

Department of International Relations

Course: Comparative Politics

Security and liberty: How was citizen's freedom
challenged by terrorism? A USA-EU
comparative analysis

Supervisor:

Morlino Leonardo

Candidate: Antonio Scaramella

627262

Co-supervisor:

Orsini Alessandro

A.Y. 2016/2017

Introduction	4
Chapter I.....	8
1.1 The United States	9
1.2 The European Union	10
1.3 The issue of Definition.....	11
1.3.1 Terrorism.....	11
1.3.2 Democracy	16
1.4 Democratic Qualities.....	18
1.4.1 Rule of Law	19
1.4.2 Freedom.....	20
1.4.3 Equality	21
1.4.4 Responsiveness.....	23
Chapter II	26
2.1 How States define terrorism.....	30
2.1.1 The United States of America	30
2.1.2 The European Union	31
2.1.3 France.....	33
2.1.4 Germany	34
2.1.5 Belgium	36
2.2 States' reactions to Terrorism	37
2.2.1 The United States of America	39
2.2.2 The European Union	50
2.2.3 France	58
2.2.4 Germany	66
2.2.5 Belgium	73
Chapter III.....	79
3.1 Detention	83
3.1.1 Level of Subversion – USA.....	83
3.1.2 Level of Subversion – France.....	87
3.1.3 Level of Subversion - Germany	89
3.1.4 Level of Subversion – Belgium.....	91
3.1.5 Level of Subversion – European Union	92
3.1.6 Subversion caused by Detention provisions – General Assessment	93
3.2 Data Protection.....	93

3.2.1 Level of Subversion – United States	93
3.2.2 Level of Subversion – France.....	96
3.2.3 Degree of Subversion – Germany	98
3.2.4 Degree of Subversion – Belgium	99
3.2.5 Degree of Subversion – European Union.....	100
3.2.6 Subversion caused by Data Protection provisions – General Assessment	102
3.3 Freedom of Movement	102
3.3.1 Degree of Subversion – United States.....	102
3.3.2 Degree of Subversion - France.....	104
3.3.4 Degree of Subversion – Belgium	106
3.3.5 Level of Subversion – European Union	107
3.3.6 Subversion caused by freedom of movement provisions – General Assessment.	108
3.4 Final Results.....	108
Chapter IV	109
4.1 Securitization.....	111
4.3 Institutions do matter.....	114
4.3 The role of the EU.....	119
Conclusion.....	124
Bibliography.....	129
Abstract	132

Introduction

First and foremost, it is essential to explain which is going to be the research question that we are going to address during this research: Has the quality of personal liberty being hindered by the terroristic threat in Europe and in the United States? This question fits with one of the most typical questions of political science, the classical dilemma between security and freedom, and what is going to be analysed here is going to be who, among the two, is winning the struggle in the most advanced democracies, that should be theoretically the most resilient to external threat, and to the targeting of such fundamental values. The questions seem to be relevant today more than ever, since modern liberal democracies must face an enemy that uses its most fundamental features (civil rights and freedom) to harm them, directly and indirectly. The following research is not meant to be merely a theoretical exercise limited to scholarly fruition, on the contrary it is meant to be a tool for policy makers to understand in which direction the democratic world has moved so far when dealing with the matter of terrorism, and what consequences those moves have had in the quality of democracy. Whether this changes are for the best or the worst will not be assessed here, as it is a matter of political nature and not of a scientific one. As a matter of fact, we can see from Freedom House analysis that:

“There were setbacks in political rights, civil liberties, or both, in a number of countries rated “Free” by the report, including Brazil, the Czech Republic, Denmark, France, Hungary, Poland, Serbia, South Africa, South Korea, Spain, Tunisia, and the United States.” (House, 2017)

This work will therefore focus on the legal and political changes that happened in liberal democracies that were hit by a terrorist attack, and then understand the consequences that those acts have had on the quality of democracy in those countries, with special attention to those laws affecting personal liberties, meaning detention, privacy rights and data protection, and freedom of movement, which is a debated issue especially in the EU area. The comparison will therefore be between the United States of America, taken at the federal and not state level, and the European Union taken with of course a focus on the one democracy that has suffered more losses, France. Terrorist

attacks however, are not limited to the Western world, that will be analysed here, but it is in the West that we find the higher number of stable and strong democracies, thus making it the focal point of the analysis.

This type of case selection seems to be workable for several reasons: taken as a cross-Atlantic bloc, the two constitute what is currently defined as the “free world”, and the free world, that is the one in which we have nowadays the higher number of stable and strong democracies, must be the key focus of this type of analysis. For the sake of comparison, we could define the two broader cases, USA and EU (with its Member States as sub-units), as an area study, as we can easily compare the two because of common historical and cultural traditions. Some differences of course need to be clarified: while the United States are a federal state, the European Union, as it is now, is still far from becoming a federal union; some advancement have been made in the field of security and “hard power”, since the failure of the ECD, but still those progresses cannot allow us to discuss solely the Union as a single block, and therefore the need arises to focus on specific member states to carry on the quality of democracy analysis. What anyway will be the most important variable for this research, terrorism, is the common denominator that links all the cases we are going to consider.

The analysis will be carried on using a diachronic approach: the different qualities, reactions and legal frameworks will be analysed before and after the terrorist attack has been carried on, in way to understand whether there has been some change in the democratic quality in the analysed cases. This will require some degree of time differences also between the cases taken into consideration for the research, but the time variable here cannot and will not be ignored as it is of fundamental importance to understand the phenomenon. For what is concerning the US, obviously, the milestone from which to begin must be the attack on the 11 September 2001, an attack that shocked the public opinion and changed not only the internal American policy, but also influenced world politics of the next decades. For what concerns Europe, the legal changes must be analysed starting from the first terrorist attack the continent had to face in almost a century, starting from the underground Madrid bombing in March 2004, and coming to the most recent attacks led on, or claimed, by the so-called Islamic State, on France and, lastly, on the city of Berlin at the end of 2016. What were the response given by the single

member states and by the Union as a whole will be one of the key focuses of this research, also because it developed in time, due to the occurrence of the terrorist attacks during a larger time-span.

The first chapter will deal with case selection and will provide the reason why we have deemed the selected cases to be the most important and significant to understand the issue at hand; the “terrorist attack” variable is going to be central in case selection. Countries like Italy for example, although having a complex and interesting approach to terrorism that developed in the last decades, must be excluded as it has not been subject to any attacks in the recent years, and therefore comparison would be flawed. As the following work intends to be scientific in nature, the rest of the chapter will be dedicated to the issue of defining what is going to be analysed in the research, with a focus on the definition of terrorism, democracy and the qualities of democracy (rule of law, liberty, equality, responsiveness) that, after the waves of terroristic attacks that shock the West, might have been hindered.

The second chapter gets deeper into the analysis, as the legal situation of the different countries will be analysed in detail, in way to find out what has been done in modern democracies to shield themselves from terrorism and the efforts carried on so far in the area of counterterrorism. The chapter will begin with an analysis on how the different countries taken into account, define terrorism, something of utmost importance especially when dealing with issues like detention and freedom of movement, as it might change the way a suspect is treated, as a normal criminal offender or, on the contrary, as a terrorist. The rest of the chapter is going in depth in the analysis of the legal framework of the different countries, with a short account for the recent situation of the country and the attitude the government and national security forces on the issue, followed by a three-fold analysis of the legal changes in those areas that interest us the most, as are the ones that more deeply affect the freedom of the individual: detention and the right of freedom, data protection and privacy rights, and freedom of movement.

The third chapter will constitute the core of the research, as the data collected in the second chapter will be analysed in depth to understand how the new legal changes have concretely affected the level of rights enjoyed not only by the terrorists, but also by

the citizenship in general, and therefore draw conclusions on how empirically the states have responded to the issue of terrorism. We will be dealing with strong and consolidated democracies, with strong checks and balances and in which freedom and rights are deeply embedded in the population and in the political culture, so the changes might not be excessive, but the trend, if confirmed, will need to be taken into serious consideration. The analysis of the single countries will be then compared, with a special attention to intra-EU comparison, that will then be compared with the United States of America, to understand how the two shores of the Atlantic have decided to carry on their fight against terror.

The fourth and last chapter will serve as a closure of the whole work, as it will lead to the conclusions that can be drawn from the research, scientifically and politically speaking. It is in fact clear that the politicization of terrorism has changed radically the political agenda and security got in the centre of the political arena, and the consequences of such a shift must be discussed. The attitude of the public on the issue of rights might have changed, thus allowing governments to pass harsh security laws without losing significant political power and influences and, if we link this kind of development with the centralization of power in the executive branch that we have witnessed in the past decades, the consequences might be hardly damaging for the existence of democracy as a whole.

Chapter I

The choice of the countries selected for this research is not casual, on the contrary is functional for the results that we want to achieve. Terrorism is not an only-Western issue, is a global issue that a large number of global players are tackling every day, but the focus on the West is functional as it might be useful to understand possible developments for weaker or less consolidated democracies. It is undeniably true that the European countries and the US had, in crude numbers, suffered less losses from terrorism, compared with Middle Eastern countries, but most of those countries are not consolidated democracies, if they are democracies at all. The West has served in the last decade as a beacon for human rights, and has concentrated efforts and resources to the spreading of its values, managing to make those same human rights part of international law, and therefore allowing to uphold them, with obvious limitations, all around the world. The terrorism issue however made fear and panic an element of everyday life in countries that did not suffer from wars and conflict for a long time, and this has led to consequences in the change of perspective the public has towards rights, and we can see the spread and growth of movements and ideas that go in the opposite direction, if not clearly against, those rights, and governments and political elites, bearing in mind the need for re-election, follow the needs and will of the people they represent. If the trend analysed in this research will be significant and the suspects can be confirmed, there is ground for worrying for not only the quality of the democracies we live in, but also for the existence of democracy as a whole, and, if history really tends to repeat itself, the concerns might be concrete. A complex set of trends, that cannot be analysed in this research, might lead to a new era of nationalism, with all the dire consequences that World War II has shown us. Moreover, the analysis of the West can be used as a way to understand how less stable democracies, or other forms of government, might answer to the need for security; if the West will be unable to uphold rights, as it is not respecting them or unwilling to defend them to answer to security concerns, there is ground to doubt how well other countries will hold up human rights, if they will at all. If we consider that, among the most important global players, we have countries like Russia and China in which human rights are, at best, limited, and if the European countries and the United States follow a path that leads

to the curtailment of human rights as an answer to terrorism, there is little hope that such rights will even come back at the centre of the international agenda anytime soon, and this is an outcome that must be avoided at all cost, either we relinquish years of fights for democracy and its rights. The following chapter will also deal with the analysis of the issue we dealing with, as it is fundamental to understand, first of all, what terrorism is and also, it is of utter importance to analyse democracy and its qualities, if we want to analyse the phenomenon that we are dealing with in a scientific way.

1.1 The United States

The choice of the United States as a case study is almost self-explanatory: 9/11 was a shocking event not only for the American public but for the whole world, and the echo and the consequences on such an attack can be felt on the world still today. The so-called “war on terror” started by the George W. Bush after the events of New York, was so broad in sense and in meaning that was from many sides criticized, but the debate on the matter will not be continued here. What is important for us to understand is that the terrorist attack struck the very heart of America gave way to one of the broadest and most complex reaction to terrorism to date, including an unprecedented all-out war against the perpetrators (or alleged perpetrators). On legal grounds, we have the PATRIOT Act of 2001 (short for ‘Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism’), that served as a basic legal framework for enhancing domestic security, surveillance procedures, border protection and control, as well as harshening of criminal punishment for terrorism or alleged participation to terrorism, and in general, national defence. The Act, together with other policies carried on by the Bush administration from that moment on, set America on a path of outright war against terror, that did not just culminate the defence of national borders or national interest, but went far beyond that, up to attacking independent states with the accusation of harbouring terrorists in their soil, with no other justifications needed. Apart from the international consequences that followed 9/11, what concerns us most is defining and understanding if, in the US, the quality of democracy, usually considered among the highest-scoring in most of the democratic scales existing, diminished or not . Moreover,

the US case has been analysed thoroughly by many scholars, providing us with insight on the matter, together with a large array of data to use on the analysis. On a first sight, the answer could be positive, also in the light of the elections held at the end of 2016 that led to the presidency of Donald Trump with an outright focus on national defence pushed to the limits of isolationism. This anyways remain nothing but assumptions and impressions, until data collection and analysis will be carried on entirely.

1.2 The European Union

The analysis of the European Union, that was not straightforward until more recent years, has become of greater interest recently, with the attacks that hit the different member states of the Union. The difference with the United States is sticking in many aspects, especially when dealing with issues of terrorism, due to a stronger commitment to human rights, usually completely different from the one followed by the United States; the European construction has its foundations on human rights and the Member states have also provided themselves with an international Court, the European Court of Human Rights, an unprecedented attempt to safeguard human rights at a supranational level. Moreover, several European constitutional orders create serious issues when it comes to undermining civil rights, so deeply embedded in the legal and political culture, thus making the analysis particularly interesting. The shift of terrorist attention from the US to Europe in the last years may be attributed to many different factors; for one, we can cite the birth of a new terrorist organization, the Islamic State (IS), whose objective is not only the end of the American hegemony in the Middle-Eastern area, but is also the creation of a Caliphate that naturally is going to clash with Europe, being in its way of conquest of the old Muslim borders. Apart from this historical account, which has a limited empirical value, what terroristic groups probably found out is the permeability of Europe to infiltration, being it a space of freedom and free movement where is much easier to prepare and hide. This is true especially in those countries that, in the last decades experienced a strong migration coming from middle-eastern countries.

1.3 The issue of Definition

Having defined what is going to be the objective and the selected case for the research, it is of utter importance to define the concepts that we are going to use in this analysis. We need concepts that can embrace a wide array of different empirical realities, being engaged in cross-area comparison of the two sides of the Atlantic “and while there is an end to geographical size, there is apparently no end to the proliferation of political units” (Sartori, 1970).

The concepts that are the essential building blocks of this work are indeed contested concepts, and a clear definition of all must be given to carry on the research effectively and without incurring into methodological flaws. The conclusions on which the definitions will be built on are going to be the key concepts that will be used in the analysis of democratic quality in Europe and in the US during this troubled times of terrorism and terroristic threat, that shifted the focus of policy making towards security. The research for the right definitions of concept will begin with the one of terrorism, a relatively new phenomenon that still strives to be defined by scholars, but that needs to be analysed in detail. Then the analysis will turn to the definition of democracy, specifically of liberal democracy, and the qualities that define it in contrast to other forms of government. On the qualities, the analysis will go more in depth by analysing four democratic qualities that can be more easily affected by the phenomenon, and that will be operationalized in way to make possible an empirical analysis of the qualities and their eventual changes in the last years.

1.3.1 Terrorism

First and foremost, it is important to define what will be the main variable of the research, namely, terrorism. If we look at the etymology of the word we can trace its root to the Latin verb *terrere* that can be translated as “frighten” or “provoke dread”, which gives us the sense of one of the main characteristics of the concept but is not helpful in finding a definition suitable for research purpose. We can get closer when analysing the historical development of the concept, that reappeared in Revolutionary France during Maximilien Robespierre’s rule, called “Le Terreur”, which was characterized by the use

of violence in the everyday political life, and therefore gives us the sense of terror used as a political tool, a mean to an end. This idea returned during the so-called “terror bombing” led on by air force in way to destroy the opponent’s moral and led surrender. By exploring its historical use, we can therefore find three main ideas that lie behind the concept of terrorism: use fear as a political tool to achieve a certain objective. Partially, this features survive in modern terrorism, but the phenomenon has developed in many directions and with many underlying political, religious or ethnical purposes, thus leading to the difficulty of defining clearly the concept.

The definition of the concept is widely debated in social sciences, and a universally and widely accepted definition of the phenomenon is yet to be found, up to being defined as impossible as the quest for the Holy Grail by Levitt in 1986. The causes of such uncertainty are several:

- The concept of terrorism is instrumental in the political arena, and the definition can be changed accordingly to the political need of the day, as Schmidt puts it “one man’s terrorist is the other man’s freedom fighter” (Schmid, 2011). This holds both in the national and in the international discussion on the phenomenon. The political use of the term, usually in a subjective and pejorative way, has made the possibility of finding a universal definition at best, remote.
- Terrorism, as any social science concepts, is a social construction, is not made of brute scientific facts like physics or mathematics, but is a continuously changing phenomenon that evolves together with its social meaning. Creating a universal definition that can united the anarchist terrorism of the late 19th century and the modern Islamic terrorism can indeed be a daunting task.

On the other hand, and despite the definition problem of the concept exist, for the purpose of the following research, a definition needs to be found. We might want to draw our definition from internationally recognized law: the Security Council of the United Nations in resolution 1566[2004] defines terrorism as:

[...] criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons

or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature;

Although this might be effective as a legal mean to fight terrorism, this definition appears to be too broad for research purpose. The resolution abroad was approved by the inter-governmental body of the United Nations, and there is not wide support on this kind of definition, in fact, seeing such a definition passed by the General Assembly seems as of today, a naïve hope. This one has been clearly meant to persecute terrorists for their crimes in a courthouse, and the same can be said of definitions made by national government on the definitional issue of such a new phenomenon. The US government still uses a definition of terrorism contained in the US Code Title 22 (2656b) that dates back to 1983, only considers terrorism as “politically motivated violence against non-combatant targets by sub-national groups”; we can see clearly that a definition like this cannot suite the research as well, being far too broad.

If we want to create a basic definition, we can first find the different between two types of violence: war and terrorism. If terrorism and be associated to war, the definitional problem would not be relevant anymore, but this is not the case; in fact, no matter the type of targets (combatants or non-combatants), the key difference is that terrorism does not allow self-defence, unlike war, therefore this type of definition must be discarded, and we cannot find a solution in such a similarity. Many other definitions tend to oversimplify the issue by simply ignoring the definitional problem: for one, it was invented as a pejorative term to discredit the violent actions carried on by insurgent subgroups inside the state. Apart from tending to oversimplify a complex issue, such a definition cannot be applied since it offers very few distinctive analytic qualities that can actually create a comprehensive definition. If we go deeper following this line of reasoning, we see how terrorism can be categorized as “a lower level of political violence

[...] the weapon of the weak” (Richards, 2014). This definition, although more precise, still leaves ample room in defining the issue as a separated concept from the one of generalized violence, therefore, we need a definition, even a minimal one, that can help in problematizing and analysing the issue. Longman and Schmid argued that:

... even a minimum theory requires some consensus about what to theorize about [...] without some solution to the definitional problem ... there can be no uniform data collection and no responsible theory building on terrorism. (Longman & Schmid, 2008)

What has been recognized as essential feature of terrorism is that the real target of the terrorist action is not the direct victim of the act itself, but the wider psychological impact of it, that can influence the public opinion and the policy makers in a determined area; moreover, with the development of technology and information, the area that can be targeted by a terrorist attack can be easily defined as the global public, that of course is influenced to a limited degree compared to the area stroke by the attack. The creation of fear and death is instrumental to the creation of an emotional reaction in the population, something that will create a climate of insecurity among the public, since the terrorist can prove to the world to be able to take away from the state the so called “monopoly of use of force”, one of the key features of the modern state as we know it. we can state that the by-product of terrorism, fear and anxiety, is in the end the main feature that we need to consider, as it influences the way policymakers feel, think and respond to such a threat. According to Richards, this feature of creation of a wide psychological impact is to be considered key in defining, at least at a minimum level, what terrorism is. We can therefore find in this type of definition, at least two targets of terrorism: the direct target, that we can define as the immediate victim, and a secondary target, although the more important one, that is the audience that the terrorist groups wants to address. This audience can indeed be very broad, Schmid listed ten terrorist audiences:

Table 1: Ten Terrorist Audiences

1. The adversary/-ies of the terrorist organization (usually a government);
2. The constituency/ society of the adversary/-ies;
3. The targeted direct victims and their family;
4. Others who have reason to fear that they might be the next targets;
5. “Neutral” distant publics;
6. The supporting constituency of the terrorist organization;
7. Potential sympathetic sectors of domestic and foreign publics;
8. Other terrorist groups rivalling for prominence;
9. The terrorist and his organization;
10. The Media.

(Schmid, 2005)

If we take this assumption we can broaden the targets of terrorism extensively, but moreover, we can make a definition that encompasses all different types of terrorism, ranging from the single killing of high political personalities to the mass killings of more recent years. We can therefore synthesise the definition of terrorism as follows: *the motivated use of violence, or threat of its use, towards a primary target that is unable to defend itself, while the concrete target is intimidating an audience into a course of action that would not have been chosen otherwise.*

This definition is able to encompass both the direct terrorist attack and the direct victims as well as their emotional and eventually political consequences, that are considered by many scholars as the key elements that differentiate terrorism from other forms of violence like war. We can consider terrorism to be a sort of violent propaganda that is able to cause political consequences in an area much wider than the one directly hit by the attack. This is particularly true in the present days due to the speed at which information can travel through the media, that not only transmits but also amplifies it, following the old journalistic adagio “good news is bad news and bad news is good news and no news is bad news”. The countries that will be selected as case studies are therefore going to be those countries that have suffered direct terrorist attacks in the recent past, but we will consider also what has happened and what has changed in the political arena and in the public opinion in the aftermath of the attack, thus giving as a broader

understanding of what terrorism can imply for the democracies that are struck by such attacks.

1.3.2 Democracy

We can now move on towards the definition of Democracy. On the account of democracy, the definitions that have been given of the concept are too many to be counted, and the debate on the matter is far to be concluded, as democracy can be considered a “double concept”, being ideal and empirical at the same time. As done above, we can start the analysis by using an etymological definition of democracy from the Greek *demokratia* “government of the people”, dating back to the early years of Athens as a city state, but this would not be helpful in the definition of a modern democracy, being just a definition with no procedures attached to it; at best this definition can be useful when analysing certain institutions of direct democracies like referendums, present in many constitutions, but nothing more than that. Moreover, as that kind of democracy was intended, it lacked one of the main feature we consider nowadays essential for a democracy to be called so, universal suffrage, which, at that time was inconceivable. If we want to look at the mechanisms behind this “rule of the people” we can look at the definition made by Schumpeter of procedural democracy: “The democratic method is that institutional arrangement for arriving at political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will” (Schumpeter, 1976).

This kind of definition though can indeed be used to democracy, but not to the modern liberal democracies, in which there are some key ideals that cannot be touched even if the will of the people goes in a different direction, first and foremost, private property. The modern liberal democracy has to protect some minimal socio-economic conditions, mainly associated with private property and a minimum level of welfare state, for the regime to be justified in the eyes of the population; in abstract, we can state that also these conditions can be changed in time, but this has not been the case in the liberal democracies in the last decades. Dahl develops a more substantive notion of democracy, fitter for empirical research in the area of democracy, by identifying five criteria for the definition of a political entity as democracy: effective participation, voting equality,

enlightened understanding, control of the political agenda and the inclusion of adult residents who enjoy citizenship rights (Dahl, 1989). This definition, even if still procedural, adds empirical elements that are essential in the description of a regime that is meant to be democratic. We can also go more in detail when defining democracies by describing what rules and institutions have to be present for a regime to be called democratic: rules and procedures regarding universal suffrage; free, fair, competitive and recurrent elections; a decision making body elected with the above cited norms; a government that is accountable to a parliamentary assembly or to the people (by direct suffrage); a set of intermediary structures, namely parties; a functioning bureaucracy (Morlino, 2011). Since this research will be dealing with European countries inside the European Union, is worth recalling the issue brought upon by Schmitter and Karl: these institutions, in way to satisfy the principle of sovereignty and independence, must not be subjected or conditioned by “non-elected parties”, or exponents of other regimes (Karl & Schmitter, 1993). This concerns mainly applies to countries in which the democratic regime is threatened by the presence of strong armed forces ready and willing to seize power (or that have actually already done so), and does not apply to the States we are going to focus on. However, it is unquestionable that the EU member states have lost parts of their independence and sovereignty to a body different from themselves, and that they are conditioned by a non-elected body, namely the European Commission, that is made of non-elected officials that can deeply influence the political and economic situation of the member states. In this occasion though, sovereignty has been willingly surrendered, therefore not comprising a loss of democratic quality; on the contrary the process of Europeanization has led to a stronger commitment to democracy in many member states, especially the ones that accesses the Union in 2008. For the former soviet republics, the commitment to the European project not only improved their internal democracy, but can also be considered useful to counter possible authoritarian backlash in those countries.

By looking at these variables, we can assess with a high degree of certainty that one regime can be called democratic. For the purpose of the following research, we can state that the States that are going to be considered, all respond to at least the minimum criteria for being considered a democratic regime. While it can be ascertained that the

States we are going to focus the research can be considered full-fledged democracies, but, since we recognize that all the unities of analysis answer to the minimal procedural definition of democracy, it is important also to give a broader definition, and we are dealing with liberal democracies. In liberal democracies, the most important features are procedural ones: accountability and competition. This though does not suffice, as effective freedoms are a necessary complement in the development and definition of a liberal democracy. This definition not only encompasses all the case studies that will be considered, but also is the easiest one to operationalized and control empirically, being based on Dahl's criteria cited above. Moreover, participation, competition and rule of law remain the essential aspects to consider when dealing with democracies and democratic qualities. A question that will be essential to analyse in this research will be how we can define a good democracy and a democratic quality and which analytical tools can be used for the definition and analysis of such qualities and whether and if there were some changes that can be related to the terroristic threat all over the world. The issues that appealed to the concept of terrorism also applies to the concept of democracy, as well as concepts of democratic quality and good democracy: being social constructions and normative concepts, the definition is a complex task.

1.4 Democratic Qualities

The definitions below will be combining both quantitative and qualitative analysis, following the work of Morlino in *Changes for Democracy* (2011) in the analysis of democratic qualities, and will draw from it. First and foremost, is necessary to establish a clear definition of quality. The term can be analysed in three different meanings:

1. Quality is defined by the established procedural aspects associated with each product, according to some recurring methods and time. Emphasis on the *procedure*.
2. Quality consists in the structural characteristics of a product, the details that it features. Emphasis is on the *content*.

3. The quality of a product or service, in our case the democratic government, is derived indirectly from the satisfaction expressed by the customer. Emphasis is on the *result*.

This threefold division is going to be essential in the analysis of what the qualities are related to the assessment of a quality or “good” democracy. A good democracy is essentially a broadly legitimated regime that completely satisfies the citizens (results), in which the citizens enjoy substantial degree of liberty and equality (content) and the citizens have the possibility to evaluate whether the government pursues its objectives according to the rule of law (result). Morlino indicates eight possible dimensions or qualities to define the quality of democracy. Five of them are procedural: rule of law, electoral accountability, inter-institutional accountability, participation and competition. Other two are substantive in nature, the content of democracy: freedom and equality. The final dimension concerns with the result, the responsiveness of democracy. The institutions and mechanisms of representative democracy are the main object of the analysis and the main actors involved are the citizen-individuals, territorial communities and the various forms of associations. These definitions apply not only to States but also for wider entities. For the purpose of the research, not all qualities will be analysed in detail, as we are dealing with well-established democracies in which, regardless of the level of some qualities, the minimum criteria have been already fulfilled. The qualities that could be hindered by the terroristic threat therefore are not those who more strictly depend on the constitutional set of our selected countries, like electoral accountability, nor those related to participation and competition in the political arena. On the other hand, rule of law, freedom, equality and responsiveness could be affected, and will need further analysis for the sake of clarification.

1.4.1 Rule of Law

The first democratic quality that will be analysed is the rule of law, intended as essential for the survival of the state and its functioning. It does not only entail the enforcement of legal norms, but also the principle of supremacy of law and the capacity of the state, and its authorities to enforce the respect of the laws, laws that have to be publicly known, universal, stable and non-retroactive. For the purpose of the research,

this will be among the key quality to be analysed, as it is fundamental not only for the analysis of democratic qualities, but also the survival of a state, and will therefore be analysed more in detail. We can consider five main sub dimensions of this quality:

1. Individual security and civil order. The focus here is on right to life, freedom from fear and torture, personal security and property guarantees.
2. Independent, professional and efficient (swift resolution of criminal enquires) judiciary system that allows equal access to justice and the application erga omnes of legal norms.
3. Institutional and administrative capacity to formulate, implement and enforce the law; there must therefore be a governance system capable of ensuring the production of high quality legislation and its transparent implementation throughout the country without distinctions. This dimensions entails the existence of a local or centralized but efficient civil bureaucracy.
4. Effective fight against corruption, illegality and abuse of power by state agencies. If of course enhanced by the absence of areas controlled by organized crime and the existence of an efficient police force that respects rights and freedoms granted by the law.
5. Security forces (both police and armed forces) that are respectful of citizen rights and are under civilian control.

In a liberal democracy, for all of the above to exist and being upheld, it is necessary the presence and wide spreading of democratic values, on popular and elite level as well the legislative and economic means to effectively carry on in the real world the dispositions and implementation of the law. This quality will be among the core ones that will be analysed in this research, and will be later on operationalized.

1.4.2 Freedom

First among the substantial content quality of democracy, is at the very fundament of normative definitions of democracy, and is one of the first values that need to be considered when defining a regime as a democracy or not. For the purpose of this research though, we will assume that a minimal level of freedom already exists, since we are dealing with well-established democracies, but the degree to which this level can be

limited or hampered by the terroristic threat is fundamental. Here lies one of the core questions of this research and in general, of political sciences: the trade-off between freedom and security. How this trade-off has changed during the last years is going to be an essential question that needs to be answered.

