

THE EMERGENCY PARADIGM AND THE NEW TERRORISM

What if the end of terrorism was not in sight? *

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In what follows I wish to argue that constitutional democracies should not employ emergency institutions to deal with today's terrorism.¹ By this I mean that the kind of institutions classically called emergency powers are not an adequate framework for confronting the new terrorism that has emerged over the last decade, spectacularly striking the World Trade Center on September 11, 2001. A given terrorist attack might call for emergency action. But coping with the impact of a particular strike and confronting terrorism generally are two different things. Treating today's terrorism as an emergency amounts, I shall contend, to using the wrong paradigm.

Terrorism as used by Al-Qaeda and jihadist militants is in many ways out of the ordinary. First, terrorism in general does not fit neatly into our category of crime. Like common crimes, terrorist strikes are acts of violence perpetrated on civilians or non-combatants. However, unlike ordinary crimes terrorist actions are designed to have an impact on a much larger number of people, possibly an entire nation, than the direct victims of the violent action. The larger impact is critical to the political dimension of terrorism. Terrorists seek to advance their cause by disrupting the lives (through the "terror" effect) of many more people than they hit. With today's particular brand of terrorism, this extraordinary character is compounded by another element: there is a probability that terrorists might use unconventional weapons capable of inflicting massive damage of unprecedented scale. This new terrorism also challenges, arguably, other familiar categories and lines of division, such as those separating intelligence gathering from criminal investigations or external from internal security.

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In light of such characteristics, it seems natural to see today's terrorism as an exceptional threat. At different points in the past, however, going as far back as Ancient Rome, various constitutional systems have confronted exceptional circumstances threatening their existence. They have often done so by using institutional arrangements specifically designed for that purpose. Such arrangements are usually referred to as emergency institutions, sometimes as "states of exception"; they include the Roman dictatorship, martial law, or the French state of siege, to mention just a few. One may ask the question, then, of whether we should use institutions like these to deal with the arguably exceptional danger posed by today's terrorism.

To address this question, I will examine salient emergency institutions found in different legal traditions, focusing on both history and theory. Constitutional emergency institutions, I will show, have a common underlying structure across contexts and cultures. Call this structure the emergency paradigm. I will characterize the paradigm identifying its component parts and the various forms they take in different contexts. On this basis, I will argue that the emergency paradigm is structurally unsuited for confronting the present wave of terrorism.²

1. Emergency institutions: history and theories

1.1. Ancient republican Rome: the dictatorship

No emergency institution has attracted more attention than the Roman dictatorship; it has been considered a model of constitutional emergency powers by a long tradition of writers ranging from Machiavelli and Rousseau to Clinton Rossiter and Carl Friedrich in recent times.³ Who has not heard the story of Cincinnatus? Called from the fields, the story goes, Cincinnatus assumed the absolute authority of the dictator for sixteen days, crushed the enemy, and then virtuously resigned high office to return to his plows. This story is probably a legend, but the mere fact that it has become legendary is evidence of the

² I will not argue against using emergency institutions for coping with acute crises and disruptions such as may occur in the wake of a given terrorist attack –or in case of natural disasters or health crises. My argument concerns the use of emergency institutions for countering terrorism generally, including the preventive dimension of such counter-terrorist measures. Thus, my focus is different from that of Bruce Ackerman in his book, *Before the next attack*, Yale University Press, New-Haven, 2006. For another perspective on emergency powers, see John Ferejohn and Pasquale Pasquino, "The law of the exception: a typology of emergency powers", *International Journal of Constitutional Law*, 2004, 2, pp. 210-239.

³ See Machiavelli, *Discourses on Livy*, Book I, ch. 34; Rousseau, *On the Social Contract*, Book IV, ch. 6; C. Rossiter, *Constitutional Dictatorship*, [1948], New-York: Harbinger Books, 1963, pp. 15-28; C. Friedrich, *Constitutional Government and Democracy*, 4th edition, Waltham, Mss, Toronto and London: Blaisdell Publishing Company, 1968, pp. 557-560, 580-581

enduring attraction exercised by the Roman dictatorship. Such attraction, however, raises problems as it may lead to anachronistic reinterpreting with later admirers of the Roman dictatorship reading back into the institution the concerns of their own time.⁴

Forming an accurate picture of the Roman dictatorship is no easy task; it runs into two quite different difficulties. First, most sources concerning the Roman dictatorship date from the second and first centuries BC or later, while the institution itself was in regular use much earlier. The annals of Rome indicate that seventy-six dictators were appointed from 501 BC to 202 BC.⁵ After that, dictatorship fell into disuse for one hundred and twenty years. Then, Sulla and Caesar briefly revived it (in 82 BC and 49-44 BC respectively), although in ways that have traditionally been viewed as destructive of republican institutions.⁶ Thus, while it is the dictatorship of the earlier period that has been held up as a model of constitutional emergency government, most of our information about it involves some measure of conjecturing in the sources themselves.⁷ Such uncertainty is problematic because, over the course of this earlier period, Roman institutions underwent significant changes, notably the creation of the Tribunes of the Plebs with the right to veto the decisions of other magistrates (*intercessio*), and the gradual strengthening of the right of appeal to the people (*provocatio ad populum*) in case magistrates should want to use coercion against citizens. *Provocatio* came to be regarded as one of the principal rights of the individual Roman citizen, providing a guarantee against execution or flogging without trial. Since the dictatorship began to be used before the establishment of these institutions the commands of dictators were probably not subject, originally, to vetoes by the Tribunes, or to *provocatio*. A number of sources affirm that this continued to be the case afterwards, maintaining that there was no right of appeal to the people against a dictator. Today the prevailing view seems to be that the

⁴ A recent study has argued that anachronistic distortions have affected most modern accounts of the Roman dictatorship by political theorists and philosophers, including those by Machiavelli and Rousseau; see F. Saint-Bonnet, *L'état d'exception*, Paris, Presses Universitaires de France, 2001, pp. 43-71.

⁵ Not all of the 76 cases are well attested; some may be dubious. But there is no doubt that the dictatorship was used regularly over this period.

⁶ The question of how sharp the break was between the earlier dictatorship and those of Sulla and Caesar is still the subject of scholarly debate; see in particular, C. Nicolet "La dictature à Rome", in M. Duverger (ed.), *Dictatures et légitimité*, Paris: Presses Universitaires de France, 1982 pp. 69-84; C. Nicolet, "Dictateurs romains, *strategoi autokratores*, généraux carthaginois", in F. Hinard (ed.), *Dictatures*, Paris: De Boccard, 1988, pp. 27-47. Note that the issue was controversial among ancient authors as well. Thus, Dionysius of Halicarnassus, writing in the late first century BC, included in his account of the early dictatorship a vehement charge against the "harshness and cruelty" of Sulla, commenting that Sulla's dictatorship revealed what had been the true nature of the institution all along. "So", Dionysius wrote, "the Romans then perceived what they had long been ignorant of, that the dictatorship is a tyranny". (Dionysius of Halicarnassus, *Roman Antiquities*, V, 70-77, esp. 77, 4).

⁷ See, among others, W. Nippel, "Emergency powers in the Roman republic", in B. Manin, P. Pasquino (eds.), *Le Gouvernement d'exception*, Paris: Cahiers du CREA, 2000.

right of *provocatio* did become available against dictators (probably around 300 BC), at least within the city boundary (*domi*). This means, however, that we do not have a clear picture of just how far the authority of dictators extended at various points in time.

The second difficulty is related to the character of the Roman constitution, and of dictatorship in particular, not to the state of our knowledge. The early dictatorship was essentially a customary institution. Statutes concerning particular dictators were passed on occasion, but the institution was primarily governed by constitutional custom. No written law generally defining the powers of the office was ever passed. Moreover, in Rome constitutional practice was shaped by contending views of what was the proper conduct of each organ.⁸ This was particularly true of the dictatorship, which seems to have been associated with the struggles between patricians and plebeians; various annalists mentioned that it was used as a means to instill fear in the plebs.⁹ Finally Roman constitutional tradition was explicitly considered flexible and open to pragmatic adjustment. Not following precedent if the need arose was regarded as both justified and desirable.¹⁰ Given the contentious and pragmatic character of Roman public life, one should not expect the dictatorship to have been governed by fixed and well-defined rules; searching for such rules would indeed be misguided. On the other hand, if we take into account the general character of Roman constitutional practice, it is unsurprising that we should observe variations and exceptions across known instances of dictatorship.¹¹

⁸ See A. Lintott, *The Constitution of the Roman Republic*, Oxford, Oxford University Press, 1999, pp. 1-26. Lintott notes that "the constitution of the Republic was not something fixed and clear-cut, but evolved according to the Romans' needs by more means than one. It was also inevitably controversial: there were frequently at least two positions that could be taken on major issues", stressing further that "the constitution did not stand above politics like a law code: it is what the Romans thought to be right and did." pp. 7, 26.

⁹ See Livy, II, 18. II, 29-30; Dionysius of Halicarnassus, *Roman Antiquities*, V, 70, 1-5. However, inspiring fear (*metus*) did not necessarily mean using coercion. Actually, there were virtually no cases of dictators employing violence to suppress popular seditions. Dictators seem to have acted more like mediators, possibly combining intimidation and suasion to calm civil unrest. While Dionysius stressed that the dictatorship was originally designed as an instrument of the patricians, he also noted that the office had been used with moderation and virtue down to Sulla. It is surprising that Machiavelli, alert as he was to the importance of class struggles in republican Rome, should have failed to mention the class element in the dictatorship. Rousseau did not mention it either. However, this character did not escape the attention of Montesquieu (see *The Spirit of the Laws*, Book II, chapter 2).

¹⁰ On this, see A. Lintott, *The Constitution of the Roman Republic*, *op.cit.*, pp. 4-7

¹¹ For instance, we find in the annals cases of dictators staying in office for longer than the traditional six months, see Livy, VI, 1; XI, 22. We also find cases of dictators being designated by popular vote (see below). In another case the will of the dictator did not prevail over the opposition of the Tribunes (in a dispute between the dictator and his subordinate, the master of the cavalry [*magister equitum*]), see Livy, VIII, 30-35.

