Public Enemy.
The Effectiveness of Administrativr Judicial Protection*

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Abstract

The essay is aimed at ascertaining whether judicial protection of aliens who are considered potentially dangerous has been weakened by the use of emergency and derogatory laws concerning anti-terrorism measures. To which extent is it possible that both procedural and substantial guarantees are limited for the sake of collective interest in the case of global security? More accurate basis for decision affecting rights at stake have been recently met by the Italian Courts: facts and predictions about risks must be put under strict scrutinity to ensure the exercise of a judicial review inspired by the principle of the effectiveness and fullness of administrative judicial protection.

In a recent decision, the European Union Court of First Instance, pronouncing again on the Kadi case[1] affirmed – amongst other things – two principles of great importance, which will be used as the basis for this paper.

This was a judicial decision made in the European context and connected to the question of the war on terrorism and the nature of the evaluations made by the UN Sanctions Committee.

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More generally, the subject concerns the controversial relationship between the requirements of international cooperation[2] and the principles of European law. The decision in question, or more accurately some of its grounds, provides – as said – at least two of the elements on which this paper will centre and that essentially concern the appropriate level of judicial control.

The first elements is represented by the affirmation according to which "when fundamental rights are at stake, reasons of international cooperation in the war on terrorism are no longer sufficient to justify a reduction in judicial control". The second is a necessary corollary of the first, and states that the principle of due process[3] must be verified in reality, the mere formal regularity of proceedings being insufficient.

The war on terrorism, in the final analysis, must be conducted through the impositions of sanctions, with preventative functions, formulated on evaluations of public order, laid down by the executive but on which the judge, at least when fundamental rights are at stake, must be able to intervene with full control[4]. Consequently, the question becomes (more accurately, necessarily implies) the identification of parameters of judgment defined by their reasonableness and proportionality[5], insofar as reasonableness, according to Ledda's well-known definition[6], pertains "to the world of values, and therefore to the fundamental need for justice".

The international war on terrorism is, of course, only one of the possible fields of inquiry, since the definition of public enemy is clearly

[1] Here we refer to the decisions of the E.U. General Court 30.9.10 T. 85/09, on which – above all – see M. Savino, *Kadi II: i diritti dei sospetti terroristi presi sul serio*, in 3 G.D.A. 257 (2011). For previous pronouncements on the case, see A. Sandulli, *I rapporti tra diritto europeo ed internazionale. Il caso Kadi: un nuovo caso Solange?*, 5 G.D.A. 513 (2008).

[2] See A. Bianchi, *Assessing the Effectiveness of the U.N. Security Council's anti-terrorism measures: the quest for legitimacy and cohesion*, 17 Eur. J. Int'l L. 881 (2007).

[3] In this case thwarted because the Commission had not even considered the possibility of questioning the evaluations of the Sanctions Committee in light of the observations of the plaintiff, even going so far as to deny the judge access to the elements of proof, see par. 171 of Kadi decision. On the import of the principle, on a global dimension as well, see G. della Cananea, *Al di là dei confini statuali. Principi generali del diritto pubblico globale* (2009).

[4] See again M. Savino, cit. at 1.

[5] On reasonableness, see most recently, F. Merusi, *La ragionevolezza e la discrezionalità amministrativa* (2011); F. Modugno, *La ragionevolezza nella giustizia costituzionale* (2007), at 17.

extremely relative: its meaning (though it might be better to speak of its perception) depends on a historically changeable set of values and objectives assumed from time to time as fundamental principles in given historical and political contexts. This may well refer, to remain in the context of Italy, to those suspected of belonging to Mafia-type organisations, domestic political terrorists, or drug traffickers. Whoever the enemy is, we can be certain that the means of defence are (almost) always emergency measures. In the same way, and for the same reasons, the responses of the state (or states) will in turn depend on the concrete definition given to public order and security in a particular context[7]. Whilst the concepts of public enemy, order and security are variable – under the rule of law – the same cannot be said as regards the choice of the means, and its use, against the enemy. In fact, it is limited in its appropriateness and, no less importantly, its impact on the inviolable rights of the "enemy"[8].

