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The antiterrorism legislation in a post-9/11 scenario and the Courts' approach in protecting fundamental rights: the cases of France and of United Kingdom

Prof. Elena Griglio
SUPERVISOR

Prof. Carlo Magrassi
CO-SUPERVISOR

Francesca Natalini - 645322
CANDIDATE

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INTRODUCTION

Nowadays, the terrorist attacks on the Twin Towers on 11th September 2001 are still considered as being one of the most prominent events of the last twenty years. A new wave of terror overcame Western societies, among both the populations and Governments. The climate of tension did not disappear over time since then, following the 9/11, further terrorist attacks occurred and the raise of ISIS and Al-Qaeda, and their increasing number of members, were more and more a cause for concern. Consequently, since 2001, many Western countries started to implement extensive counterterrorism strategy, with a wide range of severe measures in order to tackle the so-called "War on Terror".

Nonetheless, it seemed quite inevitable that these provisions were going to constitute a significant attack in the fundamental rights and liberties of citizens. According to many, depriving individuals of their rights and freedoms was crucial in order to preserve security. According to some observer's opinion, it is especially in times of crisis that democracies must show their key principles and values, by taking into account that rights would lose their essence if they were easily rescindable in circumstances of emergency[1].

Therefore, the balance between security and liberty has become a central issue. Indeed, the aim of this thesis is to analyse the difficulty of achieving the equilibrium between national security demands and individual rights' protection, since the implementation of antiterrorist measures were often justified as pursuing the objective of public safety, at the expense of fundamental rights and liberties, which were often limited and infringed. In other terms, the thesis' objective is to investigate the impact of counterterrorist legislation on fundamental rights in the aftermath of 9/11. In order to evaluate this impact, it will be also necessary to look at the role of the High Courts in defending the fundamental rights according to constitutional principles, and to examine whether they represented an effective counterbalance to the Governments' intrusion in the individual rights' sphere.

The collision between rights and national security was particularly evident in France and in United Kingdom. These two countries had to face a common challenge, the fight against terrorism, but their different constitutional contexts influenced their legislative and judicial responses. Indeed, what is important to bear in mind is that the French system is based on the "civil law" model, while the United Kingdom is a "common law" country. The former is founded on codified and written rules, including a written Constitution, the latter is a court-based legal model, referring mainly to case law and precedents and to customary law, thus conferring to the judges a primary role. Consequently, the French and British antiterrorist

[1] C. Michaelsen, *Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric*, in University of New South Wales Law Journal 29, No. 2 (2006), p.2.

responses were not identical, due also to their diverse constitutional environments. For instance, in contrast to UK, the existence of a written regulation concerning the state of emergency led the French Government to legally enact a series of restrictive measures that were justified by the state of emergency itself, also prompting an administrative-based management of the terrorist threat. The UK approved several harsh counterterrorist provisions as well, but along with a slight and progressive commitment to ponder them with the respect of fundamental rights. That might be explained by the strong evolution of the rights' incorporation in the British legal system. In UK, the importance of legally providing for a set of rights and freedoms has deep roots and a long historical landscape, from the Magna Carta (1215) to the Human Rights Act (1998). The latter was quite significant, since it incorporated the rights disposed in the European Convention on Human Rights into domestic British law. Both France and United Kingdom had already dealt with terrorism in the past, but since 2001 they adopted more restrictive counterterrorist measures, also due to their alliance to United States of America and as part of a wider European engagement in the fight against terrorism. Most of these provisions were hard to conciliate with the full exercise of rights and liberties. The thesis is structured in three chapters.

The first one will describe the main counterterrorist laws that were enacted by France and United Kingdom right after the 9/11 attacks and in the aftermath of impactful terrorist attacks in both countries, respectively the Paris attacks of November 2015, which led to the declaration of the state of emergency, and London bombings in July 2005.

The second part will draw the attention on the counterterrorist legislation's repercussions on fundamental rights, in terms of their limitations in both France and United Kingdom. The rights and freedoms which were mostly affected have been the right to liberty of movement, the inviolability of the home, the right to privacy, the freedom of association, the freedom of religion, the right to liberty and security, the freedom of expression, and the prohibition of discrimination. As a matter of fact, it will also be clear how one of the multiple effects of the antiterrorist measures has been an increasing discrimination against the Muslim communities, non-nationals and citizens with a foreign background, since part of counterterrorism strategy's outcome was the adoption of stricter immigration laws and of citizenship deprivation's provisions.

Lastly, the third chapter will regard the position of the French Constitutional Council and the UK's House of Lords in dealing with the French and British counterterrorist legislation's intrusion in the fundamental rights' safeguards. In performing the constitutional review of antiterrorist acts, the Constitutional Council's approach may be deemed as deferential towards the legislative and executive branches, due to a weak sense of legitimization in intervening in national security matters, and thanks to the adoption of self-restraint techniques in order to

maintain intrusive laws within constitutional boundaries. On the contrary, the UK House of Lords, which was the final court of appeal in the British judicial system until 2009, illustrated a change in its traditional deferential attitude with reference to security issues. Since 2001, the House of Lords adopted a more non-deferential approach, by claiming the important role of the judges as counterbalance to the Executive, even in circumstances such as the fight against terrorism, and by affirming that national security matters were no longer non-justiciable. This demeanour often led the House to declare various antiterrorist measures incompatible with domestic law because of their infringement on fundamental rights. Therefore, it is possible to state that, with respect to the Constitutional Council, the House of Lords was, in a way, more efficient in uniting counterterrorism and fundamental rights and in avoiding accepting a balance between rights and security being more in favour of the latter.

CHAPTER 1. COUNTERTERRORIST LEGISLATION AFTER 9/11 ATTACKS

1.1 The French legislation against the war on terror

The attacks committed by the militant Islamist terrorist group Al-Qaeda against the United States on 11th September 2001 marked a turning point in the national security policies, by provoking States' reaction and awareness about a threat without precedent. The international and national security has become the major priority in every Western country and the antiterrorism came to be defined as the only official doctrine on the subject of security in the West[2].

In France, the juridical body in the fight against terrorism had already been created in the 1980s as a consequence of the Paris terrorist attacks of 1985-86, leading French authorities to design antiterrorist tools relatively soon with respect to other European countries[3].

Particularly, since the 1980s, France has had a specific legal apparatus, a derogation from ordinary criminal law, which still serves today as the basis for anti-terrorism. For instance, the Law no. 86-1020 of 9 September 1986 introduced, for the first time, the possibility of aggravating offences if committed "in relation to a terrorist enterprise", and created a specialized body of investigative judges and prosecutors, the central counter-terrorism service, to handle all terrorism cases[4]. Other eight laws from 1991 to 1997 made sure that terrorism cases escaped more and more ordinary jurisdictions[5] and already included searches and surveillance powers[6]. In 1995, the governmental plan "Vigipirate" was promulgated, giving a wider framework of responsibilities and principles of action in the fights against terrorism[7].

Nonetheless, the 9/11 attacks underlined the necessity to construct a much stronger domestic response. As a matter of fact, the French government adopted a strict approach to face the so-called "war on terror". Contrary to the American approach, based on the idea of terrorism as an external threat and the consequent military engagement in the Middle Eastern countries[8],

[2] J. Alix, O. Cahn, *Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale*, in Revue de science criminelle et de droit pénal comparé, (2017), p.846.
[3] A. Garapon, *Les dispositifs antiterroristes de la France et des États-Unis*, in Esprit, No. 327 (8/9), (2006), p.128.
[4] F. Ragazzi, *L'évolution de la politique anti-terroriste en France depuis les attentats de 2015 : anticipation et mise au pas du corps social*, in SciencesPo Centre de Recherches Internationales (2017), [online] : L'évolution de la politique anti-terroriste en France depuis les attentats de 2015 : anticipation et mise au pas du corps social | Sciences Po CERI.
[5] For terrorism crimes, trials before professional magistrates were instituted at the crown courts in Paris, which constitutes an exception to the rule of trial of crown court before a popular jury.
[6] Trente cinq ans de législation antiterroriste | Vie publique.fr (vie-publique.fr)
[7] Ibid.
[8] A. Garapon, *Les dispositifs antiterroristes de la France et des États-Unis*, cit., p.128.

France considered terrorism as a problem of internal security. As a result, the existing measures of surveillance and control were reinforced, and new ones were developed. The French legislation, right after 9/11, strengthened the powers of administrative authorities and police forces and included several restrictions of general scope, addressed to individuals, to specific organizations and to the whole population[9].

The French legislation became more and more preventive rather than reactive, with a rigid restrictive character in terms of limitations of individuals' lives[10], especially after the Paris attacks of November 2015. The latter led to the declaration of the state of emergency and to the adoption of stringent extraordinary legislation, which was justified by a political discourse based on the gravity and exceptional nature of the terrorist threat[11]. Moreover, a process of "normalisation" of the emergency appeared to be evident, through the extraordinary measures' transformation into ordinary legislation. The emergency was "normalised" as meaning that it was a clear example of making the state of emergency permanent, since some of the administrative powers provided for by the state of emergency were translated into ordinary powers, hence they can be utilised in ordinary circumstances, outside an exceptional situation. Hence, the idea the increasing administrative powers have become "normal", as if it was indispensable for French citizens' security.

1.1.1 The French legislative response to 9/11 attacks

The 9/11 attacks have been a shocking phenomenon that promoted the introduction of new regulations into Western States' domestic legislation[12]. This paragraph will describe the several and diverse Acts related to French counterterrorism strategy, by showing a common security-based tendency. Indeed, the laws contributed to radicalise a more preventive strategy founded on security mechanisms and controls of wide areas of public and private life, such as house searches, retention of communication data, video surveillance and closures or limitations of accessing in public areas. Many of this kind of powers were considered as strongly limiting fundamental rights. The French post 9/11 approach was truly engaged in installing a globalized surveillance, also through the empowerment of administrative authorities, which acquired more and more the role of intervening in the individuals' rights and liberties. Along with the increasing powers addressed to administrative agents, the

[9] J.C. Paye, *Lutte antiterroriste et controle de la vie privée*, in Multitudes, No.11, (2003), p.92.
[10] M. Garrigos-Kerjan, *La tendance sécuritaire de la lutte contre le terrorisme*, in Archives de politique criminelle, No.28, (2006), p. 190.
[11] A. Tsoukala, *Democracy in the Light of Security: British and French Political Discourses on Domestic Counter-Terrorism Policies***,** in Political Studies: Vol.54, (2006), p. 618.
[12] R. Letteron, *La difficile construction d'un droit de l'antiterrorisme* - Le Club des Juristes (2021) [online] : https://blog.leclubdesjuristes.com/apres-11-septembre-la-difficile-construction-dun-droit-de-lantiterrorisme/

position of the judiciary, in matter of controlling and eventually authorising the limitations of fundamental rights, decreased. The automatic control of a judge in the sphere of individual liberties almost disappeared. This will be even more evident in the legislation after 2015 attacks.

a. The "Day-to-day Security law" (Law no. 2001-1062 of 15 November 2001)

In France, one of the legislative acts that can be considered as a direct consequence of the 2001 terrorist attacks is the Law No. 2001-1062 of 15th November 2001, or the so-called "*Loi sur la sécurité quotidienne*", which was the starting point of a broader social control. Thanks to a general deal between the members of the Parliament, the Prime Minister and the President of the Republic, and due to a climate of tension and emergency, this law was not submitted to the preventative control of the Constitutional Council, which could have limited or influenced the political discretionality of Parliament[13]. The "day-today security law" consisted of a legislative package concerning a series of instruments to combat terrorist activities and the illicit trafficking of weapons. Particularly, it hardened the judicial police's powers in matter of identity controls to fight against terrorism, such as in case of vehicles' frisk, and reinforced the private security agents' powers to carry out searches and palpations to every suspected person[14]. For the purpose of managing the terrorist threat, the Law No. 2001-1062 created the National Institute of Scientific Police, designing the possibility of being imprisoned if an individual refuses to be subjected to a DNA sample. Thus, it instituted an automatic national file archive of terrorist suspects' fingerprints[15]. This legislation also established sanctions related to the crime of financing acts of terrorism, by providing for the general confiscation of guilty individuals' assets[16]. The objective of these measures was to affect terrorism at its roots.

Moreover, it introduced certain security regulations specifically addressed to the new information and communication technologies, which was viewed as a potential supporting resource for terrorist acts[17]. In fact, it allowed the preventive retention of connection data for a period of one year, to which financial administrative agents could get access[18]. One month later its adoption, the law's field of application was extended.

[13] J.C. Paye, *Lutte antiterroriste et controle de la vie privée*, cit., p.98.
[14] Trente cinq ans de législation antiterroriste | Vie publique.fr (vie-publique.fr)
[15] M. Garrigos-Kerjan, *La tendance sécuritaire de la lutte contre le terrorisme*, in Archives de politique criminelle, No.28, (2006), 194.
[16] Trente cinq ans de législation antiterroriste | Vie publique.fr (vie-publique.fr)
[17] Law n° 2001-1062, 15th November 2001.
[18] J.C. Paye, *Lutte antiterroriste et controle de la vie privée*, cit., p.98.

b. The "Law on orientation and planning for the internal security" (Law no. 2002-1094 of 29 August 2002)

The next stage in the legislative response to the attacks of September 2001 directly induced French government to adopt the Law No. 2002-1094 of 29th August 2002 on the "orientation and planning for the internal security"[19], which was examined by the National Assembly with urgence and validated by the Constitutional Council. It essentially reorganized the domestic structures that were charged to ensure the internal security, by extending the powers of the judicial and local police forces. In the fight against terrorism and criminal organizations, the law included regulations for making the investigations and the use of the intelligence services more effective, by fostering institutional cooperation on the international level[20]. The law was criticized because it also allowed a more precise surveillance of the information on Internet, since it created a new system for collecting, analysing and identifying the IT data[21]. Together with the law of 15 November 2001, this legislation promoted a "general mobilisation" of every professional figure related to security and invited the citizens themselves to actively participate in the struggle against insecurity[22]. In fact, the Law of 29 August 2002 provided for a series of financial, organizational, technical and human mechanisms which the legislator had to exploit in the following legislation for ensuring this general mobilisation and, more generally, for guaranteeing a better balance between the community police and the judicial actions of the internal security forces[23].

c. The "Law for Internal Security" (Law No. 2003-239 of 18 March 2003)

The law on the internal security continued the wavelength of the abovementioned laws. It legitimised the existence of file archives belonging to the judicial police and to the *gendarmerie*, whose competences went beyond the fight against terrorism[24]. It dealt with the prefects' central role in relation to domestic security, with new types of incrimination for ensuring public security, with the enforcement of the powers of police authorities and of municipal and rural police forces, and with a fortified protection of individuals participating

[19] Law n° 2002-1094, 29th August 2002.
[20] Trente cinq ans de législation antiterroriste | Vie publique.fr (vie-publique.fr)
[21] Ibid.
[22] J. Danet, *Le droit pénal et la procédure pénale sous le paradigme de l'insécurité*, in Archives de politique criminelle, No. 25, (2003), p. 41.
[23] Ibid., p.42.
[24] M. Garrigos-Kerjan, *La tendance sécuritaire de la lutte contre le terrorisme*, cit., p.194.

in the security policies[25]. It also broadened the field of the automatic national file archive of suspected terrorists' fingerprints, which was created by the Law of 15th November 2001[26]. The legislation made the police investigations more efficacious and prolonged the application of the day-to-day security law's regulations, strengthening the fight against terrorism, until 31st December 2005[27].

d. The "Law on Combating Terrorism and Miscellaneous Provisions on Security and Border Controls" (Law No. 2006-64 of 23 January 2006)

The Law No. 2006-64 of 23 January 2006 was adopted and promulgated through an urgency procedure due to the London terrorist attacks of 7 July 2005[28]. In the light of these attacks, this law represented a further effort to manage the terrorist threat, through the introduction of several provisions that demonstrated the perception of danger in that period. For instance, it increased the duration of police custody in cases of terrorism[29].
Among its most important measures, the law obliged the telecommunication operators, the Internet providers and the whole public institutions allowing an access to Internet, to automatically retain login data for one year[30]. These data could be viewed by police authorities without a magistrate's authorisation, but simply under the permission of a high officer appointed by the National Commission of Security Interceptions' Control[31]. This wide retention of data and its administrative, rather than judicial, control was heavily criticized. However, the Constitutional Council justified this passage by declaring that terrorism prevention did not belong to judiciary domain[32]. This mechanism was part of the implementation of a true terrorism prevention's apparatus of the administrative police, which characterized the whole French counterterrorism approach. The process of increasing administrative agents' powers and of intensifying the tools for French citizens' security designed the preventive strategy of France's antiterrorism laws, aiming at more preventing as much as possible terrorist attacks rather than reacting to the attacks *a posteriori.* This procedure included the intensification of identity controls in international trains, and of

[25] O. Mallet, *Principales dispositions de la loi n° 2003-239 du 18 Mars 2003 pour la sécurité inérieure concernant les collectivités locales,* (2003) [online] : https://www.amf.asso.fr/documents-principales-dispositions-la-loi-n-2003-239-du-18-mars-2003-pour-la-securite-interieure-concernant-les-collectivites-locales/7614
[26] M. Garrigos-Kerjan, *La tendance sécuritaire de la lutte contre le terrorisme,* cit., p.194.
[27] Trente cinq ans de législation antiterroriste | Vie publique.fr (vie-publique.fr)
[28] lutte contre le terrorisme sécurité et contrôles frontaliers | Vie publique.fr (vie-publique.fr)
[29] J. Kilpatrick, *Quand un état d'urgence temporaire devient permanent, le cas de la France,* in Transnational Institute, (2020), p. 24.
[30] Law n° 2006-64 of 23rd January 2006, art.6.
[31] Ibid.
[32] Trente cinq ans de législation antiterroriste | Vie publique.fr (vie-publique.fr)

controls regarding air travels[33]. Furthermore, the legislation also contained certain measures about video surveillance, which, for instance, was enlarged to the places considered the most exposed to terrorist attacks, and provided for the administrative freezing of financial assets linked to terrorism[34].

The law was certainly a symbolic turning point because it established an important commitment of administrative police in the domestic management of the war on terrorism[35].

e. "The Law on Security and Fight against Terrorism" (Law No. 2012-1432 of 21 December 2012)

Since the terrorist menace acquired more and more a permanent character, the Government adopted, through an accelerated procedure started in October 2012[36], the Law of 21 December 2012, 'on to security and the fight against terrorism'[37], which aimed to harden the domestic counterterrorism's tools. Firstly, it prolonged the Law of 23 January 2006's regulations about the fight against terrorism, which authorized a preventive surveillance of connection data concerning Internet, delocalization and mobile phones data, from their initial expiration of 31st December 2012 to 31st December 2015[38].

Furthermore, the legislation modified the Penal Code, strengthening the juridical arsenal. Most notably, it added the article 113-13, which allows to prosecute a French citizen or any individual who habitually resides in the French territory, for having perpetrated abroad a terrorist act, without the necessity to wait for an official report, describing the facts, drafted by the foreign State[39]. This prosecution may also be effectuated without verifying whether the act constitutes a crime in both countries. This measure also covers the scenario where the individual has participated abroad into a terrorist training camp if no crime has been committed[40]. Finally, the Law No. 2012-1432 revised some regulations about the code of entry and residence of foreigners and the right of asylum relating to the departmental committee of expulsion[41].

To sum up, this law has been significant in the French antiterrorist legislation's pathway, by extending the rules of application of the criminal law, by introducing a new type of incrimination and by lengthening the directives regarding the identity controls and the

[33] Ibid.
[34] Ibid.
[35] J. Alix, O. Cahn, *Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale*, cit., p.852.
[36] Lutte contre le terrorisme - Sénat (senat.fr)
[37] Law n° 2012-1432 of 21st December 2012.
[38] *Loi du 21 décembre relative à la sécurité et à la lutte contre le terrorisme* [online] : Vie publique.fr
[39] J. Kilpatrick, *Quand un état d'urgence temporaire devient permanent, le cas de la France*, cit., p. 24.
[40] Ibid.
[41] Lutte contre le terrorisme - Sénat (senat.fr)

administrative surveillance of data[42].

f. The "Law Strengthening Counter-Terrorism Provisions" (Law No. 2014-1353 of 13 November 2014)

Due to the rising of the Islamic State "Daesh" and to the high likelihood of jihadist fighters' return to France from Syria and Iraq for committing terrorist attacks[43], French Government approved the Law of 13 November 2014, which represented an additional pillar to the counterterrorist measures.

The law introduced a mechanism of prohibition of exit from French territory, which gives to the Minister of Interior the power to prohibit French citizens suspected of planning to participate in terrorist activities abroad from leaving France for a period of six months, renewable for up to two years[44]. Thanks to this new measure, the administrative police authorities' powers increased, by attributing to the Minister of Interior a stronger power of coercion restricting the freedom of movement of individuals[45]. In other terms, this prohibition is not based on the commission of an act of terrorism or on the suspicion that a terrorist act has been perpetrated by the individual. Instead, the latter cannot leave the French territory just because he is likely to engage in terrorist activity in the future[46]. That is a clear example of French preventive strategy. What is more, the legislation introduced a new article in the Penal Code (art. 421-2-6) concerning the crime of "*entreprise individuelle terroriste*"[47], which allows to prosecute those who are individually involved in preparative acts for terrorist acts, the so-called lone wolves.

Finally, Article 9 of the law reinforced the measures of surveillance and control through a new mechanism of blocking Internet websites prompting terrorism. As a matter of fact, the administrative authorities may directly oblige the website provider to remove the content considered to incite terrorist acts by 24 hours[48]. As a whole, this legislation has been widely criticized for imposing several restrictions on certain individuals' fundamental freedoms.

g. The "Law on Intelligence Sector" (Law No. 2015-912 of 24 July 2015)

[42] M.H. Gozzi, Dalloz, *Sécurité et lutte contre le terrorisme : l'arsenal juridique encore renforcé*, published by the University of Toulouse (2013).
[43] J. Borricand, *Politique antiterroriste française et respect des droits fondamentaux*, in Electronic Review of Master on Law of the Federal University of Alagoas, (2014), p.169.
[44] France: Anti-Terrorist Law Prohibiting Citizens from Leaving France Found Constitutional | Library of Congress (loc.gov) .
[45] J. Fragnon, K. Roudier, *Entre répression et prévention, retour sur l'antiterrorisme en France*, cit., p.61.
[46] J. Borricand, *Politique antiterroriste française et respect des droits fondamentaux*, cit. p.175.
[47] Ibid., p.172.
[48] Law n° 2014-1353 of 13th November 2014, art.9.

The Law of 24 July 2015, related to the intelligence sector, aimed to define a precise legal framework authorizing the intelligence services to resort to techniques for acquiring strategic information. The application of these techniques is subject to a permission by the Prime Minister, based on the opinion of an independent administrative authority[49].

The law did not only legalized intelligence services' mechanisms, but it also officially provided the intelligence with the prerogatives traditionally reserved to the judicial police[50]. The extension of these intelligence gathering from the judicial machinery to intelligence services includes the use of virtual infiltration, private places' images tapping and appropriation of IT data. Indeed, the law reaffirmed certain existing regulations on the subject of security interceptions and of access to connection data[51]. Through the access to telecommunication providers' networks, it guaranteed a more efficient monitoring of individuals who are identified as a possible terrorist menace, and the detection in advance of terrorist plans[52]. Furthermore, the legislation established a legal setting of international surveillance measures which can apply abroad, with a view to ensure the protection of France's interests and security[53].

Therefore, the main effect of this law was the evident empowerment of the intelligence services, which, from that moment, acquired a prominent role in the fight against terrorism. After the approval of the law, the Human Rights Committee of United Nations even declared that the new intelligence services' powers were excessively wide because of their immoderate intrusive character with respect to the right of private and family life, and due to the absence of an adequate judicial authorization[54].

To sum up, the antiterrorist legislation right after 9/11 attacks delineated a preventive approach, based on focusing more the attention on monitoring the individuals who could potentially engage in terrorist activities or on controlling certain areas limiting the freedom of movement. Other novelties were the growing position of administrative authorities and the contemporary begging of the declining of judicial controls in terms of powers' intrusion in fundamental rights and liberties. The decreasing margins of action of the judicial apparatus highlighted its gradual exclusion in the counter-terrorist management, that will be even accentuated by state of emergency 2015-2017, and was something totally new in the French constitutional system.

[49] Sécurité : loi relative au renseignement | Vie publique.fr (vie-publique.fr)
[50] J. Alix, O. Cahn, *Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale*, cit., p.853.
[51] *Etude d'impact du Loi relatif au renseignement,* in Dossier législatif (2015), p.40 [online] : https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000030375694/
[52] Ibid.
[53] Ibid.
[54] J. Kilpatrick, *Quand un état d'urgence temporaire devient permanent, le cas de la France*, cit., p.22.

1.1.2 The French legislation in regard to Paris attacks in 2015

If the French Government considered security from terrorism a priority already in the early years after the 9/11 attacks, the Paris attacks of 13th November 2015 at the Bataclan and the Stade de France caused an even greater climate of tension. Not by chance, the day after the attacks, the special legal regime of the state of emergency was declared by the President of the Republic François Hollande. The state of emergency is a particular context that permits France to restrain specific rights in order to address a particular threat to public safety and national security, on the condition that these measures seek to restore a 'normal' situation, guaranteeing full respect of rights, as soon as possible[55]. Specifically, in France the state of emergency is regulated by three main provisions: the Law No. 55-385 of 3 April 1955, Article 16 and Article 36 of the Constitution: the 1955 Law gives extraordinary powers to administrative authorities, such as the Minister of Interior and the prefects; the Article 16 of the Constitution confers extraordinary powers to the President of the Republic; the Article 36 regulates the state of siege on which the state of emergency is modeled. The state of emergency must be formally decreed and decided by the Council of Ministers (and declared by the President of the Republic), in the event of imminent danger resulting from serious breaches of public order, or in the event of a public calamity. In order to extend the state of emergency longer than 12 days, it is necessary a law approved by the Parliament.
Although it was initially presented as a temporary response to the attacks, the regime was extended six times by the legislature until its expiration on 1st November 2017. In November 2015, there was even a failed attempt to constitutionalize the state of emergency.
The state of emergency, officially started on 14th November 2015, attributed many powers to the Minister of Interior, such as the ability to place under house arrest individuals considered dangerous for public security, to limit freedom of movement, of persons and vehicles in specified areas, to detain people and resources[56]. The administrative authorities could also forbid certain public meetings and demonstrations or disband any association seen as a threat to public order, and could authorize administrative searches[57]. Moreover, during the period 2015-2017, stronger restrictions were allowed through the several amendments brought to the untouched text of 1955[58]. The maintenance of state of emergency for almost 2 years was not considered enough to face the terrorist threat, and the government decided to translate some special powers, that the 1955 Law grants to the administrative authorities, into ordinary

[55] Ibid., p.5.
[56] Ibid., p.9
[57] Ibid.
[58] S.H. Vauchez, *The State of Emergency in France: Days Without End?*, in European Constitutional Law Review, No. 14, (2018), p.704.

legislation[59]. This meant a normalisation of the exception, making many restrictions, justified by the state of emergency, permanent. What is also important to note is that all the provisions, based on 1955 Law, are administrative, thus preventive in nature and not subject to a prior judicial control[60].

As a matter of fact, a common tendency, especially since 2014 legislation and thereafter, has been that it is the Executive, through the prefects and on the basis of information from the intelligence services, that decides to restrict the freedom of an individual, and not a judge on the basis of evidence collected by the judicial police in the context of an investigation[61].

