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Towards a New Model of Criminal Justice System in the Era of Globalised Criminality:

The Biggest Challenges for Criminal Process Legislation

A dissertation presented by

André Claro Amaral Ventura
to
National University of Ireland, Cork

in partial fulfilment of the requirements for the Degree of Doctor of Philosophy (Ph.D) in the subject of Law

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Research conducted at the Faculty of Law

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DECLARATION OF ORIGINALITY

I declare that, to the best of my knowledge and belief, this thesis is my own work, all sources are properly acknowledged, and the thesis contains no plagiarism.

I further declare that I have not previously submitted this work, or any version of it, for assessment for any other qualification or award offered by University College Cork or any other institution.

Student’s signature:

ABSTRACT

The main objective of this thesis is the critical analysis of the evolution of the criminal justice systems throughout the past decade, with special attention to the fight against transnational terrorism.

It is evident – for any observer - that such threats and the associated risk that terrorism entails, has changed significantly throughout the past decade. This perception has generated answers – many times radical ones – by States, as they have committed themselves to warrant the safety of their populations and to ease a growing sentiment of social panic.

This thesis seeks to analyse the characteristics of this new threat and the responses that States have developed in the fight against terrorism since 9/11, which have questioned some of the essential principles and values in place in their own legal systems. In such sense, freedom and security are placed into perspective throughout the analysis of the specific antiterrorist legal reforms of five different States: Israel, Portugal, Spain, the United Kingdom and the United States of America.

On the other hand, in light of those antiterrorist reforms, it will be questioned if it is possible to speak of the emergence of a new system of criminal justice (and of a process of a convergence between common law and civil law systems), built upon a control and preventive security framework, significantly different from traditional models.

Finally, this research project has the fundamental objective to contribute to a better understanding on the economic, social and civilization costs of those legal reforms regarding human rights, the rule of law and democracy in modern States

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The completion of my dissertation and subsequent Ph.D. has been a long journey. It's true that "Life is what happens" when you are completing your dissertation. Life doesn't stand still, nor wait until you are finished and have time to manage it. Much has happened and changed in the time I've been involved with this project, but there is no doubt that these years were the most important of my life in terms of academic career development.

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CHAPTER I

METHODOLOGY AND "THEORETICAL FRAMEWORK"

"The natural sciences talk about their results. The social sciences talk about their methods"[1]

Henry Poincare

[1] Poincare, Henry, *Science and Method*, Courier Dover Publications (2011), p. 65

1) Introduction

This work aims to study a very specific topic: the development of criminal procedure law in the post-September 11 period, in the areas covered by the various important counter-terrorism and counter-organised crime measures taken not only by national governments, but also by international organisations such as the UN or NATO. More specifically, this work will seek to analyse the criminal investigation and coercive measures adopted in the fight against terrorism and organised crime, as well as the structural changes in the nature of the criminal justice system of democratic constitutional states.

Another important aspect on which we will focus in this work is related to the nature of these legal changes and their dissemination in other areas of law as regards the curtailment of rights and restriction of guarantees[2].

Finally, this study will address the impact and costs of these legislative changes[3] in the nature and structure of the democratic rule of law. As has been recognised not only by the legal community, but also by experts in economics and sociology, the impact of these ongoing changes in the criminal justice system was observed not only in the restricted area of law, but also in several key areas of contemporary society.

In this respect, we will attempt to answer the following three fundamental questions:

1) To know whether ongoing legislative changes have divided contemporary criminal proceedings into two stages: the pre-trial stage and the trial stage, with fundamentally different values and principles.

[2] Edwards, Jack E., *Bank Secrecy Act: Suspicious Activity Report Use Is Increasing, But FinCEN Needs to Further Develop and Document Its Form Revision Process*, DIANE Publishing (2009), pp. 42 - 64
[3] Gupta , Kulwant , *International terrorism: Conventions, resolutions, legislations, terrorist organisations and terrorists*, Atlantic Publishers & Dist, (2002), p. 138

2) To ascertain whether the distinction between inquisitorial and adversarial procedure (i.e. the usual distinction between continental and Anglo-Saxon legal and criminal justice systems) remains current and scientifically sustainable.
3) To objectively analyse and quantify the costs and implications of these measures for the liberal democratic nature of the state.

2) Methodological Approach

Given that this is an analysis of the legal systems – or of some legal systems – within the contemporary context of the fight against terrorism and organised crime, the comparative method would, by nature, be the ideal working method. The comparison of legislation and case law[4] between the jurisdictions chosen for analysis is therefore the primary and overarching objective of this research work. In fact, it would be impossible to identify any global trend of change or paradigm shift without addressing, for comparison purposes, the legislative building blocks corresponding to the various matters between the different legal systems.

However, in this context, if the comparative methodology itself plays an inevitably decisive role, the choice of "objects" to be compared, i.e. the legal systems chosen to be thoroughly analysed and compared, is equally important.

The comparative methodology consists of a specific research strategy based on the comparison of analytical objects related to each other by certain common features.[5] Undoubtedly, comparative law is a powerful method of the comparative research of legal systems. However, is it relevant to attribute the results of comparative

[4] Cruz, P., "*Comparative Law in a Changing World"*, Cambridge University press, London (1999), p. 5
[5] Gutteridge, H., *Comparative law: an introduction to the comparative method of legal study and research*, Cambridge University Press (1949), P. 76

investigations to comparative law? Is it possible that they constitute its integral component or should they be considered something independent, a separate domain of legal scholarship?

The comparative method is applied in comparative law as the basic specialized method of the research of legal phenomena. Besides, the emergence of comparative law as a science resulted from analysing and resolving new problems in general jurisprudence. As Saidov asserts in this connection that when defining the designation of comparative law it is necessary to speak not so much about the institutional recognition of a new discipline, but rather about the acknowledgment of a number of new problems that have appeared in legal science.[6]

As Kiekbaev states:

> "It appears hardly possible to determine the character of the comparison process. The comparatists only refer to the necessity of comparison of similar legal systems. He fails to mention the significance of comparison for the establishment of differences in those legal phenomena which were initially believed to be identical or similar. In this connection, the well-known German comparatists K. Zweigert and H. Kotz recognize that the process of comparison represents the most complicated aspect of comparative law and that is deemed rather problematic to establish any rigid rules regulating this process. David holds that comparative law is nothing but a method of study of legal systems. This theory was dominant in USSR as well as in the rest of East and Central Europe in second half of the 20th century. Acknowledging the given work, Hungarian comparatist Szabo developed it further, asserting that 'comparative law' is a much broader concept in comparison with simply a method of jurisprudence; it is characterized as a 'whole movement'".[7]

In the particular case of our study, the comparative methodology consists mainly of the comparative analysis of legal systems (previously selected) according to relevant material topics in terms of the subject of this research study: legislation relating to the criminal justice system in the fight against terrorism and organised crime.

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[6] Saidov, A.H., *Sravnitelnogo Pravovedeniye. Obshaya Chast,* Izdatelstvo Zertsalo, Moscow (2001), pp. 77

[7] Kiekbaev, Djalil I., "Comparative Law: Method, Science or Educational Discipline?", in *European Journal of Comparative Law,* V. 7, September (2003)

Similarly, it is important to note the strong doctrinal research component (doctrinal research method) that this work involves. Doctrinal research asks what the law is on a particular issue[8]. It is concerned with analysis of the legal doctrine and how it has been developed and applied.[9] This type of research is also known as pure theoretical research. It consists of either a simple research directed at finding a specific statement of the law or a more complex and in depth analysis of legal reasoning.

Indeed, a large part of the data presented herein was obtained from a comparative analysis, according to methodological and legal canons, of legislation and cases examined by courts of different jurisdictions. In this context, the extent of the doctrinal analysis cannot, in methodological terms, be ignored or neglected: on the contrary, it will be a useful tool, complementary to the comparative approach that prevails in this work.

Doctrinal research is, indeed, gaining an increasing importance within legal methodology. According to Van Gestel and Micklitz:

> "Where some have argued in the past that interdisciplinarians often produce such abstract knowledge that has little relevance for legal practice, those who criticize doctrinal research normally do not claim that this research has no value for legal practice or legal understanding. In fact, much of the criticism towards doctrinal legal research appears to be either outdated or lacking a clear focus (…). There also appears to be an emerging debate in Europe about the 'true nature' of law as a science and about the consequences for legal scholarship. Until today, however, doctrinal legal research has managed to keep its dominant position both at the national and the European level".[10]

Therefore, official sources and the prevailing doctrine are two key elements to be taken into account when analysing each of the jurisdictions. This research tool (doctrinal research method) allows us to clearly understand the major reform trends

[8] Steven, M. Barkan, "Desconstructing legal research: a Lw Librarian's Commentary on Critical Legal Studies", *Law Librarian Journal*, nº 617 (1987), p.

[9] Daryl, L., "Copyright Under Siege: An Economic Analysis of the Essential Facilities Doctrine and the Compulsory Licensing of Copyrighted Works" in *Albany Law Journal of Science and Technology,* 17 (2007), pp. 481-558

[10] Rob Van Gestel and Hans W. Micklitz, "Revitalizing Doctrinal Research in Europe: What about Methodology?", *European University Institute Working Papers*, 2011/05, pp. 5 - 6

observed in each of the jurisdictions, as well as the main issues pointed out by observers and authorised sources regarding the fight against terrorism and organised crime.

What are the reasons for the choice of these jurisdictions – United Kingdom, United States, Spain, Israel and Portugal - from a legal and sociological perspective?

The choice of the English, Spanish and Israeli legal systems is clearly based on sociological and political grounds of considerable importance: these States – traditionally integrated into the 'Western bloc" – are highly familiar with the problem and the consequences of terrorism. Moreover, their legal systems, in addition to dealing, historically, with the presence of various types of terrorism and organised crime, have had to adapt – we shall see through which mechanisms – to a new type of emerging global terrorism based on new forms of communication and dissemination.

Two topics should be considered here, from a methodological point of view: the nature of the legal systems concerned[11] (traditionally, from the point of view of international policy categorisation) and the legal means used in the fight against terrorism and organised crime. The trends and changes that have occurred – some of

[11] The reference to the nature of the legal systems considered in this analysis is based on the decisive hermeneutic criterion of the traditional distinction between the continental (inquisitorial) and Anglo-Saxon (typically adversarial) legal systems. Adversarialism has long been subject to criticism. It has been described as being too confrontational because cases are presented to courts as disputes and trials are regarded as contests of opposing interests.
The process is regarded as antagonistic and confrontational, with primacy being accorded to negating or destroying the opposition's case rather than to settling the dispute. Paradoxically, conflict is used to resolve conflict. Its focus on proof rather than truth, and party control of proceedings has been criticized as elevating the interests of the parties over the need or desire to find the truth or to secure justice more broadly.
Other pressures for change have been more practical than ideological. In a number of the criminal justice systems in Europe and the common law world, imprisonment rates have risen steadily over the past three decades, often unrelated to increases in the crime rate and have put pressure on limited and inadequate prison systems and state budgets. In 2008, in the United States, the imprisonment rate was around 756 per 100,000 of the population; in the United Kingdom, around 153 per 100,000 and in Australia, 129 per 100,000. Though imprisonment rates have been rising, European imprisonment rates are generally lower than Anglo-American rates: Spain has a relatively high imprisonment rate of 160 per 100,000, but west and middle-Europe (France 96; Germany 89; the Netherlands 100; Switzerland 76; Belgium 93; Austria 95) and the Scandinavian countries are considerably lower. One of the factors driving higher imprisonment rates has been the growth of populist punitiveness, or penal populism, which has been described as the process by which politicians tap into, and use for their own purposes, what they believe to be the public"s generally punitive stance. See Freiberg, Arie, *Post – Adversarial and Post – Inuisitorial Justice: transcending traditional Penological Paradigms* available at www.aija.org.au/NAJ%202010/Papers/Freiberg%20A.pdf

them ongoing – reflect a global scenario of changes that clearly define the emerging criminal justice systems, or at least a global trend of changes that inevitably affect the new criminal justice systems[12] in what Marks call "the post-September 11world".[13] The expression "post-September 11 world" refers to the significant changes brought about in the criminal justice systems by the September 11, 2001 attacks on New York and Washington. Indeed, it is inevitable to conclude that these events have caused a real revolution in such significant areas of the criminal justice system as police investigative powers, the prerogatives of intelligence and information systems in crime prevention, citizens' fundamental rights, prison systems, etc. In a sense, the case law and legislative changes examined throughout this work can only be understood in the light of this legal, political and sociological concept.

These are the changes – particularly from the point of view of criminal law and criminal procedure – that define the main subject of this work.

What are the main features of the changes underway in the legal systems under review, in their response to the phenomenon of terrorism and organised crime? To what extent were these changes caused directly or indirectly by the events of September 11, 2001, March 11, 2004 (Madrid) or July 7, 2005 (London)? In what way has there been a bifurcation of criminal justice systems into two distinct stages: a pre-trial stage and a

[12] Indeed, some of the most significant changes relate precisely to one of the key issues selected for analysis in this research project: the 'bifurcation of criminal justice systems'. In fact, some of the legislative reforms undertaken in countries such as England and Spain, as well as a number of administrative and police instruments that have been created reinforce the idea of a progressive distancing or separation between the pre-trial stage and the trial stage in terms of fundamental rules and principles. Therefore, what we call "emerging legislative changes" should be addressed within the framework of this increasing bifurcation of criminal justice systems. Cfr. Masferrer, Aniceto, *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism*, Springer (2012), pp. 34 – 65.

[13] Marks, Ronald. A., *Spying in America in the Post 9/11 World: domestic threat and the need for change, Greenwood Edition,* California (2010), P. 65

trial stage? What are the implications and costs of these changes in the basic structure of the democratic rule of law? [14]

These questions will be answered through a careful collection and detailed analysis of empirical and legislative data. Once again, the need for a strong methodological component is crucial: the type of data to be collected and analysed (in a universe of so much documentary information and legislative output) and the analytical comparison methods to be used are decisive elements in the structuring of this work.

In this particular work those empirical and field research elements are referred to some interviews, surveys and ethnographic observation developed in Israel and Spain. But what is exactly the utility of these empirical research methods?

Empirical research allows us to understand essentially the difference between what is usually called "law in the books" and "law in action". Basically, it is a reality interpretation tool underlying the existing regulatory system. Empirical research allows us to interpret the legal phenomenon far beyond the legislative and case-law framework, mainly through the study and analysis of social groups, of their behaviours and reactions.

At the same time, this empirical research will ease the understanding of the impact of the legal system on the social, economic and civilisational spheres[15], which will be essential, in the specific case of this thesis, to understand the costs of counter-terrorism measures in the structure and values of the democratic rule of law.

Finally, empirical research is unquestionably an essential tool when seeking to understand the sources and reasons of ongoing legislative changes, as is the case in this work. Indeed, only by understanding the real human and social context inherent in a

[14] See Cheryl Saunders, Katherine Le Roy, *The Rule of Law*, Federation Press, (2003), p.65

[15] Moser-Mercer, Barbara and Lambert, Sylvie, *Bridging the Gap: Empirical Research in Simultaneous Interpretation*, John Benjamins Publishing, (1994), pp. 105 - 120

given historical moment can one understand the reasons behind the changes that have taken place and – if in any way possible – anticipate changes in the more or less near future.

Scholars recognize the value of empirical analysis in understanding the legal system and its role in society. Due to the information technology, data sources on the legal system are improving in quality and accessibility. Compared with just a few years ago, researchers today can easily access original data sets. However, empirical studies cover a range of techniques which are usually not sharply defined. Empirical research methods can be characterized by the collection of data and data-analyses on which a theory, hypotheses or conclusion is based. Indeed, several simple empirical tests are available to confront the best available data with theory.[16] Basically, the "empirical legal research is valuable in revealing and explaining the practices and procedures of legal, regulatory, redress and dispute resolution systems and the impact of legal phenomena on a range of social institutions, on business and on citizens".[17]

In fact, it remains out of doubt that the comparative method will be the main methodological pillar of this work: the previously chosen legal systems will be compared to identify changing trends, the emergence of new paradigms of criminal justice, the (legal, social and economic) costs of these new changes in terms of civil liberties and civilisational development.

To what extent are the comparative and empirical research methods useful and scientifically sound in a work of this kind?

It is undoubtedly that the application of the comparative method has many advantages in the context of this research work.

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[16] Caminada, Koen, "Empirical research methods in law", *Universiteit Leiden Phd Course Orientation* (2009), pp. 43 - 54

[17] D. H. Genn, M. Partington, S. Wheeler, *Law in the real world: inquiring and understanding how law works, Final Report and Recommendations (*London: The Nuffield Foundation, 2006), p. 1

1) On the one hand, it enables us to identify, in each legal system, common points and aspects of legislation (adopted and awaiting approval) to prevent and combat the phenomena of terrorism and organised crime. In this respect, comparing functionally similar legal institutes allows us to understand the social, economic and legal contexts that serve as the historical basis for ongoing changes at the global level.
2) On the other hand, the comparative methodology also allows us to define, in a way, common points of legislative developments in homogeneous or similar areas. For example, the comparative analysis of counter-terrorism measures proposed and adopted in the United Kingdom and in Spain (in the aftermath of the 7/7/2005 and 11/3/2004 attacks) shows, as we shall see in the following chapters, important similarities that make it possible to establish a stable pattern of analysis of legislative developments.
3) The comparative method is generally agreed to be an important interpretive tool. At this point, the comparison of legislation and case law is a very useful tool for the interpretation of domestic and international rules relating to the fight against terrorism and organised crime.
4) Finally, the comparative methodology is both an interpretative tool and a source of development and legislative impetus, insofar as various countries (especially small and medium-sized ones) tend to adopt legal solutions similar to those already tested in other states that play a major role in international politics. As Baldwin and Davis have noted:

> "It is principally through empirical study of the practice of law…and in studying the way legal processes and decisions impact upon the citizen, that the disciplines of sociology and, to a lesser degree, philosophy, psychology, and economics have entered into and enriched the study of law. This multidisciplinary research has, in

> turn, influenced many aspects of legal practice…Even the rules and procedures of the law, which can seem arcane and specialist, reflect this influence."[18]

One last note on the methodological framework: much of the comparative research work will be carried out through the joint analysis of draft laws or legislative proposals brought before the National Parliaments of the countries concerned. This choice is based on two clear and substantial reasons: on the one hand, these legislative proposals (many of them arising in the aftermath of terrorist attacks, such as March 11 in Madrid or July 7 in London) reflect, better than anything else, the spirit of change inherent in the legislator in view of the emergence of new and potential criminal outbreaks; on the other hand, these elements allow us to identify changes on a global scale, or at least beyond the borders of each State.

For the purposes of this analysis, it should be clear that we are in a timeframe of just over a decade, which covers the period after the attacks of September 11, 2001 up to the present day. This dimension represents an important methodological topic, insofar as it restricts the underlying materiality to the analysis and even the historical and sociological context of the phenomena under study. We should therefore highlight this particular historical and temporal context on which the comparative analysis focuses: the post-9/11 period and the changes made to the legal system in response to the outbreak of global terrorism, which has since been at the forefront of the world political agenda. According to Scheppele, 9/11 starts a new era in terms of criminal justice paradigm because:

> "At the time, the United States was shocked and the world was shocked along with it. The audacity of the attack prompted an extraordinary outpouring of sympathy for the United States. It also prompted an unprecedented series of legal actions. NATO triggered art.5 of its founding Treaty to bring all Member States to the aid of the United States.' The United Nations Security Council both recognised 'the

[18] John Baldwin and Gwynn Davis, 'Empirical Research in Law', Chapter 39 in Peter Cane and Mark Tushnet, *The Oxford Handbook of Legal Studies*, Oxford University Press, 2003, at 881.

> inherent right of individual and collective self-defense' in conjunction with the attacks and also passed a series of resolutions to coordinate global action in the fight against terrorism. Regional bodies all over the world-the European Union, the African Union, the Arab League, the Association of South East Asian Nations, the Organisation of American States and more-condemned the attack, and then joined in the antiterror campaign with resolutions, directives, treaties and action plans. For a brief time after 9/11 it appeared that much of the world had come together to fight terrorism".[19]

This timeframe is justified because "this is the period everything has changed, both in terms of crime and in terms of criminal system"[20]. After 9/11 the Western countries often sneered at law. Despite the extraordinary secrecy that tried to hide the details - the wars, the black sites, the renditions, the torture – countries like United States, United Kingdom, Spain and Israel made it quite publicly clear that international law was to be no barrier to action if their self-interest were at stake. Western conduct in the "global war on terror" threw out a generation's worth of progress in bringing humanitarianism to international conflict. The Geneva Conventions regime had established that international humanitarian law covered all persons in spaces of armed conflict who are not fighting or who have stopped fighting - and yet detainees were labelled "enemy combatants" and lifted out of the Geneva system altogether . The Convention against Torture and many other international instruments had laid down strict rules not only against torture itself, but also against cruel, inhuman and degrading treatment of detainees – and yet "enhanced interrogation" brought back beatings, stress positions, sensory assault, sleep deprivation and the water board, defended as legal under the new paradigm of "war on terror". Formal extradition treaties had generally governed the movement of detained persons from country to country; extra-legal transfers of persons (renditions) were used only occasionally when a suspect was moved

[19] Scheppele, Kim, *Global Security Law and the Challenge to Constitutionalism after 9/11*, Thomson Reuters (Professional) UK Limited and Contributors (2011), p. 353

[20] Jeffrey L. Dunoff and Joel P. Trachtman, (eds) *Ruling the World: Constitutionalism, International Law, and Global Governance* (2009); Armin von Bogdandy, "Constitutionalism in International Law: Comments on a Proposal trom Germany" (2006) 47 Harv. J. Int. L. 223.

to stand trial in a country that abided by international norms. And yet, after 9/11, extraordinary rendition transported terrorism suspects from places where they were protected by law to places where they were not. On the eve of 9/11, there was already budding international agreement that major international conflicts were to be resolved through the UN Security Council. And yet the UN Security Council was bypassed as soon as it became evident that the Security Council would not agree to what the United States, Britain and Spain wanted to do on Iraq.[21]

Finally, we must bear in mind, as has been repeatedly noted by contemporary criminology and criminal sciences, that extreme caution should be exercised when identifying paradigm shifts within criminal justice systems[22]. Although there are strong, solid and persistent lines of change, the generalisation of results, extrapolation and definitive conclusions can be a serious flaw from the methodological and scientific point of view. Therefore, this work will focus particularly on identifying the main lines of change within the criminal justice systems, derived from the fight against these new forms of crime, avoiding definitive and sweeping conclusions without sufficient evidential and scientific basis.

[21] Scheppele, Kim, *supra* note 18 at 356
[22] Samuel G., "Comparative Law and jurisprudence" in *International and Comparative Law Quarterly*, vol. 47 (1998) p. 817

a) Global Terrorism and the Changing Criminal Justice System – a Theoretical Perspective

Familiarity with global terrorism is increasing. The West is the primary target of ongoing aggression. It receives successive blows that undermine its confidence in the institutions it set up to maintain world order, civil societies' confidence in their own governments, confidence in the capacity of the defence and security forces, and loyalty to the values underlying their culture.

In the 20th century, the ending of Western imperial rule in the world of peoples they considered barbarians and savages, left a residual confidence in the model of international order mentioned in the UN Charter and in the Universal Declaration of Human Rights, which were submitted to the various organisations that were created to act in the areas of economy, security, culture and development.

When NATO, the defence organisation that survived the fall of the Berlin Wall in 1989, celebrated its 50th anniversary in 1999, in Washington, the capital of the remaining superpower, it became aware of the change and, thus, adopted a new strategic concept in which it identified international terrorism and transnational organised crime as the greatest threat to the Member States.

As has so often occurred in the wars of the past, previous experience does not help to face the novelty of aggressions, and the September 11 attack, which brought down the Twin Towers, showed that the identification of the threat was not followed by the definition of an appropriate new strategy, neither by NATO nor by the Member States.

The United States, offended and humiliated by Al Qaeda, tried to review its security and criminal justice policy by signing the new National Security Strategy on

September 17, 2002[23]. This was complemented a year later by a national strategy for combating terrorism. We saw France deciding to review its Vigipirate Plan of 1978 in order to deal with the new threat, defining the Army's intervention in preventive actions. Furthermore, at the 2002 Prague Summit, NATO drew up the Military Concept MC 472 for the same purpose. While, in February 2003, Spain, which would later be severely stricken, approved the Strategic Defence Review, which also addressed "foreign terrorism against the West" and urging the Armed Forces to counter this threat within NATO and the European Union, in peace and humanitarian aid operations and supporting the state security forces.

The March 11 attack in Madrid showed that the relationship between the threat of global terrorism and the security response had not found a suitable model. US unilateralism, evidenced in Iraq, seems to have established a global danger for all Western states, without having been able to contribute to a security doctrine for world peace.

The interpretation of the additional side effects of the intervention in Iraq in response to the aggression suffered, included those such as an instability that has plagued the Security Council, NATO and the European Union. Furthermore, a discredit that has fallen upon the governments of the contingent coalition who acted without any land occupation plan and thereby, creating the void of Iraqi representation, alienating the confidence of the population, enabling the gradual, but difficult identification of the profiles of the aggressor and the aggression, of the causes and reasons and of the innovative counter-terrorism strategies.

One of the main novelties of this new world order is that the principle, signed in Westphalia, that the State is not only the sole legitimate holder of violence, but also the

[23] Michael Lind, *The American Way of Strategy : U.S. Foreign Policy and the American Way of Life: U.S. Foreign Policy and the American Way of Life*, Oxford University Press (2006), p. 132

only entity capable of making war, is definitely in crisis. The end of bipolarity in 1989[24] did not confirm the hope for peace dividends, because conflicts have multiplied, albeit with new and disturbing features: the capacity of violence by non-State actors who are nonetheless entitled to challenge the Member States and undermine their sovereign foundations.

They do not face opponents supported by a civil society of which they are the instrument, using conventional armies, on the orders of a government corresponding to international rules: terrorism, rather than confronting armies, brutally attacks innocent populations to break the pillar of trust that connects them to legitimate power, using the opponent's media to enhance the perverse effects of the attacks, also aiming at the times that allow broadcasting the events live, as was the case in the March 11 and September 11 attacks.

The new international terrorism moves and takes advantage of the international legal framework, allowing itself to protectively use the barriers of geographical state borders, abuse the free movement of persons to establish dormant internal colonies within civil societies that are prospective targets, learn how to manipulate financial and computer networks that serve transnationalism, incite subversion on account of local dissatisfaction, manipulate the theories of justification by incorporating religious values in the proclaimed strategic concept, decentralise initiatives, not make objectives clear and maintain the climate of victory for the simple fact of persisting.

Contemporary criminal justice systems – and democratically structured States – have to face an unpredictably agile and stealthy enemy by making contingency arrangements to organise preventive measures against agents for whom dying is confirmedly not a risk or problem.

[24] Bogdan, Denitch, *The End of the Cold War: European Unity, Socialism, and the Shift in Global Power*, University of Minnesota Press, (1990), p. 45

It is therefore necessary to reformulate international cooperation, starting with information services and by recognising that there is a difference between an international danger or threat and a transnational danger or threat, the latter requiring some sacrifice of the traditional reservations of sovereignty.

It will also be important to reformulate the concepts that delimit the interventions of the security forces and armed forces, because the new threat of terrorism and transnational organised crime has nothing to do with old geographical boundaries or with traditional established powers.

Indeed, the weakness of the international community in the fight against terrorism has no better expression than the inability of the UN to find a globally acceptable definition of terrorism. Since the times when the League of Nations was unable to find, before the outbreak of World War II, a concept of terrorism in its Convention for the Prevention and Punishment of Terrorism (1937), the international community has persistently failed to reach a consensus on the broad definition of terrorism.

Only very recently, from a legal point of view, and as a consequence of the global impact of the terrorist attacks of September 11, 2001 on US soil, significant progress has been made in achieving a consensual and relatively stable definition of the concept of "terrorism", although it has not yet been definitively formalised by international resolutions. It is necessary to mention, in this field, the United Nations Resolution nº 59/195, (22 March 2005), UN resolution nº 39/159 (17 December 1984), UN resolution nº 54/109 (25 February 2000), UN resolution nº 59/46 (16 December 2004) and the United Nation Security Council resolution nº 1456 (2003).[25]

[25] See all these matters, deeply analysed, at Omer Elagab and Jeeheaan Elagab, *International Law Documents Related to Terrorism,* Cavendish Publishing Ltd, (1997), p. 980

This research work is based on a relatively balanced and consensual definition of terrorism that has been defined and defended on various international platforms, such as:

- United Nations Organisation: despite the creation of the Counter-Terrorism Committee (CTC), the General Assembly has not yet reached a formal definition. However, there are several resolutions on this topic: UN Security Council Resolution 1269/1999, 1368/2001 and 1373/2001.

- United States of America: this country has produced plenty of material from which the following can be noted: Title 22 of the United States Code, Section 2656f (d); Point III. "Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends" in "*The National Security Strategy of the United States of America*".

- NATO: AAP-6 Glossary – "Terms and Definitions" provides the following definition: "the unlawful use or threatened use of force or violence against individuals or property to coerce or intimidate governments or societies, often to achieve political, religious, or ideological objectives."[26]

This definition has attempted to be somehow consensual, particularly in view of the violent conceptual disputes that have arisen at the United Nations General Assembly and Security Council over the term "terrorism". However, this definition ignores - or at least underestimates - the cases of state terrorism, the inclusion of which could lead to serious legal consequences in terms of international conflict resolution. In this respect, this study will address terrorism as a global threat, whose potential for understanding

[26] Thomas M. Pick, Anne Speckhard, Beatrice Jacuch, *Home-Grown Terrorism: Understanding and Addressing the Root Causes of Radicalisation Among Groups With an Immigrant Heritage in Europe,* IOS Press BV (2009), p. 93 ; See also Thomas-Durell Young, *Command in NATO After the Cold War,* Diane Publishing (1999), pp. 56 - 76

covers not only terrorism by religious or ideological groups, but also political and state terrorism.

b) The Research Questions

Having said that, it is important to clarify the main research questions addressed in this study and which somehow determine and delimit the research and data collection activities carried out.

1) As a first consideration we will observe and analyse the phenomenon that we could call "bifurcation of criminal justice systems", based on an increasingly relevant and evident distinction between the pre-trial stage and the trial stage itself. Indeed, the growing concern of criminal justice systems about the prevention and suppression of terrorism and organised crime seems to have produced substantial differences of values and principles between these two procedural stages. The first stage seems to be particularly marked by broad judicial and police investigative powers and prerogatives, while the second stage seems committed to the defence and protection of the fundamental rights of suspects and the traditional values of the rule of law. This bifurcation of the criminal justice system, its prevalence and impact will be analysed in its full depth and extent.

2) In a second stage, the goal is to understand if the classical difference between the adversarial and inquisitorial models of criminal procedure remains intact, relevant and current in the new international legal and geopolitical context. Indeed, it is necessary to understand if this bifurcation of criminal justice systems (referred to

above) and the new features of these systems (especially in the context of criminal procedure) are still compatible with the traditional distinction between the inquisitorial and adversarial procedure models.

3) Finally, we will analyse the implications of the antiterrorist reforms in the structure and functioning of the democratic rule of law. The sacrifices imposed in terms of civil rights and democratic freedoms – with the proliferation of extensive security legislation in criminal proceedings – has been one of the most creative debates conducted on counter-terrorism legislation in Western countries[27]. Nevertheless, any serious scientific study on this matter cannot ignore the enormous financial and civilizational costs that resulted from a whole new set of laws aimed at strengthening the powers of criminal investigation, the State's prevention and control capacity[28], reducing judicial control mechanisms in proceedings and allowing for special schemes such as controversial exceptions to commonly established constitutional principles

3) The "New Threat" and the challenges of Criminal Justice Systems.

The 1990s, with the victory of the market economy, the collapse of the USSR and the foundering of economic borders boosted by the unstoppable advance of technology, created a qualitatively new situation in the world, with a single hyperpower,

[27] Freeman, Michael, *Freedom Or Security: The Consequences for Democracies Using Emergency Powers to Fight Terror*, Greenwood Publishing Group (2003), p. 132
[28] Conte, Alex, *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand*, *Springer Edition*, (2010), p. 111

the United States, and with the proliferation of unemployed Russian scientists (and other) experts in nuclear weapons.

While there was this astonishing (unprecedented) power of the United States, the world went on to live in a network, so much so that it is now possible to create organisations of citizens from different countries to achieve a common objective. Furthermore, in the theoretical terms of international relations, some ideas were put forward (and, although debatable, took root), such as the definitive political and economic system having been reached through liberal economic schemes, according to Fukuyama, or the vertigo brought about by the clash of civilisations, according to Huntington, or citizen sovereignty against State sovereignty, according to Kofi Annan. In the case of the United States, the currently dominant doctrine is the fundamentalism of the Realist school of thought, which sees the world as a set of Nations in a chaotic system, where this power can only be dominated by military force.

All this tells us that we are experiencing a major qualitative change in our international life and in the theory of international relations. In fact, it is extremely important to remember that, in 2001, political, economic and financial power was concentrated in the United States[29] (32.6 % of global GDP), UE (26.5 %) and Japan (13.4 %), accounting for 72.5 % in this set of the Northern Hemisphere, where China would gain an increasing share during the 21st century, not forgetting Russia's recovery. All this economic power depends on the control of production and the consequent trading of oil, which in itself helps shape some of the foreign policies adopted by these international actors. Everything that has been said, plus the oil, becomes an explosive mixture that the North American Realist school of thought tends to aggravate.

[29] Simon Bromley, *American Hegemony and World Oil: The Industry, the State System and the World Economy,* Penn State Press (1991), pp. 54 - 68

The sense of (historical, religious, ethnic, economic) humiliation of some of the world's great civilisations in the face of the power represented by the Northern Hemisphere, concentrated in the United States, in addition to the shame they feel about their own governments, creates a feeling of rebellion and defiance that currently has the means to act.

The behaviour of the major oil companies in the producing countries, particularly in the Middle East, which due to their multinational nature do not forget their country of origin, helps such movements of rebellion and defiance materialise.

The case of Palestine allows for a concentration of effort and attention.

If the civilisational divide is recognised by Western thinkers themselves as dangerous and capable of giving rise to a future major conflict, everything should be done to avoid it. In this new framework, however, terrorism has the ways and means to definitely jump from the local and regional scale to the global scale. Exactly the same reasoning applies to transnational organised crime.

All this means that terrorism, being morally unjustifiable and unacceptably violent for acting mainly against innocent people around the world, is today a tool of International Politics, gaining a visibility and importance that it had never achieved when the objectives were local or regional. Indeed, we must accept that international terrorism can be simultaneously a political tool and a tool of organised crime, in both the domestic and foreign policy spheres, and this very relationship will be examined thoroughly in this research work.

a) The New Phenomena of Terrorism and Transnational Organised Crime as a Key Challenge for Criminal Justice Systems

From 1993, when the first attack on the World Trade Center was carried out by Ramzi Yousef, to 2003, with the black weeks of April and May (166 casualties in attacks in Chechnya, the Philippines, Saudi Arabia and Morocco), terrorist violence acquired a new dimension, transforming reality and changing the world. Similarly, the globalisation of violence imposed by Colombian and Mexican drug cartels, on par with major economic groups engaged in tax evasion and money laundering activities, caused a significant change in the *modus operandi* of modern crime. The same decade also saw the carnages of Oklahoma, Nairobi, Mombasa and Bali. All these disasters have a common denominator: to inflict the maximum number of civilian casualties. They were all united in the rejection of the so-called "American model" and the "unipolar world", Western lifestyle and the liberal democratic culture prevailing there.

In this context, a number of international criminal networks (such as the famous Italian *Cosa Nostra*) and some "traditional" terrorist groups (such as the Hezbollah or Islamic Jihad)[30] were gradually left behind, both in terms of the international importance and immediate impact of their attacks and in terms of the perception of a global action plan. The new players, who exhausted all the efforts made by political actors and the media, were, on the one hand, the new Mexican and Colombian drug lords (with unprecedented mass murder and terror strategies) and, on the other hand, Al Qaeda, whose proclaimed leader declared a full-fledged war against the United States and Israel since 1998.

[30] Marianne Vardalos, *Engaging Terror: A Critical and Interdisciplinary Approach*, Universal-Publishers (2009) p. 54

We must therefore conclude that the contemporary criminal landscape is changing at an exponential speed, which has caused the profound changes that criminal justice systems have undergone in recent years. In this respect, it is important to distinguish two key phenomena:

b) The New International Organised Crime

The 1990s and the early 21st century saw profound changes in the fabric of organised crime worldwide. These changes were brought about by two factors from the outset: the use and dissemination of new technologies and, on the other hand, the use of financial circuits of capital transfer and investment. Criminal organisations have become global, also internationalising the very crimes that sustain them: trafficking in drugs, weapons and women, money laundering, institutional corruption, etc.

On the one hand, current criminal networks, taking advantage of the regional free-movement areas (such as the European Union), disseminate and diversify the type of activities, making their control and police surveillance difficult; on the other hand, the effects of the criminal acts also multiply and human or arms trafficking networks, for example, have several relocated bases and can therefore diversify the action, management and coordination (as well as financial capital investment) sites.

This scenario – which is growing exponentially due to the use of the internet and new information technologies – has forced states to adopt specific legislative measures that, for the sake of efficiency, have resulted in a significant reduction in citizens' fundamental rights.

In this context, countries such as the United States and the United Kingdom have considerably strengthened police powers in citizen identification, raids, searches and

wiretapping, to the detriment of the guarantees constitutionally granted to citizens in the liberal system created in the second half of the 20th century. However, the need to control illegal trafficking and the freedom of movement and capital has caused, in recent years, substantial setbacks in the freedom of movement, in both the European Union (where several States have increased border controls and required additional measures for customs supervision) and the United States.

At the same time, the alliance between traditional criminal groups and terrorist groups has become noticeable, as they join forces to maximise common benefits. Indeed, in most cases, terrorism has been linked to crimes such as the falsification of documents, money laundering and illegal trafficking, which are mostly carried out by criminal organisations driven by purely economic and financial interests.

Consequently, the research carried out unconditionally demonstrates that Western countries have produced an incredible amount of new legislation regarding the fight against tax evasion and avoidance, money laundering and corruption. A paradigmatic case is Portugal – a Southern European country with deep-rooted corruption practices – which, in the past six years, has made a true paradigmatic revolution in bank supervision and in the fight against tax evasion and avoidance.

In any case, the ongoing changes seem to be persistent and enduring: the face of organised crime is definitely changing, acquiring a transnational scope based on powerful technological and military means. It is also inevitable to conclude that this change has produced, among other phenomena, a perverse and unpredictable consequence: a new form of international terrorism.

c) The New International Terrorism

We speak of a quantitative change due to the number of casualties in a single act, and of a qualitative change in that the border of terrorist action has moved to unexpected regions, creating a different form of war, where the apparent absence of a declared strategy is offset by marked signs of a palpable, material strategy expressed in acts, guidelines, messages, physical coordinators and military commanders. Where the targets and objectives are global, as long as they have a serious and tremendous impact on Western interests in the world and are thus capable of generating panic, fear and turmoil.

Therefore, we should perhaps speak of a global "catastrophic terrorism" seeking easy profits. A new international terrorism, that distances and distinguishes itself from other modern and pre-modern forms of political or ideological violence. Some of the features of this New International Terrorism have already been the subject of scientific research and are scattered across security reports, journal articles, independent analysts, ongoing legal proceedings and important theoretical and practical studies.

The main features, which we will examine in detail in later chapters, are:

- Its transnational or internationalised nature, due to the association and complicity of formerly isolated groups and the choice of increasingly large areas of action, taking on a global dimension. The signs of cooperation between the IRA and Colombian groups, or the complicity of Iraqi-based groups (such as Ansar al Islam) with Al Qaeda, make it necessary to review and reformulate the typical form of terrorist action. On the other hand, the penetration of Al Qaeda in more than 40 countries around the world, with renewed cells in many of them, as well as the "outsourcing" of other small, but fast-acting groups, leads us to face the new international terrorism not as the product of a

faction of fanatics – as in the 1970s and 1980s[31] – but as a federation, or a confederation, united more by the final outcome, by their common enmity and immediate objectives than by ideological, tribal, national or ethnic ties.

This obviously does not mean that the phenomenon of criminal association and international connections to terrorist groups weren't already a reality in the 1980s and early 1990s. The IRA, for example, already had a solid operational network of contacts and financing at international level, very similar to today's major Islamist and South American groups[32]. The point, here, is that these new groups of terrorists or criminal organizations seem to have developed a very specific and unique connection - at the different stages of the operational activity – based only on common objectives and financial reasons.

- The loss of territorial bases in sympathising, supporting and tolerant states and consequent demand for new clandestine bases in democratic or liberal states, or in failed, disorganised or incapable states. With the fall of Taliban power in Afghanistan in 2001-2002 and the end of cooperation between France and Sudan, as well as the strengthening of international control over remote areas in North Africa or South-East Asia, terrorist groups have gradually lost their fixed and stable bases and chosen mobile and clandestine bases, often integrated within Europe or North America.

- The use of increasingly powerful means of destruction, including the threat of using weapons of mass destruction, making fewer terrorist incidents correspond to a far greater number of casualties. This has become easier with the use of state-of-the-art explosive mixtures, portable anti-aircraft missiles and, in the case of the attack on the Tokyo Subway, with biological and chemical weapons.

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[31] Beleza, Teresa, *Direito Penal – Volume I,* Universidade de Lisboa Editora, Lisboa (1989), pp. 43 - 45

[32] Bew, Paul and Gillespie, Gordon. *Northern Ireland: A Chronology of the Troubles 1968-1999*. Lanham, MD, Scarecrow Press, (1999) p. 302; Dillon, Martin. *God and the Gun: The Church and Irish Terrorism*. New York, Routledge, (1998) p. 204

- The association of politically- and ideologically-driven groups with organised crime groups, with technical division of work and tasks, areas of influence, allocation of funds to specialised areas of action (communications, data collection, influence on bureaucratic structures, etc.). Although the relationship between terrorism and ordinary crime is a long-standing issue of criminology and criminal law, the rise of phenomena such as "narco-terrorism" has become an inescapable reality, a symbol of the alliance between terrorism and the new international organised crime.

4) Towards a New Model of Criminal Justice System

a) The new characteristics of Criminal Justice Systems

While the features and operation of terrorism and organised crime are being thoroughly studied, the examination and analysis of the effects and costs of counter-terrorism (and counter-organised crime) measures in the legislative, social and even civilisational context are becoming increasingly important.

These costs are today evident at all levels. Besides the pervasive feeling of reduction or sacrifice of some of their fundamental freedoms, citizens are actually seeing some of their constitutionally guaranteed fundamental rights restricted[33]. We will examine a number of paradigmatic cases of counter-terrorism legislation in the United States and the United Kingdom.

[33] Eckes, Christina, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford University Press, Oxford (2009), p. 185

These costs, as Donohue calls them[34], are mainly of a legal nature, but also of an economic, social and, ultimately, civilisational nature.

It is notorious that all the States chosen for analysis in this work have made significant changes in the powers and prerogatives of police and judicial authorities in the fight against terrorism and organised crime. Those powers, as will be seen on a case-by-case basis, were so extended that they often suppress fundamental rights peacefully rooted in communities. In other cases, moreover, they placed significant restrictions on the exercise of those fundamental rights: this is the case, for example, of the right to mobility, to free movement between States, to access of information and its dissemination, religious freedom, etc.

The significant increase of police powers in matters of criminal investigation and the corresponding adjustment of judicial and administrative control mechanisms have led to significant criticism of legislative developments in the Western world since 9/11. The increasing lack of control in house searches, wiretapping, computer control or banking supervision clearly reflects a very specific obsession with terrorism and organised crime. Indeed, the United States, Spain, England and even countries like Portugal or Ireland have known increasingly harsh and inflexible legislative proposals relating to fundamental rights and freedoms. Some were approved. The *Patriot Act* in the United States, or the review of the codes of criminal procedure in Portugal and Spain, or even the extraordinary extension of pre-trial detention periods prevailing in the United Kingdom for terrorist suspects are consolidated symbols of this new paradigm of criminal justice.

As will be discussed in greater detail below, wiretapping and surveillance mechanisms have been made available and widely used in all these legal systems,

[34] Donohue, Laura K., *The Cost of Counterterrorism – Power, Politics and Liberty*, Cambridge University Press (2008), pp. 3 - 7

without exception. In the prevailing post-9/11 paradigm, a predominantly exceptional mechanism becomes a routine, common and effective means of combating terrorism and transnational organised crime.

State control over electronic data transmission systems has also increased exponentially – in both quantitative and qualitative terms – causing a pervasive feeling of lack of freedom and intimacy among citizens and users. Therefore, the concept of "moral panics" seems to serve as a justification for all kinds of restrictions, since they are all carried out as a way to effectively combat terrorism and organised crime, always subject to the possibility of fatal attacks and unimaginable consequences.

Also within the context of economic activity and of financial intervention and mobilisation capacities, the costs of counter-terrorism laws have been significant.

As Donohue states:

> "Although financial counterterrorist laws may be causing an incremental erosion of areas already subject to substantial government control or regulation, they have infringed on a broad range of rights – free speech, religion, privacy and property – all important to the overall health of a democracy. They have caused other political and humanitarian damage as well".[35]

Indeed, counter-terrorism laws have also affected the free movement of capital and banking regulation significantly, imposing strong restrictions on the application of bank secrecy and the free movement of capital, especially when sourced from countries considered as an "enemy zone" or "suspected zone".

These restrictions, in addition to the obvious costs from the point of view of immediate financial and economic activities, have given way to a new international regulation model which in turn has led to a substantial loss of confidence and stability of primary and secondary financial markets worldwide[36].

[35] Donohue, Laura, *supra* note 33 at 25
[36] Oana M. Nedelescu, R. B. Johnston, *The Impact of Terrorism on Financial Markets*, Issues 2005-2060, International Monetary Fund, (2005)

There have also been significant changes in the field of freedom of expression. For example, in the United Kingdom, freedom of religious and ideological expression has been significantly restricted, and the "propaganda of Islamic fundamentalism" has become a criminal offence punishable by imprisonment.

Without drawing any final conclusions at this stage, it is important to emphasise that this set of changes has gradually distorted, at various levels, the criminal justice model prevailing in most Western countries. This distortion has gained particular relevance in the rights of suspects and in the very structure of the criminal procedure system inherited from 19th century classical liberalism. Throughout this work, we will see exactly what this new configuration of the criminal justice system is in its various aspects.

At this stage, it is essential to this work to analyse whether this set of changes implied the progressive implementation of a criminal procedure law characterised by two very distinct stages: the first stage – of inquiry and prosecution – dominated by the secrecy of the inquiry and extended police powers – either for obtaining information from suspects or restricting their fundamental rights – and by a reduced participation of suspects and virtually no judicial control. On the other hand, a second stage (or the trial stage), characterised by the guarantee of the fundamental values of the classical liberal system, in particular the right to a fair trial, the right to defence and the right of victims to participate in the proceedings and to appeal to higher courts, among others.

Although we cannot yet speak of a paradigm shift, all documentary and empirical data collected indicate that there is a strong trend of change[37], visible and noticeable in all areas of law, from banking regulation to criminal procedure law.