In other words, the type of interest that deserves protection, when not the need to defend the supreme principles of the system, marks the limit of the legislature's choice[9]. But the degree of imprecision in the concepts[10] of public security and order, and the unpredictability of the risk (in its timing and impact)[11], make it impossible to define the measure, legitimising the recourse to emergency legislation[12] in which – in itself and in the interpretation made of it by decisions of the courts as clarified

[6] F. Ledda, *L'attività amministrativa*, in *Il diritto amministrativo degli anni '80* (1987), at 109.

[7] See G. Corso, *Ordine pubblico nel diritto amministrativo*, XI Dig. Disc. Pubbl. (1995), at 437.

[8] See F. Modugno, cit. at 5, 17 and the reference to the decision of the Constitutional Court No. 341/06.

[9] See R. Bartoli, *Regola ed eccezione nel contrasto al terrorismo internazionale*, D. Pubbl. 329 (2010).

[10] On indeterminate juridical concepts, and on judgments depending on reasonableness, see M. Simoncini, *La regolazione del rischio e il sistema degli standard. Elementi per una teoria dell'azione amministrativa attraverso i casi del terrorismo e dell'ambiente* (2010).

[11] For an overview of the sources and powers foreseen in administrative law see AIPDA, *Il diritto amministrativo dell'emergenza* (2004), in particular the contributions of C. Marzuoli, R. Cavallo Perin and F. Salvia respectively for identification of the causes of emergencies within and without the administration.

[12] On the relationship between rule and exception and on the different sources of emergency powers, see G. de Vergottini, *Guerra e costituzione. Nuovi conflitti e sfide alla democrazia* (2004), especially 202 and 213.

later – the relationship "between the principle of legality and its transgression, the system of guarantees and its suspension, which become the poles in a field of tension, the extremes of a relationship of complementariness and incompatibility"[13] ends up being the subject of legal reflection. The response of the Italian system to emergencies, to situations that place public order and security at risk, such as the war on terrorism (including the domestic terrorism of the so-called "years of lead") resides – as in many others states, European and otherwise – substantially in emergency and derogatory laws. In the specific case treated here (opposing the enemies of public order and security), we consider the dispositions contained in Art. 13 of the Consolidated Bill on immigration (Legislative Decree 25.7.1998 no. 286 and successive modifications and integrations) and those in Law 31.7.2005 no. 155 (Urgent measures to fight international terrorism) and Legislative Decree 6.2.2007 no. 30 (expulsion of EU citizens for reasons of public order or security). These are provisions that regulate – as is evident – different cases and that are taken as parameters of reference insofar as they relate to the protection of public order and the security of the state[14] and, more specifically, to expulsion for security reasons[15].

The above-mentioned provisions share the same *ratio-legis*, albeit with the underlined differences among the cases on which they have an impact on; they share the vagueness (more correctly:, the indeterminateness) of the presupposition for the issue of the expulsion order. The latter can be issued for reasons of state security (Art. 20 Legislative Decree 30/2007 – Art. 13 Legislative Decree 286/98 which also refer to public order); for imperative reasons of public security or other reasons of public order or security (Art. 20 Legislative Decree 30/2007); and in those cases in which, with reference to a foreigner, "there is good reason to assume that their presence in the territory of the state might in some way assist terrorist organisations or activities, including international ones as well"

[13] P. Costa, *I diritti dei nemici: un ossimoro?*, in 38 Quad. Fiorentini 19 (2009), quoted by R. Bartoli, cit. at 9.

[14] On this see S. Raimondi, *Per l'affermazione della sicurezza pubblica come diritto*, Dir. Amm. 752 (2006).

