RIVISTA
AIC ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI

Rivista N°: 4/2015
DATA PUBBLICAZIONE: 06/11/2015

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INTERNET AND FUNDAMENTAL RIGHTS IN TIME OF TERRORISM[**]

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1. My iter procedendi

The Italian "Declaration of Rights in Internet" has posed the question of the *minimum* guarantees needed for the fundamental rights in Internet.

Is the Declaration able to comply with this task also when the liberties are threatened by Terrorism?

From a legal perspective, I propose to inquire about the extent to which a State may legally squeeze the liberties in order to prevent the risk of Terrorism.

My presentation will follow a logical *iter*: I will examine, firstly, the features of the law of fear, i.e. the legal remedies against the Terrorism; then, explore the principal examples of counter terrorism laws *in itinere* or already adopted in Europe and in the US; finally, propose a model of "Law of fear" suited to the criteria of constitutional legitimacy and coherent with the guarantees posed by the aforementioned Declaration.

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[**] Speech held at the "Internet Governance Forum", 9 November 2015, Joao Pessoa, Brazil, during the Italian Panel on "Building Internet Bills of Rights: challenges and opportunities".

L'Associazione Italiana Costituzionalisti è iscritta al Registro Operatori della Comunicazione dal 9.10.2013 col n. 23897
La Rivista AIC è registrata presso il Tribunale di Roma col n. 339 del 5.8.2010 — Codice ISSN: 2039-8298 (on-line)
Rivista sottoposta a referaggio — Rivista inclusa nella classe A delle Riviste scientifiche dell'Area 12 - Scienze giuridiche
Direttore Responsabile: Prof. Antonio D'Atena — Direttore: Prof. Paola Bilancia

2. The law of fear

The model of Law of fear responds to the anticipatory aim of a preventive policy. It intends to prevent that the danger of a future event is translated into actual and certain damage.

Here, the legislator must move on the slippery slope of risk, meant as both the verification and the calculation of the probability of its taking place. In this context its task requires the mediation between antagonistic values. Indeed, legislators are normally expected to balance constitutionally relevant goods, but here the goods are misaligned because of the different time of their coming into effect.

On the one hand, a present and secure damage occurs to the fundamental freedoms, that are being compressed; on the other hand, a future and hypothetical advantage is expected to the security, that would be strengthened. So the damage sustained by the holder of the right to privacy (only to indicate one of the rights in question) should be more than compensated by the future and uncertain advantage procured to the holders of the right to security (GEARTY C., 2013)

In light of this, Chief judges – national and supranational, from the Supreme Court of the United States (leading case: Keith, June 19, 1972, at *https://supreme.justia.com/cases/federal/us/407/297/case.html*) to the European Court of Justice (Grand Chamber, April 8, 2014, Digital Rights Ireland, see *infra*) – have been narrowing the political discretion of the policy maker in accordance with precautionality – proportionality principles, which guarantee a balanced coexistence between competing values.

The first principle guides the policy maker in its *ex ante* prognosis of the threatened danger (C. Sunstein, 2005). The question he must answer is the following: what are the chances of the risk actually happening? This is a non-mathematical test, the outcome of which is therefore disputable. An example may be given of the extent of such relativity: the legislator must decide the level of tolerable risk, i.e. the risk threshold that the community is willing to accept. Field research shows that the level depends on the age of the person; in fact, the elderly, being not tolerant of high risks, will tend to accept a very low threshold of danger. Should be elderly be taken as a primary reference, the legislator should respond with a strong compression of freedoms even in the absence of a serious likelihood of the terrorism event. The opposite would prove true, if the sample was composed exclusively of young people.

Hence two corollaries (Boutillon S., 2002).

The first implies that the legislator should refrain from typical legal assessments, namely to assume the existence of a risk regardless of its concrete evaluation. The task of the legislator is to check by an *ex ante* prognosis the reasonable occurrence of the feared event.

The second corollary requires the legislature to supplement the first criterion, given its insufficiency, with that of proportionality. Pursuant to proportionality, the costs borne by a certain freedom, which would be compressed, must be compared with the benefits of an increased safety.

