Terrorist Threats, Executive Powers and Democracy under Siege

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Abstract

The state, any state, provides the means without which the individual would not be able to survive and function meaningfully in the society. The state is so far the most complex sociopolitical construct to provide an alternative of what Thomas Hobbes termed 'a warre, as of every man, against every man.' Provision of ontological security, however, is not only the state's main goal, but also it's major source of legitimacy. In the current paper I argue that this source of legitimacy is the real target of terrorist acts. This explains why terrorism, domestic as well as transnational, attracts such attention despite its relatively small impact compared to other sources of ontological insecurity, such as public health threats, car accidents, or crime. To protect itself, the executive engages in a complex strategic behavior to exploit the terrorist threat for its own benefits, a process known as "macro-securitization of a threat" in order to extract emergency powers, to promulgate anti-terrorism laws, and to secure additional budget for its power agencies. This is not a goal in and of itself, but an attempt by the executive to fulfill its role and secure its source of legitimacy. Security in such circumstances takes preponderance, as the argument goes, over democratic principles. In times of crisis, especially in the aftermath of a terrorist attack, the general public fantasizes about the power of the state to extend protection, and is willing to trade civil liberties for greater security. The current research demonstrates how the executive constructs the image of external threat, especially in the aftermath of an incident, and uses the anxiety and fear in the society in order to put enormous pressure on the legislator to pass laws that otherwise would not slip through the democratic checks. Once the additional powers are acquired, it becomes increasingly difficult to revert the balance to the status quo ante. In a long run, this could be harmful to the democratic arrangement and institutional balance of power, even in the most consolidated democratic systems. The temporal powers get extended time after time, and in some cases become permanent laws. Historical examples from UK, US and Spain are used to test the validity of the hypothesis.

Keywords: terrorism, democracy, emergency (antiterrorism) legislation, special executive powers

Introduction

'Any society that would give up a little liberty to gain a little security
will deserve neither and lose both.'
-- **Benjamin Franklin[1]**

Provision of security for the citizens is among the most important basic functions of the state, regardless of its type: democratic or not. The ability of the state to provide collective ontological security to all individuals is part of the Hobbesian social contract, and a prime source of legitimacy for both the state and for its executive power. This explains why terrorism, domestic as well as transnational, attracts such attention despite its relatively small impact compared to other sources of ontological insecurity, such as public health threats, car accidents, or crime. Looked from this perspective, terrorism poses equally dire threat to democratic[2] as well as non-democratic states.

Although recent empirical research has challenged the notion that democracies are disproportionately more targeted by terrorists than non-democracies (Savun and Phillips 2009; Lutz and Lutz 2010), previous research and conventional wisdom suggest that there indeed exists a correlation between regime type and terrorism (Schmid 1992; Charters 1994; Eubank and Weinberg 1994; Sandler 1995; Weinberg and Eubank 1998; Li 2005; Pape 2006; Pape and Feldman 2010). This is not because there must be something inherently attractive in democracies to make them fertile ground for terrorists. In and of itself democracy cannot be a satisfactory independent variable, since often times it merely offers permissive and conductive environment for political violence, such as greater civil liberties, free press (ergo greater publicity for terrorist acts), and other freedoms and institutional constraints imposed on democratic governments (Schmid 1992; Eubank and Weinberg 1994; Sandler 1995; Li and Schaub 2004; Li 2005; Nacos 2005; Drakos and Gofas 2006). Rather, it is because non-democracies have lower threshold of tolerance for political dissent and without much restraint are able to collect extensive information on their citizens and nip in the bud any attempt for political dissent, especially a violent one. It is not a coincidence that terrorism is virtually missing from totalitarian states.

The institutional structure of democratic regimes severely constrains the executive, legislative, and judicial bodies in their scope of action in fulfilling the main purpose of the state: provision of ontological security to the citizens. This is because for democracies, unlike in non-democratic states, monopoly over violence and its discretionary use is not the major source of legitimacy. Hence, democracies face a dire trade-off between the necessity to provide greater security at the expense of democratic principles, such as personal freedoms, civil liberties and fair judicial process (Wilkinson 1986; Viscusi and Zeckhauser 2003; Davis and Silver 2004; Enders and Sandler 2011). From here, the fundamental challenge to the democratic state relates to the question how to reconcile provision of

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[1] Benjamin Franklin, An Historical Review of the Constitution and Government of Pennsylvania, from Its Otigins (1759), *reprinted in* 3 The Works of Benjamin Franklin, at 107 (Jared Sparks ed. Townsend MacCount 1882).

[2] Many authors talk about 'liberal democracy' rather than just 'democracy' in the context of terrorism threat (c.f. Wilkinson 1986; Eubank and Weinberg 1994; Sandler 1995; Enders and Sandler 2011). Some authors even split hair more thinly, arguing that the electoral systems also matter, using PR vs. Majoritarian systems as dichotomous variable to explain democratic regimes' predisposition to terrorist activities (c.f. Eubank and Weinberg 1994: 429-30; Li 2005). In this paper I do not distinguish between 'liberal' and 'social' or any other kinds of democracy. Presumably, all democratic regimes, as long as they meet the Schumpeterian minimalist criteria (Schumpeter 1994) and Przeworski's definition (1991), share similar characteristics and constraints with regard to dealing with terrorist threats. For a more comprehensive definition see Larry Diamond (1999:11). He builds on the extended concept of 'procedural democracy' of Philippe Schmitter (1995), and Terry Karl (1980; 1991; 1995), but takes the idea of liberal democracy a step further by outlining ten main components, including 'individual and group liberties [which] are effectively protected by independent nondiscriminatory judiciary…[t]he rule of law [which] protects citizens from *unjustified detention, exile, terror, torture, and undue interference in their personal lives* not only by the state but also by organized non-state and anti-state forces' (emphasis added). For similar discussion see also Georg Sorensen (1993:12-13) where he uses eight conceptual characteristics of democracy.

ontological security with upholding democratic principles, both of which are sources of legitimacy and identity for the regime? The question is not as trivial as it may seem. Although there is currently not sufficient empirical evidence to confirm it, arguably the system of accountability through periodic elections embedded in the democratic systems may lead to swift replacement of any government which seems inapt to respond quickly and decisively enough to a terrorist threat, and fails to meet the expectations of its citizens for provision of ontological security. Thus, after the 9/11 attacks, the response of the policy makers was to introduce various temporary, extrajudicial measures and emergency laws, such as the Guantanamo Bay detention center or the Patriot Act, in order to reassure the general population. Since September 2001 virtually all democratic states have implemented a wide range of restrictive anti-terrorist security reforms, counter-terrorist regulations and emergency laws, although their exact number and scope differ from country to country. Thus, Spain doubled its regulations from 12 to 23, while Germany quadrupled them from 4 to 16, and the UK increased its nine-fold, from 3 to 28 (Epifanio 2011).

Clearly terrorism – and especially transnational terrorism – puts enormous pressure on democratic governments to maintain legitimacy and stay in power. The present paper examines how democratic institutions function and respond to such threats under pressure, and how the specific framing of the threat by the executive impacts the institutional balance, the overall institutional design, and the political structure of the democratic state.

Various commentators do not hesitate to point that successful counterterrorism policies pass through temporary limiting of the civil liberties and basic human rights in the name of global security for the citizens. This is usually achieved via temporal, extending extra-legal powers granted to the executive branch until the threat is dealt with. Taking a political economy perspective, Enders and Sandler (2011) use microeconomic-based indifference curve analysis to examine the dynamic of such power shift and to assess the impact of a terrorist attack on the trade-off dilemma between civil liberties and security. According to their argument, in each democratic state there exists a 'social equilibrium' in which the trade-off is at optimal value and delivers the greatest social welfare. In the aftermath of a terrorist attack, they reason, the point at which the social equilibrium is reached is pushed towards greater security and less civil liberties. This argument reflects the worldview of the so called 'consequentialists,' who believe that the danger to the ontological security of the citizens justifies surrendering civil liberties, and is a good enough reason to allow temporal deviation from the accepted democratic norms. Putting security and safety first, the consequentialists claim that the risk from an attack justifies the means, and the democratic structure is strong enough to endure such temporary paralegal measures in extraordinary times of danger. Michael Ignatieff, for example, claims that necessity may require actions in defense of democracy 'which will stray from democracy's own foundational commitments to dignity,' concluding that at the end the society will be much better off choosing the 'lesser evil' of sacrificing civil rights, as long as it remembers that it is for its own good, and it is temporal (Ignatieff 2005: 8-12).

Consequentialists in general also defend the so called 'ticking bomb scenario.' They argue that in cases where saving the life of innocent victims from a terrorist attack depends upon the ability of the state authorities to obtain vital information fast, such actions are justified. They defend the right such information to be collected by means of violating basic human rights, such as the use of torture as interrogating tactic, or by violating basic civil rights, such as spying on, invading privacy, profiling, and arbitrary detaining without due process for unlimited time presumed suspects (Parry 2004; Posner 2004; Dershowitz 2008). Shockingly, even military medical personnel – essentially physicians who have certainly taken the Hippocratic Oath – do not shy away from promoting torture and even killing of suspected terrorists. For example, the former US Navy Chief of Neuropsychiatry at Guantanamo Bay,

William Henry Anderson – a doctor himself – unabashedly and impudently claimed, 'There are about 1.4 billion Muslims in the world. Embedded within this healthy body are, perhaps, 100,000 people who are eager and active in their pursuit of killing us. Just as successful treatment of cancer requires killing of the malignant cells, we will need to kill this small minority.' Anderson then goes on further to specify that the militants' 'brains… are structurally and functionally different from ours' (Anderson 2004: 55). In brief, extraordinary situations require extraordinary measures, and all is permitted as long as it is for the good of the society.

In the current paper I challenge this perspective by examining what are the consequences from such a line of logic for the democratic structure and the institutional design of the state. In the beginning, I put forward the argument that the problem with terrorism needs to be correctly defined in the context of the threat it poses to the state, and the measures that need to be taken for successfully countering it. Thus, my first claim is that the way the problem of terrorism is framed, defined, communicated by the policy makers, and then perceived by the public, has tremendous impact on the subsequent legislation process, and as I will attempt to prove – on the democratic framework as a whole. The institutional, legal, and moral limits on the range and scope of the executive branch competences restrain its ability to exercise power that is beyond the reach of the institutional checks, and which cannot be properly accounted for. In order for any democratic state to be able to manage the challenges posed to it by terrorists, the threat has to be defined clearly, and then placed in the context of existing legal framework to deal with it without destroying the power equilibrium in the democratic system. However, the executive branch has arguably less concern about the institutional balance and more about its ability to fulfill its main function as protector of citizens' life and security, as efficiently as possible. By portraying the terrorist threat as omnipresent and lurking in the shadows, the executive branch seeks to achieve two goals: first, to justify its demand for extra power, which would broaden its immediate perimeter of governance; and second, to strip out itself from accountability, transparency, and any other form of political responsibility for failing to deliver security to the citizens it governs, in case a terrorist ploy materializes. This self-serving approach, however, has far reaching consequences.

