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FROM MILITANT DEMOCRACY TO THE PREVENTIVE STATE?

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In what follows I will discuss constitutional paradigms that emerge form clusters of counter-terror techniques that are used in liberal and illiberal democracies that face the challenge of international Islamist[1] terrorism. The security measures seem to cluster around intellectually distinguishable models with very different consequences as to separation of powers, scope of rights and procedures and levels of fundamental rights restrictions. The models are introduced in Part I where I speculate that in case the terrorist threat becomes pervasive the instruments of militant democracy and prevention will merge in a new constitutional arrangement that is called here the Counter-terror state. Part II considers at more detail the experience of constitutional regimes that have experienced threats to the survival of the political regime. Elements of militant democracy[2] and of the preventive state, and also emergency[3] might be relevant in the analysis of the state's reactions to terror. The experience of militant democracy, as a constitutionally legitimised departure from 'ordinary' constitutionalism is relevant, given the intimate relation between terror and fundamentalist political movements. I will also consider the contemporary drift towards the 'preventive state'. The 'preventive state' is a specific form of welfare state paternalism that operates against non-political security threats. The 'preventive state' is the result of piecemeal constitutional change that is endorsed by judicial reinterpretation of constitutional principles.

In Part III I discuss the potential range of rights restrictions emerging in the logic of the Counter-terror state. Such restrictions depend on social choices, and I show in Part IV that in light of the distortions of decision-making under conditions of uncertainty and panic that emerges in regard to disasters, it is not clear who should make the societal determination on the proper level of risk-taking. The risk-related decisions do not follow from principles that apply in the determination of rights for ordinary circumstances. In case of *serious* terrorist threat with the possibility of mass disaster or daily damage rights related mistakes do have disastrous consequences. This precondition is fundamentally different from the one that exists at the times of 'normalcy', which serves for the ordinary constitutional calculus of liberty. Constitutionalism as an order of liberty is about risk taking; however the preconditions for such position may not be present in case of actual threat of disaster. The Concluding remarks emphasise that there are substantive, principled and pragmatic reasons for a formal, constitutionally foreseen Counter-terror state. These reasons may or may not be compelling, as the matter is somewhat contingent on the nature of the very democracy. The precondition for the legitimacy of such state is that it should be one that results from public deliberation and that the citizens are deprived of the conditions for such deliberation in the name of security.

Although in light of liberal legal theory catastrophes may require the rethinking of the place of rights in a democracy, and mass international terrorism is such a catastrophe, a switch to a Counter-terror state is not obvious, given lack of certainty about terrorism and because of prudential considerations. As a matter of practical development a likely alternative to a full scale Counter-terror state is a move away from the judicial state towards a preventive state with a detention regime[4]. We are toying with the possibility of turning Big

[1] The term 'Islamist' refers to a distorted, or perverted minority version of Islam, like Salafism.

[2] The summary of militant democracy follows an earlier paper, Militant Democracy and Transition Towards Democracy in A. Sajo (ed.) Militant Democracy. Eleven International Publishing. 2004.

[3] The article does not discuss the constitutional experience of what is technically called 'state of emergency', though this is one of the standard legal regimes that was used to handle domestic terrorism from Northern Ireland to India. For some of the experiences see International Commission of Jurists. States of Emergency. Their Impact on Human Rights. 1983. But state of emergency is applied to a great number of different problems and is quite often the state's reaction to all forms of insurgency. Indeed, it is the opposite of exceptionality, if one considers how often it is used. D O'Donnell, States of Exception. 21 *ICJ Review*, December 1978. p. 52. reports that at that time there were at least 30 of the then existing states having some kind of emergency.

[4] Article 22 of the Indian Constitution provides for such detention regime. In normal times preventive detention under the Constitution applies for a period of three months from the date of detention. Right to counsel does not apply. The maximum period beyond three months may be provided for

Brother's surveillance and potential arbitrariness into a condition of everyday life that we don't even notice anymore. However, currently the judicial state has not abandoned its position in most liberal democracies and it continues to remind us that restrictions are not normal, though might be legitimate.

1.Constitutional Alternatives in Face of Permanent Threat of Disaster

In many regards international Islamist terrorism as a form of fundamentalist violence represents (in a less calculable, rationality defying way) a fundamental challenge to democracy or any other existing stable state order that offers basic security. Of course, the suicidal element and the desire of total destruction of the enemy without any distinction between targets, be it civilian or governmental is a specificity that turns Islamist international terrorism into a category of its own, a development that if materializes will force the rethinking of the currently available constitutional solutions. But for the time being one finds that the attempts are to accommodate the problem handling into the existing schemes though allowing for amendments. A number of clustered constitutional responses have emerged or are on the horizon of the constitutionally permissible in response to the international terrorist threats. I refer to clusters, as instead of well identifiable sets of constitutional norms following identifiable principles we have at the moment sets and trends of legal techniques that effect constitutional rights and arrangements, remaining so far mostly within the boundaries of the existing constitutional text.[5]

With or without textual change it might be that the emerging structures will solidify into new models of constitutional arrangements in democracies. One may find these models troubling from a liberal constitutionalist perspective and may come up with proposals how to make the emerging system more human rights responsive, but these normative and pragmatic efforts, although part of the very formation of the new structures should not deter us from intellectually mapping the potential constitutional scenery emerging in the "battlefield".

A constitutional state's self-defence will remain within a constitutional paradigm only if it is capable of excluding conceptually and institutionally the abuse of opportunities for restricting rights, or, to be realistic, at least of keeping them within rational bounds.[6] There are a number of attempts both at the normative and the practical level to satisfy requirements of self-defence. Many constitutional texts are inclined to disregard the possibility of disorder (see the Constitution of the United States). But behind the denial (including denial by admissibility), the constitution has an unarticulated, under-theorized, uncertain but fundamental relation to the possibility of its own destruction that comes to light when the government and the forces of order face politics that is based on emotionalism or permanent threat. In such circumstances the state cannot avoid to bring out its own foundational violence. The law is reluctant to address and confront such violence, partly because it does not want to admit that by limiting its own violence, it would undermine its chances of survival. The important intellectual development seems to be that constitutional thought turned towards the problem of system self-defence[7]. Considering these developments and other institutional reactions of democracies facing political action, which have a high probability of irreversible disastrous damage to democracy, or the very foundation, the carrier of that democracy, the political order that provides security to citizens, the following paradigms emerged:

- accommodation of the handling of the threat into the existing system, with shifts in the pro-

statutorily by Parliament for certain class of cases. Under Article 22(4) the detainee might be held for a period beyond three months three months if: a)an Advisory Board consisting of a sitting , retired high court judge or a person qualified to be a High Court judge holds before the expiry of three months that there is sufficient cause to continue to hold the detainee in preventive detention or b) If Parliament prescribes the circumstances under which or the class of cases in which a detainee's detention may be continued beyond three months without the opinion of the Advisory Board. While in the post-independence Gopalan case the Supreme Court considered Article 22 a complete court by 1973 elements of judicial supervisions were required, moving the detention regime within the judicial state, see Sambhu Nath Sarkar vs State of West Bengal 1974(1) SCR 1, although not without further uncertainties.

[5] The European arrest warrant that was developed in a different context seems very important in the international cooperation against terrorism but it may require changes to the German and Polish Constitutions.

[6] The Schmittian version of emergency and war are outside this model. This is not to say that there are no differences (at least in principle) between the law of war of liberal states and that of the illiberal state. However these principled assumptions that presuppose a liberal culture and people that have embedded the humanism of that culture easily, though not necessarily succumb to the existential necessities of war.

[7] Not the first time, as militant democracy indicates. However, mainstream constitutional thought remained to a great extent unshaken by it, and emergency and related matters never managed to occupy the place of central and decisive problem that structures constitutional thinking. The present trend points in that direction, though it is not clear that the breakthrough will occur, and not only because there is still hope that the terrorists war against the infidel will not last for decades, and there will not be a 'second attack'. Constitutional theory is particularly good in compartmentalization, and security related constitutional issues might be marginalized again, partly because the bulk of public law continues to do with mundane matters like segregating zoning, or school curriculum. Constitutional problems of school curriculum are a great litmus test: if secularism, neutrality, freedom of religion related matters are discussed in the shadow of terrorism, for example when you have to factor into the argument how a curriculum choice fosters terrorism or creates sentiments of exclusion that might generate terrorists etc, than security concerns have really changed constitutional concerns.

portionality analysis that is used in the judicial and administrative choices ('business as usual'[8], or 'Please don't panic, the police is controlling the situation'[9]);

- "Twilight zone"[10] or "times of stress"[11] model: here the counter-terror arsenal is still within the parameters of the judicial state. The model centers on the proper standards to be applied by the judiciary in the constitutional handling of the terrorism problem.
- Militant democracy (applied to terrorism)
- Preventive state (including its strong version of a detention state, where as a result of the preventive considerations mass detention (and wherever applicable its functional equivalents, e.g. expulsion, extradition, relocation, deprivation of citizenship) is used as a preferred choice of action;
- Counter-terror state;
- State of emergency: *I.* A number of constitutions consider disorder to be an unusual but possible contingency. This is discussed under the heading of emergency. In this understanding of emergency the exceptional state is foreseen and is made acceptable, but only as a transitory departure from ordinary tranquillity. The constitutionally authorized, procedurally predetermined departure from ordinary decision-making and human rights (or a special temporary version of it[12]). *II.* The alternative meaning of emergency refers to the use of unconstrained executive (military and security) power where the constitutional element is that there will be a return to constitutional values after the crisis and the decision-makers might be subject to ex post accountability[13]. We also have to consider the denial of constitutionalism in the Schmittian version of emergency, where the declaration of the state of emergency is the privilege of the sovereign and it is, therefore above or outside the constitutional scheme: here the only constraint is lack of success.
- War (using all the war powers, however undetermined these are under the constitution but claiming that this is all constitutional because that's the way the constitution is designed).[14]

These various responses are not final and isolated from each other[15]. Quite the opposite the clusters are unstable and fluid, partly because the very nature and importance of international Islamist terrorism, or at least its political understanding changes, it is unstable and mixed, and partly because the alternative constitutional responses are non simply reactions. Further, it is not clear that the world has changed in a fundamental way and all our life and constitutionalism have to be restructured in a definitive way. Democracies and other states as well as their relations have, however, looking at certain techniques and certain institutional arrangements and cooperations in a changing way, in a counter-terrorist perspective. The elements of the emerging structures are not new but the probabilistic or panic driven perspective on the use of these measures points to the possibility of a constitutional paradigm shift, away from a good times liberty regimes[16] to a bad times security regime.

