# "Enemy Aliens" in Italy?
## The Conflation between Terrorism and Immigration*

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*Abstract*

The global «war on terror» has strengthened domestic executive powers vis-à-vis foreign suspect terrorists by establishing a "special" regime: executive detentions (often indefinite), extraordinary renditions, military trials, freezing of funds, selective use of police powers (mainly to the detriment of Muslim people) have been part of the tool-box employed by various liberal democracies in their fight against the terrorist threat. In Italy, by contrast, the empowerment of the government has mainly been achieved by exploiting the "ordinary" immigration law tools. The trajectory of the special anti-terror deportation power illustrates the point: the 2005 anti-terrorist regime – establishing severe restrictions on due process rights – has been rarely used and gradually dismantled; deportation orders against suspected terrorists have been rather adopted on the basis of the 1998 immigration regime, which regulates the general executive power to deport aliens threatening public order and national security. The result is a peculiar conflation between anti-terrorism and immigration measures. Even if such conflation is common to many countries, a distinguishing feature of the Italian mix is that the instrumental relationship between the two policy goals is reversed. For the Italian government, *salus rei publicae* seems to be dependent 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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TABLE OF CONTENTS:



**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[1].

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 the relation between legality and emergency is more complex than liberals are willing to admit. To affirm the "permanent supremacy" of the rule of law[2], while the law itself provides for emergency clauses granting a "blank cheque" to the executive, is contradictory[3]. Despite being conceived as invulnerable "trumps"[4], pre-established "side-

[1] On the «business-as-usual» approach, O. Gross and F. Níaoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006). For a critical examination of the legal notion of «enemy alien» in the US legal order, D. Cole, *Enemy aliens* (2003).

[2] A. Dicey, *Introduction to the Study of the Law of the Constitution* (1959).

[3] C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1922). The debate on Schmitt's view is still very much alive in the American legal culture: for opposite perspectives, D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (2006) and E. Posner & A. Verveale, *The Executive Unbound: After the Madisonian Republic* (2010).

[4] R. Dworkin, *Taking Rights Seriously* (1977).

constraints"[5], or liberties enjoying "lexical priority"[6], fundamental rights do suffer from derogations – even in liberal legal orders. 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* other relevant public (or private) interests[7].

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[8]. This combination generates a major legal problem, further explored in this paper with regard to the Italian "war on terror".

On the one hand, security is not just a sovereign realm of the State: it is, more accurately, a business of State executives. Predictably, 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[9].

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 panic, governments must reassure, and a common way to do it – even if liberal thinkers may not like it – is to reassess the 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 shifts the "liberty costs" onto insular or underrepresented minorities – as aliens usually are[10].

[5] R. Nozick, *Anarchy, State and Utopia* (1974).
[6] J. Rawls, *A Theory of Justice* (1999), on the concept of lexical priority and its application to basic liberties.
[7] E. Posner & A. Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (2007).
[8] P. Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (2000).
[9] For the idea that «administrative contains, built in its structure, a series of legal "black holes" and "grey holes"», see A. Vermeule, *Our Schmittian Administrative Law*, 122 Harv. L. Rev. 1096 (2009).
[10] An important variable of anti-terrorist measures concerns their *distributive impact*.

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 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

After 9/11, Italy did not enact specific provisions against suspect foreign terrorist. The government rather relied upon two sets of ordinary provisions: the criminal regime aimed at punishing terrorism (since 2001 expressly extended to acts of international terrorism)[11], and the administrative regime set up to control immigration[12]. In the latter discipline –

Sometimes, the discrimination stems from the selective enforcement of rules that are, *per se*, non-discriminatory: for instance, 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 is identified as the most likely source of the threat. In such a case, the problem 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*, 11 J. of Political Philosophy 191 (2003).

[11] See, in particular, Articles 270-*bis* to 270-*sexies* of the Penal Code, as amended, *inter alia*, by law decree no. 374 of 2001, enacted as law no. 438 of 2001.

[12] Legislative decree 286 of 1998, as amended by law 189 of 2002. For a general overview of both the criminal and the administrative regime, see P. Bonetti, *Terrorism, Asylum and Immigration in Italian Law*, in E. Guild & A. Baldaccini (ed.), *Terrorism and the Foreigner: A decade of Tension around the Rule of Law in Europe* (2007).

more relevant to this analysis – the aim to prevent terrorism may determine both an impediment to the entry and residence of aliens in the territory of the State[13], and a prerequisite in administrative and judicial orders of expulsion[14].