[37] Jeffrey F. Addicott, *Terrorism and Law: The Rule Of Law And The War On Terror*, Lawyers & Judges Publishing Company (2004), p. 247

The attacks of September 11, 2001 on the World Trade Center and, later, the attacks of March 11, 2003 in Madrid and of July 7 (and July 26, 2005) in London, forged with blood and fire, visions of death and destruction, (re)create a global environment of terror and fear, in which governments and populations are living under the constant threat of terrorism. This fact has implicated a clear tendency to expand executive power and this, as Donohue states, has serious implications:

> "The state may use the information it acquires not just for counterterrorism, but to prevent popular dissent, to manipulate the other branches of government, or to exert social control. The tendency of the executive branch to acquire power was not lost on the American founders, who used the separation of powers doctrine to check executive strength. The problem is that in the face of terrorism the legislature's and the judiciary's ability to offset the executive is severely diminished".[38]

Terrorism has become the main concern of governments in the 21st century and, in spite of not being a phenomenon of this century, of having very distant roots, and having intensified in the 1970s, throughout Europe and in the United States, it became particularly visible, ostensible and, above all, ubiquitous after September 11, 2001.

Terrorism used to occur within borders, but it is now global, does not recognise national borders to act, and is organised in mindless, almost invisible and intangible networks.

Consequently, counter-terrorism policies are also global. Therefore, one of the key aspects of this globalisation of terror is, admittedly, the creation of numerous counter-terrorism laws that underlie the value of security, that are inscribed and result in a fervent legislative impetus, and that, in the name of security, restrict fundamental rights and, in particular, the various aspects of "civil liberties".

The events of 9/11 gave way to a period marked by a trend of erosion and oppression of civil liberties and rights, constitutionally protected freedoms and

[38] Donohue, Laura K., *supra* note 33 at 11

guarantees, owing to the coercive enforcement of highly aggressive security measures imposed by the executive arm of Government, in particular by the governments of the United States and the United Kingdom. The imbalance between freedom and security reflect the "imbalance of powers" created by the ineffectiveness of the US system of "checks and balances" based on the main idea of the separation of powers. In other words, the flaws of this system are a result of the implementation of a new standard in which the abuse of executive law-enforcement power usurps the power of the Courts and Parliaments, suppressing the guarantees inherent in the normal functioning of the constitutional system.

As a result, the imposition of restrictions on the rights, liberties and guarantees has shrunk and compressed the sphere of civil liberties, and, indeed, the American democratic political system has not been able to redraw an "adaptive zone" to face the pressure of the wicked enemy.

However, this axis between good and evil has shifted to another plane, projecting itself into a dual, or rather, dialogical and exponential dimension of conflict, where a new paradigm emerges: security vs. freedom, in the United Kingdom, Spain, Portugal (which constitute the scope of the territorial jurisdiction, the "spatial/territorial dimension" examined in our study) and in all countries, from both a regional (i.e. throughout the European Union) and international perspective.

It was to protect citizens' safety that the Bush administration led the Congress to approve the *Patriot Act*, in which security standards abound, containing new powers to make arrests *sine die*, to perform administrative surveillance and search operations, without prior judicial authorisation, summary trials, with total absence of evidence, and as regards the right to privacy, the increase of powers to intercept telephone and internet

communications, the withdrawal of restrictions on the use of special powers of counterintelligence operations in ordinary criminal proceedings.

The application of human rights legislation to moderate the reaction of governments to what they call "terrorism" is one of the toughest tests for the concept of human rights. The way terrorists are seen by the political system, all this gregarious movement around the deviltry of terrorists justifies the lack of respect for the Rule of Law and democracy and, consequently, justifies the contempt and rejection of human rights standards by terrorists, who ruthlessly and mercilessly claim that many innocent people must die.

It is understood that this conflict justifies some restrictions on the exercise of civil liberties or even their temporary suspension, because the purpose of human rights legislation is basically to keep counter-terrorism measures and activities under control.

In this context, the human rights benchmark is an important limit to serve as a buffer and to compel Governments to justify the anti-democratic measures they use in the open hunt for terrorists. However, we must not forget that it is the responsibility of Member States, of their whole array of political/administrative and judicial institutions to secure these limits[39].

Ultimately, the question is: What if Member States are unable to shoulder this responsibility? Well, this is an algorithm with the following two overlapping hypotheses:

- What if the State itself cannot live with this internal and external (self-organised) ambiguity caused by this turbulent phenomenon, the emergence of these disorders and "moral panics", this scenario of chaos created by terrorism? In other words:

[39] Richard Ashby Wilson, *Human Rights in the War on Terror*, Cambridge University Press, (2005), p. 33

1 - What if the State cannot survive the external ambiguity caused by the manipulation of "these enemies", i.e. the new mindless and global terrorists?

2 - What if the State cannot survive itself, its internal ambiguity (fear increases security measures, withdraws freedoms, rights and guarantees that are fundamental, essential), its survival, succumbing to what we may call self-strangulation?

The direct effect of the terror that materialises and reaches its maximum impact through terrorist attacks is the destruction, restriction and even suppression of freedoms, rights and guarantees, of "civil liberties".

We will examine how the 9/11 and other terrorist attacks (specified below) have conditioned and changed the internal security systems and plans of the countries under study (the United States, the United Kingdom, Israel, Spain and Portugal).

This implies explaining the role of internal security (understood both in its organisational/supervisory dimension and in its "security policy"[40] dimension) in addressing the shock of terror – we will therefore outline how these countries have reacted to terrorism.

Our study covers a 10-year period and we chose September 11, 2001 ("9/11") as the starting point. This choice is based on two different reasons: one of a legal nature and another of a political and philosophical nature. On the one hand, as we will explain throughout this work, the main criminal policy and legislative changes occurred after the September 11 attacks. In this context, virtually all Western (and Asian) countries have taken important measures in the prevention, investigation and prosecution of terrorist offences and organised crime. On the other hand, it seems clear, from a

[40] Andrew D. James, *Science and Technology Policies for the Antiterrorism Era*, IOS Press (2006). In relation to the specific security policy in Portugal see José M. Magone, *The Developing Place of Portugal in the European Union*, Transaction Publishers, (2004), pp. 67 - 89

geopolitical point of view, that the September 11 attacks substantially changed the conduct of international relations between states, including the legal instruments of police and judicial cooperation.

However, some other "target dates" are important to gather the main legislative reactions, so, in addition to of 11 September, we recorded March 11, 2004 and July 7, 2005, because we believe that these major disasters represent ruptures and, consequently, they have led to mandatory reflections on the State's security system, particularly on how it deals with the discourse and the sources of terrorism.

This implies pointing out terrorist attacks that, given their ability to inflict terror with exponential and uncontrollable effects, are the pretext for the compulsive impetus in security legislation production. It also implies, naturally, measuring the reactions to terror and recording the myriad of counter-terrorism rules and standards that have arisen after the attacks, regardless of ethically evaluating the issue of "terrorist threats".

The terrorist acts of September 11, 2001, March 11, 2004, and July 7, 2005 clearly and unequivocally demonstrated that contemporary terrorism has become characterised by a high degree of complexity[41], organisation and transnational action and that, by selecting apparently scattered targets, it is capable of reaching the deepest organisational pillars of democratic societies.

Indeed, only after we realise that terrorism is a complex social, political and legal phenomenon established within the chaos of terror itself can we control its effects and subvert its logic of application and operation.

Again, and still regarding the initial question, if the legal and regulatory mechanisms serve to increase security, legally restrict terrorist activities and threats, then why do they have the completely opposite effect?: they are factors of increased

[41] Jorgen S. Nielsen, Samim Akgönül, Ahmet Alibasic, *Yearbook of Muslims in Europe*, BRILL, (2009), pp 329 – 345.

insecurity and violence... after all, two aspects of the same reality: they enhance the factors of uncontrollable fear.

In this system, we must consider that we are dealing with a tetralogical ring in which clashes, unrest, turmoil and movements are precisely that: the order/disorder/interaction in which there are multiple international actors, levels of power and in which the notion of sovereignty of the classic post-Westphalian model collapsed, all this in the name of terrorism.

We could say that the new international order resulting from the juxtaposition of characters/actors also has the harmonising power to create a new balance in which the European criminal area could play a key role, either for the harmonisation of sanctions, or for the reduction, if not eradication of criminal havens.

However, and this would be a suggestion for further research, based on this comparative analysis of security vs. freedom, an attempt could be made to assess the new security model in the light of the "binding pattern".

The pattern that separates security from freedom, or rather, that places security and freedom at opposite ends should be abandoned, and research should continue in order to find the binding one, which exerts on security and freedom a centrifugal and centripetal pressure of concentrated authority and not of totalitarian authoritarianism, lest we lose the references to fundamental rights.

We therefore believe that we can give a completely innovative answer to the problem of terrorism as being a phenomenon of collective schizophrenia, of legal schizophrenia, and that it is possible to find the binding pattern, the human or humanised model to serve as a stabilising and balancing force in the new risk society.[42]

[42] Beck, Ulrich, *Risk Society: towards a new modernity,* Sage Publications, London (1992), p. 78

b) Conclusion

Having systematically presented the broad lines of research and scientific issues that define the subject of this work, as well as its methodological structure, it is important to provide a brief summary of the chapter organisation and theoretical structure of the work.

The new context emerging from the September 11 attacks in the United States will be presented and examined in detail in the second chapter. This topic, which is closely linked to the above-mentioned timeframe, will focus primarily on the analysis and specification of three distinct topics: the new political discourse and social response in the "era of global terrorism"; the new legal framework of emergency management and the response of criminal justice systems; the new criminology and criminal policy guidelines on the fight against terrorism, clearly reinforcing the so-called Criminal Law of the Enemy (*Feindstrafrecht*)[43].

After this analysis, each of the subsequent chapters will deal with the chosen jurisdictions (United Kingdom, United States, Israel, Portugal and Spain) separately, detailing the ongoing legislative reform processes and the new positions of the majority doctrine in the fight against terrorism and transnational organised crime. This separate analysis will reveal common signs of change, sound legislative reform processes and their sociological and political contexts, which can comprehensively characterise what we described as the 'bifurcation of criminal justice systems'.

Finally, the last part of this work will seek to combine the main topics studied in each of the jurisdictions and establish a paradigmatic overview of the ongoing changes in the framework of contemporary criminal justice systems, in the post-September 11

[43] Jakobs, Gunter, 'Bürgerstrafrecht und Feindstrafrecht', in 5(3) *Höchstrichterliche Rechtsprechung Strafrecht* 88 (2004), p. 76

period. Indeed, the data collected from the exhaustive research carried out should be structured within a global theoretical framework that allows us to understand whether or not we are dealing with a new model of criminal justice and what are the prevailing features of the criminal justice system in the prevention and prosecution of the new threat.

CHAPTER II

THE NEW THREAT OF GLOBAL TERRORISM AND ITS IMPLICATIONS

"Le supplice ne rétablissait pas la justice; il réactivait le pouvoir" [44]

Michel Foucault

[44] Resende, Harolodo, *Michel Foucault: Transversais entre educação*, filosofia e história, LTDA Ed. (2011), p. 56

1. Global Terrorism: The "New Threat"

Before beginning the analysis of this new terrorist threat to contemporary western societies it is important to explain how this chapter fits in this investigation study. What is the connection between the study of modern international threats and the research questions presented in chapter I?

In chapter I've identified the three main research questions which are the backbone of this study. On the on hand, to understand the changes that have occurred in the structure of the systems of criminal justice as a result of the antiterrorist reforms undertaken in the past decade. On the other, to analyse the convergence that seems to be occurring between legal systems traditionally belonging to different families, as an answer to a comman and global problem. Finally, to identify the results and the costs of these antiterrorist measures, from the point of view of the evolution of the systems of criminal justice, and the point of view of the structure of the rule of law in democratic states.

Therefore this chapter will look at the implications of the configuration of international terrorism for the analysis of the research questions herein. At the same time, a detailed analysis of the main criminal justice models will be carried out, with attention to recent developments. Through this analysis, it will be better understood the theoretical basis under which the antiterrorist measures - that will be specifically scrutinized in chapters III and IV - were adopted by the States.

As a starting point it is fundamental to understand the nature of the phenomenon we designated in the first chapter as "global terrorism"[45] and to fully comprehend its diverse

[45] Weinberg, Leonard, *Global terrorism*, The Rosen Publishing Group (2009), p. 11

forms and manifestations throughout this past decade. In this regard we must recognize that contemporary terrorism is not just, as Ventura observes, terrorism with weapons and explosives, but a "multidimensional phenomenon with a variety of expressions that includes a wide range of realities such as cyber terrorism, food terrorism and transnational organised crime".[46]

This chapter will provide an understanding on the way terrorism has developed in recent years. Such an understanding, will allow for a better comprehension of the reason behind those legal reforms and their impact in both accusatorial and inquisitorial systems cannot be fully comprehended.

The facts and ideas which will be developed in this chapter II will allow us to look into States' reaction to the phenomenon of terrorism, as they seek to suppress and prevent terrorist acts and the spread of panic and fear.

In this way, it is essential to understand exactly what we are talking about when we use the term "global terrorism" and the multiple definitions it can comprise. Martin notes that only by analyzing the essence of the concept of terrorism can we grasp the legislative response of States during the past decade[47]. This is what we will attempt to do in this chapter, paving the way for the topics we will scrutinize in chapter III and IV, where different reactions by States in the context of the war against terrorism will be compared.

It is crucial to underline that the development of terrorism as we have come to know it has caused significant changes to States' response to such a complex reality as we will see in this chapter. This is due not only to the international character of the new terrorist threat but also to some specific features related to religious terrorism and specifically to

[46] Ventura, Antony, "*Il problema del origini de Terrorismo di Sinistra*" in Terrorismi in Itália, Il mulino ed. (2004), pp. 75 – 149; Rienner, Lynne, Transnational Organized Crime and International Security, M. & Serrano (eds) (2002), pp. 56 and following; Dishman, C., '*Terrorism crime and transformation*' in Studies in Conflict and Terrorism, Global University ed. (2001) p. 24.

[47] Martin, Gus, *Understanding terrorism, challenges, perspectives and issues*, SAGE ed. (2010) p. 103

extremist muslim terrorism, and to important ties with organised international criminal groups. These new characteristics, as Orezen observes, are at the basis of the main changes to criminal justice models that have taken place in the past decade[48]. We will therefore try to systematize in this chapter:

a) the global dimension of the new terrorist threat;

b) religious fundamentalism and the genesis of extremist muslim terrorism;

c) the connection between terrorism and organised crime.

As Dias observes, the main reasons for the structural changes we have witnessed in regard to criminal procedure laws - extension of pre-trial detention periods, increased communications control, new paradigm in police powers and the reform of migration regulations - are closely linked to the emergence of new forms of terrorism and to the global and transnational dimension of this new threat.

According to Megoli, this situation clearly shows the state of panic that exists in European and non-Europeans countries alike with regard to the phenomenon of terrorism[49]. The concepts of "permanent disruption" and "social state of exception" have been widely used in Portugal, Spain and Germany[50] to describe this phenomenon, which ultimately aims to express the state of permanent fear, or dread, of a terrorist attack or threat. Thus, this chapter will look at the following relevant aspects:

1) analysis of the concept of terrorism and its historical evolution;

2) timeline of most relevant events in modern and contemporary terrorism;

3) emergence of new forms of terrorism

4) new threat of extremist muslim terrorismand the motivations behind it;

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[48] Orezen, Suleyman, and Bal, Ihsan, *Multi-Faceted Approach to Radicalization in Terrorist Organizations*, Ios PressInc, (2011), pp. 44 - 78

[49] Megoli, Robert (org.), *Exploring Criminal Justice: The Essentials*, Jones & Bartlett Publishers (2012), p. 392 - 399

[50] Guedes Valente, Manuel Monteiro, "*Terrorismo – fundamento de restrição de direitos*" in Terrorismo (org. Adriano Moreira), Almedina Ed., 2004, pp. 422 - 457

5) relationship between terrorism and organised crime - structural and circumstantial connections;
6) characteristics of global terrorism and the necessity of new responses by the criminal justice systems.

In what measure are these aspects important in relation to the research questions posed in chapter I?

Only by comprehending this significant historical modification is it possible to fully understand the fundamental change in the characteristics that surround the terrorist phenomenon and the real dimension and extent of the main antiterrorist reforms that have taken place in this past decade.

To grasp not only the cause but also the significance of the legal reforms of the last decade, a global understanding of the essential characteristics of this new threat, as well as its historical evolution, is necessary.

This historical analysis will provide insight into the chain of events that preceded the 9/11 attacks and the other main terrorist attacks of the past decade (Madrid, London, Bali, among others). Furthermore, knowledge of the motivations and the nature of claims behind modern terrorist groups is also fundamental to understand the responses adopted by States throughout the past decade. As Valente refers “if [modern terrorism] had no claims to global dominance and no characteristics of mass terrorism, certainly the response by states would have been very different in the past years”.[51]

Before the historical analysis, however, it is fundamental to understand the theoretical, philosophical and doctrinal tradition underlying the evolution of the terrorist phenomenon, as well as the own evolution of criminal justice systems in the wake of such phenomenon. As Moreira refers "to understand the evolution and impact of terrorism among modern justice

[51] Guedes Valente, Manuel, *Direito penal do inimigo e o terrorismo: o progresso ao retrocesso*, Almedina (2010), pp. 67 – 68.

systems it is absolutely necessary to understand the genesis and the evolution of the theoretical models on which such systems are based upon".[52] This is the theoretical framework which will be studied hereafter.

2. The Global Threat of Terrorism and the 'Bifurcation' of Criminal Justice Systems – a Theoretical Approach

Looking back to the 1970s, punitive sentiment began to gain momentum in the criminal system, after a exceptionally long period of relative stability and penal welfarism dating from the 1980s that had utilised a common sense approach by generations of academics, policy makers and criminal justice practitioners. Effectively, a system of decency and humanity has morphed into one of insecurity, anger and resentment. David Garland contends that in Britain, for example, a significant shift toward a punitive approach to criminal justice policy has taken place and a whole new ´justice system´ started to be dominant.[53]

The justice system will always depend on the model that prevails in the light of a given historical period and as a result of very different conditions. What kind of model? A model that might be imposed by governments, by social bodies or simply by the cultural and legal tradition of a people. The key to interpreting a given justice system is, exactly, in the dominant model (the model that has had more influence on the justice system) and in its main normative guidelines.

[52] Moreira, Adriano, "A ambivalência terrorista" in *Terrorismo*, Almedina Ed., Coimbra (2004), p. 11
[53] Garland, David, "The Limits of Sovereign Power, Strategies of Crime Control in Contemporary Society" in *Culture of Control: Crime and Social Order in Contemporary Society*, Oxford University Press, Oxford (2001), p. 447

Specifically considering the case of criminal justice, the dominant model has a decisive importance in the definition of its rules and of its most important principles. As was stated in the models' analysis as presented by Herbert Packer, depending on the prevalence of the 'crime control model' or of the 'due process model', the essential judicial rules will vary: the admission or not of certain evidences, the allowance or not of pre-trial detention, the presumption of innocence or the presumption of guilt, etc. In the same manner, the conclusions are proved beyond doubt in Packer's analysis, regarding the fact that the objectives of the justice system are also mutable and dependant on the predominant model: in truth, according to the crime control model, the justice system's objective would be to suppress and repress crime, whereas in the due process model, the objective is to ensure that the accused or suspect (facing the State prosecution's charge) has the means to fully exercise his right of defence.

Therefore, one comes to the conclusion that the justice system depends on the model or models that present themselves as dominant in a given historical period. In this sense, it is essential to analyse the works of Richard Vogler and the main points of his book "*World View of Criminal Procedure*".

His position is that both models presented by Packer are not, after all, opposing and antinomic models, as they are frequently presented in the legal literature[54]. For that reason it is not possible, to understand the justice system based on the tension between these two alleged opposing models because:

> "(…) Put simply, crime control is patently an objective whereas due process is a method. In no sense can they be considered as polar opposites or 'antinomies' and to do so is to give unwarranted priority to the model which promises results over the model which merely describes a procedure. So far from being value-neutral, the terms of the argument are loaded from the outset."[55]

[54]Tarr, Alan , *Judicial Process and Judicial Policymaking,* 6th ed**.,** Cengage Learning (2012), p. 91
[55] Vogler, Richard, *World view of criminal justice,* Ashgate Publishing *(2005),* p. 7

In truth, by dissecting the two models presented by Packer, it seems noteworthy that they focus on different things. While the crime control model seems to be focused on the objective of the justice system, the due process model tends to place that focus on the procedures inherent to the system's functioning.[56]

However, the conclusion achieved by Vogler regarding the definition of dynamics and trends that conform the justice system will be even more important. According to him, three 'broad methodological guidelines' coexist and shape the justice systems characterisation. These are as follows:

- The inquisitorial model;

- The accusatorial/adversarial model;

- mediated popular justice;

According to Vogler, these three 'methodological guidelines'[57] coincidently interfere with the justice system and, depending on the dominium or on the prevalence of each one, the justice system will be completely different. The prevalence of one of these 'methodological guidelines' (as Vogler calls them) determines the criminal justice model in force. As Roberts highlights:

> "More serious criticisms of "A World View of Criminal Justice" begin with its title. On closer examination, it is apparent that the book is not directly concerned with criminal justice, but rather with criminal procedure, criminal process or criminal justice systems. This is not merely a pedantic terminological quibble. Most of the text is given over to historical or comparative description, but in a short conclusion and somewhat longer introduction Vogler advances explicitly normative legal and moral claims. His principal contention is that every legitimate system of criminal procedure must reconcile aspects of the inquisitorial, adversarial and popular justice traditions ('the three great trial methodologies') with its own distinctive legal, cultural and political heritage.
> Vogler grounds his argument in historical experience, whilst simultaneously insisting that his analysis substantiates an idealized conception of criminal procedure—a blend of the descriptive and the normative in some ways reminiscent of Ronald Dworkin's influential theory of adjudication."[58]

[56] Packer, Herbert,"Two Models of the Criminal Process" in *University of Pennsylvania Law Review* 113 (1964), pp. 1- 68
[57] Vogler, Richard, *supra* note 439 at 98
[58] Roberts, Paul, "Comparative Criminal Justice Goes Global", *Oxford Journal of Legal Studies*, 28(2), pp. 369-391 (2008), p. 374

Sharing Vogler's perspective, a detailed and persistent analysis of some historical justice systems leads us to the proof of the permanent interaction between these three methodologies. Their presence and influence is undoubtedly in every justice system in history. It is not acceptable that the criticism made by some authors to Packer may be applied to Vogler's work, since these "methodological guidelines" referred by Vogler are not merely procedural or related to proceedings. When a reference is made (in Vogler's work) to the inquisitorial or accusatorial system (or even to mediated popular justice traditions), it bears in mind not only the essential rules of procedure characterising each one of these systems, but also their objectives, which are considerably different in each of these models. For example, in regard to the level of truth to be achieved in the criminal process: while the inquisitorial system searches, at all costs, for a pure truth and for a real reconstruction of the facts – regardless of financial costs or the means of achieving it -, the accusatorial system is committed to achieving a procedural truth, aware of its limitations and of the nature of the justice system. In addition to the above, some systems of traditional justice aim at the application of communitarian justice, in name of the "historical community".

It is based on this conclusion that one must understand the justice system, its nature and its functions. It is from this perspective that one should build the theoretical model which will sustain this investigation and the theoretical framework of our analysis. This is because, as Vogler states, only through this 'triple dimension perspective' will one be able to understand, with enough realism, the dynamics and the balance at stake in the criminal process:

> "Every system, at different historical epochs, has experienced the gravitational pull of each of the three trial modes and has responded accordingly. Every system, in its current structure and practice, crystallizes their relative influence to a greater or lesser extent. The central argument of this book is that whatever mode of procedure

> is operated, it should not seek to exclude, significantly limit or disable the participation of any of these three legitimate interests in criminal justice."[59]

Understanding these three broad methodological guidelines, these three "models of justice" and their permanent interaction is the key to understand the justice system and its transformations.

In reality, a system with mainly inquisitorial tendencies will establish long periods of pre-trial detention, in order to ensure the necessary evidence is obtained and preserved[60], as well as the protection of witnesses (particularly in cases of violent or highly organised crime), whereas a system with mainly accusatorial tendencies will privilege the development of the judicial proceedings and the adversarial principle as a way of restoring truth and "social consensus", thus opting for considerably short periods of pre-trial detention.[61]

The main idea to be maintained is as follows: the justice system, in particular the criminal procedure, is developed according not only to the defendant's essential rights and guarantees of defence and impartiality, but also according to the State's interest in repressing and controlling criminality and, furthermore, to the interest expressed by the community, which imagines new ways to apply justice according to its aspirations. All these vectors and interests (the methodological guidelines) are, as Vogler states, legitimate, meaning that all must find their own area of influence within the justice system. None of these vectors may be eliminated nor can their legitimacy be questioned,

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[59] Vogler, Richard, *supra* note 439 at 16

[60] Costa Pinto, Frederico, *Direito Processual Penal*, Universidade de Lisboa (2008), p. 56

[61] One must explain the classical opposition between inquisitorial process v. accusatorial process. In Vogler's book, the reader is taken to a conceptual world that identifies the inquisitorial model as being responsible for the serious attacks made to the fundamental rights still persisting in some political regimes (such as the Chinese or the Russian) and the accusatorial model as a symbol of freedoms and procedural guarantees achieved during a long path of historical maturation. It obviously is an excessively Anglo-Saxon vision of procedural law. In truth, the most recent comparative studies on the matter, some by Anglo-Saxon authors, have recognized that the differences between both regimes don't have today the importance and the meaning classically attributed to them, while one can also see that both come progressively together regarding such important issues such as pre-trial detention time limits, detentions' regime and rules on obtaining and preserving evidence.

purely because the system's characterisation will be the result of their interference and interaction.[62]

Nevertheless, these considerations give birth to another equally important question: which factors or conditions influence and determine the prevalence, at a given historical moment, of one of these three models? Which factors impose a mainly inquisitorial tendency on criminal procedure, in detriment of the adversarial or accusatorial line of thought? Or which factors produce a dominant influence over popular justice methods, in detriment of normative and institutional justice?

During his research, Vogler states very clearly that no justice system can ever dare to exclude any of these poles or exert its legitimate influence (and thus shape the characterisation of criminal procedure), but he does not produce a framework capable of answering, in a clear manner, which factors determine the predominance of one of the "presented methodological guidelines". On the other hand, he apparently attributes that result to a certain "historical randomness".[63]

Close attention must be paid to this point, because it was one of the most important elements for the criticism received by Vogler's works. In truth, if in the *World View of Criminal Justice* a criticism to any mathematical or geometrical perspective of criminal procedure is made (that is, the idea that the system's dominant values may be scientifically determined), a perfect answer is still lacking. Which factors determine the combination and interaction of the methodological guidelines?

In fact, this seems to be the theoretical structural flaw of the research carried out by Vogler, as stated by Roberts:

> "Finally, the values which each procedural tradition is supposed to represent, and in practice to incubate and propagate, are not delineated with sufficient care or focused application. It is truistic that legitimate criminal process for a modern

[62] Voger, Richard, *supra* note 439 at 98
[63] Vogler refers to a "historical necessity". See Vogler, Richard, *supra* note 439 at 13

> democracy must balance the competing interests of individual participants, state and society. The real question is: how?"
> The central thesis of A World View of Criminal Justice, that criminal procedure reform must always combine elements of 'the three great trial methodologies', in itself provides no tangible answers.[64]

From this perspective comes the most important question to be answered in relation to Vogler's work: how do these three great trial methodologies interact within the justice system and define its main aspects?

The only point of reference left behind by Vogler's work regarding this question is extremely controversial and poorly sustained from a scientific perspecitve. It is related to the idea that the inquisitorial model is closely linked to authoritarian political regimes or centralised and bureaucratic systems. In this sense, according to Vogler the inquisitorial model would tend to be predominant in the emergence of this type of political regimes, thus explaining the use the Nazi, the Soviet, or the Communist Chinese regimens have made of this model of criminal procedure.

This approach appears to lack accuracy because it is based on a historical perspective of the inquisitorial system (that is, juridical traditions and organised practices) in Continental Europe. Basically, it is based on an old fashioned view of the inquisitorial system.

As Summers refers, the distinction between inquisitorial system and accusatorial system lost its scientific utility with the development verified during the last century on both models, contributing indeed to often confuse the scientific discussion and hide the similarities between both models, as well as darkening the unquestionable existence of an European tradition of sharing the essential values in criminal procedure.[65]

[64] Roberts, Paul, *supra* note 442 at 391
[65] Summers, Sarah, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, Hart Publishing, Oxford (2007), p. 10

In fact, the inquisitorial system's vision is, in Vogler's work, a theoretical and abstract vision, disconnected from the reality of European continental practice[66]. For that reason, it is rejected or strongly criticised by French, Spanish or Dutch scholars. Any comparative perspective would tend to systematically find converging points between both juridical traditions, thus producing a systematic global understanding of the European criminal procedure, very different from the theoretical description of inquisitorial or accusatorial models.

This is, in fact, an inevitable consequence of political, economical and social conditions which mark contemporary Europe. It would be impossible, as the comparativist Patrick Glenn emphasises, to completely separate the European juridical traditions. On the contrary, a gradual cohesion and the sharing of values and attitudes in the essential questions would be inevitable, which is even more evident within the context of a communitarian Europe. [67] [68]

The strong influence of the European Convention on Human Rights (ECHR)[69] must be emphasized, as it established a minimum standard of protection of fundamental rights which led to a greater convergence among the States of the European Community in regard to the development and protection of human rights. As Palmer observes, the development of a common measure in the protection of human rights has reinforced European law as a legal family built upon common principles and rules.[70]

Furthermore, the jurisprudence of the European Court of Justice, when referring to the ECHR and to the constitutional protection given to fundamental rights, helped

[66] Delmas Marty, Mireille, *European criminal procedures*, Cambridge University Press (2002) p. 20
[67] Glenn, Patrick, "Comparative Legal Families and Comparative Legal Traditions" in M Reimann and R Zimmerman (eds) *The Oxford Handbook of Comparative Law*, OUP, Oxford (2008) , p. 432
[68] Field, S., and West, A., "Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Process", *Criminal Law Forum* 14 (2003), pp. 261–316
[69] Adopted by the Council of Europe on July 4, 1950.
[70] Palmer, Vernon, *Mixed Jurisdictions Worldwide: The Third Legal Family*, Cambridge University Press, (2001) p. 233

cement this commn path towards a mutual degree human rights protection. The adoption of the Charter of Fundamental Rights of the European Union (in 2000 as a declaration and later in 2007 as an effective bill of rights) represented a fundamental step in asserting a common protection of human rights in all the dimensions of the European Union.

Therefore, despite this orientation of Vogler, one question remains essential towards the understanding of modern criminal procedure: if the system's characterisation is built with the geometrical scope of the three broad methodological guidelines, which factors contribute towards a prevalence of one over the others?
We will now analyse each of the factors that decide how and for what reason these 'methodological guidelines' interact.

1) The fundamental law or the constitutional tradition of a given State;

The issue appears to be extraordinarily important within the scope of this work. The identification of the determining factors of the existent type of criminal procedure may renew the entire scientific perspective on criminal procedural law.
Here, it is important to remember the theoretical proposition formulated in the beginning and which support this judgment: all justice systems tend to reflect a certain political-social program, inherent in the constitutional text (in countries that have a written constitution) or found in the juridical and popular justice tradition of a country.
Effectively, the programmatic spirit and social, political and moral rules emanating from the constitutional text have a strong imprint on the country's justice system, shaping it in its principles and characteristics. For instance, European liberal constitutions inevitably impose some decisive characteristics into their respective

criminal procedure models,[71] such as: respect for the adversarial preceding; demand for strong defence guarantees; and imposition of limits regarding freedom-depriving sentences. On the other hand, the fundamental laws of Islamic States tend to reproduce ancestral procedural rules, based on a determined form of ritualistic or religious justice and, although they also consecrate some rules which are close to western models, they draw a process model very different from liberal systems.

2) Ideological context and the narrative underlying the political and institutional speech, as well as the social perception associated to it.

The country's fundamental law or constitutional tradition is as relevant as the ideological background and the context of values, ideas and "emotional state" in which a given society lives in.

The political and institutional speech, the transmission of values and the social perception emanating from the media and power nuclei play a decisive role in the legislative production, as well as in the pragmatic orientation of all levels of governance (federal, regional, local).

As Kostakopoulou affirms, on the abstract of her article "How to do Things with Security Post 9/11":

> "Discourses and the ideas, perceptions and templates upon which they are based exert a powerful influence on law-making, push policy – making in a precise direction and determine operational action and outcomes. British counter-terrorist law and policy post 9/11 is heavily mediated through a conceptual filter that evokes a siege mode of democracy, which deliberately displaces the traditional rights-based model, and a security narrative based on a double asymmetry.
> (…) Both features of the Government's security discourse are critical in explaining not only British counter-terrorist legislation and policy evolution in the 21st

[71] Roberson, Cliff, *Constitutional Law and Criminal Justice*, CRC Press (2009), pp. 28 and following.

> Century, but also their official depiction as necessary, and singular, responses to some structured necessity and the associated logic of 'no alternative." [72]

3) The jurisprudential tradition and the institutional structure of the criminal investigation bodies

Another factor with a vital importance in the justice system's characterization, in particular in the area of criminal procedure is its jurisprudential tradition.[73] In fact, even in civil law systems, without the rule of binding precedent, strong lines of jurisprudential trends have formed, consolidated by Superior Courts' decisions. Even without being "binding" in a normative sense, they form a solid and preponderant current of juridical references, to which juridical agents normally obey and which lower courts normally follow.

In this sense, it seems wise to summarise the three essential points discussed within the previously posed question: which factors contribute towards the definition and characterisation of the criminal justice system, within the scientific framework defined by Voger?

These are the factors we have identified and separately explained above:

- The fundamental law or the constitutional tradition of a State
- The ideological context and the narrative underlying the political and institutional speech, as well as the associated social perception

[72] Kostakopoulou, Dora, "How to do Things with Security post 9/11" in *Oxford Journal of Legal Studies*, Vol. 28, n. 2 (2008), p. 317 (abstract)
[73] Maldonado, Daniel, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, Cambridge University Press (2013), p. 273

- The jurisprudential tradition and the institutional organization of criminal investigation bodies

After the investigation of the fundamental elements that contribute to the framing and characterisation of the justice system, analysed according to the scientific framework delimited by Vogler, it is now important to reflect upon the model of justice system more adequate to deal with the 21st century crime reality, as well as with social aspirations concerned with the application of justice.[74]

What type of justice system should prevail in the face of a new criminality, with new resources and objectives? What objectives should be assumed by the justice system as fundamental in this new era, which still maintains the challenges of the past (the suspect's fundamental rights during the investigation stage, for instance) and face others equally relevant (for example, the victim's role during the criminal procedure)?

It was discussed how Packer distinguishes the two criminal justice models, focusing on the different objectives they assume: while the crime control model defines repression and the fight against criminality as its biggest objective, due control model concerns are related to the suspects fundamental rights within the criminal process. At the same time, contemporary authors such as Douglas E. Beloof shed some light on some structural flaws in Packer's models[75], particularly the little attention paid to the victim and his/her role within the criminal process. It was also analysed how Vogler criticises the existence of these two models as being opposed or antinomic.

Nevertheless, assuming from the start the need to complement this framework with a new reference to the victim's part in the criminal process (today, it is a consensual idea not only by criminology, but also by juridical sociology and by the positive law of

[74] Levine, James, *International Criminal Justice: Critical Perspectives and New Challenges*, Springer ed. (2010) p. 125
[75] Beloof, Douglas, *Victim's Rights*, Abc Clio Edition, London (2012), p. 5

the majority of liberal-democrat systems), it seems rather evident that both models emphasise two great axiological poles of criminal process. The fight against crime and the concern with ensuring the effectiveness of the suspect's fundamental rights are, in truth, two of the most important values, if not the most important, of the criminal process.[76]

Even with obvious practical and scientific flaws, Packer's model has the advantage of bringing us face to face with the biggest concerns of the justice system and the criminal process. The advantage of understanding its internal dynamics, the transformations suffered throughout history and even the guidelines which were passed on to them by different political regimes.

Trying to construct an analytical framework based on Packer's two great models and after the important contribution received from his most fierce critiques, the question to be asked is: which justice model is more appropriate for the challenges of new criminality and the new structural issues of criminal process? [77]

Through Vogler's analysis, a study was made of the guidelines of each and every modern justice system, as well as of the variables and conditioning factors (the 'three methodological guidelines') determining their influence and predominance. Once again, the question is: how is the contemporary juridical-criminal system characterized or how should it be characterised? Which characteristics should prevail in the justice system's direction, in the face of the new data that design today's reality? Which is the predictable evolution of the system in the near future?

It is undeniable that today's criminality has characteristics of sophistication and development never seen before in history. At the same time, the terrorist phenomenon,

[76] Letschert , Rianne Monique, *The New Faces of Victimhood: Globalization, Transnational Crimes and Victim Rights*, Springer ed. (2011), p. 45
[77] Beinart, Peter, *The Good Fight: Why Liberals, and Only Liberals, Can Win the War on Terror*, Melbourne Univ. Publishing, (2007), pp. 31 and following.

whilst not new has assumed proportions that have not been seen in other historical moments, both due to the inevitable impact terrorists acts have on a globalised media world and equally due to growing sophistication and technological advancements by terrorists groups. Terrorism stands out so profoundly within modern criminality that some authors, such as Bruce Ackerman or Richard Leone, are not shy in mentioning "the age of terror" or "the age of terrorism".[78]

What repercussions might occur along the development and globalisation of this type of criminality in the evolution of justice system, especially in an age where citizens are authentically concerned with the limitations imposed on their freedoms and with the assaults to their fundamental rights?

First of all, it seems wise to state that, even after the dissemination of large scale terrorist attacks in the United States and Europe (New York, Madrid, London) and large scale military operations in Iraq and Afghanistan, there is a general consensus regarding the need to maintain democratic institutions and the constitutional-liberal framework firm and in full force. This holds true, at least in the most important legal texts and in the dominant political speech.[79] Such consensus obviously stems from the citizens and other social agents' legitimate concerns in ensuring the rights, freedoms and guarantees achieved in the aftermath of World War II, but at the same time, from the concerns in maintaining a "moral and ethical superiority" in the fight against terrorism and against all types of organised criminality. As Kostakopoulou states:

> "It seems to me that liberal democratic countries have a legal and moral responsibility to maintain the integrity of their political culture in countering political extremism. For liberal democratic principles are not an optional extra." [80]

[78] Ackerman, Bruce, "*Before the Next Attack. Preserving Civil Liberties in an Age of Terrorism*" (Yale University Press, New Haven and London, (2006); Leone, Richard, *The war on our freedoms: civil liberties in an age of terrorism*, Ed. BBS Public Affairs (2003).
[79] See articles 3 – 26 European Union Charter of Fundamental Rights; the preamble of the recent Lisbon Treaty and even the United Nations Global Counter-Terrorism Strategy.
[80] Kostakopoulou, Dora, *supra* note 456 at 340

In this sense, there seems to be the need for a new criminal procedure model, capable of understanding the evolution and the reforms that recently emerged in countries such as the United Kingdom and Israel. A model capable of preserving the essential framework of the liberal criminal system while at the same time, comprehending the recent reforms taking place in different jurisdictions. A new reality of crime and a new reality of justice.

Effectively, both models presented by Packer – as opposing models – don't seem to have the potential to frame the reality of today's criminal process. On the other hand, as Vogler identified, both seem to consider different issues (crime control model on the justice system's objective and due process model on its functioning method) and, therefore, an important part of the criminal process reality fails to be understood. On the other hand, because – and this is apparently the biggest flaw in Packer's models – they analyse the criminal process as a 'uniform whole-model', ignoring its different stages and autonomies, by way of different structures and objectives.

The idea of bifurcation of criminal justice system wants to designate a model that distinguishes and differentiates the criminal process into two distinct stages – 1) investigation and prevention; 2) trial and crime punishment – with distinct guiding principles and main objectives. In truth, this model sees these two stages as considerably autonomous and separable from each other, structurally different and, therefore, the subject of different normative standards.

By accepting this difference, the evolution of the rules applicable to each phase is differentiated. The two phases must be allowed to have an autonomous evolution, both from a scientific and a legal point of view.

Beyond that, the idea of bifurcation of criminal justice system has yet another fundamental characteristic as a scientific model: it is gifted of an enormous explaining

potential, in response to the complex evolution recently registered in different juridical jurisdictions, in particular the countries we have analysed in this work.

What is the point of asking whether the English criminal process is orientated towards the repression and punishment of criminality (Crime Control model) or towards the assurance of the suspect's fundamental rights (due process model)? Or rather if its biggest objective is to ensure a satisfactory compensation of the victim and the protection of his/her procedural role (victim satisfaction model)? These questions, as Soares da Veiga noted, have lost their fundamental value and interest.[81]

Most certainly, during the early stages of the investigation of a crime, the responsible agents and bodies would not be primarily concerned with fulfilling the victim's objectives and needs[82] (in a stage when it's not even clear what type of crime was perpetrated, how it was perpetrated and under what circumstances). Nevertheless, this may already occur during the trial stage, where the court tries to access the need to punish or not a given (criminal) conduct and to restore, as far as possible, the social tissue affected by that crime (restorative justice). At the same time, it would not make sense (in most legal systems) to characterize the criminal process as being accusatorial in its early stages, because the investigation bodies have not even gathered the necessary information to confront the possible suspect. Even so, no one is honestly able to raise any doubts about the accusatorial process predominating, for example, in the United Kingdom.[83]

This reasoning emphasises, from the start, the frailty of a criminal process 'traditional' models, whether of Packer's terms or by characterising it, in absolute terms, as inquisitorial or accusatorial or even as a traditional system. A criminal justice system might have eminently inquisitorial characteristics during the process' early

[81] Soares da Veiga, Raul, *supra* note 208 at 67
[82] Costa Pinto, Frederico, *supra* note 272 at 43
[83] Gibson, Bryan, *The Criminal Justice System: An Introduction*, Waterside Press (2008), p. 28

stages (by protecting information and imposing freedom-limiting measures to the suspects) and become an extremely enthusiastic defender of the adversarial proceeding during the trial and sentence enforcement stages.

In this sense, it becomes fundamental, from early on, to commence from a new model that distinguishes two autonomous stages during the criminal process:

- Phase I: Prevention and Investigation [of criminal conduct]
- Phase II: Trial and Punishment [of criminal conduct]

The first stage includes all investigation acts developed by the bodies in charge of the criminal investigation, starting from the moment the crime is reported until the moment it is taken to court. The entire scope of prevention measures[84] related to a specific crime (in general, put into practice by legal authorities) or to crime in general (in general, put into practice by political-administrative bodies), such as police raids in high incident areas, protection to risk groups, prevention measures imposed as public safety measures, special strategies of surveillance of people and goods, etc., is also part of this universe.

The advantage granted by this model is that it focuses on each one of these stages in an autonomous fashion, thus enabling a greater comprehension of the legal system under analysis. The bifurcation of criminal justice system is increasingly more important, which is proved by the fact that nowadays criminology and juridical sociology studies are forced to make a two-phased analyses of the aspects involved in the criminal process or even in criminal politics in general. As Stewart Field states, regarding the 19th century French criminal process:

[84] Regarding crime prevention strategies see Ashworth, Andrew, *Sentencing and criminal justice*,, 4th ed., Cambridge University Press (2005), pp. 69 - 78

> "These changes are associated with the "Code d'instruction criminelle 1808" which strongly influenced reforms in various German territories (and indeed throughout Europe) and especially the first German Federal Code of Criminal Procedure in 1877. This introduced that system that French jurists from Helie onwards have seen as a 'mixed system': an inquisitorial private state investigation during the pre-trial phase and a public accusatorial trial phase." [85]

Basically, this model will separately look at the pre-trial phase and the trial phase, with one particularity: it includes realities that somehow go beyond the criminal process, as the administrative crime prevention measures previously mentioned. In truth, police measures of prevention and public control, among others, cannot be included within the scope of the criminal process, rather making it a part of what is generally designated as 'criminal politics'.

Going back to the two phases distinguished earlier, it is important to issue some consideration on their differentiation. Understanding the differences between them might help one understand the grounds of this idea of bifurcation of criminal justice systems.

From the start, it is quite evident that the first phase has a much greater proximity to the alleged crime, which has several implications. During the course of an early investigation, the extent and scope of the crime committed is not always clear, which demands very careful information sharing, a concern that, in general, is no longer present during the second (judicial) phase, where the classical principle of publicity and the right to defense fully apply. Beyond that, the opportunities given to the suspect during the investigation's preliminary phases of contradicting testimonials and collected evidence are obviously fewer[86] than during the trial phase. In fact, it does not make any sense to present to the suspect the collected evidence, which at that stage may be still very much embryonic and poorly articulated. Besides that, if this information was

[85] Field, Stewart, "Fair Trials and Procedure Tradition in Europe" in *Oxford Journal of Legal Studies*, March (2009), p. 13
[86] Costa Pinto, Frederico, *supra* note 272 at 67

communicated, it would allow the suspect the power and capacity to destroy other and possible more important evidence or to intimidate relevant witnesses for the process' development.

The analysis of British and American legal systems – that will be undertaken in Chapter IV – will facilitate the understanding of the substantial difference in results that the researcher could obtain if he focused his attention on the study of some recently approved laws in relation to the investigation phase (for example: twenty six days pre-trial detention for suspects of terrorism, house searches without judicial warrant for highly organised crime or terrorism) or, on the contrary, on the study of the rules and principles of the trial phase. As will be demonstrated, such conclusions can also be drawn in relation to the Portuguese and Spanish legal systems.

In fact, any lawyer exclusively focusing on the aspects previously analysed of the Portuguese penal procedural law wouldn't have any doubts in, according to Herbert Packer's theoretical framework, classifying the portuguese model in force as "crime control model". In fact, the majority of the previously analysed restrictions that are imposed to the fundamental rights are in order to facilitate investigation and draw reliable evidence that may lead to the suspect's conviction. A scheme of this type would be categorised, according to Packer, as a crime control model, without any shadow of doubt.

> "The crime control model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process (...). The model, in order to operate successfully, must produce high rate of apprehension and conviction and must do so in a context where the magnitudes being dealt with are very large, and the resources for dealing with them are very limited." [87]

At the same time, according to Vogler's scientific grid, the Portuguese system would be undoubtedly classified as mainly inquisitorial. In truth, the restrictions

[87] Packer, Herbert, *supra* note 440 at 113

regarding the information granted to the suspects for his/her defence or even to the general public (a consequence of the investigational secrecy regime), as well as a tendency for a broad implementation of the pre-trial detention measure would always be seen as symptoms of a strongly inquisitorial system.

In fact, according to Vogler's conception, the inquisitorial process is indeed characterised by "four essential features, the third of which is the use of different forms of intolerable pressure against defendants in order to achieve co-operation".[88]

Nevertheless, a deep analysis of the Portuguese procedural law, focused on the trial and appeals phases would lead to completely different results, as will be seen now.

