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Symposium
Citizens and Enemy Aliens

Daniela Luigia Caglioti[*] *& Giacinto della Cananea*[**]

A multi-disciplinary analysis

This special issue of IJPL focuses on the implications of the measures taken to combat trans-national terrorism. This subject involves multiple perspectives and has complex roots in different academic disciplines and their sub-fields, such as history, law (especially criminal law, international law and public law), and sociology. It also concerns a variety of 'real world' fields of endeavour, including those of judges, administrators, and experts in international relations. There are consequently many aspects to consider, with a variety of themes, questions, and issues that have commanded attention for more than a decade. Moreover, "citizens and enemy aliens" is both a subject for academic study and a complex aspect of governmental activity and social life. This by itself explains why we have decided to convene scholars with different academic backgrounds in the research project and in the seminars organized to discuss its outcomes.

In what follows, we first describe and compare the measures taken by governments in different periods and countries in regard to both their citizens, when they are suspected of "intelligence with the enemy", and to aliens, who are regarded as enemies even though they do not have the status of combatants and do not enjoy the guarantees of that status. We then argue that some of the measures adopted were already used in the First World War, while others have been introduced in recent years, especially in the context of the United Nations.

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Precisely for this reason, a recurrent concern of this special issue is the "war on terror". A distinctive feature of the measures taken against terrorism in the past decade has been the attempt to liken the reaction against terrorism to a war, which is a more or less well-defined legal concept with a series of implications for the techniques of government and their limits (how suspects must be treated, what their rights are). We argue that, historically and conceptually, terrorism differs from "war" and may not, therefore, entail similar practical consequences. Public authorities have, of course, several ways to exercise force, but in a liberal democracy) nothing (allows the State to use force regardless of all legal restraints. Another, and related, issue is the legal status of individuals. We do not discuss only the legitimacy of qualifying a group of persons as "enemy aliens", with the aim or the effect of depriving them of some of the most fundamental guarantees accorded by liberal democracies, including the right to be heard and the right to an effective judicial protection. We also discuss the political, social and psychological implications. Anger at bomb attacks in New York, Washington, Madrid and London required prompt action by governments, but, as Bruce Ackerman has acutely observed, terrorism justifies neither repressive laws that may devastate civil liberties nor racial profiling and stigmatisation. This is very important in view of the need to promote more suitable behaviour among public administrators.

Individual contributions

We have also paid attention to more specific topics related to citizens and enemy aliens. In the first contribution to this issue, Daniela Luigia Caglioti considers historically the dilemma between the safety of the population and the system (as in the old maxim *salus rei publicae suprema lex*), on the one hand, and the safeguards for liberties and rights on the other. She argues that this dilemma is not a novelty of the twenty-first century, and shows the analogies with WWI, but also the differences, which must not be overlooked.

Giacinto della Cananea focuses on the administrative due process of law. He observes that, whilst the courts often initially deferred to political power, comparative analysis of national and supranational judicial institutions shows that in more recent years the courts have ensured that some essential procedural requirements imposed on governments are respected, and legislators have modified laws accordingly. However, some

aspects of such procedural requirements have been redefined and can no longer be conceptualised in the traditional terms of the nation-state.

The three contributions that follow explore more specific aspects from a legal point of view. Mario Savino focuses on the balance between security and freedom in counter-terrorism and immigration policies, mainly from the point of view of legislation and administrative practice. Renata Spagnuolo Vigorita argues that, while the Italian legislature has repeatedly manifested its lack of interest in constraints on government, both administrative courts and the Constitutional court have restored safeguards, using general principles of law such as equality and reasonableness. Federico Fabbrini demonstrates, however, that judicial guarantees are not unlimited. Indeed, the experience of "extraordinary" measures like renditions reveals that even in liberal democracies there are tensions that may not be solved by the courts.

Fabbrini's emphasis on "extraordinary" measures is paralleled by Vincenzo Rapone's focus on the studies conducted, in particular, by Giorgio Agamben and which show the risk of exclusion from the human community because such measures allow? differentiations with no reference to the universals of discourse and culture. Finally, Leopoldo Moscosofocuses on the notions of emergency powers as well as on the controversy on the state of exception, and points to the difficulties inherent to violence control, to the emergence of private governments, and to the nation-state's loss of centrality in both domestic and international politics.

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ARTICLES

Dealing with Enemy Aliens in WWI: Security versus Civil Liberties and Property Rights

Daniela L. Caglioti[*]

Abstract

WWI is probably the first conflict in which governments and armies have dealt with the issue of civilian of enemy nationalities on a massive scale. Governments and parliaments discriminated between citizens and aliens and established an equation between nationality/ethnic origins and dangerousness, citizens of enemy nationality and citizens of enemy ethnic origin were lumped together and stripped of their liberties, rights and properties. This article tries to understand how the belligerent countries addressed the enemy aliens issue and explores the historical roots of a widespread twentieth-century practice.

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1. Introduction

In the aftermath of 9/11, many countries involved in the so-called *war on terror* were faced with the dilemma of choosing between the security of the nation and the safety of its population, on the one hand, and the maintenance of constitutional freedoms and respect of human rights on the other. The laws passed and the preventive campaign launched indicate that there was a risk that security concerns, presented with the rhetoric of emergency, might override civil liberties and human rights. Endangering principles long recognized, many governments and parliaments discriminated between citizens and aliens and established an equation between nationality/ethnic origins and dangerousness. As the mass preventive campaign launched in the US and the Guantanamo files show, ethnic origin has been often considered a sufficient feature for a person to be declared potentially dangerous.

The dilemma between the safety of the population and the system, on the one hand, and the safeguarding of principles, liberties and rights on the other, is not a novelty of the twenty-first century. The difference, however, consisted in the capacity of democratic societies and public opinions, especially since WWII and the signing of the 1949 Geneva Convention, to react against discrimination, violence, restriction of civil liberties, torture, and breaches of human rights and constitutional guarantees.

Whilst the defence of rights, and in particular the emergence of the language and practice of human rights, appears to be a relatively recent phenomenon[1], discrimination between citizens and aliens, the ethnicization of citizenship, the use of emergency powers and bypassing the constitution in order to deal with the enemy, and the tendency to shift

[1] See in particular S. Moyn, *The last utopia: human rights in history* (2010). For a recent assessment of the historiographical literature on the history of human rights see S. Hoffmann, *Genealogies of Human Rights*, in S. Hoffmann (ed.) *Human Rights in the Twentieth Century. A Critical History* (2011) and M. Bradley, *Writing Human Rights History*, 2 Mest. Stor. 3 (2011).

guilt and responsibility from the individual to groups – religious, ethnic, or social – seem to be practices from a distant past. The "double standard" in treating potentially dangerous people stigmatized by David Cole in his book published in 2002, and in many articles written for scholarly journals and for the New York Review of Books, is something which has not been introduced by the so-called "war on terror"[2] but had at least two main manifestations during the twentieth century. In the two world wars, in almost all the belligerent countries, enemy nationality/origin and dangerousness became synonymous. Citizens of enemy nationality and citizens of enemy ethnic origin were lumped together and stripped of their liberties, rights and properties.

This short article deals with WWI and explores the historical roots of a widespread twentieth-century practice.

2. Enemy aliens in the First World War

WWI is probably the first conflict in which governments and armies have dealt with the issue of civilian of enemy nationalities on a massive scale, mixing together all the practices mentioned above. Understanding how the belligerent countries addressed this problem during the Great War can explain the roots of a pattern and a behaviour repeatedly apparent also during WWII (the most famous example being the internment of 110,000 Japanese and American-Japanese in the US during WWII), and re-enacted many times during the twentieth century, and most recently in the so-called *war on terror*.

In almost all the states which took part in WWI, governments issued decrees and implemented measures dealing with civilians of enemy nationality who at the outbreak of the war happened to be on their territory. The governments or the armies in charge of conduct of the war sought to neutralize all persons with ties to an enemy country, on the presumption that they would necessarily be more loyal to their origins and blood than to the country in which they worked and lived. German and Austro-Hungarian subjects domiciled in France, Britain or Russia, and later in all the countries which joined the Allies, and British, French and Russian citizens living in Germany or in the Habsburg Empire, and then in Turkey or Bulgaria, were recast as dangerous, sometimes

[2] D. Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (2003).

extremely dangerous, internal enemies. These foreign subjects were in some cases transient tourists, students, or seasonal workers; but in most cases they had been residents of the belligerent countries for many years. Some of them were even born in the country, some had married a national, others had acquired nationality papers, others were in the process of obtaining them; many owned houses, land, or firms and, of course, spoke the local language fluently. The outbreak of the war transformed them, regardless of their personal stories, feelings, ideas, and senses of belonging, into enemy aliens accused of posing a threat to the national security and the survival of each belligerent country.

All the participants in WWI dealt with the enemy aliens issue by using state of emergency provisions: governments (and sometimes armies) assumed full legislative powers and issued orders in council or decrees which limited personal freedom; restricted civil and political liberties; and eventually curbed the economic activities of the civilians of enemy nationality and jeopardized their property rights[3].

Britain underwent a "revolutionary" transition from peace to war with "the most radical alterations in governmental organizations and, comparatively speaking, the most sweeping invasions of civil and economic liberties"[4]. On 8 August 1914, Britain adopted the Defence of the Realm Act (DORA), which has been considered closely akin to "a legislative declaration of martial law throughout England" and "established a virtual state of siege"[5].

In France the state of siege was declared on 4 August 1914 and, for the next five months "the country was ruled by a cabinet and military dictatorship". Then, as the war continued, Parliament reopened and the country resorted to a different method of government "characterized by several marked innovations […]: permanence of sessions, acceleration of the legislative process, the development of new controls and the modification of the old ones, the express or tacit transfer to Cabinet of certain powers of legislation, the abandonment of *la lutte des partis*"[6].

[3] The classic book on state of emergency is C. Rossiter, *Constitutional dictatorship: crisis government in the modern democracies* (1963). For a recent discussion of constitutional dictatorships see J. Ferejohn & P. Pasquino, *The law of the exception: A typology of emergency powers*, 2 Int. J. Const. L. 2 (2004).

[4] Rossiter, *Constitutional dictatorship*, cit. at 3, 151.

[5] *Ibidem* 153, 154.

[6] *Ibidem* 106.

In Cisleithania (the Austrian part of the Habsburg Empire) emergency rule had already been declared in March 1914, while in Hungary parliament "was anything but representative"[7].

Germany resorted to the 1851 Law of Siege, which was introduced in each of the twenty-four army corps districts, turning the country "into a group of dictatorships, each of which conducted its own policy"[8]. The army occupied a central position also in the state of emergency provisions issued in the Russian Empire[9]. The Italian Parliament passed a one-article bill, which gave the executive full powers two days before Italy's entry into the war against the Central Powers, while the army was empowered by art. 251 of the military penal code in war zones.

Besides assuming emergency powers, governments also strengthened their countries' legislation on aliens. Under these measures foreigners had to register, abandon their homes, and live in designated areas; they could not own cars, bicycles, and other means of transport or communication like carrier pigeons or telegraphs; they were subject to curfew. Britain's 1905 Aliens Act was made more stringent on 5 August 1914 when the government introduced the Aliens Restriction Act which allowed stricter control of all aliens and covered movements in and out of the country, compulsory registration, etc.[10]. In Italy, a decree issued on 2 May 1915, prevented foreigners from entering the country without a passport and a visa; required all aliens, both those in transit and those residing on Italian territory, to register; compelled employers to notify the hiring of foreigners; ordered landowners to communicate the sale of urban or rural estates to foreigners; and instructed hotels to declare the presence of aliens[11].

The provisions aimed at controlling all foreigners were accompanied by various other measures targeted on enemy aliens and which culminated in internment in concentration camps. Each country adopted a combination of expulsion, repatriation, displacement, and above all

[7] M. Cornwall, *Austria-Hungary and Yugoslavia*, in J. Horne (ed.), *A Companion to World War I* (2010).
[8] G. Feldman, *Army, industry, and labor in Germany, 1914-1918* (1966).
[9] E. Lohr, *Nationalising the Russian Empire: The Campaign against Enemy Aliens during World War I* (2003).
[10] J. Bird, *The Control of Enemy Alien Civilians in Great Britain, 1914-1918* (1986).
[11] Decreto Luogotenenziale (DL) no. 634, 2 May 1915 in GU no. 123, 19 May 1915, then extended for the entire war with the DL no. 1824, 23 December 1915.

internment of enemy nationals (especially, but not exclusively, men aged between 17 and 50).

Enemy aliens could not participate in assemblies and demonstrations; they could not own newspapers and magazines, and could not meet in ethnic clubs and societies. As a consequence, in countries like Canada, New Zealand, Australia and the United States, the ethnic press was closed down, the teaching of foreign enemy languages in school was suspended, while many aliens sought to elude the severity of the procedures by changing their surnames and hiding their origins. Even music composed by nationals of enemy countries could no longer be played, and concert halls and opera houses had to change their repertoires. Living and dead German composers, in particular, suffered from the ban imposed by nationalist hysteria.

Almost all the countries at war issued a "trading with the enemy act" which prevented enemy aliens from continuing their business activities; these acts ordered the seizure, confiscation, and sometime even the liquidation of property, shops, firms, shares and assets, patents, and copyrights.

Concentration camps opened almost everywhere, in Europe, and then in the US, Brazil, the dominions of the British Empire, China and the colonies. From Morocco to India, from Egypt to Algeria, from Hong Kong to Cuba, civilians of enemy nationality, whether of arms-bearing age or not, experienced confinement, or the extreme hardship and boredom of a concentration camp, sometimes for the entire war. At least 450,000 enemy aliens were interned in Europe and approximately 50,000 to 100,000 in countries outside Europe[12]. Germany interned in concentration camps more than 100,000 enemy civilians and drew no distinction between "mobilisables" – those who could be drafted, i.e. men aged between 17 and 50 – and "non-mobilisables" – women, children, and elderly people. France did almost the same by interning 40,000. Britain detained approximately 40,000 men aged between 17 and 45, and repatriated women, children, and the elderly. In the Russian Empire, 50,000 enemy aliens were interned, and more than 250,000 were deported together with subjects of German origin and other members of

[12] R. Speed III, *Prisoners, Diplomats, and the Great War: A Study in the Diplomacy of Captivity* (1990) and M. Stibbe, *Civilian Internment and Civilian Internees in Europe, 1914-20*, 1-2 Imm. & Min. 49 (2008).

ethnic minorities[13]. Austria-Hungary confined some enemy aliens (Britons and French in particular) in designated villages and towns, interning in concentration camps those, subjects and non-subjects, whose origins made them less reliable (Italians and ethnic Italians, Ukrainians, etc.). Italy confined, mainly in Sardinia, enemy aliens together with Italian individuals considered dangerous, such as anarchists, socialists and the so-called 'austriacanti' (persons suspected of being in favour of Austria-Hungary). Also the US resorted to internment for a small group of approximately two thousand men out of 254,000 registered as enemy aliens[14].

All these measures, and internment in particular, were presented as acts of retaliation and reprisal. No country was willing to assume the responsibility of being the first to discriminate against aliens and violate international law.

The equation between origins and dangerousness established by many governments provoked an 'ethnic turn' in the concept of citizenship. Passports and nationality papers proved to be insufficient and less powerful than origins in defining national identity. Denaturalization (and consequently disenfranchisement) became a common practice in France, Britain, Germany, and Canada, while a ban on new naturalizations was imposed almost everywhere, and in particular in the Russian Empire, the Ottoman Empire and Italy. Governments and public opinion exhibited great distrust in multiple identities and belongings. Whenever they had to choose between ethnicity and citizenship, they opted for the former.

As the war went on, the campaign and the measures against 'enemy aliens' expanded well beyond this category. On the one hand, they involved all aliens (even friendly and neutral ones). On the other, they targeted groups of citizens whose loyalty was questioned because of their ethnic origin, or their religious belief, or their former nationality. Among the persons affected were: 1. people who had recently acquired nationality papers (e.g. the Ruthenians of the Habsburg Empire migrated to Canada, or Germans in France who had very recently acquired citizenship); 2. women who had lost their original citizenship and acquired a new one by way of marriage; 3. minorities with national

[13] E. Lohr, *Nationalising the Russian Empire* cit. at 9, 123 ff.
[14] J. Nagler, *Nationale Minoritäten im Krieg: "Feindliche Ausländer" und die amerikanische Heimatfront während des Ersten Weltkriegs* (2000).

aspirations (the Armenians or the Greeks in the Ottoman Empire, the Poles, Czechs, Italians etc. in the Austro-Hungarian Empire); 4. minorities resistant to forced nationalization and long discriminated against (the Jews almost everywhere; the Muslims in the Russian Empire); 5. minorities living in the border regions, whose loyalty was considered difficult to ascertain (the Alsatians and Lorrainians in France, the Italians of Trentino, South Tyrol and Istria, etc.).

These measures were anticipated or echoed by popular reaction and the press. The popular reaction took many forms – complaints, informing, reporting, acts of vandalism against the property of enemy aliens (shop-window smashing, the looting and burning of shops and houses belonging to alleged enemy aliens), verbal violence, the hunting down and lynching of alleged spies and enemies, frequently only on the basis of rumours which frequently turned out to be false, or fits of public and collective hysteria[15].

The press fuelled the anti-alienist feelings with articles, cartoons, pamphlets, and racist campaigns[16]. Almost everywhere, pacifist and liberal groups found it very difficult to state their positions in public.

