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THE STATE OF EMERGENCY AND THE (INALIENABLE) FIRMNESS OF THE VALUES OF FREEDOM OF A DEMOCRATIC ORDER: THE ITALIAN APPROACH**

Sommario: 1. The enemies of democracy: introductory notes. 2. The declaration of the state of siege within the Italian Constitution: general profiles. 3.The legal form of the act of deliberation of the state of siege.4.Fundamental rights and criminal law of the "enemy aliens". 5. The (inalienable) firmness of the values of freedom (also) during a (dramatic) emergency situation.

1. The enemies of democracy: introductory notes

The constitutional value of peace, supreme principle of the Italian legal system, sacralized within the article 11 of the Constitution, results in the repudiation of the war as an instrument of offense to the liberty of the peoples and as a means of resolving international disputes[1] in accordance with international law[2] where, moreover, "*the ban on the use of force is widely held to be peremptory in nature, and has often been described as the 'cornerstone' of the modern international system*"[3].

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** This is a revised version of the paper delivered to the "10th World Congress of Constitutional Law 2018 - WORKSHOP #7 Constitutional Rights Protection in times of Emergency", Seoul 18-22 June 2018, organized by the Korean Association of the IACL in collaboration with the Executive Committee of the IACL.

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[1] Cf.,*ex plurimis*: L. CARLASSARE, *L'art. 11 Cost. nella visione dei Costituenti*, 2013, in *www.costituzionalismo.it/articoli/437/*, 2 sqq.; M. BENVENUTI,*Il principio del ripudio della guerra nell'ordinamento costituzionale italiano*, Napoli, 2010, 115 sqq.; L. CARLASSARE, *Costituzione italiana e partecipazione a operazioni militari*, in N. RONZITTI (ed.), *Nato, Conflitto in Kosovo e Costituzione italiana*, Milano, 2000, 159 sqq.; M. CECCHETTI, *Il "ripudio della guerra" contenuto nella carta costituzionale alla luce del diritto e della prassi internazionale*, in *La Com. Int*., 1993, 284 sqq.;L. GIANFORMAGGIO, *La guerra come negazione del diritto,* in *Dem. e Dir.*, 1992, 279 sqq.; A. CASSESE, *Art. 11*, inG.BRANCA (ed.), *Commentario della Costituzione, Artt. 1/12 Principi Fondamentali*, Bologna, 1975, 568 sqq.

[2] Cf. A. BARONE, *La difesa nazionale nella Costituzione*, in *Dir. e Soc., Parte I*, 1987, 646.

[3] Cf. C. J. TAMS, *The Use of Force against Terrorists*, in *The European Journal of International Law*, Vol. 20, no. 2, 2009, 359.

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Historically, however, the existence of an intimate correlation between politics and the use of weapons, aimed at satisfying the "raison d'état", has always accompanied (and justified), even within the framework of a broad and controversial evolutionary process, the use of war violence in order to achieve objectives of dominance, conquest and supremacy within the international community, coming to believe that war is nothing more than "the continuation of politics by other means"[4].

At the same time, by now passed a traditional approach, according to which the concept of war expresses the idea of the classical notion of "international conflict"[5], id est "armed struggle between two or more States"[6], at present, it cannot be denied that state of war and / or crisis (internal and / or international)[7]can also be discussed with reference to events that, although not ontologically comparable to war operations in the proper sense intended, may well require the mobilization of military (and civil) forces to guarantee the stability of the established order[8].

On such occasions, the notion of war can be juxtaposed with armed conflict in order to ensure that in the situations of hostility that the parties do not recognize as a "state of war" the rules of international humanitarian law[9] and at least some rules of war law must be applied[10].

The profound changes of the characteristic features of armed conflicts that have occurred over time[11] have thus engendered numerous hermeneutical difficulties concerning the definition of the exact applicative latitude of the article 11 of the Italian Constitution, linked, as it is easy to understand, to the complex exegesis of multiform nature of the sources of danger for a democratic order.

Frequently, they are hidden behind activities which, although they do not fall within the framework of a classic conception of hostility between sovereign states, nevertheless they can well undermine the integrity of the foundations of free institutions and, consequently, require the preparation of severe and rapid initiatives to combat acts of (*lato sensu*) military aggression perpetrated.

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[4] Cf. C. VON CLAUSEWITZ, *Della Guerra*, G. E. RUSCONI (ed.), Torino 2000, XXV.

[5] Cf. N. RONZITTI, *Guerra*, in *Digesto delle Discipline Pubblicistiche*, VIII vol., 1993, 17 sqq.

[6] Cf. A. CURTI GIALDINO, *Guerra (diritto internazionale)*, in *Enc. Dir.*, *XIX vol*., Milano, 1970, 849 sqq.

[7]Cf.,*ex multis*: M. MANCINI, *Stato di guerra e conflitto armato nel diritto internazionale*, Torino 2009, 11 sqq.; N. RONZITTI, *Diritto internazionale per Ufficiali della Marina Militare*, Roma, 1993, 205 sq.

[8]Cf.,*ex plurimis*: H. TIGROUDJA, *Quel(s) droit(s) applicable(s) à la «guerre au terrorisme»*, in *Annuaire français de droit international*, 48, 2002, 83 sqq.; U. RAPETTO, R. DI NUNZIO, *Le nuove guerre*, Milano, 2001, 226 sqq.; N. RONZITTI, *Diritto internazionale per Ufficiali*, *op. cit*.,205 sq.

[9] Indeed, according to P. ALSTON, J. MORGAN-FOSTER, W. ABRESCH, *The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Confl icts: Extrajudicial Executions in the 'War on Terror'*, in *The European Journal of International Law*, 2008, Vol. 19, no. 1, 191 sqq., a commonly accepted starting point for understanding the relationship between international human rights law and international humanitarian law is the Nuclear Weapons Advisory Opinion of the International Court of Justice. In Nuclear Weapons, the Court examined the relationship between human rights law and humanitarian law during armed confl ict and concluded that the test of what constitutes an arbitrary deprivation of life in the context of hostilities falls to be determined by the applicable lex specialis, namely, the law applicable in armed confl ict which is designed to regulate the conduct of hostilities.

[10] Cf. P. GARGIULO, *La guerra: profili di diritto internazionale*, in AA. VV.,*La guerra. Profili di diritto internazionale e diritto interno*, Quaderni 3, Università degli Studi di Teramo, Napoli, 2002, 62.

[11] Cf. A. BARONE, *La difesa nazionale*, *op.cit*.,664 sqq.

Thus, for example, in the case of limited international conflict; this essentially translates into a form of subversion of the established order, which exploits factors of internal instability, but which is directed by foreign state organizations in order to compromise the stability of the internal political order to exercise its interference up to the territorial annexation or control of that given state community.

According to a certain opinion, these are hypotheses that can be framed within the phenomenon of the so-called state terrorism which can be divided into four groups: terrorist acts committed during armed conflicts; terrorist acts perpetrated usually on foreign soil by state agents outside the framework of an armed conflict; acts involving the state in the activities of terrorist groups; internal state terrorism[12], even if *<<the expression 'state terrorism' is widely employed in literature, with different meanings, thus leading to some confusion>>*[13].

The aims of these actions are, therefore, the same as those of an international war in the proper sense intended; the modalities of realization are different, however, as technological progress and the complex system of international alliances would expose states with hegemonic tendencies, in the case of open conflict, to a potential, but unsustainable, hostilities escalation.

Therefore, it is preferred to act in silence, destabilizing the established order from within, until it reaches the danger of using non-conventional but deadly weapons[14].

The reaction to this form of subversion is based, of necessity, on a strong ideological cohesion[15] (anchored to the basic values of a democratic system) of the state community, the only factor of essential matrix actually suitable to correctly orient, respecting the inviolable rights of the individual, the use of force against such (basically) eversive actions, whether they are supported by political / social aims, or expression of exacerbated religious fundamentalisms[16].

Terrorism, it is known, is a political act of a violent nature[17].

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[12] Indeed, this categorization is all the more puzzling as traditional analyses have focused on the nature and distance of the link between the state and terrorist groups (ranging from a very close relationship to no relationship at all and the state committing terrorist acts without the intermediation of terrorist groups), without taking into consideration the existence of an armed conflict. Anyway, the main question relating to state-sponsored terrorism is undoubtedly state responsibility. Cf.,*ex multis*: N. QUÉNIVET, *The World after September 11: Has It Really Changed?*, in *The European Journal of International Law*, Vol. 16, no.3, 2005, 565 sqq.; C. WARBRICK, *The European Response to Terrorism in an Age of Human Rights*, in *The European Journal of International Law*, Vol. 15, no.5, 2004, 992 sq.

[13] Cf. M. DI FILIPPO, *Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes*, in *The European Journal of International Law*, Vol. 19, no. 3, 2008, 548.

[14] Cf. C. C. JOYNER, *Countering Nuclear Terrorism: A Conventional Response*, in *The European Journal of International Law*, Vol. 18, no. 2, 2007, 227 sqq.

[15] Cf. G. DE VERGOTTINI, *Indirizzo politico della difesa e sistema costituzionale*, Milano, 1971, 58.

[16]Cf.,*ex plurimis*: M. ADRAOUI, *Borders and sovereignty in Islamist and jihadist thought: past and present*, in *International Affairs*, Volume 93, Issue 4, 2017, 931 sqq.; N. A. SHAH, *The Use of Force under Islamic Law*, in *The European Journal of International Law*, Vol. 24, no. 1, 2013, 346; F. LÉGARÉ, *Les réseaux terroristes islamistes: moins puissants, plus violents*, in *Politique étrangère*, n°3-4 - 68eannée, 2003, 665 sqq.; A. CHOUET, *Violence islamiste et réseaux du terrorisme international*, in *Politique étrangère*, 2003, n°3-4 - 68eannée, 643 sqq.

[17]Cf.,*ex multis*: S. ZEULI, *Terrorismo internazionale*, Napoli, 2002, 17 sqq.; A. CASSESE, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, in *European Journal of International Law*, 2001, 994 sq.; M. Laudi, *Terrorismo (diritto interno)* (*ad vocem*), in *Enc. Dir*., XLIV vol., Milano, 1992, 356 sqq. Indeed,

Violence and terror represent the (empirical) characteristic connotations of terrorist activities[18]; unavoidable requirements, *condiciones sine quibus non* to pursue and achieve the pre-set targets of devastation[19].

An essential element, in this context, is the claim of the paternity of the actions performed[20].

The ideological or "moral" component consists in the fact that the person who launches the terrorist action pursues a goal with a political, social motivation or because of an extremist religious belief[21].

In this sense, according to a certain approach, the act of terrorist origin calls, of necessity, the purpose of eversion[22].

This reconstructive option, however, leaves out to highlight some differential profiles that, in conclusion, denote, between the two phenomena, while recognizing a possible common matrix, an essential consistency and a concrete applicative latitude not always coincident[23].

<<*terrorism is not a new phenomenon; it has long been a method of violent action by organizations and individuals attempting to achieve political goals. Indeed, terrorism is not an end but rather a modus operandi. According a particular opinion, all terrorists share one common denominator: they "live" in the future, and are convinced that they will defeat their enemies and achieve their political goals*>>. Cf. B. GANOR, *Terrorism in the Twenty-First Century*, in S.C. SHAPIRA, J.S. HAMMOND, L.A. COLE (eds), *Essentials of Terror Medicine*, New York, 2009, 13.

[18]Cf.,*ex plurimis*: R. MASSARI, *Il terrorismo. Storia, concetti, metodi*, Roma, 1998, 165 sqq.;C. J. TAMS, *The Use of Force*, *op. cit*., 361.

[19] About a study that examined mental health, work, and social life impacts in a sample of family members and relatives of the victims 6 and 18 months after a terrorist attack, see C. VUILLERMOZ, T. BAUBET, S. LESIEUR, A. SANNA, Y. MOTREFF, P. PIRARD, P. CHAUVIN, S. VANDENTORREN,*Health, work and social life impacts of January 2015 terrorist attacks in Paris on victim's relatives; 6 and 18 months after events*, in *European Journal of Public Health*, Volume 28, Issue suppl_4, 2018. According to U. WESEMANN, P. ZIMMERMANN, M. MAHNKE, O. BUTLER, S. POLK, G. WILLMUND, *Burdens on emergency responders after a terrorist attack in Berlin*, in*Occupational Medicine*, Volume 68, Issue 1, 2018, 60 sqq., the psychological consequences of terrorist attacks on both the general population and emergency responders can be even more severe than those of a natural catastrophe.

[20] Indeed, according to P. M. DUPUY, *State sponsors of terrorism: issues of international responsability*, in A. BIANCHI, Y. NAQVI (eds.), *Enforcing International Law Norms against Terrorism*,Oxford, 2004, 4 sq., most authors raise the difficulty of defining terrorism in a simple way, although specialists of humanitarian law rightly make the point that teh prohibition of clearly identified acts of terrorism may be found in the "law of Geneva".

[21] Cf. G. PISAPIA, *Terrorismo: delitto politico o delitto comune?*, in *Giust. Pen.*, II, 1975, 259. Indeed, modern history has seen the rise of terrorist organizations, diverse in their political objectives and geographic origins. All these organizations, however, share one, unifying variable – their reliance on the use of violence against civilians to achieve their goals. The decision to embrace terrorism as their preferred modus operandi is the outcome of a rational decision-making process, based on a cost–benefit analysis that leaves terrorism outweighing any other alternative. The decision to conduct a terrorist act does not necessarily mean that the perpetrators are "abnormal" or that they suffer from severe personality disorders. Rather, a rational calculation of the costs and benefits leads them to adopt the modus operandi, which they perceive as being the most effective method to achieve their political objectives and make a mark in their theater of operations. On this point, see B. GANOR, *Terrorism in the Twenty-First Century*, *op. cit*., 14.

[22] According to M. DI FILIPPO, *Terrorist Crimes and International Co-operation*, *op. cit*., 543 sqq., it must be admitted that neither the aim pursued by the perpetrator nor the methods employed are per se conclusive parameters able to provide reliable guidance in the evaluation of the content of an international notion of terrorist crime. A preliminary step in the analysis must consist in the examination of two elements, namely the juridical interest undermined by the violent actions and the appreciation of the inadmissibility of its infringement by the community of states, according to the prevailing values affi rmed in general international law. Only after such elements are examined does it become possible to explore the room for the drafting of an international category of terrorist crimes and to single out which special elements must be added (a dolus specialis, a particular method of action, or both).

[23] Cf. S. ZEULI, *Terrorismo*, *op. cit*., 33.

In fact, the term eversion refers to the whole series of means of political struggle used to violently subvert the constitutional order, that is to say the complex of principles and institutes on which a state is founded.

Terrorism, instead, consists in an indiscriminate attack against governments, institutions and organizations, characterized by the repeated and systematic use of violent means against individuals, groups or things and destined to spread a situation of fear[24].

It follows that the terrorist act is not always accompanied by (or implies) eversive purposes[25].

The eversion, in turn, then, includes in itself the idea of subversion[26].

Finally, terrorism appears to be a conceptual and phenomenic entity different from both war[27] and guerrilla warfare[28], as well as from revolutionary movement[29], yet it can represent the starting point (conceptual and ideological) of political-institutional exasperation that, if carried out to extremes, appears to be able to culminate in a real danger for the same immanence of the free Institutions within a democratic order[30].

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[24] Cf. M. MAZZANTI, *La legge 6 febbraio 1980 n. 15, contro il terrorismo*, in *Giust. Pen*.,1980, 236.

