

**“ENEMY ALIENS” IN ITALY?**  
**THE CONFLATION BETWEEN TERRORISM AND IMMIGRATION**

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### **1. In the Name of Security**

Is it appropriate, for a liberal democracy, to curb – in the name of national security – the fundamental rights of those who try to destroy our freedoms and democracy and are, thus, perceived as “enemies”? «No, it is not. Liberal democracies are not supposed to betray their own foundational values while defending themselves». This would be the standard answer that most liberal thinkers would give, and defend even when an emergency occurs. Legal scholars often translate this liberal stance in the idea that emergencies should not alter the ordinary system of legal and institutional guarantees: the invocation of a «business-as-usual» approach, the inadmissibility of «double standards of legality» and the rejection of the «enemy alien» notion enjoy widespread support<sup>1</sup>.

However, one may find that answer too simplistic, especially when the respondent – the philosopher of the day – does not bear any responsibility for the consequences. Already in the 1920s, Carl Schmitt warned that relations between law and reality are

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<sup>1</sup> On the «business-as-usual» approach, O. Gross and F. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge, 2006, p. 86 ss. For a critical examination of the legal notion of «enemy alien» in the US legal order, D. Cole, *Enemy Aliens*, New York, 2003.

more complex than liberals are willing to admit. To affirm the «permanent supremacy» of the rule of law<sup>2</sup>, even if the law itself provides for emergency clauses and thus grants a “blank cheque” to the executive, is contradictory.<sup>3</sup> Despite being conceived as invulnerable “trumps”,<sup>4</sup> pre-established “side-constraints”<sup>5</sup>, or liberties enjoying “lexical priority”, fundamental rights do suffer from derogations – even in liberal legal orders.<sup>6</sup> In fact, norms and courts often admit the possibility of a trade-off: the exact extension of a civil liberty is a matter of balance *vis-à-vis* public (or private) interests.<sup>7</sup>

Among the competing public interests, the Hobbesian value of security enjoys a privileged position. In today’s liberal democracies – where arbitrary powers based on categorical discriminations (racial, religious, sexual, and alike) have been ruled out – security survives both as an intangible area of State sovereignty and as the ultimate legitimate aim of rights’ curtailment. This combination generates a major legal problem – further explored in this paper.

On the one hand, security is not just a sovereign realm of the State: it is, more accurately, a business of State executives. Predictable, governments tend to decline the concept of security along the ordinary-emergency *continuum*, so as to shield their own decisions either from judiciary control or from international oversight (and sometimes from both). Therefore, the concept of security may well result in a “grey hole” of the rule of law, easy to exploit under conditions of (assumed) emergency.

On the other hand, security, by providing a legal *pass-partout* to the executives, paves the way to majoritarian excesses. The fact that liberties are curbed in the name of security is not a problem *per se*: when public opinion panics, governments must reassure, and a common way to do it – even if liberal thinkers may not like it – is to reassess the

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<sup>2</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed.), 1959, p. 288.

<sup>3</sup> C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1922), Chicago, 2005. For a thoughtful discussion of Schmitt’s view, D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, Cambridge, 2006.

<sup>4</sup> R. Dworkin, *Taking Rights Seriously*, London, 1977, p. 190 ss.

<sup>5</sup> Nozick, *Anarchy, State and Utopia*, Oxford, 1974, p. 28 ss.

<sup>6</sup> J. Rawls, *A Theory of Justice* (rev. edition), Cambridge, 1999, p. 36 ss. and 214 ss. (respectively, on the concept of lexical priority and its application to basic liberties).

<sup>7</sup> E.A. Posner and A. Vermeule, *Terror in the Balance: Security, Liberty, and the Courts*, New York, 2007.

liberty-security balance in favour of the latter. The problem rather lies in the uneven impact that the new balance may imply. For intuitive reasons, it is convenient for executives to craft security-driven measures that tend to shift the “liberty costs” on insular or underrepresented minorities – as aliens usually are.<sup>8</sup>

In other words, by acting in the name of security, it is possible for executives to discriminate against aliens so as to minimize the political costs of their decisions. This seems to be a complete defeat of the liberal approach to emergencies: the fact that a «public order» or «national security» clause is enshrined in a law to provide governments the necessary flexibility does not prevent executives from exerting an arbitrary power, while at the same time paying lip service to the rule of law.

So much granted, the question addressed in this paper is not *whether it is appropriate* for liberal democracies to restrict the fundamental rights of those who threaten the national security, but rather *how – and to what extent – it is possible* for liberal democracies to do so: are there legal constraints that prevent a majoritarian exploitation of the security clause? And what are they? More concretely, the issue addressed in this paper is whether, and to what extent, European States are allowed – by domestic and international law – to restrict the fundamental rights of (suspected) terrorists in the name of security. The Italian anti-terrorist regime will be used as a test case.