Juridical measures, internment, violence and anti-alienist behaviour contributed to the destruction or dispersal of numerous ethnic groups, altering the ethnic, social, and linguistic composition of many European and non-European cities and regions.

The campaign against enemy aliens also promoted the large-scale nationalization of economies through seizing and expropriating property, expropriating or forcing out foreign capital and foreign presence, and

[15] Violence increased in particular after the sinking of the Lusitania in May 1915. See E. Lohr, *Patriotic violence and the state: the Moscow riots of May 1915*, 3 Kritika 4 (2003); P. Panayi, *Anti-German Riots in Britain during the First World War*, in P. Panayi (ed.), *Racial Violence in Britain, 1840-1950* (1993); N. Gullace, *Friends, Aliens, and Enemies: Fictive Communities and the Lusitania Riots of 1915*, 4 J. of Soc. Hist. 40 (2005). For violence in the United States see J. Nagler, *Nationale Minoritäten im Krieg* cit. at 14, 340 ff..

[16] On Britain see P. Panayi, *The Enemy in Our Midst. Germans in Britain during the First World War* (1991) and S. Terwey, *Moderner Antisemitismus in Grossbritannien, 1899-1919: über die Funktion von Vorurteilen sowie Einwanderung und nationale Identität* (2006); on Germany see M. Stibbe, *German Anglophobia and the Great War, 1914-1918* (2001); on Italy A. Ventrone, *La seduzione totalitaria. Guerra, modernità, violenza politica (1914-1918)* (2003) and D. Caglioti, *From Germanophilia to Germanophobia. Government Policies and Nationalist Campaigns against Enemy Aliens in Italy during WWI*, forthcoming.

increasing state control on the economy. The most extreme measures were taken by the Russian Empire, where the campaign against enemy aliens, ethnic Germans, Jews and Muslims "resulted […] in the nationalization of a substantial portion of the imperial economy, and the transfer of extensive land holdings and rural properties from the targeted minorities to favoured groups"[17]. But nationalization of the economy was an important feature also in the US, where the office of the Alien Property Custodian worked intensively to eradicate German enterprises and promote "their thorough naturalization into an American character" of industry and intellectual property[18].

3. International conventions, humanitarianism and international law

When the First World War broke out, the status of enemy aliens or enemy civilians was not covered by any international convention. The two Geneva Conventions of 1864 and 1906 were exclusively concerned with prisoners of war, the wounded and sick on battlefields, and non-combatants – medical doctors, chaplains, personnel behind the lines – who, though not bearing arms, were directly involved in the war effort, digging trenches, transporting and delivering food and weapons, healing the wounded, burying dead soldiers, etc. Although the 1864 Geneva Convention provided a model for the subsequent ones, it was far from conceiving total war or war waged against civilians[19]. It was still based on the idea that wars were conflicts between states and their armies, not between nations.

Thirty-five years later, the 1899 Hague Convention went further, but not to the extent that it fully recognized the need to protect civilians. The war contemplated by the text of the agreement was still a conventional conflict which involved armies and was fought on battlegrounds distant from inhabited areas. Populations (the term "civilian" was almost entirely absent, except in article 25 on espionage) were covered by articles 42-56

[17] E. Lohr, *Nationalising the Russian Empire* cit. at 9, 1.

[18] *Alien Property Custodian Report. A detailed report by the Alien property custodian of all proceedings had by him under the trading with the enemy act during the calendar year 1918 and to the close of business on February 15, 1919* (1919).

[19] M. Finnemore, *Rules of War and Wars of Rules: The International Red Cross and the Restraint of State Violence*, in J. Boli & G. Thomas (ed.), *Constructing world culture: international nongovernmental organizations since 1875* (1999).

of the Convention, which regulated the behaviour of armies in occupied territory[20]. The Convention required the occupying army to respect the population, family honour, religious beliefs, and private property. It forbade pillage. It prohibited the occupying army from compelling the population to take part in the conflict. It stipulated that the occupants could not levy taxes, tolls, etc. The text of these articles was incorporated substantially unchanged into the 1907 Hague Convention, which contained only an ambiguous reference to the condition of enemy civilians. The short paragraph h of article 23 forbade "To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the *nationals of the hostile party*". It also stated that "A belligerent is likewise forbidden to compel the *nationals of the hostile party* to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war." Commenting on this article, James Garner, one of the first scholars to thoroughly research the enemy alien issue, remarked that a country at war "ought not to detain enemy subjects, confiscate their properties, or subject them to any disabilities, further than such as the protection of the national security and defense may require"[21]. Even though these principles were violated almost everywhere during the Great War, the approval of this article demonstrates and confirms that, at the time, private international law had developed more than public law.

For all matters not covered by the Convention, appeal could be made to the 'Martens clause', according to which "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience"[22]. In fact, all that remained to

[20] See *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 29 July 1899 and *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907.

[21] J. Garner, *Treatment of Enemy Aliens*, 12 Am. J. Int. L. 27 (1918).

[22] Geneva Preamble 1899.

protect civilians and non-combatants was a petition of principles and a generic reference to natural law, above all to a practice that differed greatly from one war to another. As far as enemy aliens were concerned, and to provide only some examples, English civilians were confined in France during the Napoleonic wars; property was confiscated during the American civil war; Prussians and Germans were expelled from Paris during the Franco-Prussian war; Italians were expelled from the Ottoman Empire during the Turkish-Italian war of 1911-1912; Boers were interned in concentration camps during the Anglo-Boer war.

The development of international law after the second half of the nineteenth century had spread confidence in the idea that "civilized" countries could fight a humanized war adhering to rules discussed in international conferences and agreed upon in international conventions and multilateral treaties. This illusion faded away when WWI broke out: the measures adopted at the beginning of the war in almost all the countries stressed sovereignty, and they were in open contrast with the above-mentioned agreement and the opinion of international lawyers.

Governments condemned the measures adopted against their own subjects. But they were ready to implement them against their own enemy aliens, often resorting to retaliation and reprisal as arguments to justify them. Whilst economic measures did not raise objections, restrictions upon personal liberty, and internment in particular, mobilized the diplomacies of the neutral countries in charge of the interests of the belligerents and the international humanitarian organizations. One week after the war, it was already clear that a humanitarian emergency had arisen.

The American ambassadors and consuls, who had been entrusted with the task of representing the interests of both sides (they had to safeguard German and Austro-Hungarian interests in France and Britain, and French and British interests in Germany, Austria-Hungary and the Ottoman Empire), worked hard – especially in the first months – collecting information, negotiating repatriations, and ensuring the reception of food, correspondence, etc. Ambassadors like Walter H. Page, Henry Morgenthau Sr., James W. Gerard, and lawyers like Chandler Anderson, deployed all their skills in order to resolve the thorny issue of enemy aliens.

An important role was also played by humanitarian organizations like the Red Cross or the YMCA. But while the latter took steps to relieve

pain, suffering, hunger[23], the former also engaged in diplomatic activity during and after the war. The aim of this activity was not to interfere with the development of the war, nor to advance human rights claims; rather, the motivation which drove the propositions and the activities of the Red Cross was humanitarianism.

The Red Cross did not initially know how to cope with the thousands of requests for information and help that it received from the families of displaced or interned civilians. In October 1914, only two months after the outbreak of the war, when thousands of civilians had already been stripped of their freedom and interned in concentration camps or confined in designated areas, the *Bulletin International des Sociétés de la Croix Rouge* acknowledged the problem: *Une catégorie de personnes qui sortait de la sphère d'action de l'Agence, n'étant pas visée par les accord internationaux, était les internés civils. Soit que l'espionnage, "le service de renseignements", comme l'appelle la diplomatie, se fût développé au point de rendre suspects un grand nombre d'individus libérés des obligations militaires, soit que chaque belligérant ait considéré comme de bonne prise les ressortissants de l'adversaire, se trouvant sur son territoire, un nombre important des civils français furent retenus en Allemagne, et un nombre plus grand encore des sujets allemands ou autrichiens, en France et en Grande-Bretagne, furent empêchés de regagner leur patrie et gardés dans des sortes de camps de concentration, ou simplement frappés de l'interdiction de partir. Il s'agissait de simples touriste en villégiature, de résidents domiciliés, d'employés attachés à des maisons de commerce, notamment à des hôtels ou pensions. Surpris par la brusque irruption de la guerre, ils se trouvèrent souvent pris au dépourvu et complètement dénués des ressources nécessaires pour un séjour se prolongeant jusqu'à l'entrée de l'hiver. Rien d'étonnant que leur sort ne fût pas réglé. D'après les principes généraux du droit des gens, la guerre est normalement limitée aux armées, la population civile reste en dehors. Elle ne devait pas être impliquée dans les hostilités*[24].

Thanks to the expertise developed in previous wars, the International Committee of the Red Cross was prepared to deal with soldiers; but as far as civilians were concerned, it felt helpless. 'Nous nous sentions

[23] On the activity of the YMCA see K. Steuer, *Pursuit of an 'Unparalleled Opportunity'. The American YMCA and Prisoner of War Diplomacy among the Central Power Nations during World War I, 1914-1923* (2008).

[24] Bulletin International des Sociétés de la Croix Rouge, tome XLV, Octobre 1914, n. 180, pp. 261-262.

desarmés', said the ICRC's rapporteur in the first published account of the Agency for Prisoners of War[25]. After the first bewilderment, the International Committee of the Red Cross decided to open a civilian branch in the Agency for prisoners of war. The head of the civil section, the Swiss medical doctor Frédéric Ferrière, a leading figure of the ICRC since the Franco-Prussian war, worked strenuously during the war to reduce hardship and, after the war, with the aim of preparing a Convention on the treatment of enemy civilians on which different countries could agree.

After the 1864 Geneva Convention, all the international efforts had been directed not against the war but for its "humanization". The First World War, by contrast, was a novelty because it involved civilians from its very beginning; and it proved to be a novelty difficult to deal with. The magnitude of the war and universal compulsory conscription had made matters completely different from the previous conflicts, when, with few exceptions, enemy aliens had been expelled and repatriated. The First World War, created two new categories besides combatants and non-combatants,. To use the language of the Red Cross, these categories consisted of "mobilisables" (would-be or could-be combatants) and "non mobilisables" (women, children and elderly people). The former group, males aged between 15 and 50, "whose impossibility to wear a uniform was only accidental"[26], had to be prevented with all means from enlisting in their own national army. But because there were potential soldiers and had been deprived of their freedom by the war, they should receive, according to the president of the ICRC, Gustave Ador, the same treatment that the Geneva convention guaranteed to POWs[27]. The latter group, mainly composed of "innocent victims" (women, frequently pregnant, children, old women and men in their 70s and 80s, sick persons) should be repatriated, and many of the efforts of Frédéric Ferrière and the Agency for civilian internees were made in that direction.

The civil section of the Agency for Prisoners of War worked strenuously throughout the conflict to collect information on internees, internment camps, and living conditions in the camps; but above all it

[25] *Ibidem*, p. 262. This was the feeling conveyed by the ICRC in the first report on the activity of the International Prisoners of War Agency.
[26] Ibid., p. 262.
[27] See *Egalité de traitement pour les prisonniers de guerre militaire et civils. (Cent soixante-troisième circulaire aux Comités centraux)*, in 181 BICR 5-8 (1915).

strove to negotiate the repatriation of all "non-mobilisables". However, the efforts of the Red Cross, the Vatican, and other organizations were often ineffectual and fruitless. During a Conference of the Red Cross organizations of neutral countries, which took place in Geneva in 1917, Gustave Ador, the chief of the ICRC, vehemently condemned the situation and urged a rapid solution: *Civilian internment is a novel feature of this war; international treaties did not foresee this phenomenon. At the start of the war it seemed logical that enemy civilians might be retained as suspects; a few months should have been enough to separate the chaff from the wheat. [But now] we have to add to the number of civilian internees those deported into enemy territory as well as the inhabitants of territories occupied by the enemy. These civilians have been deprived of their liberty and their treatment hardly differs from that of prisoners. After three years and more of war, we demand that these different categories of civilian detainees should become the object of special consideration and that their situation, which in some respects is even more cruel than that of military prisoners, should be properly discussed before the fourth winter of the war*[28].

During the same conference, the ICRC laid down a list of actions to be taken by the belligerent countries, including the repatriation of all civilian internees and the extension of the Geneva Convention to them. Only very few of these propositions were implemented, however. only in the fifth year of the conflict did the governments of the warring countries start to sign bilateral agreements concerning prisoners of war and civilian internees. Germany and France agreed in March 1918 on the repatriation of sick internees. Germany and Belgium signed an agreement on the repatriation of "non-mobilisables" in April 1918. Germany and Britain exchanged civilians and POWs after an agreement signed in July 1918. However, when the war ended there were still thousands of civilians interned in concentration camps in either belligerent or neutral countries (mainly Switzerland and Netherlands).

Bilateral agreements momentarily eased the conditions of the enemy aliens, but they did not lay the basis for a new international law settlement dealing with the issue.

Notwithstanding the numerous violations of both the Geneva and Hague Conventions, advocates of humanitarianism, international lawyers, and representatives of international organizations like the Red Cross did

[28] I quote from the English translation cit. in M. Stibbe, *Civilian Internment and Civilian Internees in Europe*, *1914-20*, cit. at 12.

not lose faith in the possibility of humanizing war. After peace treaties, and in the wake of demobilization, when Europe still teemed with displaced persons, refugees, stateless people, or prisoners waiting to be repatriated, different projects started to be conceived. The International Committee of the Red Cross, in particular, and the International Law Association were both engaged in drafting a Convention on enemy aliens and civilians in wartime.

Discussion for the Convention on enemy aliens began at the XXI Conference of the Red Cross in 1921 and continued for the next fourteen years. The ICRC was able to present a final draft at the Tokyo Conference in 1934. The draft, entitled *International Convention on the Condition and Protection of Civilians of enemy nationality who are on territory belonging to or occupied by a belligerent*, clearly defined what constituted an enemy alien and established in 33 articles the provisions for the humanitarian treatment of such subjects[29].

The Convention was not a revolutionary document. It set basic humanitarian rules and was driven by a common-sense approach. Yet no country was willing to endorse and sign it. When WWII broke out, the ICRC made another attempt to have it signed and implemented, but again failed. The Convention was rejected and the enemy aliens issue remained unresolved. Belligerent countries thus dealt with civilians of enemy nationality and enemy origins as they had done in WWI, but on a new massive scale.

[29] The text is available at the following URL: *http://www.icrc.org/ihl.nsf/FULL/ 320?-OpenDocument* [last access 4 December 2011].

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

*Giacinto della Cananea***

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.

* This is a revised version of the paper presented at a symposium on "Citizens and Enemy Aliens" (Naples, June 15, 2011). I wish to thank all participants for their comments, particularly Pasquale De Sena, Andrea Graziosi and Francesco Riccobono, as well as Alec Stone Sweet for inviting me to present my views on some of the cases discussed here in a seminar at the LUISS in Rome, in October 2011. Obviously, the usual disclaimer applies.

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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.*
>
> 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).

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

*Mario Savino**

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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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.

Public Enemy.
The Effectiveness of Administrativr Judicial Protection*

*Renata Spagnuolo Vigorita**

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.

Extraordinary Renditions and the State Secret Privilege: Italy and the United States Compared

Federico Fabbrini[*]

Abstract

The purpose of this article is to analyze the application of the State secret privilege in litigations concerning cases of extraordinary renditions in Italy and the United States (US). The article addresses the decision of the Italian Constitutional Court in the *Abu Omar* case and compares it with the case law of US federal courts in the *El-Masri* case. It is argued, with several caveats, that a common pattern emerges in both Italy and the US, whenever a case of extraordinary rendition is either investigated in a criminal proceeding or claimed in a civil suit for the purpose of civil liability: if the government invokes the existence of a State secret privilege, the judiciary shows utmost deference to the determination of the executive branch, making it impossible for the individuals allegedly subjected to extraordinary renditions to obtain justice before domestic courts. The article therefore examines what role legislatures and supranational human rights institutions could play to reverse this

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troubling trend, by assessing the differences and the similarities existing between Italy and the US. Even though legislatures, both in parliamentary and separation of powers systems, have proved either unwilling or unable to check the invocation of the privilege by the executive branch, the article suggests that the existence of judicial fora beyond the States, where individuals can bring their human rights claims, can be a valuable mechanism to ensure that allegations of extraordinary renditions are effectively adjudicated and redressed.

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1. Introduction

The purpose of this article is to analyze the application of the State secret privilege in litigations concerning cases of extraordinary renditions in Italy and the United States (US). Specifically, the article addresses the decision of the *Corte Costituzionale* (CCost), Italy's Constitutional Court, in the *Abu Omar* case[1] and places it in a broader constitutional perspective, by comparing it with the case law of US federal courts.[2] On the basis of the comparative assessment, the article argues that a common pattern emerges both in Italy and the US, whenever a case of extraordinary rendition is either investigated in a criminal proceeding or claimed in a civil suit for the purpose of civil liability: if the government

[1] C.Cost., sent. 106/2009, March 11, 2009 (published April 8, 2009).
[2] *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006); *aff'd by El-Masri v. US*, 479 F.3d 296 (4th Cir. 2007); *cert. denied El-Masri v. US*, 552 US 947 (2007). Cfr. also *Mohamed v. Jeppesen Dataplan Inc.*, 539 F. Supp. 2d 1128 (N.D. Ca. 2008); *rev'd by Mohamed v. Jeppesen Dataplan Inc.*, 536 F.3d 992 (9th Cir. 2009); *aff'd by, En banc Mohamed v. Jeppesen Dataplan Inc.*, 2010 US App. LEXIS 18746 (9th Cir. 2010); *cert. denied Mohamed v. Jeppesen Dataplan Inc.*, 2011 U.S. LEXIS 3575.

invokes the existence of a State secret privilege, the judiciary shows utmost deference to the determination of the executive branch and proceeds either to a dismissal of the civil action or to an acquittal of the accused persons. The consequence of the application of the State secret privilege is, therefore, the impossibility for the individuals allegedly subjected to extraordinary renditions to obtain justice through redress before domestic courts.