Thus, it is probably not possible, and not desirable either, to depict the early Roman dictatorship as an office governed by clear-cut rules. We can, however, identify the core principles of the office.¹² They were as follows.

The dictator held undivided authority. Unlike most other magistracies, the dictatorship was not collegial. All accounts of dictatorship mentioned this feature. When reporting an episode in which a given dictator did not enjoy undivided power, writers stressed the unprecedented character of the event.¹³ Since the dictator did not have colleagues, these could not obstruct his decisions. In Rome the principle of collegial magistracies did not mean that colleagues had to consult each other and act in concert; it meant that colleagues could block or reverse each other's decisions; often the consuls took turns in the commanding position. None of this applied to the dictator who could thus deal quickly and decisively with the matter at hand. The need for unified command in times of military crisis seems to be what prompted the invention of the dictatorship. Exactly how far the power of the dictator extended was a contentious matter. Controversies over this were not settled by clear and fixed rules, but by casuistry, thus leading to outcomes that varied somewhat from one case to the next.¹⁴ The extent of the dictator's authority also varied over time with the strengthening of the right of *provocatio*. However, one core element seems to have been stable and undoubted: the power of the dictator was greater than that of other magistrates because he held concentrated authority. Such concentration of power made the dictator almost similar to a king, Cicero wrote.¹⁵

But a king he was not because this undivided authority was conferred only for a short term. This was the second key characteristic of the dictatorship, one that made it consistent with republican principles. Alongside with collegiality, limited terms of office were considered essential to republican magistracies, distinguishing them from monarchical

¹² F. Saint-Bonnet claims that a conceptual framework such as rule and exception fails to capture the reality of the Roman dictatorship (see F. Saint-Bonnet, *L'état d'exception*, *op.cit.*, pp. 43-71). This is persuasive, but it does not prove that the institution was not governed by special, and identifiable, principles. It would be a mistake to look for well-defined and uncontroversial rules regulating the dictatorship. Thus, the lack of such rules does not imply that the dictatorship was not a special office, one that recognizably differed from other magistracies. In characterizing the dictatorship we may use, I submit, the notion of core rules (or principles) surrounded by a penumbra of epistemic imprecision and real variation.

¹³ See Polybius, *Histories*, III, 103; Livy, II, 25-27, esp. 27. Most conflicts of authority seem to have occurred between the dictator and his legal subordinate, the master of the cavalry; on this, see A. Lintott, *The Constitution of the Roman Republic*, *op.cit.* p. 112.

¹⁴ See A. Lintott, *The Constitution of the Roman republic*, *op. cit.*, p. 112

¹⁵ See Cicero, *De Republica*, II, 32, 56. See also J.L. Ferrary, "Cicéron et la dictature", F. Hinard (ed.), *Dictatures*, *op.cit.*, pp. 97-105.

power.¹⁶ Mommsen later characterized the dictatorship as a "temporary restoration of kingship".¹⁷ According to many sources this temporary character took the form of a six-month time limit.¹⁸ However, this was not a well-defined rule; it suffered deviations.¹⁹ Rather, the core principle seems to have been that of short-term appointment. The dictator was appointed for a specified task the accomplishment of which was expected to take a limited amount of time.²⁰ The fact that records always indicated the task for which a given dictator was appointed demonstrates the importance of this feature. While the dictatorship was originally designed to confront military crises or internal dissensions, its use gradually extended to circumstances in which a magistrate enjoying supreme power (*imperium*) was needed while the consuls were unavailable (such as performing religious rituals in case of epidemics, or convening electoral assemblies). In the context of military crises the six-month time limit might have been due to pragmatic considerations (such as the length of military campaigns by the time of the early republic), but it could also be seen as the symbol of the republican character of an office that was otherwise similar to kingship. In proposing his draft of an ideal republican constitution, Cicero characterized the dictatorship as follows: "When a serious war or civil dissensions arise, let one man hold, should the senate so decide, a power equal to that of the two consuls for no longer than six months."²¹ In the preceding sentences, Cicero had just stated that the two consuls should hold "royal power" (*regium imperium*). The wording and structure of this section seemed designed to suggest that the six-month time limit exactly balanced the concentration of royal power into a single magistrate. While the dictator would hold twice as much power as each consul, thus getting perilously close to monarchy, he would be kept within republican limits by holding such power for only half of the consuls' term.

A third characteristic of the dictatorship was that it was externally conferred. This, too, was open to variations. Usually the Senate would direct the consuls to appoint a dictator.

¹⁶ In writing about the first year of the republic, right after the expulsion of Tarquinius, Livy wrote: "But the origin of liberty may be referred to this time rather because the consular authority was limited to one year than because there was any weakening of the authority the kings had possessed. The first consuls retained all the rights and insignia of office. However, one precaution was taken: that the terror they inspired should not be doubled by permitting both to have the *fascēs*." (Livy, II, 1, 7-8).

¹⁷ T. Mommsen, *Römisches Staatsrecht*, Zweiter Band, 1. Teil, Akademische Druck- u. Verlagsanstalt, Graz, 1952, p. 168.

¹⁸ See for instance Cicero, *On the laws*, III, 3, 3, 9; Livy, III, 29; XXIII, 22; Dionysius of Halicarnassus, *Roman Antiquities*, V, 77.

¹⁹ For cases of dictators staying in office for more than six months, see above.

²⁰ See A. Lintott, *The Constitution of the Roman republic*, *op. cit.*, p.110

²¹ Cicero, *On the laws*, III, 3, 9

In some cases a popular vote was held, albeit rarely.²² But dictators were not self-appointed. No magistrate was allowed to assume the authority of the dictator if he thought that the circumstances justified it; that decision had to be made by someone else. And if a popular leader had proclaimed himself a dictator, this would have been perceived as an attempt to establish kingship, thus arousing formidable opposition. The fact that even Sulla and Caesar cared to cause themselves to be appointed as dictators shows the strength of this customary rule.²³

Finally the dictatorship was used regularly, not only on occasion. We know of other Ancient cities occasionally appointing special magistrates entrusted with full powers for a limited term.²⁴ But in Rome this practice was employed repeatedly over a long period of time, thus allowing the development of constitutional customs that regulated it.

Cicero's formulations gave striking expression to Roman republican principles: in times of crisis power may be concentrated in the hands of a single official, on the condition that some other body so decided and that the extent of the power conferred be balanced by the brevity of the term.

1.2. The Anglo-American liberal tradition: suspension of *habeas corpus* and martial law

Moving to a different context, consider now another institution, the acts suspending *habeas corpus* that the British parliament passed during the Revolution of 1689 and thereafter.²⁵ Montesquieu was possibly the first theorist to note the importance of these

²² For an uncertain case of election by the people, see Livy, XXI, 31. For a clearer case of popular election, see Livy, XXVII, 5.

²³ Sulla was appointed as dictator by the *Interrex*, both consuls being dead. However, backed by his army and while using large-scale violence, he had first sent a letter expressing his willingness to assume the dictatorship. See F. Hinard, "De la dictature à la tyrannie. Réflexions sur la dictature de Sylla", in F. Hinard (ed.), *Dictatures, op.cit.*, pp. 87-96. As for Caesar, the legal forms of his successive appointments as dictator are less well known. He too, however, acted with the backing of his army, succeeding in getting himself appointed as dictator instead of just assuming the office. See C. Nicolet, "La dictature à Rome", in M. Duverger (ed.), *Dictatures et légitimité, op.cit.*, pp. 78-81

²⁴ See C. Nicolet, "Dictateurs romains, *strategoï autokratores*, généraux carthaginois", in F. Hinard (ed.), *Dictatures, op.cit.*, pp. 39-41. Greek authors generally called such officials "*strategoï autokratores*" (literally "generals with full powers"). The Athenians used the practice during the expedition to Sicily in 415. "*Strategoï autokrator*" is the phrase employed by Polybius in his account of the appointment of a dictator after the battle of Trasimenes in 217. In this account Polybius did not transliterate the Latin word. See Polybius, *Histories*, III, 86, 6.

²⁵ The first act suspending *habeas corpus* (1 William & Mary, c. 2) was passed in March 1689 shortly after the choice of William and Mary as successors to the Crown. It was a measure designed to prevent James's return. This act was the precedent for all subsequent suspensions, notably those during the wars of the French Revolution and Empire. Such acts were passed about a dozen times over the course of the Eighteenth century

statutes. On the basis of those that he was aware of by the early eighteenth century, Montesquieu discerned that such acts had become part of the English constitutional tradition; and so, he included the practice in his account of the "constitution of England". In a curiously worded passage of this most famous account, Montesquieu mentioned that when the English parliament determined that a "secret conspiracy" was threatening the state, it could authorize the executive to arrest and detain without trial those suspected. In evident endorsement of the practice, Montesquieu closed this passage with the following sentence: the citizens thus detained, he wrote, "would lose their liberty for a while only so as to preserve it for ever."²⁶

However, conclusive evidence that by the Eighteenth century the practice of suspending *habeas corpus* had become a recognized emergency institution in English constitutional law comes from the leading juristic authority of the period, Blackstone. In writing about *habeas corpus*, Blackstone stressed how essential it was to personal liberty that no one could be detained without trial. Prohibiting secret imprisonments was even more important, he added. Then, Blackstone continued:

And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever, it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing. As the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger.... In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while in order to preserve it for ever.²⁷

The fact that Blackstone's closing words echoed those of Montesquieu suggested that the two authors shared the same line of argument. Moreover, Blackstone's statement demonstrated that the foremost authority in eighteenth century English law explicitly conceptualized

(there is some uncertainty on the count). See C. C. Crawford, "The Suspension of the Habeas Corpus Act and the Revolution of 1689", *The English Historical Review*, vol. 30, No. 120 (Oct. 1915), pp. 613-630; C. Emsley, "Repression, 'terror' and the rule of law in England during the decade of the French Revolution", *The English Historical Review*, vol. 100, No. 397 (Oct. 1985), pp. 801-825.