This difference in weight between costs and benefits suggested the judges to set the proportionality not in the usual terms of equivalence, but in those of reasonable inequality: the advantage to the protected value (security), because of its uncertainty, must exceed the certain damage caused to the compressed right (the right to freedom susceptible of being attacked). In a constitutional State, the injury to basic rights is acceptable only if necessary for the defence of a value equal to or greater than that concretely threatened by aggression (as Roach 2011 and before Alexy 1986 clearly explained).

3. Its exceptional and temporary nature

The model "law of fear" has two identity features: the exceptional and temporary nature of its rules. Briefly, these rules, being an exception to general principles, must be strictly interpreted and, above all, have a default validity over time. So, failing the emergency status, the special regime comes to an end and the ordinary course of events is resumed. This means that, at the expiry of the sunset clause, the emergency law should not be extended unless in extreme cases. Otherwise, the exception would replace the general rule and the compression of freedom in view of an uncertain advantage in the future would no longer be compensated by an only temporary asymmetrical regulation. A more in depth analysis of this subject can be found in the paper I published at the Italian on line journal *Federalismi* (*http://www.federalismi.it/nv14/articolo-documento.cfm?artid=29517*).

4. The European laws of fear

Let's see whether and to what extent the recent legislation of major European States has complied with the precautionary – proportionality principles.

My analysis will address the main European laws enacted in the wake of the Charlie Hebdo event (De Minico, 24 January 2015). Despite their diversity, the measures adopted have in common that they do not duly consider the proportionality-precautionary principles.

The United Kingdom was already active on the topic before Charlie Hebdo with the Counter-terrorism and Security Bill 2014-15 (now *Counter-terrorism and Security Act 2015*, at *http://www.legislation.gov.uk/ukpga/2015/6/contents/enacted/data.htm*); under this Bill, UK isolated the suspected people of terrorism, withdrawing their passports to prevent their entry or exit from the country. It is manifest, thus, an unbroken continuity with the strict policy of the "Regulation of Investigatory Power Act and the Anti-terrorism, Crime and Security Act 2001".

It is not surprising that the further development of this policy aims to achieve universal transparency of conversations on Skype, What's App and any device, forcing the owners of these platforms to create the so-called back doors. This solution, if technically possible, involves the inconvenience of making insecure virtual spaces; once the States open the door, it will easily become accessible to anyone at the expense of our privacy. This policy of indiscriminate visibility has a double cost. An economic one, when the State obliges individuals, platform owners, to pay for the technical implementation of the required measures. Citizens

are dispossessed of their fundamental freedoms and are handled as subjects. In fact, they are deprived of their privacy in conversations with weak excuses and without their consent.

France, albeit declaring to be against the introduction of the American Patriot Act, has *de facto* assumed it as a model. Francois Hollande was among the first ones to announce that he had the intention of closing the websites suspected of being related to terrorism. This measure is too harsh and extreme; it limits and suffocates the freedom of thought, without ensuring an efficient prevention against terrorism, as I am going to highlight examining the Italian legislation inspired to the French model. Hollande's promise was kept with the Decree n°2015-125 (at *http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030195477&categorieLien=id*). Further measures favouring statÈs espionage have been adopted in the recent law of the intelligence, already approved by the National Assembly. This last piece of legislation implies that the phone conversations and the online communications could be kept by the Telco and the ISP operating in the French territory for a very long period of time. If requested, the said companies will have to transmit those data to the intelligence, without an order from the judge, if just authorized by the Prime Minister, on the advice of a new Independent Authority (hereinafter I.A.). Moreover, in case of emergency, there is even no need for the political authorization by the Prime Minister, which is converted to a possible revocation.

Here, even the much blamed American system has been surpassed. Indeed, the NSA must in all cases be authorized by the judge before any wide recollection of the users' phone and online extrinsic data. The French draft law goes far beyond and closes the circle, because it allows that even the phone conversations' content and the e-mails be acquired. Therefore, neither it is satisfied of acquiring those meta data, which are enough for the US system, nor it pays respect and attention to the ban imposed by the European Court of Justice, (ECJ (Grand Chamber), 8 April 2014, joined cases C-293/12 e C-594/12, *Digital Rights Ireland Ltd v. Ireland*, at *http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd9bde2c321cf9429d99d5d41bf3f27ee9.e34KaxiLc3qMb40Rch0SaxuRbNn0?text=&docid=150642&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=201148*). The Court states that the means and the finality of the data recollection have to be well defined and suited to the data's nature, while ensuring that privacy be sacrificed only within the limits of the strict necessity.