This troubling trend could be counteracted in a number of ways. The article will first investigate the role of legislatures in the oversight of the executive power and how the differences between a parliamentary and a separation of powers system may affect the capacity of the political branches to check and balance each other and prevent potential abuses in the use of the State secret privilege. As will be shown, however, the willingness and the ability of Parliament or Congress to counteract the increasing recourse by the executive to the State secret privilege seems weak in both the Italian and the US contexts. The article will therefore examine a second means of redress against the abuse of the State secret privilege: the role of supranational judicial institutions. Here, the divergence between the US and Italy appears significant: indeed, contrary to the US, Italy – as the other European countries – is subject to an external human rights scrutiny exercised by the European Court of Human Rights (ECtHR). Despite a number of caveats, it is argued that the existence of a multilevel system of human rights protection in Europe might prove effective and make the individuals adversely affected by human rights violations better off.

The structure of the article is as follows. Section 2 examines in some detail the *Abu Omar* trial as an example of the post-9/11 practice of extraordinary renditions and addresses the complex litigation on the applicability of the State secret privilege that has occurred before the Italian CCost. Section 3 takes into account the *El-Masri* case before the US courts and, by emphasizing the similar way in which Italian and US courts handle the questions raised by the executive's assertion of a State secret privilege in cases of extraordinary renditions, develops an analytical framework on the role of the domestic judiciary. Section 4 evaluates the role of the legislatures in the US and Italy and compares their capacity to oversee the executive branch's abuse of the State secret privilege. Finally, section 5 considers the role of supranational judicial institutions and looks at some recent developments in the case law of the ECtHR that highlight the potentials of a multilevel system of human rights protection to remedy

human rights violations produced by the practice of extraordinary renditions: the application lodged by Mr. El-Masri before the ECtHR will be reported as an example and compared with the less effective international mechanisms binding the US in the framework of the Inter-American human rights system. A brief conclusion follows.

2. The *Abu Omar* case

One of the most contentious counter-terrorism policies utilized by the US administration in the post-9/11 era is a program known as 'extraordinary rendition.'[3] This program essentially consisted in the abduction of individuals suspected of being involved in terrorist plots or being part of terrorist networks and their secret transfer to detention facilities in third countries, in which constitutional and international standards of human rights protection do not apply, for the purpose of being interrogated.[4] One such individual was Mr. Osama Mustafa Hassan

[3] Cfr. Louis Fisher, *Extraordinary Rendition: the Price of Secrecy*, 57 Am. U.L. Rev. (2008) 1405, 1418 now reprinted in The Constitution and 9/11 (2008) ch. 10, who explains that the 'extraordinary rendition' program was inaugurated in 1995 – cfr. Presidential Decision Directive 39 (June 21, 1995) – but reached its apex in the post-9/11 epoch. Departing from the approach of the previous US Administration, the new US President has established a Special Inter-Agency Task Force "to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control." (Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009) 'Ensuring Lawful Interrogations' Sec. 5 (e)(ii)). The Special Task Force then issued its recommendations to the US President advising that transfer practices comply with applicable legal requirements and do not result in the transfer of persons to face torture. The Task Force supported the continued use of assurances from a receiving country that an individual would not face torture if transferred there but requested strengthened mechanism to obtain, evaluate and monitor these assurances. (Dept. of Just., Press release 09-835, Aug. 24, 2009 available at: http://www.justice.gov/opa/pr/2009/August/09-ag-835.html (last accessed June 10, 2011)).

[4] For a strong criticism of the use of 'extraordinary renditions' in the war on terror on human rights grounds cfr. Margaret Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 Geo. Wash. L. Rev. (2006) 1333 an the report of the Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (2004). The practice of extraordinary rendition has come under fire also by

Nasr (alias Abu Omar), an Egyptian-born Muslim cleric living in Milan (Italy). The Italian police was already investigating the possible involvement of Mr. Abu Omar with radical Islamist groups, when, on 12 February 2003 Mr. Abu Omar was secretly kidnapped by a group of Central Intelligence Agency (CIA) operatives with the support of Italian security and intelligence officers and transferred to Egypt where he was detained for several month for interrogation purposes and allegedly subjected to torture and inhuman and degrading treatments.[5]

Soon afterwards, the Office of the public prosecutor in Milan opened a criminal investigation for the crime of abduction of Mr. Abu Omar and began an inquiry to identify the persons responsible for the crime.[6] It ought to be highlighted that in the Italian constitutional system, contrary to what occurs in the US, public prosecutors do not depend on the executive branch but enjoy the same wide autonomy and independence of ordinary judges. Indeed, both prosecutors and judges are civil servants, hired through public examinations, and are subject only to the disciplinary rules adopted by the *Consiglio Superiore della Magistratura* (Supreme Council of the Judiciary), i.e. the body representing the judiciary as an autonomous and independent branch of government.[7] In

multiple international institutions. Cfr. the Concluding Observations of the Human Rights Committee established under the International Covenant on Civil and Political Rights, *Report on the USA*, CCPR/C/USA/CO/3/Rev.1 Dec. 18, 2006; the Final Report of the European Parliament, *Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, Eur. Parl. Doc. A6-0020/2007, Jan. 30, 2007; and the two Reports written by Dick Marty for the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, *Alleged Secret Detentions in Council of Europe Member States*, AS/Jur (2006) 03, Jan. 22, 2006 and *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States*, AS/Jur (2007) 36, June 7, 2007.

[5] For an account of the facts involving Mr. Abu Omar and for an overview of the judicial proceedings that followed cfr. Tommaso F. Giupponi, *Stato di diritto e attività di* intelligence*: gli interrogativi del caso Abu Omar*, Quaderni Costituzionali (2006) 810; Francesco Messineo, *"Extraordinary Renditions" and State Obligations to Criminalize and Prosecute Torture in the Light of the* Abu Omar *Case in Italy*, 7 J. Int'l Crim. J. (2009), 1023.

[6] Cfr. Penal code It., Art. 605 (criminalizing abduction) and Art. 289-bis (criminalizing abduction for terrorist purposes).

[7] For a comparison of the organization of the judicial branch in Italy and the US and for an assessment of the role and functions of the Supreme Council of the Judiciary in Italy cfr. Alessandro Pizzorusso, *Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies*, 38 Am. J. Comp. L. (1990), 373

addition, in reaction to the practice of the Fascist period, the 1948 Constitution decided to remove from the executive's discretion any decision regarding crimes to investigated and codified instead an opposing rule:[8] Art. 112 of the Constitution affirms that "the public prosecutor has the duty to initiate criminal proceedings" whenever he has been informed that a crime has been committed.[9]

During its investigations between 2005 and 2006, the Office of the public prosecutor gathered a large amount of evidence concerning the involvement of CIA operatives and Italian intelligence and security officers in the abduction of Mr. Abu Omar. At that time, moreover, the government neither attempted to prevent the inquiry nor formally invoked any State secret privilege.[10] This eventually led, on 5 December 2006, to the official indictment of 26 US and 9 Italian citizens. According to the adversarial system introduced in Italy by the 1988 Code of criminal procedure,[11] it is the duty of the public prosecutor to carry out criminal investigations and afterwards to formulate an indictment of the allegedly responsible persons, requesting that they be subjected to criminal trial.[12] The decision whether to open the criminal trial is, how-

and Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (2002).

[8] Cfr. Mario Chiavario, *Diritto Processuale Penale. Profilo Istituzionale* (2005). For a comparison between the European legal systems establishing a principle of prosecutorial discretion and those with a constitutionalized duty to prosecute any *notitia criminis* cfr. Luca Luparia, *Obbligatorietà e discrezionalità dell'azione penale nel quadro comparativo europeo*, Giurisprudenza Italiana (2002), 1751.

[9] Const. It., Art. 112. (A translation of the Italian Constitution by Carlo Fusaro is available in English at the International Constitutional Law web site: *http://www.servat.unibe.ch/icl/it__indx.html* (last accessed June 10, 2011)).

[10] At the time of the investigations the government (headed from 2001 to 2006 by Prime Minister Berlusconi) did not formally invoke the State secret privilege. Nevertheless, in a confidential letter to the prosecutors it cautioned about the existence of reasons of national security concerning the relationship between the SISMI and the CIA. This was later interpreted by the new government (headed from 2006 to 2008 by Prime Minister Prodi) as implying the assertion of a State secret privilege. Cfr. infra text accompanying nt. 14 & 22.

[11] For an introduction to the Italian Code of criminal procedure in English cfr. William Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 Yale J. Int'l L. (1992), 2; Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 Am. J. Comp. L. (2000), 227.

[12] Cfr. Code of criminal procedure It., Art. 405 (request of the indictment by the Office of the public prosecutors).

ever, made in a public hearing, in the presence of the indicted persons, by a third independent magistrate, the *giudice dell'udienza preliminare* (gup) – i.e. the judge of the preliminary hearing, who evaluates the request of the public prosecutor on the basis of the evidence the latter collected during his investigations.[13] The *gup* of Milan decided to open the criminal trial at the preliminary hearing of 16 February 2007.

When the preliminary hearing was still pending in Milan, however, on 14 February 2007, the *Presidente del Consiglio*, Italy's Prime Minister (from Spring 2006, Mr. Prodi) commenced legal proceedings before the CCost against the Office of the public prosecutor of Milan, complaining that the investigations in the *Abu Omar* case had violated a State secret privilege regarding the relationship between the Italian military intelligence (SISMI)[14] and its foreign counterparts, and requesting the CCost to declare invalid all evidence gathered by the prosecutors.[15] Indeed, the Italian Constitution, instead of introducing a decentralized US-style system of judicial review, created a specialized judicial body, the CCost, on the Kelsenian model, to review the constitutionality of legislation.[16] The CCost, however, was granted also additional functions,[17] among which, especially, the power to umpire "conflicts of allocation of powers" between the branches of government.[18] Accordingly, any institution which alleges that one of its prerogatives has been unlawfully

[13] Cfr. Code of criminal procedure It., Art. 424 *juncto* Art. 429 (decision of the gup whether to open the criminal trial).

[14] The SISMI, established under Law 801/1977, was the Italian military intelligence agency involved in counter-proliferation activities and in all counter-intelligence operations taking place outside the national territory. Since the enactment of Law 124/2007 the SISMI has been replaced by the AISE. For an introduction to the organization and the functions of the Italian intelligence apparatus cfr. Tommaso F. Giupponi & Federico Fabbrini, *Intelligence Agencies and the State Secret Privilege: the Italian Experience*, 4 Int'l J. Const. Law 3 (2010), 443.

[15] Reg. C. 2/2007.

[16] Cfr. in general Mauro Cappelletti, Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato (1972) and Norman Dorsen, Michel Rosenfeld, Andras Sajo & Susan Baer, Comparative Constitutionalism. Cases and Materials (2003), ch. 2. On the kelsenian model of constitutional review cfr. specifically Theo Öhlinger, *The Genesis of the Austrian Model of Constitutional Review of Legislation*, 16 Ratio Juris 2 (2003), 206.

[17] For an introduction to Italian CCost cfr. Gustavo Zagrebelsky, *La giurisdizione costituzionale*, in *Manuale di diritto pubblico* (Giuliano Amato & Augusto Barbera eds. 1991, 3rd ed.), 657; and Tania Groppi, *The Constitutional Court of Italy: Towards a Multilevel System of Constitutional Review?*, 3 J. Comp. L. (2008), 100.

[18] Cfr. Const. It., Art. 134 (functions of the CCost).

abridged by another branch, or that another branch has wrongly exercised the competences with which it was rightly endowed, can recur to the CCost to vindicate its powers.[19]

After the gup's decision on 16 February 2007 to open a criminal trial against the CIA and SISMI agents, the Prime Minister brought, on 14 March 2007, a new action for the allocation of powers before the CCost against the gup, claiming that its decision to open the criminal trial was based on evidence collected in violation of the State secret privilege and was, as such, void.[20] Both 'conflicts of allocations of powers' were declared *prima facie* admissible by the CCost on 18 April 2007.[21] In June, then, reacting to the initiative of the government, the Office of the public prosecutor of Milan also commenced proceedings before the CCost against the Prime Minister, complaining about the violation of its constitutional prerogatives and claiming that the position of the government had been inconsistent, since the State secret privilege had not been formally invoked by the executive during the investigations and had only been asserted lately.[22] The CCost also admitted *prima facie* this case and proceeded to a joint assessment of it with the previous two.[23]

In the meanwhile, however, the criminal trial in Milan had been moving on and the judge of the IV Criminal Division of the Tribunal of Milan in charge of the case had proceeded to the cross-examination

[19] On the role of the Italian CCost in umpiring conflicts of allocation of powers cfr. Augusto Cerri, *Poteri dello Stato (Conflitto tra i)*, in Enciclopedia Giuridica Treccani, vol. XXIII (1991) *ad vocem*. When the CCost is called upon to decide on a conflict of allocation of powers it shall first decide whether the action is *prima facie* admissible. A conflict of allocation is admissible if: a) the *subjects* of the proceedings, i.e. both parties, can be considered as 'powers of the State'; b) the *object* of the controversy has to do with a delimitation of constitutionally attributed powers. The CCost, in its case law, has been willing to interpret quite widely both criteria. Cfr. e.g. C.Cost. sent. 48/1998, Feb. 25, 1998 (published March 11, 1998) (holding that a conflict raised by the Parliamentary Committee for the control of the public broadcast channel is admissible), C.Cost. sent. 457/1999, Dec. 14, 1999 (published Dec. 29, 1999) (holding that the conflict of allocation is admissible to protect the constitutionally determined sphere of attribution of each branch from any legal measure that can be adopted by other branches). If a conflict is declared admissible the CCost will then, with a separate decision, rule on the merit. Cfr. also Antonio Ruggeri & Antonio Spadaro, Lineamenti di Giustizia Costituzionale (2005).

[20] Reg. C. 3/2007.

[21] C.Cost., ord. 124/2007, April 18, 2007 (published April 26, 2007); C.Cost., ord. 125/2007, April 18, 2007 (published April 26, 2007).

[22] Reg. C. 6/2007.

[23] C.Cost., ord. 337/2007, Sept. 26, 2007 (published Oct. 3, 2007).

phase, summoning witnesses and acquiring other evidence. Because of this, the new Prime Minister (from Spring 2008, Mr. Berlusconi) on 30 May 2008 commenced proceedings before the CCost against the Tribunal of Milan, claiming that the advancement of the trial while a decision on the State secrecy privilege was still pending before the CCost infringed the constitutional prerogatives of the executive branch.[24] On 13 December 2008, then, the Tribunal of Milan suspended the ongoing trial and brought proceeding against the Prime Minister before the CCost.[25] In his brief, the judge of Milan recalled that the officers of the SISMI who were accused in the trial had expressed their impossibility of presenting relevant evidence in their defence because of the existence of a State secret privilege and underlined how the Chief executive had confirmed the assertion of such a privilege. He therefore complained that the State secret privilege *de facto* made impossible for the court to issue a decision on the criminal liability of the accused persons.[26]

Eventually, after joining the unprecedented number of five 'conflicts of allocation of powers', all raised in the context of the same criminal case, the CCost on 11 March 2009 delivered its decision. The CCost began its opinion stating that the purpose of its ruling was – as typical of a ruling umpiring 'conflicts of allocation of powers' between branches of government – to clarify "the respective ambits of constitutional attributions that may be legitimately exercised, on the one hand, by the Prime

[24] Reg. C. 14/2008. The CCost declared the conflict for allocation of powers *prima facie* admissible on June 25, 2008: Cfr. C.Cost., ord. 230/2008, June 25, 2008 (published July 2, 2008).

[25] Reg. C. 20/2008. The CCost declared the conflict for allocation of powers *prima facie* admissible on Dec. 17, 2008: Cfr C.Cost., ord. 425/2008, Dec. 17, 2008 (published Dec. 24, 2008).

[26] The situation that took place in the *Abu Omar* trial should not be confused with the rules in force in the US under the Classified Information Procedure Act (CIPA) – P.L. 96-456 codified at 18 U.S.C. App. III. – i.e. the Congressional act regulating the operation of the State secret privilege in the criminal context. CIPA, indeed, operates when the executive branch wants to prosecute ad individual and, *at the same time*, wants to preserve the secrecy of several information, thus limiting the defendant's rights to confront witnesses and present evidence in his defence. In the case at hand, instead, the problem was different. It has already been highlighted in text accompanying supra nt. 7 that in the Italian legal system prosecutors are independent from the executive branch: in the case at hand, therefore, the State secret privilege was not invoked by the Office of the public prosecutors but rather by the defendants (shielded by the government) in order to avoid the disclosure in court of the evidence collected by the prosecutors.