[25]Cf.,*ex multis*: G. DE FRANCESCO, *D.L. 15/12/1979 n° 625. Misure urgenti per la tutela dell'ordine democratico e della sicurezza pubblica. L. 6/2/1980 n° 15. Conversione in legge, con modificazioni del d.l. 15/12/1979 n° 625, concernente misure urgenti per la tutela dell'ordine democratico e della sicurezza pubblica, Commento art. 1 e art. 2*, in *Leg. Pen*.,1981, 37 sqq.; C. ALBANELLO, *Misure urgenti per la tutela dell'ordine democratico e della sicurezza pubblica*, in *Giur. Merito*, I, 1981, 277 sq.;S. ZEULI, *Terrorismo*, *op. cit*., 36.

[26] Cf. G. DE FRANCESCO, *op. cit*., 52.

[27]Cf.,*ex plurimis*: M. FERRERI, M. MINEO, *Il terrore viene dall'Islam. Il terrorismo islamico ieri e oggi*, Palermo, 2001, 9; L. BONANATE, *Dimensioni del terrorismo politico*, Milano, 1979, 137 sq.;A. PANZERA, *Attività terroristiche e diritto internazionale*, Napoli, 1978, 180 sqq.

[28] Cf. A. PANZERA, *Terrorismo (diritto internazionale),* in *Enc. Dir.*, XLIV vol., Milano, 1992, 371; A. PANZERA, *Attività terroristiche*, *op. cit*.,3. Indeed, terrorism is a modus operandi in which deliberate violence against civilians is used for the purpose of achieving political goals. In this respect, it is the intentional harming of civilians, which is at the core of terrorism, that makes this modus operandi illegitimate, even if it is meant, prima facie, to achieve justified objectives. This definition makes a distinction between an action intended to harm civilians and one intended to harm military and security personnel. The latter is defined as a guerilla or insurgency action, even though the perpetrator might use the same modus operandi (shooting, suicide bombing, or rocket fire). Thus, in seeking to achieve the same political objectives, an organization or perpetrator might carry out a "terrorist" attack on one occasion and a "guerilla" attack on another. Furthermore, even the political goal of an organization may change as it engages in acts of terrorism or guerilla warfare. Sometimes attacks are executed for the purpose of achieving social, economic, or national goals, such as a separate state or national liberation. On this point, see B. GANOR, *Terrorism in the Twenty-First Century*, *op. cit*., 13 sq.

[29] Cf. A. PANZERA, *Terrorismo*, *op. cit*., 371; A. PANZERA, *Attività terroristiche*, *op. cit*.,3.

[30] On this point, see S. MARTIN, L. WEINBERG, *The Role of Terrorism in Twenty-First-Century Warfare*, New York, 2017, 6 sqq.

The attack on established power is a complex phenomenon[31]; insurrection[32], revolution[33], coup d'état[34], civil war[35], are the most striking examples[36].

It is the same constituted power which, in such cases, must give full support to all its resources to preserve itself[37], accompanied in this process by the whole civil society, whose members, citizens, *uti singuli* and, at the same time, as members of a community bound by shared values, must be the first to believe in (and to defend) their own freedom laboriously conquered over the centuries[38].

Within this framework, it is necessary to assess compliance with the constitutional dictate about the use of the military instrument whenever the aggression is not, at least immediately, undertaken and / or directed by a sovereign State, but consists in the the fulfillment of terrorist acts, for this alone no less destructivescertainly, as sadly the experience gained has taught over the last decades[39].

At the same time, however, trying to provide a interpretation, constitutionally oriented, about the legal regime to be applied on such occasions, appears to be an indispensable con-

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[31] Cf. V. GUELI, *Colpo di Stato*, (*ad vocem*), in *Enc. Dir.*, III vol., Milano, 1960, 669 sqq.

[32]Cf.,*ex multis*: E. GALLO, *Insurrezione armata contro i poteri dello Stato*, in *Giust. Pen*., II, 1981, 237 sqq.; C. CARBONE, *Insurrezione armata contro i poteri dello Stato*, (*ad vocem*), in *Enc. Dir*., XXI vol., Milano, 1971, 861 sqq.

[33] Cf. G. FIASCHI, *Rivoluzione,* (*ad vocem*), in *Enc. Dir*., XLI vol., Milano, 1989, 68 sqq.

[34] Cf. V. GUELI, *Colpo di Stato*, *op. cit*., 672 sqq.

[35]Cf.,*ex plurimis*: N. RONZITTI, *Diritto internazionale dei conflitti armati*, Torino, 2001, 301 sqq.; E. GALLO, *Guerra civile (diritto penale)* , in *Enc. Dir.*, *XIX vol*., Milano, 1992, 894; R. BARSOTTI, *Insorti* (*ad vocem*), in *Enc. Dir*., XXI vol., Milano, 1971, 798 sqq.;G. MOTZO, *Assedio (stato di),* in *Enc. Dir.*, III vol., Milano, 1958, 251 sqq.;N. RONZITTI, *Guerra*, *op. cit*., 19 sqq.

[36] Indeed, there are perhaps hundreds of different definitions of terrorism, all of which tend to reflect the political world-view of the definer. The same act of violence can be classified differently, depending on the identities of the perpetrators. Groups that engage in identical behavior might be considered by their sympathizers as freedom fighters, and by their enemies as terrorists. Cf. B. GANOR, *Terrorism in the Twenty-First Century*, *op. cit*., 13. On this point, see, *ex plurimis*: C. TOWNSHEND, *Terrorism: A Very Short Introduction*, Oxford, 2018; C. C. Combs, *Terrorism in the Twenty-First Century*, New York, 2018; R. JACKSON, D. PISOIU (eds.), *Contemporary Debates on Terrorism*, New York, 2018; O. LYNCH, J. ARGOMANIZ (eds.) *Victims and Perpetrators of Terrorism: Exploring Identities, Roles and Narratives*, New York, 2018; N. HÉNIN, *Comprendre le terrorisme*, Paris, 2017; B. SAUL, *Defining Terrorism in International Law*, New York, 2006.

[37] Cf. T.M. FRANCK, *Terrorism and the right to self-defense*, in *The American Journal of International Law*, 2001, Volume 95, 839 sqq.

[38] Cf. B. PELLEGRINO, G. ROSIN, *Profili costituzionali in tema di compiti di difesa interna dell'ordinamento da parte delle Forze Armate*, in *Rass. Giust. Mil.*, I, 1981, 45 sq.

[39] Whether states can use force against terrorists based in another country is much discussed. The relevant provisions of the UN Charter do not provide a conclusive answer, but have to be interpreted. According to C. J. TAMS, *The Use of Force*, *op. cit*., 359 sqq., in the course of the last two decades, the Charter regime has been re-adjusted, so as to permit forcible responses to terrorism under more lenient conditions. As far as collective responses are concerned, it is no longer disputed that the Security Council could authorize the use of force against terrorists; however, it has so far refrained from doing so. More controversially, the international community during the last two decades has increasingly recognized a right of states to use unilateral force against terrorists. This new practice is justified under an expanded doctrine of self-defence. It can be explained as part of a strong international policy against terrorism and is part of an overall tendency to view exceptions to the ban on force more favourably than 20 years ago. Conversely, it has led to a normative drift affecting key limitations of the traditional doctrine of self-defence, and increases the risk of abuse.

ceptual operation in order to understand the limits of lawfulness within which to consider respectful of the founding principles of a modern system of values the activity of defense of free Institutions against the "enemies of democracy".

Nonetheless, it is necessary to keep in mind the need not to disavow, even in the course of a situation of (dramatic) emergency, the set of ideals of juridical civilization proper to modern constitutionalism in which, ultimately, the democratic nature of an legal order is resolved[40].

Consequently, providing for specific procedures for crisis and / or emergency management - no matter if it is of a military nature or the result of an attempt at internal destabilization related to terrorist attacks[41] - implies the need to identify *a priori* appropriate bodies to approve the state of siege.

Moreover, it involves the logical consequence to define the formal and substantial limits, within which the (temporary) suspension of fundamental human rights can possibly be arranged[42], or the deprivation (temporary) of effectiveness of one or more constitutional rules that recognize rights, by an act-source different from the Constitution[43],

That isin order to find the right balance underlying the need to preserve the immanence of free Institutions[44] without, at the same time, disregarding and / or mortifying their the axiological foundations on which they are based, also in order to prevent, even in the face of the crisis, the "suspension of representative democracy"[45].

Therefore, it can be considered, certainly, that the more serious and thoughtful the will to protect the << values >> characterizing the constitution, the greater should be the attention to prepare, in advance, remedies involving exceptions to normality in order to counteract the danger[46].

The question of how a security challenge (namely terrorism) can affect our understanding of the rule of law implies that the new challenge to the security of our society (which we call with the expression "international terrorism") needs new measures to fight terror and the dangers of disgregating of the democratic Institutions[47].

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[40] Cf. F. BILANCIA, *Emergenza, interpretazione per valori e certezza del diritto*, in *Giur. Cost*., 1993, 3012 sq.

[41] Cf. G. MARAZZITA, *L'emergenza costituzionale*. *Definizione e modelli*, Milano, 2003, 157 sqq.

[42]Cf.,*ex multis*: A. BARAK, *Democrazia, terrorismo e Corti di giustizia*, in *Giur. cost*., 2002, 3385 sqq.; G. FRANCIOSI, *Emergenza terrorismo e diritti di libertà*, in *Quad. Cost.*, I, 2002, 77 sqq.; S. CECCANTI, *L'Italia non è una democrazia protetta, ma la Turchia e la Corte di Strasburgo non lo sanno*, in *Giur. Cost.*, 2001, 2113 sqq.; G. BATTAGLINI, *Convenzione europea, misure d'emergenza e controllo del giudice*, in *Giur. cost*., I, 1982, 404 sqq.; M. BON VALSASSINA, *Profilo dell'opposizione anticostituzionale nello Stato contemporaneo*, in *Riv. Trim. Dir. Pubbl.*, 1957, 531 sqq.; C. ALBANELLO, *Misure urgenti*, *op. cit.*, 276 sqq.

[43] Cf. M. PIAZZA, *L'illegittima <<sospensione della Costituzione>> prevista nel c.d. <<Piano Solo>>*, in *Giur. Cost.*, 2001, 812.

[44] Cf. A. SCHIMEL, *Face au terrorisme: les lois spéciales à l'italienne*, in *Sociologie du travail*, 28e année n°4, 1986, 527.

[45] Cf. P. PINNA, *Guerra (stato di)*, in *Digesto delle Discipline Pubblicistiche,* VIII vol., 1993, 58.

[46] Cf. G. DE VERGOTTINI, *Necessità, Costituzione materiale e disciplina dell'emergenza. In margine al pensiero di Costantino Mortati*, in *Dir. e Soc.*,1992, 229.

[47] About some of the central dynamics of terrorist activity, i.e. its causation (why does it occur where and when it does?), its varying levels across place and time (why does it endure for periods and at the specific, differing levels that it does?), the processes by which terrorist campaigns come to an end (why does it dry up in some settings at some moments, but not in and at others?) and the patterns of support involved in terrorism (why are

These new measures are sometimes conflicting with parts of our traditional understanding of freedoms and the rule of law.

So, it is not terrorism itself which directly endangers rule of law (or at least not primarily), but the reaction to it is[48].

In this sense, it has been observed, the phenomenon of the temporary ineffectiveness of the principles that characterize a democratic order can not undermine the so-called "Constitutional minimum"[49], or those values placed to define the most intimate essence of a modern legal order.

However, the action of the institutions responsible for managing the crisis situation can still be addressed both in the sense of redefining the structure of the competences[50], for example in terms the partial deactivation of parliamentary prerogatives to proceed with a concentration of powers in the hands of the Government[51], both, more directly, in the sense of investing (and conditioning and / or temporarily limiting) the fundamental freedoms of citizens[52].

The severity of the suspension measure is evident; it involves the disregard of the constitutional provision, both in its substantial content, and in reference to the (judicial) protection of its effectiveness[53].

It deprives, that is, the individual of the guarantees that this rule gives him, canceling the moment of freedom and reintegrating the moment of authority.

Of course, national security can not be the reason for recognizing to the government authorities an unlimited license to disregard the most elementary values of the person, but, at the same time, absolute respect and, in any case, unavoidable of the rights of the person can not constitute the cause of the impossibility of defense of the community[54].

In this sense, it was observed, the balance and the compromise are the price imposed on democracy. Only a strong, secure and stable democracy can afford to respect and protect human rights, and only a democracy built on the foundations of human rights can exist in complete safety[55].

2. The declaration of the state of siege within the Italian Constitution: general profiles

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some people more likely to endorse and practice it than others?), see R. ENGLISH, *Does Terrorism Work? A History*, New York, 2016.

[48] Cf. A. JAKAB, *Breaching constitutional law on moral grounds in the fight against terrorism: Implied presuppositions and proposed solutions in the discourse on 'the Rule of Law vs. Terrorism'*, in *International Journal of Constitutional Law*, Volume 9, Issue 1, 2011, 62.

[49] Cf. G. MARAZZITA, *L'emergenza costituzionale*, *op. cit*., 237 sqq.

[50] Cf. G. FERRARI, *Guerra (stato di)*, (*ad vocem*), in *Enc. Dir., XIX vol*., Milano, 1970, 827 sq.

[51] Cf. G. DE VERGOTTINI, *Necessità, Costituzione materiale*, *op. cit*., 231.

[52] Cf. G. FERRARI, *Guerra (stato di)*, *op. cit*., 828.

[53] Cf. G. MARAZZITA, *L'emergenza costituzionale*, *op. cit*., 244 sqq.

[54] Cf. F. FABBRINI, *Silent enim leges inter arma? La Corte Suprema degli Stati Uniti e la Corte di Giustizia Europea nella lotta al terrorismo*, in *Riv. Trim. Dir. Pubbl*., 03, 2009, 591 sqq.

[55] Cf. A. BARAK, *Democrazia, op. cit*., 3393.

Within the Italian legal system it is not currently possible to find a unitary corpus of juridical norms capable of regulating, both from a substantive point of view and from a procedural point of view, the management of the state of crisis and/or emergency[56]that is not immediately attributable to war events, considered, in the traditional sense, as a conflict and / or armed struggle between two or more sovereign states.

The Italian Constitution does not contain a complete regulation of such cases, in comparaison with what happens in many other countries so to make believe that "*constitutional provisions allowing for states of emergency have effectively globalized in the course of the 20th century*"[57].

Therefore, it is an inadequate regulatory system that requires urgent reconsideration[58].

The lack of a rule that regulates, within the Italian Constitution, the state of siege (or to another descriptive formula of an emergency situation of internal matrix)[59],traces back to the debate held within the Constituent Assembly[60], distinguished by the emergence of different (and, among them, not reducible to synthesis and / or unity) ideological positions susceptive of being able to be amalgamated within an overall picture tendentially shared only after a thorough reflection.

At that time, attempts were made to introduce rules aimed at regulating the temporary suspension of fundamental rights in case of emergency, but, eventually, it was decided not to allow this option because the inviolable rights characterize the republican constitution and admitting to suspend them would have meant to disregard the most intimate essence of a democratic order even during a crisis.

In fact, at that context, it was possible to assist, on the one hand, to the development of proposals aimed at regulating and admitting the state of public danger, providing, in some cases, specific profiles of responsibility (mainly of a political nature).

On the other hand, the position emerged of those who placed themselves in the sense of an explicit rejection of the institution of the state of siege, an approach expressed also only through the remark according to which the silence of the Constitution on the point (in its formulation *in fieri* at the time of the debate), should have been intended in the sense of pleading illegal (*rectius*: contrary to the constitutional dictation) any (whatever the applicable text) deliberation, declaration and / or pronouncement of the state of public danger[61].

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[56] An unforeseen situation which, by making the law, normally in force, inadequate, raises the need for a state of exception capable of facing it. Cf. G. MARAZZITA, *L'emergenza costituzionale*, *op. cit*., 17.

