Donato Castronuovo

The "Years of Lead" in Italy and Reward Models as Counterterrorism Measures in Europe[1]

Abstract

The subject is addressed by focusing on two aspects: i) the identification of constant political-criminal models in emergency legislation, with particular reference to the fight against terrorism; ii) diachronic and synchronic dissemination of such constants in other legal experiences, both of the past and contemporary with Italian legislation of the 1970s/1980s. The concluding paragraph will offer some brief remarks regarding the relevance of such tools today in the fight against international terrorism in Europe, taking into special consideration one of the aforesaid constants, namely, reward-based legislation aimed at so-called *pentiti*.

I. Emergency legislation as a parallel track alongside "common" criminal law.

The expression "emergency legislation" generally indicates a set of "special" legislative measures aimed originally at combating the phenomenon of terrorism and subversion in the so-called "Years of Lead"[2] and later extended to organised crime in all its forms, from the mafia to drug trafficking, the scourge of kidnapping, corruption, global terrorism and, ultimately, wholly diverse phenomena (e.g. violence during sports events).[3] Such measures, not always temporary, are characterised by a strengthening of

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2 The expression appears to have derived from the film by Margarethe von Trotta *Bleierne Zeit*, 1981, Germany.

3 Moccia (ed.), *I diritti fondamentali della persona alla prova dell'emergenza* (2009). From an Anglo-Saxon perspective, Walsh, "Beyond the Ordinary: Criminal Law and Terrorism", in Lennon/King/McCartney (eds.), *Counter-terrorism, Constitutionalism and Miscarriages of Justice* (2018), § 3.

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repressive responses, a reduction or suspension of individual guarantees and rights, an extension of the powers of police forces, etc.[4]

Based on this and other current definitions, it may be assumed that the fight against the political terrorism of the 1970s and 1980s represents not just *one* of the possible forms in which emergency legislation manifested itself in the Italian context, but rather its *main*, original expression. And, moreover, that such legislation was aimed at producing a massive increase in the repressive effectiveness of the state machinery.

Such assumptions deserve to be verified on the basis of a historical description.

First of all, one might wonder whether the extreme intensification of the state's repressive response is the sole feature of emergency legislation. Secondly, whether such a "beyond the ordinary" phenomenon actually began with the legislative responses to the political terrorism of the "Years of Lead".

As we shall see, answering these two questions will entail considering the existence of more remote constants and will enable us to set out a model – a *mos italicus* in criminal law, focused on "combating" (or even "of the enemy") – which has partial analogies in other European legal systems.

II. From the origins to the Years of Lead

In reality, the history of emergency legislation began over a century before the Years of Lead: more precisely, in the early years of the unified Italian State with the "Pica Law", no. 1409 of 15 August 1863, which was aimed at rooting out brigandage in the southern provinces of the former Bourbon kingdom. It was later confirmed and clarified by the "Peruzzi Law", no. 1661 of 7 February 1864. The adoption of "special" laws to deal with emergencies thus manifested itself even before the introduction of the first criminal code of unified Italy: the Zanardelli Code of 1889.

With the Pica Law, the post-Risorgimento emergency was tackled by relying on military tribunals, stepping up repressive measures and suspending or reducing constitutional guarantees; but the law also introduced a special extenuating circumstance: those who had already turned themselves in or who turned themselves in within a month after the law's entry into force would qualify for a reward in the form of a reduction in the severity of the penalty.

The historical judgment on this anti-brigandage legislation is usually very negative: among other things, the Pica Law is deemed to have had a harmful influence on the penal system of the newly born Kingdom of Italy, precisely by inaugurating the long tradition of exceptional and emergency legislation that would develop alongside the "liberal" code and constitute a second repressive track.[5]

4 Grevi, "Sistema penale e leggi dell'emergenza: la risposta legislativa al terrorismo", in Pasquino (ed.), *La prova delle armi* (1984), 17 ff.; Donini, "Lotta al terrorismo e ruolo della giurisdizione", *Questione giustizia*, Gli Speciali: *Terrorismo internazionale. Politiche della sicurezza. Diritti fondamentali*, 2016, 113.