The process, through which the executive achieves the abovementioned goals, closely corresponds to what some scholars have termed it "macro-securitization" (Waever 1998; Buzan 2006), and is described in the second part of the paper. There, I first argue that by maintaining a certain level of ambiguity and insecurity within the society the executive is using the generated pressure by both, potential and actual terrorist threat, to model the perception of impending danger among the citizens and obtain a consensus to expand its scope of action at expense of personal freedoms, civil liberties and various democratic norms. It further uses this consensus to rush extra-legal, 'temporal,' extended security measures and powers through the legislative branch that will provide the legal basis for its newly acquired wider prerogatives, and to secure the expanded budgetary funding for that. Under the generated popular pressure from fear of terrorism, the legislative branch falls victim to the very principle of democracy – accountability, embodied in the procedures of regular elections. Pressed not only by the executive branch, but also by the general public, the legislator finds it hard to oppose legislation in the name of ontological security of the citizens, even if it seem to be destroying hard established civil liberties. Finally, once passed the emergency legislation entrenches itself into the political system and extends its life indefinitely, ultimately changing the balance of power within the political equilibrium.

Democracy and the Role of the State

Without the structure of the state individuals do not possess the means and the capability to ensure their physical existence, and to exercise effectively their social functionality. For that reason they aim at

organizing in bigger social groups and delegating coercive power and authority to the state, so that it can provide them in return with security from external and internal threats, and shelter them from each other. That is the main reason for Hobbes in the *Leviathan* to argue that in the anarchic world the state of nature is the state of war – '... a warre, as of every man, against every man' (Hobbes 2009: 70). The state's origin, and its main purpose, is in providing security for its citizens so that individuals do not get atomized and swamped in the state of nature, relying only upon their own strength to survive. Thus 'the motive, and end for which this renouncing [of Natural Rights], and transferring of Right is introduced, is nothing else but the security of a mans person, in his life, and in the means of so preserving life, as not to be weary of it... This mutuall transferring of Right, is that which men call Contract' (Hobbes 1990: 74). By consenting to delegate to the state the role of protector from all threats – external as well as internal – the citizens *de facto* legitimize the control of the state over the domain of both, international and domestic politics. In this context, as Weber notes, the state acquires 'the monopoly of legitimate physical violence within a certain territory' (Weber 1994: 310-11). Therefore, the state not only has a role in providing security for itself and its citizens from external aggression, regardless whether it is coming from a state or a non-state actor, but also has obligation for managing the political dynamic within its domain. On this point Agamben argues that '[i]n the course of a gradual neutralization of politics and the progressive surrender of traditional tasks of the state, security imposes itself as the basic principle of state activity' (Agamben 2002: 1). Since the type of regime has direct impact on the domestic politics, the question whether a particular type of regime is capable to fulfill the basic obligation of the state for provision of ontological security for its citizens becomes actual.

Several scholars have recently contributed to the theories explaining sources of legitimacy for states (Easton 1965; Schaar 1981; Connolly 1984; Weber 1984; Beetham 1991). Despite the differences in opinion that exist on that topic, virtually all scholars agree that institutions are a major source of legitimacy for the state. Regardless of its type – democratic or not – any regime needs to have institutions, which allow the state to function in order to command legitimacy, to maintain order, to enforce the authority of the state, and to collect taxes, etc. Seen as political constructs that fulfill specific functions, institutions may have different origin. War is considered a major driver for state-building and for developing of institutions (Tilly 1975; Porter 2002; Howard 2009), although some scholars correctly point that outside Europe, US and Japan war has not been a major trigger for state-building (Sørensen 2001). The type of regime, however, is not determined solely by its institutional design, but also by the way power is exercised (Easton 1965; Munck 1996; 2001; 2009), and ultimately by the shared values within the ideological framework that underpins the states' organization.

Democracy is currently considered the leading regime type in the world, offering so far the best form of ideologically substantiated alternative of governance[3] (Dahl 1956; 1971; 1989; Sørensen 1990; Huntington 1991; Fukuyama 2006; Sørensen 2008). It is based on the principles of the rule of the people (Sørensen 2008: 3-4), electoral participation and contested elections, wider representation of the political values and preferences of the citizens by political parties, rule of law, freedom of speech and assembly, and civil liberties. Undoubtedly, the democratic institutional structure and ideological framework are different from that in the authoritarian regimes in many ways. Perhaps, the biggest contrast is evident in the democratic state commitments to the primacy of its own rules and the institutional separation and independence of the main sources of power. These are all measures intended to keep the structure of the system intact and protected from personal wimps of the civil servants and administrative officers. For

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[3]   For a more comprehensive debate on the theoretical aspects of democracy see discussion of the basic concepts, such as the narrow definition of 'electoral democracy' as defined by Joseph Schumpeter (1947), emphasizing the competitive elections as the essence of the democratic process (Huntington, 1991; Przeworski 1991; Lipset 1981, 1994); at the opposite end of minimalists are the 'maximalist' theory of David Held (1987), and the comprehensive approach of Robert A. Dahl (1971, 1989).

that reason the notion of *Rechtsstaat* is often considered *the most important* basic characteristic of the democratic regime[4] (Rose, Mishler et al. 1998: 32). Similarly, Zakaria claims that constitutional liberalism and its 'impartial judge' principles are the actual main characteristics of liberal democracy, and not just the right of mass plebiscite (Zakaria 2007).

On theory, democracy is expected to cover all aspects of the statesmanship, and to be able adequately and efficiently to govern both, the internal and the external organizational dynamics of the state. In the same time the very notion of democracy suggests constrained power for the state in respect to the rights and freedoms of the individual, especially in the context of "liberal democracy."[5] As part of its internal scale of values, the doctrine of democracy postulates high ethical and principal norms in the relationship between the individuals and the institutions, upholding the sanctity of freedom, rule of law, liberty, and human dignity – all expected to endure under any given circumstances. These principles indeed make the liberal democracy so much more suitable and desirable alternative than any other type of regime ideology. The democratic principles of governance, regardless if considered from the minimalist or from the comprehensive point of view, inevitably raise the bar for the democratic way of *modus operandi*. Democracy comes embedded with its own internal ethical code – the *internal morality of democracy* (Sunstein 2001: 7). This is essentially the aggregate of norms established by the structure of the democratic regime, in conjunction with the dynamics of the democratic process. Among others, are the constitutionally protected rights of freedom of speech, travel, privacy, and assembly. They all comprise the notion of civil liberties – essential part of democracy (Dahl 1989; Sørensen 1993; Diamond 1999).

Democratic Dilemma

The major point of contestation in the context of the current debate is related to the dilemma which principles and norms should take precedence in cases when they mutually contradict each other. While many of the principles and norms come explicitly stated within the democratic theory, implicit to any type of democratic regime comes also *the right of existence*. The major theoretical problem then lies in the question whether the necessity to deal with external and internal threats to the ontological security and the right of existence of the citizens of a democratic state overrides the civil liberties and human rights, either temporarily or permanently. The dilemma is a complex one, not only because puts the fundamental principles of democracy on test. It is further complicated by the dynamic of individual and collective rational reactions to threats, as outlined by Maslow (Maslow and Frager 1987). According to this classical notion of human behavior, in the hierarchy of needs low level ones, such as safety, take preponderance over higher level ones, such as gratification from personal liberty and civil rights, when put under the strains of existential threats, such as acts of terrorism. As Maslow correctly indicates, under such circumstances, "A common, almost an expectable reaction, is the easier acceptance of dictatorship or of military rule" (*Ibid*.: 19). The consequences from this theoretical assumption become clearer in the context of the discussion of the securitization of the terrorist threat by the executive, as discussed in the next section of this paper.

In addition, the problem with civil liberties cuts even deeper into the relationship between the state and the citizens. *If the state is supposed to protect the individual, does that mean that it can deprive him/her from basic freedoms for his/her own good?* Put in this way, the question of civil liberties comes

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[4]   Rose suggests that *Rechtsstaat* comes from *Recht* which in German refers to 'justice' therefore its application in the context of a given regime 'goes beyond the rituals of formal legality.' For more detailed discussion of the discursive meanings of the term and its broader implications to the concept for a democratic regime see Rose et al. (1998:32-33). For similar discussion see also Diamond (1999).

[5]   For outline the three major conditions for a democracy to be considered 'liberal' – competition, participation, and civil liberties see Dahl (1971:3).

at odds with the basic function of the state itself – provision of ontological security for the individual. If human life is considered priority for the state authority, then all means for protecting it are allowed and justifiable when it comes to limitations, or even complete abolition, of basic democratic principles, including human rights and civil liberties. On the other hand, if the fundamental principles of democracy are considered more important, than the state is limited in its ability to protect its citizens' lives, therefore the state is handicapped in its basic function as a sentinel of the right of existence. Classical works from Hobbes or Rousseau are of little help here, as the contractual basis of the relationship between the individual and the state, according the to former, has no relation to the legitimizing concepts on which the regime of governance is based; while the concept of "general will" necessitates exemption from the notion of wellbeing for the individual and instead puts the emphasis for legitimacy on the aggregated interest of the society, while the threat of terrorism is squarely in the domain of the individual perspective on ontological security. The dilemma reflects the dual source of legitimacy for the democratic state – provision of ontological security and guarantee of a set of freedoms and rights.

The moral hazard from this dilemma is easily identifiable: in the former case, once the Pandora box is opened for exceptions, later it will be very difficult, if not impossible, to find a reasonable line – and most importantly, one that is agreed by all groups in the society – to separate the matters related to the right of existence from matters related to the democratic virtues. In the latter case, the principles of democracy are upheld intact, but they lose their role of vital social and political regulator since they are incapable of sustaining the most basic right – that of existence.

Democracy, Institutions, and the Rule of Law

To address the dilemma outlined above, one has to look further into the relationship between democracy and rule of law as a major legitimizing factor. Often democracy is described as 'the rule of the people,' but in reality this definition is far from the actual concept of the contemporary representative democracy. The representation of public interests and people's political preferences, and indeed the satisfaction from the way of governance, is embedded in the process of accountability, made possible by a set of institutions, such as parties, legislative body, constitution, and principle of checks and balances, among other things. Under democracy all citizens are guaranteed to enjoy legal equality and a right to a due process. Along with the primacy of the law – a principle presupposing subordination of the state and its agents to the laws – the aforementioned components compose the core of the rule of law.[6] Aristotle, for example, claimed: "[T]he rule of law, is argued, is preferable to that of any individual" (Aristotle 1988, Book III, 1286 : 78). Centuries later the great Lord Chief Justice Edward Coke stated in the case of Proclamations that, '[t]he King himself ought not to be subject to man, but subject to God and the law, because the law makes him King'(quotted in Goldstein, Greene et al. 1992: 205, *supra* n.14). What is understood by 'law' here relates to Fuller's classical definition as norms which are general, publicly promulgated, not retroactive, clear and understandable, logically consistent, feasible, and stable over time (Fuller 1964). Building on this, Solum makes the conclusion that no extralegal commands should be regarded as obligatory (Solum 1994: 122), therefore reaffirming the notion of primacy of the law as the most important and unalterable basic principle in the modern democratic state. Some scholars have successfully demonstrated that the rule of law could exist, and be respected, in non-democratic societies, and as such is not unique to the democratic systems (Linz 1975; Rose, Mishler et al. 1998). But, as they also correctly point, the rule of law in these regimes is weakened by the lack of accountability to the mass electorate. For the democratic setting, the implications from the aforementioned discussion are

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[6] For more extensive explanation of the role of the rule of law in democracy, see Guillermo O'Donnell (1999). By primacy of law it is meant here the traditional concept that the law has an autonomous causal efficacy, i.e. people obey law because actions must follow prior norms. For more on that see Maravall and Przeworski (2003).

clear: rule of law essentially means compliance with the institutional rules, which are universally valid and predictable. Thus, the rule of law defines the political system as one in which everyone, including the institutions of power, and the civil servants who control them, are kept accountable to the mass electorate and to the same unbiased and non-arbitrary standards to which are all else.[7]

The rule of law presupposes compliance with the laws in two general cases: a) when problem arises in interference with the basic rights of the individuals, and b) where the rules establish who has the authority to rule and how this authority is to be exercised (Sanchez-Cuenca 2003: 69). Following similar framework, Rose et al. call the rule of law the 'dictatorship of law,' therefore emphasizing that establishing primacy of the rule of law is not possible without its imperative imposition as a dictatorship, eliminating thereof any other alternatives (Rose, Mishler et al. 1998: 1-2). Rose et al. also argue that rule of law is not only an important ingredient of the modern state, but also that without it, there cannot be any real transition to democracy, nor further democratic consolidation (*Ibid.*). Hence, the rule of law is the *sine qua non* ingredient of the democratic system.