First of all, Portuguese law established a totally accusatorial trial system, being that the adversarial proceeding is in full force. In truth, it is so stated in the Constitution of the Portuguese Republic:

> "The criminal process has an accusatorial structure, being that the trial audience and the actions of taking of evidences determined by law are subordinated to the adversarial proceeding".[89]

In the same manner, the Criminal Process Code directly appeals to the functioning of the adversarial proceeding during the production of evidence, with the exclusion of illegally obtained evidence from the prosecution's case at trial.

Apart from these important aspects, Portuguese procedural law presents a complex and intense web of legal appeals, very similar to common law systems.[90] In the Portuguese legal system, beyond the prevalence of the possibility of appealing legal decisions (art 399 CPP), the entire system is assembled to allow an appeal route, not only for sentences or final judgments, but also the majority of the decisions made by a judge during a trial. In the light of the aforesaid, it is also important to say that the

[88] Vogler, Richard, *supra* note 439 at 19
[89] Art 32, no. 5 of the Constitution of the Portuguese Republic (translated by the author)
[90] Articles 67 – 83 of the Criminal Procedure Code (Law nº 20/2013 21st February)

majority of decisions allow a double appeal, not forgetting about the permanent possibility of appealing to the Constitutional Court in matters of constitutionality. In truth, many criticism have been made in relation to this "excess in the guarantee of the trial" in the Portuguese legal system, which was identified as one of the main causes of the justice's delay. In 2003, during an interview to a Portuguese newspaper, the President of the Assembly of the Republic referred to this "excess of rights and guarantees" which, according to him, is transformed or can be transformed into an "absence of justice and guarantees". [91] Rothwax calls it the "overextensions of protections".[92]

The recent legislative alterations introduced in some legal systems concerning the fight against terrorism and highly organised crime have come to create some instability in the traditional characterization given to systems, such as inquisitorial, accusatorial or popular justice system. Indeed, it seems that the notion of 'inquisitorial' legal procedure today exists "only in the unreflected projections of common lawyers", as suggested by Nijboer.[93]

It seems evident that the legislative evolution will have to bear in mind the characteristics attributed to this new emerging criminality in the globalised world[94] by most studies. It will also have to pay a stronger attention to the forecasts and specific alerts made by the government agencies in charge of fighting crime all over the world. For example, the Australian Crime Comission, in an analysis carried out for the year 2009, suggests that:

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[91] See interview of Mr. Almeida Santos (current President of the Portuguese Socialist Party) to Newspaper *O Diabo* on 17/06/2007, available at http://www.ps.parlamento.pt/?menu=opinioes&id=3067&leg= (accessed on August, 2013)
[92] Rothwax, Harold, *Guilty – The collapse of Criminal Justice*, Random House, New York (1996)
[93] Nijboer, J.F., "Common Law Tradition in Evidence observed from a Continental Perspective", in *Comparative Law*, IOL ed., (2008) pp. 299 – 338.
[94] Held, D. and others, *Global Transformations: Politics, Economics and Culture*, Cambridge University Press, Cambridge (1999), p. 56

> "New technology has enabled organised crime groups to operate across national borders and execute illegal activity at a geographical distance from their victims. Using new and available technology, international and Australian crime groups commit complex frauds, access equipment to produce drugs and share child pornography. Technology increases the ease with which money can be transferred offshore, enabling organised crime groups to undertake cross border money laundering." [95]

But, apart from the technological aspect[96], the report produces some important conclusions related to new IT crimes and money laundering, in a scale never before witnessed by any country. Some conclusions drawn by the report will now be stated, for their key importance within the continuance of this research project:

> "Organised crime is involved in a diverse and increasing range of industries. In general, it is becoming more involved in sectors or industries where there are fewer risks, less law enforcement attention and greater opportunities to generate large profits.
> New technology has also made it easier to move goods over large distances and between countries (…).
> There are parallels between the types of activities carried out by criminals and terrorists. Both use transport, communications and financial services to plan and support their activities. Both target the vulnerability of their victims and engage experts to assist their activity.
> Criminals and terrorists protect themselves and their assets, hide information and use similar methods of operation including violence, corruption and money laundering." [97]

It seems quite evident that the legislation to be produced in this area, according to current circumstances, will have to produce a very sensitive balance between the fight against this new type of criminality and the genuine social concerns of citizens' fundamental rights and basic freedoms. The underlying political speech and ideological narrative seem to point at this direction, which, as was seen in the analysis made of Vogler, will unavoidably affect the legislative reforms in course.

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[95] Australian Crime Commission, *The Organised Crime in Australia – 2009* available at http://www.crimecommission.gov.au/publications/oca/_files/2008/2008_oca_key_issues_trends.pdf

[96] As Steve Uglow refers, the impact of new technologies doesn't only have a negative effect in terms of organised crime; their influence on the investigation and police work should also be highlighted. See Uglow, Steve, *Criminal Justice*, Sweet & Maxwell Ltd. (2002). pp. 68 - 72

[97] Australian Crime Commission, *The Organised Crime in Australia – 2009* available at http://www.crimecommission.gov.au/publications/oca/_files/2008/2008_oca_key_issues_trends.pdf (accessed on August, 2013)

The concern over safety in face of the fear of new terrorist attacks (United Kingdom and Spain) or by the increasing and obvious organised urban criminality (France and Greece) or even by the unpredictable effects of colossal financial frauds (USA) will lead – or, in some cases, have already lead – to legislative measures that harden the fight against this type of crimes,[98] facilitating criminal investigations and allowing for harsher and more restrictive measures of coercion on the suspects. On the other hand, the growing social and public concern related to freedoms and fundamental rights will force governments and parliaments to significantly modify the law, as well as to create counter-weights that maintain the constitutional scheme of *checks-and-balances* in functioning. In truth, this *checks-and-balances* system represents one of the most important legacies from the classical liberalism and was kept as an essential pillar within the European Union's structure. [99]

In truth, no investigator can honestly believe that measures will be undertaken to contain and restrict criminal investigation activities, within this context of 'war on terror'.[100] On the contrary, the tendency witnessed (even in countries such as the United Kingdom and Spain) goes in the direction of a growing flexibility of these activities. At the same time, there is a broadening of the situations in which the bodies of criminal police may intervene (restricting the citizens' fundamental rights) without the need of judicial intervention[101], which, in the past, was only allowed for in utterly exceptional situations. In the same fashion, the pre-charge detention time limits will tend to be extended, particularly in situations involving terrorism or highly organised criminality.

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[98] Cuerda, Antonio, *Nuevos Desafíos Del Derecho Penal Internacional: Terrorismo, Crímenes Internacionales y Derechos Fundamentales*, Tecnos ed. (2009), p. 45

[99] Fisher, Elizabeth, "The European Union in the age of Accountability" in *Oxford Journal of Legal Studies*, Vol. 24, n. 3 (2004), p. 506

[100] Klosek, Jacqueline, *War on Privacy*, Greenwood Publishing (2007) pp. 77 - 90

[101] (United Kingdom) Antiterrorism, Crime and Security Act 2001, Part IV s 23 (1); (Portugal) Art. 174, no. 4 of Portuguese Code of Criminal Process.

At the same time, within the operation of crime prevention, one witnesses – and will still continue to witness in a near future – a growing number of police-based "preventive operations", particularly in problematic areas, in order to prevent terrorist crimes, arms trafficking, money laundering and other activities of criminal group.[102]

This reasoning serves to conclude that a progressive prevalence of the crime control model within the scope of Phase I (or, in Vogler's terms, of inquisitorial line) will take place, in which the objectives of the criminal policy will dominate the process' path, with increasing breaches on the citizens' fundamental rights.

On the other hand, as a way to manage to necessary balance within the criminal process, to answer the growing social concerns or simply to maintain the foundations of the liberal legal tradition, governments will tend to create more effective mechanisms of control and assessment of evidences and the means used to obtain them, legal ways to enable a more effective participation of the suspect during trial (considering that this intervention was extremely limited during the investigation phase) and public scrutiny of the charge and trial of these suspects.

All of this can be translated into a reinforcement of the defense mechanisms at the suspect's disposal, with more room for adversarial debate and, especially, more mechanisms of legal appeal. Basically, this means a progressive prevalence of the due process model within Phase II (or accusatorial line), in which the suspect's guarantees and his/her fundamental rights are the process' main concern. We have here, in a very clear way, the idea of bifurcation of criminal justice system.

Basically, systems traditionally considered as accusatorial, according to academic standards, will know a slow but steady inquisitorial tendency within the scope of crime

[102] FATF – GAFI, *Building Effective Systems to Fight Money Laundering and Terrorist Financing*, (June, 2007) available at http://www.fatf-gafi.org/dataoecd/18/11/38944355.pdf (accessed on August, 2013)

prevention and investigation mechanisms. This is precisely what is happening in the United Kingdom and also in the United States. On the other hand, some continental systems will tend to harden their prevention and investigation system (Phase I) and to accentuate the respective inquisitorial tendency, especially when certain types of crimes are on the line (example: the Portuguese Gun Law 2006). This tendency will probably also result in an increase (shy or considerable, depending on the governments) of pre-trial detention rates in a near future, as referred by Frederico Isasca. [103]

This tendency will be the systems' answer to the boom in organised and highly violent crime that has been witnessed over the last decade, as well as the growing terrorist threat. Increasingly intrusive investigation measures and more permanent crime prevention actions – programmes such as Zero Tolerance Policing[104] - are combined with the social demand for harsh and exemplary punishments on the suspects, even if "against the results obtained by the majority of investigations and studies in this area", as referred by Andrew Ashworth. [105]

A very important example of this punitive or securitizing tendency is the abandonment of some very central procedural safeguards that serve to protect people from abuse in the legal environment, such as the rights of the suspects and prisoners in sexual crimes. Thomas contends that in the United Kingdom a sex offender register has been created based not on substantive evaluation or research but popular opinion expressed through the media, including the publication of sex offenders details, which has led to mass demonstration, denunciation and vigilantism. The so-called return of the

[103] Isasca, Frederico, "Prisão preventiva e restantes medidas de coacção" in *Jornadas…*, cit., pp. 65 - 79
[104] Uglow, Steve, *Criminal Justice*, 2nd Edition, Sweet & Maxwell Ed., London (2002), p. 59
[105] Ashworth, Andrew, *supra* note 467 at 389

victim and victim status has also become apparent in this prevailing punitive environment.[106]

However, at the same time, the liberal tradition and the system's credibility will force the use of open and transparent schemes of legal activity during the trial stage, in a clear sign respect for the liberal principles such as fair trial and rule of law.[107] Even if merely symbolic, Western democracies can not abandon their most significant and historical values and juridical principles.

It is this theoretical framework that will underpin the analysis of the data in chapters III and IV, entailing us to observe the phenomenon of bifurcation of criminal justice system, how the antiterrorist responses have brought common law and civil law systems closer together, and the significant costs that have resulted in regard to legal and constitutional values. However, prior to the detailed study of such legal responses, it will be useful to engage in a deeper understanding of the specific characteristics of this new threat, as well the historical path and the most significant issues that were raised towards criminal justice systems, namely the surge of new types of terrorism in the world stage.

3. Historical Evolution of Terrorism

Although terrorism has been, in its broadest sense, the penicle for changes in many societies[108], the current phenomenon finds its roots in the French Revolution. It

[106] Thomas, Terry, "When Public Protection becomes Punishment? The UK Use of Civil Measures to Contain the Sex Offender" (2004) in *European Journal of Criminal Policy and Research*, nº2 , p. 339

[107] Weissbrodt, David, *The Right to a Fair Trial - articles 8, 10 and 11 of the Universal Declaration of Human Rights*, Martinus Nijhoff Publishers (2001)

[108] Hübschle, for example, analyses the way in which diverse forms of Islamic related terrorism have changed the political panorama of societies in the Arab World, many times prompting true movements of

was during this period that terrorism gained a new life and that the term terror started to enter the vocabulary of many politicians, "even identifying the decisive stage of the revolution, after the "law of suspects", passed in September 1793, condemning thousands of citizens to the guillotine." In 1798, the dictionary of the French Academy began to include the word terrorism as a "political figure in which Power kills to maintain or enhance itself."[109]

"Revolutionary Catechism" was the first known organisation in the fight against despotism. However, at the time of its creation, no rules were layed out concerning the function of the organisation.

Thus in 1879, "a group of youths outraged with the regime of the time, gathered ideas and adopted the principles that were intended to guide "Catechism", in order to tackle the organised and systematic violence by the czarist power." [110] This is how 'Narodnaya Volya' was created, which literally means People's Will. It was the first active terrorist organisation known up to that time. The death of Czar Alexander, following the attack of March 1, 1881, has been attributed to this group."[111]

The principles of *Narodnaya Volya* are consubstantiated on the following:

> "Terrorist action consists in the suppression of the government´s most harmful men, in defending the party against espionage and in the punishment of the most evident violence and arbitrariness committed by the Government and the Administration. The purpose is to undermine the prestige of governmental force, to constantly prove the possibility to fight against the government, thus fortifying the revolutionary spirit of the people, and, finally, to form active members prepared to fight." [112]

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national liberation, as the OLP (Palestine), Lebanon and Iran (with the Islamic Revolution). Cfr. Hübschle, Islamic revolution and terrorism, Leya ed. (2005), pp. 11 - 16

[109] V. Authors, Enciclopédia Luso-Brasileira de Cultura, Lisbon, Editorial Verbo Ed., p. 1429.

[110] Franco, Pinheiro Joaquim, "A Rússia dos Czares" in *Revista Nação e Defesa*, nº 34 (2008), p. 27.

[111] Ibid. at., p. 31

[112] Chaliand, Gérard, *The History of Terrorism: From Antiquity to Al Qaeda*, University of California Press (2007), pp. 147 and following

From here onward, a kind of faceless terrorism or systematic terrorism began to slowly develop, nevertheless without defined goals or specific enemies to knock down. It is with this concept on systematic and global terrorism, as put forward by Marshall[113] that we will work on this study. It is a formulation that has been gaining ground among those who investigate terrorism as a concept. Sousa Santos states that:

> "The emerging phenomenon of contemporary terrorism post 9/11 has to be seen from a double perspective: a global dimension (in so far as its objectives are the global and complete destruction of the international legal and political system) and a systematic dimension (as global terrorist networks organize and coordinate many autonomous groups for a common purpose)." [114]

However, it already brought about the idea that the population as well as members of the organisation itself could be targets of terrorism, if necessary. On the other hand, it also mentioned that people should be influenced for the purpose of a revolution. Attacks have since multiplied, several methods have been used to perform such attacks and many thousands have been victims of terrorist acts.

The most important demonstration of this sort of terrorism occurred after World War II, more specifically in the late sixties. Most analysts point to 1968 as the milestone of modern terrorism, when systematic terrorist operations by the Palestine Liberation Organisation (PLO) began.[115] Authors like Hoffman and Laqueur consider that "the decisive milestone of this change refers to the hijacking of an airplane of the Israeli airlines by members of the Popular Front for the Liberation of Palestine (PFLP), one of the six factions of the Palestine Liberation Organisation (PLO)."[116]

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[113] Marshall, Monty G., *Global "Terrorism: an overview and analysis*", Integrated Network for Societal Conflict Research (2002)
[114] Sousa Santos, Boaventura, *Towards a New Legal Common Sense: Law, Globalization, and Emancipation*, Cambridge University Press (2002), pp. 45 - 68
[115] Chaliand, Gérard, "*La Mesure Du Terrorisme*" in Revue Stratégique, Nº 66/67, from 1997, p. 9.
[116] Laqueur, Walter, *No End to War: Terrorism in the Twenty-First Century*, Continuum Ed. (2004), pp. 86 - 105

These tactical and operational changes were enabled by technological advances, especially in the manufacturing of weapons with variable degrees of power, in the air transportation system, as well as in the media, with regard to television channels.[117]

This illustrates, in Veres' words, a fundamental truth concerning contemporary terrorism: the fact that is a form of mass terrorism, highly resonated through the media, and which aims for the death of the highest number of people (civilian or not) as a means of social and political unrest using the media to widen the attention of its actions [118.] Pinheiro notes that "whilst terrorists of the nineteenth century were idealistic, with moral rigor and unable to kill innocents, those of our days perform most infamous tasks with complete insensitivity."[119]

This situation takes on impressive proportions in any empirical analysis, for example, of the various media sources. Let us consider, by way of example, the cases of Portugal and Spain. In the year 2000, the most widely-read national newspaper in Portugal (Correio da Manhã newspaper) published about 45 articles related to terrorism, mostly concerning the situation in the Middle East. In 2004, the same newspaper had roughly about 2805 articles related to terrorism.[120]

Since the 1980's, terrorism has again gained new life and actions have become increasingly violent. It can be said that the 1980's were a milestone for the indiscriminate spread of terror. Terrorist acts have become increasingly violent and are intended to affect the greatest number of people.

Sousa Santos identifies this phenomenon as "mediatic terrorism", that is, a type of criminal activity that seeks to achieve its goals through the global dissemination of

[117] Piçarra, Nuno, *Electronic Surveillance and European Union*, ALFA (2008), p. 76
[118] Veres, Luis, *La retórica del terror: Sobre lenguaje, terrorismo y medios de comunicación*, Ediciones de la Torre (2009), pp. 25 and following
[119] Pinheiro, Joaquim A. Franco, Revista Militar, Lisbon (2003) p. 474
[120] Rodrigo de Castro, André, *Estatisticas sobre terrorismo e jornalismo*, Verbo ed., Lisboa (2012), pp. 56 - 57

fear, panic, and its imperialistic or destructive objectives. This element is relevant insofar as it enables the understanding of governments desire to control the media and in a certain way, to control the freedom of expression of its citizens.[121]

Methods have also evolved. Bombs, explosive devices and kidnappings are now the most widely used instruments, whilst the use of airplane hijacking has curiously declined in the last decade (see Appendix below). A novelty in the new era of terrorism is the action of suicide bombers known also as kamikazes.[122] With them, the world watched in horror as a new medium was being used: the innocent-bomb.[123]

The damages resulting from terrorist actions during the 90s, translate the intensification of the destructive nature of terrorist operations. When terrorists attacked the World Trade Centre for the first time in 1993, they intended to kill thousands of people, although the number of victims was much smaller. Another situation, which has been occurring with some frequency, is the appearance of religious "sects" that instigate the idea of a better world for their believers. These groups have caused many problems to governments they are part of. Such was the case of the attack with "sarin gas" perpetrated by the Japanese religious cult "Aum Shin Rikio" inside the Tokyo subway in 1995. 12 people died in this attack and over 5,000 were injured.[124]

It should be noted that since that time authors like Hubback, Bowers, Hoffman and Laqueur, drew attention to"the growing danger manifested by many extremists and

[121] Sousa Santos, Boaventura, *A linguagem sociológica do terrorismo*, Universidade de Coimbra (2003), p. 78

[122] Men and / or women bombers who sacrifice the lives of innocent people as well as their own lives on behalf of the cause they advocate.. Islamic extremists believe that such acts are not suicides, but acts of martyrdom, and thus truly acceptable in the holy war.

[123] http://islam.about.com/cs/currentevents/a/suicide_bomb.htm accessed August 2008.

[124] Smith, Paul J., "Ameaças Transnacionais e a Sobrevivência do Estado: um Papel para o Militar?" *Military Review*, Brazilian – 1st Quarter 2000, p. 72.

fanatics of religious nature, insofar that they represented - and still remain – a serious threat to international security".[125]

The 1990's were, as such, the seed of this new terrorism that acquired global dimension and had mass destruction as an objective. This phenomenon - and the corresponding responses by the criminal justice systems, will be the subject of the analysis herein. As Albuquerque refers, it is important to locate the birth of global terrorism in the 1990's as it was during that decade that States began to comprehend the scope and the potential dimension of the dangers and threats related to this problem. According to the same author, it was during the 1990's that the deadliest attacks that the world witnessed began to be planned, developed and finally executed.[126]

In 1993, Al-Qaeda's Muslim terrorists failed with their intention in the first attack to the World Trade Centre, but they also made it clear that "New York, the centre of the economic and political power of the West, would be attacked again."[127] Thus, it was that on September 11, 2001, in New York, the largest single attack in history took place.

Jenkins, one of the most prominent and acute observers of terrorism, claimed in 1985 that "simply killing many people has rarely been the purpose of terrorism (...). Terrorists operate on the principle of the least necessary effort. They find it unnecessary to kill many since killing some may be enough for their purposes."[128]

However, this statement no longer made sense after the attacks of 9/11. Terrorism, which has since long been present in the history of human societies, now

[125] Nascimento, José Miguel de Fraga, *O Terrorismo e seus intérpretes – Uma abordagem psicossocial*, Lisbon, Hugin, February 2002, p. 8.
[126] Albuquerque, Martim, *Estudos sobre terrorismo global*, Almedina, Coimbra (2009), p. 87
[127] Pohly, Michael and Duran, Khalid, *Ussama Bin Laden e o Terrorismo Internacional*, Lisbon, Terramor, November 2001, p. 6.
[128] Jenkins, Brian, *International Terrorism: the other world war*, Rand Corporation ed., New York (1995), p. 21

heightens its main feature to the highest expression: the ability to terrorize and to intimidate the most. Hoffman characterized the attacks of 9/11 as follows:

> "Ambitious extent and dimension; perfect synchronization and coordination; professionalism and skills in keeping such a big operation in secret; strong determination and dedication of the 19 aircraft hijackers who willingly killed themselves as well as the passengers and crews of the four taken aircrafts and the thousands of people who were visiting the World Trade Centre and the Pentagon and those who worked there." [129]

Moreover, these attacks left a warning: "future terrorist attacks [will happen] in the metropolises of modern industrial societies."[130]

The majority of antiterrorist laws in the United States and in several European countries are the result of the analysis carried out after the 9/11 attacks. It is therefore necessary to observe how this change in the nature of the terrorist threat conditioned the responses by different states.

By considerably raising the level of the threat and the potential degree of destruction, States were forced to formulate more sophisticated and effective responses, which however, were also more intrusive of citizens' rights, as Donohue points out.[131] Global and massive control programs of electronic surveillance and wiretapping were included as part of an imperative need to contain that potential threat of mass destruction.

On the other hand, whilst the terrorist phenomenon of the XIX century and of the greater part of the XX century was confined to actions by certain relatively small groups,[132] modern techniques of massive recruitment, using new technologies, have required states to adopt control and surveillance measures in a degree never seen before

[129] Ibid., p. 23
[130] Pohly, Michael, and Khalid Duran, *supra* note 69 at 6.
[131] Donohue, Laura, *supra* note 33 at 67
[132] Moledo, Miguel, *O terrorismo na Europa: perspectiva histórica*, Almedina (2003), pp. 56 - 78

in the history of mankind, as Marques da Silva observes.[133] It also brought about new international partnerships and new instruments of international legal cooperation.

The point, as Wagner notes, is the following: terrorism of Islamic inspiration assumed global objectives, positioning itself as a threat to all secular and democratic states in the world. This new paradigm of threat forced states to adopt new instruments of international cooperation regarding the sharing of information, even among countries where such was highly unlikely to occur.[134]

The first years of the second decade of the XXI century have been particularly relevant to understand the adaptation capability of muslim extremist groups, namely does affiliated with Al-Quaeda. The western, US lead offensive against these groups struck the heart of their leaderships and led many to consider that by dealing significant blows to the main structure of those organizations, they would succeded in dismantling their networks and therefore their capacity to produce significant attacks on the west. This was emphasysed by American authorities when they declared that such organizations would only be able to carry out "lone wolf attacks, carried out by misfits and madmen indoctrinated over the internet."[135] This proved only partially true. Whilst killing many of the top operational leaders of Al-Quaeda and its affiliated groups did hinder the ability to organize sophisticated and complex attacks on the West (also called "spectaculars"), Al-Quaeda and others have concentrated their attention to more immediate targets closer to their bases. This has also been possible due to the failures of the Arab Sping, which in many ways gave momentum to the propaganda of extremist muslim ideology.

[133] Marques da Silva, Germano, *Direito Penal Português*, Vol II, Ed. Verbo (2004), p. 67
[134] Wagner, Patrick, *Deterrence and Terrorism: Can Global Terrorism be Deterred?*, GRIN Verlag (2011), p. 6
[135] *The Economist*, September 28, 2013, pg. 21.

For a better understanding of this it is important to study in detail the objectives of those groups, directly or indirectly affiliated to Al-Quaeda.[136]

4. Extremist-Muslim Terrorism. The objectives of al-Qaeda's "Terrorist Organisations"

Al-Qaeda and its associated groups such as the Abu Sayaf Group, Al Shabab and Boko Haram, among others, operate on the basis of an Islamic political-religious fundamentalist ideology called Salafism[137]. They employ extremist and selective interpretations of Islam which determine all operating aspects of these organisations, from the process of recruiting new members to their use in the perpetration of terrorist acts, involving also strategic decision-making, obtaining financial and logistical support as well as operational planning.

But what are the objectives of Muslim extremist terrorism (or global or "catastrophic" terrorism)?

According to Loureiro dos Santos, "the objectives of organisations in which the use of catastrophic terrorism is legitimate, are political, in the purest sense of the word. They intend to change power relations."[138] These political objectives consist of three

[136] It must be underlined here that this new kind of terrorism, perpetrated by muslim extremists groups such al-Qaeda, is distant from the tolerance towards other faiths that has been central throughout the centuries to Islamic tradition. The history of Islam provides some of the earliest examples of pluralist tradition and of the earliest codes of human rights, and played an important role in shaping human civilisation. Furthermore, the Quran explicity promotes diversity, compassion, forgiveness and restraint. In fact,,it actually advises its followers to beware of extremism. The views that are proclaimed by terrorists are very much at odds with what is generally agreed to be the principles of Islam (Transnational Terrorism – The Threat to Australia, 2004, Page ix and following, available at: http://www.dfat.gov.au/publications/terrorism/transnational_terrorism.pdf, accessed July 2013)

[137] Malet, David, *Foreign Fighters: Transnational Identity in Civil Conflicts*, Oxford University Press (2013) pp. 189 and following.

[138] Loureiro dos Santos, *Um futuro sem terrorismo?* Almedina (2007) pp. 39-43.

types of objectives: the ultimate goal, the intermediate (or "sectorial") objectives and the lower targets (or "geographically restricted").

Its aims are global and they are not willing to any compromise in order to establish a pan-Muslim super-state:

> "The demands of these terrorists are absolute. Unlike other known forms of terror, they are not contained by geography, political dispute or particular historical grievance. Their rhetoric often seeks to exploit local populist concerns to their own ends. They do not allow for remedy or compromise. Their views on means and ends differ from previously known forms of terrorism. They know their goals cannot be achieved through persuasion. Their violence is not designed to get a seat at a negotiating table. It signals a committed path to their final end"[139]

Thus, another order would emerge against, "a centre formed by Islamic countries (Islam), whose core would be located somewhere in one of these countries (or outside by virtue of the possibilities offered by the use of cyberspace),"[140] where the Sharia would be imposed in a fundamentalist interpretation of the precepts of the Holy Book of Muslims, the Qur'an, and once more implementing the "Caliphate"[141]

All those who do not follow their cause are deemed legitimate targets. This includes other Muslims as has been seen throughout the years of their terrorist operations which have been carried out in predominantly Muslim-populated countries.[142] However, an attack on the U.S. (in political, economic and sociological terms) or UK is still the primary intermediate objective and thus forcing a retreat from the power relations and occupation/exploitation exercised upon the Islamic world (the presence of U.S. troops in Saudi Arabia is considered a provocation by Muslims, since it is the birthplace of Islam). With the attacks of 9/11, the U.S. assumed a Grand

[139] Transnational Terrorism, *supra* note 78, at page vii, accessed July 2013
[140] Loureiro dos Santos, *supra* note 80 at 48
[141] The period in which the Caliphs of Islam ruled which represents the heydays of ancient Islam's power on a global scale
[142] Transnational Terrorism, *supra* note 78, at page ix, accessed July 2013

Strategy in order to prevent other attacks from occurring. The so-called USA Patriot Act was only the first of these reactions.

The second objective is to recover the Sharia in the the lost territories of the Islam, such as the Caucasus, the Balkans, and an important part of the Iberian peninsula (al-Andalus); regions that belonged to Muslims for centuries. Such frustration over the lost Muslim territory originated therein, the existence of Muslim terrorist organisations willing to fight the "infidel invader."[143]

Europe is, thirdly, another intermediate target of great importance, insofar that excluding those countries belonging to the "Great Caliphate", other countries, or at least the most of the important urban centres, would become key pieces used to bend European policies so that the Muslim will can flourish. Likewise, Muslim enclaves would be constituted throughout the numerous Muslim communities residing in Europe.[144] Through this objective, the U.S. would become isolated, which would lead to a weakening of its influence and intervention in international affairs.

It is important to note that while the tactics and immediate targets may change according to the leadership of groups affiliated with Al-Quaeda and with present objectives, the goals of muslim extremism are clear, as has been noted by *The Economist*:

[143] Basically, as Moghadam refers, the main idea is to recover the "Great Caliphate", which is a big, geographically divided territory - huge area of continental and insular land, extending from al-Andalus, in the West, to the extreme Eastern Indonesia, in the East. It would separate Eurasia, in the South from Africa turning the Mediterranean world into an Muslim fundamentalist lake; It would include the Petroleum regions (the Gulf region) and it would hold geostrategic key positions to control the oil routes to India and China, which one might also call the Pan-regions, which are regions of large importance within the global economy. In other words, as Moghadam advocates, in global geopolitical terms, those who would dominate this vast territory ("Great Caliphate"), would have significant if not decisive advantages143, with regard to the ownership of natural energy resources, and would thus weaken the current Unipolar World Order represented by the United States, as well as other emerging and expanding powers.(Moghadam, Assaf, *The Globalization of Martyrdom: Al Qaeda, Salafi Jihad, and the Diffusion of Suicide Attacks*, JHU Press, 2011, p. 77 and following)

[144] Carmo, Nuno da Câmara, *Enclaves islâmicos na Europa Ocidental*, Verbo ed. (2009), pp. 67 and following.

> "While attacks on the far enemy are important both as a deterrent and as source of jihadist inspiration, they are not al-Quaeda's main purpose. Its overriding aim remains, as it has been since bin Laden saw the retreat of the Soviet Union, the creation of a new caliphate across the Islamic world based on unswerving adherence to Sharia Law. That requires the corrupting influence of the "Zionist-Crusader alliance" in the region to be extirpated and all apostate Muslim governments removed."[145]

Soares da Veiga, mentions more specific, intermidiate objectives of global terrorism, such as: "1) replacing corrupt Muslim governments throughout the Muslim world; 2) to oust U.S. forces from the most sacred Muslim grounds - Saudi Arabia, where the shrine cities of Mecca and Medina are located; 3) to oust the Jews from Palestine; 4) to release the European and Asian regions that were once Muslim: represented by the great Albania in the Balkans, Chechnya and other Asian regions in the Caucasus, Kashmir in India, Xingjian in China and some areas of Central Asia."[146]

The central issue in these objectives is the choice of a country where a significant effort is made to replace non-fundamentalist governments with fundamentalist ones. Loureiro dos Santos indicates the following as the most probable nations: Saudi Arabia, Turkey, Egypt or Pakistan.[147]

Fundamentalist Muslim groups have recently considered Iraq a "top" prioriy. Zarkawi the former number one of al-Qaeda in Iraq, said that Iraq would be the best place to establish the generating power of the "new great Islamic civilization".

At a lower level, there are objectives that seek to educate, organise and census the Jihadist "battalions". Such requires large physical spaces that must be poorly controlled and inhabited that could be found in failed states. The best and most likely place is centred in the Pashtun tribal border area between Pakistan and Afghanistan, which is going through a rapid 'Talibanisation' process.

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[145] *The Economist*, September 28, 2013, pg 23.
[146] Soares da Veiga, Raul, *O Terrorismo e os Direitos Fundamentais*, Universidade de Lisboa (2010) pp. 44-56.
[147] Santos, General Loureiro dos, *supra* note 80 at 94

According to Fawaz, an assessment of al-Qaeda's achieved and failed objectives, shows us that some have not yet been met, such as: "jeopardising the International order led by the U.S[148]; attacking the U.S. again or taking measures in any European country since 2005, with the exception of Turkey; overthrowing regimes of Muslim countries, especially Saudi Arabia and expelling the Israelis from Palestine."[149] Donohue underlines here the impact of actions for the prevention and containment of terrorist attacks, resulting from various antiterrorist legislative packages approved by Western countries.[150]

However, Al-Qaeda has achieved some major goals. Such can be seen, in particular, in causing restrictions to the civil rights in democracie. They have succeeded in causing serious economic losses, especially in the tourist sector of developed countries. We have also seen a continuation to instigate Muslim crowds against the West, they attract funding, there is an increase in the number of volunteers for the Jihad, increasing militant anti-Americanism and anti-Westernism and putting pressure on U.S. forces to leave Saudi Arabia.

Understanding the motivations and immediate objectives of terrorist groups is also a fundamental element to ensure an adequate response to the research questions posed in chapter I. The efficiency of the responses to terrorist threats depends, as Sageman refers, on the knowledge of its immediate objectives and its underlying causes.[151]

Fundamentalist ideologues are in charge of the development and interpretation (and updating) of religious ideology. They base themselves on ideological and political motivations and on the fact that Muslim societies have struggled to cope with the

[148] Fawaz, Gerges, *The far enemy*, Cambridge University Press (2005), p. 82
[149] Loureiro dos Santos, *supra* note 80 at 97.
[150] Donohue, Laura, *supra* note 33, at 267

challenges of modernity in order to justify the importance of implementing the Qur'an in these fundamentalist societies. They take on Wahhabism, a extremist branch of Sunni Islam

The feeling that is most applied to the fighters by ideologues of the Jihad is the feeling of humiliation. According to Kosrokhavar, it is important to differentiate three kinds of humiliation: the one arising from social inferiority and economic marginality, the one that is reported by the media and accounts for the Western "offensive" against Islam (Palestine, Afghanistan) and also, the one which lies in the cultural and religious threat of a secular and domineering West:

> "Terrorists justify and feed their ideology through skilful exploitation of dynamics within mainstream societies. They use adverse political, social and economic conditions as a rallying cry to recruit and motivate their members. They exploit distrust of the West and feelings of humiliation and anger."[152]

The Israeli-Palestinian conflict, the prisons in Guantanamo and Abu Ghraib, the wars in Iraq and Afghanistan as well as Chechnya, the Kashmir issue, among others, trigger a feeling of humiliation in the mujahedeen, which ideologues take the opportunity to encourage, spread and adjust in accordance with good propaganda techniques. It is this feeling that leads to the sacrifice of suicide or according to al-Qaeda's interpretation, to "martyrdom".

This aspect has been notoriously absent from the reforms undertaken by European States and the USA, which have mostly targeted the criminal side of terrorism, rarely addressing the political – propaganda and fundraising – aspects of extremist religious terrorism.[153]

[153] Gunaratna, Rohan ,*Transnational Terrorism, Support Networks & Trends*, LTDA Publishers (2010), pp 45 - 62

5. New types of terrorist threat

Understanding the evolution of how terrorists act and the new shapes they can be manifested is key for the analysis of the antiterrorist reforms that will be carried out in chapters III and IV. Only by understanding this phenomenon comprehensively will it be possible to understand the prevention, control and surveillance programs initiated in the past decade as well as the legal reforms undertaken in criminal and criminal procedure areas.

In what way is the understanding of the new types of terrorist threats relevant in regard to the research questions set fourth in Chapter I?

From the outset, the fact that it is a phenomenon with levels of threat of a potentially catastrophic level has forced States to adopt measures of preventive nature, which are relevant as they are behind the changes occurring within the criminal justice systems (namely regarding the differentiation between different phases of the criminal process). Also – and this is a fundamental aspect – the fact that these systems face a common and global threat has forced different systems to adopt common and coordinated answers, which in turn is behind the convergent evolution of legal systems traditionally belonging to distinct families (mostly regarding common law and civil systems). Bacelar Gouveia goes as far as claiming that "terrorism of global nature and the associated panic have caused the greatest convergence of the last centuries between families of common and civil law."[154]

One of the major threats which however hovers latent over the world, relates to the possibility that terrorist organisations possess weapons of mass destruction. What spreads the greatest terror are not the handmade explosives or even the conventional ones but the possibility of terrorist commands gaining access to chemical, biological or

[154] Bacelar Gouveia, Jorge, *Estudos de Direito e Segurança*, Almedina, Lisboa (2010), p. 87

nuclear weapons and being able to use them in their attacks. Past events have shown that it's no transcendental thing for these weapons to be in the possession of terrorist organisations. The case supporting this theory goes back to the 90's, specifically in 1995 when the Japanese religious cult "Aum Shin Rikio" attacked the interior of the Tokyo Underground with "sarin gas" and where 12 people died and over 5,000 were injured.

The Western world is extremely vulnerable in this field, although the combined efforts between intelligence services, security forces and civil protection are an undeniable given in the prevention of this phenomenon[155].

There is a strong suspicion that al-Qaeda is in possession of weapons of mass destruction. Marvin Cetron, adviser to the President of the United States, stated in 2004 that: "terrorists will have access to weapons of mass destruction and large-scale attacks will take place within the Western powers. The question is when".[156]

This possibility [of some terrorist groups being in possession of weapons of mass destruction] has strongly influenced the responses of States to terrorist threats, namely in what concerns the strengthening of surveillance and prevention (in the United Kingdom for instance) and the control over communications (in Portugal and Spain, for example).

We must therefore conclude, that we are witnessing the emergence of a new range of terrorist events, with growing impact on the various antiterrorist laws, which have been approved, in the last decade. This phenomenon should be studied precisely, accurately dividing the new forms of terrorism that have been analysed by experts.

[155] This is what can be deduced from the instructions disseminated by the Office for Civil Protection Liaison Agents Civil Protection. (Ref 916/dspc01).
[156] Cardoso, Joana, *News on Terrorism – Portuguese edition*, Lisboa (2007), p. 78

Stern explains that the greater part of antiterrorist reforms approved by western governments had the objective of containing the risk of new types of highly lethal and devastating threats.[157]

It should be noted that terrorism does not need such efficiency. The mere possibility that a fatal disease can be spread by mail and arrive in unsuspecting forms anywhere in the world, causes a considerable psychological impact, and is sufficient to destabilize a society - one of the goals of terrorist groups

Legislators have been concerned mainly with the following forms of terrorism: nuclear and radiological terrorism[158]; bacteriological, chemical or biological terrorism[159]; and cyber terrorism[160].

[157] Stern, Jessica, *The Ultimate Terrorists*, Harvard University Press, 2000 pp. 48 - 54

[158] Developments since World War II up to the present day have made it possible for "dirty bombs" (bombs made with radioactive material mixed with conventional explosives), which may be as designated small atomic bombs with considerable effects, weighting between 15-20 Kg, to be transported by a terrorist in a backpack. The end of the Cold War and Russia's loss of its former Soviet republics, allowed for many weapons of mass destruction to be "dispersed" throughout the now independent countries, whereby Russia has no longer any effective control over these weapons. Russia's race in nuclear weapons lost as much of its sense at the end of the Cold War and consequently some of the scientists who manufactured this type of weaponry became "unemployed". Some of these "unemployed" scientists, in a true state of economic need, sold the formulas for the production of nuclear, biological and chemical weapons on the black market to strangers, possibly terrorists. This kind of situation causes an immediate concern to take into consideration that enhances the threat that the use of these weapons by terrorists poses.

[159] This type of weapon, besides its devastating effect, can have a number of agents that will originate a number of diseases. Bacteriological and chemical weapons are easier to prepare given the easy access to its components on the chemical or pharmaceutical industry's market. Chemical weapons are usually classified into four groups (which in turn can bebe subdivided into several types):Group I against people and their effects; Group II against vegetables and their effects; Group III against people and their effects; Group IV against vegetables and people (Crone, Hugh, *Banning Chemical Weapons: The Scientific Background*, Cambridge University Press ,1992, pp. 45 and following; Wecht, Cyril, *Forensic Aspects Of Chemical And Biological Terrorism*, Lawyers & Judges Publishing Company, 2004, pp. 307 – 313)

[160] Cyber terrorism or computer terrorism translates into new forms of terrorist activity that, according to the definition by the European Union, "are aimed at the destruction or decay of computer systems such as civilian or military databases, or telecommunications systems, in order to destabilise the State or exert pressure over public powers" (Ribeiro, António Silva, AAVV, *As Teias do Terror, Novas Ameaças Globais*, Edições Esquilo, 2003, p. 121). In this sense, countries are not only confronted with the spectre of violent terrorism, but also with a new threat that is technologically advanced, poorly understood, painless, and against which it is difficult to defend.

6. Transnational Organised Crime and its connection to terrorism

How relevant is the connection between terrorism and organised crime in relation to the research questions set forth in the opening chapter of this study?

Terrorism in itself is not responsible for the entire framework of legal reforms undertaken in the past decade as Costa observes. According to this author, the relation between terrorism and organised crime is an essential factor that provides insight into the antiterrorist reforms and the fundamental changes in criminal law.[161]

Transnational organised crime has an increased relevance regarding the initial premise as it enables to point to the similarities and differences in treatment and responses adopted by inquisitorial and accusatorial systems.

As Bacelar Gouveia points out:

> "The new characterization of the crime of transnational organised crime generated common responses among considerably diferent criminal justice systems, as well as unlikely alliances. The connection between terrorism and organised crime as a global threat became, unexpectedly, a source of convergence between systems of civil and common law."[162]

The social and political changes that occurred at the end of the last millennium and at the beginning of this one, caused significant shifts at different levels of life in general and of community organisation.[163] The dismantling of the former Soviet Union catalysed the end of the "Cold War" and deeply transformed the balances established up to that time, paving the way for globalisation.[164]

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[161] Faria Costa, José, *Noções fundamentais de direito penal*, 3ª ed., Coimbra Editora (2012), pp. 101 - 103

[162] Bacelar Gouveia, Jorge, *Estudos de direito e segurança*, Almedina (2007), pp. 52 – 53 (translated by the author)

[163] Lewicki, Roy J., *Essentials of Negotiation*, 3rd edition, Burr Ridge, IL Editions, London (2003), pp. 89 - 99

[164] Severiano Teixeira, José, *A guerra fria e o terrorismo moderno*, Quid Juris (2004), pp. 34 -36

The globalisation we live in today affects not only the flow of goods, services and capital, but involves also large flows of people, ideas, information and technology.

Organised crime also reached a global dimension[165], just as the phenomenon of terrorism, in a way that the current discourse on security, almost necessarily integrates a reference to organised crime as it is considered one of the new threats.[166]

Today, society identifies organised crime as an ethnically homogeneous criminal organisations with a rigid structure headed by a powerful leader or godfather[167]. The reality though is far more complex and diverse: organised crime is a phenomenon built of a large number of many and complex factors, mostly of clandestine nature, making it difficult to clearly define. This has been subject to analysis by various academic studies and international organisations, with the aim of establishing an agreed definition of organised crime.[168]

a) Conceptual Framework

One of the most pragmatic ways of defining organised crime is via the definition of its actors - criminal organisations. In this sense, the United Nations, through the Convention Against Organised Transnational Crime, adopted by the General Assembly of the United Nations in November 2000, in its Article 2, defines a criminal organisation as a "structured group of three or more persons with a certain temporal permanence, acting specifically with the aim of committing one or more serious crimes, in order to obtain, directly or indirectly, a financial or other benefit". The same

[165] Santos, Loureiro dos, *A globalização do crime*, Universidade Nova de Lisboa (2003), p. 43
[166] Hobsbawn, Eric J., *Globalisation, Democracy and Terrorism*, Abacus ed. (2008), pp. 62 - 73
[167] Council of Europe, *Combating Organised Crime: Best-practice Surveys of the Council of Europe*, Business & Economics (2004), p. 179
[168] Ibid. at p. 182

convention defines a felony, "as conduct that constitutes the offense punished by deprivation of liberty for a maximum period of at least four years, or a more serious penalty."

In the current legal context and in global terms, it is common to speak of two types of embodied crime: general or common crime and and organised crime.

- General or common crime - consisting of a series of criminal acts, usually practiced separately and individually, assuming random, non-strategic and unforeseen forms of violence[169], where geographic implementation seldom exceeds regional borders and where its victims are directly related to the consummation of the crime; and
- Organised crime - which consists of criminal acts committed repeatedly as a result of a continuous activity and systematically operated by a structured group implemented on a national, international and transnational level, with a clear strategy or objectives for profit or power erosion of sovereignty and security bodies[170].

One can also identify and subdivide organised crime into two classifications, taking the motivations and objectives as a differentiating criterion: one with dominant motivations and objectives relating to profit (drug trafficking, arms trafficking, human trafficking, banditry, kidnapping and extortion, organised economic crime, counterfeiting of money and means of payment, forgery and trafficking of administrative documents, cybercrime, corruption, money laundering etc.); and the other having predominately political and religious motivations and objectives: (terrorism and groups of ideological or environmental contestation).

[169] Guedes Valente, Manuel, *A violência militar e o terrorismo*, Almedina (2004), p. 12- 35
[170] Beleza, Teresa, *A criminalidade organizada do século XVIII ao século XXI*, Universidade de Lisboa ed. (2008), p. 67

Understanding this theoretical framework is important as great part of contemporary terrorism can be identified with highly sophisticated groups of organised crime, in what concerns their methods and structure. As Fiedler, observes, it is not possible to understand anything about contemporary terrorism without understanding its permanent (historical and conceptual) links to organised crime.[171]

b) Fields of action of organised crime

There are deep historical roots in organised crime. It has developed in order to meet the marginal needs of society, but has always aimed at ensuring that the illegitimate needs of society are met, contributing to its "stability" through illegal activities, which currently are among the following: gambling, illegal immigration, exploitation of prostitution, tobacco smuggling and drug trafficking, cybercrime, etc.[172]

Organised crime has lucrative purposes and motivations and presents a large capacity to internationalise and to obtain high incomes of which a part is applied in legitimate businesses as a form of money laundering[173]. As an outcome of this economic power, there have been situations in which organised crime groups prompted to assist governments in solving problems[174] within the legal framework, which means that they are not always socially frowned upon, and are in some cases even "protected" by some sectors of the community in which these criminals are inserted.

Thus, groups of organised crime are sometimes seen as any other business. Indeed, organised crime also works on the market, the only difference is that it acts

[171] Fiedler, Robert, *Links Between Terrorism and Transnational Crime Groups*, GRIN Verlag, (2010) p. 7
[172] Beleza, Teresa, supra note 113 at 89
[173] Block, Alan, *All is Clouded by Desire: Global Banking, Money Laundering, and International Organized Crime*, Greenwood Publishing Group, 2004, pp. 45 - 85
[174] Fiedler, Robert, *supra* note 114, at 78 - 79

illegally and if necessary may resort to violence to enforce its purposes[175]. This is the reason why most antiterrorist legislations worldwide (including Israel, Portugal, Spain, the United Kingdom and the United States) have included strong measures of control on financial transactions. As Donohue has observed, financial counter-terrorism has moved to the frontline of the battle against terrorism and organised crime in modern societies.[176]

However, groups involved in organised crime and that have predominantly political and religious motivations generally have, as their primarly aim, national, international and transnational terrorism. Such being highly socially and politically disapproved.[177]

Organised crime poses a threat to societies and governments, failing to respect internationally recognized human rights standards. This situation became globally evident through the September 11, 2001 attacks, where the actors involved proved they could target any place in the world, demonstrating great capacity to in several fields of action, with innovative modus operandi, threatening the life and security, socio-economic stability as well as the confidence in structures of authority and power.