5 Adorni, "Il brigantaggio", in Violante, *Storia d'Italia. Annali 12. La criminalità* (1997), 281 ff.; Rosoni, "Dalle codificazioni preunitarie al codice Rocco", in Insolera/Mazzacuva/Pavarini/

If we shift our focus from the post-Risorgimento context to that of the 1970s and 1980s—hence a very different institutional and constitutional context from the one in which the 19th-century legislation had been enacted—we again find a legislation that derogates, at least partially, from constitutional principles, on both a procedural and substantive level. Such derogations were implemented not only through special laws, but also by making significant changes to the codes (criminal and procedural) and to the penitentiary system.

This legislation was often deficient in terms of certainty/determinateness, as it tended to stray away from the typical criteria of a criminal law based on the fact and on culpability, moving closer to a perspective centred on subjective elements: the offender (*Täterstrafrecht*), his/her intimate attitude (*Gesinnungsstrafrecht*) and social dangerousness, which would moreover lead to prosecution of association offences and mere danger. This understanding was markedly symbolic, repressive, preventive and ultimately authoritarian.[6] The legislative instruments used were often law decrees; parliamentary minorities participated in the production of legislation only at a later stage, at the time of conversion into law. Furthermore, this approach was characterised by a certain recurrence, resulting in a sort of oxymoronic "stabilisation of the emergency".[7]

The highly repressive nature of this legislation, despite not resulting in an automatic abandonment of the model of the constitutional state, certainly represented an element of crisis.[8] According to a widely held, but not uncontroversial view, the legislation of the Years of Lead—while not devoid of aberrations—generally remained within the framework of constitutional guarantees, though the results of the emergency logic were an expression of a worrying involution of the legal system.[9]

In any case, in the Years of Lead, as in post-Risorgimento Italy, the criminal law focused on "combating" (if not on "the enemy") developed along two directions of criminal policy:

i) on the one hand, an intensification of the repressive response and a limitation of freedoms;
ii) on the other hand, a reward-based approach of both a substantive and procedural nature, aimed at breaking up terrorist groups, with the possible rehabilitation

Zanotti, *Introduzione al sistema penale*, Vol. I (2012), 18; R. Minna, *Crimini associati, norme penali e politica del diritto* (2007), 13 ff.

6 See generally Vives Antón, "Garantías constitucionales y terrorismo", in Alonso Rimo/Cuerda Arnau/Fernández Hernández, *Terrorismo, sistema penal y derechos fundamentales* (2018), 27; Dickson, "The Constitutional Governance of Counter-Terrorism", in Lennon/King/McCartney (eds.), *Counter-terrorism, Constitutionalism and Miscarriages of Justice* (2018), § 2.

7 Moccia, *La perenne emergenza. Tendenze autoritarie nel sistema penale* (1997).

8 On the incompatibility between constitutional state and "exceptional" criminal law, see, Ferrajoli, *Diritto e ragione. Teoria del garantismo penale* (1996), 850 ff.

9 For a historical overview, see, Pulitanò, "L'evoluzione delle politiche penali in Italia negli anni settanta e ottanta", in Donini/Stortoni, *Il diritto penale tra scienza e politica* (2015), 36.

> of the many—mostly young—individuals who had participated in the "armed struggle".[10]

In my opinion, the truly characteristic feature of "Italian-style" emergency criminal law is identifiable in the latter aspect: in the "rewards", as a "differentiated strategy" for combating terrorism, which combined a more inflexible criminal law with what was at least apparently a more lenient approach, oriented towards securing offenders' withdrawal, dissociation, and cooperation in trials, and was critically defined as a *soft inquisition* or *trafficking in indulgences.*[11]

The reward-based legislation adopted in Italy in the 1970s and 1980s probably represents the most significant experience—among civil law systems—in the field of collaborators with justice.[12]

Law 152/1975 ("Reale Law") and Law 533/1977 were characterised solely by the repressive aspect (strong limitations for provisional release, extension of police custody and searches, as well as of the legitimate use of arms by public officials). However, Law Decree 59/1978, adopted a few days after Moro's kidnapping,, beside the introduction of the severely punished crime of "kidnapping for purposes of terrorism or subversion" (Article 289-*bis* Criminal Code), provided for rewards consisting in substantial reductions of sentences for "active dissociation", that is, for participants in kidnappings who helped to secure the release of the victim.