Although the rule of the law mandates imperative obedience by the democratic state institutions, and their respective agents, to the same laws, rules and principles to which the ordinary citizens are held up, the question of consistency and compliance with the principles of democracy is not an end in itself. It is endogenous to the dynamics and functionality of the system, and thus to the state itself. In democratic systems the reason for compliance is usually linked to legitimacy. According to Max Weber, '[i]f the state is to exist, the dominated must obey the authority claimed by the powers that be.' (Weber, Gerth et al. 1991: 78) But then he asks a rhetorical question: 'When and why do men obey? Upon what inner justifications and upon what external means does this domination rest?' (*Ibid.*) The inner justification is, obviously, the sense of legitimacy. This is rather a normative conceptualization of the democratic system, emphasizing the existence of some set of common values, which are shared by the community, therefore making the virtues of liberal democracy cultural sanctities. Following this trend of logic, internalized values and norms, and over-imposed sense of legitimacy, determine and dictate people's actions. For the majority of them, breaking the law is not only illegitimate, but also immoral.

Other scholars, however, argue that the rule of law is not and should not be regarded as a normative conception, but rather as a positive one (Maravall and Przeworski 2003). In other words, people do not obey laws because they have high respect for them, and duty to do so, but because they have high incentives, such as avoidance of major transgressions, and establishment of grounds for coordinated actions (Meravall and Przeworski, 2003). This may be true when it comes down to the motivation of an individual to follow the rules and obey the laws. Indeed, if the cost for rebellion against the system is high enough to raise the risk of total loss, than compliance is the better and less risky choice (*Ibid.*). Either way, however, agents of the state (i.e. political officials), need to honor the laws of the state, either because they feel the duty, or because they have the incentive to do so (Weingast 2003). This statement is further corroborated by the necessity of the internal dynamic in the system to enforce the rule of law for its own sake. As Diamond claims, 'Only when commitment to police the behavior of the state is powerfully credible… does a ruling party, president, or sovereign develop a self-interest in adhering to the rules of the game, which makes those constitutionals rules self-enforcing'(Diamond 1999: 70).

Under democracy, the rule of law and submission to its primacy, are basic tenets, which allow the

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  Predictability is important characteristic of the rule of law, too because if the goal of the institutional system is to bring stability, this can be achieved only by clear rules of engagement and conduct that are visible to everyone and available to everyone. Therefore, institutional systems can achieve stability by compliance only when individuals can predict certain outcomes, which can be observed, so that some can be desired, and others – avoided. Maravall and Przeworski for example make the argument that the rule of law matters because 'laws inform people what to expect of others… At the same time, [laws] facilitate coordination of sanctions against a government that deviates from its own announcements.' (Maravall and Przeworski, 2003: 5).

citizens and the state institutions to interrelate in structurally regulated environment. Thus, the democratic political system functioning under the rule of law as its foundational principle represents a closed and self-sufficient structure, which excludes reliance upon extralegal methods for settlement of problems of any sort. When democracy is forced to go out of its self-imposed constrains to deal with an issue, the system loses credibility.

Permissive Social Consensus

Essentially, the status quo as initially set by the institutional design – constitutional, or otherwise – is implicit to the concept of regime type in the case of consolidated democracy. From a theoretical point of view, the choices discussed above represent the two extremes of a continuum, and reflect the general debate between absolutists and consequentialists. In practice, each status quo in a consolidated regime is based on preexisting balance that provides established measures and mechanisms to deal with threats directed both to the ontological security, and the human rights and civil liberties, of the citizens. This status quo is accepted and internalized by the majority of the citizens and the institutions, and it is furthered through education, the media, and popular culture, in congruence with the Gramscian hegemonic culture cycle. Under such circumstances, the change of the social equilibrium from point A to point B requires external force that must be strong enough to destabilize the existing balance and underlie the structural conditions for change. The change itself, however, is a result of intentional and rational decision-making of the political elites, especially of those, which hold the greatest executive power. Hence, the social equilibrium transition from point A to social equilibrium point B is quite intentionally desired by the main executive actors, and is made possible under permissive social consensus. This is, indeed, the process of securitization of the terrorist threat per se, which is missing from the theoretical framework of the original conceptualization in Waever and Buzan. This is also the reason why it is so important for the current argument to outline the sequence, in which the executive power constructs an intangible, but omnipresent perception of a threat, and to look into the dynamic how this action in period I enables the social equilibrium transition from point A to point B in period II.

The practical implications from this discussion relate to the conditions, which permit changes of the status quo, and allow for the transition from one social equilibrium to another. The democratic institutions maintain power balance by imposing coherence on the scope of actions of each other. It is through these institutions that all political actors must channel their interests in order to obtain legitimacy and resolve their conflicts, without leaving the domain of democratic principles and norms (Maravall and Przeworski 2003: 7-9). Changing an established status quo requires considerable deliberation between all participants of the political system, i.e. institutions, parties, and citizenry. Most importantly, it requires renegotiating the social equilibrium, which also means a fundamental cultural shift of the balance between the various norms and principles, which underpin the specific democratic regime. Not at last, it requires the establishment of a new hegemonic culture, which closely reflects the new social equilibrium.

Democracy, State, and Terrorism

The preceding discussion leads us to the final concept that needs to be clarified in order to examine the dynamic of securitization of threat by the executive – what actually hides behind the vague and contested notion of "terrorism." Terrorism is a form of political violence, perpetrated against civilians,

with the intent of instilling fear in order to attain political goals.[8] If we place on a continuum all the options for achieving political goals, terrorism clearly falls outside the spectrum of morally acceptable courses of action under the democratic process. But on a macro level, it is just one of the available, even rational, alternatives. The nature of the democratic regimes presupposes *a priori* agreement between the political actors to adhere to a set of simple rules of behavior, among them upholding the constitution and the laws of the land, recognizing the outcomes from the elections and rejecting illicit means of political contestation, including the use of violence. Violence, except the one perpetrated by the state itself and its overt and covert agents, is prohibited and severely punished by all states, regardless whether they are democratic or not. Thus, the monopoly over the use of violence becomes a fundamental tenet of the state, regardless of its regime, and as such is one of its basic legitimizers. In non-democratic systems, the use of violence by non-state actors is often justified by the lack of alternative courses of action. Ironically, as Sloan has pointed in one of the early comprehensive studies of terrorism, it is precisely because of this apparent lack of venues to act that the distinction between the despicable murderous acts of a "terrorist" and the legitimate campaign against a repressive regime by a "freedom fighter" becomes so difficult (Sloan 1978). More paradoxically, however, terrorists tend to justify their acts much the same way even under democracies, namely as a reaction to a tyrannical regime.

Just as with any other form of political violence, terrorism is aimed at coercing opponents into achieving political goals. However, while there is little doubt that terrorism is harmful to the state, it rarely if at all constitutes a direct and viable threat to its unity and ability to function. As long as we do not envision failing or failed states, any functioning government has enough means to protect its integrity and unity against terrorist threats. As Kenneth Waltz correctly points out, terrorism is not threatening the power of the state per se, but merely irritating it (Waltz 2002). Similarly, Gray claims that it is all but impossible for terrorist organizations to inflict truly major physical damage upon the *capabilities* of the states, much the same way it is close to impossible for states to root out 'all of the would-be warriors-by-terror' (Gray 2002). However, by endangering the life of the ordinary citizens, terrorists aim at undermining the ability of the state to deliver its most basic promise − provision of ontological security, and use this as leverage to extract political concessions from it.

This relationship between terrorism as a form of political violence and the state is even more complicated than it appears. Arguably, terrorism is inherently linked to the existence of the state itself. It is best defined by none else than its core *raison d'être*. Violence, especially political violence that is perpetrated by non-state actors, has always been present at some form or another during the evolution and consolidation of the state. But, as the state evolved over the past few centuries, it developed increasingly sophisticated mechanisms for internal control, leaving little or no room for the use of unauthorized violence as means for dissent by non-state actors. Since the only legitimate political violence is the one authorized, and/or perpetrated by the state and its agents, any other case of political violence, or intent thereof, becomes automatically an act of terrorism. That is why in its most rudimentary form, terrorism is often referred to as a type of extreme resistance against the state itself (Walter 1967). Noam Chomsky has succinctly captured this state-centered vintage point by giving it a relativistic outlook. Terrorism, he claimed, 'is not the weapon of the weak,' but 'the weapon of those who are against 'us' whoever 'us' happened to be' (Chomsky 2004: 254). Arguably, this definition is a good starting point because outlines the directional relationship between state and non-state actors in the violent competition for achieving political goals. A brief historical review of terrorism would reveal that

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[8]   Definitions of terrorism are nowadays a genre of itself. Throughout this paper I use the term terrorism as to define political violence committed by an individual, or a group, not affiliated with a particular state. State sponsored terrorism, and state terror, although part of the notion of terrorism, are beyond the scope of the paper and are not discussed here. For more comprehensive discussions of various definitions and general typology, see Shultz 1978, Schmid 1984, Hoffman 2006, Howard et al., ed. 2003 among others.

the state itself is the perpetrator of terror of the worst, most violent and deadly kind. Yet, the power to label someone a terrorist still remains firmly within the domain of the state and its agents.

The apparent conceptual variations of terrorism, and the line that separates it from other forms of politically motivated violence, complicates also the discussion how best the state can counter it. The dominant view is that the existing legislation in democratic states provides enough qualification clauses, which address the necessity in times of crisis temporarily to limit the scope and extend of the basic human rights – the so called 'derogation' clauses and mechanisms.[9] Hence, under specific, narrowly defined conditions, it is possible to derogate from certain clauses. In the context of this established view, the advocated emergency laws and extra-legal measures are traditionally rejected as acts of 'illegitimate' and 'unjustifiable' use of force, ones that do not measure up to the ends, because acts of terrorism constitute *criminal rather than political* offenses, and therefore must be prosecuted as such (O'Brien 1978; Lodge 1981). For the proponents of this view, even though terrorism is considered different from criminal activity, the act of violence itself must be prosecuted and punished under the current provisions of the criminal law (Blakesley 2006).

