Administrative Due Process in Liberal Democracies: a Post-9/11 World*

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Abstract

Over the past ten years, in liberal democracies, the balance between authority and freedom has been more or less evidently modified by the measures taken by public authorities against trans-national terrorism. While Part I specifies that the article focuses on administrative measures, considered from the point of view of due process of law, Part II illustrates briefly how that such measures have deeply affected national constitutional settings, rather than merely reshaping some of their elements. Part III argues that, especially after an initial period, the courts have ensured that the procedural requirements imposed on governments are respected, although some of these requirements have been redefined. This leads, in part IV, to a twofold conclusion: procedural guarantees, grounded in the liberal democratic institutions, and are still important and merit being preserved, especially in the light of changes occurred at a global level, but nostalgia for a (supposed) golden era of constitutionalism, conceived at the level of the State, is inadvisable for those who are interested in keeping those safeguards alive.

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> *We should be willing, out of respect for our own traditions and values, to accept whatever unknown loss of efficiency this deference to morality may entail. Our Constitution demands that we run that risk in our ordinary criminal process: no doubt our police would be more efficient in preventing crime, and we would all be safer, if we ignored the rights of due process at home.*
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> Ronald Dworkin, *What the Court Really Said* (*The New York Review of Books*, 12 August 2004)

I. Introduction - the paradox of a post 9/11 world

Since September 2011, liberal democracies experienced a paradox[1]. On the one hand, our societies have sought to protect themselves from uncertainties relating to what has always been considered one of the most

[1] More precisely, the article considers some liberal democracies that form a minority of countries in the world: see R. Dahl, *On Democracy* (1999), 2. To some extent, the analysis carried out in this article may apply to other hierarchical, but "decent", societies, where, as suggested by John Rawls, justice is impartially administered, and at least some human rights are recognized: see J. Rawls, *The Law of Peoples* (2003), 64. Whether this is, for example, the case with Russia is a complex question, since its anti-terrorism law leaves the courts a wide margin of discretion to rule that any literature is extremist: see the *International Herald Tribune*, November 4, 2011 ("Russian terror law put to 'absurd' use").

important values: collective security. More than ever before, collective security is being put at risk by the actions of various groups: separatists, terrorists, and religious fanatics. Trans-national terrorist organisations now have the ability to inflict harm in hitherto unthinkable ways on things, people, and ordered civil co-existence. They can even manage without the support of friendly governments. If public institutions wish to safeguard this public good (an 'if' about which there can be no hesitation from the legal point of view, while there may be a variety of opinions on 'how' this can be achieved), they must change the way they operate. On the other hand, however, in using these operational methods, public authorities must respect their own, self-imposed, limits of both a substantive and a procedural nature. As regards the former, there is the absolute prohibition of torture and all forms of non-humane treatment, and the prohibition of collective expulsion, especially in Europe. Second, in all liberal democracies there is an increasing need for public authorities to ensure security for all, without infringing the requirements of (procedural) due process of law. This implies, *inter alia*, that a hearing be provided to all those who may suffer from detrimental measures taken by governments and that reasons be given for these measures.

The paradox emerges clearly from the words of the concurring opinions of two judges in the ruling of the European Court of Human Rights in *Saadi v. Italy*, "States are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect"[2]. The fact that such values are conceived as universal values, which are valid for all persons[3], explains the tensions which have arisen between a state's duty to protect the life of its citizens and safeguards for non-citizens, even those who have been found guilty of crimes associated with terrorism.

In this article, I will focus on administrative due process, that is to say with regard to administrative measures, as opposed to criminal sanctions, and will try to present arguments concerning this paradox. First, I will suggest that administrative anti-terrorism measures taken by

[2] Eur. Ct. H. R., *Saadi v. Italy* (application n. 37201/06, judgment dated 28 February 2008), concurring opinion of Judges Myjers and Zagrebelsky.

[3] See A. Cassese, *Human Rights in a Changing World* (1990) (for the thesis that, though doctrines of human rights can be misused by nation-states pursuing their own interests, the development of human rights nonetheless represents an important advance for people).

public authorities (examined in section II), when considered as a whole, have deeply affected national constitutional settings (considered in section III), rather than merely reshaping some of their elements. However, I shall argue that especially after an initial period, the courts have ensured that the procedural requirements imposed on governments are respected (section IV), although some of these requirements have been redefined. I would argue as follows: procedural guarantees are grounded in the liberal democratic institutions, and are still important and merit being preserved, especially in the light of changes at a global level. However, nostalgia for a (supposed) golden era of constitutionalism, conceived within the borders of the nation-state, is inadvisable for those who are interested in keeping those safeguards alive.

II. Anti-terrorism administrative measures

A. A province of the executive

Since 9/11, liberal democracies reacted against trans-national terrorism not only through the actions of the criminal courts, although public opinion has devoted particular attention to certain trials, but also by means of a variety of administrative measures. These measures take many forms, but they all share one characteristic: Whatever the constitutional orthodoxy regarding the separation of powers and the role of elected parliaments may be, anti-terrorism policies have been developed and implemented by the executive branch.

This is hardly surprising. What the American constitutionalist Bruce Ackerman has observed with regard to the political cycle created by the anger at bomb attacks in New York and Washington, Madrid and London[4], applies everywhere. As the panic over anthrax epidemics or mini-nuclear bombs spreads, and the resulting demand for "extra-ordinary" measures against terrorism grows, a prompt reaction may come only from the executive. This is not at issue. What is at issue, to be more precise, is the growing powers of the executive.

Consider first the case of the US. Soon after the terrorist attacks of 9/11, the President promised the American people decisive action, and Congress approved the Patriot Act by an overwhelming majority. The

[4] See B. Ackerman, *Before the Next Attack. Preserving Civil Liberties in an Age of Terrorism* (2006), 2 (asserting that "politicians (will) come up with repressive laws that ease our anxiety").

Act not only granted vast powers to the President, but also provided for exemptions from judicial guarantees[5]. Even though it was Congress that approved the new legal framework, it was conceived and built by presidential advisors, and it gave the President unprecedented powers outside times of war, justified by the rhetoric of the "war on terror"[6], the underlying aim being to liken the reaction against terrorism to a war, which is a more or less well-defined legal concept, with specific implications (which weapons may not be used, how prisoners must be treated, which safeguards regard civilians)

Similar developments occurred within parliamentary systems, such as in the United Kingdom, the birthplace of parliamentary institutions. After 2001, Parliament granted the executive vast powers, although they were more limited than those requested by the Blair Government. These powers do not only include those to take all appropriate individual measures, such as orders, inspections, and sanctions. They also include general provisions, that is to say, secondary or tertiary legislation[7].

B. A panoply of measures

Apart from general provisions, governments have passed hundreds of administrative measures. The growth of these measures, accompanied by more or less formalized restrictions on judicial safeguards, is a common feature of liberal democracies. It has a powerful impact on private interests in their relations with government. It affects the underpinnings of individual rights and effective judicial protection which lie at the heart of Western constitutionalism[8]. It modifies our societies. This article seeks to present an overview – a way of looking at many apparently unrelated problems. Inevitably, such an effort must be incomplete and tentative, but it may shed light on some aspects of administrative practice.

Extraordinary measures. "Extraordinary" measures are not taken by public authorities in a sort of state of lawlessness, outside the legal order

[5] B. Ackerman, *Before the Next Attack*, cit. at 4, 2.