The subsequent "Cossiga Law" (Law Decree 625/1979 likewise moved in two directions: on the one hand, it provided for a harsher response on a substantive and procedural level; on the other hand, it granted extenuating circumstances in the case of dissociation or cooperation in the gathering of decisive evidence and a particular form of "pro-active withdrawal".[13]

The so-called "Law on *Pentiti*" (Law 304/1982) accentuated the reward-based criminal policy by providing for a ground for exemption from punishment and some extenuating circumstances according to the type of cooperation (dismantlement of the organisation, prevention of a crime, gathering of evidence, identification of those responsible, reconstruction of the facts) and the type of role in the terrorist activity

10 On the rewarding techniques, see Beernaert, *Repentis et collaborateurs de justice dans le système pénal: anlyse comparée et critique* (2002); Ruga Riva, *Il premio per la collaborazione processuale* (2002); Benítez Ortúzar, *El colaborador con la justicia* (2004); Hardinghaus, *Strafzumessung bei Aufklärungs- und Präventionshilfe. Der Kronzeuge im deutschen Strafrecht unter besonderer Berücksichtigung von § 46b StGB* (2015).

11 Padovani, "La soave inquisizione", *Rivista italiana di diritto e procedura penale* (1981), 529; Padovani, "Il traffico delle indulgenze", *Rivista italiana di diritto e procedura penale* (1986), 398. For a list of the advantages and drawbacks tied to rewarding practices, see Beccaria, *Dei delitti e delle pene* (1764), § XXXVII.

12 Cf. Tak, "Deals with Criminals: Supergrasses, Crown Witness and Pentiti", *EJCCLCJ* 5/1 (1997), 1; Beernaert, "De l'irrésistible ascension des 'repentis' et 'collaborateurs de justice' dans le système penal", *Déviance et Société* 27/1 (2013), 85; Sommier, "Repentir et dissociation : la fin des 'années de plombs' en Italie?", *Cultures & Conflits* (2000), 1.

13 Chelazzi, *La dissociazione dal terrorismo* (1981); Ruga Riva, *Il premio per la collaborazione processuale* (2002), 42 ff.

(having taken part or not in carrying out the offences committed in pursuit of the organisation's objectives).

Law 34/1987, in an attempt to "close" the era of the Years of Lead, established rewards for forms of "pure" repentance, without simultaneous cooperation, where the "only" requirement was the admission of the activities actually engaged in, the adoption of behaviour that was objectively and manifestly incompatible with a persisting membership in the organisation and the repudiation of violence as a method of political struggle. This law, like Law 304/1982 (and unlike the Cossiga Law), provided for an "expiry date"; but unlike in the previous legislation, the purpose of "combating" terrorism was entirely replaced by (or pursued through) that of dissociation and rehabilitation, a "strategy" that has met with a variety of appraisals.[14]

Finally, Article 4-*bis* of the Penitentiary Act (Law no. 354/1975, as amended in 1991) fits into an "upside-down perspective". It includes offences committed for purposes of terrorism or subversion in the large catalogue of the so-called *reati ostativi*, which preclude the normal enjoyment of benefits such as the opportunity to work outside prison, bonus leaves and measures alternative to detention, and abolishes this preclusion solely for detainees who collaborate with the justice system.