Finally, another common trend of French antiterrorist legislation post-2015 attacks, is the approval and the application of increasing restrictions and limitations on individuals' rights and liberties, and of expanding police and administrative authorities' powers.

a. The "Law prolonging the application of the Law No. 55-385 of 3 April 1955" (Law No. 2015-1501 of 20 November 2015)

Adopted through an accelerated procedure started on 18th November, the Law of 20th November 2015 was a direct consequence of the Paris attacks of 13th November. It toughened the exceptional powers and prolonged the duration of 1955 Law application; the state of emergency was extended for three months starting from 26 November 2015[62]. It increased the legal base of house arrest, which became applicable to any person against whom "there are serious reasons to believe that his behaviour constitutes a threat to public safety and order"[63]. House arrest could be effectuated in any moment, during the day and night. Furthermore, it modified the regime of assignment related to residence. For instance, the Minister of Interior could order to any person, assigned to a residence, to periodically present himself to police units[64]. The legislation has also introduced the article 14-1 to the 1955 Law, providing for administrative jurisdictions' competence to control the legality of the measures decided by the public authorities during the exception regime[65]. It rendered 1955 Law's measures more efficient by establishing that the Parliament must be informed immediately about Government's every decision related to the state of emergency. Finally, the law 2015-1501 tightened the regulations concerning the power to disband associations or groups considered to

[59] Ibid., p.701.
[60] Ibid., p.709.
[61] J. Fragnon, *L'antiterrorisme à la française : répression, prévention, anticipation*, in The Conversation Blog, (2020), [online] : L'antiterrorisme à la française : répression, prévention, anticipation (theconversation.com).
[62] Law n° 2015-1501 of 20th November 2015, art.1.
[63] Ibid.
[64] Sécurité : état d'urgence, 3 avril 1955, | Vie publique.fr (vie-publique.fr)
[65] J. Alix, O. Cahn, *Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale*, cit., p.865.

pose a threat to public order, and others related to the blocking of Internet websites responsible for apology of terrorism[66].
Once again, the adoption of this legislation was justified by a political discourse under which the gravity of the attacks, designed as "the worst terrorist acts committed in Europe since the Second World War"[67], and their permanent nature required tougher restrictions.

b. The "Law strengthening the fight against organised crime, terrorism and their financing, and improving the efficiency and guarantees of criminal proceedings" (Law No. 2016-731 of 3 June 2016)

The Law No. 2016-731's objective was to support the instruments to fight against terrorism and its financing, by modifying the French Penal Code, the Penal Procedure Code and the Code of Internal Security[68]. Specifically, the text confirmed the judges and prosecutors' new means of investigation, such as searches during the night in domiciles related to terrorism and in case of risk to injury to life, and as the utilization of technical devices of proximity in order to directly intercept connection data, that are necessary to identify terminal equipment of a user[69].
Moreover, the law hardened the penal response with respect to the offence of online jihadist propaganda, and the grounds on which police forces may use their weapons are broadened[70].
Furthermore, the general powers of the administrative police came also to include the administrative control of the returnees, according to which the Minister of Interior may impose security measures on those individuals that are thought to have left the national territory with the aim of joining terrorist groups' activities in circumstances that may constitute a threat for public security during their return to the French territory.[71] The legislative text established the strengthening of access controls to places hosting major events, and it also aimed to improve the protection of threatened witnesses and to toughen the conditions for acquiring and holding weapons[72]. Finally, it created a specific offence for trafficking in cultural property coming from terrorist groups' operations.

c. The "Law on Public Security Law" (Law No. 2017- 258 of 28 February 2017)

[66] La Loi 2015-1501 du 20 novembre 2015 prolonge l'état d'urgence pour une durée de 3 mois jusqu'au 26 février 2016 | Infos Droits
[67] Dossier législatif N° 3225 - Projet de loi prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence et renforçant l'efficacité de ses dispositions (assemblee-nationale.fr)
[68] J. Kilpatrick, *Quand un état d'urgence temporaire devient permanent, le cas de la France*, cit., p. 26.
[69] Trente cinq ans de législation antiterroriste | Vie publique.fr (vie-publique.fr)
[70] Lutte contre le terrorisme : les avancées grâce à la loi du 3 juin 2016 / 2016 - Actualités / Archives des actualités / Archives - Ministère de l'Intérieur (interieur.gouv.fr)
[71] J. Alix, O. Cahn, *Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale*, cit., p.853.
[72] Law n° 2016-731 of 3rd June 2016.

The Law No. 2017-258, related to public security, intended to harden the juridical security of the forces of order, by making their interventions more efficient, and it clarified the circumstances in which they can use weapons, by weakly differentiating firearms (potentially lethal) and less deadly arms[73]. In this way, the use of firearms was governed by a unified and common frame applying to security forces and to *gendarmes*. Finally, the legislative text reintroduced the offence of habitual consultation of terrorist sites, which had been previously censored by the Constitutional Council, by precising that the consultation must go along with the manifest intention to adhere to terrorist ideology[74].

d. The "Law strengthening internal security and the fight against terrorism" (Law No. 2017-1510 of 30 October 2017)

One of the most significant legislative texts in the period of the state of emergency between 2015 and 2017 was the law reinforcing the interior security and the fight against terrorism of 30 October 2017. The main objective of the law was to provide the State with new counterterrorism instruments in order to declare the end of the state of emergency[75]. Consequently, the legislative text integrated some regulations, first adopted in an exceptional regime, into the ordinary legislation. For this reason, it transposed some measures contained in the 1955 Law into the Code of Interior Security. Additionally, it included certain modifications related to the intelligence services and extended the grounds for effectuating borders' controls[76]. The administrative authorities were given wider permanent powers to prevent attacks to public security and order in the framework of fighting against terrorism. Moreover, the legislative act of 2017 represented a rapprochement between judiciary and administrative police, emphasizing the French tendency to implement an "administrativisation" of terrorism's repression[77]. As a matter of fact, the prefect had the competence to install perimeters of security and protection zones in those places or events that could be subject to terrorist attacks due to their nature or to the breadth of their turnout[78]. In these areas, the prefect may regulate the individuals' access and circulation. The administrative authorities had also the ability to order the administrative closure of places of worship for apology or provocation to terrorism[79], and to establish surveillance measures concerning those individuals who are suspected to constitute a

[73] J. Kilpatrick, *Quand un état d'urgence temporaire devient permanent, le cas de la France,* cit., p.26.
[74] Sécurite publique, policiers, usage des armes à feu, anonymat | Vie publique.fr (vie-publique.fr)
[75] J. Fragnon, K. Roudier, *Entre répression et prévention, retour sur l'antiterrorisme en France*, cit., p.62.
[76] J. Kilpatrick, *Quand un état d'urgence temporaire devient permanent, le cas de la France*, cit., p.16.
[77] J. Alix, O. Cahn, *Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale*, cit., p.853.
[78] Law n° 2017-1510 of 30th October 2017, art.1.
[79] Ibid., art.2.

grave menace to public security, with the possibility to constrain them in a specific geographical area[80].

The Law of 30 October 2017 has been deeply criticized and has sparked a political and social debate about the normalisation of the state of emergency and the consequent impact on individual rights on a permanent basis. Indeed, through the integration of the derogations to rights and liberties into the ordinary law, firstly justified by the state of emergency, the application of these limits was no longer verified by an administrative judge, who could contest the measures taken by the administrative police.[81]

The transformation of the state of emergency in a permanent situation and the increasing powers of the administrative authorities in the fight against terrorism are the most relevant elements showing how France has been intensely touched by the terrorist attacks, influencing its approach in the counterterrorism strategy.

1.2 The United Kingdom's counterterrorism legislation

The focus on security policies was not novel to United Kingdom, which had already enacted counterterrorist regulations in response to the Irish Republican Army's activities in the 1970s, 1980s, and 1990s[82]. However, the 9/11 attacks were different and gave a new emphasis on security issues in many States, even in UK. One of the most important British responses to the 9/11 attacks was a multi-layered scheme, the so-called "CONTEST" ("Counter-Terrorism Strategy") which was first published in 2003, then updated in the following years, and was based on four components, 'Pursue', 'Prevent, 'Protect' and 'Prepare', in the face of potential terrorist attacks in the long term[83]. The first workstream "Pursue" included the detention and prosecution of individuals planning terrorist activities; the "Prevent" area consisted of intervening in those sectors or communities that are at risk of radicalisation; the "Protect" frame's objective was to tighten the protection against terrorist operations, and finally the "Prepare" tactic aimed at mitigating the effects of terrorist attacks that cannot be avoided[84].

The London bombings on 7 July 2005 were a further incentive to strengthen the existing antiterrorism laws, through a new criminalisation for encouraging terrorism, the disruption of would-be terrorists' recruitment and tougher procedures to impede that those individuals

[80] Ibid., art.3.
[81] J. Kilpatrick, *Quand un état d'urgence temporaire devient permanent, le cas de la France*, cit., p. 17.
[82] B. Golder, G. Williams, *Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism*, in Journal of Comparative Policy Analysis, Vol. 8, No. 1, (2006), p.4.
[83] S. Bonino, *Policing Strategies against Islamic Terrorism in the UK after 9/11: The Socio-Political Realities for British Muslims*, Journal of Muslim Minority Affairs, Vol. 32, No. 1, (2012) p.6.
[84] CONTEST - anti terrorism - Spelthorne Borough Council

remain or enter in the UK[85]. The Government was overall criticized for the increasing number of arrests, right after the 7/7 bombings, and for the overwhelming amount of terrorism-related legislation during this period[86]. Specifically, the most significant laws after London bombings were the Terrorism Act of 2006 and the Counterterrorism Act of 2008, followed by the Terrorism Prevention and Investigation Measures Act of 2011 and the Counter-Terrorism Security Act of 2015.

In broader terms, the UK approach to the war on terror has been defined as a combination of a criminal prosecution approach and security/executive measures approach[87]. Indeed, the counterterrorist response entailed the increasing State's coercive powers related to criminal law, police powers and exceptional pre-emptive measures[88]. Nonetheless, the UK antiterrorist measures have been heavily intrusive in the fundamental rights and liberties' sphere.

With the view to better understand the UK's response to the 9/11 attacks, it is necessary to analyse the main legislation that were adopted as a direct reaction to those attacks: the Antiterrorism Crime and Security Act of 2001 and the Prevention of Terrorism Act of 2005. The legislative Acts following the London bombing of 2005 will be also described.

1.2.1 The British legislative reaction to 9/11 events

The post-9/11 attacks UK's legislation has been one of the most restrictive in whole Europe at the time. The antiterrorist Acts approved between 2001 and 2005 have been a clear example of the UK's reaction to the attacks. During these years, the Government implemented measures that had a strong impact on fundamental rights and liberties, through increasing powers of detention, of retention of communication data and restrictions of freedom of movement. The most striking element has been certainly the implementation for four years of a provision allowing an evident discrimination between nationals and non-nationals and the Government's propensity to derogate from its obligations under the European Convention of Human Rights. This aspect was a common element in both the Anti-Terrorism Crime and Security Act 2001, with the indefinite detention of alien terrorist suspects, and the Prevention of Terrorism Act 2005, with the application of "derogating" orders. Hence, it is possible to notice that the UK approach in this first period after the 11 September was characterized by a political and

[85] Clare Feikert-Ahalt, *The UK's Legal Response to the London Bombings of 7/7*, in Library of Congress, (2013), [online]: https://blogs.loc.gov/law/2013/05/the-uks-legal-response-to-the-london-bombings-of-77/

[86] Ibid.

[87] D. Bonner, *Counter-Terrorism and European Human Rights since 9/11: The United Kingdom Experience*, in European Public Law 19, No. 1 (2013), p.97.

[88] H. Fenwick, G.Phillipson, *UK counter-terror law post-9/11: initial acceptance of extraordinary measures and the partial return to human rights norms*, In V. Ramraj, M. Hor, K. Roach, & G. Williams (Eds.), Global Anti-Terrorism Law and Policy (2nd ed.), (2012), p. 481.

legislative aim to guarantee British citizens' security to the maximum extent at the expense of the protection of their fundamental rights. Security needs were certainly the priority and were the justification for legitimising every restrictive measure.

a. The Antiterrorism Crime and Security Act (2001)

The Antiterrorism Crime and Security Act (ATCS) entered into force on 14 December 2001, as a means to enlarge the legislation in several areas in order to guarantee that the British Government have the essential powers to counteract the threat in UK, in light of the 9/11 attacks. The ATCS Bill was based on the definition of terrorism contained in the main UK's antiterrorist law, the Terrorism Act 2000, whose certain provisions were strengthened and amended by the Act of 2001.

Some of its regulations included to cut off terrorist funding, to extend police's investigation powers, to ensure that government agencies can collect sufficient information for the war against terrorism[89]. In order to attack the financial support for terrorism, the enforcement departments were given well-constructed powers of seizure and forfeiture of terrorist cash anywhere in UK[90]. Moreover, the Bill modified the relevant immigration procedures, with the aim of avoiding that international terrorists or suspected international terrorists might abuse the asylum and immigration laws of UK[91]. Part 2 of the same Act created a new power enabling the Treasury to freeze terrorists' assets at the beginning of the investigation, rather than just before the trial. In its Part 5, the Act extended the existing racially aggravated offences to cover offences aggravated by religious hostility[92]. The Act embraced "provisions facilitating the retention by communications providers of data about their customers' communications for national security purposes so that they can be accessed by the security, intelligence and law enforcement agencies"[93]. The Ministry of Defence police forces' powers were enhanced in matter of identification of suspects[94].

The most debated provision was the one linked to the indefinite detention without trial of international terrorists, for which the Joint Committee on Human Rights expressed concerns on its impact on fundamental human rights[95]. Indeed, the Act was widely condemned for limiting certain civil liberties for a specific group of people, the non-nationals suspected of being

[89] Explanatory Notes to Antiterrorism Crime and Security Act 2001.
[90] Antiterrorism Crime and Security Act 2001, Part 1.
[91] V.H. Henning, *Anti-terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation From the European Convention on Human Rights?*, in American University International Law Review Vol.17, (2002), p. 1268.
[92] Explanatory Notes to Antiterrorism Crime and Security Act 2001, par.16.
[93] ATCS Act 2001, Part.11.
[94] Explanatory Notes to Antiterrorism Crime and Security Act 2001.
[95] D. Bonner, *Managing Terrorism While Respecting Human Rights? European Aspects of the Antiterrorism Crime and Security Act 2001*, in European Public Law, Vol. 8, (2002), p.506.

terrorists. The Act did not respect the principle of equality and non-discrimination, which requires an equal treatment of individuals or groups irrespective of their particular characteristics, such as, in this case, irrespective of their nationality. The Act's measure was instead a clear example of discrimination between nationals and non-nationals and of unequal treatment in front of the law. As a matter of fact, the ATCS Bill authorized the arrest and indefinite detention without trial of those individuals, without British citizenship, suspected to be terrorists, who cannot be deported because of a risk to be subject to torture. The Act established that this considerable power to arrest and detain could be executed on the basis of a Secretary of State's certificate indicating his belief that the individual's presence in the United Kingdom posed a threat to national security and that he or she was suspected of being an international terrorist[96]. This certificate had to be subject to the appeal of the Special Immigration Appeals Commission (SIAC), which could cancel it.

In principle, the indefinite detention of foreigners without trial was contrary to Article 5 of the European Convention of Human Rights, protecting the right on liberty and security, and to the Human Rights Act of 1998[97]. Therefore, the provision could be applied only by derogating to Article 5, thus by exploiting Article 15 of ECHR, under which the derogations may happen in case of a public emergency threatening the life of the nations and to the extent strictly required by the exigencies of the situation. Consequently, United Kingdom declared the state of emergency. The Act's implementation relied on the exceptional nature of the threat and was defined as a necessary sacrifice for protecting people and their "freedom from insecurity, from fear and from taking of life"[98]. The validity of the derogation to Article 5 of ECHR under Article 15 was called into question by the House of Lords, which in December 2004, declared the Part 4's Section 23 of the Act incompatible with the ECHR. The House of Lords essentially analysed the Act's measure with respect of specific elements: the proper use of Article 15 (ECHR) on the possibility to derogate from the Convention's rights; whether the provision respected the principle of proportionality and the principle of non-discrimination; the role of the Parliament and of the courts in dealing with the review of the measure. The HoL mainly affirmed that the measure was neither proportional nor necessary, and it was evidently in breach with the principle of equality and non-discrimination since that the terrorist threat is presented both by UK nationals and non-nationals, and that the provision deprived only the latter's liberty, the different treatment was not justified because it was based just on their nationality. The Bill was then replaced by the Prevention of Terrorism Act in 2005.

[96] ATCS Act 2001, Part.4.
[97] Ibid, p. 498.
[98] A. Tsoukala, *Democracy in the Light of Security: British and French Political Discourses on Domestic Counter-Terrorism Policies*, in Political Studies Vol. 54, (2006), p.611.

b. The Prevention of Terrorism Act (2005)

Entered into force in March 2005, the Prevention of Terrorism Act was the direct side-effect of the Law Lords' ruling that the indefinite detention without charge of foreign terrorist suspects violated domestic and European human rights laws.

The Act's main objective was to introduce "control orders", which are preventive orders imposing obligations on individuals, irrespective of their nationality or terrorist cause, suspected to be involved in terrorism-related activity, and restricting or preventing their further involvement in such activity. Therefore, the Act allowed the Government to restrict individuals' activities, considered to be involved in terrorist operations but for whom there is not sufficient evidence to charge[99]. These obligations embraced certain prohibitions on the possession or use of certain items, restrictions on movement to or within certain areas, and restrictions on communications and associations, such as no internet access[100]. On the basis of the Government's view of the compatibility of the orders with the right to liberty and security disposed in Article 5 of the European Convention on Human Rights, two kinds of control orders were envisaged: "derogating" and "non-derogating" ones[101].

The former could contain measures incompatible with the individual's right to liberty (art.5, ECHR). It must be renewed every six months and it must be designed by the court itself on application from the Secretary of State. Since a deprivation of liberty is allowed, the Act provided for the supervision by the courts of non-derogating orders.

The latter do not involve a derogation from ECHR and are made by the Secretary of State who must request the authorization from the court[102]. It must be renewed annually, rather than every six months.

What it has been criticized by the Joint Committee on Human Rights of the Parliament is that the Government accepted that the derogating orders, allowing a non-negligible impact on individuals' right to liberty, are founded on a weak standard of proof[103]. As a matter of fact, these orders may be imposed on the grounds of a mere reasonable suspicion and balance of probabilities.

The control orders regime was subject to several court decisions because of its incompatibility with human rights, for instance it was at the centre of two judgements of House of Lords in 2007[104].

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[99] C. Gearty, *Human rights, civil society and the challenge of terrorism*, Seminar report, Centre for the Study of Human Rights, London School of Economics and Political Science, (2008), p.21.
[100] Explanatory Notes to Prevention of Terrorism Act 2005.
[101] A. Horne, G. Berman, *Control orders and Prevention of Terrorism Act 2005*, in House of Commons Library, (2011), p.4.
[102] Explanatory Notes to Prevention of Terrorism Act 2005.
[103] A. Horne, G. Berman, *Control orders and Prevention of Terrorism Act 2005*, cit., p.7.
[104] Ibid., p.11.

Lastly, the Prevention of Terrorism Act was revoked by the Terrorism Prevention and Investigation Measures Act of December 2011.

1.2.2 The British Acts following the London bombings in 2005

The London attacks in 2005 were a shocking event for British society and political environment and certainly did not decrease the perception that the national security was at high risk. Therefore, the Acts of 2006 and of 2008 were still part of the restrictive tendency of antiterrorist legislation. Nonetheless, a gradual evolution is notable with the Act of 2011 and the Act of 2015, trying to slightly balance security needs and rights' safeguards, due to the increasing criticisms by human rights groups and committees, and to the potential pressure exercised by the judicial apparatus through court rulings contrary to rights and liberties' limitations.

a. The Terrorism Act (2006)

The Terrorism Act was object of a notable controversy and scrutiny in both House of Commons and House of Lords, and even after it entered into force on 30 March 2006, it continued to awaken oppositions and criticisms. The Government considered it as a necessary response to the terrorist threat reanimated by the 7/7 bombings in London. The Act essentially amended the existing antiterrorism measures, especially the Terrorism Act of 2000, and created a number of new terrorism-related offences. The Act regulated the offence of encouragement of terrorism, by supplementing the existing common law offence of incitement to commit a crime[105]. It established the criminalisation of publications of statements inciting and "glorifying" terrorism, by increasing the Secretary of State's powers to proscription, to allow for the proscription of groups which glorify terrorism, or the activities associated with acts that glorify terrorism[106]. It instituted the offence related to the preparation of terrorist acts and to the terrorism training, by providing for punishments for those who have obtained skills necessary to prepare and commit terrorist acts.
The measures, related to encouragement and glorification of terrorism and to dissemination of terrorism publications, were made applicable also electronically, with a view to embrace the offences conducted by individuals on social media[107].
Furthermore, the Bill amplified police and investigatory powers, by allowing the extension of

[105] Explanatory Notes to Terrorism Act 2006.
[106] Ibid.
[107] C.A. Honeywood, *Britain's Approach to Balancing Counter-Terrorism Laws with Human Rights*, in Journal of Strategic Security , Vol. 9, No. 3, Special Issue: Emerging Threats, (2016), p.34.

the pre-charge detention period for terrorist suspects with a judicial approval from 14 to 28 days[108]. This last measure was at the core of the political discussion, since the initial proposal was to enlarge the detention period without trial for up to 90 days, which was deemed by the Government as a necessary term of detention to prevent terrorism[109]. This proposal was finally defeated, together with the provisions concerning the closure of extremist mosques.
Due to several disapprovals, especially by organizations protecting civil liberties, various changes have been brought to the Act, which is still in force nowadays.

b. The Counter-Terrorism Act (2008)

The political debate about the period of 90 days of the detention without charge kept on in the pathway of the Counter-Terrorism Act, approved in November 2008. The latter should have initially included an extension of the abovementioned period from 28 to 42 days, but the proposal was dropped by the House of Lords[110]. Nonetheless, the Counter-Terrorism Act contained a number of equally harsh measures.
The Act's provisions were developed in accordance with the Government's objectives: to provide for new powers for collecting and sharing counterterrorism information; to devise further regulations about the detention and questioning of terrorist suspects and about the prosecution and punishment of terrorist offences; to impose notification requirements on individuals convicted of such offences; and to grant further powers to act against terrorist financing[111].
Precisely, Part 1 of the Act contains a new power for taking fingerprints and DNA samples of individuals subject to control orders and the opportunity to make full use of them in terrorism investigations. Part 2 regulates the possibility to enquiry terrorist suspects after they have been charged and Part 3 enables extended sentences for those convicted of terrorism-related offences. The latter may be also monitored by the police and obliged to remain in UK. Furthermore, the Treasury is given new powers to intervene in case of suspected money laundering or terrorist financing transactions outside UK. It finally amended the Regulation of Investigatory Powers Act 2000 to allow intercept material to be revealed in exceptional circumstances, and contained some amendments to the control order system under the Prevention of Terrorism Act 2005[112].

[108] C. Gearty, *Human rights, civil society and the challenge of terrorism*, cit., p.23.
[109] Claire Feikert-Ahalt , *The UK's Legal Response to the London Bombings of 7/7*, in Library of Congress, (2013), [online]: https://blogs.loc.gov/law/2013/05/the-uks-legal-response-to-the-london-bombings-of-77/
[110] Counter-Terrorism Act 2008 - Parliamentary Bills - UK Parliament
[111] Counter-Terrorism Act 2008 | UK civil liberties | The Guardian
[112] Explanatory Notes to Counter-Terrorism Act 2008.

c. The Terrorism Prevention and Investigation Measures Act (2011)

The Terrorism Prevention and Investigation Measures Act was a key pillar in the pathway of British antiterrorism legislation, because it represented the Government's commitment to rebalance security measures and the respect for civil liberties. The Executive's necessity to find a new equilibrium between rights and security may be explained by the increasing critics and debates on antiterrorism legislation's impact of rights and liberties, and in particular, on the control orders regime's heavy consequences in terms of limitations and restrictions on fundamental rights. This was also clear by the pressure made by the judiciary, with many court rulings that were highly disapproving about the control orders.

It was approved in December 2011 and was the outcome of a review, made in January 2011, of counterterrorism and security powers, including the review of control orders, previously established by the Prevention of Terrorism Act 2005. As a matter of fact, the Government's intention was to replace the control orders regime with a more focused and less intrusive system of "Terrorism Prevention and Investigation Measures"("TPIMs")[113]. The TPIMs were designed to protect the public from the risk posed by individuals believed to have engaged in terrorism-related activity, but who cannot be prosecuted or, in case of foreign nationals, deported, and to guarantee more efficient methods to find evidence that would lead to prosecutions[114]. The TPIMs may embrace restrictions such as GPS tagging, reporting requirements and restrictions on travel, movement, association, communication, finances, work and study[115]. Although some of the Act's restrictions have been seen as partly similar to the control orders regime, there are notable differences. The Act of 2011 increased the safeguards concerning the civil liberties of the individuals subject to these measures. Such safeguards consist of a tough scrutiny before imposing the measures, and of the provision of the TPIMs' maximum two year-duration, which can be renewed if there is sufficient evidence that the individual has re-engaged in terrorism[116]. Moreover, the restrictions excessively limiting the individual's normal daily life were conceived to be kept to the minimum necessary to protect the public and to be proportionate and clearly justified[117]. The Act's final provisions better clarified the restrictions that cannot be imposed.

Although the Bill guaranteed a better equilibrium between intrusive security measures and safeguards' civil liberties, the Joint Committee on Human Rights was not completely satisfied,

[113] Terrorism Prevention and Investigation Measures Act - GOV.UK (www.gov.uk)
[114] *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011*, Tenth Report of Session 2013–14, drafted by House of Lords, House of Commons, Joint Committee on Human Rights, p.3.
[115] Ibid., p.9.
[116] Terrorism Prevention and Investigation Measures Act 2011, Section 5.
[117] Terrorism Prevention and Investigation Measures Act - GOV.UK (www.gov.uk)

and some human rights concerns remained[118]. The Act was amended several times in the following years.

d. The Counter-Terrorism and Security Act (2015)

In 2014, the British Government believed that it was necessary to enhance the counterterrorism legislation, due to the independent Joint Terrorism Analysis Centre's report declaring that the UK national terrorist threat level moved from "substantial" to "severe", and that a terrorist attack was "highly likely"[119].

The Counter-Terrorism and Security Act received Royal Assent in February 2015, and it bolstered the powers of the counterterrorism strategy's elements (CONTEST). For instance, Part 5 of the Act included the legal duty for every local authority, when exercising its functions, "to have due regard to the need to prevent people from being drawn into terrorism"[120].

The Act provided for further provisions to impose temporary restrictions on travel in case of persons suspected to be involved in terrorism. Specifically, the executive power had the faculty to seize passports of the abovementioned individuals for up to 30 days. Moreover, the Temporary Exclusion Order was created in order to authorize the government to prevent anyone suspected of engaging in terrorism from returning to the United Kingdom for a period of up to two years and are renewable[121]. In addition, the Act enhanced some Terrorism Prevention and Investigation Measures Act 2011's regulations for a better monitoring and control of suspected terrorists, through several limitations, such as the obligation to reside in a particular location[122]. Part 3 of the Act enlarged the grounds on which the Secretary of State may require, to communication services providers, the retention of communication data for helping authorities to identify individuals. Part 4 established a number of arrangements for border and transport security and Part 6 amended the Terrorism Act 2000 regarding both insurance payments made in response to terrorist demands and the power to examine goods.

In conclusion, the Act fortified the independent oversight regulations for UK counter-terrorism legislation by extending the statutory competences of the Independent Reviewer of Terrorism Legislation and by creating a Privacy and Civil Liberties Board[123].