[6] See V. Lowe, '*Clear and Present Danger': Responses to Terrorism*, 54 Int' & Comp. L. Q. 185, 187 (2005) (holding that the current legal position is quite clear: armed conflict, including that between the U.S. and the Taleban, were certainly 'wars', while the 'war against terrorism' is not, as a matter of international law, a war in the proper sense).

[7] For this distinction, with regard to the U.K., see R. Baldwin, *Rules and Government* (1995).

[8] For this thesis, see C. McIlwain, *Constitutionalism – Ancient and Modern* (1947).

(*extra ordinem*). They are, rather, measures adopted during a state of emergency which is more or less clearly defined either by the Constitution itself or by some other legal source. The US Constitution again provides a significant example, to the extent that it permits the suspension of habeas corpus "when in cases of Rebellion or Invasion the public Safety may require it". A similar provision is laid down in Article 15 of the European Convention on Human Rights (ECHR). For example, the UK Government's suspension of the rights recognized by the ECHR was not a political decision which breached the constitutional order, although it was clearly a highly discretionary and controversial one, while some measures taken by the Canadian authorities have been justified as exceptions associated with the global war on terror[9].

Expulsions, extraditions, and extraordinary renditions. Under the threat of trans-national terrorism, liberal democracies have extensively exercised some traditional attributes of sovereignty over their territory. First, several laws, particularly those regulating immigration, have been interpreted restrictively against resident aliens. Second, several persons suspect of being involved in terrorism have been extradited to other countries for prosecution there[10]. Third, governmental administrative powers to expel these suspects have been strengthened. Fourth, both authoritarian governments as well as some liberal democracies have used *extra ordinem* powers, such as extraordinary renditions.

While the first kind of governmental power identified above is undisputed, although its exercise often raises serious issues of legitimacy and transparency[11], the last is certainly in conflict not only with national constitutions[12], but also with the European Convention of Human

[9] For critical remarks concerning the Canadian security certificate programme considered as a mechanism of arbitrary detention targeted at non-citizens, see R. Aitken, *Notes on the Canadian exception: security certificates in critical context*, 12 Citizenship Studies 381 (2008).

[10] See S. Marks, *State Centrism, International Law and the Anxieties of Influence*, 19 Leiden Journal Int'l L., 339, 342 (2006) (calling this the 'prosecute or extradite rule').

[11] See B. Ackermann *Before the Next Attack*, cit. at 4, 36 (observing critically that "the administration … has transformed the immigration laws into a machine for the arbitrary detention of residents who come from the Islamic world – ordering secret hearings before immigration judges and using minor infractions to sweep thousands into detention centres to prepare the ground for their removal and deportation. And has manipulated other statutes to similar effects")

[12] See F. Fabbrini, *Extraordinary Renditions and the State Secret Privilege: Italy and the United States Compared,* 3 It. J. Public L. 261 (2011) (arguing that the judiciary shows

Rights[13]. Moreover, the second and third measures, were also constitutionally controversial. The issues that arose may be considered by citing two examples concerning Italy. Since 2001, the "public interest" has justified not only extraditions, but also a new kind of measure. In 2008, Parliament converted into law a governmental decree which gave the Minister of Internal Affairs the power to expel alien residents who might be dangerous to public security. For example, a self-proclaimed imam was seized and sent back to his country of origin, although he was married to an Italian-born citizen. The question thus arose as to whether his right to effective judicial protection had been impaired. Extraditions, too, raised problems. Consider, for example, *Saadi*. After the end of his prison term, the Italian Minister of Internal Affairs issued an order that Saadi be returned to his country, Tunisia, where a military tribunal had sentenced him to twenty years in jail. The order held that it was "apparent from existing evidence" that Saadi had played an active role in the organization of terrorist acts. Not only did Saadi deny this, but he also argued that enforcement of the deportation order would expose him to a serious risk of being subjected to inhuman treatment, if not to torture. He also asked for a hearing before the local refugee board, with a view to being granted political asylum. But the hearing did not take place and after internal judicial remedies had been exhausted, it was only the European Court of Human Rights that declared the deportation of Saadi unlawful, because it infringed the "absolute" prohibition against torture[14]. This applies, *a fortiori*, to the extraordinary renditions agreed between European and US governments.

Police measures. Perhaps the most obvious measure is the confiscation of weapons, as well as any kind of object that may be used as a weapon. But governments have also exercised many other kinds of power. In the U.S., when approving the *Authorization for Use of Military*

deference to the choices made by the executive branch, making it impossible for the individuals allegedly subjected to extraordinary renditions to obtain justice before domestic courts).

[13] Eur. Ct. H. R., *Iskandarov v. Russia* (application no. 17185/05 judged on 23 September 2010) (affirming that both Articles 3 and 5 were infringed, in particular the behaviour of the Russian authorities constituted "*a complete negation of the guarantees of liberty and security of person contained in Article 5 of the Convention and a most grave violation of that Article*": § 150).

[14] See Eur. Ct. H. R., *Saadi v. Italy* (application n. 37201/06, judged on 28 February 2008), § 42 ff. and 102, where actions agreed by several European police forces are described.

Force, Congress empowered the President "to use all necessary and appropriate force against those […] he determines planned, authorized, committed, or aided the terrorist attacks […] on September 11, 2001". Consideration of such cases as *Boumedien*, a naturalized citizen of Bosnia held in military detention by the United States at Guantanamo Bay[15], reveals that a wide range of interests are affected by counter-terrorism measures. In the UK, the Prevention of Terrorism Act permits the administration to keep a suspected terrorist in detention so long as it convinces a judge (not a jury) that he is probably a terrorist. In other words, the test no longer requires the government to prove guilt beyond a reasonable doubt. ([16]) One dispute that arose before the UK courts, *Secretary of State for the Home Department (Respondent) v. AF*, shows the many types and the effect of governmental powers. AF was a dual United Kingdom and Libyan national who returned to the UK after 2001. The UK government decided to place him under close surveillance, prohibiting him from leaving his flat or having contact with other people, and imposing a number of other restrictions[17]. Whether the measures taken to place AF under control infringed his personal freedom when considered as a whole remains to be seen, and implies an

[15] See U.S. Supreme Court, *Boumediene v. Bush*, 553 U.S. 723 (2008). Justice Kennedy delivered the opinion for the 5-4 majority, holding that the prisoners had the right to habeas corpus.

[16] See B. Ackerman, *Before the Next Attack. Preserving Civil Liberties in an Age of Terrorism*, cit. at 4, 69.

[17] House of Lords, *Secretary of State for the Home Department (Respondent) v. AF* [2007] UKHL 46. From the analytical description by Lord Bingham, we learn that AF was required to remain in the flat where he was already living (not including any communal areas) at all times save for certain hours. He was thus subject to a 14-hour curfew; he was required to wear an electronic tag at all times; he was restricted during non-curfew hours to a limited area of about 9 square miles; he was to report to a monitoring company on first leaving his flat after a curfew period had ended and on his last return before the next curfew period began; his flat was liable to be searched by the police at any time; during curfew hours he was not allowed to permit any person to enter his flat except his father, official or professional visitors, children aged 10 or under or persons agreed by the Home Office in advance on supplying the visitor's name, address, date of birth and photographic identification; nor was he to communicate directly or indirectly at any time with a certain specified individual (and, later, several specified individuals); he was only permitted to attend one specified mosque; he was not permitted to have any communications equipment of any kind; he was to surrender his passport and was prohibited from visiting airports, sea ports or certain railway stations; finally, he was subject to additional obligations pertaining to his financial arrangements.

assessment under the proportionality test developed by the European Court of Human Rights[18].