III. Penalties and rewards: the utilitarian character of emergency legislation

The very notion of "reward-based criminal law" embodies an oxymoron, whose apparent contradictoriness can be overcome if the reward measures are understood from the perspective of a "rationality of purpose."[15] All the reward measures mentioned thus far have a *rationale* which, in a broad sense, is *negotiatory.*[16]

The utilitarian logic is evident: it is based on an exchange between conduct that is "demanded" (withdrawal, dissociation, cooperation) and a "promised" recompense (exemption from punishment, reduction of penalty), as well as between the reduction of individual liabilities and the political need to combat the terrorist phenomenon. Likewise evident is the efficiency and objective-oriented logic underlying the legislation in question and the activity of investigative and judicial bodies. Essentially, from this perspective—to paraphrase the well-known axiom of von Clausewitz on the relationship between war and politics—*reward-based criminal legislation is a continuation of the fight against terrorism by other means.*

14 Cf. Caselli *et al.*, *La dissociazione dal terrorismo* (1989).

15 Ruga Riva, *Il premio per la collaborazione processuale* (2002), 6 ff.

16 They are mostly "substantive" reward measures (extenuating circumstances or grounds of exemption from punishment) as the principle of mandatory prosecution applies Italy (Art. 112 Constitution); in the legal orders embracing the opposite principle of discretion, it is simpler to apply also forms of "procedural rewards" (through informal immunity agreements, plea bargaining, etc.). Cf. Bernasconi, *La collaborazione processuale* (1995); Ruga Riva, *Il premio per la collaborazione processuale* (2002), 26 ff., 204 ff.; Beernaert, *Repentis et collaborateurs de justice dans le système pénal* (2002), 313 ff.; McKay, "The Doctrine of Public Interest Immunity and Fair Trial Guarantees", in Lennon/King/McCartney (eds.), *Counter-terrorism, Constitutionalism and Miscarriages of Justice* (2018), § 13.

Above and beyond the negative view one might take of the "stabilisation of the emergency" that the large volume of Italian reward-based legislation suggests—not only for the measures that have been made permanent, but also for the recurrent use of special legislation—it is undeniable that the reward techniques, despite being highly controversial, achieved a recognised historical effectiveness in the fight against the terrorist and subversive violence of the 1970s and 1980s.[17]

Certainly, in addition to the controversies already mentioned, and those due to particular cases of judicial application, the reward measures also raised criticism from those who disputed their compatibility with the general principles of criminal law, for example because of their alleged contradiction with the purpose or functions of punishment.

It has indeed been argued that the reward provisions turn the principle of proportionality of penalties upside-down, since the individuals who are most deeply "implicated", such as the promoters, can offer more in terms of cooperation (and, accordingly, obtain more by way of a reward) than a member with a minor role; and that such measures do not give rise to the likelihood of the offender becoming less dangerous or reintegrated into society.[18]

However, it has also been observed that the reward measures have in any case a certain preventive effectiveness to the extent that they are aimed at breaking up criminal organisations and reaffirming ethical and social values, also on an individual level (though no "repentance" is required, nor is the term *pentiti* used in any of the above-described measures).[19]

IV. The dissemination of models of antiterrorist criminal policy in Europe.

In addition to the previously noted extension towards other areas of legislation at a national level, the reward model seems to have been disseminated to a certain degree on an international level as well. However, whereas in the fight against terrorism we can recognise everywhere and in every era an *intensification of repression*, which represents its most evident diachronic and synchronic constant, that does not seem to be the case with the *reward constant*. The reward-based approach does not appear to have the same importance or be disseminated so widely, at least from the standpoint of its practical application, exception made for reward instruments tied mostly, on a substantive sphere, to cases of "pro-active withdrawal".

17 Cf. Ruga Riva, *Il premio per la collaborazione processuale* (2002), 527 ff.; Pulitanò, "L'evoluzione delle politiche penali in Italia negli anni settanta e ottanta", in Donini/Stortoni, *Il diritto penale tra scienza e politica* (2015), 36 ff.; Cottu, "Altre 'soavi inquisizioni'", in *Diritto penale contemporaneo – Rivista trimestrale,* (2017), 197 ff.