Yet, a growing number of scholars and policy makers argue in favor of special emergency anti-terrorism laws. Since 9/11 all democratic states, and a large number of non-democratic states, have passed an excessive number of anti-terrorism legislation. One of the most objective reasons for that lies in the state itself. Even the remote possibility, or indeed the mere speculation about a terrorist threat, causes great uneasiness with the citizens in the ability of the state to fulfill its role as the sole provider and guarantor of their ontological security. Other sources of threat to the ontological security of the citizens arguably present disproportionately larger threat to the society and to the ontological security of the citizens. Health threats, such as cardiovascular disease and cancer, are the largest killers in contemporary western world. About 500,000 Americans and 192,000 British die every year of heart related causes, for example. Car accidents are also a major public safety concern. In the United States, there are around 50,000 traffic fatalities every year, and shooting fatalities number around 9,000 per year. By comparison, the total death toll of terrorism in the United States between 1968 and 2011 is around 4,500, including 2,977 victims of September 11 attacks. Still, the state throws unprecedented amount of human capital and funds in fighting terrorism; skills and money that could be channeled in much more efficient way, and to more beneficial ends. With a fraction of the funds the United States spends on anti-terrorism each year education, healthcare, infrastructure, and environment can be significantly improved, not to mention that global plagues, such as famine and malaria, can be completely eradicated worldwide. Yet, states persistently give priority to terrorism. This should not be puzzling, though. A weak state response in the face of a terrorist threat can be seen as a failure of the executive to deliver on its part of the Hobbesian unwritten contract. This as a consequence undermines, at least partially, its legitimacy and monopole over executive power and over the use violence. For that precise reason, and not for anything else, nowadays in the post-Cold War era, terrorism tops states' agenda of threats. This is also the reason why anti-terrorism policies and measures, unlike anti-crime ones, focus primarily on *anticipation* and *prevention*. As a result, such an approach requires careful construction of a threat, which is based on perception and not on actual realization.

From a different point of view, the anti-terrorism legislation can be seen as an attempt by the state to consolidate its power in the face of challenges coming from globalization of technologies and social media. The difference between crime and political violence in this context is subtle, but consequential. It is generally assumed that criminals engage into illicit activities knowing they break the laws, and thus

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[9]   Article 15(1) of the European Convention on Human Rights (ECHR) reads, 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

accept guilt *a priory* for it. When caught, criminals may defend themselves by denying involvement, or they may seek mitigating circumstances that would explain motivation and behavior. So far, however, no criminal has made in court the argument that his or her actions were justified and righteous by the fact that he or she does not recognize the legality of the law, or indeed the legitimacy of state that has enacted it. Criminals may or may not escape justice, and when caught might or might not consider their punishment commensurable to the crime they have committed. However, the self-serving motivation behind all ordinary crimes, be it out of greed or passion, and the deeply embedded norms and values in which individuals are brought up within any society, remove the most obvious of all defense options from consideration – rejection of courts and laws legality, as well as challenging the state legitimacy itself.

This is not the case with presumed terrorists. More often than not, their justification rests on the rejection of the state itself, and all of its contiguous agencies and laws. In fact, the denial of legitimacy of the state, and the regime associated with it, is often terrorists' first line of defense. They perceive the violence as a necessary *reaction* to already established injustice, and ever since Emile Henry's infamous justification in court, they explain and justify the death of innocents with the notion of 'guilty by association.'[10] Furthermore, the success of a terrorist act consists not only it its realization, but also in the mere act of the threat itself. No democratically elected government can be held accountable by the electorate, and the citizenry at large, for devastations caused by a natural disaster, such as an earthquake, tsunami, tornado, flood, or a hurricane. It might be blamed for failing to respond adequately to its aftermath, as it was the case with Hurricane Katrina in the US, or with the post March 11, 2011 response by the Japanese government. A failure to anticipate, disrupt and prevent a terrorist attack, however, is usually seen in a very different light, and the executive bears great responsibility for not preventing a manmade carnage. A terrorist act can have serious consequences not only for the specific political actors in power, but also for the legitimacy of the regime in place, and for the legitimacy of the state as a whole.

To meet this tall challenge, executive and legislative branches feel pressured to establish a tight security. They often promote extralegal, 'temporal,' extended security measures for countering terrorism. These measures are indeed the lethal ingredients, harming the very foundation of democracy. Such measures not only crack wide open the door for exceptions that cannot be easily, if at all, closed again, but also deny the foundational principle of democracy, as already discussed at length earlier – the rule of law. Under democracy sometimes it is not difficult – indeed, in moments of crisis, such as the attacks in NYC, Madrid, London, Moscow, etc., it may be even easier – to misinterpret and mislead the citizens about the nature and the size of the threat. It is in moments like these that governments could (mis)use the pressure from fear and shock on the citizens and promote measures, which ultimately abolish many of the protections and limits embedded in the democratic political systems. In the name of the ontological security of the people, executive presses for, and the legislator swiftly passes laws that displace the existing societal equilibrium between security and civil liberties. In result, they destroy – knowingly or unknowingly – whistler-blower and watchdog parts of the civil society, and impact the freedom of speech and the free press. Such actions are often done in the name of democracy, but the paradox is that they destroy the very notion they are intended to protect.

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[10] On February 12, 1894, Emile Henry bombed the Cafe Terminus at the Gare Saint-Lazare in Paris, killing one person and injuring more than twenty others. He explained in the following way why he had carried out the bombing: "The bourgeoisie did not distinguish among the anarchists . . . the persecution was a mass one . . .and since you hold a whole party responsible for the actions of a single man, and strike indiscriminately, we, too, strike indiscriminately." To the question about the death of innocent people, he notoriously replied "… there are no innocent bourgeois!" hence introducing the "guilty by association" notion. For more on it, see Chiliad and Blin 2004.

Constructing the Threat

The way governments communicate the threat of terrorism is directly related to the way it is perceived by the general public. But, in reality, the perceived image could have little to do with the scope of the real threat itself. Rather, it could have more to do with the way the threat is formulated, or securitized, by the executive and its agencies. The concept of securitization was best formulated by Ole Waever, who claimed that "something is a security problem when the elites declare it so" and that as such becomes accepted by the general audience (Waever 1998: 44). Building on this notion Buzan claims that "macro-securitizations" are based on "universalist constructions of threats" that are aimed at "framing security issues, agendas and relationships on a system-wide basis," such as the Cold War, nuclear proliferation, environmental threats, or indeed, terrorism (Buzan 2006). After 9/11, on more than one occasions, state officials of different rank claimed that the question is not whether there will be another attack, but rather when would it happen, and what would be its magnitude. Eleven years on, however, such a threat remains hypothetical. This only shows how officials tend to present the possible threat as certain, continuous, and omnipresent, emphasizing the sense of uncertainty and vulnerability of the individual citizens, and the social order as a whole. The problem of how exactly the threat is both communicated and perceived – with its endogenous implication of uncertainty as when, but inevitability as what and how – is focal to understanding why the democratic system is regarded as more vulnerable to terrorist attacks. It reveals the dynamic how the threat is first constructed and communicated by the executive to the general population, and then after being transformed by the generated pressure, is reflected back to the legislative and the judicial branches, leaving little room for dissent. John Mueller makes a similar point with regard to the precautions against terrorist attack, essentially claiming that if no attack takes place, then 'disproved doomsayers' can successfully claim that their warnings may have prevented 'calamity from happening' (Mueller 2002: 50). With other words, it pays off for officials in power to attain to the saying that one can never be too cautious about terrorism. So far the events have proven him right.

The crux of the danger to liberal democracy posed by terrorism is directly related to how people perceive the threat and therefore how far they are willing to go in granting exclusive 'temporal' powers to the executive, or in giving up civil liberties in exchange for provision of greater security. The executive controls a great deal of information, much of which is not directly revealed to the general public. This asymmetry allows for its exploitation and possible abuse. The way rhetoric is used by government officials to portrait a threat has tremendous impact on the perception of the danger by the public, and from there – how this pressure is reflected back to the other actors. This is especially true in the aftermath of a terrorist attack, when the sensitivity of the general public is heightened. Under liberal democracy, during a time of crisis, it is the executive that has both, the responsibility and capability, to define the threat and to design the counter measures. But since it pays off to be 'extra cautious,' governments usually have rather strong incentive to overstate the scope of the threat, and to overreact in the name of the safety of the citizens. Legislation aimed at providing 'temporal' harsher extra-legal measures and means to counter terrorism is then essentially a function of the process for justification by the executive branch for the need of such temporal powers, and serves as a basis for the construction of a threatening image for the general public. This image is not in any way a reflection of the reality, but represents a distorted, exaggerated and vague version of it. The legislative branch then, under pressure from both the executive branch and the general public, finds it impossible to resist the demand for passing various anti-terrorism measures, which under normal circumstances would be incompatible with the principles of the liberal democracy. Even more importantly, such rhetoric generates an environment of intolerance in which any dissent from the official position, that is the interpretation of the threat by

the executive, becomes increasingly unacceptable. Of course, the executive usually possesses more complete details about the events and can use this knowledge to its advantage by selecting which exactly bits of information it will release.

How Secure We Are v. How Secure We Feel

Perceptions matter and the process how they are constructed is important. The actual condition of being secure is quite different from feeling secure, and the two must be distinguished. In the dictionary definitions often the condition of being "secure" refers on the one hand to being 'free from danger' (Merriam-Webster Dictionary), and safe 'against attack, impregnable, reliable, certain not to fail or give way' (Concise Oxford Dictionary); and on the other as being 'free from fear or distrust' (Merriam-Webster Dictionary) and 'untroubled by danger or apprehension' (Concise Oxford Dictionary). Let us look at some of the explanations of how perception is formed.

Many scholars emphasize terrorism's subjective nature, and the difference between its public exposition and its private perception due to the term's communicative connotation. Donald Hanle, for example, looks at terrorism from more subjective-normative point of view, claiming: 'Terrorism is called *terrorism* because it violates the normative values of the target entity regarding the employment of lethal force' (Hanle 1989: 104). Lodge reminds us that terrorism is usually done for effect, 'as theatre or public spectacle,' acknowledging that almost always terrorist goals include attracting media coverage for their activities and instilling fear among the public (Lodge 1981: 2). Tuman (2010) discusses terrorism as a vehicle for communicating messages, similar to what Kydd and Walter (2006) call a 'strategy for costly signaling.' In all instances, the scholars seem to agree that terrorists desire to attract and use publicity as part of their strategy. Behind the goal of instilling fear among the general population lurks the real reason for this hunger for public attention – to make their acts visible, and to destroy the confidence in the state, therefore undermining the ability of the state to provide security.

The important difference between *feeling insecure* and actually *being in danger* was captured early on by Wolfers. He argued that 'security, in an objective sense, measures the absence of threats to acquired values; in a subjective sense, the absence of fear that such values will be attacked' (Wolfers 1962). Therefore, we must distinguish between 'how secure we are' – that is the objective security – and 'how secure we feel' – i.e., the subjective security. The subjective character of the threat is often linked to uncertainty, and the consequential failure to determine enemies from friends. The profound distrust then inevitably brings fractures to the community of trust, and so threatens both the coherence of the society, and the legitimacy of the institutions (Huysmans 1998: 235-6). Trust is based on individual's attachment to 'routinized modes of interaction' like a 'screening-off device' type of social behavior which allows individuals to get on with their affairs of day-to-day life (Giddens 1991 : 40). In similar vein, Goffman points out that although individuals encounter constant dangers in their lives, they develop routines in order to make adjustments and focus on other tasks. Therefore, rules and routines become important in the social behavior because they give the 'social world its normal appearance' (Goffman 1976: 240). Thus, he claims, the ability to recognize friend from foe is crucial for surviving in asymmetric socio-political environment.