[8] The term is used in Oren Gross, Chaos And Rules: Should Responses To Violent Crises Always Be Constitutional? 112 *Yale L.J.* 1011, 1021 who describes this 'framework' in the following terms: "The Business as Usual model is based on notions of constitutional absolutism and perfection. According to this model, ordinary legal rules and norms continue to be followed strictly with no substantive change even in times of emergency and crisis. The law in times of war remains the same as in times of peace." He also consider Other models of emergency powers that he groups together under the general category of "models of accommodation": these are close to what I refer to using Michel Rosenfeld's 'times of stress' expression. In Oren Gross' view the 'models of accommodation' attempt to accommodate, within the existing normative structure, security considerations and needs. Though the ordinary system is kept intact as much as possible, some exceptional adjustments are introduced to accommodate exigency. This compromise, it is argued, allows for the continued faithful adherence to the principle of the rule of law and to fundamental democratic values, while at the same time providing the state with adequate measures to withstand the storm wrought by the crisis."
The additional models I discuss depart (partly, and not always deliberately) from the existing patterns claiming that the departure is needed to save the very values it has to disregard in certain regards.

[9] This is a reference to a Hungarian novel by Jeno Rejto (Quarantine in the Grand Hotel). At the moment the chief of police utters the above sentence, panic burst out.

[10] Peter Margulies, Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11th. 84 B.U.L. Rev. 383 (2004).

[11] Michel Rosenfeld, JUDICIAL BALANCING IN TIMES OF STRESS: COMPARING DIVERSE APPROACHES TO THE WAR ON TERROR, in this issue???

[12] Bruce Ackerman, The Emergency Constitution, 113 Yale L.J. 1029, (2004). The crisis is understood to be acute, the polity is singularly focused on survival and all other political concerns and objectives recede into the background, at 1040.

[13] "However, bright-line demarcations between normalcy and emergency are all too frequently untenable, and distinctions between the two made difficult, if not impossible. In fact, the exception is hardly an exception at all." "there may be circumstances where the appropriate method of tackling grave dangers and threats entails going outside the constitutional order, at times even violating otherwise accepted constitutional principles, rules, and norms. Such a response, if pursued in appropriate circumstances and properly applied, may strengthen rather than weaken, and result in more rather than less, long-term constitutional fidelity and commitment to the rule of law." Gross, op. cit. 1022-23. In a way this is an honest and well reasoned attempt to save Carl Schmitt from Carl Schmitt.

[14] "The traditional unwillingness of courts to decide constitutional questions unnecessarily also illustrates in a rough way the … maxim… In time of war the laws are silent." William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 202 (1998).

[15] Noah Feldman, Choices of Law, Choices of War, 25 Harv. J. L. & Pub. Pol'y 457 (2002) argues that international terrorism fits both into the 'war' and the 'crime' models. Perhaps none is adequate.

[16] L. A. Powe, Jr., Situating Schauer, 72 Notre Dame L. Rev. 1519, 1531-32 (1997): speech is a "good times civil liberty".

The above approaches differ to a great extent in regard to their assumptions of risk (how likely the disaster is) and also about risk-taking. With the exception of the 'business as usual' approach these models expressly enable preventive measures based on more or less realistic probabilistic assumptions.[17] As legal-political strategies they face the following questions: how one determines, on what grounds, in which procedure the probability of future stochastic occurrences? Even where there is no clear cut textual recognition of the demands of these models they capture in an interesting way the cluster of legal reactions that emerge in the context of international terrorism, facilitated but not necessarily always related to terrorism.

At the intersection of the different policies a cluster of specifically international terrorism driven measures appears. I call this conglomerate a Counter-terror state. Many combinations of these measures emerged and are in the waiting in contemporary democracies, all justified in terms of counter-terror scenarios. Many of the constituent techniques originate from militant democracy of from the preventive state, and share to some extent the legitimisation used in these models. My assumption is that, *ceteris paribus*, that the democracies will not recognise in the text of the constitution a full-fledged Counter-terror state as a set of extraordinary authorisations, except if a qualitative change in the perception of the terrorist threat forces society to re-evaluate its fundamental risk assumptions. The present trends point towards the normalisation of additional preventive measures and the extension of the preventive state to new areas of ordinary life, in combination with elements of militant democracy.

2. Handling of Political Threats in Militant Democracy and the Preventive State

In this article I discuss only the militant democracy and the preventive state paradigms that are likely to get some kind of constitutional ratification in the constitutional system of many democracies. Picking mostly from these two arsenals a *distinct* counter-terror state is conceivable. The distinctness of the counter-terror state refers to the fact that its preventive solutions are narrowly tailored to be applicable to terrorism only. However, and in a very problematic way, it is more and more likely that the legal policies of counter-terrorism will have inevitable spillover effects. The result is that the counter-terror state will be one that incorporates and legitimizes an extended preventive state that also incorporates with or without clear constitutionalisation elements of militant democracy.

2. 1. What is militant democracy?

Majority rule creates the opportunity for deformation of democracy and the imposition of a concept of good life that does not allow for alternative forms and autonomous definition of the good life. Within the framework of the democratic process, using the mechanisms of democracy (free speech, assembly, elections), a regime may be established that dissolves democracy. "It will always remain one of the best jokes of democracy that it provides its own deadly enemies with the means with which it can be destroyed."[18] Tolerance might become suicidal in certain political circumstances. As Lord Acton put it: "At one period toleration would destroy society; at another, persecution is fatal to liberty."[19]

Today, militant democracy is most commonly understood as the fight against radical movements, especially parties, and their activities. The approach was incorporated into a fully democratic constitution in Germany after World War II.[20] Article 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) reflects that concern in a way that might justify many counter-terrorist measures:

[17] "The court of appeal in Düsseldorf held that, in search of so-called "sleepers" of Islamic terror organizations, the circle of persons that has to submit to a grid search has to be definable and restricted. Only personal data of citizens of suspicious countries or of a specific religious group (e.g. Muslim persons) are allowed to be passed on, not data of German citizens, that are neither Muslim nor born in a suspicious country." Lepsius Liberty, Security, and Terrorism: The Legal Position in Germany, 5 German Law Journal No. 5 (1 May 2004) Part Two, referring to decisions of OLG Düsseldorf, Neue Zeitschrift für Verwaltungsrecht 629 (2002), with different reasoning OLG Frankfurt, op. cit., 626-627. http://www.germanlawjournal.com/article.php?id=423#_edn11

[18] "Das wird immer einer der besten Witze der Demokratie bleiben, dass sie ihren Todfeinden die Mittel selber stellte, durch die sie vernichtet wurde," Joseph Goebbels, quoted in K.D. Bracher et al. (Eds.), Nationalsozialistiche Diktatur, 1933-1945: Ein Bilanz, 16 (1983). The term 'militant democracy' became known in the English-language political science literature in an essay of Karl Loewenstein in 1937. Loewenstein, Militant Democracy and Fundamental Rights, 31 *American Political Science Review* 417 (1937). Prior to World War II, a number of constitutional regimes used various techniques that belong to the arsenal of militant democracy (outlawing parties, prohibition of uniforms, and so on) before the phrase was even born. However, very often these measures were intended to protect semi-democratic and autocratic political systems against popular fascist movements that made impressive gains at the elections.

[19] Lord Acton, Smith's Irish History, in History of Freedom, edited by Figgis and Lawrence. London. 1907. 252

[20] Several components of Germany's Basic Law serve the purpose of preventing the abuse of democracy. These basic constitutional choices relate primarily to institutions that are closely connected to political democracy (most typically, political parties). Some post-communist constitutions enacted during the transition to democracy follow the German example to certain extent by expressly prohibiting the exclusive control over the state by any organization (see e.g., Hungary's Constitution, Art. 2(3); Poland's Constitution, Art. 13).

"(n)othing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

But the threat of totalitarian movements is not simply that Fascist will win at the elections. Lowenstein argued that authoritarian regimes are held together not by violence but by emotionalism. This is what replaces the rule of law. Authoritarian regimes and fascist movements possess an arsenal of techniques for emotional mobilization. Nationalist fervour and intimidation, with the implied threat of physical coercion, are the most common elements of political emotionalism. The only genuine goal of such politics and movements is to seize and retain power at all costs. This description applies to Al-Quaida. They can succeed in this goal only if they operate within the democratic institutional infrastructure.

Democracies are rather defenceless against emotionally manipulative politics and challenges that exploit constitutional opportunities. In this regard the emotionalism of totalitarian religious fundamentalism is not very far from that of the emotionalism of extreme right and left totalitarian movements. Moreover, the intimidation and scare resulting from terror is also generating a kind of politics of emotion or other form of irrationality. Although today, at least in secular societies, the likelihood that the democratic regime will be destroyed through the abuse of democratic political institutions and processes is slight, it is clear that the defensive mechanisms of democracy are rather weak. We don't have a clear picture about the capacity of the state to resist terrorism (partly because it is said that a clear understanding of these capacities would help the 'enemy') and we have even less knowledge about the fate of liberal constitutional structures, once the state and the political forces in power become unconstrained in the name of efficient counter-terrorism. The current institutional arrangements offer little control over the legitimacy (and appropriateness) of restrictive measures that increase the power of state agencies over the citizens.

There are obvious differences between contemporary international terrorism[21] and the abuse of democratic institutions that resulted in the militant democracy answer. International terrorists operate clandestinely and aim at public intimidation. The prevailing legal definition emphasizes that the violence against the public intends to intimidate the public in order to force changes in public policies. These changes are assumed to occur because of the specific responsiveness of a democratic political community. The other fundamental goal of a terrorist act is the disruption of a governmental function or other service crucial to the public with the aim of compelling public authorities to specific behavior. The emotional politics behind the totalitarian movement relies on open legal techniques of democracy in order to establish an irreversibly anti-democratic system of power.[22] This irreversible shift might be the goal of Islamist fundamentalists in Muslim countries where militant democracy would be applicable, were these states democracies.

One could object that the differences between terrorism and political fundamentalism are increasingly blurred. In Algeria an extreme measure of militant democracy was applied when elections were suspended in view of the emerging victory of (primarily local) Islamist fundamentalists, who were engaged in large scale terrorism.[23] Certain national terrorist organisations did have a 'civilian' political wing and national radical Islamist movements and local religious organi-

[21] "By and large there is agreement that a terrorist act, group, or organization is characterized, first and foremost, by the choice of a particular strategy, i.e. to inflict visibly massive harm on non-combatants in order to destabilize the enemy system or regime. The strategy of terrorism sets it off from other forms of militant action such as partisan and guerilla warfare that target the persons and infrastructure of a political regime or occupying power. The second defining feature is the proclaimed goal of terrorism: Terrorists oppose, and want to change radically, the socio-political status quo, whether on the national, the regional, or the "global" level. This sets terrorism off from the different forms of organized crime (and the war economy of warlords) that seek profit." Renate Mayntz, Organizational Forms of Terrorism Hierarchy, Network, or a Type sui generis? MPIfG Discussion Paper 04/4. International terrorism has a religious rather than secular basis, it is international in scope, and is characterized by its network structure that makes the fight against it difficult and the existing arsenal of the law difficult to apply. See e.g. Hirschmann, Kai, 2000: The Changing Face of Terrorism. In: International Politics and Society 7(3), 299–310.

[22] The historical experience suggests that most of the emotional politics based totalitarian movements rely on violence and terrorist techniques are part of their arsenal of intimidation.