Freedom per se can indeed be defined as a quite evanescent concept, but can be easily empirically translated into a set of civil and political rights, easier to analyse than such a volatile idea. Political rights encompass a wide range of values: right to vote, right to compete for electoral support, right to be elected to a public office, right to (in different ways, depending on the constitutional setting) directly elect the leader of the government or influence intra-party primary elections. What concerns us the most is going to be the second dimension of freedom, civil rights, that are the one that firstly can be hindered when the security issue becomes increasingly important in the political agenda. Civil rights include personal liberty, right to legal defence, right to privacy, freedom of movement and residence, secrecy of correspondence, freedom of thought and expression, right to information and free press, freedom of assembly. While those rights have been before all others set down in the first democratic constitutions, like the Declaration of Independence of the United States, are those that could be more at risk in the present political scenario, both nationally and internationally.

We can make a clear differentiation here between two main dimensions essential for the functioning of a good democracy: the first entails the right for citizens to enjoy those rights at the higher degree that does not hinder the fruition of others, the second is the actual procedures by which these rights are actually implemented, leading therefore back to the issue of efficiency described when dealing with the analysis of rule of law, that, as said above, is fundamental for the creation and survival not only of a democracy, but for every form of political regime.

1.4.3 Equality

Social-economic rights complement the first group; while the first group pertains to the capacity of the citizens to enjoy certain rights, this group concerns the actual procedure of guarantee of this rights to everybody, leading to the concept of efficiency, very close related to the first dimension, rule of law, as well as the last one,

responsiveness. Even here, rule of law is important, as only through a strong political and institutional framework is possible to implement rights and, more in general, only the broad application of those rights can make a modern and empirical democracy come closer to the ideal one. This group includes health right, assistance and social security, right to work and dignity. These kind of rights are tough very costly, and in the last years have been designed laws to make this rights less of a burden for States' finance, but this damaged equality; as a matter of fact, this rights are usually more precarious than the previous group. This issue has become more and more essential for modern Western democracies in the last decades: during the economic upturn, rights have been given to a wider part of society, and costs were easily sustained; in this historical moment of economic downturn, on the other hand, together with the strong flows of migrants coming from the other poorer countries, the issue of sustaining, both politically and economically, this kind of rights, has become a key question of policy-makers.

Realistically speaking, full-fledged equality is almost utopian, but some levels of it can be achieved and are in general accepted by policy makers. We could describe two phases for the creation of equality in a State: the first is *stricto sensu* equality, namely equality before the law and the absence of sex, race, language, religious, opinions discrimination. This phase is generally accepted and can be defined as formal equality, and generally this has been achieved in almost all developed democracies. On the other hand, the second phase entails the pursuit of substantive equality, meaning lifting the barriers that limit social and economic equality, so the full development of human person.

While being generally accepted and enshrined as constitutional values, the actual implementation still is an issue that needs a solution. The legal framework exists, both at national, regional and international level, but its application is of course hampered by political and economic issue of the moment. Moreover, the full implementation of such values will be incredibly costly for States' finances, and at present there is not enough political support nor political legitimacy for anything of such, nor at a mass nor at an elite level for similar expenditures. In addition, the economic and administrative means for such an implementation are at best inadequate or, more usually completely utopian, with only a handful of (small and wealthy) States able to reach full-fledged equality, thus leading to a distortion of such qualities, that can be very well written on paper but to

which there are no instruments of implementation nor the political will to do so. For the purpose of this analysis we will not focus on a “social charter”, as it will be a daunting task that will lead us off-topic, but we will consider if in practice laws are applicable to all citizens equally or if equality can be considered a “manifesto right” (Pogge, 2008). This issue is going to be analysed more in detail when dealing with responsiveness, that of course is fundamental in the implementation of laws and norms.

1.4.4 Responsiveness

Responsiveness is the last democratic quality implying the result. It is the capacity of government to satisfy the governed by executing its policies in a way that corresponds to their demands. This dimension is related to accountability, as it can be seen as a way of seeing “representation in action” (Eulau & Karps, 1977), and, as said above, is also strongly related to the implementation of the substantial qualities of democracy, freedom and equality; this quality is explicated by four main components: policies of public interest, guarantee of services to individuals and groups, distribution of material goods through administration to the constituency and the extension of symbolic goods as a way to foster loyalty towards the State and support for the incumbent government.

The empirical analysis is tough complex, as the only viable measure is the citizens’ satisfaction, so we face the issue of measuring the perception of responsiveness rather than responsiveness itself. Perhaps the most effective method to analyse responsiveness is the legitimacy of the government, measured in confidence with the political (democratic) institutions being the best alternative to carry on policies in favour of citizens. Although this might be not empirically perfect, the measure of citizenry’s satisfaction can be easily found in a wide range of surveys, and is the best analytic tool at our disposition. Another option, followed by Lijphart, would be to measure the distance perceived between governed and government in relation to a set of essential political issues.

Lack of responsiveness can be seen as responsible for the modern disenchantment with politics and parties; when the rule of law is not sufficiently strong, responsiveness is minimal and therefore citizens do not feel satisfied with their government, perceived as incapable of answering people’s needs. This specific pattern is particularly salient in the

last years, as the disenfranchisement with politics and politicians led to the growth of populist movement in almost all developed countries, especially in Europe, where the blame is also shifted towards the European institutions, that are deemed responsible for lack of responsiveness of national government, that are unable to satisfy all citizens' needs due to economic constraints imposed by non-elected institutions. For what concerns our analysis, it is mostly important to understand how the public sees the responsiveness of national government regarding the security issue, and how this reflects on the feeling of the electorate. This process might have led to the creation and growth either of populist movements or new-nationalistic ones, that will in many case limit some main freedoms. In the more recent political discourse, the issue of migration, as is deemed deeply connected to the issue of security and terrorism, has led to proposals limitation of freedom of movement, association, expression of religious and cultural minorities.

There are two objective limits on responsiveness: one is that the elected leaders do not always seek to understand and respond to the perceptions and positions of the citizens, sometimes even to keep winning elections on behalf of the solution to one political issue. Politicians might also take advantage of complexity of problems and shift political attention on one issue rather than another to keep winning political support, rather than actually seek a solution to it or, in case of populist movement, propose simple solutions to complex issue in way to gain more consensus. The second is the limited resources available for government's spending. Governments has at its disposal only a limited amount of resources to satisfy all its citizens, and economic constraints on public spending can affect even the wealthiest countries' responsiveness, especially when the pressure coming from unemployment and immigrations grows, thus leading to discontent, dissatisfaction and disenfranchisement with the democratic institutions as a whole, with all the risks connected to this kind of issues. This becomes particularly salient when governments have to face security issues: with a frightened public, the government can easily find support for liberty tightening rules, without causing resent in the majority and shifting towards undemocratic positions.

For the selected purpose of this research, we will consider those acts, carried on or still under scrutiny, that the governments of the selected countries (those hit by a terrorist attack) have done in way to counter terrorism. Typically, and this is the case we are going to analyse, the laws encompass those regarding personal liberties and the most basic civil rights. A law that strikes the personal freedom of the individual, or its private life, has to be judged on the effect it has on:

- Rule of law, meaning that the law is applied correctly by all the state's agencies and, more important, the laws produced are consistent with the supreme value of the constitutions they have to respect.
- Freedom, meaning how much the new laws have in practice affected the everyday life of the citizens, both in public and private life. This, and the previous one, are the ones that will need a deeper analysis as they are the ones more concretely touched by security reforms
- Equality, meaning how this laws are carried on in practice and wheatear and if they are applied equally and rightfully to all members of society, regardless of religion, race or gender.
- Responsiveness, the most complex quality to analyse, and here we will try to understand whether or not the public feels safe with the current and new laws and if they believe the government acted correctly while dealing with terrorist issues.

Chapter II

We will now begin the analysis of how the countries of the West have responded, during the years, to the rising concern of terrorism as a matter of legal and political discussion. Here we will analyse in detail the legal changes and the cases that have been carried on in the different countries with regards to some key concerns for the freedom of the individual, namely: asset seizures and forfeiture, investigation and tap wiring, prosecution and state secrets, aliens and ethnic profiling, interrogations and emergency powers. It's easy to agree on the fact that those provisions of law, even if fundamental for the safety and well-being of the citizens of a nation, are those that more heavily can harm the personal liberties of the individual, considered both in economic activity, personal sphere and relation with the government and the security forces.

One key question that we need to address is whether the terroristic threat poses the conditions for declaring a state of permanent war. This was the approach the Bush administration took when answering to the attack carried on in New York, when he called on the “war on terror”, using all of his powers as Commander in Chief to wage “[...] war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated”. Not only he called for an outright war, it also gave it a global scope to it, by targeting not only the members of al Qaeda, but also every other terrorist group. Calling for total war is not only a form of political rhetoric; it gives the possibility to the security forces to act above the boundaries of some laws and rely only on the internationally recognized principles of the *ius in bello*; and we are not only dealing with modern constitutional rights, but also of some principles enshrined in the Western political culture for centuries, like the habeas corpus right, declared in the *Magna Charta Libertatum* of 1215. The case of the prison of Guantanamo Bay is emblematic in this sense; in the early 2000s, roughly 700 citizens of different nationalities were held in prison, most of them detained with no charges or after a due process (different cases of law will be analysed in detail further), but they were detained as “enemy combatants” and therefore be detained, during a time of war, only under the power of the President.

Traditionally, the concept of “law of war” applies during the period of armed conflicts, and is limited both in time and space, as the war zone usually is limited to a certain area; that condition will trigger the Geneva Conventions, thus giving to combatants and non-combatants a set of special rights and duties that will last for the time of the conflict. This concepts can be easily applied to a normal war, but when we are dealing with the concept of war on terror, is easy to see how the “law of war”, together with its inherent democratic and liberty deficit, can carry on for a long time and basically with an unlimited scope. Law of war can hinder the constitutional guarantees for the safety of democratic survival itself, but is meant to be short in time and narrow in scope, otherwise the risk of incurring into violation of constitutional standards becomes higher. This concept was clear already in Roman times, with the *dictator*, appointed by the Senate, having full powers to defend the Republic, but only for six months’ time: when this system failed, Julius Cesar paved its way for his personal dictatorship and the birth of the Roman Empire. Such a concern is of course limited in present days due to a stronger system of checks and balances, but it can be affirmed that a prolonged time of war, whether it is “classical” or “unconventional” warfare, can be dangerous for democracy. In times of war the classical division of power tends to be, at best, limited, with all the power concentrated in the executive and with the legislative and judicial power casted aside for the sake of State’s security.

This is, among others, one of the key issues we are covering in this research, and is a fundamental one nonetheless. Terrorism needs to be fought as it poses threats to the democratic order at so many levels, but something that politicians and decisions makers need to carefully consider is that a too strong reaction to terrorism, that hinders some key fundamental freedoms of the individuals, can “either destroy the terrorist organization or, by unmasking the inherent fascism of the system, destroy the legitimacy of the state” (Townshend, 2002). If we want democracy and its core values to survive, untouched, to the terroristic threat that has been present for the last decades, we need always to remember that a response that is too harsh will not only be detrimental for the quality of democracy itself, but also, it could mean the collapse of democracy as a political structure, which is eventually what many terrorist groups seek to obtain. This being said, considering war on terror as a classical form of warfare is detrimental for democracy, if

we want to preserve democracy for all the time needed to defeat terrorism, we need to consider it a “normal” issue to deal with, as much as possible, and reject the concept of war if we want democracy to survive.

Before beginning with the analysis and comparison of the law changes and proposals, another fundamental issue needs to be tackled: although the scope of this research is on the so-called “Free World”, that we take as a single unity in the global arena, we must also note the presence of differences between the EU and the US that go beyond the fact of the first not being a state. The two have had, in general, different approaches to terrorism and, following the analysis made by Oliverio (Oliverio, 2008) in her article, three factors are significant:

1. Military and arsenal size.
2. Social conditions and historical experiences with terrorism.
3. Overall political strategy.

The first one is the easiest to analyse, as the USA holds, first and foremost, the largest nuclear arsenal of the globe, together with unmatched projection capabilities and resources. On the other hand, the States of the European Union relied since the beginning of the Cold War on the United States for their defence; the US was implicitly given the task of global defence and security, thus allowing Europe to cut on military budgets without the risks connected to lower military expenditures. The graph shows clearly this situation, that remained substantially unchanged in the future decades (and the difference could become even more striking if Trump’s plans of increasing US military capabilities succeeds). This difference leads to

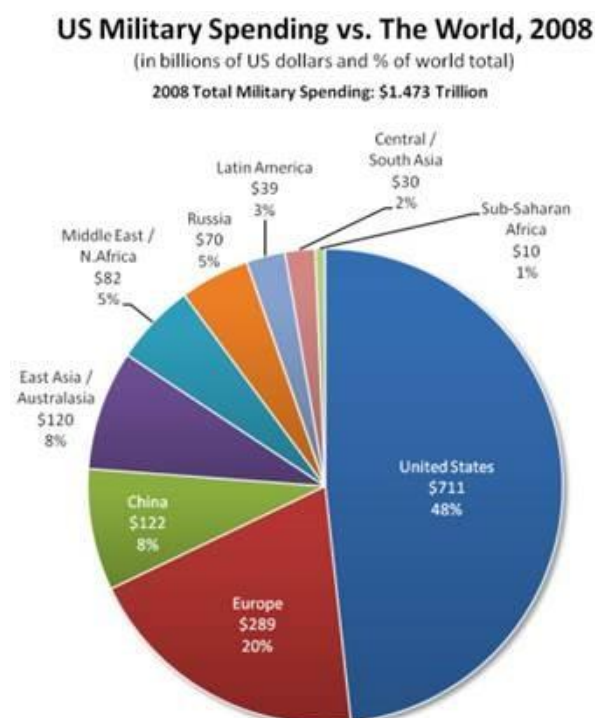


Figure 1: US Military Spending vs. the World 2008 / Source: Center for Arms Control and Non-Proliferation

two opposite strategies for defence against terrorism: on one hand the US, which is isolated and far from the Muslim world, has as a main interest to fight back terrorism abroad while keeping the homeland separated; on the other, the EU States cannot do such a thing, as they must fight terrorism at home, so they must rely on police forces combined with the military. This explains why the US rely more on their military rather than police forces to carry on counterterrorism. This factor is intimately connected to the second one, the social and historical differences. While the US, except from few isolated cases, has never experiences terrorism, European countries face a totally different situation, with terrorist groups embedded in the social life and political history. The experience the European countries maturated while fighting IRA, the Red Brigades, ETA or RAF taught that fighting terrorism with hard power can sometimes do more harm than good. This lead to an approach that is radically different, and that the US have criticized as too soft and less effective. From this factor depends the last one, the political strategies pursued. As said above, the stance of the US against terrorism assumed the look of an atypical form of warfare, with the double interest of keeping the homeland safe and isolated while defending its interest abroad. Europe, on the contrary, usually deals with terrorism as it would do with normal criminal investigation, and this has a double beneficial effect:

- Pursuing normal crimes is easier from a legal standpoint and are easier to fight, and sometimes disrupting illicit endeavours of terrorist groups makes them unable to carry on their plans, thus making this approach cost-effective.
- By fighting terrorism with normal criminal means, the state is not forced to curtail civil rights or liberties. This makes the country less prone to undemocratic measures that could hinder the quality of inside democracy and the international stance of the State.

Now that the key difference between the two systems have been defined, we can move on to the comparison of the legal systems and the changed in legislation of the last years, while bearing in mind this fundamental issues.

2.1 How States define terrorism

First and foremost, is fundamental to consider how countries have defined terrorism in their legal systems, to have a first-hand understanding of how large the scope of counterterrorism might get when dealing with matters of personal freedoms and liberty. As our focus is not only at the state level, when dealing with the issue of terrorism and counterterrorism, especially for the European state is important to deal also with those inter-state measures taken at European level and the definitions given by the Union of terrorism. Of course, the nature of this comparison is not “like-for-like”, but, as remarked by comparatists like Danneman, “we should beware of a rigid focus on similarity/differences and instead seek to strike a proper balance [...] for the purpose of the comparative inquiry” (Dannemann, 2006); the same idea will be applied when comparing EU law provisions and US ones, while such a distinction will obviously be useless when dealing with the comparison between sovereign states.

2.1.1 The United States of America

International terrorism in the US law system is included among the criminal law corpus, namely Title 18 of the United States Code; it includes, other from the definition, different actions that can trigger an accusation of terrorism, ranging from homicide (2332), use of weapons of mass destruction (2332a), harbouring or aiding terrorist with material support (2339;2339A.). It is defined in Part I – Chapter 113B, and goes as follows:

(1) the term "international terrorism" means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

- (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

We can easily see here how the definition is intended to, first, criminalize terrorism as a dangerous act or a threat to human life in general, intended for intimidation and influence that we analysed in the previous chapter. What is striking in this kind of definition is the scope that the United States assign to their security forces: not only the US is going to fight terrorism on its own soil, but will also continue to do so, by identifies an international duty to fight the crime of terrorism in several forms.

2.1.2 The European Union

In the field of counterterrorism and security the European Union still has several flaws, mainly due to the different approaches taken by the Member States when it comes to matters of internal and external security issues. Maastricht Treaty of 1992 was the first legal act that committed the EU States to conferral on the Union of competence regarding justice and home affairs, but the process was slow and difficult to develop, due to the sovereignty questions attached to such commitment. Nevertheless, the EU has taken, especially after 9/11, several measures on the matter, as Den Boer has written “all of a sudden, decisions were possible on dormant dossiers” (Den Boer, 2006), and from that moment regulations regarding terrorism spread like wildfire all over Europe. It is striking to note that only six countries of the EU, prior to 2002, had legislation regarding criminalization of terrorism, while by 2007, 22 states had it. The psychological impact of 9/11 cannot be overestimated here, but there was undeniably a “viral propagation of anti-

terrorist law in Europe” (Roach, 2013). The most important legal act in this sense is the “Council Framework Decision of 13 June 2002 on combating terrorism” that gave a definition of terrorism, the first coming from an international body. The definition is also in this case very broad.

1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

— seriously intimidating a population, or

— unduly compelling a Government or international organisation to perform or abstain from performing any act, or

— seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,

shall be deemed to be terrorist offences:

(a) attacks upon a person’s life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking;

(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed in (a) to (h).

Surprisingly, the definition made by the EU is in some respect even stronger and more detailed than the one of the US, with offences going far off to the classic ones of intimidation or homicide, including offences of public provocation, recruitment and training, but also serious property damages that are likely to result in major economic loss. Especially these ones raised concerns about the protection of a fundamental right as the right to associate, up to the point that the European Parliament tried to introduce human rights safeguards in the new legislation, but failed as the amendments were blocked by the Council. It is interesting to note that the US on this account is constrained by the First Amendment on freedom of association, and even the PATRIOT Act, that indeed had a role in enlarging the possible charges for terrorism, could not go further on this account.

2.1.3 France

The French Republic is not new to the danger of terroristic threat, as it was targeted by terroristic attack already during the Algerian War, so the first legal act regarding terrorism is the Law no. 86-1020 of 9 September 1986. It defines terrorism as follows in art. 421 of the French *Code Pénal*:

The following offences constitute acts of terrorism where they are committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb public order through intimidation or terror:

- 1- Wilful attacks on life, wilful attacks on the physical integrity of persons, abduction and unlawful detention and also as the hijacking of planes, vessels or any other means of transport, defined by Book II of the present Code;

- 2- theft, extortion, destruction, defacement and damage, and also computer offences, as defined under Book III of the present Code;
- 3- offences committed by combat organisations and disbanded movements [...];
- 4- the production or keeping of machines, dangerous or explosive devices [...];

What is interesting to note in the French case is that the legislator reacted to each terrorist wave with new laws, thus making this case particularly interesting in a diachronic analysis like the one we are carrying on in this research. Three major counter-terror laws were enacted, after the one of 1986: in 1996 (Law no. 96-647 of 22 July), in 2001 (Law no. 2001-1062 of 15 November), and of 2006 (Law no. 2006-64 of 23 January). Those laws enlarged the cases to which terrorism can be applied as a criminal offence, including environmental terrorism, harshening of punishment for cases of weapons and explosives trafficking and others. The counter-terrorism law in France is particularly of interest for our case and will be analysed in further detail; core will also be the analysis of the prolonged state of emergency which, by definition should be strictly limited in time.

2.1.4 Germany

Although a definition of terrorism as such can be found directly in the German Criminal Code (Strafgesetzbuch), the case is well defined in section 129a of the code, regarding penalties for the formation of a terrorist organization. Such organizations are defined as:

Whosoever forms an organisation whose aims or activities are directed at the commission of

1. murder under specific aggravating circumstances (section 211), murder (section 212) or genocide (section 6 of the Code of International Criminal Law) or a crime against humanity (section 7 of the Code of International Criminal Law) or a war crime (section 8, section 9, section 10, section 11 or section 12 of the Code of International Criminal Law); or

2. crimes against personal liberty under section 239a or section 239b,

or whosoever participates in such a group as a member shall be liable to imprisonment from one to ten years.

[...]

or by any person who participates in such a group as a member, if one of the offences stipulated in Nos 1 to 5 is intended to seriously intimidate the population, to unlawfully coerce a public authority or an international organisation through the use of force or the threat of the use of force, or to significantly impair or destroy the fundamental political, constitutional, economic or social structures of a state or an international organisation, and which, given the nature or consequences of such offences, may seriously damage a state or an international organisation.

The German Code is very similar to the French approach in this definition; it includes again crimes against the environment, illegal possession or trafficking of weapons and weaponry. The German law also includes the funding of such organizations, more or less active levels of support; moreover, the German system for many instances follows directly International law, making it an interesting case for comparison. In addition, new counter terrorism law has been recently passed, adding travelling outside the country with the intent to receive terrorist training, together with a new section on terrorism financing to the Criminal Code, and creates national identity card and passport restrictions on foreign fighters. What is more interesting for this research though will be the 2009 amendments to the Federal Criminal Police Act (BKA Gesetz), that, being challenged both the Green Party and human rights associations, has faced judgement by the German Constitutional Court, proving partially successful; this case will be of interest when dealing with rule of law in checks-and-balance systems. The amendments, regarding far-reaching powers of the polices in the field of data collection and, therefore, touching fundamental privacy rights.

2.1.5 Belgium

Most notably, the case of Belgium is of fundamental importance for our research, for two main reasons: it has been attacked severely by terrorists and has found out, at the wake of the new wave of terroristic threat of the last years, to be one of the bases for terrorists, both lone wolves and active cells. The presence of a great Muslim community, especially in Molenbeek, has forced a state build on tolerance and respect for differences (due to the particular composition of its citizenry) to apply new rules that raised several concerns, especially in human rights organizations. Here the analysis of the change of the law regime will prove of particular interest. New legislation and especially police raids, checks and travel bans, will be further analysed in detail; the Kingdom of Belgium had only after the events of 9/11 enacted a law regarding terrorism, the Terrorist Offences Act of 2003, following the framework proposed by the EU Council (see above). The Act added Title I Ter in the Belgian Criminal Code, defines a terrorist offence in art. 137:

[an act which] “by its nature or context may cause serious harm to a country or an international organisation” and which is “committed intentionally with the aim of seriously intimidating a population or unduly forcing public authorities or an international organisation to take or refrain from taking certain action or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.”

Here the legislation seems to be softer, as it defines clearly that an “organisation whose real purpose is solely of a political, trade union or philanthropic, philosophical or religious nature, or which solely pursues any other legitimate aim, cannot, as such, be considered a terrorist group”, thus providing a minimum level of protection to those kinds of associations, following the Belgian guideline of fighting terrorism at its roots, but in practice, some critics argue, the counter terrorism policy was too harsh and coercive, therefore failed; the situation though, seems to be changing: in the course of 2015 and 2016, 30 new measures to counter terrorism have been proposed in Belgium by the government, especially after the international criticism, as the country’s police forces

seemed to be unable to block or even control the presence of terroristic cells in its own territory.

2.2 States' reactions to Terrorism

Now that terrorism has been defined for the countries selected, we need to go more in depth in their legal framework to understand what kind of policies have been carried on against the terrorist threat and what are the consequences for the qualities of democracy described in Chapter I. What remains fundamental to understand also in this chapter is going to be how far the securitization of democracy has gone what effects it has had on the so-called Free Word. In the light of the studies carried on so far, we can clearly witness that policy makers had to face a two-faceted problem: the need to protect the citizenry and the need to protect the values on which democracy is founded. The issue is nowadays incredibly complex, due to several factors. First and foremost, the changing nature of the terroristic threat itself that, being unpredictable for its own nature, poses an everchanging threat that the classic police approach of responsive action is unable to cope with. However, the demand for law enforcement and security agents, both for active duty and for the psychological wellbeing of the citizenry, has risen in numbers and resources provided: for one France, between 2015 and 2016, proceeded by hiring 7,500 new staff and adding 900 million euros to counterterrorism budget, and pledged to continue on this track for the years to come, and same happened to Belgium and will happen in the next years in Germany, that announced the same type of investments after the latest attacks. Police forces are unable, under the constraints of law, to act before the act has occurred and, having most police forces a responsive approach rather than a preventive one. Similar problems occur also for the judiciary, as most of the times it proves too slow to react timely to the needs of police or intelligence forces, that must retain their actions or act outside the boundaries of law. The case of Belgium is emblematic in this case: for one, in 2010 Fouad Belkacem founded an association, Sharia4Belgium, with clear intent of spreading terroristic propaganda in Belgium. It was shut down due to such allegations in 2012, but by the time the process started, in 2014, only seven members of the organization were charged and judged, while many others had already departed to fight in Syria. This poses two relevant questions: is the division of powers, so cherished by the modern state,

become inadequate to resist to such a threat? And if it is so, what can be the future of democracy? The absence of a division between executive power and the judiciary is one of the key features of a totalitarian regime and, especially in Europe, we must be aware of the risks involved in such a process, as well as the consequences it has had in the past.

The issue becomes even more central for political analysis due to the particular situation democracy is living at present days. As stressed by authors like Attali, we live in societies characterized by competition between several timescales, with the media and the market playing a leading role also on law, police, justice and politics (Attali, 2011). With the media giving grater coverage to news regarding terrorism and crime in general, the need for security coming from the population becomes greater and greater, often disregarding what were the great achievements of the past century on rights for convicts and accused. This concept, labelled “penal populism” is a tendency that can be found in many Western postmodern societies: this “risk society”, as defined by Beck, is easier to panic, therefore leading to a perceived (yet apparent) increase of the crime rate, followed by a call for reaction from politicians, that most of the time follow the populist wave and propose law changes that tough appear to be simple answers to complex issues. The case of Belgium shows us that there is no simple solution to terrorism, and harsh punishments not only can be ineffective, but could also be counterproductive: especially when dealing with radicalized Muslims, this could have the side effect of reinforcing their belief and their disenfranchisement towards the state, in addition to the possibility of further radicalization in jail. Moreover, harsher punishment could lead to a stronger protection by the family members, that would be more unlikely to turn in a loved one for the sake of a too harsh punishment.

The mediatization of crime and terrorism is fundamental when dealing with such issues, as it occupies the top headlines on new and old media. In a society already prone to panic, “This hyper-mediatization process may cause a spike in attention that is interpreter by politicians as an urgent call for reaction emanating from a frightened public opinion” (Seron & André, 2016), thus causing an emotional, rather than rational, response to terrorism, usually accompanied by the lack of preparation and work usually associated with policy production. This does not work only when dealing with issues regarding the efficacy of the produced policy, whose chances of success may vary due to several

possible variables, but also may harm the constitutionally defended values that lay on the foundation of many modern democracies. The panicked public want reassurances and, due to a general feeling of distrust for the establishment, the best answer is always going to be that a harsher law has to be passed, and stricter controls imposed with it. This operation most of the times seem to pay off, in terms of political consensus: the election of Donald Trump as President of the United States and the rise of Marine Le Pen as leader of the Front National are a clear indicator of this. Whether this can be good for democracy, needs to be discussed more in detail, but what appears clear is that penal populism, linked with political opportunism, seems like a viable way for politicians to increase their consensus. The election of Trump and the measures he is trying to pass in the Congress do not come “out of the blue”, they are the culminating point of a policy of criminalization of terrorism that begun in the aftermath of 9/11 with the Bush administration, and partially continued with the Obama one. Since the “9/11 effect” paved the way for new counterterrorism legislation all over the world, it seems fundamental to start the analysis with the United States of America, so far the first world power and the state that more is committed to fighting terrorism worldwide.

2.2.1 The United States of America

As said above, the attack of 9/11 can be considered the trigger that spark debate and legislation all over the world to tackle the issue of security against terrorist attacks. Most strikingly, the “body of US legislation [...] appears rather modest” (Hamilton, 2017): we witness the hastily adoption of the PATRIOT Act in 2001, which became a lightning rod for critics of Bush’s administration, followed by the Department of Homeland Security in 2002 and the Intelligence Reform and Terrorism Prevention Act in 2004. Strikingly, most of the criticism was moved to the PATRIOT Act, that can be defined mild in comparison to the latter, which made the US undergo the largest change of American security since WWII. However, what is important to understand is that the legislative body is quite small, compared to the one of many other states, and the actions that followed were, in scope, limited, and often countered by legal courts at all levels, including the Supreme Court. The harshest and most criticized responses to terrorism were not taken following the classical democratic process: most of them were justified

under the Authorization of Military Force (AMF), passed by the Congress in the immediate aftermath of 9/11, an emergency resolution which authorizes the President to “use all the necessary and appropriate force” against the perpetrators of 9/11. Under the justification of this resolution are comprised detention of foreign nationals as enemy combatants in Guantanamo Bay prison, disappearances and extraordinary renditions and many others. We can clearly notice here how the US, in the moments immediately following the attack, shifted towards a warlike approach, with all the issues connected to it noted above. However, public opinion and international pressure, linked with litigations and courts’ opinion, have reversed most of such policies, but will be included in this analysis, especially since they are illegal or limitedly legal, therefore are of crucial interest.