Minister and, on the other, by the several judicial authorities involved in the investigation and the trial"[27] of Mr. Abu Omar (i.e. separately, the Office of the public prosecutor, the gup and the trial judge of Milan). Specifically, the focus of the decision was whether the Chief executive could invoke a State secret privilege (concealing all the relationships between the SISMI and the CIA) and thus prevent the judiciary from investigating and prosecuting the individuals allegedly involved in the abduction and extraordinary rendition of Mr. Abu Omar.

In the Italian legal system, the discipline of the State secret privilege is provided by statute.[28] A recent act of Parliament, Law 124/2007 – whose principles, however, are in continuity with those of the previous legislation dating to the 1970s[29] – affirms that a State secret privilege can be asserted to protect "the acts, the documents, the information, the activities, and all other things, whose knowledge or circulation can damage the integrity of the Republic, even in relation with international agreements, the defence of the institutions established by the Constitution, the independence of the State *vis-à-vis* other States and in its relationship with them and the preparation and military defence of the State."[30] The Chief executive is the only authority entitled to assert the State secret privilege[31] and classification cannot last for more than 30 years.[32] The invocation of the privilege "inhibits judicial inquiry."[33] However, to balance the need of national security with the rule of law, Law 124/2007 provides that when a judge is dissatisfied with the executive's assertion of the privilege it can raise a 'formal appeal' to the Prime Minister, asking for the removal of the privilege and can, subsequently, bring an action for allocation of powers before the CCost.[34]

[27] C.Cost., sent. 106/2009, March 11, 2009 (published April 8, 2009), *cons. dir.*, § 3.
[28] For a detailed account of the Law 124/2007 cfr. Giupponi & Fabbrini (supra note 14). For a more general overview of the role of the State secret privilege in Italian constitutional politics cfr. instead Andrea Morrone, *Il* nomos *del segreto di Stato, tra politica e Costituzione*, Forum Quaderni Costituzionali (2008).
[29] C.Cost. sent. 106/2009, *cons. dir.*, §4. The previous discipline of the State secret privilege was provided by Law 801/1977. For an overview of the continuities and discontinuities between the two regimes cfr. Giulio M. Salerno, *Il segreto di Stato tra conferme e novità*, Percorsi costituzionali (2008), 66.
[30] Law 124/2007, Art. 39(1).
[31] Law 124/2007, Art. 39(4) (power of the Prime Minister to assert the privilege).
[32] Law 124/2007, Art. 39(8) (expiration of the privilege after 30 years).
[33] Law 124/2007, Art. 41(5).
[34] Cfr. Law 124/2007, Art.s 41(1) and 41(7) (possibility for the judiciary to ask the

The judgment of the CCost began with a detailed explanation of the facts of the case and with a long reassessment of the precedents of the CCost regarding the State secret privilege.[35] The CCost restated its view that the State secret privilege "represents a preeminent interest in any legal system, whatever its political regime"[36] and that the executive branch enjoys a "wide discretion"[37] in deciding whether to classify a piece of information as a State secret. The CCost consequently affirmed that the judiciary "cannot scrutinize the '*an*' [if] or the '*quomodo*' [how] of the decision of the executive to seal an information as a State secret, because the choice on the necessary and appropriate means to ensure national security is a political one – belonging as such to the executive branch and not to the ordinary judiciary."[38] At the same time, however, the CCost reaffirmed its role "in the case of a conflict of allocation between branches of government."[39] From this statement it seemed therefore to follow that the CCost enjoyed a full and unrestrained power to scrutinize the decision of the executive branch to assert the existence of a privilege.

In the holding, the CCost mainly upheld the requests of the Prime Minister, affirming that the Office of the public prosecutor and, subsequently, the gup and the Tribunal of Milan had infringed upon the prerogative of the executive branch.[40] Although at the start of the investigations the Prime Minister had not asserted reasons of national security, once the State secret privilege was sealed on the documents concerning the relationship between the Italian intelligence agencies and the CIA, the public prosecutors were prevented from using this evidence to formalize the indictment; the gup could not ground on them in its decision to open a criminal trial; and the judge should not have admitted the examination of witnesses on this account. The CCost, instead,

government whether it has formally asserted the privilege and to contest this decision by raising a 'conflict of attribution' before the CCost).

[35] For an introduction to the precedents of the CCost in the field of the State secret privilege cfr. Carlo Bonzano, Il segreto di Stato nel processo penale (2010), ch. 1 and Alessandro Pace, *L'apposizione del segreto di Stato nei principi costituzionali e nella legge 124/2007*, Giurisprudenza Costituzionale (2008), 4047.

[36] C.Cost. sent. 106/2009, *cons. dir.*, §3 quoting C.Cost. sent. 86/1977, May 24, 1977 (published June 1, 1977).

[37] C.Cost. sent. 106/2009, *cons. dir.*, §3 quoting C.Cost. sent. 86/1977.

[38] C.Cost. sent. 106/2009, *cons. dir.*, §3 quoting C.Cost. sent. 86/1977.

[39] C.Cost. sent. 106/2009, *cons. dir.*, §3.

[40] Id., §8.

affirmed that the Tribunal of Milan could not be criticized by the Prime Minister for the advancement of the trial.[41] And it also rejected the action brought by the prosecutors, affirming that, in fact, no violations of their constitutional prerogatives had occurred, since the Prime Minister had not obstructed their investigation concerning the crime of abduction of Mr. Abu Omar.[42]

Equally, in the *ratio decidendi* of its ruling, the CCost rejected the conflict of allocation of powers raised by the Tribunal of Milan, who complained that the Prime Minister's assertion of a State secret privilege was over-broad and prevented the judiciary from undertaking its constitutional duty to investigate crimes and provide justice.[43] After clarifying that the State secret "does not concern the crime of abduction '*ex se*' [in itself] – which can therefore be investigated by the judicial authority – but rather, on the one hand, the relationship between the Italian intelligence services and the foreign agencies and, on the other, the organizational structure and the operative functions of the [Italian intelligence]"[44], the CCost forcefully affirmed that "any judicial review on the decision to invoke a State secret privilege has to be excluded."[45] According to the CCost, the precedents and the legislation made it clear that the Prime Minister was entitled to a wide discretion in this field, and could not be subject to the scrutiny of ordinary courts.

With a deferential move, however, the CCost also abdicated its constitutional role in reviewing the action of the executive branch even in the context of a conflict of 'allocation of powers':[46] In the words of the CCost, in fact, "the judgment on what means are considered as most appropriate or simply useful to ensure the security of the State belongs to the Prime Minister under the control of Parliament."[47] According to the CCost, its only task was that of checking "the existence or inexistence of the conditions that justify the invocation of the State secret privilege, but

[41] Id., §11.
[42] Id., §6.1.
[43] Id., §12.
[44] Id., §12.3.
[45] Id., §12.4.
[46] Cfr. Tommaso F. Giupponi, *Servizi di informazione e segreto di Stato nella legge n. 124/2007*, Forum Quaderni Costituzionali (2009), 46; Adele Anzon, *Il segreto di Stato ancora una volta tra Presidente del Consiglio, autorità giudiziaria e Corte costituzionale*, Giurisprudenza costituzionale (2009), 1020.
[47] C.Cost. sent. 106/2009, *cons. dir.*, §12.4.

not to judge on the merits of the reasons that prompted its invocation."[48] By bowing to the autonomous evaluation of the government, under the control of Parliament, and by restricting its review to an external oversight of the respect of the procedures provided by the law, the CCost embraced a "kind of political question doctrine."[49] As a consequence of its decision indeed, once the executive branch invokes the State secret privilege in court, this "effectively bars the judiciary"[50] from continuing its investigation and prosecutions and no scrutiny on the decision of the Prime Minister can be exercised even by the CCost.[51]

After the decision of the CCost, in April 2009 the criminal trial restarted in Milan: on the basis of the ruling of the CCost, however, the prosecutors and the judge were not allowed to use the evidence concerning the relationship between the SISMI and the CIA, regarded by the executive branch as a State secret. *De facto*, the existence of a State privilege represented an insurmountable hurdle that significantly shaped the outcome of the trial.[52] When on 4 November 2009 the judge read his decision,[53] he condemned 23 CIA agents of US nationality for the crime of abduction of Mr. Abu Omar, sanctioning them from three to five years imprisonment; he acquitted three US citizens for reasons of diplomatic immunity; and was forced to dismiss the indictment against all the Italian defendants (agents of the SISMI) since the existence of a State secret privilege prevented the assessment of their co-responsibility in the crime. As the US had already made clear that it would not extradite its officers to Italy,[54] however, not a single individual

[48] Id.

[49] Giupponi (cit. at 46), 47.

[50] C. Cost., sent. 106/2009, *cons. dir.* §4.

[51] Cfr. the critical remarks of Fabrizio Ramacci, *Segreto di Stato,* salus rei publicae *e "sbarramento" ai p.m.*, Giurisprudenza costituzionale (2009), 1015 and Giovanni Salvi, *La Corte e il segreto di Stato*, Cassazione Penale (2009) 3729.

[52] Messineo (supra note 5), 1043. Cfr. also Giovanni Bianconi, *Il processo dimezzato dalla mannaia del segreto di Stato*, Il Corriere della Sera, Oct. 1, 2009, at 27; Antonio Tarasco, *Il Caso* Abu Omar *e l'eccesso di motivazione dell'atto giudiziario: dei diversi modi di straripamento del potere*, Corriere Giuridico 6 (2010), 827.

[53] Trib. Milano, IV sez. pen., Nov. 4, 2009 (published Feb. 1, 2010).

[54] At this day, the Italian Ministry of Justice has not forwarded any official request of extradition of the accused and convicted persons to the US. The US Dept. of State, however, had already made clear on Feb. 28, 2007 that, if requested, it would not extradite its citizens to Italy for trial or punishment. Cfr. Craig Whitlock, *US Won't Send CIA Defendants to Italy: Abduction Probes Hurt Anti-Terrorism Efforts, State Dept. Official*

will be subject to criminal sanctions for the extraordinary rendition of Mr. Abu Omar.[55]

The decision of the Tribunal of Milan has been appealed both by the defendant and by the Office of the public prosecutor,[56] and is now pending before the Criminal Division of the Appeal Court of Milan. In light of the broad recognition of the State secret privilege offered in a final and binding decision by the CCost, however, it is unlikely that overhauls will take place on appeal.[57] Indeed, the decision of the CCost to acknowledge a wide discretion to the executive branch in invoking the State secret privilege to prevent the disclosure of information regarding the organization of the Italian intelligence agencies and its relationship with foreign agencies (namely, the CIA) – without any possibility of judicial review on the legitimacy of the Prime Minister's decision to classify a piece of information as a State secret – jeopardizes the ability of the judiciary to perform its task and forecloses the possibility for the individuals subjected to extraordinary renditions to obtain a remedy before domestic courts.[58]

Says, The Washington Post, March 1, 2007. On the problem of judicial immunity for foreign intelligence agents cfr. Paola Gaeta, Extraordinary renditions *e immunità dalla giurisdizione penale degli agenti di Stati esteri: il caso* Abu Omar, Rivista di Diritto Internazionale (2006) 126.

[55] Of course, the fact that, in any case, the *Abu Omar* prosecution has eventually led to the condemnation of 23 CIA agents for their involvement in the unlawful abduction and secret rendition of Mr. Abu Omar, can be regarded as a positive step in the re-establishment of the rule of law in the post-9/11 era. Cfr. David Cole, *Getting Away With Torture*, N.Y. Rev. of Books 1 (2010), 39. The fact that nobody will be really punished for the wrongdoing, however, is problematic and unsatisfactory from a human rights perspective.

[56] Cfr. Biagio Marsiglia, *Abu Omar, appello della Procura: "Il segreto di Stato? Ambiguo"*, Il Corriere della Sera, March 20, 2010.

[57] Messineo (cit. at 5), 1043.

[58] According to the Code of criminal procedure It., Art. 74, natural persons who have suffered a damage from a crime, can bring a civil action in tort against the responsible person or, alternatively, can join the criminal proceedings activated by the Office of the public prosecutor against the indicted persons. In this case, the trial judge, beside being responsible of ascertaining the criminal liabilities, can also award pecuniary damages to the victim of a crime. The decision of the trial judge on the issue of civil liability is however determined by its ruling on the question of criminal responsibility. Mr. Abu Omar had joined the criminal proceedings activated by the Office of the public prosecutor of Milan. Because of the application of the State secret privilege, he will be unable to claim damages from the Italian intelligence officers who allegedly cooperated in its abduction and extraordinary rendition.

The position of the Italian judiciary, however, is not unique on the international scene.

3. The *El-Masri* case

In the past years, a number of cases concerning the policy of extraordinary renditions have been litigated in several jurisdictions around the world.[59] This confirms a trend by which counter-terrorism strategies adopted in the aftermath of 9/11 have been increasingly subjected to judicial scrutiny to ensure compatibility with principles of fundamental rights.[60] Nevertheless, while the judiciary, both in the US and Europe, has reaffirmed its role in reviewing the action of the political branches e.g. on the issues of indefinite detention and economic sanctions against suspected terrorists,[61] its involvement in the field of extraordinary renditions and State secrecy has been much less spectacular so far. Limiting the assessment to only those cases that took place before US federal courts in which litigation about extraordinary renditions was interwoven with the executive branch claim of a State

[59] For a general and updated overview of litigation of cases of extraordinary renditions in the US cfr. Louis Fisher, *The American Constitution at the End of the Bush Presidency*, in Developments in American Politics (Bruce Cain et al. eds., 2010), 238, 249 ff who also highlights how criminal investigations of cases of extraordinary renditions had been activated in a number of European States (beside Italy cfr.: Denmark, Germany, Ireland, Norway, Sweden) and are currently pending in Spain. Civil proceedings have advanced, unsuccessfully, also in the United Kingdom. Cfr: *Mohamed v. Secretary of State* [2008] EWHC 2048 (Admin.); *aff'd by Mohamed v. Secretary of State* [2009] EWHC 152 (Admin.) on which see Sudha Setty, *Litigating Secrets: Comparative Perspective on the State Secret Privilege*, 75 Brooklyn L. Rev. (2009) 201, 240.

[60] Cfr. Federico Fabbrini, *The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice*, 28 Yearbook Eur. L. (2009), 664.

[61] Cfr. e.g. *Lakhdar Boumediene et al. v. George W. Bush et al.* 553 US 723 (2008) (on the constitutional rights to *habeas corpus* for aliens detained as enemy combatants in Guantanamo); European Court of Justice, Joined Cases C-402/05 P & C-415/05 P *Yassin A. Kadi & Al Barakaat International Foundation v. EU Council and Commission* judgment of 3 September 2008, nyr (on the fundamental right to due process and fair proceeding for the individuals and entities targeted by United Nations counter-terrorism sanctions aiming at freezing their financial properties) – on which see David Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, Cato Supreme Court Rev. (2008), 47 and Giacinto della Cananea, *Global Security and Procedural Due Process of Law Between the United Nations and the European Union:* Kadi & Al Barakaat, 15 Columbia J. Eur. L. (2009), 519.

secret privilege,[62] I will consider in particular the *El-Masri* case,[63] as a meaningful comparative example of a trans-Atlantic pattern of judicial retreat in the face of the invocation by the government of the State secret privilege for reasons of national security.

Mr. Khaled El-Masri, a German citizen of Lebanese descent, was seized, under suspicion of being a terrorist, by the Macedonian authorities on the 31 December 2003 and rendered to the US intelligence, who secretly transferred him to Afghanistan. There, he was detained incommunicado for several months and allegedly tortured and subjected to inhumane and degrading treatment. In May 2004, however, the CIA apparently came to the conclusion that there had been a mistake of identity and that it was detaining an innocent man. Mr. El-Masri was therefore flown back to Europe and allegedly abandoned on the side of an Albanian road. [64] On 6 December 2005, Mr. El-Masri filed a civil case in the US federal District Court for the Eastern District of Virginia, suing the former director of the CIA, certain unknown agents of the CIA and the corporations owning the private jets with which the CIA had operated his extraordinary rendition to and from Afghanistan as well as their personnel.[65] As already underlined, since in the US prosecutors are embedded in the executive branch, it is mainly through actions in tort

[62] Other cases in which plaintiffs brought civil proceedings claiming damages for their subjection to extraordinary rendition and in which the US government sought dismissal of the suit by invocation of the State secret privilege have been resolved in favour of the government on other grounds. Cfr. *Arar v. Ashcroft* 414 F. Supp. 2d 250 (E.D.N.Y. 2006); *aff'd by Arar v. Ashcroft* 532 F. 3d 157 (2d Cir. 2008); *aff'd by, En banc Arar v. Ashcroft* US App. LEXIS 23988 (2d Cir. 2009); *cert. denied by Arar v. Ashcroft* 130 S. Ct. 3409 (2009).

[63] *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006); *aff'd by El-Masri v. US* 479 F.3d 296 (4th Cir. 2007); *cert. denied El-Masri v. US* 552 US 947 (2007). But cfr. also *Mohamed v. Jeppesen Dataplan Inc.*, 539 F. Supp. 2d 1128 (N.D. Ca. 2008); *rev'd by Mohamed v. Jeppesen Dataplan Inc.*, 536 F.3d 992 (9th Cir. 2009); *aff'd by, En banc Mohamed v. Jeppesen Dataplan Inc.*, 2010 US App. LEXIS 18746 (9th Cir. 2010); *cert. denied Mohamed v. Jeppesen Dataplan Inc.*, 2011 U.S. LEXIS 3575.