The globalisation of new communication technologies also facilitated the internationalisation of organised crime[178], favouring the rapid displacement of capital and goods from one corner of the world to another, as well as instant contact between people via the Internet and mobile phone, regardless of the distance separating them. The intense dislocation of products and revenues within international circuits provides, among other things, for the extension of criminal activities of organised groups throughout several countries, leading to international cooperation and interdependence between the national criminal organisations of the involved countries.

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[175] Guedes Valente, Manuel, *Direito Processual Penal*, 2ª ed., Almedina (2004), p. 67
[176] Donohue, Laura , supra note 33 at 67
[177] Guedes Valente, Manuel,, supra note 112 at 57
[178] Santos, Loureiro dos, *A globalização do conhecimento e o terrorismo global*, Almedina (2003), p. 56

Modern terrorism has known a high degree of sophistication partly due to the development of organised criminal groups. It must be emphasized here that many of the measures adopted as antiterrorist were incorporated into ordinary criminal legislation after a few years, so as to be applicable to non-terrorist criminal organizations. Donohue views this phenomenon as a progressive penetration of antiterrorist laws in the criminal justice system.[179]

Supranational crime, which knows no boundaries and covers a wide range of offenses, can be integrated in the concept of organised crime[180]. It is, therefore, a vast and broad concept, that is important to clarify for the purpose of this study.

A set of variables exist that regulate the differentiation process in the identification and classification of organised crime, evidencing the participation of a plurality of individuals that carry out criminal actions; the eventual distribution of functions among them due to the affirmation of principles of control, internal discipline and hierarchical obedience; demonstrated operational capacity in the execution of serious crimes within transnational context, using violence when necessary; motivation and determination of the criminal conduct based on the expectation of obtaining monetary payouts which may come from entities incorporated in the legal economy.

According to these criteria there are numerous criminal organisations that engage or invest in the practice of crime and fall within the category of organised crime[181]. Thus, we can find criminal organisations such as mafia clans; networks that sponsor and encourage illegal immigration; gangs who exploit illegal gambling, prostitution and human trafficking; organisations engaged in theft and burglary,

[179] Donohue, *supra* note 33, at 10 - 25
[180] Groenhuijsen, Marc, *Usual and Unusual Organising Criminals in Europe and Beyond: Profitable Crimes, from Underworld to Upper World*, Liber Amicorum Petrus Van Duyne, Maklu ed., (2011), p. 271
[181] Smith, James, *supra* note 66 at 56

tampering and theft of vehicles used for trafficking, crimes of abduction, kidnapping and extortion; organisations engaged in drug trafficking and tobacco smuggling.

Organised crime therefore represents a serious threat to the security of many European countries. Upon reaching a level of power that was previously reserved exclusively to countries, this phenomenon has achieved the capacity to stabilise economically, socially and even politically the countries where these organisations operate. This implies that the threat addressed also the safety of citizens themselves, undermining the most basic rights such as the human life.

Such criminal organisations have proven to be eager to expand their range of intervention, thus multiplying their area of action through a supranational perspective. The exact outline behind the motivations of these mafia groups in Europe is not yet clearly defined. However, it should be noted that there is the possibility of violent action, theft and robbery, money laundering, drug and human trafficking, etc.

In the European Union, organised crime has developed in various areas of criminal activity: drug trafficking, car adulteration and trafficking, arms trafficking, robberies of banks and value transportation companies, human trafficking, document forgery, economic crimes (smuggling of tobacco, alcohol and alcoholic beverages as well as mineral oils), money laundering, cultural crimes (illegal market of artworks) and computer crimes[182]. Even if developed by relatively small groups, one can not fail to take into account that the European territory is an operating scene for foreign or international groups, including groups from South America and Central Asia. We will now take a deeper look at some of these crimes because they are the most relevant ones

[182] Beken, Vander, *Measuring Organised Crime in Europe: A Feasibility Study of a Risk-based Methodology Across the European Union*, Maklu ed., (2004), pp. 143 and following

that occur in the European Union, according to statistics registered by the security forces and intelligence services of some of the countries we are analyzing.[183]

One of the most important connections between terrorist groups and other criminal groups lies precisely in mutual assistance regarding document forgery. As Conde refers, a great part of forged documents used by terrorist groups comes from small suburban groups that do not care for whom they are working.[184] Many antiterrorist measures adopted in countries like Portugal, Spain and the United Kingdom cannot be understood without making such connections.

States have become greatly dependent on computer structures, which make them a primary target for terrorist organizations. Furthermore, terrorist groups have become aware of the potential devastating effects that a large scale cyber attack could cause, especially at a financial and economic level – but also at an energetic one – among western nations. This new reality has significant implications as states have been forced to gain knowledge of cyber criminality in order to be able to face modern terrorist and to respond by adopting the necessary antiterrorist measures, as Colarik has observed.[185] Criminal organisations seem increasingly skilled in the illegal transportation of goods or persons and have developed their capacity to interact within criminal structures and to corrupt customs' officials, allowing them to carry out their activities. In fact, weighing the possible profits and risks, there is a favourable terrain to the flourishing of this type of activity, which can yield great profits to criminal organisations without incurring high risks of being intercepted.The laundering of capital from crimes carried out in the European Union and United States by criminals based in other parts of the globe

[183] Oliveira, Adriano, *Tráfico de drogas e crime organizado: peças e mecanismos*, Juruá ed. (2008), p. 167

[184] Munoz Conde, Francisco, *De nuevo sobre el derecho penal del enemigo*, Universidad de Buenos Aires ed., p. 56

[185] Colarik, Andrew, *Cyber terrorism: political and economic implications*, Idea Group Pub. (2006), pp. 34 – 43.

presents serious challenges, both in terms of the values involved, as in the difficulty to prove the causal link between these capitals and the associated crime. The European Union has taken on several measures to fight money laundering. In late 2001, after the 9/11 attacks, the EU paved the way for the cooperation between national financial intelligence units. An initiative, which was quickly followed by legislation destined to identify, trace, freeze and seize assets and products of criminal origin.[186]

Trafficking in human beings is of crucial importance in regard to global terrorism, notably as a source of income. The transnational nature of human trafficking, often sustained by networks organised on a global scale, determines the need to establish interconnections with international organisations, promoting knowledge and the sharing of information. Valente explains that the relation between terrorist groups and international criminal groups has become so close that it no longer uncommon to see terrorist organizations being used as platform for trafficking human beings or facilitating human smuggling as a quick way to obtain profits.[187] Only in such manner is it possible to understand how antiterrorist legal reforms in countries like Israel, Portugal and Spain have included specific measures dealing with human trafficking and money laundering that may result from such activities.[188, 189]

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[186] Another piece of legislation to fight money laundering, adopted in December 2001, extends its definition to cover all serious crimes, including offenses related to terrorism. This legislation is no longer applicable only to banks and financial institutions as the previous one, but also to encompass accountants, lawyers, notaries, real estate agents, casinos and dealers in high-value goods. (Truman, Edwin, supra note 159, at p. 45). All persons exercising these professions have now an obligation to inform the authorities on suspicious transactions that come to their knowledge within the exercise of their functions. This measure is meant to promote greater control over these professions and has been extended to all Member-States that adopted antiterrorism legislation since 2003.

[187] Guedes Valente, *supra* note 112 at 56

[188] Fernandez, Ruben, *El Derecho Penal de la Unión Europea: Situación Actual y Perspectivas de Futuro*, Univ de Castilla La Mancha (2007), p. 207

[189] The European Union, which elaborated a worldwide strategy since 1996, took a major step forward by establishing, in 2002, a common definition of human trafficking. This definition has been applied in all Member-States of the extended E.U. and, in certain circumstances this crime is punishable by a minimum prison sentence of eight years. The Union's work draws heavily on the Brussels Declaration (September 2002), which recommends the implementation of concrete measures and standards, as well as norms and better practices to eradicate the exploitation of human misery.

c) International and transnational organised crime in the new international context after the attacks of 9/11.

The geopolitical fragmentation that occurred in the eighties and the subsequent breakdown across central Europe and the various Balkan wars[190] led to profound changes in the geography of organised crime both in Europe and in the rest of the world. From this decade onwards, criminal organisations started to reinforce the expansion of their activities across the globe, becoming eminently transnational organisations.[191]

Within the current framework, criminal organisations with greater potential dominate the major trafficking channels on a global scale. Transnationalisation was a natural process for these organisations considering that they tend to maximize opportunities and minimize risks, which led them to locate their activities in those territories where the risks represented by the action of state authorities was reduced and therefore the opportunity to expand their activities was increased.[192]

Organised crime takes advantage of the existing differences between the national legislation of the different countries where they operate. These are often represented by differences in the definition of a certain type of crime, which makes it easier to enter some markets than others. The lack of harmony in judicial proceedings as well as the absence of significant international judicial cooperation is also worrying in the sense that national authorities are unable to legally cope with organised crime.[193]

New technologies allow greater access to communication, either by phone or e-mail, as well as new types of transportation, thus contributing to increase the expansion

[190] Woodward, Susan, *Balkan tragedy: chaos and dissolution after the Cold War,* Brookings Institution Press (1995)
[191] Garcia, *supra* note 157, at p. 43
[192] Smith, James, *supra* note 66 at 57
[193] Garcia, supra note 157, at 56

of criminal networks. For organised crime groups linked to counterfeiting money, documents or artwork, technological advances enabled almost perfect results, making the intervention of the police and judicial authorities increasingly challenging.

On the other hand, human trafficking and illegal immigration are surely the most important sectors next to the drug trafficking sector moving an estimated 8 billion dollars per year[194]. This is essentially caused by the attractiveness of western European economies, combined with resentment towards home countries, generated by economic and political instability. Following the dismantling of the former USSR and the enlargement of EU borders, migration fluxes increased from countries south of Russia[195] caused by poverty and the search for better living conditions. The trafficking of human beings mainly originates from Eastern Europe, but also Asia, Africa and Latin America.

With regard to financial crimes these consist essentially in activities related to fraud, counterfeiting and money laundering, i.e. classical operations with economic consequences through the disturbance of financial markets and their use for criminal purposes.

Trafficking includes diverse activities such as smuggling of alcohol and tobacco or arms trafficking, robberies and vehicle thefts. Each of these activities has specific grounds and is structured according to the target, origin and destination of the goods, but perpetrators always aim at high profits. These profits are then often used to fund terrorist activities.

According to Reno, states that present a weak consolidation of their sovereignty structures facilitate the creation, dissemination and consolidation of coalitions and

[194] Various Authors, ”*Tráfico de seres humanos y migraciones: un análisis desde la perspectiva de los Derechos Humanos*” in Conferencia Internacional "Tráfico de Seres Humanos y Migraciones", IEPALA Editorial (2005) , p. 75

[195] Langstrom, Tarja, *Transformation in Russia and international law*, Martinus Nijhoff Publishers, (2003), p. 187

networks of terrorist activities. Such spring up due to the economic benefits, the ability to create employment and the possibility of reinvesting profits in local economies.[196]

Organised crime might currently be a secondary consideration due to mediatisation of terrorism, although a part of organised crime is demonstrably linked to terrorism by providing weapons or funding operations. There is even the possibility that in some areas of the world, a merger between terrorist and criminal groups is underway, which can create, in fact, a more dangerous threat than before because of the accumulation of financial capacity and the spill over into political motivations.[197]

To aggravate the current framework of threats, there is nowadays a symbiotic relationship between some kind of criminal organisations and some terrorist groups as well as between political activities and lucrative criminal activities[198], giving rise to what Xavier Raufer called hybrid entities. As a typical example of these organisations we have the case of Colombia, the country responsible for producing about 80% of the world's cocaine and 75% of the heroin consumed in the United States of America. The Colombian government maintains, for a few decades now, a conflict with the Colombian Revolutionary Armed Forces (FARC), funded by the drug cartels, which control a significant area of inland where they protect the activities of drug traffickers - drug plantations, laboratories, landing lanes for planes that intervene in the transportation of traffickers and drugs, etc.[199]

Considering that this phenomenon is an obvious threat to society, the United Nations, drafted a legislative guide in March 2003, aiming to assist those countries

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[196] Reno, William, *Warlord politics and African States*, Lynne Rienner Publishers (1998), pp. 15 and following

[197] Shanty, Frank, *Organized Crime: From Trafficking to Terrorism*, Volume I, ABC-CLIO, 2008, pp. 123 and following

[198] Forest, James, *Countering terrorism and insurgency in 21st century*, ABC-CLIO ed. (2007) p. 173

[199] Biddle, Stephen, "*Why you can not get a lot for a little*" in Mershon International Studies Review (1997), pp. 113 - 116

wishing to ratify the UN Convention against organised transnational crime, in order to elaborate their own legislation to be used in the fight against organised crime.

This has therefore forced national criminal justice systems to respond adequately, particularly through a considerable increase in applicable criminal penalties for certain types of crime, which were once almost insignificantly punished. Crimes such passport forgery, tax fraud, money laundering, concealment of relevant financial information, the spread of terrorist or subversive ideology, etc. are on this list. Moreover, this phenomenon has forced a closer cooperation both between agencies and security forces within a country and between intelligence services of different countries, in order to effectively fight criminal networks, which are highly geographically dispersed and diverse in terms of the nationalities of the group members.

The problem is serious, both in Europe and in the rest of the world insomuch that several international organisations have been devoted to studying transnational organised crime. Furthermore, the UN organised in Naples, in 1994, an international conference on transnational organised crime, where 140 countries were represented. This form of crime was considered a great danger and given the extent of money laundering in all countries, the need for greater international cooperation to deal with this phenomenon was agreed upon. In April 2000, the Tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders in Vienna reaffirmed once again this concern with organised crime and its links with terrorist groups.[200]

Also other organisations such as the G8, the Council of Europe and the European Union have repeatedly addressed this phenomenon and are trying to establish some preventive measures for its proliferation.

[200] Godson, R., "*Transnational Crime, Corruption, and Security*" in Grave New World-Security Challenges in the 21st Century (2003), UNVA ed., p. 46

However it is up to each Member-State, as an independent decision centre to act and if necessary to use force, in order to ensure the achievement of the ultimate goals of security, justice and welfare and strongly resisting the exercise of any powers which lack state legitimacy in its territory.

One cannot disregard that these criminal organisations are devoid of territory[201], and that their activities may be located in different territories from those from which they project their power. Therefore the problem of fighting them is not just a police matter but requires also a strong strand of foreign policy, of relations with those states that provide coverage for these organisations and those states that are victims of criminal activities. It becomes thus understandable that the fight against transnational organised crime encompasses the collaboration between all states in the creation of a minimum level of conditions that may end this scourge. Globalisation has provided ways to surpass traditional borders, which has facilitated the action of criminal organisations and hampered the identification of these groups and their elements, thus hindering the development of an internal security system and requiring at the same time the promotion of a global security to fight transnational organised crime.

In Europe, empirical data shows[202] that this part of the world acts as a centre of attraction for the various criminal organisations operating globally because:

* Organisations involved in vehicle theft, vitiation or trafficking, illegal immigration, human trafficking and prostitution come from Central and Eastern Europe and Russia.

* Organisations of Polish, Hungarian and Russian involved in vehicle adulteration and theft, posing a high danger and damage to the European Union. The

[201] Vlassis, Dimitri, *Combating Transnational Crime: Concepts, Activities and Responses*, Routledge (2013), p. 6
[202] Carrapiço, Helena, O *crime organizado transnacional na Europa: origens, práticas e consequências*, Instituto de Defesa Nacional (2006), p. 13

high demand for certain vehicles that are circulating within the EU, make them a target insofar that these criminal organisations ultimately meet the market demand through theft and adulteration, introducing these vehicles in countries like Russia, Kosovo among others. A scourge to which Portugal, Spain and the UK do not escape, with the aggravating circumstance of having a broader market covering certain African and Asian countries with a high vehicle shortage;

* From Latin America comes cocaine originating from Colombian cartels[203], which use local European criminal organisations, such as criminal organisations from Galicia in Spain or some organisations based in Italia, to enter and distribute within Europe, through the various means of transport and the most varied forms of concealment.

* Organisations involved in drug trafficking and elaborated fraud schemes from West Africa, especially from Nigeria.

* The Triads from Asia export drugs to Europe, control networks of illegal immigration and human trafficking and are also involved in extortion and prostitution. The Asian communities in several EU Member-States facilitate their activity here.

* The big heroin trafficking from the Middle East and Central Asia arrives in Europe via Turkey and Pakistan. The import routes cross several Eastern European countries, and the main entry point is Germany, where mostly Turkish and Kurdish citizens are employed for the distribution in Europe.

* Synthetic drugs, which are considered fashionable and increasing in consumption, are distributed throughout Europe from the Netherlands. The organisations from the Netherlands are the main manufacturers of these types of drug, competing with those from Poland and Hungary.

[203] Paz Neves, Eduardo, *Tráfico de droga na América do Sul: perspectivas e inovações*, Biblioteca 24 horas (2009), pp. 78 - 98

Transnational organised crime is a global threat against fundamental rights of human beings, such as terrorism and proliferation of weapons among other growing criminal threats[204]. Indeed, the activity and even the very existence of criminal organisations with the objectives identified above represent a threat to the security of states and certainly harm the fundamental rights of citizens.

Although there is no concrete data to analyse in full and statistically the evolution of organised crime, it is undoubtedly fitted to and rooted in contemporary societies and seeks to respond to the ever increasing demand for their goods and services.

Given the risk that organised crime poses to societies and States, it is up to the political power to develop commitment policies and to define the resources to be allocated to fight this scourge. Within this point of view, terrorism and organised crime are different problems with similar consequences and that need to be addressed in a common path. Understanding this point is an essential step to organise the legal fight against terrorism within the international community.

The political concern with the fight against organised crime is clearly felt European-wide. It was mentioned in the Hague Programme and adopted in the European Council on November 4 and 5, 2004, as one of the ten priorities of the Union for strengthening the area of freedom, security and justice.

The European Union has been developing an integrated system for border management and visa policies[205]. Special attention shall be given in the short and medium term, to creating the conditions that allow the abolition of controls at internal borders of the new Member-States. This measure was also provided for by the European

[204] Pierre, Andrew, *Cascade of arms: managing conventional weapons proliferation*, Brookings Institution Press, 1997, p. 60
[205] Meloni, Annalisa, *Visa Policy within the European Union Structure*, Springer ed. (2006), pp. 86 - 94

Council on November 4 and 5, 2004 against the backdrop of a growing concern with the phenomenon of global terrorism and its social consequences.

As for granting visas, a policy has been developed that should address the requirements in terms of document security and enable better consular cooperation[206].

The credibility of a common positive approach to immigration depends largely on the United States and European Union's ability to control illegal immigration. Developing an effective policy on repatriation and readmission is essential in the fight against terrorism and organised crime.[207]

Hence a stronger stance against human trafficking can be obtained which may be largely facilitated by the effectiveness of the involved authorities in matters of security and by a strong solidarity.

7. Organised crime and terrorism: a dangerous liaison

On the one hand the connection to organised crime is one of the fundamental characteristics of modern terrorism and as such has been behind the responses that stated adopted in the aftermath of 9/11. On the other hand, as Forest refers, it is only possible to understand the financial and economic antiterrorist measures when taking into account the deep connection between terrorist activities and other economic activities (legal or illegal).[208]

It is important to stress that terrorism and organised crime walk, more than ever, hand in hand and rarely collide with each other. The problem of this interconnection lies

[206] Olsson, Stefan, *Crisis Management in the European Union: Cooperation in the Face of Emergencies*, Springer, (2009) p. 110
[207] Tomé, Helena, *Politicas de repatriação pós 11 de Setembro*, Quid Juris (2003), p. 78
[208] Forest, James, *supra* note 141, at 173

precisely in the fact that both can reinforce one another, emerging stronger from such a union[209]. Criminal groups and terrorist groups realised that they can systematically co-operate, exponentially increasing the benefits for their respective activities. Moreover, the cooperation of both these universes hampers investigations and prosecutions by the police, due to the human and geographical dispersion of the activities, as well as their increasing complexity.

Transnational terrorism works through loose networks rather than through hierarchy or within borders. It is neither dependent on nation-state sponsors, nor responsive to conventional deterrents. To defeat one is not to defeat all. It is constantly evolving, with a capacity to regenerate and adapt where its forces are degraded.[210] The data presented above, whether from the European Union or the United States, leaves no room for doubts that this link is growing,[211] especially in the Western world, where criminal gangs and highly experienced professionals (e.g. in the forgery of passports and human trafficking) put their activities at the service of terrorist organisations in return for extremely large sums. Meanwhile, other groups involved in financial crimes help to launder and hide the necessary funds for the continuous prosecution of this cycle.[212]

Since the beginning of the last decade and especially after the attacks of 9/11, contemporary criminology has been insisting that one of the new features of this global terrorism is the permanent connection with parallel activities and organised crime groups. These groups have proved to be essential for the development of functional and complementary activities to the very terrorist activity, such as obtaining explosives, fake identities, money laundering and concealment of information, etc.

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[209] Koh, Jae-myong , *Suppressing Terrorist Financing and money laundering*,, Springer Ed. (2003), p. 56
[210] *Transnational Terrorism*, supra note 45, at p.7, accessed July 2013
[211] Shanty, Frank, supra note 140, at 104
[212] Ventura, André, "*A vitima e o processo penal: subsídios para uma compreensão jurídico-dogmática*" in *Revista de Direito Público* nº 5 (2011) p. 27

Cooperation between terrorist groups and "professional organised crime" entails a progressive sophistication of the terrorist methods[213]. Terrorist activities have thus become more complex, diverse and technologically supported. This fact also forced the criminal justice systems of the various countries involved in the fight against terrorism to an intense overhaul of its legislation in areas such as the interception of telephone and electronic communications, house searches and a general strengthening of police powers against citizens' rights.

It must however be noted that in what concerns legal international cooperation in this matter, there is still much to be done:

> "Despite the existence of co-operative legal frameworks, bilateral co-operation has been limited and multilateral co-operation is largely non-existent. (...) The international experience in this realm, and to this point in time, indicates that, with the criminalization of terrorist fundraising and close enforcement by host agencies and authorities, terrorist fundraising receded. Nevertheless, only a few countries have been able to criminalize the support networks of certain terrorist groups."[214]

Finally, the growing connection between organised crime groups and the terrorist phenomenon also caused serious consequences in terms of legal regulation of immigration and migration[215], especially to western countries. Indeed, the use of false identity documents and the use of international networks for human trafficking and smuggling forced criminal justice systems to strengthen the legal prevention and prosecution of such crimes. In turn, changes were also made to the legislation regarding nationality and Residence permits, as well as to the criminal and customs control

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[213] Marques Guedes, Armando, *Terrorismo e sofisticação: uma relação perigosa*, Almedina (2009), p. 45

214 Gunaratna, supra note 96, accessed August, 2013. Furthermore, as Gunaratna states, most states have criminalized their domestic terrorist groups without criminalizing the foreign groups: "The US has taken the lead by criminalizing 30 terrorist groups. Although the UK has been able to criminalize the domestic Republican and Loyalist terrorist groups, the new legal framework is expected to alter the status quo. In addition to its domestic groups, India criminalized the LTTE, after an LTTE female suicide bomber assassinated Rajiv Gandhi, a former Prime Minister, in May 1991. Germany and a few other European states criminalized the PKK after the PKK conducted a series of terrorist operations throughout Europe". Gunaratna, supra note 54, accessed August, 2013

[215] Paz Neves, *Leonardo*, *Estados fracassados e o Eixo do mal na politica*, Biblioteca 24 horas Ed. (2008), p. 19

mechanisms used in the various internal and external borders of the European Union. According to Farrall, the emergence of terrorism as a global threat imposed the biggest change in the criminal justice system since World War II[216]. It is this change that we will analyse in detail in chapters III and IV.

8. Social panic and the speech of fear: the expression of contemporary global terrorism

Contemporary terrorism is skilful in using one of the greatest resources made available by the West technological development: the mass media. In effect, terrorists base their strategy not only on the concrete damage they can produce but also in the capacity to broadcast worldwide the images to the media.[217]

Most recent studies on this matter demonstrate the impact of terrorist attacks on the economy, financial markets and politics as never before. This is due to, as Amaral Argolo observes, the attention of mass media over phenomenon of terrorism.

An element of undisputed relevance, which is intimately related to modern day terrorism is the mediatic coverage of terrorism, is panic as a weapon of social aggression.

Panic and the message of panic have become elements of the terrorist threat by themselves. As Marques da Silva observes, the permanent threat of a borderless terrorism has become the most lethal and efficient weapon that terrorist and criminal organizations can use. On the other hand, this new type of social panic has become

[216] Farrall, Stephen, *Fear of Crime: Critical Voices in an Age of Anxiety*, Routledge, (2008), p. 65
[217] Argolo, Jose Amaral, *Terrorismo e Midia* Editora E-papers (2010) p. 162

responsible for the stigmatization of certain communities, that have been associated, in a superficial way, to the terrorist phenomenon[218]

This point is of extreme importance. Social panic, stemming from the threat of terrorism has been able to provoke high social conflictuality and rising suspicion towards certain communities which have been difficult to repel. It has also been behind was is called the "criminal law of the enemy." In chapters III and IV the impact and the scope of this phenomenon in regard to the marginalization of certain communities will be further developed.

Qian notices how panic has become a viral consequence of contemporary terrorism and one of the main causes of unrest in modern societies.[219] Several indicators demonstrate the growing importance of terrorism among mass media and general society. The topic has become, from 9/11 onwards, one of the highest concerns of Europeans and one of the themes most covered by newspapers and television broadcasts.

In what way does this social phenomenon relate to the responses that States have designed as an answer to terrorist threats? On the other hand, the general panic that took over societies after September 11 forced more repressive measures but also the adoption of preventive measures. This - as we will see in the following chapters - resulted in the increase of pre-trial detention powers and the expansion of surveillance and other privacy related controls. José Argolo notes that "panic served as a justification and pretext for western governments to approve highly intrusive and restrictive measures of

[218] Marques da Silvs, Germano, *Direito Penal, II*, Verbo (2003), p. 67
[219] Qian, Yufang, *Discursive Constructions Around Terrorism in the People's Daily (China) and The Sun (UK) Before and After 9.11: A Corpus-based Contrastive Critical Discourse Analysis*, Peter Lang Ed. (2010) p. 135

citizens freedoms, which never would have been possible in a normal context. Fear is the true moral foundation of these antiterrorist measures".[220]

Finally, the spread of panic throughout different sectors of society has obvious implications regarding the dominant model of criminal process, which has had to adapt accordingly, as we will analyse in detail in the final chapter. From this we can draw that not only regarding preventive measures but also regarding the language and objectives of criminal justice in the wake of 9/11, new kinds of crime, new terminology and new objectives for criminal policy have emerged. And in this way, as Jakobs advances, these new categories and goals progressively paved the way for a new criminal law of the enemy that aims to provide answers to societies dominated by fear.[221]

The idea of a 'new threat' of terrorism, which is also new and different in how it needs to be combated in different ways in jurisdictions, is a central key to understand the antiterrorist reforms of the last decade in Europe and United States.

In what way does this new global terrorism justify original and innovative responses by the criminal justice systems? In what way are these new types of terrorism behind the main legislative changes in criminal process law in most western countries?

As a starting point, the global nature of the threat forced national criminal laws to adapt towards international cooperation. This is highlighted by Noemi, claiming that this has been the most significant shift as it created a fundamental need to cooperate in this area, setting aside classic sovereign stances.[222]

On the other hand, the features of this new emerging terrorism - access to sophisticated technological and computers instruments, disperse geographic settings, large and complex international financial movements - compeled the adoption of

[220] Argolo, *supra* note 160 at 191
[221] Kalek, Wolfgand, *International Prosecution of Human Rights Crimes*, Springer Ed. (2007), p.8
[222] Gal-or, Noemi, *Tolerating Terrorism in the West: An International Survey*, Taylor & Francis (2004), pp. 26 - 36

appropriate legal instruments, which as Sousa Santos notices, became acceptable to society.[223] We will look deeper into these measures in chapters III and IV.

New measures to respond to threats that are increasingly perceived as global menaces, specially considering that some of these terrorist groups are openly set out to destroy modern society as we have come to know it, may be demanded, as Barros argues, and which may further attack migration policies and freedom of speech[224]. This author indicates that States are more aware now that in spite of their firm position in protecting freedom of speech, they would have to agree to set limits to such rights in order to defend their own survival.

This new global terrorism - that aims to cause the highest possible number of casualties and which has become international and mobile - has led to two significant changes in criminal proceedings as Chandra has observed: pre-trial detention and intercepting communications.[225]

The fact that individuals belonging to terrorist organizations can originated from different countries, with different nationalities, and still be able to carry out activities in different countries, has forced States to increase pre-trial detentions as a way of securing public safety and restraining mobility between national and regional territories.

On the other hand, the employment of sophisticated communication techniques by terrorist groups has compelled criminal laws to become more flexible in the use of wiretapping or e-mail interception. This thus raises questions regarding the citizens right to privacy and intimacy. This is also strongly emphasized by Donohue. [226]

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[223] Sousa Santos, Boaventura, *A sociedade da informação,* Almedina (2003), p. 56
[224] Barros, José Manoel, *Terrorismo: acção, reacção e prevenção*, Arte & Ciência Ed. (2003), pp. 131 and following
[225] Chandra, Ramesh, *Global Terrorism: Foreign policy in the age of terrorism*, Gyan Publishing House (2003), pp. 202 and following
[226] Donohue, *supra* note 33 at. 120 - 134

Contemporary terrorism cannot be analysed today without looking at its relationship with the “criminal law of the enemy” as defined by Jakobs. The global nature of terrorist threats has led to the revival, or strengthening, in many places of a category of a “criminal enemy” or “civilisational adversary". This new criminal law seeks to expand the instruments and powers of police authorities in order to achieve maximum results in crime prevention, eliminating obstacles and legal barriers in the name of “efficiency” and “prevention”.[227]

On the backbone of a climate of fear and a permanent state of exception, this criminal law has justified similar responses, from both accusatorial and inquisitorial systems, which strongly collide with the Western liberal constitutional tradition. Those State responses and the evolution of the criminal justice systems in different countries after 2001 will be now be carefully assessed in chapters III and IV.

[227] Mariani, Cliff, Terrorism Prevention and Response: The Definitive Law Enforcement Guide to Prepare for Terrorist Activity, Looseleaf Law Publications (2003), pp. 56 - 67

CHAPTER III

Antiterrorist legislation and Civil Liberties - (2001-2010) – the Inquisitorial Systems[228]

"In the aftermath of a terrorist attack stakes are high: legislators fear being seen as lenient or indifferent and often grant the executive broader authorities without thorough debate"[229]

Laura Donohue

[228] According to Adofikwu "the inquisitorial system is a legal system where the court or a part of the court is actively involved in investigating the facts of the case. The first jurisdiction to wholly adapt this method was the Holy Roman Empire. The main feature of the inquisitorial system is the functioning of the examining or investigating judge". See Adofikwu, Aje, *Understanding the adversarial and inquisitorial justice*, Routledge (2010), p. 6. For a proper definition of Inquisitorial Systems, in terms of criminal justice, see Pakes, Francis, *Comparative Criminal Justice*, Routledge, (2012) p. 93

[229] Donohue, Laura, *supra* note 33 at 121

1. Introduction: Setting the context

a) The Impact of the Fight against Terrorism and Organised Crime in Civil Law Systems

As a starting point, it is important to define the legal and social context that will be the framework of this chapter. When dealing with global phenomena like terrorism and transnational organised crime, the context in which such threats appear must be apprehended in order to gain insight on states' reaction to them. Realising the context in which these reforms take place is essential to understand the evolution and reasoning behind them. In the last decade terrorism has become the main threat to national security and to regional and international stability. It has also revealed an extremely dangerous aspect for social sustainability: the panic and fear associated with the permanent threat of new terrorist attacks and the repercussion on the political debate, legislative action and social media. This is due not only to the actual logistics of terrorism but as Clive Walker refers, to three interrelated aspects: the fight against terrorism by military and police forces, to the social panic caused by attacks and to the uncertainty of new threats and the constant restrictions on fundamental rights of citizens.[230] It is under this triple perspective that the impact of terrorism on inquisitorial systems of criminal nature will be examined. The present analysis is carried out with reference to the Portuguese, Spanish and French legal systems, however with a clear preponderance of the first two systems.

[230] Walker, Clive, *The antiterrorism legislation*, Oxford University Press (2009), pp. 54 - 62; Machado, Manuel, *O terrorismo nas fronteiras árabes*, Almedina (2003), p. 68

Terrorist threats have developed a sense of constant fear throughout society. This is a situation that merits some reflection and compels a distinction between inquisitorial and accusatorial systems. As Aldé points out:

> "Since 2001 the phenomenon of terrorism caused a shock of exceptional dimensions to continental political systems, demonstrating the lack of experience and preparation of political and cultural actors to firmly and sturdily discuss such a vast and complex matter as international terrorism".[231]

Consequentially, the perspective and analysis of inquisitorial systems regarding this matter must be specific and properly addressed. Aldé also notices how the media and political actors of anglo-saxon countries were much better prepared to deal with this new foreign threat even though they were, in most cases, directly involved in military conflicts.[232]

In systems of inquisitorial nature[233] – namely Portugal, Spain and France – this aura of fear, social unrest, and political and legislative bewilderment became common place in the analysis of the post 9/11 legal framework. This context influenced most of the legal reforms of the past decade regarding criminal procedure and is clearly identified in any study on this matter. As Azuela states, fear and the spectre of an unidentified and not comprehensible threat, represent an important impulse for the sketching of antiterrorist reforms approved by southern and central European countries.[234] This phenomenon requires specific assessment in the context of inquisitorial systems.

Indeed, according to Gouveia, terrorism has caused in Western societies, the spectrum of internal and external enemies, and the need for all types of measures - even the most

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[231] Aldé, Alessandra, *A construção da política: democracia, cidadania e meios de comunicação de massa*, Editora FGV, Rio de Janeiro (2004), p. 45 (translated by the author)

[232] Ibid at 38; Gotia, Ernesto, *El fenómeno global del terrorismo*, Universidad de Madrid, ABA ed. (2005), pp. 56 - 78

[233] We will be focusing mainly on Spanish and Portuguese examples which present similarities in the legal reforms undertaken in the past decade.

[234] Azuela, Arturo, *Irak con Q: bitácora de una guerra*, Plaza y Valdes, (2005) pp. 76 - 84

radical and inhumane ones - to contain and eliminate these same enemies.[235] According to Sousa Santos, criminal justice models in countries like Portugal and Spain have never been so affected by the fear and panic of imminent terrorist attacks. According to the same author, terrorism has somehow become a legitimising source for new criminal legislation.

The elements gathered in 2004 by Sousa Santos, demonstrate that even in Portugal, a traditionally peaceful country with few episodes of terrorist violence, the most significant concern of citizens was precisely the potential presence, in the country, of "terrorist sleeper cells" that at any moment could launch similar attacks to those witnessed in Madrid on 11 March 2004.[236] This perception was mirrored in countries like Spain, Germany and France, despite their opposition to the invasion of Iraq and to the counter-terrorism methods adopted by the United States.

In Spain, the most widely-read national newspaper (El Pais) published approximately 1300 articles related to terrorism in the year 2000, while in 2004, it had more than 6000 articles or editorial comments on terrorist incidents. Similarly in systems of accusatorial nature the impact of mass media is evident albeit in a smaller dimension as will be seen in the following chapter. Nunez suggests that:

> "Although there has been a notorious eagerness of the media to publish everything that relates to terrorist threats (and specially imminent threats on our societies), this media obsession has affected more the continental systems, eventually less prepared to deal with a phenomenon of global and catastrophic dimensions". [237]

This small field research aims to demonstrate more precisely the idea of a widespread panic (that Cohen has called 'moral panics'[238]) related to the ongoing

[235] Bacelar Gouveia, Jorge, *Revisitar o pensamento do 'moral panics' na Europa do Sul*, Almedina (2009), p. 59
[236] Sousa Santos, Boaventura, *Forum Social Mundial: Manual de uso*, Icaria Editorial, (2005) p. 208
[237] Nunez, António, *É melhor contra tudo*, NBL ed., São Paulo (2009), p. 176
[238] Cohen, Stanley, *Folk devils and moral panics: the creation of the Mods and the Rockers*, Routledge Ed., (1980)

terrorist threat. Little by little, an almost obsessive connection has been established between the individual and collective spheres, and the reason behind this, as Jack Young argues, is becoming irrational, permeable to all sorts of adverse effects and abusive projects of political and social change.[239] Terrorism has motivated an enormous expansion in police powers over the last decade in countries like Portugal and Spain.

In so far as this topic is concerned, it is necessary to establish a connection with the theoretical framework presented in chapter II. As was explained therein, the evolution of the criminal procedure system after 2001 was based on the significant reinforcement of executive and police powers [in the preliminary stages of the criminal process], while simultaneously creating compensation mechanisms in the later stages of proceedings, namely during the trial stage. The theoretical framework, set forth in chapter II, proves extremely useful in this regard: the exponential reinforcement of police powers and the reduction of citizens' rights in relation to the investigation and prevention of terrorism can be explained by the logic of the 'bifurcation' of the criminal justice system, specifically analysed in chapter II.

In relation to statistic data, for example, Sousa Santos produced an interesting study that shows an increase of about 45% in arrests made by the police since 2002 for "suspicious activity" or "suspicious conduct" without any concrete evidence.[240] Also, Guedes Valente examined police functions in most continental systems and found that there clearly has been an 'extremely broad' increase of powers and modes of action, both in criminal investigations and preventive acts.[241] Another interesting fact related to Portugal, Spain and France presented by Sousa Santos, is linked to the establishment of

[239] Young, Jock, "Moral panics and the transgressive other", Crime Media Culture 2011 7, p. 245 at http://cmc.sagepub.com/content/7/3/245.full.pdf+html

[240] Sousa Santos, Boaventura, "A margem de erro no combate ao terrorismo" in *Revista de Direito Publico, nº3* , Quid Juris, Lisboa (2012), pp. 45 – 67

[241] Guedes Valente, Manuel, *Direito e Segurança: reflexões para o século XXI*, Instituto de Altos Estudos Militares, Lisboa (2003), pp. 57 - 86

a new and consistent relationship between police and military authorities, which had been quite ineffective since the 1980's. Indeed, the military also began acquiring important intelligence skills for the fight against terrorism and started integrating platforms for the cooperation and communication with civilian programs for the research and prevention of terrorism. Sousa Santos calls it the 'militarisation of national security, with important consequences in terms of fundamental rights.'[242]

On the other hand, the constant restriction of fundamental rights has been especially controversial in systems of an inquisitorial nature. Despite the historical criticism of some of aspects related to the inquisitorial nature in continental criminal proceedings, the last decade has involved, as Christina Eckes noted, a constant degradation of the fundamental rights in criminal matters. For instance, in areas such as privacy and communication protection and the right to appeal in courts, the restrictions imposed by antiterrorist laws have been the most severe in the last forty years[243].

In systems of inquisitorial nature, the necessary balance between national security and fundamental rights has become their greatest identity challenge, as Munoz Conde refers. Indeed, if criminal justice systems want to retain their fundamental identity in the coming years, they will have to look for a more balanced and moderate way of dealing with the phenomenon of terrorism and organised crime.[244]

This climate has been fuelled by a number of political factions engaged in drafting and passing legislation that under normal circumstances public reason would never allow to be enacted. As Guedes Valente argues, this climate of "permanent state of

[242] Sousa Santos, Boaventura, *supra* note 56 at 61
[243] Eckes, Christina, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford University Press, Oxford University Press, Oxford (2009)
[244] Munoz Conde, Francisco, *Direito Penal do Inimigo*, Juruá Editora, São Paulo (2001), p. 56

exception" has been one of the main sociological characteristics of Western countries in the post-9/11 world.[245]

This "permanent state of exception" has become a phenomenon of great interest to researchers, but also of grave concern. In Spain, in 2000, more than 62% of Spanish citizens claimed to be against the death penalty and any kind of life sentence, but by 2005, this percentage had dropped to 46%, i.e. more than half of the respondents agreed to such penalties for certain types of crime, in particular terrorism. Similarly, while in 1998 the main concern of Spanish citizens was employment and economic growth, in 2005, more than 76% claimed terrorism and illegal immigration to be their chief concern. This reflects an obvious connection with the terrorist attacks of 11 March, committed mostly by foreign nationals resident in Spain.[246]

Another very curious fact is connected with the draft legislation on criminal and national security policy presented to the Spanish and Portuguese parliaments between 2004 and 2006. In Portugal, 60% of this draft legislation presented to Parliament was directly or indirectly related to the fight against terrorism. In Spain, this issue was addressed in 71% of the draft legislation submitted.[247]

Finally, in both countries, more than 50% of the legislative changes made to the criminal codes over the last decade are related to terrorism or organised crime, either extending penalties or creating monitoring and investigation mechanisms, or even limiting the rights of suspects that could eventually jeopardise the investigations lead by the authorities.

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[245] Guedes Valente, Manuel Monteiro, *Terrorismo – fundamento de restrição de direitos in* Terrorismo (org. Adriano Moreira), Almedina Ed., 2004, pp. 422 - 457

[246] Mitchell Silber, *The Al-Qaeda Factor: Plots against the West*, University of Pennsylvania Press (2011) p. 195

[247] Gabinete do Ministério dos Negócios Estrangeiros, *Projectos legislativos parlamentares (2002 – 2012*), Universidade Católida ed. (2013), pp. 45 – 98.

According to Jackson, this is a new dominant legal and political language based on imagery of the ongoing terrorist disaster that is felt in all areas of legislation, from criminal law to banking law.[248]

As Jackson also argues, the specific language of the new "war on terror" extended to all areas of social life[249] eventually reaching its highest form of expression in what Gunther Jakobs called "the criminal law of the enemy".[250] Indeed, criminal justice systems have explicitly or implicitly created certain abstract categories of prime suspects of terrorism: foreigners, Islamic fundamentalists, religious minorities. This is why one of the areas that underwent most changes in the aftermath of the 9/11 attacks was precisely that of immigration, nationality and asylum policies. Despite this being a particularly sensitive and prominent topic in anglo-saxon countries, also in nations like Spain, France and even Portugal, policies that were followed up until the year 2000 regarding immigration and nationality were severely affected on foot of this terrorism threat.

Finally, attention should be drawn, as Odysseos does, to the "context of legitimacy" that arises from the permanent state of exception related to the phenomenon of terrorism.[251] In this study – in which various elements are gathered from different countries – L. Odysseos clearly demonstrates the social willingness – and often its manipulation through the media – to adopt criminal and administrative measures that can only be characterised as highly oppressive and restrictive of citizens' fundamental rights. This predisposition is generated by the permanent state of fear of new terrorist attacks and of the possible existence of, however small, sleeper cells in any country, city

[248] Jakson, Robert, *Writing the War on Terrorism: Language, Politics and Counter-terrorism*, Manchester University Press (2005)
[249] Ibid. at pp. 102 - 134
[250] Günther Jakobs, *Bürgerstrafrecht und Feindstrafrecht*, Höchstrichterliche Rechtsprechung Strafrecht, (2004), p. 88
[251] Odysseos, Luiza, *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order*, Taylor & Francis ed.(2007) p. 85

or community, that are often provided by national governments in a premeditated and confused manner.

It is this "context of legitimacy" before the eyes of citizens that allows the deepest attacks on the core of their intimacy and private life, in the name of the vague concept of "national security and defence". By presenting an ever-present deadly enemy engaged in an obsessive war of civilizations, governments obtain the support of the majority of the population for the approval and ratification of measures that were considered unthinkable and unsustainable until a decade ago.[252] The rationale of this phenomenon lies precisely in an uncritical social context of legitimacy, which actually explains the approval, by national parliaments, of criminal law and criminal procedure measures that are highly restrictive of fundamental rights (such as the Portuguese Arms Law or the Spanish legislation on communications surveillance) without any justification.

We are therefore, as Young argues, faced with a specific permeable and supple social context, that brings many Western countries closer to phenomena already observed in countries that are used to living with the problem of terrorism on a permanent basis, such as Israel, Russia or India.[253]

[252] Geyer, Georgie, *Predicting the unthinkable, anticipating the impossible: from the fall of the Berlin Wall to America in the new century*, Transaction Publishers (2011), p. 49
[253] Young, Jack, *supra* note 193 at 242

2. Main Trends: Fighting Terrorism in Inquisitorial Systems

a) The right to freedom and the increase use of pre-trial detention

The analysis of pre-trial detention in the context of antiterrorist reforms in systems of inquisitorial nature reveals that changes have focused mostly in the nature and meaning of pre-trial detention rather than on the duration of detention (in spite of a small increase). In effect, as Soares da Veiga points out, the significant change that terrorism brought to continental justice systems was that pre-trial detention, previously regarded as a precautionary measure only to be applied in exceptional circumstances, began to be applied on a regular basis in cases involving suspictions of terrorism or organised criminal organizations.[254]

This idea merits a deeper explanation. Pre-trial detention has, even in inquisitorial systems, an exceptional and cautionary nature (albeit its use has become increasingly usual). This means it should only be applied by courts when other less restrictive measure are not considered effective or when there is a credible threat of evasion of justice. What Soares da Veiga argues is precisely this paradigm change where pre-trial detention becomes customary and routinely used, shifting its nature from exceptional and cautionary into a sort of pre-punishment.

However, this profound change to criminal justice systems of inquisitorial nature should not go unnoticed. In fact, it should be considered as one of the most important consequences of criminal reforms approved in Portugal and Spain. The analysis, in

[254]Soares da Veiga, Raul, "O juiz de instrução e a tutela dos direitos fundamentais" in *Jornadas de Direito Processual Penal e Direitos Fundamentais*, Almedina (2004), p. 87

legislative terms is not easy: while articles 186º and 203º of, respectively, the Portuguese and Spanish Criminal Procedure Codes only altered the duration of pre-trial detention by about 15 days, articles 188º and 204º (of the respective codes) changed significantly the requirements for the application of pre-trial detention. In Spain, pre-trial detention becomes mandatory when the investigation deals with crimes of terrorism that involve international affairs. As for Portugal, the exceptional nature of this measure, only to be applied in cases of risk of flight or destruction of evidence, is now left aside and can be applied to almost any serious offence (penalty of 5 years and above).

This change in the very nature of pre-trial detention in inquisitorial systems is of the utmost importance and, as Sousa Santos observes, has produced a deep change in the identity of criminal justice systems. According to the same author, the regular and systematic enforcement of pre-trial detention amounts to making principles, such as the presumption of innocence, secondary to fighting violent crimes, namely terrorism.[255] On the other hand, these changes reveal - both in Portugal and Spain - a progressive weakening of the right to freedom. Thus, not only do suspects see their freedom set aside whilst not having been formally accused (or sentenced) of having committed any crime, but also the reforms undertaken in the last decade have drastically reduced the judicial defense and appeal of pre-trial detention measures. In this sense, as Moraes notes:

> "With these antiterrorist reforms, the principles of freedom, guilt and presumption of innocence give place to a new criminal law of enemy (Jakobs) where the main objectives are characterized by permanent fear of social unrest or of terrorist attacks capable of affecting the survival of democratic institutions".[256]

[255] Sousa Santos, Boaventura, *A globalização e as ciências sociais*, Cortez Ed., Coimbra (2002), p. 87
[256] Moraes, Alexandre, *Direito Penal do Inimigo - a terceira velocidade do direito penal*, Juruá Ed. (2008), p. 65 (translated by the author)

According to the data recently presented by the Observatory of Terrorism and Organised Crime of Lisbon in 2009, systems of inquisitorial nature, already accustomed to applying an extremely high rate of pre-trial detention (in spite of its exceptional nature), have seen its use further multiplied and becoming a somehow normal practice.[257] Sousa Santos and Soares da Veiga have claimed that no other phenomenon has caused such an intense transformation over the past two centuries, in terms of pre-trial detention and judicial remedies as the recent phenomenon of global terrorist threat.[258]

Also in terms of communication and privacy rights of suspects, civil law systems have undergone significant changes relating to the fight against terrorism and organised crime, restricting more than ever the communication rights of individuals held in pre-trial detention due to activities directly or indirectly related to the phenomenon of terrorism.