18 Padovani, "Il traffico delle indulgenze", *Rivista italiana di diritto e procedura penale* (1986), 419 ff.

19 Pulitanò, *Diritto penale* (2017), 503 ff.

Let us schematically summarise the trends in the antiterrorism legislation of the 1970s/1980s in some European countries.[20]

a) The repressive constant.

In Germany, starting from the mid 1970s, laws were introduced on several occasions with the aim of combating political terrorism. Such laws were criticised for their excessive harshness, even outside the legal debate.[21]. In France, the law of 9 September 1986 created special rules for the repression of terrorism, which were substantially reiterated in the criminal code of 1994 (Articles 421–1 et seq.) and characterised by particular rigour on a substantive and procedural level.[22] In the United Kingdom, very tough legislation had already been adopted as early as the first decades of the 20th century, with the application of martial law and offences tried by military tribunals, and was later echoed in the antiterrorism legislation of the 1970s and 1980s.[23] In Spain the legal system "metabolised" the phenomenon of terrorism, especially as far as Basque separatism was concerned, to the extent that the Spanish Constitution of 1978 allows for the suspension of several fundamental rights in the case of individuals accused of participating in armed bands or terrorist groups; even though the derogation—which regards personal freedom, the inviolability of the home and the secrecy of communications—requires the introduction of a *ley organica* to determine the manner and circumstances of the suspension (Article 55, paragraph 2, Spanish Constitution).[24]

b) The reward constant.

In connection with the fight against terrorism in the 1970s/1980s, the reward constant also finds analogies in geographically near legal systems.[25]

20 For a comparative overview, see Vercher, *Terrorism in Europe. An International Comparative Legal Analysis* (1992). With reference to international terrorism, Galli, *The Law on Terrorism: The UK, France and Italy Compared* (2015); Rossi, "La circolarità dei modelli nazionali nel processo di armonizzazione europea delle legislazioni penali antiterrorism", *Diritto penale contemporaneo – Rivista trimestrale* (2017), 176 ff.

21 We need only mention the documentary film *Deutscher Herbst*, Germany, 1978.

22 Cf. Pradel, *Droit pénal général* (2016), 272; Leroy, *Droit pénal général*, (2018), 145; Ottenhof, "Le droit pénal français à l'épreuve du terrorisme", *Revue de sciences criminelles* (1987), 607 ff.; Cartier, "Le terrorisme dans le nouveau code pénal français", *Revue de sciences criminelles* (1995), 225 ff.

23 Greer, "Terrorism and Counter-Terrorism in the UK: From Northern Irish Troubles to Global Islamist Jihad", in Lennon/King/McCartney (eds.), *Counter-terrorism, Constitutionalism and Miscarriages of Justice* (2018), § 4.

24 Cancio Meliá, *Los delitos de terrorismo: estructura típica e injusto* (2010), 83, 151 ff.

25 Cf. Vercher, *Terrorism in Europe. An International Comparative Legal Analysis* (1992), 258 ff.; Tak, "Deals with Criminals: Supergrasses, Crown Witness and Pentiti", *EJCCLCJ* 5/1 (1997), 4; Beernaert, *Repentis et collaborateurs de justice dans le système pénal* (2002); Ruga Riva, *Il premio per la collaborazione processuale* (2002), 99 ff.; Hardinghaus,

In France, the *code Napoléon* of 1810 already included a general provision relating to the *excuse de dénonciation*, whereby informants were granted exemption from punishment or a reduction of sentence. However, the successive provisions on *repentis* in relation to acts of terrorism—now laid down in Articles 422–1 and 422–2 of the *code pénal* of 1994, which address possible cases of pro-active withdrawal—have been scarcely applied.[26]

In Spain, where the reward instrument has deep historical roots, such measures were relied on, starting from 1981, to combat Basque separatist terrorism. Legal scholars explicitly recognise their derivation from the Italian model of the 1980s, but they also acknowledge the very poor success of such measures in the Spanish context.[27]