## **2. The 2005 Anti-Terrorist Law: The Ministerial Power of Deportation**

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<sup>8</sup> An important variable of anti-terrorist measures concerns their *distributive impact*. Sometimes, the discrimination stems from the selective enforcement of rules that are, *per se*, non-discriminatory. For intuitive – yet questionable reasons – body searches in our airports tend to be more careful and strict on Muslims than they are on other ethnic or religious groups. Other times, discrimination is in-built in the legislative provision: this happens when the provision explicitly addresses a distinctive category of persons that are identified as the most likely source of the threat. In such a case, the problem that arises is whether the «double standard of legality» at the root of the legal scheme holds. On the security versus liberty trade-off, see J. Waldron, *Security and Liberty: The Image of Balance*, in *Journal of Political Philosophy*, 2003, vol. 11, n. 2, p. 191 ss.

Following the terrorist attacks that occurred in London on 7 July 2005, Italy introduced the first – and, so far, only<sup>9</sup> – regime specifically addressed to “enemy aliens” (more accurately, to foreigners that might represent a terrorist threat to the country). On 27 July 2005, in fact, the Italian Government adopted the law decree no. 144/2005, embodying urgent measures to fight international terrorism. Within three days, the Parliament ratified, converting the emergency decree in a permanent law<sup>10</sup>.

This piece of legislation provides for various criminal and administrative measures aiming at detecting terrorist sources and preventing attacks. The most salient part of the new regime concerns the administrative expulsion of suspected terrorists. Article 3 entrusts the minister of the interior (or, upon delegation, the prefect) with the power to deport the foreigner who has committed terrorist-related crimes, or «against whom there are well-founded reasons to believe that her presence in the territory of the State might in any manner facilitate terrorist organizations or activities, also international in character» (Article 3, para. 1). The obvious consequence of such a vague wording is the extremely wide margin of discretion enjoyed by the minister (and the prefects) in exerting the deportation power.

This highly discretionary power has been coupled with various derogations to the ordinary due process guarantees. First, expulsion orders are immediately enforceable (para. 2): according to this provision – expired on 31 December 2007 – the forced deportation of the alien is allowed without prior judicial validation of the order, in patent violation of the *habeas corpus* guarantees enshrined in Article 13 of the Constitution. Second, if the grounds of the expulsion order were covered by an investigative or intelligence secret, the judicial proceeding could be suspended for a period of two years, at the end of which, if the secret was still in place, the court could decide on the basis of the information available (para. 5): such a temporary provision (in force until the end of 2007) was to prevent an effective judicial scrutiny, both by

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<sup>9</sup> In 2007, two new law decrees (no. 181 of 1 November and no. 249 of 29 December) were adopted, both amending and integrating the 2005 anti-terror deportation regime. The two decrees were not converted in a permanent law and, thus, lost their effects (retroactively).

<sup>10</sup> The Senate approved the government proposal on 29 July 2005, while the Chamber of Deputies did the same one day later.

restricting its scope and by stalling it for a long period of time, hence rendering «virtually meaningless a possible favourable outcome for the alien who has meanwhile been expelled»<sup>11</sup>. Thirdly, contrary to the general rule, the judge that is competent to review the legality of the order – a regional administrative court – has no power to stay its execution: as a consequence, the expulsion is enforced even when the judge deems it *prima facie* patently unlawful and the exercise of the right of defence is severely hampered<sup>12</sup>.

Before examining the actual impact of these provisions, three elements should be stressed from the outset.

First, notwithstanding the political statement of public emergency made at the time of the adoption of the mentioned regime, Italy did not decide to resort to derogations under Article 15 of the European Convention on Human Rights (ECHR) and/or Article 4 of the International Covenant on Civil and Political Rights (ICCPR). The obligations stemming from these international instruments are binding on Italian decision-making authorities not only because of the international responsibility arising in case of breach in front of the competent human right bodies, but also as parameter of constitutionality<sup>13</sup>.

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<sup>11</sup> A. Saccucci, *The Italian 2005 Anti-terrorism Legislation in the Light of International Human Rights Obligations*, in ..., p. 192.