[23] One of the problems with the Counter-terror state is that the robust and long-lasting restrictions often occur in countries that are hardly mature democracies: in fact the anti-terror measures and permanent emergency create a semblance of oppression and remain an obstacle to democracy. Given the scale of terrorism in countries like Algeria that is bordering permanent civil war it is of course hard to advocate full blown democracy. There is a paradox here that reminds me of the paradox of militant democracy: anti-terror measures that defy human rights and democracy are allegedly legitimate. There is a 'counter-paradox' exemplified in recent Greek legislation. Law 3251/2004 exempts from terrorist crime those acts which are committed with the aim to establish or defend (!!) a democratic regime or in the exercise of fundamental rights. This approach seems to go against the understanding of militant democracy (the prohibition on abuse of rights) of the European Convention of Human Rights (Articles 17 and 18). The attitude of the Greek legislation is shared by many countries where the government, like that of South Africa came out of a struggle where the resistance movement (and the government) were involved in acts of terror. Of course, with the benefit of hindsight ANC turned to be different from fundamentalist Islamist terror as it, indeed, established a democracy. The position represented in the Greek law is a clearly abusive and the pro-democracy terrorism argument makes it impossible at the moment to come up with an international treaty on terrorism.

sations may have strong relations to international terrorist networks.[24]

A further potential difference is that hand militant democracy was designed to fight against secular totalitarian movements. But totalitarian political movements often relied on terrorist methods and were in control of illegal, subvert networks. Moreover, anti-secularist groups that concentrate on terror in countries with Muslim majorities are interested in the creation of radically Islamist states. This is an effort to create an irreversibly anti-democratic regime where the fundamental self-regarding choices of the individual are not tolerated. From the perspective on 'traditional' political terrorism this kind of religiously motivated international terrorism is fundamentally different, as many movements relying on terrorism where not against democracy as a principle, but wanted a democratic regime for their kin. Intellectually, however, there is a striking community: both forms of political action are part of distinct worldviews of political fanaticism, the archenemy of liberalism.

It is not surprising that the legal techniques, which were developed against totalitarian political movements are increasingly used in democracies against religious fundamentalist movements, which are considered to provide support networks to terrorist networks. These religious movements intend to combine the advantages the democratic process and rule of law offers with terrorism, and also against terrorist movements that are primarily interested in destabilising Westernised Islamist or 'infidel' regimes. Some religious fundamentalist movements rely on terrorist intimidation, just like non-totalitarian political movements, e.g. see Basque political extremism and ETA. Historically too, totalitarian movements, which used democratic means relied at the same time on terrorist intimidation (see the SA in Weimar Germany).

2.2. The Preventive State

One can only speculate how far reaching the counter-terror reactions will be. But it is easy to foresee that these reactions have the potential to move towards a new separation of powers arrangement and to a restructuring of fundamental rights. The emerging paradigm is one of a preventive state, a term introduced by Professor Carol Steiker[25]. Professor Steiker emphasized that criminal law and criminal law related law enforcement activities are not the most important among the techniques intended to neutralize dangerous individuals. In the aftermath of 9/11 this preventive paradigm became increasingly applicable to the measures and practices that are taken against terrorism but which affect the whole society.[26]

Counter-terror measures, and particularly those that were taken in response to international terrorist threats aim at *prevention*. Such measures rely on the techniques that were developed to handle dangerous people (drug traffickers, money launderers, child molesters, etc.,) and aggravate a certain crisis of legality. The measures are, to a great extent not new. The new development is that the crossing of thresholds is becoming routine. By crossing of threshold I mean that the results of increased, and legally easy to obtain surveillance are not only used in the prevention context but these are increasingly admissible in criminal procedures. For example, the USA Patriot Act eased the restrictions under which wiretap results can be presented in a criminal context. Equally important for the emergence of the preventive state is that the boarder-crossing measures, which are being made permissible in the terrorism context may become acceptable outside the global terrorism context, and not simply for anti-crime purposes but for general administrative purposes of the welfare state.

The emerging concept of preventive state is increasingly used beyond the original criminal law paradigm to describe a structure where a new technique of disaster prevention (that is replacing crime prevention) plays a decisive role in structuring the whole constitutional order. The prevention that originates from the handling of dangerous people neatly coincides with certain concerns of the modern welfare state, at least its more paternalistic versions, that undertakes to prevent all sorts of misfortune, using techniques of surveillance.[27] The surveillance policies that are emerging outside the counter-terror world, e.g., a national DNA bank for health or crime

[24] See, e.g., Victor Ferreres Comella, The New Regulation of Political Parties in Spain, and the Decision to Outlaw Batasuna, in Militant Democracy, supra note 2, at 133.

[25] Carol S. Steiker, op. cit.

[26] For the application of the term in the anti-terrorist context see Eric S. Janus, The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence Criminal Law Bulletin, Vol. 40, No 6. p. 576, 2004; Robert M. Chesney, THE SLEEPER SCENARIO: TERRORISM-SUPPORT LAWS AND THE DEMANDS OF PREVENTION, 42 HARV. J. LEGIS. 1 (2005).
The term emerged in Germany too (Praeventionsstaat) Erhard Denninger, Freiheit durch Sicherheit. Wie viel Schutz der inneren Sicherheit verlangt und verträgt das deutsche Grundgesetz?, Kritische Justiz 467 (2002).

[27] This is again remarkably captured in Steiker, op. cit. at 779: "The growth of the regulatory state in the post-New Deal Twentieth Century further established the pervasive presence and knowledge of the state in many guises, creating new opportunities for prophylactic state action." Ibid at 778-79.. For a similar trend and that the anti-terrorism techniques are relying on a continuous development that predates 9/11 see, in the German context Lepsius, op. cit.

identification purposes will become possible once such data bank is established under the dictates of terror-prevention. But the preventive state may move beyond the reinforcement of current trends aimed at the restructuring of fundamental rights. The detention regime represents a particularly problematic version of prevention, and not only because the grounds of dangerousness are elusive and in the terrorist context will easily remain within the privilege of the executive. Mass detention is structurally conducive to mass abuse of human rights given the level of dependency of the detainees and the interests of the jailers. In case a prevention state is constitutionalised, it is of primary importance to have all possible safeguards for humane treatment and control over detention conditions. The practical difficulty is that this is again cost intensive and it is difficult to allocate resources to protect a group that is considered as being composed of dehumanised people. Such dehumanisation is facilitated by the self-presentation of the suicide bomber. To grant 'prisoner of war' status to the detainees is perhaps conducive to a minimal humanitarian protection. However, contrary to prisoners of war, the typical detainee is suspect of dangerous tendencies; he is a person who either participated with a certain probability, or is supposed to be *willing* to participate in heinous crimes[28], and therefore should be subject to punishment. A typical prisoner of war shall be released after the cessation of hostilities, while this does not apply here, as the detainee shall be brought to justice.[29] On the other hand the basis of detention will be the *potential* to become a terror supporter: the model of this logic is again the US Japanese internment. *Korematsu* may not be good law anymore, but "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war and insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous."[30]

From a constitutionalist perspective the issue is to what extent the preventive state model can fit into the present constitutional arrangements, and, more broadly, is there a need for a separate constitutional model that incorporates the prevention state concerns. Of course, the preventive state as it stands today, before being turned into a full scale constitutional program, is an individualized, piecemeal set of developments that point in the same direction.[31] In the process of forming a proper answer to this question it seems reasonable to consider the experiences with militant democracy that represents an attempt to incorporate into the constitution and into the concept of constitutionalism a certain level of departure from the 'normal' structures and principles that animate liberal constitutional democracies.

2.3. The Counter-terror State as a Mixed Regime

Both militant democracy and the preventive state as components of an counter-terror state are in principle disregarding certain fundamental values of the very system they stood up to defend. This charge of self-contradiction is erroneous, and the paradox is only illusory, or, in fact, hypocritical. There is a clear difference between those who disagree regarding permissible democratic policies and those who simply deny the reliance on democracy as a primary process of decision-making and the legitimacy of democratic life forms in civil society.[32] Among the latter we find the enemies of democracy, including terrorists. Fundamentalist terrorists attack the people in democracies not only because of the imperialism of the 'infidel', but also because of the challenge that democracy represents to the community of true believers, who are to be kept in the flock. The religious movements that lend public support to the religiously motivated ideas of terrorists are the legitimate targets of the counter-terror state as militant democracy. The threat of religious subversion may justify restrictions and prohibitions regarding the political participation of such movements[33]. Already Locke,

[28] The way inchoate crimes are interpreted and given how serious terrorist crimes are, it is possible that the law will criminalize the intent (willingness) to participate in terror acts – a development that certainly challenges all the assumptions of enlightenment based criminal law.

[29] The alternative status model for the potential terror supporter is the one of the mentally disabled suicidal person who is committed to psychiatric placement until contrary medical finding. Here due process or (in Europe) patient's rights require regular revision of the status of the person, while in a terrorist detention situation the personal conditions do not matter, and release is dependent on the ending of the 'hostilities'.

[30] United States v. Salerno, 481 U.S. 739 (1987). One should ask: if this is true what is the relevance of the Congressional Habeas Corpus suspension provision of the American Constitution? In case of an alleged crime one needs suspension of the Constitution but in the lesser case of alleged dangerousness there is no need for that?

[31] Specific elements of the preventive state non-program are presented as explicit programs, for example when it comes to handling of sex-offenders in the community. But there is no all encompassing program relating the general nature of the state behind the preventive state. It is more a matter of muddling through independent but structurally similar decisions.

[32] This distinction follows in a way R. Cooter, Constitutional Consequentialism: Bargain Democracy versus Median Democracy, 3 Theoretical Inquiries in Law 1, at 3 (January 2002). Cooter argues that in case of a shared value, the debate regarding a related policy is generally not about the value itself but about the meaning and interpretation of that value. The ultimate dilemma that comes up in accepting militant democracy is this: at what point is the community (co-existence within the community) endangered without exclusion of certain participants.

[33] This is very different from personal liberty deprivation, where different standards shall apply.

in his letter on religious tolerance, has indicated that the state's tolerance toward religions does not extend to those who, in the name of religion, demand civil powers, that is, privileges, or who are not willing to be tolerant toward others: "those that by their atheism undermine and destroy all religion, can have no pretence of religion whereupon to challenge the privilege of a toleration."[34] It is a fundamental assumption of liberal democracy that it operates only where some kind of rational discourse is possible and such discourse is understood to be the normative basis of the decision-making in the community. However, the denial of participatory rights is intended to maintain the conditions of that discourse.

This justification of the anti-democratic, rights-restricting measures, special regimes against fundamental enemies of democracies does not rule out the possibility that the measures taken under the dictates of exigency that fundamentally depart from the principles of democracy will actually undermine democracy itself.

While the militant democracy elements in the counter-terror state are questionable as far as democracy is protected here by restricting democracy (at the expense of specific groups) the prevalent element of the preventive state, *viz*. penetration undermines the traditional concept of liberal constitutionalism. The fight against terrorism, like against other forms of subversion of democracy needs *penetration* (among other into terrorist networks but also into all areas of social life in order to detect terrorist potentials) with all the related rule of law problems. By *penetration* I refer to a kind of gathering of information that enables reasonable and informed preventive action.