[64] For an account of the facts involving Mr. El-Masri and for an overview of the judicial proceedings that followed cfr. Fisher (supra note 3), 1442; Daniel Huyck, *Fade to Black:* El-Masri v. United States *Validates the Use of the State Secret Privilege to Dismiss "Extraordinary Renditions" Claims*, 17 Minn. J. Int'l L. (2005), 435.

[65] Cfr. Complaint, *El-Masri v. Tenet*, No. 05-cv-1417 (E.D. Va) (available at: http://www.aclu.org/files/safefree/rendition/asset_upload_file829_22211.pdf (last accessed June 10, 2011)).

like the one brought by Mr. El-Masri that practices such as the CIA extraordinary renditions program can be subject to judicial scrutiny.[66]

Mr. El-Masri asserted three separate causes of action. To begin with, he claimed violations of his constitutional rights of due process as recognized in the V Amendment to the US Constitution.[67] In addition, he asserted a violation of the international legal norms prohibiting prolonged arbitrary detention as well as those prohibiting cruel, inhuman and degrading treatment – as incorporated in US law through the Alien Tort Statute (ATS). The ATS – a provision originally codified in the 1789 Judiciary Act[68] – has been interpreted as granting federal courts jurisdiction over lawsuits brought by aliens seeking damages for violations of norms of customary international law,[69] since the decision of the US Court of Appeal for the Second Circuit in *Filartiga v. Peña-Irala*.[70] The Supreme Court, despite clarifying that only a limited set of international norms can be justiciable under the ATS, has substantially confirmed this construction in *Sosa v. Alvarez-Machain*[71] – hence making the ATS an effective mechanism to review violations of peremptory norms of international human rights law,[72] such as the one alleged by Mr. El-Masri.

While the case was still at the pleading stage, however, in March 2006,

[66] Cfr. text accompanying supra nt. 7.

[67] Cfr. US Const., V Am (due process clause). On the due process clause cfr. also John Orth, Due Process of Law (2003). Cfr. also *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971) (recognizing an implied cause of action for an individual whose constitutional rights have been violated by federal agents).

[68] 1 Stat. 73-93: now codified as 28 USC § 1350: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

[69] Cfr. Louis Henkin, *International Law as Law in the US*, 82 Mich. L. Rev. 1560 (1984) and Harold H. Koh, Filártiga v. Peña-Irala*: Judicial Internalization of the Customary International Law Norm Against Torture, in* International Law Stories (John Noyes et al. eds., 2007). As it is well know, however, this interpretation of the ATS is criticized by the revisionist school of foreign relations law: cfr. Curtis Bradley & Jack Goldsmith, Foreign Relations Law (2006), ch. 7.

[70] *Filartiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).

[71] *Sosa v. Alvarez-Machain* 542 US 692 (2004).

[72] For a more general reflection on the role that international human rights law can play in domestic adjudication cfr., in a comparative perspective, also Theodor Orlin & Martin Scheinin, *Introduction*, in The Jurisprudence of Human Rights: A Comparative Interpretive Approach (Martin Scheinin et al. eds., 2000), 3 and Henry Steiner, Philip Alston & Ryan Goodman, International Human Rights in Context: Law Politics Morals (2007, 3rd ed.) 1177.

the US administration (then headed by President Bush) filed a statement of interest in the case and moved to intervene in the suit, requesting that the District Court dismiss the case on claim of the existence of a State secret privilege.[73] In the US, the State secret privilege is not based on a Congressional act but rather derives from the common law jurisprudence of US federal courts.[74] Since the 1953 decision of the US Supreme Court (USSCt) in *US v. Reynolds*,[75] the government has been granted the privilege to resist court-ordered disclosure of information during litigation if "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."[76] According to the USSCt, to be valid, the assertion of the privilege has to be formally claimed by the executive branch. The court must, on a case by case basis, "satisfy[] itself that the occasion for invoking the privilege is appropriate."[77] As essentially an evidentiary privilege, the State secret forecloses the disclosure in court of the information it protects, but does not automatically compel the dismissal of an entire case.[78]

On 12 May 2006, the judge of the District Court heard arguments by the parties and ordered that the government's claim of the State secret privilege was valid. As a consequence, it granted motion to dismiss the case, bringing Mr. El-Masri's action to an abrupt end before the case could even move to discovery.[79] In the opinion of the District Court, "a two step analysis"[80] was necessary in order to decide on the question at stake. First, the court had to determine as a threshold matter whether the

[73] Cfr. Federal Rules of Civil Procedure, Rule 24(a) (right of intervention in a pending procedure).

[74] Cfr. Edward Liu, *The State Secret Privilege and Other Limits on Litigation Involving Classified Information*, Congressional Research Service, R40603, May 28, 2009. Cfr. also Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the Reynolds Case (2006) and Robert Pallito & William Weaver, Presidential Secrecy and the Law (2007).

[75] *US v. Reynolds*, 345 US 1 (1953).

[76] Id., at 10.

[77] Id., at 11.

[78] From this point of view the State secret privilege as framed in *Reynolds* differs from the absolute bar to judicial inquiry established by the USSCt in *Totten v. US* 92 US 105 (1876) (declaring *tout court* nonjusticiable a case brought against the federal government to enforce a contract of espionage). Cfr. Liu (supra note 74), 5.

[79] Fisher (supra note 3), 1444; Setty (supra note 59), 215.

[80] *El-Masri v. Tenet (El-Masri I)*, 437 F. Supp. 2d 530 (E.D. Va. 2006), at 10.

assertion of the State secret privilege by the government was valid in the case at hand. Second, if the assertion of the privilege was valid, the court had to consider whether dismissal of the suit was required or whether the case could nonetheless proceed in some fashion that would adequately safeguard the State secrets.

On the first issue, the court began by stating that in its view "the privilege derived from the President's constitutional authority over the conduct of [the US] diplomatic and military affairs."[81] Following the litmus test established by the US Supreme Court in *Reynolds*, then, the District Court affirmed that the executive had the duty to formally invoke the privilege and that the judiciary ought to "carefully scrutinize"[82] its assertion. However, deferring to the greater expertise in national security matters of the government, the court declared itself to be satisfied in the case at hand that the executive had demonstrated "a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."[83] On the basis of these governing principles, the court held that the executive's claim was valid. In the court's view, Mr. El-Masri's complaint alleged "a clandestine intelligence program, and the means and method the foreign intelligence services of this and other countries used to carry [it] out [...]. And […] any admission or denial of this allegations by the defendant in this case would […] present a grave risk of injury to national security."[84]

Having acknowledged that the executive's assertion of the State secret privilege was valid, the District Court moved to the second issue, considering whether the case could nonetheless be tried without compromising sensitive information. According to the court, "in the instant case, this question [could be] easily answered in the negative. To succeed on his claim, Mr. El Masri would have to prove that he was abducted, detained and subjected to cruel and degrading treatment, all as part of the US' extraordinary rendition program [and…] any answer to the complaint by the defendants risks the disclosure of specific details about the rendition argument."[85] In the end, despite regretting that "the dismissal of the complaint [would] deprive[] Mr. El-Masri of an

[81] Id., at 11.
[82] Id., at 14.
[83] Id., at 14 quoting *Reynolds*, at 10.
[84] *El-Masri I*, at 17-18.
[85] Id., at 22.

American judicial forum for vindicating his claim,"[86] the District Court concluded that "controlling legal principles require[d] that in the present circumstances, Mr. El-Masri's private interest must give way to the national interest in preserving State secrets."[87]

The decision of the District Court was appealed by Mr. El-Masri to the US Court of Appeal for the Fourth Circuit, which on November 2006 reviewed the case *de novo*. On 2 March 2007, however, an unanimous three-judge panel of the Circuit Court affirmed the decision of the lower court. Just like the District Court, the judges began their opinion holding that the State secret, despite being an evidentiary common law privilege, "performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign affairs responsibility."[88] The court also reasserted the *Reynolds* test – stating that the balanced decision of the USSCt required the judiciary to remain "firmly in control of deciding whether an executive assertion of the State secret privilege is valid, but subject to a standard mandating restraint in the exercise of its authority."[89] It finally confirmed that dismissal of a case was appropriate when "the circumstances make clear that sensitive military information will be so central to the subject matter of the litigation."[90]

Testing the case of Mr. El-Masri on these controlling principles, the Circuit Court argued that the litigation at hand could not but threaten the disclosure of relevant State secrets. Although Mr. El-Masri had contended that most of the evidence sealed by the government as State secrets had already been made public, the court held that "advancing a case in the court of public opinion, against the US at large, is an undertaking quite different from prevailing against specific defendants in a court of law."[91] In the judges' view, "to establish a *prima facie* case, [Mr. El-Masri] would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him. Such a showing could be made only with evidence that exposes how the

[86] Id., at 24.
[87] Id., at 24.
[88] *El-Masri v. US (El-Masri II)*, 479 F.3d 296 (4th Cir. 2007), at 14.
[89] Id., at 18.
[90] Id., at 22 quoting *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005), at 348.
[91] *El-Masri II*, at 31.

CIA organizes, staffs and supervises its most sensitive intelligence operations."[92] In addition, the court emphasized that, because of the State secret privilege, the defendants could not properly defend themselves. In light of all this, thus, the lower court had not erred in dismissing the claim.[93]

In the final section of its opinion, the Circuit Court dwelled on what role the judiciary should have when reviewing the assertion of the State secret privilege by the executive branch. Despite remarking that "the State secret doctrine does not represent a surrender of judicial control over access to the courts,"[94] the judges openly admitted that their function had to be "modest"[95] and that they would exceed their power if they could "disregard settled legal principles in order to reach the merit of an executive action […] on the ground that the President's foreign policy has gotten out of line."[96] Echoing the District Court, finally, the judges of the Fourth Circuit "recognize[d] the gravity of [the] conclusion that Mr. El-Masri must be denied a judicial forum for his complaint"[97] but pleaded that in the present circumstances the fundamental principle of access to court had to bow to reasons of national security.[98] Mr. El-Masri appealed the decision of the Circuit Court to the USSCt. As is well known, however, review of a case by the highest US federal court is not automatic. On 9 October 2007, the USSCt denied the *writ of certiorari*, effectively terminating Mr. El-Masri's suit.[99]

Meanwhile, the *ratio decidendi* of the Fourth Circuit in the matter of State secret privilege is setting a standard toward which other federal courts in the US are converging. Hence, on 8 September 2010, the US Court of Appeal for the Ninth Circuit, reviewing *en banc* a previous decision in the *Mohamed* case – another civil suit brought by an individual

[92] Id., at 31.
[93] As the critics of the decision have noticed, *de facto* the Fourth Circuit in its decision conflates the *Reyonlds* and the *Totten* doctrines ensuring that whenever the government asserts a State secret privilege, the suit will be unable to move forward. Cfr. Huyck (supra note 64), 456.
[94] *El-Masri II*, at 41.
[95] Id., at 43.
[96] Id., at 43.
[97] Id., at 45.
[98] Cfr. Fisher (supra note 3), 1447; Huyck (supra note 64), 454.
[99] *El-Masri v. US*, 552 US 947 (2007). Cfr. Aziz Huq, *Supreme Court El-Masri Rejection Undermines Accountability for Renditions*, Jurist, Oct. 12, 2007.

allegedly subjected to extraordinary rendition against an airline corporation, Jeppesen Dataplan, accused of arranging secret flights for the CIA – granted motion to dismiss the case at the pre-trial phase, as requested by the new Obama administration for reasons of State secrecy.[100] Despite a forceful dissent by five judges, and notwithstanding the majority's awareness that the case presented "a painful conflict between human rights and national security,"[101] the Circuit Court – drawing largely on the *El-Masri* decision of the Fourth Circuit[102] – in the end "reluctantly"[103] concluded that the State secret privilege was asserted validly and barred the suit from continuing.[104] On 16 May 2011, then, the USSCt again denied *certiorari* to review the Ninth Circuit decision, bringing to a close also the *Mohamed* litigation.[105]

In conclusion, as the previous analysis highlights, a consistent feature characterizes the case law of the US federal courts in litigation involving cases of extraordinary rendition: whenever the government asserts the existence of a State secret privilege, courts step back and, by granting

[100] See the critical Editorial, *Torture is a Crime, Not a Secret*, The New York Times, Sept. 9, 2010, A30, NY ed. The new Administration has established a new policy and procedures for the assertion of the State secret privilege in court in order to ensure greater accountability. In particular, the Dept. of Justice has committed itself to heightened the standard under which it will recur to the privilege, affirming that it will recur to it only to the extent necessary to protect national security against the risk of significant harm. Moreover, it has tailored the effects of its invocation, affirming that whenever possible it will allow cases to move forward in the event that the sensitive information at issue is not critical to the case - hence facilitating court review. The final decision on the assertion of the State secret privilege, then, is centralized in the Attorney General (Dept. of Just., Press release 09-1013, Sept. 23, 2009 available at *http://www.justice.gov/opa/pr/2009/September/09-ag-1013.html* (last accessed June 10, 2011)). These new policies however have been criticize for being insufficient: cfr. e.g. Fisher (supra note 59), 254. See also Editorial, *Shady Secrets*, The International Herlad Tribune, Oct. 1, 2010, at 6.

[101] *Mohamed v. Jeppesen Dataplan Inc.*, 2010 US App. LEXIS 18746 (9th Cir. 2010), at 65.

[102] The Ninth Circuit rejected the conflation between the *Reynolds* and the *Totten* test that the Fourth Circuit had reached in *El-Masri II*. This difference, however, did not affect the conclusion of the case which was identical in both suits. Moreover, the dissenters contested that the majority had really avoided the conflation between the two tests made also by the Fourth Circuit, arguing (contrary to the opinion of the majority) that in no way could the *Totten* bar be relevant in the present case. Cfr. *Mohamed* (Hawkins J. dissenting), at 86.

[103] *Mohamed*, at 4.

[104] Id., at 47 quoting *El-Masri II*, at 312.

[105] *Mohamed v. Jeppesen Dataplan Inc.*, 2011 U.S. LEXIS 3575. See also Editorial, *Malign Neglect*, The International Herald Tribune, May 24, 2011, at 8.

motion to dismiss the actions for civil liability, ensure *de facto* immunity from judicial scrutiny to the executive branch and its intelligence agencies.[106] From this point of view, the jurisprudence of the US federal courts – as developed in particular in *El-Masri* (and recently confirmed in *Mohamed*) – shows striking similarities with the position of the Italian CCost in *Abu Omar*. As seen in the previous Section, indeed, the highest Italian court ensured a wide discretion to the Chief executive in invoking the State secret privilege and renounced any meaningful role for either the ordinary judges or for itself in scrutinizing whether the assertion of the privilege by the Prime Minister was warranted or not.[107] A common pattern of judicial deference therefore emerges from the comparative assessment of courts' decisions concerning extraordinary renditions and the State secret privilege both in Italy and the US.[108]

Of course, any such interim conclusion shall be qualified by a number of caveats. Several differences between the Italian and US cases have already been highlighted. To begin with, US courts were facing actions for damages, whereas the *Abu Omar* case was a decision of a Constitutional Court umpiring conflicts between branches of government. The diversities of these proceedings as well as the specificities of the cases considered may have had some bearing on the decisions. In addition, while the outcome of *El-Masri* (and *Mohamed*) was the absolute impossibility for the plaintiffs to continue their claims, in Italy – notwithstanding the decision of the CConst in *Abu Omar* – the trial before the Tribunal of Milan was able to continue and a first judgment (now appealed) was delivered in November 2009. I have already underlined, however, how this ruling was largely shaped by the application of the State secret privilege:[109] none of the Italian intelligence agents who

[106] Cfr. Fisher (supra note 3), 1447-1448; Huyck (supra note 64), 437. Cfr. also *Mohamed* (Hawkins J. dissenting), at 83 criticizing that the majority of the Court for "transform[ing] an evidentiary privilege into an immunity doctrine."

[107] Cfr. Giupponi (supra note 46), 46; Messineo (supra note 5), 1040.

[108] As well demonstrated by Laura Donohue, *The Shadow of the State Secret*, 159 U. Pa. L. Rev. (2010), 77 with regard to the US, because of the deference demonstrated by the judiciary, the use of the State secret privilege is increasing also in litigation which is not related to national security. A spill-over effects, in other words, is taking place and transforming the privilege from an evidentiary rule to a powerful litigation tools in the hands of the government and of private actors. Similar concerns have also been voiced in Italy by Giupponi (supra note 46).

[109] See supra text accompanying nt. 52.

were indicted for the crime of abduction could be tried, given the impossibility of using evidence which the government had sealed as secret against them, and only CIA officers of US nationality (for whom the State secret privilege was not asserted) were eventually condemned. In any case, they will not be subject to punishment, since the US refuses extradition.

More generally, then, differences in constitutional structure between a parliamentary system with a centralized Constitutional Court, like Italy, and a system of separated institutions sharing power as in the US, should not be ignored. However – to follow the methodological insights of Ran Hirshl – analyzing "cases that are different on all variables that are not central to the study but match in terms that are, thereby emphasizing the significance of consistency on the key independent variable in explaining the similar readings on the dependent variable"[110] is a sound exercise of comparison. The purpose of this work is to demonstrate that the State secret privilege trumps domestic litigation concerning cases of extraordinary renditions. The *Abu Omar* case in Italy was taken as a starting point and compared with case law from the US federal courts. Despite the differences in constitutional structure, mechanisms of litigation and technical outcomes in the specific cases, a consistent pattern of judicial retreat before the assertion of the State secret privilege has emerged in both countries. Since this state of affairs is troubling from the perspective of the protection of fundamental rights, possible avenues for redress need to be investigated.