[15] For an examination of the grounds for expulsion, in legislation and in the decisions of the courts, see G. Tropea, *Homo sacer? Considerazioni perplesse sulla tutela processuale del migrante*, 4 Dir. Amm. 839 (2008) for observations on the system of dividing competences between the ordinary judge and the administrative judge (pp. 881-887).

(Art. 3 Law. 155/05). It is interesting to note that only in the cases of expulsions identified by the above-mentioned Article 20 of Legislative Decree 30/2007, is explicit reference made to respecting compliance (.see paragraph 4) with the principle of proportionality and to with the necessity to identifying "individual behaviour on the part of the subject that represents a concrete and current threat to public order or security".

The call to respect the principle of proportionality[16] between the measure adopted and behaviour that in reality is believed to be, and identified as, abstractly likely to compromise order and security is due to the fact that the above-mentioned disposition represents the transposition of Directive 2004/38/EC relative to the right of EU citizens and their families to circulate. In other words, we may presume that the call for proportionality – since it is a European norm – cannot be missing given the importance of the principle in the European space, in which, as well-known, it forms a fundamental principle[17]. And if this reconstruction is correct, it cannot but derive from an interpretation of the other dispositions (referred to previously) which are "oriented" to the strict observance of that principle. To the latter, however, there is no textual reference at all, which evidently presupposes the enormous field of discretion in judgment on the correspondence of a behaviour that represents a possible threat to security. And if danger to the lives of nations, or the public order, can assume various meanings, so that its defence can certainly reduce – in given circumstances – the guarantees provided by the Constitution, or the degree of defence of fundamental rights[18], what cannot be lacking is ascertainment of the facts[19]. Only the

[16] On the principle, see A. Sandulli, *La proporzionalità dell'azione amministrativa*, (1998); D.U. Galetta, *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo* (1998); by the same author, for reconstruction of the principle in EU case law, see *Norme italiane sulla ripartizione del traffico aereo nel sistema aeroportuale di Milano, principio di proporzionalità e ripartizione di competenze fra organi (brevi riflessioni alla sentenza della Corte di giustizia 18 gennaio 2011, in casa C-361/98)*, 1 Riv. It. Dir. Pubbl. Com. 152 (2001).

[17] A. Massera, *I principi generali*, M.P. Chiti, G. Greco (eds.), *Trattato di diritto amministrativo europeo*, Parte generale, vol. I, 332 (2009).

[18] See C. Marzuoli, *Il diritto amministrativo dell'emergenza: fonti e poteri* in Annuario AIPDA 2004, cit. at 11, 19.

[19] A reaction "necessary" to protect the state that is not considered and evaluated in terms of alternative decision-making and attention to guarantees would be the equivalent of resorting to the doctrine of the reason of state: see G. de Vergottini, cit. at 12, 221.

presence of specific, proven and congruent charges can justify the legitimate restriction of the enemy's rights[20]. But what about the right to a fair trial, or to a defence? What instruments does the system of administrative judicial system offer or deny to the parties?

If we consider the nature of some expulsions (in particular those ordered in application of the above-mentioned Law 155/05): this is often described in terms of an "act of policy administration"[21] or the often secret classification of the reports which provide the basis for the expulsion procedure[22]: these are only some of the elements that render defence substantially difficult.

This also concerns the derogations from trial rules in the specific legislation regarding the war on international terrorism. Paragraph 4 bis of Art. 3 of Law 155/05[23] establishes, in fact, that in relation to the expulsion procedures mentioned in paragraph 1, it is not permitted to suspend the execution in court pursuant to Art. 21 Law. 1034/71 as later modified.

The successive paragraph 5, in force until 2007, established that when, in the course of the examination of the appeal against expulsion, the decision depended on the cognizance of documents covered by investigative confidentiality or state secrecy, the proceedings should be suspended until the document or its essential contents could be communicated to the Administrative Court, and in any case for a period of time of no more than two years, after which the Regional Administrative Court (TAR) should be able to establish a time limit for the administration to produce new elements for the decision or to revoke the contested provision. In the absence of the latter, the TAR could take a decision on the basis of the documents in its possession.