In conclusion, nowadays most of the Acts, that have been described in this paragraph, are not

[118] *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011*, Tenth Report of Session 2013–14, drafted by House of Lords, House of Commons, Joint Committee on Human Rights, p.8.
[119] Explanatory Notes to Counter-Terrorism and Security Act 2015.
[120] Counter-Terrorism and Security Act 2015 and the Prevent Programme | London Councils
[121] C.A. Honeywood, *Britain's Approach to Balancing Counter-Terrorism Laws with Human Rights,* cit.,p. 39.
[122] Counter-Terrorism and Security Act 2015, Part 2.
[123] Ibid., Part 7.

fully applicable according to their original texts, since many have been amended. For instance, the Anti-Terrorism Crime and Security Act 2001 is still into force and is still among the UK primary counterterrorist legislation, but in its amended version of 2019 that lacks the most controversial aspects previously described. The Terrorism Prevention and Investigation Measures Act 2011 is still applicable in its modified version of 2020.

In the most recent years Several Acts have been approved, such as Counterterrorism and Border Security Act of 2019[124]. Efforts have been made to balance security and rights. For instance, the role of the Independent Reviewer of Terrorism Legislation has become more and more important. However, criticisms on limitations on fundamental rights are still significant due to the expansion of controls, that is likely to continue as terrorism evolves[125].

What is certain is that UK remains one of the strongest actors in the fight against terrorism, and still deems the Islamist terrorism as the largest threat to national security.

[124] Country Reports on Terrorism 2019: United Kingdom, United Kingdom - United States Department of State

[125] J. Rowbottom, *Terrorism law and the erosion of free speech in the UK,* VerfBlog on Matters Constitutional, (2022), [online]: Terrorism law and the erosion of free speech in the UK – Verfassungsblog

CHAPTER 2. ANTITERRORIST LEGISLATION'S IMPACT ON FUNDAMENTAL RIGHTS IN FRANCE AND UK

2.1 The French and British antiterrorist legislation's collision with human rights and civil liberties

Most of the security policies facing the terrorist threat resulted in several restrictions on civil liberties and fundamental rights, which raised public suspicion and concern by many human rights organizations and associations. The latter claimed that the antiterrorist legislation compromised civil liberties on which democratic societies were founded[126]. Therefore, the adoption of exceptional measures in the framework of the fight against terrorism had to be made along with a communication politics aiming at justifying the rationale of these provisions, and at excluding every doubt about their necessity and their harmful impact on the public liberties[127]. Furthermore, journalists, politicians and some scholars seemed to suggest that, while core human rights should not be infringed under any circumstances, other liberties may sometimes be violated as an indispensable "lesser evil" in the war on terror[128].

Moreover, diverse studies have evoked that civil liberties, political rights and fundamental rights have been weakened by counterterrorist legislation not only due to increasing coercive powers of the State, but because, following terrorist attacks, the public has been more inclined to accept and call for a strong Government's response, which may restrict individual freedoms, when terrorism threatens their physical security[129].

The fundamental rights that were commonly limited by antiterrorist laws have been the right to liberty of movement (specially to limit the movement of foreign fighters), the inviolability of the home (through house searches), the right to privacy (through retention of communication data), the freedom of association, the freedom of religion, the right to liberty and security, the freedom of expression and of communication[130], and the prohibition of discrimination[131].

In France, the broadest criticism, in terms of civil liberties limitations, were addressed to the laws adopted right after the 9/11 attacks, to the duration of the state of emergency started in

[126] D. Haubrich, *September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared,* in Government & Opposition Ltd, (2003), p. 3.
[127] A. Tsoukala*, La légitimation des mesures d'exception dans la lutte antiterroriste en Europe*, in Cultures & Conflits, 61 (2006), p.2.
[128] L. Baccini, T. Chen, T. Lin, C. Tsai, E. Shor, *Counterterrorist Legislation and Respect for Civil Liberties: An Inevitable Collision?*, in Studies in Conflict & Terrorism, (2018), p. 341.
[129] L.Y. Hunter, *Terrorism, Civil Liberties, and Political Rights: A Cross-National Analysis*, in Studies in conflict & Terrorism Vol. 39, No.2, (2016), p. 167.
[130] A. Oehmichen, *Terrorism and anti-terror legislation - the terrorised legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France,* cit., p. 304-305.
[131] The discrimination that had been prompted by the French and British counterterrorist strategy will be analysed in the next paragraph.

2015, and to the translation of extraordinary measures into permanent and ordinary legislation. The French emergency measures were presented as the proof that democracy could attack vigorously its enemies and as a tool to face the gravity and the exceptional nature of the menace[132].

Along with the United Kingdom, France has been inserted in the top five of a name-and-shame list, published by several non-governmental organizations in relation the protection of human rights, such as the Human Rights Watch (HRW), *Reporters Sans Frontières* (RSF) and the International Federation of Human Rights (FIDH), which considered the counter-terrorist legislation in breach of civil rights[133]. The French counter-terrorist legislation's consequences on fundamental rights did not decrease in the state of emergency, declared in November 2015 and lasted until 2017. In addition, according to a few authors, the French counter-terrorism machine illustrated that, in France, fundamental rights have been sacrificed for security, due also to the partial acceptance of French population, which is deemed as traditionally deferential towards the *État*, thus towards the State's power to provide safety and security[134].

Moreover, what was truly problematic for civil liberties' safeguards was the limited margin of action of judicial apparatus and the wide discretion and power of intervention of the administrative one. In relation to the individual rights' weakening, the empowerment of administrative authorities was quite relevant, since that, traditionally, the administrative powers did not regulate the restrictions on freedoms, with which the judiciary authorities dealt with. Consequently, the administrative strengthening and the lack of judicial controls undermined the traditional controls, that had been envisaged to guarantee that the limitations on liberties were lawful, proportional and non-discriminatory[135]. The result was a wide margin of action and discretion of administrative agents. Indeed, in several cases, the restrictions on public gatherings have not been directly linked to the prevention of violent attacks against the population, and therefore they could not be justified as necessary and proportionate under the state of emergency. Furthermore, the transposition of exceptional measures into ordinary law, and thus the normalisation of the state of emergency with the Law of October 2017, has evidently eroded human rights protection standards and caused individual rights violations, which were not always considered to be proportionate and necessary in the fight against terrorism[136].

In sum, in France, fundamental rights were undoubtedly undermined, without a proper and

[132] A. Tsoukala, *La légitimation des mesures d'exception dans la lutte antiterroriste en Europe,* cit. p.6.
[133] D. Haubrich, *September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared,* cit., p.7
[134] C. Sudborough, *The war against fundamental rights: French counterterrorism policy and the need to integrate international security and human rights agreements*, in Suffolk Transnational Law Review (2007), p. 478.
[135] F.N. Aloain, *L'exercice contemporain des pouvoirs d'urgence : réflexions sur la permanence, la nonpermanence et les ordres juridiques administratifs*, in Cultures & Conflits Journal, (2018), p. 24.
[136] S.H. Vauchez, *The State of Emergency in France: Days Without End?*, cit., p. 720.

preventive judicial control, by the supremacy granted to police and intelligence services, the excessive empowerment of administrative authorities and the process of making permanent certain of these administrative measures. Thus, France surely sacrificed the full respect of fundamental rights in the interest of national security. The French interference with individual rights cannot be overlooked, noting that it has been estimated that, overall, in 2015-2017 period, there have been 4,444 house searches, 754 house arrests, 656 geographical bans, 59 protection and security zones, 39 bans on demonstrations, 29 closures of bars and theatres, 19 closures of places of worship[137]. All these considerations certainly call into question whether French Government managed to guarantee an effective balance between liberty and security in its antiterrorist legislation.

In United Kingdom, due to the impact of Human Rights Act 1998 on courts' interest for human rights and on society, the counter-terrorist legislation, such as the Antiterrorism Crime and Security Act of 2001, was strongly criticized by public opinion, jurists, and human rights groups. Since a state of war is usually linked to sacrifice, the description of the fight against terrorism as a war against a new enemy allowed the Executive to display the emergency measures as "sacrifices", required for an efficient protection of the British citizens[138]. The relative acceptance of exceptional measures was only possible on a certain reformulation of the concept of liberty and of the human rights' place in the British society[139]. However, the UK's legislation has tried more to include some efforts for an effective balance between antiterrorist measures and respect for civil liberties and human rights. In effect, a perceptible desire to develop an antiterrorist legislation which can be consistent with the protection of rights may be observed. For instance, the work of the Joint Committee on Human Rights cannot be overlooked, representing the Government's effort to ensure that the human rights implications may be subject to the comment or scrutiny by a select committee, and it has sometimes ignited the political debate during the legislative approval of the Acts[140]. Moreover, the practice of appointing the Independent Reviewer of Terrorist Legislation, that has been more frequent since 2015, demonstrated the Government's increasing interest for human rights protection. Nonetheless, fundamental human rights and civil liberties have been heavily affected by the UK counterterrorist legislation, especially by the Acts that have been a direct response to a terrorist attack or to the perception of a high degree of terrorist risk. This contrast is ascribed to the fact that, on the one hand, United Kingdom has been globally the guiding light of liberty thanks to the development of strong human rights protection systems, such as the Human

[137] F. Molins, *Lutte antiterroriste et libertés*, cit., p.13.
[138] A. Tsoukala, *La légitimation des mesures d'exception dans la lutte antiterroriste en Europe,* cit., p.3.
[139] Ibid., p.7.
[140] C. Walker, *Human Rights and Counterterrorism in UK*, in Ashgate Companion to Political Violence, (2016), p.8.

Rights Act 1998[141]. On the other hand, when it comes to domestic and international terrorism, it has implemented one of the harshest systems of limitations on its population in Europe, being necessary to derogate from ECHR's obligations[142]. In addition, United Kingdom became the country which validated the longest durations of detention without charge[143].
In general terms, the fundamental rights are converted into a political instrument, likely to be applied selectively. Hence, even the UK's experience demonstrates the complexity of reaching a perfect balance between human rights safeguards and national security policies. This equilibrium is essential to achieve, not only because the limitations to individual rights may call into question the essence of liberal democracy, also because these restrictions may be ineffective in the fight against terrorism by creating an alienated ground of support and a dissatisfaction in those communities, particularly affected by the measures, which terrorist groups may exploit for acquiring recruits[144].

2.1.1 The right to privacy and the right to a private life

The right to privacy, and the right to a private life, is the individual's right to be protected against the interference into his or her personal life and to pre-empt the unauthorized acquisition or publication of private personal information[145]. In France, this right was deeply restricted by several French counterterrorist Acts, such as the Law No. 2001-1062 of 15 November 2001. Its limitation derived from the stronger police powers in matter of identity controls, of inspection and search powers, and from the provisions concerning the retention of online communication data. As a matter of fact, the Article 29 of the abovementioned law allowed a preventive retention of Internet connection data, without a prior judge's consent, for twelve months, to which administrative agents could easily access. Due to the relevant restriction of the right to privacy through extensive body-searches and vehicles searches, several doubts were raised about its constitutionality, and thus its impact on human rights, and its legislative process was, not by chance, criticized by human rights defenders[146]. For instance, the National Consultive Commission of Human Rights identified certain measures of the Law of 2001 as a threat to the personal freedom to privacy, that would have no consequences on

[141] T. Landman, *The United Kingdom: the Continuity of Terror and Counterterror*, Chapter 5 of National Insecurity and Human Rights : Democracies Debate Counterterrorism, edited by Alison Brysk, and Gershon Shafir, University of California Press, (2007), p. 77.
[142] Ibid.
[143] Oehmichen A., *Terrorism and anti-terror legislation - the terrorised legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France* cit., p. 313.
[144] J. Blackbourn, *Counter-Terrorism and Civil Liberties: The United Kingdom Experience, 1968-2008,* cit., p. 73.
[145] D. Haubrich, *September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared,* cit., p.11.
[146] A. Oehmichen, *Terrorism and anti-terror legislation - the terrorised legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France*., cit., p. 299.

terrorists[147]. The right to private life was furtherly limited by the Law of August 2002 due to the extension of citizens' surveillance opportunities[148]. The right to privacy was once again undermined by the Law No. 2003-239 of 18 March 2003 due to the non-transparency of the management of individuals' personal files, allowed by the law[149]. At the end of the state of emergency, the right to private life continued to be affected by individual measures of administrative control and surveillance that were transposed into ordinary law through the Act of October 2017[150].

In United Kingdom, the right to privacy was affected by the Anti-Terrorism Crime and Security Act 2001, because of extensive grounds for the retention of communications data[151], and it was encroached by the restrictions and the obligations that could be imposed by the Terrorism Prevention and Investigation Measures Act of 2011. Finally, through the introduction of Temporary Exclusion Orders (TEOs) under the Counter-Terrorism and Security Act 2015, certain limitations to the right to a private life could be involved in the circumstance where the person cannot re-join his family in Britain[152].

2.1.2 The right to inviolability of home

The right to inviolability of home is an essential component of the individuals' privacy and, according to Article 12 of the Universal Declaration of Human Rights of 1948, "no one shall be subjected to arbitrary interference with his … home…"[153]. In the French scenario, this right was mainly affected by the Law of March 2003's provisions strengthening the grounds on which house searches could be implemented. The increasing house searches' powers interfered with the right to inviolability of home even in UK.

2.1.3 The freedom of movement

The freedom of movement is the individual' right to travel within the territory of a country and to leave the country and to return to it. The limitation of the freedom of movement was one of the main targets of the French and British counterterrorist legislation, since it was an instrument

[147] Ibid., p. 285.
[148] J.C. Paye, *Lutte antiterroriste et controle de la vie privée,* cit., p. 99.
[149] A. Oehmichen, *Terrorism and anti-terror legislation - the terrorised legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France*., cit., p. 287.
[150] D. Hebinger, *La sécurité et les libertés. L'adaptation de la législation antiterroriste française dans le contexte post-13 Novembre 2015*, in Presses de Sciences Po « Le Champs de Mars » N° 31, (2018), p. 90.
[151] D. Haubrich, *September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared,* cit., p.14.
[152] H. Fenwick, *Responding to the ISIS threat: extending coercive non-trial-based measures in the Counter-Terrorism and Security Act 2015*, in International Review of Law, Computers & Technology, Vol. 30, No. 3 (2016), p. 179.
[153] The Universal Declaration of Human Rights, 1948.

to restrict and control the movement of foreign fighters and of potential terrorist suspects.
In France, the impact on this freedom was due to the Law of November 2001, the Law of March 2003 and the Law No. 2006-64 of 23 January 2006, because of the provisions strengthening the house arrests and searches of moving or parked vehicles, along with the ones extending the mechanisms concerning the control of people's movement and the prolonged duration of police custody[154]. It had also been declared that "the liberty-security balance has never been challenged to such a point and security has never been valued to the detriment of liberty to such extent"[155], given also the large and imprecise feature of its preventive goal that challenged the freedom of too many people, as believed by the National Commission on Information and Liberty. Moreover, the freedom of movement was heavily weakened by the legislation of 2014 owing to the mechanism of prohibition of exit from French territory based on a mere suspicion that an individual may engage in terrorist activities in the future. The impact on this freedom was accentuated by the fact that these limitations were controlled by administrative authorities without a preventive intervention of a judge who should be the guarantor of fundamental liberties[156]. During the state of emergency, the limitations to the freedom of movement were furtherly justified by the reinforcement of police powers, granted to administrative authorities, and the emergency measures. Even after the formal end of the state of emergency, the full exercise of the freedom of movement was not respected through the continue house arrests, the searches without a judicial control, the identity controls and the prefects' power to impose geographical limitations to individuals.
Even in United Kingdom, the constraints on the freedom of movement were not spared. In addition to the increasing house arrests' powers, this freedom was widely compromised by Temporary Exclusion Orders (TEOs) since were used to impede that an individual, who has gone to Syria to support or fight for ISIS, could return freely to UK. According to some, the TEOs could violate the British obligations under the International Covenant on Civil and Political Rights, which affirms that "nobody shall be arbitrarily deprived of the right to enter his own country"[157]. Although, according to others, the decision of preventing individuals to return to UK was not arbitrary due to a court's oversight, the impact on freedom of movement was still notable since the exclusion period could also last up to two years[158].

[154] A. Oehmichen, *Terrorism and anti-terror legislation - the terrorised legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France*., cit., p. 291.
[155] Ibid., p. 292.
[156] J. Borricand, *Politique antiterroriste française et respect des droits fondamentaux,* cit., p.176.
[157] Article 12, ICCPR.
[158] H. Fenwick, *Responding to the ISIS threat: extending coercive non-trial-based measures in the Counter-Terrorism and Security Act 2015*, in International Review of Law, Computers & Technology, Vol. 30, No. 3 (2016), p. 177.

2.1.4 The right to liberty and security

The right to liberty and security, enshrined in the Article 5 ECHR, concentrates on safeguarding individuals' freedom from misguided detention, as opposed to protecting personal safety, and on generally guaranteeing the individual's personal freedom[159]. This right was not only limited but truly violated by the UK's Anti-Terrorism Crime and Security Act 2001. The indefinite detention of non-national terrorist suspects where deportation may be followed by torture, allowed by Part IV of the Act, constituted a limitation to the right to liberty and security of person, that was excessive to an extent that it was hard to justify even by the growing degree of threat created by terrorism[160]. As a matter of fact, the measure completely violated "the lawful detention of a person after conviction of a competent court"[161], being so intrusive in the individual rights' sphere that the conditions, required by ECHR's Article 15 to derogate from the Convention's obligations, were not properly respected. In 2004, the provision was declared, by the House of Lords, to be disproportionate, with respect to the threat posed to the country, and discriminatory, since it involved only foreign nationals (that is why it was also in breach with Article 14 ECHR). Only in 2005, the measure was abrogated and, as a result, it is worth highlighting that one of the most interfering and detrimental regulations, in terms of human rights protection, has been applied for four years, and thus the fundamental right to liberty and security was heavily limited during this period. Specifically, from 2001 to March 2005, sixteen people were detain under the Act[162].

In 2005, the right to liberty and security was deeply infringed by the control orders regime, established by the Prevention of Terrorism Act. Indeed, the control orders model included the ability to impose restrictions outside Article 5 ECHR. Furthermore, this right could be strongly limited on account of the wide scope of the restrictions and to the possibility to apply several limitations together[163], being conceivably traumatic for the person involved. Due to their excessive and intrusive nature, the control orders *per se* have been considered by the UK Joint Committee on Human Rights, in its report of 2007, as representing an infringement of the fundamental human right to liberty (art.5 ECHR)[164]. The impact on the individual right was also aggravated by the fact that the derogating orders were enacted on the basis of a mere suspicion and a weak standard of proof regarding the individual's involvement in terrorist

[159] Equality and Human Rights Commission. [online]: https://www.equalityhumanrights.com/en/human-rights-act/article-5-right-liberty-and-security

[160] Oehmichen A., *Terrorism and anti-terror legislation - the terrorised legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France*,cit., p. 306.

[161] Article 5 of European Convention on Human Rights.

[162] D. Bonner, *Counter-Terrorism and European Human Rights since 9/11: The United Kingdom Experience,* cit., p. 109.

[163] S.D. Bachmann, M. Burt, *Control Orders Post 9-11 and Human Rights in the United Kingdom, Australia and Canada: A Kafkaesque Dilemma,* in 15 Deakin L Rev 131 (2010), p.137.

[164] Ibid., p.139.

activities.

Finally, the right to liberty and security was encroached by the Terrorism Act 2006, since, according to the human rights organization Liberty and by Amnesty International, the extension of the pre-charge detention of terrorist suspects from 14 to 28 days violated the right under which an individual cannot be kept without trial longer than it is necessary[165]. Lastly, the infringement of mentioned right kept on being a feature of the Counter-Terrorism Act 2008, as a result of the lack of sufficient safeguards against arbitrary detention and the risk of detention abuses and violations of European human rights legislation[166].

2.1.5 The right to freedom of assembly and association

Enshrined in the Article 11 of the European Convention of Human Rights, the right to freedom of assembly and association is the right of individuals to meet and to engage in peaceful protest, and to create and join associations to pursue common objectives.

In France, this right was quite compromised by the one of most controversial elements of French counter-terrorist legislation after 9/11, that was the initial vagueness of definition of terrorism[167], that failed to exclude minor crimes. The impact on this right derived also from other provisions lacking legal specificity, such as those criminalizing association with people who were involved in terrorist enterprises without properly distinguishing between innocent and criminal association, or without requiring some form of strategic involvement or guilty intention[168]. The limited exercise of the freedom of assembly and association was demonstrated by the several incidents in which a hundred people were arrested, but only few of them were actually involved in terrorist activities[169]. Furthermore, the special powers conferred to the French administrative authorities have been used to target political activists during the state of emergency[170]. This was inevitably deemed as a violation to the mentioned right and to the right to protest, as also reported by Amnesty International in 2017[171]. For instance, in October 2016, the emergency legislation was utilized to forbid two manifestations against the expulsion programme of migrants and refugees from Calais[172].

In United Kingdom, the freedom of assembly and association was mainly invaded by the

[165] Counter-Terrorism Act 2008 | UK civil liberties | The Guardian
[166] Ibid.
[167] Initially, the post-9/11 definition of terrorism was founded on the definition of the legislation of 1986, which defined terrorism as "an individual or collective enterprise intending to gravely trouble public order by means of intimidation or terror."
[168] Sudborough C., *The war against fundamental rights: French counterterrorism policy and the need to integrate international security and human rights agreements,* cit., p.476.
[169] Ibid., p.475.
[170] S.H. Vauchez, *The State of Emergency in France: Days Without End?*, cit., p.708.
[171] Ibid.
[172] J. Kilpatrick, *Quand un état d'urgence temporaire devient permanent, le cas de la France*, cit., p.13.

Terrorism Prevention and Investigation Measures under the Act of 2011 and by the Counter-Terrorism and Security Act 2015, even though this interference was designed to be effectuated on a more proportional and necessary basis than in the past[173].

2.1.6 The freedom of expression

According Article 10 of the European Convention of Human Rights, the freedom of expression consists of the right "[…] to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers […]"[174].
Together with other liberties, the freedom of expression was intrusively undermined by the French Law No. 2014-1353 of 13 November 2014 because of the introduction in the Penal Code of the apology of terrorism offence, particularly on online public communication services. Indeed, it was the expression of an opinion that was repressed by the new Article 421-2-5 of the Penal Code, not an act of terrorism[175]. As a matter of fact, the French definition of apology of terrorism, contained in the abovementioned article, was characterized by a too extensive scope of the notion, which did not properly allow to distinguish between remarks that, while being provocative and polemical, remain in the framework of a legitimate debate, and those which should be considered as falling within the scope of incitement to hatred or violence[176]. In this context, the law of November 2014 overcame the criteria established by the international and European law to balance the repression of the incitement to terrorism and the freedom of expression[177]. Indeed, the European Court of Human Rights itself considered the apology of terrorism as a restriction on freedom of expression[178].
In the context of the British counterterrorist legislation, the consequences on the freedom of expression was one of the most controversial aspects of the Terrorism Act 2006, caused by its provision that criminalised the glorification and incitement of terrorism, also with specific reference to Internet[179]. For instance, the glorification of terrorism is defined by the Act as "any form of praise or celebration" of a terrorist act, "whether in the past, in the future or generally" from which "members of the public could reasonably be expected to infer that, what is being glorified as conduct, should be emulated by them in existing circumstances."[180] The person is

[173] D. Bonner, *Counter-Terrorism and European Human Rights since 9/11: The United Kingdom Experience,* cit., p. 115.
[174] Article 10 ECHR.
[175] E. Daoud, C. Godeberge, *La loi du 13 novembre 2014 constitue-t-elle une atteinte à la liberté d'expression?,* in AJ Pénal, Dossier Lutte contre le terrorisme, (2014), p. 564.
[176] F. Dubuisson, *Lutte contre le terrorisme et liberté d'expression : le cas de la répression de l'apologie du terrorisme*, in La Lutte Contre Le Terrorisme Editions Pedone (2017), p. 277.
[177] Ibid., p. 284.
[178] Ibid.
[179] D. Murray, *Freedom of expression, Counter-Terrorism and the Internet in the light of the UK Terrorist Act 2006 and the jurisprudence of the European Court of Human Rights*, in Netherlands Quarterly of Human Rights, Vol. 27/3 (2009), p. 340.
[180] Terrorism Act 2006, para. 20.

guilty if he is deemed to be reckless in committing any form of praise or celebration. The critical element is that the interpretation of the individual's recklessness and intention is upon the "members of the public" and may be a very subjective evaluation, being sometimes hard to distinguish between what is reckless and what is negligent[181]. The Act considers it "irrelevant" whether anyone is "in fact encouraged or induced" to commit terrorism[182]. The limitation on the freedom of expression is ascribed to the fact that an individual's action may be considered to fall into the prohibition of glorification, while it may actually belong to the speech offences, which are not included in the domain of criminality[183]. The Act criminalizes glorification even on Internet, which is a different reality and where the lack of the face-to-face decision making may lead to a greater ambiguity when deciding whether individual's expression falls into a crime[184]. Moreover, the freedom of expression was improperly restricted by the Act of 2006 because the new offence of encouragement of terrorism is based on the broad and vague definition of terrorism, contained in the Act of 2000[185]. Furthermore, the freedom of expression has been touched by the Act of 2011, since the authorities may prohibit the possession of certain means of electronic communication or may restrict the use of these means, without, however, being able to prohibit the possession of any means of communication or even deprive a person of access to the Internet, as was provided for by previous laws[186].

2.1.7 The freedom of religion

The freedom of religion comprehends the right "[…] to manifest his religion or belief, in worship, teaching, practice and observance […]"[187]. In the context of the French antiterrorist measures, the limitation on the effective exercise of the freedom of religion was generally given by the fact that these provisions were applied in a systematic and discriminatory way, targeting especially Muslim communities, who were often treated with suspicion just for their religious beliefs rather than for evidence of criminal behaviour. The closure of places of worship and the condemnation of "rigours practice of Islam" and of connections with "radical Islamist movements" not only limited the freedom of religion, but also created a sort of

[181] D. Murray, *Freedom of expression, Counter-Terrorism and the Internet in the light of the UK Terrorist Act 2006 and the jurisprudence of the European Court of Human Rights,* cit., p. 343.
[182] E. Parker, *Implementation of the UK Terrorism Act 2006 – The Relationship Between counterterrorism law, Free Speech, and the Muslim community in the United Kingdom versus the united States*, Emory International Law Review, Vol. 21, No. 2, (2007), p. 716.
[183] D. Murray, *Freedom of expression, Counter-Terrorism and the Internet in the light of the UK Terrorist Act 2006 and the jurisprudence of the European Court of Human Rights,* cit., p. 343.
[184] Ibid., p. 349.
[185] Article 19, *The Impact of Anti-Terror laws on Freedom of Expression, Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism, and Human Rights*, Article 19, London, 2006, p.7.
[186] A. Duffy-Meunier, S. Hourson, C. Sénac, *La lutte contre le terrorisme et les droits fondamentaux au Royaume-Uni*, in Droit comparé et européen, Vol.30, (2017), p. 219.
[187] Article 9 ECHR.

discrimination towards Muslim within French society[188]. As a matter of fact, a strong progression of islamophobic acts has been registered in France since 2015[189]. The confusion between terrorism and Islam and the practice through which Islam was elevated to a national security threat had a notable negative impact on Muslim groups, which was also noted by various human rights organizations[190]. For instance, in 2016, Amnesty International denounced the application of the emergency measures related to expulsion of aliens, for having harmful repercussion on the Arab and Muslim communities in France[191].

The restriction of the freedom of religion and a sort of islamophobia were also prompted by the UK's counterterrorist legislation. Already at the time of the Terrorism Act of 2006, the British members of Parliament, media and proponents of the Act, declared that terrorist speech by radical Muslim would have been the target of the Act 2006[192]. In addition, in the exercise of the security police powers, authorities tended often to focus more their attention on Muslim individuals, who were viewed as "suspect communities" against which the Government must take measures to avoid their radicalisation and extremism[193]. For instance, many young Muslims stated that being stopped and searched in the streets, under counterterrorist police powers, became their most frequent and repeated contact with the police[194]. Not by chance, the frequency with which they were stopped, or saw others being stopped, gave them a feeling of alienation, provoking perceptions of racial and religious discrimination. According to some data, 87% of terrorism-related prisoners in Great Britain in 2010 recognised themselves as Muslim[195]. Through the incorporation of religion as a tool to fight against terrorism and through measures that limited the freedom of religion, Islam and Muslim people are linked to terrorism in the public discourse, which inevitably fostered discriminatory behaviours and increased alienation of these persons[196].