Freezing of funds and other economic assets. Thus far, several measures have been considered which impinge more or less directly on personal freedom. Structurally analogous to these measures are those affecting income, wealth and other aspects of economic life. A very large proportion of government measures falls within the competence of economic affairs ministries, inter-ministerial committees and independent agencies which supervise flows of capital. But the best known case is that of the freezing of funds decided against Kadi by the auxiliary body of the UN Security Council known as the "Sanctions Committee". Yassin Abdullah Kadi, a Saudi Arabia citizen with a number of assets in the UK, was subjected to the freezing of all his funds without prior notice. Whether this measure could be annulled by a court, since it infringed his right to property, is an important question which will be considered soon. It should be pointed out immediately, however, that, to the extent Kadi did not initially have access to his funds and other economic assets, this measure drastically affected his capacity to spend money on his own health or that of his family. Only some years later, however, were provisions for attenuating these effects adopted by the UN institutions.

C. From national to global measures

While close attention has been paid to "unilateral" actions, especially those taken by the US government, the constitutional change produced by the resolutions adopted by the UN Security Council went relatively unnoticed for some years, until Kadi and other cases were adjudicated.[19] An entirely new legal framework has been introduced, beginning with Resolution no. 1373/2001, which provides that the States must:

"(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalise the wilful provision or collection […] of funds […] to be used in order to carry out terrorist acts;

[18] See A. Stone Sweet &Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Col. J. Transnational L. 73 (2008) (arguing that proportionality consistutes a doctrinal underpinning for the expansion of judicial power globally).

[19] See, however, J. Alvarez, *Hegemonic International Law Revisited*, 97 Am. J. Int'l L. 873, 875 (2003) (observing that "despite the [Security Council]'s refusal to give explicit approval to Operation Iraqi Freedom in advance, worries about hegemonic capture of the Security Council should not be relegated to science fiction", as well as the U.S. lead of the activities effected by the experts within the Sanctions Committee).

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of or at the direction of such persons […];

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit […] terrorist acts".

In brief, the purpose of the UN Resolution is to ensure as far as possible that funds and other economic resources are not made available to assist terrorism by placing constraints on both those who are involved in terrorist activities and those who support their activities. From an economic point of view, there is obviously a huge difference between the traditional UN measure against a State, that is to say the embargo, and the new "smart sanctions", particularly the freezing of funds.

However, from a legal point of view, the new measures are even more innovative, for the simple reason that the Security Council's legally binding counter-terrorism orders are a "rare phenomenon in international law: legally binding obligations"[20]. Moreover, while an embargo is a sanction against a State (or a group of States)[21], smart sanctions produce their effects beyond the category of States. These effects do not concern individuals and legal entities indirectly, through intermediation by the State, but directly. As a matter of fact, physical and legal persons and other entities suspected of giving material or financial aid to terrorist organisations are not only subjected to the general rules laid down by the Security Council, but are also listed by an auxiliary body of the Security Council, named (significantly) the Sanctions Committee, which keeps the list and updates it.

It should be made clear that in principle, listing decisions produce

[20] J. Alvarez, *Hegemonic International Law Revisited*, cit. at 19, 874.

[21] For an interesting analysis of Security Council sanctions practice through 2006, see J.M. Farrall, *United Nations Sanctions and the Rule of Law* (2008). See also A. Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: the Quest for Legitimacy and Cohesion*, 17 Eur. J. Int'l Law 881 (2007) (pointing out the harsh criticism raised as a result of sanctions against Iraq, due to their detrimental impact on the population).

their effects for only six months. However, they are extended automatically for each individual and legal entity included in the list unless and until the de-listing procedure has been successfully carried out. This outcome is far from easy to achieve, however. Although individual and legal entities included in the list may ask for the de-listing procedure to be started, the first formal step must come from a State. Moreover, the de-listing procedure is very different from a review before an independent tribunal or a court. Not only does the applicant have a huge burden of proof, but all the evidence collected in favour of de-listing is submitted to a political body, where the State that initially proposed listing may ask for further evidence or simply oppose the de-listing on the basis of undisclosed evidence gathered by its intelligence sources. The temporal limit placed on the effects of counter-terrorism measures may thus become more apparent than real.

All this implies a twofold change of a constitutional nature. First of all, the Security Council has started to legislate[22]. In other words, in the series of UN resolutions taken since 2001, there is not simply a strong impulse towards the adoption of co-ordinated norms which each legislator is free to implement at the national level. Secondly, to the extent that the Security Council allows its auxiliary body to impose measures, which are defined (imprecisely) as sanctions, an administrative power is being exercised for the first time by the UN against physical and legal persons. Both developments are very problematic. Although the legal basis for UN resolutions is relatively beyond dispute, the question arises as to whether the Security Council is an appropriate seat of authority for legislation, since "threats" to international peace are vaguely defined, thus making the Security Council's "discretion impervious to judicial review"[23]. This immunity, and the danger of errors and abuses that it creates[24], have become yet more evident, since for many years UN resolutions have contained no conditions that might significantly limit

[22] See Paul C, Szasz, *The Security Council Starts Legislating*, 96 Am. J. Int'l Law 901 (2002) (underlining the Security Council's new "legislative" phase).

[23] J. Alvarez, *Hegemonic International Law Revisited*, cit. at 19, 874, footnote 9. Alvarez adds, at 875, that the global policy was promoted by the U.S. with the aim of exporting national anti-terrorism legislation, particularly the U.S. Patriot Act.

[24] J. Alvarez, *Hegemonic International Law Revisited*, cit. at 19, 876 mentions the opportunistic conduct of several human rights violators "justifying old and new repressive national measures" against opponents who are defined as saboteurs or terrorists.

the Sanctions Committee's power to include individuals and legal entities in the black list, although some commentators have demanded a more consistent approach to procedural protection[25].

Only in 2005 did Resolution no. 1735 introduce certain procedural constraints. It provided that when proposing names to the Committee for inclusion in the Consolidated List, "States shall [...] provide a statement of case [which] should provide as much detail as possible on the basis(es) for the listing, including: (i) specific information supporting a determination that the individual or entity meets the criteria above; (ii) the nature of the information; and (iii) supporting information or documents that can be provided" (§ 5). It also requested "designating States, at the time of the submission, to identify those parts of the statement that may be publicly released" (§ 6). It is also up to national governments to request amendment or withdrawal of the measures, or else to implement them in their respective legal systems (§§ 13 and 14). Moreover, there is no such thing as judicial review. The least that can be said, therefore, is that constraints on power have been weakened on the whole, since the rules and decisions adopted at a global level are not subject to safeguards comparable to those provided by national constitutions.

III. Constitutional safeguards under stress

A. The impact of anti-terrorism measures

How important are governmentally-determined measures in relation to individual lives and that of society in general? From an economic point of view, hundreds of funds and economic resources have been frozen. All this of course affects the conditions of individual freedom and independence. It also influences the working capacities of the persons affected, together with other measures such as the revocation of licenses for professionals and firms. It has a profound impact on the ability of individuals and groups to pursue their interests within society, in their relationship with public authorities.