If we analyze the aforementioned decision more in details, it emerges that the European judge, in the name of proportionality and necessity, not only has overruled the EU Directive 2006/24 (at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF*), which obliged the Telco and the ISP to keep those data for a maximum of two years, but also has designed, implicitly, new ways of detention, very well detailed as to form and aim. It is necessary that the order of the judge or of an I.A. should involve only terrorism's suspects, not common people, and be limited to specific information and goals. By contrast, the French proposal takes away from the communication any privacy, by acquiring their contents. What appears too oppressive and burdensome is the fact that this can be done by means of a political authorization, for an unlimited time and without the intervention of a judge, which is the

natural keeper of freedoms. This piece of legislation applies to anyone; therefore, any French citizen becomes *ipso iure* a presumed suspect, unless the contrary is proven. Accordingly, the unlimited time, the massive surveillance, the general presumption of guilt, the absence of security of the natural authority, which the Court of Justice has held to be unlawful, now appear once again in the French legislation, making the decision as *inutiliter data.*

The French example could encourage a run to lower the security in the authoritative regulation of Internet, because "If France does it, why wouldn't every other government do the same thing?" (*The New York Times*, 2015). But the concern of the European Court of Justice is confirmed by a recent decision (C.G. 6 October 2015, Case C-362/14, at *http://curia.europa.eu/juris/document/document.jsf?text=&docid=169195&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=202439*), which has revoked the approval, by mean of the Commission, of the USA-Europe Safe Harbour Agreement. According to the Commission the US data treatment is coherent with European rules, because if the European Citizens' data should be transferred in the US, they would receive a treatment with no less guarantees then in Europe. The Court, instead, has ruled otherwise, considering that the NSA can acquire anyonÈs data even in absence of a suspect. It has, therefore, overruled the approval given by the Commission.

Let's reflect on this point: can we consider our data safe if they are kept in Europe and endangered if transferred to the US? Or is rather the opposite true, namely that the US data are at risk in Europe due to the supervened harshness of French, Italian and English laws, which do not respect the ECJ decisions, whilst the new American legislation in part corrects the targets of the Patriot Act in favor of privacy?

I conclude the survey of the European antiterrorism legislation with some thoughts about the Italian Decree Law holding "urgent measures against terrorism" (at *http://www.gazzettaufficiale.it/eli/id/2015/02/19/15G00019/sg*). This piece of legislation affects many areas of the Italian legal system.

Due to time constraints, I am going to highlight the critical points in a summary way.

1. The Law adds new criminal offences or aggravating circumstances to those already provided by our legislation, introducing again offences based on presumed danger, which on several occasions have been found of doubtful legitimacy by our Constitutional Court.

2. It calls for the drawing by the Ministry of Interior of blacklists for the website suspected of being related to terrorism. Such lists are verified by the judge before being transmitted to the ISP for the ban and the closure of the websites.

The doubts of compliance with the constitution concern here the nature of the power of the judge, which satisfies the reserve of jurisdiction requirement, and thus the constitutional legitimacy of those lists, only if it has a substantial nature.

3. Lastly, it introduces a discipline, which is derogatory to the privacy law, Legislative Decree n°196/2003, without any reasonable justification.

At the conversion stage of the Decree Law I recommended, during the preliminary inquiry held by the II and the IV Commissions of the Chamber of Deputies, that the Decree Law should have been amended to ensure its constitutional legitimacy (De Minico, 9 March 2015). In particular, I suggested to clarify the substantial nature of the power of the judge on

the lists; to erase the crimes *contra constitutionem* and finally to reduce to the strict necessary the derogations to the privacy law. Nothing of the kind was upheld in the conversion law, therefore strong doubts of unconstitutionality still remains.