In that respect, the interest of terrorists and governments to exaggerate the actual threat, seem to converge: the former, to make their shadow seem greater and scarier than it is; the latter, to find justification for increasing the scope of its powers in the name of greater security. In a perverse way, this unwanted and unholy convergence of interests seems to serve the two antagonistically opposed actors equally well. This is, in fact, the real source of threat to the liberal democratic state. Furthermore, as briefly discussed earlier, states have and intrinsic vested interest to be 'on the safe side' because it is strategically wiser to be blamed for overreaction than for recklessness. By controlling the means to

communicate a subjective version of the threat, states have the power to influence – not to say 'manipulate' – the perception of the society for the impending threat and its scope. Through public pronouncements and various signaling communication devices, such as the color coding system in the US, the states use the threat from terrorism to construct their own version of it and exploit that. Individuals rely on routines to get on with their lives, while threats disturb the routines creating uncertainty and omnipresent perception of danger. That is what the executive power relies on, and when the social equilibrium is destroyed, it seeks to exploit the generated pressure for action to both, widen its budget and broaden its scope of competences.

The way the construction of the threat is done is by exploitation of the apparent difference between subjective and objective danger of terrorism, in order to deem the threat an 'ontological' – that is an existential. Using the asymmetry of information regarding the actual danger from terrorist attacks, and the level of trust citizens have in the state, the executive constructs a vague but powerful image of a faceless enemy (often living next door). The perception of the threat then evokes simultaneously general anxiety and fear of an insidious omnipresent danger that cannot be identified with certainty, nor traced to its address of origin. In the meantime, as Loader points out, the same fear and general anxiety evokes 'equally compelling hopes and fantasies' – deterministic and goal oriented in the core of their nature – that the danger will be contained and the evil, defeated (Loader 1997). The costly, and in a historical perspective perhaps imprudent, interventions in the past, such as the bombing raids in late 1998 in Afghanistan and Sudan in retaliation against the parallel bombings of the West African US embassies; or the invasion of Afghanistan in the aftermath of September 11, are used to demonstrate resolve and capabilities to act in the face of daring challenges. With the right tools available at the executive's disposal, the general public likes to think that it is impossible to be seriously harmed and such interventions help constructing that image. One can almost compare this strategy to the feeling of coziness and security when a storm is raging outside our house, yet inside it feels safe. Of course, just like in the case of terrorism, some liberties are curtailed by obvious reasons, such as the liberty of movement (say going to a movie, the store, etc.). For the obvious reasons, a terrorist threat is much more abstract, and requires elaborate communicative construction, but the basic principle remains the same.

In such cases acquiring extralegal powers becomes not just a viable option, but an attractive one and worth it. That is when various agents of the executive come out to make public statements about the immediate need of emergency laws and extralegal powers. As Ruby argues, states effectively 'securitize' terrorism, thus enabling the 'greatest latitude in meeting the immediate ontological security needs of the public, transforming the experience of uncertainty and chaos posed by the invisible yet omnipresent 'terrorists in our midst' into a concrete enemy against which the *full powers of the state* can be arrayed' (Ruby 2004: 4).

There are two major problems emerging from the actions of the executive branch. First, the constitutional limits are in place to guard the citizens from arbitrary decisions of abusive governors. But, once these limitations have been voluntarily removed and destroyed, there is no established procedure for them to be restored. Theoretically, the purpose of the constitutional checks and balances, and the role of civil society, is to enforce limits on governance and not to rely upon the good will of the executive agencies to voluntarily self-police. But the executive usually has a rational desire to keep the freshly acquired powers indefinitely, or at least holding on to them for as long as possible. Once new powers and resources are granted – even as temporary emergency laws and measures under extraordinary circumstances – it becomes very difficult to be taken away.

The most striking and extreme example of how destructive for the institutional structure and for the survival of the democratic regime as a whole the practice of misperception of an external or internal threat and the granting of emergency laws have been, is found in the tragic history of the Weimar

Republic in the hands of Hitler, and Italy in the hands of Mussolini. Hitler was able to exploit the resentment over the Versailles Treaty (an external threat) by turning it into an ontological issue, and coupling it with the crisis of the Depression and the erosion of popular support for democracy in favor of security. Then by craftily employing propaganda and terror to undermine the democratic institutions of the Weimar Republic, he ultimately succeeded seizing absolute power.[11] Similarly, Mussolini effectively destroyed the Italian democracy by overstating the size of the economic devastation (internal threat), adding up to it the already widespread strong resentment against the treaties, in which Italy was allegedly cheated out in the distributions of the spoils of the First World War, and evoked extralegal 'temporal' measures for meeting immediate security needs and dangers (Wilkinson 2011).[12]

The second problem is that terrorism is not a tangible threat that can be eliminated, or indeed vanquished. This misperception is fueled by the executive's own rhetoric. In the most recent case, the Bush Administration waged a "war on terror" – a term that suggests an endgame. But even if we accept that away from the battlefield, there are other, more abstract, battles that can be fought and won – for example, a clash between ideologies – it would be a misnomer to claim that such a "war on terror" can be ever won. For once, terrorism is a strategy, not an ideology; it is a means to an end, not an end in and of itself. In addition, it is one very durable and well paying off strategy, perhaps as durable as the state itself. But the strategic placement of counterterrorism into the realm of ideological confrontation – thus evoking the need of survival of the society and the state as a whole – sets the stage for a wide range of measures that need no further justification.

Executive Orders and Legislative Initiatives in Democracy under Pressure

To understand, and adequately assess, the threat of terrorism from liberal democratic perspective, it is imperative to look deeper in the details and the dynamics of how the political interplay between the branches of executive and legislative powers occurs. The executive power institutions' prime concern is *security and order*, and *not preservation of liberal democratic values*. In consolidated democracies these two notions – not necessarily antithetical, but certainly not complimentary either – come bounded together by the institutional structure of accountability of checks and balances, by the 'dictatorship of the law,' and by the expectations raised and promoted by shared political culture among the general population. On theory, the legislative branch must serve as a strong hold in the democratic institutional design; it must be able to withstand pressure from the government for obtaining extranormal powers, even in times of crisis, and must keep in check the power of the executive. The obvious problem with the legislative branch however is in the subjective nature of the increased pressure exerted over it in times of crises, to meet the expectations of the general public. The Latin proverb '*Vox populi, vox Dei*,' 'The voice of the people is the voice of God' successfully captures part of the problem.[13] Legislators' placement depends on the voters. But in a moment of crisis when the citizens feel gravely endangered – regardless whether their perception is correct and corresponds to the reality, or whether it is misguided by deliberate efforts either by terrorists, or by their own government, or both, – there is a great deal of expectations for the legislative to support the efforts of the executive to curtail the crisis and deal with

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[11] For more on how Hitler rose to power, see Allen, W. S. (1965). *The Nazi seizure of power: the experience of a single German town, 1930-1935*, Quadrangle Books.; Bracher, K. D. (1970). *The German dictatorship; the origins, structure, and effects of national socialism*. New York,, Praeger Publishers.; and for more general account about Nazism and democracy, see Peukert, D. (1987). *Inside Nazi Germany : conformity, opposition, and racism in everyday life*. New Haven, Yale University Press.;

[12] For more on Mussolini, see Salvemini, G. (1973). *The origins of fascism in Italy*. New York,, Harper & Row, Lyttelton, A. (2004). *The seizure of power : fascism in Italy, 1919-1929*. London ; New York, Routledge, Paxton, R. O. (2004). *The anatomy of fascism*. New York, Knopf.

[13] This Latin proverb can be found quoted for first time by William of Malmesbury in the Twelfth Century.

the threat. Under such conditions it is indeed very unlikely for a legislator to go against the wish of the people and cast a highly unpopular nay vote in order to uphold some vague civil liberties and democratic values. Such rational choice argument could be especially validated for the American democratic system, where the voting record is usually carefully scrutinized in times of elections by many of the constituents, voters' groups, lobbyist, etc., and where members of the Congress and the Senate are routinely held accountable for their voting patterns. In such times of turbulent crisis, a nay vote against stretching out 'a little extra' security measures, and denial for giving off 'a little extra' para-constitutional powers to the executive branch for the 'sake of the nation,' could effectively amount to a political suicide. After all, people's life and security are at stake, and very few politicians would dare to insist on some vague constitutional rights and civil liberties, when the emotions are running so high. In cases like this, the *sense of temporality of the crisis* tends to obscure the pervasiveness and permanency of the legislation, and its long term consequences. Put under tremendous pressure by both, the executive branch, and by the general public, the legislator – depending upon the vote of the constituents who demand provision of security and safety – can easily overlook, or miscalculate, the long term consequences of the legislation that is about to pass. Such consequences do not become immediately evident, at least until the pressure is lowered. As William Crotty keenly points out about the case of voting the USA PATRIOT Act, discussed below, by passing it, the Congress sought the quickest and the fastest way to 'pass the buck' back to the executive branch in order to lower the pressure on itself (Crotty 2004: 196).

Selected Cases Studies

The rest of this section will offer a comparative overview of anti-terrorism legislation cases from the US, UK, and Spain, demonstrating how temporal emergency laws rushed in record time and then continuously extended, and how under pressure of terrorist acts, new anti-terrorism legislation has been passed without much resistance from the legislators. The cases were selected to represent three different types of democracies, where their duration, historical experiences, and paths of development vary, as well as their institutional and constitutional structure differs. The selected countries had different experience with terrorism over the past 150 years. In each case, however, the pattern remains the same – anti-terrorism laws are passed under tremendous pressure from the executive and the general population, within record short periods of time, and at the expenses of civil liberties and human rights. In all three cases the institutional balance of power was changed, more or less permanently, with various executive agencies gaining extended outreach.

UK

United Kingdom is one of the oldest contemporary democratic systems in the world. Its traditions in protection of basic human and personal rights date back to 1215 *Magna Carta*, which established the principle of *habeas corpus* – the right to a due process. Prior to September 11, and the wave of Islamic extremist terrorism during the first decade of 21st century, the state already had a long experience with terrorism and anti-terrorism legislation. This is mainly linked to the decades-long conflict over Northern Ireland and the terrorist campaigns of the Irish Republican Army (IRA) and later the Provisional IRA (PIRA). Because of its historical experience, UK also had one of the toughest anti-terrorism laws in the world, as for example, the *Terrorism Act of 2000*. The UK anti-terrorism laws can be traced back to the *Civil Authorities Act of 1922*, which provided the basis for maintaining the Unionist control over the territory. The Act was initially intended to last for just one year, but was continuously readopted for decades and kept alive. In 1973 it was renamed to *Northern Ireland Emergency Provisions Act*, and since then it had its own share of renewals. As Donohue observes, the UK government's rationale for

maintaining this temporal emergency legislation alive for so long kept changing from an interim measure to establish peace in the territory, to a crucial legal provision for upholding Northern Ireland's constitutional position (Donohue 2000).