In setting the legal landscape for the US, it is imperative to begin the analysis with a closer look to the PATRIOT Act. It is a large piece of legislation, voted with astonishing majority both in the House (357-66) and the Senate (98-1); while signing the bill in October 2001, President George W. Bush remarked:

"This legislation gives law enforcement officials better tools to put an end to financial counterfeiting, smuggling and money-laundering. Secondly, it gives intelligence operations and criminal operations the chance to operate not on separate tracks, but to share vital information so necessary to disrupt a terrorist attack before it occurs. As of today, we're changing the laws governing information-sharing"¹

The PATRIOT includes, aside from more funds for several federal agencies, measures for: money laundering and terrorism financing, rules regarding detention of suspected foreigners, data sharing, biometric controls, accession to passenger flight information. As said above, the PATRIOT Act serves as a lightning rod for criticism, but if we look more carefully in the text we can notice that, for the most part, it just grants already existing powers to security forces during counterterrorism investigations. Most of such measures were already present in the legal system for the fight against organized crime and, as the

¹ President Signs Anti-Terrorism Bill: Remarks by the President at signing of Patriot Act. The White House, October 26, 2001

then-Senator Joe Biden said: "the FBI could get a wiretap to investigate the mafia, but they could not get one to investigate terrorists. To put it bluntly, that was crazy! What's good for the mob should be good for terrorists."². Let's look at the measures more in detail:

- **Allows law enforcement to use surveillance against more crimes of terror.** Before the Patriot Act, security forces could conduct electronic surveillance on ordinary crimes but not terrorism-related ones, therefore limiting the efficacy of police action. The Act allowed information gathering also for terrorism related crimes, including weapons offenses, murder of Americans abroad and terrorism financing.
- **Allows federal agents to follow sophisticated terrorists trained to evade detection.** A roving wiretap (a tracking device able to track directly a target rather than a specific phone) can be authorized by a federal judge. The Act allowed to use such a measure (already existing) against terrorism, as terrorist are well trained and could easily evade the tracking of a personal cell phone.
- **Allows law enforcement to conduct investigations without tipping off terrorists.** Federal courts are now able to accept, even in cases of terrorism, the use of reasonable delay in communicating the approval of a search warrant in case of terrorist suspects, thus allowing a faster and more efficient response.
- **Allows federal agents to ask a court for an order to obtain business records in national security terrorism cases.** Business records have proven highly valuable for the solution of a wide range of crimes. Under the Patriot Act, the government can now ask a federal court to allow the production of such a record for terrorism-related crimes. Such a record can be produced and authorized to obtain intelligence to protect the US against international terrorism. Here a constitutional limitation applies, as it cannot be produced if the investigation is conducted on the basis of activities protected by the First Amendment, related to religion, free speech and freedom of association.

² Senator Biden, Congressional Record, October 25, 2001

So far, the analysis of the Patriot Act does not seem to pose questions regarding the quality of liberty, it just enlarges pre-existing legislation to the crime of terrorism, with an approach similar to the European one described above. Unlike the general opinion would suggest us, the US has strict limitations to curtailment of liberty and civil rights due to Constitutional limitations and the amendments. The First Amendment cited above sets limitation to the US government, on the base of freedom of association and freedom of speech, for what regards crimes such membership or incitement to terrorism, which cannot be punished, unlike in Europe, where those crimes have been already introduced or will be anytime soon. The next section, however, raises some concerns for what regarding data sharing and protection and therefore, privacy rights, that in the last decade, with the creation of social networks and new forms of communication, made this kind of rights particularly relevant.

- **The Patriot Act facilitated information sharing and cooperation among government agencies.** The Act removed the existing legal barriers that disallowed data transfers between federal agencies, intelligence and national defence. The effort is aimed at a stronger coordination between federal defence branches, making agents able to gather information from different sources to uncover terrorist attacks before they take place.
- **Allows law enforcement officials to obtain a search warrant anywhere a terrorist-related activity occurred.** Before the Patriot Act, law enforcers had to obtain a search warrant in the district where the search needed to be carried on. The Act provides that warrants can be obtained in any district in which terrorism-related activities occurred, regardless of where they will be executed.
- **The Patriot Act increased the penalties for those who commit terrorist crimes.** In particular, the Act prohibits terrorist harbouring and enhances maximum penalties for crimes usually related to terrorism, like arson, hijacking, material or financial support of terrorist organizations, weapon possession and smuggling. Moreover, the Act enhanced “conspiracy penalties”, namely engaging in one of the offenses usually related to terrorism; previous legislation would only allow five years in prison for “general conspiracy” even for terrorist-related cases of conspiracy.

It is easy to note why this second part of the Patriot Act raises more concern than the previous part, as it touches more directly the personal life sphere of individuals, regardless of them being criminals, terrorists, or simply citizens. As a fundamental right, privacy is one, among others, that new laws on law enforcement and especially terrorism, tackle more directly, and we deem appropriate to bring our analysis with legal changes on this matter.

DATA PROTECTION New technologies allow a vast array of possibilities for information control and data gathering and can constitute a threat to privacy rights. The Fourth Amendment is the only constitutional legal basis for data protection, as it guarantees the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures”, but such a right is guaranteed only if the targeted individuals has a “legitimate expectation of privacy”, thus excluding from the scope all information voluntarily turned over (e-mail, visited websites, dialled phone numbers, banking records). And even in the case the Fourth Amendment applies, there could be “reasonable governmental interests”, therefore allowing broad space for law enforcement and governmental actions. Before the 9/11 attacks, this matter was regulated with the Privacy Act of 1974: the scope of the Act is limited to records in a “system of records”. The Act covered the classical intelligence data gathering for investigation and security actions; the most striking features, that has been later modified after the attack, is the data sharing. Concerning disclosure, the Act forbade it not only towards any legal or physical person, but also towards other agencies (if the subject individual does not provide written consent); moreover, federal agencies may retain only those information related to a pending investigation, scope of the agency itself, or by explicit order of the President, following a criterion of proportionality that balances the agency needs and the rights of the investigated target. After the terroristic attack that hit the US, the framework has changed, due to the new strategy of “war on terror” promoted by Bush administration. Given the importance of intelligence and information gathering in the fight against terrorism, the possibilities of governmental agencies and law enforcing ones have been increased in range and scope, but partially disregarding privacy rights for the sake of national security. The PATRIOT Act changed the Foreign Intelligence Surveillance Act (FISA), whose scope was originally providing a framework for electronic surveillance of

foreign intelligent in the interest of national security. The main provisions added by PATRIOT are: a provision added by Section 215, allowing access to business records for international terrorism investigation, metadata surveillance and lastly a new legal instrument allowing the government to collect intelligence of any type of non-US targets who might have information related to national security. The new rules therefore allow the FBI to access business records and, most notably “any tangible things” connected to the investigation, and also allows its sharing to other interested agencies. Information collection can only be carried on under judicial authority, but it is undeniable how provisions of the PATRIOT Act changed data protection standards in the United States; in addition, the Attorney General can use his emergency authority to allow the FBI to collect such information without ex-ante but only ex-post judicial control and review. There are tough limits to the use of such a legal instrument, as it requires a “specific selection term” to be used as a base to produce the information required; with the term that can be defined as “a specific selection term means a term that specifically identifies a person, account, personal device, address or any other specific identifier” (Boehm, 2015). It must be said that the data collection, regardless of whether business records or phone calls, cannot exceed the 180 days (if done on a daily basis) in way to protect better citizen rights, and must be destroyed promptly if they not contain any foreign intelligence information. The problem in this respect comes when the difference between US and foreign citizens: only US citizens are entitled to such protections, while for foreign citizens, data can be retained by the agency and are exempted from the erasure provision.

It is easy to note that one of the main issues coming out of new American regulations regarding data protection comes when rights of non-US citizens are considered. Section 702 of FISA Amendment Act of 2008 is the legal provision that allowed mass surveillance of non-US citizens communications as well as the infamous NSA interception program, and is far-reaching: communication, content, metadata and records can be collected without the same data protection features listed for US citizens, which are anyway, limited and lacking a federal framework. Although subject to heavy criticism, this section has never been changed since 2008. Apart from the clear divide between nationals and foreigners on data protection, USA data collection system has many flaws from an human right protection standpoint: the laws on data not only does not guarantee

high levels of protection for citizens, in addition, this protection framework applies only for records obtained following normal procedures. Any records or collection of data gathered by other means, will not fall under the jurisdiction of the Act, thus making the information unprotected by the framework above.

DETENTION Another important issue concerning on one hand human rights and on the other national security, is among the classical issue of State vs personal freedom. In the case of terrorism, here the USA are fundamental to analyse: as described above, their unmatched military force, together with number of operative agents around the globe, gives the US a global reach when it comes to fighting wars, and the war on terror was not an exception. Since the wake of the tragic events, Bush's stance on the issue was clear "the President was ordering actions that could only be lawful in a *de iure* armed conflict: targeting to kill without warning, indefinite detention without trial, and search and seizure on the high seas without consent" (McCormack, 2012). Torture, extraordinary renditions and pre-trial detention for terrorists were accepted by the American public more or less explicitly, at least up to 2009. The political situation in the US conditioned the public opinion, up to the point that demands for a special terrorism court, separated from the normal judiciary, begun to rise. Amos Guoira in 2009 supported the idea of special courts for terrorism-related crimes, able to have access to limited access information that should not become public; Jack Goldsmith, in the same year, proposed a special court for pre-trial detention of terrorist. This kind of proposal never actually came to existence, but gives us an idea of the political situation in the US and how far the public debate went during the years concerning terrorism and how to fight it. The departure from peacetime norms in the "war on terrorism" surely are the military detentions without trial, both of US citizens captured in American territory or outside it, together with the more than 700 persons of different nationalities held in Guantanamo Bay, Cuba. In all cases, the Government claimed to have acted under the boundaries of war powers held by the President, claims later rejected by the Supreme Court. The situation now has changed, and now only 41 prisoners remain in Guantanamo Bay, but the development of cases law on the matter remains of key interest. In respect to this matter, the analysis of case law by the Supreme Court can be an eye-opener.

- **Hamdi v. Rumsfeld 542 U.S. 507 (2004)** Hamdi was an American citizen that was captured by US forces in Afghanistan, taken to Guantanamo and only later, after the ascertainment of his American origins, transferred to the Navy base in Norfolk, Virginia. In his case, he claimed his right of habeas corpus, while the Government argued that: the President can imprison those he considers “enemy combatants”, conditions also enforced by the AMF granted by the Congress; moreover, an enemy combatant does not have habeas corpus right, even more, Hamdi could not invoke habeas corpus since there was no need for a due process. Justice O’Connor position, together with other three Justices, agreed on the AMF authorization of detention, but also believed that the detainee had the right to “rebut the Government” before a neutral jurisdiction. On the other hand, Justice O’Connor plurality opinion states that individuals connected to the Taliban could be detained for an extended period of time, up to the end of their life, in case that “active hostility” continued for so long. In conclusion, the Court decided that detention was correct, and that an US citizen hold the right to due process. This position is critical for our conceptualization of democracy as in institutional arrangement were the division of power is fundamental: if the President, as Chief of the executive branch, can brand citizens as enemy combatants with only ex-post judicial control, what could prevent the President to classifying a political dissident as an EC? We must always remember the adagio “one’s terrorist is another’s freedom fighter”, and if such a doctrine is taken at its extreme consequences, the message for the democratic constitutional order is not reassuring.
- **Rasul v. Bush 542 U.S. (2004)** This case, coupled with other from detainees in Guantanamo, is somewhat more reassuring. The prisoners were detained for more than two years due to (contested) allegations but with no charges, and without access to legal counsel, something that has been defined by Justice Stevens “custody in violation of the Constitution or laws of the United States”. Justice Scalia, on the other hand dissented on this majority opinion, claiming that foreigners had no such right as in Hamdi, giving us a clear picture about international human rights in 2004 America. Justice Scalia anyway held a minority position, thus habes corpus petitions were filed and then transferred to

D.C., or a military tribunal (Combatant Status Review Tribunals - CSRT) to decide on their status of enemy combatant or also for their charges of violation of law of war.

These two cases help us to understand both the legal and political situation in America regarding detention of terrorists, or alleged terrorists. But we need to analyse the most debated matter, the situation of detainees in Guantanamo Bay, more in detail. The legal condition of Guantanamo detainees has been long debated: as said, US citizens enjoyed some degree of rights, while other nationalities were not allowed to do the same: following Rasul, the habeas corpus petitions filed to the D.C. Courts followed two distinct tracks: one that did not want to concede any right to prisoners (due process or even internationally recognized human rights, deemed non self-executing), while another agreed to concede to foreigners that their claims were at least valid. According to Judge Green numerous detainees of Guantanamo, although being considered as enemy combatants and therefore put in chains under AMF, were captured far away from anything resembling a battlefield, thus making the military detention unjustified. Moreover, the disrespect for human rights in this case is clear: the application of habeas corpus right was undecided (with governmental claim of inapplicability, as Guantanamo is not officially American soil), Geneva Convention did not apply as prisoners were not actually captured around a warzone, nor human rights conventions against torture was deemed to be considered as non-self-executing. The situation of Guantanamo, together with the extraordinary measures carried on by the United States in the immediate aftermath of the 9/11 attacks, clearly show us how strongly the US responded: this was not only deeply damaging for the internal quality of democracy in America, but also damaged the international stance of the United States as a beacon of freedom, liberty and justice. Freedom from unlawful restraint and government mistreatment is one of the fundamental basis on which democracy distinguishes itself from dictatorship, and it seems that the US is forgetting this simple yet powerful concept. If that would not be enough, we need to keep in mind that those people were detained not by decision of a court, they were detained by executive order, without the chance, for years, to even discuss legal help of knowing the accusations pending on their heads. Even the highest judges in America are dissenting of whether or not give minimal rights protection to those individuals,

disregarding human rights for a war that, even if we know when started, still has no clear end. Disrespect of rules and laws in times of war can partially be accepted, but when the war goes on for years, the role of the executive, and the one of the military, become too broad and uncontested, with all the potential consequences this can have.

FREEDOM OF MOVEMENT The last of the fundamental freedoms we are going to analyse. In the American case, this is of particular interest for controlling the level of equality when it comes to law application. We have already seen that, regarding detention, there are some clear-cut differences between American citizens and foreign nationals, but this can be understood as citizens of one nation might enjoy a higher level of protection when judged in their own country. Another side effect of 9/11 was the radical change of perception the population, the security forces and also politicians had regarding a specific social group, namely, Muslims. The Aviation and Transportation Security Act of 2001 marks one of the first attempts, immediately after 9/11, to strengthen regulation of aircraft security. The Act allowed the Transport Security Administration to collect and transfer to other agencies the transportation data, or PNR, of all passengers coming from outside the US (the Act does not apply to American carriers on national soil). While per se being of tantamount importance to ensure aviation safety, the possession and transfer of PNR constitutes a great problem for personal privacy: not only the data are stored for 3.5 years, but also they include personal information as religious or ethnic information, financial data, affiliation to particular groups, place of residence and means of contacting the individual (email, phone number etc.). the problem here stands on the ground of equality, as not only these data are transferred to other agencies with the correlated risks for privacy, but they only apply to foreigners, and especially towards particular groups of foreigners deemed to be potentially dangerous.

Moreover, the US took the lead on enhancement of border controls in the world. The process begun before 9/11, as already in 1996 the Congress called upon the Attorney General to formulate and automatic entry and exit monitoring for foreigners, with the PATRIOT Act calling for the use of biometrics; this process led to the Enhanced Border Security and Visa Entry Reform Act of 2002. In the immediate aftermath of the attack in New York, the Immigration Services identified, through a combination of biometrics and

PNR 7602 individuals that shared similar features to the ones of the 19 hijackers, most of which were of Muslim background. Overtime, more than 3000 migrants of similar background were interrogated at their entry in the US without any concrete evidence of connection to terrorist groups whatsoever. The Act was followed by the “Special Registration Procedures for Certain Non-Immigrants”, meaning forced registration, interview and biometrics scan of individuals coming from Iran, Iraq, Libya, Sudan and Syria, based on criteria elaborated by the Department of Homeland Security. The programme was later enlarged to include foreigners coming from Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen; with the sole exception of North Korea, it is easy to see how all the countries listed above are Muslim countries. The NSEER (National Security Entry-Exit Registration System) soon followed in 2003, with biometric registration of individuals from 112 nationalities, later applied for all visitors coming to the USA. These data are not only shared among agencies for purposes of law enforcement, national security and immigration control, but also are stored in US data system for a period ranging from 75 to 100 years, often more than a lifetime.

Although being still debated in Courts, we deem necessary to note in this research the most recent developments of travel restrictions in the US, the so-called Trump’s “Muslim Ban”. The President used an executive order to restrict access to the US of citizens coming from seven countries of Muslim majority (Syria, Iran, Sudan, Libya, Somalia, Yemen and Iraq), with the intended purpose to “keep radical Islam outside the US”, and in the meantime, it also prohibited the entrance of refugee in the US tout court. The consequences, both home and abroad, had great redundancy and American courts came into play to stop this travel ban from becoming fully effective. Without criticizing the formulation or the international consequences of such an order, which is beyond the scope of this research, we can though clearly state that the intentions behind it are clearly dangerous for democracy. A segment of population is excluded, on the grounds of nationality, from entering the country without any alleged charges or being found guilty of any crime or being remotely suspected of being terrorists, thus posing a great threat to equality. Moreover, this was not done by the Congress, the legislative power on which

the popular preferences are more represented, but by the Executive branch of government, which, in the US is an (almost) monocratic office represented by the President. The ban could have proved a huge blow to the idea of the United States as “the land of freedom and possibility”, and could have dealt a strong blow to the quality of democracy in the US, but the balance of power, so strongly enshrined in the Constitution, allowed federal Courts to have the authority to challenge such an executive order. The first rejection of the order came from San Francisco’s Ninth Circle and is the first one that has come so far to the appeals court, and the result is still uncertain. On one hand, it is true that the President deserves reference when it comes to matters of national security, on the other it poses great threats to equality and, first and foremost, could be against not only normal law, but also against the Constitution, as the First Amendment that protects freedom of speech and religious freedom.

2.2.2 The European Union

As specified above, the situation of the European Union cannot be analysed with a pure like-for-like comparison with the other cases of this research, as is not, and is not going to be very soon, a federal state. However, due to its importance in the international and regional arena, understanding how the Union relates to the issue of terrorism is fundamental. Of course, the EU powers on the issue of counterterrorism are limited, as the matter is still mainly in the hands of the states, but some progresses in this direction have been made in the last years. Maastricht gave the Union competence over justice and home affairs, up to the construction of an “Area of Freedom, Security and Justice” and terrorism has, in a way helped the enhancing of the Union power on a matter that used to be exclusively of State competences. During the process of state building of modern national states, the presence of a common foreign enemy was one of the key processes that led to the unification of smaller sub-units into a stronger one; if this process is going to happen for the European Union anytime soon is not the subject of this research, but is a possibility we cannot ignore completely.

As said above, the movement towards an European involvement in matters of security and counterterrorism began with the Maastricht Treaty, and later changed with Lisbon Treaty in 2009, in which common security, defence and foreign policies set under a common framework of shared competence between the States and the Union. Taking a step back from Lisbon, the Council of the European Union approved a common anti-terrorism strategy, comprised of four main pillars:

1. Prevent: tackling the root causes of terrorism and avoid radicalization of individuals.
2. Protect: improved border, transport and city security, by reducing structural vulnerability as much as possible.
3. Pursue: pursue and investigations of terrorists both home and abroad, with the key mandate of impeding travel, communication and money transfer and bringing perpetrators to justice.
4. Respond: improving capabilities regarding the aftermath of attacks and the answer given to the population.

The Union does not, however, enter directly into the law enforcement system of the member States, rather it gives its contribution, rather it works as a framework in which national government and security agencies can confront and develop collective capabilities. Security agencies have indeed found the benefits of working tighter rather than separately: since EU citizens can move freely among the states of the Union, using only intelligence from one member state can prove not only difficult to track down terrorists, but also can be detrimental to the investigation process. Usually intelligence agencies are not used to work on an “information-sharing” base, rather than cherish information as a value, but the situation has been changing in the last decades: “Finally, within the EU there is a strong shared sense that a slack culture of international intelligence-sharing may lead to an inaptitude to join crucial ‘dots’” (Gill, 2006). Information sharing can be a fundamental need if those ‘dots’ are to be joined, and this is true not only for the larger member states, that have higher defence and security budgets, but especially for smaller ones, that can use knowledge that otherwise they will not be able to gather.

Some degree of centralization in this respect has already begun in the last decades, with the role of Europol being fundamental as an information-gatherer actor: Article 3 of the Council Decision of 6 April 2009 states that the objective of Europol is to support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating organized crime, terrorism and other forms of serious crime affecting two or more Member States. We can see that, rather than intruding into national security policies, Europol comes into action when the investigation is a cross-border issue, acting more like a coordinator of a joint effort rather than taking the lead; being law enforcement a crucial sovereignty matter, this accomplishment can be considered a great step forward for European coordination and integration; quoting Occhipinti, “‘European FBI’ remains a long way off. Nevertheless, Europol’s expanded operational role and greater autonomy indicate a shift in the direction of supranationalism” (Occhipinti, 2015); this shift of competences can be interpreted in two ways: either terrorism is pushing for a more integrated and supranational approach to the matter of law enforcement, or it is just the integration process moving forward, and both possibilities are extremely interesting. Most of the work of Europol in the field of counterterrorism is data collection and examination, thus creating some issue for privacy and privacy protection regimes that will need to be analysed in detail. Another powerful instrument in the hand of the Union in the field of counterterrorism is INTCEN (EU Analysis Intelligence Centre), an agency under the High Representative office and provides a framework in which national intelligence, both military and civilian, can exchange information. It can be fundamental as intelligence agencies can transmit timely crucial data to colleagues in another country that can better control and in case eliminate the potential threat to security. Therefore, we can clearly see two trends in the EU regarding security and information sharing: on the one hand, we can witness a clear verticalization of intelligence service, similar to the one of a national state. On the other hand, networking and horizontal forms of intelligence and data sharing are encouraged and supported.

Both with Europol and INTCEN (and partially with Frontex, which, not being focused on counterterrorism, has been excluded from this analysis) we though face a problem with democratic accountability: we have two agencies that handle a vast amount of data of

citizens but are not accountable to anyone in particular, unlike the national security forces on which their action is carried on. The issue is double, as the existence of these agencies does not pose a problem only with democratic accountability, but also in the issue of data protection, as data are usually stored for long periods of time. Similar to the one we encountered in the US, in the EU the issue is felt even more, as not only the accountability is challenged, but information is stored and shared not only between national agencies, but also at supranational level and by foreign intelligence agencies. In general, there is a trend that needs to be taken into account when dealing with the US/EU comparison: while in the US measure restricting or limiting human rights are under constant scrutiny and debate at a national level (and are eventually limited, like in the case of Guantanamo detainees), in the EU the debate rests at national level and rarely is taken at a supranational one, where the action and the discussion happens mostly in an intergovernmentalist fashion and in which the voice of the European Parliament, usually more prone to the protection of human rights, is rarely heard and often ignored.

DATA PROTECTION Data protection is enshrined at the highest level of European law, as it is guaranteed by art. 16 TFEU, that explicitly mentions personal data protection; moreover, this right is not only guaranteed to citizens, as the article states that “everyone” possesses such a right, meaning all natural persons. In addition to Article 16 TFEU, Articles 7 and 8 CFR are two further important sources of data protection at primary law level. Both articles establish two comprehensive rights protecting private life and personal data of individuals (Boehm, 2015). However, interpretation from the Court of Justice allows limitations and restrictions of said articles: this is true when it comes to public security, fight against international terrorism and prevention of illegal entry in the EU

In a law enforcement context, Article 7 and 8 of the Charter may therefore be lawfully restricted. For instance, the Court of Justice has already recognized, amongst others, the fight against serious crime to ensure public security, the fight against international terrorism to maintain international peace as well as the prevention of illegal entry into the EU as objectives of general interest. All restrictions need to pass through a three-step process: the essence of the right is respected, the restriction is done as an objective of general interest and if the proportionality, appropriateness and necessity rules have been

met. The greatest threat to data privacy came from the Data Retention Directive of 2002, which allowed the Member States to store telecommunication data for a period ranging from 6 to 24 months, giving the right to security agencies to access, under judicial control, personal details such as IP address, e-mail, phone calls and SMS. The Court in 2014 annulled the Directive, during the judgement *Digital Rights Ireland vs Ireland*, as it would violate personal privacy rights. Limitations still hold when it comes to law enforcement, but the Court marked them as violations of Art 7 and 8, that need to be justified: collection and retention of data, and the access from security agencies and national authorities are “particularly serious” and “wide ranging”, as they target almost every citizen of the Union. Those data are considered so personal that the citizen would experience a too strong surveillance on their life contrary to the essence of the rights enshrined in the CFR. To the test cited above, the Court added that, for the purpose of law enforcement, the data can be collected and analysed, but only when there is a genuine link between the threat and the data collected.

All EU data protection instruments independent of the policy area contain standards relating to the quality of data including: requirements on lawful processing, datasets that must be adequate, relevant and not excessive in relation to the original purpose of processing, accuracy, continuous assessing of data that will allow to understand timely the change of the situation that made the personal controls necessary. It is interesting to note here the striking difference between the opinions of the European Parliament, that proposes a stricter wording and highly regulated criteria, and the Council, that want to give more space for decision to Member states. We must in addition note that data transfer to third states is possible when it comes to law enforcement: Europol and Eurojust are allowed, through provisions of the former third pillar and after previous control over the effective level of data protection granted by the third state, to transfer data. This peculiar feature of EU regulation can be understood when we consider the special relation with the United States when it comes to needs of counterterrorism and in general, security, on which the EU and the US rely strongly on each other.

In the case of the EU we can see clearly that data protection is a sensitive issue that is protected by the strong umbrella of the Court of Justice, and the discussion for a new directive on data control and regulation “Directive for Data Protection in the LE

sector (DDPLE)” is now under scrutiny and likely to be passed. Such a Directive, if approved, would provide a European framework for data protection and data analysis for all Member States, that right now hold a large level of discretionality when it comes to law enforcement. The Directive as it is would create strong limitations to the possibilities for excessive data mining and profiling as it would be detrimental for human rights. What is interesting in this respect is that the directive does not mention, nor limits, the activity of European security agencies like Europol or Eurojust, that will not be limited to such regulations. This can be seen as a two-faceted issue: it can be interpreted as a way for member states to actively protect human rights in their national legislation while on the other hand being able to exploit such measures under the umbrella of Europol; either way, it can be seen as a clear attempt to centralize the information gathering for security purpose, as European agencies, not being restricted by human rights concerns, would be able to muster a larger number of information, thus making Member states rely heavily on European institutions, a way to centralize and transfer to a supranational level a sector traditionally under the strict control of national governments.

DETENTION The Union does not have power over detention directly, as it still remains completely under State jurisdiction and internal law. However, some steps towards such a direction have been taken in the recent years, especially with the European Arrest Warrant (EAW). Although the proposal predates the events of 9/11, it became politically viable only after the terrorist attack. The “jewel in the crown of the EU’s response to the terrorist attack” (Douglas-Scott, 2004) is among the most prominent and most debated anti-terrorism measures: adopted in 2002, transformed the regime regulating extradition among EU countries. The measure is indeed efficient, as it consists mainly in a box ticking exercise, but voices of concern for procedural rights, disproportionality, poor detention conditions and innocent imprisonment are rising. Most notably, the human rights issue, so well protected in Europe by a series of institutions is completely ignored, and cannot be ground to which extradition can be refused. Moreover, the legislation was promoted as an effort to fight terrorism, but if we look at data, the EAW is not limited to acts of terrorism or related to it, it includes 32 offences, including also road traffic offences, and has been mainly used for minor offences. This unproportionate use of the EAW has only detrimental consequences for human rights of

the individuals, as they can be taken from their homes for long periods of time to be judged for a minor offence in a foreign court.

There is here a clear disregard of human rights, that implies a curtailment of judicial rights for individuals for the sake of protection against terrorism. While we have seen the case of Guantanamo as an extreme case for detention in the US, is clear that the EAW is not a special provision but here to stay, at least for the time being. Miranda rights were not curtailed after 9/11, and that would have been understandable in a sense, but it did not happen, in a striking contrast between the conception of Europe as a bulwark of human rights versus the security-driven US. We witness here a tendency that would clash with our common sense: it is true that the US levelled down partially the protection of rights for all offenders, but while procedural protection are levelled up, in the EU there is a tendency, to contrast terrorism, to level down protection for all citizens, regardless of their affiliation with terrorist groups. On the other hand, there is nothing comparable to enemy combatants detention in the EU, but this does not mean the European States are completely innocent, as they actively participated in illegal US detention and transfer of suspected terrorist, with Poland being the first EU member complicit in CIA's secret detention, but the European Commission failed to bring to Court those states deemed responsible for renditions, thus making the EU's support for human rights at least blurred. The European Parliament however, is still a strong advocate of human rights protection, but in this purely inter-governmental issues, the power that lies on the Parliament is still limited to the possibility to voice the problem, rather than contributing actively to a solution. One last issue needs to be taken into consideration when dealing with EU stance on detention and criminalization of terrorism: while the US keeps legislation on the matter as special legislation, the EU tends to "normalize" such norms by including them in normal criminal justice. While this can be beneficial for the security forces that can act more quickly and effectively on the territory, this poses an issue due to possible spill over effects that can seriously hinder the level of rights protection enjoyed by all EU citizens, not only those charged with terrorism accusations, and the European Arrest Warrant cited above is a clear example of this trend, that could be dangerous in the long run. However, as the case for data protection showed, the power of the Court of Justice is still strong in this matter, and we could expect an intervention in this sense. Nevertheless, law

enforcement and detention powers are still strongly in the hands of the member states, thus making an intervention of this kind difficult, if not unlikely.