[188] CCIF-Annual-Report-2016_0.pdf (islamophobie.net)
[189] Ibid.
[190] S.H. Vauchez, *The State of Emergency in France: Days Without End?*, cit., p. 707.
[191] S. Jorio, *La securisation des politiques migratoires françaises, en contexte europeen. Effets sur les droits humains des migrants et des refugies*, Thesis for University of Quebec, (2020), p.166.
[192] E. Parker, *Implementation of the UK Terrorism Act 2006 – The Relationship Between counterterrorism law, Free Speech, and the Muslim community in the United Kingdom versus the united States,* cit., p.722.
[193] T. Abbas, I. Awan, *Limits of UK Counterterrorism Policy and its Implications for Islamophobia and Far Right Extremism*, in International Journal for Crime, Justice and Social Democracy, (2015), p. 17.
[194] Choudhury T., Fenwick H., *The impact on counter-terrorism measures on Muslim communities*, in International Review of Law, Computers & Technology, (2011), p.173.
[195] Ibid., p. 153.
[196] M.J. Hickman et al., '*Suspect Communities'? Counter-terrorism policy, the press, and the impact on Irish and Muslim communities in Britain*, Report of a research project: A comparative study of the representations of 'suspect' communities in multi-ethnic Britain and of their impact on Muslim and Irish communities 1974-2007, Funded by the Economic and Social Science Research Council (2011), p.4.

2.2 The increasing discrimination between aliens and citizens

The antiterrorism legislation has not only negatively affected the fundamental human rights and civil liberties of French and British population, but also prompted a legitimized discrimination between citizens and aliens, affecting the principle of non-discrimination and right to equality, due to the fact that the non-nationals were considered to be possibly involved in terrorist activities, because of the widespread tension and fear following the terrorist attacks and to political propaganda and debates. One important factor that was at the basis of the increased discrimination has been the approval of more restrictive immigration laws in correspondence of counterterrorism legislation, in most of the European countries. Indeed, the restriction of immigration laws fostered the idea of immigrant as a potential terrorist and the necessity to make it harder for immigrants to entry and reside within French and British national borders. The discrimination between citizens and aliens or citizens with foreign origins was also the outcome of the wide provisions on deprivation of citizenship, which became a counterterrorist tool and, many times, an integral part of antiterrorist strategy and legislation of both countries.

2.2.1 The toughening of the immigration and asylum laws

Immigration, asylum and national security have been often connected in some way, but following the 9/11 attacks, this relationship acquired a greater resonance due to the concern about the interaction between terrorism, borders and movement of people, together with an increasing fear of foreigners and a political rhetoric of exclusion. Moreover, the 11 September attacks created the idea of considering individuals as a threat to a State on the basis of their ethnicity or religious belief, and not on their nationality[197]. Therefore, the counterterrorism policy has evidently reshaped the immigration law and policy. Governments have often attempted to justify barrier to immigration on the grounds of national security concerns and utilised new immigration strategies as antiterrorism tactics[198]. In the aftermath of 9/11, most European countries tempered their border controls and toughened their migration policies by making it harder for potential migrants to legally migrate to another country[199]. In addition, right after the Paris attacks of 2015, certain European States debated about new methods to monitor and record immigrants to overcome the unease of Islamist terrorists' infiltration in

[197] E. Guild, Immigration, *Asylum, Borders and Terrorism: The Unexpected Victims of 11 September 2001*, Chapter 12 of the book 11 September 2001 : War, Terror and Judgement, edited by Bulent Gokay, and R. B. J. Walker, Taylor & Francis Group, (2003), p.170.
[198] V. Bove, T. Böhmelt, E. Nussio, *Terrorism abroad and migration policies at home*, in Journal of European Public Policy, (2021), p. 191.
[199] Ibid.

migratory flows[200].

As a matter of fact, several studies have suggested that immigration policies became more severe under the influence of counterterrorist legislation, and especially after the 9/11 attacks, due to two main reasons: the former concerns security considerations, dealing with the necessity to make the terrorist infiltration costs higher and thus to reduce terrorism; the latter is linked to governments' accountability for insecurity and their need to respond to the electorate's fear and demand for security expectations[201]. In this sense, as well as many antiterrorist laws, immigration policies, that came along with antiterrorist legislation, had more a symbolic character, used by the politicians to demonstrate to the public that they were acting against the terrorist threat. Hence, immigration policies have become an important tool in the war on terrorism. However, governments have often focused these policies on Arab or Muslim immigrants, creating a strong sense of alienation and discrimination, and reinforcing racial and religious stereotypes in the public opinion. On many occasions, connecting immigration policies to counterterrorism measures has not been beneficial to the governments, because the alienated and discriminated ethnic communities are more inclined to support terrorism[202].

The next two subparagraphs will analyse the scenarios in France and in United Kingdom, where the Governments decided to include the adoption of strict immigration laws into the counterterrorism strategy, fostering a deeper discrimination between citizens and aliens.

2.2.1.1 The hardening of the French immigration and asylum regulations

In France, the terrorist fears' influence on asylum and immigration policies have been based on the concepts of public order and national security, which served as parameters to apply the expulsion of aliens from French territory for many years[203]. The public order concept, that had been used in the French immigration laws after 1994, was extended to the immigration policy from 2001 onwards. As a matter of fact, since the terrorist attacks, the condition of not being a threat to public order was enlarged to the whole movement of an alien, being a necessary requirement for the entry, residence and return of the non-national[204]. The immigrants were also limited by the increasing identity controls and administrative detentions specifically addressed to them. Hence, according to some data, in September and October 2001, the number

[200] Ibid.
[201] M. Helbling, D. Meierrieks, *Transnational terrorism and restrictive immigration policies*, in Journal of Peace Research, Vol. 57(4), (2020), p.565.
[202] A. Spencer, *Using Immigration Policies as a Tool in the War on Terror*, in Crossroads Vol. 7 No.1, (2007), p.40.
[203] C. Saas, *The Changes in Laws on Immigration and Asylum in France in Response to Terrorist Fears*, Chapter 5 of Elspeth Guild and Anneliese Baldaccini (eds.), Terrorism and the Foreigner, Koninklijke Brill NV. Printed in the Netherlands (2007), p. 233.
[204] Ibid., p.247.

of irregular immigrants put in administrative detention with the purpose of expulsion had increased by 30 per cent[205].

Thus, as in many European countries, in France the adoption of the counterterrorist legislation came along with the toughening of the immigration policy, since the climate of tension fostered the idea of identifying migrants as terrorists or criminals. Unsurprisingly, in the same year of the approval of the Law on Internal Security of 18 March 2003, the Law Sarkozy on Immigration entered into force in November 2003. For many, no other reform to immigration law had been so harsh since World War II, but it was declared to be a direct response to the public emergency given by the terrorist threat[206]. The Law restrained the existing immigration law: it tightened the system of visa and entry; it prolonged the time-limits for the administrative detention of those aliens who have been denied the right to reside in the French territory; it created a database for digital fingerprints and photos for the visa applications and for a more precise control of irregular aliens; it strengthened the penalties in the case of aid for irregular entry and residence[207]. Furthermore, the Law rendered the aliens' residence in the French territory more precarious, by allowing to release a ten-year residence permit only after having proved the aliens' integration within French society[208].

In 2004, the French asylum law was also changed as a result of the terrorist attacks and of counterterrorist laws' approval, through a series of amendments that actually removed the right to asylum, which was replaced by a subsidiary protection, and established that the fact of being a threat to the public order has been more utilised as a condition for inadmissibility or admissibility for the asylum verification process[209]. The reform of the asylum law was criticised by the *Coordination française pour le droit d'asile* because it practically consisted of a deterioration of the application of the Refugee Convention in France[210].

A few months later the approval of Law of 23 January 2006, a strict immigration law, the *Loi relative à l'immigration et à l'intégration*, entered into force in July 2006, which introduced some impediments to immigrants, such as the invalidation of the automatic regularization, which until then usually happened after ten years of living in France, and its replacement by a 10-year resident card that was subject to the acquirement of a French language diploma[211].

Moreover, the *Loi relative à la maitrise de l'immigration à l'intégration et à l'asile* of November 2007 established new obstacles for family reunification and the *Loi relative à*

[205] Ibid., p.250.
[206] Ibid., p.260.
[207] Loi n° 2003-1119 du 26 novembre 2003 relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité (1). - Légifrance (legifrance.gouv.fr)
[208] C. Saas, *The Changes in Laws on Immigration and Asylum in France in Response to Terrorist Fears,* cit., p.261.
[209] Ibid., p.258.
[210] Ibid., p.259.
[211] P. May, *Ideological justifications for restrictive immigration policies: An analysis of parliamentary discourses on immigration in France and Canada (2006–2013),* in French Politics Journal Vol.14, (2016), p.294.

l'immigration, à l'intégration et à la nationalité of June 2011 sought to deter illegal immigration by amending expulsion mechanisms[212]. It extended the maximum length of detention for illegal immigrants from 35 to 42 days, as well as limiting access to legal assistance in the National Court of Asylum[213].

During the state of emergency 2015-2017, the exceptional laws, that had been adopted, analysed in previous chapter, aimed at influencing and regulating the migratory control, thus the immigration regulations. An example has been the Law of 13 November 2014, which introduced the Articles 214-1 to 4 of the Code of Entry and Residence of Foreigners and the Right to Asylum, and whose provisions have been utilised for strengthening the existing exceptional regime overseas.

Since the Law of 30 October 2017, the control of migrants, such as expulsion and house arrest, requires administrative measures, because of the harmonisation between the surveillance systems of the terrorist threat and those envisaged to control the foreigners. Indeed, the aliens have been deemed as the target of the "permanent state of emergency", whose law had been extended also to provisions of the criminal law on prevention and enforcement of the religious radicalization, that were applied in a targeted manner to Muslims and in general to aliens[214]. Moreover, the borders controls have been reinforced because of the connection between terrorism and immigration, as illustrated by the Council of State which validated, in 2017, the extension of these controls on the basis of the existence a link between migratory flows and terrorist threat[215]. Furthermore, the contamination of the common law of aliens by the pre-emptive logic of the state of emergency is demonstrated not only by the Law of 2017, but also by the Law on Immigration and Asylum, which entered into force in September 2018. The latter provided for the extension of the administrative investigation to asylum seekers, that was covered by the Internal Security Code and that was already extended by the Law of 2017 to all public officials[216]. These investigations, which allow the unlimited use of information from foreign intelligence services to detect potential terrorists among refugees, helped to normalize and generalize the police registration of foreigners[217]. In addition, it established that the alien has only 90 days, instead of the 120 days set by the law of 29 July 2015 on the reform of the right of asylum, to submit his asylum application once he has arrived in France[218]. Finally, the Law on Immigration and Asylum of 2018 included a tightening of expulsion measures and a

[212] Ibid.
[213] Ibid.
[214] J.P. Foegle, *Les étrangers, cibles de l'état d'urgence*, in Plein Droit Revue No.117, (2018), p.8.
[215] Ibid., p.9.
[216] Ibid.
[217] Ibid.
[218] Asile et immigration : la loi du 10 septembre 2018 | Vie publique.fr (vie-publique.fr)

prolongation of irregular immigrants[219].

In conclusion, it is important to remind that France has been viewed as one of the leading European host countries for asylum seekers and, it has often developed an approach with the aim of improving the immigrants' integration. However, in correspondence of terrorist events and of the state of emergency started in 2015, certain harsh immigration policy and regulations have been delineated in order to make them aligned with certain counterterrorist legislation, specifically in those periods where the perception of the immigrant as a potential terrorist was stronger.

2.2.1.2 The stiffening of the United Kingdom's immigration and asylum measures

Hardening immigration, asylum and borders controls constituted a central role in the UK's counterterrorism legislation and parliamentary debates since 9/11. Immigration and asylum were tools for challenging the government on the issue of limiting the effects of human rights legislation for security policy[220]. In the British political debates, terrorism was described as an issue of checking foreigners, both those entering in UK and those who already lived in the country[221]. In addition, immigration and asylum issues emerged in the UK's politics of exception through two main convictions: the former consisted of the idea that potential terrorist could abuse of asylum and immigrations mechanisms; the latter was the use of an immigration tool, the Special Immigration Appeal Committee, in the war on terror. It was provided for by the Anti-Terrorism Crime and Security Act and created inevitably a link between counterterrorism, immigration and asylum[222].

This connection was institutionalised by the Anti-Terrorism Crime and Security Act of 2001, whose Part IV was entitled "Immigration and Asylum", in which the controversial provision of indefinite detention of non-nationals was contained, also dealing with the retention of fingerprint data in cases of asylum or immigration[223]. Furthermore, new regulations were approved to allow the removal of residence permits on the grounds of a certification by the minister of a terrorism threat[224]. The Anti-Terrorism Crime and Security Act of 2001 has been an example illustrating the collision and the merging between immigration regulations and counterterrorism legislation.

In the context of the counterterrorism legislation's implementation in a post-9/11 scenario, the

[219] Ibid.
[220] A. Buonfino, J. Huysmans, *Politics of Exception and Unease: Immigration, Asylum and Terrorism in Parliamentary Debates in the UK*, in Political Studies Vol. 56, (2008), p.769.
[221] Ibid., p. 768.
[222] Ibid., p.773.
[223] A. Spencer, *Using Immigration Policies as a Tool in the War on Terror*, cit., p.22.
[224] Guild E., Immigration, *Asylum, Borders and Terrorism: The Unexpected Victims of 11 September 2001,* cit., p. 177.

Nationality, Immigration and Asylum Act entered into force in November 2002. The latter extended the detention powers, through which an asylum seeker could be detained at any moment during his application[225]. The detention of refugees, convicted of criminal offences, was also allowed in case of crimes not particularly serious, and thus it was criticised for being contrary to the UK's obligations under the Refugee Convention[226]. In addition, asylum seekers were denied support unless they made their claim "as soon as reasonably practicable" after arriving in the United Kingdom and they could declare how they arrived in the UK. The removal of this support was criticised by some NGOs because it could heavily affect the lives of thousands of asylum applicants, and it was also found to be in breach of Article 3 of the European Convention of Human Rights by the court of appeal[227]. The Act also increased immigration officers' powers and privatised certain features of immigration control[228].

The London attacks of 2005 revived the attention on foreigners, even though the terrorists were British citizens. It was indeed a political strategy, trying to externalise the menace by describing it as coming from abroad, declaring the presence of foreigners Muslims who had been helped from outside in the British territory[229]. Hence, immigration measures did not remain immune from being influenced by the terrorist events and by the consequential counterterrorist legislation. A striking example of combination of immigration rules and antiterrorist laws has been the Immigration, Asylum and Nationality Act, approved in March 2006. For instance, the Act required that asylum is forbidden for anyone who has committed or incited others to prepare or encourage terrorism, and those who are deemed to be terrorists can be excluded from protection provided for by the Convention on the Status of Refugees[230]. This requirement was considered by some to be too wide because it did not take into consideration the broadness of the definition of terrorism at the time[231]. Moreover, the Bill extended deportation and removal powers, and gave the police the ability to obtain advanced information on passengers scheduled to arrive, depart, or are scheduled to leave the United Kingdom. Lastly, it allowed immigration agents to seize travel documents, and register and verify biometric data from people entering the United Kingdom[232].

Right after the Terrorism Act of 2006, the UK Borders Bill was discussed and then approved in 2007. The Bill followed the Home Office's 2007 White Paper *Securing the UK Border: Our*

[225] Nationality, Immigration and Asylum Act 2002, Part IV.
[226] Nationality, Immigration and Asylum Act 2002 | UK civil liberties | The Guardian
[227] D. Stevens, *The Nationality, Immigration and Asylum Act 2002: Secure Borders, Safe Haven?*, in The Modern Law Review, Vol. 67, No. 4 (2004), p.618.
[228] Ibid., p.622.
[229] A. Buonfino, J. Huysmans, *Politics of Exception and Unease: Immigration, Asylum and Terrorism in Parliamentary Debates in the UK*, cit., p.777.
[230] Explanatory Notes to the Immigration, Asylum and Nationality Act 2006.
[231] Immigration, Asylum and Nationality Act 2006 | UK civil liberties | The Guardian
[232] Ibid.

Vision and Strategy for the Future, which aimed to "securitize" migration by reducing terrorist attacks through a system of borders that would prevent the terrorist suspects' entrance in UK[233]. The strategy also included the introduction of the Visa Waiver Test, which was comprised of a series of criteria verifying the general degree of damage posed by an alien from a specific country.

The UK Borders Act strengthened the powers for immigration control and of the Border and Immigration Agency. Specifically, the Act conferred to the immigration officers certain police-like powers such as increased detention, entry, search and seizure powers[234]. That was particularly criticised by civil liberties associations, since these new powers could be racially and socially controversial[235]. It also enacted obligatory biometric identity documents on non-EU immigrants and bestowed the Secretary of State far-reaching powers to retain and share immigrants' information[236]. In addition, the UK Borders Act of 2007 allowed the automatic deportation of some aliens in case of imprisonment for certain offences or in case of imprisonment longer than one year[237]. Upon immigrants who have been granted limited leave to stay, the law allowed for additional reporting and residency requirements to be placed on them[238]. Hence, aliens became subject to a series of tough controls, including the tracking of the entry and exit of those arriving in and leaving the British territory[239].

In the context of the Counterterrorism Act 2008's discussions, the Criminal Justice and Immigration Act introduced a special immigration status for those who are deemed to be involved in terrorism, for which they are forbidden to enter or remain in UK and may be subject to limitations concerning their residence and employment[240]. Further restrictions on immigration derived from the Borders, Citizenship and Immigration Act of 2009, which strengthened border controls, immigration agents' customs powers, viewed as too invasive by the National Council on Civil Liberties, and the conditions to gain a residential status[241].

Since, in 2014, around 400 people from UK, who had left the country to fight in Syria and Iraq, were expected to come back to the British territory, raising security concerns[242], limiting immigration measures were also the objective of the Immigration Act of 2014. The latter widely decreased appeal rights while restricting the ability of those detained to apply for

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[233] D. McGhee, *The paths to citizenship: a critical examination of immigration policy in Britain since 2001*, in Patterns of Prejudice (2009), p. 42.
[234] UK Borders Act 2007 | UK civil liberties | The Guardian
[235] Ibid.
[236] Explanatory Notes to UK Borders Act 2007, paragraphs 4-5, 19-20.
[237] Ibid., par. 12-18.
[238] UK Borders Act 2007 | UK civil liberties | The Guardian
[239] M. Bosworth, M. Guild, *Governing through migration control: security and citizenship in Britain*, in British Journal of Criminology , Vol. 48 (2008), p.710.
[240] Criminal Justice and Immigration Act 2008, Part X.
[241] Borders, Citizenship and Immigration Act 2009 | UK civil liberties | The Guardian
[242] L. Zedner, *The Hostile Border: Crimmigration, Counter-Terrorism, Crossing the line on Rights?*, in New Criminal Law Review, Vol. 22, No.3 (2019), p. 331.

immigration bail, and tightened up appeals against removal and deportation orders, grounded on Article 8 (ECHR)[243]. It also included a variety of other measures to strengthen the country's image as "hostile to migrants"[244], especially the illegal ones. This idea of UK as a hostile environment was actually accentuated by the Immigration Act of 2016, one year after the Counterterrorism and Security Act 2015. For instance, it included new provisions to facilitate to fortify immigration laws and removed automatic in-country right of appeal to all immigration applications and for deportation cases[245].

In conclusion, United Kingdom was among the several States which sought to recognise all the legislative means to impede the movement of would-be terrorists across the national borders[246]. The outcome of this effort was the British counterterrorist legislation's influence on immigration and asylum laws and sometimes the convergence between the two. However, the emphasized controls on migrants blurred significant gaps between citizens and aliens, in terms of legal rights and of an affective and qualitative sense of belonging[247]. The criminalization of migration thus re-mould the terms for security-UK citizens[248]. In the following years, UK Government will persist with an immigration policy creating a hostile environment, especially through the merging of criminal, immigration, and counter-terrorism legislation at the border and the exceptional powers conferred to police and immigration officials in the name of security[249].

2.2.2 The deprivation of citizenship as a counterterrorist tool

The previous paragraph highlighted how French and British counterterrorist legislation encouraged and fostered the debate and the approval of restrictive immigration and asylum laws, creating the idea of immigrant as a terrorist suspect and accentuating the tendency to legalize a discrimination between citizens and aliens. The antiterrorist legislation and strategies of both countries comprehended such a discrimination through the inclusion of an additional kind of measure that was often utilised as a counterterrorist instrument: the deprivation of citizenship, whose regulations have been restricted under the stimulus of and by antiterrorist laws. This measure had been used by France and United Kingdom prior to the 9/11 but was revived in the fight against terrorism, since sometimes the attackers were home-grown

[243] A. Aliverti, *The New Immigration Act 2014 and the Banality of Immigration Controls*, in Borders Criminology Blog (2014) [online]: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2014/05/new-immigration . Accessed 3 April 2022.
[244] Ibid.
[245] New UK Immigration Act 2016, an analysis by a UK Immigration lawyer (crossborderlegal.co.uk)
[246] L. Zedner, *The Hostile Border: Crimmigration, Counter-Terrorism, Crossing the line on Rights?*, cit., p.324.
[247] M. Bosworth, M. Guild, *Governing through migration control: security and citizenship in Britain*, cit., p.714.
[248] Ibid.
[249] L. Zedner, *The Hostile Border: Crimmigration, Counter-Terrorism, Crossing the line on Rights?*, cit., p.345.

terrorists, thus citizens of the countries where the terrorist attacks were perpetrated, such in the case of Paris attacks in 2015[250].

The deprivation of citizenship *ratio* has been connected to the governments' objective of removal of those individuals who are considered a risk to the national security, since the main difference between citizens and aliens is that the latter can be deported. Hence, the measure has often been a tool to expel potentially dangerous individuals and to prevent them from freely moving inside and outside the national territory. It has also been a symbolic sanction with a function of deterring terrorist actions, in the sense that it discourages people to accomplish terrorist activities, since losing their citizenship would be considered to be too high a cost to pay[251]. In this way, citizenship is more a privilege than a right, as if only some people were worthy of it. In any case, deportation has been the clear goal of French and British policies on citizenship[252]. Hence, the loss of citizenship is a method to "externalise" the management of the risk and the penal treatment of individuals[253]. However, while in France individuals are deported after the actual deprivation, in UK the Government aims to deprive people from their citizenship while they are abroad, immediately preventing them to entry in the British territory[254].

Despite some differences between British and French legal provisions on deprivation of citizenship, both countries display a common tendency to modify these provisions in the light of terrorist attacks and of their respective counterterrorist legislation. Sometimes, revocation of citizenship measures were actually contained in antiterrorist laws. In addition, they show three common features in France and UK: the deprivation policies made the citizenship dependent on non-engagement in terrorism; governments ensure that the deprivation has severe effects on the targeted individuals, especially in terms of exit from the territory; these dependency and consequences usually apply only to those citizens with a "foreign background", particularly Muslims[255]. As a matter of fact, on many occasions, the deportation orders taken against terrorist suspects solely addressed to persons involved in "Islamic extremism", increasing the sense of alienation of Muslim communities and the idea that citizenship policies, often contained in counterterrorist laws, is not effectuated to the same extent to everyone[256]. The discrimination between citizens and aliens, and between citizens and those with foreign origins,

[250] E. Cloots, *The Legal Limits of Citizenship Deprivation as a Counterterror Strategy*, in European Public Law 23, No. 1 (2017), p.57.
[251] P.T. Lenard, *Democracies and the Power to Revoke Citizenship*, in Ethics & International Affairs, Vol.30, No.1 (2016), p.85.
[252] É. Fargues, *The revival of citizenship deprivation in France and the UK as an instance of citizenship renationalisation*, in Citizenship Studies (2017), p.990.
[253] J. Lepoutre, *L'impasse de la décheance de la nationalité*, in Plein Droit No.118, (2018), p.22.
[254] É. Fargues, *The revival of citizenship deprivation in France and the UK as an instance of citizenship renationalisation,* cit., p.990.
[255] Ibid., p.985.
[256] Ibid., p.992.

is fostered also by the fact that, in accordance with the international norm of avoiding statelessness[257], these provisions have usually involved dual-nationals, who encounter the risk of being deprived of their citizenship, in addition to the same regular punishment of the mono-nationals[258]. The latter are consequently better protected, creating a sort of discriminatory hierarchy of citizens, who are treated unequally by establishing different punishments for the same crime[259]. A related distinction made by these measures has often been the one between naturalized and native-born citizens, being the latter more worthy of State's protection and trust[260]. Nonetheless, it is significant to take into account that the effective contribution of the deprivation of citizenship measures to in the fight against terrorism has been often called into question and debated by literature. For instance, on the longer term, the loss of citizenship could be counterproductive as a counterterrorism strategy since it may give rise to further radicalisation and marginalisation, making people more motivated to join or return to terrorist groups[261]. Moreover, it could alter bilateral relations and generate diplomatic tensions[262]. Finally, it is important to highlight that the antiterrorist legislation had an impact on fundamental rights and fostered discrimination within national societies, not only through their limiting provisions and their influence on restrictive immigration policies, but also by including terrorism-related denationalization measures, which also engaged ECHR Rights, such as the right not to be subject to inhuman or degrading treatment or punishment, the right to respect for private and family life, the right to non-discrimination, and the rights to a fair trial and to an effective national remedy[263]. Indeed, deprivation of citizenship may be connected to the risk that the expelled individuals' human rights are infringed: they may be unable to efficiently challenge the deprivation decision, they may be expatriated under doubtful conditions and may be subject to ill treatment, or they may be indicted, potentially in breach of due process standards/norms[264]. Therefore, the revocation of citizenship was part of a series of counterterrorist measures that invaded civil liberties.

2.2.2.1 The citizenship's deprivation measures in France

In France, the main provision regulating the deprivation of citizenship is Article 25 of the Civil

[257] The main legal reference is Article 15 of the Universal Declaration of Human Rights claiming that everyone has the right to a nationality, and forbidding arbitrary deprivation of nationality.
[258] C. Joppke, *Terror and the loss of citizenship*, in Citizenship Studies, (2016), p.745.
[259] P.T. Lenard, *Democracies and the Power to Revoke Citizenship*, cit., p.79.
[260] E. Cloots, *The Legal Limits of Citizenship Deprivation as a Counterterror Strategy*, cit., p.78.
[261] M. P. Bolhuis, J. van Wijk, *Citizenship Deprivation as a Counterterrorism Measure in Europe; Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism*, in European Journal of Migration and Law 22 (2020), p.340.
[262] Ibid., p.365.
[263] E. Cloots, *The Legal Limits of Citizenship Deprivation as a Counterterror Strategy*, cit., p. 68.
[264] M.P. Bolhuis, J. van Wijk, *Citizenship Deprivation as a Counterterrorism Measure in Europe; Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism,* cit., p.364.

Code, which establishes the conditions under which an individual, after a conviction, who has acquired citizenship by naturalization and is bi-national, may lose his or her citizenship. Among these conditions, the convictions for acts against fundamental interests of the nation or crimes or offences constituting acts of terrorism are included. After the individual has been informed by the Minister of Interior and had the opportunity to respond, and after consulting the Council of State, the application of the measure is decided by Council of Minister[265]. Initially, the individual could be deprived of his citizenship only if he committed the offence within ten years after the acquisition of citizenship by naturalization[266].