[57] Cf. S. HUMPHREYS, *Legalizing Lawlessness: On Giorgio Agamben's State of Exception*, in *The European Journal of International Law*, Vol. 17, no.3, 2006, 683.

[58] Cf. G. De Minico, *Costituzione, emergenza e terrorismo*, Napoli, 2016, 31 sqq.;G. DE VERGOTTINI, *Profili costituzionali della gestione delle emergenze*, in *Rass. Parl*., 2001, 275 sqq.

[59]Cf.,*ex multis*: F. COCOZZA, *Assedio (stato di)* (*ad vocem*), in *Enc. Giur.*,*III vol*., Roma, 1988, 1 sqq.; G. CATALDI, *La clausola di deroga della convenzione europea dei diritti dell'uomo*, in *Riv. Dir. Eur.*, 1983, 9 sqq.; G. MOTZO, *Assedio (stato di),op. cit*., 251 sqq.

[60] Cf. B. CHERCHI, *Stato d'assedio e sospensione delle libertà nei lavori dell'assemblea costituente*, in *Riv. Trim. Dir. Pubbl*., 1981, 1108 sqq.; F. COLONNA, *Stato di pericolo pubblico e sospensione dei diritti di libertà dei cittadini*, in *Dem. e Dir*., 1967, 263 sqq.

[61] Cf. L. BUSCEMA, *Lo stato di guerra in tempo di pace*, Napoli, 2014, 290 sqq.

In accordance with an exactly opposite perspective, however, later, part of the doctrine argued that the absence of any constitutional reference to the regime to be applied in case of emergency not of a warlike nature could have been interpreted in the sense of allowing the reference to the procedures described art. 78 of italian constitution not only, therefore, for the hypothesis of international war, but also for the proclamation of the state of siege[62].

Sometimes, after all, as already noted, the state of crisis can arise from sources of destabilization with respect to which it is difficult to draw a clear line of demarcation on their nature.

This hypothesis especially occurs when the aggression perpetrated against democratic Institutions comes from initiatives that, although not been planned and undertaken by sovereign states and although they can not be qualified, in the traditional sense, as military operations, they assume, however, as to structure and modus operandi, a hybrid connotation, as sadly teaches, in a recent past, the spread of international terrorism[63].

Thus, the only constitutional regulation which is applicable by analogy appears to be the article 78 const., which rules,however, the hypothesis of deliberation of the state of war when the armed conflict occurs between two or more sovereign states.

In this sense, it was observed, the procedure envisaged pursuant to art. 78 const, considered together with the art. 87 const., presents the merit of requesting the competition of the three constitutional bodies (parliament, government and president of the republic) that characterize the particular political / constitutional order of democratic inspiration of the italian legal system.

Consequently, it allows to ensure, thanks to an articulated model of checks and balances drawn up in the Constitutional Charter, the firmness of the values of modern constitutionalism from the danger of authoritarianism[64], while admitting the emanation of (atypical) government measures, with the same value of the law norms, which are indispensable to face the crisis[65].

After all,<<*today many countries require parliamentary ratification, sometimes post hoc, of the executive or presidential prerogative to 'decide on the exception'*>>[66].

Indeed, in order to bestow "constitutional dignity" to the basic principles considered indispensable for the purpose of "legalizing", from a procedural point of view, the methods of conducting hostilities, the choice made by the Constituent Assembly was to introduce "minimum provisions" capable of balancing, in deference to the pre-eminent "pacifist principle"[67], opposing needs.

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[62] Cf. M. PIAZZA, *L'illegittima <<sospensione della Costituzione>>*, *op. cit*., 816 sqq.;G. MOTZO, *Assedio (stato di),op. cit*., 259 sqq.

[63] Cf. G. DE VERGOTTINI, *La difficile convivenza tra libertà e sicurezza: la risposta delle democrazie al terrorismo. Gli ordinamenti nazionali*, 2003, in *http://archivio.rivistaaic.it/materiali/convegni/aic200310/devergottini.html*.

[64] Cf. F. COCOZZA, *Assedio (stato di)*, *op. cit*., 8.

[65] Cf. P. BARRERA, *Parlamento e politiche di sicurezza: tendenze e prospettive*, in *Quad. Cost.*, 1987, 297 sqq.; M. SCUDIERO, *Aspetti dei poteri necessari per lo stato di guerra,* Napoli, 1969, 128 sqq.

[66] Cf. S. HUMPHREYS, *Legalizing Lawlessness*, *op. cit*., 684.

[67] Cf. A. GIARDINA, *Art. 78*, in G. BRANCA (ed.), *Commentario della Costituzione*, Bologna, 1979, 95.

On the one hand, in fact, at that time it seemed essential to scan, even though synthetically (but, in any case, clearly), the role played by each constitutional body in the case of activation of the procedures for deliberation and declaration of the state of war[68].

Thus, recognizing this way the prevalence of the Parliament regarding the appreciation of the not otherwise avoidable conferment to the Government of the necessary powers (extraordinary, but certainly temporary and, in any case, respectful of the supreme principles of the constitutional order) to face the war emergency, conferring to the President of the Republic, also during the crisis,through the declaration of the state of war, the task of evaluating the conformity to the Constitution of the political choices made in order to the management of the emergency[69].

That is because it is assumed that the function of guaranteeing respect for the "constitutional legality", immediately attributable to the role played by the President of the Republic within the current political / constitutional structure of the legal system, precisely in the event of an emergency war, is taken pivotal value in order to safeguard the most intimate consistency of the fundamental principles of the legal system when we witness a possible *vulnus*resulting from the violation of constitutional precepts by the bodies appointed to exercise the function of political direction in matters of defense and security.

On the other hand, differently, it was evident immediatly the need to bring out the role of the Executive in the operational management of the emergency in progress, not circumscribing, a priori, the typology of prerogatives and powers that are likely to be attributed by the Parliament pursuant to art. 78 of the Constitution, but introducing a certain degree of elasticity of (extraordinary) powers that can be conferred in such a way as to make it possible to adapt, in the best possible way,with respect to the contingent situation, the nature and consistence of the prerogatives of derogation from the ordinary regime granted in parliamentary seat[70].

In this context, in the face of a constitutional dictate considered (probably) excessively synthetic (but, at the same time, solemn and lapidary), over time there have been numerous questions about the exact essential and applicative latitude of the attributions recognized to the Parliament on both the power to deliberation the state of war and, analogically, of the state of siege and / or public danger, both in order to confer to the Government the necessary powers.

This, in light of the need for to achieve the harmonious composition of parliamentary prerogatives with the constitutional compliance control operated by the President of the Republic in relation to the political guidelines elaborated in the legislative assembly, in addition to the maximum opportunity to identify the essential characteristic traits (as well as to delimit the

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[68] Cf. A. BARONE, *La difesa nazionale nella Costituzione*, in *Dir. e Soc., Parte II,* 1988, 37 sqq.

[69]Cf.,*ex plurimis*: (A. CASSESE, *Il IX comma dell'art. 87, seconda parte*, in G. BRANCA (ed.), *Commentario della Costituzione*, Bologna, 1978, 271 sqq.; C. A. JEMOLO, *Impegni di trattati e dichiarazione di guerra*, in *Studi per il XX Ann. ASS. Cost*., IV vol.,1964, 297 sqq.; L. ELIA, *Gli atti bicamerali non legislativi*, in *Studi sulla Costituzione*, II vol., Milano, 1958: 431 sq.; C. CARBONE, *Sulla validità dei bandi militari,* Padova, 1957, 48 sqq.; A. BARONE, *La difesa nazionale*, *op. cit*., 50; G. FERRARI, *Guerra (stato di)*, *op. cit*., 842; P. PINNA, *Guerra (stato di)*, *op. cit*., 50; N. RONZITTI, *Diritto internazionale*, *op. cit*., 95; N. RONZITTI, *Diritto internazionale per Ufficiali*, *op. cit*.,201; M. SCUDIERO, *Aspetti dei poteri necessari*, *op. cit*., 82.

[70] Cf. F. COLONNA, *Stato di pericolo pubblico*, *op. cit*., 265 sq.

themselves consistency) of the effects (normative and metagiuridic) related to the further (and different) consequences, constitutionally foreseen, deriving from the "proclamation" of the state of war and/or (internal and/or international) emergency[71].

In this regard, the emergence of a conceptual model was immediately highlighted, within which delimiting the competences and attributions of the constitutional institutions, an expression of a marked break with the past[72].

In fact, replacing the political / constitutional structure of the liberal state of nineteenth-century matrix, consecrated within a constitutional charter bestowed on the subjects by the will of the sovereign (the Albertine Statute), in which the role played by the King was paramount (in relation to the declaration, without any parliamentary control, of the state of war) and, more in general, from the Government (about the totality of the powers in relation to the conduct of the conflict), a system of "checks and balances" has been formalized to guarantee effectiveness to the democratic control exercised by representatives of the people[73] at a time of vital importance for the very existence of the State[74].

3.The legal form of the act of deliberation of the state of siege

Having ascertained that the decision of the state of war is an exclusive prerogative of the Parliament[75], over time there have arisen significant perplexities both in order of the nature of the act of deliberation[76] and in relation to its adequacy with respect to the current geopolitical context.

On this point, the attention of the most careful doctrine was essentially focused on the opportunity (*rectius*: on a possible assessment of conformity to the dictate and the spirit of the Constitution) to request, for the purposes of the deliberation of the state of war, the adoption a legislative act, or, in place of it, a bicameral (non-legislative) act.

The propensity in favor of one or the other solution was conditioned, in reality, in the context of the florilegium of hypotheses matured also from the survey carried out in relation to the (equally controversial) nature and consistency of the conferment to the Government of the necessary powers for the management of the war crisis, even if it represents a mere possibility (and certainly not a necessary consequence) accessory to the same deliberation of the state of war[77].

In effect, those who state that the state of war must be deliberated by law take into preeminent consideration the conferral to the government of the powers necessary to organize national defense and to conduct hostilities.

In this regard, there is no doubt that the legislative act is indispensable[78].

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[71] Cf. P. PINNA, *Guerra (stato di)*, *op. cit*., 50.
[72] Cf. G. FERRARI, *Guerra (stato di)*, *op. cit*., 818 sqq.
[73] Cf. P. BARRERA, *Parlamento e politiche di sicurezza*, *op. cit*., 306.
[74] Cf. A. GIARDINA, *Art. 78*, *op. cit*., 94 sqq.
[75] Cf. P. PINNA, *Guerra (stato di)*, *op. cit*., 55; G. FERRARI, *Guerra (stato di)*, *op. cit*., 840.
[76] Cf. G. FERRARI, *Guerra (stato di)*, *op. cit*., 840 sq.;L. ELIA, *Gli atti bicamerali*, *op. cit*., 431 sqq.
[77] Cf. P. PINNA, *Guerra (stato di)*, *op. cit*., 50; A. GIARDINA, *Art. 78*, *op. cit*., 97.
[78] Cf. A. GIARDINA, *Art. 78*, *op. cit*., 97.

Furthermore, privileging the thesis of the legislative nature of the deliberative act would allow to recognize the possibility for the President of the Republic to carry out a penetrating control of constitutional legitimacy (and merit), at the time of the promulgation of the law[79], until reaching the exercise of power referral to the Chambers for violation of the pacifist value consecrated pursuant to art. 11 of the Constitution[80], as well as the faculty, to whomever belongs in compliance with the superprimary normative dictation, recurring the conditions, to appeal to the Constitutional Court to obtain the declaration of unconstitutionality of the deliberative law of the state of war[81] and, finally, the possibility of resorting to institute of the abrogative referendum[82].

The legislative form would then be considered the most suitable for the purpose of granting a license of legitimacy, retroactively, to the effects deriving from the armed response of the State accomplished in the immediate circumstances of an attack against which it certainly can not be expected, for obvious reasons of operational readiness, before proceeding to a military reaction that effectively contrasts the aggression suffered, the formalization of an authorization act, of parliamentary matrix, of the orders given by the executive power[83].

In deference to a different (and antithetical) perspective, however, in a critical sense with respect to the thesis of the indefectibility of recourse to a legislative act, a further reconstructive option was advocated aimed at recognizing the possibility of achieving the adoption of the deliberation of the state of war through the use of a non-legislative bicameral act (*rectius*: to an identical resolution adopted by each of the two Chambers)[84], considered the inexistence, within the formal dictate of the article 78 of the Constitution, of any reference to the principle of the reserve of law, be it absolute and / or relative, never reinforced and / or strengthened[85].

After all, the deliberation of the state of war is, indeed, a typical act of political orientation, devoid of normative character[86].

Moreover, it has been highlighted, requesting the legislative form of the deliberative act of the state of war would mean allowing the Government, in the absence of any "anomalous" parliamentary reserve, adopting, subsisting, certainly and maximally, in such cases, the con-

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[79] Cf. G. FERRARI, *Guerra (stato di)*, *op. cit*., 841.

[80] Cf. A. GIARDINA, *Art. 78*, *op. cit*., 98; G. FERRARI, *Guerra (stato di)*, *op. cit*., 838.

[81] Cf.,*ex multis*: F. RIGANO, *La guerra: profili di diritto costituzionale interno*, in AA.VV., *La guerra. Profili di diritto internazionale e diritto interno*, Napoli, 1992, 42; L. CARLASSARE, *Costituzione italiana*, *op. cit*., 173; G. FERRARI, *Guerra (stato di)*, *op. cit*., 838 sq.

[82] Cf. C. CARBONE, *Sulla validità dei bandi*, *op. cit.*, 46; G. FERRARI, *Guerra (stato di)*, *op. cit*., 838 sq.

[83] Cf. G. FERRARI, *Guerra (stato di)*, *op. cit*., 842 sq. In this sense, it has been observed, the attempt to limit the freedom of action ... establishing a guarantee of preventive deliberation of the Chambers ... has a very limited practical value, as the experiences of the last conflicts indicate the beginning of hostility independently of any internal formal act that demonstrates its intention or the intervention of such acts when the hostilities have been irreparably begun. On this point, see G. DE VERGOTTINI, *Indirizzo politico*, *op. cit*., 262 sqq.

[84] Cf. L. ELIA, *Gli atti bicamerali*, *op. cit*., 431 sqq.

[85] Cf. G. FERRARI, *Guerra (stato di)*, *op. cit*., 835.

[86] Cf. M. SCUDIERO, *Aspetti dei poteri necessari*, *op. cit*., 78.

ditions of necessity and urgency, a decree-law, thus distorting tòhe exclusive political competence of the representative organ of the popular will[87]; what the Constituent was concerned with avoiding[88].

In the context of an approach aimed at circumscribeing, in a limited sense, the use of such a procedure, it is then argued the admissibility of the use of the model described in art. 78 const. only in the hypothesis in which the state of war corresponds to - *rectius*: follows - a situation of internal instability, to be faced simultaneously with the ongoing international conflict[89].

There are those who, further, in case of public danger determined by endogenous factors, considers applicable the art. 78 const. not in its entirety[90], but with exclusive reference to the conferral of the powers necessary to the Executive by the Chambers[91], so as to grant a license of democratic legitimacy to the possible suspension of constitutional rights that the Government could temporarily orders to face the emergency[92].

This conclusion takes root the correctness of such an approach on the base of the complexity of the procedure enumerated by art. 78 const., considered disproportionate and inadequate, for example, in the event of a crisis of size and effects however contained[93], in this way suggesting the use of a different (modulated, compared to the real consistency of the danger), regulating regime of the state of exception.

In this sense, it emerges the conviction of sufficiency (in any case, subsisting certain prerequisites) of the use of to the emergency decree ex art. 77 const.