5. Towards a new emergency law?

As evidenced by the legislations just examined, the fight against terrorism has opened the door to very significant breaches of the constitutional order. Therefore, let us briefly consider the remedies that could lead the emergency regimes back to legality and to what extent the Italian Declaration could contribute to pursuing this objective.

a) For what concerns the US system, first of all the principle of the separation of powers should be taken into consideration. Although this principle is susceptible of being derogated, it may not lead to a *reductio ad unum* of the powers. On the contrary, for reasons of democratic control, these powers need to be kept distinct especially during times of emergency. In more general terms, the evaluation of the state of emergency has to be given back to the Congress. Once again the latter has been deprived of a power in favour of the presidential institution, exploiting the absence of a separation of competence in the US Constitution.

b) *De iure condendo* a common remedy both to the US and the European experience could be found into leading the legislature - being the legitimate power - back to the respect of the principles of precautionality and proportionality, which have to be taken into account especially in situation of danger for the rights and the democracy itself.

Any legislative innovation is required to comply with these principle. Apart their political and ethical value, the principles of precautionality and proportionality can be already drawn from the existing Constitutions; moreover they are diffusely developed in the case law and now by our Declaration. Thus, the legislator has to limit the fundamental rights to the strict necessary and ensure that to a given compression of a certain right will correspond a probable advantage for a counter-posed value. Otherwise, the regulation would be illegitimate and politically inadequate. This last judgment is also proven by the fact that the extended controls over the terrorists' actual and virtual movements have not been able to avoid their cruel actions. As a matter of fact, controlling everyone is like controlling no one. A preventive action could be truly effective if is aimed at and targeted to specific objectives.

c) Another remedy could consists of imposing to the legislator to re-examine the temporary legislation; the prorogation of a law could be made subject to progressively qualified and growing political majorities. This proposal was advanced by Ackerman for the US system, but in principle could be applied also to the European Legal systems (Ackerman, 2006). However, its enactment appears difficult as it would require constitutional amendments.

d) This is the picture of the remedies *de iure condendo.* In general, the effectiveness of the constitutional order is based on the fact that derogatory measures do not subvert the core of such order. Here, my speech goes back to the starting point; in fact, the emergency legislator has been given a mandate to preserve the endangered legal system. This is the genetic limit of any derogatory laws, the overreaching of which entails the violation of the

same legality which the emergency legislation has to defend. Therefore, the extraordinary law, has its own natural limit in the bringing back the system into balance, which has been temporarily altered and threatened by the state of danger. In order to do so, the derogatory power has to be limited in time so that to ensure the reversal to a normal state, avoiding the occurrence of irreversible breaches to the established order. Such breaches would alter the core of both the fundamental principles and liberties of the constitutional order, preventing the system to resume its original identity.

It obviously comes to mind the concept of counter-limits. This concept has been developed in Europe to set limits to the preminence of supranational over national law. This same concept can be applied in the domestic relationship between ordinary and extraordinary legislation, in the sense of an untouchable *minimum*, which cannot be overruled even by the power of exception.

To sum up, the measures of prevention must not be *extra-ordinem* but compatible with the system. The emergency power, despite being exceptional, still remains a constituted power subject to the requirements of the "rule of law". This power does not write on a blank blackboard, because there is a constitutional framework to be respected. In the absence of any such framework, it would be a constituent power. It is evident, however, the intrinsic contradiction of applying original powers to preserve a political-institutional system. The emergency must be kept within the boundaries of the rule of law, otherwise the introduction of an exceptional law would hide a new legal-political order, aiming to illegally replace the existing one.

In conclusion, the fundamental rights and the guarantees of democracy must be defended especially in times of crisis.

Otherwise, the end of the crisis would lead into and abnormal reality, built upon the sacrifice of the democratic values which represent the ultimate ratio of the emergency legislation.

The basic assumption is that the values of democracy must be construed as prevailing upon any other value. The same assumption can be found in the Declaration of Interne Rights (Commission for Rights and Duties in Internet, 28 July 2015) as to the right to access the Internet (art. 2), which is to be considered nowadays a fundamental right and a cornerstone of democracy. Consequently, the Declaration states that the right to access may not be made conditional upon budgetary limitations or restrictions of public expenditures. The State must pursue its budgetary balance providing that an adequate response be given to everyone. From this point of view, the Italian Declaration may offer to domestic legislators and international policy-makers a strong political reference for a correct framework of values. This is a most significant innovation as to the approach to the regulation of the Internet up to now adopted.

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