The counter-terror state, following the logic of militant democracy intends to protect certain fundamental rights and values by denying those rights to some people who are believed to abuse the system. The logic runs the risk of singling out certain groups of people as potential abusers of the opportunities that democracy and human rights have to offer.

There is a fundamental difference between the actual strategies, even beyond the difference in the handling of probabilities. For example, even if one finds legitimate the rights restrictions that are dictated by militant democracy considerations, the extension of the restriction of freedoms in the name of counter-terrorism is potentially broader than what is dictated in a militant democracy. In the case of militant democracy situations the restrictive measures are rather well targeted at the "enemy' to be contained. The 'enemy' is relatively well identifiable and the impact of the restriction on the rest of the society is not direct (at least in principle) so that the right to associate, travel, speak should not be affected for people unrelated to the suspect groups, movements, ideas that are considered dangerous to democracy. Many of these considerations apply to the political wing of the Islamists operating primarily among Muslims.

But the logic of the counter-terror measures that applies to clandestine terror networks is different. In this context, exactly because these measures are intended to eliminate the knowledge disparity that helps the clandestine terrorist and those who work on recruitment, are based on massive data collection and other related restrictions of movement, assembly, etc. Such measures affect all, and additional restrictions of freedom are likewise spilling over the whole society, in order to restrict the possibilities of the terrorist. For that reason, in the counter-terror policy perspective all citizens are to some extent treated as being, at least to a small extent, potential terrorists. The right to travel, privacy, property of all citizens (see the ease to freeze assets) etc., are affected. Further, these measures are costly, and sometimes prohibitively so. It follows, in line with the above considerations of probabilistic calculus that the preventive efforts will concentrate on certain select groups. Because of the intricate relation between Islam (a perverted minority version of it) and the terrorist networks in the probabilistic calculus it seems to be reasonable to concentrate the above mentioned rights restricting efforts on the 'suspect groups', even if the suspect group cannot be well defined among the much larger group of Muslims. Moreover, in some countries; at least at the level of public opinion there seems to be some sympathy among larger groups of Muslims who are therefore a logical extended target of prevention suspicion. This runs a fundamental risk of institutionalised discrimination. The singling out is not justified by sufficient reasons, and it remains, at best, at the level of justification offered in *Korematsu*: if the military commander believes that people of Japanese ancestry will collaborate with the Japanese, assuming the Japanese troops reach the West Coast, than people of Japanese ancestry are dangerous. The concerns about the repressive abuse of detention "are especially heightened when the state moves, as it often

[34] J. Locke, A Letter Concerning Toleration: Latin and English Texts, (J. Horton & S. Mendus, (eds.)) 47 (1991).

does in the criminal context, against a discrete and targeted enemy."[35]

One cannot deny *a priori* that in face of a threat of disaster that cannot be well calculated but has the potential to entail fundamental damage to the existence of the society, a different fundamental assumption may prevail about the possibilities and conditions of public order that serves as a precondition for the constitutional regime. The constitutionalisation of militant democracy is one such option, and the procedural safeguards built into the use of the arsenal of militant democracy, the effort to rely on judicial control, though using different substantive criteria than in 'normal' law indicate the genuine commitment to the rule of law and democracy. In a militant democracy institutional design allows for a certain switch from the default model of democracy that serves for most of the assumptions of the constitutional regime. A second switch mechanism that emerged in constitutional design is that of a state of emergency. For our purposes here it is sufficient to refer to a Weberian ideal type of constitutionalized emergency[36] where judicial control is less important, and where the emphasis is on a shift on decision-making from the legislative to the executive. Here the constitutional control exists primarily in the form of strong procedural rules that are required for the authorization and continuation of emergency.[37] Further, restrictions of most fundamental rights are foreseen *ex ante* for the emergency situation, though additional restrictions may be introduced during the emergency. Such possibility is foreseen in international human rights documents. The theoretical issue is whether the still uncertain *repertoire* of the counter-terror state fits into the state of emergency. It is intellectually attractive to handle the counter-terror exception as a separate category that combines elements of militant democracy, and, perhaps, state of war, though a very exceptional one (without an identifiable enemy state).

Of course, there are serious arguments to keep the *repertoire* within the paradigm of the existing mechanisms of the democratic state, applying standard proportionality analysis combined with new administrative priorities, where the weight of national security or public order will be increased. Given the current assumptions regarding the continued presence of international religious terrorism a counter-terror state presupposes a long term enabling.

3. Issues of Rights Restriction in the Counter-terror state

There are compelling reasons for treating fundamental rights as having overriding nature, or in the famous wording of Dworkin: to treat fundamental rights (and only fundamental rights) as trumps. "Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."[38].

This is not *unconditional* rights absolutism. From a utilitarian perspective rights are protected because in a legally structured world this is the most efficient form to enhance individual autonomy. Rights have strategic advantages. Alternatively, fundamental rights are part of individual autonomy. Autonomy means that the individual is in exclusive charge of (responsible for) his fate, or choices determining this identity. Rights embody the "'moral fact that a person belongs to himself and not others nor to society as a whole.'" *Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S., at 777, n. 5.[39]

Fundamental rights (and only fundamental rights i.e. those that satisfy specific moral functions) are trumps, but this is not absoluteness in the sense that their use cannot go 'wrong'. But what is 'wrong'? Dworkin admits that even speech rights can be restricted to "protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit."[40] Upon reflection on the nature of lib-

[35] Carol S. Steiker, Foreword: The Limits of the Preventive State. 88 The Journal of Criminal Law and Criminology 3. 771. 806 (1998).

[36] Emergency as state of exception, as envisioned in Carl Schmitt's nightmere is outside the legal sphere. It will be the success, not the legality of this exceptionalist, unbound political regime that will provide legitimacy to it, ex post. The problem is that in case the state of exception is efficient, it might result in a tyranny where legitimacy questions matter the least.

[37] See, for example the supermajority requirements in the South African Constitution, or the complicated process of the promulgation in Hungary and in Poland.

[38] Dworkin, op. cit. xii. In a very different Continental tradition, Jean Dabin took a very strong position arguing that rights are given (pertain) to individuals to serve these individuals and not to be the tools of specific social goals, which remain extremely vague Jean Dabin, Le droit subjectif, pp289 et seq.

[39] This was stated in regard to the right to privacy when Stevens, J., (concurring) quoted Charles Fried's formulation, Correspondence, 6 Phil. & Pub. Affairs 288-289 (1977).

[40] Ibid. at 191. Notwithstanding this apparently easy going position, Dworkin is well known for not accepting standard claims of major public benefits. Like other Kant inspired rights theorists (Nozick, Charles Fried) the real end to the rights based regime is a catastrophe. Some leading contemporary rights theorists seem to be even more permissive when it comes to rights restriction: Instead of rights absolutism Alexy talks about "a general prima facie priority in favour of individual rights"; "there [must] be stronger grounds in favour of... [a] resolution required by collective goods than exist for that required by individual rights". The "[p]rima facie priority [of rights] does not exclude the setting aside of individual rights" in favor of other interests with stronger grounds." Robert Alexy, Individual Rights and Collective Goods, in (Carlos Niño ed., 1992) Rights at 163, 178-79.

erties, one finds the justification for preventive action against the abuse of such rights.

Dworkin seems to accept a definitional restriction of fundamental rights, where the specific use is outside the 'proper' definition of the fundamental right. It might be that the initial recognition of a right is not to be applied in the specific case. This happens if it is shown that the values protected by the original right are not really at stake in the marginal case or "if the right were so defined, then the cost to society would not be simply incremental, but would be of a degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved."[41]

Arguably this might be the case with the ticking suicide bomber or where there is a high probability of repeated mass terrorism: the disregard of procedural rights in the temporary incapacitation of suspects and even of 'suspect categories', e.g. of all passengers of a flight is occurring where the consequences of the terror act do not impose only an incremental increase of the costs of right to society. It should be noted that rule of law and rights based considerations as they exist are presented in an absolutist way (indeed this is the source of the success of human rights: it precludes any discussion that would question its absolute validity). Such absolutism served well in many circumstances. However, it remains a form of thinking that precludes adaptation to new circumstances. Rights absolutism is certainly causing problems (which are overcome within militant democracy, which admits relativism of rights, but it operates only if specific preconditions are met: without it the exceptionalism does not apply. The German techniques on the defensive/preventive control of the abuse of freedom of assembly offer a good illustration. A law that was modelled on the language of the German restrictions was introduced in Poland. The Polish Constitutional Tribunal ruled that the Assemblies and Road Traffic Amendment Act of 2004 is unconstitutional because it violates the rule of law.[42] Only the dissent recognized that the new conditions of social communication demand a new look at the right of assembly. The inhibitions that surround fundamental rights inhibit the genuine re-evaluation of the functions and values served by these rights, and the liberal panic[43] that is generated by the security panic does not help to overcome inhibitions, especially inhibitions which have a pedigree and reputation of being historically correct. The call for such re-evaluation should not be understood as a call to disregard the inherent dangers that emerge once one allows the court or the legislator to evaluate of the use of the right remains within its "original function". A functionalist analysis or conditionality may destroy the force of rights by opening up right to judicial or legislative discretion.

Given the above considerations there are no principled objections about radical rights restrictions in favour of public security among conditions of a catastrophe. This is not, however, a carte blanche for a Counter-terror state, where catastrophe is only a matter of speculation. First, the presence, the proximity of a catastrophe remains highly contested, and given that the finding of a catastrophe is a self-fulfilling prophecy law should prevent the occurrence of self-fulfilling prophecies that are based on panic. Secondly, as the following table indicates, the scope of rights restrictions differs in different rights restriction regimes (*see table 1*).

It should be noted that there are obvious differences in terms of rights restrictions between the two regimes. Further, the Counter-terror state moves towards a regime where the rule of law is barely applicable to non-citizens. This element is not characteristic in the prevention state. Given these differences, the considerations that enabled the incorporation of militant democracy and of the preventive state as we know into the prevailing paradigm of constitutionalism are not fully present once militant democracy and preventive state measures are combined in the Counter-terror state.

The Counter-terror state will be operative under perhaps qualitatively different assumptions, once international terrorism becomes a mass phenomena and a matter of daily life. Under such circumstances restrictive measures that seem rational for the maintenance of public safety will result in massive regulatory restriction of liberties. These rational measures may include relocation, ownership restrictions, disregard of privacy, expedited expulsion, restrictions on citizenship, and the institutionalization of expedited administrative measures without judicial control that is considered to cumbersome. Prohibitions on all sorts of assembly, because all mass gatherings

[41] Dworkin, op. cit. at 200.

[42] See Judgment of 10th November, 2004, Kp 1/04. Like in Germany two decades ago, there were violent assemblies in Poland, especially peasant demonstrations regarding agricultural policies. See Judgment of 10th November, 2004, Kp 1/04.

[43] Adrian Vermeuleargues that security panics, which results in assumptions of mistakenly high risk is countered by panic among liberals who claim that there is an excessive risk to fundamental rights resulting from panic dictated restrictive measures on civil liberties. See Adrian Vermeule, Libertarian Panics, U of Chicago, Public Law Working Paper No. 83. 2005.