Another interesting phenomenon should be mentioned: in countries like Portugal, Spain and even Italy, at the same time as the application of pre-trial detention in terrorist related proceedings became customary, the legal means available to suspects to appeal against such decisions have also been significantly reduced.[259]

Some of these jurisdictions, such as Spain, France and even Germany, have a long history of combating terrorism and organised crime, especially related to political and ideological issues. Santin points out, that the legislation of civil law systems focused

[257] Observatório de Segurança, Criminalidade Organizada e Terrorismo (OSCOT), "Terrorismo e prisão preventiva" in www.oscot.pt (2009); See also Tyler, Tom, *Legitimacy and criminal justice: international perspectives*, Russell Sage Foundation, (2007), p. 320
[258] Soares da Veiga, Raul,supra note 26, at. p. 67; Sousa Santos, Boaventura, *supra* note 209 at 50
[259] Figueiredo Dias, Jorde de, *O terrorismo e o sistema de recursos*, Almedina, Coimbra (2009), pp. 65 – 79

mainly on fighting and preventing political and ideological terrorism and not on this new global terrorism. [260]

In inquisitorial systems the shock produced by the legislative packages adopted after 9/11 has not perhaps been as significant as in other countries. Indeed, as Santin argues, long periods of pre-trial detention, relatively frequent wiretapping and electronic surveillance, as well as secret proceedings during initial investigations were already, features traditionally associated with this type of jurisdictions. However, he also explains that civil law systems too have undergone changes as a result of the fight against terrorism and transnational organised crime.[261] These changes have had, as Munoz Conde refers, profound consequences within the context of the right to freedom and intimacy.[262] In fact, as this author demonstrates, the respective sections of the Portuguese and Spanish Criminal Codes concerning the right to freedom and intimacy, have become virtually unrecognisable with the changes introduced in 2003 and 2006, respectively. Also the Setence nº. 86-B/2006 of August, 12 of the Spanish Supreme Court, specifically pointed out this phenomenon to conclude that:

> "After the profound reforms that occurred in the criminal proceedings following the approval of antiterrorist legislation, fundamental rights to freedom and intimacy must have a new perspective, a new formulation that is suitable to the demands of justice systems in the post September, 11 era".[263]

The changes brought about in jurisdictions such as Portugal, Spain or even France and Italy, unlike common law systems, were not so much about pre-trial detention periods or other coercive measures, but rather about interference in citizens' private lives and banking and financial control.

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[260] Valter Foleto Santin, *Controle judicial da segurança pública: eficiência do serviço na prevenção e repressão ao crime*, Ed. Revista dos Tribunais (Jan/2004), pp. 100 - 150
[261] Valter Foleto Santin, *ibid* at 181
[262] Munoz Conde, Francisco, *El nuevo derecho penal autoritario: consideraciones sobre el llamado derecho penal del enemigo*, Tirant Lo Blanc Ed., Montevideo (2010), p. 45
[263] Sentence nº 86-B/2006 (August 12) published in *Diario Real de Legislacion -2006*, Madrid (2007), pp. 87 - 104 (translated by the author)

As has been said before, the changes regarding the right to freedom and the presumption of innocence occured because of the way in which states began enforcing pre-trial detention. Even when the offenses are financial and economic crimes related to financing of terrorism or money laundering it has become common to place suspects in pre-trial detention, in many cases without formal charge.[264]

Guedes Valente observes that a reasonable suspicion of a connection, direct or indirect, to the financing of terrorist activities is sufficient ground for the total restriction of citizens freedom.[265]

For example, Spanish criminal procedure law no longer requires that a given crime be punishable with a prison sentence of more than 5 years (thus allowing, for example, the pre-trial detention of perpetrators of the crime of falsification of documents intended for terrorist groups or other mafia groups). In turn, Portuguese law imposes pre-trial detention where a crime – regardless of its nature – is committed with the use of firearms (the "Arms Law", passed in April 2006) and suspected of being linked to terrorist activities, although this concept is not expressly defined in the Portuguese Criminal Code and Code of Criminal Procedure. About this law, Prof. Dias explained that:

> "The traditional idea that pre-trial detention should be a restraining, preventive measure to protect society in exceptional cases has been completely replaced by the fact that it is now a normal and recurring feature of the criminal justice system". [266]

As for statistics, the Observatory on Terrorism and Organised Crime provided very important data for this research, regarding Portugal and Spain. According to this Observatory, between 2001 and 2011 Portugal almost doubled the number of pre-trial detainees, while Spain almost tripled its figures. Similarly, while from 1995 to 2000

[264] Soares da Veiga, Raul, *supra* note 88 at. 67
[265] Guedes Valente, Manuel, *Regime juridico da investigação criminal: anotado e comentado*, Almedina (2006), p. 87
[266] Dias, Figueiredo, *Temas Básicos da Doutrina Penal*, Coimbra Editora, 3ª ed. (2005), p. 141

only 2% of prisoners in Portugal were held in pre-trial detention for terrorism-related activities, this figure rose to 10% in 2003. In turn, in Spain, the number of pre-trial detainees linked to terrorism was around 19% from 1995 to 2000 and in 2003, this figure rose to 26%, i.e., more than a quarter of the country's pre-trial detainees. As Manuel Iribarne said, after 2001, terrorism became the major concern of the Spanish criminal justice system, which includes not only the courts and criminal police forces, but also the intelligence and information service.[267]

Costa Bandeira considers that the right to freedom was the most severely affected by the antiterrorist reforms in Portugal and Spain. According to Bandeira, although the growing and uncontrollable State interference in the private life of citizens is a very serious issue, the restrictions to the right to freedom have affected the stability as well as the confidence of societies in the justice systems in a particularly serious way. The extension and the strengthening of pre-trial detention regimes, as well as the changes in the system of judicial remedies –as we will see - only confirms, according to Costa Bandeira, this legislative trend in systems of inquisitorial nature.[268]

[267] Iribarne, Manuel Fraga, "El terrorismo hoy" *at Terrorismo* (Org. Adriano Moreira), Ed. Almedina, Coimbra (2004),pp.163 - 192

[268] Costa Bandeira, Leonardo, *Do direito constitucional de recorrer em liberdade*, Editora del Rey (2003), p. 115

b) The Right to Privacy and the emergence of new methods for surveillance and criminal investigation. Preventive powers of law enforcement - a new paradigm of cooperation between police forces and intelligence services

As with accusatorial systems, in inquisitorial systems the phenomenon of international terrorism has also produced important changes in the form of action of the police authority, especially in terms of the sharing of sensitive information about the lives of citizens and companies. In Portugal, for example, the Legislative Decree nº. 34/2005 of 15 March, has ignored the recommendations of the OECD regarding information that ought to be considered confidential or of sensitive nature and granted the Portuguese's information services full access to the data of individual citizens, authorising the same department to use them almost without discretion in cases of potential terrorist or serious international crimes. On the other hand, a specific platform was created in which this data would be shared among the intelligence service and the various bodies of the criminal police, for the purpose of investigating organised crime, without any judicial supervision. According to Faria Costa, "this was the biggest offense to the right of privacy of citizens of the Iberian Peninsula in the last century ".[269]

It is clear that the emergence of a global terrorist threat compels agencies responsible for coordinating the security of citizens and the defence of a State territory, to make an increased effort in terms of harmonising and sharing information. However,

[269] Faria Costa *supra* note 104 at 56

what was witnessed in Spain and Portugal over the last decade was the destruction of those barriers and legal rules that protected certain types of information traditionally considered as sensitive, such as information of intimate or sexual nature or information on citizen's geographical mobility, their banking or financial status. As Munagorri refers, "in just ten years, Portugal and Spain receded a century in terms of protecting the privacy of citizens and the State's agency".[270]

Also in terms of communication and privacy rights of suspects, civil law systems have undergone significant changes with regard to the fight against terrorism and organised crime, restricting more than ever the communication rights of individuals held in pre-trial detention due to activities directly or indirectly related to the phenomenon of terrorism. According to the reform of the Portuguese Code of Criminal Procedure adopted in 2006, terrorism suspects may remain without any communication with the outside world – except once with their attorney and in the presence of the Public Prosecutor – for a period of up to seven days, under a court order. Spanish law has also undergone changes in this context, moving closer to the Portuguese legislation on this matter and allowing for suspects to be detained in isolation for up to six days, by means of specific court order.[271]

This last point has led to important debates in Spain and France, two countries particularly affected by the terrorist phenomenon. The right of detainees to communicate with the outside (either with their families or even with their legal representatives) has been strongly restricted by the legislative reforms of the last decade. In Spain for example, the detainee can communicate with his or her legal representative after a 48 hour-period; but this communication can be intercepted by the

[270] Munagorri, Ignatio y Falcon, Maria José, *Punishment And Culture: A Right to Punish?*, Martinus Nijhoff Publishers (2006), p. 234; Moral Garcia, Antonio del, *Criminal Law in Spain*, Kluwer Law International, Madrid (2010) p. 42

[271] Ventura, André, "A vítima e o processo penal: subsídios para uma compreensão jurídico-dogmática" in *Revista de Direito Publico*, Almedina (2011), pp. 5 - 12

authorities when dealing with terrorism or organised crime. Similarly, France adopted legislation in 2008 which has caused heated debates about the right to communication of detainees, that only allows detainees to communicate with their representatives 48 hours after their arrest.

In any case, as stated by Sena, a new paradigm in terms of police action and the right to privacy of citizens, seems to be emerging[272]: criminal police bodies, along with the intelligence services and with the approval of Governments, have increasingly developed ways of intercepting communications as well as control platforms that virtually nullify the scope of the fundamental right to privacy of citizens.

As Monet refers, another important consequence of the terrorist phenomenon on a global scale is the strengthening of police powers and the reduction of judicial guarantees, in such a way that a comparison can be drawn between police powers in the Iberian Peninsula before the fall of dictatorships and after the March, 11 bombings in Madrid.[273] These enhanced powers aimed to streamline procedures and enhance skills, although they have, still according to Monet, translated into unparalleled restrictions to fundamental rights and guarantees of citizens.

Indeed, as Soares da Veiga refers, police authorities have moved away from being an auxiliary resource at the service and dependence of judges and courts to become almost independent forces, reinforced with discretionary and immunity powers when it comes to matters of terrorism and organised crime.[274] In Spain, for example, the Royal Decree-Law 34/2005 of 21 April created a number of exceptions to the requirements of court orders to carry out house searches in cases of terrorism suspects. In other words it designed a wide range of situations in which police forces can enter suspects' home

[272] Sena, Adrienne, *Terrorismo e direito: os impactos do terrorismo na comunidade internacional e no Brasil : perspectivas político-jurídicas*, Editora Forense (2003), p. 324.
[273] Monet, Jean-Claude, *Policias e Sociedades na Europa Vol III*, Universidade de São Paulo Ed. ~(2001), p. 272.
[274] Soares da Veiga, Raul, *supra* note 218 at 65 - 98

without a warrant. In Portugal this legislation has not yet been finally approved, but it is under discussion in the Parliament.[275] These situations infringe upon citizens right to the inviolability of their dwelling, a right which is historically connected and therefore strongly protected in systems of common law, and that will be discussed in the next chapters.

Furthermore, reforms undertaken suggest a rise in the control of financial flows and relevant banking information as in Spanish Royal Decree nº. 451/2001 which, in addition to the obligation to inform regional governments of any suspicious wire transfer (particularly those made from certain countries or areas of the world), allows the same credit institutions to freeze any amounts also considered 'suspicious', even without any judicial or administrative order. Luis Veres even believes this to have been a paradigm shift in the Spanish financial and banking law, which will have consequences for many years to come.[276]

Therefore, as Ernesto Dias points out, radical changes were introduced in the control of national and international financial transfers, as well as in the fight against money laundering.[277]

In the case of Portugal, Government approved the Decree-law nº. 193/VIII of 20 December 2001, by which a list of unprecedented duties for banking and/or financial institutions was created with the specific aim of preventing the financing of terrorism and organised crime, Also in Spain, Royal Decree nº. 451/2001 of 3 November created a paradigm shift in terms of banking and financial legislation, imposing on these

[275] Ibid. at 218$_{p218}$ Veres, Luis, *La retórica del terror: Sobre lenguaje, terrorismo y medios de comunicación*, Ediciones de la Torre (2009).
[277] Dias, Mário Ernesto, *O regime jurídico da prisão preventiva e da liberdade provisória*, Ed. Njira (2005), p. 38

institutions a set of transparency and monitoring rules much stricter than those in force in most liberal economies.[278]

In countries like Portugal and Spain, as Albuquerque notes, this increased flexibility of powers became a real transfer of powers from the judiciary to the executive: while the legal framework prior to 2006 required the intervention of a court for house warrants, after 2006 the system created an array of cases where such warrants are unnecessary and police forces can operate by themselves.[279] Faria Costa argues in the sense of a "subversion of the constitutional model" caused by this increased flexibility regarding warrants as a result of the antiterrorist reforms undertaken in Portugal and Spain.[280]

On this matter, it is important to note that state intelligence services have acquired a set of discretionary powers in relation to terrorist investigations, regaining a position that they previously had and was taken from them following the democratic movements of the 1970s. This aspect should deserve further clarification: as a matter of fact, Intelligence agencies in Portugal and Spain had a leading role in the defence of their dictatorial regimes, as noted by Rosas.[281] This weakened their position as well as power significantly after the advent of democracy in these countries in the 70's and, contrary to what happened in countries like France and the Netherlands, their surveillance and investigation powers were extremely limited during the 80's and 90's. Now, with the advent of terrorism on a global scale, these powers were significantly extended, giving these organs, powers that are very similar to the powers of criminal police. In Portugal, this scheme was expressly defined in the new organic law of the

[278] World Bank Publications, *Combating Money Laundering and the Financing of Terrorism: A Comprehensive Training Guide*, Volume 1, Business &Economics (2009), p. 4
[279] Pinto Albuquerque, Paulo, *Comentário do Código de Processo Penal à luz da Constituição da República Portuguesa*, Universidade Católica Editora (2010), p. 645
[280] Faria Costa, José, *supra* note 104 at 145 - 148
[281] Rosas, Fernando, *Portugal e o Estado Novo (1939 – 1960)*, Ed. Presença (1992), pp. 68 - 76

Information and Security Service (SIS), which equated the SIS and the criminal investigation bodies, in terms of their powers and prerogatives.

This resulted in what Soares da Veiga called "a paradigm shift in terms of police action and cooperation between the various security and information forces", a paradigm that privileges promptness and efficiency over the fundamental rights of citizens, a model that favours a tougher response to the terrorist phenomenon over the constitutionally established guarantees of citizens.[282]

It should be noted that these new powers are not exceptional and are intended to be exercised in the context of extremely hazardous situations or social upheavals. On the contrary: some of the new police forces have highly invasive powers in terms of the violation of banking information, health information and information on the mobility of citizens, even within the European Union.

This new paradigm of police action is therefore characterized by:[283]

a) Massive and coordinated performance of the several criminal police bodies in cases of terrorism and organised crime.

b) Access by the police and intelligence services, to virtually all kinds of information on citizens, even to the most sensitive ones.

c) Real-time sharing of information, such as elements related to terrorism and organised crime, through rational platforms for data sharing, specifically created for this purpose.

d) Increased police brutality and "aggressive interrogation techniques" committed on suspects of terrorisms and organised crime.

e) Creation of specific mixed units formed by security and intelligence forces to achieve complete efficiency of the channels created for the solid and permanent sharing of information foreseen by the criminal and procedural law.

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[282] Soares da Veiga, Raul, *supra* note 88 at 81

[283] Lis, Brynjar, *Globalisation and the future of terrorism: patterns and predictions*, Routledge ed, (2005), p. 104

c) Freedom of expression and the limitations imposed by the law against terrorism, within the framework of freedom of expression and communication

Another most significant fact in terms of the impact of the antiterrorist laws approved after 9/11 is precisely related to the freedom of expression and freedom of communication. Figueiredo Dias and Fátima Matamouros go as far as sustaining that the Portuguese antiterrorist legislation adopted in the last decade caused serious damage to the country's development in terms of freedom of thought.[284] If, on the one hand, Portugal did not include in its jurisdiction crimes such as "apology for terrorism", on the other, the media was prohibited from, directly or indirectly, promoting or inciting terrorism.[285]

But antiterrorist laws in inquisitorial systems did not only impact the freedom of the press or the freedom of thought, they came to affect a principle once considered sacred: the disclosure of criminal proceedings and the principle of public scrutiny of the criminal justice system.

Although civil law jurisdictions are traditionally known for the confidentiality of investigations (i.e. the impossibility for suspects or third parties to access any information related to the case in question), this feature was radically changed by the set of antiterrorism laws passed after 9/11.[286]

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[284] Fátima Matamouros, Maria, *Sob escuta: reflexões sobre o problema das escutas telefónicas*, Principia ed. (2003), pp. 76 - 84

[285] Ferreira, Carlos, *Literatura e Jornalismo, Práticas Politicas,* EdUSP, São Paulo (2007), p. 144; Aquino, Rubin Santos, *Sociedade Brasileira: uma história através dos movimentos sociais*, Record Ed., Rio de Janeiro (1999), pp 68 - 79

[286] White, Nigel, Samuel Katja, *Counter-Terrorism: International Law and Practice*, Oxford University Press (2012), p. 1015

This point is particularly complex in the Portuguese and Spanish criminal systems[287] and, therefore, deserves a more in-depth treatment. Indeed, both the Portuguese law and the Spanish law had made significant progress concerning confidentiality of investigations, coming very close to the Anglo-Saxon systems. While Spain, through Royal Decree nº. 43/2004 of 15 March, set out the guidelines for the reform of criminal procedure (which included the principle of the public nature of proceedings), article 86 (approved in 2006) of the Portuguese Code of Criminal Procedure stipulates that the whole proceeding should be public, unless the court orders otherwise and in cases specifically foreseen by law.[288]

In Portugal, Spain and France the vast majority of cases brought before criminal court only become public once the investigative stages have finished, which often occurs more than 18 months after the beginning of proceedings. On the other hand, in inquisitorial systems, even when criminal proceedings are disclosed, a number of elements considered essential by the Public Prosecutor, remain under investigation secrecy.

On the one hand, the Portuguese legislative reform created important and mandatory exceptions for cases of terrorism and organised crime[289], keeping proceedings confidential, in these cases, virtually until the trial hearing.[290] On the other hand, in cases of terrorism and organised crime of complex nature (Article 86 of the Code of Criminal Procedure) information cannot be provided even if it requested by the suspects to defend their reputation or honour in the eyes of society. Moreover, in the above mentioned cases where there is a connection to any transnational terrorist group,

[287] Beleza, Teresa, *O segredo de justiça em Portugal*, Almedina (1998), pp. 34 - 43
[288] João Latas, António, *Mudar a justiça penal: linhas de reforma do processo penal português*, Almedina, Coimbra (2012); See also Guerrero, Mercedes, *La justicia penal negociada – Un análisis comparativo entre los procesos penales español y peruano*, GRIN Verlag Ed. (2010), p. 70.
[289] Maria Portela, Irene, *A segurança e a escolha do inimigo: o efeito double-blind do 11 S*, Universidad de Santiago Compostela (2009), p. 952; See also Nedler, Gizlene, *Hisťoria & direito: jogos de encontros e transdisciplinaridade*, Revan Ed. Lisboa (2007), p. 74
[290] Portuguese Criminal Procedure Code Article 86

the confidentiality of proceedings can be kept even beyond the time limit set by the previous statutory scheme.

Until 2002, in Spain, no detainee (even in cases of terrorism and/or organised crime) could be deprived of communicating with the outside world (including the defence counsel or legal representative) for more than 24 hours after the arrest[291]; since 2002, this period has been extended to 62 hours and can even go up to 13 days in cases of strong evidence of terrorist or organised crime activities. Nonetheless, until 2002, criminal proceedings were usually public and could only be restricted in terms of their publicity in cases of serious offense to public decency or disturbance of the criminal investigation, always through a court order, which had to be renewed every three months; since 2002, the publicity of criminal proceedings has always been restricted when international terrorist crimes are concerned and their outcome is no longer in the hands of the court, but instead taken on by the Attorney General.

It must be concluded, therefore, that in spite of the reforms that have taken place, the terrorist phenomenon has produced and continues to produce important exceptions that cannot be ignored. As the USA General Accounting Office notes, the fight against terrorism after 9/11 has stalled, if not terminated, most of the liberal reforms that were underway in Southern Europe countries during the 1990's.[292]

According to the reform of the Portuguese Code of Criminal Procedure adopted in 2006, terrorism suspects may remain without any communication with the outside world – except once with their attorney and in the presence of the Public Prosecutor – for a period of up to seven days[293], under a court order. Spanish law has also undergone

[291] Alvarez, Peres, Fernando, *Universitas Vitae. Homenaje a Ruperto Nuñez Barbero,* Universidad de Salamanca (2008), p. 359

[292] United States General Accounting Office, "*Combating Terrorism. Selected Challenges and Related Recommendations*, US Department of Justice (2001), p. 47

[293] Article 86 of Portuguese Criminal Procedure Code (after 2006 reform); João Latas, António, *Mudar a justiça penal: linhas de reforma do processo penal português*, Almedina Coimbra (2012); See also

changes in this context, moving closer to the Portuguese legislation on this matter and allowing for suspects to be detained in isolation for up to six days, by means of specific court order.

d) The doctrine of criminal equality & the development of marginal communities: the legal status of immigrants and the control of migration flows within the 'war on terror'

Finally, the field of immigration and asylum underwent major changes after 9/11 in the United States, March, 11 in Madrid and July, 7 in London. Even countries with a traditionally benevolent attitude towards immigration, such as Belgium, Luxembourg and Spain, have introduced new restrictions in this field.[294]

Two distinct aspects should be highlighted on this subject: one related to the direct control of migratory flows coming from countries considered potentially dangerous in terms of connections to terrorist groups; and another related to the strengthening of the powers of police and customs authorities in this matter. Both aspects are naturally interrelated. The emergence of a criminal law of the enemy has compelled a double action policy: a strengthening of the control mechanisms of migration flows from a selected number of countries and at the same time the strengthening of police powers in customs and border controls. In Spain for instance, Royal Decree nº65 – A/2009, of January 12, broadened the powers of the different municipal police forces for identifying and detaining foreign citizens when suspected of

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Cardinal, Paulo, e Oliveira, Jorge, *One Country, Two Systems, Three Legal Orders - Perspectives of Evolution,* Springer Ed. (2009) p. 65

[294] John Garcia, Michael, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens,* DIANE Publishing (2010), pp. 10 and following; Ruggiero, Giovanni, *Perspectives on Immigration and Terrorism*, IOS Press (2011), pp. 29 - 31

illegally overstaying in the country and allowing for continuous detention until proper identification and the origin of suspects is cleared.

However, where this criminal law of the enemy can best be observed is in the fact that immigration control policies are not universal in their scope, but rather are directed to a group of communities or selected countries, where Muslims are the majority, or to certain areas of the world home to "pariah or failed states"[295]. For example, by official rule nº 563/2010 of June 12, the Spanish Government instructed custom and maritime authorities to pay special attention to a specific number of countries defining a set of actions to be undertaken when involving individuals from those countries when involved in such situations.

In regard to the first topic, the reversal of the direction of immigration policies in the civil law systems within the European Union is an undeniable occurrence. With Law No. 34/2004 of 21 March, Portugal began to consider the immediate expulsion of all foreigners involved in terrorist activities, regardless of whether or not such activities were committed on Portuguese soil. Similarly, the granting of permanent residence visas or nationality (with the so-called Nationality Law of 2006) began to be subject to the condition that there was no prior conviction directly or indirectly linked to terrorist activities or international criminal networks (mainly trafficking in human beings), considering as such the mere participation in a group or organisation deemed to be "inspired on terrorism". This, again, is a preventive criminal law specifically focused on terrorism.

The Portuguese Constitutional Court – as well as the Spanish one, since Spain enacted similar legislation a few months later – would subsequently mitigate the effects

[295] Chomsky, Noam, *Failed States: The Abuse of Power and the Assault on Democracy*, Macmillan Ed. (2007) pp. 1 - 15

of the Nationality Law, obliging the State to observe the appeals brought by suspects and thus discarding the concept of "immediate expulsion".[296]

Also Germany, for example, substantially amended its immigration and asylum legislation and, in 2003[297], it denied to any citizen belonging to any group or organisation included in a long list approved by its Home Office, which contained several Islamic-inspired organisations and others related to Islamic charities and social services. It should be noted that, according to German legislation, no court order or prior administrative or police proceeding would be required to prevent the entry of any citizen in the country, merely on the grounds of their participation in or association with a group that the German authorities consider to be suspected of perpetrating or supporting, directly or indirectly, terrorist activities.

In this specific area of immigration and asylum, civil law countries have seen a true change of direction, largely due to the terrorist phenomenon, as Evelin Brouwer points out[298]. In some cases, such as Portugal and Spain, the constitutional courts have made legislation more flexible and introduced some improvements that were required to ensure compliance with their respective constitutions and with the provisions of Community law. However, the criminal codes of several countries, such as Portugal, Spain and Germany, were not indifferent to this phenomenon and imposed much harsher penalties for illegal immigration and human trafficking, when related to terrorist groups.[299]

In these cases, it should be noted that the penalties for terrorism-related crimes have become extremely high when compared to those applied to the same type of

[296] Figueiredo Dias, Jorge de, *XXV Anos de Jurisprudência Constitucional Portuguesa*, Coimbra Editora (2009), pp. 135 - 189

[297] Klusmeyer, Douglas, *Immigration policy in the Federal Republic of Germany: negotiating membership and remaking the nation*, Berghahn Books, (2009), p. 253

[298] Evelien Brouwer and Petra Catz (org), *Immigration, Asylum and Terrorism: A Changing Dynamic in European Law*, Instituut voor Rechtssociologie, Centrum voor Migratierecht, (2003)

[299] Bacelar Gouveia, Jorge, *Direito e Segurança: perspectivas para o século XXI*, Quid Juris, Lisboa (2011), p. 45

crimes but not associated with terrorist groups. In the case of Portugal, for example, while the crime of falsification of documents can be punished with up to three years in prison or a simple fine, the crime of falsification of documents for a terrorist group is punished with a minimum mandatory sentence of 2 to 5 years in prison. Similarly, in Spanish law, while the crime of aiding illegal immigration is punished with imprisonment from six months to four years, in the case of aiding illegal immigration for terrorist purposes, the penalty can range between four and eight years in prison.

It can therefore be said, as Robert Megoli (2012) argues, that the fight against terrorism has become the primary concern of criminal law, making a number of new aggravated crimes revolve around that phenomenon, proving it to be the highest priority in the criminal law of risk driven societies.[300].

e) The creation of new criminal offences and the development of the framework of a criminal policy to fight terrorism and organised crime

In criminal justice systems of inquisitorial nature there has been a proliferation of new offenses relating to the terrorist phenomenon. As stated by Beleza, terrorism and transnational organised crime became the central guiding principle of criminal policies of Governments of Southern Europe.[301]

Still, another important aspect regarding civil law systems should be highlighted. Due to the phenomenon of international terrorism, most of these systems created or improved certain types of crimes, some of which were previously non-existent and

[300] Megoli, Robert (org.*), Exploring Criminal Justice: The Essentials*, Jones & Bartlett Publishers (2012), p. 392
[301] Beleza, Teresa, *Direito Penal, II*, AAFDL Ed., Lisboa (1980), p.25

others unclear as to their meaning. In fact, specific types of crimes were created, mostly related to the financing of terrorism and international criminal groups (the case of the Austrian Criminal Code).[302] Also herein we can observe the creation of the crime of terrorist association (rather than mere criminal association, which existed in the Spanish, Portuguese and French jurisdictions), and of the crime of propaganda and dissemination of terrorist ideology (in France and Belgium). From a strictly legal point of view, the number of terrorism-related crimes, in countries like Spain, Portugal, France and Germany, virtually doubled.[303] As Duff explained, the concept of terrorism has become part of the soul of criminal law.[304]

On the other hand, considering the possibility of terrorist acts being committed with the use of various kinds of weapons or materials, most of these legal systems also created specific crimes related to the sale or sharing of chemical or nuclear material with terrorist networks and the use of specific biological agents against civilian targets. Such is the case of Belgium, for example, where article 331(3) of its Code of Criminal Procedure was amended to include all activities related to the design, sharing, sale or dissemination of this type of hazardous materials for terrorist purposes in the concept of "terrorist activity". In this case, the maximum penalty was extended to ten years in prison, even if such acts did not cause any casualties or damage. As Ramsay explained, the phenomenon of terrorism has forced us to move from a criminal law of facts (and their punishment) to a criminal law of targeted prevention and protection of threatened legal interests.[305]

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[302] Yotopoulos-Marangopoulos, Wolfgang Benedek, *Antiterrorist Measures And Human Rights*, Martinus Nijhoff Publishers (2004), p. 156

[303] For example, regarding economic and financial crimes connected to terrorism, see, in Portugal, a Lei nº 25/2008 de 5 de Junho and in Spain, Real Decreto 56/2003 de 14 de Octubre, that created three new types of crimes specifically related to fighting terrorismo (financing terrorist organizations, money laundering linked to terrorist organizations and enabling the financing of terrorist organizations).

[304] Duff, Lindsay Farmer and S.E. Marshall, *The structures of Criminal Law*, Oxford University Press (2011) p. 223

[305] Ramsay, Peter, *The Insecurity State*, Oxford University Press, (2012) p. 192

This seems to be a key aspect of the development of criminal justice systems as a result of terrorism. The creation of a new list of offences specifically related to terrorism and organised crime has assaulted the criminal codes of most civil law systems, such as the aforementioned cases of Belgium, Austria, Portugal, Spain, France, Germany and Luxembourg. Norway, for example, through the Decree of 5 October 2001, introduced a whole new legislation on the financing of terrorism, creating two new types of crime with aggravated penalties: the crime of financing international terrorism and of money laundering for terrorist groups or activities. Similarly, in Germany, the antiterrorism package known as 'Otto-Katalog' introduced a new list of offences related to the direct or indirect support or the mere participation in terrorist groups.

Still with regard to civil law systems, another point is readily identified when we carefully examine the measures that have been adopted to combat terrorism and organised crime: the substantial extension of criminal penalties – in some cases more than twice the limit set at the beginning of 2001 – for crimes potentially related to terrorism, such as falsification of documents, assisting illegal immigration and arms trafficking. In Portugal, for example, with the reform of the Code of Criminal Procedure adopted in 2006, if such crimes are somehow linked to current or ongoing terrorist acts, the penalty applied will be aggravated by 2/3, which is identical to the model used in Spain since 2003.

Italy specifically introduced the offence of "participation in international terrorist organisations" as well as the mere provision of assistance to these organisations, while criminally punishing all acts, even auxiliary, aimed at supporting the organisation, financing or development of organisations that intend to attack targets on Italian territory.

The same thing happened in France with the approval of the law of 15 November 2001[306], which substantially extended the penalties applicable to members and leaders of terrorist organisations vis-à-vis members and leaders of other types of criminal organisations. According to Masferrer, the new criminal law of the enemy is essentially counter-terrorism criminal law.[307]

Still in the specific context of civil law jurisdictions, the case of Luxembourg should be mentioned because of the sudden and profound changes it underwent with the approval of an antiterrorism law on 8 July 2003. This created a new list of terrorism-related crimes – envisaging both the financing of terrorism and terrorist activities themselves – and substantially extended the applicable penalties. In the specific case of Luxembourg – unique in the European Union – it even introduced the possibility of applying the maximum sentence of life imprisonment (although requiring regular review by a specialised court) where the terrorist offence is associated with serious human and material loss. In this case, we have a situation where the phenomenon of terrorism not only added new types of crime and extended the penalties applicable to others, but it also gave rise to a new core identity of the criminal justice system.

f) Modifications to the right of appeal system under legislative antiterrorist reforms

One of the most important changes undergone by civil law systems in the fight against terrorism has to do with the right to appeal against court decisions. While in 2001 the Portuguese and Spanish criminal procedure systems were characterised as

[306] Orttung, Robert, *National Counter-terrorism Strategies: Legal, Institutional, and Public Policy Dimensions in the US, UK, France, Turkey and Russia,* IOS Press (2006), pp. 15 - 21
[307] Masferrer, Ancieto, *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism,* Springer Ed. (2012) p. 163

being highly generous in terms of appeals against court decisions (including the application of pre-trial detention and other coercive measures), since the reforms of 2003 (Spain) and 2006 (Portugal), the right to 'habeas corpus' has been highly restricted and the allegation of any irregularities or illegalities committed during the investigation are now permitted only in a limited number of circumstances.[308]

The 'habeas corpus' regime and the changes introduced by antiterrorist reforms are factors that should be taken into account. The paradigm shift of the last decade, both in Portugal and in Spain is well known. For example, Sentence nº. 45/2008 of December, 12 of the Portuguese Constitutional Court, did in fact acknowledge this paradigm shift by referring to a new perspective that has to guide the courts in the application of the system of habeas corpus, and that is suitable to the new criminal and procedural law system in force since 2006 and to the new requirements of the fight against new crime phenomena.[309]

However the changes in habeas corpus cannot be ignored when studying the impact of antiterrorists reforms because what is at stake here is the right to judicial review but also the right to freedom. As per Cavalcante:

> "One of the main changes under this scheme is precisely the idea that habeas corpus should be a restricted and exceptional figure, almost a rarity. This idea, in fact, is completely different from the conception that guided the majority of courts before the antiterrorist reforms of the last decade".[310]

This is an aspect of the utmost relevance concerning the antiterrorist reforms undertaken in inquisitorial systems that has not acquired the same significance in accusatorial systems, as noted by Costa Pinto.[311] However, the reform of the appeals

[308] Portuguese Criminal Procedure Code (introduction) at http://www.dgpj.mj.pt/sections/leis-da-justica/livro-iv-leis-criminais/leis-processuais/codigo-de-processo-penal/diplomas-que-publicam

[309] See Sentence nº 45/2008 (December 12) Constitutional Court available at *Diário da Republica Portuguesa*, 14 de Dezembro de 2008, Boletim 13, p. 6

[310] Trindadade Cavalcante, João, *Direito Constitucional objectivo: teoria e questões*, Leya (2013) p. 65

[311] Costa Pinto, Frederico Lacerda, *Supervisão, direito ao silencia e legalidade da prova*, Almedina (2009), p. 48; Beleza, Teresa, *Direito Penal*, AAL ed., Universidade de Lisboa (1989), p. 45

system must be included as one of the main trends of the new antiterrorist framework adopted in inquisitorial systems.

The 2006 reform of the Portuguese Criminal Procedure Code foresees now only two types of appeals against pre-trial detention: violation of material ou territorial competence by a court or gross mistake in the evaluation of the case. All other situations - that constitute the vast majority - are to be made in routine revisions which should take place between three to six months after the sentencing. The same has occured with the reform of the Spanish Criminal Procedure Code (articles 205º and onwards).

This demonstrates a clear trend in limiting the judicial appeals provided to suspects and, has the general objective of diminishing the power of the judiciary in prevention and repression of serious crimes. That is the element which is most underlined by Portuguese and Spanish doctrine: the progressive curtailing or even the suppressing of the role of the courts in investigating, preventing and repressing terrorism and the concentration of powers in the Executive. This idea has two dimensions: on one hand, the growing tendency to avoid the involvement of courts in these processes (avoidance of legal process), so that they remain almost completely under the control of the Executive, who can better manage and steer them through the public opinion. On the other, the basic sense of restricting some fundamental rights inherent to criminal procedure using the exceptional character brought about by the fight against terrorism and the need to act swiftly and firmly against this phenomenon.

This restriction of the right to appeal is so broad and impacting that it has led to several requests to the Spanish Constitutional Court for the review of such reforms. In 2008, the Spanish Constitutional Court (by decision 56/2008 of March 12th) declared the Royal Decree 78/2006 unconstitutional for “severely restricting the right of Spanish

people to effective legal protection of their rights and for basically revoking suspects' rights in cases of terrorism or organised crime."

The result was that the Spanish Government presented, in 2009, a draft project to review the constitution (Legislative Project nº 34-A/2009) with a view to defining the meaning and the extent of the right to effective judicial protection of individual interests.

As Losano observes:

> "This limitation to the right of judicial appeal in pre-trial detention situations and of defense of fundamental rights will continue and grow in a near future while the spectre of the fight against terrorism continues to be, as has been, the inspiring source of our legislative reforms".[312].

In this respect, jurisprudence of the Constitutional Courts in Portugal and Spain have been particularly critical, with a list of very important decisions that have somewhat minimised the impact of legislative reforms (please refer to sentence no. 45/2008 of April, 15 and no. 34/2010 of May, 12 of the Portuguese Constitutional Court and to sentence no. 32-B of October, 1 of the Spanish Constitutional Court).

[312] Losano, Mario, El Derecho Ante la Globalización y el Terrorismo: "Cedant Arma Togae": A*ctas Del Coloquio Internacional Humboldt, Montevide*o Abril 2003, Alexander von Humboldt Stiftung/Foundation, Berlin (2004) p. 103

3. The Impact of Counter-Terrorism Measures on the Liberal and Democratic Nature of the Constitutional Rule of Law

At this stage it is important to look at some of the findings regarding the trends we encountered in the recent development of systems of inquisitorial nature. Thus, as was outlined, the pre-trial detention framework was substantially altered, not necessarily in the length of pre-trial detention periods but significantly in the transformation of its nature and enforcement conditions. However, as Guedes Valente states, it cannot be denied that this change implies that citizens saw their right to liberty and presumption of innocence seriously restricted.[313]

Nonetheless, the reforms that have taken place regarding the confidentiality of proceedings, wiretapping and video surveillance, as well as the control of financial information, indicate a new and serious unbalance between fundamental rights and the need of the State for security and ensuring its own survival. As Dershowitz observes, the antiterrorist reforms gave priority to security concerns over the liberal illuminist paradigm of the right to freedom and to privacy.[314]

There is yet another conclusion to be extracted from this: in some way, as Hespanha states, the phenomenon of terrorism compelled systems of inquisitorial nature to return to their past, disregarding or ignoring the liberalization waves of the past decades. According to Hespanha, some elements such as the thorough control of financial flows or the regular use of pre-trial detention are nothing more than a return to

[313] Guedes Valente, Manuel, *Prisão – a metamorfose da benevolência*, Almedina Brasil (2009), p. 23
[314] Dershowitz, Alan M., *Por qué aumenta el terrorismo?:Para comprender la amenaza y responder al desafío*, Encuentro ed. (2004), p. 219

the past, to the true identity of inquisitorial systems. The conflict that terrorism caused was between the movement towards modernisation and liberalisation that had been taking place in the past decades entailing a regression since 2001. According to this author, suchdevelopments would thereforerepresent a historical process of regression in inquisitorial systems. [315]

Whatever position one takes, it cannot be denied that antiterrorist reforms approved in the past decade represent a move backwards in legal systems: the Portuguese system of pre-trial detention before 1989 was very close to the existing framework since 2006, regarding requirements and enforcement of pre-trial detention. Even so, there are some important specificities in antiterrorist reforms of the last decade in spite of this regression: electronic surveillance, communications' control, restrictive immigration policies and movement controls that cannot be compared to any other historical period and must be analyzed in the specific context of the fight against terrorism and organised crime after 2001.

Countries like Portugal and Spain have experienced some difficulties in implementing this model, insofar that Sousa Santos even mentions that the dominant models of criminal justice in the Iberian Peninsula have consistently failed to define a balance between citizens' fundamental rights and the interest of the State in criminal law enforcement. [316]

With the reforms that have been discussed above it is clear that the core values and principles of criminal procedure models in civil law countries are in peril. We must now analyse to what extent this transformation has produced an identity crisis that affects the very nature of criminal justice systems.

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[315] Hespanha, António, *Cultura Jurídica Europeia: síntese de um milénio*, Publicações Europa-América (2003), p. 112

[316] Sousa Santos, Boaventura, *O imaginário da península ibéria na luta contra o terrorismo*, Quid Juris, Coimbra (2007), p. 76

The Spanish case deserves a more detailed analysis in regard to the measures taken concerning the confidentiality of investigations and suspects' communication rights. Although legislation made confidentiality of investigations gradually more flexible and (in some cases) even extended the rights of detainees in criminal proceedings (the case of the Royal Decree of 23 June 1997) over the 1990's, the situation changed radically after 2001 and was consolidated following the terrorist attacks at the Atocha railway station in Madrid, in 2004.

Although the Spanish criminal system is already widely familiar with the terrorist phenomenon – the first antiterrorism law dates back to the late 19th century – Law of 10 July 1894 –the Spanish Criminal Code and criminal legislation have also been adapted to the new context of the threat of transnational terrorism, especially after 2004. In this regard, it must be highlighted that the extension of the maximum penalty from thirty to forty years, in case of a terrorist crime (under Organic Law No. 7/2003) and, on the other hand, the total ban on external communications by terror suspects, even to the point of prohibiting religious and legal support (the lawyer will be appointed by the state and not chosen by the detainee, which has raised serious concerns as to the right to defence enshrined in the Spanish Constitution).

After the March 11 attacks in Madrid, there was also a thorough reform of the detention system for prisoners involved in terrorist activities. Thus, under the Law of 22 June 2004, '1st degree prisoners' would be all those whose crimes are related to terrorist activities, which implies, firstly, a situation of near isolation and transfer to a prison establishment outside of their area of residence. On the other hand, the same law specifically prohibits the benefit of parole for prisoners connected to terrorist crimes,

which has caused a definitive conceptual and legal divide between common criminal law and antiterrorist criminal law.[317]

Nevertheless, the greatest impact of antiterrorism legislation on the Spanish criminal justice model occured, in the extension of the maximum pre-trial detention periods that can be imposed on terror suspects, as was also the case with Portuguese antiterrorist legislation.[318] Although the maximum period for which a suspect can be detained before being brought to a criminal court is 72 hours in Spanish legislation, this period may be extended up to five days in cases of terrorism and transnational organised crime, pursuant to Organic Law No. 7/2003. Similarly, while the maximum period of pre-trial detention was set at 12 months, this period has been extended from 24 up to 36 months in cases of terrorism and organised crime, which has raised significant questions as to the compatibility of this legislation with the principles of swift justice and presumption of innocence enshrined in the Spanish Constitution.

However, in the same way that the rights of suspects (and also of convicts) have been strongly limited and restricted in these early stages of criminal proceedings, the Spanish Parliament – as well as the Constitutional Court – have introduced significant changes to the extent of the rights of suspects in trial hearings and appeals to higher courts. For example, the Spanish Constitutional Court Judgement No. 235/2007 provided that the right to freedom of expression and the right of communication cannot be arbitrarily limited or curtailed, even in cases of terrorism, and should in any case be fully protected – as in any other type of offence – during the trial, which should be open and public. On the other hand, Judgement No. 102/2009 (also of the Spanish Constitutional Court) established the obligation to allow the evaluation, at trial, of all the evidence and legal issues that were not admitted during the pre-trial stage.

[317] Farré, Juan Aviles, *El Terrorismo en España: de ETA a Al- Qaeda*, Arco Libros ed. (2011) p. 87
[318] Costa Pinto, Frederico Lacerda da, *Prisão preventiva e terrorismo em Portugal*, Almedina (2006), pp. 67 - 89

Finally, the powers of the suspect's attorney or legal representative, highly restricted during the pre-trial stage where terrorist offences[319] are concerned, are fully active during the trial stage and subsequent appeals, in which they can examine all existing evidence against the suspect and the methods used to obtain it, particularly to investigate any cases of torture.[320]

Thus, a deliberate balance, desired by the legislator, is achieved based on a clear proposition of current crime policy: criminal proceedings should be driven by different values and objectives during the pre-trial stage and the trial stage.[321] While the first stage criminal proceedings should focus primarily on social prevention and criminal investigation, allowing evidence to be obtained quickly and social order and tranquillity to be restored, during the trial stage, the justice system should aim to ensure that the suspect's rights are fully respected vis-à-vis the public accusation, allowing for a balanced justice model.

Also in the case of Portugal, the criminal justice system changed profoundly as a consequence of counterterrorist legislation, especially after the reform of the Code of Criminal Procedure in 2006.

With this reform, pre-trial detention practically ceased to be – like I mentioned before - an exceptional preventive measure and became a common and recurring feature in the administration of justice. Indeed, while before the reform of the Code of Criminal Procedure in 2006, pre-trial detention could only be applied if three specific conditions were met (risk of compromising the investigation, risk of escape, and criminal offence punishable with more than three years imprisonment), since this legislative reform, pre-

[319] Beiras, Iñaki, *Política Criminal y Sistema Penal: Viejas y Nuevas Racionalidades Punitivas*, Anthropos Editorial (2005), p. 65

[320] Lee, Steven, *Intervention, Terrorism and Torture: Contemporary Challenges to Just War Theory*, Springer, (2007), pp. 119 and following.

[321] This idea will be developed and specified within a proper theoretical framework within the last chapter of this thesis.

trial detention can be applied provided that, for example, the crime is connected to any international terrorist network or has been committed using firearms (in what became known as the "Arms Law" of the Portuguese Republic.[322]

On the other hand, the reform drive of the late 1990s – notably in Draft Law No. 34/97 and Draft Law No. 86/99, presented to the Portuguese Parliament[323] – has diminished, if not disappeared altogether since the 9/11 attacks. In fact, after the attacks, the organising committees of the these draft laws never met again and the reform of the criminal code in 2006, together with the "Arms Law", reversed the intention to restrict the use of wiretapping and electronic eavesdropping. On the contrary, the 2006 reform further broadened the scope of State intervention in citizens' personal data, authorising criminal police authorities to access information on financial and banking transactions and even telephone conversations and electronic communications.

Criminal justice systems of inquisitorial nature have had an interesting evolution, which will be studied in more detail in the final chapter. It is however inevitable to highlight that the reforms presented in this chapter were aimed mostly to the preliminary stages of criminal proceedings. This situation illustrates the fact that the antiterrorist reforms of the past decade must be analysed separately and thoroughly in regard to their global impact on criminal justice systems, in order to avoid premature and poorly grounded answers. As Sousa Santos states:

> "Antiterrorist reforms and their impact in restricting fundamental rights should not be seen in a generic way because undeniably their effects are concentrated mainly on the initial phases of criminal proceedings".[324]

This situation is illustrated by historical evidence: during the 1990s, the great debates around the Portuguese criminal justice focused on the issues of wiretapping,

[322] Marinho Pinto, António, *Justiça à Portuguesa*, Leya ed., Lisboa (2009) p. 52
[323] Portuguese Parliament, *Actas e Projectos lei, 1990 – 2000,* Almedina, Lisboa (2003)
[324] Sousa Santos, Boaventura, *Democratizar a democracia: os caminhos da democracia participativa*, Civilização Brasileira ed. (2002), p. 314 (translation by the author)

pre-trial detention and the appeals system. As to the first two issues, most Portuguese scholars began to agree on the need to restrict the possibility of intercepting telephone conversations and electronic communications, as well as a more careful and exceptional use of pre-trial detention. On the other hand, the appeals system began to be seen as too mild and one of the causes of the endemic delays in the Portuguese criminal justice system.