<sup>12</sup> In addition, Article 3 of law no. 155 of 2005 repeals a norm (Article 13, para 3-sexies, of the legislative decree no. 286 of 1998) that prohibited the expulsion of aliens put on trial for very serious crimes, including terrorism-related ones. As a result, the decision to expel – rather than prosecute – suspect terrorists or other potential criminals is left in the hands of the government: when foreigners are concerned, the public interest in prosecuting crimes defers to the public interest in getting rid of them. The reasonableness of such a provision has been put in question, both in relation to the different treatment of nationals put on trial for the same crimes (P. Bonetti, *Terrorismo e stranieri nel diritto italiano. Disciplina legislativa e profili costituzionali – Il parte. Il terrorismo nelle norme speciali e comuni in materia di stranieri, immigrazione e asilo*, in *Diritto immigrazione e cittadinanza*, 2005, p. 23 s.) and *per se*, as a potentially counter-productive anti-terrorist strategy: the deportation of a likely terrorist may be successful in cutting his/her links with the local organizations, but leaves him/her free to join other cells of international terrorist networks (E. Rosi, *La lotta al terrorismo non ammette deroghe alla tutela dei diritti umani*, in *Amministrazione civile*, 2008, 105); moreover, the expulsion of a suspect terrorist under trial may lead to a premature ending investigations that may prove to be helpful in the (local and global) fight against terror.

<sup>13</sup> According to Article 117, para 1, of the Constitution, as amended in 2001, domestic legislative authorities must respect the obligations arising from international and European Community law.

Second, the above-mentioned provisions have the object of a political tension between the Government and the Parliament. The latter prevented the government's attempt to make the first two norms permanent, by not ratifying the law decrees no. 181 and 249 of 2007. Moreover, a recent legislative act (legislative decree no. 104 of 2010, known as Code of the administrative process) repealed the last provision. As a result, the most questionable norms of the 2005 anti-terrorist expulsion regime have disappeared.

Third, this anti-terrorist regime enriches a pre-existing discipline on expulsion established by the general legislation on immigration and alien's condition in Italy adopted in 1998<sup>14</sup>. According to Article 13, para. 1, of this legislation, the minister of the interior has the power to expel an alien for «public order» or «security of the State» reasons. This is the only kind of expulsion order that can be enforced against an alien who is a minor (less than 18 years old), holds the residence permit (unless it is revoked), lives with a relative or spouse of Italian nationality, or is a woman in state of pregnancy<sup>15</sup>. The scope of application of this norm is, thus, wider than that established in the 2005 anti-terrorist legislation, which is, in principle, subject to all the above-mentioned subjective limitations. For this reasons, and despite the (slightly) stronger due process guarantees in favour of the alien, the government often resorts to the 1998 general provision on expulsion even if it is ordered for anti-terrorist purposes<sup>16</sup>.

### **3. Administrative Discretion and Domestic Judicial Review**

As noticed above, the Italian minister of the interior might expel an alien who is suspected to represent a terrorist threat drawing on two different legal basis: the first one is the specific deportation power provide for in Article 3 of the 2005 anti-terrorist legislation, according to which the minister of the interior (or, upon delegation, the prefect) may deport the alien who has committed terrorist-related crimes, or «against

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<sup>14</sup> Legislative decree no. 286 of 1998, as amended by law no. 189 of 2002.

<sup>15</sup> Article 19, para. 2, of the legislative decree no. 286 of 1998 states that in the mentioned case no expulsion order can be executed, with the only exception of the expulsion for public order and security reasons regulated by Article 13, para 1.

<sup>16</sup> P. Bonetti, *Terrorismo e stranieri nel diritto italiano*, cit., p. 22.

whom there are well-founded reasons to believe that her presence in the territory of the State might in any manner facilitate terrorist organizations or activities, also international in character»; the second one is the general deportation power regulated by Article 13, para. 1, of the 1998 legislation on immigration, that empowers the minister of interior to expel an alien on the ground of «public order» or «security of the State» concerns. How wide is the discretion actually enjoyed by the government in exerting such a power?

To answer, it is necessary to go beyond the (rather vague) wording of the mentioned provisions and ascertain how strict or, by contrast, deferent is the scrutiny provided by the competent (administrative) courts.

In a 2004 case the regional administrative court of Lazio stroke down a ministerial order of expulsion against Mr Fall Mamour<sup>17</sup>. Following some colourful public speeches in which he criticized the Italian participation in the Iraqi war and alluded to the risk of terrorist attacks to Italian institutions, Mr Mamour, a Senegalese citizen of Islamic religion regularly resident in Italy for 16 years, was subject to police investigations and house searches. These enquiries resulted in nothing: in particular, no prove was collected about the existence of a links with terrorist or other criminal organizations. Notwithstanding that, the minister of the interior ordered Mr Mamour to be deported back to his country of origin, on the ground that he represented a threat to «public order and the security of the State». Mr Mamour challenged the act before the competent administrative court. The first instance court annulled the ministerial order, holding that none of the government's allegations was sufficient to prove that Mr Mamour's conduct amounted to a «concrete threat» for the public order or the national security.

The Council of State – judge of second instance – overturned the ruling on the basis of the following reasoning<sup>18</sup>. The power to deport aliens for public order or security reasons involves the responsibility of the government. In fact, it is entrusted with the minister of the interior, head of the ministry that is more directly concerned

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<sup>17</sup> Tar Lazio, judgement 11 November 2004, no. 15536.