Another emergency law in the more recent UK history is the 1994 *Criminal Justice and Public Order Act*. After a series of PIRA bombings between 1994 and 1996, the British Parliament enacted these extralegal powers without much debate or resistance, allowing the British police to stop and search at random vehicles and people, and to cordon off residential areas with the right to search all premises within this cordon without prior judicial authorization.[14] In the aftermath of July 2005 suicide bombings in London, the British Parliament passed a revision of the 1994 law, under the title *Prevention of Terrorism Act of 2005*. The legislation authorized the Home Secretary to impose 'control orders' – restriction of movements and possibility for detention of individuals under suspicion for involvement in terrorist activities without formally charging the individuals of wrong-doing. Furthermore, it has limited the possibility for appeal and is exempt from double jeopardy restrictions. In cases in which the Home Secretary decides, the individual can be either tagged with a monitoring device, or detained without being formally charged. Since this clause of the law violates Article 5 of the *European Convention on Human Rights* (ECHR), to which UK is a signatory since the 1950s, the Act has provided the so called 'derogating control order,' which provides for violation of international human rights legislations in cases of 'war or other public emergency threatening the life of the nation.' Such cases are promptly provisioned by Article 15 of ECHR.[15]

After the September 11 attacks, UK quickly followed the trend of adopting harsh anti-terrorism laws which directly infringed upon the civil liberties and human rights of the citizens. After the 2005 London Bombings, the Home Secretary John Raid stated that Britain was facing 'the most sustained threat since WWII' and that 'it is not the strongest of the species that survive… but the one most responsive to change' (Tempest 2006). His statement came in support of the passing of a new *Anti-Terrorism Act* of 2006. This Act aimed at complementing the large package of new terrorism laws, the *Anti-Terrorism, Crime and Security Act (ATCSA) 2001*, the British Parliament had adopted earlier. In the case of ATCSA, what is strange is that the legislator felt obligated to rush a new legislation, even though just a year before that it had already passed the comprehensive, but sensitive to human rights *Terrorism Act of 2000*. In the case of ATCSA, the legislation was rushed through the House of Commons with allowed a total of just sixteen hours limit for discussions. The Bill completed all of the legislative stages in order to become a law in less than ten days (Fenwick 2002; Tomkins 2002). The Act became infamous with its notorious outreach and the possibility for indefinite detention without formal charge or court sentence of foreign suspects, promptly certified by the Home Secretary as 'international terrorists,' and for allowing admissibility in courts of evidence obtained under torture. These clauses were subsequently struck down in 2004 by the House of Lords, but not before long and bitter dispute to have ensued. Also, among the long list of anti-terrorism laws adopted in the recent years in the UK, one other deserves attention – *The Counter-Terrorism Act* of 2008. The Bill expanded enormously the list of charges under the existing provision of anti-terrorism laws, doubled the duration of detention without charge to 42 days, and allowed for "adverse inferences" from silence.

From all the democratic states, UK and US have responded most radically to the terrorist attacks on their soil. The 2005 attacks in London the introduction of a large number of new offenses, and

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[14] For more on that see Bonner, D. (2000). The United Kingdom's Responses to Terrorism: the Impact of Decisions of European Judicial Institutions and of the Northern Ireland 'Peace Process'. *European Democracies Against Terrorism. Governmental Policies and Intergovernmental Cooperation*. F. Reinares. Dartmouth, Hants, Ashgate: 31-71.

[15] For the entire existence of ECHR, there have been altogether five cases out of 50+ in which the European Court on Human Rights has upheld the derogation clause. In all other case, the Court has ruled against the request for derogation (ECHR Factsheet 2012).

immigration limitations, which stemmed from various anti-terrorism laws, such as the 2006 *Terrorism Act* and 2006 *Radical and Religious Hatred Act*. According to the *Legislative Responses to International Terrorism* (LeRIT) dataset, antiterrorism laws and regulations in UK went from 3 before 2001, to 28 in 2011 (Epifanio 2011). In the UK, the period for detention without a charge was increased from 7 days, first to indefinite until 2004, and then to 28 days in 2006, and then amended to 42 days in 2008 but at the last moment the provision was dropped from the Bill. Still, UK is the democratic country with by far, the longest period for detention without a charge. For comparison, Australia, the country with the second such long period of detention allows up to 12 days, and the US maintains the 48 hour limit, albeit in some cases FBI and CIA can obtain waivers.

US

Terrorism is an act against the state, and for that reason anti-terrorist legislation is sometimes referred to as homeland security legislation, thus mixing external and internal threats, political violence and war. While the United States had its share of international terrorism incidents over the past century (bombings of the US Marine barracks in Lebanon in 1983; US West Africa embassies in Kenya, Tanzania, or the USS Cole attack in Yemen in 2000), the longest standing danger to its national security has always been from the inside, and not from the outside. This is primarily due to the heterogeneity of its society, to its historical experiences, and to the geographical conditions, which shelter the United States from two sides with large 'stopping' body of water. In the meantime, domestic terrorism has frequently been an issue, with two presidents – Lincoln and McKinley – being assassinated in tyrannicide attacks.

According to Maxwell, the first 'homeland security incident' occurred as far back as 1607, around the time when the first settlers arrived to the New World. One of Jamestown Colony leaders, James Kendall, was executed as an 'enemy of the colony' only a few months after its establishment, because he was found to endanger the colony's existence and survival (Maxwell 2004). Although anecdotal, this incident sets the beginning of a long tradition of fight against 'the enemy within' the country, and of what becomes later, against the frequent violent dissent against the power of the federal government. Despite the fact that September 11 is seen by many as a watershed in the experience of the country with terrorism, according to FBI official statistics, threat from domestic terrorism by various militia groups, white supremacists, anarchists, and sovereign citizen movements has been firmly present in the 20 years leading to September 11. Between 1980 and 2001, 482 planned acts were registered of which 250 were actually materialized (FBI 2004). All of them were carried out by US citizens affiliated with some of the groups mentioned above. This trend remained stable even after the September 11 attacks. The largest number of prevented terrorist attacks between 2002 and 2005 were not from radical Islamists, but from domestic anarchist and right wing extremist groups. (FBI 2006).

The first set of major nation-wide 'homeland security' laws date back to 1798 when John Adams' Administration pushed and successfully passed the *Alien and Sedition Acts*. A year before that the relationships between the United States and France abruptly deteriorated when France seized the staggering number of 300 American ships and broke diplomatic relationships with the United States. This incident provoked enormous domestic outcry. The executive swiftly pushed for sweeping legislation that targeted French immigrants, and tilted the political balance heavily in favor of the President. The result was the ratification by the Federalist controlled Congress, with the strong push from the Federalist party President Adams, of the Alien Acts (being two laws itself − the Alien Enemy Act and the Alien Act), and the Sedition Act. Both laws were in direct contradiction to the Bill of Rights that was passed only a few years before that. In particular, it authorized the President to detain and

remove aliens considered 'dangerous' and 'enemy' to the United States, and effectively eliminated the effects of the First Amendment by banning from printing and publishing 'any false, scandalous and malicious writing or writings against the government of the United States.' The law apparently included the President himself, and the Congress, but egregiously excluded from covering with the same anti-criticism protection the Vice-President (who at the time was also the leader of the opposition party), therefore allowing the opposition to be trashed during the campaign. The law was also set to expire two months after the next presidential elections, making sure that during the election campaigning period no criticism can be mounted against the President, or the majority in the Congress. Two states, Virginia and Kentucky, reacted quickly to these restrictions and passed laws requiring the states to ignore any unconstitutional federal laws. Their dissent has arguably led to the nullification crisis of the 1830s, the seceding of the South from the Union in 1861, and to the American Civil War (Beckman 2007). Similar interpretation led Maxwell to conclude that since the Congress passed The Patriot Act in October 2001, several state legislatures and hundreds of local governmental bodies have adopted resolutions challenging it on virtually the same grounds as those cited in 1798. (Maxwell 2004)

An early example of a homeland security legislation pushed by the executive in a time of (external) crisis and danger, and one that has infringed significantly upon established civil liberties and human rights of the citizens, is 1917 *Espionage Act* and 1918 *Sedition Act*. The two laws were passed by the Congress soon after the United States entered the First World War. The country would not have gone into the war in a first place, had not been for a series of events, starting with the sinking of *Lusitania*, a British transport ship, and culminating with the infamous espionage incident, known as *the Zimmermann Telegram*. In the case of Lusitania, German U-boats sought to sink supply ships from the United States to Britain in order to deprive the island from vital support and resources helping the British to fight the war. In the case of the Zimmermann affair, a telegram from the German foreign ministry to its embassy in Mexico was intercepted by the British Intelligence services and after a series of interesting twists, was finally revealed to the American President Woodrow Wilson and to the Congress. The telegram was an instruction to the German ambassador in Mexico City how to persuade the Mexican president to invade Texas and California, promising in return financial and logistic support, plus all the territory Mexico can get. The sinking of Lusitania in 1915 fairly outraged the American public, but it was not enough to convince the Congress to declare war on Germany and enter the war. This all changed in 1917 when the President swiftly released the Zimmermann Telegram to the general public, and its daring message, along with the genuine, but imprudent public acceptance of responsibility for its content by the German foreign minister himself, galvanized the American public's anger, mounting just enough pressure to force the reluctant and isolationist Congress to declare a war on Germany (Meyer 1966).

It was in this general context that the Espionage and Sedition Acts became instrumental political tools in the hands of the executive. It targeted 'sensitive information' release, but also banned insubordination and refusal for a draft in the army. During the World War I, the Wilson's Administration gave also a wild card support to a quasi-vigilante group – the American Protective League – whose members were authorized to snoop on their fellow citizens. And the period was marked by notorious raids under the directive of Attorney General Palmer in the context of the so called 'Red Scare.'[16] The Espionage and Sedition Acts actually remained in effect well beyond it targeted goal, too. In the 1920s, J. Edgar Hoover, the infamous but omnipotent director of FBI, is reported to have put the laws to a 'good' use. He reportedly kept a gigantic file with over 500,000 names and corresponding data of potential suspects, some 12% of which were subsequently targeted for surveillance and arrest (Beckman 2007).

Over the next half a century, a number of legislation pieces dealt with 'homeland security.' Among

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[16] For more on the WWI years, see Mueller, J. (2002). Harbinger or Aberration? A 9/11 Provocation. *The National Interest*. 69: 45-50.; see also Murphy, P. L. (1971). *The Constitution in crisis times, 1918-1969*. New York,, Harper & Row.

the most notable of them are *The Alien Registration Act* of 1940, the *Internal Security Act* of 1950, and the *Communist Control Act* of 1956. The first one enabled the issuing of various decrees, such as *Executive Order 9066*, by President F.D. Roosevelt, which provided legal grounds for the detention and incarceration of over 120,000 Japanese civilians after the Perl Harbor attack in 1942. The other laws helped the McCarthyism purges of alleged communists during the Red Scare era of the 1950s. In the turbulent late 1970s the Congress passed another crucial law, the *Foreign Intelligence Surveillance Act*, which facilitated FBI, CIA and other intelligence agencies to conduct electronic surveillance and collect information on US citizens and foreigners. Although, the legislator had provided for monitoring and control of the surveillance by a specially created, secret, court of a handful of federal district court judges appointed by the Chief Justice of the US Supreme Court, this court was seen as little more than a 'virtual rubber stamp for government requests,' with only five refusals out of 18,000 (Ratner and Miles 2006).