²⁶ Montesquieu's statement in its entirety read thus: "But if the legislative power believed itself endangered by some secret conspiracy against the state or by some correspondence with its enemies on the outside, it could, for a brief and limited time, permit the executive power to arrest suspected citizens who would lose their liberty for a while only so as to preserve it for ever [*qui ne perdraient leur liberté pour un temps que pour la conserver toujours*]. Montesquieu, *The Spirit of the Laws*, [1748], Book XI, ch. 6, Cambridge: Cambridge University Press, 1989, p. 159. Translation modified.

²⁷ W. Blackstone, *Commentaries on the Laws of England*, [1765-1769], Chicago: University of Chicago Press, 1977, vol. I, ch. 1, p. 132.

suspension of *habeas corpus* as an emergency institution comparable to the Roman dictatorship. It has sometimes been claimed that the English constitution lacked an emergency institution; the passage from the *Commentaries on the Laws of England* shows that this was not the case.

More importantly Blackstone praised, in the suspension of the *habeas corpus* act, a formal structure that was in fact similar to the appointment of Roman dictators: the Crown did not decide on its own authority to detain suspects without trial, it received authorization to do so from another constitutional body, the legislative power. Blackstone commended that structure because he viewed it as a guarantee that the emergency regime would not be triggered arbitrarily to satisfy the wishes of the Crown, but only with good reason, and with the consent of the people. The ancient republican tradition did not emphasize such goals, at least not in the same manner. But the formal structure of emergency powers advocated by ancient republicans could, in a different institutional context, be used in the service of modern liberal values.

A fairly similar point can be made about the temporal limit. For Blackstone and Montesquieu the emergency authority to detain without trial was consistent with liberty because it was temporary; the fact that *habeas corpus* was suspended only for a while was essential to their approval of the practice. Certainly Cicero, too, insisted that the dictator should hold his authority only for a short time, but his concern was to highlight the difference between a dictator and a king. Blackstone and Montesquieu had different concerns. As committed eighteenth century liberals, they were more concerned with individual freedom, (some might wish to say with negative liberty), than with forms of government. Yet just as Cicero stressed the time limit in showing that the dictatorship was consistent with republican government, Blackstone and Montesquieu invoked the temporal dimension in arguing that the suspension of *habeas corpus* comported with individual freedom. More than this, by casting the issue in temporal terms and by stating that parting with liberty for a while was justified as long as it served to preserve liberty for the future, the two writers were in effect making an argument that conformed to a key liberal principle, namely the principle that liberty may be restricted only for the sake of liberty, not for the sake of just any kind of common good, such as, for instance, the public welfare. Parting with liberty for a while in order to preserve it forever was not merely brilliant maxim. It also showed that the short duration of emergency powers could be supported on modern liberal grounds, just as it had been supported earlier, in a different context, on republican grounds.

Writing over one century after Blackstone, another authoritative English jurist, Dicey, highlighted the importance of the customary time limit—one year—included in the acts suspending *habeas corpus* passed by the British parliament.²⁸ Dicey's argument, however, was more complex than that of Blackstone and it stressed a different merit of this temporal limit.

Dicey insisted that while these statutes were "popularly called" *Habeas Corpus* Suspension Acts, this name was inaccurate. In truth, he argued, all these acts did was "to make it impossible for any person imprisoned under a warrant signed by a Secretary of State on a charge of high treason, or on suspicion of high treason, to insist upon being either discharged or put on trial."²⁹ These acts did not authorize arrest or detention on charges other than treasonable practices. Thus, they did not amount to a general suspension of *habeas corpus*. Nor did they authorize, Dicey went on, confinement of "a perfectly innocent man without any cause whatever, except (it may be) the belief that it is conducive to the public safety that the particular person—say, an influential party leader such as Wilkes, Fox or O'Connell—should be at a particular crisis kept in prison, and thereby deprived of influence."³⁰ To be sure, in case officials did not conform to these legal restrictions, no remedy was available as long as *habeas corpus* was suspended, for all imprisonments were made—presumably—on charges of treason or suspicion thereof. But as soon as the suspension act expired, Dicey stressed, officials who had broken the law became liable to indictment for illegal conduct during the time that the suspension act was in force; they became liable, he insisted, on both civil and criminal grounds.³¹ The suspension act merely prevented arrested persons from taking *at the moment* proceedings against public officials. Dicey went so far as to indicate that unlawful conduct during the suspension included using charges of treason without reasonable cause since the act authorized only the detention of persons "reasonably suspected" of treason.³² Usually Parliament passed an act of indemnity protecting officials

²⁸ A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth edition, [1915], Indianapolis: Liberty Classics, 1982, ch. V, pp.140-141.

²⁹ A.V. Dicey, *ibid.* p. 140.

³⁰ A.V. Dicey, *ibid.*, p. 143.

³¹ "The suspension act", Dicey wrote, "does not free any person from civil or criminal liability for a violation of the law." (*ibid.* p. 142). Officials, he reiterated, may have arrested persons "under the *bona fide* belief that their conduct was justified by the necessity of providing for maintenance of order. But this will not of itself, whether the *Habeas Corpus* Act be suspended or not, free the persons carrying out the arrests from criminal and civil liability for the wrong they have committed." (*ibid.* p. 143).

³² A.V. Dicey, *ibid.*, p.141. Dicey underlined the requirement of reasonable grounds for suspicion by contrasting the suspension acts with an act authorizing the Irish executive to detain on suspicion. The Irish act was framed in such a way, he noted, that "the truth of the assertion that the arrested person or "suspect" was reasonably

from penalties for unlawful actions committed while the *habeas corpus* act was suspended. Dicey emphasized, however, the uncertainty and limitations of these acts of indemnity: "the relief to be obtained" from them was only "prospective and uncertain".³³ Acts of indemnity, he went on, were not necessarily forthcoming: a suspicion on the part of the public that officials had grossly abused their powers might make it politically difficult to obtain a Parliamentary indemnity. Analyzing one indemnity act (passed in 1801), Dicey further pointed out that its terms did not cover acts of reckless cruelty to prisoners. This suggested that while parliament was usually willing to ratify some unlawful actions committed during a crisis, it might stop short of condoning egregious transgressions.³⁴

Thus, on Dicey's account the limited duration of the suspension of *habeas corpus* assumed critical importance. Obviously the termination secured that those detained on suspicion of treason regained their right to be either released or brought to regular trial, thus recovering a liberty that they had lost temporarily. Unlike Blackstone, however, Dicey did not argue that this loss was worthwhile because it was brief, he saw another merit in the temporal limit: at the end of the suspension officials could be held accountable for what they had done under it. Here accountability must be understood in broad terms, as legal accountability on both civil and criminal grounds, modified or qualified by political accountability.³⁵ This was a wholly different perspective, one with wide-ranging implications. To be sure, Dicey did not endorse the practice of suspending the *habeas corpus* act as unambiguously as Blackstone had. His account of it was much more guarded than that of the Whig lawyer of the previous century. Still, by focusing on the limitations to which the institution was subject and by emphasizing how much it differed from a mere suspension of constitutional guarantees, Dicey wanted to show that suspending *habeas corpus* was at least to some extent consistent with the

suspected" could be established by mere reference to the terms of the warrant authorizing detention. If the warrant stated that there were reasonable grounds for suspecting the arrested person, then, this constituted, sufficient evidence that the arrest had been made on reasonable suspicion. Thus, the Irish executive could not be made liable for any arrest "however groundless or malicious" provided only that "the warrant was in the form and contained the allegations required by the statute." (*ibid.* p. 141). In other words, under the Irish act no objectively reasonable grounds for suspicion were required. This was not the case, Dicey insisted, with the acts suspending *habeas corpus*.

³³ A.V. Dicey, *ibid.*, p. 144-145

³⁴ A.V. Dicey, *ibid.*, p. 145.

³⁵ Dicey did not object to the suspension acts being renewed for a significant amount of time. The Indemnity Act, which he analyzed, covered a period of seven years. In fact the *Habeas Corpus* Act had not been suspended continuously from 1794 to 1801, but it had been suspended several times over this period, with some suspensions being renewed. See C. Emsley, "Repression, 'terror' and the rule of law in England during the decade of the French Revolution", *art.cit.* p. 825

rule of law. The important point, however, is that while the limited duration of the suspension was essential for both Dicey and Blackstone, each valued it for different reasons.

For Dicey the primary quality of this feature was that it served the principle of retrospective accountability for conduct during the emergency. Note that Dicey envisioned the beneficial effects of such accountability from a particular perspective. By stressing that emergency officials found guilty of unlawful imprisonment faced punishment and civil liability unless relieved by an act of indemnity, and by insisting that the relief *to be obtained* from it was *prospective* and uncertain, Dicey was in effect focusing on the beneficial effects that retrospective accountability exercised by anticipation. The idea was that knowing that they could later become liable for what they did public officials were incited to exercise restraint when acting under the authority of the suspension act. Here accountability was envisaged from the standpoint of incentives.

Civil in addition to criminal liability for conduct during the suspension had one crucial implication: at the end of the emergency regime public officials could be sued for false imprisonment, a ground for civil action. If courts found that persons bringing this charge had indeed been wrongfully arrested and detained during the suspension, the victims would receive compensation for the wrong suffered.

Another element was even more important in the theory advanced by Dicey. If the suspension was terminated when the emergency circumstances ended, as he assumed it generally was, then, the *ex post* controls, primarily the courts and to a lesser extent the parliament, operated when the crisis was over. In other words, what was justified and not justified during the crisis –presumably a time of excitement and disorder– was ultimately determined under quieter circumstances permitting reasoned consideration of emergency actions.