Following the terrorist attacks that occurred in London on 7 July 2005, Italy introduced the main regime specifically addressed to "enemy aliens" – more accurately, to foreigners that might represent a terrorist threat to the country[15]. 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, enacting the emergency decree as a permanent law[16].

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 grounds to believe that her presence in the territory of the State might in any manner facilitate terrorist organizations or activities, also international in character»[17]. The obvious consequence

[13] Articles 4, subsection 3 and 6 (denying the entry in case of threat to public order and national security, in case of conviction for terrorist related crimes and in case the alien has been reported for deportation or denial of entry on serious grounds related to the protection of public order, national security or international relations), 5, subsections 5, 5-*bis* and 6 (preventing the issuing and renewal of residence permits on public order and State security grounds), 9, subsection 4, and 9-bis, subsection 6 (establishing the same rule in so far as the issuing of residence permits to long-term European citizens) of the legislative decree 286 of 1998.

[14] In addition to the general provisions on administrative expulsion, dictated by Article 13 (examined *infra*), see also Articles 9 of the legislative decree 286 of 1998, subsection 10 (implying deportation of long-term European residents on serious grounds related to the protection of public order and State security and for terrorism prevention purposes).

[15] Another anti-terrorist regime concerns the expulsion of foreign suspect terrorists that are European citizens. After two vain attempts in 2007 (two law decrees – no. 181 of 1 November and no. 249 of 29 December – were adopted, but were not converted in a permanent law, thus losing their effects retroactively), legislative decree no. 32 of 2008 has successfully introduced a specific deportation provision with the aim to exclude foreign European citizens threatening the security of the State (see *infra*, note 17).

[16] Law no. 155 of 2005. The Senate approved the government proposal on 29 July 2005, while the Chamber of Deputies did the same one day later.

[17] Article 3, subsection 1, law no. 155 of 2005

of such a vague wording is the extremely wide margin of discretion enjoyed by the minister (and the prefects) in exerting the deportation power[18].

This highly discretionary power has been coupled with various derogations to the ordinary due process guarantees.

First, expulsion orders are immediately enforceable[19]. Accordingly, 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[20].

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

[18] The same provision appears in Article 20 of legislative decree n. 30 of 2007, as amended by the mentioned legislative decree n. 32 of 2008, which provides for the possibility to expel a non-Italian European citizen for reasons of «State security» (article 20, subsections 1 and 2). This deportation regime, however, is much milder, in terms of procedural and substantive guarantees, than the regime dictated by the law decree 144 of 2005 with regard to non-European aliens. See, on the 2008 discipline, A. Lang, *Le modifiche al decreto legislativo n. 30 del 2007 sui cittadini comunitari*, 3-4 Dir. Imm. Citt. 123 (2008), L. Cordì & L. Degl'Innocenti, *Il nuovo assetto legale in tema di allontanamento dei cittadini comunitari: le modifiche del d.lg. n. 32 del 2008 al d.lg. n. 30 del 2007*, 6 Giur. Mer. 1538 (2008) and C. Di Stasio, *La lotta multilivello al terrorismo internazionale. Garanzia di sicurezza versus tutela dei diritti fondamentali* (2010).

[19] Article 3, subsection 2, law no. 155 of 2005.

[20] In addition, the same norm (article 3, subsection 2, of law no. 155 of 2005) admits – in derogation to the general rule enshrined in article 13, subsection 3-*sexies*, of the legislative decree no. 286 of 1998 – the possibility deportation without prior judicial validation of the order even when the alien concerned is under trial. 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 – II parte. Il terrorismo nelle norme speciali e comuni in materia di stranieri, immigrazione e asilo*, 3 Dir. Imm. Citt. 23 (2005) 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*, 1 Amm. Civ. 105 (2008); moreover, the expulsion of a suspect terrorist under trial prematurely stops investigations that might prove to be helpful in the (national and global) fight against terror.

available[21]. This way, an effective judicial scrutiny is prevented, both by 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»[22]. These two temporary provisions have been in force until 31 December 2007.

According to a third norm (set to be permanent), the regional administrative court that is competent to review the legality of the order – again contrary to the general rule – has no power to stay its execution[23]. 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.