But there is an even more serious impact on personal freedom, which

[25] See E. De Wet, *Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: the Emergence of Core Standards of Judicial Protection*, in B. Fassbender (ed.), *Securing Human Rights? Achievements and Challenges of the UN Security Council* (2011), 141.

is due to government orders to live in a specific place, detention, and expulsions. Hundreds of individuals have been detained for carrying out activities connected to terrorism. Thousands of other persons have been included in black lists, with the result that they are prevented from taking flights (no-fly lists). Millions of persons have felt the effects of new measures for checking them and their baggage in airports. Hardly anyone travelling for work or pleasure leads his/her life without resentment towards the effect of these administrative measures. An even larger number of people are subjected to the invisible surveillance carried out by high-tech instruments, in public streets and squares and railway stations, as well as in phone and internet communications[26].

My purpose is not to observe that, since 9/11, our life is much more complex. Nor is it to say that since then law and administrative practices in Western liberal democracies have considerably expanded governments' powers of surveillance, detention and command[27]. My purpose is, rather, to ascertain whether the fundamental values upon which liberal democracies rest are endangered not only by terrorist attacks but also by the measures taken by our governments to protect us. Even some of the most traditional constitutional guarantees have been regarded as obstacles to a prompt and effective reaction against terrorism rather than as public assets that must be made available to all members of society[28]. These guarantees include the division of powers and the prohibition of immunity.

B. A weakened division of powers

The changes which have occurred at the global level entail important consequences not only for national sovereignties but also within national jurisdictions. Indeed, if we look at each State as a whole, isolated set of

[26] See S.A. Shapiro & R.I. Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69 Law & Contemp. Probs. 99 (2006). See also K. Anderson, *Is There Still a "Sound Legal Basis?": The Freedom of Information Act in the Post-9/11 World,* 64 OHIO ST. L.J. 1605 (2003).

[27] See S. Marks, *State Centrism, International Law and the Anxieties of Influence*, cit. at 9, 342.

[28] For a similar line of reasoning, with a criminal justice perspective, see A.T.H. Smith, *Balancing Liberty and Security? A Legal Analysis of United Kingdom Anti-Terrorist Legislation*, 13 Eur. J. Crim. Pol'y & Res., 73 (2007) (describing tensions between anti-terrorist measures and the Human Rights Act); L. Zedner, *Securing Liberty in the Face of Terror: Reflections from Criminal Justice*, 32 J.L. & Soc'y 507, 510 (2005).

institutions hides an important part of the story. Increasingly frequently, national parliaments are simply requested to give the force of law to the non-negotiable rules approved by the UN Security Council. Even outside the implementation of such rules, there is a shift in the balance of powers between the legislative and executive branches of government, even though no constitutional provision is amended. The case of the UK is particularly interesting in this respect. As observed earlier, anti-terrorism legislation gives the Cabinet the power to lay down general provisions. These provisions are to be made in the form of Orders in Council, and must be laid before Parliament. However, as Justice Collins observed for the Queen's Bench Division's Administrative Court, "although it must be laid before Parliament, there is no procedure which enables Parliament to scrutinise or to amend any Order", though nothing excludes a debate[29]. The least that can be said, therefore, is that the discretionary powers enjoyed by the executive branch have been strengthened.

If we ask whether there is something fundamentally wrong in this, an easy answer is that the issue of separation of powers has always been a contentious one, especially when strict separation is not maintained, and continues to raise questions about where power lies. Historically, the balance of powers between the legislative and executive is not static, but dynamic. It changes, therefore, in both directions, sometimes giving rise to encroachments and constitutional disputes. As a result, if a shift occurs, it is not necessarily cause for alarm. Another answer is that, for functional reasons, it is inevitable that the executive branch will take the leadership in anti-terrorism policies, especially when public opinion calls for "quick and effective" actions. Whatever the intellectual soundness of this explanation, it suggests that further analysis is required in order to ascertain whether similar developments occur in other policy fields or divergent trends emerge.

Although these suggestions concerning the significance of the new trends may approximate reality, however, a twofold problem persists. The first is that the new global anti-terrorism policies, rules and measures are developed and decided through inter-governmental procedures which are in the hands of diplomats and senior officers from internal affairs departments. Since these procedures are surrounded by secrecy and are carried out without the presence of any experts on international human

[29] *A, K, M, Q, G. v. H.M. Treasury* (High Court of Justice, [2008] EWHC 869 (Admin).

rights[30], "experts" from national governments may work with no constraints *ex ante*, that is to say before rules and individual measures are decided. Nor can it be said that, even though these constraints are weakened, other guarantees, such as those providing *ex post* remedies against misuse and abuse of power, have been left unchanged.

C. No immunity from jurisdiction

Even in the political system of the US, where courts are perceived as countervailing powers, judicial protection has been initially weakened. First, upholding the argument of the executive branch, a District Court decision held that the judiciary had no jurisdiction to handle wrongful imprisonment cases involving foreign nationals who were being held in Guantanamo Bay. The decision was, however, reversed by the Supreme Court in *Rasul v. Bush*[31]. Speaking for the majority, and relying on precedents not highlighted by the parties, Justice Stevens argued that the *Ahrens* decision had since been largely reversed, and thus foreign nationals in Guantanamo Bay could invoke habeas corpus (wrongful detainment)[32]. Second, in *Boumediene v. Bush* the Court emphasised the intolerable length of preventative administrative measures. At least for the majority of the Court, to require (some) Guantanamo detainees to pursue the proceedings provided by the *Detainee Treatment Act* of 2005 would be to require not simply several months, but years of delay. In fact, the majority held, the "fact that these detainees have been denied meaningful access to a judicial forum for a period of years" made "these cases exceptional", especially in those cases in which "six years have elapsed without judicial oversight"[33].

[30] See B. Fassbender, *The Role of Human Rights in the Decision-Making Process of the Security Council*, in B. Fassbender (ed.), *Securing Human Rights? Achievements and Challenges of the UN Security Council*, cit. at 25, 74.

[31] *Rasul v. Bush*, 542 U.S. 466 (2004).

[32] For further remarks, see K. Roosevelt, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 Univ. Pa. L. Rev. 2018 (2007) (affirming that "Rasul is a victory for the rule of law, but one whose magnitude has yet to be determined"); J.T. Thai, *The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens's Influence From World War II to The War on Terror*, 92 Virginia Law Review 501 (2006) (underlining the contribution of Justice Stevens).

[33] *Boumediene v. Bush* (2008), cit. at 15, pp. 43 and 66, respectively. For this reason, Bruce Ackerman has argued for imposing a sunset clause on transitory measures, causing the statute or regulation establishing them to lapse after the expiry of a deadline such as six months or a year: B. Ackerman, *Before the Next Attack*, cit. at 4, 35.

A *caveat* might be helpful, however, against any temptation to consider these rulings as symptoms of a clear and linear progression, let alone progress. This caveat is justified not only by the weaknesses of every attempt to read the complex events of human history in an oversimplified evolutionary way, but also by a consideration of more recent rulings of the Supreme Court, such as that in *Ashcroft v. Al-Kidd*. In 2001, the Court recognized a "qualified immunity" for officers, and affirmed that the applicant had not met the burden of proof to show that Attorney-General Ashcroft could be sued personally.