In the case of common law systems, by contrast, and in any which adhere to the principle of the discretionary prosecution, nearly all the issues regarding the reliance on reward instruments or practices lose importance. There are not even any codified types of rewards; there are simply guidelines authorising the prosecutor or judge to take account of the cooperation of the accused as a crown witness or "supergrass".[28]

In Germany, finally, the law of 9 June 1989 introduced special reward measures as part of the fight against terrorism. The fixed date within which the measures could be conceded was extended a number of times and allowed to "lapse" in 1999, after having long been opposed by some legal scholars and public opinion.[29] It provided for a reduction or remission of the sentence as a reward for cooperation with the authorities. The reward had a broad scope (so-called *große Kronzeugenregelung*), not

Strafzumessung bei Aufklärungs- und Präventionshilfe (2015), 15 ff.; Galli, *The Law on Terrorism: The UK, France and Italy Compared* (2015), 15, 58, 252 ff.

26 Cf. Bouloc, "Le problème des repentis", *Revue de sciences criminelles* (1986), 771; Pradel, "Les infractions de terrorisme, un nouvel exemple de l'éclatement du droit penal", *Recueil Dalloz*, Chr. IX (1987), 39; Cesoni/Robert, "Du délateur au collaborateur de justice : un parcour de légitimation?", *Déviance et Société* 22/4 (1998), 415 ff.; Tak, "Deals with Criminals: Supergrasses, Crown Witness and Pentiti", *EJCCLCJ* 5/1 (1997), 7 ff. On art. 132–78 of the *code pénal*, which contains provisions relating to persons who have attempted or committed an offence but have cooperated with the authorities, see Roussel, "L'introduction du repenti ou le pragmatisme appliqué du législateur", *AJ Pénal*, 2005, 363.

27 Cf. Cuerda Arnau, *Atenuación y remisión de pena en los delitos de terrorismo* (1995); Benítez Ortúzar, "El colaborador con la justicia en el ordenamiento jurídico español", in *El Derecho penal en tiempos de cambios* (2016), 244; Faraldo Cabana, "Medidas premiales durante la ejecución de condenas por terrorismo y delincuencia organizada", in Cancio Meliá/Gómez-Jara Díez (eds.), *Derecho penal del enemigo* (2006), 757 ff.

28 Tak, "Deals with Criminals: Supergrasses, Crown Witness and Pentiti", *EJCCLCJ* 5/1 (1997), 5 ff.; Beernaert, *Repentis et collaborateurs de justice dans le système pénal: anlyse comparée et critique* (2002), 313 ff.; Ruga Riva, *Il premio per la collaborazione processuale* (2002), 206 ff. See also Appleton/Walker, *The penology of terrorism*, in Lennon/Walker (eds.), *Routledge Handbook of Law and Terrorism*, (2015), 453; Walker, *Terrorism and the Law* (2011), 288 ff.

29 Cf. Bocker, *Der Kronzeuge* (1991); Hoyer, "Die Figur des Kronzeugen", *JZ* (1994), 233; Mühlhoff/Pfeiffer, "Der Kronzeuge – Sündenfall des Rechtsstaats oder unverzichtbares Mittel der Strafverfolgung?", *Zeitschrift für Rechtspolitik* (2000), 121; Hardinghaus, *Strafzumessung bei Aufklärungs- und Präventionshilfe. Der Kronzeuge im deutschen Strafrecht unter besonderer Berücksichtigung von § 46b StGB* (2015), 5 ff., 39 ff., 65 ff.

limited solely to the sentencing stage of the trial, as it could also be applied earlier, insofar as the *Generalbundesanwalt*, with the consent of the *Bundesgerichtshof*, was accorded the power of terminating the proceedings against the cooperating offender.[30]

Contrary to what occurred in Italy, the *Kronzeugenregelung* seems to have been scarcely applied in practice as a tool against the terrorism of the former *Rote Armee Fraktion* militants. The infrequency of its application is most likely due to historical reasons: at the time of its entry into force (1989), that terrorist phenomenon had already been greatly weakened as a result of various causes.