The cases of extraordinary necessity and urgency, on which the conferment of the legislative function of the Government in compliance with the norm *de qua* is rooted and, by consequence, the introduction of a "functional interference" between the powers of the State is allowed, certainly can well count the need to face, through the introduction of a specific regulation, an internal emergency situation[94] precisely through temporary legislative measures and subjects, for guarantee purposes, to the subsequent (political) control by the Chambers[95].

A particular instrument aimed at this purpose could be represented by the so called "Drawer decrees", or government measures, having the value of law, called to regulate in advance any emergencies and suitable to explicate concrete effectiveness only when the expected danger arises[96].

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[87] Cf. A. BARONE, *La difesa nazionale*, *op. cit*., 41.

[88] Cf. Cf. A. GIARDINA, *Art. 78*, *op. cit*., 99.

[89] Cf. G. MOTZO, *Assedio (stato di),op. cit*., 261.

[90] Cf. F. MODUGNO, D. NOCILLA, *Problemi vecchi e nuovi sugli stati di emergenza nell'ordinamento italiano*, in *Studi in Onore di M.S. Giannini*, *III vol*., Milano, 1988, 538 sqq.

[91] Cf.,*ex plurimis*: P. PINNA, *Guerra (stato di)*, *op. cit*., 58; P. BARRERA, *Parlamento e politiche di sicurezza*, *op. cit*., 337; G. DE VERGOTTINI, *Indirizzo politico*, *op. cit*., 361 sqq.; G. FERRARI, *Guerra (stato di)*, *op. cit*., 844 sqq.; M. SCUDIERO, *Aspetti dei poteri necessari*, *op. cit*., 85 sq.

[92] Cf. P. STELLACCI, *Costituzionalità dello stato d'assedio*, in *Giust. Pen*, I, 1951, 333.

[93] Cf. A. GIARDINA, *Art. 78*, *op. cit*., 114.

[94] *Contra*: G. DE VERGOTTINI, *Necessità, Costituzione materiale*, *op. cit*., 235.

[95] Cf. M. SCUDIERO, *Aspetti dei poteri necessari*, *op. cit*., 126.

[96] Indeed, the measures in the drawer would remain without a real legal force erga omnes, as well as secrets, at least until the first application in concrete, which would depend on a decision in all and for all discretion.

Notice that the question is not so much to admit or not the ability of the Government to "deliberate", if necessary, the state of siege through the exercise of the regulatory power ex art. 77 const, as that, more properly, to identify the limits to which this declaration and, more generally, the emergency measures thus adopted must succumb[97].

In fact, according to a first approach, it was observed that the procedure provided by art. 77 const postulates the adoption of a government act with force of law which, being a norm of primary rank within the system of Italian legal sources, even during the emergency, could never derogate from principles or constitutional values[98].

In the opposite direction, however, following a more detailed examination, seems to be that part of the doctrine that identifies in the conversion law the instrument to "restore", in the quality of the law "all at all special"[99], the force, even of constitutional rank, from time to time susceptive to accompany and qualify the individual urgent regulatory provision of a governmental nature[100].

This approach is based on the relief according to which the Constitution, in article 77, uses, in the first paragraph, the expression "decrees which have the value of ordinary law", whereas, with respect to the second paragraph, refer to the wording "measures with the force of law", without any other specification.

In this way, according to a certain reconstructive option, when such hypotheses are used, it is considered that it is considered, more appropriately, that, during an emergency, it must refer about government acts with constitutional force, whose foundation should be sought not in art. 77 const., but in the state of necessity, or in a real institutional emergency situation[101].

In principle, the state of necessity is distinguished from necessity as a normative source[102],the first and original source of all that law, so that, with respect to it, the others are to be considered in a certain way derived[103].

The first is normally foreseen in the legal systems as a condition or prerequisite for the emanation of an act or the accomplishment of an activity in derogation from the established order of competences (typical example the legislative power exercised by the Government of pursuant to article 77 of the Constitution).

Otherwise, the need qualifies itself as a normative source outside or even against the legal system and strictly reconnecting to a fact (or to a factual situation) that has the power to impose itself by itself as normative[104].

Then, the effectiveness would remain subordinated even to the subsequent conversion into law or to a parliamentary vote of validation to become definitive. For the *a priori* fixation of the prescriptive content of the provision, with an early counter-signature, could also derive, in fact, a greater extension of the power to decide on concrete actions referred to the President of the Republic. Cf. P. G. GRASSO, *Guerra. II) Disciplina costituzionale della guerra*, (*ad vocem*), in *Enc. Giur*., XV vol., Roma, 1989, 7.

97 Cf. V. ANGIOLINI, *Necessità ed emergenza nel diritto pubblico*, Padova,1988, 141 sqq.

98 Cf. A. GIARDINA, *Art. 78*, *op. cit*., 115.

99 Cf. F. COCOZZA, *Assedio (stato di)*, *op. cit*., 8.

100 Cf. F. COCOZZA, *Assedio (stato di)*, *op. cit*., 8; P. STELLACCI, *Costituzionalità dello stato*, *op. cit*., 339 sq.

101 Cf. V. ANGIOLINI, *Necessità ed emergenza*, *op. cit.*, 107 sqq.

102 Cf. G. DE VERGOTTINI, *Necessità, Costituzione materiale*, *op. cit*., 227.

103 Cf. S. ROMANO, *Scritti minori*, Milano, 1950, 194 sqq.

104 Cf. T. MARTINES (G. SILVESTRI, ed.), *Diritto costituzionale,IX ed*., Milano, 1998, 69.

Indeed, the decrees with constitutional force do not find a specific and direct recognition within the Italian Constitution, although they can be characterized by the power to introduce a discipline that is derogatory and / or contrary to it[105].

More properly, according to prevailing doctrine, the main effect would consist not in the derogation[106], but in the suspension of the constitutional precept as long as the state of emergency remains[107].

This mechanism would be formally << illegal >>, but << not anti-juridical >>, because it is legitimized by a source that prevails over the law: the state of necessity[108]; the government act under examination could be qualified, that is, in terms of "*anomalous act of necessity*"[109], "quodammodo *caged in the procedural structure prescribed for the decree law, for essentially guarantee purposes*"[110].

In this sense, anyway, the need to convert these decrees with the force of law through constitutional law has been supported in order to allow a control by the Parliament about the acts of the Government[111] and, at the same time, to ensure the restoration of the hierarchy of legal rules[112].

However, this approach is not exempt from censorship.

In fact, on the one hand, the use of the constitutional law as an instrument of conversion was deemed capable of altering, in an unacceptable manner, thereby determining its disarticulation, the discipline dictated by the article 77 const.; on the other hand, then, the procedure outlined by the article 138 const. it proves clearly incongruous with respect to the need for celerity and rapidity (decision-making and operational) necessary to effectively combat the state of emergency that has occurred.

Thus, it is sustained the opportunity to convert the decree by ordinary law, which, in itself, is justified by the same factual situation from which the adoption of the decree arises[113].

In the context of such a reconstructive framework, however, a real conflict between constitutional values emerges.

In fact, on the one hand, the rigidity of the Constitution of 1948 comes out(so that the same can be the subject of an exemption and / or modification only in application of the procedure provided for by Article 138 of the Constitution) and, on the other hand, the value of the identity and continuity of the legal order over time, a value that is before and outside but also,

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[105] Cf. M. PIAZZA, *L'illegittima <<sospensione della Costituzione>>*, *op. cit*., 813 sqq.;M. SCUDIERO, *Aspetti dei poteri necessari*, *op. cit*., 129.

[106] Cf. S. ROMANO, *L'instaurazione di fatto di un ordinamento costituzionale e la sua legittimazione*, in *Lo stato moderno e la sua crisi*, Milano,1969, 53 sqq.

[107] Cf. M. PIAZZA, *L'illegittima <<sospensione della Costituzione>>*, *op. cit*., 813; M. SCUDIERO, *Aspetti dei poteri necessari*, *op. cit*., 129.

[108] Cf. G. DE VERGOTTINI, *Necessità, Costituzione materiale*, *op. cit*., 241; *contra*: M. PIAZZA, *L'illegittima <<sospensione della Costituzione>>*, *op. cit*., 817.

[109] Cf. G. MOTZO, *Assedio (stato di),op. cit*., 263.

[110] Cf. P. CARNEVALE, *Emergenza bellica e sospensione dei diritti costituzionalmente garantiti. Qualche prima considerazione anche alla luce dell'attualità*, in *Giur. Cost.*, 2002, 4524.

[111] Cf. P. PINNA, *L'emergenza nell'ordinamento costituzionale italiano*, Milano, 1988, 203 sqq.

[112] Cf. M. PIAZZA, *L'illegittima <<sospensione della Costituzione>>*, *op. cit*., 817 sq.

[113] Cf. V. CRISAFULLI, *Lezioni di diritto costituzionale, V ed*., Padova, 1984, 84.

at the same time, within the constitutional order, in the name of which the momentary bracketing of art. 77, in conjunction with the art. 138, is legitimized[114].

It is clear, then, that the legitimacy of the derogation from the formal hierarchy of the legal sources is valid, in any case, only inasmuch as the exercise of normative power by the Government, in the course of the emergency, is proportionate to the real situation of fact[115].

This arises, at the same time, as a justificatory presupposition of the adoption of the norms and as a factor of qualification of their validity[116]and this in order to guarantee the prevalence of the law with respect to the anarchy of (negative) values[117].

The need as a source-fact is grafted, in this perspective, not as a reality turned to the denial of the established order; on the contrary, it tends to set the minimum conditions for the normal operation of the legal system, even though it is "external" to this[118].

After all, the "right" is not the whole of the consecrated rules in a text of law and operating solely for this consecration, but the ordered complex of situations and relationships that is gathered in a center of authority, and constitutes the living law, valid as such even if contrasting with the legal one, when the observation of this documents its stabilization[119].

Thus, in the Constitution, enclosed and synthesized in the politically organized forces of the social group that in a given historical moment are able to actively interpret the general interest of the political community[120], two legal systems coexist, one ordinary or legal and one extraordinary, *de facto*, both legal.

The operate, where unavoidable, of the exceptional and temporary emergency regime,does not negate the validity of the ordinary one, which remains only partially suspended[121].

It follows, ultimately, that the overall system is twofold but, on the whole, unitary, in the sense of guaranteeing the necessary flexibility (through additions deemed appropriate) in order to face anomalous situations, while representing a single reality permeated from the founding values of a particular political community inspired by the principles of a modern democratic order[122].

4. Fundamental rights and criminal law of the "enemy aliens".

The state of emergency, be it strictly military character, or connected with the outburst of indiscriminate violent acts of terrorism[123], puts modern legal systemsinspired by the basic

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[114] Cf. A. RUGGERI, *Fonti, norme, criteri ordinatori. Lezioni*, Torino, 1996, 143.
[115] Cf. A. JAKAB, *Breaching constitutional law*, *op. cit*., 65.
[116] Cf. A. RUGGERI, *Fonti, norme, op. cit*., 144.
[117] Cf. P. BONETTI, *Terrorismo, emergenza e costituzioni democratiche*, Bologna, 2006, 216 sqq.
[118] Cf. A. RUGGERI, *Fonti, norme, op. cit*., 143.
[119] Cf. C. MORTATI, *La Costituzione materiale*, Milano,1940, 87.
[120] Cf. C. MORTATI, *La Costituzione*, *op. cit.*, 89.
[121] Cf. C. DELL'ACQUA, *Il diritto alla sicurezza nel nuovo ordine internazionale*, in *Quad. Cost.*, II, 2002, 358 sqq.; G. De Minico, *Costituzione,op. cit*., 72 sqq.
[122] Cf. G. DE VERGOTTINI, *Necessità, Costituzione materiale*, *op. cit*., 229.
[123] Cf. M. HEAD, *Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt*, Abingdon, 2017, 71 sqq.Indeed, according to S. MARTIN, L. WEINBERG, *The Role of Terrorism*, *op. cit*., 234 sq., during a war, especially in case of "civil war", "it is more frequent for terrorism to appear or peak toward the latter stages of an

principles of modern constitutionalism in the difficult position to provide tools for prevention and/or repression[124]that, ensuring an acceptable level of safety[125], do not compromise, irreparably, the hard core[126] of the values enshrined in democratic constitutions[127].

They are expression, in the final analysis, of a political/constitutional structure aimed at safeguarding and promoting the inviolable rights of the individual, including, certainly and firstly, the right of everyone to live free from fear; a juridical good - it should be noted - absolutely concrete, and of an originally individual nature, even if its owners may be individuals belonging to entire populations, or to significant sectors of the same of these[128].

In this sense, the essential presuppositions,the proceduresappear changeable and changing,as well the mechanisms envisaged within the fundamental Charts of the countries of democratic inspiration[129]where it is possible to recognize a substantial diversity *(rectius*: otherness) of the instruments of discipline of the "state of crisis"[130].

Upstream, there is often, however, a differentiation according to the nature of the emergency, distinguishing the state of war from other forms of aggression to the territorial integrity, or, more properly, to the state sovereignty that imply, in any case, a military response assimilable to the establishment of a true state of international belligerency[131].

Specularly, the same relativism seems to involve the subject of the lawfulness of the introduction, in the course of a state of crisis, of specific provisions aimed at allowing limited exceptions to the principle of intangibility of the fundamental rights of the person (now giving the executive power, now to the parliament , the power to decide on the adoption of such measures), although it is stated that their consistency, indeterminable, in an absolute sense, a priori, may well be circumscribed within a perimeter of legitimacy (constitutional) considered in any case impassable even in the face of the most dramatic emergency situations[132].

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armed conflict than during its initial phases. First, beacause terrorism appears to be a tactic employed by those whose challenges are losing ground. Second, endgame terrorism also may be carried out in retaliation against segments of a population who are perceived to have betrayed the cause for which the insurgents have been fighting. And, third, there may be a certain amount of desperation involved. The late surge in terrorism may reflect the fact that authorities (or rival groups) are closer to victory. Thus, the use of terrorism may reflect desperation and frustration.

[124] Cf. G. DE VERGOTTINI, *La guerra contro un nemico indeterminato*, 2001, in *http://www.forumcostituzionale.it/wordpress/wp-content/uploads/pre_2006/397.pdf,* 1 sq.

[125] Cf. F. RESTA, *Lessico e codici del «diritto penale del nemico»*, in *Giur. merito*, 12, 2006, 2788.

[126] Cf. G. De Minico, *Costituzione,op. cit*., 95 sqq.

[127] Cf. P. BONETTI, *Terrorismo, op. cit*., 13.

[128] Cf. F. VIGANÒ, *Terrorismo di matrice islamico-fondamentalistica e art. 270-bis c.p. nella recente esperienza giurisprudenziale*, in *Cass. pen*., 10, 2007, 3967 sqq.

[129] Indeed, the transnational nature of terrorist and counter-terrorist activities, and the inter-State cooperation that forms the basis of many counter-terrorism operations, engages difficult and controversial questions concerning the extraterritorial application of human rights law although the respect for human rights and the rule of law is a fundamental basis of the fight against terrorism. On this point, see A. CONTE, *Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?*,in *Journal of Conflict and Security Law*, Volume 18, Issue 2, 1 July 2013, 233 sqq.

[130] Cf. P. BONETTI, *Terrorismo, op. cit*., 121 sqq.

[131] Cf. J. VERHOEVEN, *Les « étirements » de la légitime défense*, in *Annuaire français de droit international*, 48, 2002, 49 sqq.

[132] In many Western States where a special legislation against terrorism has been enforced, the judges have reacted by reducing the impact of those laws limiting constitutional freedoms. According to some scholars, on the contrary, in Italy, often the judges apply such laws in an extensive way, without monitoring the respect of human

Indeed, as we have seen, the respect of substantial and / or value limits is entrusted, in this context,now to the political control, proper to a democratic system of government, carried out by the assembly of representatives of the people towards the government[133], now, more properly, to the union exercised by judges (ordinary and / or constitutional) in view of the guarantee of the primacy of the law with respect to political arbitrariness, unhooked, the latter, from any form of containment of the power of (free and discretionary) appreciation about the adoption of restrictive measures of liberties during the crisis[134].