The question of whether a court may exercise its jurisdiction with regard to anti-terrorism measures emerged in *Kadi*, too. Since Kadi was on the UN Sanctions Committee's list, he had his assets frozen. He challenged EC Regulation no. 881/2002 and other acts before the CFI. But, in a well-known and widely-criticized judgment, the CFI decided that, having regard to the primacy of the UN Charter, the EU was bound to adopt all measures to enable Member States to fulfil their obligations under the UN Charter. Accordingly, there was no power to undertake an indirect review of the lawfulness of the UN Resolution. An exception might be found, the CFI added, only if the Security Council had failed to observe the fundamental peremptory provisions of *jus cogens*, which was not the case[34]. This ruling has been criticized not only by most commentators[35], but also by other judicial institutions. In an opinion delivered in the appeal before the European Court of Justice, Advocate General Maduro convincingly argued that EU institutions had failed to identify any basis in the Treaty from which it could logically follow that measures for the implementation of UN resolutions are accorded immunity from judicial review[36]. He went on to affirm that any such immunity, even if it were justified by the doctrine (evoked by the Commission) according to which political questions are not subject to decisions by the courts, would

[34] CFI, Case T-351/01, *Kadi v. Council and Commission*. According to the Court, because the decision was not to be regarded as arbitrary or disproportionate interference with the fundamental right to the enjoyment of property (§§ 234 to 252).

[35] See, in particular, P. Eeckhout, *Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions: In Search of the Right Fit'* 3 Eur. Const. L. Rev. 183, 195 (2007) and B. Conforti, *Decisioni del Consiglio di sicurezza e diritti fondamentali in una bizzarra sentenza del Tribunale comunitario di primo grado*, 11 *Il diritto dell'Unione Europea* 333 (2006).

[36] Opinion of AG Maduro delivered on 16 January, 2008, Case C-402/05 P, *Kadi v. Council and Commission*, § 28-29.

be in conflict with the principle which holds that the Union is based on the rule of law and, therefore, guarantees judicial protection against all measures adopted by its institutions[37]. That the European Court of Justice followed the opinion of its AG, and thus reversed the lower courts' judgment, is too well-known to require more than passing mention[38].

National courts followed the same line of reasoning. In particular, in the UK, the Queen's Bench Division's Administrative Court not only observed that "an Order in Council which curtails fundamental rights cannot preclude an effective judicial review" (§ 19), even though such an Order follows the exercise of the Royal Prerogative and no right of challenge is contained in it" (§ 18)[39], but also engaged in a discussion about fundamental rights. Justice Collins dissented from the CFI's ruling in *Kadi*, though he specified that the opinion expressed by Advocate General Maduro was "no more than opinion to which a domestic court is entitled to have regard". Instead of basing his arguments on EU law, he affirmed that the applicants' case would succeed for two reasons. Firstly, it correctly invoked Article 6 of the ECHR. Secondly, the rights to be heard and to have an effective judicial protection "are rights which have existed under Common Law"[40].

[37] Opinion of AG Maduro, cit. at. 36, § 34; ECJ, Case 294/83, *Les Verts v. European Parliament* (1986).

[38] See G. della Cananea, *Global Security and Procedural Due Process of Law Between the United Nations and the European Union*, 15 Colum. J. Eur. L. 511 (2009) (arguing that the ECJ has restored procedural due process of law). But see also G. de Burça, *The European Court of Justice and the International Legal Order after Kadi*, 51 Harv. Int'l L.J. 1 (2010) (arguing that this judgment carries the risk of undermining the image of the ECJ as an actor committed to the respect of international law).

[39] *A, K, M, Q, G. v. H.M. Treasury*. [2008] EWHC 869 (Admin), §§ 18-19. Two years later, in its decision *HM Treasury v Mohammed Jabar Ahmed and others (FC); HM Treasury v Mohammed al-Ghabra (FC); R (on the application of Hani El Sayed Sabaei Youssef) v HM Treasury* [2010] UKSC 2, the U.K. Supreme Court confirmed this approach, and quashed the UK's Al-Quaida Order in part, because it was in conflict with the principle of effective judicial protection.

[40] The House of Lords had confirmed the requirement that there should be an effective right to be heard – *Secretary of State for the Home Department v. MB* [2007] 3 W.L.R. 681; another relevant case was *R(Al-Jeddah) v. Defence Secretary* [2008] 2 W.L.R. 31, concerning the internment of a British citizen in Iraq "for imperative reasons of security", where Lord Bingham had said that the only way in which such imperative reasons of security could be reconciled with the detainee's rights under Article 5 ECHR was to ensure that such rights "are not infringed to any greater extent than is inherent in such detention" (§ 34).

IV. Enforcing (administrative) due process of law

A. A due process for all: citizens and enemy aliens

Thus far, anti-terrorism measures taken by national governments have been considered almost exclusively from the point of view of their adverse effects on affected individuals and groups or, more briefly, for their substance. There is, however, another fundamental side, which is that of procedural justice. Issues concerning "process", at least in this context, are by no means merely issues of form[41]. Quite the contrary, due process claims are asserted as claims of constitutional right, as limits on the activities that governments are allowed to carry out, as well as on their operational aspects. As a matter of fact, many procedural rights do not prevent government from following a certain course of action. Rather, they require that such a course of action be taken or that a final decision be made through particular phases and in accordance with some particular obligations, such as providing the affected individual or group a reasonable opportunity to be heard and giving the reasons, respectively.

In this respect, since soon after 9/11, procedural constraints on governments have often been regarded as undue obstacles to the prevention of harm to citizens' life and property. Some limits to the action of government that would traditionally have been seriously considered by decision makers, such as *habeas corpus*, have been neglected, and, more importantly for our purposes, governments' assertions of facts and predictions of risks have not been subjected to strict scrutiny. Some justices held that special deference to the executive branch's assertions was necessary with regard to the circumstances and conditions of measures producing effects on individuals, such as the inclusion in a black list or seizure or, further, house arrest. The position expressed by Justice Thomas in particular in *Hamdi v. Rumsfeld* was very close to giving the government *carte blanche*. He affirmed that "if the president deemed it 'necessary for the public safety' to detain enemy combatants, his factual findings were 'virtually conclusive". However, the majority of the Supreme Court rejected his view, and held that although Congress had expressly authorized the detention of enemy combatants, due process required that Hamdi, a U.S. citizen, have a meaningful opportunity to challenge his enemy combatant status, although this did not call into question the power to apply such a status[42].

[41] In this sense, see J. Mashaw, *Due Process in the Administrative State* (1986), 4.
[42] *Hamdi v. Rumsfeld* (542 U.S. 507). For further comments, see B. Ackermann, *Before the*

A few years later, the same opportunity was granted to Hamdan, a Yemeni citizen, who had been captured in Afghanistan and was being held in Guantanamo Bay[43]. Once again, the Supreme Court reversed the ruling of a lower court, in this case the Court of Appeals, finding the special military commissions illegal under both military law and the Geneva Conventions with regard to aliens. Of particular interest is the rejection of the main argument brought by Justice Scalia, which was that the Detainee Treatment Act states that "[N]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defence at Guantanamo Bay, Cuba"[44]. Scalia's opinion was that this clause sufficed to deny the Supreme Court jurisdiction over the case, thus distinguishing the legal status of an alien from that of a citizen, such as Hamdan and Hamdi, respectively. The argument proposed by Justice Stevens which succeeded in convincing the majority concerned the procedures under which Hamdan was to be tried. Absent an express authorization issued by Congress, the ordinary laws of the United States apply, including the Geneva Convention. As a result of this, regardless of its deference in procedural terms[45], the Supreme Court's ruling in *Hamdan* implied that the Due Process Clause established by the Fifth Amendment applies to all 'persons', not merely to 'citizens'.