Of the pre-September 11 period, the last significant 'homeland security' law that must be discussed in somewhat greater length, is the *Anti-Terrorism and Effective Death penalty Act* (AEDPA) of 1996. The Clinton Administration proposed the bill in response to the Oklahoma City bombing in 1995 and in connection to the 1993 bombing of the World Trade Center in New York City. Despite the US long experience with different forms of terrorism, AEDPA was really the first law specifically designed to deal with it. The more general political context in which the law was crafted had to do with the changing geopolitical environment after the end of the Cold War, in which the threat of international terrorism had suddenly arrived to American soil. The general anxiety of an impending mega-terrorist attack, possibly involving weapons of mass destruction (WMD), floated openly in the public space and generated a wave of fear. A poll conducted by the L.A. Times shortly after the Oklahoma City bombing indicated that 49% of the respondents were ready to sacrifice civil liberties in exchange for greater security, and 57% believed that the existing anti-terrorism laws are too weak to meet the challenge (LATimes 1995). A year later, a staggering 72% of the Americans still believed that terrorists can hit an American city with WMDs (PEW Research Center for the People & The Press 1996). The mounting public pressure for action prompted non else, but the Republican Senate Majority Leader Bob Dole himself – the man who was gearing up to challenge the incumbent president in the November elections – to introduce the anti-terrorism bill to the Senate floor, despite the continuous resistance from many Republican senators.

AEDPA was designed to have a broad outreach, providing an array of special tools to the law enforcement agencies to deal with terrorist threats, and gave the executive new powers. For example, it empowered the Secretary of State to designate groups as 'terrorist organizations' and prohibited support for these designated terrorist groups, which included not only financial support, but also humanitarian assistance. This was especially damaging provision for various NGOs, which could no longer operate efficiently in places, such as the Palestinian Territories, and in parts of Africa, Asia, and Latin America. The law also gave more powers to the Immigration and Naturalization Service, an executive branch agency, to refuse asylum and citizenship to anyone considered having even remote or hypothetical affiliation with groups designated as 'terrorist.' The most drastic impact of the law was in the area of the basic tenets of *habeas corpus*. A special federal court was also created, which was to be appointed by the Chief Justice of the Supreme Court, and which was allowed to consider 'secret evidence' in the form of *ex parte* testimony and evidence provided in camera. Arguably, the most significant provision of all was the one authorizing the President to use 'all necessary means,' including military force and covert operations, against 'international terrorists.' This essentially empowered the President to skip over the Congress, if necessary, and authorize secret CIA kill missions, such as the 2011 assassination of Osama bin Laden in Pakistan, or even potentially to circumvent the Congress in authorizing broader military operations, such as the invasion of Afghanistan (Beckman 2007).

Although the final version of AEDPA was significantly watered down from its initial form, the law was a significant victory for the executive. It was passed with a broad bipartisan support by the Congress, with 91 in favor, 8 against and 1 abstained in the Republican controlled Senate, and with 293 to 133 and 7 abstained in a Republican controlled House. This is not an insignificant fact, because demonstrates how powerful the push from the executive was in the aftermath of a terrorist attack, and how weak the legislator was to resist such pressure. Equally important is the irony that some most vehemently opponents of the law, such as the then-Missouri Senator John Ashcroft, only five years later became one of its champions and defenders, after, of course, he found himself sitting in the chair of the Secretary of Justice. And while some of the most outreaching provisions, especially those related to financial records and bank secrecy, were pulled out of the final version of AEDPA as a concession to the opposing legislators, the post-September 11 political conjuncture made similar opposition impossible and these provisions were swiftly reincorporated into the even more comprehensive and outreaching Patriot Act.

The *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act* of 2001, best known by its backronym USA PATRIOT Act, is perhaps the most famous anti-terrorism legislation worldwide. It was signed into a law on October 26, only 45 days after the September 11 attacks. The law disproportionately increased the executive's power, giving it substantial arsenal of tools to fight the 'War on Terror' which the President George W. Bush declared to international terrorism. Despite the wide criticism of the bill, over the decade after the terrorist attack on New York City and Washington, D.C., various portions of it are continuously reauthorized, with the last two occasions taking place under what many voters considered being the liberal anti-image of George W. Bush, Barak Obama. This twist unequivocally shows how the executive is guided in its actions less by ideology and campaign promises, and more by sheer pragmatism and rationality.

The Patriot Act is largely seen as a comprehensive expansion of the law enforcement powers of the executive agencies, giving them broader rights to collect intelligence and counter potential terrorist acts. The law expanded the definition of terrorism to include 'domestic terrorism' alongside 'international terrorism.' Among the most impacted victims of the new law were various charity and humanitarian relief organizations, as well as other NGOs, which activity was severely hampered by restrictions. The bill also provided the basis for a new operational definition of terrorism which was later adopted by the newly created and generously funded, gigantic Department of Homeland Security. The law also introduced key changes to existing anti-terrorism and homeland security legislation, such as the *Foreign Intelligence Surveillance Act* of 1978, the *Electornic Communications Privacy Act* of 1986, the *Bank Secrecy Act* and the *Money Laundering Control Act* of 1970 and 1986 respectively. In total, the Patriot Act amended 12 existing acts and regulations, which covered a variety of activities, from money laundering to electronic surveillance, but also telemarketing and consumer fraud acts (Epifanio 2011). Under the new provisions of the law, aliens suspected of terrorism could now be detained for up to seven days, and became subject to various restrictions of their legal status in the country, including ban on entry, tighter border control, and most importantly, the right to create associations.

In the aftermath of the attacks, and the enormous wave of anxiety that paralyzed the general public, the polls showed that about 60% of the respondents supported curbing of civil liberties, such as tighter surveillance of electronic communications and private records. This included e-mail communications and history of web pages, phone conversations, and library records – a result that was 11% higher than the poll in the aftermath of Oklahoma City bombing (Richardson 2001). Even more significantly, the poll found that nearly half of the respondents approved passing a new law that would enable police to engage in ethnic profiling and stop people, whose appearance resembled that of the terrorists (Ibid.).

In this socially polarized environment, where emotions of fear from omnipresent but vague terrorist threat dominated, and suspicion and blatant hatred overcame rational decision making, it is no surprise

that the public's attitudes enabled the smooth and swift ratification of The Patriot Act by the Congress, with overwhelming bipartisan support in both Houses of the Congress. In an emerging political culture, in which even slight dissent was casually equated with a lack of patriotism, few senators and congressmen dared to oppose the bill. The Congress records show that out of a total of 435 representatives, The Patriot Act was passed with the wide margin of 356 to 66 in the House of Representatives, and was then opposed by only one senator in the Senate. Arguably, the ratification in the Senate resembled very much the worst traditions of democracy mimicking in the former Soviet bloc during the Cold War, when during voting procedures existed 'dissenters' that were specially designated in advance, in order emulate 'opposition.' This is not to say that anything was arranged during the vote of the Patriot Act in the US Senate, but simply to point that under the political conjuncture of the time any genuine opposition voiced by a congressman, a congresswoman and a senator would have been equal to political suicide. The voting record was a powerful tool all representatives feared, and a vote against the bill was surely going to be interpreted by the voters as a sign of unpatriotic behavior. That is why Senator Russell Feingold's (D – WI) act –the only senator to cast a nay vote – is an example of a brave, but rare, and certainly politically irrational political behavior. In contrast, an indicative example of the prevailing mood and thinking at the time comes from a detailed Washington Post report on the weeks after September 11. There, Virginia Senator Partick Leahy (D), the chair of the Senate Judiciary Committee, is portrayed to have struggled with the fear that not only the country was under attack, but his own senatorial place, had he dared to oppose the controversial legislation (O'Harrow 2002) Many congressmen and senators admitted to not have even read all, or even many, of the provisions in the bill, before voting in favor of it. According to Jim Dempsey from the Center for Democracy and Technology, the attitude of the members of the House and Senate was 'Don't bother me with the details' (Ibid.).

One of the most significant lessons from the experience with The Patriot Act is that once temporal powers are given to the executive, the case for keeping them much longer than the period they were intended to stay alive, was easy to be made, and they have all the chances slowly to turn into permanent law. Something more, it makes little difference which party's president is in office, and which party dominates the Congress' House and Senate. Keeping the newly acquired powers for as long as possible transcends ideological and party lines. In the case of the Patriot Act, some of its most contagious provisions were scheduled to expire at sunset in 2005, but the Congress reauthorized them for another five years. And when the time came again in 2009, after heated deadlocked discussions in Democrats dominated Congress, a very different one from that of four years ago, the sections, including three highly controversial areas, the 'lone wolf,' roving wiretaps for surveillance on multiple phones, and seizure of records and property in counterterrorism operations, were again extended with one more year as to prevent the issue from being used in the November 2010 midterm elections. In May 2011 President Obama once again reauthorized the extensions, this time for another four years. In it safe to predict that many of the provisions, including the highly debated 'lone wolf' will remain in force in one way or another for the foreseeable future, and sooner or later some version of it will find their way into a permanent legislation. What is needed is another external threat and crisis, for which as some commentators wisely conclude, is a question is 'when' not of 'whether.'

SPAIN

Spain's experience with terrorism is on par with that of the most European states, and dates back to the end of the 19th century, when the an anarchist wave swept over Europe and US. The most notorious early terrorist case from a long line of terrorism incidents in the country was the bombing of the Opera house in Barcelona. The incident led almost immediately to the suspension of the constitutional

guarantees and the passage of the so called *Law of 10th of July 1894* – the first explicit anti-terrorism law in the country.[17] Since then anti-terrorism laws have amassed. The 1933 *Law of Public Order* was used by the Radical Party and the Spanish Confederation of the Autonomous Right to rule the state with a series of emergency laws, where for the following few years either a 'state of alarm', i.e. a state of emergency, or a state of war was declared (Pérez 1985). This led to the constant suspension of the constitutional rights and civil liberties, and paved the road for the suspension of political opposition and use of anti-terrorism and emergency laws during general Franco's regime. After the transition to democracy in the mid-1970s, the democratic legislator passed a new Constitution which restored a great number of the civil rights and liberties suspended since the Civil War and constituted a Constitutional Court to protect individual human rights and civil liberties. Although Spain had not officially joined the ECHR, the country has ratified the Universal Declaration and other international human rights treaties, and according to Juan Carrillo Salcedo, one of the most respected jurists in the country and a judge on the European Court of Human Rights, collectively the ratified international conventions establish the foundation of the legal guarantees of human rights and civil liberties comparable to the ECHR (Salcedo 1994).