A similar mechanism was at work in the operation of martial law, another emergency institution that Dicey analyzed. However, a note of clarification is in order here. In fact Dicey distinguished between two senses of the expression "martial law". If martial law, he wrote, means the right "to repel force by force in case of invasion, insurrection, riot, or more generally of any violent resistance to the law", then it is part of the law of England, and it comports with the rule of law. If, however, martial law means "the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals", then it is "unknown to the law of England" and it is inconsistent with the rule of law. Dicey regarded

the French state of siege as the foremost exemplification of the latter sense, citing various provisions of the French law on the state of siege in support of his view.³⁶

On Dicey's view, martial law such as it existed in English law meant "the power, right or duty" of the government or of any loyal citizen to "maintain public order, or in technical language the King's peace, at whatever cost of blood or property may be in strictness necessary for that purpose."³⁷ Whether or not the means employed were strictly necessary, and whether or not the conditions necessitating such exercise of force really existed, Dicey insisted, were matters for the courts to determine.³⁸ As to the means employed, Dicey wrote:

One should always bear in mind that the question whether the force employed was necessary or excessive will, especially where death has ensued, be ultimately determined by a judge and jury, and that the estimate of what constitutes necessary force formed by a judge and jury, sitting in quiet and safety after the suppression of the riot, may differ considerably from the judgment formed by a general or magistrate, who is surrounded by armed rioters...³⁹

As to whether the conditions for the use of force existed, Dicey insisted that this was "a question of fact to be determined in any case by the Courts in the same way as any other such question."⁴⁰ Note the importance of this argument. Unlike some theorists of emergency powers such as Carl Schmitt Dicey held that the question of whether or not the public peace existed at a given point was a factual question, not a political one; it could be determined by using the same procedure and examination of evidence as were generally used by courts to decide questions of fact. Naturally these determinations could not be made while martial law was in force as recourse to it meant that the courts were no longer operating; this was indeed the key condition for using martial law.⁴¹ But as soon the courts sat again, the peace being restored, they could determine whether martial law had been properly employed. Those found to have used it wrongfully or under the wrong conditions would face the consequences unless an act of indemnity protecting them was passed.⁴²

To some extent the use of martial law during the American Civil War illustrated a point made by Dicey. On September 24, 1862 Lincoln issued a proclamation

³⁶ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, *op.cit.*, pp. 182-183.

³⁷ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, *op.cit.* pp. 186, 398 (Appendix X).

³⁸ Drawing on Dicey along with other theorists and legal decisions as well, Rossiter too supports this view of the role of courts in martial law. See C. Rossiter, *Constitutional Dictatorship*, *op.cit.* p. 143.

³⁹ A.V. Dicey, *Introduction...*, *op. cit.*, ch, VIII, p. 185.

⁴⁰ A.V. Dicey, *Introduction...* *op.cit.*, Appendix X, p. 404.

⁴¹ See A.V. Dicey, *Introduction...* *op.cit.*, Appendix X, p. 404; C. Rossiter, *Constitutional Dictatorship*, *op.cit.* p. 147.

⁴² See A.V. Dicey, *Introduction...* *op.cit.*, Appendix X, pp. 406-407

placing the entire territory of the Union, the battlefield states as well as others, under martial law.⁴³ By virtue of this proclamation military tribunals were set up and began to operate in various parts of the country, including the loyal Northern states. After the conclusion of the war the Supreme Court famously ruled in *Ex Parte Milligan* that military tribunals outside of "the theatre of active military operations" were unconstitutional. The Court articulated the conditions for lawful use of martial law. "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."⁴⁴ The Court also highlighted the difference between the circumstances under which it was deciding the Milligan case (in 1866) and the circumstances that prevailed before. The decision read thus:

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed that are happily terminated. *Now* that the public safety is assured, this question, as well as others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.⁴⁵

As Dicey argued, calm deliberation over what was really necessary during the emergency did not place until the emergency was over. In practice, however, the anticipation of future potential indictments for improper use of martial law did not play much of a role during the American Civil war. Nor were there, actually, any such indictments.

The fact that the use of martial law during the American Civil War did not conform to Dicey's theory did not invalidate it. For the theory was not intended as an accurate depiction of all instances of martial law, but as a theory of how the institution could and should be used. More broadly, whether or not Dicey's account of the suspension of *habeas*

⁴³ "Proclamation Suspending the Writ of Habeas Corpus", 24 September, 1862, in A. Lincoln, *Speeches and Writings*, 2 vols., New-York: The Library of America, 1989, vol. II, p. 371. The official title of this proclamation suggested that Lincoln was holding as one and the same thing two different institutions, suspension of *Habeas Corpus* and martial law. On no interpretation prior to this, did suspension of *habeas corpus* imply the power to set up military tribunals. On the constitutional aspects of this question, see J. G. Randall, *Constitutional Problems under Lincoln*, [1926], Gloucester: Smith, 1963, ch. 8; C. Rossiter, *Constitutional Dictatorship, op.cit.*, pp. 235-236. For a study of military tribunals during the Civil War, see M. Neely, *The Fate of Liberty, Abraham Lincoln and civil liberties*, Oxford: Oxford University Press, 1991.

⁴⁴ *Ex Parte Milligan*, 4 Wall. 2 (1866), 127. Original emphasis.

⁴⁵ *Ex Parte Milligan*, 4 Wall. 2 (1866), 109. Original emphasis. Such rhetorical emphasis on the difference in times was perhaps self-referentially apologetic on the part of the Court. Two years earlier, when the war was not concluded, the Supreme Court had declined to review the merits of the decision by a military commission sitting in Ohio (and thus away from the theater of military operations) that sentenced Clement Vallandigham to imprisonment. See *Ex parte Vallandigham*, 1 Wall. 243 (1864). On the Vallandigham case, see: W. H. Rehnquist, *All the Laws but One. Civil liberties in wartime*, New-York: Vintage Books, 1998, ch. 5; G. R. Stone, *Perilous Times. Free speech in wartime*, New-York: Norton, 2004, pp. 94-108.

corpus and of martial law was historically accurate, his theory of them was important for another reason: it offered what was arguably the most comprehensive and elaborate method ever advanced for controlling emergency powers.⁴⁶ Dicey's theory relied on *ex post* controls primarily by the courts and to a lesser extent by the parliament to secure that emergency authority was activated under circumstances that really required it, and used in the proper manner once in force. Thus, Dicey's method went further than Blackstone's theory of the suspension of *habeas corpus*: Blackstone focused on the guarantee that the suspension was decided for good reason, but he did not have much to offer about the proper use of the authorization to detain without trial once it was granted.⁴⁷ While Blackstone's method relied primarily on the *ex ante* mechanism, Dicey was able to extend the domain protected from unwarranted actions by shifting the focus to *ex post* controls. For both authors emergency actions were externally sanctioned. For Blackstone, however, this sanction took the form of a prior broad authorization by the parliament while for Dicey it took the form of detailed review by the courts after the fact, coupled with parliamentary indemnification. Thus, although Dicey and Blackstone shared liberal commitments, they offered two methods for limiting arbitrariness in emergency government that differed in their scope and in their institutional structure. Yet for both theories the limited duration of the emergency authority was fundamentally important.

The fact that temporal limits could be valued for different reasons comes into sharper relief if we consider the motivations of the agents in Dicey's model. On his view fear of punishment and calculation of consequences incited emergency officials to act in justifiable ways; the limited duration of the emergency regime was of value because it allowed such motivations to come into play by placing the time for accountability in the foreseeable future. This was not what Blackstone and Montesquieu found valuable in the temporary character of the suspension of *habeas corpus*. Considerations of incentives and accountability were even more alien to the merits that ancient Roman republicans found in the short term of office of the dictator. However, the incentive-based model proposed by Dicey was in harmony with widespread views in the culture of his time. It is striking to note that beyond the diversity of

⁴⁶ On the importance of Dicey for a theory of emergency powers, see D. Dyzenhaus, *The Constitution of Law. Legality in a Time of Emergency*. Cambridge: Cambridge University Press, 2006.

⁴⁷ Blackstone noted that during the suspensions of *Habeas Corpus* some persons imprisoned on suspicion had suffered long confinement just because they had been forgotten. He did not, however, suggest a remedy for this. See W. Blackstone, *Commentaries on the Laws of England, op.cit.*, Vol. III, ch. 8, p. 138

cultural contexts the limited duration of emergency authority was considered essential in all cases.

1.3. The continental tradition: French republicans and the experience of the state of siege

The principle that emergency authority should be of limited duration was also important in a third legal tradition: French modern republicanism. This shows clearly in the conception and use of the state of siege.

While martial law has generally been considered the model emergency institution in the common law tradition, the French state of siege (*l'état de siège*) occupied a similar position in the civil law tradition: it served as a model for a number of countries in both Europe and Latin America. The French institution reflected a twofold commitment to the principle of legality and to that of parliamentary supremacy. Constitutional governments were inevitably confronted with crises requiring some curtailment of freedom, French jurists argued, but it was possible to regulate crisis government by well considered laws passed in quiet times by the elected representatives of the people; the French legislation regulating the state of siege conformed to this model. Such advance regulation, these French authors insisted, accorded better with the principle of non-arbitrary government than ad hoc crisis legislation (*les lois de circonstances*) dictated by the exigencies of each crisis and adopted on the spur of the moment.⁴⁸ Thus, the state of siege was shaped by the French republican tradition and its characteristic commitments. Yet the principle of limited duration was as important in this tradition as it was in the English liberal tradition. Moreover, whatever Dicey said, the French state of siege was designed to serve a principle that he, too, endorsed: limiting arbitrariness in emergency government was best achieved in the absence of the excitement caused by an existing emergency. However, the French relied on regulation ahead of the emergency instead of accountability when it was over, and they placed the determination of reasonable emergency measures in the hands of deputies rather than in those of judges.

⁴⁸ Praise of advance legislative regulation of crisis government was pervasive among French writings about the state of siege. See for example, T. Reinach, *De l'état de siège*, Paris: François Pichon, 1885, pp. 272-275; P. Romain, *L'état de siège politique*, Albi: Librairie des Orphelins-Apprentis, 1918, pp. 16-19, 482-483. Most of these writings deplored that the state of siege legislation was not constitutionalized, but they praised the fact that it was the work of an elected assembly.