In a similar vein, two years earlier, the House of Lords, in its judicial capacity, in *A and others v. Secretary of State for the Home Department*, had struck down antiterrorist legislation which authorized the government to detain aliens – but not citizens – for indefinite periods without trial[46]. In particular, Section 23 of the *Anti-terrorism, Crime and Security*

Next Attack, cit. at 4, 27 (criticizing the "justices' uncertainty over bedrock principles of due process"). Ackermann, at 62, also recalls the internment of US citizens of Japanese descent during the 2nd World War, in particular Justice Black's dissenting opinion in *Korematsu*, conceding "that 'all legal restrictions which curtail the civil rights of a single racial group are immediately suspect'".

[43] U.S. Supreme Court, *Hamdan v. Rumsfeld*, 548 US 557 (2006).

[44] § 1005(e)(1), 119. Scalia also warned the Court that expanding jurisdiction to hear writs of habeas corpus from Guantanamo Bay would create an excessive load for the courts system, and insisted that petitioners such as Hamdan held in Guantanamo lacked the right to a writ of habeas corpus.

[45] For this remark, see E.A. Young, *The Constitution Outside the Constitution*, 117 Yale L. J. 408, 439 (2007). For a further analysis, see N.K. Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 Harv. L. Rev. 65 (2006).

[46] *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56. Unlike

Act, which provided for their indefinite detention without trial and deportation, and was only applied to non-British nationals, was held to be incompatible with Article 14 of the ECHR, which prohibits any discrimination on any grounds associated with, inter alia, "national or social origin, association with a national minority". As a consequence of this, the Blair government passed new legislation which eliminated that discrimination[47].

It may be said, therefore, that as the months and years have passed, due process has played a role in moderating the impact of governmental actions on individual and collective interests. In a variety of jurisdictions, the demand for a more accurate basis for decisions adversely affecting those interests has been met either by the legislators or by the courts. It is especially to the latter's credit if it is now accepted that procedural requirements apply to citizens and non-citizens alike.

B. Rationales of procedural due process of law

When looking at cases such as those of Hamdan, Kadi and many others, one might argue that, where disputes about anti-terrorism measures reach higher jurisdictions, established standards of judicial review are enforced. In other words, after some years of distress following 9/11, there would be a gradual rediscovery of due process safeguards. Although a description of this kind is not fundamentally wrong, it oversimplifies the case. First, we must do more than make the simple observation that higher courts are less deferential to political power than are lower courts. The underlying reasons behind a rediscovery of procedural due process of law must thus be explored. As a second step, an attempt must be made to see whether with respect to anti-terrorism measures, there is not simply a growing interaction between judicial institutions, the so-called "dialogue between courts" ([48]), but a more complex interaction between legal orders. Last but not least, it might be useful, if such a situation occurs, to devote closer attention to the

the majority, Lord Hoffmann held that the entire 2001 Act was incompatible with the United Kingdom's constitution, and its commitment to human rights.

[47] For further, critical comments, see B. Ackermann, *Before the Next Attack*, cit. at 4, 182, and S. Shah, *From Westminster to Strasbourg: A and others v United Kingdom,* 9 Human Rights L. Rev. 473 (2009) (observing that, in spite of the Lords' clear ruling, cases concerning the Act kept coming).

[48] See M. Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 Eur. Const. L. Rev. 5 (2009).

standards of procedural fairness. Are they higher or lower than in the pre-9/11 world? Or are they simply different? And, if so, what new model is emerging?

From the first point of view, there is no doubt that the higher courts enforced fundamental procedural constraints on governments. But this is only a part of a more complex reality. Consider the EU again. For all the weaknesses of the CFI's ruling in *Kadi*, a few months later the same court followed a more prudent approach in another dispute concerning anti-terrorism measures, OMPI, where it found an infringement of basic due process requirements and accordingly quashed the contested measures[49]. In the U.S., too, when the Supreme Court decided that in light of the Due Process Clauses, the power of judicial review implied a judicial duty to determine the adequacy of process, administrative procedures were gradually rectified by legislation. Following a different approach, the British courts have found that Parliament did not intend to deviate from established standards of "natural justice". In several countries, some kind of hearing has been provided in procedures concerning asylum seekers, as well as in those aimed at expelling aliens who are considered potentially dangerous. Procedural fairness in this context is often associated with substantive principles such as those of equality or non-discrimination. It is also, though less frequently, associated with the prohibition of specific conduct, in particular inhuman treatment and torture, as we have seen with regard to *Saadi*. If a prior hearing is not regarded as being compatible with collective security, at least *ex post* safeguards are recognized, particularly access to the courts, which had initially been made more difficult, if not denied.

What are the underlying rationales? Of course, one reason for this is the courts' insistence on traditional values, such as process regularity or the necessity to assess the credibility of both government allegations and predictions about future risk. Another reason is still internal to each legal order, that is to say, the demand for greater respect of due process from civil liberties associations and some political movements. A third rationale for the gradual rediscovery of due process safeguards is that the same

[49] See CFI, Case T-222/08, *Organisation de Modjaedins du people de l'Iran v. Council* (2006). See also, for further comments, G. della Cananea, *Return to the Due Process of Law: The European Union and the Fight Against Terrorism*, 4 Eur. L. Rev. 896 (2008) (arguing that *OMPI* revealed a traditional, but limited, approach to due process of law, which was more focused on the adequacy of procedures than the rights at stake).

international or supranational authorities which requested that the states adopt measures against terrorism later demanded that they pay attention to at least some procedural issues. This applies not only to the EU, but also, in some respects, to the UN.

The three rationales just identified are not only distinct from a theoretical point of view. It would be ingenuous, for example, to think that the Security Council is seeking to pursue broad ideas of procedural justice when it amends the rules for listing and de-listing individuals and legal entities. Rather, it is implementing a political compromise between those states, such as Sweden, that had called for greater respect for certain essential due process requirements, and the rest. However, these rationales may also converge in some respects. Consider, for example, the twofold conclusion reached by Lord Bingham, speaking for the House of Lords in *AF*. First, although there has been a real war going on against the Taliban government, and there were good reasons to keep AF subject to control, since he was suspected of having close ties with groups of terrorists with ties to Osama Bin Laden, an order of this kind may have more adverse effects than certain criminal penalties, and thus produce "devastating consequences" for the individuals and their families. Second, and consequently, not only did Article 6(1) apply, but it also entitled the affected person "to such measure of procedural protection as is commensurate with the gravity of the potential consequences"[50].

C. Raising the standards of due process?

It is precisely in this respect that my reading of the ruling of the ECJ in *Kadi* diverges from those developed by other commentators. According to them, the ECJ made the (wrong) choice to over-emphasize the autonomy of its own legal system with regard to UN law[51]. Moreover, they look for a comparison with the approach followed by the German Constitutional Court in the famous *Solange* saga, in which the Court declared that "so long as the integration progress has not progressed so far that Community law also possesses a catalogue of rights", national

[50] See House of Lords, *Secretary of State v. AF*, cit. at 17, § 21.