Table 1

Rights restrictions in the regime of		
Fundamental right or institution	Militant Democracy	Counter-terror state
Freedom of movement	No	For some
Extraditing	No	yes*
Free speech	Yes	yes**
Free exercise of religion	No***	Yes
Freedom of association	Yes	yes****
Freedom of assembly	Yes	No
Surveillance (secret)	Yes, but limited	Far reaching, Administrative*****
Denial of due process	No	Yes******
Detention without judicial control	Yes, in some systems	Yes*******
Burden of proof, hearsay, special trust in government evidence	No	Reversed
Immigration	No	Yes
Torture	No	At least facilitation through rendition of non-citizens********
Access to information	No	Yes
Who declares?	Parliament, or Political branches jointly; Judicial control; Limited in time	General legislative authorization, triggered by events, case by case handling by the executive

* See also the European arrest warrant that was not specifically designed for the fight against terrorism. See further the possibility of extraditing foreign citizens to non-safe countries (where torture or punishment for political views is to be expected).

** Even within the existing paradigm of free speech (clear and present danger) one can envision a return to the interpretation of the test that was offered in Dennis that is mere advocacy or apology of terrorism will be criminalized.

*** In countries like Turkey where anti-secular forces represent not only a danger to democracy but also to security, restrictions apply.

**** For example the German Act on Associations (Vereinsgesetz) enables the government to ban organizations that promote illegality of undermine the Constitution (this is different for the procedure regarding totalitarian parties foreseen in the German Basic Law). After 9/11 the Act was amended and the 'religious privilege' was repealed. In consequence at least half a dozen religious organizations were banned. Membership in the group is not criminalized so far.

***** Of course, in many countries the reflex of the judicial state continues to have effect. In Norway, for example, extended covert police surveillance requires judicial approval, but at a closed hearing with a security clear lawyer present. The law entered into force on 5 August 2005.

The extension of surveillance may serve security concerns and therefore it is becoming accepted in democracies, and these might be sufficient for incapacitation (at enormous administrative costs) but the concerns of the judicial state do not offer mechanisms to take legal action against the alleged terrorists because surveillance based evidence is hardly admissible or the authorities are reluctant to disclose their sources or allow cross examination. Mullah Krekar's case serves as a good illustration. Mullah Krekar, the admitted former head of Ansar Al-Islam, a UN listed terror group was granted asylum in Norway in 1991. In 2002 he returned to Iraq allegedly to continue his terrorist activities. Once got back to Norway his refugee status was revoked and was arrested several times with charges of terrorism but because there was no admissible evidence the charges were repeatedly dropped and extradition to Jordan was rejected because of concerns of possible torture in Jordan. The valid deportation order could not be executed because of rule of law concerns. On the other hand Sweden denied the asylum application of Ahmed Agiza who was returned to Egypt to serve his in absentia conviction for terrorism. The Swedish government got assurances that Swedish diplomats can visit regularly the terrorist to see that Egypt provides to its commitments. Nevertheless, UN Committee against Torture found Sweden to be in violation of the Convention against Torture. Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005). See further Chahal v. United Kingdom, Judgment of 15 November 1996, where the Court found a guarantee provided by the Indian government to be, of its own, insufficient protection against human rights violations.

On extradition related problems see generally Human Rights Watch "Empty Promises:" Diplomatic Assurances No Safeguard against Torture.April 2004 Vol.16 No.4 (D)

****** In Hamdi v. Rumsfeld 124 S. Ct. 2633 (2004) it is noticeable that the Supreme court is ready to accept a lower standard of due process that applies in administrative procedure.

******* This seems to be the dividing line at the moment between the judicial state and the detention state. India had a number of systems with administrative detention (see above).

******** Even the Canadian Supreme Court agreed that in principle, depending of the outcome of balancing non-citizens might be extradited to countries where there is a serious risk of torture. Suresh v. Canada (Minister of Citizenship and Immigration) 2002.

offer potential targets are also likely. Both efficiency considerations and the limited availability of judicial and other supervision serving resources indicate that under increased threat of terror there will be a movement away from the judicial state, perhaps towards a preventive regime.[44] Even if judicial review survives in the Counter-terror state, at least *pro forma*, it will be a fully deferential rubberstamp operation as it happened at times of war, using risk assumptions exemplified in *Dennis*.

A preventive regime with a (administrative) detention regime does not turn the Counter-terror state into a regime that satisfies principles of liberal constitutionalism, even if a country's constitution envisions and legalizes such practices.

Some forms of detention that were created in the past in democracies seem unacceptable by contemporary human rights standards.[45] But 'contemporary standards' are subject to social-cultural change and the risk assumptions are certainly crucial in the shaping of that change. Detention regimes exist already in mature democracies, like India and Israel. It is debated how the existence of such regime undermined the democratic, and even more the liberal nature of these states, which seem to maintain democracy by allowing pockets of exceptionalism that are isolated from the rest of society. From time to time the judiciary attempted to bring under its control some elements of these enclaves of exceptionalism, but it is not clear how sustainable the effort is.

Ironically the move towards a detention regime means the acceptance of the inheritance of colonialism: both in Israel and originally in India the British emergency ordinances were used for administrative detention, and France relies on measures inherited from the Algerian war. In the United States the executive relies on a World War II precedent regarding the use of in camera military courts. In Israel and in India there was a move towards applying the norms of the judicial state, in the sense of allowing stricter supervision of detention conditions by the judiciary[46], and in the US the Supreme Court did not rule out a similar role for the judiciary. Ironically, to the extent stable democracies (most of them former colonizers) reinvent detention regimes, they re-import the par excellence tool of oppression of the former colonial power. Unfortunately, in this regard the terrorists and those who sympathize with their success score a point, as they claimed that they fight against the infidels as colonizers, and now the colonizer is colonized because the means of oppression used by the colonizers is self-imposed upon the neo-colonialist successors. When the courts of mature democracies refuse to accept information obtained by the police in former colonies who continue to use police practices of the former colonizers, in an unconscious way they fight the dirty past of the former colonial power. It is a position triggers the standard reaction from law-enforcement officials, claiming that the high judicial standards are out of touch with reality; and at least the American, British, Italian and French executives push for a more rights intrusive legislative authorization of law enforcement and co-operation with the 'less respectable' foreign authorities.[47] At the same

[44] I am in no way advocating such measures, but assume that this is the most likely trend.

[45] See the contemporary condemnation of the Japanese internment and its approval in Korematsu or the rejection of the position of the House of Lords' position in Liversidge.

[46] The judiciary in Germany is particularly adamant in regard of not giving up its supervisory role and so far there was little willingness to change its proportionality analysis in favor of the preponderance of security concerns. A Hamburg court overturned the conviction of Mounir Motassedeq of over 3,000 counts of accessory to murder. Applying the ordinary standards of a rule of law state the Hamburg court stated: "a conflict between the security interests of the executive and the rights to defense of the accused cannot be resolved to the disadvantage of the accused. .. [W]e cannot abandon the rule of law. That would be the beginning of a fatal development and ultimately a victory for the terrorists... The fight against terrorism cannot be a wild, unjust war." Desmond Butler German Judges order a Retrial for 9/11 Figure N.Y. Times, March 5, 2004, at A1. However, the issue is not how just the 'war' is – it is just as self-defence can be: the issue is how effective it is with traditional rule of law means.

"The German Constitutional Court handed down a judgment on July 18th 2005 declaring the German European Arrest Warrant Act unconstitutional… The Constitutional Court held that the Act … infringes the constitutionally protected freedom against extradition of Germans in a disproportionate manner and contrary to Article 19.4 of the Basic Law because it provided for no possibility of challenging the judicial decision granting extradition… The consequence of the judgment is that the extradition to Spain of suspected member of the Al Quaeda terror network of both German and Syrian nationalities was freed." http://eulaw.typepad.com/eulawblog/2005/09/european_arrest.html

(See, however, the Schleier abduction decision, where the Court was more ready to disregard fundamental rights and deferred to government policies in an actual terrorist threat situation). See further, for the UK A v. Secretary of State for the Home Department, [2004] UKHL 56, 2 W.L.R. 87. e.g. Lord Hoffmann's position. However, the Polish Tribunal ruled that the European arrest warrant is constitutional for the time being, although the Polish Constitution unconditionally prohibits the extraditing of Polish citizens, and immediately after the decision Polish citizens were extradited.

[47] At this point, once again the paradox of international counter-terrorism – and the only chance of success for a policy against international Islamist terrorism comes from international co-operation that incorporates co-operation with illiberal states that have a strong reputation of condoning terrorism. Notwithstanding some very strong judicial statements that would like to protect the borders of the national rule of law based legal system from the impurities of the 'torture states', the national governments have to integrate their counter-terror policies into an international program that seems to condone serious abuses of human rights at the level of actual practices. This inevitable acceptance of illiberal, hardly democratic regimes is troubling for a number of reasons. The position of countries like Algeria or Egypt is that without harsh measures and rights restrictions (which in the official version are way not that drastic as Western human rights NGOs claim) they could not prevent a fundamentalist take-over. This is clearly a militant democracy argument and as such quite acceptable, though crucial elements of Western militant democracy, like strong judicial oversight are hardly present. But the problem is more a chicken and egg problem. It is argued that the religious fundamentalists are a genuine threat exactly because the governments are oppressive, authoritarian and non-responsive (corrupt). Whatever the sequence is, and irrespective of the strength of the arguments made by the illiberal allies of the Western states, it is

time such human rights based snobbery at their allies in counter-terrorism undermines the possibilities of a united front. Or, perhaps, the problem underlines the importance of having universal human rights, because without such fundamental agreement there can be no co-operation.[48]

Of course, detention (limited in time or unlimited until the general threat is deemed to persist) is just one component of the Counter-terror state. Gray is a color of a surprising number of shadows. Even in rule of law conscious judicial states like Germany "the police law doctrine of individual liability has slowly been abrogated in favor of new security laws which empower the police to control people without prior suspicion".[49]

The current administrative and law enforcement attempts to move from criminal justice to preventive justice were countered in many democracies by judicial review, although the extension of the preventive state through legislation is going ahead without strong judicial resistance and even where judicial opposition exists this is based on doctrines of proportionality[50]. The standard of comparison for proportionality easily varies, especially in face of non-quantifiable threats. Further, as mentioned above, because preventive measures are not classified as 'punishments', in the preventive state the judiciary either will diminish its standards of control or simply will not be involved.

It is hard to strike a balance at the moment, and in a number of Western democracies the judicial positions shifted to some extent back to the pre-existing stance of the judicial state (that is primacy of the judiciary). The highest echelon of the judiciary seems ready to assert control over the alleged dictates of counter-terror policies. It seems that the judiciary did not gave up its desire to steer the judicial state among the conditions of proliferating ever more far-reaching counter-terror measures. This means that they apply some form of balancing or proportionality, and at least in matters of alleged torture they refuse compromises. This attitude, however, brings up the conflict between constitutionalism and democracy, and the related normative question of who shall take the fundamental decisions on matters of societal risk-taking. In order to structure this problem that is crucial for the legitimacy of one or another constitutional arrangement that deals with international terrorism, one has to take into consideration the problem of social risk-taking (See Part IV., infra).