<sup>18</sup> Council of State, judgement 16 January 2006, no. 88.

with the presence of aliens in the national territory. The exercise of that power is, hence, an expression of «high administrative discretion». Therefore, the administrative judge cannot intrude – as the court of first instance erroneously did – in that area of discretion: the judicial review should rather consist in an «external scrutiny concerning the lack of an adequate motivation» or *excès de pouvoir* violations, such as «misrepresentation, illogicality or arbitrariness». In the specific case, the Council of State could not detect any of the mentioned violation and thus affirmed the lawfulness of the ministerial order<sup>19</sup>.

The same «high discretion» doctrine finds its way in the case-law regarding orders enacted on the basis of the specific anti-terrorist deportation provision (Article 3 of law no. 155 of 2005). In a 2006 ruling, the administrative court of first instance upholds a ministerial order of expulsion issued against Ben Said Faycal, known as the Imam of Varese<sup>20</sup>. The deportation order describes – without disclosing the sources – Mr Faycal as a fundamentalist being active in recruiting Islamic combatants to enrol in Bosnia, Cecenia and Algeria and having established links with suspected terrorists. The court asserts that, in consideration of the high degree of discretion enjoyed by the government in issuing anti-terrorist deportation orders, the judicial review can only be carried out having regard to the manifestly non-unreasonable and non-illogic character of the administrative decision. Therefore, without inquiring into the reliability of the government's allegations, the court accepts the qualification of the Mr Fayal's conduct as dangerous for the national security and confirms that the order is not manifestly unreasonable and illogic.

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<sup>19</sup> In a similar case – concerning a ministerial order of expulsion of Hemmam Abdelkrim, an Algerian citizen, for public order reasons – the court of first instance (Tar Lazio, judgement 7 April 2005, no. 3146) anticipated the Council of State's position, by stating that the judicial scrutiny on the administrative discretion is «external» in so far as the judge can only ascertain the «manifest unreasonableness or absolute absence of prerequisite», whereas she cannot interfere in the substance of a decision requiring «technical expertise in the field of security».

<sup>20</sup> Tar Lazio, judgement 23 March 2006, no. 5070.

As these cases patently show<sup>21</sup>, ministerial expulsion orders issued for public order and national security reasons or, more specifically, for anti-terrorist purposes are subjected to a very deferent judicial scrutiny. By adopting an «external» standard of review, the competent administrative courts deliberately take a step back from assessing the consistency and reliability of the allegations gathered by the administration against suspected terrorist aliens. This is all the more troubling since the kind of expulsion examined is preventive, thus excluding a further assessment of the charges before a criminal court.

#### **4. Due Process and Constitutional Review**

One might expect that the «high administrative discretion» doctrine (and the consequent «hands-off» judicial strategy) described above is counterbalanced by a stricter review on the procedural ground. Hence, the following question needs to be addressed: are the ordinary due process guarantees (usually observed in the adoption of an administrative decision) also in place when the minister of the interior exerts her power to deport a suspected terrorist?

If one looks at the discipline of expulsion for terrorist reasons, the answer is not very reassuring. As noticed above<sup>22</sup>, Article 3 of the 2005 anti-terrorist legislation establishes various derogations to due process. First, the deportation order of a suspected terrorist is immediately enforceable (para. 2): it is executed without prior judicial validation, despite the fact that the execution implies a forced repatriation, that is, restriction to the personal freedom of the alien that – according to the fundamental principle enshrined in art. 13 of the Constitution – require the involvement of a judge. Second, when government's allegations are based on information covered by a State secret, the criminal trial is suspended for a maximum period of two years, at the end of which the court may decide on the basis of the information available (para. 5): in concrete, when a State secret is there, the court cannot take perform any significant

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<sup>21</sup> For an analysis, N. Pisani, *Lotta al terrorismo e garanzie giurisdizionali per lo straniero nella recente prassi italiana: le espulsioni per motivi di ordine pubblico e sicurezza dello Stato*, in P. Gargiulo and M.C. Vitucci, *La tutela dei diritti umani nella lotta e nella guerra al terrorismo*, Napoli, 2009, p. 403 ss.

<sup>22</sup> *Supra*, para. 2.

review, with the result that judicial scrutiny is absent. Thirdly, the court that reviews the legality of the ministerial order cannot stay its execution (para. 4-*bis*). Here too, the exercise of the right of defence is severely hampered: it might be quite hard for an alien to make her voice heard in an Italian process while staying abroad, perhaps in a North African jail. Are all these restrictions compatible with the due process principle, as guaranteed in the Italian Constitution and in the international norms?

While the latter is a permanent provision, the former two ones were temporary in character: they expired on 31 December 2007, despite an unsuccessful attempt of the government to make them permanent<sup>23</sup>. This circumstance raises the question whether a temporary derogation to a fundamental right might be more acceptable.