There is another reason, however, for paying particular attention to the French state of siege: the institution was, we might say, tried and tested. The state of siege was repeatedly used in nineteenth century France; the laws governing it were changed reflecting that experience. Furthermore, later on the state of siege served as one the principal instruments for governing France during the First World War. As a result of this historical experience, the French state of siege holds lessons for implementing limited duration in emergency government.

Before turning to these lessons, a brief presentation of the state of siege is in order as the name of the institution could be misleading. In spite of its name the state of siege was not designed for the administration of places besieged by assailants. It was a political institution designed for situations of grave danger to national security. French jurists called it the political state of siege (*l'état de siège politique*), distinguishing it from the state of siege proper (*l'état de siège proprement dit*), which also existed in French law and was reserved for beleaguered places. Two laws, one passed in 1849 and the other in 1878, regulated the political state of siege.⁴⁹ The statute of 1878 replaced some provisions of the prior organic law, while leaving others in place.⁵⁰ In essence the effects of the state of siege continued to be regulated by the legislation of 1849, while the conditions for initiating it were changed by the law of 1878. Neither of these laws was part of the 1875 Constitution. Even if they had been, they could not have been enforced on the parliament, as the institutions of the Third Republic did not provide for constitutional review. Yet this did not make the laws regulating the state of siege inconsequential. First and foremost, they were binding on the executive, with parliamentary responsibility acting as a potential enforcement mechanism. They also carried some weight among jurists and politicians.⁵¹

The principal effects of declaring the state of siege were as follows. First, law enforcement and the function of maintaining public order passed from the hands of civil officials, such as mayors or prefects, to local military commanders. However civil officials retained their other functions of local government. Next, military authorities were granted

⁴⁹ Law of August 9, 1849, *Le Moniteur*, 12 août 1849. Law of April 4, 1878, *Journal Officiel de la République Française*, 4 avril 1878.

⁵⁰ The law of 1849 was passed pursuant to article 106 of the 1848 Constitution which provided that a future law would regulate the use of the state of siege.

⁵¹ At the outbreak of the First World War, a leading French jurist, Barthélemy, advanced a plausible hypothesis as to why these regulations were not futile even though not binding on parliamentarians. The laws regulating the state of siege, Barthélemy suggested, offered ready at hand guidelines that legislators confronted with a major crisis would find helpful under circumstances fraught with anxiety and panic. See J. Barthélemy, "Le droit public en temps de guerre", *Revue de Droit Public*, 1915, p. 144

powers permitting the infringement of specified rights; the list of such rights was limitative; the law explicitly provided that citizens continued to enjoy their other rights.⁵² A third effect of the state of siege was to authorize military courts to assume jurisdiction over all crimes and other offences against the security of the Republic, the Constitution, and the public safety and order.⁵³ During the First World War a system of preventive censorship was appended to the state of siege. A law punishing "indiscretions of the press in times of war" was passed in August 1914. Military courts served to enforce it, by virtue of the state of siege. A central press bureau was set up to control *ex ante* the military and diplomatic information published by the press.⁵⁴

The state of siege did not amount to government by the military, however. For one thing, top military commanders remained under the control of the government, that is, of civilian authorities. For another, the Cabinet and the Prime Minister (*le Président du Conseil*) remained accountable to the parliament. By and large both conditions were actually fulfilled during the First World War, except for the first six months of the war.⁵⁵ After declaring the state of siege on August 5, 1914, the parliament adjourned. But it reconvened in January 1915 and was in permanent session until almost a year after the cessation of hostilities. Over those years seven Cabinets and five Prime Ministers succeeded in office. Only one Cabinet was dismissed by a formal vote of no confidence, but the others resigned because they sensed that they were losing parliamentary support. This was not a departure from the pattern prevailing before the war.⁵⁶ The courts, both the *Conseil d'Etat* and the *Cour de Cassation* played virtually no role in controlling the measures taken by the government. But the parliament determined who was entrusted with governing the country and conducting the war. It also exercised oversight of governmental policy, meeting at times in closed sessions [*comités secrets*] and relying most of the time on the work of parliamentary committees. Parliamentary influence extended to the operation of the state of siege and to the war measures.⁵⁷

⁵² The military could: 1/ search homes by day or night, 2/ deport liberated convicts and persons not having residence in the area placed under the state of siege, 3/ search for arms and munitions and remove them, 4/ forbid publications and meetings that they judged to be of a nature to incite or sustain disorder. See Law of August 9, 1849, art. 9-11

⁵³ Law of August 9, 1849, art. 8

⁵⁴ P. Renouvin, *Les formes du gouvernement de guerre*, Paris & New-Haven: Publications de la Dotation Carnegie pour la paix internationale, 1926, pp. 38-49

⁵⁵ On the relations between the Cabinet and high military commanders during World War I, see P. Renouvin, *Les formes du gouvernement de guerre*, *op.cit.*, pp. 76-85

⁵⁶ See P. Renouvin, *Les formes du gouvernement de guerre*, *op.cit.* pp. 96, 152-155

⁵⁷ The actual jurisdiction of military courts was significantly restricted in 1916 on the insistence of the parliament; on this, see P. Renouvin, *Les formes du gouvernement de guerre*, *op.cit.*, pp. 31-38. On the role of

Overcoming the initial resistance of military commanders, parliamentary committees gained access to the battlefields, which they actually visited quite often and where they conducted investigations.

Returning to the question of duration, the most significant elements are to be found in the statute of 1878 that gave to the institution its definitive form. Declaring the state of siege was the prerogative of the parliament. That, however, was already the case in the law of 1849. The exclusive right of the parliament needed reaffirmation in 1878 as the constitutional laws of 1875 had established a new institutional arrangement, different from that of 1848. One of the key aims of the 1878 statute was indeed to adjust the declaration of the state of siege to the new institutional order. The republican assembly of 1878 also chose to strengthen parliamentary prerogatives in declaring the state of siege as a response to the aborted *coup* by the President of the Republic, Marshal Mac-Mahon, in 1877. After the dissolution of the assembly in May 1877, monarchist circles were talking about declaring the state of siege and holding elections under it. Still the principle of legislative declaration of the state of siege was not a change from 1849. Moreover it conformed to the French republican tradition of parliamentary supremacy.

What the legislation passed in 1878 changed, however, was the conditions for declaring the state of siege and the regulation of its duration. The new law provided that it could "only be declared in the event of imminent danger resulting from a foreign war or an armed insurrection [*insurrection à main armée*]" (art.1, cl.1). The corresponding clause in the law of 1849 read: "in the event of imminent danger to internal or external security [*en cas de péril imminent pour la sécurité intérieure ou extérieure*]." ⁵⁸ The committee reporting on the project in 1878 noted: "We thought that these terms [the terms of 1849] were too vague, and that it was necessary to guard ordinary law from *the impulses or indeed the errors of the legislative power*." ⁵⁹ Even more importantly, a second change was made in 1878: the new

the parliament more broadly, see P. Renouvin, *Les formes du gouvernement de guerre*, *op.cit.*, pp.96-128; C. Rossiter, *Constitutional Dictatorship*, *op.cit.*, pp. 91-116.

⁵⁸ This wording was the subject of some discussion in 1849. The government wanted the state of siege to be declared "in case of war or insurrection". The commission reporting on the government's project commented that the state of siege would be conditional upon: "unambiguous signs portending preparations for combat [*des signes non équivoques annonçant les préparatifs du combat*]" (Rapport de M. Alex Fourtanier au nom de la Commission chargée d'examiner le projet de loi sur l'état de siège, *Le Moniteur*, 11 Août 1849). Still the assembly could not agree on the term "insurrection". Some members found it too vague, while others wanted to authorize declaring the state of siege in case of an impending insurrection, not only an actual one. See on this, P. Romain, *L'état de siège politique*, *op.cit.*, pp. 130-132.

⁵⁹ Rapport fait au nom de la commission chargée d'examiner la proposition de loi de M. Bardoux, sur l'état de siège, par M. Franck Chauveau, *Journal Officiel de la République Française*, 16 février 1878, p. 1627. My

legislation introduced time limits. Whereas the law of 1849 did not mention duration, the statute of 1878 provided that the law declaring the state of siege "shall set the period of its duration [*elle fixe le temps de sa durée*]" (art.1, cl. 3), adding the following clause: "At the expiration of this period, the state of siege shall cease automatically [*de plein droit*] unless a new law should prolong its effects." (art.1, cl. 4).⁶⁰ This provision was considered a significant innovation and it met with objections. Members of the Senate in particular argued that it was impossible to foresee the duration of the emergency.⁶¹ These objections did not carry the day, however.

The committee report contained an indication of what the new provisions were effectively doing. The committee remarked that at the expiration of the time limit specified by the declaring law, the state of siege would be lifted automatically "unless the circumstances that triggered it were still existing, in which case a new law would prolong its effects."⁶² Thus, the time limit included in the proposed formulation did not presuppose that the duration of crises could be anticipated at their beginning. Nor was the new law assuming that crises would necessarily be brief. What the law did was to make the assessment of circumstances at set intervals mandatory. The legislature would be required to check regularly, at intervals fixed from the outset, whether the circumstances warranting the state of siege were still there.

In fact the choice of the more precise wording ("imminent danger resulting from a foreign war or an armed insurrection") and of time limits was a reaction to the extensive and prolonged use of the state of siege in the wake of the Franco-Prussian war and of the insurrection of the Paris Commune. After the collapse of the imperial regime, the provisional government had employed the state of siege for fighting the invasion and suppressing the insurrection. But successive cabinets, backed by majorities in the assembly, had kept it in force thereafter in a number of regions until 1876, primarily for the purpose of controlling the press.⁶³ In the words of Dufaure, one of the key protagonists in the legislation concerning the

emphasis. This formulation demonstrates that the law aimed to guard against legislative abuse of the state of siege. Parliamentary control in and of itself was not viewed as a sufficient guarantee

⁶⁰ Article 1 of the law of 1878 also stated that the law declaring the state of siege should "determine the communes, arrondissements, départements" to which it was to apply (art.1, cl. 3). Spatial restrictions formulated in identical terms were already present in the law of 1849 (art. 2, cl. 2). With regard to spatial limitations the law of 1878 made no changes.

