, M. FIOCCA, ibid., p. 206, 237. Read also, on the point: L. A. D'ANGELO, F. ROBERTI, ibid., p. 97 and following; P. L. VIGNA, ibid., p. 130; P. TONINI, ibid., p. 110; V. SPRIGARELLI, *L'impiege della polizia giudiziaria e le attività sotto coperatura, in Terrorismo internazionale: modifiche al sistema penale e nuovi srtumenti di prevenzione*, edited by E. ROSI, S. SCOPELLETTI, Milan, 2006, p.116-117.
[60] Idem, p. 226.