Whatever role the judiciary assumes under the present circumstances, in case of mass terrorism the judicial state will not be able to sustain itself, and the judiciary will become deferential or simply it will not exercise any supervision, due to legislative changes. There will be an automatic shift first to emergency and then to the Counter-terror state. It is foreseeable that in a Counter-terror state there will be new policies on the possession and use of firearms, or interrogation, without any attempt of the law and the courts to curtail the policy choices.

The creation of 'special' constitutional regimes has its inherent problems. The experience with militant democracy is not convincing as to its efficiency: and it was efficiency that dictated the introduction of such regime into liberal constitutions. The measures seem to be efficient but in the countries where militant democracy was institutionalized there were no serious threats to democracy originating from the emotional politics of totalitarian mass movements. It is also clear that where counter-terror state is applied, and where democracy is not robust, as in Russia or Pakistan, the counter-terror measures contributed to the erosion of democracy.

It is perhaps accidental that in countries where the threat of terrorism is at the moment more serious (in terms of probability of occurrence) the need for stronger protection of constitutionalism through formalized, or constitutionalized solutions of a predetermined and limited counter-terror state is more needed. Most Western democracies, which were so far less exposed are in the enviable position of safety that enables them to maintain most of their high standards without specific efforts. Paradoxically

clear that perhaps in the majority of Islamist states there is considerable support for fundamentalist political Islam and that support may provide logistic support to international terrorism. However, the mistrust of Western judiciaries and other institutions in the institutions of non-democratic states might be justified in pragmatic terms as the use of torture, the duplicity of paid agents, and the possibly high level of penetration into the Islamic state by fundamentalists, or even the actual complicity of state agencies and fundamentalists in some countries makes the information coming from the allies unreliable at best. Moreover, it is in the interest of these non-democratic regimes to call all the political movements that are critical of the oppressive regime as terrorists of as fundamentalists. It is often contentious in rendition, asylum denial and extradition cases to what extent the person is only pictured as terrorist by the national authorities of Third World countries, though he is only a dissident or just someone who got into personal conflict with local police that is systematically abusing its powers. This reluctance of the judiciary and some other public institutions to rely on information coming from 'torture states' is further increased by the institutional (organizational) interests of Western executive bodies and law enforcement in particular, to accept the information provided by their partner organizations operating in 'torture states'.

[48] Andras Sajo, Human Rights knowledge systems??? in Chris Eisgruber and Andras Sajo (eds.)

[49] Oliver Lepsius,. #38.

[50] In the context of preventive justice proportionality is the preferred approach even in the United States. See Austin v. United States, 509 U.S. 602, 622 (1993) (civil forfeiture has to proportionate). See Steiker, op. cit. 776. The only area where at least some judges use a categorical approach is torture.

it is in these countries that the likelihood of abusing emergency for the sake of departure from democracy and human rights is lesser. It is more likely at the moment that in 'mature' democracies the abuse is not about perpetuating authoritarian regimes but reliance on emergency by incumbents to win elections in fair elections.

It seems to me that the 'business as usual' attitude of certain Western European courts and other agencies sends the wrong message to other, less fortunate states fighting terrorism. The theoretical conclusion, namely that there are a variety of possible constitutional models to handle the probable threat of a terrorist disaster, has a strong pragmatic implication. The frontline countries[51], which are ridden by daily terror, need special constitutional regimes to prevent the deterioration of the regime into permanent illiberalism. The message that the same inflexible human rights standards are to be applied that were so valiantly defended by certain European high courts may not send the right message.

But one should not hasten to impose the judicially or democratically agreed upon limited restriction of fundamental rights. The judiciary, human rights activists, and principled politicians (even if motivated by hidden anti-Americanism is simply being in opposition) stand up for seasoned ideals that proved central to liberal constitutionalism. Even if these ideals seem to pose problems in a changed environment, even if ideals, as Lord Acton would put it, are neither entirely true, nor entirely feasible, it takes "one excess to correct another, an ideal to correct an evil."[52]

It is certainly more attractive to share the principles of great liberal thinkers than the fears of secret services analysts. But one feels the presence of some Western hypocrisy and double standard here. Consider the countries where the threat seems to be contained, i.e. it is limited to a couple of smaller attacks with little likelihood that there will be much domestic reserve for additional terrorist attacks. The judiciary of most of this countries often condemns authorities in Third World countries where torture is practiced in the fight against (alleged) terrorism. These condemned countries are not genuine democracies but the fundamental difference is that the presence of, and popular support to, terrorism is sizeable. It is not clear that the democratic reaction of the great democracies would be fundamentally different from what is practiced in certain Islamic states, at least it might be quite similar without proper constitutional and civic preparation in good times. At the same time the 'torturer countries' are expected to provide for the defense of the less affected Western democracies.[53] In the interconnected world (that is already interconnected through mass migration and networks of interconnection) democracies and counter-terror quasi authoritarian regimes are interconnected too, and without the benefits of co-operation one cannot expect risk reduction. But this brings up the issue, to what extent this unseemly international coalition of different states can work together with different sets of norms, how one can have a system where 'torture' states and judicial states have to fight terror together. Is the judicial state that snobs the 'information' coming from 'torture' states is living in hypocrisy or self-denial?

4. Constitutional risk aversion in the Counter-terror state

The religious fanaticism of fundamentalist terrorism challenges fundamental assumptions of enlightenment that serve as the foundation of liberal constitutional order, namely that human beings act in self-respect. Further, it challenges the state monopoly over terror, a foundational characteristics of modernity. Constitutional democracy limits (and disguises) state monopoly over constraint and violence, which is the ultimate underlying foundational element of political organization. A monopoly of violence is still violence. The constitutional arrangement that limits and legitimises the monopoly over violence is successful because it offers basic social security. But the security of society that results from the monopolization of violence is ambivalent. The constitutional regime's precondition is security that is needed for the political community. In this regard a constitutional regime is not different from despotism, hence there remains a certain affinity in the most constitutional democracy to its despotic antinomy when it comes to the safeguards of the existence of the political regime. Montesquieu, describing despotism, has some prophetic words on the ambiguity of the security preconditions of all state power. All forms of political government need tranquillity but where there is tranquillity there will be the silence "of those towns which the enemy is ready to invade".[54] A window of

[51] Note that only a minority of terror attacks is committed against the 'infidel', and the real 'battlefield' is outside Europe.

[52] Gertrude Himmelfarb, Lord Action. Routledge, London. 1952. 84.

[53] See the problem of admissibility of evidence provided by police and secret services operating in 'torturer' states, including states that have nasty standards of police interrogation that differ from what is found civilized in the West.

[54] La conservation de l'État n'est que la conservation du prince, ou plutôt du palais où il est enfermé. Tout ce qui ne menace pas directement ce pal-

a radically militant democracy opens exactly on such towns and the same might be the result of a protracted war on terror.

Whichever form the counter-terror state will take partly depends upon the dictates of the terrorists. Nevertheless the form of this new constitutional conglomerate still remains a matter of more or less democratic self-definition, although the anxiety of the public regarding public safety may play an increasing role in such self-definition.

The most natural characteristics of a political community is self-defence. Self-defence incorporates the maintenance of public order. The protection of public order entails the risk that those in power will use public order protection as a pretext for the preservation of their personal power. This is clearly an abuse of self-preservation. A constitutional state's self-defence raises peculiar problems even beyond the above-mentioned abusive self-preservation. One of these problems is that in certain genuine emergency situations the danger to the public order and public good requires departures from established rules and requires the use of discretionary power. Already Montesquieu identified such situations ("if the legislative power believed itself endangered by some secret conspiracy against the state"[55]), allowing here a temporary disregard of separation of powers.

Democracy in its less self-confident, and therefore potentially more militant and prevention oriented versions (i.e., when it is concerned with its own preservation) is risk averse, at least selectively. (This paper only deals with democracies concerned with self-preservation and hereinafter 'democracy' stands as a shorthand for this type of democracy only.) Risk aversion is troubling in a constitutional democracy that stands for liberty. Risk-taking is required for liberty, at least according to Justice Brandeis, who gave the following justification for not limiting freedom of speech:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail against the arbitrary. [....]They believed [...] courage to be the secret of liberty [...and] that the greatest menace to freedom is an inert people.[56]

Further, he referred to the negative consequences of preventive oppression: "fear breeds repression [...], repression breeds hate."[57] The remark points to an inherent problem of militant democracy resulting from risk aversion: where hatred is already widespread in society, the government has less to lose in the application of repression. Therefore there will be a greater likelihood that restrictive means will be abused and that such abuse will meet lesser resistance from otherwise freedom- loving citizens.

Along these lines of risk-taking for liberty, Brandeis (referring to speech) suggested that the seriousness of the evil, the probability of occurrence, and the reasonableness of the assumption regarding the probability are to be taken into account. Following Justice Holmes, he insisted that in the speech context immediacy (of harm, evil) is the applicable test. Immediacy cannot be translated directly into probability, though immediacy increases probability. Immediacy refers to the temporal and spatial vicinity of acting in an evil way.

As mentioned above, if a society operates under the assumption of risk aversion in matters of political action, it follows that the above reasoning is not attractive. The inclination to social risk aversion increases where specific historical experiences and reasons dictate precaution. Here even low probabilities of occurrence of an anti-democratic u-turn are impermis-

ais ou la ville capitale ne fait point d'impression sur des esprits ignorants, orgueilleux et prévenus; et, quant à l'enchaînement des événements, ils ne peuvent le suivre, le prévoir, y penser même. La politique, ses ressorts et ses lois y doivent être très bornées; et le gouvernement politique y est aussi simple que le gouvernement civil.

Tout se réduit à concilier le gouvernement politique et civil avec le gouvernement domestique, les officiers de l'État avec ceux du sérail.

Un pareil État sera dans la meilleure situation, lorsqu'il pourra se regarder comme seul dans le monde; qu'il sera environné de déserts, et séparé des peuples qu'il appellera barbares. Ne pouvant compter sur la milice, il sera bon qu'il détruise une partie de lui-même.

Comme le principe du gouvernement despotique est la crainte, le but en est la tranquillité; mais ce n'est point une paix, c'est le silence de ces villes que l'ennemi est près d'occuper. » C.-L. de S. Montesquieu De L' Esprit des Lois. Livre V. Ch. XIV

Here is my 'democratic' version of Montesquieu's vision (changes are in italics:

The preservation of the state is only the preservation of the *citizen*, or rather of the palace where he is confined. Whatever does not directly menace this palace or the capital makes no impression on ignorant, proud, and prejudiced minds; and as for the concatenation of events, they are unable to trace, to foresee, or even to conceive it. …

Such a state is happiest when it can look upon itself as the only one in the world, when it is environed with deserts, and separated from those people whom the state will call Barbarians. Since it cannot depend on the militia, it is proper it should destroy a part of itself, namely those who are suspect of being different and therefore emissaries of the Barbarians…

As security is the principle of *democracy*, its end is tranquillity; but this tranquillity cannot be called a peace: no, it is only the silence of those towns, which the enemy is ready to invade.

Since strength does not lie in the people, but in the secret services that animate it, in order to defend the state secrecy and surveillance must be preserved...