Of course, due process rights are not absolute. They may well be balanced against competing relevant interests, such as the security of the nation. The paradigmatic hypothesis is a situation of emergency: in such a condition, some constitutions explicitly admit the possibility to temporarily restrict or suspend a fundamental right<sup>24</sup>. Other ones – like the Italian Constitution – are silent on the issue, but this makes little difference<sup>25</sup>.

However, this does not rule out the possibility for the legislative authorities to make a pragmatic accommodation. As far as the restriction of basic rights in emergency situation is concerned, a (very) basic standard has been set in a 1982 constitutional case on the extension of the period of pre-trial detention concerning persons suspected of terrorist-related crimes<sup>26</sup>. The Constitutional Court acknowledges that terrorist acts may determine a state of emergency, but pointed out that «emergency, in its proper meaning» should be considered as an anomalous and serious condition that is «temporary in its essence»; therefore, emergency «may well justify the adoption of

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<sup>23</sup> See Article 1, law decree 29 December 2007, no. 249, not converted in law and, thus, expired.

<sup>24</sup> For a discussion of the issue, with specific reference to the US constitutional system, B. Ackermann, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, Yale, 2006.

<sup>25</sup> See, for instance, Tar Lazio, judgement 7 April 2005, no. 3146, para. 1.1, holding that the giving notice requirement foreseen by the general legislation on administrative proceedings (Article 7 of law no. 241 of 1998) is not due in the case of an expulsion procedure promoted for public order and national security purposes, being such a procedure «urgent “by definition”».

<sup>25</sup> Tar Lazio, judgement 23 March 2006, no. 5070.

<sup>26</sup> Constitutional Court, judgment 14 January 1982, no. 15.

extraordinary measures, which, however, become unlawful if they remain in force during the time»<sup>27</sup>.

Such a standard has not been further developed in the constitutional jurisprudence. Nonetheless, one might coherently expect that, if a temporary restriction is provided for in a law, a scrutiny of proportionality on the duration of the restriction apply. More generally, constitutional and human rights courts increasingly resort to proportionality as the guiding criterion in assessing the legality of restrictions imposed on a fundamental right, being they temporary or permanent.

That was not the case of the above-mentioned (temporary and permanent) provisions concerning the expulsion of suspect terrorists. In 2006, an administrative court raised the question of constitutionality with regard to (some aspects) of that discipline<sup>28</sup>. However, the Constitutional Court did not tackle the relevant aspects of the question, declaring them inadmissible on procedural grounds<sup>29</sup>. No other constitutional question has been raised so far, and none will likely be raised in the future. The reason is simple: the relevant due process restrictions provided for in Article 3 of the 2005 legislation have expired<sup>30</sup> or have been repealed<sup>31</sup>.

The result might be surprising: how is that the Italian non-majoritarian institutions (namely, the courts) have not even tried to “legalize” a parliamentary-sanctioned executive power that could infringe upon fundamental due process rights? And how is that the most dangerous legislative norms were erased by the same majoritarian authorities (the Parliament, in particular) that approved them? Does all this mean that courts are deferent to the emergency and anti-terrorist decisions of the political bodies because – and in so far as – the latter are rather “moderate” in exploiting emergencies and maximizing executive powers?

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<sup>27</sup> Constitutional Court, no. 15 of 1982, para. 7 of the motivation.

<sup>28</sup> Tar Lazio, ordinance 23 March 2006, no. 227.

<sup>29</sup> Constitutional Court, judgement 10 December 2007, no. 432.

<sup>30</sup> As mentioned, paras. 2 and 5 of Article 3 expired at the end of 2007, as foreseen by para 6 of the same article.

<sup>31</sup> Para. 4-*bis* of Article 3 has been repealed by Article 4, para. 1, no. 3, of Annex 4 to the legislative decree 2 July 2010, no. 104 (Code of the administrative process).

An appropriate answer to such questions goes beyond the scope of this paper. One can only observe that: a) the government has done very little use of the special expulsion power regulated by Article 3 of the 2005 anti-terrorist legislation; b) as a consequence, courts had almost no chances to raise the constitutionality issue of Article 3 before the Constitutional Court; c) the dismantling of such a special expulsion power, done by the same majoritarian bodies (Parliament-Government) that invented it has much to do with its practical irrelevance; d) when the government wants to expel a suspected terrorist, it may well resort to the general power of expulsion for public order and national security reasons<sup>32</sup>.