4. The role of legislatures: constitutional checks and balances

Whereas both in Italy and the US courts at the domestic level have surrendered judicial control over the executive's assertion of the State secret privilege to trump litigation concerning cases of extraordinary rendition,[111] both the Italian CCost and the US federal courts have invoked in a remarkably converging mode the intervention of the legislative branch as a check against possible abuses of the State secret privilege by the government and as a preferential source of redress for

[110] Ran Hirshl, *The Question of Case Selection in Comparative Constitutional Law*, 53 Am J. Comp. L. (2005), 125, 139 who defines this kind of comparative exercise as "the most different cases logic" of comparison.
[111] Fisher (supra note 3), 1447.

the individuals allegedly subjected to extraordinary renditions. I have already remarked[112] how in the *Abu Omar* case the CCost refused to exercise any review on the merits of the executive's claim, arguing instead that "it belongs to Parliament to scrutinize the way in which the Prime Minister exercises his power of asserting the State secret privilege, since it is Parliament, as the locus of popular sovereignty […], which represents the institutions which can better oversee the highest and more pressing decisions of the executive."[113] Equally, in *El-Masri*, the District Court, while acknowledging that if Mr. El-Masri had suffered a wrong he "deserves a remedy," [114] clarified "that the only source of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch."[115] The same reasoning was echoed by the Circuit Court in *Mohamed*.[116]

It has already been contested whether the judiciary can abdicate its role while calling for greater legislative oversight and remedial action.[117] As Amanda Frost has argued with regard to the US, for example, the jurisdiction of federal courts has been assigned in wide terms by Congress itself,[118] which may have deliberately used the judicial branch as a check on the abuse of the executive power.[119] "By declining to hear cases [because of the executive's assertion of the State secret privilege], courts are not just diminishing their own role in the constitutional structure, they are eliminating a constitutionally prescribed method through which Congress can curb the executive."[120] In similar terms, Tommaso Giup-

[112] Cfr. supra text accompanying nt. 47.
[113] C.Cost. sent. 106/2009, *cons. dir.*, §12.4.
[114] *El-Masri I*, at 29.
[115] Id., at 29.
[116] *Mohamed*, at 59.
[117] For a general discussion whether political mechanisms or judicial ones should be preferred in the oversight of the executive branch in times of emergency cfr. Fiona de Londras & Fergal Davis, *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*, 30 Oxford J.L.S (2010), 19. For an overview of political oversight mechanisms in parliamentary and separation of powers systems cfr. also Mark Tushnet, *The Political Constitution of Emergency Powers: Parliamentary and Separation of Powers Regulation*, Int'l J. L. in Context (2008), 275.
[118] Cfr. US Const, Art. III, sec. 2, cl. 2 (jurisdiction of federal courts as Congress shall make).
[119] Amanda Frost, *The State Secret Privilege and Separation of Powers*, 75 Fordham L. Rev. (2007), 1931.
[120] Id., 1957. Cfr. also Victor Hansen, *Extraordinary Renditions and the State Secret*

poni has criticized the decision of the Italian CCost to reject a review on the merits of the existence of the reasons that, in the *Abu Omar* case, justified the invocation of the State secret privilege by the Prime Minister:[121] as he highlighted, Law 124/2007 – the statute enacted by Parliament to regulate the State secret privilege – provides that no "State secret privilege can be invoked [by the government] before the Constitutional Court."[122] It is hence reasonable to think that this provision proved the intent of Parliament to have the CCost oversee the action of the executive branch in State secrecy matters.[123]

Beyond the question of whether the judicial abdication of a supervisory role once the executive asserts a the State secret privilege is consistent with the function that the Constitution, or the legislature itself, has entrusted to courts, in this Section I examine two other interrelated issues arising from the judicial call for greater involvement of the legislature. First, I assess whether – *in constitutional terms* – legislatures may meaningfully contribute to overseeing the action of the executive branch in matters of State secrecy. To this end, I highlight the differences that exist between parliamentary systems and separation of powers systems. Second, I evaluate whether – *in factual terms* – Parliament and Congress have played any role in the cases at stake, by considering whether the *Abu Omar* and the *El-Masri* sagas have prompted significant domestic reactions from the Italian and US legislative branches. As I will try to demonstrate, the answer to the first question (can the legislatures do something?) already highlights several fallacies in the judicial call for greater legislative involvement. It is, however, the answer to the second question (did the legislatures do something?) that proves how constitutional checks and balances can sometimes be insufficient to curb the executive branch and provide redress to individuals who have suffered human rights violations.

The capacity of the legislature to check and balance the executive branch depends, among others, on the constitutional structure of the

Privilege: Keeping Focus on the Task at Hand, 33 N.C.J. Int'l L. & Com. Reg. (2008), 629, 652 who argues that "there is a role for both Congress and the courts in th[e] process" of executive oversight.

[121] Giupponi (supra note 46), 47.

[122] Law 124/2007, Art. 41(8).

[123] On the basis of this provision, in other words, the CCost should be entitled to access all information which the government has sealed as secrets. Cfr. also Giovanni Salvi, *Alla Consulta il ruolo di ultimo garante*, 40 Guida al diritto (2007), 85.

government and the political and electoral system.[124] Historically, in a parliamentary democracy, the executive derives its authority from Parliament – which is the only branch of government directly elected by the people. As such, any misguided decision by the Prime Minister and his government could be, in the abstract, rectified by the intervention of Parliament, through a vote of no-confidence or other measures provided by parliamentary procedures.[125] This scheme, however, largely fails to account for the contemporary reality of parliamentary systems. In a centuries-long development, the balance of powers between the executives and the legislatures has shifted, substantially increasing the power of the former over the latter.[126] A number of political and constitutional developments have favoured this transformation, including the rise of political parties, the personalization of electoral politics as well as the codification in a number of basic laws – in the attempt to rationalize the 'virtues and vices' of a parliamentary regime – of special powers for the executive government.[127]

[124] A vast literature on comparative government is available both in political science and constitutional law scholarship. Cfr. in general Giovanni Sartori, Comparative Constitutional Engineering (1997); Mark Tushnet & Vicki Jackson, Comparative Constitutional Law (2003, 2nd ed.), ch. VII(A) but see also Leopoldo Elia, *Governo (Forme di)*, in Enciclopedia del diritto, XIX (1970), *ad vocem* 634; Maurice Duverger, Institutions politiques et droit constitutionnel. Vol 1. Les Grands Systèmes Politiques (1970); Juan Linz, *Presidential or Parliamentary Democracy: Does it Make a Difference?*, in The Failure of Presidential Democracy. Vol. 1. Comparative Perspectives (Juan Linz & Arturo Valenzuela eds., 1994), 3.

[125] This traditional understanding of a parliamentary system was famously codified in the 1789 French Declaration of the Rights of Men and Citizens, Art. 6, which famously proclaimed that "la loi est l'expression de la volonté générale." On this understanding, not only the executive was simply requested to *execute* the will of Parliament but also courts, were prevented from interpreting the law and, of course, from reviewing its compatibility with the Constitution. Cfr. Michel Troper, *Justice constitutionnelle et démocratie*, Revue française de droit constitutionnel (1990), 31.

[126] For an historical account of the transformations of parliamentary regimes in Europe cfr. Augusto Barbera, *I parlamenti. Un'Analisi comparativa* (1999) and Giuliano Amato, *Forme di Stato e forme di governo* (2006). An impressive reconstruction of the developments of government in human history is provided by the three volumes of Samuel Finer, *The History of Government from the Earliest Time* (1997).

[127] Cfr. Stefano Ceccanti, *La forma di governo parlamentare in trasformazione* (1997). The attempt to 'rationalize' the parliamentary regime has been more remarkable in France with the enactment of the 1958 Constitution. Cfr. e.g. Const. Fr. Art. 44(3) (power of government to ask Parliament to express a single vote on bill proposed by the Prime Minister), Art. 48(2) (power of government to decide the agenda of the bills on which

In Europe, England pioneered these transformations through its conventions on the law of the Constitution, largely because of its simple-plurality electoral system.[128] Despite some delays, however, also in continental Europe – at least since the post-war period – the executives have ceased to be the mere administrative agents of Parliament and have become the real masters of the political process.[129] Leaders of political parties now compete in popular elections and in the case of victory enjoy a parliamentary majority through which they can pursue their political agenda.[130] True enough, in many European countries, among which Italy,[131] the existence of a proportional electoral system – as well as

Parliament shall vote for two weeks a month), Art. 49(3) (power of government to enact a bill *as if* it was approved by Parliament by engaging its political responsibility). Since the 1962 constitutional amendment and the introduction of a direct election of the President of the Republic, however, the French parliamentary regime is generally described as a semi-presidential system. Cfr. Maurice Duverger, *A New Political System Model: Semi-Presidential Government*, 8 European J. Pol. R. (1980), 165. On the rationalization of parliamentary regimes in other European countries cfr. also Arnaud Martin, *Stabilité gouvernementale et rationalisation du régime parlementaire espagnol*, Revue française de droit constitutionnel (2000), 27 (on Spain); Eugeni Tanchev, *Parlamentarianism Rationalized*, 2 E. Eu. Const. Rev. (1993), 33 (on Central and Eastern European countries) and the literature quote infra in nt. 133.

[128] The classical account of these transformations is provided by Walter Bagheot, The English Constitution (1867). On the English model of 'cabinet government' the contemporary literature is infinite: cfr. *inter alia*, the recent works of Anthony King, The British Constitution (2007) and Richard Hefferman & Paul Webb, *The British Prime Minister: Much More Than "First Among Equals"*, in *The Presidentialization of Politics. A Comparative Study of Modern Democracies* (Thomas Poguntke & Paul Webb eds., 2007), 26.

[129] Cfr. in a comparative perspective Anthony King, *Modes of Executive-Legislative Relations: Great Britain, France and West Germany*, 1 Legislative Studies Quartlerly 1 (1976), 11; Sabino Cassese, *Il potere esecutivo nei sistemi parlamentari di governo*, Quaderni Costituzionali (1993), 141; Augusto Barbera & Carlo Fusaro, *Il governo delle democrazie* (2001).

[130] Cfr. in a comparative constitutional law perspective Giuseppe Morbidelli, Lucio Pegoraro, Antonio Reposo & Mauro Volpi, *Diritto pubblico comparato* (2005), ch. V and, from a political science perspective Lieven de Winter, *The Role of Parliament in Government Formation and Resignation*, in Parliaments and Majority Rule in Western Europe (Herbert Döring ed., 1995), 115.

[131] Italy has had a proportional electoral system from 1948 to 1993 but a mixed electoral system (with a prevailing majoritarian component) between 1993 and 2005. In 2005, a bill reintroduced a proportional system: nevertheless, the consolidation of a bipolar political competition seems (despite several steps backwards and numerous uncertainties) under way. For an introduction to the current electoral legislation cfr. Carlo Fusaro, *Party System Developments and Electoral Legislation in Italy (1948-2009)*, 1 Bulletin of Italian Politics

practices of 'consociational democracy' – have favoured the formations of coalition governments with a plurality of parties in which the Prime Minister has a weaker position.[132] Precisely to counter this role, however, many European Constitutions have assigned to the executive branch a special status in Parliament, strengthening its capacity to set the agenda and making a vote of no-confidence by the legislature unlikely or extremely difficult.[133]

In a system of separation of powers as in the US (often – inappropriately – called a presidential system),[134] instead, the executive branch is endowed with an autonomous popular legitimacy from that of Congress.[135] Hence, the latter cannot (save through the impeachment procedure)[136] challenge the actions, no matter how misguided, of the former by terminating his office.[137] The reverse, however, is also true: the President cannot affect the operations of Congress and force it to follow his lead, e.g. by threatening a new anticipated election.[138] In the US constitutional system, the political branches of government are separate and enjoy an independent electoral legitimacy.[139] In the intent of the Founding fathers, this institutional arrangement was adopted to ensure a reciprocal balance between the legislature and the executive, on the

(2009), 49. On the most recent developments cfr. also Andrea Morrone, *Governo, opposizione, democrazia maggioritaria*, Il Mulino 4 (2003), 637 and Vincenzo Lippolis, *Riforma della legge elettorale e forma di governo*, Quaderni Costituzionali (2007), 342.

[132] For a classical distinction between 'majoritarian' and 'consociational' democracy cfr. Arend Lijphart, Patters of Democracy (1999).

[133] Cfr. e.g. Basic Law FRG, Art. 67 (constructive no-confidence vote) – on which see Karl-Rudolf Korte & Manuel Fröhlich, *Politik und Regieren in Deutschland* (2004); Const. Sp., Art. 113 (constructive no-confidence vote) – on which see Eduardo Virgala Foruria, *La moción de censura en la Constitución de 1978* (1988).

[134] For the celebrated definition of the US system of government as "separated institutions sharing power" cfr. Richard Neustadt, *Presidential Power and the Modern President* (1990, rev. ed.), 29.

[135] Cfr. US Const. Art. II, sec. 1, cl. 3 (election of the President).

[136] Cfr. US Const. Art. II, sec. 4 (removal from office of the President).

[137] Cfr. US Const. Art. II, sec. 1, cl. 1 *juncto* Am. XXII (term of President office four years renewable once).

[138] Cfr. US Const. Art. I, sec. 2, cl. 1 (term of Representatives two years) and Art. I, sec. 3, cl. 1 (term of Senators six years).

[139] Theodor Lowi & Benjamin Ginsberg, *American Government: Freedom and Power* (1990); Louis Fisher, *American Constitutional Law. Vol 1. Constitutional Structures: Separated Powers and Federalism* (1995, 2nd ed.); Laurence Tribe, *American Constitutional Law*, Vol. 1 (2000, 3rd ed.), ch. 2.

assumption that mutual controls would avoid the establishment of an arbitrary government.[140] The structure of the US constitutional system, otherwise, requires the branches to share power:[141] and since the President must obtain the consent of Congress to implement his agenda, the legislature plays a role in shaping the policies of the executive and in controlling its implementation.

Also in the US, however, the "constitutional dialogues"[142] between the political branches of government have largely evolved over time, significantly departing from what the framers had in mind when the US Constitution was enacted in 1787.[143] In particular, two developments have affected the US institutional arrangement: i.e. the consolidation of a two-party system and the transition from a Congressional to a Presidential government. Party politics and interests representation have made the activity of both branches subject to electoral competition based on alternative political agendas[144] and have increased the possibility of a 'divided government' – the Presidency and Congress being controlled by different political parties.[145] The rise of the modern Presidency,[146] in the New Deal era and especially during the Cold War,

[140] Cfr. *Federalist Papers*, LI (Madison) stating that the US Constitution is crafted to ensure that "ambition must be made to counteract ambition". As it is well known a lively debate is taking place in the US about the virtues and vices of the US separation of powers system. Compare Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L. Rev. (2000), 633 and Steven Calabresi, *The Virtues of Presidential Government*, 18 Const. Comm. (2001), 51.

[141] Cfr. Neustadt (supra note 134), 29.

[142] I draw the expression from Louis Fisher, Constitutional Dialogues: Interpretation as Political Process (1988).

[143] Cfr. e.g. Lowi – Ginsberg (supra note 139); Fisher (supra note 139) and especially the paramount work of Bruce Ackerman, *We the People: Vol. 2. Transformations* (1998). For an historical account of the 'constitutional vision' of the founding period cfr. also Gordon Wood, *The Creation of the American Republic 1776-1787* (1998, 2nd ed); Akhil Reed Amar, *America's Constitution. A Biography* (2006).

[144] On the rise of party politics in the US cfr. the classic works of Walter Burnham, *Party System and the Political Process*, in The American Party Systems (William Chambers & Walter Burnham eds., 1967), 292 and Leon Epstein, *Political Parties in the American Mold* (1986).

[145] On 'divided government' cfr. David Mayhew, *Divided We Govern: Party Control, Lawmaking and Investigations* 1946-2002 (2005, 2nd ed.) and Morris Fiorina, *Divided Government* (1996).

[146] Cfr. the classical Arthur Schlessinger Jr., *The Imperial Presidency* (1973) but see also Thomas Cronin, *The Invention of the American Presidency* (1989).

has produced an extraordinary expansion of the administrative apparatus[147] and, in reaction to this, the establishment of new Congressional mechanisms of review, e.g. through oversight committees and the practice of holding public hearings.[148]

These phenomena have affected the capacity of the legislatures, both in Europe and the US, to oversee the executive's action. In parliamentary systems, because of the *continuum* between parliamentary majorities and executive governments, the role of Parliament in the oversight of the executive branch has sharply diminished. Nowadays, rather, the 'opposition in Parliament' – i.e. the political parties which do not share the platform on which the government was elected – has the role to check the actions of the Prime Minister and to bring to the attention of the public at large the inadequacies of the executive.[149] Following the British practice of the 'shadow cabinet', a number of Continental European countries have found it convenient to formalize this model, but not always successfully.[150] In the US system of separation of powers, the ability of the political branches to check each other has, for structural reasons, traditionally been greater: nevertheless, Congress's role in controlling the action of the executive increasingly depends on political contingency – with greater scrutiny in times of 'divided government' and a more constrained stand in the periods in which both Congress and the Presidency are dominated by the same political majority.[151]

[147] Cfr. Cass Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. (1987), 415 and Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Columbia L. Rev. (1984) 574.