Normally, "*when war, rebellions, and dangers erupt, most constitutional governments step outside their usual procedures to deal with regime-threatening conflicts*"[135].

Naturally, the establishment of real "states of exception"[136], or "states of emergency"[137], situations in which the legal system is suspended and continuously infringed[138], appears strongly conditioned by the nature and consistency of the powers conferred, in accordance with the procedures formally provided for in the various constitutional provisions, because of the actual situation of necessity concretely verified, which corresponds to the clarification of the limits of derogation and / or suspendability of the constitutional guarantees placed to protect the individual's freedom[139].

And if, in the course of an armed conflict, in the traditional sense understood, it seems to be legitimate to imagine a pervasive incidence of possible restrictions to the rights of the person in view of the overcoming of the war emergency[140], certainly emerge substantial (and further) perplexities also (*rectius: a fortiori*) on the legitimacy of measures of a repressive nature (characterized by a criminal nature)[141]conceived in order to aggravate the reaction of the

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rights and freedoms of individuals. On this point, about the main legal instruments to counter terrorism, so as to identify the most critical aspects which risk being in contrast with the constitutional order, especially concerning italian changes of the criminal, administrative and penitentiary systems and their applications in court, see M. TROGU, *La costituzionalizzazione dell'emergenza in Italia*, in *Democrazia e Sicurezza*, 2017, 01, 175 sqq.

[133] Cf. A. GREENE, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of crisis*, Oxford, 2018, 52 sqq.

[134] Cf. F. STELIA, *I diritti fondamentali nei periodi di crisi, di guerra e di terrorismo: il modello Barak*, in *Riv. It. Dir. e Proc. Pen*., 03, 2005, 928 sqq.; P. BONETTI, *Terrorismo, op. cit*., 237 sq.

[135] Cf. K. L. Scheppele, *North American emergencies: The use of emergency powers in Canada and the United States*, in *International Journal of Constitutional Law*, Volume 4, Issue 2, 2006, 213.

[136]Cf.,*ex multis*: A. ELLIAN, G. MOLIER (eds), *The State of Exception and Militant Democracy in a Time of Terror*, Dordrecht, 2012; L. ZAGATO, *A proposito dello stato di eccezione. Contributo critico di un internazionalista intorno alla monografia di Agamben*, in *DEP.Deportate, esuli e profughe. Rivista telematica di studi sulla memoria femminile*, 7, 2007, 269 sqq.;ID, *L'eccezione per motivi di emergenza nel diritto internazionale dei diritti umani*, in *DEP.Deportate, esuli e profughe. Rivista telematica di studi sulla memoria femminile*, 5-6, 2006, 138 sqq.;G. AGAMBEN, *Stato di eccezione*, Torino, 2003.

[137] Cf. D. DYZENHAUS, *States of Emergency*, Oxford, 2012; V. EBOLI, *La tutela dei diritti umani negli stati d'emergenza*, Milano, 2010, 44 sqq.

[138] Cf. P. BONETTI, *Terrorismo, op. cit*., 158.

[139] Cf. P. BONETTI, *Terrorismo, op. cit*., 153 sqq.

[140] Although obviously, even in such cases, not being able to overcome the impassable boundary of human dignity. On this point, see A. HAREL, A. SHARON, *Dignity, Emergency, Exception*, in P. AURIEL, O. BEAUD, C. WELLMAN (eds.), *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law*, Cham 2018: 101 sqq.

[141] Cf. G. FLORA, *Profili penali del terrorismo internazionale: tra delirio di onnipotenza e sindrome di autocastrazione*, in *Riv. it. dir. e proc. pen.*, 01, 2008: 62 sqq.

legal system in order to behaviors marked by a particular social dangerousness[142] and capable of attacking the conditions of free and peaceful coexistence among the community members[143].

"*In such exceptional circumstances, special powers may be entrusted to the executive branch of government to counter the threat, having recourse, if necessary, to emergency measures*"[144].

According to a particular approach, in defense of the extraordinary measures (for example) adopted in order to face the hubris of terrorism[145], by definition of a proteiform nature, in the various violent ways in which it can manifest itself[146], the moral superiority is emphasized, which is the foundation of the exceptional discipline introduced, with respect to the danger to be prevented and this, of course, especially where the derogatory rules are sacrificing the inviolable rights of the person who are themselves assaulted by the blind terrorist violence[147].

In this regard, it has been observed that the moral superiority claimed for the anti-terrorist measures is believed to be linked to the protective role they play in relation to the fundamental rights of the citizen provided by the law.

In this sense the possibility of a suspension of the fundamental rights of the citizen is expected only when this decision is strictly necessary so that <<*"the constitution and the law", so despised by terrorists, can be "restored and strengthened"*>>[148].

About this, over time, the doctrine has been wondered about the opportunity and about the legitimacy (*rectius*: lawfulness) of the legislative interventions undertaken in the sense of

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[142] Cf. M. SAVINO, *"Enemy Aliens" In Italy? The Conflation Between Terrorism And Immigration*, in *Italian Journal of Public Law*, 2011, 225.

[143]Cf.,*ex plurimis*: (C. DE MAGLIE, S. SEMINARA (eds.), *Terrorismo internazionale e diritto penale*, Padova, 2007; R. KOSTORIS, R. ORLANDI (eds.), *Contrasto al terrorismo interno e internazionale*, Torino, 2007; F. PALAZZO, *Contrasto al terrorismo, diritto penale del nemico e principi fondamentali*, in *Quest. Giust*., 2006: 666 sqq.

[144] Cf. A. BIANCHI, *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, in *The European Journal of International Law*, Vol. 17, no.5, 2007, 891.

[145] About the origins and evolution of terrorism, particularly in the aftermath of the First and Second World Wars, the internationalization of terrorism, religion and terrorism, suicide terrorism, terrorism's exploitation of the media of communications, the psychology of terrorism, terrorism's modus operandi (e.g., tactics and weaponry), and new trends and challenges, see B. HOFFMAN, *Inside Terrorism*, New York, 2017.

[146]Cf.,*ex multis*: B.S. MAWAJDEH, M. H. TALHOUNI, M. S. RASHAYDEH, I. J. HUSSEIN, *The Culture of Peace and the Prevention of Terrorism from the Perspectives of Islamic Education and the United Nations*, in *Journal of Education and Practice*, Vol.8, n.1, 2017, 49 sqq.; K. GAIBULLOEV, J. A. PIAZZA, T. SANDLER, *Regime Types and Terrorism*, in Volume 71, Issue 3, 2017, 492; P. A. CLÉMENT, *Le terrorisme est une violence politique comme les autres. Vers une normalisation typologique du terrorisme*, in *Études internationals*, 45, n. 3, 2014, 358 sqq.;A. PEMBERTON, *Restorative Justice in Terrorist Victimisations: Comparative Implications*, in *Oñati Socio-Legal Series*, v. 4, n. 3, 2014, 374 sq.; T. WEIGEND, *The Universal Terrorist. The International Community Grappling with a Definition*, in *Journal of International Criminal Justice*, Volume 4, Issue 5, 2006, 915 sqq.;T. DEFFARGES, *Sur la nature et les causes du terrorisme. Une revue de la littérature économique*, in *Tiers-Monde*, tome 44, n°174, 2003, 370 sqq.;A. JAKAB, *Breaching constitutional law*, *op. cit*., 64;M. DI FILIPPO, *Terrorist Crimes and International Co-operation*, *op. cit*., 561 sqq.; N. QUÉNIVET, *The World after September 11*, *op. cit*., 562 sq.

[147] Cf. M. SAVINO, *"Enemy Aliens"*, *op. cit*., 225. About the tremendous impact a terrorist attack and a state's anti-terrorist operations can have on the human rights of victims, see S. GALANI, *Terrorist Hostage-taking and Human Rights: Protecting Victims of Terrorism under the European Convention on Human Rights*, in *Human Rights Law Review*, Volume 19, Issue 1, 2019, 149 sqq.

[148] Cf. P. GILBERT, *Il dilemma del terrorismo*, Milano, 1997, 169 sqq.

modeling the normative instruments to combat international terrorism through the formulation of a special *corpus* of norms[149], enclosed within the common notion of "criminal law of the enemy"[150] (or, according to a broad meaning, of “legal dimension of the enemy”[151] as if it could be distinguished a criminal law of the civis communis, a criminal law "of the enemy" and, conversely, a criminal law "of the friend"[152].

According to this approach, a title of legitimacy to phenomena of radical social exclusion, capable of easily degenerating into a struggle without a neighborhood, would be introduced within the legal system, conferring legal citizenship to a model of security of citizens focused not on the ordinary principles of a police right of a democratic state, but on a fundamentally irreconcilable set of values with respect to the juridical tradition of modern constitutionalism and based on an incipient "fear of the foreigner"[153].

The conceptual presupposition of such an approach must be sought, in essence, in the idea that the fundamental rights of the person, far from being recognized and guaranteed *ab origine*, must be affirmed by force in the implementation of a criminal law of war, applicable towards the enemy, however defined and / or identified, and ideally not referable, *prima facie*, to the citizen, having regard to the balancing between preventive needs and principle of offensiveness[154].

According to the described perspective, it would be useless to oppose the limit of the innermost consistency of the inviolable rights of man, first and foremost the recognition, upstream, of the dignity of the person[155], where, at the hands of the enemy, those same fundamental freedoms are attacked and / or violated[156].

However, one should never forget, even in such circumstances, that the dignity of the person[157] constitutes, in this sense, a fundamental value not so much because it is formalized

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[149] Cf. B. ACKERMAN, *La costituzione d’emergenza*, Roma, 2005, 24 sqq.

[150] Cf.,*ex plurimis*: A. PAGLIARO, *"Diritto penale del nemico": una costruzione illogica e pericolosa*, in *Cass. pen*., 2010, 2460 sqq.;F. ZUMPANI, *Critica del diritto penale del nemico e tutela dei diritti umani*, in *Diritto e questioni pubbliche*, 10, 2010, 525 sqq.; F. MANTOVANI, *Il diritto penale del nemico, il diritto penale dell'amico, il nemico del diritto penale e l'amico del diritto penale*, in *Riv. it. dir. e proc. pen*., 2007, 470 sqq.; L. FERRAJOLI, *Il «diritto penale del nemico» e la dissoluzione del diritto penale*, in *Questione giustizia*, 2006, 797 sqq.; D. PULITANÒ, *Lo sfaldamento del sistema penale e l'ottica amico-nemico*, in *Questione giustizia*, 2006, 740 sqq.; F. PALAZZO, *Contrasto al terrorismo*, *op. cit*., 666 sqq.

[151] Cf. C. DE FIORES, *La revisione dei codici militari: una riforma per la guerra*, 2004, in *http://www.costituzionalismo.it/articoli/135/,* 2 sqq.

[152] Cf. G. FLORA, *Verso un diritto penale del tipo d'autore?*, in *Riv. it. dir. e proc. pen*., 2008, 563.

[153] Cf. J. BELTRAN, G. PARMENTIER, *Les Etats-Unis à l'épreuve de la vulnérabilité*, in *Politique étrangère*, n°4 - 66eannée, 2001, 781.

[154] Cf. G. DE MINICO, *Costituzione,op. cit*., 177 sqq.

[155] Cf. N. Bruzzi, *La discriminazione fondata sulla disabilità: il principio di dignità come lente trifocale*, in *Resp. civ. e prev*., 03, 2013, 933.

[156] Cf. D. LAMANNA DI SALVO, E. GILBERTI BARBON, *Spunti di riflessione sull'interpretazione dell'art. 51 cost*., in *Giur. merito*, 05, 2013, 1157 sqq.

[157] Indeed, acording to C. M. EWING, *With dignity and justice for all: The jurisprudence of equal dignity and the partial convergence of liberty and equality in American constitutional law*, in *International Journal of Constitutional Law*, Volume 16, Issue 3, 2018, 753 sqq., human dignity in its liberty- and equality-regarding aspects become a sign and marker of practices that (might) warrant constitutional protection, even as it is the anterior value on which constitutional liberty and equality are grounded.

in a Constitutional Charter, but because it is felt by the community, becoming a characterizing element of a revolted society to the promotion and protection of human rights[158].

In fact, it is declined, at least in a minimal sense, in terms of the supreme principle of the legal order[159], presupposition of all fundamental rights[160], right to have rights[161], unconditional respect for the most intimate essence of the individual, corresponding to the quality of man in as such[162], beyond any form of abjection, debasement and physical and moral degradation.

Nevertheless, facing the most dramatic situations of danger, it is easy to run the risk of violating human rights against individuals who are simply suspected of involvement in activities aimed at destabilizing the established order[163], also through the use of techniques of deprivation of personal freedom which are inadmissible within a democratic order[164], such as the hypotheses of torture[165], of extraordinary rendition[166], which has been called 'torture by proxy'[167], of suspension of the "privilege of the right of *Habeas Corpus*"[168] or of violation of the right to effective judicial review[169].

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[158] Cf. E. J. CRIDDLE, *Protecting human rights during teh emergencies. Delegation, Derogation and Deference*, in E. J. CRIDDLE (ed.), *Human Rights in Emergencies*, Cambridge, 2017, 32 sqq.;R. SERRA-CRISTÓBAL, *The Impact of Counter-Terrorism Security Measures on Fundamental Rights. What Constitutionalism and Supranational Human Rights standards offer to respond to the terrorist threat?*, in *Democracy and Security Review*, V, no. 2, 2015, 28 sqq.

[159] Cf. F. SACCO, *Il consenso del beneficiario dell'amministrazione di sostegno e il conflitto tra dignità e libertà*, in *Giur. cost*. 03, 2007, 2280.

[160] Cf. V. TIGANO, *Tutela della dignità umana e illecita produzione di embrioni per fini di ricerca*, in *Riv. it. dir. e proc. pen*., 04, 2010, 1749.

[161] Cf. F. RESTA, *Neoschiavismo e dignità della persona*, in *Giur. merito*, 06, 2008, 1673.

[162] Cf. F. SACCO, *Il consenso del beneficiario*, *op. cit*., 2280.

[163] Cf. J. FITZPATRICK, *Speaking Law to Power: The War Against Terrorism and Human Rights*, in *European Journal of International Law*, 14, Issue 2, 2013, 247 sqq.

[164] Cf. M. DUFFY, *Detention of Terrorism Suspects: Political Discourse and Fragmented Practices*, Oxford, 2018: 128 sqq.

[165]Cf.,D. WEBBER, *Preventive Detention of Terror Suspects: A New Legal Framework*, Abingdon, 2016; P. N. S. RUMNEY, *Torturing Terrorists: Exploring the Limits of Law, Human Rights and Academic Freedom*, Abingdon, 2015; M. DUFFY, *The "War on Terror" and the Framework of International Law*, Cambridge, 2015, 511 sqq.; A. PUGIOTTO, *Repressione penale della tortura e Costituzione: anatomia di un reato che non c'è*, in *Riv. Trim. Dir. Penn. Cont.,* 2014, 139 sqq.; C. EDELSON, *Emergency Presidential Power: From the Drafting of the Constitution to the war on terror*, Madison, 2013, 205 sqq.; J. P. TERRY, *The War on Terror: The Legal Dimension*, Lanham, 2013, 73 sqq.; C. MACKEN, *Counter-Terrorism and the Detention of Suspected Terrorists: Preventive Detention and International Human Rights Law*, Abingdon, 2011; G. LANZA, *Obblighi internazionali d'incriminazione penale della tortura e ordinamento interno*, in *Indice Pen*., 2011, 746 sqq.; N. G. ANGELINI, *Detenzione e divieto di tortura*, in *Resp. civ. e prev*., 01, 2010, 95 sqq.; R. FREER, *Turning to torture in a 'nation of law'*, in *Journal of Human Rights Practice*, 2009, Volume 1, Issue 1, 168 sqq.; P. SANDS, *Torture Team: Deception, Cruelty and the Compromise of Law*, London, 2008;M. DONINI, *Il diritto penale di fronte al <<nemico>>*, in *Cass. Pen*., 02, 2006: 735 sqq.; T. SCOVAZZI, *Tortura e formalismi giuridici di basso profilo*, in *Riv. dir. int*., 04, 2006, 905 sqq.;P. BONETTI, *Terrorismo, op. cit*., 262 sqq.; A. JAKAB, *Breaching constitutional law*, *op. cit*., 68 sqq.; F. STELIA, *I diritti fondamentali*, *op. cit*., 942 sqq.; Marchesi, 1999: 463 sqq.