The deprivation of nationality, covering only the naturalised citizens, implicitly intimates the idea that they are not really French or, worse still, that their foreign origin (Algerian, Moroccan, Tunisian, Turkish, etc.) would explain their criminal and terrorist trajectories[267]. From time to time, there have been amendments and suggestions to amend the deprivation of nationality provision, not by chance in correspondence of terrorist attacks and in the context of counterterrorist legislation. In the eyes of the Government, depriving terrorists from their French nationality seemed to be a proper response to the attacks, which would allow to remove from the national territory any person who commits such an act and who is deemed as undesirable in the national community[268]. It also appeared as a political reaction of the Executive demonstrating its ability to act in such circumstances.

In the aftermath of 9/11 attacks, in 2003, the area of the provision's implementation was enlarged, by allowing to deprive citizenship for terrorist offences committed before the acquisition of nationality[269]. Moreover, in 2006, this temporal limit between the acquisition of French nationality and the deprivation, and the one between the commission of the offence and the application of the deprivation measure, were extended until fifteen years[270]. In other terms, a naturalised French citizen could be deprived from his nationality fifteen years before and after his naturalisation, thus thirty years in total[271]. This extension was promulgated by a counterterrorist Act (Law No. 2006-64 of 23 January 2006), approved through an emergency procedure in the wake of Madrid and London attacks in 2004 and 2005[272]. Security concern

[265] P. Wautelet, *Deprivation of citizenship for 'jihadists'. Analysis of Belgian and French practice and policy in light of the principle of equal treatment*. SSRN paper, Amsterdam: Elsevier (2016), p. 2, [online]: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713742
[266] Ibid.
[267] V. Geisser, *Déchoir de la nationalité des djihadistes « 100% made in France » : qui cherche-t-on à punir ?*, in Centre d'Information et d'Etudes sur les Migrations Internationales, « Migrations Société » No.162, (2015), p. 10.
[268] O. Le Bot, X. Philippe, *Les réponses juridiques aux attentats terroristes du 13 novembre 2015 à Paris : de la déclaration de l'état d'urgence à la révision constitutionnelle abandonnée,* cit., p.53.
[269] M.P. Bolhuis, J. van Wijk, *Citizenship Deprivation as a Counterterrorism Measure in Europe; Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism,* cit., p.343.
[270] P. Wautelet, *Deprivation of citizenship for 'jihadists'. Analysis of Belgian and French practice and policy in light of the principle of equal treatment*, cit., p.5.
[271] É. Fargues, *The revival of citizenship deprivation in France and the UK as an instance of citizenship renationalisation*, cit., p.988.
[272] Ibid.

forcefully entered more and more the field of nationality law, due to the Government's tendency to transform French citizenship into a purely repressive and security instrument, aimed at a particular community, hoping to persuade it that terrorism no longer really has a place in France[273].

Following the Paris attacks, in November 2015, the Government of François Hollande proposed a constitutional reform aiming at constitutionalising, other than the state of emergency, the deprivation of nationality for individuals who are French nationals by birth, but holding another nationality, in the case of their conviction for an offence seriously undermining the life of the Nation, including acts of terrorism. Therefore, also French born citizens could lose their nationality and be assigned to the nationality of a country of origin where they have never lived[274]. The position of the French Government essentially showed the willing to implement a powerful symbolic measure in a highly emotional post-attack context, knowing that such dramatic events can occur at any time on French territory and that they could involve, in one way or another, binational individuals[275]. The constitutional plan *Protection de la Nation* would have furtherly broken the principle of non-discrimination and equality, by legitimising a discrimination between the citizens with a dual citizenship and French-born-mono-nationals. The binational people were in some way treated as indirect (or collateral) responsible for terrorist acts committed on French territory[276]. For this reason, it deeply divided French society. Moreover, the content of the constitutional reform offered no constitutional guarantee that such a measure could only be taken by a judge and not only under the judge's control[277]. Consequently, the constitutional reform was rejected in February 2016, due to the several oppositions which viewed the distinction between two categories of citizens as contrary to the principles of the Republic[278].

In any case, a distinction between different kinds of citizens is still in place, due to the possibility to deprive the naturalised citizens with dual nationality from their citizenship. Even though the Constitutional Council declined the argument that this represents a discrimination, this differentiation remains tough and debatable because it generates a "revocable citizenship for former immigrants and an irrevocable one for French-born nationals"[279]. Since 1996, thirteen dual nationals had lost their French citizenship due to convictions for terrorist offences, and between 2016 and January 2020, a further three citizens were deprived from their

[273] V. Geisser, *Déchoir de la nationalité des djihadistes « 100% made in France » : qui cherche-t-on à punir ?*, cit., p.14.
[274] Ibid., p.5.
[275] Ibid., p.7.
[276] Ibid., p.12.
[277] O. Le Bot, X. Philippe, *Les réponses juridiques aux attentats terroristes du 13 novembre 2015 à Paris : de la déclaration de l'état d'urgence à la révision constitutionnelle abandonnée,* cit., p.55.
[278] V. Geisser, *Déchoir de la nationalité des djihadistes « 100% made in France » : qui cherche-t-on à punir ?*, cit., p.7.
[279] É. Fargues, *The revival of citizenship deprivation in France and the UK as an instance of citizenship renationalisation,* cit., p.991.

French nationality for terrorist crimes[280].

In conclusion, among the several effects of counterterrorist legislation on the individual rights' sphere, the discrimination deriving from the deprivation of citizenship measures, used as counterterrorist tools, is comprehended. As a matter of fact, the French counterterrorist approach also included amendments to the nationality law, sometimes directly contained in counterterrorist laws, promoting the idea that citizens with a foreign or immigrant background are more dangerous or more likely to be terrorists than the "true" French by birth. Although the failed constitutional reform had proposed to narrow the gap between naturalised individuals and citizens by birth, it would have anyway included differences of treatment between citizens, between mono-nationals and pluri-nationals.

The current French deprivation of citizenship provisions, in connection with terrorist crimes, still fosters a discrimination between French individuals in the light of the way with which they acquired French nationality, whether by naturalisation or by birth, and depending on the possession of one or more nationalities. In case of the commission of a terrorist crime, these individuals are treated differently since only the naturalised citizens with dual nationality may lose their citizenship, facing an additional punishment with respect to citizens by birth and naturalised mono-national citizens. The discrimination is clear also due to the fact that the pluri-nationality is often the result of foreign origin. Hence, nowadays the "category" of French people of foreign origin remains a specific target. The inevitable consequence is the weakening of the principle of equality and non-discrimination, too often justified by security needs.

2.2.2.2 The citizenship's deprivation in the British counterterrorist strategy

In the wake of 9/11 attacks, citizenship became more and more a privilege, something that only those who demonstrated to be good British citizens deserve to obtain, hence the procedures to access to British citizenship were restricted and were progressively based on understanding the British values and way of life, through the introduction of a test of "Britishness" in 2005[281].

On the other hand, the deprivation of such a citizenship has been widely utilised as a counterterrorist instrument, often incorporated in restrictive immigration acts and influenced by the counterterrorism legislation, with the evident objective to deport aliens or impede them to enter British territory, even more than in France. In 2002 and in the context of the

[280] M.P. Bolhuis, J. van Wijk, *Citizenship Deprivation as a Counterterrorism Measure in Europe; Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism,* cit., p.344.

[281] T. Choudhury, *The radicalisation of citizenship deprivation*, in Critical Social Policy, Vol. 37(2), (2017), p. 234.

controversial Anti-Terrorism Crime and Security Act 2001, the UK Government already went beyond the measures rejected in France, contained in the constitutional reform of 2015, by making citizenship deprivation applicable also to British citizens by birth with dual nationality[282].

The British deprivation of nationality provisions not only are stronger than the French ones but are also more restrictive with respect to the individuals' rights and personal life. As a matter fact, the state discretion and executive power to deprive citizens from their British citizenship were expanded from time to time to make denationalisation easier, as a result of the UK's engagement in the fight against terrorism[283].

The original provision on the deprivation of citizenship is contained in the British Nationality Act of 1981, which allowed the deprivation, in case of certain crimes, for naturalised citizens who had been convicted for one year of imprisonment within five years since the naturalisation[284]. The Act was subject to several amendments, often justified on the grounds of the war on terror and of the expulsion of terrorists "masked" as UK citizens[285]. A significant amendment to Section 40 of the Act 1981 was approved right after the 9/11 attacks, with the Nationality Immigration and Asylum Act of 2002. Firstly, the latter allowed citizenship deprivation also for British citizens by birth with dual nationality and changed the grounds for depriving nationality, lowering the standard of proof. Indeed, the individual could lose his nationality if the Secretary of State was merely satisfied that there had been a conduct that was "seriously prejudicial to vital interests" of UK[286]. Moreover, the right to appeal of the affected citizen was quite restricted since the Secretary of State could take the deprivation decision on the basis of information that he considers should remain secret for reasons of national security[287]. An example of the limitation to the right to appeal and of the wide discretion with which the deprivation of citizenship has been used, is the case of Abu-Hamza, a Muslim preacher, who was indicted of sustaining terrorist attacks in his sermons[288]. Instead of bringing criminal charges against him, which would have been more difficult to prove and would have taken longer to chase, the authorities chose the simpler and quicker route of citizenship removal followed by deportation[289].

In addition, the Act fostered the discrimination between two categories of British citizens by

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[282] S. Mantu, *Citizenship Deprivation in the United Kingdom: Statelessness and Terrorism*, in Tilburg Law Review (Gaunt), Vol. 19, No. Issues 1-2, (2014), p.164.
[283] T. Choudhury, *The radicalisation of citizenship deprivation,* cit., p.239.
[284] British Nationality Act 1981, Section 40.
[285] S. Mantu, *'Terrorist' citizens and the human right to nationality*, in Journal of Contemporary European Studies (2018), p.32.
[286] L. Zedner, *Citizenship Deprivation, Security and Human Rights*, in European Journal of Migration and Law 18, No. 2 (2016), p.229.
[287] S. Mantu, *Citizenship Deprivation in the United Kingdom: Statelessness and Terrorism,* cit., p.165.
[288] S. Lavi, *Punishment and the Revocation of Citizenship in United Kingdom, United States and Israel*, in New Criminal Law Review, Vol. 13, No. 2, (2010), p.411.
[289] Ibid.

birth: the dual nationals who can be deprived from their citizenship by Government's discretion, and the mono-nationals who deserve better legal protections[290].

Furthermore, the approved changes allowed to apply deprivation and deportation mechanisms to happen simultaneously, and many times the deprivation of citizenship was ordered while the individual was abroad in order to apply immediately an exclusion order, preventing him to return to UK[291]. Indeed, the UK approach is a clear example of viewing citizenship as a security matter, and as an instrument to expel unwanted individuals from British territory. Most of the deprivation of citizenship decisions were indeed followed by deportation orders. In the wake of the London bombings in 2005, with the Prevention of Terrorism Act 2005 and the Terrorism Act 2006 as a background, a further amendment was implemented by the Immigration, Asylum and Nationality Act 2006. Through the amendments of 2006 and the following one of 2014, the deportation as a direct effect of the deprivation order was made more explicit[292]. The Act of 2006 extended the State's power and discretion to remove citizenship. The test, on which the deprivation's decision was based, was furtherly weakened by conferring to the Secretary of State the power to deprive nationality if he is satisfied that the deprivation is "conducive to the public good", that was the same standard for deportation procedures[293]. The act also maintained the prohibition of statelessness, that was contained in the previous Act. Through the approval of this weak standard of proof, the objective of citizenship deprivation became much more preventive rather than punitive, since the concerned person no longer had to actually have done anything before having his or her nationality removed[294]. The removal of citizenship became more than ever a counterterrorist instrument connected to national security.

Lastly, the deprivation of citizenship's powers were widely enlarged through the amendment of Section 40's Act 1981 by the Immigration Act of 2014. It was a quite significant change and intrusion in the individuals' personal life since it allowed a violation of the prohibition of statelessness, despite the previous commitments to reduce statelessness. Specifically, the amended Section 40 established the possibility to make a naturalised citizen stateless when he or she "conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom"[295] and the Secretary of State has "reasonable grounds for believing that the person is able, under the law of a country or territory outside the United

[290] T. Choudhury, *The radicalisation of citizenship deprivation,* cit., p.235.
[291] Ibid., p.166.
[292] É. Fargues, *The revival of citizenship deprivation in France and the UK as an instance of citizenship renationalisation,* cit., p.989.
[293] S. Lavi, *Punishment and the Revocation of Citizenship in United Kingdom, United States and Israel*, cit., p.405.
[294] É. Fargues, *The revival of citizenship deprivation in France and the UK as an instance of citizenship renationalisation,* cit., p. 988.
[295] British Nationality Act, Section 40(4A).

Kingdom, to become a national of such a country or territory"[296]. Hence, the revocation of citizenship became possible also for naturalised citizens who do not have another nationality. Given the grave effects that can result from being declared stateless, deprivation would be founded on the earlier test of whether the individual "has conducted him or herself in a manner seriously prejudicial to the UK's vital interests"[297]. The Executive was shifting further and further towards a strategy of exporting the menace given by home grown terrorists[298]. It also important to notice that the Act increased the discrimination between different kinds of citizens since only naturalised citizens became at risk of statelessness. The Government reminded that, when signing the 1961 Stateless Convention, the UK entered a reservation under Article 8(3) retaining the right to deprive a naturalised citizen of his nationality and make him stateless on the grounds contained in the Act of 1981[299]. The Executive also argued that the affected persons could avoid statelessness by the ability to acquire another nationality, however there is no legal condition for the individual to have obtained or been assured the nationality of another country before the revocation is applied, nor is there any requisite of timely attainment[300].

As a result of these changes since 2002, the current provisions establish that the Secretary of State may deprive citizenship if he is satisfied that the deprivation is conducive to the public good, that is when the individual is engaged in severe crimes such as terrorism and glorification of terrorism. If the naturalised citizen is involved in activities that are seriously prejudicial to UK's vital interests, the deprivation may lead to statelessness.

The Secretary of State has a wide discretion since he can take this decision without any judicial authorisation[301]. As a matter of fact, one of the specific traits of UK's system is that the citizenship revocation connected to terrorist acts may be ordered without a criminal conviction, giving to the Executive a wide margin of action and a great power in deciding whether to remove nationality or not[302]. That is quite disrespectful of the fundamental rights' sphere. By missing to determine a particular offense or to permit the minimum procedural requirements for a criminal trial, the UK provisions demonstrate how the deprivation of citizenship has moved from a legal penalty as a consequence of the violation of a duty, according to a punitive approach, to a risk management technique, thus according to a

[296] Ibid.
[297] T. Choudhury, *The radicalisation of citizenship deprivation,* cit., p.235.
[298] Ibid.
[299] A. Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*, in Queen's Law Journal 40, No. 1, (2014), p.15.
[300] L. Zedner, *Citizenship Deprivation, Security and Human Rights,* cit., p.234.
[301] M.P. Bolhuis, J. van Wijk, *Citizenship Deprivation as a Counterterrorism Measure in Europe; Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism,* cit., p.347.
[302] S. Mantu, *'Terrorist' citizens and the human right to nationality*, cit., p. 35.

preventive model[303].

Another impactful feature of UK's approach related to deprivation of citizenship is that most of the nationality removals, based on national security concerns, were addressed to Muslim males, deemed to be lacking of British values, and people engaged in Islamic "extremism", fostering the perceived connection between Islam and terrorism. Moreover, most of the time, the measure is ordered when the person is abroad[304].

In conclusion, as in France, the British citizenship deprivation provisions, approved in the context of counterterrorism legislation and influenced by it, and often contained in restrictive immigration laws as a result of the antiterrorism strategy, inevitably created a discrimination between citizens. Although these measures can also be applied towards British citizens by birth, the naturalised citizens are always considered more likely to be terrorist suspects than others, and face the risk of statelessness, which can have a high impact on their personal life. Since it has not been empirically demonstrated that naturalised citizens pose a greater threat to nationality security that citizens by birth, the maintenance of stateless risk only for naturalised individuals is evidently discriminatory[305]. That is why, according to the academic literature, the UK's power to denationalise may often collide with the right to equality and non-discrimination (Art.14 ECHR) and the right to private life (Art.8 ECHR)[306].

In addition, in the UK scenario, the lack of judicial control and authorisation, and of an official criminal terrorism-related conviction, and the consequent Executive's wide margin of action are quite problematic. The only option for the affected person is to try to challenge the Government before UK's courts, but that seems quite impossible since the deprivation order has an immediate effect and is often applied when the individual is abroad[307]. That is a significant limitation to the right to appeal and to the right to a fair trial.

Lastly, the deprivation measures' effective in the fight against terrorism and in the protection of national security is quite doubtful. Indeed, the denationalised individuals may also be more fragile and be subject to terrorist organizations' recruitment, since the revocation of citizenship may prompt a dissatisfaction and anger towards the State, and the capacity to plan terrorist acts may not decrease whether the individual is abroad or in the British soil[308].

[303] S. Lavi, *Punishment and the Revocation of Citizenship in United Kingdom, United States and Israel*, cit., p.413.
[304] A. Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*., cit., p.17.
[305] L. Zedner, *Citizenship Deprivation, Security and Human Rights,* cit., p.236.
[306] Ibid., p.238.
[307] T. Choudhury, *The radicalisation of citizenship deprivation,* cit., p. 236.
[308] L. Zedner, *Citizenship Deprivation, Security and Human Rights,* cit., p. 240.

CHAPTER 3. THE ROLE OF FRENCH AND BRITISH HIGH COURTS IN COMBINING COUNTERTERRORISM AND FUNDAMENTAL RIGHTS

3.1 The French Constitutional Council's approach

In France, the antiterrorist legislation conferred the administrative authorities increasing powers that restricted fundamental rights, which came along with a declining role of the judiciary apparatus in the control of these limitations. For this reason, the constitutionality of counterterrorist legislation, in relation to the infringement on individual rights, has been called into question several times. The French highest constitutional authority is the Constitutional Council, established in 1958. The French Constitutional Council was not created to protect rights and freedoms. First and foremost, it was designed as an instrument for the rationalization of parliamentarism intended to remedy the excesses of the former Republics, and thus to guarantee the distribution of normative competences between the Government and the Parliament.[309] Over time, and especially since the 1970s, the image of the Constitutional Council as a protector of rights and freedoms has been built, for instance by enriching the catalogue of rights with constitutional value and by utilising rights and liberties as the main source of legitimisation of the Council's decisions[310]. Nonetheless, the construction of this image was accompanied by little hesitation in sanctioning politically sensitive legislation[311]. The Council's wavering in censuring legislative acts was more and more evident in the French antiterrorist legislation's constitutional review. As a matter of fact, the Constitutional Council's approach in reviewing counterterrorist laws and in guaranteeing a correct balance between security measures and rights' safeguards has been characterized by a partial deference to the legislator and by a judicial self-restraint[312]. The deferential general attitude has historically been typical of the Council, and in the context of the fight against terrorism, thus in the constitutionality review of counterterrorist legislation, this approach has not disappeared. The Council's partially deferential disposition was part of a remodelling of the constitutionality control of the antiterrorist and security laws, in such a way as to keep them within constitutional limits and to avoid a declaration of unconstitutionality[313].
Moreover, the Constitutional Council demonstrated a broad understanding of public order

[309] V. Champeils-Desplats, *Le Conseil constitutionnel, protecteur des droits et libertés?*, in Cahiers de la recherche sur les droits fondamentaux No.9 (Open Edition Journals), (2011), p. 11.
[310] Ibid., p.14.
[311] Ibid., 13.
[312] Ibid.
[313] K. Roudier, *Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire*, in Les Nouveaux Cahiers du Conseil constitutionnel No.51 (2016), p.38.

prevention and security requirements[314]. In effect, the measures restricting the rights and freedoms, guaranteed by the Constitution, appear all the more justified in the eyes of the Constitutional Council since their purpose is to protect public security and order[315].
In other terms, several times it preferred to justify the constitutionality of security provisions, restricting rights and freedoms, as necessary to guarantee the public order, rather than to challenge the Government's decisions in delicate circumstances such as the fight against terrorism[316]. This attitude resulted in a tendency to adopt a fallback position that has moved the Council away from the role as protector of rights, possibly implementing an inefficient judicial review[317]. Indeed, it is relevant to notice that the Council has often used the principle of "not manifest unbalance" between rights and security, rather than "not proportionate and necessary", as a standard for the constitutional review, making the review itself global, weaker and more superficial and leaving the proportionality test to the administrative courts. Furthermore, even when the Council declared unconstitutional a legislative provision, it tended to incorporate a technique to limit and to mitigate the effects of such decisions. Hence, the unconstitutionality declarations' effects have almost systematically been neutralized by the Council itself[318]. On the one hand, the Council has thus made full use of its power to defer effects over time. On the other hand, it has deprived its declarations of unconstitutionality of useful effect through late decision-making[319]. As a matter of fact, the Council has often postponed the consequences of unconstitutionality and allowed an unconstitutional act to still apply along with its infringement on rights. The provided rationale was often that an immediate repeal of the censored provisions would "misunderstand the constitutional purpose of safeguarding public order and would have demonstrably excessive consequences"[320]. In addition, the Constitutional Council has often recalled the competence of the legislator to lay down the rules concerning «civil rights and the fundamental guarantees granted to citizens for the exercise of civil liberties» and has declared that the Council does not have general discretionary powers of the same nature that Parliamentary does, promoting a "legicentrist" conception of the regime of civil liberties[321]. Indeed, the Council used this assertion to refrain itself from giving to the legislator indications to make the act constitutional.

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[314] V. Champeil-Desplats, *L'état d'urgence devant le Conseil constitutionnel ou quand l'Etat de droit s'accommode de normes inconstitutionnelles*, in Rapport - Ce qui reste(ra)toujours de l'urgence, Défenseur des Droits/CREDOF, (2018), p.2. ⟨hal-01919732⟩

[315] V. Champeil-Desplats, *L'autonomisation relative des références à la sécurité dans les décisions du Conseil constitutionnel*, in Jus Politicum Revue de Droit Politique No.20-21, (2018), p. 275.

[316] Ibid., p.272.

[317] Ibid.

[318] V. Champeil-Desplats, *L'état d'urgence devant le Conseil constitutionnel ou quand l'Etat de droit s'accommode de normes inconstitutionnelles*, cit., p.5.

[319] Ibid.

[320] Ibid., p.6.

[321] V. Champeil-Desplats, *Le Conseil constitutionnel a-t-il une conception des libertés publiques ?*, in Jus politicum. Revue de droit politique, Dalloz, (2012), p.6.

It is also important to consider that, until the constitutional reform of 2008, the Council could review the laws only before their enactment, thus its margin of action was even more limited. Especially regarding the antiterrorist provisions right after the 9/11 attacks and the ones during the state of emergency in 2015, the Constitutional Council's global and limited control has been quite problematic because it ended up acknowledging the evolution of political choices, contained in the antiterrorist laws, towards an ever-increasing consideration of defence and security requirements, to the detriment of rights and freedoms[322].

During the state of emergency of 2015-2017, the Council's fallback position has been favoured by the fact that it has not been the most requested judicial body to monitor the measures adopted in the context of the state of emergency[323]. In view of their administrative nature and the strict interpretation that the Constitutional Council confers on the extent of the jurisdiction of the judicial judge in this matter, the bulk of the litigation of the state of emergency was often left to the administrative judges[324]. In addition, during this period, the Council has justified the validation of antiterrorist measures through the affirmation the constitutionality of principle of the state of emergency regime[325]. By exercising a superficial control, explicitly restricted to the sanction of only "manifestly unbalanced" provisions, with some exceptions, the Constitutional Council seems to have invoked a presumption of constitutionality and legitimized the state of emergency regime and its following legislative amendments[326].

If the Constitutional Council is not in a position to impose obligations of action on the legislator in matters of security, however it allows him a lot[327]. There are few censures made against provisions that the Council has deemed justified by a specific security requirement. The legislator is sanctioned only if there is a clear violation of constitutional rights and freedoms. The decisions of the Constitutional Council are therefore generally characterized by a laissez-faire attitude. The resulting lack of censorship has the long-term effect of legitimizing successive security legislation[328].

In conclusion, the diverse mechanisms that the Constitutional Council has adopted in the constitutionality review of antiterrorist legislation, such as the deferral of the decisions' effects and the weak and superficial standard of review based on the absence of a "manifest

[322] K. Roudier, *Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire,* cit., p.38.
[323] V. Champeil-Desplats, *L'état d'urgence devant le Conseil constitutionnel ou quand l'Etat de droit s'accommode de normes inconstitutionnelles,* cit., p.1.
[324] Ibid.
[325] V. Champeil-Desplats, *L'état d'urgence devant le Conseil constitutionnel ou quand l'Etat de droit s'accommode de normes inconstitutionnelles,* cit., p.3.
[326] Ibid., p.4.
[327] K. Roudier, *Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire,* cit., p.38.
[328] V. Champeil-Desplats, *L' autonomisation relative des références à la sécurité dans les décisions du Conseil constitutionnel,* cit., p.284.

unbalance", have certainly raised doubts about the Council's efficiency in guaranteeing an equilibrium between security and rights, and thus in combining counterterrorism and fundamental rights. In post-2001 years, this approach led the Council to legitimize an ever-deepening invasion of the individual sphere during a time when there was a phase of panic in the anti-terrorism legislation which then became part of a broader security policy scheme[329].
The paragraph will describe a series of Constitutional Council's decisions which had reviewed the constitutionality of counterterrorist measures, that had been described in the first chapter. These decisions cover the antiterrorist legislation of the post-9/11 attacks scenario, such as the decision 2003-467 DC of 13th March 2003, the decision 2005-532 DC of 19th January 2006 and the decision 2015-713 DC of 23rd July 2015, and of the state of emergency started on November 2015, specifically the decision 2015-527 QPC of 22nd December 2015, the decision 2016-536 QPC of 19th February 2016 and the decision 2017-695 QPC of 29th March 2018. Their outcomes differ in terms of "constitutionality" and "partial unconstitutionality". Nonetheless, they are all equally relevant to understand and display the Constitutional Council's self-restraint attitude, marked by the manifest unbalance's standard of review, by the deferral of the decision's effects, by the use of interpretation reserve to preserve the measures' constitutionality, by making the legislator responsible for the equilibrium between security and rights, and by raising the fight against terrorism as a legitimate and superior objective that justifies the infringement on individual rights' sphere.