[148] On the role of Congress *vis-à-vis* the Presidency cfr. Nelson Polsby, *Congress and the Presidency* (1986) and more recently Nelson Polsby, *How Congress Evolves* (2004).

[149] Cfr. Robert Dahl, *Patterns of Opposition*, in Political Opposition in Western Democracies (Robert Dahl ed., 1966), 332.

[150] On the shadow cabinet in Britain cfr. David R. Turner, *The Shadow Cabinet in British Politics* (1969) and Giuseppe de Vergottini, *Lo Shadow Cabinet. Saggio sul rilevo costituzionale dell'opposizione nel regime parlamentare britannico* (1973). For the institutionalization of a 'statute of the opposition' in other European countries cfr. Ignacio Fernandez Sarasola, *El control parlamentario y su regulación en el Ordenamiento español*, Revista Española de Derecho Constitucional (2000) (on Spain); Giovanni Guzzetta, *La fine della centralità parlamentare e lo statuto dell'opposizione*, in *Come chiudere la transizione?* (Stefano Ceccanti & Salvatore Vassallo eds., 2004), 301 (on Italy); Pierre Avril, *Le statut de l'opposition: un feuilleton inachevé (Les articles 4 et 51-1 de la Constitution)*, Les Petits Affiches, Dec. 19, 2008, at 9 (on France).

[151] Cfr. Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. (2006), 2311.

The difficulties faced by legislatures in overseeing executive action seem even greater in the field of counter-terrorism, where the executive can either claim a constitutional role in ensuring national security or greater expertise and ability to act swiftly.[152] A burgeoning literature has accounted for the tremendous, and largely unchecked, expansion of Presidential powers in the US after 9/11.[153] It should be emphasized, however, that the strengthening of the executive branch has also been remarkable in parliamentary systems "which are formally adhering to the legislative model"[154] – that is, those systems which require anti-terrorism initiatives, with an impact on human rights, to be based on special legislation establishing concrete rules and specific powers for the executive government.[155] These general considerations on the role of legislatures are well reflected in the institutional mechanisms and political practices existing both in Italy and the US with regard to parliamentary or congressional oversight of the actions of the executive branch in matters of State secrecy.

In Italy, Law 124/2007 established a Parliamentary Committee on the Security of the Republic (COPASIR) to ensure a legislative oversight of executive action in matters of intelligence agencies and the State secret privilege.[156] COPASIR is composed of five members of the *Camera dei*

[152] Cfr. *inter alia* Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 Harv. L. Rev. (2005), 2637; Bruce Ackerman, *Before the Next Attack. Preserving Civil Liberties in an Age of Terrorism* (2006); Paolo Bonetti, *Terrorismo, emergenza e costituzioni democratiche* (2006); Andreas Paulus & Mindia Vashakmadze, *Parliamentary Control Over the Use of Armed Forces Against Terrorism: in Defence of the Separation of Powers*, 38 Netherland Yearbook Eur. L. (2007), 113.

[153] Cfr. e.g. Fisher (supra note 3); Frederick Schwarz & Aziz Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (2007); Scott Matheson Jr., *Presidential Constitutionalism in Perilous Times* (2009).

[154] Daphne Barak-Erez, *Terrorism Law Between the Executive and Legislative Models*, 57 Am. J. Comp. L. (2009), 877, 891.

[155] On the difficulties of Parliaments (and the opposition in it) to check the executive branch in times of national crises cfr. Yigal Mersel, *How Patriotic Can the Opposition Be? The Constitutional Role of the Minority Party in Times of Peace and During National Crises*, NYU Global Law Working Paper 2 (2004); Dirk Haubrich, *September 11, Anti-Terrorism Laws and Civil Liberties: Britain, France and Germany Compared*, in Government and Opposition (2003), 3. For a more general discussion about the presidentialization of constitutional systems in the post-9/11 era cfr. also Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: the Post-9/11 Globalization of Public Law and the International State of Emergency*, in The Migration of Constitutional Ideas (Sujit Choundry ed., 2007) 347.

[156] The COPASIR has replaced the Parliamentary Committee established under Law

Deputati – i.e. the lower Chamber of Parliament – and five members of the *Senato* – i.e. the higher Chamber of Parliament – nominated by the Presidents of the two branches of the legislature, and it ensures the equal representation of both the members of the majority party (or coalition parties) in Parliament and of the opposition. To guarantee a meaningful involvement of the minority parties and an effective check on the activity of the government, the law requires that the President of COPASIR be chosen among the members of the opposition.[157] COPASIR has oversight, advisory and investigative functions[158] and shall be regularly informed by the executive of all his decisions.[159] COPASIR can access, under a duty of confidentiality, security files[160] and shall report to Parliament every year on the advancement of its activities.[161]

Nevertheless, as a matter of fact, the powers of COPASIR to review the decisions of the executive branch in issues of State secrecy may be quite limited.[162] Indeed, the Prime Minister – when the sharing of information with COPASIR may jeopardize "the security of the Republic, the relationship with foreign States, the course of ongoing operation or the security of sources of information and agents of the secret services"[163] – can assert a State secret privilege and refuse the disclosure of documents even to COPASIR. Law 124/2007 requires that the executive not invoke a State secret privilege when COPASIR is investigating institutional misconducts by intelligence officers:[164] however, in fact, this would seem to be only a minor hurdle, as it is up to the executive itself to decide whether the COPASIR's request can be rejected. Against the decision of the Prime Minister, the only weapon in the hands of COPASIR is to refer

801/1977 named COPACO. Cfr. Paolo Bonetti, *Aspetti costituzionali del nuovo sistema di informazione per la sicurezza della Repubblica*, Diritto e società (2008), 251 and Francesco Sidoti, *The Italian Intelligence Service*, in *Gehaimdienste in Europa* (Thomas Jäger & Anna Daun eds., 2009), 78.

[157] Law 124/2007, Art. 31 (structure and composition of COPASIR).

[158] Law 124/2007, Art.s 31, 32 and 34 (functions of COPASIR).

[159] Law 124/2007, Art. 33 (duty of government to inform COPASIR).

[160] Law 124/2007, Art. 36 (duty of COPASIR not to disclose secrets).

[161] Law 124/2007, Art. 35 (duty of COPASIR to report yearly its activities to Parliament).

[162] Cfr. Giupponi & Fabbrini (supra note 14), 458.

[163] Law 124/2007, Art. 31(8).

[164] Law 124/2007, Art. 31(9) (prohibition for government to refuse disclosure of information to COPASIR when the latter is investigating misconducts by intelligence agencies).

the matter to Parliament, "for consequential evaluations,"[165] following the traditional logic of parliamentary control of executive action. For the reasons mentioned above, however, this hardly seems satisfactory.

In the US, both houses of Congress have established intelligence oversight Committees.[166] No legal framework, however, regulates the assertion of the State secret privilege by the executive and its control by the legislature.[167] During the 111th Congress (in times of 'divided government'), bills were advanced either in the House of Representative or in the Senate, attempting to impose more stringent conditions on the invocation of the privilege by the President and requiring the Attorney General to report to the Congressional intelligence Committees on cases in which the executive had asserted the State secret privilege in court.[168] Nevertheless, none of the proposed measures has yet been enacted (and the arrival of a new administration, of the same political party of the congressional majority has slowed reform efforts during the 112th Congress). In addition, the previous US President strongly opposed any reform of the State secret privilege, claiming that any regulation of the matter by the legislature would be inconsistent with his constitutional role of ensuring national security, and warning that it could "refuse to comply with the legislated state secrets framework based on the theory of constitutional avoidance."[169]

[165] Law 124/2007, Art. 31(10).

[166] Cfr. 50 USC § 413 (reports to Congressional Committees of intelligence activities and anticipated activities). On the role of the intelligence oversight Committees in controlling the executive branch in counter-terrorism policies and its difficulties cfr. Anne O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 Cal. L. Rev. (2006), 1655. Note that just before the electoral recess of fall 2010 Congress approved the Intelligence Authorization bill – H.R. 2701 – the first piece of legislation in the field of intelligence oversight of the last six years, to ensure greater disclosure to the Congressional Committee of secret CIA activity by the President. The bill is now waiting Presidential signature to enter into force. Critics, however, have voiced concern about the effectiveness of the act. Cfr. Greg Miller, *With Bill, Congress Reasserts Oversight of Secret CIA Activities*, The Washington Post, Oct. 1, 2010, at A22.

[167] Cfr. also Heidi Kitrosser, *Congressional Oversight of National Security Activity: Improving Information Funnels*, 29 Cardozo L. Rev. (2008), 1049.

[168] Cfr. H.R. 984 (State Secret Protection bill); S. 417 (State Secret Protection bill) on which see Liu (supra note 74), 12 and Setty (supra note 59), 218.

[169] Setty (supra note 59), 223-224. For an explanation of the theory of 'constitutional avoidance' and for its criticism cfr. Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 Columbia L. Rev. (2006) 1189. Departing from the stand of the previous Administration, however, the new policies and procedures elaborated by the

In this context, it should come as no surprise that the Italian Parliament and the US Congress did not take steps in reaction to the *Abu Omar* and *El-Masri* cases. Despite the decision of the Italian Prime Ministers to raise three different conflicts of allocation of powers before the CCost on the claim that the judicial investigation in the *Abu Omar* case had threatened the disclosure of allegedly secret information concerning the relationship between the CIA and the SISMI, the COPASIR (both at the time of the centre-left government of Mr. Prodi and during the conservative government of Mr. Berlusconi) neither requested explanations from the executive branch concerning the alleged abduction of Mr. Abu Omar nor activated autonomous investigations to verify whether the action of the Prime Minister in barring criminal prosecutions of SISMI agents was justified. By the same token, the US Congress failed to react to the broad assertion of State secret privilege in litigation concerning cases of extraordinary renditions.[170] Even though these events were among the motivating factors in pushing the US legislator (but only once the Democratic Party gained majority in 2007) to advance reforms regarding the State secret privilege,[171] Congress neither ordered any independent investigation on the alleged wrongdoing nor took any other effective remedial actions.[172]

From this point of view, an often cited model[173] is the independent Commission established by the Canadian government to investigate the involvement of the Canadian security forces in the extraordinary rendition of Mr. Maher Arar – a Canadian national born in Syria who was rendered by the US to Syria under suspicion of being a terrorist suspect and allegedly subjected to torture and other inhumane and degrading treatments.[174] It is remarkable, however, that although the

Dept. of Justice on the assertion of the State secret privilege require the Attorney General to provide periodic reports on all cases in which the privilege is asserted to the appropriate oversight Committees in Congress (Dept. of Just., Press release 09-1013, Sept. 23, 2009 available at *http://www.justice.gov/opa/pr/2009/September/09-ag-1013.html* (last accessed June 10, 2011)). See also supra nt. 100.

[170] Cfr. Jared Perkins, *The State Secrets Privilege and the Abdication of Oversight*, 21 BYU J. Pub. L. (2007), 235, 259 who highlights how "Congress is unlikely to be the champion of the cause of suspected terrorists (even though it is now clear that label is not applicable to Mr. Arar, nor, most likely, to Mr. El-Masri)."

[171] Setty (supra note 59), 213.

[172] Cfr. Cole (supra note 55), 39.

[173] Cfr. Tushnet (supra note 117), 284; Cole (supra note 55), 39.

[174] For an account of the facts involving Mr. Arar and for an overview of the judicial

Canadian authorities had only the (albeit relevant) role of sharing inaccurate and unreliable intelligence with the CIA, while US authorities bore the (almost entire) responsibility for the unlawful decision to detain Mr. Arar and secretly remove him to Syria, it was Canada – and not the US – that set up a special inquiry to report on the case and eventually decided to award Mr. Arar a significant payment in compensatory damages.[175] Hence, not only was Mr. Arar unable to obtain judicial redress in the US:[176] The US executive and Congress consistently refused to provide an alternative remedy, among others by declining any invitation by the Arar Commission to participate in the inquiry.[177]

In conclusion, as the analysis above highlights, there are serious concerns about the role of the legislative branch in ensuring a meaningful constitutional check on possible abuses by the executive branch in the assertion of a State secret privilege. Although both in the US and in Italy courts have stepped back and invoked "*nonjudicial* relief,"[178] institutional design and political dynamics in both parliamentary and separation of powers systems make legislative oversight of executive action difficult. It goes without saying that any such conclusion is tentative and should not be over-generalized. Professor Mark Tushnet has rightly argued that, "even in settings quite unfavourable to the development of constraints on the flow of power to executive government during emergencies, political control *can* work, and sometimes might work in real time more effectively that judicial controls."[179] In the specific case under review here,

proceedings that followed cfr. Fisher (supra note 3), 1436; Erin Craddock, *Torturous Consequences and the Case of Maher Arar: Can Canadian Solutions "Cure" The Due Process Deficiencies in the US Removal Proceedings?*, 93 Cornell L. Rev. (2008), 621

[175] Cfr. the two reports of the *ad hoc* Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006); *A New Review Mechanisms for the RCMP's National Security Activity* (2006). Cfr. also Cornel Marian, *Learning from Others: The Scalia-Breyer Debate and the Benefit of Foreign Sources of Law to US Constitutional Interpretation of Counter-Terrorism Initiatives*, 4 Int'l J. Const. L. 1 (2010), 5, 11 who contrasts the *Arar* case with *El-Masri*.

[176] Cfr. supra nt. 62.

[177] Cfr. Kent Roach, *Review and Oversight of National Security Activities and Some Reflection on Canada's Arar Inquiry*, 29 Cardozo L. Rev. (2007), 53, 82 who highlights that "the Canadian inquiry might have been even more effective had the US and Syrian governments not declined the inquiry's invitation to participate."

[178] *Mohamed*, at 58-59 (emphasis in the original).

[179] Tushnet (supra note 117), 287 (emphasis in the original).

however, both the Italian Parliament and the US Congress have proved too weak in counteracting the recourse by the executive to the State secret privilege. Additional means of redress need therefore to be considered.

5. The role of supranational courts: multilevel protection of fundamental rights

The previous analysis has demonstrated that both in the US and in Italy, domestic courts have been unwilling or unable to review the assertion of the State secret privilege by the executive, even when the cases pending in their dockets concern allegations of extraordinary renditions and severe infringements of human rights. The capacity of domestic legislatures to oversee and curb the action of the executive branch, otherwise, has turned out to be limited both in the Italian parliamentary system and in the US system of separation of powers. If this is so, what can be an alternative venue of redress for individuals like Mr. Abu Omar and Mr. El-Masri, who have suffered severe infringements of their most basic rights – being abducted and secretly renditioned to be interrogated and detained in countries which are widely known to practice torture and other inhumane and degrading treatments?

In this section I examine the role that could be played by institutions who have jurisdiction to hear individual human rights claim *beyond the State*.[180] To this end, I first outline – *in constitutional terms* – the main institutional and jurisprudential features of the supranational systems for the protection of fundamental rights which operate in the European and the American contexts. Secondly, I analyze – *in factual terms* – whether these human rights arrangements can provide an effective mechanism to

[180] On the concept of multilevel protection of fundamental rights cfr. Ingolf Pernice & Ralf Kanitz, *Fundamental Rights and Multilevel Constitutionalism in Europe,* Walter Hallstein-Institute paper 7 (2004) now reprinted in The Emerging Constitution of the European Union (Deidre Curtin et al. eds., 2004); Giovanni Guzzetta, *Garanzia multilivello dei diritti e dialogo tra le Corti nella prospettiva di un* Bill of Rights *europeo*, in *Tutela dei diritti fondamentali e costituzionalismo multilivello. Tra Europa e Stati nazionali* (Antonio d'Atena & Pierfrancesco Grossi eds., 2004), 155. On the idea of constitutionalism beyond the State more generally cfr. instead European Constitutionalism Beyond the State (Joseph H.H. Weiler & Marlene Wind eds., 2004); Matthias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism In and Beyond the State*, in Ruling the World: Constitutionalism, International Law and Global Governance (Jeffrey Dunoff & Joel Trachtman eds., 2009), 258.

relief the human rights violations here at stake. As I will try to demonstrate, the assessment of the first issue reveals a major difference between Italy and the US: contrary to the latter, indeed, Italy – as the other European countries – is subject to a stringent supervision by supranational human rights bodies which can hold it liable for its illicit conduct. These structural differences affect the second issue, concerning the practical ability of supranational courts to offer an additional forum in which cases of extraordinary renditions and State secrecy, such as the one alleged by Mr. Abu Omar and Mr. El-Masri, can be effectively adjudicated and redressed.