[166] Cf. M. JACKSON, *Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction*, in *The European Journal of International Law*, Vol. 27, no. 3, 2016, 817 sqq.

[167] Cf. C. FORCESE, *The Capacity to Protect: Diplomatic Protection of Dual Nationals in the 'War on Terror'*, in *The European Journal of International Law*, Vol. 17, no.2, 2006, 393.

[168] Cf. G. L. NEUMAN, *Comment, Counter-terrorist Operations and the Rule of Law*, in *The European Journal of International Law*, Vol. 15, no.5, 2004, 1026 sqq.;M. DONINI, *Il diritto penale*, *op. cit*., 760.

[169] Cf. M. PAYANDEH, H. SAUER, *European Union: UN sanctions and EU fundamental rights*, in *International Journal of Constitutional Law*, Volume 7, Issue 2, 2009, 309 sqq.

In this context, sadly " *States will continue to torture; others will be tempted to assist*"[170] and, facing the imminent danger, it could also happen that there could be a mitigation of the attention by the courts of justice.

After all, Lord Justice Simon Brown aptly summed up the typical approach of the courts when confronted with issues concerning national security:

<<*The very words "national security" have acquired over the years an almost mystical significance. The mere incantation of the phrase of itself instantly discourages the court from satisfactorily fulfilling its normal role of deciding where the balance of public interest lies*>>[171].

So, the war against terrorism becames the quintessential "*normless and exceptionless exception*"[172].

For these reasons, it is argued that, even in the context of an international pacification process, "*the war on terror created a much more difficult world*"[173].

In this perspective, the "criminal law of the enemy" implies the construction of a model of incrimination focused not on the typical fact of crime, according to an objective perspective, but on the author of the conduct[174] and this, in thesis, to better cope with the arrogance of the enemy, even at the cost of weakening the guarantees proper to a democratic order and run the risk of directing the political / constitutional structure of the State towards (no longer controllable) authoritarian drifts[175].

The tendency which matures in the front of such an orientation is that of introducing a factor of intolerable discrimination[176].

This, far from achieving a thoughtful balancing of conflicting values at stake - in this case, security and social defense, on the one hand and freedom and guarantees individual, on the other - appears to be aimed at univocally guaranteeing national security, in the face of a significant reduction in the freedoms and habeas corpus proceedings traditionally recognized to citizens[177].

In this way, the result of such a policy consists in a unreasonable mortification and discrimination of the foreigners[178], poorly seen by the law and suspected merely because of being born, raised and / or lived in a particular country[179].

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[170] Cf. M. JACKSON, *Freeing Soering*, *op. cit*., 829.

[171] Cf. A. KAVANAGH, *Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape*, in *International Journal of Constitutional Law*, Volume 9, Issue 1, 2011, 173.

[172] Cf. J. FITZPATRICK, *Speaking Law to Power*, *op. cit*., 251.

[173] Cf. C. BELL, *Peace Settlements and Human Rights: A Post-Cold War Circular History*, in *Journal of Human Rights Practice*, Volume 9, Issue 3, 2017, 370.

[174] Cf. G. FLORA, *Verso un diritto penale*, *op. cit*., 559 sqq.

[175] Cf. S. BONINI, *Lotta alla criminalità organizzata e terroristica, garanzia dell'individuo, garanzia della collettività: riflessioni schematiche*, in *Cass. pen*., 05, 2009, 2216 sqq.

[176] Cf. D. MOECKLI, *Human Rights and Non-discrimination in the 'War on Terror'*, Oxford, 2008.

[177] Cf. A. MANNA, *Erosione delle garanzie individuali in nome dell'efficienza dell'azione di contrasto al terrorismo: la privacy*, in *Riv. it. dir. e proc. pen*., 04, 2004, 1024.

[178] In order to a recent study about the relationship between the threat posed by terrorism and immigration, see E. CRUZ, S. J. D'ALESSIO, L. STOLZENBERG, *Decisions made in terror: Testing the relationship between terrorism and immigration*, in *Migration Studies*, 25 April 2019.

[179] Cf.,*ex plurimis*: S. TABBONI, *Lo straniero e l'altro*, Napoli, 2006; R. CIPOLLINI, (ed.), *Percezione dello straniero e pregiudizio etnico*, Milano, 2002; Z. BAUMAN, *La società dell'incertezza*, Bologna, 1999.

So, the dangerous criminal, the terrorist, the foreign enemy[180] and the subversive of the democratic system become the most tipic archetypes of these sectors of intervention[181].

Reduced to the rank of non-persons, the "enemy aliens"[182] become subject to a specific sub-system of the criminal order[183], self-referenced and governed by codes and logics of war[184].

In this regard, it has been observed in a critical sense that the failure to apply the principles of equality and proportionality to subjects merely suspected of terrorist crimes would represent one of the multiple causes that staves off the objective of global justice, creating a real sense of injustice, supported by the need to apply the power to achieve a blind collective security, excessively raised to an emergency justification[185].

These reflections, however, would not in themselves be sufficient to completely oppose if not to a criminal law of the enemy, to a criminal law of the emergency (and terrorism is the prototype of the emergency), soaked of emotional concepts, inspired by the "need for security" of the community (criminal law as a function of reassurance of the community members)[186], entrusted to indeterminate cases, malleable at will in the application practice, irrepressibly addressed to the anticipation of the threshold for criminal liability[187].

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[180] For example, the Law 43/2015 arose from the need to be able to rely on the most effective legal instruments in combating the phenomenon of FTF and, among these, the so-called “lone wolves”, meaning thereby people, often also second or third-generation immigrants, who autonomously convert to the cause of the “Jihad” and act on their own account. This is a different kind of terrorist than the traditional profile describing him as a member of a criminal organization, also international, as was written in Art. 270-bis and following articles of the Criminal Code (Associations, also international, for the purposes of terrorism). The counter-terrorism measures identified in Law 43/2015 envisage new incrimination provisions or broadening the scope of existing provisions (incriminating the recruit and not only the recruiter, self-training, organizing transfers abroad to finance terrorist activities) and the adoption of individual prevention measures now comprehensively regulated by the anti-Mafia Code (Legislative Decree No. 159/2011). In this last respect, on the one hand, the Law aims to ban anyone (Italian or foreign) suspected of sympathising with the fundamentalist cause from leaving the Country in order to go fight with the Islamic militias (and then return to our Country with a load of experiences acquired on the battlefield) and, on the other hand, expel from the Country any non-EU citizen suspected of having links with terrorism or who has eventually merely manifested the will to fight in conflicts abroad. On this point, see *The measures to fight terrorism in Italy. International cooperation as the linchpin in the fight against terrorism*, in *https://www.esteri.it/mae/en/politica_estera/temi_globali/lotta_terrorismo/italy-supports-the-global-coalition-in-the-fight-against-daesh.html*.

[181] Cf. M. Donini, *Il diritto penale*, *op. cit*., 742 sqq.

[182] Cf. D. Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*, New York, 2003.

[183] In point of fact, according to M. S. Bonomi, *Counter - terrorism legislation in Italy: the key role of administrative measures*, in *http://romatrepress.uniroma3.it/ojs/index.php/law/article/download/1873/1863,156*, currently, administrative expulsions have become a key element of Italy’s counter-terrorism policy and represent a discretionary power of the executive. Indeed, the administrative expulsion of the foreigner for reasons of public order and security, provided for under Legislative Decree No. 286/98, is to be promoted by the Minister of the Interior (or by the Prefect upon a mandate from the Minister) and is accompanied by an order motivating the reasons of the danger of the expelled individual for the “security of the State”, as in the case of subjects involved in espionage or terrorist activities. It is a flexible terrorist risk prevention instrument to be used against those citizens who, legally present on the national territory, represent a danger for the State even if they have not committed offences listed in the categories mentioned above. On this point, see *The measures to fight terrorism in Italy, op. cit*.

[184] Cf. F. Resta, *Lessico e codici*, *op. cit*., 2788 sqq.

[185] Cf. (F. Zumpani, *Critica del diritto penale*, *op. cit*., 528 sqq.

[186] Cf. R. Serra-Cristóbal, *The Impact of Counter-Terrorism Security Measures*, *op. cit*., 53.

[187] Cf. G. Flora, *Profili penali del terrorismo internazionale*, *op. cit*., 63. Indeed, the emergence of Islamic State has created new security concerns for Western nations, particularly those which have experienced a recent upsurge in domestic terrorist activities inspired by the organisation. Whilst the nature of the terrorist threat might

About that, it has been said, more than "criminal law of the enemy",it is better to talk, then, of "criminal law of inequality"[188] - or, in some cases, of the "Alt-Right"[189] - expression of the search for social consensus during the emergency, warned as necessary so that the security of citizens can be effectively guaranteed and capable of legitimizing and justifying the suspension of the rights of the *hostes*[190], or the activation of particular juridical instruments predisposed for such eventualities[191].

5. The (inalienable) firmness of the values of freedom (also) during a (dramatic) emergency situation

Security, even if intimately connected with extremely important human interests[192], does not represent the only superordinate value on the altar of which immolating (every e) any fundamental right, but constitutes a desirable objective whose pursuit passes through a balancing between interests that takes into account, in the last instance, the "uncollectable" of the surrender of a fraction of freedom that translates, in short, into the disregard of its most intimate essential foundation.

It consists in structural values, interconnected and connatural to the system as an ideological base of itself, since democracy is characterized by focusing on a rule of law that respects human rights[193].

In this sense, it has been effectively pointed out that speaking of a fundamental right to the security of citizens actually means disguising with the appearance of law what represents the naked strength that fundamental rights try to contain[194].

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have changed since the early days after 9/11, domestic responses to that threat—in the form of new anti-terrorism laws— have not demonstrated a significant evolution in thinking about counterterrorism. What all the responses have in common, however, is that they think that enacting new and increasingly intrusive legislation is the best way of resolving the threat of terrorism. On this point, see J. BLACKBOURN, D. KAYIS, N. MCGARRITY,*Anti-Terrorism Law and Foreign Terrorist Fighters*, New York, 2018.

[188] Cf. D. PULITANÒ, *Lo sfaldamento del sistema penale*, *op. cit*., 740 sqq.

[189] The Alternative Right, commonly known as the Alt-Right, is a set of far-right wing ideologies, groups and individuals in the United States whose core beliefs is that “white identity” is under attack by multicultural forces (i.e., non-white and liberal elements) who seek to undermine the prominence of white people and their civilization. The Alt-Right is considered a destabilizing force in American politics, especially the intentionally provocative protest demonstrations by their adherents around the country. On this point, see G. HAWLEY, *Making Sense of the Alt-Right*, New York, 2017.

[190] Cf. E. D'IPPOLITO, *La sentenza "Diaz", tra pulsioni in malam partem e tipi d'autori "simpatici" e "antipatici": qualche riflessione sulla percezione mediatica del reato*, in *Cass. pen*., 06, 2013, 2246 sqq.

[191] Cf. P. BONETTI, *Terrorismo, op. cit*., 62 sqq.

[192] Cf. T. E. FROSINI, *I diritti dichiarati sul serio*, 2009, in *www.jus.unitn.it/cardozo/Review/2009/Frosini.pdf*, 6.

[193] Cf. P. A. PILLITU, *Le sanzioni dell'unione e della comunità europea nei confronti dello Zimbabwe e di esponenti del suo governo per gravi violazioni dei diritti umani e dei principi democratici*, in *Riv. dir. internaz*., 01, 2003, 57 sqq.

[194] Human rights is all too often the first casualty of national insecurity. However, threatened democracies have important options, and democratic governance, the rule of law, and international cooperation are crucial foundations for counterterror policy. On this point, see A. BRYSK, G. SHAFIR (cur.), *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, Berkeley, 2007.

Above all, if this right is conceived as a sort of fundamental prerequisite for all other rights, for which there can be no rights without security[195].

"*The generally held view is that the fight against terrorism should not lead to restricting human rights and civil liberties*"[196].

Preserving the essential characteristics of this system of values, therefore, does not mean remaining helpless in the face of danger, but consolidating the firmness of the *idem sentire* that links the members of a civil society that wants to remain so even when "the forces of evil" try to undermine, through violence and terror, the essential bases on which, over the centuries, laboriously, the rule of law has been built.

In a broader perspective, then, we tend to valorize new type of regimes, which is called "humanitarian security regimes", that are "*the regimes driven by altruistic imperatives aiming to prohibit and restrict behaviour, impede lethal technology, or ban categories of weapons through disarmament treaties, and centrally embracing humanitarian perspectives that seek to prevent civilian casualties, precluding harmful behaviour, and protecting and guaranteeing the rights of victims and survivors of armed violence. Thus, the chief goals of humanitarian security regimes are to reduce human suffering, to prohibit harm and to protect victims*"[197].

In this context, the use of ordinary tools for the management of emergency situations, without the need to provide for derogations (more or less temporary) to the constitutional principles regarding freedom, even if they could take on the meaning of incapacity for adequately addressing the danger and appear, consequently, the result of an underestimation of risk, in reality it could constitute an index of the ever stronger tendency in democratic constitutionalism to maintain stable the constitutional principles, considered indispensable for the coexistence of society, whatever the circumstance of social and political life in which that society lives[198].

This is an acceptable risk to run in order not to expose the community to the danger of a progressive involution of the values of freedom on which it is founded, although naturally reaffirming the possibility of imagining some sacrifice of individual rights that materializes, however, at most, in a simple accentuation of the preventive purposes of criminal law in place of the classic function of repressive character[199].

In any case, the price to be paid on the altar of an efficient system of prevention and repression of terrorist and / or subversive acts (internal and / or international) cannot go so far as to disregard the spirit that animates the fundamental rights of the person even if the measures adopted are not immediately effective to combat internationally rooted eversion phenomena[200], engendering, in this way, a recession of rights in the face of the priority need for security[201].

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[195] Cf. R. BARTOLI, *"Chiaro e oscuro" dei diritti umani alla luce del processo di giurisdizionalizzazione del diritto*, in *Riv. it. dir. e proc. pen.*, 03, 2012, 797 sqq.

[196] Cf. N. QUÉNIVET, *The World after September 11*, *op. cit.*, 568.

[197] Cf. D. GARCIA, *Humanitarian security regimes*, in *International Affairs*, Volume 91, Issue 1, 2015, 55.

[198] Cf. P. BONETTI, *Terrorismo, op. cit.*, 294 sqq.

[199] Cf. P. BONETTI, *Terrorismo, op. cit.*, 51 sqq.

[200] Cf. J. FITZPATRICK, *Speaking Law to Power*, *op. cit.*, 263 sq.

[201] Cf. A. IOPPOLO, *La repressione del terrorismo internazionale nella recente giurisprudenza italiana e comunitaria*, Torino, 2009, 22.