FREEDOM OF MOVEMENT Is one of the cornerstone of the *aquis communautaire*, introduced as a fundamental element of free market and then enlarged in scope and strength with the Schengen Agreement. Protected as one of the most important features of the European Union, in the last years after the terrorist attacks that hit Europe, together with the migration crises that followed the events of Arab Spring, the need for stronger border control both on the outside and on the inside of the Union. David Cameron in an article published in the Financial Times expressed his concerns on the matter, then in a letter addressed on 10th November 2015 to the President of the European Council, Donald Tusk, the British Prime Minister followed the example of Austrian, German and Dutch governments to voice the need for a better management of border control in the Union, mainly for a matter of security, since the attack on Paris and the difficulty of catching its perpetrators have showed the potential misuse that the terrorists can do of such a freedom.

It is in fact astonishing the number of terrorists that used the great achievement of freedom of movement to move freely around Europe, a problem that has been tackled only recently for the case of returning foreign fighters from Syria. Under the Schengen Agreement, member states can, in extreme circumstances and for a period of six months (renewable up to two years) to reinstate border control, As of today, seven member states have reintroduced said border controls: France, Malta, Germany, Austria, Denmark, Sweden and Norway, the latter, although not a member of EU, is part of the Schengen agreement. This was the case since the beginning of the migratory crisis, linked to the possible terrorist threat coming from the large number of refugees fleeing to Europe. While no legal action has still been taken at European level to change the legal framework of freedom of movement, the system is surely under pressure: calls for reinstatement of border controls have found great echo in the European political discourse, and will probably continue in the next years. Immediately after the attack on Paris, the French Minister of Interior Bernard Cazeneuve called for a strengthening of border control at EU level, with passport checking for all Europeans leaving or entering Europe, followed by biometrics scans. The possibility for Eu citizens to move freely in the territory of the

Union was one of the greatest achievement of United Europe and among the most felt as essential by the citizenry, if this fundamental freedom ceases to exist though, the blow that terrorist have dealt to the Union is going to be greater than we can imagine at this point. It is unlikely though that the Union will give up on such an important achievement of the integration process; moreover, border controls, although will surely make the movement of potential terrorist harder, will not stop the spread of the radical ideas that are at the base of terrorism, and ideas that can travel with or without border control.

2.2.3 France

Undeniably France has been the country that more than any other has been the country that has been targeted the most in the last decades, with a number of dead that does not find equal in all other countries of Europe, thus calling for special actions and reactions to the issue of counterterrorism. France is not new to terrorism, but the attack on the Bataclan club shacked the international public opinion as much as the 9/11 attack, due to his brutality and unpredictability. the issue of human rights and democracy are of course particularly felt in France, that can be considered, at least for a part, one of the countries that first imagine the existence of such universal rights belonging to human kind in general. For the sake of this research, the in-depth analysis of the French case is fundamental. First and foremost, when dealing with French reaction to terrorism, it is fundamental to refer to the state of emergency (*état d'urgence*) that the country is under since the Bataclan attack of 13 November 2015. The state of emergency can be declared based on Law 55-385 of 1955, and is meant to manage internal crisis and moments of particular danger for the Republic: in this situation, the central government and the military obtain large powers over civilian authority, something that recalls wartime provisions. The President of the Republic, together with the Council of Ministers can proclaim the state of emergency, but only for 12 days; for longer timespans, the government is required to pass a law trough the Parliament. So far, the state of emergency has lasted for more than a year and, according to President Hollande, it will continue until the Presidential elections of 2017, in way to protect rallies and manifestations during the political campaign, creating a new record for the longest period of time France has been

under state of emergency since the Algerian war. For what concerns our field of interest, the Minister of the Interior and the prefects (direct expression of the central government in local communities) gain exceptional powers: house arrests can be pronounced without judiciary intervention, police raids without judicial overview, circulation can be forbidden in certain areas, curfew can be established, gathering places can be forcibly closed, websites and groups can be shut down or closed if deemed dangerous for public order, and even legally owned weapons can be seized. All the previous provisions can be later appealed, but the government does not need justification. Moreover, around 10,000 soldiers have been deployed in the country to guard sensitive targets; their presence was required after the terroristic attacks in Paris, and was meant to end soon, but the attack in Nice made soldiers stay in the street at least until the end of the state of emergency, for security purposes.

Although being legally justified, as it is based on laws and the Fifth Republic Constitution, we can clearly see in this case that such provisions can severely hamper the classic democratic values of division of powers, freedom of expression and manifestation, as well as safety in one's own home, which is questioned by the possibility of day and night controls. This is justified by the level and amount of terroristic attacks that shacked the French Republic in the last years, but we need to ask ourselves what this has caused to the quality of democracy in one of the countries in which the modern state and modern freedoms have been firstly conceived.

DATA PROTECTION For what concerns protection of personal data and surveillance, we must refer to Law 912 of 24 July 2015, that creates the new legal framework for intelligence and personal data gathering in the French Republic. This law has been considered by several human rights associations and groups to be draconian and too dangerous for human rights; critics have in fact argued that the provisions of this law go far beyond the mere purpose of counterterrorism, as they are going to strongly limit personal privacy as well as personal freedom in general. For once, also the consultation of sites supporting terroristic activities both home and abroad is now considered a felony, punished with either monetary fines or detention up to two years. First and foremost, police and prosecutors can now use electronical eavesdropping, phone tapping, hidden cameras and electronic communication analysis. This means, usually under the control of

intelligence agencies, are now open for police control; there are though limitations to when they can be used:

- National independence, territory integrity and national defence;
- To prevent terrorism;
- To prevent immediate threats to public order;
- To prevent organized crime.

However, the limitations have been considered enough for justify such large powers from normal police authorities, human rights concern still apply. If we go more in depth in the analysis, we can see that the concerns can be justified. Under judicial authorization intelligence agencies (and when allowed, police forces) can collect communications, documents and information through telecom operators, including location, duration and time of those data transmission of citizens if so is deemed fundamental for matters of national and public security. In addition, in case of terrorism prevention, therefore relating to individuals previously marked as terrorists or potential terrorists, the control of personal information is even more invasive, as it allows the control and collection of real time data transmissions, including social media. Moreover, all data traffic can be analysed to identify potential terroristic threat, based on all-country, anonymous data sets. The new law also hinders the most common rights of inmates and prisoners, as prisoners can be searched and their cells tapped under the authorization of a prosecutor.

What is also particularly striking in this law provision is the possibility for the executive branch to skip judicial oversight: operations of this kind are authorized by the Prime Minister together with a non-binding opinion from the National Commission for Oversight of Intelligence Gathering Techniques (Commission National de contrôle des techniques de renseignement) (“CNCTR”) for a period of maximum four months and, in case of “absolute emergency” and for the purposes of terrorism prevention, national integrity and immediate threats prevention, The Prime Minister can act and provide the authorization without asking for the CNCTR opinion. Moreover, Bénédicte Dambrine notes that “Because these provisions are considered to be within the scope of “administrative police”, they do not require a prior authorization from a judicial judge” (Dambrine, 2015), thus creating de facto the possibility for the government and its

agencies to act completely outside of the judicial framework and judicial review for purposes of law enforcement. Data acquired this way are later to be destroyed and can be transferred to third agencies or international bodies only in case of previously signed agreements or under European law framework. Destruction must be carried on in:

- 30 days after collection for suspected individuals known or in the “inner circle” the person for whom the authorization has been carried on. –
- 120 days after the day it was collected inside of private spaces and vehicles wiretapping
- 4 years for traffic data from telecom operators and log data kept by hosting providers. In the case of encrypted data, the time limit starts at the moment the competent authority has completed the decryption.

The government also created, with governmental decrees of 2008, two databases named EDVIGE and CRISTINA: the first, which stands for “Exploitation documentaire et valorisation de l’information Générale” is used for collection of data of criminals and suspects, whereas CRISTINA (Centralisation du renseignement intérieur pour la sécurité du territoire et les intérêts nationaux) is created with the specific purpose of combating terrorism and is controlled by the French Counterterrorism agency, and not only stores data of possible terrorists, but can be also used for data mining and profile making. The creation of the CRISTINA database, allowed by an unpublished decree, has raised in the country several concerns for privacy that led to legal actions, as it does not store only data from convicted or suspected criminals, but also normal citizens. Said legal actions were later rejected by the State Council on the ground of public security.

French action in this respect however, has not stopped to internal action only. It is interesting to note that François Molins (Paris chief prosecutor), together with counterparts from Europe and United States, has written an article in the New York Times calling upon Apple and Google to provide, for justice and security purposes, “backdoors” to access the encryption systems created by the two informatic colossuses in the operating systems of their smartphones (which constitute the 96% of the operating systems of smartphone globally), which so far appear almost impossible to break through. This gives us an insight on how French, and in general, European and American law enforcers see

the issue of privacy related to security, in which privacy can be totally neglected when need of law enforcement come into place. Even if this can be justified on a legal basis and on the ground of public security, it proves strongly detrimental for privacy as a human right, as it would have governmental agencies intruding in the personal life of their citizens to a whole new level that never before the technological era could have been possible, as smartphones have become an essential part of everyday life for many people, that store personal information, global tracking position, preferences and personal communication.

DETENTION When it comes to fighting terrorism by the normal use of police forces, France usually takes a pre-emptive approach to the issue by using the ordinary judicial system, although terrorism investigations and eventual conviction can follow exceptional procedures. As we stated earlier, France is not new to terrorism, as it was used by Algerian insurgent groups, and since the 1980 all cases regarding the issue of terrorism have been centralized in Paris, with a special Central Counterterrorism Department of the Prosecution Service, or 14th section. The creation of this special section of normal judicial courts dates back 1986, date in which the basic counterterrorism law in France was established. For what concerns detention strictu sensu, police forces could detain suspected terrorist without particular other charges up to 96 hours, but the law, as we will analyse in detail, allows now longer timespan for pretrial detention, as part of the pre-emptive approach that French authorities have decided to undertake when fighting terrorism. The offence of terrorism is defined as “the participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles” in the Criminal Code (CC) 421-2-1. This felony was considered of minor entity, can lead to a maximum threshold of 10 years of imprisonment. The recent development of the French law regarding detention are though much more interesting.

A law change of 2006 (Law 2006-64) made the offence of terrorism a serious crime and worsened the possible consequences of conviction with a maximum imprisonment time of 20 years in cases in which the terrorist criminal association has the main goal to prepare attacks on life and physical integrity of citizens, abduction, detention and hijacking. Leadership of associations of this kind is punishable with a maximum detention

period of 30 years. This law, designed as a respond to the terrorist bombing of London underground in 2005, also allowed the police forces to detain without charges a suspected terrorist up to 120 hours without the possibility of seeing an attorney and also increased, under particular condition, six days of detention without charges. Terrorism charges and convictions have been worsened in response, firstly to 9/11, then to terrorist bombing in London and, more recently, after the attacks on Charlie Hebdo and the Bataclan club. Within the detention sector, the Criminal Code was partially changed to worsen charges for a list of offenses not per se of terroristic nature, but “where they are committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb the public order through intimidation or terror” charges for those crimes are subject to higher sentence: for example attack on life, which sets the maximum imprisonment time to 30 years, if done in connection with a terrorist intent can led to life imprisonment; in some special cases, a terrorist can be convicted to life imprisonment without any possibility to ask or hope for early release.

The state of emergency that the country is on, as said above, enhances even more the powers in the hand of police and security forces. Without warrants from a judge, police forces can raid houses and business facilities, collect personal data and place suspects under house arrest, and these new procedures, as could have been expected, are targeting mainly French Muslims living in the French metropolitan territory. While it is understandable that Muslims are mostly targeted, human rights associations are calling upon the government to terminate the state of emergency, that is creating several issues concerning human rights and equality. Human rights associations claim that the government is targeting minorities to make the majority feel safer; while this can be understandable in the light of the next presidential elections, the concerns for human rights protection still are cause for preoccupation. Moreover, usually house arrests and searches are conducted upon tenuous grounds. The situation has granted attention worldwide, up to the UN Human Rights Committee, that called for the end of the emergency laws, but Holland’s government not only is not willing to back down, it wants to enshrine the state of emergency in the French Constitution, which now in Article 16 only regulates the state of siege and the special powers grantable in the hand of the President of the Republic. If this process is carried on until the end, the President will be

able to activate the powers of the state of emergency with more ease and will be harder for human rights associations and for the judicial branch to mount legal challenges against results of the powers. French Prime Minister Manuel Valls has defended the state of emergency, claiming that said raids are not casually carried on nor justified on an ethnical or religious base, rather are carried on "objective suspicions," and that the measures should stay in place "until we can get rid of Daesh,". What is interesting to note in this respect is the fact that the laws have also enjoyed political and public support: far right parties were of course in favour, but similar support is enjoyed in centrist parties of the political spectrum, and the same can be said regarding the population, that is not only favouring such laws, but would also be favourable in extending the laws beyond the limits set today. This is understandable in the logic of "penal populism" that we were discussing above: the population want easy and hard solutions for issues of security, in which considerations for human rights and equality are not considered of outmost importance. The public prefers to consider criminals as a minority that, although of course not being favoured by the government, are not adequately punished or pursued; this makes useful for political entrepreneurs to act harsh on criminals while neglecting human rights concerns and still gain a political advantage out of it. This tendency can be particularly detrimental for the quality of democracy in modern states, as all the accomplishments of human rights of the last decades tend to disappears and to be hindered for political opportunism by political entrepreneurs using the majority's fears at the expense of the minority's rights.

FREEDOM OF MOVEMENT As for the above, the freedom of movement in France is conditioned by the state of emergency. Freedom of movement inside the French territory can be limited by the governmental power to establish curfew when deemed necessary and forbid public gathering, but what mostly concerns us is the fact the France is among those countries that have decided to suspend the Schengen Agreement, thus reintroducing frontier control to enter its territory. Although a temporary measure, we can see how the government, pushed by the fear of the population and the growing far-right Front National, is trying to limit as much as possible the freedom of movement, that has undeniably been used by terrorist to move effortlessly around Europe. The government, under the input of Minister of Interior Bernard Cazeneuve proposed in 2014 a bill, that

would have allowed the government the possibility to ban French nationals from leaving the country; this bill was intended to limit as much as possible the possibility for future terrorist to leave the country and return as foreign fighters. The issue per se is indeed important, but the Minister of the Interior could have banned people under bare suspicions of “planning to leave the country with the aim of participating in terrorist activities” and later creating a possible threat for public security upon returning in the country. The ban would have had the direct effect of withdrawing the passport of said person thus preventing him to leave the country. The bill was subjected to the judgement of the “Commission Nationale Consultative des Droits de l’Homme”, that rejected the bill, since the decision of whether or not withdrawn the passport of suspect individual was to be delivered under intelligence agency notes that could have not been challenged by the suspect due to their secrecy. The Commission in fact noted that such a strong limitation of the freedom of movement, enshrined not only in as a fundamental European Right, but also protected by Article 12 of the International Covenant on Civil and Political Rights, that states that everyone has the right to leave any country, including their own. Of course restrictions have to be permitted, and indeed the Covenant does, but they have to be provided by law and necessary for public health or security; in this case, the ground on which suspected individuals can be forbidden to leave the country seems to be, at best, vague. The risk for democracy if a bill like this is passed can be great, as there would be no possibility for the accused to counter the accusations on his account, as they would be covered by secrecy. Moreover, this approach, far from being pre-emptive, seems to provide a too harsh punishment if compared to internationally recognized human rights.

On a similar account, Holland has been recently pushing for a proposal that would allow the government to strip French nationals with double nationality of their French citizenship in the case that they are convicted under the ground of terrorism. This could configure a way in which the French government could decide to remove the right of free movement that is enshrined in the EU citizenship; even if each Member State has the right to decide autonomously on the way to grant citizenship (as Eu citizenship has been constructed as a subsidiary citizenship), this proposal could seriously hinder the human rights of those convicted.

2.2.4 Germany

Germany, as well as France, has already experienced terrorism before the new wave of Islamic terror, and its legislation on the matter dates back to the 1970s, when the left-wing terrorism of the RAF (Red Army Faction – Rote Armee Fraktion) was at the very peak of its influence. Due to the very protective nature of the German Basic Law when it comes to the protection of rights, the constitutionality of said norms was often challenged, with the Constitutional Court playing a fundamental role in the protection of rights, that many times stopped governmental action in provisions that limited too harsh limitations of liberty and personal freedom, especially in the field of privacy and data protection. Following the general European tendency of criminalizing terrorism within Criminal Codes, the German Criminal Code (Strafgesetzbuch) contains almost all the law provisions regarding terrorism in the Federal Republic. Some historical account is necessary in the analysis of the German democracy: we need to recall that the Basic Law, the Constitution of (first) West Germany and then of the reunited Republic, stems as a rejection of the Weimar Constitution that eventually led to the creation of the Third Reich, therefore it “was conscious about the importance to control state power and guarantee personal freedom” (Zoller, 2004). Personal freedoms and civil and human rights are deeply embedded in the Constitution and is difficult, if not impossible, to overcome them with normal law provisions. The case of the RAF proves this point, as the terrorist group wanted to push the state of to its limits, in way to prove that the rule of law will eventually show its real face as a new form of dictatorship, but this logic never “gained momentum” (Zoller, 2004), as the logic that the State could never be completely safe was widely accepted both by the government and the population. This balance between security and rights begun to shake during the 90s; in 1998 the Schröder government approved a law allowing eavesdropping on a wide basis to fight terrorism and organized crime. This development poses some questions on its reasons, especially if we consider of how the Eastern Germans were under the strict control of the STASI. However, this tendency towards securitization took another step forwards after the events of 9/11, especially when Germany was accused, as Belgium is accused today, to be a safe haven in which terrorist were able to move without any form of police control and that the attack on the Twin Towers was partly organized in Hamburg, with the government implementing Security

Package I and II, that together emended 19 statutes and six statutory orders. Critics and commenters at the time claimed that there was not enough time for parliamentary discussion or public debate on the matter, as the new type of terroristic threat, relaying not anymore on clear national ties but on an obscure international network, set security as the outmost priority for the government, rather than the protection of liberties, thus allowing harsher legislation. Moreover, before moving to the analysis of more recent legislation, it is important to note how Germany not only is restricted in its actions on the matter of terrorism and in general security by the Basic Law, but is also part of many international conventions that create a whole set of negative and positive obligations.

DATA PROTECTION Surveillance legislation is the one, under German jurisdiction, that can potentially affect the larger number of people, thus generating great concerns when it comes to privacy right, guaranteed not only by European legislation but also by international conventions that, as we stated above, limit the action of German lawmakers. Art. 8 of the European Convention guarantees the right to respect for private and family life, home and correspondence, and in Paragraph 2 are set the limitations and the extent to which the State can legitimately interfere in said right. The State, as clarified in the case *Klaus v Germany*, recognizes the need for a certain degree of control that can go beyond the boundaries set by the right “Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order to effectively counter such threats, to undertake secret surveillance of subversive elements operating within its jurisdiction”³, but we also need to underline that provisions under which such subversions of the right can be done have to be set by a legal instrument, have a legitimate aim for the well-being of the democratic society as a whole and has to abide to the principle of proportionality. When it comes to eavesdropping and surveillance, the Federal Republic stands at the same level of other European counterparts and sometimes does even more, as the Constitutional Court interpretation of international and European treaties kept in place satisfying safeguards: audio/video surveillance can begin only after a written order, stating all the reasons of necessity of such an intrusive act, and such orders have to be delivered to the

³ U.N. HRC, General Comment 16 8 (1988)

parliamentary supervisory body, thus safeguarding the inner balance of power of the Federal Republic.

In the 90s, special investigations techniques were introduced with the declared purpose to fight against organized crime (resulting applicable also to terrorism), like optical or acoustical observation in public places and private homes, the second requiring an amendment to art 12 of the Basic law, concerning the inviolability of the home. The Constitutional Court partially destroyed the legal apparatus by considering some provisions unconstitutional, especially regarding monitoring of telecommunication and audio surveillance in private properties. A more recent and as well important case for the development of data control regime in Germany is the one decided by the Düsseldorf's Higher Regional Court regarding the "Sauerland Group". Four persons committed to attacking, in 2010, US institutions in Germany before the pending decision in the German Parliament on the extent of the German intervention in Afghanistan with several barrels of hydrogen peroxide that could have, after due preparations, being exploited as explosive with the force of 410 kg of TNT. The suspects were caught in the process of explosive making, and eventually plead guilty in front of the Court, that imprisoned them for a period ranging from 12 to 5 years of detention. This case is important as it led to the creation of new offences, such as propaganda for terrorism and recruitment, preparation of serious offence against the state and establishing contacts for the preparation of the latter. Together with these offences, the Federal Office of Criminal Investigation was given new and stronger computer surveillance tools, including the possibility of lawfully hacking a suspects' personal computer through the use of infected cookies or Trojan horse viruses; also in this respect, the work of the Constitutional Court has proven essential in the protection of the rights enshrined in the Basic Law, as it declared that this kind of searches and controls were allowed only when the prosecutors or the security agency can prove a "concrete and imminent danger" for legally protected interests, meaning life, freedom, the foundations of the state itself or, more in general, of human existence. This definition is indeed a broad one, but at least gives a limitation to the power of police and security agencies in hacking a personal computer. A few years back, this would have constituted a minor offence to personal privacy right, as computers did not store in their databases so many personal information about the owner, but in present days, a limitation

to the possibility of such an high level of intrusiveness is not only more than welcome, but fundamental.

Following the US and their European counterparts, after 9/11 new provisions were introduced to respond to the new terroristic threat. The Federal Office of Criminal Investigations (Bundeskriminalamt), as well as secret service agencies have been given the possibility to monitor ID and Passports to a large extent, and the agencies are becoming essential policy making actors in this field, showing that counter-terrorism legislation, which was confined only into law enforcement and criminal law, is now spreading and adapting to a changing environment. This tendency that we found earlier when dealing with the European Union as a whole, can be identified also in the German case, as we have a general “levelling-down” of rights not only for criminal and convicts, but also towards the general public that these laws are meant to protect. We can also see that this trend is countered, as expected, only by national or regional courts, rather than international organizations that seem to hold small or inexistent power on agenda setting in this field.

The recent attacks in Berlin and the shootout in Munich, linked with the government response to them, shows one of the greatest issues with Germany fighting terrorism. The Merkel government, several times accused of increasing the terroristic threat with its policy of welcoming refugees, passed a law that will make video surveillance in public places much easier, but does not force the owners of such public premises to install CCTV cameras. This, like other measures increasing surveillance of migrants and increasing the level of audio and video data collection, mostly have legislative green light, but on the other hand are very likely to be blocked or countered by other power-holders in a country in which privacy is considered an essential issue. Here is the great flaw of Germany, that with its cumbersome past is still not ready to deliver strong powers of control to the central government, leaving in place the horizontal division of power that the division in Lander creates, thus making a centralized effort difficult if not useless. The strength of a strong vertical and horizontal division of powers in Germany proves the solidity of the Basic Law, that still guarantees a stricter protection of rights, both in writing and in its side effects. This is both a strength, when it comes to rights protection, or a flaw, when it comes to security. The country is meant to be highly

decentralized by its own constitutions, also when it comes to intelligence, police, and law enforcement “that was a “major handicap in the battle against modern terrorism” a senior western intelligence official said recently for the Financial Times (Chazan, 2016). The Federal Bundesamt für Verfassungsschutz (BfV), the central security body and the local equivalents Landesbehörde Verfassungsschutz (LfV) often have communication problems, especially when it comes to intelligence and data collection, as the legislative framework is confusing, with different privacy and data protection laws for each Lander, therefore electronic surveillance and intercepted materials that could be used for terrorism prevention can be a complicated issue. On the other hand, privacy and data protection is fundamentally well protect by the German legal framework, and the appearance of the terroristic threat has had very limited effects on the legal framework, especially thanks to the intervention of the Constitutional Court and the federal division of powers, with both the Karlsruhe Court and the Lander playing a fundamental role in the law-making process.

DETENTION The issue of federal division of power has of course consequences not only for issues of data protection, but does so also for law enforcement and police actions. The present government recognized such needs for improvement of coordination and strengthening of police forces, calling for an increased number of policemen and security forces on the ground, as well as a centralization of police forces. This change, that would be uneasy for any other country, is for obvious reasons, even more complex in Germany, as the Constitutional and state framework has been set after World War II as a way to prohibit in the future a strong and centralized action of the government towards the German population. As said above, this is positive while dealing with the defence of rights, but can be detrimental of police and security agencies’ efforts of combating terrorism. Regarding detention of terrorist, section 31 of the Introductory Act to the Judicature (Kontaktsperre) regulates incommunicado detention of terrorists suspects, and were established during the attacks and kidnappings led by RAF; accordingly, a terrorist, or suspect terrorist, can be detained without being able to speak with his/her lawyer in private for a maximum period of 30 days, a period that theoretically could be prolonged indefinitely, thus causing several critiques and complaints also in front of the European Commission of Human Rights. The provision is still valid, but we can see that in normal legal practice have been applied on a very limited number of cases

and not applied ever since. However, in 2006 a very similar provision has appeared, allowing this same procedure to a vast array of cases, ranging from terrorism to organized crime like mafia, thus critically enlarging the number of case in which a prisoner can be kept alone in isolation away from family and especially a lawyer, making him unable to prepare an adequate defence. Moreover, since Western legal systems rely on presumption of innocence, this system can be used to break the inmate, isolating him from everyone and (hopefully not) use this time completely alone to torture him. Oehmichen has observed that “intrusive laws are often easily adopted under "special" circumstances, but most difficultly abolished, and still rather likely to be extended. The example of the Kontaktsperre proves the best evidence for this thesis” (Oehmichen, 2008). It is important to consider this aspect when dealing with the work related to this research, as it would be easy to downgrade harsh provisions on detention or limitation of civil liberties as provisional laws or emergency laws, but those laws could either survive the emergency period or create a precedent, thus setting the stage for further legislation that can hinder the quality of our democracy in the next decades.

FREEDOM OF MOVEMENT Germany has always been among the staunchest supporters of freedom of movement in the EU area and of peoples in general, and has maintained this stance also during the last few years, despite the migration crisis and the mounting issue of terrorism. Mostly the new German legislation regarding freedom of movement applied to terrorist, suspect terrorist and especially foreign fighters, that have become an issue in the country in the last years. A new law, passed in June 2015, introduced new anti-terrorism norms, rendering a crime to travel abroad with the intention of receiving training to become a terrorist and created a regime for ID card and passport restrictions for the so-called “foreign fighters”, partially following and reproducing the “Foreign Terrorist Fighters” resolution of the UN Security Council of 2014. The number of those leaving Germany to join or be trained by the IS or other terrorist organizations and cells have risen, in 2015 only, of 20%, thus creating the need for the introduction of this new legislation in the national framework; a similar law was applied in 2014, as authorities could revoke passports and ID cards from terrorists supporting the IS, but this new law provision makes broader the possibility of acting in this regards. The 2015 law

changed section 89a of the German Criminal code, which created the offence of receiving or giving training with the purpose of a terrorism-related crime, broadening the scope of the law, as travelling outside Germany with the intent of receiving terrorist training is considered a criminal offence punishable with the same law instrument. Moreover, the law also changed the wording of section 89c, dealing with the crime of terrorism financing, and, by removing the wording “substantial assets”, implicitly allows the criminal court to punish a suspect foreign fighters not only under section 89a, but also under 89c, as not only he or she was going there to train, but also provided, with his presence on the territory controlled by a terrorist group, provided to the group a valuable asset, even if it is not of financial or material nature. In addition, this provision can be applied to all kinds of terrorism financing, not only those meant to prepare oneself for a serious attack against the state of the citizenry. Under the new legislation, ID cards and passports can be revoked in case the authorities deem the person to be a potential danger to a significant interest of the Federal Republic, and substituted with new, special ones, with the following wording on it: “not valid for travel outside of Germany”, thus making it impossible for suspects or condemned terrorists to leave the country, either in or outside the European Union. This provision, according to the German government, will allow not only an easier identification of suspected terrorist within the territory of Germany, but also will impede new potential foreign fighters to freely leave the country, get training in Syria or elsewhere, and return to Germany with the knowledge and the skills necessary to prepare and enact a terrorist attack, both in Germany or elsewhere in Europe, as the foreign fighter is not able anymore to use the freedom of movement granted under the European law framework. Of course some criticism were raised, many by opposition parties and legal practitioners: the new law could be unconstitutional, as the crime would be punished too far in advance of the actual criminal act or attempt, thus making it a punishment ex-ante; moreover, criminal attorneys point out the difficulty to prove the intent of receiving terrorist training so far in advance, where the act is so far from concretizing itself. The Constitutional Court did not pronounce itself on this particular case yet, but on the other hand the government claims that proofs of intentionality of said joining or training can be found easily, due to the eagerness the future terrorist usually show in demonstrating their support on social media and more in general on the internet,

and the police and security forces, as said above, have now all the instruments to control and check on the online status and activities of potential terrorists.