Before examining the actual impact of these provisions, three elements should be noticed. 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 front of human right bodies in case of violations, but also as a parameter of internal legality[24].

Second, the above-mentioned provisions have caused inter-institutional tensions. The Parliament has opposed government's attempt to make the first two norms (from temporary to) permanent, by not enacting 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[25]. As a result, the most questionable norms of the 2005 expulsion regime have disappeared.

Third, the 2005 anti-terrorist provisions supplement the general

[21] Article 3, subsection 5, law no. 155 of 2005.

[22] A. Saccucci, *The Italian 2005 Anti-terrorism Legislation in the Light of International Human Rights Obligations*, 1 I. Y. I. L. 192 (2005).

[23] Article 3, subsection 4-*bis*, law no. 155 of 2005.

[24] According to Article 117, par. 1, of the Constitution, as amended in 2001, domestic legislative authorities must respect the obligations arising from international and European Community law.

[25] See Article 4, subsection 1, no. 32, of annex 4 to the legislative decree 2 July 2010, no. 104 (Code of administrative procedure), amending art. 3, subsection 4-bis, law no. 155 of 2005.

expulsion regime provided for in the 1998 basic legislation on immigration and alien's condition in Italy[26]. According to the latter, the Minister of the interior has the power to expel an alien for «public order» or «security of the State» reasons[27]. Expulsion order based on these grounds can be enforced against aliens even when they are minor (less than 18 years old), hold a residence permit, live with relatives or a spouse of Italian nationality, or is a woman in state of pregnancy[28]. By contrast, the 2005 anti-terrorist legislation is not exempted from the above-mentioned subjective limitations. Also for this reason, the government has often resorted to the 1998 general provision on expulsion – rather than to the 2005 special regime – in order to pursue its anti-terrorist policy.

### 3. Administrative discretion and domestic judicial review

How wide is the discretion enjoyed by the government in exerting the mentioned deportation power? Besides the rather vague wording of the grounds mentioned in Article 3 of the 2005 anti-terrorist legislation (special regime) and in Article 13 of the 1998 legislation (general regime), how strict or, by contrast, deferent is the scrutiny provided by the competent courts?

The case law on the issue is thin, and yet revealing. A first case dates back to 2004,when the first instance administrative court (Tar Lazio) stroke down a ministerial order of expulsion issued – on the basis of the general regime – against Mr. Fall Mamour, a Senegalese citizen of Islamic religion regularly resident in Italy for 16 years, known as the Imam of Carmagnola. Mr. Mamour had publicly criticized the Italian participation in the Iraqi war and had alluded to the consequent risk of terrorist attacks. He was, then, subject to police investigations and house searches, which resulted in nothing: no link with terrorist organizations was proved. Nonetheless, the Minister of the interior ordered Mr. Mamour to be deported back to his country of origin, for «disturbing public order

[26] Legislative decree no. 286 of 1998, as amended by law no. 189 of 2002.
[27] Article 13, subsection 1, legislative decree no. 286 of 1998.
[28] Article 19, subsection 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.
[29] Tar Lazio, judgement 11 November 2004, no. 15536.

and being a threat to national security». Mr. Mamour challenged the decision, but had to immediately leave Italy for Senegal with his Italian wife and children. The first instance court – as anticipated – 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[29].

The Council of State – judge of second instance – overturned the ruling on the basis of the following reasoning[30]. The power to deport aliens for public order and security reasons involves the responsibility of the government. In fact, whereas the ordinary expulsion orders are issued at the administrative level by the competent prefect[31], the power to issue this special order is entrusted with the minister of the interior, that is, to the political head of the administrative apparatus guaranteeing public security over the national territory. The exercise of that power is, hence, an expression of «high administrative discretion». Accordingly, an administrative court cannot intrude – as the court of first instance erroneously did – in that area of discretion: judges should rather limit themselves to an «external scrutiny concerning the lack of an adequate motivation» or to assess whether *excès de pouvoir* violations, such as «misrepresentation, illogicality or arbitrariness», have occurred. In the specific case, the Council of State could not detect any such violation and thus affirmed the lawfulness of the ministerial order[32].

The same «high discretion» doctrine finds its way in the case law regarding orders enacted on the basis of the 2005 anti-terrorist regime. 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[33]. The order describes – without disclosing the sources – Mr. Faycal as a fundamentalist being active in recruiting Islamic combatants to enrol in Bosnia, Chechnya and Algeria and having

[30] Council of State, judgement 16 January 2006, no. 88.