Today the dissemination of reward models appears to have gained fresh impetus in European law. Article 16 of Directive 2017/541/EU, which *authorises* the Member States to introduce mitigating circumstances for offenders who renounce terrorist activity and provide the authorities with information, represents a first (timid) attempt to harmonise the various national reward models.[31] The EU legislator allows the States to make use of such measures beside the more repressive obligations to criminalize, which constitute the greatest (and most traditional) part of the Directive. This means that the results of the reward measures are not disowned at the EU level, inasmuch as they are expressly permitted, nor ethical issues (*we don't negotiate with terrorist!*) are maintained to be necessarily obstructive to their exploitation: the EU legislator seems to have voluntarily bypassed the issue by simply avoiding to take position, leaving the choice individually to the States.

However, although art. 16 of the mentioned Directive does not prohibit the adoption of such measures, it nonetheless does neither impose them, thus remaining on a position in-between a prohibition and an obligation. This evidently risks to reducing, instead of improving, the harmonisation on the counter-terrorism legislation, and to producing a wider discrepancy in the Member States legislations.

In fact, even a summary comparison between national rules and the minimal provisions of Article 16 raises issues of interpretation that are yet to be resolved; these mainly regard: *i)* the absolute or relative nature of the margin of discretion enjoyed by the Member States, should they spontaneously decide to transpose and implement Article 16 on a national level; *ii)* the exhaustiveness or, on the contrary, the incompleteness of the minimum standards established by that article; *iii)* whether or not the reward for defected terrorists who cooperate with the public authorities may be extended to exemption from punishment under certain conditions and reliance on heterogeneous measures (e.g. dismissal of the case or non-punishment).

30 Hardinghaus, *Strafzumessung bei Aufklärungs- und Präventionshilfe* (2015), 53 ff., 60 ff.; Ruga Riva, *Il premio per la collaborazione processuale* (2002), 122 ff., 244 ff.; Petzsche, "The European Influence on Anti-Terrorism Law", *German LJ* (2012), 13/9, 1063; Safferling, Terror and Law, *JICJ* (2006), 4/5, 116.

31 The minimum standards provided for in Art. 16 reiterate, without any modification, the ones contained in Article 6 of the Framework Decision 2002/475/JHA on combating terrorism (repealed by the directive).

Hence, although the mentioned Directive does leave the door open to the use of rewarding measures, it nonetheless seems to do so at the cost of partly and potentially sacrificing its harmonization aims.

On the other hand, a harmonization activity willing to include also rewards measures, before it may be able to indicate mandatory minimum standards, presupposes the existence of a shared reward model in the European Union, whose development requires an intense and well-informed comparative exchange considering not only the legislative framework but also the reward practices historically experimented within the different countries. In this perspective, the European Commission has financed a transnational study – involving eight different universities in seven different Member States – which is currently still undergoing.[32]

V. The reward model and the challenge of international terrorism.

Non-punishment or rewards may also be a "payoff for denunciation", as it was once stigmatized in French legal literature in reference to the *excuse de dénonciation*, but, as noted, in the Italian experience of the Years of Lead, the reward instrument represented an important element in the strategies of the constitutional state.

Its use at the present time as a parallel measure for combating international or global terrorism should thus not be ruled out a priori, though the morphological and anthropological characteristics of today's phenomenon—at least as regards "foreign fighters"—are profoundly different, as is the criminological paradigm of reference (e.g. a structure that is not necessarily pyramidal or hierarchical, but rather organised in a "network", in small terrorist cells, groups of kamikazes or lone wolves, diehards committed to their nihilistic project of annihilation). It seems reasonable, in fact, to assume that at least individuals who have a marginal role or are implicated in only one of the many preparatory or accessory activities, e.g. funding, training, arranging travel, apologia, etc. might potentially be open to the reward logic. The receptiveness towards rewards cannot be ruled out a priori in these cases, as some investigative results claimed by the judiciary, also in Italy, seem to indicate.