The above-mentioned dispositions were the object of a judgment of

[20] See F. Mantovani, *Il diritto penale del nemico, il diritto penale dell'amico, il nemico del diritto penale e l'amico del diritto penale*, 2/3 Riv. it. dir. proc. pen. 470 (2007), which provides an extensive historical reconstruction of organised crime, with reference to the Mafia, drug trafficking, and terrorism (ideological), and of the responses in defence of societies, also through the use of emergency and derogatory laws.

[21] On this concept, see, above all, G. della Cananea, *Gli atti amministrativi generali* (2000).

[22] Though with reference to the refusal of citizenship, on the affirmation of the principle by which the exercise of the right to defence and the guarantee of a fair trial would be satisfied by the production of secret reports with all the cautions and guarantees foreseen for classified documents, see Council of State, VI, 2.3.2009 No. 1173; 4.12.2009 no. 7637.

[23] New norms on the expulsion of foreigners for prevention of terrorism.

constitutional legitimacy promoted by the Lazio TAR with an ordinance of 17.5.2006, and concluded with the decision of the Constitutional Court no. 432/07. According to the judgment of the Lazio TAR, because of the effect of the law in question, the trial would have been substantially inhibited. And, indeed, the resulting system (the impossibility of requesting the precautionary measure and suspension of the trial because of the presence of state secrets) produces a notable imbalance between the parties in the trial, forming an obstacle against the protection of the legal positions damaged by the administration – and moreover through a provision that has already been withdrawn from preventive confirmation by the ordinary judge.

In precluding the suspension of the execution of the decree of expulsion in a judicial setting, paragraph 4 bis of Article 3 of Law 155/05, would have introduced, again in the view of the Lazio TAR, "an unreasonable impediment to the right of defence and the judicial remedies that are ensured for all citizens in dealing with the actions of the public administration in violation of Articles 3, 24 and 113 of the Constitution"[24]. The proposed questions of constitutional legitimacy were declared in part inadmissible (those raised with reference to paragraphs 4 bis and 5 of Law 155/05), and in part unfounded (Art. 3, paragraph 4). According to the Constitutional Court, in fact, the TAR had failed to explore "the possibility of a different reconstruction of the "system", so as not necessarily to entail the connection between the prohibition of the concession of the provisional remedy and the automatic suspension of the trial as a result of the presence of secrets of state". And this insofar as, in its ordinance of remission, the TAR has unjustifiably opted for a superimposition of the provisions contained in the Codified Bill on immigration with those of Law 155/05, without exploring interpretative solutions able to exclude the cumulative effect of the prohibition to concede the adjournment and the two-year postponement of the proceedings.

What is clearer are the grounds cited by the Constitutional Court in favour of the pronouncement on the irrelevance of the question raised with reference to Article 3, paragraph 4, because the dispositions contained therein (in no case can judicial appeal suspend the execution

[24] On the pre-trial phase of the administrative trial intended as an essential instrument of the right of defence ex Art. 24 Cost., see Constitutional Court sentence no. 284/1974.

of the ruling) are entirely consistent with the system of judicial controls on administrative acts that provides for, as well known, the restraining power of the judge to suspend the efficacy of the impugned ruling on the presupposition of its enforceability.

Whatever considerations can be made on the decision, which in any case does not go deeply into the matter, it is certainly useful for the purposes of this paper – at least within certain limits on the decrees contained therein and relative to the dispositions still in force from Legislative Decree 144/04. This is so for two main reasons. The first concerns the normative framework as a whole and the different reading put forward by the Constitutional Court itself. The reference is evidently to the problem of the normative superimposition, which has already been mentioned when discussing the norms relative to expulsion and the motives of public order and security implied in those provisions, and to the division of jurisdiction between the ordinary judge and the administrative judge. In other words, the requirement to reconstruct the system underlined by the Constitutional Court, confirms the existence, also in the specific sector in question, of a legislation that is not always coherent; rather, it is confused, being made up of normative texts that are not clear in themselves or when read together. With all their foreseeable as much as inevitable fallout at the level of protecting the principle of the certainty of law.