[31] See Article 13, subsection 2, legislative decree no. 286 of 1998.

[32] In a similar case – concerning a ministerial order of expulsion of Hemmam Abdelkrim, an Algerian citizen, on public order grounds – 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 judges can only ascertain the «manifest unreasonableness or absolute absence of prerequisite», whereas they cannot interfere in the substance of a decision requiring «technical expertise in the field of security».

[33] Tar Lazio, judgement 23 March 2006, no. 5070.

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 measures, a 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 Mr. Fayal's conduct as dangerous for the national security and confirms that the order is not manifestly unreasonable and illogic.

As these cases patently show[34], ministerial expulsion decisions issued on public order and State security grounds 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 this kind of expulsion is preventive in character: its aim is to prevent, not to punish, thus it does not imply any judicial assessment of the charges.

**4. Due process and constitutional review**

One might expect that this «high administrative discretion» doctrine, with the resulting «hands-off» judicial strategy, is counterbalanced by a stricter review on procedural grounds. Hence, the following question arises: do ministerial deportation orders for anti-terrorism purposes imply adherence to due process guarantees, as usually applied to administrative procedures?

If one looks at the discipline of expulsion for terrorist reasons, the answer is not very reassuring[35]. As noticed above[36], Article 3 of the 2005

[34] For an analysis, P. Bonetti, *Terrorism, Asylum and Immigration in Italian Law*, cit. at 12, 315, 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 & M. Vitucci (ed.), *La tutela dei diritti umani nella lotta e nella guerra al terrorismo* (2009).

[35] On the impact of European and international law procedural guarantees on Italian expulsion regime, A. Liguori, *Obblighi internazionali e comunitari in materia di garanzie procedurali avverso l'espulsione dei migranti in Europa*, 11 Dir. Imm. Citt. 29 (2009). On due process restrictions in the various kinds of Italian expulsion procedures, A. Puggiotto,

anti-terrorist legislation establishes various derogations to due process. First, deportation orders of are immediately enforceable: they are executed without prior judicial validation, despite the fact that the execution implies a forced repatriation, that is, a 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. In concrete, when a State secret is there, the court cannot perform any significant scrutiny. Thirdly, the court reviewing the legality of the ministerial order cannot stay its execution. 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 by Italian and international law?

First of all, in the Italian legal order, due process rights are not conceived as absolute. They may well be balanced against competing relevant interests, such as public order or national security. The paradigmatic hypothesis is a situation of emergency: some constitutions explicitly admit the possibility to restrict or suspend a fundamental right when an emergency occurs[37]. Other ones – like the Italian Constitution – are silent on the issue.

Yet, this does imply the legal irrelevance of extraordinary situations. Silent the Constitution, legislative authorities may still strike pragmatic accommodations, and judges themselves often admit the curtailment of due process rights in case of emergencies[38]. In this regard, a (very) basic

*I meccanismi di allontanamento dello straniero, tra politica del diritto e diritti violati*, 13 Dir. Imm. Citt. 42 (2010).

[36] *Supra*, § 2.

[37] 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* (2006).

[38] See, for instance, Tar Lazio, judgement 7 April 2005, no. 3146, par. 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"». Tar Lazio, judgement 23 March 2006, no. 5070.

standard has been set in a 1982 constitutional case concerning the extension of the period of pre-trial detention concerning persons suspected of terrorist-related crimes[39]. The Constitutional Court acknowledged 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 extraordinary measures, which, however, become unlawful if they remain in force during the time»[40].

Such a standard has not been further developed in the constitutional jurisprudence[41]. 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.

Nonetheless, as far as the above-mentioned (temporary and permanent) provisions on the expulsion of suspect terrorists are concerned, that was not the case. In 2006, an administrative court raised the question of constitutionality with regard to (some aspects) of that discipline[42]. However, the Constitutional Court did not tackle the relevant aspects of the question, declaring them inadmissible on procedural grounds[43]. No other constitutional question has been raised so far, and none will likely be raised in the future: in fact, the relevant due process restrictions provided for in Article 3 of the 2005 legislation have expired or have been repealed[44].