⁶¹ See T. Reinach, *De l'état de siège*, Paris: François Pichon, 1885, p. 129.

⁶² Rapport fait au nom de la commission chargée d'examiner la proposition de loi de M. Bardoux, sur l'état de siège, par M. Franck Chauveau, *Journal Officiel de la République Française*, 16 février 1878, p. 1627.

⁶³ Thiers was reported to have expressed openly his appreciation for the state of siege as an instrument of government. A statement attributed to him was often cited. Thiers reputedly said: "For a long time a republican constitution will mean freedom tempered by the state of siege [*La république sera pour longtemps la liberté*]

state of siege, the experience of 1871-1876 had demonstrated that "the state of siege was much easier to establish than to lift."⁶⁴ This maxim condensed, it seemed, the lessons that the French were drawing from historical experience. There was an asymmetry between the initiation and the termination of the emergency regime. The automatic lifting of the state of siege at the end of the set period –unless a new law prolonged it– was a response to this asymmetry. Note that the annual character of the English acts suspending *habeas corpus* coupled with possible renewals achieved in fact a similar result: the parliament had to check every year whether the circumstances justifying the suspension were still existing. However, the particular difficulties associated with terminating the emergency regime were not the subject of such acute concern in Britain. For the French, it was certainly important that the state of siege should be employed only with good reason, but extra precautions were necessary to ensure that it was lifted when the reason for declaring it ended.

Thus, the key concern in 1878 was to ensure that the state of siege would not last longer than the circumstances that justified it in the first place. In exactly what ways, may we ask, was the new legislation furthering this goal? Members of the assembly did not elaborate much on this. In fact by opting for the new definition of the triggering conditions, the legislators of 1878 were making the assessment of circumstances less complicated than under the previous law. For it was indeed less problematic to determine whether an armed insurrection (or a foreign war) had come to an end than to decide on whether an imminent threat to internal (or external) security had ended. The change was not only a gain in precision; it also introduced an element of concreteness. A foreign war or an armed insurrection had an observable dimension that imminent threats to security had not. Thus, it was reasonable to think that determining whether or not the conditions for the state of siege had ended would be easier under the new law. Note that this did not imply that what constituted the end of an armed insurrection (or a foreign war) was just a self-evident, undisputable fact. Even if argument over whether or not the conditions had ended was inevitable, the precision of new definition and the observable element in it made a difference. For it was indeed true that (1) the discussion would have a sharper focus, and (2) that the arguments on either side would be more open to challenge, if the subject was the end of an armed insurrection (or a foreign war) than if it had been the end of a threat to internal (or

tempérée par l'état de siège]." The statement may have been apocryphal. It was first reported by comte de Douhet in a speech to the Senate (14 mars 1878), *Journal Officiel de la République Française*, 15 mars 1878. p. 2887.

⁶⁴ The words of Dufaure are reported in T. Reinach, *De l'état de siege, op. cit.*, p. 129.

external) security. Finally, it was also reasonable to think that beyond the doors of parliament, public opinion at large would more easily discern the end of the concrete conditions than that of the more abstract ones. While the protagonists did not articulate the arguments just stated, there were objectively good reasons for making the choice they made.

The declaration of the state of siege at the beginning of the First World War did not exactly conform to the rule set down in 1878. On August 2, 1914, President Poincaré issued a decree placing the entire country in the state of siege. He immediately summoned the parliament that was in recess. On August 4, the French government received the German declaration of war. On August 5, the parliament passed a law confirming the establishment of the state of siege over the entire territory "for the duration of the war." Referring to the duration of the war instead of fixing a precise time period, and including the entire national territory were undoubtedly departures from the law of 1878. Moreover the existence of an "imminent peril" could be disputed technically speaking.⁶⁵ But there was a clear perception both within the parliament and outside that a line had been crossed and that war was upon the country.

At the other end the state of siege was not lifted until October 12, 1919 while the armistice was dated November 11, 1918, and the Treaty of Versailles was signed on June 28, 1919. The state of siege was not lifted at the cessation of hostilities. Clemenceau wanted, it seems, to retain some control over the press so as to have a free hand in the peace negotiations. As noted earlier, enforcement of censorship was in turn dependent on the state of siege. Thus, Clemenceau needed the state of siege. As for the parliament, it was faced with the options of voting him out or letting him conduct the negotiations as he saw fit. Pressure for lifting the state of siege was mounting, however.⁶⁶ The successive passing of such decisive and cognitively salient thresholds as the armistice and, then, the peace treaty, gradually made this pressure irresistible. Furthermore, parliamentary elections could no longer be deferred

⁶⁵ J. Barthélemy listed the various ways in which the declaration of August 1914 deviated from the antecedent regulation of the state of siege and the "official doctrine" about it. This doctrine, he went on, "is absolutely immaterial; (...) the government, supported by virtually unanimous public opinion, regards itself as having the extraordinary power to take whatever measures are appropriate." See J. Barthélemy, "Le droit public en temps de guerre", *Revue de Droit Public*, 1915, *passim*, esp. p.156.

⁶⁶ P. Renouvin, *Les formes du gouvernement de guerre, op.cit.*, pp. 48-49. On the role of the press during the peace negotiations, see P. Miquel, *La paix de Versailles et l'opinion publique française*, Paris: Flammarion, 1972. The lifting of the state of siege at the end of the war does not seem to have been the subject of significant historical research yet. I should like to thank Pr. Gilles Le Béguec, the author of *La république des avocats*, Paris.Armand Colin, 2003, for his invaluable insights into this matter.

now that the war was so manifestly over. They were scheduled for December 1919. It seemed inconceivable to have an electoral campaign and to hold elections under the state of siege.

Thus, the declaration and lifting of the state of siege in the First World War both defeated the endeavors of the legislators of 1878 and confirmed some of their ideas. The war gave powerful confirmation to the notion that the state of siege was easier to declare than to lift. On the other hand, the assembly of 1878 did not succeed in producing technically binding regulation, particularly concerning the declaration of the state of siege. The war suggested that clear lines vividly demarcating the beginning and the end of the actual crisis were at least as important as legal conditions in the initiation and termination of the emergency regime. This seemed to be the second lesson from the French experience with the state of siege.

II. The emergency paradigm:

We are now in a position to characterize the emergency paradigm. *Emergency institutions authorize temporarily deviating from constitutional norms when circumstances require it.* It is striking to find in the theory and practice of emergency institutions across a variety of contexts the three elements forming this structure:

- (1) Authorized deviating from higher order norms as reflected in the constitution
- (2) Special conditions designed to make sure that circumstances necessitate (1)
- (3) Temporal limitations on (1)

While these elements are present in all contexts, they are specified and emphasized differently in each. The persistence of this structure over time and across cultures suggests that we are dealing here with a powerful framework for confronting crises and controlling their management. The fact that while simple the structure may serve different constitutional values probably accounts for its robustness. Hence, we may call this three-fold structure the emergency paradigm.

The table below supplies a schematic map of the forms taken by these elements in the emergency institutions studied earlier.

TABLE

	Dictatorship	Suspension of <i>habeas corpus</i>	Martial law	State of siege
Authorized deviating				
<i>Procedural</i>	Single magistrate		Military courts	Military in charge of public order; military courts
<i>Substantive</i>	Not subject to <i>provocatio</i> (?)	Detention without trial	Use of force for restoring order	Infringement of specified rights
Special conditions				
<i>Procedural</i>	External appointment	Ex ante parliamentary authorization; Ex post control by courts + parliament	Ex post control by courts	
<i>Substantive</i>			Courts closed	Conditions defined in antecedent legislation
Temporal limitations	Short term, usually 6 months at the most	1 year, renewable	As long as substantive condition holds	Automatic lapsing at set intervals. Renewable as long as substantive conditions hold

Note first that emergency institutions are features of political systems in which public authorities are bound to act according to known and fixed rules, whether written or unwritten. In systems where public authorities are not bound by such rules, emergency institutions are pointless. Suppose a political system in which those who govern had a duty to pursue the common good in any manner they deemed appropriate. Circumstances would not make a difference there: those in power could conduct public affairs according to the same principle in emergency and non-emergency conditions alike. Not all rule-governed systems have emergency institutions, but such institutions have a place only in rule-governed systems.

In such systems, emergency institutions authorize for a limited time deviations from the normative order of which they are a part, on condition that circumstances justify such deviations. The emergency paradigm, then, has a particular shape: it is both permissive (1) and restrictive (2) and (3). On the one hand, emergency institutions permit deviating from the normative order under consideration. Such deviating may be either procedural, concerning the institutional method by which public decisions are made during the emergency, or substantive, concerning the content of emergency measures. Entrusting supreme power to a single official in republican Rome illustrates the former case. Permitting infringement of individual rights in modern republican France instantiates the latter case.

Simultaneously, however, emergency institutions restrict departures from norms. This is why such institutions are consistent with the normative system they are a part of: they restrict, as well as authorize, public actions and modes of public action considered highly undesirable in that system. These institutions do not comport with the constitution merely by virtue of being included in it. Nor are they constitutional just because they subject emergency government to rules instead of leaving it to the discretion of officials. They are consistent with the fundamental values reflected in each constitutional system in that they restrict actions conflicting with these fundamental values.

Emergency institutions restrict departures from norms in two ways, first by limiting the time during which such departures may occur, and second by requiring special confirmation that they are necessary given the circumstances. Special confirmation may in turn take two forms. Recourse to emergency government may require approval by a body other than that which exercises emergency authority, thus securing that the need for deviating from norms is not left to the sole judgment of emergency agents. Parliamentary authorization of executive detention in the English tradition exemplifies such a procedural mode of confirmation. Another way of requiring special confirmation, one concerning substance,

consists in writing into law the concrete conditions that need to be met for deviating from norms. The French legislation about the state of siege did this. These two modes may also be combined, as in the regulation of martial law.