This, above all in consideration of the fact that the exceptional nature that accompanies extraordinary measures can well turn into normal, in the medium-long term, within a society that, easily, can be accustomed to a progressive surrender of fractions, more and more consistent, of its freedom in the name of a war against an often invisible enemy and, as such, susceptive the possibility of becoming a bugbear usable, at will, instrumentally, to justify unacceptable restrictions of the inviolable rights of the individual[202].

Insurmountable limits of an essential nature derive, in this sense, not only from the constitutional norms constituting the heritage of values of modern democratic States, but also, in particular, from international, general and treaty law, both universal and regional.

The eventual suspension of the rights of the person there established is linked to specific and precise prescriptions of both substantive and procedural order in which, in any case, it emerges the inderogability, without conditions, of a "hard core" of freedom considered as coessential to the existence of the same principle of humanity and, therefore, inescapable landmark of the innermost essence of the individual.

It is undeniable that international terrorism, by its very nature, proves capable not only of involving and endangering the security and safeness of the citizens of a State affected by violent attacks on its territorial and political integrity, but also of constituting source of extreme danger for the firmness of the principles and values on which the delicate balances of peaceful coexistence among peoples are based within the international community.

Consequently, "*addressing, and possibly defeating, terrorism needs a comprehensive strategy*"[203], which presupposes, within the international community, despite some difficulties in the coordination between different legal traditions[204], the preparation of collaboration tools[205] aimed at the prevention and repression of every possible terrorist / subversive outbreak[206].

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[202] Cf. F. ZUMPANI, *Critica del diritto penale*, *op. cit*., 531 sq.

[203] Cf. M. DI FILIPPO, *Terrorist Crimes and International Co-operation*, *op. cit*., 533.

[204] Cf. H. LABAYLE, *Droit international et lutte contre le terrorisme*, in *Annuaire français de droit international*, 32, 1986, 106 sqq.;M. POULAIN, *Les attentats du 11 septembre et leurs suites : quelques points de repère*, in *Annuaire français de droit international*, 48, 2002, 41 sqq.

[205] According to W. HOPKINSON, J. LINDLEY-FRENCH, *The New Geopolitics of Terror: Demons and Dragons*, New York, 2017, 2 sqq., terrorism, misery and state tensions across the Middle East interact with wider current geopolitics to create a highly dangerous strategic environment. The West needs a counter-terrorism strategy, a counter-insurgency strategy and a 'classic' geopolitical strategy. Weaving such very different elements into one unified whole will be a major challenge based on an innovative framework characterized by four levels of analysis: "*sub-state ethnic and sectarian divisions from which terror groups have emerged; the impact of such groups on state structures and regional state relations; the implications of regional tensions for regional strategic and extra-regional actors, most notably European states, Russia, and the United States, together with implications for the security and defence of those states; and finally the impact of such threats on geopolitics and state competition between Great Powers the world over*".

[206] Cf., *ex plurimis*: M. SOSSAI, *La prevenzione del terrorismo nel diritto internazionale*, Torino, 2012, 99 sqq.; A. SERRANÒ, *Le armi razionali contro il terrorismo contemporaneo*, Milano, 2009, 82 sqq.; C. DI STASIO, *La lotta multilivello al terrorismo internazionale*, Milano, 2009, 103 sqq.; R. NIGRO, *La nozione di terrorismo internazionale nella prassi del Consiglio di Sicurezza delle Nazioni Unite*, in C. FOCARELLI (ed.), *Le nuove frontiere del diritto internazionale*, Perugia, 2008: 53 sqq.; U. VILLANI, *L'attuazione da parte dell'Unione europea delle decisioni del Consiglio di Sicurezza per il mantenimento della pace e la lotta al terrorismo*, in M. TUFANO (ed.), *La crisi dell'Unione Europea. Problematiche generali e verifiche settoriali*, Napoli, 2007, 163 sqq.;L. BAUCCIO, *L'accertamento del fatto reato di terrorismo internazionale: aspetti teorici e pratici*, Milano, 2005, 433 sqq.; S. REITANO, *Le misure di contrasto al terrorismo internazionale tra Unione Europea e normativa italiana di adattamento*, in *Indice Pen*., 3, 2004, 1210 sqq.; A. VALSECCHI, *Il problema della definizione di terrorismo*, in *Riv. it. dir. e proc. pen*., 04, 2004, 1132 sqq.; Y.

The European view[207], for example, wide if not universal, seems to accept that the task of protecting human rights cannot be switched off while terrorism is dealt with[208], in the context, in particular, of the European Convention of Human Rights[209]in reference to which the suspension of the liberties conventionally enshrined can not be preventive[210] and can never be ordered in the case of a (only) presumed and eventual exposure to (hypothetical) prejudices[211], while recognizing that each sovereign State has an "unavoidable margin of appreciation"[212] or the sovereign State's right to weigh, at best, the conditions of danger which justify any exemptions provided for these cases[213].

BANIFATEMI, *La lutte contre le financement du terrorisme international*, in *Annuaire français de droit international*, 48, 2002, 104 sqq.; L. MIGLIORINO, *La dichiarazione delle Nazioni Unite sulle misure per eliminare il terrorismo internazionale*, in *Riv. Dir. Int*., 1995, 969 sqq.;F. MOSCONI, *La Convenzione europea per la repressione del terrorismo*, in *Riv. Dir. Int*., 1979, 303 sqq.;L. MIGLIORINO, *Iniziative europee nella lotta al terrorismo internazionale: la Convenzione del 27 gennaio 1977*, in *Riv. Dir. Int. Priv. e Proc*., 1977, 473 sqq.;P. BONETTI, *Terrorismo, op. cit*., 86 sqq.; A. IOPPOLO, *La repressione del terrorismo*, *op. cit*., 69 sqq.;A. PANZERA, *Terrorismo*, *op. cit*., 37 sqq.; ID, *Attività terroristiche*, *op. cit*.,145 sqq.; N. QUÉNIVET, *The World after September 11*, *op. cit*., 569 sqq.; N. RONZITTI, *Diritto internazionale per Ufficiali*, *op. cit*.,142 sqq.; S. ZEULI, *Terrorismo*, *op. cit*., 79 sqq.

[207]Cf.,*ex multis*: C. HILLEBRAND, *Counter-Terrorism Networks in the European Union: Maintaining Democratic Legitimacy after 9/11*, Oxford, 2012; M. O'Neill, *The Evolving EU Counter-Terrorism Legal Framework*, Abingdon, 2012.

[208] Indeed, according to J. WOUTERS, F. NAERT, *The European Union and 'September 11'*, *Institute for International Law*

Working Paper No 40 - January 2003, revised March 2003, 1 sqq., international cooperation is essential in the fight against international terrorism and, more than in any other continent, in Europe, such cooperation is strongly institutionalized. European international organizations play a crucial role in this respect. The EU has reacted to the September 11 events by fairly quickly adopting an impressive number of measures, in many policy areas. It has achieved the most progress in the field of cooperation in criminal matters, although the jury is still out on whether the measures adopted will all be effectively implemented and vigilance will be required to ensure overall consistency and continuing respect for human rights, democratic oversight and the rule of law. Finally, in respect of the fight aganist the causes of terrorism significant progress has been made, though much remains to be done.

[209]Cf.,*ex multis*: J. REYNOLDS, *Empire, Emergency and International Law*, Cambridge, 2017, 117 sqq.; M. E. SALERNO, *In the Fight Against Terrorism, Does Article 15 of the ECHR Constitute an Effective Limitation to States' Power to Derogate From Their Human Rights Obligations?*, in *Democracy and Security Review*, VII, no. 1, 2017, 109 sqq.;L. ZAGATO, *L'eccezione per motivi di emergenza nel diritto internazionale dei diritti umani*, in *DEP.Deportate, esuli e profughe. Rivista telematica di studi sulla memoria femminile*, 5-6, 2006,140 sqq.;P. BONETTI, *Terrorismo, op. cit*., 228 sqq.; G. CATALDI, *La clausola di deroga della convenzione*, *op. cit*., 3 sqq.; V. EBOLI, *La tutela dei diritti umani*, *op. cit.*, 43 sqq.. Indeed, according to C. WARBRICK, *The European Response to Terrorism*, *op. cit*., 1016 sqq., in Europe, the ratification of the European Convention on Human Rights (ECHR) by practically all European states means that the European Court of Human Rights will have jurisdiction over the striking of a balance between the rights of individuals and the response to terrorism. This ultimate judicial role is important because it means that the European states may not put 'terrrorists' beyond the law. Where a state finds the threat to its security so serious that it must resort to a military rather than a police response, international humanitarian law (IHL) may apply but, because of the procedural avenue which the ECHR provides, it is important to stress that IHL does not apply to the exclusion of human rights law.

[210] Cf. E. NANOPOULOS, *The Fight against Terrorism, Fundamental Rights and the EU Courts: The Unsolved Conundrum*, in *Cambridge Yearbook of European Legal Studies*, 2012, 14, 269 sqq.

[211] Cf. P. BONETTI, *Terrorismo, op. cit*., 232 sqq.

[212] Cf. Y. ARAI-TAKAHASHI, The defensibility of the margin of appreciation doctrine in the ECHR: value-pluralism in the European integration*, in* Revue Européenne de Droit Public*,* 2001, 1162 sq.;R.S.T.J. MACDONALD, The margin of appreciation in the jurisprudence of the European Court of Human Rights*, in* Collected Courses of the Academy of European Law*, 1992,* 1992: 95 sq.

[213] Cf. D. U. GALETTA, *Il principio di proporzionalità nella Convenzione europea dei diritti dell'uomo, fra principio di necessarietà e dottrina del margine di apprezzamento statale: riflessioni generali su contenuti e rilevanza effettiva del principio*, in *Riv. It. Dir. pubbl. com*., 1999, 744 sqq.; R. SAPIENZA, *Sul margine di apprezzamento*

In this context, however, there are positions of freedom, "presumable expression of principles of *ius cogens*"[214], not suspendable or derogable even in the face of the most dramatic emergency situations, at the cost of dissolution of the indefectible characteristic traits of a legal system inspired by the basic principles of modern constitutionalism[215].

It is also true, however, that, "*the E.C.H.R. has been able to elaborate an increasingly extensive view of human rights obligations of the states but one which possesses sufficient flexibility that states have seldom found the need to have recourse to the emergency derogation provision in Article 15, still less to find their circumstances so constrained that they should leave the Convention system altogether*"[216].

In any case, it goes without saying that "*terrorism is by its nature an exceptional (even if occasionally devastative) phenomenon opposed to the exercise of state authority in our everyday life. If we seriously weaken the concept of rule of law for fighting this new challenge (terrorism), we risk failing to answer to a traditional major challenge (limitation of or fight against the arbitrary use of government power)*"[217].

In truth, it has been effectively observed that, even if the attribute of sovereignty postulates the unquestionability of the political choices made especially in the face of a situation of crisis, nevertheless it can be said that in the presence of terrorism to every democracy is required a "duty of serenity" because terrorism has a particular vocation to exacerbate the repressive function of the State to the detriment of its role in protecting individual liberties[218].

In this sense, a preventive and / or repressive / sanctioning system that is able to respect the primacy of the law (*rectius*: the supremacy of the values of the person), helps to protect and strengthen the freedoms (axiological heritage essential for a democracy) and prevents to a social community to undertake a process of progressive barbarization of customs[219].

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statale nel sistema della Convenzione europea dei diritti dell'uomo, in *Riv. Dir. Int*., 1991, 571 sqq.) P. BONETTI, *Terrorismo, op. cit*., 233 sqq.; L. ZAGATO, *L'eccezione per motivi di emergenza*, *op. cit*., 148 sqq.

[214] Cf. S. BARTOLE, B. CONFORTI, G. RAIMONDI (eds.), *Commentario alla Convenzione europea dei diritti dell'uomo*, Padova 2001, 437.

[215] Cf. F. VIGANÒ, *Terrorismo, Guerra e sistema penale*, in *Riv. It. Dir. e Proc. Pen*, 02, 2006, 670 sqq.

[216] Cf. C. WARBRICK, *The European Response to Terrorism*, *op. cit*., 999.

[217] Cf. A. JAKAB, *Breaching constitutional law*, *op. cit*., 77 sq.

[218] Cf. P. BONETTI, *Terrorismo, op. cit*., 21 sqq.

[219] Significant institutional reforms, extraordinary legal measures broadening police powers, encouraging terrorists to repent, represented the tools used to suppress the terrorist phenomenon in Italy in the 1970s. Cf. A. CENTO BULL, P. COOKE, *Ending Terrorism in Italy*, Abingdon, 2013; B. VETTORI, *Terrorism and counterterrorism in Italy from 1970's to date: a review*, 2007, in *http://www.transcrime.it/wp-content/uploads/2013/11/14_Terrorism_and_Counterterrorism_in_Italy1.pdf*, 7 sqq. For an analysis of the main trends in the Italian response to terrorism regarding the effectiveness of specific policies and their impact on civil liberties with reference to a period between 1970 and 1989, see D. DELLA PORTA, *Institutional responses to terrorism: The Italian case*, in *Terrorism and Political Violence*, Volume 4, 1992, 155 sqq. On this point, see also M. PAVARINI, *The New Penology and Politics in Crisis - The Italian Case*, in *Brit. J. Criminology*, Volume 34, 1994, 49 sqq. Starting from September 11, 2001, the international community has launched initiatives to prevent and counter the threat of terrorism by using, dependin the circumstance, military or law enforcement instruments or, in the perspective of prevention, addressing the social and economic conditions liable to favour the spread of extremist propaganda or the recruitment of terrorists. Thus, currently, Italy has a legislation in line with the highest international standards in fighting terrorism and violent extremism. Lately, Law No. 43 of 17 April 2015 is especially aimed at addressing the phenomenon of the so-called "Foreign Terrorist Fighters" (FTF). Then, Italian legislators came back to the issue of combating terrorism in 2016 with the adoption of Law No. 153 of 28 July of 2017 which it adjusts Italian legislation to a number of international commitments on this issue, also making several amendments to the Criminal Code, adding thereto

Thus, in balancing the opposing needs, on the one hand, the protection of the collective interest and, secondly, the safeguarding of individual guarantees, the assessment carried out regarding the necessity and proportionality of the measures adopted plays a decisive role[220].

Fundamental rights are an essential part of a democratic legal system and occupy a privileged position within it.

This results in the prohibition of their infringement except when justified on the grounds of general interest and with the limitation being proportionate to the perceived threat.

Consequently, it is imperative to determine which risks and threats to security, justify restrictions on human rights and under what conditions[221].

In this sense, if collective security needs can justify the adoption of restrictive measures to individual rights and freedoms, particularly serious must be the danger for the public order to authorize the exercise of "the right of derogation" that allows the suspension of the guarantee also of rights for which, in thesis, their intangibility is postulated[222].

Making the fundamental rights of the person pliable during a situation of emergency, in reality, requires a democratic "deliberation" that allows to ascertain the recurrence of the indefectible justifying presuppositions for a (even temporary) suspension and / or derogation to the values of freedom of the person as this is functional to ensure the protection of the legal order, in deference to the principle of "*primum vivere*"[223].

Within democratic constitutions, i.e., the State of emergency refers to a regulated situation whereby extended powers are conferred upon authorities in order to confront a threat to the stability of public institutions, the rights of citizens or other general interests.

Consequently, the declaration of emergency requires the concurrence of certain circumstances, the intervention of Parliament, its temporal limitation and, more importantly, the identification of those rights that could be limited and the extent of such limitation.