3.1.1 The validation of the controversial Law on Internal Security

The Constitutional Council's decision 2003-467 DC of 13th March 2003 is one of the most significant decisions that demonstrated the deferential approach of the Council concerning the constitutional review of counterterrorism legislation, especially right after the attacks of 2001. The decision declared consistent with the Constitution the Law No. 2003-239 of 18 March 2003, the Law "for Internal Security", which was described in the first chapter and was one of the most restrictive acts in terms of limitations on rights and liberties. Despite the introduction of rights' restraints, the decision of 2003 is a clear example of how the Constitutional Council exercised only a limited control, restricted to the censorship of the disproportions or manifest errors committed by the legislator in the reconciliation that he has to make between the preservation of public order and the exercise of rights and freedoms[330].
The decision was the result of the *saisines* by sixty senators and more than sixty deputies who

[329] K. Roudier, *Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire,* cit., p.43.
[330] G. Armand, *Que reste-t-il de la protection constitutionnelle de la liberté individuelle ?,* in Revue française de droit constitutionnel No. 65, (2006), p. 37.

claimed several complaints about diverse articles of the Law in relation to their consequences on individual freedoms. For instance, the requisition powers conferred on the prefect, with a view of restoring public order, established by Article 3 of the Law, were deemed by the senators and deputies as being designed in too general and imprecise terms to meet the requirements of Article 34 of the Constitution, considering also that these powers were likely to affect the exercise of civil liberties[331]. However, the Council declared that the legislator did not go beyond his competences in attributing the powers to the administrative authorities[332]. The Council then analysed the Articles from 11 to 13 of the Law about new powers for vehicle visits by judicial police officers and other officers under their control, which were viewed by the two parliamentary referrals as constituting excessive infringements on the right to private life, the inviolability of the home, the freedom of movement and individual liberty, especially since the Articles determined insufficient position for the judicial judge, guarantor of individual freedoms, in the conduct of the proceedings[333]. In response to this complaint, the Council used two assertions that are part of its deferential and self-restraint approach. Firstly, the Council reminded that it is up to the legislator "to ensure reconciliation between, on the one hand, the prevention of infringements of public order and the search for the perpetrators of offences, both necessary for the safeguarding of rights and principles of constitutional value, and, on the other hand, the exercise of constitutionally guaranteed freedoms, including freedom of movement and respect for privacy"[334]. Secondly, the Council implemented its constitutionality review on the basis of the weak abovementioned standard, the absence of a "manifest unbalance". Hence, it declared that the reconciliation of the Articles' provisions between constitutional principles is not vitiated by any manifest error[335]. In addition, in this decision, the Council often claimed that the limitations to constitutionally guaranteed rights, resulting from the administrative authorities' powers, were justified by the necessity to safeguard the public order. In this way, the Council legitimized a balance which is more inclined in favour of the demands of public order to the detriment of the protection of rights and freedoms[336]. Moreover, the measures that were most criticised by the *saisines* were the ones contained in the Articles from 21 to 25, which allowed automated personal data processing systems implemented by national police and gendarmerie services[337]. According to the senators and deputies, these provisions violated the right to private life and, by allowing

[331] Conseil Constitutionnel, *Commentaire de la décision n° 2003-467 DC du 13 mars 2003*, in Les Cahiers du Conseil Constitutionnel N° 15 (2003), p.1. https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/commentaires/cahier15/ccc_467dc.pdf
[332] Decision 2003-467 DC, 13th March 2003, paragraph 4.
[333] Conseil Constitutionnel, *Commentaire de la décision n° 2003-467 DC du 13 mars 2003,* cit., p. 2.
[334] Decision 2003-467 DC, 13th March 2003, paragraph 8.
[335] Ibid., paragraph 12.
[336] G. Armand, *Que reste-t-il de la protection constitutionnelle de la liberté individuelle ?*, cit., p.39.
[337] K. Roudier, *Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire,* cit., p. 39.

access to personal data for the purposes of administrative enquiry, the legislator would allow it to be used to the detriment of the legitimate interests of the persons concerned and to be contrary to the right to a normal family life[338]. Once again, the Council declared constitutional the provisions which actually represented limitations to individual rights, by affirming that it is for the legislator to lay down the rules concerning the fundamental guarantees granted to citizens for the exercise of their civil liberties and that it is up to him to guarantee a balance between security needs and individual rights[339]. It also affirmed that the conciliation between the contested measures and the right to private life was not "manifestly unbalanced". The Constitutional Council therefore validated the principle of the establishment of mechanisms that are necessary for the development of a population's surveillance in order to prevent violations of public order[340].

Even in the analysis of the following controversial Articles of the Law of 18 March 2003, the Council kept on utilising the arguments concerning the legislator's competence to guarantee an efficient balance and the "not manifest unbalance" standard.

Hence, it is quite evident that the deferential approach led the Council to give priority to public order and security requirements at the expense of the full exercise of individual rights and liberties.

3.1.2 The constitutionality of the surveillance mechanisms and of the administrative controls

On 19th January 2006, the Constitutional Council ruled on the Law No. 2006-64 of 23 January 2006, the "Law on Combating Terrorism and Miscellaneous Provisions on Security and Border Controls", upon the *saisine* of more than sixty senators. One of the Law's controversial aspects was that it obliged the telecommunication operators, the Internet providers and the whole public institutions allowing an access to Internet, to automatically retain login data for one year, under the administrative, rather than judicial, control[341]. Specifically, the senators challenged the constitutionality of Articles 6 and 8 of the Law of 23 January 2006 due to their impact on liberties. The Article 6 permitted the administrative requisition of traffic data from electronic communications operators and online service providers. The novelty of this provision was that the data could be disclosed within the framework of the administrative police and not exclusively, as was the case until now, within the framework of the judicial police, by creating an original administrative procedure in the

[338] Conseil Constitutionnel, *Commentaire de la décision n° 2003-467 DC du 13 mars 2003,* cit., p.5.
[339] Decision 2003-467 DC, 13th March 2003, paragraph 20.
[340] K. Roudier, *Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire,* cit., p. 41.
[341] Law n° 2006-64 of 23rd January 2006, art.6.

domain of "security interceptions"[342]. The senators claimed that such administrative control, by depriving legal guarantees of constitutional requirements, disregarded Article 66 of the Constitution and Articles 2, 4 and 16 of the Declaration of the Rights of Man and of the Citizen of 1789, thus being assault on individual liberty and on right to private life[343]. They also contested that this mechanism of surveillance lacked satisfactory procedural guarantees. In addition, the senators' *saisine* claimed that the Article 8 of the Law was in breach of the individual liberty, particularly the freedom of movement and the right to private life, since it embraced a wider and more intrusive utilisation of vehicle data control devices, by also providing a mobile surveillance of persons installed in traced vehicles[344]. This system of generalized traceability of citizens was extended to a repetition of prevention and repression of offences, the majority of which had nothing to do with terrorism[345].

The Constitutional Council rejected the senators' complaints and declared Articles 6 and 8 of the Law of 23 January 2006 as constitutional[346]. In order to maintain the contested antiterrorist legislation within constitutional boundaries, as in the decision of 13th March 2003, the Council stated that "it is the task of the legislator to reconcile the prevention of breaches of law and order necessary to safeguard rights and principles of constitutional value and the exercising of constitutionally guaranteed freedoms among which the right to privacy and individual liberty"[347]. Moreover, the Council also affirmed that administrative police measures, likely to affect the right to privacy, are justified by the necessity to safeguard public order, which once again is deemed to be a superior goal compared to the exercise of liberties[348]. For instance, regarding the intrusive use and surveillance of vehicles data control devices, the Constitutional Council concluded that "in view of the objectives assigned to it by the legislator and of all the guarantees it has provided", such a system was proper "to ensure, between respect for privacy and the safeguarding of public order", a reconciliation that is not clearly unbalanced[349]. Indeed, in the decision of 2006, the controversial measures are depicted as necessary to prevent terrorism and, more in general, in the fight against terrorism that becomes, in the eyes of the Council, not only the primary objective but also a justification for the potential infringement on rights and liberties.

Even in this decision, the Constitutional Council declared as in compliance with the

[342] Constitutional Council, *Commentaire de la décision n° 2005-532 DC du 19 janvier 2006*, in Les Cahiers du Conseil Constitutionnel N°20 (2006), p.3. https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/commentaires/cahier20/ccc_532dc.pdf
[343] The *Saisine* by 60 senators of the Decision n° 2005-532 DC of 19 January 2006.
[344] Ibid.
[345] Ibid.
[346] The Constitutional Council censored a terminology contained in Article 6, which was not part of the senators' complaints.
[347] Decision n° 2005-532 DC of 19 January 2006, paragraph 9.
[348] Constitutional Council, *Commentaire de la décision n° 2005-532 DC du 19 janvier 2006*, cit., p.8.
[349] Decision n° 2005-532 DC of 19 January 2006, paragraphs 19-20.

Constitution certain antiterrorist measures that had an adverse impact on individual rights, validating the citizens' surveillance and the increasing role of administrative authorities in the war on terror, along with the progressive marginalisation of the judicial control. The objective of guaranteeing the public order kept on being a priority over the individual freedoms' safeguards.

3.1.3 The decision concerning the infringements on the right to privacy, on the freedom of communication and on the right to an effective judicial remedy

The decision 2015-713 DC of 23rd July 2015, that dealt with the Law No. 2015-912 of 24 July 2015, the "Law on Intelligence Sector", is a further example in which the Constitutional Council validated the expansion of administrative authorities' powers and intrusive intelligence sector's mechanisms in the fight against terrorism, sometimes to the detriment of rights and freedoms. In the decision of 2015, the Council also confirmed a fallback position, illustrated by a modulation of the constitutionality check in the sense of a slackening of the constitutionality constraint[350]. Indeed, even in this case, the Constitutional Council seemed to favour a form of presumption of constitutionality, which is based on the constantly repeated idea that it does not have the same discretion as the legislator[351].
The Constitutional Council was appealed by the President of the Senate, by sixty deputies and the President of the Republic, being the first time that the latter requested a constitutionality review to the Council. The President of the Republic asked the Council to examine some of the Law's provisions in relation to three constitutional requirements: the right to privacy, freedom of communication and the right to an effective judicial remedy. The deputies contested the constitutionality of: the wide grounds on which administrative investigations could start; of the considerable technical means of massive data collection; of the proportionality, in relation to the objectives sought, of the implementation of these intrusive techniques, in the age where digital is present at every moment of citizens' lives[352]. They also declared that "the concentration of powers in the hands of the Executive is worrying, since at no time a real right of recourse of the citizen to the judicial judge, guarantor of individual freedoms, exists"[353]. The deputies argued that the purposes of the public intelligence policy, enumerated by the legislator, are too broad, in view of the techniques for collecting the information provided for in the Law of 2015, and under-defined.[354] They inferred a

[350] K. Roudier, *Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire,* cit., p.43.
[351] V. Champeil-Desplats, *À quoi sert encore le Conseil constitutionnel ?*, in Plein Droit No. 76, (2008), p. 30.
[352] *Saisine* by 60 deputies, Decision n° 2015-713 DC of 23 July 2015.
[353] Ibid.
[354] Constitutional Council, *Commentaire Décision n° 2015-713 DC du 23 juillet 2015*, p.15. https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2015713dc/2015713dc_ccc.pdf

disproportionate infringement on the right to privacy and freedom of expression. Hence the main issue was the constitutionality of certain provisions with reference to their impact on rights and liberties[355]. Nonetheless, the majority of the Law's contested measures were declared as constitutional, confirming the Council's fallback position. The necessity of public security and of fighting terrorist activities facilitated the validation of the Law on Intelligence Sector 2015's regulations on the instantaneous communication of technical data on the utilisation of technical tools permitting an immediate localisation and on collecting such data[356]. As a matter of fact, according to the Council, the contested provisions were in compliance with the Constitution since the legislator had been sufficiently precise and restrictive in defining the objectives justifying the use of intelligence technique[357]. The Council also declared as constitutional those measures that were deemed by the deputies as lacking sufficient guarantees to protect the freedom of expression and communication[358]. Furthermore, once again the Council made use of the standard of constitutionality based on the absence of a manifest unbalance, for validating other contested measures related to intelligence mechanisms and to the administrative access to retained connection data, which, according to the Council, "do not bring a manifestly disproportional violation to the right to private life"[359].

Although several organizations had expressed their concerns about the Law of 2015, such as the UN Human Rights Committee which, a few days before the Council's decision, stated that it was worried that "the Law […] gives overly broad powers of highly intrusive surveillance to intelligence services […]"[360], the Council has never found a clearly disproportionate balance between the prevention of breaches of public order and the right to respect for privacy, the secrecy of correspondence or the inviolability of the home that these provisions provided[361]. Finally, the silence of the Constitutional Council in Decision No. 2015-713 DC of 23 July 2015 concerning the absence of the judicial judge, for which the sixty deputies of the *saisine* were concerned, demonstrates the consequent weakening of the safeguards around the right's management[362].

[355] Ibid., p.2.
[356] F. Gardòs-Orosz, Z. Szente, *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective* (ed.), Routledge, (2018), p. 23.
[357] Decision n° 2015-713 DC of 23 July 2015, paragraph 14.
[358] Ibid., paragraph 20.
[359] Ibid., paragraph 25.
[360] Human Rights Committe, *Final observations concerning the fifth period report of France*, CCPR/C/FRA/CO/5. 21 July 2015.
[361] K. Roudier, *Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire,* cit., p.45.
[362] Ibid., p.48.

3.1.4 The constitutional review of the state of emergency's restrictive measures

The decision 2015-527 QPC of 22nd December 2015 and the decision 2016-536 QPC of 19th February 2016 are the outcomes of the constitutionality review of restrictive measures taken for antiterrorist reasons, in the framework of the state of emergency started in 2015. These measures have been often contained in the abovementioned French antiterrorist legislation, and during the state of emergency, due to their impact on individual rights, their constitutionality had been called into question in front of the Constitutional Council. Both decisions' objects of review were specific Law of 1955's articles, amended by the Law No. 2015-1501 of 20 November 2015. These decisions are equally relevant to understand the Constitutional Council's deferential approach in combining security requirements and rights and liberties' protection in the state of emergency.

Regarding the decision of 2015, the Constitutional Council was appealed by the *Conseil d'État* for a priority question of constitutionality relating to the compliance with the rights and freedoms, guaranteed by the Constitution, of Article 6 of the Act of 3 April 1955 on the state of emergency as amended by the Law of 20 November 2015[363]. The contested Article 6 regulated the house arrests in case of state of emergency, which were considered to disregard the rights guaranteed by Article 66 of the Constitution. Specifically, it had been complained that there was "no link between the nature of the imminent danger or the public calamity that led to the declaration of a state of emergency and the nature of the threat to public security and order likely to justify a measure of house arrest"[364], thus "unjustifiably infringing upon the freedom of movement, to the right to lead a normal family life, and to freedom of assembly and demonstration"[365]. Nonetheless, the Constitutional Council found that the house arrest, provided by the contested provisions, does not constitute a depriving measure of liberty, however specifying that house arrest cannot last more than twelve hours[366]. Furthermore, having regard to the situation leading to the declaration of the state of emergency, and maybe feeling under pressure by the fight against terrorism, the Council not only declared that the controversial measures did not constitute a serious and "manifestly" unlawful infringement of a fundamental freedom, but it also left the proportionality review of the measures to the administrative courts[367]. In this way, the confirms its usual reasoning characterized by a self-restraint attitude. Firstly, the Council ensures that the legislator has

[363] Constitutional Council, *Commentaire Décision n° 2015-527 QPC du 22 décembre 2015*, in Les Cahiers du Conseil Constitutionnel (2015), p.1, https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2015527qpc/2015527qpc_ccc.pdf
[364] Ibid., p.12.
[365] Ibid.
[366] Decision 2015-527 QPC of 22nd December 2015, paragraph 5.
[367] Ibid., paragraph 12.

sufficiently regulated the powers conferred on the administrative authority and that he can legislate on the state of emergency, using the constitutionality of the state of emergency as a justification for the application of measures limiting rights[368]. Secondly, it declares that it is up to the administrative judge to carry out a proportionality check of the measures[369]. This decision seems to demonstrate the Constitutional Council's willing to almost refrain itself from performing a deep and rigid review in order to avoid running counter to the Government's decisions in delicate circumstances such as the fight against terrorism.

A few months later, in January 2016, the Constitutional Council was appealed by the *Conseil d'État* for a priority question of constitutionality, requested by the Human Rights League, with reference to the conformity with the constitutional rights and liberties of Article 11 (paragraph 1) of the Law of 1955, as amended by the Law of 20 November 2015. In case of state of emergency, Article 11 allows the administrative authority to order searches and to copy data stored in a computer system to which searches provide access. According to the applicant Human Rights League, this administrative authority's power disregarded the constitutional requirement for judicial review of measures affecting the inviolability of the home, disproportionately infringing individual freedom, the right to privacy and the right to an effective judicial remedy[370]. The fact that administrative authority could carry out judicial police operations, which may lead to repressive measures, was also criticised. While the seizure of computer data was pronounced as unconstitutional, the majority of the contested provisions of Article 11 were declared constitutional. Indeed, even in the decision 2016-536 QPC of 19th February 2016, the Council left to the administrative courts the task to accomplish the measures' proportionality review and affirmed that the administrative searches "operate a conciliation that is not manifestly unbalanced between the requirements of Article 2 of the 1789 Declaration and the objective of constitutional value of safeguarding public order"[371], taking also into account that they "contribute to prevent the imminent danger or consequences of the public calamity to which the country is exposed"[372]. Finally, the Council also legitimised the competence of the administrative judge, instead of the judicial judge's one, in dealing with the potential violation of the inviolability of home due to house searches measures[373]. Hence, the Council accepted the lack of a judicial control by excluding the

[368] Constitutional Council, *Commentaire Décision n° 2015-527 QPC du 22 décembre 2015,* cit., p.22.
[369] Ibid.
[370] Constitutional Council, *Commentaire Décision n°2016-536 QPC of 19th February 2016*, in Les Cahiers du Conseil Constitutionnel, (2016), p.7. https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2016536qpc/2016536qpc_ccc.pdf
[371] Decision 2016-536 QPC of 19th February 2016, paragraph 12.
[372] Ibid.
[373] C. Valmalette, *Controverse sur la compétence du juge des perquisitions antiterroristes*, in Les Cahiers Portalis N°6, (2019), p.161.

inviolability of home's principle from the individual liberty's domain[374].
In both decisions the Constitutional Council used its self-restraining techniques to maintain restrictive measures affecting rights and liberties within the constitutional boundaries and accepted the increasing administrative apparatus' powers that characterized the French Government's counterterrorist approach.

3.1.5 The acceptance of the "normalised" emergency's provisions

The decision 2017-695 QPC of 29th March 2018 may be considered as one of the most representative decisions in terms of displaying the Constitutional Council's deferential approach and its techniques of self-restraint, facilitating an unbalance between individual rights' protection and public security requirements. It is the fundamental decision gathering the different grievances against the 2017 legislation. As a matter of fact, the decision's purpose was to verify the constitutionality of a series of articles of the Code of Internal Security as established by the Law No. 2017-1510 of 30 October 2017, the "Law strengthening internal security and the fight against terrorism", which was one of the most controversial antiterrorist legislations since it also prolonged the application of exceptional measures, making the state of emergency's logic durable[375].
Firstly, the Constitutional Council judged constitutional the provisions about the prefect's power to establish a perimeter of protection, within which the access and movement of persons are regulated for the purpose of securing a place or event exposed to a terrorist risk, heavily affecting the freedom of movement. Here, the Council utilised the interpretation reserves as a technique to, on the one hand, save the law from the possible unconstitutionality, and, on the other hand, to determine the meaning that its statements should take and how they will be applied in practice[376]. Furthermore, the Council declared the constitutionality of those articles that authorised the administrative authority to temporarily close places of worship in order to prevent the commission of acts of terrorism, on the basis of certain ideas, theories or activities. Once again, the Council found that there was not a "manifestly unbalance" between on the one hand, the objective of constitutional value of preventing violations of public order and, on the other hand, freedom of conscience and the free exercise of worship[377]. The Council specified that "if the closure of a place of worship is based on the provocation to the violence, to the hatred or discrimination, it is up to the prefect to establish that this

[374] Ibid., p.162.
[375] W. Sabète-Ghobria, *Le contrôle de constitutionnalité des mesures limitatives aux libertés individuelles dans le cadre de la loi no 2017-1510 du 30 octobre 2017, renforçant la sécurité intérieure et la lutte contre le terrorisme*, in Les Annales de Droit N° 14 (2020), p. 2.
[376] Ibid., p.6.
[377] Decision 2017-695 QPC of 29th March 2018, paragraph 43.

provocation is well connected with the risk of committing acts of terrorism"[378], but, in this way, it accepted the prefects' wide margin of action and the likely possibility to affect the freedom of religion. Finally, the Council pronounced the constitutionality of the individual measures of administrative control and surveillance that may be issued for the purpose of preventing the commission of an act of terrorism and, specifically, the prohibition of meeting certain persons[379]. Therefore, the Council validated most of the contested provisions, allowing the administration to implement particularly restrictive measures of freedom for preventive purposes only[380]. Even in this case, it analysed the referred regulations on the basis of the legislator's task to implement a conciliation between the objective of the fight against terrorism and the freedom of religion, the freedom of movement and the right to a private life. In so doing, the Council adopted a strictly finalist approach which, in a way, distances itself from a rigid and full control of proportionality which should be performed with respect to the protection of rights, since it is not sufficient to show that a measure infringing a fundamental freedom pursues a legitimate purpose in a democracy[381]. By confining itself to take into consideration the abstract purpose of the measures, the Council's control is inevitably limited and weak, raising the terrorist menace to public order to a higher degree of importance compared to the civil liberties' safeguards[382]. In addition, the weakness of the constitutionality control is again fostered by considering only the "manifest unbalances", by permitting that an attack on freedom, the disproportion of which, to be real, is not significant enough to be deemed manifest, does not incur censorship[383]. Lastly, regarding the few provisions that were declared unconstitutional, the Council also postponed the effects of the unconstitutionality until October 2018[384]. Unsurprisingly, the deferral of its unconstitutionality decisions one of typical aspects of its deferential approach.

3.1.6 The Constitutional Council's persistent deferential attitude

More recently, the Council pronounced the decision 2021-822 DC of 30th July 2021, which is partly connected to the decision 2017-695 QPC of 29th March 2018, since the Council applied similar techniques of constitutionality review and had to judge certain provisions of the Law of 30 October 2017, amended by a new counterterrorist legislation. The latter is the

[378] Ibid., paragraph 39.
[379] Ibid., paragraphs 46-50.
[380] V. Sizaire, *Une question d'équilibre ? À propos de la décision du Conseil constitutionnel n° 2017-695 QPC du 29 mars 2018*, in La Revue des Droits de l'Homme N°18, (2019), p.1
[381] Ibid., p.2.
[382] Ibid., p.3.
[383] Ibid.
[384] Decision 2017-695 QPC of 29th March 2018, paragraph 72.

Law No. 2021-998 of 30 July 2021, the "Law on the Prevention of Acts of Terrorism and Intelligence", which perpetuates the inclusion in the common law of excessive police powers conferred on the administrative authorities, inspired by the state of emergency and introduced by the Law of 2017[385]. Many of these measures were depicted, by senators of the *saisine*, for being intrusive in the spheres of the freedom of movement, the right to private life, the inviolability of home and the right to a normal family life. The Constitutional Council declared the constitutionality of some of the contested provisions, affirming that the legislator has the role to ensure the conciliation between the prevention of breaches of public order and the exercise of freedom of movement and of the right to private life, and utilising the interpretation reserves as a mechanism to maintain the potential unconstitutional provisions within constitutional boundaries[386]. Lastly, the objective of the fight against terrorism still seems to be represented as a goal so important as to allow restrictions on freedoms and to view them as the lesser evil.

3.2 The jurisprudence of the UK's House of Lords

The House of Lords is the upper house of the UK's Parliament and, until 2009, represented the final court of appeal in the British judicial apparatus, through the Law Lords, or Lords of Appeal in Ordinary, which was a group of judges exercising the judicial functions of the House[387]. Therefore, it played a vital role as a judicial court and as a counterbalance to the Government in those years when the British counterterrorism legislation was most controversial in terms of restricting fundamental rights, as described in the previous chapters. In the past, the House of Lords has traditionally demonstrated a judicial deference to the other branches, especially in time of crisis and wars, where the Executive has often found very scarce resistance for its claims in matter of national security. This judicial self-restraint, when the national security was at stake, may be explained by a series of factors: the constitutional inappropriateness for the judiciary to get involved in national security issues, which were viewed as non-justiciable; the court's lack of the necessary information for deciding on such cases, that often are kept secret by the Executive; the traditional British concept of Parliament's sovereignty[388]. Nonetheless, according to many scholars, this pattern changed or

[385] M. Pugliese, *Renforcement de la prévention d'actes de terrorisme : la loi publiée*, in Dalloz le quotidien du droit, (7 September 2021), [online] : https://www.dalloz-actualite.fr/flash/renforcement-de-prevention-d-actes-de-terrorisme-loi-publiee#.Ym-SbOhBy5d

[386] Press release of Decision No. 2021-822 DC of 30 July 2021, p.3. https://www.conseil-constitutionnel.fr/sites/default/files/2021-07/2021822dc_cp.pdf

[387] https://www.parliament.uk/business/lords/

[388] J. Ip, *The Supreme Court and House of Lords in the War on Terror: Inter Arma Silent Leges?*, in Michigan State University College of Law Journal of International Law 19, No. 1 (2010), p.3.

started to grow weak since the 9/11 attacks, when the House of Lords began to challenge the executive unilateralism in the security domain and to adopt a more non-deferential approach, contrary to the French Constitutional Council with respect to the counterterrorism legislation's review[389]. In effect, the House of Lords demonstrated its new non-deferential disposition to rigidly scrutinize the Government's security measures in a series of decisions, such as the ones concerning the indefinite detention of non-nationals, the control orders regime and the use of evidence obtained by torture[390]. In this way, the House of Lords has certainly contributed, more than the Constitutional Council, to the efforts for limiting the Executive's intrusion in the fundamental rights' sphere, by viewing national security concerns as no longer non-justiciable[391]. According to some academics, the House of Lords' new attitude might have been favoured by several elements. The first one might have been an increasing civil society involving human rights and civil liberties associations, such as Liberty and Justice that also intervened in many major cases of the House of Lords[392]. Secondly, the inclusion of the European Convention on Human Rights in the UK's domestic legal system through the Human Rights Act, approved in 1998 and come into force in 2000, had been certainly a stimulating component, giving to the judiciary a stronger sense of legitimization in intervening in human rights cases[393]. The HRA actually fostered the implementation of the parliamentary "Joint Committee on Human Rights", which drafted reports about the antiterrorist legislation's impact on human rights, on which some of the House of Lords' decisions relied on[394]. Lastly, the new judicial deferential approach might have derived from the different idea of the "war on terror" compared to other wars and crises, considering it as a lengthy and uncertain period of tension that does not require a high degree of deference to the Executive[395].

According to some constitutional scholars, the change of the House of Lords' attitude has not been a radical one, in the sense that it could have done more in controlling the Executive in the counterterrorism legislation and that the degree of deference has been often different and heterogenous among the Law Lords[396]. However, it is certain and significant that the national security issues stopped to be deemed as a prohibited area for the judicial review, which was no more necessarily totally deferential[397]. Particularly, the non-deferential approach with

[389] Ibid., p.28.
[390] Ibid., p.33.
[391] A. Kavanagh, *Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape,* in International Journal of Constitutional Law, Vol. 9 (2011), p.173.
[392] J. Ip, *The Supreme Court and House of Lords in the War on Terror: Inter Arma Silent Leges?*, cit., p.36.
[393] Ibid., p.39.
[394] Ibid., p.40.
[395] Ibid., p.59.
[396] M. Harris, Public Law Values in the House of Lords - In an Age of Counter-Terrorism, in Auckland University Law Review 17 (2011), p. 139.
[397] A. Kavanagh, *Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape,* cit., p.174.

reference to counterterrorist legislation has been marked by the Belmarsh case of 2004, which gave the input to the idea that the Government cannot be as free as in the past to justify restrictive antiterrorist measures by declaring that national security belongs to the exclusive responsibility of the Executive[398]. Indeed, the Government increasingly had to explain the counterterrorist provisions in conformity with human rights, also under the influence of the House of Lords decisions despite their impossibility to effectively invalid a law[399]. In truth, the House of Lords' declarations of incompatibility could not lead to the abrogation of a legislative act, because only the Parliament can repeal a law approved by the Parliament itself. However, in any case, its decisions often managed to have a resonance in the civil society and consequently to morally put pression on the Government.

To sum up, since 9/11 attacks, the House of Lords and the judicial system displayed an enhanced degree of scrutiny and a level of interventionism to defend fundamental rights in the sector of national security, which they once regarded as too tender for the judicial engagement, and in which they adopted excessive discretion in front of the pronounced consequences on individual rights and freedoms[400]. In order to better understand the House of Lords' approach in combining public security demands and the protection of fundamental rights within the review of counterterrorist legislation, the rest of the chapter will cover the following decisions: the "*A v Secretary of State for the Home Department* [2004] UKHL 56" (*Belmarsh* case), the "*A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71" (*Torture Evidence* case), the "*Secretary of State for the Home Department v JJ* [2007] UKHL 45", and the "*Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28". These decisions essentially are the result of House of Lords' judgements about the compatibility of counterterrorist measures with fundamental rights. Indeed, the infringement on individual liberties due to certain provisions of the Anti-terrorism Crime and Security Act 2001 and of the Prevention of Terrorism Act 2005 was put at stake, specifically the mechanisms of indefinite detention without trial of non-nationals, of the use of torture-induced evidence, and of control orders regime.