The other consideration that can be drawn from the statements contained in the decision under discussion regards a possible method of interpretation. The one suggested by the Constitutional Court in the case subject to its scrutiny can in fact be useful in providing the interpretation necessary to restore order to a discipline so exposed to the risk of superimpositions and/or applicative uncertainties. The Constitutional Court gives the judge the task of restoring order to the norms by exploring interpretative solutions that conform with the provisions of the Constitution and thus respect the right to formal and substantive equality, a fair trial, and the fullness of judicial protection.

Moreover, a certain tendency in this direction was already apparent in the decisions of the court on the issue of expulsions[25] prior to enactment of Law 155/05, which "invited" the authority not to enforce the order in the presence of the need for pre-trial inquiries[26]. This was

[25] See TAR Lombardia, Brescia. Ord. 12 July 2005 No. 872.

[26] See G. Saporito, *La sospensione dell'esecuzione del provvedimento impugnato nella*

almost inevitable if we consider the evanescence of the concepts considered by the norms, and the lack compulsiveness and determinedness of the provisions contained therein. It is not clear, in fact, what can be recognised in, or rather expressed by, the concept of "assisting terrorist organisations or activities" (and, moreover, in the absence of any reference to the intentionality of the behaviour)[27]. Hence the impossibility of predetermining types of behaviour in abstract is directly proportional to the degree of discretion assigned to the administration in adoption of the measures[28]. Guarantee of the principle of the certainty of law must consequently be recuperated through the motivation, whose congruity must be subject to full evaluation by the judge[29]. The Constitutional Court[30] has recently stated in agreement with what mentioned above, according to which Articles 1 and 2 as well as the Code of Administrative Trial (which affirm – respectively – the fullness of the protection according to European law, parity of the parties and the principle of a fair trial) "converge in the centrality of the motivation as a guarantee of the constitutional right to defence" according to Articles 24 and 113, and not only as a manifestation of the principle of the progression and impartiality of the administrative action. The necessary indeterminateness of the power granted by the law to the administrative authority cannot, in other words, produce the effect of attributing complete liberty to that same administration: "it is not sufficient that the power be aimed by the law towards the protection of goods or of a value, but it is indispensable that its exercise be determined in its content and

giurisprudenza amministrativa (1981). Suspensions and requests for postponement having been prohibited (Law 155/05), the mechanism of the "invitation" (intended to reinforce the burden of motivation when the order is to be carried out) could function excellently, as allowed by articles 21 *bis* and 21 *quater* of Law 241/90 modified by Law 15/2005.

[27] See A. Calaioli, *Comment on Art. 3. International Terrorism* (Legislative Decree 27.7.2005 No. 144), 4 Leg. Pen. 451 (2005); TAR Lazio, I *ter*, 11.11.04, 15386 – Fall Mamour c/ Ministero dell'Interno, on the question of evaluation of the facts and concrete verification of the risk of compromise of the object being protected.

[28] See N. Pisani, *Lotta al terrorismo e garanzia giurisdizionale per lo straniero nella recente prassi italiana: le espulsioni per motivi di ordine pubblico e sicurezza dello Stato*, in P. Gargiulo, M.C. Vitucci (eds.), *La tutela dei diritti umani nella lotta e nella guerra al terrorismo* 403 (2009).

[29] *Contra* Council of State, VI, 16 December 2006 No. 88, according to which expulsion orders are configurable by the standard of acts of policy administration and as such objects of a control that is only extrinsic.