[55] C.-L. de S. Montesquieu, The Spirit of the Laws, (A. Cohler, B. Miller, & H. Stone, (eds. & trans.)), Book 11, 159 (1989). The conspiracy would entitle the executive to make arrests.

[56] Whitney v. California, 274 US 357 at 375 (1927). For a similar attitude in the war on terror context see Justice Stevens, dissenting: „For this Nation is to remain true to the ideals symbolised by its flag, it must not wield to the tools of tyrants even to resist an assault by the forces of tyranny." . Rumsfeld v. Padilla No. 03-1027. Argued April 28, 2004--Decided June 28, 2004.

[57] Id.

sible, or at least a matter of precautionary restriction. This assumption resulted in the advocacy for militant democracy, and it if such dictates prevail in a world of terrorist induced disaster scenarios. The risk evaluations of a disaster-aware regime system differ from that in a 'normal' or 'pre-terror' liberal state. The risk assumptions are illustrated in *Dennis* that was decided at the height of the Cold War were the Justices of the Supreme Court, like many ordinary Americans where of the opinion that in regard to Communist advocacy of revolution "we cannot bind the Government to wait" until an attempt to act is imminent.[58] Concepts of imminence vary, and in the atmosphere of the 'war on terror' it might change back with more reason than it was found acceptable during the days of KGB inspired communist conspiracies.[59]

Certain constitutional systems are based on the assumption that risk-taking is impermissibly careless; if liberty is risk taking, than this is irrational and unacceptable, in light of historical experiences or realities. (Of course, the whole debate about terrorism is major attempt to construe a narrative with normative force regarding the 'reality' that exists).[60] In light of the prevailing liberal understanding of freedom of expression, the dissemination of (even offensive) views does not threaten democracy *per se* or the constitutional state to a degree to which it would be proportionally justified to criminalize such views. A political system is simply not a democracy if there are views that cannot be represented for political reasons. But what about the systematic preparation of mindsets that seems to bread (in a very small percentage of the audience) readiness to commit terrorist acts, one that makes banal the value of human life, including one's own?

Under the present circumstances, I would consider legislation that curtails free speech in order to prevent brainwashing impermissible for in a liberal system, and unnecessary for a counter-terror state. It is quite another issue if organizations, especially parties *and religious entities*, are used as a framework for expressions that in and of themselves are not criminal. The destabilizing effect of a demonstration and the mobilizing effect of (irrational and gravely violent) public speech may threaten democracy, or at least public order. The appearance of the above-described 'prohibited' topics in propaganda might call for restriction (although not necessarily criminal restriction). According to the principle of proportionality, these forms of extremist speech may indeed entail restriction. Outlawing of events, the restriction of the operation of parties and churches, and, if necessary, their dissolution (with the burden of proof on the authorities, in each specific instances) including the prohibition of religious propaganda might also satisfy a proportionality test under a heightened terrorist threat. At the moment, however, these considerations are not much present in the public discussion.

Are the assumptions of social risk aversion that would justify rights restrictions envisioned in the Counter-terror state themselves justified?[61] Under which circumstances could one claim that such assumptions are reasonable? Risk can be evaluated in terms of reasonableness in a number of cases. A reasonable ground for such assumption of risk can be established in cases where the future event pertains to a class of events that have had a high observed (past) occurrence. Such events can be discussed in terms of statistical probabilities. Some events that need to be evaluated in the militant democracy or free speech context do not show these characteristics (even if one does not accept that historical events are unique). In other words, in some instances there are no, or only few, cases where hate speech resulted in racial atrocities or cases where participation of anti-democratic

[58] "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected....
Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. ...
The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger." 341 U.S. 494, at 509-511.

[59] The Australian Supreme Court had even stronger assumptions of risk in the decision banning the Communist Party.

[60] The German Constitutional Court, for example, found constitutional the decision of the Bavarian authorities to prohibit the well-known Holocaust-revisionist historian David Irving from speaking in a demonstration, as it seemed likely his remarks would amount to a crime. The demonstration itself was not prohibited.Decision of 13 April 1994, 90 BVerfGE, 241-255 ('Auschwitz hoax').

[61] Contrary to the militant democracy scenario, where historical experience serves as a strong factor in the probability calculus and where the development of the disaster takes a long time with a number of opportunities to interfere, in the terror scenario history plays a different and minor role, while the disastrous events are developing with extreme speed after the operational action (the suicide mission) has been started, and it is nearly impossible to intervene at that stage.

forces at free elections resulted in an irreversibly anti-democratic regime. In circumstances where events do not constitute a mass phenomenon, public attitudes to risk and risk-taking might replace risk analysis based on the use of data. (However, single events are very often treated as fate in everyday thinking.) In situations where there is no basis to evaluate probabilities, risk-taking is of a special nature: it absorbs assumptions about risk (probability). In these cases risk-taking or risk aversion implies that the decision-maker accepts/rejects all probabilities of occurrence. This might seem unreasonable, as it is not based on occurrence-related analysis. However, this approach to risk as an attitude is functional in the decision-making process, as it helps to come up with solutions in situations where information is scarce or too costly. Even where there are data (which presupposes a significant number of events as well as costly data collection), there is still a matter left for risk-taking as an attitude, as there is no benchmark regarding proper behaviour under conditions of known (identifiable) risks.

To complicate matters, when it comes to disasters that undermine the state or its democratic structure the probability calculation and the related-consequences calculation become particularly difficult, not only because the events are too scarce for statistical (probabilistic) analysis, but because events are not insular. The simple model of probability is based on the assumption that occurrences are isolated. The related assumption of insularity works this way: repeated abuse of speech results in a deterioration of the communicative sphere, but it remains unrelated to electoral results and *vice versa*.

The specific problem of the constitutionality of the counter-terror state emerges in a context where relations are causal and *interrelated*. One event increases the likelihood of a different second one that disproportionately increases the likelihood of an evil consequence. Hence the often-noticed cascade phenomenon in the collapse of law and order and democracy.[62] Most liberal democracies are ready to take risks when it comes to speech. When it comes to terrorism supporting movements, or clandestine networks, the assumption might be different. Contrary to the relatively isolated speech situation, in the case of religious movements one can easily assume that action/speech within the movement context has a multiplying effect: that it will result in an organized way in additional action/speech, causing multiplied risk. Speech and action that by definition are likely to result in mass action significantly increase the likelihood of evil.

The implications for rights restrictions and discrimination of the different risk-assumptions were mentioned above. Currently there is some judicial resistance to the shift to more risk aversion that is going on through the channels of ordinary politics, executive and law-enforcement practices and legislation. The political process is not yet fully at the level of constitutionalisation of a counter-terror regime, in the sense of pushing for fundamental formal changes in the text of the constitution, which might change the role of the judiciary in the definition of permissible rights restrictions. At the moment many courts continue to claim that they protect fundamental rights. In a society that faces the threat of large scale terrorist attacks judicial mistakes in favor of the rule of law and liberty will result in considerable increase in the likelihood of terror acts.[63] It may sound somewhat demagogic, but the judges are quite probably better sheltered than the general public or the public of another country that will be the target of the next terror act in case of a mistaken grant of asylum. The directly concerned public has limited opportunities to express its concerns and desires regarding public safety, and even if they do so through their politicians, the judiciary is there to veto these decisions in the name of constitutional imperatives. Cass Sunstein has argued that in case of high risk situation, in regard to the mistakes the public makes in panic or under conditions of uncertainty one should rely on expert decisions.[64] This points towards executive decision-making though it does not rule out some judicial control, as long as this is increasing the reliability of expert risk-handling. Sunstein claims that ordinary citizens as humans are irrational risk evaluators, partly because of affect that determines risk perception. Scientifically trained experts are less vulnerable to cognitive defects originating in emotional distortions. It thus makes sense to transfer decision-making in these areas to experts insulated from political processes. The opposite view was recently presented by Dan Kahan and co-authors. They point to the enormous discrep-

[62] The rule of law might collapse as a result of a cascade process where one democracy-protective restriction triggers a second one and their combined effect puts the rule of law in jeopardy. Suspension of habeas corpus becomes particularly problematic when conditions of detention are placed beyond the control of law.

[63] The reality is somewhat more complicated. People who are acquitted for reasons of non-admissibility of evidence quite often continue to remain in preliminary detention on other grounds, or certainly remain under close surveillance.

[64] Cass Sunstein, Laws of Fear. Cambridge University Press. 2005.

ancies among experts in matters of risk perception. Increased government regulation that bypasses the democratic process shows shortcomings that are not that different from public democratic judgment. In particular, Dan Kahan and colleagues argue that the disagreements between lay and expert perceptions of risk are grounded on different value choices. These value choices are emotionally grounded, but emotions and values cluster in society, as they are culturally shaped. The Dan Kahan approach is based on the assumption that "culture is *cognitively* prior to facts in the sense that cultural values shape what individuals *believe* the consequences of such policies to be."[65] Constitutionalism is a device to fight the tendency of men to link the probability of a particular event taking place with their ability to imagine similar events taking place (availability heuristics) that seems to become pervasive in the context of terrorist threat.

While in ordinary circumstances judicial policy-making can be justified on grounds that the rights protection provided by the courts serves all citizens, the case is different where alleged terrorists are acquitted on grounds of ordinary due process standards (like the wiretap evidence was collected before such data were statutorily made admissible), and in case the judiciary vetoes the laws that are enacted to protect security. These decisions, which were taken on principled grounds impose a risk to the community that is greater than the risk in 'ordinary cases' where on similar procedural grounds a murderer is acquitted. However, constitutionalism is an institution that is deliberately created to disregard utilitarian calculations, at least to some extent. The recurrent question is, is the threat of international terrorism one that goes beyond the conditions that serve as prerequisites to constitutionalism. The answer is that we don't know, and we don't know partly because, contrary to the assumptions of constitutional democracy, we are not provided with sufficient information under the pretext that this will endanger security and leads to unnecessary panic.

5. Concluding Remarks

The constitutional state's self-defence builds its regime of legal protection on the presumption of being endangered. It views some phenomena, behaviour, and the operation of certain groups with scepticism and suspicion. In this regard, democracy's stance, if not dictated by fear, should at least be precautionary. As a legal and technical result of precaution, the presuppositions about the liberty to act might be reversed. The intellectual limit of this is the presumption of innocence in criminal procedures. Unfortunately, as the preventive state model indicates, the boundaries of crime are easily shifted. Another boundary is that, although the presumption of the 'abuse of liberty' does not have to be questioned all the time, the impact of this presumption upon those who do not abuse liberty must be subject to scrutiny at all times.