[39] Constitutional Court, judgment 14 January 1982, no. 15.
[40] Constitutional Court, no. 15 of 1982, para. 7 of the motivation.
[41] On terrorism-related emergencies in the Italian legal order and in the constitutional case law, G. Neppi-Modona, *La giurisprudenza costituzionale italiana in tema di leggi di emergenza contro il terrorismo, la mafia e la criminalità organizzata*, in T. Groppi (ed.), *Democrazia e terrorismo* (2006) and P. Carnevale, *Emergenza bellica, guerra al terrorismo e forma di governo: qualche considerazione sulla disattuazione dell'art. 78 della Costituzione*, in T. Groppi (ed.), *Democrazia e terrorismo* (2006); P. Bonetti, *Problemi e prospettive costituzionali nella lotta al terrorismo in Italia*, in M. Cavino, M. Losano & C. Tripodina (ed.), *Lotta al terrorismo e tutela dei diritto costituzionali* (2009) and V. Eboli, *La tutela dei diritti umani negli stati d'emergenza* (2010).
[42] Tar Lazio, ordinance 23 March 2006, no. 227.
[43] Constitutional Court, judgement 10 December 2007, no. 432.
[44] See *supra*, § 2.

A crucial question, than, arises: 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 show deference to emergency anti-terrorist decisions of the political bodies in so far as the latter are rather "moderate" in exploiting emergencies and maximizing executive powers?

An appropriate answer to such broad questions goes beyond the scope of this paper. One can only observe that: a) the Italian 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 little chance to properly 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 very limited practical relevance; 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[45].

In 2004, the latter power fell – at least partially – under the scrutiny of the constitutional judges: in that case, the Court partially not only reaffirmed the principle of *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);it also explicitly rejected the «double-standard» view, which implies that aliens' rights are softer than citizens' rights[46]. In principle, the Italian constitutional doctrine affirms that categorical distinctions based on nationality are not allowed, unless a reasonable ground for the discrimination may be established[47].

[45] As regulated by Article 13, subsection 1, of 1998 legislation on immigration (see above, § 2).

[46] Constitutional Court, judgement no. 222 of 2004, par. 6 of the motivation.

[47] It is enough to mention tow recent cases: Constitutional Court judgements no. 245 of 2011 (affirming the right of unauthorized migrants to get married) and no. 40 of 2011 (denying the possibility to exclude legally resident third-country nationals from access to social benefits at the regional level on the sole basis of citizenship).

### 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, in the latter there is no legislative notion equivalent to the American one. Yet, aliens – just like citizens – may well become enemies, when they threaten the security of the nation. Does it make any difference in terms of respect due to their fundamental rights? Should Italian authorities guarantee the rights of friendly aliens and those of hostile aliens (terrorists or suspected terrorists) 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*, according to which deportation is forbidden when the person would be expelled in a country where she faces the risk of torture or degrading treatment[48].

[48] 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 D. Allain, *The* Jus Cogens *Nature of* Non-refoulement, 1 Int. J of Refugee L. 538 (2001); see also, with specific reference to anti-terrorism measures, R. Bruin & K. Wouters, *Terrorism and Non-derogability of* Non-refoulement, 1 Int. J of Refugee L. 24 (2003).

The tension between the Italian anti-terrorism policy and the international principle of *non-refoulement* soon became evident. In the above-mentioned case of the Imam of Varese[49], 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 principle of *non-refoulement*, which is also explicitly acknowledged in the Italian regulation on expulsion[50].

Nonetheless, the court surprisingly held that the principle of *non-refoulement* did not apply to the concerned person, since he had not been recognized as refugee. The argument is patently wrong. It incorrectly assumes 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 principle[51].

The real issue – 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 is an "enemy" – remained open: is the prohibition on *refoulement absolute*, thus protecting also the "enemy", or is, by contrast, *relative* in nature, hence allowing for a balancing of a fundamental right of the suspect terrorist with a fundamental interest of the national community, namely security[52]?

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

Mr. Fadhal Saadi represented a threat to national security. As the

[49] Tar Lazio, judgement 23 March 2006, no. 5070.

[50] Article 19, par. 1, of the general legislation on immigration (legislative decree no. 286 of 1998).

[51] By contrast, the international provision is grounded on the assumption that State power to expel is constrained by the fundamental right not to be tortured. Thus, the *non-refoulement* principle implies that even when a person does not qualify as refugee, she is still protected from a repatriation that puts her 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.