3.2.1 The invalidation of the non-nationals' indefinite detention without trial

The so-called *Belmarsh* case truly represented a turning point in the traditional judicial approach of the House of Lords, since it marked the rejection of the idea that the courts

[398] Ibid., p.192.
[399] C.R.J. Murray, *Nudging or Fudging: The UK Courts' Counterterrorism Jurisprudence since 9/11*, in Journal of Conflict and Security Law 21, No. 1 (2016), p.111.
[400] D. Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?*, (ed.) Routledge, (2008), p.347.

should implement an uninvolved attitude and spotlighted the concept under which national security issues are no longer non-justiciable[401].

The contested provision, object of the decision, was the Section 23 of the Anti-terrorism Crime and Security Act of 2001, that allowed to indefinitely detain a foreign national without trial, who was a terrorist suspect and who cannot be deported in the receiving country due to the risk of torture. The application of this power was based on the derogation from Article 5 (ECHR), protecting the right to personal liberty, through the activation of Article 15 ECHR's procedure. From December 2001 and December 2004, seventeen individuals had been detained at the Belmarsh prison, and nine of them challenged the lawfulness of their detention in front of the Special Immigration Appeals Commission (SIAC), the Court of Appeal[402] and then of the House of Lords[403]. Due to the decision's constitutional resonance and importance, a special panel of Law Lords of nine judges was formed to decide on the case, rather than the usual five[404].

The appellants essentially claimed that the requirements, established by the Article 15, to derogate from the Convention' s rights had been not fulfilled. First, they stated that there was not "a public emergency threatening the life of nation", declaring that the emergency was not imminent and temporary, and that the UK was the only country who had derogated from the ECHR among the European States[405]. In this matter, the majority of the Law Lords accepted the Home Secretary's assertion on the existence of an emergency threatening the life of the nation, considering that the European Court of Human Rights itself leaves to the states a wide margin of appreciation in deciding what constitutes a real danger to public safety, and that the executive branch is more suitable for making such an evaluation[406]. That was the only deferential part of the whole decision, that can be justified by the fact that the House of Lords did not possess the necessary information and evidence for denying the existence of the emergency[407]. Moreover, even if it was a deferential assertion, the declaration of the Law Lords on the existence of an emergency may be still considered significant since, formerly, the British courts would not even have felt qualified to doubt the executive's assessment of an issue related to national security[408]. Lord Hoffman was the only judge who hindered the

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[401] A. Kavanagh, *Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape,* cit., p.183.
[402] The Court of Appeal had declared that the UK Government's measure was a proportionate response to the threat.
[403] S. Shah, *The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish,* in Human Rights Law Review 5, No. 2 (2005), p.406.
[404] D. Feldman, *United Kingdom: House of Lords on Anti-Terrorism, Crime and Security Act 2001,* in European Constitutional Law Review 1, No. 3 (2005), p. 534.
[405] S. Shah, *The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish,* cit., p.407.
[406] Lord Bingham affirmed that the assessment of whether an emergency exists is mainly a political one and as such "great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question". Source:
A v Secretary of State for the Home Department [2004] UKHL 56, paragraphs 20-29.
[407] A. Kavanagh, *Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape,* cit., p.182.
[408] D. Feldman, *United Kingdom: House of Lords on Anti-Terrorism, Crime and Security Act 2001,* cit., p.539.

Government's view, by affirming that the "threat to the life of the nation" is a threat to "our institutions of government or our existence as a civil community"[409], and the terrorist violence was not the case. He was also contrary to the idea that only the Executive could decide on the matter of the public emergency, declaring that "we, as a United Kingdom court, have to decide the matter for ourselves"[410]. That constituted a true rupture with the traditional judicial approach, also outstripping the other judges[411].

Furthermore, the Law Lords had to verify whether the power to detain non-nationals without trial under a public emergency did not overcome what was "strictly required by the exigencies of the situation", thus they had to implement a true proportionality test. The latter had not been accomplished by the SIAC and the Court of Appeal, which "erroneously" deferred it to the executive branch[412]. The proportionality test was carried out quite rigidly by the House of Lords. Indeed, Lord Bingham based its reasoning on three elements: whether there was a legislative goal satisfactorily significant to justify restricting a fundamental right; if the provisions were rationally designed to achieve the statutory purpose; and whether they did not infringe rights more than necessary to achieve the legitimate objective[413]. The majority of the Law Lords found that these requirements had not been fulfilled, in the sense that the Section 23's powers of the Act were excessive, irrational and disproportionate[414]. The crucial issue was that the Government treated differently nationals and non-nationals, although they were equally suspected terrorists. As a matter of fact, the Lords reminded that the terrorist threat derived from British citizens as well as foreign individuals, but only the latter's liberty was deprived. Baroness Hale made clear this point, affirming that there was "[…] no a real explanation of why it is necessary to lock up one group of people sharing exactly the same characteristics as another group which it does not think necessary to lock up […]", and thus "[…] if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners. It is not strictly required by the exigencies of the situation."[415] Therefore, the UK's Government had failed to demonstrate a rational correlation between the aim to be achieved (the protection of British citizens from the imperil of terrorist attacks) and the measures taken (the detention of only some of those suspected of causing this danger[416]. The measures were also declared to be heavily discriminatory, violating Article 14 ECHR on the prohibition of

[409] *A v Secretary of State* [2004] UKHL 56, paragraph 96.
[410] Ibid., p.92.
[411] M. Elliott, *United Kingdom: Detention without Trial and the War on Terror*, in International Journal of Constitutional Law 4, No. 3 (2006), p.557.
[412] *A v Secretary of State* [2004] UKHL 56, paragraph 44.
[413] D. Feldman, *United Kingdom: House of Lords on Anti-Terrorism, Crime and Security Act 2001,* cit., p.540.
[414] N. Hayes, *Liberty v. Security - UK Anti-Terrorism Legislation, the ECHR and the House of Lords,* in Trinity College Law Review 8 (2005), p.114.
[415] *A v Secretary of State* [2004] UKHL 56, paragraphs 228-231.
[416] N. Hayes, *Liberty v. Security - UK Anti-Terrorism Legislation, the ECHR and the House of Lords,* cit., p.115.

discrimination, due to the fact that only the foreigners could be detained as a result of being suspected terrorists, just like UK nationals[417]. Hence, the appellants were treated differently because of their nationality or immigration status, which were irrelevant criteria with reference to the measure's objective of combating terrorism[418]. In this way, the principle of equality came to overlap with the proportionality test, and the different treatment between nationals and non-nationals was pronounced to be unjustified. For all these reasons, the contested provisions were declared incompatible with the Convention rights, because of the invalid derogation to Article 15 and of the consequent violation of Article 5 and 14 ECHR.
The constitutional importance of the *Belmarsh* case is truly notable. Firstly, it represented the rupture with the traditional self-restraint approach of the judiciary, demonstrating that the deference must not be necessarily absolute and that the judges have actually a consistent role also in matter of national security. That was also evident through the Lords' response to the Attorney General, when the latter affirmed that the courts were not enabled to judicially review the Executive's reaction to the public emergency[419]. The Lords claimed their position, by stating that "[…] the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself […]"[420]. Lord Bingham had additionally asserted that, on the basis of the Human Rights Act (1998), the judges' responsibility and competence in protecting fundamental rights and freedoms through the conduction of the judicial review, highlighting the judges' new feeling of legitimacy in their actions[421]. Then, the House of Lords' decision drew the attention on the fundamental right to be free from deprivation of liberty, irrespective of the individuals' nationality. It demonstrated that, when the right to liberty is limited, strict and rigid conditions must be satisfied, being subject to an intense judicial scrutiny from which the executive and the legislature cannot escape even in case of national security issues[422].
Finally, it was quite relevant that, although the declaration of incompatibility could not abrogate the legislative measures, the UK's Government seemed to be politically obliged to abandon the detention without trial mechanism, through the adoption of the Prevention of Terrorism Act (2005)[423]. As a matter of fact, the decision made human rights more pressing than ever in a circumstance of tension in which the public safety was the priority[424]. Indeed, the Law Lords managed to protect fundamental rights against their excessive infringement

[417] S. Shah, *The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish,* cit., p.414.
[418] *A v Secretary of State* [2004] UKHL 56, paragraph 54.
[419] N. Hayes, *Liberty v. Security - UK Anti-Terrorism Legislation, the ECHR and the House of Lords,* cit., p.123.
[420] *A v Secretary of State* [2004] UKHL 56, paragraph 42.
[421] D. Feldman, *United Kingdom: House of Lords on Anti-Terrorism, Crime and Security Act 2001,* cit. p.547.
[422] Ibid.
[423] M. Elliott, *United Kingdom: Detention without Trial and the War on Terror,* cit., p. 560.
[424] C.R.J. Murray, *Nudging or Fudging: The UK Courts' Counterterrorism Jurisprudence since 9/11,* cit., p.110.

given by the counterterrorist legislation and was able to remind that an efficient equilibrium between security and liberties must always be found.

3.2.2 The affirmation of the absolute prohibition of torture

The *Torture Evidence* case is a further example of the House of Lords non-deferential approach, underlining the importance of protecting a fundamental liberty even in case of the war on terror. What is interesting is that the House of Lords had to review, once again, the human rights implications of Part IV of the Anti-Terrorism Crime and Security Act 2001 (ACTSA)[425]. As a matter of fact, the detainees who challenged their detention in the Belmarsh case were the same appellants in the House of Lords' decision "*A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71". Supported by many international human rights' associations, they claimed that the UK's Government made use of evidence obtained by torture, in the Special Immigration Appeals Commission (SIAC) proceedings, which certified the individuals as suspected terrorists and thus decided on the necessity for the detainees' continued detention[426]. In August 2004, the Court of Appeal had already rejected the appellants' claim that the admission of that information resulted in an infringement of the obligations under the European Convention on Human Rights and the Convention Against Torture[427]. The Court of Appeal's decision caused sharp backlash in the civil society and within international organizations dealing with human rights, since it allowed the Secretary of State to employ torture-induced evidence[428]. In December 2005, the House of Lords announced its decision on the matter. The main question, in front of the Law Lords, was whether SIAC, when presiding over an appeal according to Section 25 of ACTSA 2001, could "receive evidence which has or may have been procured by torture inflicted, in order to obtain evidence, by officials of a foreign state without the complicity of the British authorities"[429]. The common law rule regarding the admissibility of hearsay evidence normally prevents third-party torture evidence from being used in an English court[430]. However, SIAC had its own rules of procedure and evidence that have been validated by Parliament, consenting SIAC to "receive evidence that would not be admissible in a court of law"[431]. The Home

[425] S. Shah, *The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues*, in Human Rights Law Review 6, No. 2 (2006), p.416.
[426] B. Gasper, *Examining the Use of Evidence Obtained Under Torture: The Case of the British Detainees May Test the Resolve of the European Convention in the Era of Terrorism*, in American University International Law Review, (2005), Vol. 21, p.294.
[427] Ibid., p. 295.
[428] T. Thienel, *Foreign Acts of Torture and the Admissibility of Evidence*, in Journal of International Criminal Justice 4, No. 2 (2006), p.402.
[429] *A v Secretary of State (No 2)* [2005] UKHL 71, paragraph 1.
[430] S. Shah, *The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues,* cit., p.417.
[431] Special Immigration Appeals Commission (Procedure) Rules 2003, Rule 44.

Secretary had also affirmed that there was not a legal duty impeding him to present evidence obtained by torture to SIAC[432].

The decision of the House of Lords was quite significant since it overrode the Court of Appeal's judgement, by unanimously stating that British courts, including SIAC, cannot utilise evidence that might have been acquired through torture, "irrespective of where, or by whom, or on whose authority the torture was inflicted"[433], making the torture-induced declarations always inadmissible in evidence[434]. This important statement put the House of Lords at the core of an enduring discussion about the strength of the prohibition on the use of torture in intense circumstances, such as in the fight against terrorism[435]. The Law Lords' reasoning was based on the emphasis of the historical common law's constitutional principle of repugnance of torture for its illegality and inhumanity[436]. They also relied on the support of Article 15 of International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984), which embraced an exclusionary rule establishing that "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings". Although this Convention is not part of the British domestic law, and thus not directly applicable, it is relevant that the House of Lords chose to use it as a boost for interpreting the domestic principles and for going against the Government[437]. According to the Law Lords, the antiterrorist provisions must be in compliance with the international human rights standards[438]. Therefore, through the affirmation of the inadmissibility of evidence obtained by torture, the House of Lords complied with the Article 6 ECHR, protecting the right to a fair trial, and Article 15 of the mentioned Convention.

Nonetheless, considering the difference between judicial and administrative bodies, the Law Lords declared that the exclusionary rule only applied to judicial use, and not to the executive, consequently the Secretary of State could actually utilise evidence procured by any means, contrary to SIAC[439]. Finally, the House of Lords determined that the exclusionary rule could only be executed if it was possible to prove that an assertion had been obtained by torture, but that the related burden of proof could not be imposed on the appellants[440].

The House of Lords' absolute condemnation of torture cannot be overlooked. Once again, the Law Lords counterbalanced the counterterrorist measures' excessive intrusion in the

[432] S. Shah, *The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues,* cit., p.417.
[433] *A v Secretary of State (No 2*) [2005] UKHL 71, paragraph 51.
[434] J. Ip, *The Supreme Court and House of Lords in the War on Terror: Inter Arma Silent Leges,* cit., p.27.
[435] T. Thienel, *Foreign Acts of Torture and the Admissibility of Evidence,* cit., p.402.
[436] S. Shah, *The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues,* cit., p.419.
[437] T. Thienel, *Foreign Acts of Torture and the Admissibility of Evidence,* cit., p.403.
[438] S. Shah, *The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues,* cit., p. 425.
[439] Ibid., p.405.
[440] Ibid., p.408.

fundamental rights' sphere. Indeed, this decision reversed the unwritten belief that torture can be tolerated under certain circumstances. For many human rights groups, it was considered a true victory, being a "momentous decision" that "destroys any trace of legality with which the UK's Government had tried to defend a totally illegal and wicked policy, within the framework of its measures to combat terrorism", as declared by Amnesty International[441]. That is what has made the *Torture and Evidence* case a landmark decision in understanding the House of Lords' approach in the war on terror and its impact on fundamental rights.

3.2.3 The incompatibility of the control orders' regime with the right to liberty

After the abrogation of certain controversial measures of the Anti-terrorism Crime and Security Act 2001, further restrictive provisions, established by the Prevention of Terrorism Act 2005 (PTA), were contested by human rights associations.
In October 2007, the House of Lords announced its judgement about the congruity of the control orders regime with the right to liberty. The six appellants had been suspected of being engaged in terrorist activities and they were subject to a non-derogating control order under Section 2 of the PTA, notwithstanding the fact that none of them was officially incriminated for the offence related to terrorism[442]. According to the control order, they were obliged to remain in their residence eighteen hours a day, along with the exclusion of social visitors[443]. The main question to which the House of Lords had to answer was whether the application of the control order constituted a deprivation of liberty, in breach of Article 5 ECHR protecting the right to personal liberty and security. The decision actually illustrated the heterogeneity of the judges' visions, also with reference to rights. Indeed, some Lords adopted a closed conception of rights, and other interpreted rights in a more expansive way[444]. For instance, Lord Bingham and Baroness Hale affirmed that the deprivation of liberty "[…] may take numerous forms. The variety of such forms is being increased by developments in legal standards and attitudes, and the Convention must be interpreted in the light of notions prevailing in democratic states"[445]. In other terms, the deprivation of liberty does not only arise in case of arrest or detention. On the contrary, Lord Hoffman displayed a narrower vision about the scope of the right to liberty, which, according to him, can be considered to be violated in a circumstance similar to imprisonment[446]. According to Lord Hoffman, liberty

[441] Torture evidence inadmissible in UK courts, Lords rules | World news | The Guardian
[442] S. Guy, *Control Orders Held to Constitute a Deprivation of Liberty*, in Human Rights Law Centre, (2007). Available at: Control Orders Held to Constitute a Deprivation of Liberty | Human Rights Law Centre (hrlc.org.au)
[443] Ibid.
[444] M. Harris, *Public Law Values in the House of Lords - In an Age of Counter-Terrorism*, cit., p.129.
[445] *Secretary of State v JJ* [2007] UKHL 45, paragraph 15.
[446] Ibid., paragraph 46.

was just "restricted" and not "deprived". Therefore, the outcome of this diversity was not a unanimous decision.

In any case, the majority of the Law Lords chose to use a flexible definition of the right to liberty, in order to declare that an eighteen-hour curfew, imposed by a control order, was such a harsh limitation to the liberty of the affected individuals that it represented a deprivation of liberty under the sense of Article 5 ECHR[447]. The violation of the individuals' liberty was not only due to the eighteen-hour curfew in a narrow sense, but also by the fact that the control order led practically to a "[…] solitary confinement for this lengthy period every day for an indefinite duration, with very little contact with the outside world, with means insufficient to permit the provision of significant facilities for self-entertainment […]"[448]. Hence, the cumulative effect of the obligations and the consequential "concrete situation" of the affected person under the control orders were deemed to be a consistent deprivation of liberty[449].

Through this decision of 2007, the House of Lords drew the Government's attention on the too restrictive nature of the control orders regime and on the necessity to find a better balance between security requirements and respect for individual liberties, which, as demonstrated by the House of Lords' approach, cannot be deprived even in the urgent fight against terrorism.

3.2.4 The control orders' inconsistency with the right to a fair trial

The "*Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28" was one of the most discussed decisions at the time, since it seriously called into question the functioning of control orders regime. In effect, the latter was again put at stake in June 2009, when the House of Lords judged the compatibility of such mechanism with the right to a fair trial, protected by Article 6 ECHR, with widespread consequences.

Under Section 2 of the PTA 2005, non-derogating control orders were imposed on the three appellants, significantly restricting their liberty, "[…] on the ground that the Secretary of State had reasonable grounds for suspecting that the appellant was, or had been, involved in terrorism-related activity" [450]. The nine judges of the Law Lords were asked to decide whether the system that resulted in the making of the control order fulfilled the individuals' right to a fair trial, embraced by Article 6 ECHR together with the Human Rights Act[451]. Specifically, the issue was whether the presence of security-cleared special advocates in the trials was adequate to compensate the lack of an open hearing, with the total disclosure of the relevant

[447] A. Kavanagh, *Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape,* cit., p.187.
[448] *Secretary of State v JJ* [2007] UKHL 45, paragraph 24.
[449] G. Berman, A. Horne, *Control orders and Prevention of Terrorism Act 2005,* cit., p.11.
[450] *Secretary of State v AF (No 3)* [2009] UKHL 28, paragraph 1.
[451] Ibid.

material[452]. The "controlled" appellants claimed that their rights had been encroached because the judge, in a closed hearing, had utilised material that had not been revealed to them, since the disclosure of such material could have jeopardised national security[453].

As a matter of fact, it was the House of Lords' second endeavour to define the minimum standards of disclosure that are required for a fair hearing in control orders cases[454]. They had already attempted to do so in a preceding case "*MB v Secretary of State for the Home Department* [2007] UKHL 46", but from that time two cases had brought the matter back before the House of Lords[455].

The Law Lords unanimously held that, when a control order is imposed on an individual, the latter must be given satisfactory material about the allegations against him in order to allow him to efficiently instruct his special advocate, and that, if the material contains just general statements and his hearing is mainly based on closed information, the right to a fair trial under Article 6 ECHR would be violated[456]. Consequently, in case of such violation, the control orders could not be implemented[457].

This decision had quite a significant impact. Firstly, it is important to notice that the House of Lords showed a non-deferential approach in the sense that it illustrated how the control orders hearings were, until then, often in breach of the right to a fair trial, since most of the time they were closed hearings with secret evidence for reasons of national security[458]. Therefore, the declaration of the necessity of "sufficient information", that must be given to the affected individuals, even in circumstances such as national security issues, cannot be overlooked. Indeed, the House of Lords' non-deferential attitude was even more evident by taking into account that the courts traditionally affirmed that the main elements of the right to a fair trial must leave the way to national security[459]. On the contrary, this decision strongly shows that it is the national security that must retreat in favour of the requirements of such a right[460].

Secondly, in the aftermath of this decision, the control orders regime became more difficult to apply, and a number of control orders were nullified by lower courts, starting to be implemented only for a small amount of people[461]. Lord Hoffman, in his judgement, even declared that the ruling "[…] may well destroy the system of control orders which is a

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[452] A. Kavanagh, *Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape,* cit., p.188.
[453] B. Middleton, *House of Lords, Secret Control Order Hearings: a Qualified Victory for the Right to a Fair Trial*, in The Journal of Criminal Law (2009), p. 389.
[454] M. Ryder, *Secretary of State for the Home Department v AF and others [2009] UKHL 28,* in UK Supreme Court Blog (2009), Available at: Secretary of State for the Home Department v AF and others [2009] UKHL 28 – UKSCBlog
[455] Ibid.
[456] Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28, paragraph 59.
[457] B. Middleton, *House of Lords, Secret Control Order Hearings: a Qualified Victory for the Right to a Fair Trial,* cit., p.390.
[458] Ibid.
[459] A. Kavanagh, *Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape,* cit., p.189.
[460] Ibid.
[461] Ibid.

significant part of this country's defences against terrorism."[462] Not by chance, the Home Secretary expressed his dissatisfaction for the resolution, because it hindered the protection of public safety[463]. In such manner, the House of Lords manifested how the judiciary's efforts to defend the fundamental rights' safeguards, against the intrusion of antiterrorist measures, may result in the enforcement of constitutional restraints on the Government, even in the framework of national security.

[462] *Secretary of State v AF (No 3)* [2009] UKHL 28, paragraph 70.
[463] F. Gibb, *Disarray over terror control orders after law lords ruling on secret evidence*, in The Times, (2009). Available at http://www.timesonline.co.uk/tol/news/uk/article6469431.ece

CONCLUSIONS

The terrorist attacks of 11 September 2001 pushed the Western countries to quickly plan and adopt a harsh antiterrorism strategy as a direct response to what was perceived as a true war, the so-called "War on Terror". The severity of the counterterrorism legislation resulted in a deep collision with fundamental rights and freedoms, which did not go unnoticed by several human rights groups. The balance between the need to guarantee security and the individual rights' protection rapidly became a central issue of political and social debate in the following twenty years.

According to international human rights agreements, there are rights from which it is possible to derogate in exceptional cases, and there are other rights whose scope and essence must be respected in every circumstance. This thesis illustrates how the antiterrorist legislation has limited and interfered with several fundamental rights, regardless of their violable or inviolable nature. Indeed, the aim of this dissertation has been to investigate the intrusive impact of counterterrorist legislation, in the post-9/11 scenario in France and United Kingdom, on fundamental rights and liberties. This collision has been analysed also through the examination of the role of the respective High Courts, the French Constitutional Council and the UK House of Lords, in their efforts to guarantee an effective balance between national security requirements and individual rights' safeguards.

The outcome of this analysis is that the French and UK Governments did implement strict antiterrorist measures at the expense of the full exercise of fundamental rights, which were strongly limited by the enactment of increasing investigation, surveillance and enforcement powers related to terrorism. However, the French and British counterterrorist responses were not totally identical. Indeed, their different constitutional context and features, that have been mentioned in the introduction, influenced their attitude in facing the common terrorist emergency. Consequently, on the one hand, the French Government enacted severe antiterrorist provisions on the basis of the written regulation of the state of emergency, fostering a management of the emergency with a deep administrative nature, along with the judges' secondary position. On the other hand, although the British antiterrorist provisions affected the exercise of fundamental rights as well, the UK's constitutional traits led the Government to progressively enact counterterrorist measures, that more considered, with respect to France, the British historical incorporation of fundamental rights in the domestic law and the stronger reaction from civil society and human rights associations.

The effects on the fundamental rights' sphere were also clear through the Governments' fostering a discrimination between different "categories" of people, through the hardening of immigration laws and the use of deprivation of citizenship as a counterterrorist tool. The

weakening of rights was viewed as the lesser evil in the emergency given by the terrorist threat to public safety. In addition, the result of the dissertation is that the judicial system, which should be the guarantor of fundamental rights, did (and could) not always exercise this function. The judges' role has been different in France and in UK, due also to their different constitutional models, described in the introduction. Indeed, in the civil law systems, the judge's decision-making is quite secondary, while in common law organisations as the UK, it is primary and binding. Not by chance, in the French scenario, not only the judges' general position has declined, due to their decreasing powers in controlling rights' limitations, but the Constitutional Council itself adopted a fallback behaviour. The Council did not manage to put strong boundaries to the Executive in its constitutionality reviews of counterterrorist laws, and its deferential and self-restraint approach had the effect of legitimizing the implementation of restrictive measures and the normalisation of the state of emergency since 2015. On the contrary, the UK House of Lords demonstrated to have taken a more decisive and non-deferential position, by often highlighting that the Government had crossed the line in its pursuit of national security at a cost to civil liberties and fundamental rights principles. The main lesson learnt through the House of Lords' decisions is certainly that national security issues cannot be considered as an exclusive responsibility of the executive and legislative branches, and that they cannot be deemed as non-justiciable as formerly.

The balance between security and rights has been truly a challenge to achieve, even for strong democracies like France and United Kingdom. This complexity is even more accentuated taking into account that the limitations to individual rights may be ineffective in the fight against terrorism by promoting the existence of an alienated ground of support and a dissatisfaction in those communities, particularly affected by the measures, which terrorist groups may exploit for acquiring recruits. Whether demands of national security and protection of human rights will keep on being in conflict remains an open question.

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SUMMARY

The 9/11 terrorist attacks have been a shocking event for the whole world. The Western countries were particularly affected by the attacks, both their populations and their Governments. The climate of tension endured over time since, following the 9/11, further terrorist attacks occurred and the raising of ISIS and Al-Qaeda, and their increasing number of affiliates, were more and more a cause for concern. Therefore, many Western States began to implement extensive counterterrorism strategies, with a wide range of severe measures in order to tackle the so-called "War on Terror". The perception of a new kind of threat without precedent constituted a true turning point in the development of national security policies.
A particular strong reaction came from France and United Kingdom. These two countries had to face a common challenge, the fight against terrorism, but their different constitutional contexts influenced their legislative and judicial responses. Indeed, what is important to heed is that the French system is based on the "civil law" model, while the United Kingdom is a "common law" country. Therefore, the French and British antiterrorist responses were not identical, due also to their diverse constitutional environments. For instance, in contrast to the UK, the existence of a written regulation concerning the state of emergency led the French Government to legally enact a series of restrictive measures that were justified by the state of emergency itself, also prompting an administrative-based management of the terrorist threat. The UK approved several harsh counterterrorist provisions as well, but along with a slight and progressive commitment to ponder them with the respect of fundamental rights, due also to the British historical incorporation of fundamental rights in the domestic law and to a stronger reaction from civil society and human rights associations.
Both France and UK had already experienced terrorism issues, but the attacks of 11 September 2001 revived their antiterrorist policies, being both also subject of further attacks in the following years. The new counterterrorist legislation, described in the first chapter of the thesis, was quite severe and impactful, in terms of increasing Executive's powers and of limitations on fundamental rights and civil liberties.
France considered terrorism as a problem of internal security and, as a result, the existing measures of surveillance and control were reinforced, and new ones were developed. The French counterterrorist strategy contributed to radicalise a more preventive approach founded on security mechanisms and controls of wide areas of public and private life, such as house searches, retention of communication data, video surveillance and closures or limitations of accessing in public areas. Moreover, the administrative authorities' powers were strongly increased and enhanced, becoming the main actors in managing public safety issues. The administrative empowerment came along with the weakening of the judicial apparatus. The

role of the judges as guarantor of fundamental rights and as those who can authorize and control their possible restrictions almost wore off. Right after 9/11, one of the most important French antiterrorist acts was the "Day-to-day Security law", the Law no. 2001-1062 of 15 November 2001, which, among other things, toughened the judicial police's powers in matter of identity controls to fight against terrorism, such as in case of vehicles' frisk, and reinforced the private security agents' powers to carry out searches and palpations to every suspected person. Then, the Law No. 2002-1094 of 29th August 2002 on the "orientation and planning for the internal security" furtherly extended the powers of the judicial and local police forces and the use of intelligence services, which were again reinforced in March 2003 by the Law No. 2003-239 "for internal security". The Law No. 2006-64 of 23 January 2006 allowed a wide retention of Internet connection data under an administrative, rather than judicial authorization, and marked the official engagement of the administrative apparatus in the domestic management of terrorist threat. The thesis has also analysed the "Law Strengthening Counter-Terrorism Provisions", the Law No. 2014-1353 of 13 November 2014, which introduced the prohibition of exit from French territory for citizens suspected of planning to participate in terrorist activities, giving to administrative authorities the power to limit the freedom of movement, and the Law No. 2015-912 of 24 July 2015, which intrusively empowered the intelligence services in the fight against terrorism. In the aftermath of the Paris attacks in November 2015, new legislation was enacted, and the state of emergency was declared according to the Law No. 55-385 of 3 April 1955, whose measures were administrative in nature. The activation of the state of emergency allowed to apply several restrictions and to increase administrative powers. Regarding the antiterrorist legislation oof this period, the dissertation has examined the Law No. 2015-1501 of 20 November 2015, the Law No. 2016-731 of 3 June 2016, the Law No. 2017- 258 of 28 February 2017, and the Law No. 2017-1510 of 30 October 2017, which were quite criticised by human rights groups. These laws expanded the grounds on which it was possible to enact house arrests and they increased administrative and police powers. The Law of October 2017 integrated some regulations, first adopted in an exceptional regime, into the ordinary legislation, emphasizing the French tendency to implement an "administrativisation" of terrorism's repression. Indeed, the main problematic issue was that the maintenance of state of emergency for almost 2 years was not considered enough to face the terrorist threat, and the government decided to translate some special powers, that the 1955 Law grants to the administrative authorities, into ordinary legislation. This meant a normalisation of the exception, making many restrictions to fundamental rights and liberties, justified by the state of emergency, permanent.