In 2004, the latter power fell – at least partially – under the scrutiny of the constitutional judges: in that case, they re-established the *habeas corpus* (since then, in fact, the forced removal of the alien is only possible after a judicial validation of the ministerial order and a hearing of the concerned person) and explicitly rejected the «double-standard» view, that is, the idea that aliens’ rights are softer than citizens’ rights<sup>33</sup>. That is to say, the Italian constitutional doctrine firmly rejects, in principle, the idea that Italian authorities must guarantee the fundamental rights of an alien to the same extent than the rights of a citizen.

## **5. *Non-refoulement* and European Judicial Review**

What about the equation alien-enemy? Is it completely ruled out of the Italian legal order? Of course, there is no legislative notion equivalent to the American one. Yet, one aliens – just like citizens – may well be enemies. Does it make any difference in terms of respect due to their fundamental rights? Should Italian authorities guarantee the rights of a friendly alien and those of an hostile alien (for instance, a terrorist or suspected terrorist) to the very same extent?

One way to answer this question is to ascertain whether the Italian privileged strategy of terrorism prevention – namely, the expulsion of suspected terrorists – meets a limit in the universal principle of *non-refoulement*: deportation is forbidden when the

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<sup>32</sup> As regulated by Article 13, para. 1, of 1998 legislation on immigration (see above, para. 2).

<sup>33</sup> Constitutional Court, judgement 15 July 2004, no. 222, para. 6 of the motivation.

person would be expelled in a country where she faces the risk of torture or degrading treatment<sup>34</sup>.

The potential clash of this regime with the international principle of *non-refoulement* became very soon evident. In the above-mentioned case of the Imam of Varese<sup>35</sup>, the deportation order has been challenged not only on the ground that the terrorist-related charges were ill-founded, but also on another ground: namely, that the expulsion of Mr Faycal to his country of origin (Tunisia) would have contravened the international principle of *non-refoulement*, explicitly reasserted in the Italian regulation of the administrative power to expel aliens<sup>36</sup>. On that point, the argument of the court was the principle of non-refoulement did not apply to the suspect terrorist, since he had not been recognized as refugee.

The argument is weak. It assumed that the principle of *non-refoulement* protects aliens from deportation only until the end of the procedure for the attribution of the refugee status and that in case of denial, the alien is not protected anymore by the

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<sup>34</sup> Article 33 of the 1951 United Nations Convention on the Status of Refugees, to which Italy is a party, reads as follows: «1. No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country». See also Article 32: «1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law ...».

The same principle is well established in the ECHR system. Article 3 ECHR establishes that «No one shall be subjected to torture or to inhuman or degrading treatment or punishment». The constraints on the expulsion of aliens are made clear in the Guidelines of the Committee of Ministers of the Council of Europe: accordingly, «The use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted» (Point IV); moreover, «It is the duty of a State that has received a request for asylum to ensure that the possible return ("*refoulement*") of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion» (Point XII § 2).

On the general recognition of the principle in international law, see Allain, *The Jus Cogens Nature of Non-refoulement*, in *International Journal of Refugee Law*, 2001, p. 538 ss.; see also, with specific reference to anti-terrorism measures, Bruin and Wouters, *Terrorism and Non-derogability of Non-refoulement*, in *International Journal of Refugee Law*, 2003, p. 24 ss.

<sup>35</sup> Tar Lazio, judgement 23 March 2006, no. 5070.

<sup>36</sup> Article 19, para 1, of the general legislation on immigration (legislative decree no. 286 of 1998).

principle of non-refoulement and can, thus, be expelled. That assumption is wrong: even when they do not qualify as refugees, aliens are still be protected from a repatriation that puts them in danger of being tortured. In short, the argument of the court is based on an unduly conflation of the principle of *non-refoulement* with the regime of refuge, while the principle of *non-refoulement* is not dependent on the refugee status.

The real issue is whether the prohibition to expel towards countries where there is a concrete risk of torture or inhuman and degrading treatment holds also when the concerned alien (citizens cannot be expelled) is an enemy: in other words, the problem is whether the prohibition of *refoulement* is absolute, and thus protecting also the enemy, or relative, thus allowing for a balancing with fundamental interests of the national community (security, for instance)<sup>37</sup>.

The European Court of Human Rights explicitly addressed the problem in a series of cases – the first and leading one being the *Saadi* case – where the tension between the principle of *non-refoulement* and the Italian anti-terrorist strategy based on expulsion dramatically emerged.