2.2.5 Belgium

The issue of terrorism in Belgium is relatively new compared to experience its larger neighbours, France and Germany, had in their history, and is the one that developed more recently, and the issue is debated now more than ever, due to the strong presence that Islamic terroristic cells have in the country, especially in the urban area of Brussels. The first account of terrorist cells in Belgium appear in the late 80s, and, even if some tools were created to tackle the issue, the authorities were unable to prevent both the radicalization problem among young citizens nor the upcoming attacks in Paris and in Brussels. The debate regarding the measures to adopt regarding terrorism has grown after the series of attacks that shook Europe in the last years, as the groups that organized and led the attacks on Paris had their base in the Muslim neighbourhood of Molenbeek and exploited the laxness and weakness of the Belgium police and security forces to move undisturbed around Europe. The failure of Belgian counterterrorism was clear in the eyes of the whole world, with Belgium becoming Europe's scapegoat regarding the issue of terrorism. Critiques were moved from all sides, trying to explain the reasons behind such a failure: some accounted it for the overall institutional complexity of the Belgian state, too divided to find a comprehensive and united approach to counterterrorism, others on governmental social policies that allowed political Islam to flourish without control or on the amateurish ability of the Belgian security services that allowed Brussels and Molenbeek to become the "jihadi hotbed" and terrorists' gun shop in Europe. For the purpose of this research, the case of Belgium is therefore of particular interest, as the country has faced only recently the issue of terrorism and has had not only internal, but also international pressure to modify its way of dealing with the problem. Belgium had to tackle the issue straight ahead (one day after the Brussels attack and only six after the attack in November in Paris) with an immediate response to try to calm down the national and international scepticism concerning their ability to protect and control its citizenry and, due to the freedom of movement allowed by the European framework, of the

European community. Belgian government has in 2015, approved, as a response to the terrorist attacks, two packages of reforms, with 30 legal changes, all of which interest this research directly, and that can be divided, following the division made by Seron and André in: changes of legal framework, in criminal policy, information gathering and infrastructures. Some of the changes listed in their work have already being passed, other are under parliamentary scrutiny and others are still at parliamentary commissions levels, but they are all relevant as they allow us to understand how the problem is being faced in the country in the recent years. Speaking of reforms that do not comply with the three categories that will be analysed below, some are anyway important to recall. First, a proposal has been made to expand the state of emergency to make it similar to the French model, to use it in extreme circumstances and for longer periods of time, with all the issues that we have discussed above when dealing with the French case. In addition, the government decided to invest 400 million euro for security and the fight against terrorism, therefore comprising also provisions regarding prevention of radicalization and fight of social segregation in the poorest areas of the country, that the most suffer from the phenomenon, together with the deployment of military personnel in the streets as an aid to law enforcement. Moreover, as a response to the criticism explained above of over-complicated relationship between different law enforcement agencies in the country, a new National Security Council has been established, in way to coordinate better the action of security services, and as a start for a structural reform of the intelligence structure, that undeniably needs a faster and more effective way to exchange information.

DATA PROTECTION Due the role that secret communication has had in the planning of the terrorist attacks both in Brussels and in Paris, there has been a strong commitment of the government towards the broadening of special investigative measures against terrorist, for one, wiretapping. Part of the new legislation that is still in need for approval depends on revisions of the Belgian penal code, as they regard the use of new technologies like voice recognition and wide spreading of both home and external tapping, that can be used to find and imprison those involved in terrorist activities or those connected to it, like arm trafficking, which is a growing issue in Belgium, as several illegal shipments of weapons, even assault rifles, have been intercepted, and probably many more have not. The link between criminal activities and terrorism is not new and

not unique of Belgium, rather is a widespread phenomenon, but in Belgium this seems to have grown exponentially, and the nexus is getting stronger with every passing day. The use of said new technologies and techniques will allow police forces to find and stop not only terrorist cells but also criminal activities connected to them, in way to disrupt in one hit not only their ability to hurt, but also their means of sustainment. Following the general European approach that we have explored above, the Belgian government is following on the line of treating terrorism as a criminal offence under normal criminal law, and therefore the pursuit of terrorist will be done using all the devices the police might use when going after criminals.

This will be done together with a reinforcement of the network of cameras around the country, especially in sensitive areas; this issue in particular has raised some concern, as it could be a first step of an overall control of police forces of the life moments of all the citizenry, and we will have to wait on how the public reacts to such a measure. We need to recall that the United Kingdom is one of the first country in the world when it comes to video surveillance in sensitive areas and the program has been broadened more and more, and the citizenry seems to be on one hand well aware of the fact that they are strongly controlled, but on the other, they have accepted such a violation of their privacy as a mean to improve security. When we are dealing more in detail regarding data transfer and protection, the country is undergoing an optimisation of information exchange throughout the country for the sake of its security services. The aforementioned creation of the National Security Council is indeed an instrument that works this way, and can be used as a common platform for the different agencies and local police to confront on the issue of terrorism, that can foster coordination and assess the priorities of the moment. Under the National Security Council works the Coordination Unit for Threat Assessment (CUTA); CUTA, apart from collecting and compiling data forms regarding radicalization and terrorism coming from different agencies, has created a database, operating since September 2016, that collects specifically information regarding foreign fighters.

DETENTION The Belgian approach of counterterrorism moves along two main trails, embraced in general terms by all the European countries: prevention and enforcement. The legal changes that Belgium decided to undergo after the terroristic attacks in Brussels however, clearly followed the latter approach rather than the second,

with all the consequences that this might have in terms of social segregation, prison radicalization, and in general, distrust of the police forces. The one measure that mostly interest us is still under scrutiny of the Belgian Parliament as it will need a reform not only of the penal code but of the Constitution itself, something that, in a country with such strong cleavages, could be a difficult task, even if the public opinion seems to favour it: the government proposed in November 2015 to broad administrative detention for acts of terrorism from 24 hours to 72, linked with the abolition of the exception forbidding security forces to do house searches (in case of suspected terrorist activities) between 9 pm and 5 am, one of the provisions that were criticized the most by the international media and other European government. Indeed, these limitations hindered the capacity of security forces to be effective on the territory while doing searches, as they had to stop during the night which is, according to almost all European senior officers, the moment of the day in which a house search can be most effective. However, all the previous reforms are still under scrutiny, while some have been fully implemented, and the main target have been the “returnees”, namely foreign fighters. This specific focus can be understood, since Belgium has been the greatest “exporter” of foreign fighters, around 500, and the number is most likely to rise in the next years, as while the Islamic State is losing ground in Syria and Iraq, is trying to strengthen its presence in Europe in way to continue fighting. Belgian citizens that go abroad to fight alongside terrorist organizations (at present, mostly the Islamic state) were before just registered and signalled to the security forces; this kind of intervention is common and widespread in all European legal frameworks on the matter, but Belgium, due to the magnitude of this issue in the past years has decided to go well beyond this, as foreign fighters, as of the moment they set foot in Belgian territory, can be systematically imprisoned. Travelling for the purpose of fighting alongside terrorist was a criminal offence already in 2013, but this provision strongly harshened the condition of said “returnees”. This measure applied to all accused of going abroad with the purpose of fighting for terrorist organization, while others, considered generically as “threats” but not directly related to terrorist fight, can be put under strict electronic surveillance. Leaving aside the issue of foreign fighters, the problem posed by radicalization is under the radar of the government, especially during detention period. In this respect, the prison system has been changed, as detainees accused of spreading radical Islam can be put in isolation in way to disallow them from spreading

such ideas in a segment of the Belgian jail population that, due to its particular condition, can be more prone to be targeted of such ideas. It has been estimated by the Belgium's

State Security Services that almost 5% of the prisoners held at present day in Belgian jails pose, or will pose, a radicalization threat in 2017. Moreover, the so called "Plan Canal" has been intended, by the Ministry of Home Affairs, to extend the level of control and monitoring of specific municipalities with a specific attention to mosques and imams that are perceived to be vulnerable to the phenomenon of radicalization, and dangerous imams can be imprisoned or expelled from the country if they are found guilty of preaching hate and radicalized ideas, following an European approach of fighting the root causes of terrorism, by means of closing websites, spreading or delivery of IS propaganda material and freezing assets and accounts related to terroristic activities (in this last respect, following the international approach on the matter, both at European and UN level).

FREEDOM OF MOVEMENT The issue of freedom of movement is strictly connected with the issue of foreign fighter described above, as they pose a continues threat to the country. A 2015 legislation prohibited Belgians to travel abroad to join militant groups, and the penal code has been reformed to punish as a crime travelling abroad for terrorist purposes. In addition, Belgium has, following the example of France, simplified and broadened the procedures and possibility for the security agencies to withdrawn passports or ID cards in way to disallow travel of suspected terrorist outside of the national territory and eventually come back as trained terrorism. In addition, in the case that a convicted terrorist has a double citizenship, which is common for second generation migrants, it is possible for the court to strip their Belgian citizenship, therefore disallowing free entering in the country as well as in the whole EU area. At the beginning of 2017, the government also managed to pass a bill that will allow the deportation of legal residents if there are suspect of partaking into terrorist activities, and banning them from re-entering the country. In an effort to identify potential terrorist in Belgian soil, the government followed the European and American framework and begun the implementation of PNR (Passenger Name Record), and the data gathered with this method will be used to eventually mark "red flag" targets that might enter the country. The data coming from PNR data will be passed on to the CUTA database that will

therefore allow for the identification and tracking of suspects movement not only in the country but, due to the new connections between databases that we discussed above for the other European countries (and the US), posing reasons to worry about, as governmental agencies will be able to track down, potentially, not only dangerous targets, but in general, all people travelling on an aircraft.

Chapter III

Now that the legal framework has been controlled and check, we can move on to the analysis of said changes in the quality of democracy of the countries selected. As said in the beginning, the countries will be compared among themselves and through time, to check if time can be considered to be a variable or not; on this account, we will not consider law provisions prior to 9/11, unless they have been revisited or changed during the last years for the scope of combating terrorism. In this chapter we will use the analytic tools described in the first chapter to check how the law provisions laid down in the second one could have affected (if they had) the quality of democracy. Each country will be analysed according to the three subgroups of laws, detention, data protection and freedom of movement, and then the law provisions will be scanned using the four qualities of democracy described in the first chapter, namely rule of law, liberty, equality and responsiveness. For the sake of simplicity, we will use a numerical scale to describe how the country's legal landscape changes were, or were not important in determining the level of the qualities, with 6 degrees of change:

- 0 : Completely unchanged, the new legal provisions did not modify the quality substantially.
- 1 : Minimal change, the quality has been partially hindered but does not raise concerns for the near future.
- 2 : Minimal change, the evolution of the legal framework, following a similar direction, can leave ground for concern.
- 3 : Medium worsening of the quality, the legal provisions enacted by the government pose a threat to the quality of democracy.
- 4 : Substantial worsening of the quality, the legal provision directly threaten constitutionally defended values.
- 5 : High degree of worsening, the acts of the government go beyond the normally accepted rules and severely threaten the quality of democracy.

While of course is hopeful that level 5 is not to appear, for the sake of democratic survival as a whole, but we cannot relinquish the possibility straight head; once this process of classification is terminated and each country has been given an overall score, we will

compare the results among countries and try to understand the reasons lying beyond this differences, and how they come into existence. This will be particularly interesting for the countries of the EU, since they have to follow a minimal level of common framework, but the comparison with the United States offers grounds for analysis as well, as it is interesting to see how the country that more than anyone else publicized and politized the “war on terror” and among the staunchest supporters of human rights and freedom all over the world is actually doing when it comes to its internal quality of democracy. Once the grading will be completed, there will be enough data to make a ranking, like the one of Freedom House, but much less ambitious, and see which one among the countries selected did better and which one did worse, and analysing the underlying reasons can be a useful tool to understand why and how some countries resisted better than others to the temptation of applying harsher legislation and rights limitations when combating terrorism.

Before beginning it is important to go more in depth with a particular trend that developed in the past years and we have discussed briefly at the beginning of the previous chapter, namely “penal populism”. It is important to understand this trend as it may be one of the underlying reasons why, after the end of the twentieth century, in which the fight for rights was a constant part of the political agenda, governments have had relatively ease in passing laws curtailing rights. Of course, one of the reasons for this that we must consider is the fear and the panic that the constant eventuality of a terrorist attack strikes in the hearths of the population; as a fundamental part of the terroristic act, fear is the broader result that it can achieve, and surely the one that can hit a large part of the population, rather than the attack itself, whose numbers, so far, have been limited. But fear cannot be the only way to explain this trend, there has to be something else lying underneath, a more complex process that is in need of investigation. John Pratt, in his recent work “Penal Populism” (2007), uses this phrase as an opening of his book:

‘Democracy which began by liberating men politically has developed a dangerous tendency to enslave him through the tyranny of majorities and the deadly power of their opinion.’ – Ludwig Lewisohn, *The Modern Drama* (1915), p. 17

This analysis, even if given in 1915, can be a useful beginning for our line of reasoning. The modern society is losing trust on the elites that constituted and governed the State in the last century, the public does not want anymore to be kept on the side when political decisions happen, want to be a part of the process, thus posing a serious issue for the modern democracy, especially for representative democracy, as the call for referenda and direct intervention of citizens has become a leitmotiv that we can find in many of the modern states. This lack of trust for elites, establishment, government and civil servants does not reflect only in the political arena, but it goes deeper. Following John Pratt's wording, we can find two examples that allow us to understand what the consequences for this lower levels of trust might have: "First, with developments in Britain as an exemplar, it can transform the relationship between the government and its civil service, fundamentally weakening the ability of the criminal justice authorities to keep penal policy securely within its own grasp, thereby leaving it open to populist influences. Second, with developments in the United States as an exemplar, it can weaken the authority of criminal justice officials [...] thereby opening up the judicial process to more political and public influences and expectations." (Pratt, 2007). This twofold trend is particularly important for the matter we are discussing, as we have on one side a civil service that cannot be anymore completely independent from the wills of the public, on the other criminal justice officials that, due to the mediatisation of crime, have to "answer" in their action not only to the law but also to the public expectations. This trend therefore allows politicians and in general, public entrepreneurs, to ride the populist tide not only in the political field, but also in the judicial arena, voicing what the people want: to feel safe and protected, no matter what the cost might be, therefore calling for harsher punishment for those breaking the law. This kind of populism, that provides easy solution to complex issues, just want to gain support by giving the public what they need, without thinking about the consequences it might have. Also the judicial itself is in a way following this trend: as they do not enjoy the trust they used to have before, due to the fact of being "establishment", they want to look active and immediately responding to those highly mediatised cases in way to keep the people's trust. The guardians of the laws and the Constitution do not only need to respond to the laws of the country, as they can be challenged by anyone with enough charisma and public support and only a limited knowledge of the law or the legislative process. The situation can get even worst in times

of economic crisis like the ones we are witnessing now, as also rehabilitating inmates can become “waste of taxpayers’ money” towards those that have not contributed to the societal life, and this trend has been registered particularly in the United States; curtailing of rights to those who did harm to the society is acceptable, as they have not complied on how the society wants them to be. The new trend seems to be not that the punishment should fit to the offender, but to the offend itself, thus leading no space for consideration of human rights and their protection. This “lack of compassion”, if we can define it as such, has been coupled by a steep decline of religious authority as well, but the correlation of the two aspects will not be analysed in detail here, as it is of sociological nature.

As the rise nationalist and right wing movements and parties in Europe and in the US demonstrates, this trend is not to be taken lightly, on the contrary, it needs attention. The tendency of making the exceptional normal in penal grounds has been noted in many countries, and along them there are the countries that we have analysed in the previous chapter, therefore making this issue of outmost importance for this research. There seems to be a shift of perception from the prisoner as a human being and a citizen with rights and dignity, to the conception of the wrongdoers as dangerous and deviant, and that should be punished as much harshly as possible in way to protect the rest of the “civil” society. if this tendency has become true for normal criminal offenders, this process of course exists and can be taken at the extreme consequences when dealing with terrorist, the new “black man” of world politics. One of the key features that allows terrorist to act as they do, killing innocents and scare thousands, is the fact that they completely dehumanize their target; in the words of Igor Primoratz “Terrorists who justify their actions in utilitarian terms see themselves as members of such an [moral] elite, and relegate us to the status of lesser beings, to whom they need not, and indeed cannot, try to explain and justify their actions” (Primoratz, 1997). If the trend described above keeps moving forwards and worsening a we have witnessed in the last years, there would be little ground to distinguish how the Free World considers its criminals, terrorist included, and how terrorists treat the citizens of other countries. As said at the very beginning of this work, we are addressing how far security and securitization of society can move forward until the very fundamental values of democracy are shaken, thus making it only a procedural regime with no substance to sustain it, and it's my personal belief that how

we treat those that we consider our enemies is essential to understand up to which point we can call ourselves democratic and different from those who are not.

After having dealt with this issue of primary importance we can move our analysis, the core of this research, to find out if the trend we have discussed above is concretely going in the direction we fear or otherwise. We will begin by analysing the treatment of prisoners detained for terrorism and incommunicado detention, that deprive the suspected or convicted terrorist of the main liberty on which all the others depend, freedom, then moving to data protection and freedom of movement and see how they were affected. Each country and each provision will be analysed bearing in mind the relation between the freedom under scrutiny and the four qualities of democracy described in the first chapter, and then the overall country will receive a singular grading. Afterwards, comparison based on numerical exemplification can begin. As for the previous chapters, we will begin the analysis with the global leader of the “war on terror”, the United States of America, and then move on with the states part of the European Union.

3.1 Detention

3.1.1 Level of Subversion – USA

One of the main issues when dealing with how the US relates to the issue of war on terror can be found already in the definition given in Title 18 of the United States Criminal Code as it grants the possibility for US security services to act, when deemed necessary, beyond national borders and in the international arena. This provision, that would be irrelevant when dealing with a small country, must be considered as we are dealing with a major superpower. The US tends to have an internationalist approach in matters of national security, especially due to the major interests it holds abroad. As we have analysed in the previous chapter, what raises more than one eyebrow when it comes to the issue of detention, and especially pre-trial detention, is the case of Guantanamo Bay. As of today, the number of prisoners held in the Cuban facility has decreased steeply

to 41 inmates, but during the first years following the war on terror it was consistently higher, with more than 700 inmates. What is striking and interesting for our analysis is the fact that most of them, if not all, were detained not under a regular legal procedure, comprised of *Miranda* rights, communication with a legal attorney, or a trial. The whole process was held together by the AMF (Authorization of Armed Force), a provision that is used during time of war by the President, that strongly takes from its role as Commander-in-Chief. Such a provision gives the President the power to act as if the country is in a state of de iure conflict, and that is why the reading that needed to be understood by the American public was that the United States were at war, and at war not with another sovereign state, but with terror. The issue, especially when dealing with rule of law, is two-folded: first, democracies, when entering a state of war, usually tend to provide all the power needed to the executive branch, as is the one that directly controls the Army and is the one branch that is able to take decisions faster and with more effectiveness, and this is specifically true for the monocratic power of the President; second, in a state of war, or declared so, the checks and balances that are fundamental for democratic survival are, momentarily, cast aside. The previous issues would not raise ground for concern if the war is one or two years long, but it does when the war lasts for years, and we could agree on the fact that the war on terror lasted for far longer than that. This situation allowed the government to act freely, and the cases exposed in chapter II do allow us to deal with the fact that the US government, in the years that immediately followed 9/11, acted as it was at war, with all the connected issues related to human rights. As analysed by Morlino, when rule of law is subject to subversion, law is used either as a: political weapon or a set of rules to circumvent. In the case of the US we could claim that both happened, the President based his re-election campaign on his successes in the war on terror, and used its power as President and Commander-in-Chief to circumvent for as long as possible the limitations posed on his office.

However, after the emotional response of the American population after the tragic events of 9/11 dissipated, a more serious discussion on several levels was initiated in the United States. The timing of this response from other powers can be attributed to the issue of penal populism that we were described early on: immediately after the attack, and in the years immediately following it, America was scared. The attack constituted the first

real attempt of attacking the US soil in more than a century, something that no one was prepared for, and the reaction of the general public wanted those you perpetrated such a dreadful act had to be punished, and the consequences were set aside. Journalists, politicians and maybe judges, as part of the establishment and with their role and skill already into question, had to stick to the public opinion feeling, at least at the very beginning. Only when the dust settled they were able to question the responsibilities and the rightfulness of government's acts, and we can clearly see the difference and the division that were present not only in the American society, but also at the highest levels of the judicial branch, the Supreme Court. The cases presented in Chapter II show this shift of attitude: in *Hamdi v Rumsfeld* the detainee was not given his basic rights as he was, under the authority of the AMF, declared to be an enemy combatant, while in *Rasul v Bush*, the custody of the detainee (two years without any actual charge) was judged unconstitutional. In the case of the US the role of the Supreme Court in deciding on the matter and put under scrutiny the decisions of the government cannot be denied, neither can be the pressure exerted by the press and interest groups on the ending of the inhuman situation of Guantanamo Bay detainees, allowing us to find a positive outlook on the status of American counterpowers. Even if the system survived due to the work of the judiciary branch, and a change in the leadership in the White House, grounds for concern when it comes to the other qualities under analysis must be considered.

Freedom as well must be put into question, as even US citizens can be imprisoned without having to be charged of specific accusation, without a judicial way of having the case examined even for years. This poses undoubtedly an issue when dealing the liberty

George W. Bush's Job Approval Ratings Trend

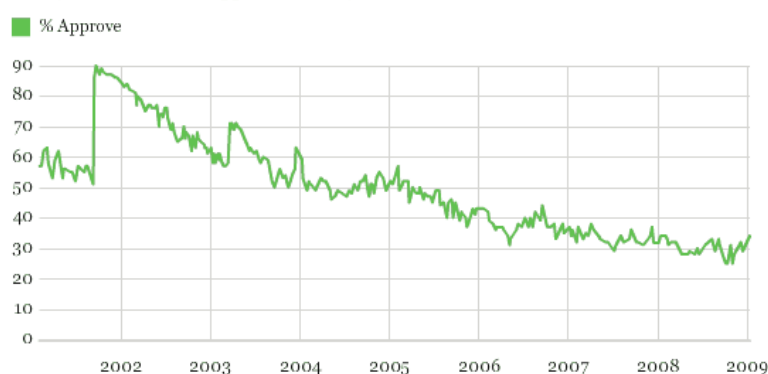


Figure 2 George W. Bush Approval Rating / Source: Gallup Group

quality, that clearly is challenged; during a moment in which AMF is working and applicable, jurisprudence gives the President the power to decide who is and who is not an enemy combatant, thus providing him with

the ability, in theory, to declare anyone to be an EC, and giving the possibility to imprison anyone, even for a long period of time, without judicial oversight. Nothing as such has ever been done by the American administration, but, since the US is a common law system, when the grounds to establish a precedent hold, there could be a way to circumvent the law. For what concerns the other two qualities, equality in this respect does not look to be particularly under pressure, while another discourse can be said about responsiveness, and for measure it we will use, with due caution, the level of appreciation of the President. For the years that interest us the most while dealing with the US, the Bush presidency, we can see a spike at 90% of preference in the immediate aftermath of the attack, but later the level of approval kept a downwards trend. What can we get from this trend? The immediate response, a strong response, was clearly appreciated by a clear majority of the American population, but then the issue related with human rights and their protection could have been part of the progressive decline. We can use this data until 2007, when the financial crisis hit the US, as the judgement of Bush's administration was likely biased by perception regarding the economic situation.

In conclusion, we can consider that the provisions applied in the United States regarding detention have had two main effects regarding democratic quality: the subversion of rule of law is high, but countered by the later intervention of the Supreme Court, that re-established a degree of judicial control over enemy combatants' detention; liberty as well has been partially affected, but later development would be needed to speak about proper quality subversion, same goes for responsiveness, but even at a lower level; conversely, equality was not worsened.

Level of Subversion - Detention – United States of America

Rule of Law	Liberty	Equality	Responsiveness	Aggregate
3	2	0	1	1,5

3.1.2 Level of Subversion – France

We have seen in the previous chapter related to France that one of the most striking features of how France responded to terrorism is the one year long state of emergency the country is in after the series of attacks that shook the country. Although the state of emergency, for its specific design, is meant to subvert partially some main liberties and rights, to consider it a subversion of rule of law would be incorrect, as President Holland relied on the Constitution of the Fifth Republic and the Parliament to prolong the state of emergency for more than 12 days. Even if this can be considered similar to the AMF that Congress approved for George W. Bush, this authorization does not go so far that the President can be deemed fully responsible for decisions regarding who is and who is not an enemy combatant. That power moves the constitutional authority of the US President in the area of *ius in bello*, while the powers granted to the French President and the Cabinet do not have such a broad and strong extension. The French President is undeniably marked a monocratic leadership, but the degree of action allowed to him are much lower than the ones given to the US President in time of war. The law changes in the ground of detention in France however provide good discussion points.

Law 2006-64 concretely empowered security forces and police in the fight against the terroristic threat. First, the maximum threshold for imprisonment regarding terrorism-related crimes has been strongly increased: for the felony of terroristic association has been doubled and raised to a maximum of 20 years, and the leadership of said association from 15 to 30; terrorism can also be used as an aggravating condition for other crimes, like attack on life that, linked with terrorism, can move the maximum imprisonment from 30 years to life. Moreover, with the raise of incommunicado detention from 96 to 120 hours, and, in special circumstance, to 6 days, can be considered as a strong position from the French government against terrorism, but even in this case, speaking of quality subversion regarding rule of law would be incorrect, as the civil order has been preserved, judges still hold a control over the punishment of the crime of terrorism.

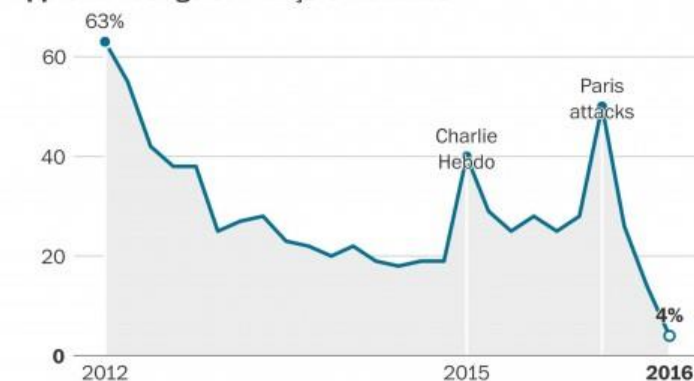
However, what is more interesting to analyse regarding France is related not to the state of emergency per se, but on the modality the provisions are put in place do raise

ground for concern. Police and security forces (in this specific case, the Prefects) are given the power to do house search and house arrests without judicial mandate, as well as search on business for data collection, on grounds much more vague than the ones used for criminal law. As all of the above are included in the powers laying on the Ministry of Interior during the time of emergency, the situation of the French Muslim minority has gotten much worse, to the point it got international attention and, for the purpose of our research, does give the chance to discuss a subversion of equality. A study published by Amnesty USA on the condition of French Muslim in 2016 provides some example of police intervention, searches and raids and, with the sole exception of a group of environmental extremist group and few, the searches were mainly directed to Muslim homes, business, mosques or Muslim related premises. Again here, rule of law cannot be put into question as police forces were only using powers granted them by the law, however the issue the study by Amnesty shows is about equality and proportionality of the actions taken into consideration, as the information given to the searched were minimum, hearings were held but with very low chance of success and severe damages were often caused in premises like restaurants and religious places. The study, for what concerns our research, concludes as follows:

“Some emergency measures may discriminate against specific groups, especially Muslims, on grounds of their religion or belief. In particular, in some cases Muslims may have been targeted because of their religious practice, considered to be “radical”, by authorities, without substantiating why they constituted a threat for public order or security. Similarly mosques have been subjected to searches, or in a few cases shut down, because of their alleged “radical” affiliation, without clear elements pointing to the commission of criminal acts of any of the individuals who ran them.” (Amnesty, 2016).

We can therefore state that there has been some high level of inequality in how this provisions were applied, up to the point we could call for cases of discrimination. On the ground of liberty too there are some concern, as those searches were conducted without caring for the personal dignity of those involved, with police forces cuffing parents in front of their kids, restaurant raids during lunch or dinner time, and so on. Yet, political rights were guaranteed, except for some parts of freedom of speech regarding

Approval ratings of François Hollande



Source: Ifop/ TNS
THE WASHINGTON POST

Figure 3 Approval ratings of Holland / Source Ifop/TNS

manifestations on public premises, carried on however only as a way to avoid large gathering of people and the inherent danger. As for responsiveness, the French population does seem to have appreciated President Hollande actions in time of crisis, as we can see from the

spikes corresponding to the attack of Charlie Hebdo and the Paris attack, therefore I would exclude the relationship between terrorism and responsiveness for the case of France. Even if Hollande's approval got at 4%, his popularity rose during crisis, and the dire steep and be attributed to different causes that do not concern this study.