However, the rise of terrorism as a global priority in terms of criminal legislation significantly changed this historical pattern, creating an interesting distinction in the reforms adopted by the Portuguese legislator (as we also observed in the case of Spain). Indeed, while the draft legal reforms in the areas of wiretapping and pre-trial detention were abandoned and gave rise to much more stringent and privacy-intrusive laws,[325] the appeals system did not change as expected, as it somehow sought to offset the tight and often disproportionate restrictions imposed on the exercise of fundamental rights during the pre-trial stage.

Some authors, such as Miguel Fernandes, have identified this phenomenon as the "two-speed development of Western criminal justice systems", seeking precisely to highlight this distinct reality of the criminal justice system during the pre-trial stage (which in Portugal and Spain is known as criminal investigation) and the trial stage.[326]

This reality can also be measured statistically. A 2012 study carried out by Costa on the Portuguese criminal justice system shows that the number of appeals to the higher courts is 15% higher during the pre-trial stage than during the trial stage. Likewise appeals to the Constitutional Court are 35% higher during the pre-trial stage than during the trial stage,[327] which means, as Costa points out, that it is currently

[325] Latas, João, *supra* note 242 at 65
[326] Fernandes, Luís Miguel, "As sociedades contemporâneas e a ameaça terrorista" at *Terrorismo* (org. Adriano Moreira), Almedina Ed. (2004), pp. 461 - 481
[327] Costa, Faria, *Noções Fundamentais de Direito Penal*, Coimbra Editora (2012), pp. 75 - 101

during the pre-trial stage when most of the possible violations of the constitution occur, either in terms of the right to freedom and in terms of the right to a fair and unbiased trial. Such restrictions to the right to freedom, to privacy or of expression, curtailing the right to appeal before a court of law, amount to infringements on the very foundations of the Rule of Law. Donohue refers to this as 'counterterrorism costs'.[328] It is important to mention the impact of antiterrorism legislation on the liberal and democratic nature of the Rule of Law, as well as its own constitutional structure. It has now become clear that profound concessions and structural changes were made to the Rule of Law as a result of the phenomenon of global terrorism.

These changes, in the specific context of systems of inquisitorial nature, can be systematised in the following topics:

• Increase in the restrictions of citizens' fundamental rights over the consolidation of executive powers;

• Crisis of the constitutional regime of fundamental rights, namely in terms of the hermeneutics and application of procedural criminal law.

• Increased sense of control and surveillance on behalf of Governments.

• Crisis in the very nature of the liberal Rule of Law and the principle of proportionality as a basic rule of exercising power[329]. These topics summarise under a broader perspective, the changing trends analysed in section II of this chapter. In fact, as Teresa Beleza[330] refers, the main changes that occurred following the antiterrorist reforms of the last decade, could be divided into two essential ideas: a growing feeling of control (at all levels) on behalf of Governments over the lives of citizens and a sense of

[328] Donohue, Laura, *supra* note 33 *at* p. 15
[329] Professor Caroline Fennell
[330] 2004

decreasing security and protection of citizens vis-à-vis the State. Teresa Beleza calls this phenomenon the "constitutional reversal" of continental justice systems.[331]

It is within this scope that the impact of antiterrorism legislation on the criminal justice model in systems of inquisitorial nature and the impact on the Rule of Law itself should be analysed. Miguel Fernandes observes that "it is a true mutation in the liberal nature of continental States and eventually a new paradigm of criminal justice will emerge". [332] A criminal justice system focused on the enemies of contemporary society and the permanent obsession to prevent terrorist threats that seem increasingly ubiquitous.

Having defined the framework for the analysis of justice systems of inquisitorial nature, we carry forward with the detailed study of the main legislative changes, which have occurred in the systems of accusatorial nature over the last decade.

[331] Beleza, Teresa, *Direito Penal*, volume II, Universidade de Lisboa ed., 3ª ed. (2004) p. 65
[332] Miguel Fernandes, Luis, *A fundamentação da guerra contra o terrorismo*, Universidade de Lisboa ed. (2012) p. 45

CHAPTER IV

Antiterrorist legislation and Civil Liberties - (2001-2010) – the Accusatorial Systems[333]

> The decline of morality, the unwillingness to accept responsibility and the confusion that our current legal system generates are all contributing factors to the deterioration of common sense in our society.[334]
>
> **Frank Fuller**

[333] According to Adofikwu "the Adversarial system is a legal system where two advocates represent their parties'positions before an impartial person or group of people, usually a judge, who attempts to determine the truth of the case. The Adversarial system is a two sided structure under which criminal trial courts operate, that puts the prosecution against the defence. Justice is done when the most effective adversary is able to convince the judge or Jury that his or her perspective on the case is the correct one". See Adofikwu, Aje, *Understanding the adversarial and inquisitorial justice*, Routledge (2010), p. 6. For a proper definition of 'Accusatorial Systems" see Stacy, Helen, *Beyond the Adversarial System*, Federation Press, Melbourne (1999), p. 140

[334] Fuller, Frank, *Studies in Criminal Justice, Terrorism and International Political Conflicts*, Universal-Publishers (2009), p. 45

1. Introduction: Setting the context

a) The Impact of the Fight against Terrorism and Organised Crime on Common Law Systems

Similarly to the previous chapter, this analysis will begin by looking into the legal and social context that will be the framework of this chapter. The study of the impact of the phenomenon of terrorism and organised crime within the framework of accusatorial systems, such as the United Kingdom, the United States and Israel, should take into account the specific historical evolution that has taken place over the last decade[335], as well as its underlying principles. Overall, the legislative changes occuring in the last decade will be scrutinised from the viewpoint of the dominant constitutional and legal principles in those systems. This analysis will enable us to perceive systematic and global changes and the impact that they are having.

From political discourse to the religious approach,[336] from academic analysis to the opinion of the masses, the entire public discourse has been imbued with fear[337] and towards a permanent state of exception[338] related to the phenomenon of terrorism. In 2002, for example, more than half of the draft laws presented to U.S. Congress were directly or indirectly related to terrorism.

The protection of the fundamental rights in accusatorial systems (namely in the United Kingdom, United States of America and Israel), is closely linked to the common

[335] Abraham, Nabeel, *Detroit 9/11: Life in the Terror Decade*, Wayne State University Press, (2011), p.2
[336] The point being made here is that religious speech, in its different appreciations, has also come to know significant radicalization trends as a consequence of fear and panic caused by terrorism. See El Houdaigi, Rachid, *Contemporary Suicide Terrorism: Origins, Trends and Ways of Tackling It* IOS Press (2012), p. 117.
[337] Hodges, Adam, Discourse, *War and Terrorism*, John Benjamins Publishing (2007), p. 10
[338] Orezen, Suleyman, *Understanding Terrorism: analysis of sociological*, IOS Press (2007), p. 244

law system and will be the main focus of this study. As will be observed, constraints in the protection of the basic rights of suspects in the first stages of criminal proceedings, in systems where those rights traditionally were heavily safeguarded from the start of any proceedings, naturally assume paramount importation.

Common law systems, have been traditionally characterised by extensive protection of the rights of suspects, granting them a set of rights and guarantees[339] that, since the English Magna Carta, constitute a sort of insurmountable barrier that must be respected, at all times, by the democratic state of law.

Some of these rights derive from the very concept of human dignity (an idea that would strongly influence German law after World War II[340]) such as the right to defence,[341] the right to be presumed innocent unless proven guilty, the right to appeal to higher courts, the principles of proportionality and equality.

Others refer to a set of guarantees that have been progressively and substantially granted by the higher courts, especially throughout the 20th century. Such guarantees were aimed at ensuring rights of due process of law, as the suspects' rights of communication, in the maximum number of days of detention permitted before being brought before a judge, in the possibility of opposing any detention that is considered unfair or illegal, in the need to obtain warrants for all acts that are particularly destructive of fundamental rights and, most notably, in the maximum periods of pre-trial detention.[342]

It is curious to note that common law criminal justice systems, characterised by their accusatorial nature, usually differ from their civil law counterparts precisely for the

[339] Costa, Pietro, The *Rule of Law: History, Theory and Criticism*, Springer, (2007), p. 179

[340] Kretzmer, David, *The concept of human dignity in human rights discourse*, Martinus Nijhoff Publishers, (2002), p. 52

[341] The right to defence herein means the right to a defence, or the right to present a defence (more information on this: http://analedrept.utm.ro/ver_en/Lucrari/2009/2009_articol_12.pdf; http://www.uni-mannheim.de/edz/pdf/dg4/LIBE115_EN.pdf)

[342] Loureiro dos Santos, Nuno, *Fundamental rights within the age of terror*, Universidade de Lisboa (2008), pp. 65 - 91

increased and strengthened set of rights that they grant to suspects, even during the pre-trial stages.

The Council of Europe, for example, notes that there is no substantial reason for suppressing or diminishing the suspects' fundamental rights during the pre-trial stage. On the contrary, it is precisely when their rights – including the right to freedom – are under greater threat that their guarantees should be strengthened and implemented.[343] In turn, the jurisprudence of the European Court of Human Rights has repeatedly stressed that the principle of presumption of innocence should limit the intervention of the state and criminal police authorities as much as possible during the pre-trial stage, in order to avoid violation of the fundamental rights of citizens.[344] In the 1983 case *Minelli v. Switzerland*, the ECHR mentioned "the presumption of innocence is not respected if, without anterior legal establishing of guilt of the defendant […] a judicial decision regarding him or her reflects the feeling that he may be guilty".[345] In the 2003 case *Duriez-Costes v. France*, [346] the ECHR in Strassbourg referred to the precedent (*Decision X v.Holland*, 1978, ECHR),[347] in which it was established that the obligation of an automobile driver to take some blood tests while suspected of being inebriated is not contrary to the presumption of innocence. Also, it was mentioned that this presumption is violated through statements made by public officials about pending investigations, which in turn encourages the public to believe in the guilt of the suspect before a sentence has been issued by a competent authority (the 1995 case of *Allenet of Ribemont v. France*). [348] Also, the right of not incriminating oneself is strongly linked to

[343] Human Rights Watch, *Human Rights and the Fight Against Terrorism: The Council of Europe Guidelines*, Council of Europe, (2005)
[344] Brice Dickson (org.), *The Judicial House of Lords: 1876-2009* , Oxford University Press (2009), p. 624; MacBride, Jeremy, *Human Rights and Criminal Procedure: The Case Law of the European Court of Human Rights*, Council of Europe publications, (2009) p. 370
[345] *Minelli v. Switzerland*, 25 March 1983, § ..., Series A no. 62, para 37
[346] *Duriez-Costes v. France*, no. 50638/99, §..., 7 October 2003
[347] *Decision X v.Holland,1978*, ECHR, No. 5124/71, Collection 42, p. 135
[348] *Allenet de Ribemont v. France*, 10 February 1995, § ..., Series A no. 308

the presumption of innocence, as was demonstrated in the 1996 case *Saunders v. Great Britain*.[349] In this case, the ECHR established that the presumption is not intended only for the judge, but other authorities of the state, regarding public statements which can be made about the accused who have not yet been sentenced.[350]

A comparative statistical analysis shows precisely that in the 1995-2000 period, countries like the United Kingdom, Australia and New Zealand had shorter periods of pre-trial detention and comparatively the lowest number of pre-trial prisoners, i.e. those detained without charge. Even in terms of serious and complex crime, usually associated with terrorism and organised crime, systems like the Australian and the UK legislation had strengthened the rights and guarantees of suspects throughout the 1990s, in particular regarding their communication with the outside world, the possibility of appealing to the courts and even their placement in prisons close to their families and homes.

Although some countries, such as the United Kingdom and the United States, have a long history of terrorist activities within their own territory – and, consequently, of counter-terrorism measures – criminal justice systems in these jurisdictions remained highly protective of the rights and guarantees of suspects, namely in comparison to the continental European doctrine.[351] This idea, although sustained by some renowned European writers, has not earned broad support within the Anglo-Saxon legal literature.[352] Indeed, the legislative evolution, especially during the last decade, has

[349] *Saunders v. the United Kingdom*, 17 December 1996, § ..., Reports of Judgments and Decisions 1996 - 97

[350] Chihaia, Gabriela Nicoleta, "Short essay on Presumption of innocence.ECHR precedent" in *Legal Practice and International Laws*, University of Transilvania Publ. at http://aspeckt.unitbv.ro/jspui/bitstream/123456789/188/1/chihaia%20g%20barbu%20s.pdf

[351] Vercher, Antonio, *Terrorism in Europe: an international comparative legal analysis*, Clarendon Press (1992), p. 65; Masi, Carlo Velho, *Criminalidade econômica e repatriação de capitais: um estudo à luz da política criminal brasileira*, EDIPUCRS ed (2012) p. 194

[352] For a historical perspective see Simpson, Alfred, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford University Press (2004); see also Alston, Philip,

brought the rules of criminal legal procedures in Anglo-Saxon and Continental systems closer to each other and at a remarkable speed, namely in terms of means of obtaining evidence and restrictions to suspects' fundamental rights. This is, for example, Chkheidze's opinion that has increasingly emphasised the emergence of elements of Continental systems within the British legal system. [353]

The conceptual sphere has also undergone substantial changes in the United States and the United Kingdom. While before 2001, the concept of terrorism was associated with a strong political and paramilitary component, after the 9/11 attacks, this concept has evolved into a much more substantive and comprehensive perspective: the UK Terrorism Act 2000 was amended precisely in 2001 so as to expand the concept of terrorism to include all forms of violence based on religious, ethnic or political reasons aimed at destroying or threatening to destroy the social fabric or the state.

Another very important factor was the expansion of the counterterrorist finance law after 9/11, both in United States and United Kingdom.[354] The 2001 Antiterrorism and Security Act (ATCSA) allowed the UK government to confiscate any money it believed to be related to terrorist operations, whether or not a court had brought proceedings in regard to an offense connected with the cash. The Statute completely blocked the judiciary from playing a role in the freezing assets of non-UK entities: where the Treasury had reason to believe that a non-UK entity posed a threat to British economy, British nationals, or United Kingdom residents, the Secretary of Treasury could issue a statutory instrument seizing that individual's assets. The legislation also expanded the function of freezing orders: not only did the issuance result in a suspension of access to

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Monitoring Fundamental Rights In The EU: The Contribution Of The Fundamental Rights Agency, Hart Publishing (2005), pp. 130 - 185

[353] Chkheidze, Giorgi, *Adding Inquisitorial Judicial Elements to the British Criminal Justice System: Trying Terrorism While Respecting Fair Trial Rights*, University of the West of England (2006, pp. 78 - 98

[354] Yager, Loren, *Terrorist Financing: Better Strategic Planning Needed to Coordinate U. S. Efforts to Deliver Counter-Terrorism Financing Training and Technical Assistance Abroad*, DIANE Publishing (2006) p. 42

funds but it could also require discloser of personal information. There were criminal penalties of up to two years' imprisonment for falling to abide by the order, to or provide the requested data.[355] All of this has strained the fragile balance between security and freedom. The balance between a traditionally accusatorial approach of common law systems and the protection of fundamental rights becomes a challenge for reviewing criminal procedures as a consequence of increased security purposes.

The context in which these antiterrorist reforms happen is of utmost importance. As Seidl refers, the balance between freedom and security is extremely delicate and problematic in countries like the United States, England and even Israel, partly due to important historical reasons.[356] As Seidl points out, antiterrorist reforms have generated an important impact as well as public discussions in countries like the United States and England, much more than in continental systems.[357] This is due to historical, cultural and contextual reasons that must be understood. The dimension and the impact of legislative reforms in the public sphere had intense and lasting consequences for criminal justice systems. These lines of change will be the object of the examination hereafter.

[355] Antiterrorism, Crime and Security Act 2001, chapter 24, Part I. The new provisions replaced section 24 with section 31 of the Terrorism Act 2000.
[356] Seidl, Florian, *Terrorism and the Balance Between Freedom and Security*, GRIN Verlag, 2007 pp. 5 and following
[357] Seidl, Florian, *ibid* at 8

2. Main Trends: Fighting Terrorism in Accusatorial Systems

a) The right to freedom and the increase use of pre-trial detention

Pre-trial detention periods in the United Kingdom, were substantially extended in 2001, from a maximum of 48 hours to a period of seven days in which a suspect could be detained without charge. Previously the United Kingdom had a substantially more generous and humanistic normative system in regard to preventive detention that the majority of European countries. Under that regime the suspect could not be detained for over 48 hours without formal charge and could not be stopped from contacting his defense. As Hatchard and Harding observe, cases where communication with the outsider were completely prohibited were practically non-existent since the late 70's and always required validation by the courts.[358]

Yet, the United Kingdom rapidly went from being one of the European countries with the shortest periods of pre-trial detention to being one in the opposite situation. In 2006, with the Terrorism Act, the British Parliament approved the extension of pre-trial detention from 14 to 28 days, a period that had not been seen in this legal system since the late 1970s, in the fight against Northern Ireland related terrorism (the term originally proposed was forty-two days, but it was eventually settled at twenty-eight days). This extended 28 day period required however an annual renewal by an affirmative order without which it would revert back to the 14 days term. Successive orders were made in 2007, 2008 and 2009, without challenge to the Executive orders. Since 2011 pre-charge

[358] Hatchard, John, Harding, Andrew *Preventive Detention and Security Law: A Comparative Survey*, Martinus Nijhoff Publishers (1993), pp. 137- 145

detention has reverted back to the 14 days period but remains however subject to s 25(2) of the 2006 Act which allows the Executive to restore the extended 28 day pre-charge detention.[359] The Protection of Freedoms Bill,[360] contains provisions which will repeal the powers contained in the 2006 Act that enable the reinstatement of the 28 day pre-charge detention.

Note that terrorism takes on full significance in this respect: while terror suspects could be detained without charge for up to twenty-eight days, pre-trial detention for any other common offence cannot, in principle, go beyond two days. In this respect, terrorism becomes once more, as Horgan refers, the central topic and the underlying concern of criminal justice systems of accusatorial nature.[361]

The recent case law of the House of Lords with regard to detention powers in the fight against terrorism within the United Kingdom should also be mentioned here. Although successive British Governments increased the powers to detain suspects of terrorism or terrorist activities since 2005, the courts and especially the House of Lords have imposed some limitations to these powers.[362] It is worth mentioning the Belmarsh decision[363] which considered the arrest of a group of terrorism suspects under the legal provisions of national emergency disproportionate – and consequently illegal.

The Lords essentially had to address two central issues. The first was whether the Government's derogation from the European Convention of Human Rights (ECHR) in respect of the detention measures was lawful. The second was whether the statutory

[359] This situation prompted an outcry from the opposition: "Shadow Home Secretary Yvette Cooper argued that the Government had taken a "chaotic" approach to national security by allowing the powers to lapse without having been entirely clear what emergency powers could be introduced to reinstate extended pre-charge detention if this became necessary" Horne, Alexander, Brman, Gavin, *Pre-Charge Detention in Terrorism Cases* - Commons Library Standard Note, Published 16 March 2012, Standard notes SN05634.

[360] See: http://services.parliament.uk/bills/2010-12/protectionoffreedoms.html

[361] Horgan, John, *Walking Away from Terrorism: Accounts of Disengagement from Radical and Extremist Movements*, Routledge (2009), pp. 29 and following

[362] Gardbaum, Stephen, *The New Commonwealth Model of Constitutionalism: Theory and Practice*, Cambridge University Press, (2013), p. 168

[363] *A and others v Secretary of State for the Home Department* [2004] UKHL, p. 56

provisions under which the appellants had been detained were incompatible with the ECHR. The Lords thus addressed the designation issue as well as the interference issue. By an eight-to-one majority, the derogation by the UK Government from the ECHR was quashed and a declaration issued to the extent that section 23 ATCSA was incompatible with the Human Rights Act 1998 (UK).

The House of Lords judgment can be divided into three different moments : Seven members of the Court — Lords Bingham, Nicholls, Hope, Scott, Rodger, Carswell, and Baroness Hale — held that, while a 'public emergency threatening the life of the nation' could be said to exist, the detention provision could not be said to be 'strictly required' by that emergency. It was disproportionate and discriminatory and hence unlawful. One judge — Lord Walker — dissented. He held both that there was a public emergency threatening the life of the nation and that the detention provision of section 23 ATCSA was neither discriminatory nor disproportionate to the aim the measure sought to achieve. Lord Hoffmann agreed with the majority that the provisions in question were incompatible with article 5 of the ECHR. However, he was the only judge who held the derogation unlawful on the ground that there was no 'war or other public emergency threatening the life of the nation' within the meaning of article 15 of the ECHR.[364]

This decision demonstrates, with enough reliability, that the case-law has not always followed the objectives of the executive branch in the fight against terrorism and has been an essential element of control and restraint of the derogations proposed by Governments to the principles of Community and International law with regard to rights, freedoms and guarantees.[365]

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[364] See The Question of Proportionality and the Belmarsh Detainees Decision at http://epress.anu.edu.au/war_terror/mobile_devices/ch07s05.html

[365] Kavanagh, Aileen, *Constitutional Review Under the UK Human Rights Act*, Cambridge University Press, (2009) p. 385

The Belmarsh Case also drew significant limitations in respect of the derogation regime of Article 5 of the European Convention on Human Rights and Fundamental Freedoms, regarding the unlimited detention periods and to the absence of formal charges of terrorism suspects.[366] As Feldman states:

> "The Belmarsh decision marked a dramatic change in direction. While the judgment itself changed little, especially for the individuals caught up in the government's detention/control order/deportation strategy, it was remarkable for the rejection by eight of the nine Law Lords of the appropriateness of deferring to the executive in assessing the proportionality of measures taken under the cloak of national security.[…]) More significantly, perhaps, Belmarsh has opened up the political and legal debate about the necessity of adhering to the logic of the cycle of terror and repression. In particular, the decision served to embolden campaigning NGOs and political opposition to the legislation, by confounding the automatic assumption that counter-terrorism measures were untouchable".[367]

The phenomenon of "Control Orders"[368] issued by the Home Secretary in the United Kingdom, which led to the detention of about 2,500 foreigners between 2002 and 2007, for being suspected of belonging to a terrorist group or of being connected to financing terrorist activities, also deserves some reference. Actually, this kind of action of the executive branch has been one of the chosen methods by successive British Governments to effectively – and without further need of control or judicial verification - fight terrorism and organised crime, especially when related to international sources. However, it cannot be said, that these measures have been – and continue to be – peacefully accepted in the United Kingdom, in fact it is also undeniable that legal and academic literature continue to analyse them extremely critically.[369]

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[366] The Belmarsh case – a legal theorectical analysis in http://natashalatiff.com/2008/11/06/a-v-secretary-of-state-belmarsh-case-legal-theoretical-analysis/ ; Thiel, Markus, *The Militant Democracy Principle in Modern Democracies*, Ashgate Publishing, (2009) p. 339

[367] Fledman, D., "The Dampening Effect of Human Rights Norms" in http://epress.anu.edu.au/war_terror/mobile_devices/ch15s11.html

[368] Donohue, Laura, *supra* note 33 at 63 - 71

[369] Mathew, Penelope, *Fresh perspectives on the war on terror*, ANU E Press, (2008) pp. 340 and following

In the United States, the pre-trial detention period was substantially extended, both in terms of permissible period and in terms of the reasons that legally justify the application of pre-trial detention.[370]

Before 9/11, the United States had a very similar detention procedure to, and based primarily on, the procedure that was followed in the United Kingdom. The interpretation that resulted from case law gave citizens the right to communicate with the outside, the right to a counsel of the suspect's choosing or appointed by the state and a maximum detention period of 48 hours without formal charge. In some ways the law in the United States was even stricter than in the United Kingdom, requiring the presence of counsel during any questioning to a suspect regardless of the crime at hand, including terrorism.[371]

Soon after the 9/11 attacks, even unlimited detention of terror suspects was permitted, provided that it was confirmed by the Attorney-General. In fact, on March 11, 2003, a federal appeals court ruled that the 650 detainees have no legal rights in the United States and may not ask courts to review their detentions. The unanimous ruling by a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit, consisting of judges A. Raymond Randolph, Merrick Garland, Stephen Williams, means that the detainees can be held indefinitely without access to lawyers or judges. The decision upheld a federal court ruling issued in August of 2002.[372 and 373]

This broadening and substantial change of the rules for preventive detention is probably the most direct expression of counter-terrorist measures adopted by Western

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[370] Human Rights Watch, *UK: Counter the Threat or Counterproductive? Commentary on Proposed Counterterrorism Measures*, Human Rights Watch Publications, pp. 8 - 19

[371] Wroble, Lisa, *The Right to Counsel: From Gideon V. Wainwright to Gideon's Trumpet*, Enslow Publishers (2009), pp. 51 - 64

[372] Schmittroth, Linda, *Immigration and Illegal Aliens: Burden Or Blessing?,* Gale Group ed., (2003), p. 28

[373] For more information on this case see: http://911research.wtc7.net/cache/post911/attacks/saltlaketribune_courtbacks.html (accessed on August, 2013)

States. However, as Williams refers, this is not a simple extension of probation, but truly a new culture that conceives and implements preventive detention as a tool to fight crime.[374]

This idea must be further explained. Criminal justice systems have implemented preventive detention as a customary and permanent measure within the scope of proceedings involving terrorism and organised crime - allowing the precautionary and exceptional aspects of these measures - that were at its historical origin to wane. It is this "profound historical change", as indicated by Professor Munoz Conde that determined an increase of over 30% of pre-trial detentions in countries like the United Kingdom and Israel.[375]

Within this topic, one must distinguish between States that have simply extended the legally allowed deadlines for pre-trial detention and those that have moreover began to make a permanent and constant use of pre-trial detentions in proceedings related to terrorism and organised crime. In the wide range of systems of accusatorial nature, we can say that the British, American and Israeli legal systems have begun to consider detention as a recurring and usual instrument for the prossecution of terrorism and organised crime.[376]

Once more, Munoz Conde draws attention to this aspect, which should be emphasised: the increased use of pre-trial detentions and the related extension of its terms is a characteristic trait of the major reforms to the post 9/11 criminal legislation and relates to the emergence of a new criminal law that is directly focused on a specific

[374] Williams, Marian, "The Effect of Pretrial Detention on Imprisonment Decisions", *Criminal Justice Review*, March (2013) , nº 38
[375] Munoz Conde, Francisco José. *Derecho Penal Parte Especial.* 15a edición, ALDA ed. (2010) p. 755
[376] Bahtiyar, Zarif, *Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU*, Wolf Legal Publishers, (2009), p. 889

objective of criminal policy: fighting terrorism and its supporters. In a word: the criminal law of the enemy.

b) The Right to Privacy and the emergence of new methods for surveillance and criminal investigation. Preventive powers of law enforcement - a new paradigm of cooperation between police forces and intelligence services

In common law systems, the most significant changes probably occurred in the surveillance and prevention powers of law enforcement authorities. Prior to 2001, in the USA and the United Kingdom, most of the surveillance activities carried out by criminal police authorities – which do not include the actions carried out by intelligence agencies – required a warrant. Now, after the attacks, the situation changed dramatically: surveillance and monitoring by law enforcement authorities became constant, intense and often discretionary.[377]

In the United Kingdom, for example, no raids or interception of communications could be carried out without a warrant, even in cases of terrorism and organised crime.[378] In the United States, although in some cases law enforcement authorities could intervene autonomously in cases of terrorism – especially after the Oklahoma City bombing – their autonomy was restricted to situations of *flagrante delicto* and cases where it was not possible to obtain such warrants in due course.

[377] Mathiesen, Thomas, *Silently Silenced: Essays on the Creation of Acquiesence in Modern Society*, Waterside Press (2004) p. 86

[378] See Regulation of Investigatory Powers Act of 2000 (section 3) at http://www.legislation.gov.uk/ukpga/2000/23/section/3; See also Alexander, Yonah, *UK's Legal Responses to Terrorism,* Cavendish Publishing (2003), p. 28

Even in the specific case of wiretapping by criminal police authorities, in 1990s, the United Kingdom enacted highly restrictive legislation – when compared with continental systems – requiring a warrant in most cases and restricting the admissibility of such evidence to strictly necessary and potentially serious cases – when such facts could not be obtained through less restrictive means.[379]

But, with the new antiterrorist legislation, the state proposed to expand the interception of communications sent using public telecommunications systems or via post to all communications by telecom operators or mail delivery systems. Second, the state sought to relax warrant applications, tying them not to addresses, but to individuals, with a list of addresses and numbers attached and easily amendable by lower level officials. Third, to allow the state flexibility to react to emergencies, the power to request wiretaps would be extended from the Senior Civil Service to the head of the agency involved. Fourth, the Labour Government wanted to expand the length of time for which a warrant operated: under the previous statutes, taps remained in place only for a two month period, with the possibility of monthly renewals in cases of serious offenses, and on a six-month basis for matters of national security and economic well-being. The state proposed to change the length of time, for serious offenses, to three months, to be renewed every three months, and, for matters of national security and economic well-being, to be renewed every six months. Fifth, the government also proposed to expand its powers of interception to include private networks, with the aim of making it legal for businesses to record communications in both public and private sectors. Sixth, where previously communications data could be turned over voluntarily, the state wanted to compel targets to do so. Ultimately, the new legislation forced

[379] See Regulation of Investigatory Powers Act 2000, Sections 33 – 40 at http://www.legislation.gov.uk/ukpga/2000/23/pdfs/ukpga_20000023_en.pdf

Internet Service Providers (ISPs) to attach devices to their systems enabling communications to be intercepted en route.[380]

Furthermore, monitoring extended to areas not traditionally covered,[381] such as cyber activity and financial movements, which are now considered central to the fight against terrorism[382] and organised crime. In this context, the UK Prevention of Terrorism Act 2005 empowers authorities to carry out a different set of surveillance practices on terror suspects, making their administrative authorisation dependent on the Home Secretary and not on any judicial authority. Much of the British Parliament's discussions in 1994 and 1995 suggested that wiretapping should be restricted to cases of great complexity and, as a rule, of a transnational nature. During the same period, some of the most important associations that deal with the protection of citizens' rights, freedoms and guarantees -such as the British Columbia Civil Liberties Association (BCCLA), whilst analysing the situation in the United Kingdom - defended that mandates or court orders to intercept telephone communications should specify exactly what kind of elements are targeted and have a twenty-four hour period for their implementation. It is important to mention that the United Kingdom's legal literature has been deeply divided over this subject, swinging between a shy interpretation of antiterrorist legislation and a fierce opposition. Doyle, for example, has been one of the most consistent critics of the telephone interception legislation in England and the United States in the last decade.[383] In turn, Aleksander Avkov has brought consistent

[380] Donohue, Laura, supra note 33 at 196; The Rt.Hon. Sir Swinton Thomas, *Report of the Interception of Communications Commissioner for 2001*, (Oct. 31, 2002), H.C. 1243, at 50, available at www.ipt-uk.com/docs/.
[381] Piçarra, Nuno, *Electronic Surveillance and European Union*, ALFA (2008), p. 143
[382] Gustin, Joseph, *Cyber Terrorism: A Guide for Facility Managers*, CRC Press (2007), pp. 139 and following
[383] Doyle, Charles, Privacy: An Overview of the Electronic Communications Privacy Act, Congressional Research Service (Oct. 2012) at http://www.fas.org/sgp/crs/misc/R41733.pdf

and extremely critical studies regarding the evolution of telephone interception in recent decades.[384]

In this respect – as would actually happen with most Southern and Central European countries – police powers in road surveillance, control of financial flows, monitoring telephone conversations and electronic communications have increased exponentially, in flagrant violation of the fundamental right to privacy enshrined in most European constitutions and in the jurisprudence of the higher courts.

Accompanying and leading the global wave of antiterrorist security, the United Kingdom, along with the United States, introduced further provisions to combat terrorism. The Antiterrorism, Crime and Security Act 2001 (ATCSA) was the United Kingdom's response to the September 11, 2001 terrorist attacks.

The ATCSA came into force on 14 December 2001, amending the counter-terrorism provisions already in force in the United Kingdom to provide the Government with increased powers to combat all forms of terrorism.

The measures were intended to:

• Cut off terrorist funding without a court order.

• Ensure that government departments and agencies can collect and share information required for countering the terrorist threat, including the interception of telephone conversations and electronic communications, with no limits and without a court order.

• Ensure the security of the nuclear and aviation industries that now constitute classified information are protected and maintained by British intelligence services.[385]

In relation to electronic surveillance, the United Kingdom significantly expanded the closed-circuit television network. By 2003, two and a half million, or roughly 10 % of the globe's total number of CCTV's operated on British soil. Donohue explains that:

[384] Vladimirovich Avakov, Aleksander, *Plato's Dreams Realized: Surveillance and Citizen Rights, from KGB to FBI*, Algora Publishing (2006) pp. 52 - 62

[385] Sousa, Clara Costa, UK*: Serviços de Inteligência na era do terrorismo*, Bertrand Ed. (2002), p. 34

> "The net effect is substantial: each person travelling through London is caught on film approximately 300 times per day. These devices do not just watch and record; some use facial recognition technology to scan the public against a database of persons sought by the state". [386]

A particular consideration should be given to the paradigmatic case of the above mentioned 'control orders', i.e., administrative orders aimed precisely at ensuring an up-to-date database of terror suspects and their changes. Similarly, the recipients of these orders were also automatically subjected to the collection of evidence (such as DNA and fingerprints) that previously required a court order too. The Terrorism Act 2006 allowed law enforcement authorities to immediately gather fingerprints and other DNA evidence deemed necessary to prevent future terrorist acts, even if there was no indication of such a threat.

As Gallant points out, changes recently introduced in the British criminal justice system were unthinkable in terms of confidentiality of investigations.[387] In a system accustomed to the highest levels of publicity in criminal proceedings compared to all other European systems, the changes introduced in 2006 regarding terrorism prevention legislation definitely reversed this trend, bringing the structure of British criminal procedure closer to its civil law counterparts, such as Portugal and Spain. Indeed, as with these two countries, also the UK law (Terrorism Prevention and Investigation Measures Bill) went on to consider the possibility of keeping proceedings confidential until the trial in cases of terrorism or connection to terrorist activities.

In turn, in the USA, the USA Patriot Act made two important changes to the Foreign Intelligence Surveillance Act (FISA): it allowed applications where foreign intelligence constituted only 'a significant purpose' for an investigation, and it authorised the state to obtain tangible objects, such as computer disks and drives. Where

[386] Donohue, Laura, supra note 33 at 214 -215
[387] Gallant, Michelle Mary, *Money Laundering And The Proceeds Of Crime*, Edward Elgar Publishing, (2005), p. 22

previously FISA applications requires that the gathering of foreign intelligence be the sole reason for search or surveillance, the new legislation allowed for applications when foreign intelligence provided a merely significant reason. The Attorney General quickly seized on this power and issued guidelines that said such authorisation could be sought even if the primary ends of the surveillance related to ordinary crime.

In relation to the USA Patriot Act, the idea of a strong concentration and strengthening of Executive power must be once again emphasised. The strengthening of both, the Executive and Police power and its dimension are, according to Susana Bonetto, the main features of the antiterrorist reforms of the last decade.[388] The strengthening of the internal security structure under Title I (sections 101 to 106) consists of the following measures[389]:

a) Establishment of a Counterterrorism Fund (Sec. 101) which shall remain available to repay the Department of Justice for any costs incurred in connection with:

- (1) re-establishing the operational capability of an office or facility that has been damaged or destroyed as the result of any domestic or international terrorism incident;
- (2) providing support to counter, investigate, or prosecute domestic or international terrorism, including, without limitation, paying rewards in connection with these activities; and
- (3) conducting terrorism threat assessments of Federal agencies and their facilities and reimburse any department or agency of the Federal Government for any costs incurred in connection with detaining in foreign countries individuals accused of acts of terrorism that violate the laws of the United States.

b) Increased funding for the Technical Support Center at the Federal Bureau of Investigation. (Sec. 103).

[388] Bonneto, Susana, *Política y desborde. Más allá de la democracia liberal*, Eduvim, 2012 Buenos Aires (2012), pp. 48 - 52
[389] Rogeiro, Nuno, *O Patriot Act na óptica da segurança internacional*, Almedina (2009), pp. 82 - 91

c) Expansion of the National Electronic Crime Task Force Initiative (Sec. 105): "the Director of the United States Secret Service shall take appropriate actions to develop a national network of electronic crime task forces, based on the New York Electronic Crimes Task Force model, throughout the United States, for the purpose of preventing, detecting, and investigating various forms of electronic crimes, including potential terrorist attacks against critical infrastructure and financial payment systems."

d) New presidential authority (Sec. 106) to order the confiscation of property under IEEPA (International Emergency Economic Powers Act) and TWEA (Trading with the Enemy Act). Section 106 amends Section 703 of IEEPA (50 U.S.C. 1702), allowing the President to confiscate foreign property as retaliation of attacks perpetrated by foreign nationals. However, Section 106 goes further and amends IEEPA to authorise the President to freeze foreign property located in the United States or subject to the jurisdiction of the United States, during any investigation under the International Emergency Economic Powers Act, without having to wait for the conviction of the perpetrator of the crime or threat. In this context, the Government can confidentially submit any information provided by intelligence services on which the IEEPA relied on to decide to prosecute a given individual. This possibility does not confer or imply any right to judicial review of the decision, which has been highly disputed in the United States for directly violating the constitutional right of citizens to judicial review.

e) Requests for military assistance to enforce prohibition in certain emergencies (Sec. 104). The Department of Justice may request assistance during emergency situations previously provided for under the exceptions, i.e. emergency situations involving chemical, biological and nuclear weapons, (18 U.S.C. 2332e, 10 U.S.C.175a, 229E, 831(e). This section amends section 18 U.S.C. 2332, including emergency situations with other weapons of mass destruction.

With regard to the confidentiality of investigations and the rights of communication of suspects, common law systems saw significant changes after the September 11 attacks.[390] For example, while in the United Kingdom the maximum period for which a suspect could be held without communication and formal charge was extended from three to seven days in cases of terrorism,[391] in the United States there was not even a prescribed maximum period of non-communication, leaving that decision to the US Attorney General or the special military tribunals when the suspect is detained under military jurisdiction, pursuant to the Patriot Act.[392] To avoid the possibility of judicial appeal and the access to a lawyer by suspects of terrorist acts, the United States approved the Military Commission Act in 2006, establishing a special jurisdiction of military courts for suspects of terrorism, wherein traditional safeguards such as Habeas Corpus, the right to a lawyer in any stage of the procedure and the right to a judicial appeal were denied. Under this new detention system, suspects of terrorism could easily be forced to total isolation from the outside world for an almost unlimited amount out time.[393]

Israel is an important case study in this matter. The Israeli state has always been, within the common law family, one of the great exceptions to the general principle of

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[390] Dalglish, Lucy A., *State Open Government Law and Practice in a Post-9/11 World: Changes in State Public Information Laws in the United State Since the War on Terrorism and Selected Changes in National Public Information Laws Since the War on Terrorism in Colombia, France, Israel, and the United Kingdom*, Lawyers & Judges Publishing Company, (2007), p. 80

[391] Terrorism Act 2000, extended the limit to 7 days detention without charge for terrorist suspects. It also allows terrorist organisations to be banned by the Government and not by the Courts. Sixty groups have to date been outlawed.

[392] For example, Section 412 of the US Patriot Act amended the Immigration and Nationality Act, adding a provision on the detention of suspected terrorists. This provision empowers the US Attorney General to order the arrest of foreign nationals when there is a reasonable basis to suspect them of involvement in terrorism or other activities that constitute a danger to the national security of the United States. The period of arrest on these grounds was originally restricted to seven days, during which the Attorney General had to decide whether deportation procedures should continue or criminal measures should be taken against the detainee; otherwise, the suspect had to be released from detention. However, the new provision allows the administrative detention of a person, even in cases where their deportation from the United States does not appear imminent, for a period of six months at a time if the Attorney General thinks the release of that person would endanger US national security.

[393] See Section 7 of Military Commissions Act of 2006 (MCA)

publicity of proceedings. Indeed, in cases of investigations related to terrorism and organised crime which undermine national security, the whole proceedings should be conducted on a basis of strict confidentiality, so much so that the trial may be closed to the public under special circumstances. Similarly, it must not be forgotten that after 2001, many of the trials relating to terrorism or criminal activities related to international organisations were conducted in special military tribunals[394], in most cases without any publicity.

Israel has for many decades also resorted to military jurisdiction as way to bypass fundamental rights and civil jurisdiction rules. On the one hand, the concept of enemy combatant has been very broadly interpreted by police authorities, allowing detention in isolation of hundreds of suspects of terrorist activities. On the other, in 2013, the Israeli Parliament approved the Anti-Terror Bill, which authorizes administrative detentions - without any judicial intervention – of terrorism suspects and specifically prohibits communication with the outside – even with a counselor – for a period of up to 30 days.[395]

It should also be noted that the United States, Israel and the United Kingdom are not the only examples of this situation. Also New Zealand, for example, has considerably restricted the publicity of criminal proceedings related to international terrorism, which has drawn heavy criticism at home for being contrary to the New Zealand Bill of Rights Act 1990.

Furthermore, there are the legal costs – or the direct impact on the legal systems of most Western countries – identified by Donohue, especially in related to the rights to freedom, privacy and property in the American and British legal systems. According to Laura Donohue, the impact of counter-terrorism measures has been significant, in the

[394] Duffy, Helen, *The 'War on Terror' and the framework of international law*, Cambridge University Press, p. 317
[395] See http://news.xinhuanet.com/english/world/2013-06/10/c_132444865.htm

context of the right to privacy of citizens – with increased interference in telecommunications and electronic communications. This is a true legal cost of the war on terrorism and organised crime.[396]

The report presented by the European Parliament in 2007, relating to EU Member States in the fight against terrorism, clearly shows that citizens' privacy rights were the most severely affected. This is a consequence of authorities having been empowered to take surveillance measures that brink upon the personal life of citizens while only requiring administrative authorization to do so.

This privacy relates not only to telephone conversations and electronic communications, but also to the protection of personal data and financial banking, clinical and other information, etc. In no other area of social life were citizen' rights so restricted in the last decade in the name of the fight against terrorism and organised crime.

The consideration that has to be addressed is related not only to the phenomenon of terrorism in itself, but also to the perception that companies, as a whole, have of the phenomenon, its consequences and implications. As Furedi points out, the phenomenon of terrorism is, in contemporary society, an amplifier for people's fears and insecurities.[397]

[396] Donohue, Laura, *supra* note 33 at 187 (interception of comunications)
[397] Furedi, Frank, *Culture of Fear Revisited*, Continuum International Publishing Group, (2006), p. 75

c) Freedom of expression and the limitations imposed by the law against terrorism, within the framework of freedom of expression and communication

Although financial counterterrorist laws may be causing an incremental erosion of areas already subject to substantial government control or regulation,[398] they have infringed on a broad range of rights – free speech, religion, privacy, and property – all important to the overall health of a democracy. They have caused other political and humanitarian damage as well.

A very interesting point in this respect is related to freedom of expression, of association and of artistic creation. Such values have long been protected and are considered part of the pillars of the common law legal family, representing an extremely important element in the case law of countries like the United States, the United Kingdom and Australia.

For example, the United Kingdom, which has been one of the most enthusiastic advocates of people's freedom of expression at the United Nations General Assembly and the Security Council, is precisely one of the countries that have restricted this freedom in the fight against terrorism. On the one hand, it began to criminalise the discourse in defence of Islamic fundamentalism and of incitement to revolt against the United Kingdom, in spite of the lack of any concrete action; on the other hand, the mere fact of belonging to what the Executive considers to be a terrorist organisation or associated with any terrorist group, is punishable by up to five years imprisonment

[398] Kraft, Michael, *U. S. Government Counterterrorism: A Guide to Who Does What*, CRC Press, (2012) pp. 21 and following; Huckerby, Jayne, *Gender, National Security and Counter-terrorism*, Routledge (2013) p. 183

without the need for any actual action or activity. As Conde argues, the right to free expression was probably the most affected – along with the right to freedom – by the fight against terrorism waged by Western governments, and the one that most expressively led us to ask ourselves about how far we are willing to go to save our way of life.[399]

This is one of the most relevant aspects of the constraints in terms of civil rights in the context of the fight against terrorism. Freedom of expression, whether in terms of the media, whether in terms of freedom of thought or academic freedom, has been severely affected by emerging antiterrorist legislation. Streb reviewed academic freedom in the post September 11 period and concluded that, under all possible analytical perspectives, a significant decrease of freedom had indeed occurred.[400]

Walter also points out that the continued restrictions to the freedom of the press and freedom of thought, is one of the most serious consequences of the "war against terrorism" and suggests a compensation rationale, which he recommends be adopted by all Common Law jurisdictions:

> "Countries should compensate for the restriction of fundamental rights (such as the intimacy and privacy of communications) with a strengthening of freedom of expression and freedom to criticise, as a way to ensure democratic scrutiny of the executive branch."[401]

The case of Israel has proved to be a perfect example in this regard. The Jewish state has frequently applied restrictions on freedom of expression and association, always in defence of national security and the fight against terrorism. From the closing down of public television channels to the censorship of certain radio programmes, the Israeli Government has, since its inception in 1948, frequently enacted highly restrictive

[399] Losano, Mario G. y Francisco Munoz Conde (org.), *El. Derecho ante la globalización y el terrorismo*, Ed. Tirant lo Blanch, Valencia, (2004) p. 128
[400] Streb, Matthew, *Academic Freedom at the Dawn of a New Century: How Terrorism*, Governments, And Culture Wars Impact Free Speech, Stanford University Press (2006), pp. 43 - 49
[401] Walter, Christian, *Terrorism as a Challenger for National And International Law: Security Versus Liberty?*, Springer, (2004), p. 63

laws on freedom of expression and communication. The September 11 attacks undeniably worsened this trend, notably with the adoption, in 2005, of a legislative package specifically designed to combat "the dissemination and propaganda of terrorism", which was passed in the Knesset by a 2/3 majority of members. Once again, this reflects the maintenance of a "permanent state of exception", this time applied to the freedom of communication and expression.

In addition to the formal (or legal) aspects of these reforms, there is another aspect that should be highlighted, as Sousa Santos refers: the considerable restrictions to the freedom of information and to the freedom of the press[402]. Indeed, the eagerness of Governments to control information and to predict any type of threat, also led them to impose to the media, severe restrictions to their freedom to inform the public. These limitations, as Sousa Santos furthermore stressed, have not always been enacted through specific laws or direct orders, but were disguised with economic or political pressure. In fact, the number of legal proceedings and criminal investigations against the media, have not only increased exponentially- in particular in the United States– but also in the majority of accusatorial systems, heavy fines were applied to the boards of directors that violated secrecy rules of criminal investigations or that, in the understanding of Governments, made the apology of terrorist movements.

