FRANCESCA GALLI, LAW ON TERRORISM: THE UK, FRANCE AND ITALY COMPARED, BRUXELLES, BRUYLANT, 2015 (394 PP.)

A DISCERNING ANALYSIS ON THREE EUROPEAN COUNTRIES' FIGHT OVER DOMESTIC TERRORISM

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1.

Law on terrorism is the first monograph of a young Italian scholar, Francesca Galli, who has built her academic career abroad from her native country. This experience has secured her the toolkit to approach her field of research, that is criminal law, and – more precisely – counter-terrorism legislation, from a comparative perspective analysing three European countries, i.e. United Kingdom, France and Italy.

The book's asserted aim is to give a contribution in shaping future anti-terrorism policies in such a way to rebalance the objective of protecting the population at large with the need not to adopt measures too detrimental to individual rights. This work can thus be placed within the wider ongoing academic debate on anti-terrorism legislation which have known huge developments since September 2001. The most striking of them is a shift towards an authoritarian model of preventive criminal law that has its roots in an academic debate stemming from Günter Jakob's theory of a *Feindstrafrecht* – an 'enemy criminal law'[1] – able to deny human rights and legal guarantees to anyone who is seen as sources of danger because of some suspicious behaviour.

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[1]G. Jakob, *Kriminalisierung im Vorfeld einer Rechtsgutverletzung*, 97 Zeitschrift für die gesamte Strafrechtwissenschaft, 751 (1985).

By embracing a civil libertarian's point of view, the Author effort is to deny the validity of this 'us and them' approach in counter-terrorism policies and in criminal law at large, mainly because of the unforeseeable consequences which would affect key principles such as legality, equality, due process and presumption of innocence.

Galli's work finds its clear distinguishing features within this wide debate in its efforts in comparing a common law jurisdiction with two civil law countries, in focusing both on legal provision and case-law. The outcome is – at the end of the day – that the strongest difference among the three approaches lays in the different use of preventive administrative measure. The book has been structured in four chapter each one focusing on a selected theme, while an introduction and a final chapter with concluding remarks complete the work. The first choice worth to be highlighted is the insertion in the introduction of a brief but interesting historical overview for each of the three countries concerning the specific terroristic threats faced in the past and their domestic response. This historical background takes into account a period which goes from the 1960s to the end of the 1990s, that is before the radical Islamic terrorist activities would became a major concern for liberal democracies after September 2001.

2.

Chapter one explore the context, dealing with the evolution of the substantive criminal law designed to face terrorism, such as the attempts to define terrorism and the creation of new offences related to it. The Author highlight the common features shared by the three legal orders on this issue. First of all, terrorism has been defined as a concept rather than a criminal offence as such and a common mens rea is shared by the three definitions, mentioning an indiscriminate use of violence for political purposes. New provisions have introduced criminal offences in inchoate mode and have criminalize of all sort of preparatory acts, and last but not least, they have framed the use of special procedural measures. Therefore, those new pieces of legislation seems to be quite problematic. Instead of keeping the criminalisation of preparatory acts restricted to those which are close to the stage of

execution of the intended offences, they have been drafted – according to the Author – in a too vague fashion, going beyond the limits of what criminal law normally penalises. Actually, the introduction of those inchoate offences has been coupled with the development of anticipative criminal investigations, triggering the application of special procedural rules for the investigation and trial of terrorist offences. However, the latter tend to rely more and more on individual characteristics or belief as if race, religion and ethnicity could be considered indicators of dangerousness. Their application affect a wide group of individuals, often with reduced judicial oversight – such as immigrant – even though they cannot be found guilty of any crime and with a concrete risk of a spill-over effect.

The second and third chapter take into account two different kind of investigative powers and their applying procedures, i.e. the interception of communications and police powers to stop, search, and to detain for questioning. Chapter two examines the distinctive features of telephone tapping provision in the three jurisdictions, a typical mean of investigation which after September 11 has become crucial for its practical uses in prevention and prosecution of terrorist activities. The Author has focused on the actors involved in the interceptions either for authorisation or execution purposes, the scope and duration of them and the potential use of the information gathered as evidence at trial. In the United Kingdom intercept evidence is not admissible in criminal proceeding, while in France and Italy almost all criminal investigations involve the use of intercepted information, which usually contains a plenty of highly probative material to grant the conviction of suspects.

Consequently, it can be easily understood how hard it is to prosecute suspected terrorists in the UK. Telephone tapping can be used for investigative purposes and crime prevention but not for prosecution. To deal with the following shortage of evidence, the government have looked to administrative measures such as control orders or terrorism prevention and investigation measures as means to get hold of those suspected of terrorist activities. Therefore, according to the Author, the ban of the intercept evidence at trial has provided an excuse for the creation of extra-judicial methods by which terrorist suspect can be locked up

without the need to have them prosecuted, convicted, sentenced by the criminal courts.

In France and Italy, an opposite situation can be found: telephone tapping is far better conceived and its crucial in prosecution. In order to achieve this aim, the two continental legislators have drawn a clear line to distinguish between judicial interceptions for the purpose of evidence gathering to support the prosecution case and preventive interceptions for general purposes of national security.