There is little doubt that Mr Fadhal Saadi could represent a threat to the national security. As the Italian police ascertained, in fact, this Tunisian citizen living in Milan had been involved in an international network of militant Islamists and spent some time in an al-Qaeda training camp. On 9 October 2002, the applicant was arrested on suspicion of involvement in international terrorism and placed in pre-trial detention. An Italian criminal court sentenced him to four years and six months' imprisonment, and, as a secondary penalty, ordered that, after serving his sentence, he was to be deported. On 4 August 2006, four days after the release, the minister of the interior ordered Mr Saadi to be deported to Tunisia, stating that his conduct was disturbing public order and threatening national security. While still in Italy, Mr Saadi asked the European Court of Human Rights to suspend and annul the decision of expulsion, alleging that he had been sentenced in his absence in Tunisia for political reasons and that he feared he would be

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<sup>37</sup> See, on the Italian case, E. Cavasino, *Refoulement, Divieto di tortura, sicurezza nazionale: riflessioni sulle forme di un difficile bilanciamento*, in P. Gargiulo and M.C. Vitucci, *La tutela dei diritti umani nella lotta e nella guerra al terrorismo*, cit., p. 379.

subjected to torture and political and religious reprisals. On 5 October 2006, the European Court ordered the suspension of the expulsion: the Italian government complied.

On 28 February 2008, the European Court ruled on the merit of Mr Saadi's application<sup>38</sup>. It had to decide whether it is possible for a party to the ECHR to deport a terrorist to a country where he faces the concrete risk of torture or ill-treatment. At the core of the problem is the absolute or relative nature of the principle of *non-refoulement*: is it possible to weight the risk of torture or ill-treatment against the protection of national security?

In the *Chahal* case (1996), the European Court had already given a negative answer. In that case, the court held that the UK could not return Karamjit Singh Chahal, an alleged Sikh militant, to India in reliance on diplomatic assurances against torture from New Delhi, no matter what crimes he was suspected of or his status in the UK.

The British government intervened in *Saadi* in the attempt to encourage the court to reconsider the *Chahal* doctrine, arguing that the right of a person to be protected from torture abroad should be balanced against the risk he poses to the deporting state. In particular, the British government proposed the adoption of a new approach in removal cases that, by giving relevance to the diplomatic assurances by the receiving state, would allow a balancing test. The Italian government subscribed the same argument.

Nonetheless, the European court rejected the British approach, holding that the deportation of the applicant to Tunisia would constitute a violation of Article 3 ECHR. As the court explained, «[T]he argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of “risk” and “dangerousness” in this context do not lend themselves to a balancing test because they are notions that can only

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<sup>38</sup> European Court of Human Rights, Grand Chamber, Case *Saadi v. Italy*, application no. 37201/06, 28 February 2008.

be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not». <sup>39</sup>

Since *Saadi*, the absolute nature of the prohibition on *refoulement* has been confirmed by the Court of Strasbourg in many other cases involving Italian deportation orders of suspected terrorist<sup>40</sup>, with mixed consequences. On the one hand, after *Saadi*, the Italian government has started to disregard – on the ground that they are not legally binding – the interim measures of the European Court aiming to suspend the deportation to dangerous countries. On the other hand, in reaction to such a behaviour, the judges of Strasbourg have clarified, in the *Ben Khemais* case<sup>41</sup>, that the opposite is true: when a party to the ECHR does not enforce a urgency measure adopted under Article 39 of the Rules of the Court incurs, according to Article 34 of the Convention, in a violation of the individual right to an effective remedy and of the Court's jurisdiction. Accordingly, the European judges now impose on Italy the duty to compensate the damages caused to the expelled persons<sup>42</sup>. Despite all that, and notwithstanding the increasing cooperation of domestic judges with the court of Strasbourg<sup>43</sup>, the Italian government refrains from compliance. This way, the value of national security seems to transcend the legal impossibility of a balance<sup>44</sup>.

## 6. Conclusions

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<sup>39</sup> *Saadi v. Italy*, para. 139. It may be interesting to note that this outright confirmation of the absolute nature of the principle of *non-refoulement* marks a considerable distance with the approach of the Canadian Supreme Court in the case *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002, where a relative understanding of non-refoulement is allowed, balancing test, by the principle of proportionality, is allowed.

<sup>40</sup> See *Ben Kehmais v Italy*, application no. 246/07, 24 February 2009; *Adbelhedi v. Italy*, application no. 2638/07, *Ben Salah v. Italy*, application no. 38128706, *Bouyahia v Italy*, application no. 46792/06, *C.B.Z. v Italy*, application no. 44006/06, *Hamraoui v Italy*, application no. 16201/07, *O. v Italy*, application no. 37257/06, *Soltana v Italy*, application no. 37336/06, all of them decided on 14 March 2009.

<sup>41</sup> *Ben Khemais v. Italy*, application no. 246/07, 24 February 2009.

<sup>42</sup> See, *ex multis*, the recent case *Toumi v. Italy*, application no. 25716/09, 5 April 2011.

<sup>43</sup> Criminal Supreme Court (Corte di cassazione penale), Section VI, judgement 28 May 2010, no. 20514. On this judgement, see P. Palermo, *Dal terrorismo alla tortura attraverso le procedure di espulsione. Una sentenza della Corte di cassazione*, in *Rivista penale*, 2010, n. 10, p. 1277 ss.