After Franco's death in 1975 one of the first steps to abolish the draconian anti-terrorism and emergency legislation that was used during the fascist regime to keep tight control over the political process in the country, was to remove terrorism crimes from the military law, and to establish a civil tribunal that will deal with criminal and terrorism offenses. Separatist terrorism, however, not only did not cease during the transition to democracy, but on the contrary, boomed. In the aftermath of a particularly violent terrorist campaign in 1978, in which 27 people were killed in different incidents, the response of the state was to push for the adoption of *Decree 21/1978* – a piece of legislation that expanded the powers of the police and courts, extended the police custody to indefinite detention with or without judicial authorization, and allowed for random search of premises without the need of prior authorization (Ocaña 2005). ETA's increasing violence prompted the adoption next year of *Decree 3/1979 on Security of the Citizens*, which remains one of the most controversial counter-terrorism legislation (Pérez 1985). The new law introduced *apologia*, or glorification and added special criminal proceedings to many offenses, such as robbery or illegal detention, that were now prosecutable and punishable under the terrorism legislation. In more recent years, in response to the renewed wave of ETA violence, a number of emergency laws and legal proceedings were introduced. The revision of the Criminal Code in 1995 included a wide range of anti-terrorism measures, including among the most obvious provisions, also such as Article 574 and Article 576, which criminalized collaboration with terrorists. These provisions raised a controversy over whether the forced mandatory payment of the so called 'revolutionary tax' – a regular payment ETA extorted from various businesses, constituted a case of such 'collaboration' (Martinez 2004).

Despite the indefinite truce that ETA announced in 1998 after prolonged negotiations with the Spanish government, the organization kept the fire burning by engaging into the so called 'violencia callejera,' a form of low intensity urban violence, in which teenagers with loose affiliations to ETA, engaged in small scale street violence. Its aggregated result was a systematic and persistent harassment of the Basque citizens who did not openly declare their nationalist views (Ocaña 2005). The state used the growing public frustration swiftly to push for new counterterrorism legislation. This effort resulted in the adoption of the *Organic Law 2/1998* of June 15, which was later expanded under the provisions of the *Organic Law 5/2000* of January 12. The laws criminalized 'counter demonstrations,' demonstrations that aimed at disturbing the order of a legal demonstration, limited the right of assembly.

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[17] For detailed history of early Spanish anti-terrorism legislation see Pérez, C. L. (1985). *Tratamiento Juridico Del Terrorismo*, Centro de Publicaciones del Ministerio de Justicia, Secretaría General Técnica.

Unlike the case of U.K., and other countries, Spain did not react with counterterrorism laws to September 11. The state kept its focus on ETA despite the rising threat from Islamic extremism and the large number of Muslim immigrants in the country. This all changed after the March 11 Madrid bombings in 2004. The initial reaction of the Prime Minister José María Aznar of the governing Popular Party's blamed the attacks on ETA, despite the clear evidence against that. According to Antonio Franco, Editor in Chief of the Barcelona-based *El Periodico de Catalunya*, the Prime Minister personally called him, along with other journalists and editors from national media, to convince him that ETA was involved in March 11 attack with the words: 'It was ETA, Antonio, don't doubt it in the least!' (Alvarez and Sciolino 2004). At the end, the governing Popular Party lost the elections, and the new government did not waste time, but pushed for sweep legislative changes in the country's Criminal Code. This resulted in new anti-terrorism legislation, the *Organic Law 4/2005* of October 10, which included stricter measures against the control and storage of substances, which can be used to create explosives. In result, Spain drastically increased the sentences for terrorist activities and introduced new limit for maximum sentences – forty years. These measures are of direct connection to the public outcry and popular demand for greater security, especially in the context of well publicized campaign to release 'non-repentant terrorists' – a public information stunt by the executive to increase the pressure over the legislator.

All in all, the anti-terrorism legislation in Spain since 2001 doubled, which is nowhere comparable to the disproportionate increase of such measures in other countries equally impacted by terrorism, such as Italy, France, Germany, or U.K. (Epifanio 2011). But, it has to be remembered that Spain had significant anti-terrorism legislation to begin with, and quite draconian laws that helped the survival of Franco's regime for decades. This resulted, on the one hand, in large heritage and legacy of all kinds of legal provisions, laws and arrangements that survived the fall of the authoritarian regime and found their place in the current body of counter-terrorism legislation. Hence, when we talk about that kind of legislation has 'only' doubled, we have to account for the initial amount that existed. On the other hand, Spain is an example how even in a country where the population is generally sensitive and averse to either emergency laws, or sweeping anti-terrorism legislation that curtail the established human rights and civil liberties, there was still a large number of laws passed over the years. This would not have been possible without the strong pressure of the voters over the legislator to pass such laws, which the executive has designated as imperative in its struggle with terrorist groups, be they domestic like ETA, or international affiliates of al Qaeda. In the case of Spain one can clearly distinguish important time periods linked to the passing of counterterrorism legislation, such as the post-Franco transitional period, the 1980s and 1990s' counter-waves to ETA's campaigns, and the post-March 11 period. In all cases, the legislator sought to limit three aspects of human rights in order to battle more successfully the terrorist threat: the right to personal liberty; the freedom of communication and assembly; and the privacy of one's own personal home. It is also rather informative the way anti-terrorism laws in the country are related to basic political freedoms, such as prohibiting certain political parties, denying funding, or prohibition of calling a referendum. Notable also are the measures against free media, although the Constitutional Court has ruled against that measure in 1987.

Conclusion

Legislation, produced under pressure in times of crisis, can damage the very structure of the democratic system, especially if there is no sound judicial system in place to contain it, or reverse it. Even the most advanced democracies in the world had their moments of deviation, some even more than once or twice. Although not fatal, emergency legislations left hard to repair damages, in some cases

leading to serious legitimacy crises. Wilkinson calls such acts of deliberate suspension, or limitations, of civil liberty on grounds of expediency 'betrayals' to the principles of democracy (Wilkinson 2011). In theory, the basic principles of democracy are considered intransient, 'cardinal,' and immutable under any circumstances, never to be tempted into slipping onto the slippery slope of consenting to 'temporal' 'emergency' laws, and extra-legal measures. In practice, institutional design not always provides the best, and the more solid, protection against such slippage. Emergency legislation can be even more dangerous, considering the elasticity of people's tolerance for curtailing basic democratic principles in the name of the security. The boundaries of liberal democracy are not clear and visible, nor are they fixed and immobile. Quite to the contrary, they are blurred and hard for determining, often leaving a huge gray area of uncertainty opened.

Counterterrorism legislation – and for that matter any other emergency legislation in times of crisis that is produced under pressure – is not always perceived at time of passing it as radical as it is in reality. It rarely constitutes a wholesale aggregate of laws and regulations for complete change and reorganization of the social and political life. No matter how incremental though, the pieces of emergency legislation could, and often do add to an existing ones, and at the end built up to a serious and unforeseen challenge to the democratic nature of the system. What is more, they are difficult to reverse. Not immediately obvious, and often out of the attention of the general public, such laws can successfully alter the institutional design of the democratic regime. In many democratic states emergency legislations grant step by step encroaching powers to the executive branch, essentially violating the principles of justice and the right to a due process.[18] The result is a political system that favors the executive branch and its security agencies in the name of provision of ontological security, but striking a damaging blow in the face of the individual rights and liberties. Most importantly, it curtails, and even destroys, the principles of accountability and transparency – ultimately changing the structure of the political system, by altering its most vital mechanisms of checks and balances. As Laura Donohue has noted in the case of the U.K. legislative efforts to counter terrorism, there is something entrenching in the nature of the emergency laws promulgated by the Government and passed by the Parliament. She makes a compelling argument about 'a confluence of primary factors and secondary circumstances,' which ultimately perpetuate the emergency measures and laws well 'beyond their intended life' (Donohue 2003: 412). As the short comparison of cases above has shown, the implications of her findings reach far beyond the case of U.K..

In summing up the abovementioned discussion, there are three major points that need to be reiterated: First, the asymmetric nature of the terrorism threat places significant moral burden over the executive branch. Not knowing the scope of the real threat, and not having any reliable and proven working early warning system in place, the best choice for every government in dealing with terrorism is to reinsure itself by securitizing the possible danger and making it certain. This would explain why it is more rational for the executive to construct an unclear, but omnipresent image of the terrorist threat. Briefly put, it pays off to exaggerate the threat and either to claim credit for keeping the state safe, or to counter criticism in a case of emergency. The government also has a vested interest to use the momentum to establish and maintain a certain level of insecurity within the society by using a specially tailored rhetoric and political pressure, and claim as much extra power as conditions allow. History has shown that so far it takes a long time for the balance of powers to be restored to levels close to the status

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[18] Numerous case studies show how such legislation has partially eroded fundamentals of the democratic system in West Germany (in the 70s and 80s), U.K., Israel, Italy, and France. For excellent reviews and case studies of European states and their struggle with terrorism, see Charters, D. A. (1994). *The deadly sin of terrorism : its effect on democracy and civil liberty in six countries.* Westport, Conn., Greenwood Press.; Reinares, F. (2000). *European democracies against terrorism : governmental policies and intergovernmental cooperation.* Aldershot, UK Brookfield, Vt., Ashgate.; Leeuwen, M. v. and Nederlands Instituut voor Internationale Betrekkingen "Clingendael." (2003). *Confronting terrorism : European experiences, threat perceptions, and policies.* The Hague ; New York, Kluwer Law International.

quo ante. The powers, of course, would come with an extra bonus – inflated budget, a factor that any organizational theory must account for in explaining the logic of organization of the executive agencies.

Second, when put under pressure, the legislative branch is expected to fail in fulfilling one of its basic functions – to preserve the structure of the democratic system. Because of its dependence on voters and their perception of the threat, rather than the real scope of the threat, it would be a political suicide for any member of the legislative branch to oppose granting the necessary powers requested by the executive to guarantee the security of the citizens. It is a paradox that the democratic system, which should keep the legislative branch accountable to the voters via elections, in times of crisis could become a victim of its own virtue. Finally, once the balance of power between the branches in the system is changed, there is neither guarantee, nor a mechanism, how and when it can be restored back. On the contrary, emergency laws can prove very durable and entrenching as the experience in the cases above demonstrate, thus minimizing the chances for restoration.

The findings in this paper go beyond the recent attacks in Europe, and the United States. They have very important implications, not only for the stability of the political system in the consolidated liberal democracies, but even more so for those in transition, where the democratizing process is not finished yet. If we are to assume that political culture supposes sharing of certain political values that can be used as self-regulating mechanism within the consolidated democracies, this political culture certainly is not developed yet within the transitional states. Curbing basic freedoms, civil liberties, and abolishing vital means for keeping the executive branch accountable in the name of national security, and the ontological safety of the citizens, ultimately destroys the legitimacy of the democratic regime, by undermining its ability to deal with the threat. Not only the process of democratic consolidation, but the very notion of democracy as a political system, is undermined and put under question. Russia, most of the countries in Latin America, and some of the countries in South Asia are among the areas, where such a risk is palpable.

From democratic perspective, a compromise with the ontological (in)security, and what is an important nuance – an (in)security based on perception of the threat, and not the real threat – is much better than compromise with the principles of the democratic system. In the former, there is a probable, but undetermined chance for loss of human life, in the latter – there is a certain chance for loss of freedoms for all. In this paper I argue that governments have a rational motivation to choose the latter, as their main goal, and a source of legitimacy, has more to do with provision of security than with safeguarding of democratic principles. The question is what the society, not so much as an aggregate of individuals, but more as subgroups and epistemic communities, would ultimately decide. The famous quote by General John Stark from 200 years ago captures well the dilemma at hand: 'Live free or die, death is not the worst of evils.'

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