However, the (cautious) optimism about the successful outcome of the use of reward measures in the global fight against terrorism is yet to be borne out. The repressive side of emergency criminal legislation risks producing undesirable side effects on the willingness of Islamic communities to cooperate for crime prevention purposes: directing the repressive response in an unbalanced manner against one *type of offender* ends up equating the latter with an *enemy* and risks lumping together *terrorists*, *radicalised individuals* and *individuals in the process of being radicalised.*[33] The many inchoate terrorist offences introduced at a national and supranational level have led to an extreme widening in the scope of the criminal law concept of "Islamist"

32 The reference is to the project *FIGHTER* cited in note 1.

33 Brandon, "Terrorism, Human Rights and the Rule of Law: 120 years of the UK's Legal Response to Terrorism", in *CLR* (2004), 997.

or "jihadist" terrorist, a category which today commonly includes individuals who are still "inactive", "dormant" or only "sympathisers". Broad repression in some cases risks itself becoming a "collateral radicalisation" factor for marginal individuals who are vulnerable to fundamentalist dystopia.[34]

Paradoxically, Directive 2017/541/EU could itself contribute, indirectly, to disincentivising broad recourse to forms of preventive cooperation. The inchoate offences envisaged by the directive (which Member States are obliged to transpose and implement, and which greatly expand the category of terrorist offences compared to the standards of the Years of Lead) potentially encompass every conduct even only remotely approaching terrorism, making the application of detention measures likely even in the event of cooperation. The same applies, *mutatis mutandis*, for forms of spontaneous cooperation on the part of individuals who are not facing criminal proceedings.[35]

In view of the repressive tendency of all emergency legislation and the impairment of guarantees that ensues, it is worth noting one innovation of the post-World War II era, which took root very slowly and thus had little influence in the Years of Lead, but undoubtedly has an impact on the current era of international terrorism: emergency legislation is subject to limitations not only of a constitutional nature, but also of a supranational nature, by virtue of the European Convention on Human Rights.[36]

Therefore, the challenge for the jurist today remains the same as in the Years of Lead: the ability of the constitutional state to win this new and different battle, without betraying itself. By also employing, therefore, reward instruments, provided they are in a form compatible with principles enshrined in the Constitution and international conventions, without yielding to ahistorical reeditions of "soft inquisition" practices.

34 Rossi, "Crisis y transformación de los sistemas penales en Europa en el ámbito de la lucha contra el terrorismo", *Revista Penal* 46 (2020), 212. Cf. also Caneppele, "The terrorist threat before and after 9/11. What has changed in Europe", in Body-Gendrot et al. (eds.), *The Routledge Handbook of European Criminology* (2014), 490; Cole, *Enemy Aliens* (2006); Legrand/Bronitt/Stewart, "Evidence of the impact of counter-terrorism legislation", in Lennon/Walker (eds.), *Routledge Handbook of Law and Terrorism* (2015), 311 ff.; Cancio Meliá, "Terrorismo y Derecho penal", in Cancio Meliá (ed.), *Política criminal en vanguardia* (2008), 312; Díaz Gómez, "Líneas politico-criminales de la ejecución penal de personas condenadas por delitos de terrorismo", in Portilla/Contreras/Pérez Cepeda (eds.), *Terrorismo y contraterrorismo en el siglo XXI* (2017), 212.

35 Walker, *Terrorism and the Law* (2011), 19.

36 In fact, a question regarding the observance of provisions under the Convention could also be raised in reference to reward measures, insofar as their application results in a violation of the right to a fair trial (Art. 6 ECHR). On this subject, see Beernaert, "La recevabilité des preuves en matière pénale dans la jurisprudence de la Cour européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme* (2007), 88 ff.; De Valkeneer, "Quelques réflexions à propos de la prescription de l'action publique et des 'repentis' ou collaborateurs de justice", *Revue droit pénal et de criminologie* (2014), 1097 ff.