[30] Decision of 5 November 2010 No. 310.

procedures"[31]. And "if the legislature and the executive power act anticipating events, in a condition of uncertainty […] the judges intervene for the most part when the events or at least their anticipation, are already ongoing or have already taken place. But this does not entirely exclude a control of the reasonableness, the ex ante (prior) evaluation of the risk and the congruity of the instruments introduced with respect to the aim, the proportionality of the legislative measures in relation to their impact of the protection of fundamental rights"[32].

It is therefore necessary to verify the margins of discretion given to the administrative judge for the necessary balancing[33] between the opposing needs highlighted[34]. These margins exist and are testified to by a very recent decision of the Council of State[35], with which the administrative judge is deemed able to exercise evaluative power in the determination of the real effects of their pronouncement, when establishing the effects of a ruling that has proved illegitimate[36]. More specifically, the Council of State felt it necessary not to decree on the effects of the annulment of the acts reviewed at the first grade of the trial and to use only the confirmative effects of the appeal decision; and to ensure that the acts reviewed

[31] Thus stated the Constitutional Court 7 April 2011 No. 115, which declared the constitutional illegitimacy of article 54, par. 4, of Legislative Decree 18 August 2000 No. 267, modified by Law 125/08, for having attributed to mayors, as officers of government, the power to adopt provisions of normative and efficacious content for an unspecified time with the aim of preventing and eliminating dangers that threaten public safety and urban security beyond cases of contingency and urgency.

[32] R. Bin, *Democrazia e terrorismo*, available at www.forumcostituzionale.it.

[33] On the balance of values in the war on international terrorism, see P. De Sena, M.C. Vitucci, *The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of values*, in 20 Eur. J. Int'l L. 193 (2009).

[34] On conciliation between security and rights, and the use of emergency legislative instruments in defence of democracy, see 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* 83, 89 (2006).

[35] The reference is to the Council of State, VI, 10 May 2011 No. 2755, see A Travi, *Accoglimento dell'impugnazione di un provvedimento e "non annullamento" dell'atto illegittimo,* in 8 Urb. app. 936 (2011). On the reformed administrative trial, see M. Ramajoli, *Lo statuto del provvedimento amministrativo a vent'anni dall'approvazione della legge n. 241/90, ovvero del nesso di strumentalità triangolare tra procedimento, atto e processo*, in 2 Dir. Proc. Amm. 459 (2010).

[36] The issue dealt with by the decision concerns a petition lodged by an environmental organisation against a regional hunting plan for lack of a strategic environmental evaluation.

conserve their effects until their modification and/or substitution on the part of the competent administration.

This is a further step towards the exercise of a judicial review inspired by the principle of the effectiveness and the fullness of administrative judicial protection deriving from Articles 6 and 13 of the European Court of Human Rights, from 24, 111 and 113 of the Constitution, and from the Code of the Administrative Trial.

This could well represent the response to the suggestion of the Constitutional Court to resolve the specific case by seeking interpretative options that ensure a mechanism of proportioned balance between the values concerned.

Thus, conformity with the law of an emergency measure that, as has often been underlined, finds its legitimisation in judgments whose content is necessarily prognostic or probabilistic, can be measured by the judge with a set of instruments that enable ascertainment of respect for trial guarantees[37].

[37] On the call for reasonableness and ascertainment of the facts founded on solid circumstances that would justify the judgement of danger, see TAR Lombardia, Milan, III, 3 November 2009 No. 4944; TAR Lazio, I, 9 September 2009 No. 8425; Council of State, VI, 8 September 2009 No. 5259, on the theme of ascertainment in social danger and residence permits; on the necessary ascertainment by the judge of the existence of particular circumstances likely to constitute a sufficiently grave threat to society and public order, see the decision of the Tribunal Administratif de Lille of 27-31 August 2010, on the nonconformity of the norms passed by the French Government on the theme of immigration at Article 27 of Directive 2004/38/EC of 29.4.2004.