Chapter three deals with enhanced police powers for the purpose of evidence gathering and prosecution of terrorist suspects. More in details, the Author focuses on the powers of stop and search of individuals and vehicles, the powers of entry and search of houses and other premises, the gathering and retention of fingerprints and other non-intimate samples, the powers of detention for evidence gathering with a view to prosecution and pre-trial detention provisions. The most important outcome of this part of the enquiry is that anti-terrorism policies are becoming increasingly proactive, because their aim is to detect and stop terrorists plots before being carried out. They seems to be grounded on suspicions rather than reasonable grounds, as reactive policies in criminal law usually are. Consequently, a common trend in each of three jurisdictions is an higher level of policy autonomy and a mirroring decrease of judicial scrutiny.

This outcome is particularly evident in the UK where, according to Terrorism Act 2000, a person can be arrested on ground of reasonable suspicions of being a terrorist – without any requirement of having committed or being about to commit an offence. This provision have the only aim of gathering evidences during police questioning, and once again is the result of the features of that legal order, where post-charge questioning is considered unacceptable. In France and Italy, police have wide general powers of stop, search and arrest, not only on allegation of terrorism, but these powers ought to be applied under narrow circumstances of necessity and urgency. Moreover, Italy and France allow very long periods of pre-trial detention for defendants which reach a maximum of six and four years respectively, a length that make comprehensible the reasons why these two countries did not have a necessity to introduce

administrative detention measures. Because of that, the two countries have been condemned several times by the Strasbourg Court in relation to these long periods of pre-trial detention which have been judged not in compliance with the right to be tried within a reasonable time ex art. 5(3) ECHR.

Finally, chapter four analyses administrative measures for the detention, control and deportation of terrorist suspect. Being concerned with the thorniest issue relating to anti-terrorism policies, this is also the longest chapter of the book where a in depth analysis of the new administrative tools adopted in the three countries is provided. The shift towards administrative means is due to need of providing a quick answer where national security is thought to be in danger bypassing the complexity of criminal investigations and at the expense of judicial scrutiny. This implies sidelining individual rights being these measures based on secret intelligence gathered by security services which are not meant to be used as evidence in criminal process.

Once again is the United Kingdom's legal order the most concerned by these kind of provisions, mainly because of the aforementioned peculiarities concerning the impossibility to rely on interceptions and pre-charge detention which are deemed to lower the chance of evidence-gathering for prosecution purposes. Therefore, Britain made massive use during the last decades to a range of administrative restrictions on the right to liberty for suspected terrorists, such as deportations, indefinite detention without trial, control orders, terrorism prevention and investigation measures (TPIMs) and proscription. Today's most important administrative instruments are TPIMs and proscription while deportation, detention and control order have been phased-out due to their troublesome effect on human rights.

Also France and Italy rely on administrative measures within anti-terrorism policies, and above all on deportation of suspected terrorist which, nevertheless, seems to be the most problematic tool considering that the person concerned could undergo torture in their homeland and appeals against the administrative decision are not suspensive. Moreover deportation order on national security grounds can be directed only against foreigners thus implying the aforementioned match between immigration and counter-terrorism law.

3.

In conclusion, by comparatively examining the three countries the Author gives to the reader wider means to understand the current situation and to learn some valuable lessons. The diachronic comparison is used to show that today's scenario is not that different from the past – when the main terroristic threat was a pure domestic one. It is acknowledged that some developments in terrorist activities have clearly affected their modus operandi. The internet is just an obvious example of these changes on the operational side, since it opened up to self-recruitment and self-training of 'lonewolves' and home-grown terrorist, leading to the growth of new counter-terrorism policies and the introduction of new provisions.

However, according to the Author, the clear shift towards prevention, surveillance and security should be provided also with theoretical coordinate. In particular, reference ought to be made to sociological studies dealing with the 'risk society' and a 'culture of control'. In other words, the evolution of the terrorist threat we are nowadays facing is just one of the drivers of the law on terror, while citizen's perceptions and the need for national governments to cope with public fear and anxiety are increasingly influencing the political and legal response to terrorism. Thus, the criminal law policies adopted so far have lowered the standards of proof to a 'possibility of future harm' which is based on intelligence information and could not be more faraway from the ordinary 'proof of past criminal activities', which relies on more onerous evidentiary requirements. According to the Author, this evolution is the reflection of a shift towards an 'enemy criminal law' that is replacing a 'citizen's criminal law'. The former implies that anyone whose behaviour intend to deny his opponent's way of life is to be considered an enemy and can legitimately been investigated by the state. The foreigner become an outsiders, thus an enemy and this is particularly true where anti-terrorism policies are matched with immigration law, becoming utmost apparent how the latter is used as a substitute of criminal law. As consequence, we face a politicisation of law and a denial of human rights and legal guarantees.

Therefore, no convincing reason can be easily found to justify the introduction of extraordinary measures which go under the label of 'war on terror' and which allow derogations from the

usual guarantees granted by criminal substantial and procedural law whenever an individual become suspected of terrorism. This is mostly true considering that preventive administrative measures are no more connected only to genuine emergency and are no more exceptional nor temporary. The painful question arising is whether terrorist should not be treated as criminals like the other or they should be entitled only to a lower degree of rights.

All those crucial issues make Francesca Galli's book extremely actual and a real open-minding reading on terrorism law and its spill-over effect on criminal law at large. Beside that, it has to be prized the interdisciplinary approach with an amazing and successful attempt to highlight the blurring boundaries between administrative and criminal law, which make the reading attractive and useful both to administrative and criminal lawyers.