Level of Subversion – Detention – France

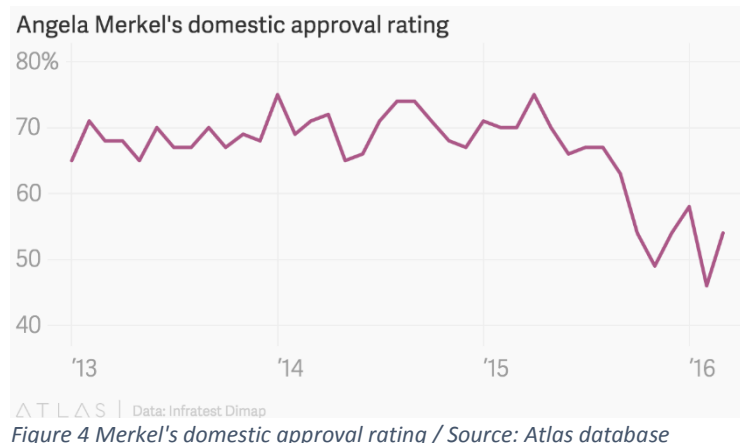
Rule of Law	Liberty	Equality	Responsiveness	Aggregate
0	1	4	0	1,25

3.1.3 Level of Subversion - Germany

Insofar, the Federal Republic of Germany seems to be the one that, among the European States, answered better to the issue of terrorism, especially when it comes to detention. The laws regarding terrorism were create and included in the criminal Code during the period of RAF's maximal activity, have remained substantially unchanged. On

the field of detention and direct law enforcement, Germany preferred to continue with the existing rules rather than approving new ones. However, one provision that we analysed in the previous chapter, Kontaktsperre, can provide some ground for discussion: approved during the early years of the RAF, this provision allows police forces to detain an individual for a period up to 30 days, in isolation and without the possibility of speaking to a lawyer or family; in addition, this period can be enlarged indefinitely if some conditions apply. Regularly this provision would not be included in the scope of our research, as we are trying to assume a degree of change, but this one is somewhat an exception. There have not been modifications to this law up to now, nor they are planned in the recent future, but this emergency provision, that was left on the shelf for years unused, has been not only coming back, but has been broadened. This was done with a law that, with the scope of rearranging and reorganizing for the sake of simplicity the German law, made this special provision possible for a wider range of situation, from terrorism to organized crime. While the rationale behind it is understandable, as such a treatment could break the morale of the criminal and force him to confess, on the ground of human rights cannot be easily accepted. The provision de facto could allow for long periods of incommunicado detention. It is however important to remark that the said provision has not been used yet, but grounds for concern do exist, especially on the grounds of liberty and personal dignity.

The quality subversion in the case of Germany appears anyway to be rather modest. Rule of law is still upheld by all branches of government, and the work of the Constitutional Court continues keeping in check the activities of all the government. In this respect, the Basic Law seems to provide a strong and highly protected legal



framework, disallowing by its nature and construction, excessive governmental powers. Unlike France, there are also no grounds for concern in equality and feelings of racism and islamophobia are still very

limited; protests and manifestations against the “Islamisation of Germany” have happened in the last years, but remains an isolated phenomenon and not too big in empirical numbers. As for responsiveness, the graph here shows a general appreciation of Angela Merkel and the work of her government in the last year, with a steep decrease to be signalled after her decision of opening borders to Syrian refugees, that alienated parts of her electorate, but still she appears to be a strong and trustworthy leader in the eyes of the German population.

Level of Subversion – Detention – Germany

Rule of Law	Liberty	Equality	Responsiveness	Aggregate
0	2	0	0	0,5

3.1.4 Level of Subversion – Belgium

At first sight, the case of Belgium is clearly interesting for our purpose, as, being relatively new to the issue of terrorism, or at least of terrorism at such an high and dangerous level, had to tackle the problem swiftly and strongly to reassure, first, a scared population, second, other European government that were harshly criticizing Belgium for the laxness of their counterterrorism effort. While not neglecting prevention against radicalization, the new legislation focused on law enforcement to tackle criticism from the inside and the outside. The government had to acknowledge a clear lack of control over some urban areas, in which police forces dared not to set foot, therefore leaving ground for the growth of a network between terrorist cells and criminal groups, sometimes also strongly linked together, as criminal activity can serve as a way to provide for funds needed for terroristic activities. In this respect it is fair to say that the laxness, or unpreparedness, of police forces and security agency poses a serious threat to the ability of the government to rule over certain areas, indirectly favouring illegality and threats to the civil order and individual security, therefore we can very well argue for a worsening of the rule of law quality in the country.

Liberty, especially for Muslims leaving in the country, is also on the hedge; among the legislative reforms proposed by the government, there is a raise of administrative detention from 24 to 72 hours that, while not being dangerous per se, as is lower than in many other countries, proves a clear worsening of the previous condition that is related to terrorism, and the same can be said about the ending of the limitation on night house searches. Similar concerns for equality may apply when we start dealing with the condition in prisons, in which inmates preaching Islam can be put into isolation; in addition, dangerous imams can be expelled or put into jail or house arrest for inciting the population towards terrorism. Similar limitation to freedom of speech, even if justified as a mean of prevention, are an absolute novelty in the Belgian panorama, which is understandable due to the several cleavages the country is divided by. In the eyes of the Belgian population the government is doing a good job, as we can see from a steep increase in the approval rating of Charles Michel, the Belgian Prime Minister, who is appreciated by the 71% of the Belgian population, an historical result in such a divided country, so we can claim that there are no grounds to discuss of a worsening of responsiveness, on the contrary, the governmental action has been approved by a clear majority of the population.

Level of Subversion – Detention – Belgium

Rule of Law	Liberty	Equality	Responsiveness	Aggregate
2	3	3	0	2

3.1.5 Level of Subversion – European Union

We remarked already in the previous chapter how the European Union still does not have any law enforcement power, not the capacity of detain citizens and individuals directly, as it must always rely on national police force to do so. However, it is important not to exclude the Union from this kind of analysis, as it does provide a framework of rights and duties on this field that must be considered, therefore, if the analysis proves some level of subversion related to the EU, such subversion will be added to the ones of the EU member states subject to our analysis. The only development at European level on the field of detention so far has been the institutionalization of the European Arrest

Warrant, that made extradition between EU countries much easier than before. Even if designed to counter terrorism, it has been used mainly for minor offences. Due to the impossibility of refusing extradition for other member states, this tool can be dangerous for personal liberty, as individuals can be extradited and be taken away from their homes for long periods of time while they wait for trial in a foreign court.

For what concerns the other qualities under scrutiny, the European Legal framework on detention, as it could be expected, has a minimum impact, as nor rule of law, nor equality nor responsiveness, have been hindered. For what concerns the latter, the use of levels of confidence of the EU would be methodologically biased: the European citizenry relies on their country's government to protect them from terrorism, not on European institutions.

Level of Subversion – Detention – European Union

Rule of Law	Liberty	Equality	Responsiveness	Average
0	1	0	0	0,25

3.1.6 Subversion caused by Detention provisions – General Assessment

	Rule of Law	Liberty	Equality	Responsiveness	Average	Final
United States	3	2	0	1	1,50	1,50
France	0	1	4	0	1,25	1,50
Germany	0	2	0	0	0,50	0,75
Belgium	2	3	3	0	2,00	2,25

3.2 Data Protection

3.2.1 Level of Subversion – United States

Many important changes in the legal framework regarding data protection have taken place after the terroristic attack of 9/11, pushed by the need to individuate and

terminate terroristic activities not only on the ground but also in the cyberspace, that, as many analysts now affirm, is most likely to become one of the future battlegrounds, and by its own nature, the most difficult to control and keep under check and scrutiny. The fundamental importance of intelligence and information gathering in the “war on terror” was acknowledged, but more importantly, it was acknowledged the need for the different parts of the US defence and security agencies, to coordinate their effort, enhancing information sharing. The trend that seems to appear in this respect would show that national security in most of the time can easily trump privacy right, even if it is enshrined in the Constitution, specifically in the Fourth Amendment.

For terrorist investigations, federal agencies can check on business records, metadata and collect any type of information collected to an investigation related to national security, a clear sign that privacy right is easily dismissed for the sake of national security. However, it is important to recall that this type of investigations still need judicial control *ex ante* to be carried on, except for emergency powers in the hand of the Attorney General. As recalled in the previous chapter, the rights of non-American citizens are the ones that are more threatened by this provisions. The question that we need to address is how and if privacy right can coexist with the overreaching abilities of governments to enter and control such an vast amount of data, data that keep growing every day as the world population gets more and more connected through internet. The problem is even more felt in the United States, especially after the scandal brought on by the former NSA agent Edward Snowden, that showed how the NSA was able not only to intercept and retrieve data globally, but also could enter American citizen’s computers using “backdoors” present both in hardware and software. Differently from the cases related to detention, the reaction to said revelations was felt far and wide, worsening not only the political status of the US government at home but also abroad. Global surveillance plans have been put into action in the United States since 1940, but what is striking about this last one is the extent to which the government could intrude in the personal life of so many individuals, regardless of their citizenship. Not only in the legislative branch was concerned about the matter, also branches of the Executive believed that the program was violating not only the constitution, but also the PATRIOT

Act from which it stemmed. In a report of the Privacy and Civil Liberties Oversight Board of January 2014 we read that:

The Section 215 bulk telephone records program lacks a viable legal foundation under Section 215 [of the Patriot Act], implicates constitutional concerns under the First and Fourth Amendments, raises serious threats to privacy and civil liberties as a policy matter, and has shown only limited value. As a result, the Board recommends that the government end the program.⁴

The program eventually was not stopped immediately by the government, and a second report in June of the same year states that certain elements of the Act were “close to the line” of unconstitutionality. Moreover, it is important to recall that the Washington post revealed that a conspicuous number of low level judges were actively signing requests by governmental agencies and law enforcement to authorize several requests to begin with interception, phone tapping or pursue of personal data, thus posing relevant question on the independency of some part of the judicial branch from the government. After the scandal, both the Congress and the Senate advanced proposals to halt the ability of the NSA to collect such a large amount of information; however, those proposals were pointed only at ending the collection of data from American phones and computers, while the bulk of investigative power related to foreign intelligence (that includes all non-American citizens) remained untouched.

Moving to quality subversion analysis, the system put in place by the Bush administration and, to a certain extent, maintained by the Obama one, poses serious concerns regarding democratic qualities in general. Rule of law is undeniably under pressure in this instance: we are presented security forces that are not kept under check by the Parliament, and even only partially by the government that act beyond the boundaries of law, or at least very close to those boundaries, and a judicial branch that proved to be not always independent. Liberty in terms of privacy right is also heavily endangered, as we have seen how far the government can enter in the private life of citizens, all for the sake of national security.

⁴ "Report on the Telephone Records Program Conducted under Section 215". Privacy and Civil Liberties Oversight Board. January 23, 2014.

Responsiveness, in terms of governmental support for this programs, can also be in question, as the Obama ratings show a downward tendency by the time the scandal broke out, moreover, we also witness protests coming from all levels: state governments refusing to aid the NSA, lawsuits and civil society movements expressed clearly mistrust towards the government ability to collect only the necessary data and do not overstep its boundaries.

Level of Subversion – Data Protection – USA

Rule of Law	Liberty	Equality	Responsiveness	Average
3	4	0	3	2,50

3.2.2 Level of Subversion – France

In France we have a perfect example for the research, as we have a new law, Law 912 of July 2015, that was designed specifically to provide the police and security forces broader investigative power to fight terrorism. Police, and not only intelligence, has been allowed to use means that strongly limit the rights of privacy, in the cases discussed in the previous chapter (national defence, terrorism prevention, threat to public order, organized crime prevention), like eavesdropping, phone tapping and electronic communication analysis. While three of them indeed provide strong limitations, the wording “immediate threat to public order” has been left, maybe intentionally, open to interpretation, thus giving the possibility to act in a vast array of cases. We live in a world that is deeply connected, and smartphones and personal computers have become an increasingly important part of our everyday life, and we have seen in the US case, they can be easily cracked. But while we could understand a black hat company to do so, we would not expect a government to go so much in depth in controlling our life. The protocols adopted by the new law are intrusive and surely strongly hinder the right of privacy. This could be considered a relative problem if such instruments were used only to tackle the issue of terrorism, anyway posing concerns for human life, yet limited, but the wording “threat to public order” can be used for so many possibilities that would make it easy to get a warrant for a long list of possible situations, therefore allowing the security

forces to access not only the data of individuals, but also whereabouts, contacts and recent communication. The risk posed to privacy rights are undeniably high in this case.

There is more to this law, as it is disturbing how the government provided itself the right to act, in the cases reported above, beyond judicial control or parliamentary oversight. However understandable that the government must be allowed to act quickly in cases of emergency, those kinds of interventions are considered part of administrative police, and therefore judicial review, both *ex ante* and *ex post*, is not required. Although said provisions have never, insofar, used outside of the necessities of counterterrorism, the future consequences are troubling. The creation of the CRISTINA database is worrying as well: first of all, was created with an unpublished decree, second, even if designed to protect the country from terrorism, has been used to collect and farm data of normal citizens without any connection whatsoever to terrorist attacks or organizations. Its creation, together with the beforementioned request of the French government of “backdoors” to easily hack mobile phones, gives us a clear cut idea on where France stands on the issue, and we can clearly define it security-driven, rather than rights driven.

Regarding qualities, I would say that there was a minimal, yet present level of rule of law subversion in this stance: the laws regarding data protection and mining were made on purpose very broad, thus giving the possibility to use said provisions on far too many cases. Moreover, the process of approval of the CRISTINA decree was clearly non-transparent, as well as its use. Liberty in terms of privacy rights, both by the provision and the newly created database, has been hindered, in a way that could pose concerns for the future, as it is structured to allow mass surveillance of the whole citizenship. Being, we can say, bipartisan and affecting the whole citizenry, on this occasion we cannot find grounds for equality concerns. For what concerns responsiveness, the French civil society has reacted negatively to the law and its consequences, but did not manage to gather many supporters, and legal actions have been repelled by the Council of State. We can find a low level of discontent on the matter, but not a generalized one.

Level of Subversion – Data Protection – France

Rule of Law	Liberty	Equality	Responsiveness	Average
2	3	0	1	1,50

3.2.3 Degree of Subversion – Germany

At first glance, Germany is the one that has faced the issue of data protection and privacy rights more effectively, trying to create an adequate balance between the need to protect its citizens from harm and protecting effectively their rights. The history of how the German Constitution was developed and designed surely has an importance on this matter, as privacy rights are held into high consideration. Audio, video and data surveillance can be carried out only after a written order that included all the reasons that could justify such an intrusive control over the citizen's life, and has to be checked by the parliamentary supervisory body. Moreover, as noted in the previous chapter, the federalist nature of the German State is meant to counter best any effort of centralization of powers in the hand of the executive, that not only is controlled by the legislative and the judiciary, but also by the authority of the Laender, that can block or disregard provisions coming the central authority.

The role of the Constitutional Court in this respect also needs to be considered, as it was crucial in defending the rights of German citizens and to limit the powers in the hand of police and security agencies, ensuring that said instruments can be used only in cases of imminent danger. It seems that the troubled past of Germany, and the several checks and balances put in place by the Constitution and defended by the Court, are working effectively in protecting citizens' rights. In this respect, the German legislation has not been changed in a way that can be defined as detrimental for the first three qualities of democracy. From a responsiveness perspective, we can see how the approval rating on Angela Merkel's work as head of government has witnesses a steep decrease in the middle of 2015, corresponding to her controversial approval for the entrance in the country of Syrian refugees, stuck in the now closed Balkan Route. Her political opponents connected such an event with the terrorist attacks in Berlin in the end of 2016, but we can see that, by the time the attack concretely took place, Merkel's popularity was regaining strength, showing a support for the actions taken by her government, therefore we can claim that there are no grounds for concern for Germany either.

Level of Subversion – Data Protection – Germany

Rule of Law	Freedom	Equality	Responsiveness	Average
0	0	0	0	0

3.2.4 Degree of Subversion – Belgium

The Belgian approach on counterterrorism focused more on law enforcement rather than data monitoring, with a small number of provisions both approved or under parliamentary scrutiny. The fact that terrorist cells in Brussels and in the country, are often mingled or closely connected to criminal groups, allows the use of conventional procedures for investigation. The level of analysis possible at this level of the legislative procedure is limited, but we will try regardless. The new legal provisions will require the revision of the penal code, and will entail an extensive use of wiretapping and cameras to control more sensitive areas. For what concerns data protection and transferral, the country is undertaking an effort towards a more centralized approach to security, due to the clear failure that the excessive division have created. The data control performed by the CUTA will collect a vast amount of data, but has been conceived to collect said data only for purpose of counterterrorism, and the targets are going to be only terrorists and foreign fighters, not the whole population, something completely different from the development the CRISTINA server in France. As written in the previous chapter, the only interesting new provisions coming out are an extended use of cameras, with a special attention on cameras meant to control plates, in way to have an idea of who comes and goes from dangerous neighbourhoods, however do not raise concern on the ground of qualities.

Level of Subversion – Data Protection – Belgium

Rule of Law	Liberty	Equality	Responsiveness	Average
0	0	0	0	0

3.2.5 Degree of Subversion – European Union

Compared to the small amount of provisions the EU has on detention, the extension on provisions regarding data protection and privacy is much larger, as the right to privacy is enshrined at the highest level of European law. While the regulation on law enforcement related cases is still limited, being strongly connected to the national level, the EU, with the great role of the Commission, is having a leading role on this matter. The Data Detention Directive of 2002 was a starting point, as the EU was trying to legislate on a matter of interest for the whole community; however, the directive was rejected by the Court, that still holds high strong standards for data protections. The case reported in the previous chapter regarding the possibility for Europol and Eurojust to act “beyond” rights protection, while the States will be controlled more strictly, is an interesting possible development to control if the European Union is subtly trying to create the need for Member States to rely on EU institutions. Moreover, it poses indeed some concerns regarding democratic qualities, as, while national security agencies can be constrained by human rights respect the supranational police will not; this could have been also a way in which the Council (and therefore the governments) were trying to keep their ability to data gathering while avoiding problems at home with public concerns for human rights activism.

We must anyway recall the special connection that, when it comes to counterterrorism, the EU has with the United States, which, as we have already seen above, has been pushing for stronger data collection and control, as they rely strongly on each other for identification of potential threats and targets. This strong connection led to the creation of the so-called Privacy Shield, a pact between the EU and the US that would, in its terms, disallow the transferral of EU citizen’s data in the US if those data are not enough well protected. We have seen above how the situation for privacy protection right in the United States is not at the highest point in its history, and the situation did not get better with the election of Donald Trump. Here to understand the situation at its fullest, we need to look at both the shores of the Atlantic: the protection of data coming from the EU to the US was granted by a special committee, the Privacy and Civil Liberties Oversight Board (PCLOB). This board, coupled with an ombudsman to take care of EU

complaints, is not working any longer, as all the members, except for one, have resigned. Moreover, the protection promised to Europe from the American administration are not supported by laws, but only presidential directives or agency policies, that can be easily removed by the President, thus making the flow of data coming from EU to the US, completely unregulated. In Cynthia M. Wong words “The deal was flawed from the start” (Wong, 2017), as the pact did not actively prevented surveillance of European data, as it is possible to do a complete scanning of information coming from the under-ocean cables that link the EU and the US. Personal information like address, cell phone locations and preferences can be therefore analysed when an American firm working in Europe send its personal data back home, and we can imagine how a giant like Facebook, containing an incredibly large amount of personal data, that the EU has been unable to protect correctly.

Concluding on the issue, we can say that some ground of concern for the European Union do exist when coming to data protection. Regarding rule of law, the way the differentiation between national agencies and Europol and Eurojust has been devised poses some threat on how the framework may develop, as it constitutes a blurred limitation to the action of said agencies, that could work outside of the right protection framework established so far. While equality does not pose concerns, liberty does. The US-EU relation, even if understandable from a strategic point of view, creates a consistent legislative loophole that does not adequately protect citizens’ privacy right, as data can be stored and analysed in computer farms in the US and the protection of sensitive data is not adequately protected, mostly due to how the agreement with the American administration was devised. Responsiveness, same as equality, is not concerning, on the contrary, the European public is aware of the issue of data protection online and worried about misuse of their own personal data, and are satisfied by any development in the field, either from a national or supranational authority.

Level of Subversion – Data Protection – European Union

Rule of Law	Freedom	Equality	Responsiveness	Average
1	2	0	0	0,75

3.2.6 Subversion caused by Data Protection provisions – General Assessment

	Rule of Law	Liberty	Equality	Responsiveness	Average	Final
United States	3	4	0	3	2,50	2,50
France	2	3	0	1	1,50	2,25
Germany	0	0	0	0	0	0,75
Belgium	0	0	0	0	0	0,75

3.3 Freedom of Movement

3.3.1 Degree of Subversion – United States

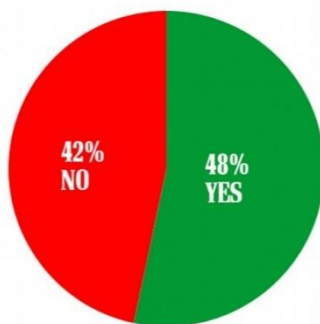
The shocking events of 9/11, among others, had an immediate side effect which was the strengthening of aircraft travelling security. The major US development, later extended, as we will see, to EU countries as well, is the introduction of the PNR (Passenger Name Record), reporting not only travel information, but also some personal sensitive information, medical condition, or food preference, affiliations, phone number, email and many more. The PNR, linked with biometrics, introduced in the legislation after the PATRIOT Act, was used to identify and interrogate thousands of people of Muslim background, as they shared some features with the hijackers. The travel limitations and extreme level of control did not stop there however, they were even worsened by the Special Registration Procedure, aimed specifically only towards migrants from a selected number of countries considered dangerous for national security, something that recalls very closely the “travel ban” proposed by the Trump administration in the last months and later rejected by national courts. Although unlike in kind, the two share the same underlying concept, as we are presented with provisions aimed at blocking some individuals or questioning them harder than others only on the ground of their nationality. The issue constitutes an issue not only for equality but also for freedom, as also in this case, privacy rights are under serious attack: the PNR is stored in US

databases, shared among agencies and kept for 3.5 years, and the biometrics can be held in store for almost a century. In a whole century of data storage, the chances for that information to leak and get used for purposes other than national security rise highly, thus posing a concrete threat to privacy rights, which, as we have seen in the previous chapter, is not a healthy right in the US.

The travel ban has not only a strong detrimental for the freedom of movement, but also for equality, as it targets people on the ground of nationality rather than any act of felony, done home or abroad, that could justify such a limitation. Here the role of the national courts and, probably soon, the Supreme Court, has done a great deal to block the action of the central government, signalling, in this respect a strong commitment from the US judiciary body to freedom of movement and equality. Moreover, even if matters of national security have indeed the outmost importance, the respect for basic rights like non-discrimination on the base of religion, enshrined in the First Amendment of the US Constitution, must have tantamount importance.

In conclusion, we can assess the level of subversion caused to the freedom of movement as a reaction to terrorism. Rule of law does not constitute an issue here, as for the first Acts proposed and approved immediately after 9/11, the democratic procedures of checks and balances, administrative and judicial control were respected; for what concerns the travel ban as well we can claim the level of rule of law has not been affected, on the contrary, we can conclude that, in this respect, rule of law is still in good health. Nevertheless, the same cannot be said about freedom. Not only the new security rules

AMERICAN VOTERS SUPPORT FOR SUSPENDING
IMMIGRATION FROM 'TERROR PRONE' REGIONS



Source: Quinnipiac University

Figure 5 American Support for "Muslim Ban"
/ Source: Quinnipiac University

regarding travelling in the US have hindered the freedom of movement, but the level of storage and sharing of personal data and biometrics among federal and national agencies poses a threat to privacy right as well, as those data and numbers contain several information that, at best, can be defined as sensitive. Equality, as we have seen above, has been dealt a strong blow with both the specific entry procedures from a selected number of countries, and an even harsher one with Trump's

travel ban; both target a selected group of people only on the ground of nationality but also on those of religion. Although the second is not clearly stated in any of those pieces of legislation, it is undeniable that creating special conditions of entry in countries that have a strong Muslim majority is intended to limit the access to the country also on the ground of religious belief. Responsiveness however does not appear to be hindered by said provisions: the support for Bush's administration was at the highest peak during the aftermath of 9/11, when those provisions were approved and made law. Trump's administration, however being among the most divisive presidency to date, still enjoys a satisfying level of support among the American population, with a slight majority of voters being in favour of the travel ban, and an even higher majority that would approve a required registration to local authorities of being Muslim, a treatment that in the US is used also for sex offenders. The protests from both civil society and a large part of the population still do not represent the majority of Americans, that support a control over the Muslim population coming in the United States.

Level of Subversion – Freedom of Movement – United States

Rule of Law	Freedom	Equality	Responsiveness	Average
0	3	4	0	1,75

3.3.2 Degree of Subversion - France

Two main considerations must be done when dealing with the condition of freedom of movement in France after the terroristic attacks in the last years: the state of emergency, that strongly conditionate the public life in France, and the clear and undeniable fact that terrorist exploited the possibilities of freedom of movement without control to arrive in Paris, and disappear back in Belgium. Bearing this in mind, it is understandable why France decided to suspend the Schengen Agreement. The proposal by Cazeneuve, later rejected by the Commission on Human rights, would have been a serious deprivation of liberty for many individuals, who might have been seen their passport withdrawn only on the base of unquestionable intelligence reports (unquestionable due to their secrecy). However, the proposal has been dropped for now,

and no news on this matter are have yet been announced. As for the matter of freedom of movement, it does not appear that there are any grounds to claim quality subversion, as the possibility to reinstate border controls is part of the possibilities listed in the Schengen agreement and, being only temporary, does not constitute an issue for liberty. Similar considerations can be made when dealing with equality and responsiveness.

Level of Subversion – Freedom of Movement - France

Rule of Law	Liberty	Equality	Responsiveness	Average
0	0	0	0	0

3.3.3 Degree of Subversion – Germany

Germany, as one of the core countries of the EU, has always been supporting freedom of movement as a fundamental freedom for European citizens'. The new legal provisions created by the German government only entail those blocking the travelling chances for foreign fighters and worsening the charges for those attempting to travel outside Germany with the intention of giving or receiving training by a terrorist group, therefore does not affect the general population but only a small number of people with criminal intentions. The only provision that created grounds for concern is the one that allows ID and passport revocation for suspected individuals, that will be impeded in travelling abroad not only all around the world but also in Europe, in way to block more easily the movement of those that want to exploit freedom of movement as a tool to make it harder for European security authorities to arrest them. Criticism on this last provision must be taken into due consideration, as a German would be able to sentence a suspect for a crime that has not taken place already and a citizen would see hindered the possibility of travelling outside of its own country (this provision entails only German citizens), but we do not have yet a case law from the Constitutional Court and the matter is still open for the time being. The justification coming from the government, however, seem to be convincing, as usually the suspect terrorist is easy to individuate in the web, as is more likely to demonstrate support for a certain terrorist organization online, therefore making

the identification easier and maybe, from a legal standpoint, it would allow to justify a punishment ex-ante.

In conclusion, we can state that Germany, like France, does not poses ground of concern when it comes to quality subversion deriving from travel restriction legislation. All the legal changes have been designed carefully to apply only to a very limited number of people and are not likely to be broadened to the whole population, thus do not appear to be damaging for the qualities under scrutiny.

Level of Subversion – Freedom of Movement – Germany

Rule of Law	Liberty	Equality	Responsiveness	Average
0	0	0	0	0

3.3.4 Degree of Subversion – Belgium

As we said above, most of the criticism to Belgium came on how easily terrorists could exit and enter the Belgian territory, and it is an issue the government has been trying to fight back on. The example followed was the French one, but while the ID and passport withdrawal in France found a strong opposition, in Belgium the provision has been enacted, and it is possible to restrict the freedom of movement of certain individuals by mean of ID withdrawal. In addition, at the beginning of this years, the government passed a new legislation allowing deportation of legal migrants residing in the country if suspected in taking part of terrorist activities, and banned from Belgium. Such a harsher reaction to terrorism in travel restrictions is understandable if we consider the fact that Belgium was the operative headquarter of European terrorism, and the government, to avoid continued criticism, needed and answer which appeared to be strong after years of laxness. Belgium has been among the first countries to apply the PNR European directive, but the scope is, in national legislation, becoming even more complex, as Belgian parliament approved a draft law that will allow the government to store and share not only the PNR of passengers travelling with an aircraft, but also of those travelling by train.

In conclusion, we can state that, for Belgium as for all the other European countries taken under consideration, freedom of movement has been affected to a very

limited extent, therefore we can conclude that the level of quality subversion is equal to 0. The provisions applied have been taken with due consideration for national and international legal framework, do not limit the freedom of people nor their equality, and the population has responded positively to governmental action, therefore not constituting an issue for responsiveness.

Level of Subversion – Freedom of Movement – Belgium

Rule of Law	Freedom	Equality	Responsiveness	Average
0	0	0	0	0

3.3.5 Level of Subversion – European Union

Talking of level of quality subversion due to freedom of movement, when dealing with the EU case sounds at best paradoxical. While calls for better border control have been made by several government, that reinstate border control under the clause of the Schengen agreement, freedom of movement remains one of the most important ones, and by far mostly felt freedom for European citizens. European institutions and its representatives have always been supporting freedom of movement and always tried to avoid that Member States enacted provisions that could hinder freedom of movement; moreover, the cover that the jurisprudence of the ECJ provides on this matter is extensive and said limitations could be declared to be against the Treaties. Due to the results obtained to far on the matter of freedom of movement, we believe there are grounds to claim that the EU not only does not show features of quality subversion, on the contrary, appears that the European Union is working as a democratic anchor for the states that are part of it, granting on this field a strong and continuous support. The causes and consequences of this resulting democratic anchoring will be discussed and analysed more in detail in the next chapter, but at first glance the comparison with the United States is striking in this field much more than others.