The other restrictive feature of emergency institutions is that they authorize deviations from norms only for a limited time. Temporal limitations may be of two kinds. They may set the time during which the emergency regime may last in absolute terms, independently from circumstances: by and large this seems to have been the case with the Roman dictatorship. Alternatively, temporal limitations may provide that the emergency regime lasts for only as long as the circumstances requiring it persist. This is the mode of the other three institutions with one variation depending on whether or not periodical assessment of circumstances is mandatory. Regulation of suspension of *habeas corpus* and the state of siege mandates such periodical assessment while regulation of martial law does not.

These temporal limitations, however, point to an important element. From the perspective of the normative system in which each institution is included the crucial point is that deviating from norms ends up being actually temporary. As noted earlier, in various theories the temporary character of such deviating was a critical condition for holding emergency institutions acceptable. Ancient republicans viewed the brevity of tenure as somehow alleviating the harm inherent in undivided power. Eighteenth century liberals held that preserving liberty was worth sacrificing it for a while. Dicey reasoned that the rule of law was maintained because at the end of the emergency regime officials were held accountable and victims of wrongs compensated. All of these arguments for endorsing the use of emergency institutions implied that the emergency regime effectively came to an end after a limited time.

Leaving history aside, it would be hard from the standpoint of present day liberal constitutionalism to justify the use of emergency institutions without relying in some way or other on these arguments. At any rate we would not regard the use of emergency institutions as justified where none of these arguments applied. Now none of them could be advanced if the state of emergency remained in force for a long or indefinite period of time.

But legal provisions cannot possibly determine the length of crises. If the law sets the duration of the emergency authority independently from circumstances, then the institution becomes worthless in the face of protracted crises. The Romans could not have coped with drawn out crises by means of dictatorship. If, on the other hand, the law allows the emergency regime to last as long as the crisis lasts, this problem does not arise, but another

emerges. Suppose, for example, that after careful deliberations the British parliament judged necessary to renew suspension of *habeas corpus*, year after year for decades. Then, the government would hold tremendous power not just for a short while, people could be detained on unverified suspicions for a lifetime, and the prospects of accountability and compensation would be so remote as to become inconsequential. It is hard to think of any reasons for considering such a state of affairs acceptable.

Ultimately, then, constitutional emergency institutions presuppose that the circumstances calling for deviations from norms are in fact temporary. If these circumstances did not end within a limited time, a key condition justifying the use of emergency institutions would be missing. Moreover, as the French experience suggests, these institutions work reasonably well if clear and vivid lines demarcate in reality the beginning and the end of the emergency circumstances. Neither of these conditions seems likely to be met by present day terrorism.

III. Confronting terrorism: the need for sustainability

There are indeed a number of reasons for doubting that the present terrorist threat will be temporary. A number of studies by experts in counter-terrorism have emphasized for quite some time the long-term character of this threat. One student of terrorism expressed the point in striking fashion soon after the 9/11 attacks: "terrorism is not a threat that is temporary. We cannot count on ending a phenomenon that can be brought about by any small group in a world of seven billion people."⁶⁷ Various other studies and policy-oriented analyses have since formulated the same diagnosis.⁶⁸ However, the implications of this diagnosis for the use of emergency institutions have not attracted much attention. Influential studies continue to conceptualize the present terrorist threat as an emergency.⁶⁹

⁶⁷ Philip B. Heymann, *Terrorism, Freedom and Security. Winning without War*, The M.I.T. Press, Cambridge, 2003, p. XII. In a later work, the author has proposed "rules and procedures that should govern the US legal system's response to terrorism for decades to come." See Philip B. Heymann, Juliette N. Kayyem, *Protecting liberty in an age of terror*, The M.I.T. Press, Cambridge, 2005, p. 2.

⁶⁸ See for instance: S. Simon, D. Benjamin, "America and the New Terrorism", *Survival*, The International Institute for Strategic Studies, vol. 42, 1, Spring 2000, pp. 59-75; Audrey K. Cronin, James L. Ludes, (eds.), *Attacking Terrorism. Elements of a grand strategy*, Georgetown University Press, Washington, D.C., 2004, *passim*, esp. ch. 6: Lindsay Clutterbuck, "Law enforcement"; D. Omand, "Countering international terrorism: the use of strategy", *Survival*, vol. 47, 4, Winter 2005-2006, pp. 107-116; *La France face au terrorisme, Livre blanc du gouvernement sur la sécurité intérieure face au terrorisme*, Paris, La Documentation Française, 2006; among other things the White Paper stresses this: "As it draws support primarily from the younger generation the terrorist threat should be durable" (p. 11).

⁶⁹ See for example Richard A. Posner, *Not a Suicide Pact. The Constitution in a Time of National Emergency*, Oxford University Press, 2006.

Three main reasons seem to be pointing in the direction of a long lasting terrorist threat. The first such reason is suggested by history. Terrorist acts, it would seem, tend to occur in waves hitting several countries over the same period of time. The author who first advanced this claim, David Rapoport, characterizes the notion of a wave as follows: "It is a cycle of activity in a given time period –a cycle characterized by expansion and contraction phases. A crucial feature is its international character; similar activities occur in several countries driven by a common predominant energy that shapes the participating groups' characteristics and mutual relationships." ⁷⁰ Rapoport identifies four such waves of terrorist activity since the end of the nineteenth century: the "Anarchist" wave originating in Russia in the 1880s and ending with the First World War, the "Anti-colonial" wave beginning in the 1920s and lasting about forty years, the "New Left" wave in the 1960s and 1970s, –illustrated by the activities of groups such as the German Red Army *Fraktion* or the Italian Red Brigades–, and a "Religious" wave starting around 1979 and continuing today. The claim is not, of course, that each wave has begun and ended with a clear break. The author also grants that some organizations using terrorism survived the wave in which they originated –such as the Irish Republican Army. Rather, the idea is that terrorist activities have followed a recognizable pattern, made of cycles, since the end of the nineteenth century. The notion of wave must be viewed in contrast to that of organization. In the previous three cycles terrorist activity has lasted longer than the particular organizations operating in each of them. In each case terrorist organizations were formed, then disappeared, but terrorist activity continued as new organizations inspired by the same theme emerged. The wave ended when its dominant theme ceased to inspire new organizations.

The notion of terrorism is notoriously difficult to define. While Rapoport does not articulate a definition of terrorism, the activities occurring during each of the four waves he identifies display sufficient similarities to justify ranging them in the same category. Two elements form the core of present day definitions of terrorism. Terrorist acts are acts of violence (1) perpetrated against civilians or non-combatants, and (2) designed to influence different audiences: the acts of violence are designed both to intimidate the adversary and to stir up potential followers by exposing the weaknesses of the adversary and by leading it to overreact thus generating more opposition; the goal is also to inspire the desire to imitate the act amongst those committed to the same cause. The material characteristics of the act reflect

⁷⁰ David C. Rapoport, "The four waves of modern terrorism", in D. Rapoport (ed.), *Terrorism. Critical Concepts in Political Science*, 4 vols., London, Routledge, 2006, vol. IV, *The Fourth or Religious Wave*, p. 4.

the importance given to this dual impact on public perceptions. Terrorists choose their targets and modes of action so as to achieve wide publicity. The characteristics of terrorism thus understood have undoubtedly been present in the terrorist attacks of the last decade.

What is striking, however, and what justifies Rapoport's approach is that such characteristics were also found in assassinations of prominent political figures by nineteenth century Anarchists, in the actions of "Freedom fighters" during the anti-colonial struggles, and in plane hijackings or hostage takings during the 1970s. The "new terrorism" that arose in the 1980s has been more destructive than its predecessors; this is indeed one of the characteristics that have led to term it as "new". While terrorists of previous generations sought primarily to draw attention to a cause and to grievances without necessarily causing heavy casualties, the new terrorists have focused more on inflicting significant damage and loss of life. An often-cited remark by terrorism expert Brian Jenkins captures the essence of the "old" terrorism: "Terrorists want a lot of people watching, not a lot of people dead."

Terrorists of the last decades have departed from that mode. Still publicity has remained one of their key instruments. Even when causing significant casualties, terrorists have typically been weaker actors confronting stronger ones. The new terrorists have used publicity to compensate somewhat for this asymmetry by magnifying the damage actually inflicted. They have also used the other side of publicity, the cult of heroes and martyrs, to heighten support for their actions. Thus, even though terrorism has mutated, publicity is still one of its choice weapons. That was the case for the Russian Anarchists of the nineteenth century as well. According to Rapoport, Russian Anarchists invented, and theorized, a new form of political action that Kropotkin named: "Propaganda by the deed". Another figure in Russian terrorism described the terrorist as "noble, terrible, irresistibly fascinating, uniting the two sublimities of human grandeur, the martyr and the hero."⁷¹

The terrorists' reliance on publicity may help to explain why particular terrorist actions tend to occur in different countries over the same time period while violent actions not relying on publicity, such as guerilla warfare or military campaigns, do not display this pattern. When a terrorist action occurs, it is ipso facto widely publicized. If judged successful by various publics, it then spawns replications, including, on occasion, by groups that do not share the ideology of the first users. This is particularly true when a new method of action is introduced. Such a dynamic of learning and emulation was important, for instance, in the propagation of suicide bombing. Shiite groups introduced the tactic in Lebanon. It achieved

⁷¹ Stepniak, *Underground Russia*, cited by David Rapoport, "The four waves of modern terrorism", *art.cit.*, p. 7.

stunning results, ousting American and French troops that had entered the country on a peace mission after the 1982 Israeli invasion. The secular Tamil Tigers, in Sri-Lanka, were so impressed by the achievements in Lebanon that they adopted the tactic in their own fight against the Buddhists. Note that from 1983 to 2000 the Tamil Tigers used suicide bombings more than all Islamic groups combined.⁷²

If, on the other hand, terrorist groups meet with resistance on the part of those attacked and do not achieve much by their actions –as was the case, for example with the Anarchist groups or with the European terrorist movements of the 1970s–, then those failures are highly salient, too. Over time the problematic nature of the activity becomes more and more visible. Fewer terrorist organizations are formed and the wave recedes.