The UK's response to terrorist attacks was not to be outdone. In the aftermath of 9/11 attacks and in the wake of the London bombings in July 2005, the British counterterrorist response

entailed the increasing State's coercive powers related to criminal law, police powers and exceptional pre-emptive measures, that were heavily intrusive in the fundamental rights and liberties' sphere. In the period 2001-2005, the terrorism-related legislation was characterized by increasing powers of detention, of retention of communication data and restrictions of freedom of movement. One of the most striking elements was certainly the implementation for four years of a provision allowing an evident discrimination between nationals and non-nationals and the Government's propensity to derogate from its obligations under the European Convention of Human Rights. This aspect was a common element in both the Anti-Terrorism Crime and Security Act 2001, which established the indefinite detention of alien terrorist suspects without trial, and the Prevention of Terrorism Act 2005, that introduced the regime of "control orders", which were preventive orders imposing obligations on suspected terrorists and some of which could derogate from the European Convention of Human Rights. In 2006, awakening oppositions and criticism, the Terrorism Act amplified investigatory and police powers, regulated the offence of encouragement and glorification of terrorism, and punished the online dissemination of terrorism publications. Then, the Counter-Terrorism Act of 2008 provided for new powers for collecting and sharing counterterrorism information and devised further regulations about the detention and questioning of terrorist suspects and about the prosecution and punishment of terrorist offences. In the pathways of UK's counterterrorist legislation, a key pillar was the Terrorism Prevention and Investigation Measures Act of 2011, since it represented a Government's slight commitment to rebalance security measures and the respect for civil liberties, by abolishing the control orders scheme and by introducing the Terrorism Prevention and Investigation Measures regime, but human rights concerns remained. Finally, the Counter-Terrorism and Security Act of 2015 created the "Temporary Exclusion Order", through which the Government could prevent anyone suspected of engaging in terrorism from returning to the United Kingdom for a period of up to two years, renewable. The Act also enlarged the grounds on which the Secretary of State may request the communication services providers, to retain communication data for helping authorities to identify individuals.

Both French and British antiterrorist legislation drew the attention of their civil societies and human rights associations on the deep collision with fundamental rights and civil liberties, on which democratic societies were founded. That is the central issue of the dissertation's second chapter. Nonetheless, unlike France, in United Kingdom, a perceptible desire to develop an antiterrorist legislation which could be consistent with the protection of rights may be observed, through the work of the Joint Committee on Human Rights and the practice of appointing the Independent Reviewer of Terrorist Legislation.

The fundamental rights that were commonly limited by antiterrorist laws have been the right

to liberty of movement, the inviolability of the home (through house searches), the right to privacy (through retention of communication data), the freedom of association, the freedom of religion, the right to liberty and security, the freedom of expression, and the prohibition of discrimination.

In France, the broadest disapproval, in terms of civil liberties limitations, referred to the laws adopted right after the 9/11 attacks, to the duration of the state of emergency started in 2015, and to the translation of extraordinary measures into permanent and ordinary legislation.

The effective exercise of the right to privacy, which is the right of the individual to be protected against the interference into his or her personal life and to pre-empt the unauthorized acquisition or publication of private personal information, was called into question with the Law of November 2001. The limitation of this right derived from the stronger police powers in matter of identity controls, of inspection and search powers, and from the provisions concerning the retention of online communication data. In 2002 and 2003, this right was furtherly compromised by extension of citizens' surveillance opportunities and by the non-transparency of the management of individuals' personal files, allowed by the law. In UK, the right to privacy was affected by the Anti-Terrorism Crime and Security Act 2001, owing to the extensive grounds for the retention of communications data, and it was encroached by the restrictions and the obligations that could be imposed by the Terrorism Prevention and Investigation Measures Act of 2011.

Regarding the right to inviolability of home, it was mainly affected by the increasing house searches' powers in both France and UK.

Moreover, the restriction of the fundamental freedom of movement was one of the main targets of the French and British counterterrorist legislation, since it was an instrument to restrict and control the movement of foreign fighters and of potential terrorist suspects. In France, the impact on this freedom was ascribed to the Law No. 2001-1062 of 15 November 2001, the Law No. 2003-239 of 18 March 2003 and the Law No. 2006-64 of 23 January 2006, because of the provisions strengthening the house arrests, along with the ones extending the mechanisms concerning the control of people's movement and the prolonged duration of police custody. In addition, the freedom of movement was heavily constrained by the legislation of 2014, owing to the mechanism of prohibition of exit from French territory based on a mere suspicion that an individual may engage in terrorist activities in the future.

In United Kingdom, in addition to the increasing house arrests' powers, this freedom was widely compromised by Temporary Exclusion Orders (TEOs) since were used to impede that an individual, who has gone to Syria to support or fight for ISIS, could return freely to UK. According to some, the TEOs could violate the British obligations under the International Covenant on Civil and Political Rights, which affirms that "nobody shall be arbitrarily

deprived of the right to enter his own country".

As regards to the right to liberty and security, enshrined in the Article 5 ECHR, it concentrates on safeguarding individuals' freedom from misguided detention, as opposed to protecting personal safety, and on generally guaranteeing the individual's personal freedom. This right was not only limited but truly violated by the UK's Anti-Terrorism Crime and Security Act 2001. The indefinite detention of non-national terrorist suspects without trial, where deportation may be followed by torture, allowed by Part IV of the Act, constituted a limitation to the right to liberty and security of person, that was excessive to an extent that it was hard to justify even by the growing degree of threat created by terrorism. In 2005, the right to liberty and security was deeply infringed by the control orders regime, established by the Prevention of Terrorism Act. The impact on the individual right was also aggravated by the fact that the derogating orders were enacted on the basis of a mere suspicion and a weak standard of proof regarding the individual's involvement in terrorist activities. Finally, the right to liberty and security was encroached by the Terrorism Act 2006 and the Counter-Terrorism Act 2008, since, according to the human rights organization Liberty and by Amnesty International, the extension of the pre-charge detention of terrorist suspects from 14 to 28 days violated the right under which an individual cannot be kept without trial longer than it is necessary.

The full exercise of the freedom of assembly and association was also compromised. In France, the impact on this right derived also from the counterterrorist provisions lacking legal specificity, such as those criminalizing association with people who were involved in terrorist enterprises without properly distinguishing between innocent and criminal association, or without requiring some form of strategic involvement or guilty intention. Furthermore, the special powers conferred to the French administrative authorities have been used to target political activists during the state of emergency. In UK, the freedom of assembly and association was mainly invaded by the Terrorism Prevention and Investigation Measures under the Act of 2011 and by the Counter-Terrorism and Security Act 2015, even though this interference was designed to be effectuated on a more proportional and necessary basis than in the past.

The freedom of expression was one of the most affected rights in the war on terror. It was intrusively undermined by the French Law No. 2014-1353 of 13 November 2014 because of the introduction in the Penal Code of the apology of terrorism offence, particularly on online public communication services. Indeed, it was the expression of an opinion that was repressed by the new Article 421-2-5 of the Penal Code, not an act of terrorism. In the context of the British counterterrorist legislation, the consequences on the freedom of expression constituted one of the most controversial aspects of the Terrorism Act 2006, caused by its provision that

criminalised the glorification and incitement of terrorism, also with specific reference to Internet. The limitation on freedom of expression is ascribed to the fact that an individual's action may be considered to fall into the prohibition of glorification, while it may actually belong to the speech offences, which are not included in the domain of criminality. Moreover, the freedom of expression was improperly restricted by the UK's Act of 2006 because the new offence of encouragement of terrorism is based on the broad and vague definition of terrorism, contained in the Act of 2000.

In both France and UK, the limitation of the freedom of religion was partly founded on a discriminatory approach. Indeed, in the context of the French antiterrorist measures, the limitation on the effective exercise of the freedom of religion was generally given by the fact that these provisions were applied in a systematic and discriminatory way, targeting especially Muslim communities, who were often treated with suspicion just for their religious beliefs rather than for evidence of criminal behaviour. The closure of places of worship and the condemnation of "rigours practice of Islam" and of connections with "radical Islamist movements" not only limited the freedom of religion, but also created a sort of discrimination towards Muslim within French society. The restriction of the freedom of religion and a sort of islamophobia were also fostered by the UK's counterterrorist legislation. Already at the time of the Terrorism Act of 2006, the British members of Parliament, media and proponents of the Act, declared that terrorist speech by radical Muslim would have been the target of the Act 2006. In addition, in the exercise of the security police powers, authorities tended often to focus more their attention on Muslim individuals, who were viewed as "suspect communities" against which the Government must take measures to avoid their radicalisation and extremism. In sum, the exercise of the freedom of religion was inevitably weakened by the increasing confusion between terrorism and Islam and by the practice through which Islam was elevated to a national security threat had a notable negative impact on Muslim groups, which was also noted by various human rights organizations.

In the wide sphere of individual rights, the French and British counterterrorist legislation, since the 9/11 attacks, also prompted a legitimized discrimination between citizens and aliens, affecting the principle of non-discrimination and right to equality, due to the fact that the non-nationals were viewed as being possibly involved in terrorist activities, because of the widespread tension and fear following the terrorist attacks and to political propaganda and debates. One important factor that was at the bottom of the increased discrimination has been the approval of more restrictive immigration laws under the influence and in correspondence of antiterrorist legislation. Immigration policies have become an important tool in the war on terrorism. However, governments have often focused these policies on Arab or Muslim immigrants, creating a strong sense of alienation and discrimination, and reinforcing racial

and religious stereotypes in the public opinion. In France, certain restrictive immigration policy and regulations have been delineated in order to make them aligned with certain counterterrorist legislation, specifically in those periods where the perception of the immigrant as a potential terrorist was stronger. In the same year of the approval of the Law on Internal Security of 18 March 2003, the Law Sarkozy on Immigration entered into force in November 2003. The Law restrained the existing immigration law, and it was thought to be one of the harshest reforms to immigration policies since World War II, but it was justified as a direct response to the public emergency given by the terrorist threat. As a matter of fact, it tightened the system of visa and entry, it prolonged the time-limits for the administrative detention of those aliens who have been denied the right to reside in the French territory and it rendered the aliens' residence in the French territory more precarious. In the aftermath of Law of 23 January 2006, a restrictive immigration law, the *Loi relative à l'immigration et à l'intégration*, was validated in July 2006, which introduced some impediments to immigrants, such as the suppression of the automatic regularization. Furthermore, the *Loi relative à la maitrise de l'immigration à l'intégration et à l'asile* of November 2007 established new obstacles for family reunification and the *Loi relative à l'immigration, à l'intégration et à la nationalité* of June 2011 sought to deter illegal immigration by amending expulsion mechanisms. During the state of emergency 2015-2017, the adopted exceptional laws aimed at influencing and regulating the migratory control, thus the immigration regulations. An example has been the Law of 13 November 2014, which introduced the Articles 214-1 to 4 of the Code of Entry and Residence of Foreigners and the Right to Asylum. Since the Law of 30 October 2017, the control of migrants was subject to administrative measures, because of the harmonisation between the surveillance systems of the terrorist threat and those envisaged to control the foreigners. Indeed, the aliens have been deemed as the target of the "permanent" state of emergency.

In UK, hardening immigration, asylum and borders controls constituted a central role in the UK's counterterrorism legislation and parliamentary debates since 9/11. In the British political debates, terrorism was described as an issue of checking foreigners, both those entering in UK and those who already lived in the country. The outcome of this effort was the British counterterrorist legislation's influence on immigration and asylum laws and sometimes the convergence between the two. However, the emphasized controls on migrants blurred significant gaps between citizens and aliens, in terms of legal rights and of an affective and qualitative sense of belonging. The link between immigration and counterterrorism was evident through two main convictions: the former consisted of the idea that potential terrorist could abuse of asylum and immigrations mechanisms; the latter was the use of an immigration tool, the Special Immigration Appeal Committee (provided for by the

ATCSA 2001), in the war on terror. The ATCSA 2001 itself contained the Part IV that was entitled "Immigration and Asylum", where the indefinite detention of only non-nationals demonstrated a clear idea that the foreigners constituted the major terrorist threat. In the context of the counterterrorism legislation's implementation in a post-9/11 scenario, the strict Nationality, Immigration and Asylum Act entered into force in November 2002. Another striking example of the combination between immigration rules and antiterrorist laws has been the Immigration, Asylum and Nationality Act, approved in March 2006. The latter required that asylum is forbidden for anyone who has committed or incited others to prepare or encourage terrorism, and those who are deemed to be terrorists can be excluded from protection provided for by the Convention on the Status of Refugee. Right after the Terrorism Act of 2006, the UK Borders Bill was approved in 2007, which aimed to "securitize" migration by reducing terrorist attacks through a system of borders that would prevent the terrorist suspects' entrance in UK, through the strengthening of immigration control's powers. In 2008, the Criminal Justice and Immigration Act introduced a special immigration status for those who are deemed to be involved in terrorism. Finally, the Immigration Act of 2014 and the Immigration Act of 2016 prompted the idea of UK as a hostile environment to migrants, in a context where the risk of terrorist attacks in the British territory had been evaluated as severe.

The increasing discrimination between citizens and aliens, and the consequential limitation of non-nationals' rights, was evident through the inclusion of an additional kind of measure that was often utilised as a counterterrorist instrument: the deprivation of citizenship, whose regulations have been restricted under the stimulus of and by antiterrorist laws. The revival of such a measure in the fight against terrorism might have been given by the fact that sometimes the attackers were home-grown terrorists, thus citizens of the countries where the terrorist attacks were perpetrated, such in the case of Paris attacks in 2015. In both France and UK, the deprivation of citizenship *ratio* has been connected to the governments' objective of removal of those individuals who are considered a risk to the national security, since the main difference between citizens and aliens is that the latter can be deported. Deportation has been the clear goal of French and British policies on citizenship. Hence, the loss of citizenship became a method to "externalise" the management of the risk and the penal treatment of individuals. Therefore, the measure has often been a tool to expel potentially dangerous individuals and to prevent them from freely moving inside and outside the national territory. It has also been a symbolic sanction with a function of deterring terrorist actions, in the sense that it discourages people to accomplish terrorist activities, since losing their citizenship would be considered to be too high a cost to pay. Both countries have displayed a common tendency to modify these provisions in the light of terrorist attacks and of their respective

counterterrorist legislation. Sometimes, revocation of citizenship's measures were actually contained in antiterrorist laws. Moreover, they show three common features in France and UK: the deprivation policies made the citizenship dependent on non-engagement in terrorism; governments ensure that the deprivation has severe effects on the targeted individuals, especially in terms of exit from the territory; these dependency and consequences usually apply only to those citizens with a "foreign background", particularly Muslims.

The French current denationalization provisions are the result of a series of amendments that were approved as part of the counterterrorism strategy. A naturalised French citizen, being also binational, may lose his or her nationality in case of terrorist offences committed before the acquisition of citizenship, and, since 2006, the temporal limit between the acquisition of French nationality and the deprivation, and the one between the commission of the offence and the application of the deprivation measure, were extended until fifteen years. This extension was promulgated by a counterterrorist Act (Law No. 2006-64 of 23 January 2006), approved through an emergency procedure in the wake of Madrid and London attacks in 2004 and 2005. Security concern pierced more and more the field of nationality law, due to the Government's tendency to transform French citizenship into a purely repressive and security instrument. In addition, after the Paris attacks of 2015, there was a failed attempt to implement a constitutional reform that aimed at constitutionalizing the deprivation of nationality for individuals who are French nationals by birth, but holding another nationality, in the case of their conviction for an offence seriously undermining the life of the Nation, including acts of terrorism. In any case, the French counterterrorist approach also included amendments to the nationality law, sometimes directly contained in counterterrorist laws, promoting the idea that citizens with a foreign or immigrant background are more dangerous or more likely to be terrorists than the "true" French by birth. French deprivation of citizenship provisions, in connection with terrorist crimes, still fosters a discrimination between French individuals in the light of the way with which they acquired French nationality, whether by naturalisation or by birth, and depending on the possession of one or more nationalities. In case of the commission of a terrorist crime, these individuals are treated differently since only the naturalised citizens with dual nationality may lose their citizenship, facing an additional punishment with respect to citizens by birth and naturalised mono-national citizens.

In the UK's scenario, the British deprivation of nationality provisions not only are stronger than the French ones but are also more restrictive with respect to the individuals' rights and personal life. As a matter fact, the State's discretion and executive power to deprive citizens from their British citizenship were expanded from time to time to make denationalisation easier, as a result of the UK's engagement in the fight against terrorism. Since 2002, the

citizenship deprivation was also allowed for British citizens by birth with dual nationality and the grounds for depriving nationality were changed, lowering the standard of proof. Indeed, the individual could lose his nationality if the Secretary of State was merely satisfied that there had been a conduct that was "seriously prejudicial to vital interests" of UK. The discrimination between two categories of British citizens by birth was prompted: the dual nationals who can be deprived from their citizenship by Government's discretion, and the mono-nationals who deserve better legal protections. Furthermore, the approved changes allowed to apply deprivation and deportation mechanisms to happen simultaneously, and many times the deprivation of citizenship was ordered while the individual was abroad in order to apply immediately an exclusion order, preventing him to return to UK. Actually, the UK approach is a clear example of viewing citizenship as a security matter, and as an instrument to expel unwanted individuals from British territory. Most of the deprivation of citizenship decisions were indeed followed by deportation orders. In 2006, the State's power and discretion to remove citizenship were extended. The test, on which the deprivation's decision was based, was furtherly weakened by conferring to the Secretary of State the power to deprive nationality if he is satisfied that the deprivation is "conducive to the public good", that was the same standard for deportation procedures. The most striking change in the nationality law happened in 2014, when the Immigration Act permitted an intrusion in the individuals' personal life since it allowed a violation of the prohibition of statelessness, by allowing the revocation of citizenship became possible also for naturalised citizens who do not have another nationality when he or she "conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom" and the Secretary of State has "reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory". Lastly, one of the specific traits of UK's system is that the citizenship revocation connected to terrorist acts may be ordered without a criminal conviction, giving to the Executive a wide margin of action and a great power in deciding whether to remove nationality or not. That is quite disrespectful of the fundamental rights' sphere.

It is important to highlight that the antiterrorist legislation had an impact on fundamental rights and fostered discrimination within national societies, not only through their limiting provisions and their influence on strict immigration policies, but also by including terrorism-related denationalization measures, which also engaged ECHR Rights, such as the right not to be subject to inhuman or degrading treatment or punishment, the right to respect for private and family life, the right to non-discrimination, and the rights to a fair trial and to an effective national remedy.

The third and final chapter of the dissertation intended to verify the role of the High Courts, in

France and UK, in the face of the counterterrorist legislation's intrusion in the fundamental rights' domain, and to analyse whether they have managed to guarantee, through their decisions, a sort of equilibrium between security demands and the protection of individual rights. In both countries, the constitutionality of counterterrorist legislation, in relation to the infringement on individual rights, has been called into question several times, but the approaches of the French Constitutional Council and of the UK House of Lords were deeply different. This distinct judicial response might be affected by their diverse legal systems. Indeed, the judges' role has been different in France and in UK, due also to their different constitutional models, described in the introduction. Indeed, in the civil law systems, the judge's decision-making is quite secondary, while in common law organisations as the UK, it is primary and binding. Not by chance, the British Government demonstrated to be noticeably influenced by the House of Lords' rulings on the respect of fundamental rights.

Specifically, regarding the France's scenario, although the French Constitutional Council was designed just as an instrument to guarantee the distribution of normative competences between the Government and the Parliament, it acquired over time the role of protector of rights and freedoms. However, it displayed little hesitation in sanctioning politically sensitive legislation, especially with regard to the French antiterrorist laws' constitutional review. Indeed, the main Constitutional Council's approach in reviewing counterterrorist acts and in guaranteeing a correct balance between security measures and rights' safeguards has been marked by deference to the legislator and by a judicial self-restraint, which has been historically a typical element of the Council. This deference was partly due to the fact that the Constitutional Council demonstrated a broad understanding of public order prevention and security requirements. In effect, the measures restricting the rights and freedoms appear all the more justified in the eyes of the Constitutional Council since their purpose is to protect public security and order, and thus to purse the legitimate aim of the fight against terrorism. The dissertation has examined a series of decisions where the Council adopted certain techniques of self-restraint through which it could keep the most controversial antiterrorist measures, both after 9/11 attacks and in the state of emergency, within constitutional limits and to avoid a declaration of unconstitutionality. The rulings, representing this Council's attitude, are the decision 2003-467 DC of 13th March 2003, the decision 2005-532 DC of 19th January 2006, the decision 2015-713 DC of 23rd July 2015, the decision 2015-527 QPC of 22nd December 2015, the decision 2016-536 QPC of 19th February 2016 and the decision 2017-695 QPC of 29th March 2018.

Among the Council's mechanisms for maintaining its fallback position, there was the use of the principle of "not manifest unbalance" between rights and security, rather than "not proportionate and necessary", as a standard for the constitutional review, making the review

itself global, weaker and more superficial and leaving the proportionality test to the administrative courts. Furthermore, even when the Council declared unconstitutional a legislative provision, it tended to incorporate a technique to limit and to mitigate the effects of such decisions. Indeed, it often deferred and postponed the consequences of unconstitutionality and allowed an unconstitutional act to still apply along with its infringement on rights. In addition, the Constitutional Council has often recalled the competence of the legislator to lay down the rules concerning "civil rights and the fundamental guarantees granted to citizens for the exercise of civil liberties" and has declared that the Council does not have general discretionary powers of the same nature that Parliamentary does, refraining itself from giving to the legislator indications to make the act constitutional. During the state of emergency of 2015-2017, the Council's fallback position has been favoured by the fact that it has not been the most requested judicial body to monitor the measures adopted in the context of the state of emergency, because of the administrative nature of these provisions. Moreover, the Council has justified the validation of antiterrorist measures through the affirmation the constitutionality of the principle of the state of emergency regime. This approach led the Council to legitimize an ever-deepening invasion of the individual sphere and has raised doubts about its efficiency in guaranteeing an equilibrium between security and rights, and thus in combining counterterrorism and fundamental rights.
The position of the UK House of Lords, that until 2009 represented the final court of appeal in the British judicial apparatus, was quite different. It played a vital role as a judicial court and as a counterbalance to the Government in those years when the UK's counterterrorism legislation was most controversial in terms of restricting fundamental rights.
The traditional pattern of judicial deference in national security issues changed since 9/11, when the House of Lords began to challenge the Executive's unilateralism in the security domain and to adopt a more non-deferential approach. The House of Lords has certainly contributed, more than the Constitutional Council, to the efforts for limiting the Executive's intrusion in the fundamental rights' sphere, by viewing national security concerns as no longer non-justiciable.
The new engagement of the Law Lords in the national security matters might have been favoured by some factors. The increasing civil society, involving human rights and civil liberties associations, might have been the first element. For instance, Liberty and Justice also intervened in many major cases of the House of Lords. In addition, the incorporation of the European Convention on Human Rights in the UK's domestic legal system through the Human Rights Act, approved in 1998 and come into force in 2000, had been certainly a stimulating component, giving to the judiciary a stronger sense of legitimization in intervening in human rights rulings. Then, the "war on terror" was not considered a classic

and traditional type of war or crisis, since it was more deemed as a lengthy and uncertain period of tension that does not require a high level of deference to the Executive. All these components contributed to propel the House of Lords to adopt a stronger degree of scrutiny and of interventionism, in order to better defend fundamental rights from the Executive's intrusive provisions.

The thesis has examined four main decisions, where the House of Lords often highlighted that the Government had crossed the line in its pursuit of national security at a cost to civil liberties and fundamental rights principles. The true turning point, that represented the rupture with the traditional self-restraint approach of the judiciary, was the so-called "*Belmarsh* case", the ruling "*A v Secretary of State for the Home Department* [2004] UKHL 56". In this ruling, the House of Lords affirmed that the indefinite detention without trial of non-national suspected terrorists (established by Part IV of the ATCS Act 2001) was in breach with Article 5 ECHR on the right to liberty and with Article 14 ECHR on the prohibition of discrimination. Indeed, the Law Lords declared that the Government unproperly activated the derogation procedure of Article 15 ECHR, since the contested provision was not necessary and proportional, and was heavily discriminatory. The House of Lords managed to claim the importance of the judges' responsibility and competence in protecting fundamental rights and freedoms through the conduction of the judicial review. The decision also drew the attention on the fundamental right to be free from deprivation of liberty, irrespective of the individuals' nationality. It demonstrated that, when the right to liberty is limited, strict and rigid conditions must be satisfied, being subject to an intense judicial scrutiny from which the executive and the legislature cannot escape even in case of national security issues. The resonance of this ruling is even more relevant by taking into account that, although a House of Lords' declaration of incompatibility does not have the power to invalidate a legislative act, the Government seemed to be politically obliged to abandon the detention without trial mechanism.

The dissertation has also analysed the House of Lords' decisions in the following years, that were the most representative of the House of Lords' non-deferential attitude in judging the counterterrorist legislation. These rulings are the "*A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71" (*Torture Evidence* case), the "*Secretary of State for the Home Department v JJ* [2007] UKHL 45", and the "*Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28". In these cases, the House of Lords took a significant stand, by spotlighting the importance of protecting fundamental rights even in the war on terror. It essentially declared the inadmissibility of torture-induced evidence and it affirmed that certain obligations, imposed by the PTA 2005's control orders regime, resulted in a deprivation of liberty and in a violation of the right to a fair trial (Article 6 ECHR),

seriously calling into question the functioning of control orders system.

In conclusion, a correct balance between national security requirements and fundamental rights' safeguards is far from easy to achieve, but it is essential to always remind that the protection of fundamental rights and liberties cannot be taken for granted and must not be weakened by national security needs, because it is the cornerstone of every democratic society.