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new cases for incrimination. On this point, see, *ex multis*: S. D'AMATO, *Cultures of Counterterrorism: French and Italian Responses to Terrorism after 9/11*, Abingdon, 2019; F. MARONE, *The Italian Way of Counterterrorism: From a Consolidated Experience to an Integrated Approach*, in S. N. ROMANIUK, F. GRICE, D. IRRERA, S. WEBB (eds.), *The Palgrave Handbook of Global Counterterrorism Policy*, New York, 2017, 479 sqq.; A. ANTINORI, *The "urgent measures to fight terrorism" in the Italian counter-terrorism decree (D.L. n. 7/2015)*, in *Sicurezza e Scienze Sociali*, 3, 2015, 169 sqq.; R. PELIZZO, *Nihil novi sub sole? Executive power, the italian Parlamento and the "war on terror"*, in J. E. OWENS, R. PELIZZO (eds.), *The War on Terror and the Growth of Executive Power?: A Comparative Analysis*, 2010, 202 sqq.; L. ALENI, *Distinguishing Terrorism from Wars of National Liberation in the Light of International Law: A View from Italian Courts*, in *Journal of International Criminal Justice*, Volume 6, Issue 3, 2008, 525 sqq.; V. PATANÈ, *Recent Italian Efforts to Respond to Terrorism at the Legislative Level*, in *Journal of International Criminal Justice*, Volume 4, Issue 5, 2006, 1166 sqq.;A. GAMBERINI, *Gli strumenti di contrasto al terrorismo internazionale: alcuni interrogativi sulla tecnica e sull'oggetto di tutela della nuova fattispecie di cui all'art. 270-bis c.p.*, in *Critica diritto*, 2004, 1-3, 69 ss.; C. CUPELLI, *Il nuovo art. 270-bis c.p. Emergenze di tutela e deficit di determinatezza?*, in *Cass. Pen.*, 2002, 897 ss.; *The measures to fight terrorism in Italy, op. cit.*

[220] Cf. R. BALDUZZI, *Introduzione. La difficile ricerca di uno standard di compatibilità costituzionale degli strumenti di contrasto al terrorismo globale*, in M. CAVINO, M. G. LOSANO, C. TRIPODINA (eds.) (2009), *Lotta al terrorismo e tutela dei diritti costituzionali*, Torino, 2009, 1 sqq.

[221] Cf. R. SERRA-CRISTÓBAL, *The Impact of Counter-Terrorism Security Measures*, *op. cit.*, 47 sq.

[222] Cf. I. VIARENGO, *Deroghe e restrizioni alla tutela dei diritti umani nei sistemi internazionali di garanzia*, in *Riv. dir. int.*, 2005, 955 sqq.;P. A. PILLITU, *Le sanzioni dell'unione*, *op. cit.*, 63 sqq.

[223] Cf. P. CARNEVALE, *La Costituzione va alla guerra?*, Napoli, 2013, 124.

The statutory definition of the state of emergency is precisely aimed at guaranteeing fundamental rights and ensuring that the State cannot abuse this and render the most essential part of the Constitution ineffective[224].

In this sense, even in the emergencies, the first instrument to defend democracy and constitutionalism with regard to the will of the political majorities of the moment is the rigidity of the constitutions[225].

It follows that, in the face of the multiform and changing nature and intensity of the danger to be faced, necessity and proportionality of the derogatory regulation[226], introduced in order to prevent and / or in any case effectively combat acts of indiscriminate violence, are axiological connotations of political decisions aimed at circumscribing, as far as possible, the discretion of the organs of the public power within a framework of (constitutional) legality that prevents the betrayal of the values on which a democratic order is founded on the altar of his irrational defense against all possible enemies[227].

Not necessarily, therefore, the overcoming of an emergency situation requires, upstream, the establishment of normative clauses that involve, almost in terms of automatism, the exception to the basic values of a legal order in view of its protection in the event of an internal and / or international crisis[228].

The effectiveness of clauses of such consistency, appreciated, according to some, as a more serious and thoughtful will to protect the immanence of free Institutions, could however be denied by the facts where the recourse to a (disciplined) regime of exception could be the occasion of betraying the most intimate essence of the principles proper to modern constitutionalism, leading to the emergence of dangerous authoritarian drifts of the legal system[229].

However, it's true that "*when faced with a public emergency that 'threatens the life of the nation', international human rights treaties – and many constitutions – permit states to suspend the protection of certain basic rights. The existence of derogationlike clauses is generally represented as a 'concession' to the 'inevitability' of exceptional state measures in times of emergency, and also as a means to somehow control these*"[230].

In this context, it is the case of a '*double-layered constitutional system*'[231].

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[224] Cf. R. SERRA-CRISTÓBAL, *The Impact of Counter-Terrorism Security Measures*, *op. cit*., 49 sq.

[225] Cf. P. BONETTI, *Terrorismo, op. cit*., 25.

[226] Factors that are to be appreciated in reference to the intensity of the compression of the fundamental rights of the individual, of the duration of the effectiveness of the extraordinary measures arranged only for the time considered strictly necessary and essential for the purpose of overcoming the crisis and, if necessary, limited only to a geographical area where the danger is rooted.

[227] Cf. P. BONETTI, *Terrorismo, op. cit*., 39 sqq.

[228] In these cases, "*the scope of the protection afforded by constitutional regimes is, indeed, a serious question*". Cf. D. BARAK-EREZ, *Israel: The security barrier between international law, constitutional law, and domestic judicial review*, in *International Journal of Constitutional Law*, 2006, Volume 4, Issue 3, 550.

[229] Cf. G. DE MINICO, *Costituzione,op. cit*., 279 sqq.;P. BONETTI, *Terrorismo, op. cit*., 293 sqq.

[230] Cf. S. HUMPHREYS, *Legalizing Lawlessness*, *op. cit*., 678.

[231] Cf. S. HUMPHREYS, *Legalizing Lawlessness*, *op. cit*., 678. On this point, see T. R. HICKMAN, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, in *Modern Law Review*, Volume 68, Issue 4, 2005, 659.

"*The notion of exceptionalism, in this sense, lends itself to two main arguments: (a) that recent measures relating largely but not exclusively to the war on terrorism constitute a fundamental deviation from normal constitutional and legal standards; (b) that this deviation from normal standards, even if we should accept it as appropriate in the current climate, is necessarily a bad thing*"[232].

Already within the modern democratic Constitutions, the axiological coverage can be derived, in fact, from the "hard core of constitutionalism"[233], in order to face, even in an ordinary way, the dangers of disaggregation deriving from (dramatic) emergency situations while respecting the fundamental liberties of the person.

After all, it is observed, the objective of maximum dilation of the effectiveness of the inalienable rights of the individual must be achieved through the development of the potential inherent in the constitutional rules that protect the same rights and in the necessary balance with other fundamental, constitutionally guaranteed freedoms[234], susceptive of being engraved by the expansion of a single protection.

The protection of inviolable rights must therefore be systemic and not divided into a series of uncoordinated rules (and in potential conflict between them) and the realization of a balanced system of protection can only be delegated, in an order inspired by the rule of law (constitutional), for the areas of respective competence, to the legislator, the the judicial power and the Constitutional Court[235].

Indeed, the effectiveness of the rule of law is linked to the principle of accountability of public authorities (both judicial and political).

Judicial accountability enables courts to check whether counter-terrorism actions observe the duty to respect human rights as ruled by law.

Political accountability refers more to the obligation to explain the reasons behind a State's actions and policies[236].

Within a markedly democratic legal order of inspiration, the real aptitude of the inviolable rights of man, as sanctioned within formal dispositions, to conform the conduct of the citizens (and of the Community-State as a whole) is measured through the degree of effectiveness of the precept within which the fundamental freedoms are enunciated[237].

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[232] Cf. T. POOLE, *Constitutional exceptionalism and the common law*, in *International Journal of Constitutional Law*, Volume 7, Issue 2, 2009, 247.

[233] Cf. P. BONETTI, *Terrorismo, op. cit*., 295.

[234] Cf. P. HABERLE, *Le libertà fondamentali nello Stato costituzionale*, Roma, 2005, 74 sqq.

[235] Cf. Cf. P. HABERLE, *Le libertà fondamentali*, *op. cit*., 41 sqq. Indeed, according to D. BARAK-EREZ, *Israel: The security barrier between international law, op. cit.*, 552, an important point concerns, about this topic, the impact of international judicial proceedings on the institutional legitimacy of national courts. It seems that the perceived threat of international adjudication has the potential to bolster the institutional legitimacy of the national court in handling highly sensitive political questions.

[236] Cf. R. SERRA-CRISTÓBAL, *The Impact of Counter-Terrorism Security Measures*, *op. cit*., 52 sq.

[237] Cf. F. MARTINI, *Potere e diritti fondamentali nelle nuove ipotesi di giurisdizione esclusiva*, in *Dir. proc. amm*., 02, 2009, 388 sqq.;P. HABERLE, *Le libertà fondamentali*, *op. cit*., 51 sqq.

One wonders, however, whether freedom and equality can be correctly declined when insecurity and fear for one's life prevail[238] as, for example, in cases of internal and / or international crisis situations.

Even on such occasions, however, respect for fundamental rights[239] passes through a constant promotion and care by enhancing the culture of legality and responsibility[240], an indefectible precondition in order to guarantee, with democratic method, the civil and social progress of the nation, even in the course of an emergency situation[241].

In the face of the extreme "vagueness and heterogeneity" of (possible) factors of danger of disintegration of the established order[242], it proves indispensable to interpose a solid background axiological frame, which can be summarized in the *idem sentire de re publica*, within which each individual recognizes itself and in view of whose protection, it senses and promotes the irrepressible need to defend the Motherland, "the sacred duty of the citizen"[243], until the fulfillment of the extreme sacrifice , without disregarding, in the name of a supreme reason of state, the hard core of the fundamental freedoms on which the most intimate essence of a liberal legal order is based.

The most feared opponents of a democratic order become, in such a perspective, not so much the terrorists who attack individual and collective security as the disregard for fundamental freedom and human rights that follows the adoption of extraordinary emergency measures[244] which, if capable of going beyond the limits of human dignity, undermine the very same moral legitimacy in the fight against terrorism, obscuring the dividing line between victims and perpetrators[245].

In this context, it is important to appreciate the suitability and aptitude of the legal regime in force within an order, inspired by the principles proper of modern constitutionalism, to

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[238] Cf. A. BALDASSARRE, *Globalizzazione contro democrazia*, Bari, 2002, XI.

[239] Fundamental rights, like all the goods of life, like all values, it is not enough to have them conquered once and for all, but it is necessary defending and protecting them daily, having the soul strong enough to face the fight the day in which they were in danger. Cf. C.A. JEMOLO, *Che cos'è la Costituzione*, Roma, 1946, 63.

[240] Cf. C. PINELLI, *Libertà e responsabilità*, 2010, in *www.rivistaaic.it*, 1 sqq.

[241] Instead, the perception of terrorism threat erodes civil liberties and undermine multicultural democracies. On this point, see M. VERGANI, *How Is Terrorism Changing Us?: Threat Perception and Political Attitudes in the Age of Terror*, Singapore, 2018.

[242] In order not to lose the deeper meaning of the principles of democracy rooted in the Constitution, possibly understood not in a merely rhetorical sense. On this point, see A. L. SVENSSON-MCCARTHY, *The International Law of Human Rights and States of Exception*: Hague, 1998, 95 sqq.;F. AL-SUMAIT, C. LINGLE, D. DOMKE, *Terrorism's cause and cure: the rhetorical regime of democracy in the US and UK*, in *Critical Studies on Terrorism*, Vol.2, no. 1, 2009, 7 sqq.

[243] Cf. E. BETTINELLI, *Art. 52*, inG. BRANCA (ed.), *Commentario della Costituzione*, Bologna, 1992, 70 sqq.;A. BARONE, *La difesa nazionale*, *op. cit*., 1 sqq.

[244] Indeed, according to a particular approach, international humanitarian law is the applicable law in armed confl ict and governs the use of force against legitimate military targets. Accordingly, the law to be applied in the context of an armed confl ict to determine whether an individual was arbitrarily deprived of his or her life is the law and customs of war. Under that body of law, enemy combatants may be attacked unless they have surrendered or are otherwise rendered hors de combat. Terrorists who continue to plot attacks against a State may be lawful subjects of armed attack in appropriate circumstances. On this point, see J.I. CHARNEY, *The use of force against terrorism and international law*, in *The American Journal of International Law*, 2001, Volume 95, 835 sqq.;P. ALSTON, J. MORGAN-FOSTER, W. ABRESCH, *The Competence of the UN Human Rights Council*, *op. cit*., 187 sqq.

[245] Cf. F. VIGANÒ, *Terrorismo, Guerra*, *op. cit.*,665 sqq; M. DONINI, *Il diritto penale*, *op. cit*., 742 sqq.

preserve, according to the classical meaning[246], the independence (*rectius*: the unfailing attribute of sovereignty) of the State and the preservation, over time, of the free Institutions from which it is composed[247], as well as the "conservation of the social community"[248], constituted by the people[249], without, for this reason, disavowing the foundations of values on which itself is based[250].

In such a perspective, the safeguarding of the integrity of the free Institutions and of the axiological framework on which they stand - the primary condition for the preservation of the community made up of subjects entwined by the same *idem sentire de re publica* - represents "a duty placed above all the others"[251], that, precisely because "sacred"(and, therefore, among other things, connoted by a value of an eminently ethical and moral order), is, intimately and inextricably, linked to belonging to the national community identified in the Republic[252].

The protection and promotion of the values of independence and freedom, in which a democratic political/constitutional structure is recognized, therefore require "absolute loyalty to the republican institutions"[253].

In this context, the main objective is to preserve the fundamental rights of the man without being defenceless in the face of danger, so as to strengthen the firmness of the democratic system when subversive conducts try to undermine, through violence and terror, the fundamental bases on which, the rule of law has been built over the centuries, laboriously.

Ultimately, in the peacetime or during a war emergency or in an internal situation of crisis, it has to be essential to achieve the safeguard of the "*salus rei publicae*" through the use of tools that allow to avoid incurring in denying the values in which the most intimate essence of a democratic state is summarized, under penalty of its dissolution even in the case of victory against the enemy, achieved at the cost of turning the democratic system into an authoritarian regime, a state of absolute denial of the liberties that, by this way, it was apparently intended to defend.

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[246] Cf. V. GUELI, *Elementi di una dottrina dello stato e del diritto*, Roma, 1959: 69; G. Balladore Pallieri, *Dottrina dello Stato,* Padova,1964, 226.

[247] Cf. B. PELLEGRINO, G. ROSIN, *Profili costituzionali*, *op. cit*., 47.

[248] Cf. G. JELLINEK, *La dottrina generale del diritto e dello Stato,* Milano, 1949, 737.

[249] Cf. R. FEDERICI, *Guerra o diritto?*, Napoli, 2013, 207.

[250]Cf.,*ex multis*: M. PIAZZA, *L'illegittima <<sospensione della Costituzione>>*, *op. cit*., 812 sqq.; F. COCOZZA, *Assedio (stato di)*, *op. cit*., 1 sqq.; A. GIARDINA, *Art. 78*, *op. cit*., 110 sqq..

[251] Cf. D. BRUNELLI, G. MAZZI, *Diritto penale militare*, Milano, 2007, 163.

[252] Cf. S. BARTOLE, *La Nazione italiana e il patrimonio costituzionale europeo*, in *Dir. Pubbl*., 1997, 9.

[253] Cf., *ex plurimis*: A. MORELLI, *I paradossi della fedeltà alla Repubblica*, Milano, 2013; S. PANIZZA, E. STRADELLA, *Diritto Pubblico*, Santarcangelo di Romagna, 2013, 399 sq.; G. LOMBARDI, *Fedeltà (diritto costituzionale)*, in *Enc. Dir.*, *XVII vol*., Milano,1968, 177; B. PELLEGRINO, G. ROSIN, *Profili costituzionali*, *op. cit*., 49.