In principle there exist techniques for the protection of the state's constitutional (democratic, liberal) order that, again in principle, do not eliminate the values to be protected. The applicability of these techniques depends partly on the historical circumstances, and it is likely that a certain level of stress, the presence of likely disasters makes the application of these more benign measures counterproductive. I conclude that liberty is about higher risk-taking. In a way, constitutions constitutionalize risk-taking against a prevalent human risk aversion. Such constitutional choice might be laudable for liberals (as it meets their preferences), but it does not solve the problem of reasonableness. Traditional constitutional structures represent a certain implicit risk assumption and the social (legislative) risk analysis takes place within that parameter. Constitutions implicitly dictate specific assumptions about risks, which influence the risk analysis itself. But constitutional-political risk analysis and its constitutionally mandated (and changing) evaluation are not conclusive: the solutions that are dictated by considerations of risk handling are fundamentally influenced by assumptions about social costs, and the result of cost analysis and acceptance of costs. Security is expensive in the simplest terms of money (see the increased spending on security services and the costs imposed on travellers, in the form of loosing time and paying higher airport taxes). From the constitutional perspective, and from a democratic legitimacy perspective too, rights restrictions and rights violations represent social costs, which may rule out certain options of rights restrictions. To take drastic measures against Muslim religious communities is extremely costly both in terms of enforcement and in regard of the counter-productive nature of such measures resulting form the resistance and alienation generated in the Muslim community.

The legal boundaries of the democratic political regime must be set in such a way as to reckon correctly

[65] Kahan, D. *et. al.*: Fear and Democracy or Fear of Democracy? A Cultural Evaluation of Sunstein on Risk*, Yale Law School Public Law Working Paper No. 100*. (2005), 17-18

with abuses of liberties. The proportionality analysis that was developed in the judicial state for the needs of the normalcy, requires that the selected technique is the least restrictive of rights. All this is easier said than done. The principle might apply even in the Counter-terror state but who determines what is the level of *necessary* restriction?

The theoretical justification of a Counter-terror State has to face the problems of the practical application of the powers granted to specific government agencies, with all the related slippery slope and abuse problems. (The nature and sources of such abuse are to be studied in order to have efficient prevention. The abuse is often simply the result of lack of sufficient knowledge or self-deception that emerges in hast, where uncertainty cannot be admitted by decision-makers.) I am well aware that the measures of the constitutional state's preventive self-protection that are introduced in response of the possibility of disaster differ from the solutions that are generally used and accepted in a constitutional state, under ordinary circumstances. As such, restrictions may be capable of undermining the constitutional state itself, the very value to be protected. There has been a certain erosion of the constitutional state in the name of effectively protecting order and, more recently, fighting terrorism. However, it is better to prepare oneself to hardship when there is time for reason-guided reflection and not to wait until the pressures of hardship dictate hasty decisions. All these indicate that it is a) hard to avoid a departure from 'constitutionalism as usual' in the fight against international terrorism; b) that it is better to constitutionally authorize such departure with setting levels of departure, where the greater the departure the stronger the judicial or other control by external bodies shall be; however, such control might be exercised ex post under the constitution. At least the example of militant democracy indicates that a clearly constitutionalized regime of exceptions makes the constitutional system sustainable.

However, the magnitude of restrictions in a Counter-terror state differs from that in a militant democracy while the uncertainty regarding the probability of occurrence is greater and, at least in the operative stage of counter-terror action it is less prone to public discussion. To the extent the Counter-terror state moves into a constitutionally recognised preventive state this is not without problems. It should be added that a move towards the preventive state is problematic also because of its impacts outside terrorism: it reinforces the trends of the last decades to move away the techniques that animated the departure from classic constitutionalized criminal law that was based on the assumption that social condemnation that reaches the level of liberty deprivation[66] requires special judicial guarantees. It is also problematic, at least from a traditional perspective of constitutional law, that crime prevention, or, better said, *risk prevention* (through all encompassing or suspiciously selective surveillance and penetration) centered, instead of being liberty centered.

Already before 9/11 in Germany, a paradigmatic judicial state, security became a constitutional value, an 'objective interest' even in the absence of armed attack.[67] Once security becomes the factual basis of a judicial decision, the judicial control becomes quite formal and the judicial state survives in form only. "Security purposes are no longer subject of normative justifications based on the constitution, rather they enter into the weighing process as self evident fact; this no longer allows for the common constitutional "balancing-principles" to function. Facts cannot be balanced. Constitutional control in a legal sense has to transform itself into a political control, since the relevant criteria are no longer based on the supremacy of law but on factual conditions."[68]

The Counter-terror state operates as a preventive state. This means that assumptions of high risk presence will prevail in most spheres of life: the feeling of threat becomes pervasive (in accordance with the plan of the terrorists). Once the assumption of danger will become the standard one has to prove that there is *no* danger in case she has a liberty claim.[69] This is clearly the opposite of the assumptions of ordered liberty.

Of course, the protection of democracy is primarily a social and political question.[70] Legal measures are unsuccessful without governmental policies protecting democracy. As mentioned above, international terrorism may result in a situation where one has to rethink the applicability of fundamental rights. Most

[66] A certain ambiguity was part of liberal law when it came to preliminary detention that was seen as measure, a regulation that is subject to less demanding standards and not punishment, though it is very often much worse than punishment and has much less factual basis.

[67] 100 BVerfGE 313 (1999), at 382. (covert electronic surveillance system in regard to international organized crime is upheld).

[68] Lepsius, op. cit. #56.

[69] Denninger, op. cit. 471.

[70] A constitutional state capable of self-defence must be determined enough to provide the material resources that guarantee the independence of the judiciary. But even the most independent and powerful administration of justice will not be able to defend democracy and preserve it as a constitutional state if it is devoid of the constitutional spirit, that is, if those employed in the courts are not determined and active supporters of the constitutional state.

forms of principled reasoning about rights do not exclude such reconsideration. Fundamental rights are only temporary and partial absolutes that preclude the discussion regarding the consequences of a rights based regime. One should not rule out that continued, mass scale terrorist threat will impose on us a regime where rights play a much more limited role than today, and yet this will be a form of liberal democracy – the best under the circumstances. But this will be the best liberal regime under those dreadful circumstances only if people have actually understood the reasonability of such restrictions, and where people's reasonable assumptions dictate their reasonably restrictive choices. Public understanding is based on demonstrable need and shall not be replaced by panic stirred by election hungry politicians and accountability avoiding government. Such demonstration is particularly relevant because there are serious *prudential* considerations *against* the rights restrictions that seem to be dear to the proponents of an counter-terror regime. These are the same prudential considerations that animated the movement towards fundamental (natural, human) rights: without due process, or under torture false confessions mushroom; governmental agencies will become victims of organizational bias; restrictions on speech prevail over truth and innovation; restrictions on freedom of religion and ethnic or other indices in preventive operations create resentment and create new enemies to the state. There is no clear trade-off between rights restriction and security. Sometimes an increased amount of public spending might increase security in a way that does not require a considerable diminution of liberty. For example, with more expensive airport security devices it is likely that intrusive search can be eliminated.

If there will be a need for a special constitutional regime of the counter-terror state, the first rule about such state should be that there is a duty to show that the necessity for the restriction actually exists. It is in this regard that the experience of militant democracy remains relevant. At the moment, in the name of expediency, most of the relevant information is not available to the public that is invited to participate in a deliberation that is dictated by fear of the unknown. The task, *ceterum censeo*, remains to determine narrowly the techniques of precautionary legality. Otherwise we run the risk of the state that is describe by Hegel:

"Being suspected, therefore, takes the place, or has the significance and effect, of being guilty; and the external reaction against this reality that lies in bare inward intention, consists in the and barren destruction of this particular existent self, in whose case there is nothing else to take away but its mere existence."[71]

The first requirement of a rational discourse that may democratically legitimize the paradigm shift of constitutionalism towards a preventive-detentionist, or even a counter-terror security state is that people have to realize that contrary to the criminal law model of counter-terrorism where the talk is about changes in a special area of criminal law, the counter-terror dictated measures are not neatly directed against the source of terror, but effect the whole community. For example, the Patriot Act authorizes access to private records of "innocent Americans" without having to demonstrate a connection between the records and a suspected foreign terrorist or terrorist organization. In the strong version of the Counter-terror state prevention requires to consider *all* citizens and non-citizens as risk factors, though not equally so. A distinction in the application of restrictive measures among social groups in relation to religion or ethnic origin raises fundamental issues of discrimination. Is a relatively mild religion based discrimination, e.g. in frisk and search, rational and is it compellingly so? The preventively restrictive measures may encompass all spheres of society, not just criminal law. The topic of public deliberation should be this: are we ready to accept an everyday life that operates as a sphere of crime prevention *for all of us*? After all, international terrorism is made possible exactly by the ordinary tools of modernity that are quintessential to our globalized life, like internet, unlimited travel and other means of instant interconnectedness. Restrictions to limit terrorists' access to these forms of interaction mean that access for all users has to be curtailed (see storage of *all* telephone numbers called, the possibility of restricting the sixty some billion prepaid credit cards business because these cards are ideal for money laundering, etc.)

In the public debate fundamental issues of citizenship and bounds of humanity that unite mankind in the shadow of disaster should figure prominently: is society ready to give up its equality based togetherness, or citizenship implies that the whole society

[71] Philosophy of Mind # 591. Baillieu translation. Hegel had in mind the French terror. The logic of the Jacobine terror described by Hegel as the consequence of the rule of a faction over other factions through the control of the state is the archetype of the danger a suspicion based regime represents to democracy. As the French example shows, the claims of the presence of conspirators in the society resulting in emergency was the perfect (partly fabricated) opportunity for the Jacobine leadership to get rid of their opponents and to generate public support or enough fear to acquiesce in the regime.

should bear equal increased risk for not allowing racial, religious profiling, extradition etc? After all, this kind of solidarity is the basis of citizenship and nationhood. A nation prefers to go to war (according to this normative theory) in case the condition of piece is to extradite, expel etc., a certain person or group of people (or a piece of territory with people who don't want to leave). At least this was the norm in ancient Greece. The function of constitutionalism, namely the protection of insular minorities creates very strong presumptions against the permissibility of such discriminatory preventive measures dictated allegedly by efficiency, because it is likely that public sentiment and prejudice, hand in hand with administrative complacency will go against whole groups of overwhelmingly innocent people who cannot protect themselves in the ordinary democratic process.[72] Needless to say, once the restrictive measures seem to affect a well identifiable group of others, when the rights restriction can be presented as restrictions on others' rights, these measures will be defined and accepted with little concern as to their harshness.

But in case the terror attacks become a matter of daily routine, and for those countries where this is a daily reality already, if the people have to choose the dictates of fear, one more fundamental choice remains, and that will be the really hard moral choice. The terrorist denies the recognition of the victim as human being: and in a society that has to face mass terror (with daily suicide bombs and with the potential of mass disasters) all citizens are potentially denied minimal respect by the terrorists and their supporters. Under these circumstances it will be extremely difficult to consider the terrorist as a human being, a being with dignity like us. Of course, Kantian concerns (and pragmatic concerns related to the possibility of mistaking the identity of the terrorist[73]) dictate that one should never treat a human being as non-human. But Kant had in mind a very abstract moral being. Had he ever to consider the extreme difficulty no to degrade the person who by his own act has degraded humanity?

[72] This opinion is voiced by many authors, quoted in Gross, op. cit. 1035 note 105.

[73] It seems to be the case that terror prevention training is not particularly sensitive to problems of mistaken identity, hence mentally disordered citizens are likely targets of fatal preventive intervention.