[402] Sousa Santos, Boaventura, *supra* note 209 *at* 89

d) The doctrine of criminal equality & the development of marginal communities: the legal status of immigrants and the control of migration flows within the 'war on terror'.

The United States and the United Kingdom have been the countries most active in adopting anti terrorist measures, which cannot be disconnected to their close involvement in the war against terrorism[403] and their military presence in Iraq and Afghanistan. These states acquired a certain perception that they were the real targets of terrorist groups and that their way of life was what truly mattered in the defence of freedom.

In July 2006, the British Government presented its counter-terrorism strategy ("Countering International Terrorism: The United Kingdom's Strategy"). This document points out the main causes of terrorism and calls on internal cooperation, of State officials, representatives of the Muslim communities and the general public, to join efforts and work in partnership with the Government to manage and undertake effective action against this threat,[404] stating that part of the counter-terrorism strategy is run by the British secret services and obviously contains information that cannot be disclosed to the Parliament and general public. A survey conducted by The Guardian newspaper, published in late December 2004, demonstrates exactly that: 80% of the respondents who in the past supported the labour party declared themselves opposed to the British Prime Minister's policy.

This new context of "constant fear" and "sense of underground war" had significant consequences, particularly in the form of police action and in current

[403] Alcoba, Manuel Luna. *Por qué el Terrorismo*, Rey Ed., Madrid (2003), p. 31
[404] Paulo Soares, António, *UK: uma estratégia comunitária de combate ao terrorismo*, Almedina (2007), pp. 134 – 136

immigration and asylum policies. These two phenomena were particularly visible in the United States and the United Kingdom.

With regard to the treatment of foreigners, Donohue shows that in the United States alone, more than 4,000 foreigners were detained without charge under executive orders. The FBI became a constant presence in mosques and in the headquarters of Muslim organisations, which was rare or virtually non-existent until 2001.[405]

These activities were carried out by police and other security forces often based on acquired perceptions of nationality, race or religion, as evidenced by the tragic fatal shooting of Brazilian national Jean Charles de Menezes at the Stockwell underground station in South London. On the other hand, the application of house arrest orders or any other form of detention for an indefinite period of time and without any sustainable evidence has been frequent, with devastating consequences in terms of the mental health of suspects and of society itself. As Donohue points out:

> "Beyond the anxiety about physical safety, indefinite detention's long-term psychological effect on suspects can – even without coercive interrogation – be devastating. The European Court of Human Rights brought these effects to public notice in *Ireland v. United Kingdom*. But the problem was not limited to the treatment of Northern Ireland detainees. Many people subject to detention and then control orders in United Kingdom after September 11 became severally mentally disturbed. Mahmoud Abu Rideh, for instance, one of the first post 9-11 detainees, was transferred to Broadmorr psychiatric hospital. By March 2005, 4 of the 10 placed under control orders were suffering from acute psychiatric or other medical problems". [406]

In turn, Amnesty International, the European Parliament and many other important political actors, including The UK Government's independent reviewer of terrorism legislation, Lord Carlile of Berriew, have heavily criticised the application of these restrictive measures implemented by the United Kingdom, seeking to demonstrate

[405] Donohue, Laura, *supra* note 33 *at* 67
[406] Donohue, Laura, supra note 33 at 115

the negative psychological impact they are having on civil society which, through these actions, raises fear of new and more deadly terrorist attacks.[407]

The so-called 'criminal law of the enemy' conceptualised by Gunther Jakobs deserves special mention.[408] This is a point emphasised by Donohue particularly when considering that:

> "Criminal law systems after September 11 in countries like the United Kingdom and the United States have now incorporated some obvious objectives such as the repression of certain specific communities as well as their control, with the purpose of fighting transnational terrorism"[409]

A true foreigners' criminal law in the words of Professor Guedes Valente, to the extent that the criminal law system takes on the very specific purpose of protecting the national community in view of external threats. [410]

Among the areas in which more restrictions were imposed on personal rights have been precisely citizenship and immigration laws. With the conviction that a great deal of terrorist attacks were and are planned beyond their borders and by 'foreigners', British and the United States governments adopted significant restrictions to the entry of foreigners in their territories, regardless of the academic or commercial nature of such mobility. In effect, those governments strongly engaged in modifying their respective immigration laws in order to control and prevent the mobility of possible suspects of terrorist activities.

The USA Patriot Act for instance produced significant impact on immigration as it modified immigration law, increasing the ability of federal authorities to prevent foreign terrorists from entering the US, to detain foreign terrorist suspects, to deport

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[407] Agence France Press, "Britain Approves Three more 'Control Orders' on Security Suspects, English Wire", March 13 (2006)
[408] Viquez, Carolina, "Criminal Law of the Enemy - A Dogmatic Chimera or a Future-Oriented Model? (*Derecho Penal del Enemigo ¿Una Quimera Dogmática o un Modelo Orientado al Futuro?)"* at Politica Criminal, nº3 (2007), pp. 1 - 18
[409] Donohue, Laura, *supra* note 33 p. 135
[410] Guedes Valente, Manuel, *II Congresso de Direito Penal*, Coimbra (2006), p. 145

foreign terrorists, to mitigate the adverse immigration consequences for the foreign victims of September 11, and authorised appropriations to enhance the capacity of immigration, law enforcement, and intelligence agencies to more effectively respond to the threats of terrorism.

As Guild states, based on statistics of recent attacks, the British and the United States governments believe that by reducing the entry of foreigners from some countries – even when the purpose is to study or to make investments – they will strengthen their surveillance and control capacity of potential terrorists.[411]

Finally, the concept of the 'enemy's criminal law' brought about yet another worrying consequence to countries like the United States and England, as Munoz emphasises: a very significant feeling of distrust between the various racial, religious or ethnic communities.[412] Indeed, the antiterrorist reforms adopted by the United States and the United Kingdom (and already a few years ago by Israel) have created a major division between communities, with significant consequences to the cultural, social and economical-financial spheres. In a way, as Dershowitz pointed out, the 'enemy' scattered across societies, rooted itself in various communities and constitutes a new problem for democratic constitutional States, in terms of confidence and pluralism.[413]

[411] Guild, Elspeth, *Terrorism And the Foreigner: A Decade of Tension Around the Rule of Law in Europe*, Martinus Nijhoff Publishers (2007), p. 51; Guedes Valente, Manuel, *Direito penal do inimigo e o terrorismo: do progresso ao retrocesso*, Almedina (2010), p. 76
[412] Burgueno Munoz, José, *Cuéstion de Confianza*, Editorial UOC (2010), p. 18
[413] Dershowitz, Alan M., *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, Yale University Press (2008), pp. 67 - 73

e) The creation of new criminal offences & the development of the framework of a criminal policy to fight terrorism and organised crime

There is another phenomenon impossible to ignore in the context of the legislative developments of the last decade[414] that is closely related to the limitations imposed on the enjoyment of fundamental freedoms: the creation of a new set of crimes and criminal offenses directly or indirectly related to terrorism. This phenomenon seems to be cross-cutting to multiple accusatorial systems.[415]

The case of the new offence, approved by the London Government in the immediate aftermath of the 7 July 2005 bombings – the offence of glorification of terrorism – clearly reflects the climate of pressure, fear and "exceptional context" we mentioned earlier. According to this new antiterrorism legislation – passed by the British Parliament with 315 affirmative votes against 277 negative votes – people who publicly defend terrorist acts or support terrorist figures or groups, even without any specific activity or form of incitement, can be charged with the offence of "glorification of terrorism. As Jakobs points out, with this law, the borderline between a criminal law of the fact and a criminal law of the perpetrator is extremely thin.

The expression "glorification of terrorism" which relates to what Barendt has classified as "acts, at least where members of the public would reasonably infer that they should emulate them",[416] is of special concern as it raises serious questions

[414] Beckman, James, , *Comparative Legal Approaches to Homeland Security and Antiterrorism*, Ashgate Publishing (2013), p. 77
[415] Durmaz, Huseyin, *Understanding and Responding to Terrorism*, IOS Press, (2007) p. 103
[416] Barendt, Eric ,Incitement to, and Glorification of, Terrorism, DOI:10.1093/acprof:oso/9780199548781.003.0023, http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199548781.001.0001/acprof-9780199548781-chapter-23

regarding restrictions of freedom of expression in light of the inaccuracy and the almost infinite ways it can take form. The criminalisation of such a vague conduct that can be open to multiple interpretations, (such as publishing a report considering a suicide bomber a role model, suggesting one responsible for a terrorist attack should receive a commendation, or sharing a video of terrorist propaganda on a social media webpage) seems to be contrary to the interpretation that has been made by the European Convention on Human Rights by the English courts and the European Court of Justice.[417]

The criminalisation of vague conducts has been targeted elsewhere by upholding that the adherence to the principle of legality requires criminal laws to be intelligible.[418] In the United States for instance the Void-for-Vagueness doctrine requires that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"[419]

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[417] The House of Lords has upheld that offences must be clearly defined in law (*SW and CR v United Kingdom*), and that no norm can be regarded as a law unless it is formulated with sufficient precision to enable the citizen to foresee, the consequences that his actions may incur in (*Sunday Times v United Kingdom* (1979); furthermore it has stated that "no one should be punished for any act which was not clearly and ascertainably punishable when the act was done" in *Clark, R v [2003] EWCA Crim* 991 (04 April 2003);

[418] As Francis Bacon exemplified: 'For if the trumpet give an uncertain sound, who shall prepare himself to the battle? So if the law give an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes … Let there be no authority to shed blood; nor let sentence be pronounced in any court upon cases, except according to a known and certain law … Nor should a man be deprived of his life, who did not first know that he was risking it.' (Quoted in Coquillette, Francis Bacon pp 244 and 248, from Aphorism 8 and Aphorism 39 - *A Treatise on Universal Justice*, Stanford University Press, 1992).

[419] The US Supreme Court argued, in *Papachristou v. City of Jacksonville* (1972), that "a statute may be so vague or so threatening to constitutionally-protected activity that it can be pronounced wholly unconstitutional, 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' it encourages arbitrary and erratic arrests and convictions, it makes criminal activities that by modern standards are normally innocent, and it places almost unfettered discretion in the hands of the police" (http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=405&invol=156, accessed July 2013); also, in *Kolender v. Lawson* (1983) the Supreme Court stated that "the law must provide explicit standards so that those who enforce and apply the law do not do so in an arbitrary or discriminatory fashion (…) the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"(http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=461&invol=352, accessed July 2013); finally in *City of Chicago v. Morales* (1997) "[t]he statute in effect is a catchall prohibition which would

In this regard, the European Court of Human Rights has decided, in more than one occasion, on the illegal nature of the high degree of indeterminacy of some of the crimes defined under British law, as well as the excessive powers given to police authorities (for example related to the use and destruction of suspects' DNA), in regard to European Community norms,.[420]

As Borowitz argues, the introduction of this new criminal category – glorification of terrorism – is open to multiple interpretations and understandings from the point of view of the evolution of English criminal law. In any case, it should be noted that it also represents a society dominated by fear, panic and, to some extent, by the inevitable excesses that have been committed in the fight against terrorism.[421]

These excesses – and this climate of panic not only in civil society but also within the security forces themselves – are very clear in the examples of the application of antiterrorist laws presented to the ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights, in April 2006.[422]

In no other country has the concept of terrorism been so broadened and adapted to the Government's criminal policies than in the United Kingdom.[423] In fact, this concept had been opened up and broadened to such an extent that, in 2005, the British Parliament found it extremely difficult draw the line between common crime and terrorist crime in the global war on terrorism.

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allow the courts to say who could and could not be rightfully detained. An enactment may be attacked on its face as impermissibly vague if, inter alia, it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty. It is a criminal law that contains no *mens rea* requirement. It is impermissibly vague." http://caselaw.findlaw.com/il-supreme-court/1200600.html, accessed July 2013)

[420] *See S and Marper vs United Kingdom*, [2008)] 1581 EHRR, nº 50 (2009)

[87] Borowitz, Albert, *Terrorism For Self-Glorification: The Herostratos Syndrome*, Kent State University Press (2005), pp. 80 - 97

[422] ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights, *The Impact of UK Anti-Terror Laws on Freedom of Expression*, London (2006), p. 6 at http://www.article19.org/data/files/pdfs/analysis/terrorism-submission-to-icj-panel.pdf , accessed June 2013

[423]Almeida, Cândida, *Terrorismo no Reino Unido e Estados Unidos: alterações paradigmáticas*., Quid Júris (2012), p. 143

The 2000 Terrorism Act covers an extremely wide range of terrorism-related offences considered as "terrorist activity":

• Disclosure of information that may harm a terrorist investigation or interference with material that may be relevant to it (Section 39).

• Receiving, providing or inviting others to training, inside or outside the UK, relating to firearms, explosives and radioactive materials or weapons (Section 54).

• Directing an organisation which is concerned with the commission of acts of terrorism. (section 56).

• Possession of an article for a purpose connected with the commission, preparation or instigation of an act of terrorism (Section 57).

• Collecting or recording information of a kind likely to be useful to a person committing or preparing an act of terrorism, or possessing a document or record containing information of that kind (Section 58).

• Incitement of another to commit an act of terrorism wholly or partly outside the UK, where that act would constitute one of the following offences within the UK: murder, wounding with intent, poisoning, explosive offences, endangering life by damaging property (Section 59).[424]

• The failure to disclose information that may help prevent an act of terrorism or may assist in securing the apprehension, prosecution or conviction of a person involved in the commission, preparation or instigation of an act of terrorism (Section 38B, introduced by Article 117 of the Antiterrorism, Crime and Security Act).

The 2000 Terrorism Act thus covers an extremely wide range of terrorism-related offences considered as "terrorist activity". The manner in which those threats are dealt with puts pressure upon traditional principles of judicial proceedings. So for

[424] Casanova, Ignatio, *El terrorismo problematico en el siglo XXI*, universidad de Sevilla (2009), p. 56

example, the protection of the right to privacy can been diminished through the widespread use of wiretapping, and the right to freedom restricted by the increased use of preventive detention.

The following situations deserve special mention:[425]

- more than 600 people, including an 82-year-old activist, were detained during the British Labour Party Conference;

- a citizen was detained while walking on a bicycle path in Dundee;

- an 11-year-old girl was detained and searched while protesting against the war in front of a Royal Air Force base;

- in 2005, an 80-year-old Royal Air Force veteran was detained for wearing an anti-Tony Blair T-shirt;

- a 23-year-old student was detained, in 2005, while taking photographs of the M3 motorway to complete his thesis on Web design.

Israel has also created and approved new criminal offenses in relation to the terrorist threat. Indeed, while the United Kingdom created the specific offence of "glorification of terrorism", Israel added two specific offences,[426] one in the 1990s and the other in 2005: the offence of "inciting religious hatred against Jews" and the offence of "supporting international terrorism". It is this last point that causes much controversy: while the first offence had a residual application and was mainly addressed to radical Islamic activists, the second served to silence much of Israeli criticism and exert a strong legal pressure on the media. Israeli researcher and journalist Yair Lapid called this law "antiterrorism censorship law".[427]

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[425] Duffy, Helen, *The 'War on Terror' and the Framework of International Law*, Cambridge University Press (2005), p. 165

[426] Beckman, James, *Comparative Legal Approaches to Homeland Security and Antiterrorism*, Ashgate Publishing (2013), p. 146

[427] https://www.middleeastmonitor.com/news/middle-east/5117-what-yair-lapids-anti-zoabi-comments-reveal-about-israeli-politics acessed August 2013

3. The Impact of Counter-Terrorism Measures on the Liberal and Democratic Nature of the Constitutional Rule of Law

After analysing the main trends of the antiterrorist reforms in systems of accusatorial nature, it becomes essential to sumarise some conclusions in relation to the impact of those changes in the structure of the democratic State based on the rule of law and its fundamental principles. Can we speak of a change in the structure of the rule of law in accusatorial systems? Is this, paraphrasing Leogomez, a paradigm shift from a liberal State to a semi-authoritarian State? Or should we, on the other hand, be speaking of a new balance between security and fundamental rights?[428]

Since the emergence of the first antiterrorism measures adopted in the United States after 9/11, the growing imbalance between the need for community safety and the guarantee of fundamental rights of citizens has become more and more apparent. Indeed, as soon as the Presidential Declaration No. 7463 of September 14, 2001 (which declared a state of emergency and removed a number of individual liberties to the detriment of the police authorities) and the USA Patriot Act were approved, the security-focused nature of these measures became evident.

In this sense, some important American scholars, including Cassel and Dworkin,[429] as well as some international institutions like the UN, strongly appealed to not lose sight of the balance between the necessary measures to fight terrorism and

[428] Leongómez, Eduardo Pizarro, *Una democracia asediada: balance y perspectivas del conflicto armado en Colombia*, Editorial Norma (2004), pp. 56 – 62

[429] Dworkin, Ronald, "The Threat to Patriotism", New York Review of Books, February (2002); C. Fijnaut, J. Wouters & F. Naert (eds.), *Legal Instruments in the Fight against International Terrorism. A Transatlantic Dialogue*, Martinus Nijhoff Publishers, Leiden-Boston, (2004)

some of citizens' fundamental guarantees. Likewise, it became apparent that the fight against international terrorism would entail major sacrifices and, as mentioned by Donohue significant costs, especially in terms of the nature of Constitutional States and of the Rule of Law as well as in terms of the fundamental rights of liberal modern States.

The analysis of the impact of these measures in terms of the nature of democratic constitutional States must therefore be made according to three key topics:

a) Measures to fight terrorism and fundamental rights: a difficult balance

b) The crisis of the proportionality principle

c) The concepts of security and freedom within emerging models of criminal justice

As already made clear in the introduction to this chapter, criminal procedure laws were probably the elements that underwent most changes under the antiterrorism reforms adopted in the aftermath of the September 11, 2001 attacks. Torres said that perhaps at no time in history has the paradigm shift in criminal justice been so intense and clear due to a single event.[430] As a result, in no other area was the restriction of citizens' fundamental rights and guarantees vis-à-vis the power of the state to investigate and punish their crimes more apparent.

There is consensus among American and European scholars that the USA Patriot Act was a severe setback in the development of human rights protection in U.S. legislation and case law.[431] The primary goal – expressly stated in the first section of the USA Patriot Act – was the improvement of internal security,[432] which was to be achieved through a wide range of specific measures in the fields of communications,

[430] Torres, Adelino, "Terrorismo: o apocalipse da razão" at *Terrorismo* (Org. Adriano Moreira), Almedina Ed. (2004), pp. 23 – 128

[431] Brasch, Walter M., *America's Unpatriotic Acts: The Federal Government's Violation Of Constitutional And Civil Rights*, Peter Lang Ed. (2005), p. 160

[432] Rogeiro, Nuno, *O Patriot Act na óptica da segurança internacional, Almedina* (2009), pp. 56 – 98

finance and cooperation between institutions, especially the criminal police authorities, intelligence agencies and military services.

The case of the United States seems to be the one that best represents the changes undergone by the criminal procedure law in the fight against terrorism. The legal instruments proposed by President George W. Bush and passed by the U.S. Congress – including the USA Patriot Act – clearly show to what extent criminal justice systems have acquired a new configuration.[433] While drawing these conclusions, it is important to make a detailed analysis of the USA Patriot Act 2001, because it faithfully represents the new difficult balance between fundamental rights and security and the idea of the new security-focused State associated with the fight against terrorism.

The USA Patriot Act 2001 is an acronym for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism". The Patriot Act[434] is part of the U.S. Congress' response to the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon.

The Law referred to as "Patriot Act" is the result of the merger of two previous bills and similar laws, Senate Bill S.151079, passed on 11 October 2001, and the H.R. 297580 bill, passed by the Bush Administration on 12 October, amending some expressions of the H. R. 310881 bill.

After having informally resolved their differences, the Bush Administration issued the final version of the Law on 24 October, which was passed by the Senate on 25 October and signed by the President on 26 October 2001.

It could be stated that the Patriot Act is structured as a tree system, i.e. starting from a common root, which aims to increase national security, it spreads its branches in several directions, causing changes in almost all legal instruments governing strategic

[433] Ball, Howard, *The USA Patriot Act of 2001*, ABC-CLIO Ed. , London (2004), p. 56
[434] Public Law No. 107-56, 115 Stat. 272, (2001)

areas of national security (homeland security) and some aspects of international security, but for the purpose of protecting the borders and territory of the United States. It reorganised the sensitive areas of civil liberties and, in particular, changed the surveillance system, expanding and admitting new techniques and/or application of devices to operate in this sector, implying greater authority for the FBI (Federal Bureau of Investigation) and, at least temporarily, authorising it to gather and share information by intercepting wire and electronic communications in the name of national security. As a result, law enforcement and intelligence officers now have wide powers to detain "terror suspects" – without any legal definition of this concept – whether they are foreigners or U.S. citizens.

The Patriot Act amends federal money laundering laws,[435] particularly those involving overseas financial activities, creates new federal crimes,[436] increases the penalties for existing federal crimes, and adjusts existing federal criminal procedures, particularly with respect to acts of terrorism.

However, in terms of systematisation and because it is a necessarily broad overview, this analysis of the Patriot Act should develop under two key points of analysis:

I – On the one hand, the study of rules and regulations under the Patriot Act, which, by their very nature, introduced profound changes in limine to the U.S. legal system after September 11, and also led to the amendment of several legal instruments regulating pressing issues that had to be collaterally and indirectly updated or adjusted in order to meet the goal of improving security, depending on the achievement of the central purpose of the Patriot Act: to strengthen America against Terrorism.

[435]Wade, Marianne, *A War on Terror?: The European Stance on a New Threat, Changing Laws and Human Rights Implications*, Springer ed. (2009) chapter 7
[436] Figueiredo Dias, Jorge, *Nova dogmática do direito penal*, Almedina, Coimbra (2010), p. 65

II – On the other hand, the study of the meaning (i.e. the intensity of the effects produced) of the synaptic response caused by the tightening and proliferation of security measures in the rights, freedoms and guarantees of citizens, the so-called "civil liberties".[437] In turn, the United Kingdom also saw a significant shift in the paradigm of its criminal justice system and human rights protection, as a direct effect of the September 11 attacks and the London bombings of 7 July 2005.[438]

The phenomenon of terrorism in the United Kingdom is neither new nor uniform in its manifestations. On the contrary, the different threats that have been made have changed the type of antiterrorism measures adopted by the Government. As stated by Struye:

> "A fundamental concept seems seriously reviving: the concept of opponent, the threat of a imminent danger to our free society. A permanent and powerful enemy. This notion is nowadays changing: who is the enemy? What is the most preeminent risk? The terrorism and the terrorists!"[439]

It can be said that the fight against terrorism in the United Kingdom has gone through three different stages, which basically correspond to three types of causal impulses:

- The first stage corresponds to the antiterrorism measures designed to combat internal or domestic terrorism, characterised primarily by the Northern Ireland conflict.[440]

- The second stage was triggered by the 9/11 attacks on the World Trade Center, which forced the Government to find measures that, in addition to combating terrorism, would

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[437] Freedman, Jeri, *Civil Liberties and Terrorism*, ReadHowYouWant.com (2008), pp. 30 - 43

[438] Hoffman, David, *Human Rights in the UK: An Introduction to the Human Rights Act of 1998*, Pearson Education, (2009), p. 372

[439] Tanguy Struye de Swielande, *La politique étrangère américaine après la guerre froide et les défis: Asymétriques*, Presses Univ. de Louvain, (2003) p. 72 (translation by the auhor)

[440] It is extremely important to mention the Prevention of Terrorism Acts that were in force in the United Kingdom between 1974 and 1989 and that gave extended powers to the police forces to act against terrorism. In 2000, these legislative acts have been permanently replaced by the Terrorism Act 2000, which has a less aggressive approach in terms of restricting citizens' fundamental rights. See Tony Bunyan, The origins of Emergency Powers Acts in the UK at http://www.statewatch.org/news/2003/jun/23bcivil.htm

prevent possible attacks, both on British soil and against British citizens around the world, and in which the perpetrator of the threat was briefly identified as "al-Qaeda" and the Taliban.

- The third stage corresponds to the 7 July 2005 bombings, which, by their unexpected and serious nature, laid bare many flaws in the security system of the British Government and, in addition, uncovered new unsuspected home-grown and suicidal foes. The 7 July (and 26 July 2005) bombings illustrated how the antiterrorism security measures acquire repressive role, but are inadequate for prevention, because they contribute to the development and radicalisation of potential young terrorists.[441]

Since 2003, the United Kingdom has had a long-term strategy for countering international terrorism and extremists who support it, implementing a programme with short-term and long-term goals at local, national and international level, known within the Government as "CONTEST", which is divided into four main pillars known as the "Four P's": Prevent, Pursue, Protect and Prepare:

• Preventing terrorism by tackling the radicalisation of individuals;

• Pursuing terrorists and those who sponsor them;

• Protecting the public, key national services, and UK interests overseas; and

• Preparing for the consequences.

The UK's antiterrorist policies have been strongly criticized by international human rights organizations for their impact in humanitarian affairs but also for undermining the country's democratic spirit. As Held observes, the effects of the past decade's antiterrorist policies in the UK have had a strong negative impact which goes

[441] Baker, Paul, *Discourse Analysis and Media Attitudes: The Representation of Islam in the British Press*, Cambridge University Press (2013), p. 44

beyond the restriction of fundamental rights, but also point to a weakening of the British parliamentary structure.[442]

Román also says:

> "The legal battle for UK courts to admit evidence obtained under torture, whenever it had not been practiced by British agents, is the most eloquent demonstration of the hypocrisy and backward thinking to be imposed upon one of the oldest democracies in the world.
> In the heat of British and American antiterrorist policies and of circumstantial alliances, a new climate of permissiveness was created. Abusive governments worldwide enacted laws that further restrict citizen's rights and which are used to persecute, silence or eliminate political dissidence or discordant minorities, as could be seen in Russia, China, India or Uzbekistan."[443]

Referring to the 7 July 2005 bombings, Prof. Gearty, despite being more restrained than Donohue, warns of the danger of a "short-circuit debate",[444] i.e. the lack of debate on the counter-terrorism measures adopted. He suggests that:

> "The significance of the attacks in London on 7 July depends on what happens next. (...) It is devotedly to be hoped that the restrained and intelligent sense of critical distance shown by the Prime Minister in the immediate aftermath of the bombings is sustained in the months to come". [445]

This could pose a serious risk as the Government would not discuss properly and thoroughly the contentious issues raised by those attacks, such as biometric identity cards and the new antiterrorism laws applicable to the events of 7 July.

Although Gearty recognises that it is particularly difficult to reason dispassionately about these antiterrorism laws in the aftermath of a terrorist attack, he argues that:

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[442] Held, David, *Progressive Foreign Policy: New Directions for the UK*, Polity ed. (2007), p. 63

[443] Maria Portela, Irene, *A Segurança e Eescolha do Inimigo*, PhD Thesis, Universidade Santiago Compostela ed (2008), p. 431 ("*it is the legal battle of UK Government to make possible the admission, by UK Courts, of legal evidence obtained through torture, when these methods were applied by British agents worldwide. Fortunately, the British Courts didn't allow these legal reforms to go forward and the Government was forced to recede. Is must not be forgotten that most governments worldwide approved severe restrictions on freedoms and human rights based on the so called 'war on terror' but their real goals were to eliminate internal political opposition).*

[444] Maria Portela, Irene, Ibid. at p. 524

[445] Maria Portela, Irene, Ibid. at p. 405

> "It is exceptionally difficult to oppose such laws in an atmosphere that is so dominated by the politics both of the last atrocity and of the atrocity still to come, with past and future horror combining to drive out reasoned debate. However, in spite of all the propaganda surrounding them, terrorism laws in themselves do not prevent terrorism any better than the ordinary criminal law, properly enforced by diligent police action. What they do achieve is the creation of a climate of fear in which considerations of national security come to dominate and due process and political freedom move to the margins of our democratic culture, eventually dragging democracy itself onto the sidelines with them. There is already evidence of the terrorism laws of recent years and in particular the prevention of Terrorism Act 2005 having an effect of this sort.[446]

It is imperative to note that the reforms undertaken in the last decade under the criminal procedure law have not only affected the form of the criminal justice system, but also the very structure of the democratic rule of law as we know it.

Furthermore, in no other area is it so clear that there is such a separation, a distinction between the various stages of the criminal justice process,[447] which was initially characterised by an excessive and almost exclusive power of public authorities and, subsequently, by a balance (although unstable) between the state and those suspected of having committed the crimes in question.

The principle of proportionality, one of the main pillars of modern criminal procedure, has been significantly rethought so as to allow the introduction of highly restrictive measures of the fundamental rights of citizens at a very early stage of the proceedings, even when there has been no charge or conviction.

Another factor that should be taken into consideration is the crisis of the principle of proportionality, a fundamental value – inherited from the political liberalism of the late 18th and 19th centuries – of most criminal justice systems. Gauer suggests that:

> "Proportionality aims to ensure that the system's preventive or punitive measures are applied with the necessary dose and intensity, without undermining the fundamental rights of citizens. Basically, the principle of proportionality in criminal law advocates that criminal measures should be appropriate and

[446] Maria Portela, Irene, supra note 393 at 526-534
[447] This idea will be specifically analysed on the last chapter of this thesis.

proportionate to the objectives to be achieved, implying a balancing and weighting of interests."[448]

Even though it is historically undisputed that the principle of proportionality is one of the fundamental imprints of liberal systems with the clear objective of limiting the Executives' actions, it should be noted that the jurisprudence of the European Court of Human Rights has contributed to the reconstruction of its meaning. As McBride states, even though it is absent from the formal text of the European Convention, the principle of proportionality has been an essential element in the enforcement of human rights, namely when it relates to their restriction and to the enforcement of human rights in emergency or insatiability situations. The same author also notes that at the same time, the construction of the principle of proportionality has been carried out in an intelligent way by the European Court, giving a rational and consistent reading of the most threatened rights of our time, such as the right to freedom, to privacy, to property and to a defense in a court of law.[449]

As Costa Pinto notes, the crisis of the principle of proportionality can only be understood in connection to the theoretical framework specifically assessed in chapter II.[450] In truth, the crisis of the proportionality principle in the justice systems has had special repercussion in the early stages of criminal proceedings, as a direct result of the reinforcement of police powers and of investigation, surveillance and control methods. Costa Pinto develops this idea concluding that "the crisis of the main constitutional principles must be understood in the theoretical framework of the differentiated

[448] Gauer, Ruth, *Criminologia e sistemas jurídico-penais contemporâneos*, EDIPUCRS (2008), p. 238
[449] McBride, Jeremy, "Proportionality and the European Convention on Human Rights" in *The Principle of Proportionality in the Laws of Europe*, Hart Publishing (1999) pp. 23 and following.
[450] Costa Pinto, Frederico Lacerda, *Direito Processual Penal*, AAFDL, Lisboa (2010), p. 56

evolution of criminal justice systems after the terrorist attacks of 2001" [the 'bifurcation' of criminal justice system]. [451]

How does this affect the liberal nature of the modern state? In order to understand the impact of such changes it should be questioned what characterises the liberal nature of the modern state?

This question, posed by the likes of John Rawls or Stanley Benn (1982), has not received a straightforward answer, but all agree in highlighting two aspects of the rule of law: freedom as a primary and universal rule (both in the state-citizen relationship and in the horizontal relationship between citizens) and the organisation of the state's power structure to protect citizens' freedom.[452]

However, the constitutional rules of most Western countries regarding the protection of citizens' freedom have not changed in the last decade. Indeed, an idea prevailed in most countries that this is an "exceptional" context and that the Basic Law should not be amended in times of crisis. Therefore, from a strictly legal point of view, we cannot speak of a change in the constitutional structure of the state.[453] We are probably dealing with a case of appearance versus reality, and while the new context and the new Executive functions within the fight against terrorism suggest otherwise, we cannot - at least not legally – be speaking of a mutation in the nature and in the constitutional structure of the State.

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[451] Ibid. at, p. 93

[452] Rawls, John, "The Basic Liberties and Their Priority." In Sterling M. McMurrin, ed., *The Tanner Lectures on Human Values, III* , University of Utah Press; Cambridge: Cambridge University Press, (1982), pp. 1–87

[453] The main point in this argument is that we cannot speak of a shift in the structure or nature of constitutional state as a consequence of legal reforms directed against terrorism and oganized transnational crime. Rather than the fundamental values and principles inherent to the Rule of Law, what has effectively changed, as Jorge Miranda points out, is the interpretation and enforcement of laws. See Miranda, Jorge, *Escritos vários sobre direitos fundamentais*, Principia ed., Lisboa (2006) p. 501

On the other hand, although criminal justice systems have been changed and severe restrictions have been imposed on the fundamental rights of citizens in the pre-trial investigation stage, such restrictions were, at least according to legislators, offset by adding and strengthening the rights in subsequent stage of the criminal proceedings.

Once again it is possible to observe here the specific logic of the 'bifurcation' of the criminal justice system, explained in chapter II. In spite of the restrictions in the early stages of the proceedings, the reforms that were undertaken created several compensation mechanisms to those restrictions of fundamental rights and reinforcement of the executive powers. Both in the United States and in the United Kingdom, the theoretical framework of the 'bifurcation' of the criminal justice system, analysed in chapter II, is absolutely critical to understand the antiterrorist measures adopted by the States during the last decade.

Strictly speaking, this is not a fundamental change, but a new balance between freedom and security, between citizens' rights and the state's duties to protect collective interests.

Consequently, speaking of a mutation in the nature of the state over the last decade seems to be, in every sense, an excessively vague statement, with small scholastic support from an academic point of view. What really needs to be analysed is the influence of the legislative changes that have occurred in the interpretation and application of the law by the courts, a scenario that is familiar in civil law and common law systems.[454]

It is for this reason that the impact of counter-terrorism measures on the liberal and democratic nature of the constitutional rule of law should be analysed. The clear restriction on fundamental rights and the growing extension of police and government

[454] United Nations, *Handbook on Criminal Justice Responses to Terrorism*, United Nations Publications (2010) p. 9

powers in crime prevention, control and surveillance have led to a new interpretation and application of the fundamental rules in force in most Western constitutions. Indeed, the legal hermeneutics should seek a new balance between freedom and security,[455] between fundamental rights and state powers, in a context outside of the fight against terrorism and organised crime. This balance must be found, however, within the liberal rule of law and not outside of it.

Behind the creation of temporary solutions to contain and prevent terrorist threats in the short term we have found dangerous and frail solutions. On the one hand those solutions have questioned the principles and values of constitutional states which are forced to respond using anti-crisis mechanism to stike a balance and maintain their identity. On the other hand such solutions come at heavy price as they infringe upon human rights and fundamental values without ensuring they are efective or even succesful. This lack of balance, beyond being potentially counterproductive when fighting terrorism, becomes harmful to the very essence of accusatorial systems.

[455] E.U. Network of Independent Experts in Fundamental Rights, *The balance between freedom and security in the response by the European Union and its member states to the terrorist threats*, Official Publications of the European Communities (2003), pp. 21 – 5

CHAPTER V

Conclusion –

The emerging 'Bifurcation' of Criminal Justice System and Convergence as between Accusatorial and Inquisitorial Systems

The criminal justice system is not a structure which has been planned as a system[456]

Andrew Ashworth

[456] Asworth, Andrew, *Setencing and Criminal Justice*, Cambridge University Press (2010), p. 71

Summary and general overview

Following on from this differential analysis of inquisitorial and accusatorial systems, it is time to draw some important conclusions from the research undertaken. Before, however, it is important to look at what has been discussed so far in regards to the initial research questions.

Three research questions were layed out in chapter I. The analysis that followed these sought to provide solid and scientifically grounded answers, namely in regard to a specific set of legal systems (Portugal, Spain, the United Kingdom, the United States of America and Israel):

- whether the antiterrorist reforms of the past decade caused a division between the preliminary phases of criminal proceedings and the trial stages among systems of criminal justice (strongly restricting fundamental rights in the first stages and developing compensation measures in the second).
- whether the evolution of the systems of criminal justice throughout the last decade came closer together and towards a greater convergence as a result of States' responses to the new threats posed by global terrorism.
- understand the true impact and the associated costs of these measures on the liberal nature of the rule of law in democratic states and define the extent of such changes in regard to the fundamental principles and the framework of constitutional values within these States.

To answer such questions it was imperative to analyse and characterize this "new threat" that was set upon States and which they were required to address in order to provide adequate protection to their citizens and to their legal and social order. In

chapter II the phenomenon of “global terrorism” was characterized and analysed as a form of terrorism built upon objectives of global destruction, using highly sophisticated methods, mobility and cooperation with common criminal networks.

In chapters III and IV the antiterrorist measures adopted by the jurisdictions choosen for analysis were scrutinized in relation to the characteristics of the global terrorist threat as seen in chapter II. Both chapters analysed the most relevant antiterrorist measures of the past decade –regarding respectively common law and civil systems – with special attention to topics such as pre-trial detention and the right to freedom; new mechanisms of extra-judicial control of communications and freedom of expression; the marginalization of certain communities and the criminal low of the enemy; and also the advent of new criminal offenses associated with the phenomenon of global terrorism.

It is undeniable that we are facing a new global threat. As Prezelj refers it is the most complex, disseminated and concealed threat that the world has faced in the last two centuries.[457] This new threat has, as mentioned in chapter II, features that are intrinsically linked to the phenomenon of globalisation and to the internationalisation of criminal networks[458], which forced nations to a response that would encompass not only their territories and interests, but the 'international space' of interests.
In chapters III and IV, we went on to list the differentiated responses that some nations – Portugal , Spain, Israel, the United Kingdom and the United States of America - designed and produced to specifically address the problem of global terrorism.

[457] Prezelj, Iztok, *The Fight Against Terrorism and Crisis Management in the Western Balkans*, IOS Press, (2008), p. 17
[458] Andreopoulos, George, *Policing Across Borders: Law Enforcement Networks and the Challenges of Crime Control*, Springer (2012), pp. 56 - 80

The compared analysis of the States' different responses allow us to envisage an evolution in terms of convergence between inquisitorial and accusatorial systems. It will be observed the manner and the scope of this convergence further along.

Incidentally, the comparative analysis in chapters III and IV, demonstrates clearly that the legislative responses designed by nations have significant similar characteristics, despite the fundamental differences of the respective criminal justice systems, such as:

-increasing periods of pre-trial detention and the considerable surge in its use;
-the increase of arrests and deprivation of liberty that are beyond judicial scrutiny;
-the increased control of telecommunications and electronic communications, through highly intrusive and invasive techniques to the citizens' right to privacy;
-the significant increase of powers assigned to the bodies of criminal police in terms of policies for the prevention and repression of organised crime;
-control and repression systems especially designed and targeted at specific nationality or religious groups (the enemy's criminal law as referred to by Gunther Jakobs).

How do the previously studied measures have implications for the current criminal justice model? To what extent can we talk about a new characterisation of the criminal justice systems, as a result of the fight against international terrorism? This is a reflection that we necessarily have to make at this point in time. There is no doubt that in the last decade, criminal justice systems have suffered some of their biggest changes of the last century, as concluded by Prezelj. However with the detailed analysis of the main changes in the models of criminal justice systems[459], some conclusions become immediately apparent: the hardening of criminal policies and the considerable reduction of the rights of suspects in the pre-trial stage. Indeed, as Sousa Santos pointed out, the restrictions to fundamental rights in

[459] Prezelj, Iztok, *supra* note 404 at 56 - 62

criminal proceedings that have been approved throughout the last decade, are extremely significant[460]: the considerable increase of custodial measures pending the trial, the obtaining of evidence through measures that are highly invasive to privacy, and in many instances offensive to human dignity itself (such as the use of torture techniques, including waterboarding).[461] These legislative reforms are part of a design aimed at tempering the pre-trial procedural stage, through significant restrictions to the rights of suspects and a considerable increase in the powers legally assigned to police authorities and to the public prosecutors. As Loaves refers, the main concern for criminal justice systems is now the prevention of terrorism and organised crime, and not anymore the guarantee of the fundamental rights of suspects and victims.[462] The legal system of the United Kingdom is, in this respect, paradigmatic. The reforms regarding pre-trial detentions, the obtaining of evidence and measures for the police and administrative control of suspects, were so significant that the country became much more similar to Spain, Portugal or Germany than to the other countries of the Commonwealth.[463]

Under this perspective another evident aspect of the legislative reforms instigated by the terrorist phenomenon stands out: the clear approximation between two traditionally distinct criminal justice models (the so called models of accusatorial and inquisitorial nature).[464]

This approach came about for two reasons: on the one hand, in the case of accusatorial systems, the need to strengthen the prevention of terrorist acts and to ease the social

[460] Sousa Santos, Boaventura, *supra* note 56 at 51
[461] Sousa Santos, Boaventura, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, Cambridge University Press (2002), pp. 34 - 39
[462] Nacos, Brigitte L., *Selling Fear: Counterterrorism, the Media, and Public Opinion*, University of Chicago Press, Jun 1, 2011 p. 43
[463] Figueiredo Dias, Jorge de, *XXV anos de jurisprudência constitucional portuguesa: e discursos proferidos por suas Excelências o Presidente da República e o Presidente do Tribunal Constitucional, na sessão solene do XXV aniversário : Colóquio comemorativo do XXV aniversário do Tribunal Constitucional, (24 e 25 de Outubro de 2008*), Coimbra Editora (2009), pp., 135 - 189
[464] Dammer, Harry, *Comparative Criminal Justice Systems*, 5th ed., Cengage Learning, (2013) p. 149

panic which spread throughout all social sectors demanding measures typically used in other systems, such as the significant increase of pre-trial detentions or the creation of mechanisms for the administrative and police control of suspects that didn't require any judicial authorisation. On the other hand, in the case of inquisitorial systems, the need to create mechanisms that could compensate the highly restrictive legislative measures to the freedom and privacy of citizens, forced some countries to adopt (as in the case of Portugal) measures belonging to the Anglo-Saxon system, in particular the reinforcement of judicial remedies and the Habeas Corpus principle.[465]

However, the detailed analysis of counter-terrorism measures in chapters III and IV and the subsequent contextualization in the corresponding legal system, suggests an important modification of criminal justice systems with regard to their definition in the main legal literature. This idea is expressed in the visible unbalance within the justice systems themselves (between the pre-trial stage and the following stages) but also in the previously mentioned trend of *rapprochement* between inquisitorial and accusatorial systems. This idea of modification of the criminal justice system has gradually gained ground within the legal literature and must be analysed in detail.[466] What might be suggested is that criminal justice systems, whether inquisitorial or accusatorial, have a predisposition to lose their structural unity and are gradually becoming divided into two distinct blocks: a first stage in which the rights of the suspects are practically nullified (or extremely restricted) on the basis of the powers and prerogatives of administrative and police authorities; and a second stage in which suspects are empowered and equipped with various instruments for the defence of their rights and the careful assessment of the evidences obtained by the prosecution, as well as a large set of diversified resources that allow them to correct any mistakes that were

[465] Beckam, James, *supra* note 366 *at* 122 - 123
[466] Kraska, Peter, *Militarizing the American Criminal Justice System: The Changing Roles of the Armed Forces and the Police*, UPNE (2001), pp. 120 and following

made in the first stage of the process (for example, the system of judicial appeals). Beleza states that:

> "In a certain way, legislators have created a number of mechanisms to compensate for the reduced or annihilated rights during the first stage of the process, regarding the taking of evidence or even concerning the deprivation of liberty of suspects which clearly violates the principle of the presumption of innocence." [467]

We have called this imbalance, the 'bifurcation of criminal justice models'. The idea of bifurcation embodies an emerging and notorious reality within the criminal justice systems after 9/11: an increasing separation, in legal terms, between the pre-trial stage and the subsequent stages, allowing for the division of the criminal process in two significantly distinct stages, in terms of the applicable standards and principles.

This bifurcation of criminal justice systems is a trend that became apparent in chapters III and IV, showing a stage I (pre-trial) tending to be restrictive when it comes to fundamental rights of suspects and evidencing large discretionary powers[468] assigned to police forces; and a stage II in which the rights of the suspects are kept or even strengthened as a compensatory mechanism for the restrictions operated during the first stage. Similarly, this bifurcation appears to be common to inquisitorial and accusatorial systems, corroborating once more the existing approximation between these two systems as highlighted in chapters III and IV.

However we must question the scientific foundation underpinning this idea of bifurcation of criminal justice models and whether this is a mere exceptional historical situation or a real trend or paradigm shift that will last for years to come?

In chapters III and IV we analysed the main antiterrorist reforms approved by a considerable number of nations in response to the phenomenon of global terrorism and transnational organised crime. These measures, when analysed comparatively, identified

[467] Beleza, Teresa, *Direito* Penal, *I* Volume, AAFDL Lisboa (1984), p. 67 (translated by the author)
[468] Owens, John, *The War on Terror and the Growth of Executive Power?: A Comparative Analysis*, Routledge p. 42

a particular pattern common to both types of criminal justice systems which consists, as mentioned above, of a growing invalidation of fundamental rights[469] during the criminal investigation stage and, on the other hand, in the consolidation and strengthening of these rights during the trial and in the following stages. This situation brings with it another element of concern. In fact, a considerable number of detentions do not produce any formal charges or even to lead to a trial, so it is not enough to look only to the compensation mechanisms. On the contrary, as Soares da Veiga notes, very often suspects see their rights strongly restricted with no additional compensation.[470] This separation (or bifurcation) is common to both systems and, as pointed out by Rosenfeld reveals the need to maintain the constitutional identity of the currently existing justice systems[471], as well as their liberal and democratic nature, to use the famous expression of John Rawls.

Are we facing an exceptional historical moment, a solid trend for reform or even a paradigm shift within the criminal justice models?

Saraiva da Fonseca refers to a paradigm shift as a set of structural changes that show a true mutation in terms of identity and nature.[472] According to this author paradigmatic changes occur, when amendments to the core identity of a particular phenomenon, in this case, the criminal justice systems are made. Now, can we speak of a true change in the nature and identity of criminal justice systems? Shahidullah refers to the nature of criminal justice models as a combination of the following elements:

• Liberal or authoritarian/totalitarian nature, as to the political nature of the system

[469] Doswald-Beck, Louise, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, p. 255

[470] Soares da Veiga, Raul, "Acesso aos autos em processo penal" in *Revista da Faculdade de Direito da Universidade de Lisboa*, AAFDL (2010), pp. 67 - 73

[471] Rosenfeld, Jean, Terrorism, *Identity and Legitimacy: The Four Waves theory and political violence*, Taylor & Francis (2010) pp. 239 and following.

[472] Fonseca, João Saraiva, Apostila de metodologia da pesquisa científica, Universidade Aberta Ed. (2009), p. 11

• Constitutional/democratic or authoritarian nature, as to the legitimacy of the system

• Illuminist/rational or faith-motivated foundation, as to the grounding of the system

• Humanist or totalitarian nature, as the to the fundamental rights of human beings.[473]

It seems evident that the criminal procedural reforms analysed in chapters III and IV show a progressive and extensive annihilation of the fundamental rights of citizens in basic aspects of their lives such as the right to privacy, to freedom, to information and geographic mobility. Gunther Jakobs goes a bit further stating that the changes in criminal law represent, in terms of migration and foreign communities, a civilisational regression when compared to the darkest moments of 20th century European history.[474]

Similarly, the changes in terms of custody, control and electronic surveillance of citizens and telephone interception may affect the liberal and humanist nature of criminal justice systems. In fact, as the analysis of the case of the United Kingdom revealed, the priorities and the objectives of criminal policy changed significantly, placing the emphasis on the prevention and repression of terrorism and no longer on the defence of fundamental rights. These rights have actually been significantly reduced in the first stages of proceedings, at the expense of citizens' freedoms and their confidence in the justice system.