For the present argument the crucial point is that even when terrorist groups meet with resistance it takes a fairly long time for a terrorist wave to dissipate. This at least has been the case with the previous three waves that have each lasted for about one generation. According to Rapoport, this is "a suggestive time frame closest in duration to that of human life cycle, in which dreams inspiring parents lose their attractiveness for children."⁷³ While Rapoport does not clarify the nature of the mechanism driving such a generational effect, the observations certainly warrant the claim that terrorist waves have displayed so far a generational pattern. Moreover the lasting character of the previous three waves seemed to be due in large part to the themes, ideals and beliefs animating each. Whether or not it met with resistance, each wave had its own ideological momentum.

There is little reason for thinking that the present wave connected as it is with religion-based beliefs will be any more short-lived than its predecessors. Students of terrorism still debate the exact weight of religious motivations in prompting individual people to commit acts of terrorism and in pushing groups to orchestrate terrorist campaigns.⁷⁴ But there is no doubt that beliefs connected with religion, more specifically with Islam, have been playing some role. Note that the role of religion is another characteristic that differentiates what has been called the "new terrorism" from previous forms. Ideologists of jihadism have succeeded in producing a potent mix of beliefs, values, symbols and narratives that has demonstrated a certain efficacy in weaving together various grievances and mobilizing radical

⁷² See Robert A. Pape, "The strategic logic of suicide terrorism", *American Political Science Review*, vol. 97 (3), August 2003, pp. 323-361

⁷³ David C. Rapoport, "The four waves of modern terrorism", *art. cit.*, p. 5.

⁷⁴ See Stephen Holmes, *The Matador's Cape. America's reckless response to terror*, Cambridge, Cambridge University Press, 2007, ch. 1.

activists.⁷⁵ While the exact weight of this ideological factor is hard to determine, the fact that it has played some role in terrorist activity so far is sufficient to consider it a risk. Generally speaking ideologies have a timeframe of their own. Once established, they do not respond quickly to counter argument whether in the form of disconfirming evidence or rival beliefs. In light of the particularly enduring character of religions as belief systems, one cannot expect the risk posed by an ideology connected with religion to recede quickly. Whatever protections are judged necessary now, they are likely to remain so over the next decades.

A second reason for thinking that the current terrorist threat is unlikely to become insignificant in the near future lies in organizational structures. There seems to be a consensus among experts that Al Qaeda, the principal terrorist group operating at the moment, is not, at least not essentially, a hierarchical organization with a central leadership controlling the various component units.⁷⁶ The group seems to be organized more along the lines of a network, in which the participant units have a large degree of autonomy and do not necessarily communicate with the center while communicating with each other (via the Internet in particular). The decentralized character of Al Qaeda is related to the importance of the ideological motivation in it. Al Qaeda terrorists have often been described as "mission driven", not "leader driven". The respective weights of central control and unit autonomy are hard to determine, but both elements seem to be present. Besides, as a result of the 2001 campaign in Afghanistan and subsequent developments, the organization seems to have become more decentralized than it originally was. The American invasion of Iraq has further accentuated the dispersion of radical activists.

In the context of the present argument the dispersed character of the threat has important implications. In the first place, it implies that the collapse of any one terrorist group, including Al Qaeda, would offer no assurance that the danger posed by jihadist terrorism has ended. Even if in fact the central leadership of Al Qaeda was playing a preponderant role, the potential targets of terrorist attacks would not know it with sufficient certainty to let their guard down on the sole announcement that the center was no longer active. On the other hand the dispersion of terrorist groups renders political accommodation problematic. Suppose even that the target countries struck some kind of compromise involving concessions on both parts

⁷⁵ On this see Gilles Kepel, *The Roots of Radical Islam*, New York, Saqi Books, 2005; *Terreur et martyre*, Paris, Flammarion, 2008.

⁷⁶ On this see: A. K. Kronin, "Sources of contemporary terrorism" in Audrey K. Cronin, James L. Ludes, (eds.), *Attacking Terrorism, op.cit.*, pp. 19-45; Jonathan Stevenson, *Counter Terrorism: containment and beyond*, Adelphi Papers, Oxford University Press, 2004; *La France face au terrorisme, Livre blanc du gouvernement sur la sécurité intérieure face au terrorisme, op.cit.*, p. 36

with the Al Qaeda leadership, such an accord would not offer a sufficient guarantee for the target countries to drop their precautionary security arrangements.

A third reason for thinking that the threat posed by the present variety of terrorism, Islamist or otherwise, is not likely to dissipate soon has to do with technology. As one author put it: "Developing technology and the spread of knowledge will make the acquisition of weapons of mass destruction more and more possible for smaller and smaller groups. Therein lies the gravest danger we face, and it will be with us for a very long time."⁷⁷

Thus, it would not be reasonable to design arrangements for confronting terrorism on the assumption that the present threat will recede quickly. There is, however, a further reason for not counting on the end of the threat in designing these arrangements. Call it the epistemic reason. It consists in this. Even assuming that the current terrorist threat came to an end, it would be hard to determine when exactly it has ended. Unlike wars, rebellions or invasions, terrorist waves do not offer clear lines demarcating the beginning and end of the danger. Terrorist waves do come to an end, but we know it only in retrospect, generally after quite some time has passed. In fact the same holds for their beginning. Public perceptions have now identified September 11, 2001 as the beginning of the present terrorist threat. But the attacks of that day were only the most spectacular occurrence in a cycle that probably started in the 1980s. Terrorism is an activity whose beginning and end are hard to discern.

This holds for terrorism generally speaking. While terrorist groups sometimes conduct systematic campaigns that come to a clear end, the end of one campaign does not necessarily mean that terrorist attacks will not resume. Indeed those who were attacked do not regard the end of one campaign as sufficient reason for dropping their protections against potential further strikes. Even in a systematic campaign terrorist groups employ the tactic of surprise attack. Furthermore as terrorism is typically conducted by clandestine groups intelligence is crucial in assessing the existence and level of a threat. However, intelligence-based information is rarely, if ever, unambiguous.⁷⁸ It would be highly problematic to make the termination of legal and institutional arrangements dependent on such information.

The transnational character of the present terrorist threat further exacerbates the epistemic problem. Under the present circumstances it is especially hard to determine what

⁷⁷ Philip B. Heymann, *Terrorism, Freedom and Security. Winning without War*, *op. cit.*, p. 162. On this, see also: D. Omand, "Countering international terrorism: the use of strategy", *art. cit.*, p. 112;

⁷⁸ See Jonathan Stevenson, *Counter Terrorism: containment and beyond*, *op. cit.* p.17. "Intelligence, and therefore intelligence-based warnings, are inherently ambiguous", the author writes. On what can and cannot be reasonably expected from intelligence agencies see also: Paul R. Pillar, "Intelligence" in Audrey K. Cronin, James L. Ludes, (eds.), *Attacking Terrorism. Elements of a grand strategy*, *op.cit.*, pp. 115-139

would or should count as an end of the threat for any given country. Suppose that the U.S. has put in place various security arrangements, perhaps using some kind of emergency institution. Ten years have passed since 9/11. No terrorist attacks have occurred on U.S. soil, but Karachi and London have suffered terrorist strikes claimed by jihadist groups. Would the U.S. dismantle its security arrangements or terminate the emergency legislation that has been in force for ten years? Most likely, it would not. Should it? It is hard to tell. When, then? Emergency institutions are designed for national dangers, not for borderless threats.

The emergency paradigm, then, is fundamentally inappropriate for confronting the present terrorist threat. This results from its basic structure. As we noted the emergency framework includes in the first place an authorization to deviate from constitutional norms and values. Consistency with the constitutional order is secured by the fact that such deviations are temporary –and necessary. Short duration is a necessary condition for emergency measures to be consistent with constitutional values. Of course, short duration is an imprecise notion. Yet it makes a difference in kind if the expected duration of the measures to be taken numbers in decades. Given the lifespan of human beings, indefinite detention for decades would mean in many cases detention in perpetuity. Similarly, accountability at a time horizon of decades would amount to no accountability at all. The same is true of compensation for wrongs.

The requirement of short duration implies that the emergency framework is ill suited to circumstances that may necessitate a sustained course of action. We may or may not be able to drop our arrangements for confronting terrorism at some point in the future, but their consistency with constitutional values should not depend on whether or not they can be terminated and when. However, in order to be sustainable over the long haul, possibly the indefinite future, the course of action that democracies choose has to be consistent with their constitutional values from the outset. It is not the right method to rely on the end of the danger when this end is so uncertain and hard to determine.

This brings us to the other side of the emergency paradigm. The emergency paradigm requires the actions it authorizes to be temporary because these actions are deviations from constitutional norms and values. The temporary character serves to counterbalance and circumscribe the deviating. Since we are bound to deal with terrorism for a long time, we should not deal with it by means of deviations from norms. In fact it is not necessary to envision terrorism as a phenomenon to be tackled primarily through exemption from rules. The terrorism we face may be out of the ordinary, but this does not mean that we

cannot design lawful ways of dealing with it that are adapted to the particular characteristics of the activity. Present day terrorism is an objective reality whose features, including its potentially very dangerous character, can be analyzed and reasonably judged. New legislation and new legal instruments at both the domestic and international levels may be needed to confront it. But in designing those instruments, the sole question should be: what treatment does the principle of the rule of law justify for this particular phenomenon? The expectation that the phenomenon will be of limited duration should play no role at all in our reasoning.

The point of this study was not to determine the outcome of such reasoning, just to demonstrate that we should not reason along the lines of an emergency.