Level of Subversion – Freedom of Movement – European Union

Rule of Law	Freedom	Equality	Responsiveness	Average
0	0	0	0	0

3.3.6 Subversion caused by freedom of movement provisions – General Assessment

	Rule of Law	Liberty	Equality	Responsiveness	Average	Final
United States	0	3	4	0	1,75	1,75
France	0	0	0	0	0	0
Germany	0	0	0	0	0	0
Belgium	0	0	0	0	0	0

3.4 Final Results

Total Results by Country

	Detention	Data Protection	Freedom of Movement	Final
United States	1,50	2,50	1,75	5,75
France	1,50	2,25	0	3,75
Germany	0,75	0,75	0	1,50
Belgium	2,25	0,75	0	3,00

Chapter IV

Now that all data has been examined and we have a scoring for each of the countries under analysis, it is time to draw some conclusions to see how these that can help us understand how states have tackled the terroristic issue so far and how the most likely evolution of counterterrorism will look like in the next years. We cannot in fact doubt that terrorism will remain a salient issue for the next years, as the world order in which we are now allows such a dangerous environment around the globe: without a clear superpower that grants hegemony, several fault line conflicts are likely to arise in countries and regions in which religious and cultural differences can make a conflict sparkle. Since the world powers are most likely to want this state of affair to be continued for as long as possible, they will try to end this conflict by using their superior warfare abilities, thus leaving to said conflicting groups to resolve to terrorism as a mean to keep fighting, in a sort of modern age guerrilla. Conflicts nowadays are not only limited to a small area, but are most likely to have consequences worldwide, and terrorism, due to its ability to use effectively all the means and possibilities granted by the cyberspace, will remain a fundamental global threat for the years to come. This is particularly true for political Islam, that due to its messianic nature, will not likely stop its action until is completely vanquished or its objectives are achieved. While the West has undergone a process of division of powers between the temporal one of governments and the spiritual one of the Church, this process has not yet happened in many Muslim countries and political groups. The relationship between Christendom and Islam has rarely been a peaceful one and, as John Esposito puts it, they are two communities that “[...] compete and violently fight for the conquest of power, land and souls” (Esposito, 1992), and the present international environment is likely to protract this conflict for the decades to come. While the Islamic world has rediscovered its core values after years of Westernization during the Arab Spring, the West is still trying to block such excessive spreading by using all its possibilities and means, creating a possibility for conflict that, due to the extremely higher offensive potential of the West, is likely to transform into terrorism. These two different positions must not be understood only as purely balance of power, but goes deeper, in a “battle of narratives” between to different ways of life and

of understanding power and government. This conception of battle of narratives is particularly important for the objective of this research, as the West is pushing in the whole world its conception of public life that has in its core freedom, democracy and human rights. Sure is that “as long as Islam will remain Islam (and it will) and the West will remain the West (not as sure), the bottom conflict between two great civilizations and lifestyles will continue to characterize the future of reciprocal relationship, has it has for fourteen centuries” (Huntington, 1996). Our interest in this research was exactly to control how and if the West is remaining the West, and if its sets of values is still at its core or securitization is pushing modern western democracies on a different path.

The Crusades started this trail of blood and wars that is not likely to end in the close future, the conflict will instead spread and become more and more dangerous as the relations among Western and Middle Eastern States will get worst. The reasons for such a clash are many and go beyond history and power relations, and in these days, the conflict is still highly felt at all levels, both at governmental and at population one. Some scholars also argue that such a “Cold War” with Islam might also be partially exploited by political entrepreneurs in Europe, which is still on the front line when it comes to terrorism, to create a sense of European identity that still is lacking in many states of the Union, and its undeniably that some politicians already do so. This process might have serious consequences for Europe: while it can be welcomed a process that fosters the creation of a European identity, this way of doing it certainly is not the safest ones, as it could lead to a strong polarization of society and eventual break out of ethnical and religious conflicts around the Old Continent. Nevertheless, with the promised isolationism of the Trump presidency, European leaders have discovered that one again they must rely only on themselves for security and military protection: when and if they will be able to transform this need for protection into a new form of military collaboration similar to NATO, or, even more, into a closer and more federal union, is yet to be seen. However, we should consider, when dealing with this specific issue, the process of creation of the modern states in Europe and in the USA as well: the creation of a common identity between different political entities (colonies in the US and smaller nation-states in Europe) begun when the need arose to fight a common enemy, and only partially with

normal “peacetime” regulations and rules. Now we can analyse some trends that seem to arise from the qualities subversions that we have taken into consideration in this research.

4.1 Securitization

The first result that strikes the eye in this case is the very limited values of issues regarding responsiveness in all the countries we have analysed, with the exception, even if small in nature, of the US. We can understand from this result that, even if the other qualities have been hindered in a more or less substantial way, the public responded positively to the law changes, and the political leaders enjoyed support with this path leading to securitization. We can insofar confirm the presence of this trend of “penal populism” that we were discussing earlier in this work; taking away the bias given by those unaware of the legal changes in their country, we can deduct that the population is taking less care of rights and is much more concerned about security, accepting positively those legal instruments that allow a higher level of security, even despite human rights. The United States and France could represent such a trend, with the victory of Trump, with his protectionist and security-driven agenda and the growth of Marie Le Pen and the Front National, that is using terrorism and immigration to push for a strongly security-oriented program, and a consistent part of the country is supporting such a view. However, she was not granted victory in the final presidential vote, the result from the first round of election showed a clear trend in this respect. If we analyse the vote per regions, is easy to see how cities and countryside show a clear divide: while cities are more open and usually more leaning towards leaders supporting human rights and democratic values, countryside regions are much more closed and care much more about security. The penal populism path taken by many politicians indeed follows such a trend, as they rely on this kind of voters for electoral supports, voters that put security in their homes first point in their agendas.

Securitization however, does not stop on the grounds of law enforcement, it goes far beyond that, being a trend that comprises several claims. It also entails economic security, that people, especially in the countryside and in poorest parts of the country,

have long lost due to the crisis and globalization. This trend will reflect not only in the political agenda, but can turn into an economic plan, as it will push for protectionism of national economy over the choice of free market economy. It can be argued that the population that lives outside the great cities that lean on providing tertiary services rather than production, is the one that has suffered more from globalisation and will push more and more for a return to national economy and more nationalistic positions in general. This trend, important but not fundamental for the United States, is of key interest in Europe, where such a tension towards renationalization can have tremendous consequences for the future of a United Europe, especially if it is to move towards a closer and more federal one. While experts, elites and political leaders are almost completely still in favour of the European project, large parts of the population do not support it anymore, and if Europe is to be democratic, such a trend cannot be ignored. This gives a better understanding of why all European leaders follow with apprehension all elections in the continent, as a “wrong” political turn could have such great consequences for the Union. Nationalistic parties are on the rise in all of Europe, and with the economic downturn still undergoing and the migration crisis still on the verge, its more than likely that will keep growing if other political parties, especially those in charge, do something to change this trend. This can be seen, at present time, unlikely: apart from Macron in France, who set up his whole campaign on human rights, equality and Europe, several other European leaders decided to turn to partially populist and more nationalistic and security-driven moves to appeal to this scared electorate, thus creating a situation that can be detrimental for human rights.

Especially in the grounds of detention and data protection, we can see how almost all the countries under scrutiny have harshened their response to terrorism, going also beyond the limits imposed by human rights. This was particularly evident in the US, with the regime of extraordinary detention in Guantanamo Bay, at the first moment praised by a large majority of scared American citizens, but is the same with almost all states we took under scrutiny. As we defined in the first chapter, one of the main aims of terrorism, if not the first one, is to strike fear in the hearts of the population, and fear is a strong political tool: a scared public can be demanding draconian measures and the government most likely will enforce such measures to appease the sense of security required by the

electorate. This way of tackling the issue however proves short-sightedness from political leaders, as while they are responding to the country's need for security, there are laying the foundation of democratic subversion. While this is not dangerous at first glance, it can become dangerous when a less "democratic" leader wins elections, as such provisions, meant to be largely used against terrorism, could be used in the future against political opponents or, more bluntly, to suppress freedom of association or thought. We can trace a similarity here with the scope that the RAF had in Germany: by attacking the state they wanted to push the government to use all its strength against them, thus proving the inherent fascism of the system as a whole. Their attempt failed in Germany, and arguably, also Islamic terrorism is failing in this scope in the Federal Republic, that is the country that has the lowest scores in this research, but this might not be true for all the other countries. The more or less accepted doctrine of AMF could grant the US President the legal basis of considering a political opponent dangerous for the state, while the provisions that apply to the French President provide him with large powers, even larger than the ones General De Gaulle wanted for himself. Protecting a democracy is indeed a taunting task, more difficult than defending other forms of government: unlike a dictatorship, the rulers must respect a basic set of guarantees and human rights, that can be restricted but never abolished tout court, cannot just imprison political opponents and protestors, it has to listen to them and bear the consequences being basically helpless in the process. This is particularly true when it comes to terrorism: even if data and proof sustain the chance of an individual being a terrorist, the authorities must abide to the principle of presumption of innocence if they want to be spared of public criticism. However, as we have discussed so far, there is a trend towards securitization that on the other hand will shift the blame on the politician also for non-acting, regardless of rights protection, thus putting the politicians in a very difficult position, especially if wants to be re-elected. Such a difficult situation is fostered by extremist or anti-system parties, that, being in an open conflict with the incumbent institutions, will always have grounds for criticism, thus gaining strength along the way. The risk here is two-folded, on one hand we have populists or extremist parties gaining strength, on the other we have institutions that provide the tools for an un-democratic government to become a dictatorship in the future, and have all the legal instruments to enforce them. If this situation appears to be at best, dark, we could turn to a definition less harsh but that could

describe the possible future development. Karl Loewenstein coined the term “militant democracy” to define a politico-constitutional development typical of many European democracies after the victories of Fascism and Nazism in several countries (Loewenstein, 1937). The comparison here can seem a bit extreme, but there are grounds of contact and of concern. Loewenstein focused his analysis on antiextremist legislation, essential means in the hand of democracies to respond to extremist threats. We must in fact recall that fascist and Nazi leaders were at first democratically elected, and then used the powers granted them by the laws or the constitution to destroy all those that could have formed a concrete opposition to their rule. Those laws were most often antiextremist legislation, and we can claim with a good degree of certainty that said provisions match with those we have analysed in this research. Norms like the ones we have dealt with insofar have been put in place to protect democracy from its external enemies, but the question remains: what if they are used to protect the ruler from internal enemies? If the situation is not kept in constant check by all political actors, civil society and the media, this is a possibility that needs to be considered, especially due to the polarization of politics that we have witnessed in the last years. This will lead us to the other finding of this research.

4.3 Institutions do matter

If we analyse the data in a comparative way, it is easy to notice some striking differences between two subgroups: the USA and France and Germany and Belgium. While the first ones have a monocratic authority that holds much of the executive power, while the others have a completely different institutional setting that disallows concentration of power. This difference has of course different historical root causes in all of the different countries, but they lead to the same consequences: while the second group has a central authority that is hardly constrained by checks and balances, the first one has consistent authority and independence when it comes to matters related to counterterrorism.

We have a clear evidence of this when it comes to data protection, in which both Germany and Belgium have a very low subversion score. German has been built,

constitutionally speaking, to resist to all attempts of power concentration in the hand of the federal government, due to its history, while Belgium, since has traditionally been a divided country, with many cleavages, has resorted to a consensual democracy, in which decision making is intentionally made a complex process. Among all the provisions we have discussed between these two countries we have witnessed a difficulty in putting in action plans or legislative measures to counter terrorism, due to the peculiar institutional construction of these countries. Moreover, in the German case, we have a very strong controlling power of the Constitutional Court, one of the most revered and important constitutional courts of Europe, that checks continuously the work of all other German institutions, from the central government to those in the Lander. The Lander too exercise a strong controlling power over the central government, being able to oppose to its decision both autonomously and in the Bundesrat, creating a strong system of horizontal checks and balances. Due to their institutional systems, both countries are forced to find a consensus among several political players, with a more “centrist” attitude that keeps extremism at bay on both the sides of the aisle. This system avoids centrifugal drives and causes aggregation along the lines of the constitution or of some highly regarded values rather than favour extremist legislation. The absence of a monocratic figure can be seen as a positive drive for a more stable and longstanding consensus on issues of human rights protection.

However, this comes with a price, as the effective capability of the government to act in situations of danger is seriously hindered by the complexity of the law-making process and the chances of giving a strong response to attacks on democracy decrease sensibly. This is not only true when it comes to defence of democracy, but is true on a large array of issues, being it of economic or social nature. The economic and social performances of the countries are not of our main interest here, but this particular institutional setting has indeed pros and cons: on one hand we have a strong support for human rights and protection of fundamental values given by the need to compromise, build consensus and create a working majority in parliament, on the other we have executive leaders that are institutionally weaker than the ones in a presidential system, therefore less able to use their constitutional authority to impose a certain course of action on the rest of the political system. On the contrary, we have strong presidential system

that rely on a monocratic figure at the head of the executive branch, with consistent power to impose his will and act unilaterally. While this gives the government the ability to act quickly and strongly in the aftermath of a crisis, it leaves the path open for harsher legislation, less inclined to human rights protection and more keen into protection of the physical integrity of the citizens. On this respect, there is another trend that we ought to consider when dealing with the institutional setting of the countries we are examining: the changing role of political leadership that has been going on in almost all Western democracies.

Many scholars have noted a tendency, in modern political leadership, towards personalization of politics and political support, with parties used mainly as a proxy that leaders can exploit to gain recognition and voters. Usually we are faced with strong personalized leaderships that then reflect into strong and personalized government, where checks and balances can be neglected at the leader's will. However, this has harsh consequences especially in times of crisis for democracy, or moments in which democracy is suffering attacks from undemocratic enemies. Strong and charismatic leaders can indeed rally large numbers of voters and supporters by the time the elections end, but then finding a good way of governing a country without the ability or the will to negotiate with the opposition can be severely hard for democracy. We can clearly see this kind of prospective in the US approach to counterterrorism: George W. Bush wanted to appear as the strong leader of the nation, someone the citizens could rely to in a moment of peril, and to do this he acted using his personal constitutional power as President, although it is worth remembering that he obtained an overarching majority in both the houses of the Congress. A similar discourse can be done with Donald Trump, but after a little more than 100 days of office, conclusions of this kind are still difficult to make; however, history has showed us that the last Republican Presidents took very seriously their presidential mandate, using all the powers at their disposal to achieve their political targets. Same can be said for President Hollande, that used his prerogative as President at length, and enacted those laws that, as we have seen, can prove to be a risk for democracy. This happened to a very limited extent in Germany, not because Angela Merkel is a weak leader per se, as we could claim the opposite, but she had to face the German system of checks and balances, as well as controls coming from both her allies in government, the

Lander and the Constitutional Court, leading to a much lower level of democratic subversion in the country. The case of Belgium is peculiar in this sense, as we have a fragmented polity divided by several internal cleavages, that would suppose a limited number of harsh provisions; this is true when dealing with matters of freedom of movement and data protection, but surely is not when dealing with law changes relating to detention. To what we can attribute this difference? A good working hypothesis could be that Belgium has suffered more than the others a sort of penal populism: pushed by the internal political pressure for citizens asking for more security as well as the international pressure coming from the neighbouring European countries, the government had no chance but to push for strong law enforcement reforms that can be seen both internally and externally as a show of force. It is worth remembering in this case that, among the harshest of the 30 provisions discussed in the Belgium chapter, some still need parliamentary approval if not a whole constitutional change; this could mean that, after a first moment of shock the country's opposition forces could once again rally and stop similar provisions from becoming reality.

In the contemporary political landscape, we can see flamboyant leaders that with a catchy formula seem to be able to solve all the problems of the country, countered by classic old politicians, able to deal with day-to-day activities but with very low charisma. While the need for a strong and effective executive appears essential in the contemporary world, that moves faster than Parliaments, we cannot avoid looking at this prospective with some concern regarding the tenure of democracies. When strong charismatic leaders managed to get the old on Europe the last time, World War II happened, and for sure this is a scenario everybody would want to avoid. An historical comparison in this case can be useful to understand the issue more clearly. In his analysis of interwar Europe Giovanni Capoccia analyses how political elites have managed the attacks caused by the extremist (of course, we are dealing with a completely different kind of extremism) parties and groups; in the end the strong charismatic leaders failed in what, on the other hand, preserved better democracies, finding a compromise. In those years, the elites were trying at their best to preserve the democratic order, but in a fragmented political scenario, only leaders prone to build consensus rather than winning it, actually managed to keep countries safe from extremism. "The leader must painstakingly mediate among [political

parties]: the main imperative is that of avoiding defection from the democratic front” (Capoccia, 2005); we can take this words and apply them to the cases we have at hand, with all due differences. While in this example we have a democratic front that needs to be defended, nowadays democracy is taken as a granted minimum level of understanding for political leaders to remain in the political arena. However, there are now new cleavages, of those pushing for security, usually in a populist way, and those who claim that rights at the very base of democracy should be always kept into account. While human nature cannot be controlled, and the possibility of being elected in office is given to everyone, institutions can control the man in charge, and if this process is done successfully, both the executive strength and rights control are upheld. Taking a full institutional stance in this respect would be at least limited, for two main reasons: first, the personalization of politics and leadership is an undeniable fact of the last decades, second, leaders do count, especially in the two presidential systems under analysis, the United States and France. The President is accountable directly to the people and the one that has the electoral responsibility in front of the electorate, all other members of the government depend on his or her approval, and therefore their personality must be taken into careful account; we could state that too strong leadership with a limited will to compromise can be more detrimental to democracy than weaker leaders more prone to consensus. This is not to claim that institutions do not play a role, as said above, their role must be recognized as they can either free almost completely the leader from legal and political constraints or can control him more strongly, sometimes limiting his actions; such personalized developments “may well be partly contingent on the personalities and leadership styles of particular leaders, they are becoming too widespread and enduring in parliamentary regimes to be explained entirely in these terms” (Poguntke & Webb, 2002), whether such developments will be good or bad for the quality of democracy in the near future is still to be understood, sure is that handing over too much unchecked power to a single individual can be dangerous.

4.3 The role of the EU

Speaking of institutions, we must consider the influence the EU has had in the last years in the issues we have been analysing in this research. It can be fair to say that the European Union has had a positive role in the development of counterterrorism measures, up to a certain extent, rather than a negative one. The values that the EU subversion scores added to those of the countries analysed has been minimum, and the fact that, on freedom of movement, all the European countries had a score of 0 is a striking comparison with the score of the United States on the same issue. If we look at the overall score of all the countries examined, we can clearly see that the European countries have considerably smaller levels of subversion than the one of the United States. Before discussing the role of the EU in the states in which it has power, can be interesting to look at the only country we have taken into consideration without the EU, the United States.

We have already described before that the scope of action of the United States is not regional but global, standing the country as the leading superpower, something that the European Union must not worry about. This stance as the global peacekeeper, although many times countered by fact, is a well-rooted idea in the American politicians prospective, therefore politicians, especially the Presidents, feels compelled to act with strength when confronted with issues of national security. For sure 9/11 has been the greatest threat to national security to date in recent years, as the country never suffered direct destruction on homeland soil since the attack on Pearl Harbour. This can explain why the score of the United States is so high, with legislation aimed at protecting the homeland in any way possible, even when this goes too far in terms of human rights protection and upkeep. This trend was initiated well before the New York attack, but Bush pushed it forwards, with the acts and the legislations we have seen in previous chapters, and will most likely continue with the Trump administration in the next four years. Why the US is capable of such actions while the European countries, still sovereign, could not? The European Union framework, together with a strong culture of human rights spread all over the continent, disallows such intrusive interventions of government and law enforcement agencies, thus protecting more efficiently rights and liberties. The European countries had to abide to a set of norms and rules decided together and had no chance but

to follow them, pushing harder only where the Treaties allowed them, accordingly, in the field of detention and direct law enforcement. The United States do not have such limitation at a supranational nor at international level: they can freely decide on their internal and foreign policy without constraints due to their position of power in the international arena, making even UN intervention, fruitless, if not from a merely mediatic point of view. We could argue that the presence or absence of an international or supranational authority can be an important variable to consider when dealing with how states fight an issue so important as terrorism and counterterrorism, to the point that we could transfer the reasoning we did above to this case as well; the presence of some level of constraints, both at internal or external level, can strongly protect rights and liberty. International institutions create constraints and incentives for otherwise completely sovereign countries, creating a superior system of norms that can impede the actions of leaders that, strong of popular support, want to go beyond or even disregard human rights. The problem with international organizations, and arguably also with the European Union is the lack of enforcement of those principles but we will see below how this enforcement must not always be done using “strength” or power, can be also done in a more nuanced way, by persuasion and the creation of a mental framework in the minds of population and elites alike, that would therefore oppose more strongly provisions of this kind.

Moving on to the European countries, foreseeably, due to the very limited power the Union enjoys on the field of law enforcement and national security, this beneficial effect has been limited if not inexistent, and left the Member states free to act as they deemed necessary for the well-being of their citizenry. The dispositions in the Treaties on the matter have been, for a very political reason of sovereignty of member states, extremely limited, as the Union still is not a federal Union, and matters of military and security are still held strongly in the hands of national governments. However, some progresses on this field have indeed occurred, especially in the field of cooperation and coordination of police forces, as we have seen with the new roles of Europol and with the creation of shared databases to which security agencies in Member States can draw information related to their national security. This process can be indeed welcomed as a first and hesitant step to the creation of a more federal approach also in the field of security: political leaders and the public opinion are just beginning to understand that

issues like international terrorism can be faced only in an integrated way, especially since the area of free movement has been established. We have seen how the difference of competences and information between national security services, like in the Belgian case, can be utterly dangerous for an effective and rapid counterterrorism action; if we enlarge the scope of our reasoning, we can clearly see how a disaggregated response can be more difficult if not impossible. This has been understood also at an international level, with the new agreements and shared information between the two shores of the Atlantic. As already claimed at the beginning of this chapter, such a development can be more than welcomed, especially if we embrace a federalist approach to the European Union; having a common enemy and a common cause to fight against can be a powerful drive for more integration in a field that, after the failure of the ECD, has seen minimum progresses. Same line of reasoning can be followed if we take a functionalist stance on the matter, as when a new problem arises, the governments are forced, willingly or not, to accept limitations of their sovereignty and coordination to solve problems that could otherwise be complex to solve alone. A more coordinated approach to the terroristic issue can be a fundamental first step to reach more comprehensive agreements on the field of security and maybe also military; European leaders should recognize that the political turbulence in the Mediterranean Sea is going to be a fundamental issue for the years to come, and if the US will effectively limit its action in the next years, the European nations should find a new common way of dealing with defence related issues. Especially now, with an idea of two speed Europe on the table, such a type of strong cooperation also on the so called hard politics can be achieved, at least among those countries willing to do so. So far, European policies on external action and foreign policies have been, at best, limited and not effective, maybe the terroristic issue can be a sufficient reason to pursue the target of a more integrated foreign policy.

What interest us most in this striking US-EU comparison is the inexistent level of subversion related to travel restrictions and freedom of movement. The United States still have complete discretionality on how and if a foreigner can be given access to the country, being completely sovereign on the matter, and has indeed done so in the past years, excluding or controlling many individuals with the characteristic of a potential terrorist. It could be argued that, in a climate like the one in Europe after the tremendous attack on

Paris, many countries would have wanted to change their laws in a similar fashion as their American counterparts, effectively destroying one of the greatest achievement of the EU so far, but they could only do so for limited time span, as written in the Schengen Treaty, and following the European rules on the matter. The role of the EU on this matter is undeniable, and disallowed from the start extreme legislative actions like the infamous Muslim Ban proposed by the Trump administration in the United States. The European design of the area of free movement was effective not only during times of peace, but also in times of peril like the one we are facing now due to the terroristic threat, and proves to hold strongly. European institutions were among the staunchest supporters of such a development, and their influence was felt not only at the supranational, but also national level, with national political leaders strongly sustaining the need to keep free movement, probably one of the most successful policies of the Union to date, and, together with the Erasmus project, surely one of the most appreciated. Even if the European Union is facing a period of difficult due to the subsequent waves of Euroscepticism that are raging across the continent, its hold on the national institutional landscapes, especially after the Brexit referendum, is still strong, especially in the inner core of the Union. The political and social impact of the Union does not end there however, as Europe is getting more and more in the political discourse of national member states, creating new cleavages. The discourse of human rights upheld by the Union and the political parties that support it, is countered by a more nationalistic discourse on the other, often related to a certain level of populism; with the fall of the great ideologies of the past century, the cleavage left and right is not central anymore, rather now the political projects in European countries is moving towards a new debate, centred on Europe. again, from a federalist prospective this be a good starting point to create a serious confrontation of political parties at a European level, as the cleavage now is starting to resemble the one between Republicans and Democrats in the United States, with the first ones asking for less federal intervention on the government of the single federal states, and the latter pointing at a more centralistic approach focused on D.C. Whether this can be considered a good or bad development, is matter of political discussion that will not analysed in this work, but there are grounds to assume that there could have been unexpected side effect of counterterrorism and migration crisis that could be useful to the Union, rather than harmful.

Populist movements all around Europe have gathered around the banners of nationalism, border control and end of immigration, sometimes also in an extremist fashion. On the opposite, we have a whole galaxy of parties that, although still divided, are clearly in favour of the Union, with freedom of movement and work as a main bulwark to protect. Once again here an historical example borrowed by Capoccia's work can prove some insight on the issue. When faced with increasing extremism in their countries, Capoccia found out that the political leadership and elites of post-WWI Europe understood their need to unite and create a coalition to fight back extremism on political grounds, and focusing more on what could have allowed them to unite under a single banner, democracy, rather than on those issues that divided them. History tells us that that attempt eventually failed and gave rise to dictatorships all around the continent, but in this case, there might be the political and social conditions that could grant the success of such an endeavour. First, the presence of the European Union can be used as a way of uniting all those claims and issues into one comprehensive political proposal that can appeal to a large part of the moderate electorate, second, the European institutions, even if still dependant, strongly, from the support of national states, enjoy a certain level of freedom of action and can, bluntly speaking, influence in direct and indirect ways, the electorate of the Member states, thus favouring the creation of such pro-EU coalitions all around the continent. It can be argued that the neo-elected President of France, Macron, will follow such a path in his coalition-building process, as he could gather around his ideals a large part of the electorate of the old political parties, thus providing a strong defence against populism and the Front National, maybe something similar in kind to the Christian Democratic parties that held together Europe in the difficult years after the end of WWII. Probably in this situation, if such a prevision will be confirmed by reality, a more consensus-driven leadership could be preferable to the one of a charismatic and strong man.

Conclusion

To conclude this research, let us recollect our findings. Among the countries under scrutiny, we can find from the empirical results how the United States appears clearly to be the one that more than everyone else has seen its level of democratic qualities going down the steeper compared to the European counterparts; the reasons for this striking difference among countries listed among the freest ones is the world can have several reasons and we attempted to find at least some of them, mostly related to the institutional setting in the different countries. However, this can only be a partial attempt in the research of this wide phenomenon that will need further investigations, also taking from different approaches than the legal-political one presented in this work. Moreover, this research can be enlarged by adding a longer time span, thus could be understandable as a tool to analyse future development. In the case of the United States, the same approach can be used to check if the presidency of Donald Trump, surely an atypical president and with extreme view on the issue of terrorism, has concretely affected the quality of democracy in the USA. Insofar, the system of checks and balance present in the American political arena managed to keep its action limited, but as we have seen, institutions do matter and the Presidency is in practice a monocratic position of power that allows the sitting President a vast array of possible actions and legal proposals, like the so-called “Muslim Ban” quoted earlier.

The European countries that we have considered had a lower score of subversion, but this is not to say that European democracy are immune from the harms coming from harsh responses to terrorism, and the several attacks that Europe had to bear in the last decades had a strong impact not only in the legal framework and political culture of the countries, they had a broad impact that will need to be addressed soon by political elites. Some appear to have started already a process of incorporation of the feeling deriving from terroristic attack, namely populist parties. Populism is on the rise in many European countries and we could claim that Donald Trump can be associated partially with them; those parties have understood the fear and the rage coming from terrorism, and are in the position to criticize, even harshly, the sitting government, for being unable to protect the citizenry. While the political rationale is clear, as since the beginning of democratic

government the opposition has been in charge of keeping under control the government, this can have detrimental effects on democracy itself, due to the phenomenon of penal populism that we have mentioned several times in this work. While emotional reactions to terrorism can be understandable from a human point of view, they must not be justified when rules, laws and procedures are set in place, as they will last longer than the emotional reaction and can, and probably will, be used again in different circumstances and maybe targeting someone that was not the initial objective. The media of course play a fundamental role in this game, as they are the unwilling loudspeakers of the terrorists, and transforming the old journalist innuendo “no news is good news”, bad news are always news, and most often the most interesting one for the public that wants to know and understand what happens. As with the creation of laws mentioned above, not only the politicians but also the journalists have to be careful, as they have a fundamental role in forging the opinions of the public; then again, the human rationale in both cases is understandable: politicians want to follow the will of their electorate to win re-election, journals want to be on the spot and report the news timely and effectively. However, being overexposed to such a pervasive environment will inevitably strike fear in the hearts and minds of the population, and fear can be very well used as a vehicle to channel unlawful and undemocratic reforms. To find simple solutions to complex problems is not the way to proceed in a democracy; taken from a purely practical point of view, tapping all the mobile phones and ways of communication would be a highly functioning instrument to prevent attacks and control the movement of all the population under control, but what would it be of freedom of speech, freedom of movement, privacy rights, and many others. Again, while the tendency to overreact is human and understandable, policy makers, both at national, supranational and international level, must recognize that the emotional reaction, dictated by a scared electorate, can be easily exploited, but it would not be morally justified, *in primis* for the present and *in secundis* for the future. The case for German incommunicado detention must be an example of what can happen: the provision, created as an emotional response to the attacks of the RAF, has survived well beyond the lives of its creators (and its intended targets) and can be used, obviously in limited cases, still today. The fact that Germany has not used such a provision recently does not mean that will never do it in the future, and the exact same can be used for all the reforms and new law provisions that have been analysed in this work. Laws are meant

to be applicable to a wide variety of cases and to be, as much as possible, resilient to the passing of time, and laws passed under emotional pressure cannot be possibly considered resilient, on the contrary, are the ones that can be more detrimental for the quality of democracy in a country. We have seen how both Houses have passed with a plebiscite the Authorization of Military Force after the attacks of 9/11, and the unintended consequences of that act, most notably the case of Guantanamo Bay prisoners, still have a strong echo in the world. If for example we take out the “war on terror”, militarily speaking, and its immense consequences, still the United States, the “land of the free” must fight against criticism caused by the double standards applied home and worldwide, with human rights and freedom upheld as a fundamental criterion when dealing with international relations in one hand, and in the other the undemocratic and mostly inhuman treatment that those men were subjected to.