[52] See, on the Italian case, E. Cavasino, *Refoulement, Divieto di tortura, sicurezza nazionale: riflessioni sulle forme di un difficile bilanciamento*, in P. Gargiulo & M. Vitucci (ed.), *La tutela dei diritti umani nella lotta e nella guerra al terrorismo* (2009).

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

On 28 February 2008, the European Court ruled on the merit of Mr. Saadi's application[53]. 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 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. The Court, in fact, 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 immigrant status in the UK.

Twelve years later, in the attempt to encourage the court to reconsider the *Chahal* doctrine, the British government intervened in *Saadi,* 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 to the same argument.

[53] European Court of Human Rights, Grand Chamber, Case *Saadi v. Italy*, application no. 37201/06, 28 February 2008.

Nonetheless, the European Court rejected the British "deportation with assurances" 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 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»[54].

After *Saadi*, the absolute nature of the prohibition *non-refoulement* has been confirmed by the Court of Strasbourg in many other cases involving Italian deportation orders of suspected terrorist[55], with mixed consequences. On the one hand, 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[56], 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[57]. Despite all that, and notwithstanding the increasing cooperation of domestic judges with the

[54] *Saadi v. Italy*, par. 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, adhering to a relative understanding of the prohibition on *refoulement*, judges allow the government to balance it against security needs, provided that the decision is necessary and proportional.

[55] 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.

[56] *Ben Khemais v. Italy*, application no.246/07, 24 February 2009.

[57] See, *ex multis*, the recent case *Toumi v. Italy*, application no. 25716/09, 5 April 2011.

court of Strasbourg[58], the Italian government refrains from compliance. This way, the value of national security superimposes itself over the legal impossibility of a balance[59].

**6. Conclusions**

Three concluding remarks 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. The absolute prohibition on *refoulement* affirmed in *Chahal* had induced the British government, on the one hand, to resort to other means of terrorism prevention, such as the executive detention of suspected terrorists who could not be repatriated (a practice that the House of Lords outlawed)[60] or to control orders[61], on the other hand, to insist with the Court of Strasbourg for a reconsideration of the *Chahal* doctrine. The Italy government, by contrast, after *Saadi* has followed its own third way, by simply ignoring the unfavourable decisions of the European Court and, thus, neglecting its international legal commitment to the respect of human rights. No doubt, a legally questionable and untenable situation.

[58] 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*, 10 Riv. Pen. 1277 (2010).

[59] 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 & M. Vitucci (ed.), *La tutela dei diritti umani nella lotta e nella guerra al terrorismo* (2009).

[60] The obvious reference is the so-called 'Belmarsh detainees 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. A and others v Secretary of State for the Home Department, UK House of Lords [2004] UKHL 56 (),

[61] According to Article 1 of the Prevention of Terrorism Act 2005, «"control order" means an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism». Control orders are issued to monitor both national and non-national terror suspects. The House of Lords held that the majority of control orders (those falling short of 18 hours a day house arrest) were not a violation of Article 5 of the ECHR: see *Secretary of State for the Home Department v JJ and others*, [2007] UKHL 45.

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)[62], special trials (e.g. military commissions), selective use of police powers (mainly to the detriment of Muslim people) have been among the most common tools employed in various liberal democracies[63]. In Italy, by contrast, the empowerment of the government has mainly been achieved by using – or, if necessary, adapting – the ordinary instrument of immigration law. 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, the 2005 special anti-terrorist regime has been rarely used and gradually dismantled; deportation orders against suspected terrorist have been rather adopted on the basis of the general 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.

Third, in the aftermath of September 11, 2001, many liberal states have introduced comprehensive anti-terror regimes. Italy, by contrast, only passed some minor bills in response to international demands[64]. However, in 2002, the Italian government obtained the approval of the harshest norms on immigration ever passed in the peninsula[65]. A mere coincidence, of course. Yet, looking backwards, one may have the

[62] On the post-9/11 flourishing of preventive detention regimes in liberal democracies, C. Macken, *Counter-terrorism and the Detention of Suspected Terrorists: Preventive Detention and International Human Rights Law* (2011).

[63] See 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.

[64] The most relevant is law decree 18 October 2001, no. 374, enacted as law 15 December 2001, no. 438.

[65] Law 30 July 2002, n. 189, amending several provisions of the 1998 immigration regime (legislative decree no. 286 of 1998).

impression that the Italian government has successfully exploited the glamorous anti-terrorist rhetoric as 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.