[51] See A. Gattini, *Comment – Joined Cases C-402/05 & 415/05, Kadi v. Council and Al Barakaat v. Council and Commission*, 46 Common Mkt. L. Rev. 213 (2009) (arguing that the ECJ has not paid enough attention to the "cause of the promotion of international human rights at the global level, to coherence of the international legal system and the promotion of an effective dialogue between international courts").

constitutional review of EC measures would be possible[52]. They also affirm that the ECJ failed to develop a similar approach[53]. An even more critical opinion holds that the Court acted in a manner characterized by "exceptionalism" of the kind associated with the interpretation given by U.S. courts to international law[54].

In my opinion, the ECJ's decision in *Kadi*[55] is both a "typical" EU constitutional case, consistent with the Court's precedents, and a paradigmatic example of an empirical approach which does not neglect to consider legal developments in other legal regimes, as a necessarily textual analysis will suggest. From the first perspective, it is not by chance that when dismissing the UK government's objection of the inadmissibility of the appeal presented by Kadi, the ECJ recalled one the pillars of its established case-law, that is to say that "the Community is based on the rule of law", as affirmed in its famous *Les Verts* case[56], and reached conclusions which were completely different from those reached by the CFI. While the lower court had cited *Les Verts*, but had shown a reluctance to affirm its jurisdiction[57], the ECJ brought it to its logical

[52] See BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß and, for a comparative analysis, A. Slaughter, A. Stone Sweet & J.H.H. Weiler (eds.) *The European Court and national courts— doctrine and jurisprudence : legal change in its social context* (1998). See also, for a retrospective of the case-law of the German Constitutional Court with regard to European integration, Jacques Ziller, *Solange III (or the Bundesverfassungsgericht's, Europe Friendliness) On the Decision of the German Federal Constitutional Court over the Ratification of the Treaty of Lisbon*, 19 Riv. It. D. Pubbl. Com., 973 (2009). For a line of reasoning similar to that proposed in the text, on the basis of the opinion of A.G. Maduro, see A. Sandulli, *I rapporti tra diritto europeo ed internazionale. Il caso Kadi: un nuovo caso Solange?*, 13 G.D.A. 513 (2008).

[53] See J.H.H. Weiler, *Editorial*, 19 Eur. J. Int'l L. 895-896 (2008) (affirming that "Just like the Supreme Court's decision in *Medellin* … the ECJ's decision in *Kadi* is destined to become a landmark in the annals of international law" and arguing that "I have seen commentators reading into the decision a dialogical element reminiscent of the *Solange* jurisprudence. Such a reading is beauty that comes from the eye of the beholder, not from the text of the decision").

[54] See G. de Burça, *The European Court of Justice and the International Legal Order After Kadi*, cit. at 38, 36.

[55] ECJ, Joined Cases C-402/05 & 415/05, *Kadi v. Council and Al Barakaat v. Council and Commission* (judged on 13 September 2008).

[56] ECJ, Joined Cases C-402/05 & 415/05, *Kadi v. Council and Al Barakaat v. Council and Commission*, cit. at 55, § 281.

[57] The CFI held that limitation of the right of access to the Court was justified by the decisions taken by the Security Council. In the words of the Court, "the applicant's interest in having a court hear his case on its merits is not enough to outweigh the essential

consequence, affirming that no immunity from jurisdiction is admissible within the legal order of the EU, the autonomy of which it emphasised[58]. Consistently with this line of reasoning, the lack of any meaningful opportunity for Kadi to be heard and to have access to judicial protection are asserted to violate both the settled case-law of the Court and the principles stemming from the ECHR.

However, before reaching its conclusion, the ECJ took some unusual and unnecessary (if it simply intended to base its decision on precedents) steps to look at the progress made by UN bodies from the point of view of procedural fairness. After paying tribute to the role of the Security Council in the maintenance of peace and security at the global level, and somewhat rhetorically affirming its duty of deference towards the institutions of the UN[59], it did not completely rule out the possibility of admitting some kinds of derogation from "the scheme of judicial protection of fundamental rights laid down by the EC Treaty". It affirmed, rather, that a derogation was "unjustified", because the re-examination (or de-listing) procedure showed that it did not "offer the guarantees of judicial protection"[60]. This was not simply an apodictic remark. Indeed, the Court argued that adequate justification was lacking after assessing the UN procedure, and this assessment was characterized by two interesting features. Instead of looking at the "*Guidelines of the Sanctions Committee*" as was the case when the decision to include Kadi in the list had been taken, the Court considered these guidelines as amended in February 2007.

Moreover, the Court used a two-tier test for determining whether the UN guidelines were consistent with EU principles, thus applying a traditional ECHR reading of fundamental due process safeguards. The

public interest in the maintenance of international peace and security, in the face of a threat clearly identified by the Security Council" (cit. at 49, § 289).

[58] ECJ, Joined Cases C-402/05 & 415/05, *Kadi v. Council and Al Barakaat v. Council and Commission*, cit. at 55, § 282. See also § 303, where the Court refers to the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union. The UK Government's submission that judicial review in extraordinary circumstances should be only 'of the most marginal kind' was also dismissed by the Queen's Bench Division's Administrative Court in *A, K, M, Q, G. v. H.M. Treasury* (cit at 39, § 35).

[59] ECJ, Joined Cases C-402/05 & 415/05, *Kadi v. Council and Al Barakaat v. Council and Commission*, § 294 and 318.

[60] ECJ, Joined Cases C-402/05 & 415/05, *Kadi v. Council and Al Barakaat v. Council and Commission*, § 322.

first part of the test was a consideration of whether the Sanctions Committee Guidelines were open to affected interests. An evident change had taken place in that respect, and the Court was ready to take notice of it, affirming that the UN procedure was "now open to any person or entity to approach the Sanctions Committee directly, submitting a request to be removed from the summary list at what is called the 'focal' point". Ascertaining whether some kind of openness had been introduced, however, was not enough for the Court, which also applied the second part of the test, which was whether this openness was adequate, that is to say whether the procedure conformed with those settled standards of procedural fairness of which the Court had to ensure respect. This second part of the test clearly had a negative outcome, for the Court found several weaknesses in the procedure. It proposed that the question be settled by looking at four features. It began by observing that the procedure before the Sanctions Committee was "still in essence diplomatic and intergovernmental"[61]. Precisely because the procedure was still diplomatic and intergovernmental, the Court added, the affected person or legal entity might in no way "assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose"[62]. Nor, the ECJ observed, did the guidelines "require the Sanctions Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information". The deviation from the duty to give reasons was not limited to the listing decision. As a last point, also where that Committee "rejects the request for removal from the list, it is under no obligation to give reasons"[63].

The significance of these findings was unambiguous. It followed from them that the ECJ "had" to "ensure the review, in principle the full review, of the lawfulness" of the measures taken by the institutions of the

[61] ECJ, Joined Cases C-402/05 & 415/05, *Kadi v. Council and Al Barakaat v. Council and Commission*, § 323.

[62] ECJ, Joined Cases C-402/05 & 415/05, *Kadi v. Council and Al Barakaat v. Council and Commission*, § 322. The ECJ's critique was not isolated. As Justice Collins observed in *A, K… v. H.M. Treasury*, cit. at. 39, "it is obvious that this procedure does not begin to achieve fairness to the person. Governments may have their own reasons to want to ensure that he remains on the list and there is no procedure which enables him to know the case to meet so that he can make meaningful representations" (§18).

[63] ECJ, Joined Cases C-402/05 & 415/05, *Kadi v. Council and Al Barakaat v. Council and Commission*, § 325.