<sup>44</sup> This global trend, nurtured by Article 103 of the UN Charter, is detected in P. De Sena, *Lotta al terrorismo e tutela dei diritti umani: conclusioni*, in P. Gargiulo and M.C. Vitucci, *La tutela dei diritti umani nella lotta e nella guerra al terrorismo*, cit., p. 160.

Three conclusions are in order.

First, the resistance of the Italian government to the jurisprudence of the European Court of justice highlights the peculiarity of the Italian way to fight terrorism. A superficial comparison with the strategy of the UK – that has proved to be the most active European country in that fight – is sufficient to illustrate the point. While the absolute prohibition on *refoulement* affirmed in *Chahal* had induced the British government, first, to resort to executive detention of suspected terrorists who could not be repatriated (with the consequent reaction of the domestic courts, which rejected the “double standard” assumption on which the indefinite detention of “enemy aliens” was based<sup>45</sup>) and, second, to insist with the Court of Strasbourg for a reconsideration of the *Chahal* doctrine, to be replaced with a “deportation with assurances” approach, the Italy government, by contrast, after *Saadi* has followed its own third way: it simply ignores the unfavourable decisions of the European Court on the issue, thus neglecting its international legal commitment to the respect of human rights. No doubt an unwelcome (and legally untenable) situation.

Second, as the comparative analysis shows, the global «war on terror» has strengthen domestic executive powers vis-à-vis foreign suspect terrorists in many ways: executive detentions (often indefinite)<sup>46</sup>, special trials (e.g. military commissions), selective use of police powers (mainly to the detriment of Muslim people) have been three common answers to the problem in various liberal democracies<sup>47</sup>. In Italy, by

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<sup>45</sup> The obvious reference is the *Belmarsh* case, decided in House of Lords, *A. and others v. Secretary of State for Home Department* [2004] UKHL 56, 16 December 2004. See also the ruling of the European Court of Human Rights in the case *A. et al. v UK*, judgment no. 3455/05, 19 February 2009.

<sup>46</sup> On the issue, C. Macken, *Counter-terrorism and the Detention of Suspected Terrorists: Preventive Detention and International Human Rights Law*, New York, 2011.

<sup>47</sup> D. Moeckli, *Human Rights and Non-discrimination in the “War on Terror”*, cit., chapters 4-6. See also Council of Europe, *Human rights and the fight against terrorism: The Council of Europe Guidelines*, 2005, reviewing a panoply of “emergency” or “*extra ordinem*” measures adopted on both the sides of the Atlantic. Among the others, the following are mentioned: derogations to the prohibition of torture, the practice of extraordinary “renditions”, extensive collection and processing of personal data by security agencies, unauthorized practices interfering with privacy (body searches, house searches, telephone tapping, surveillance of correspondence, bugging), limitations to the right of property, executive *incommunicado* detention, restrictions to the right of defence in courts and in administrative proceedings, expulsions or extraditions in breach of the *non-refoulement* principle, selective enforcement of immigration and citizenship regimes.

contrast, the empowerment of the government has mainly been achieved by using – or, if necessary, adapting – the ordinary tools already established by immigration laws. The trajectory of the special anti-terror deportation power illustrates the point: due to the questionable restrictions imposed on due process rights of suspected terrorists, Article 3 of the 2005 anti-terrorist regime has rarely been used and has been gradually dismantled; deportation orders against suspected terrorist have been rather adopted on the basis of Article 13 of the 1998 immigration regime, regulating the general executive power to deport aliens threatening public order and national security. The result is a peculiar conflation between anti-terrorism and immigration regimes and executive powers.

Third, in the aftermath of September 11, 2001, many liberal states have adopted comprehensive anti-terror regimes. Italy, by contrast, only passed a minor bill in response to international demands<sup>48</sup>. However, in 2002, the Italian government obtained the approval of the harshest norms on immigration ever passed in the peninsula<sup>49</sup>. A mere coincidence, of course. Yet, looking backwards, one may have the impression that the domestic government exploited the glamorous anti-terrorist rhetoric has a freeway to enrich its armoury in the (more tangible and pressing) «war to immigration». Even if the terrorism-immigration conflation is common to many other countries, a distinguishing feature of the Italian mix is that the instrumental relationship between the two policy goals is reversed. After all, to many Italians (also sitting in the government), *salus rei publicae* depends more on the control of North-African migration than on the prevention of terrorist attacks. This inevitably marks a shift in the Italian understanding of the «enemy alien» category.

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<sup>48</sup> Law Decree 18 October 2001, no. 374, enacted as Law 15 December 2001, no. 438.

<sup>49</sup> Law 30 July 2002, n. 189, amending several provisions of the 1998 immigration regime (legislative decree no. 286 of 1998).