Also with regard to the constitutional nature of criminal justice systems, several principles have been explicitly undermined, as argued by Donohue[475]. The 'control orders ' in the United Kingdom and the wide powers conferred by the USA Patriot Act caused a severe crisis to the principle of separation of powers[476], with an extraordinary reinforcement of competences and powers assigned to the Executive at the expense of

[473] Shahid M. Shahidullah, *Comparative Criminal Justice Systems*, Jones & Bartlett Publishers (2012) pp. 61 - 81
[474] Jakobs, Gunter, *Derecho penal del enemigo*, Thomson-Civitas ed., Madrid (2006) p. 45
[475] Donohue, Laura, *supra* note 33 *at* 56
[476] Walker, Clive, *Terrorism and the law*, Oxford University Press (2011) pp. 326 and following

the Judiciary. Some of the most meaningful and grounded principles in the Western legal tradition have been seriously challenged, in particular, the principle of guilt and the presumption of innocence, mentioned in chapters III and IV, two main corollaries of 17th and 18th century.

However, as examined in chapters III and IV, these structural changes seem to have been applied mainly to the first stage of the criminal process, which is the stage of prevention and criminal investigation. With regard to the next steps, it seems that a few compensatory mechanisms have been created, such as the generous system available to appeal to higher courts (Portugal) or the obligation of a trial fully open to the public, even in cases of terrorism (the Spanish penal reform). As Santos refers:

> ″It seems that the major structural changes in contemporary criminal procedures take place especially in the early stages of the procedure, which is nothing less than perverse, inasmuch as it is precisely when citizens are more unprotected vis-à-vis the State″. [477]

Under this perspective criminal justice systems seem to have suffered, in the last decade, a two-speed evolution in two distinct directions: on the one hand the first procedural stages present an increasing restriction of fundamental rights and an exponential increase of public powers, whereas the trial and the final stages of the process insist in maintaining and even increasing the citizens' procedural guarantees, which can be seen as a mechanism for compensating or, according to Costa Pinto (2000), as "a reservation clause of their democratic and liberal identity". [478]

In chapter IV is described how the United States and the United Kingdom bent the need for judicial mandates to intercept conversations and to tap phones with a very negative impact in terms of the citizens' right of privacy. In the case of the United

[478] Costa Pinto, Frederico da, *Direito Processual Penal*, Universidade de Lisboa (2000), p. 65

States, for example, at the time this phenomenon occurred, the jurisprudence of higher courts was very reluctant to accept any of these elements as evidence presented in trial[479]. Once again, there seems to be an underlying mechanism designed to balance and maintain identity, through which the criminal justice system appears to seek, within itself, a solid and lasting balance with regard to the destabilising threats caused by antiterrorist reforms.

Following this preliminary framing it is now necessary to build upon each of the presented topics, in alignement with the three research questions that are the object of this study. Therefore, this chapter will be divided in three specific sections to mach those questions.

In the first section the bifurcation of the criminal justice system will be analysed in light of the antiterrorist measures seen in chapters III and IV. A greater understanding over the theroretical analysis - developed in chapter II - of the bifurcation of criminal justice systems will be pursued, as well as its legal and constitutional implications.

The second section will analyse the convergence between common and civil systems as a result of antiterrorist reforms, and in regard to the legislative endevours undertaken as a part of the efforts to fight a common threat. Through the comparison of antiterrorist laws drafted and approved in the different systems under analysis, it is possible to highlight the main points in common and the route towards a convergence that has been undertaken in the past decade.

Finally, the third section draws conclusions regarding the impact of those measures in the constitutional framework of the rule of law and the liberal nature of

[479] Gardner, Thomas, *Criminal evidence – principles and cases*, 8th ed., Cengage Learning (2007) pp. 49 and following

democratic States, seeking to examine wether or not we have before us a new, completely different criminal justice system paradigm.

Section I

1. Antiterrorist Legislation and the 'Bifurcation' of Criminal Justice System

The bifurcation of the criminal justice systems is a result of the antiterrorist legislation in the states that have been the object of this study, namely the United Kingdom, United States, Spain, Portugal and Israel. After the careful analysis carried out in chapters III and IV, it is important to draw the conclusions that support the idea of a bifurcation of the criminal justice systems. In what way has it materialised? In which legal grounds is sustained?

The fundamental impact of terrorism has been especially connected to the rights of freedom and privacy, as Walter refers,[480] even though as we have seen it has many other consequences. It is also these fundamental rights that the idea of a bifurcation of the criminal justice systems is based upon. In other words, the restrictions to the rights of freedom and privacy are supportive of a bifurcated model of the criminal justice system, distinguishing development stages.

[480] Walter, Christian, *Terrorism as a Challenger for National Ans International Law: Security Versus Liberty?*, Springer ed., (2004), pp. 51 and following.

In chapters III and IV it was possible to observe how pre-trial detention ceased to be a precautionary and exceptional measure and became a routine and standard procedure with in the criminal justice system. Sousa Santos estimates an increase of over 30% in the use of pre-trial detention among European countries, regardless of which legal family they belonged to.[481]

Here it is important to note that, on par with this considerable increase in pre-trial detention, states created mechanisms of compensation for those restrictions of freedom in the early stages of criminal proceedings, in particular by reinforcing the publicity and transparency of trials (as is the case in the reform of article 86 of the Portuguese criminal procedure law) and the appeals systems available.

In other words, if some systems, such as in the United Kingdom and in Portugal, consiberably increased the use and extension periods of pre-trial detentions for cases of terrorism and organised criminal activities, they simultaneously developing mechanisms that safeguarded and compensated for these restrictions in later stages of proceedings. This is the foundation for what is designated here as the bifurcation of criminal justice systems.

This idea [bifurcation of criminal justice systems] is strongly connected to circumstances that were seen in chapters III and IV: on the one hand, the new police powers regarding surveillance and detention; and on the other, restrictions to freedom of speech and freedom of press.

In both inquisitorial and accusatorial systems it was possible to observe that police authorities strengthened their powers of control and surveillance towards citizens, translated in measures directed at physical control and also control of communications. The examples presented regarding the United Kingdom, the United States, and also

[481] Sousa Santos, Boaventura," Direitos humanos: o desafio da interculturalidade", *Revista Direitos Humanos*, 2, Lisboa (2009), pp. 10-18

Portugal and Spain leave no doubt that such measures were substantially strengthened after the 9/11 attacks, whilst simultaneously removing the need for judicial intervention in such cases.

It was also demonstrated that in the United Kingdom and in Portugal, for example, many situations that had previously required warrants became solely dependent on the decisions of police forces or the executive, with significant consequences regarding citizens' fundamental rights.

However, several significant court decisions have restricted the use of certain electronic surveillance methods in court, namely control of communications or the use of remote control vehicles. In Portugal, decision nº 49-B June 6 of the Supreme Court of Justice, considered illegal the permanent control, over a period of more than six months, of the electronic communications based only on a suspicision that they were "financing terrorist activities". It held that there was insufficient reason to arffect such a significant restriction in the fundamental right to intimacy of citizens.

On the other hand, in the United States, in 2010, the United States Court of Appeals for the District of Columbia Circuit, *United States v. Maynard*, D.C. Cir. 2010, reversed the sentence of a citizen (Antoine Jones) that had been controlled by the police through the use of GPS device planted in his vehicle, considering such a measure amounted to a search and had violated his rights to intimacy and property without reasonable cause. [482]

In this light the double perspective of the bifurcation of the criminal justice system becomes clear, as it runs two different paths. On the one hand it intensifies the restrictions of fundamental rights in the first stages of proceedings (as response to greater efficiency in the fight against terrorism). On the other, in the second stages,

[482] http://www.supremecourt.gov/opinions/11pdf/10-1259.pdf (accessed on August, 2013)

stronger and more transparent procedures are required, especially during trial stages, as compensation mechanisms of the restrictions brought upon the first stages. This logic - close to the reality of countries such as Israel, which experience persistent historical problems of domestic and international terrorism – seems to be now influencing most western countries, taking into account the analysis undertaken herein. The "bifurcation" of the criminal justice system is evident in the vast majority of antiterrorist reforms analyzed in chapters III and IV. This can be seen a prevention mechanism by the system in itself, as it must co-exist with the previous constitutional framework and therefore grounded in the fundamental principles of liberal constitutionalism. As Masferrer refers:

> "After 9/11 criminal justice systems faced a fundamental dilema: the resolution of fundamental and urgent problems in regard to a framework of values and fundamental principles that resulted from a world that was substantially different, namely from the cold war framework and the small nationalist terrorist phenomena. So they had to adapt and create a logic of double survival of their own identity: respond to the challenges of terrorism with strength and efficiency and maintain the liberal identity of their criminal systems. This will continue to be the great challenge of the criminal procedure laws in the next decade and one which is especially noticeable – and relevant in the area of the protection of privacy and intimacy rights of citizens, evermore threatened by surveillance and cooperation programs developed by security forces and espionage services." [483]

The new paradigm of involvement and cooperation by police forces when dealing with these matters with information and espionage services has been precisely – as was mentioned in chapters III and IV – one of the most controversial points of the antiterrorist reforms of the past decade. Besides the new powers acquired by intelligence services (especially regarding inquisitorial systems), computer programs developed for control and surveillance of communications generated further controversy and strong debates among civil society. In any case it is evident that individual freedoms are objectively threatened by the development of highly intrusive methods of personal data and information control. The fact that such tools are no longer exclusively

[483] Masferrer, Aniceto, *Estado de Derecho y derechos fundamentales en la lucha contra el terrorismo: Una aproximación multidisciplinar (histórica, jurídico-comparada, filosófica y económica),* Editorial Aranzadi (2011), pp. 182 – 183 (translated by the autor)

in the hands of intelligence services but also of police forces gives us the real dimension of the threat concerning the fundamental rights of citizens regarding their privacy and intimacy. [484] As for this specific point, the judicial power has been essential in limiting the powers of police forces and safeguarding citizens' fundamental rights. Here, the logic inherent to the "bifurcation" has also been felt: while abuses in terrorism related cases by intelligence services and special forces have been tolerated in the investigation stages, the courts have been extremely demanding in the enforcement of procedural and constitutional rules regarding the admission of evidence obtained in clear violation of fundamental rights of intimacy and privacy.[485]

Another important point analysed in chapters III and IV was the development of marginal communities and new discriminatory criminal policies in the name of the antiterrorist struggle, which could be seen both in inquisitorial and accusatorial systems. Here, as presented by Gross, the idea of the bifurcation is also particularly relevant. On one hand, as we saw in the previous chapters, all of the jurisdictions analysed, developed systems of control of migration flows especially tailored towards certain communities. Citizens from Arabic countries, the Middle East and North and East Africa became the target of closer scrutiny when entering or leaving countries. Similarly, the change in policies concerning immigration allowed, in Portugal and Spain for example, the expulsion of a considerable number of citizens (allegedly involved in terrorist activities) from countries in those regions, without judicial appeal.[486]

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[484] Gross, Emanuel, *The Struggle of Democracy Against Terrorism: Lessons from the United States, the United Kingdom, and Israel*, University of Virginia Press (2006), p. 159

[485] On this point the decisions nº 34/2006 of January 15 and nº 12- A/2008 of June 8 by the Portuguese Constitutional Court are extremely elucidatory. In the latter the Court considered that: "rules which are permissive and invasive as against citizens' privacy must be limited to the necessary and proporcional in order to achieve the desired objectives – the prevention or the investigation of terrorist acts. Concerning the trial stage, courts may not allow evidence or any elements whose source affects a gross violation of the right to privacy of any citizen." (translated by the author)

The discrimination between citizens from the same community – based on their ethnic or religious belonging – became a new element of reference in the new emerging criminal law of the enemy, as could be seen in the cases of the United States, the United Kingdom, Portugal, Spain and Israel. As Donohue refers "September 11 had been carried out by foreign nationals. It was to this community the [United Kingdom] government looked to ascertain the possible threat".

But at the same time, higher Courts of all these countries (in Portugal and Spain the Constitutional Courts) maintained a demanding jurisprudence built upon the principles of equality and non discrimination, as well as upholding the respect for the fundamental principles of international law. Soares da Veiga summarises this point in an interesting manner:

> "It is peculiar to observe that, despite the growing strength of the criminal law of the enemy, constitutional courts throughout Europe have forced the legislator and the Executive to significant concessions in the name of the principle of equality and non-discrimination. It is a political question to start with, but at the same time it is about the identity of criminal justice system: on one hand, the legislator considerably raises the repression level towards communities seen as marginal or hostil; and on the other, he creates a series of political and legal mechanisms to safeguard and protect those same communities." [487]

Again this is a reference to the logic behind the bifurcation of the criminal justice system. On the same matter, two separate legal paths, which refer to distinct stages of the criminal procedure law. On one hand fundamental rights are considerably restricted at an early stage of criminal proceedings; on the other those rights are guaranteed, sometimes reinforced, in the later stages of the proceedings, seeking therefore to keep the identity of the liberal and constitutional system.

Finally, it must be questioned if antiterrorist reforms are causing a shift in the constitutional paradigm or a change in the nature of a state under democratic rule of law?

[487] Soares da Veiga, Raul, *supra* note 88 at 78

This question has been answered in different ways by several investigators. Donohue seems to follow in the direction of a significant change regarding the legal and constitutional structure of States, namely in the cases of the United Kingdom and the United States of America,[488] as a consequence of antiterrorist reforms. On the other hand, Bacelar Gouveia (and most Portuguese and Spanish authors) has been extremely reluctant to go as far as admitting a "constitutional transition" or a profound change in the nature of the liberal state. This author refers that:

> "If it is certain that the vast majority of antiterrorist legislation has caused a strong unbalance between fundamental rights and the security function of liberal States, it is not absolutely correct to say that we are facing a new constitutional identity or a subversion of the judicial nature of these States." [489]

Despite the fact that many of the reforms analysed have a significant impact on the system of protection of rights and freedoms (and thus entail a significant change in the criminal policies followed by liberal states) there does not seem to be enough scientific data to ground the idea of a constitutional transition or of a deep shift in the liberal and democratic nature of states.

On the contrary: the investigation carried out has demonstrated that during the past decade no substantial process of constitutional review was started in the countries reviewed, nor is any similar process being negotiated as far it is publicly known.

This is a significant point which deserves our attention: the constitutional identity and the identity of legal systems have been kept despite of the significant impact caused by antiterrorist reforms.

Once again, this idea represents a type of compensation and balance within the system, safeguarding its principles and essential values. As Conde refers:

[488] Donohue, Laura, *supra* note 33 at 154
[489] Bacelar Gouveia, Jorge, *Direito Constitucional, Volume* I, Almedina (2012), pp. 167-168

"The preservation of the constitutional identity of western states has been a constant legal battle. The legislator seeks to restrict fundamental rights and expand the powers of public authorities to a limit where these equilibriums are still possible to fulfill within the same framework of constitutional values." [490]

Section II

1. The Convergence between Accusatorial and Inquisitorial Systems

As already made clear in the introduction to this study, criminal procedure models were probably the legislative elements that underwent most changes under the antiterrorism legislation adopted in the aftermath of the September 11, 2001 attacks.

Indeed, in no other area was the restriction of citizens' fundamental rights and guarantees vis-à-vis the power of the state to investigate and punish their crimes more apparent. Also, in no other area was it so clear that there is a separation, a 'bifurcation' between the various stages of the criminal justice process, which was initially characterised by an excessive and almost exclusive power of public authorities and, subsequently, by a balance (although unstable) between the state and those suspected of having committed the crimes in question.

The idea of a single, harmonised criminal justice process in terms of its values and principles was definitely in crisis over the last decade, within the framework of the fight against terrorism. As Marianne Wade argues, the vast majority of antiterrorism

[490] Munoz Conde, Francisco,"El nuevo derecho penal autoritario", in *El Derecho ante la globalización y el terrorismo*, Humboldt ed., Montevideu (2003), p. 78

measures focused on the criminal justice process and led to a definitive structural imbalance that had not been seen for many decades in most of the codes of criminal procedure of Western countries.[491]

The bifurcation of criminal justice systems comes with another element, which is one of the key conclusions in the analysis of several countries: there is a convergence between systems of inquisitorial and accusatorial nature. A convergence with regard to the evolutionary trend of the last decade - observed and analysed in chapters III and IV of this work - that evidences well-known common aspects to the two types of justice systems. Pinto Albuquerque pointedly refers that "the last decade has produced an interesting phenomenon within the framework of the legislation on criminal procedure law: the classic differences between Continental and Anglo-Saxons systems ceased to exist and the brotherhood of objectives became the hallmark of this new era of 'war on terrorism'. [492]

This phenomenon of convergence between the accusatorial and inquisitorial systems is an interesting trend, which can be analysed in different situations. On the one hand, situations presenting common trends in their legislative development reveal also similar patterns in antiterrorist reforms. This is, as presented in the previous chapters, the case of the changes made to the terms for telephone tapping and interception of electronic communications. On the other hand, there are situations *of rapprochement* and convergence in which one of the systems approaches the fundamental principles that usually identify the other system. This applies to the evolution of pre-trial detention regimes in accusatorial systems, evidencing that the models of the United States clearly

[491] Wade, Marianne, *A War on Terror?: The European Stance on a New Threat, Changing Laws and Human Rights Implications*, Springer ed. (2009) chapter 7
[492] Albuquerque, Pinto de, *Direito processual penal: projectos legislativos*, Vol. II, Almedina (2006), p. 67

approach the continental models of countries such as Spain, Portugal, France and Germany.

This approximation phenomenon of converging criminal justice systems is actually, as emphasised by Olásolo, one of the trends that has sparked great interest among the various scientific and academic research communities of this area. [493] Furthermore, according to this author, although it is true that the evolution of the European Community legislation and the case law of the European Court of Human Rights significantly contributed to the *rapprochement* between legislations, it was the paradigm of a common threat (fighting global terrorism and organised crime, as described in chapter II) that did the most to move the process forward of converging the different legal systems. Let's focus again on the example of telephone interceptions and their regulatory legal regimes. As explained in chapter IV, before 2001 the British legislation required for most situations, a specific mandate for the interception of communications. This same regime was applicable in inquisitorial systems, namely Portugal and Spain that had quite similar criminal procedural law schemes. In accordance with articles 123 et seq. of the Portuguese Code of Criminal Procedure, prior to 2006 telephone tapping could only be carried out, with the authorisation of a judge, if the following requirements were met: a) crimes with a maximum sentence of at least 5 years; b) indispensability of the medium, that is, there is no other mean available to obtain the desired information that is less restrictive and invasive of privacy; c) the investigating magistrate monitors and periodically reviews the procedure, at least every three months.

However after the 2001 attacks on New York and Washington, both schemes suffered a similar evolution: in the United Kingdom and the United States the need for

[493] Olásolo, Hector, *The Triggering Procedure of the International Criminal Court*, Martinus Nijhoff Publishers (2005), p. 201

mandates (liberalisation of warrants) has been made significantly pliable allowing for an increasing number of agencies and officers to have access to the contents of telephone and electronic communications; In Portugal and Spain there was a real transfer from the Judiciary power to the Executive power[494], putting an end to the interference of courts in a very large number of situations. Indeed the new article 127 of the Code of Criminal Procedure no longer requires the intervention of Portuguese investigative judges as the decision-making body but only to review the actions of the Executive body. Basically, the real decision of authorising interceptions and telephone tapping went on to be in the hands of various criminal police bodies. As Boaventura Sousa Santos refers:

> "Bending the need for judicial mandates had, in continental systems, a more perverse feature capable of generating unbalance in the system: what happened here was a true transfer of power between the Judiciary and the Executive bodies, reversing the procedural regimes to times prior to 1975." [495]

But it is perhaps in the area of financial counterterrorism that the convergence phenomenon is most noticeable. Before 9/11 the British legislation to fight the funding of terrorism was composed by the Northern Ireland (Emergency Provisions) Act 1973 and the Prevention of Terrorism (Temporary Provisions) Act 1974: both contained clauses that gave the British Government important powers regarding the control of property in Northern Ireland. In addition, these legal instruments gave authorities a diverse set of skills, enabling them to seize and freeze any funds or property that were suspected of being used to commit acts of terrorism against the United Kingdom. Nevertheless, some of these powers demanded the intervention of courts: for example, under the Northern Ireland (Emergency Provisions) Act 1973, it was the courts' competence to freeze and seize goods of individuals formally convicted of belonging to or financing any of the following organisations declared illegal: Sinn Féin, the IRA,

[494] Friedman, George, *A próxima década*, Leya ed. (2012), pp. 56 - 65
[495] Sousa Santos, Boaventura, *supra* note 63 at p.46

Cumann na mBan, Fianna na hÉireann, Saor Éire and the UVF. In the following decades some legislative acts slowly increased the powers of the State in terms of financial control. This was the case of the Prevention of Terrorism (Temporary Provisions) Act 1989, the Northern Ireland (Emergency Provisions) Act 1998 and the Prevention of Terrorism Act 1989 (which introduced and specifically defined crimes of financing terrorism and the use of goods with terrorist purposes).

However, the antiterrorist reforms undertaken in 2001, in particular the Antiterrorism, Crime and Security Act 2001, introduced, as Laura Donohue refers, important changes that had a significant impact on the rights of citizens, businesses and financial institutions. On the one hand, Governments were given wide authority to freeze any amount of money or goods suspected of having any relation to terrorist organisations, even without the existence of a judicial procedure.[496] On the other hand, both citizens and financial institutions now had the specific legal obligation to provide information to financial authorities whenever a relation with terrorist activities was suspected, even without any specific criminal investigation or judicial intervention. The violation of these obligations could generate penalties of up to two years imprisonment.

In addition, these powers-which initially were restricted to cases of terrorism or subversion – were expanded for common crimes, including complex tax or financial crimes, as foreseen by the Proceeds of Crime Act 2001. As Tim Parkman refers, the antiterrorism legislation provoked a real paradigmatic change in the control of financial flows, whereby the State now has the power to control all transactions occurring within the economy[497], having also real power to intervene under the mere suspicion of criminal activity.

[496] Donohue, Laura, *supra* note 33 at 141 - 142
[497] Parkman, Tim, *Countering Terrorist Finance: A Training Handbook for Financial Services*, Gower Publishing, Ltd., Jan 1, 2007 pp. 39 - 48

In terms of financial control, there was a fairly similar evolution in Portugal. Before 2002, the financial counter-terrorism scheme had virtually no application, to the extent that it had been specifically created to fight guerrillas (within the framework of the colonial war until 1974). According to the 1982 Penal Code, it was even considered as a common crime (not specifically related to terrorism). However, the Code of Criminal Procedure expressly required the need for judicial mandates to freeze or seize any goods or quantities of money, without distinguishing or creating any specific regime for cases of terrorism and organised crime. On the other hand, to permanently freeze goods or securities, some kind of judicial process had to be completed or underway in relation to the individuals or organisations formally facing the charges of crimes of terrorism, corruption, money laundering or illicit transfer of income abroad, However, after the attacks of 2001 - and especially after the bombings of Madrid in 2004 – the financial terrorism scheme changed radically. On the one hand, the decision of freezing goods or money is now solely dependent on the Judicial Police and Tax Authority, without any judicial intervention. On the other hand, the requirement to have some kind of judicial process or judicial condemnation underway ceased to exist. The freezing of goods is now entirely dependent on the "reasonable suspicion that certain goods or values may, directly or indirectly, be used to finance terrorist organisations or activities, regardless of the form of use or their effective implementation".[498]

Similarly to what was witnessed in the United Kingdom, also in Portugal the intervention of courts was foregone, which the Executive power often sees as time-consuming, inefficient and too concerned with citizens' rights. At the same time, the control of property and financial flows were channelled to the Executive power, by increasing its enforcement powers and, above all, by forcing financial institutions to a

[498] Article 3 of Legislative Act No. 65/2005 of 4 January

set of increasingly comprehensive and detailed information. Article 15 B of the same law no. 65/2005 of 4 January determines, that financial institutions are obliged to inform the Government about all financial transfers exceeding EUR 500,000, as well as all suspicious movements involving terrorist organisations or other similar to these. It furthermore determines that the duty to inform encompasses all requests made by the tax or police authorities for cases showing evidences that the financing of terrorist organisations or activities.

There are therefore striking similarities between both presented schemes, which have the following defining features: the expansion of the executive powers, the weakening of the judiciary power and the sharp increase of information duties (which came along with an equally sharp restriction to the right to privacy of citizens). This is a true convergence phenomenon between the inquisitorial and accusatorial systems. As Júnior refers:

> "The approximation between the common law and the civil law systems is visible in many reforms that have been approved over the past twenty years. However, the last decade and its structural reforms of most models of criminal procedure have generated a true phenomenon of identity merger".[499]

However, although the idea of an approximation between the identities of both systems might seem excessive, the phenomenon of legislative convergence within the context of the fight against terrorism is a reality that has been increasingly highlighted by researchers engaged with criminal justice systems.

There is one remaining issue that must be raised: Is the bifurcation of the criminal justice system and the convergence between civil law and common law systems a mere historical coincidence or a trend of change that can be proven scientifically?

[499] Júnior, Osvaldo, *Introdução à história do direito: Estados Unidos x Brasil*, IBRADD ed.(2001) p. 32

The question has to be examined with caution, taking into consideration the limitations of social sciences methodology. To talk about a paradigm shift or, as per Osvaldo Jr., about an identity that is common to the different families of criminal justice systems[500], seems to be excessive or, at least, without solid and consistent scientific foundation. The bifurcation of criminal justice systems and the convergence between the different legal families has been a consistent evolution trend over the last decade. Chapters III and IV show strong evidences of this evolution, evinced by the antiterrorist reforms performed in several legal areas, such as the financial control and the pre-trial detention schemes. This trend, as highlighted by Faria Costa, will tend to increase in the foreseeable future, under the same guidelines that have existed since the 9/11 attacks.[501]

Little by little, antiterrorist reforms significantly altered the structure of criminal justice models to which we were accustomed to, moving away from the fundamental principles of rationalistic liberalism and from the ideals based on humanist and Christian formation that inspired the tradition of Western constitutions[502]. This was a common path, hence the phenomenon of approximation and convergence between the different legal families. Nevertheless, to talk about a change or paradigmatic transition is to go further than the scientific data allows us to do, crossing the borders of scientific methodology. The proof that it would be eventually excessive to be speaking of a paradigm shift within the criminal legal system, is in fact already mentioned in chapter IV: despite legislative changes, the various Constitutions have remained largely unchanged, preserving their fundamental principles and guiding values. However, it is worth noting that the meaning of some of these principles and rights has suffered significant changes in spite of maintaining the same formal existence. This implies that even though several States decided to maintain their essential constitutional framework

[500] Junior, Osvaldo, *Direito, regulação e logística*, Forum Ed., São Paulo (2009), p. 32
[501] Faria Costa, José de, Direito Penal Económico, Coimbra Editora (2009), pp. 56 - 58
[502] Faria Costa, José de, *Noções fundamentais de direito penal*, Coimbra Editora (2011), p. 45

of principles and values, they were given new meaning, by loosening their legal scope and restricting their protective effects, as a result of the antiterrorist reforms seen in chapters III and IV. Ashworth emphasizes this point when he talks of a 'hollowing out of rights'.[503]

It should also be noted that, on this issue, none of the analysed countries is currently undergoing any constitutional review process, nor are they expected to do in the near future. Furthermore, as Bacelar Gouveia refers, the integrity and the protection of constitutional values in the West are still the most effective barrier against the profound cost of our antiterrorist regimes in terms criminal justice systems.[504]

Section III

1. The impact of Counter-Terrorism Measures on the Liberal and Democratic Nature of the Constitutional Rule of Law

As Jakobs points out, the constant fight against terrorism and organised crime in the last ten years has severely restricted, if not ignored, some of the most important modern constitutional postulates, such as the right to freedom, the principle of presumption of innocence, the right to a lawyer and defence counsel at any stage of the

[503] Ashworth, Andrew, "Criminal Proccedings after the Human Right Act the Fisrst Year" in *Criminal Law Review*, 855 (2001), p. 186
[504] Bacelar Gouveia, Jorge, *supra* note 97 at 68

proceedings, the right to appeal to the higher courts, the principle of material truth, the right to non-discrimination on the basis of race or religion, etc.

This new "criminal law of the enemy"[505] has no doubt affected the fundamental structure of the democratic rule of law and its nature as inherited from the political liberalism of the 18th and 19th centuries. On the one hand, the humanist criminal law, as Figueiredo Dias called it, was definitively undermined.[506]

The reflection to be developed should consider two different aspects. On the one hand, to know if we can speak of a Constitutional Rule of Law identity in the contemporary era, i.e. whether or not we can identify a set of principles and values that are common to this type of rule and that can be undermined by the counter-terrorism measures. On the other hand, it is important to ascertain to what extent the measures adopted to combat terrorism and transnational organised crime have caused a real mutation in the liberal nature of the constitutional rule of law or if this change has limited itself to configuring the criminal justice system and, therefore, just a part of that Constitutional Rule of Law.

According to Murphy, the first step of this reflection should in any case be to recognise the changes in the legal system. The rule of law has inevitably adapted to new circumstances arising out of the September 11 attacks and, over the last decades, this adaptation has brought about a real change in the essential structure of the criminal justice systems of most Western countries.[507]

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[505] Jakobs, Gunter, *Direito Penal do Inimigo: nocoes e criticas*, Livraria do Advogado Ed., São Paulo (2012), p. 12

[506] Dias, Figueiredo, Costa Andrade, Manuel, *O homem delinquente e a sociedade criminogena*, Coimbra Editora, Coimbra (2013), p. 134

[507] Murphy, Cian, "The Constitution of EU Counter-Terrorism Law" at http://www.ejiltalk.org/the-constitution-of-eu-counter-terrorism-law/ ; see also Martin, João Lopes, *Terrorismo Transnacional: uma nova abordagem*, Almedina (2010), p. 56

In this regard, research conducted in the various countries seems to show that the changes in the structure of the rule of law should be identified and grouped as follows:

1. changes in the criminal procedure rules relating to criminal investigations, gathering evidence and coercive measures;

2. changes relating to the structure and overall purpose of the criminal justice system;

3. changes in the constitutional nature of the state and its identity as a rule of law;

With regard to the first point, as Roxin points out, there is consensus among all authors that the rules relating to the first stage of criminal proceedings (i.e. criminal investigation and preventive measures) have diametrically reversed the trend observed in the late 1980s and throughout the 1990s in most Western countries. Most of these measures have already been identified and explained above, such as the facilitation of wiretapping and the increase of data relating to pre-trial detention in Portugal and Spain.

As for the second point, it has to do with what some authors call the objectives of the criminal justice system, i.e. the goals that criminal procedure aims to achieve and secure with the measures it applies. This is basically where we find the classic differences related to the objectives of the global justice system: ensuring the application of criminal penalties, ensuring a set of insurmountable rights for suspects, or meeting the needs of crime victims as far as possible. According to George F. Cole, the fight against terrorism and organised crime has reformulated the objectives of the criminal justice system, which, on the one hand, now has as its main objective the

effective and expeditious investigation of terrorism and terrorism-related crimes, and, on the other hand, invests in crime prevention.[508]

This seems to be a fact that cannot be ignored, according to the data obtained. During the 1990s, even criminal justice systems that were based on a predominantly protective approach (i.e. focused on fundamental rights) substantially changed their concerns, as was the case, for example, of Belgium and Luxembourg. Therefore, these systems went on to focus on two essential concerns: the prevention and investigation of crimes related to terrorist activities. As Valmonte argues:

> "During the last decade, the global concern about terrorism has essentially changed the public and well-known objectives of criminal justice systems, not only in Brazil, but virtually in all Western countries. We have provided these countries with effective tools for the investigation, control and prevention of terrorism and organised crime, rather than for the protection of rights, freedoms and guarantees. For this new dominant approach, the protection of fundamental rights is inherent in the war waged against terrorism." [509]

The last point – changes in the liberal and democratic nature of the rule of law – requires deeper reflection. On the one hand, as mentioned above, it is inevitable to see that the principles of proportionality, equality and the right of defence (constitutionally enshrined rights, for example, in Portugal, Spain, France and Germany) are in crisis in the context of the fight against terrorism. A practical example is pointed out by Paulo Pinto de Albuquerque, analysing both common law and civil law systems: while before the reform of 2006 the application of pre-trial detention was an option (to be applied in exceptional cases and only under a specific set of circumstances), after this reform, the application of pre-trial detention became virtually inevitable in cases of terrorism or organised crime. This reality undermines a principle deeply rooted in existing criminal

[508] Cole, George (org.), *The American System of Criminal Justice*, Cengage Learning (2012), p. 192
[509] Velloso, Ricardo and Andrade, Vanessa, "Crime Organizado e Terrorismo no Brasil" at http://www.procrim.org/revista/index.php/COPEN/article/view/56/111 (accessed on August, 2013)

justice systems, in both in common law and civil law countries: the principle of presumption of innocence of the suspect. [510]

It may therefore be concluded that there has been a substantial change in the identity and objectives of the criminal justice system. We may even agree that some of the principles traditionally accepted in the contemporary approach of criminal procedure and inherited from the political liberalism of the post-French Revolution have been definitely undermined in the context of the global war on terrorism. Another (more comprehensive) question is whether the dynamics and structure of the Constitutional Rule of Law is also undergoing a transition or paradigm shift? In a way, the question is whether the identified changes lie strictly and specifically within the field of criminal justice or whether they are already on a wider plane of political science and constitutional structure of the countries?[511]

As already mentioned above, the costs of the war on terrorism and organised crime seem obvious today and assume various types: economic costs, legal costs and civilisational costs. The first are evident and well-identified in the reports prepared by the U.S. Senate and the European Union itself in 2010 and 2011. For example, a study conducted by researchers from Brown University's Watson Institute for International Studies estimates that the economic costs related to the war on terrorism for the United States stand at four trillion dollars since 2001, considering only the costs directly linked to the wars fought in Afghanistan, Iraq and Pakistan and also the terrorist attacks perpetrated against U.S. interests. In addition to these, a whole set of indirect costs will also have to be taken into account.[512]

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[510] Albuquerque, Paulo Pinto, "Sete teses sobre a reforma do processo penal" at http://www.ucp.pt/site/resources/documents/Docente%20-%20Palbu/Dez%20M%C3%A1ximas.pdf

[511] Conte, Alex, *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: the United Kingdom, Canada, Australia and New Zealand*, Springer, (2010), p. 391

512 Brown University's Watson Institute for International Studies, "The costs of war since 2001: Iraq, Afghanistan and Pakistan" at http://www.thefiscaltimes.com/~/~/media/Fiscal-Times/Research-

Finally, we have the civilisational costs related to the cultural and axiological heritage of the West, particularly the values inherited from the French Revolution. As Adhémar Eismein argues, the vast majority of values considered essential in the field of criminal procedure law derive from the imaginary advocated by the political liberalism of the 18th and 19th centuries, which was unreservedly asserted by the French Revolution of 1789. Now, it seems inevitable to conclude that many of these values were compromised, or at least required another type of interpretation,[513] by the criminal reforms undertaken by most Western countries in the fight against terrorism.

The civilisational costs of the war on terrorism are represented not only by the number of human lives lost, but also by the undermining of values of freedom and property and, as Sakamoto points out, by the definitive abandonment of a perspective of multilateralism and diplomatic negotiation that had been gaining ground in the 1990s and disappearing altogether after the September 11 attacks.[514]

However, regarding the question of a transition or a real mutation in the nature of the rule of law, a definitive answer seems to be exaggerated, if not premature. Although the changes identified above are varied and represent unavoidable costs of the war on terrorism and organised crime, they are not enough, alone, to cause a change in the nature of the Constitutional Rule of Law. As Poggi points out, we must not forget that the modern state, with all its functions, is an extraordinarily broad and complex entity that cannot be restricted to the specific area of criminal justice.[515] Indeed, even if the changes brought about after September 11 cover such widespread areas as banking and financial regulation – or the use of the Internet and regulation of the right of asylum and

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Center/Budget-Impact/Think-Tanks/2011/06/29/The-Costs-Of-War-Since-2001.ashx?pid=%7B1C75F3DB-0DE3-4470-8A8C-DB8E4C8DA971%7D

[513] Esmein, Adhémar, *A History of Continental Criminal Procedure* , The Lawbook Exchange (2000) p.591

[514] Sakamoto, Yoshikazu, "The Politics of Terrorism and "Civilization": How to Respond As A Human Being", at http://www.iwanami.co.jp/jpworld/text/civilization01.html

[515] Foggi, Gianfranco, *The Development of the Modern State: A Sociological Introduction*, Stanford University Press (1978), pp. 1 – 10

immigration – we must not forget that the liberal nature of the democratic rule of law is a much broader concept, both from a historical and philosophical point of view and from a legal and social point of view.

2. Conclusion

An extremely interesting fact should be noted from a comparative law perspective: while most Western states have adopted, as we have seen, specific counter-terrorist legislation following 9/11 and 11/3 (Madrid) attacks, very few of them were willing to amend the Constitution in the troubled period of the war on terrorism. In reality, what could be observed was the suspension of certain legal protections and fundamental rights, as well as the derogation of a some articles of the ECHR. The United Kingdom for example derrogated article 5 of the ECHR as to apply, in its legal system, 'control orders' and indefinite detention of foreigners suspected of terrorist activities. As Donohue refers:

> "The 2001 Antiterrorism, Crime and Security Act (ATCSA) gave the British Secretary of State the authority to specially designate ("certify") foreign individuals reasonably suspected of being a terrorist, and defined terrorist broadly, to include anyone with links to international terrorist organisations. Where either a point of law or practical considerations prevented deportations, the legislation provided for indefinite detention. To ensure that the State was in good standing with its international obligations, the United Kingdom formally derogated from Article 5 (I) of the ECHR." [516]

This is a curious fact that should make us think carefully about the liberal nature and constitutional structure of the contemporary rule of law, which shows very few and insignificant changes in the context of constitutional law.

[516] Donohue, Laura, *supra* note 33 at 58

So what is the real meaning of this? On the one hand it shows that in spite of the profound changes in the respective systems of criminal justice, there hasn't been a shift in the constitutional paradigm and that while inserted in different legal systems the models of criminal procedure remain anchored to a common set of fundamental principles. On the other hand, it also demonstrates, as Canotilho illustrates, that the modern liberal Constitutions, specially the written ones, were able to create protection and consolidation mechanisms, notably for crisis and emergency situations such as those we have lived in the past decade.[517] In the words of this author, this is a constitutionalism with eyes set on the future and which requires anti-crisis mechanisms.[518]

In any case, there is not enough data to prove the existence of a constitutional transition or a paradigm shift in the liberal and democratic nature of the rule of law. What there really is, no doubt, as Donohue points out, is the existence of a very high legal and civilisational cost for that same rule of law,[519] which is forced to sacrifice some of the core values and postulates of its existence. In this regard, we have already mentioned the principle of presumption of innocence, proportionality and the right to defence of suspects. However, fundamental values such as the right to legal defence, the protection of fundamental rights, and the right to privacy have also been deeply affected by legislative counter-terrorism measures adopted in several countries.

However, what seems evident, as Soares da Veiga points out, is that we can speak of a crisis of the fundamental values of the criminal justice system in place in the majority of western countries. Regardless of facing a constitutional transition or a shift in paradigm, what is at stake is a deep crisis of the values inherent to the systems of the

[517] Canotilho, José Joaquim Gomes, *Direito Constitucional e Teoria da Constituição,* Almedina (2006), pp. 345 - 368
[518] Xenophon Contiades, *Engineering Constitutional Change: A Comparative Perspective on Europe,* Canada and the USA, Ed.Routledge (2012)
519 Donohue, Laura, *supra* note 33 at 134

criminal justice of liberal nature. The costs of antiterrorist reforms are very diverse and relevant in relation to the fundamental freedoms, structure of State and citizens' trust.

These three elements, referred by Chang,[520] reveal a profound crisis of the dominating model of criminal justice in most western countries.

Whether we are or not before a shift in the paradigm of criminal justice, only the future – and perhaps a near future – will tell. The equilibrium that will be found between security needs and the protection of human rights – in areas so diverse such as electronic surveillance, control over financial transactions or the right to freedom and to privacy – will be indicators of the direction towards criminal justice systems are headed. As Seidl refers the structure behind this balance or behind those multiple equilibrium should provide us with a clear image of the emerging criminal justice system in the age of global terrorism.[521]

We should however bear in mind, as Donohue points out, that some of the measures included in the antiterrorist legislation approved by the West in the past decade may have immediate beneficial effects, but prove to be harmful in the long run.[522]

In the short run they may contain the terrorist threat and give a false sense of strength and security. In the long run however, they are hugely restrictive of citizens' freedoms and undermine the confidence – especially within minority communities – in democratic institutions, causing further radicalization which in the future may have a much deeper effect in regard to civil society.

The costs of antiterrorist legislation are profoundly rooted in the societies we live in. Every day we are confronted and become more aware of the serious issues

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[520] Chang, Nancy, *Silencing Political Dissent: How Post-September 11 Antiterrorism Measures Threaten Our Civil Liberties*, Seven Stories Press (2011), pp.. 15 - 28
[521] Seidl, Florian, *Terrorism and the Balance Between Freedom and Security***,** GRIN Verlag (2007) p. 67
[522] Donohue, Laura, *supra* note 33 at 89

surrounding control and surveillance mechanisms adopted in all corners of the globe after 9/11. The scandals of electronic surveillance and espionage carried out by several North American and European intelligence agencies are just the tip of the iceberg of a long and much needed debate that the civil society must face in order to identify what our systems of criminal justice should look like. In the complex and unpredictable fight against global terrorism questions such as what rights are we willing to give up, and what freedoms will we uphold no matter what, cannot be ignored. And they are crucial to ensure the survival of the democratic rule of law among liberal states.[523]

[523] Gross, Owen, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge University Press (2006), pp. 56 - 58

APPENDIX

Some events that shaped modern terrorism - A brief chronology

In September 1972, the confirmation that innocents were to become targets of terrorist acts came when, during the Munich Olympics, a group of Palestinian extremists killed some of the Israeli athletes.[524]

In December 1975, a radical group led by the Venezuelan terrorist Illich Ramirez Carlos, carried out the kidnapping of 11 ministers of the Organisation of Petroleum Exporting Countries (OPEC) in Vienna.[525]

In 1982, in Beirut, Lebanon, a terrorist attack with car bombs caused 200 deaths in the barracks of marines.[526]

In 1988, terrorists stroke again, this time with a commercial airliner that crashed in Lockerbie, Scotland, leading to the death of 259 passengers and a few by-standing Scots. At the time this was considered the largest terrorist attack since World War II. The attack was attributed to two Libyan nationals, whom Libya refused to hand to the U.S. authorities.[527]

In 1992, the Embassy of Israel in Buenos Aires, Argentina, was destroyed in an attack without antecedents for its magnitude: 30 people died. The attack was claimed by a command of Arabic origin.

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[524] Lebrun, Marc, *Que sais-je*, Interpol, Paris, Presses Universitaires de France, 1997, pp. 63-64.
[525] Claire Sterling, *A Rede do Terror – A guerra secreta do Terrorismo internacional*, Lisbon, Francisco Lyon de Castro, s.d., pp. 21-22.
[526] John, Andrade, *Acção Directa – Dicionário de Terrorismo e Activismo Político*, Lisbon, Huggin, February 1999, p.31.
[527] Hoffman, Bruce, *Inside Terrorism*, Great Britain, Indigo, 1998, p. 190.

Also in 1992 the Algerian president Mohammed Boudiaf was assassinated. At this time Islamic fundamentalism triggers systematic terrorist actions with alarming proportions.[528]

In 1993, in New York, one of the "most spectacular" terrorist episodes in U.S. history occurred: an armed van parked in the subterranean level of the World Trade Centre blew up, killing six people. The authorship was attributed to Bin Laden and his organisation.[529]

In 1994, Argentina was again the stage for terrorists. The headquarters of the Argentine-Israeli Mutual Association (AIMA) was targeted, causing more than 100 deaths and many injuries. This was considered one of the deadliest attacks in the country's history.[530]

Japan started dealing with a new kind of terrorism in 1995, when the sect "Supreme Truth" triggered a series of attacks with neurotoxic gases.[531]

In 1995, the U.S. federal building in Oklahoma exploded, causing 168 deaths. It was the biggest terrorist attack suffered in the country up to this date. The authorship was attributed to Timothy McVeigh, who had been a soldier in the Gulf War, and who was later arrested and sentenced to death.[532]

In November 1997, in Egypt, new and bloody attacks occurred against foreign tourists. Islamic terrorists claimed these attacks.[533]

In August 1998, two different attacks occurred on U.S. embassies in Africa within a few minutes. The first was in Nairobi (Kenya) with the explosion of a car bomb, killing 213 people. The second occurred in Tanzania, partially destroying the

[528] www.terrorism.com, accessed February 2008.
[529] Hoffman, Bruce, supra note 209, at p.78
[530] Supra note 210, accessed February 2008.
[531] Hoffman, Bruce, supra note 209, at p. 89
[532] Ibid. at, pp. 92-105
[533] Ibid. at, p. 93

U.S. Embassy. Both attacks were attributed to the number one enemy of the U.S. at the time, Osama Bin Laden.[534]

The largest terrorist attack in history occurred on September 11, 2001. Four commercial airliners were taken by terrorists in Boston, and subsequently diverted. Two hit the 100-floored Twin Towers of the World Trade Centre in New York. The same that had been targeted by terrorists in 1993, now ceased to exist, dragging thousands of people to death. A few minutes later the third plane crashed against the U.S. military base, the Pentagon, which was partially destroyed. A fourth plane crashed in Pennsylvania.[535]

On March 11, 2004, ten bombs went off virtually simultaneously in trains carrying commuters into Madrid. 190 people died in the attacks, with approximately 2,000 people wounded.

The terrorist attacks on 7 July 2005 tested the London Resilience Partnership plans to the limit, as four suicide bombers killed 52 passengers and injured nearly 800 on the city's transport network. Three bombs went off at 8.50am on underground trains just outside Liverpool Street and Edgware Road stations, and on another travelling between King's Cross and Russell Square. The final explosion was around an hour later on a double-decker bus in Tavistock Square, not far from King's Cross.

In November 2008, the Lashkar-e-Taiba (a group, whose name means "Army of the Pious"), a Pakistani based muslim extremist group, lauched twelve coordinated shooting and bombing attacks across Mumbai, killing 166 people, including 28 foreigners from 10 different countries, many of whom were separated and executed.

[534] Cfr. Osama Bin Laden, *Uma guerra contra o Ocidente*, Lisbon, Publicações Dom Quixote, October (2001), pp. 122-123
[535] Ibid. at, p. 132

On the 21st September 2013, Al-Shabab's jihadist fighters raided Nairobi's Westgate shopping centre and made a stand-off with Quenian police forces which lasted for three days, killing 67 people and injuring nearly 200. Non-muslims were singled out for executions and a hostage situation gave the event global mediatic coverage.

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Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)

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