What it is important to understand, and that has been the main underlying idea behind this research, is that there is a limit up to which democracy can defend itself, democracy can only go as far before becoming something other, different, and that cannot be easily distinguished from undemocratic countries that liberal democratic governments criticize all day long. This work does not prove, nor hoped to do so, that this limit has been crossed or that the United States or European countries are near it yet, but to prove that they are getting closer to that limit. If we want to take the example used by scientists when describing the imminence of a nuclear fallout, we can say that the “Doomsday Clock” is ticking and, while not yet close to the midnight, we need to understand that the risk is present and must be avoided at all costs. History taught to Europe a difficult lesson with WWII, an history that tells us that when nationalism, protectionism and hate spread over the limit, the risks are immense. They were immense when the world still did not possessed nuclear technology and now the damages would be far beyond the limits of counting.

Grim predictions aside, there are also positive accounts that emerge from this research, that could give us hints on how to effectively protect democracy while avoiding it to transform itself in something different. The case of Germany will need a more detailed and focused study as it appears to be the one that scored better than all other in this research, with a very low level of subversion for almost all the categories taken under

consideration. While the effectiveness of the Basic Law in protecting rights and freedoms has been recalled before, but there are more insights to why the German state has proven so resilient to change in an undemocratic way that go beyond the legal framework of the country and will need further research. Germany has numerous immigrant population of Muslim background, yet the number of terroristic attacks of Islamic groups or lone wolves has been very limited; a study on how Germany integrated this large number of immigrants effectively needs to be understood and eventually replicated in other countries in way to avoid both the problem of terrorism and those issues connected to damaging democracy that we have analysed so far. Indeed, the present study can and should be broadened, becoming a large area study of all EU countries, in way to understand difference and similarities and find therefore the best approach to the issue of terrorism. Of interest, could be the Eastern European countries, with specific attention to Hungary during the recent years of Orban presidency, to check the presence of absence of differentiation levels due to the communist past and the relatively recent establishment of democracy. Theoretically speaking, a new democracy, sitting in the brink between consolidation and a drawback to dictatorship, it can be easier to pass legislation more strongly against those democratic values that have not yet being fully interiorized by both the political and cultural elites and the public. The United Kingdom has been left out intentionally of this study, as the recent attacks to the country took place during the writing of the research, therefore it could not have been possible to assess empirically the new respond by Westminster and add them to the analysis. Moreover, I would consider more interesting to check in a few years what would the effects of Brexit in this field might be, since, as said above, Europe has played an important role in keeping in check the pulse of many member states to act unilaterally and sometimes beyond the boundaries of human rights and democracy, thus I believe that a “wait and see” approach could be more effective and scholarly more interesting in a few years, of course depending on how Brexit negotiations would continue.

In conclusion, this research wants to be a tool to understand the ongoing changes in European and American societies from a legal and political perspective, and a way to reflect on the role of the leaders, the institutions and the public will, and how these have evolved in the past years due to the terroristic threat. Claiming that terrorism has not

changed our lives would be, at best, naïve. The reality is that we are changing our prospective of the world we live in, we are slowly getting used to the atrocities we are forced to see so often, with parties that become a massacre and people trumped by trucks while simply walking on the street. What appeared true in the law changes that we have analysed is that European and American people, to which their leaders are often a reflection, are hardening; for how much this can be useful as a way of dealing with grief is something for psychologists to analyse, but from a social and political perspective, this can lead to unintended consequences, surely unintended by terrorists and politicians alike. When atrocities like the ones we have faced in the last decades become normality, or something close to that, it becomes easier to call for strong action and ferocious response from the government, but we must remember that if strong action and ferocious response become normality as well, and accepted ones too, that would mean an immense step back in the history of democracy.

Bibliography

- Amnesty, I., 2016. *Upturned Lives - The Disproportionate impact of France's state of emergency*, London: Amnesty International Publications.
- Attali, J., 2011. Les quatre échelles du temps. *Slate*.
- Boehm, F., 2015. *A comparison between US and EU data protection legislation for law enforcement purposes*, Brussels: Policy Department, European Parliament.
- Capoccia, G., 2005. *Defending Democracy: Reactions to extremism in Interwar Europe*. Baltimore, Maryland: John Hopkind University Press.
- Chazan, G., 2016. *Financial Times*. [Online]
Available at: <https://www.ft.com/content/aabefea4-c77a-11e6-8f29-9445cac8966f>
[Consulted in 18 April 2017].
- Dahl, R. A., 1989. *Democracy and its Crisis*. New Heaven: Yale University Press.
- Dambrine, B., 2015. *The State of French Surveillance Law*. s.l., Future of Privacy Forum.
- Dannemann, G., 2006. Comparative law: Study of Similarity or differences?. In: *Oxford Handbook of Comparative Law*. Oxford: Oxford University Press.
- Den Boer, M., 2006. Challenges for EU internal security governance on terrorism. In: *International Terrorism: an European Answer to a global threat*. Brussels: s.n.
- Douglas-Scott, S., 2004. The rule of law in the European Union: Putting the security into the area of freedom, security and justice. In: *European Law Review*. s.l.:s.n., pp. 219-242.
- Esposito, J., 1992. *The Islamic Threat: Myth or Reality?*. Oxford: Oxford University Press.
- Eulau, H. & Karp, P., 1977. The Puzzle of Representation: Specifying Components of Responsiveness. *Legislative Studies Quarterly*, 2(3), pp. 233-54.
- Gill, P., 2006. Not Just Joining the Dots but Crossing the Borders and Bridging the Voids: Constructing Security Networks after 11 September 2001. *Policing & Society*, pp. 27-49.
- Hamilton, C., 2017. The European Union: Sword or shield? Comparing counterterrorism law in the EU and USA after 9/11. *Theoretical Criminology*, 1(20).
- House, F., 2017. *Freedom in the World 2017*, Washington, DC: Freedom House.

- Huntington, S. P., 1996. *The Clash of Civilizations and the Remaking of World Order*. s.l.:Simon & Schuster.
- International, A., 2016. *Upturned Lives - The Disproportionate impact of France's state of emergency*, London: Amnesty International Publications.
- Karl, T. & Schmitter, P., 1993. What Democracy is... and is Not. In: *The Global Resurgence of Democracy*. Baltimore: John Hopkins University Press, pp. 39-52.
- Loewenstein, K., 1937. Militant Democracy and fundamental rights. *American Political Science Review*, I(4), pp. 417-32.
- Longman, A. & Schmid, A., 2008. *Political Terrorism*. New Brunswick: s.n.
- McCormack, W., 2012. *Legal Responses to Terrorism - Supplement*. s.l.:s.n.
- Morlino, L., 2011. *Changes for Democracy*. New York: Oxford University Press.
- Occhipinti, J. D., 2015. Still Moving Toward a European FBI? Re-Examining the Politics of EU Police Cooperation. *Intelligence and National Security*, pp. 234-258.
- Oehmichen, A., 2008. Incommunicado Detention in Germany. *German Law Journal*, 9(7), p. 855.
- Oliverio, A., 2008. US versus European Approaches to Terrorism: Size Really Does Matter. *Policing*, 2(4), pp. 452-462.
- Pogge, T., 2008. *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*. s.l.:Polity.
- Poguntke & Webb, 2002. The Presidentialisation of Politics in Democratic Societies. *Comparative Politics*.
- Pratt, J., 2007. *Penal Populism*. New York: Routledge.
- Primoratz, I., 1997. The Morality of Terrorism. *Journal of Applied Philosophy*, 14(3).
- Richards, A., 2014. Conceptualizing Terrorism. *Studies in CONflict & Terrorism*, pp. 213-236.
- Roach, K., 2013. Introduction: Comparative counter-terrorism law comes of age. In: *Comparative Counter-Terrorism Law*. Cambridge: Cambridge University Press.
- Sartori, G., 1970. Concept Misformation in Comparative Politics. In: *The American Political Science Review*. s.l.:American Political Science Association, pp. 1033-1053.
- Schmid, A., 2005. Terrorism as Psychological Warfare. *Democracy and Security*, pp. 137-146.
- Schmid, A. P., 2011. *The Routledge Handbook of Terrorism Research*. s.l.:s.n.
- Schumpeter, J., 1976. *Capitalism, Socialism and Democracy*. London: Allen and Unwin.

Seron, V. & André, S., 2016. 30 Measures Against Terrorism: Penal Populism between expected efficiency and potential collateral damage. In: T. Renard, a cura di *Counterterrorism in Belgium: Key Challenges and Policy Options*. Bruxelles: Egmont Papers.

Townshend, C., 2002. *Terrorism - A very short introduction*. New York: Oxford University Press.

Wong, C. M., 2017. *Human Rights Watch*. [Online]
Available at: <https://www.hrw.org/news/2017/03/01/privacy-europeans-risk>
[Consultato il giorno 5 May 2017].

Zoller, V., 2004. Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights. *German Law Journal*, 5(5).

Abstract

First and foremost, it is essential to explain which is going to be the research question that we are going to address during this research: Has the quality of personal liberty being hindered by the terroristic threat in Europe and in the United States? This question fits with one of the most typical questions of political science, the classical dilemma between security and freedom, and what is going to be analysed here is going to be who, among the two, is winning the struggle in the most advanced democracies, that should be theoretically the most resilient to external threat, and to the targeting of such fundamental values. The questions seem to be relevant today more than ever, since modern liberal democracies must face an enemy that uses its most fundamental features (civil rights and freedom) to harm them, directly and indirectly. The following research is not meant to be merely a theoretical exercise limited to scholarly fruition, on the contrary it is meant to be a tool for policy makers to understand in which direction the democratic world has moved so far when dealing with the matter of terrorism, and what consequences those moves have had in the quality of democracy. Whether this changes are for the best or the worst will not be assessed here, as it is a matter of political nature and not of a scientific one.

The choice of the countries selected for this research is not casual, on the contrary is functional for the results that we want to achieve. Terrorism is not an only-Western issue, is a global issue that a large number of global players are tackling every day, but the focus on the West is functional as it might be useful to understand possible developments for weaker or less consolidated democracies. It is undeniably true that the European countries and the US had, in crude numbers, suffered less losses from terrorism, compared with Middle Eastern countries, but most of those countries are not consolidated democracies, if they are democracies at all. The West has served in the last decade as a beacon for human rights, and has concentrated efforts and resources to the spreading of its values, managing to make those same human rights part of international law, and therefore allowing to uphold them, with obvious limitations, all around the world. The countries taken under scrutiny will be:

- **United States of America:** The choice of the United States as a case study is almost self-explanatory: 9/11 was a shocking event not only for the American public but for the whole world, and the echo and the consequences on such an attack can be felt on the world still today. On legal grounds, we have the PATRIOT Act of 2001, that served as a basic legal framework for enhancing domestic security, surveillance procedures, border protection and control, as well as harshening of criminal punishment for terrorism or alleged participation to terrorism, and in general, national defence.
- **France:** he country can be considered as the cradle of human rights and modern democracy in the West and, as a fundamental country in the development of the European Union, carrying on an analysis of this kind excluding it would be impossible. Moreover, the attacks in Paris and Nice shook the hearts and minds of not only the European public but also of political leaders, thus causing an almost immediate reaction by French and European institutions alike. In addition, the prolonged state of emergency needs to be carefully considered.
- **Germany:** on grounds of political importance in the European construction, Germany equals France, and we considered to be interesting to control, after the attacks in Munich, how the Federal Republic responded to the attacks; in addition, it can be of interest to analyse how the Basic Law, created to guarantee the outmost level of protection of human rights (due to historical reasons), withstood the terroristic attacks.
- **Belgium:** while of minor importance compared to the other cases under scrutiny, Belgium must be considered as it has been named the “jihadi hotbed” of Europe, and has been proved how the terroristic attacks in France had been planned and prepared there. This caused strong resentment and criticisms in the European community, calling for reforms in the Belgian law enforcement and counterterrorism.

The three European countries are analysed under the umbrella of the European Union, that will be considered separately in the analysis and then aligned with the results coming from the countries under it. Obviously here the analysis cannot be strictly like-for-like, as the EU is not a state and so far, is arguably not even close to become one. However, the

impact it directly has on the political life and legal framework of the different European countries is undeniable, therefore it will be considered, in an effort to understand more closely the effect it may have, also in fields like detention in which its importance, being strictly in the grounds of law enforcement, is limited.

The analysis will be carried on using a diachronic approach: the different qualities, reactions and legal frameworks will be analysed before and after the terrorist attack has been carried on, in way to understand whether there has been some change in the democratic quality in the analysed cases. This will require some degree of time differences also between the cases taken into consideration for the research, but the time variable here cannot and will not be ignored as it is of fundamental importance to understand the phenomenon. For what is concerning the US, obviously, the milestone from which to begin must be the attack on the 11 September 2001, an attack that shocked the public opinion and changed not only the internal American policy, but also influenced world politics of the next decades. For what concerns Europe, the legal changes must be analysed starting from the first terrorist attack the continent had to face in almost a century, starting from the underground Madrid bombing in March 2004, and coming to the most recent attacks led on, or claimed, by the so-called Islamic State, on France and, lastly, on the city of Berlin at the end of 2016. What were the response given by the single member states and by the Union as a whole will be one of the key focuses of this research, also because it developed in time, due to the occurrence of the terrorist attacks during a larger time-spawn.

The analysis requires some key definitions to be carried out correctly. First and foremost, a definition of terrorism is fundamental. We define terrorism as: *the motivated use of violence, or threat of its use, towards a primary target that is unable to defend itself, while the concrete target is intimidating an audience into a course of action that would not have been chosen otherwise*. This definition appears to encompass the larger number of cases of terrorism, including political and religious terrorism, even if for the scope of our analysis the main type of terrorism we come across is the one related to religious (specifically Islamic terrorism). Then, a definition of democracy is required, and since we are dealing with fully fledged democracies, in which the main procedural criteria are internalized by the population and sustained by the constitutional and legal order.

However, we are trying to assess the qualities of a good democracy, and to check how (and if) those qualities have been challenged by terrorism. The qualities under scrutiny will be:

- **Rule of Law:** is not only the enforcement of legal norms, it also connotes the principle of the supremacy of law and entails the capacity, even if limited, to make authorities respect the laws and have laws that are not retroactive, publicly known, universal, stable and non-ambiguous.
- **Freedom:** Essential rights include personal liberty, right to legal defence, privacy, freedom of residence, freedom of thought and expression, free press, right to education and so on.
- **Equality:** For the purpose of this analysis we will not focus on a “social charter”, as it will be a daunting task that will lead us off-topic, but we will consider if in practice laws are applicable to all citizens equally or if equality can be considered a “manifesto rights”.
- **Responsiveness:** is the last democratic quality implying the result. It is the capacity of government to satisfy the governed by executing its policies in a way that corresponds to their demands. This dimension is related to accountability, as it can be seen as a way of seeing “representation in action”.

The second chapter will deal with the analysis of how the countries of the West have responded, during the years, to the rising concern of terrorism as a matter of legal and political discussion. Here we will analyse in detail the legal changes and the cases that have been carried on in the different countries with regards to some key concerns for the freedom of the individual, namely: asset seizures and forfeiture, investigation and tap wiring, prosecution and state secrets, aliens and ethnic profiling, interrogations and emergency powers. It's easy to agree on the fact that those provisions of law, even if fundamental for the safety and well-being of the citizens of a nation, are those that more heavily can harm the personal liberties of the individual, considered both in economic activity, personal sphere and relation with the government and the security forces. As a first step, is fundamental to consider how countries have defined terrorism in their legal systems, to have a first-hand understanding of how large the scope of counterterrorism might get when dealing

with matters of personal freedoms and liberty. As our focus is not only at the state level, when dealing with the issue of terrorism and counterterrorism, especially for the European state is important to deal also with those inter-state measures taken at European level and the definitions given by the Union of terrorism. After this issue has been covered, the research moves to the concrete analysis of how the countries under scrutiny have responded to terrorism and what legal provisions have been approved by national parliaments or authorities to counter terrorism. What remains fundamental to understand also in this chapter is going to be how far the securitization of democracy has gone what effects it has had on the so-called Free Word. In the light of the studies carried on so far, we can clearly witness that policy makers had to face a two-faceted problem: the need to protect the citizenry and the need to protect the values on which democracy is founded. The issue is nowadays incredibly complex, due to several factors. First and foremost, the changing nature of the terroristic threat itself that, being unpredictable for its own nature, poses an everchanging threat that the classic police approach of responsive action is unable to cope with. However, the demand for law enforcement and security agents, both for active duty and for the psychological wellbeing of the citizenry, has risen in numbers and resources provided: for one France, between 2015 and 2016, proceeded by hiring 7,500 new staff and adding 900 million euros to counterterrorism budget, and pledged to continue on this track for the years to come, and same happened to Belgium and will happen in the next years in Germany, that announced the same type of investments after the latest attacks. Police forces are unable, under the constraints of law, to act before the act has occurred and, having most police forces a responsive approach rather than a preventive one. Similar problems occur also for the judiciary, as most of the times it proves too slow to react timely to the needs of police or intelligence forces, that must retain their actions or act outside the boundaries of law. The case of Belgium is emblematic in this case: for one, in 2010 Fouad Belkacem founded an association, Sharia4Belgium, with clear intent of spreading terroristic propaganda in Belgium. It was shut down due to such allegations in 2012, but by the time the process started, in 2014, only seven members of the organization were charged and judged, while many others had already departed to fight in Syria. This poses two relevant questions: is the division of powers, so cherished by the modern state, become inadequate to resist to

such a threat? And if it is so, what can be the future of democracy? The absence of a division between executive power and the judiciary is one of the key features of a totalitarian regime and, especially in Europe, we must be aware of the risks involved in such a process, as well as the consequences it has had in the past. Each unit is then analysed by looking at three particular types of law provisions involving:

- Detention
- Data Protection
- Freedom of movement

These three main groups of provisions are the ones that more than others are able to impede the maximum fulfilment of personal liberty. Detention as a category is self-explanatory, as it concerns the freedom of citizens not to be imprisoned by the state (here in the specific we will deal with incommunicado detention, when possible). The second, although already important in the past, has become more and more fundamental in the modern world, in which interconnection, internet and social media allowed the sharing and eventual storage of an amount of personal information unprecedented in any other era of mankind, thus making privacy right even more fundamental than ever before. Freedom of movement, however enshrined as a key value in the European countries and by European institutions (and Treaties), is also important in the United States and more in general in the modern world, in which the ability of moving safely and easily around the world has become one of the main features favouring and allowing globalization to flourish.

In the third chapter we will use the analytic tools described in the first chapter to check how the law provisions laid down in the second one could have affected (if they had) the quality of democracy. Each country will be analysed according to the three subgroups of laws, detention, data protection and freedom of movement, and then the law provisions will be scanned using the four qualities of democracy described in the first chapter, namely rule of law, liberty, equality and responsiveness. For the sake of simplicity, we will use a numerical scale to describe how the country's legal landscape changes were, or were not important in determining the level of the qualities, with 6 degrees of change:

- 0: Completely unchanged, the new legal provisions did not modify the quality substantially.
- 1: Minimal change, the quality has been partially hindered but does not raise concerns for the near future.
- 2: Minimal change, the evolution of the legal framework, following a similar direction, can leave ground for concern.
- 3: Medium worsening of the quality, the legal provisions enacted by the government pose a threat to the quality of democracy.
- 4: Substantial worsening of the quality, the legal provision directly threaten constitutionally defended values.
- 5: High degree of worsening, the acts of the government go beyond the normally accepted rules and severely threaten the quality of democracy.

Once the grading will be completed, there will be enough data to make a ranking, like the one of Freedom House, but much less ambitious, and see which one among the countries selected did better and which one did worse, and analysing the underlying reasons can be a useful tool to understand why and how some countries resisted better than others to the temptation of applying harsher legislation and rights limitations when combating terrorism.

In this analysis we must also recall the concept of “penal populism”. It is important to understand this trend as it may be one of the underlying reasons why, after the end of the twentieth century, in which the fight for rights was a constant part of the political agenda, governments have had relatively ease in passing laws curtailing rights. John Pratt, in his recent work “Penal Populism” (2007), uses this phrase as an opening of his book:

‘Democracy which began by liberating men politically has developed a dangerous tendency to enslave him through the tyranny of majorities and the deadly power of their opinion.’ – Ludwig Lewisohn, *The Modern Drama* (1915), p. 17

The modern society is losing trust on the elites that constituted and governed the State in the last century, the public does not want anymore to be kept on the side when political decisions happen, want to be a part of the process, thus posing a serious issue for

the modern democracy, especially for representative democracy, as the call for referenda and direct intervention of citizens has become a leitmotiv that we can find in many of the modern states. This lack of trust for elites, establishment, government and civil servants does not reflect only in the political arena, but it goes deeper. This trend therefore allows politicians and in general, public entrepreneurs, to ride the populist tide not only in the political field, but also in the judicial arena, voicing what the people want: to feel safe and protected, no matter what the cost might be, therefore calling for harsher punishment for those breaking the law. This kind of populism, that provides easy solution to complex issues, just want to gain support by giving the public what they need, without thinking about the consequences it might have. Also the judicial itself is in a way following this trend: as they do not enjoy the trust they used to have before, due to the fact of being “establishment”, they want to look active and immediately responding to those highly mediatised cases in way to keep the people’s trust. As the rise nationalist and right wing movements and parties in Europe and in the US demonstrates, this trend is not to be taken lightly, on the contrary, it needs attention. The tendency of making the exceptional normal in penal grounds has been noted in many countries, and along them there are the countries that we have analysed in the previous chapter, therefore making this issue of outmost importance for this research.

Each country is taken at once and the provisions analysed and graded for each group of norms, and by the eventual subversion of the democratic qualities related to each subgroup taken under scrutiny, following this example:

Level of Subversion – Data Protection – USA

Rule of Law	Liberty	Equality	Responsiveness	Average
3	4	0	3	2,50

Then, the country is given an overall score depending on how it fared with the analysis of the level of subversion related to detention, data protection and freedom of movement. The results are then compared between each other in way to extrapolate conclusions about the reasons and causes for each results, and presented in a comparative way. The final level of subversion appears like this:

Total Results by Country

	Detention	Data Protection	Freedom of Movement	Final
United States	1,50	2,50	1,75	5,75
France	1,50	2,25	0	3,75
Germany	0,75	0,75	0	1,50
Belgium	2,25	0,75	0	3,00

With all data has being examined and with a scoring for each of the countries under analysis, the fourth chapter tries to draw some conclusions to see how these that can help us understand how states have tackled the terroristic issue so far and how the most likely evolution of counterterrorism will look like in the next years. We cannot in fact doubt that terrorism will remain a salient issue for the next years, as the world order in which we are now allows such a dangerous environment around the globe: without a clear superpower that grants hegemony, several fault line conflicts are likely to arise in countries and regions in which religious and cultural differences can make a conflict sparkle.

Three are the main conclusions that we are able to draw from the analysis of the data: the first is a tendency towards securitization of society. This comes from the first result that strikes the eye in this case is the very limited values of issues regarding responsiveness in all the countries we have analysed, with the exception, even if small in nature, of the US. We can understand from this result that, even if the other qualities have been hindered in a more or less substantial way, the public responded positively to the law changes, and the political leaders enjoyed support with this path leading to securitization. We can insofar confirm the presence of this trend of “penal populism” that we were discussing earlier in this work; taking away the bias given by those unaware of the legal changes in their country, we can deduct that the population is taking less care of rights and is much more concerned about security, accepting positively those legal instruments that allow a higher level of security, even despite human rights. The United States and France could represent such a trend. Securitization however, does not stop on

the grounds of law enforcement, it goes far beyond that, being a trend that comprises several claims. It also entails economic security, that people, especially in the countryside and in poorest parts of the country, have long lost due to the crisis and globalization. This trend will reflect not only in the political agenda, but can turn into an economic plan, as it will push for protectionism of national economy over the choice of free market economy.

The second trend that we have individuated is that the institutions in which decisions are taken are still of fundamental importance. If we analyse the data in a comparative way, it is easy to notice some striking differences between two subgroups: the USA and France and Germany and Belgium. While the first ones have a monocratic authority that holds much of the executive power, while the others have a completely different institutional setting that disallows concentration of power. This difference has of course different historical root causes in all of the different countries, but they lead to the same consequences: while the second group has a central authority that is hardly constrained by checks and balances, the first one has consistent authority and independence when it comes to matters related to counterterrorism. We have a clear evidence of this when it comes to data protection, in which both Germany and Belgium have a very low subversion score. German has been built, constitutionally speaking, to resist to all attempts of power concentration in the hand of the federal government, due to its history, while Belgium, since has traditionally been a divided country, with many cleavages, has resorted to a consensual democracy, in which decision making is intentionally made a complex process. Due to their institutional systems, both countries are forced to find a consensus among several political players, with a more “centrist” attitude that keeps extremism at bay on both the sides of the aisle. This system avoids centrifugal drives and causes aggregation along the lines of the constitution or of some highly regarded values rather than favour extremist legislation. The absence of a monocratic figure can be seen as a positive drive for a more stable and longstanding consensus on issues of human rights protection. Many scholars have also noted a tendency, in modern political leadership, towards personalization of politics and political support, with parties used mainly as a proxy that leaders can exploit to gain recognition and voters. Usually we are faced with strong personalized leaderships than then reflect

into strong and personalized government, where checks and balances can be neglected at the leader's will. However, this has harsh consequences especially in times of crisis for democracy, or moments in which democracy is suffering attacks from undemocratic enemies. Strong and charismatic leaders can indeed rally large numbers of voters and supporters by the time the elections end, but then finding a good way of governing a country without the ability or the will to negotiate with the opposition can be severely hard for democracy. The last striking tendency coming from the results, is the importance of the European Union on the European countries, thus confirming our first impression that it was fundamental to include the analysis of the EU in this research, if even not a state, as it appears to be essential in understanding the development of the countries under it. It can be fair to say that the European Union has had a positive role in the development of counterterrorism measures, up to a certain extent, rather than a negative one. The values that the EU subversion scores added to those of the countries analysed has been minimum, and the fact that, on freedom of movement, all the European countries had a score of 0 is a striking comparison with the score of the United States on the same issue. If we look at the overall score of all the countries examined, we can clearly see that the European countries have considerably smaller levels of subversion than the one of the United States. The European Union framework, together with a strong culture of human rights spread all over the continent, disallows such intrusive interventions of government and law enforcement agencies, thus protecting more efficiently rights and liberties. The European countries had to abide to a set of norms and rules decided together and had no chance but to follow them, pushing harder only where the Treaties allowed them, accordingly, in the field of detention and direct law enforcement. The United States do not have such limitation at a supranational nor at international level: they can freely decide on their internal and foreign policy without constraints due to their position of power in the international arena, making even UN intervention, fruitless, if not from a merely mediatic point of view. We could argue that the presence or absence of an international or supranational authority can be an important variable to consider when dealing with how states fight an issue so important as terrorism and counterterrorism, to the point that we could transfer the reasoning we did above to this case as well; the presence of some level of constraints, both at internal or external level, can strongly protect rights and liberty. International institutions create constraints and incentives for otherwise completely

sovereign countries, creating a superior system of norms that can impede the actions of leaders that, strong of popular support, want to go beyond or even disregard human rights. What interests us most in this striking US-EU comparison is the inexistent level of subversion related to travel restrictions and freedom of movement. The United States still have complete discretionality on how and if a foreigner can be given access to the country, being completely sovereign on the matter, and has indeed done so in the past years, excluding or controlling many individuals with the characteristic of a potential terrorist. It could be argued that, in a climate like the one in Europe after the tremendous attack on Paris, many countries would have wanted to change their laws in a similar fashion as their American counterparts, effectively destroying one of the greatest achievements of the EU so far, but they could only do so for limited time spans, as written in the Schengen Treaty, and following the European rules on the matter. The role of the EU on this matter is undeniable, and disallowed from the start extreme legislative actions like the infamous Muslim Ban proposed by the Trump administration in the United States. The European design of the area of free movement was effective not only during times of peace, but also in times of peril like the one we are facing now due to the terroristic threat, and proves to hold strongly.

In conclusion, this research wants to be a tool to understand the ongoing changes in European and American societies from a legal and political perspective, and a way to reflect on the role of the leaders, the institutions and the public will, and how these have evolved in the past years due to the terroristic threat. What appeared true in the law changes that we have analysed is that European and American people, to which their leaders are often a reflection, are hardening; for how much this can be useful as a way of dealing with grief is something for psychologists to analyse, but from a social and political perspective, this can lead to unintended consequences, surely unintended by terrorists and politicians alike. When atrocities like the ones we have faced in the last decades become normality, or something close to that, it becomes easier to call for strong action and ferocious response from the government, but we must remember that if strong action and ferocious response become normality as well, and accepted ones too, that would mean an immense step back in the history of democracy.