EU in order to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations[64]. It might be argued that all this analysis merely represented the way in which the Court showed its formal deference towards such resolutions, before quashing the measures aimed at implementing them. However, even if this were the case, the two-tier test used by the ECJ still shows that, though the Court found that the progress made by the UN guidelines was not sufficient, at least some elements of parallelism between UN procedures and the standards that must be respected within the EU did exist. In other words, according to the Court, not only did the 2007 UN guidelines put an end to the incommensurability of procedural requirements, but the progress made by UN institutions was also moving in the direction envisaged by the EU. Whether and when such progress might be regarded by the ECJ as "adequate" so that it might be convinced that it is no longer necessary to carry out a "full review" of the lawfulness of the measures adopted by EU institutions, is of course another question, and quite a complex one. But it would not be fair to say that the ECJ raised its standards in order to re-affirm the autonomy of its legal order.

As a further demonstration of the fact that, although higher courts do not hesitate to show their willingness to take due process seriously, they do not (necessarily) raise the standards of review, it may be noted that the US Supreme Court has used a consolidated methodology, which is the three-tier constitutional test introduced in a landmark case, *Mathews v. Eldridge*. As the Court put it in 1976:

> "the identification of the specific dictates of due process generally requires consideration of three distinct factors. First, the due process interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional of substantive procedural safeguards; and finally the Government interest, including the function involved and the fiscal and administrative *lordeur* that the additional or substitute procedural requirements would entail"[65].

[64] ECJ, Joined Cases C-402/05 & 415/05, *Kadi v. Council and Al Barakaat v. Council and Commission*, § 326.

[65] 424 U.S.. 319, 334-5 (1976). For a further analysis, see J. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory*, 44 U. Chi. L. Rev. 28 (1976) (arguing that, though the Court's approach to the values of due process was satisfactory, it failed to specify the techniques that must be used).

In *Hamdi*, Justice O'Connor, writing for the majority, used the three-tier test to place limits on procedural constraints on government. She found that Hamdi had a 'liberty interest' that deserved 'weight' in the balancing exercise required by the due process clause. Such interest justified notice of the charges and an opportunity to be heard. However, during an extraordinary situation such as the ongoing military conflict, normal procedural protections such as placing the burden of proof on the government need not apply. Finally, she suggested that *ad hoc* tribunals may carry out fact-finding activities aimed at determining whether a detainee merited continued detention as an enemy combatant. Regardless of the soundness of this holding in the light of the Due Process Clause[66], that of the Court is an exercise in balancing interests which is consistent with its established pattern of judicial review of procedural requirements.

A similar exercise was carried out by the ECJ. According to the Court, there was no doubt that the procedures followed for listing individuals and legal entities, and the lack of controls, were incompatible with the general principles of EU law. These principles require that whoever incurs the unfavourable effects of an individual measure (or numerous measures, as in this case) must have a reasonable opportunity to be heard and to benefit from effective judicial remedies. It is possible that these procedural guarantees become to some degree limited, or weakened, for the sake of the collective interest, as in the case of global security. On the other hand, all rights are relative, depending on the balance of interests. It is impossible not to consider all the interests at stake, not to consider the high cost to individuals and society. In addition, if the actions of the forces of order were not subject to procedural limitations, they might perhaps be more efficient, but at the price of an unacceptable erosion of important rights which lie at the heart of liberal democracies.

V. The shift from national to global standards

If we consider how Western liberal democracies reacted to the threat of trans-national terrorism after 9/11, important differences emerge with

[66] See B. Ackermann, *Before the Next Attack*, cit. at 4, 31 (arguing that the Court eventually left Hamdi in the hands of military justice, and required him to prove his innocence).

regard not only to substantive principles of law, but also to procedural requirements. Substantive choices differ in many respects, including whether capital punishment or a lifetime in prison can be imposed on those who endanger the lives of citizens and other individuals. They differ, too, with regard to other important aspects of individual lives and society, such as the respect for privacy. Despite the diversity of substantive policy choices and decision-making procedures, some constraints would appear to comprise quite similar elements in the various legal orders. Amongst the most notable of these are the right to be heard, the right to produce documents and evidence (which the decision-maker is obliged to take into account), and the duty to refer to these documents and this evidence when reaching a final decision.

One initial way of looking at these procedural constraints on governments is to present them as a simple (and sometimes simplistic) search for common features. These features do exist, and cannot be ignored. Certain basic goals determined by law are common to most legal systems: they are legality, efficiency, and transparency. Certain techniques and instruments are also increasingly shared, including those just mentioned, and others. From this point of view, although a diversity of approach is followed by governments, the goals and techniques are increasingly similar. In other words, each legal order responds in its own specific way to the requirement that public decision-making be subjected to certain constraints aimed at structuring administrative processes and making them accountable.

Although this way of looking at recent legal developments correctly seeks to take into account both (substantive) diversity and (procedural) similarities, it fails to provide a satisfactory analysis of the growing connections between legal orders and their internal players. First, the boundaries between legal orders are increasingly losing their significance. Consider AG Maduro's opinion in *Kadi*, where he not only provides an accurate review of the case-law of both the ECJ and the European Court of Human Rights, but also mentions the dissenting opinion of Justice Murphy in the *Korematsu* case before the US Supreme Court in 1944. Consider also the decision of the U.K. Queen's Bench Division's Administrative Court in *A, K, M, Q, G. v. H.M. Treasury.* It cites the CFI's decision in *Kadi* in rather critical terms[67], the opinion of Advocate

[67] *A, K, M, Q, G. v. H.M. Treasury*, cit. at 39, § 27 (observing that "It is …difficult to see

General Maduro, and, again, the dissenting opinion of Justice Murphy in the *Korematsu* case. Consider, finally, the UN guidelines. When, for example, the Security Council instructs national governments to create a "focal point" for receiving claims for de-listing individuals included in black lists, it is introducing an institutional and procedural device which should operate everywhere in more or less the same manner. Of course, there is still much room for distinct legislative or regulatory instructions to public administrators, yet the UN rules create a sort of common platform in an area which used to be characterised by national particularities. The same happens, in a narrower area, but more intensely, within the EU, due to the direct applicability of general principles of law and to the procedural connection between national and EU courts[68].

What my arguments lead to is, therefore, a twofold conclusion. For all the importance attached to collective security against terrorism, the procedural guarantees grounded in the liberal democratic institutions are still important, and merit being preserved. However, those who are interested in keeping these safeguards alive must be aware that an "adequate" procedural protection against errors and abuses by public authorities may not be conceived within the borders of the Nation-State, due to the growing importance of "regional" and global standards. In this sense, and within these limits, due process of law confirms that not only the borders between states but also the traditional dichotomy between public law and international law must be reconsidered[69].

how the absence of any right to be heard, beyond submitting a petition in ignorance of the material relied on against the petitioner, can justify the conclusion reached").

[68] See J.K. Cogan, *The Regulatory Turn in International Law*, 52 Harv. Int'l L. J. 322 (2011) (pointing out that international organizations have entered into agreements, passed resolutions, enacted laws, and created institutions at an unprecedented rate).

[69] For further remarks about theories of public law and international law, see G. della Cananea, *Administrative Law in Europe: A Historical and Comparative Perspective*, 1 It. J. Publ. L. 45 (2009) and *Procedural Due Process of Law Beyond the State*, in A. von Bogdandy *et al*. (eds.), *The Exercise of Public Authority by International Institutions* (2010).