The capacity of supranational institutions to ensure an additional forum in which human rights claim can be heard depends, among others, by institutional as well as jurisprudential factors.[181] In the European context, Italy is bound by the European Convention on Human Rights (ECHR) – an international treaty adopted under the aegis of the Council of Europe in the aftermath of World War II (WWII) and later integrated by several additional protocols[182] which has been now ratified by 47 European States (including all the 27 Member States of the European Union)[183]. The ECHR codifies a bill of basic civil and political rights that

[181] The article will focus here only on the role 'regional' human rights institutions. Both the US and European countries are then parties to global human rights treaties, including the 1966 UN International Covenant on Civil and Political Rights (ICCPR) and are therefore subject to the universal periodic review of the UN Human Rights Council. Cfr. e.g. *Report of the USA submitted to the UN High Commissioner for Human Rights* (2010). Equally, the US and European countries are parties to the UN Convention Against Torture (CAT). However, the oversight and adjudicatory mechanisms established by these UN human rights regimes are not comparable with those operating in the framework of regional organizations such as the ECHR. The US, in addition, is not a party to the Optional Protocol of the ICCPR, on the basis of which a supervisory international body may hear petitions submitted by private individuals alleging violation by State Parties of the rights recognized in the ICCPR. Specifically on the CAT obligations binding the US and its impact in the field of extraordinary renditions cfr. instead Michael J. Garcia, *Renditions: Constraints Imposed by the Laws on Torture*, Congressional Research Service, RL32890, Sept. 8, 2009.

[182] On the historical reasons that explain the creation of a human rights architecture beyond the States in post-WW II Europe cfr. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 Int'l Org. (2000), 217; Stephen Gardbaum, *Human Rights and International Constitutionalism*, in *Ruling the World: Constitutionalism, International Law and Global Governance* (Jeffrey Dunoff & Joel Trachtman eds., 2009), 233.

[183] The European Union (EU) is endowed of its own human rights catalogue – the Charter

Contracting Parties are obliged to respect *vis-à-vis* all individuals falling under their jurisdiction. Furthermore, to ensure the effectiveness of these provisions, the ECHR has also established a powerful institutional machinery.[184] The heart of this institutional system is represented by the ECtHR, an independent judicial body empowered to hear and adjudicate individual human rights applications against the Signatory States. The ECtHR is assisted by a Council of Ministers (in which the representatives of the governments of the Contracting Parties sit), which overviews the enforcement of the ECtHR's decisions; it also used to be flanked by a Human Rights Commission (ECommHR) – which evaluated the admissibility of the individual applications and proposed a friendly settlement of the disputes.

As membership of the ECHR steadily expanded to the countries of Central and Eastern Europe in the late 1990s, however, the institutional devices for the protection of fundamental rights have been refined and the role of the ECtHR has been strongly enhanced.[185] In particular, since

of Fundamental Rights (CFR) – and has established an extremely effective judicial body: the European Court of Justice. The CFR however (still) applies just to the EU institutions and to the EU Member States only when their acts fall under the scope of application of EU law. Compare Joseph H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: on the Conflict of Standard and Values in the Protection of Human Rights in the European Legal Space*, in *The European Union and Human Rights* (Nanette Neuwahl & Allan Rosas eds., 1995) now reprinted in The Constitution of Europe (1999), ch. 3 and Martin Shapiro, *Rights in the European Union: Convergent with the USA?*, in The State of the EU. Vol. 7: With US or Against US? European Trends in American Perspective (Nicolas Jabko & Craig Parsons eds., 2005) 378. As such, the role of EU is still limited in the field under review in this paper. However on the most recent trends in the use of the State secret privilege at the EU level cfr.: Emilio de Capitani, *Unione Europea e segreto di Stato: un quadro normativo ancora in piena evoluzione*, Astrid Rassegne, Sep. 6, 2010.

184 On the institutional machinery of the ECHR cfr. Antonio Bultrini, *Il meccanismo di protezione dei diritti fondamentali istituito dalla Convenzione europea dei diritti dell'uomo. Cenni introduttivi*, in La Convenzione europea dei diritti dell'uomo. Profili ed effetti nell'ordinamento italiano (Bruno Nascimbene ed., 2002), 20. Cfr. also Alec Stone Sweet, *Sur la constitutionnalisation de la Convention européenne des droits de l'homme*, 80 Revue trimestrielle des droits de l'homme (2009), 923 who argues that the ECHR, despite its Treaty-like nature, has undergone tremendous transformations in recent years and may be today accounted as a trans-European Constitution. Cfr. also *Loizodou v. Turkey* (Application No. 15318/89) [ECtHR] judgment on the preliminary objections March 23, 1995, at §75 (defining the ECHR as the constitutional instrument of the European public order).

185 Robert Harmsen, *The Transformation of the ECHR Legal Order and the Post-Enlargement Challenges Facing the European Court of Human Rights*, in The National

the enactment of the 11th additional Protocol to the ECHR in 1998, the ECtHR and the ECommHR have been merged and the jurisdiction of the former over individual petitions has been made compulsory and automatic for all Contracting Parties. As a consequence, "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the ECHR or the protocols thereto"[186] may bring an individual action in front of the ECtHR.[187] To be able to commence legal proceedings before the ECtHR, the *ressortissants* must have exhausted all national remedies unsuccessfully.[188] If the ECtHR finds that there has been a violation of the ECHR and its protocols it can afford just satisfaction to the injured party,[189] essentially by compelling a State found guilty of breaching ECHR rights to pay pecuniary damages.[190]

The human rights machinery constraining the US at the supranational level, on the contrary, is much weaker.[191] Indeed, despite having been among the promoter of the creation, on the ashes of WWII, of new international institutions and of the adoption of a universal Bill of rights (i.e. the Universal Declaration of Human Rights),[192] for several reasons

Judicial Treatment of ECHR and EU Laws. A Comparative Constitutional Perspective (Giuseppe Martinico & Oreste Pollicino eds., 2010), 27.

[186] ECHR, Art. 34 (allegation of victim status).

[187] These phenomena have *de facto* transformed the ECtHR in a supra-national Constitutional court: Compare Jean François Flauss, *La Cour européenne des droit de l'homme est-elle une Cour constitutionnelle?*, Revue Française Droit Constitutionnel (1998), 711 and Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 H.R.L.Rev. (2002), 161.

[188] ECHR, Art. 35 (exhaustion of prior domestic remedies).

[189] ECHR, Art. 41 (just satisfaction).

[190] Cfr. Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Orders*, in A Europe of Rights (Helen Keller & Alec Stone Sweet eds., 2008), 3; Giuseppe Franco Ferrari, *National Judges and Supranational Laws. On the Effective Application of EU Law and ECHR*, in *The National Judicial Treatment of ECHR and EU Laws. A Comparative Constitutional Perspective* (Giuseppe Martinico & Oreste Pollicino eds., 2010), 21.

[191] Note that the Inter-American human rights system is not, in itself, structurally weaker than the European one. Simply, the US is not subject to the adjudicatory and enforcement mechanisms set up under the ACHR (which are instead quite similar to the one of the ECHR). Cfr. text accompanying infra nt. 194.

[192] On the leading role of the US in establishing international human rights institutions cfr. Mery Anne Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (2001) and Philippe Sands, Lawless World. America and the Making and Breaking of Global Rule (2005).

the US still systematically refuses to subject itself to the external scrutiny of a human rights institution akin to the ECtHR.[193] At the regional level, the American Human Rights Convention (ACHR) has been signed but not yet ratified by the US, with the consequence that the Inter-American Court of Human Rights (IACtHR) has no jurisdiction over individual human rights claims raised against the US.[194] The US has only approved the 1948 American Declaration of the Rights and Duties of Men (ADRDM) and is a Party to the Organization of the American States (OAS), whose Charter institutes an Inter-American Commission on Human Rights (IACommHR).[195] Nevertheless, the Statute of the IACommHR – adopted by the OAS General Assembly in 1979 – specifies that the powers of the IACommHR are extremely limited in relation to those States which have not signed the ACHR.[196]

In fact, with respect to these countries, the IACommHR has only a general function to monitor the human rights situation, to promote respect for fundamental rights and to raise human rights awareness, but it has no power to adjudicate individual applications.[197] Specifically, after the exhaustion of national remedies, private parties may file a complaint to the IACommHR alleging a violation of the ADRDM.[198] The

[193] On the position of the US *vis-à-vis* international human rights institutions compare Harold H. Koh, *Restoring America's Human Rights Reputation*, 40 Cornell Int'l L. J. (2007), 635 with Jed Rubenfeld, *The Two World Orders*, in European and US Constitutionalism (Georg Nolte ed., 2005), 280.

[194] On the Inter-American human rights system generally cfr. Scott Davidson, *The Inter-American Human Rights System* (1997) and on the IACtHR specificall cfr. Juan Antonio Trevieso, *La Corte Interamericana de Derechos Humanos opiniones consultivas y fallos: la jurisprudencia de la Corte Interamericana de Derechos Humanos* (1996).

[195] On the IACommHR cfr. Robert Goldman, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 H.R. Quarterly (2009), 856 and Maria B. Galli & Ariel Dulitzky, *A Comissão Interamericana de Direitos Humanos e o seu papel central no Sistema Interamericano de Proteção dos Direitos Humanos*, in *O Sistema Interamericano de Direitos Humanos e o direito brasileiro* (Luiz Flávio Gomes &, Flávia Piovesan eds., 2000), 56.

[196] Compare IACommHR Statute, Art. 19 (powers of IACommHR *vis-à-vis* States which are Parties to the ACHR) with Art. 20 (powers of IACommHR *vis-à-vis* States which are not Parties to the ACHR).

[197] Cfr. Thomas Burgenthal & Douglass Cassel, *The Future of the Inter-American Human Rights System*, in *El Futuro del Sistema Interamericano de Protection de los derechos humanos* (Juan Mendez & Francisco Cox eds., 1998), 539.

[198] Cfr. IACommHR Statute, Art. 24 *juncto* IACommHR Regulation, Art. 51 (procedure

IACommHR, nevertheless, can only "examine [the] communications submitted to it and any other available information, […] address the government of any member state not a Party to the [ACHR] for information deemed pertinent by this Commission, and [..] make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights."[199] No judicial decision with binding effect on the Signatory State can therefore be adopted by the IACommHR, even when it finds a violation of the fundamental rights enshrined in the ADRDM. Rather, the role of the IACommHR is that of providing an international forum in which the action of the States can be subject to public scrutiny – with the hope that 'naming and shaming' might put some political pressure on the State under review to change its policies.[200]

The differences in the institutional structure between the supranational human rights system binding Italy and the one binding the US directly affect the possibility for the individuals who allege that they have been subject to extraordinary renditions and who were not able to make their case in Italian or US fora – because of the assertion of a State secret privilege by the government trumping the possibility of domestic litigation – to obtain redress before a supranational body. Indeed, the catalogue of rights codified in the European and American human rights systems include a number of largely overlapping provisions which are of relevance for individuals who have been subject to extraordinary renditions – *inter alia*, by protecting a procedural right of access to court,[201] prohibiting torture and inhumane treatment,[202] and safeguarding to the right to liberty and respect for private life.[203] Nevertheless, the pervasive

for petitioning the IACommHR claiming a human rights violations by a State which is not a Party to the ACHR).

[199] IACommHR Statute, Art. 20(b).

[200] Steiner, Alston & Goodman (supra note 72), 1033; Goldman (supra note 195), 887.

[201] Compare ECHR, Art. 6 (right to a fair trial) and Art. 13 (right to an effective remedy at the domestic level) with ADRDM Art. XVIII (right to a fair trial) and Art. XXVI (right to due process).

[202] Compare ECHR, Art. 2 (right to life) and Art. 3 (prohibition of torture and inhumane and degrading treatment) with ADRDM Art. I (right to life) and Art. XXV (right to humane treatment).

[203] Compare ECHR Art. 5 (prohibition of detention without trial) and Art. 8 (protection of private life) with ADRDM Art. XXV (protection against arbitrary arrest) and Art. V (protection of private life).

mechanisms of adjudication operating in the framework of the ECHR appear to be more effective *vis-à-vis* the regional system binding the US. Yet, other dynamics beyond institutional design needs to be taken into account when evaluating the greater capacity of the European human rights architecture in filling possible gaps in the protection of individual rights at the domestic level.

Also the role of a supranational court such as the ECtHR, in fact, is constrained by several substantive and procedural factors. To begin with, most rights protected under the ECHR are not absolute, and rather can be restricted by the Contracting Parties in the interest of national security, subject to respect for the principle of proportionality.[204] In addition, Art. 15 ECHR affirms that "in times of war or public emergency threatening the life of the nation,"[205] Signatory States may formally derogate from their ECHR obligations (save for the respect of the right to life, the prohibition of torture and of slavery) to the extent strictly required by the exigencies of the situation.[206] Finally, the ECtHR has, over time, developed in its case law a specific doctrine – known as the margin of appreciation – which allows Contracting Parties to enjoy a certain discretion when their measures are subject to review.[207] Although not applied systematically, this doctrine commands judicial restraint and *de*

[204] On the rise of proportionality analysis (also) in the jurisprudence of the ECtHR see Alec Stone Sweet & Jud Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 Columbia J. Transnat'l L. 1 (2008), 73, 75 and Giacinto della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, in *Studies on European Public Law* (Luis Ortega Alvarez ed., 2005), 68.

[205] ECHR Art. 15.

[206] Cfr. e.g. ECtHR, *Branningan and McBride v. United Kingdom* (Applications No. 14553/89 & 14554/89) [ECtHR], judgment of May 26, 1993 (holding that national authorities are in a better position than the ECtHR to decide on the existence of an emergency) but see also See *Aksoy v. Turkey* (Application No. 21987/93) [ECtHR], judgment of July 3, 1996 (holding that the measures adopted under Art. 15 ECHR exceeded what was strictly required by the exigencies of the situation). In the literature cfr. then Eva Brems, *The Margin of Appreciation in the Case-Law of the European Court of Human Rights*, 56 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1996), 240 and Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 H. R. Quarterly (2001), 625.

[207] On the doctrine of the margin of appreciation more generally cfr. Howard Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996); Palmina Tanzarella, *Il margine di apprezzamento*, in *I diritti in Azione* (Marta Cartabia ed., 2007), 143.

facto may leave to the Contracting Parties wide room for manoeuvre in national security matters beyond any oversight by the ECtHR.[208]

Despite these constraints, however, the analysis of the case law demonstrates that the ECtHR has attempted to limit recourse by national governments to the State secret privilege, even in the field of counter-terrorism.[209] Starting with *Tinnelley & Sons Ltd v. UK*,[210] in a series of cases (mainly relating to Northern Ireland anti-terrorism legislation) the ECtHR has made clear that the assertion of the State secret privilege (there, to prevent litigation in cases of discrimination in employment and public procurements) was not compatible with the right of access to court enshrined in Art. 6 ECHR.[211] Recently, in *Devenney v. UK* the ECtHR has formulated once again the proportionality test that it adopts in these cases. The ECtHR in fact, "accepts that the protection of national security is a legitimate aim which may entail limitations on the right of access to a court, including withholding information for the purposes of security"[212], but preserves for itself the power "to consider whether there is a reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicant's right of access to a court or tribunal."[213]

In balancing the competing interests in the case at hand, the ECtHR

[208] Whether the margin of appreciation doctrine should considered as a positive feature of the ECHR system has been the object of debate: compare Eyal Benvenisti*, Margin of Appreciation, Consensus and Universal Standards*, 31 NYU J. Int'l L. & P. (1999), 843 and Paolo Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 Am. J. Int'l L. 1 (2003), 38.

[209] In other fields cfr. *Kenedi v Hungary* (Application No. 31475/05) [ECtHR] judgment of May 26, 2009 (finding a violation of Art. 6 ECHR because of the refusal of Hungary to disclose State secret documents to plaintiff despite court order); *Matyjek v. Poland* (Application No. 38184/03) [ECtHR] judgment of Sept. 24, 2007 (finding violation of Art. 6 ECHR because of the refusal of Poland to disclose State secret documents in lustration proceedings).

[210] *Tinnelly & Sons Ltd. et al. v. UK* (Application No. 20390/92) [ECtHR] judgment of July 10, 1998.

[211] Cfr. *Golder v. United Kingdom* (Application No. 4451/70) [ECtHR] judgment of Feb. 21, 1975 (interpreting Art. 6 ECHR as including a right to access to court) – on which see Carol Harlow, *Access to Justice as a Human Right: the European Convention and the European Union*, in The EU and Human Rights (Philip Alston ed., 1999), 190.

[212] *Devenney v. UK* (Application No. 24265/94) [ECtHR] judgment of June 19, 2002, at §26.

[213] Id., at §26.

considered as relevant the fact that, because of the assertion of the State secret privilege in the domestic proceedings, "there could be no independent scrutiny whatsoever"[214] of the plaintiff's claim (of discrimination on the basis of political or religious belief) and thus the applicant was "unable to challenge the dismissal or pursue any potential claim for pecuniary loss."[215] The ECtHR therefore concluded that the severity of the restriction imposed on the right to access a court – unmitigated by any other available mechanisms of complaint – "was tantamount to removal of the court's jurisdiction by executive *ipse dixit*"[216] and was in violation of the ECHR and it thus awarded pecuniary damages to the applicant. By reviewing the action of a Contracting Party through the prism of the procedural right of access to justice, these decisions of the ECtHR, in the end, suggest a confident role by the European supranational judiciary when national executives bar domestic litigation through the invocation of a State secret privilege.[217]

In light of the general institutional and jurisprudential capacity of supranational institutions in Europe and, conversely, in the US to ensure an additional forum to redress human rights violations shielded at the domestic level by the application of the State secret privilege, it is now possible to draw some cautionary remarks on the role of supranational courts in the cases of Mr. Abu Omar and Mr. El-Masri under review here. Individuals who were subject to extraordinary renditions can lodge an application before the ECtHR or the IACommHR, after the exhaustion of domestic remedies, alleging a violation of their fundamental rights.[218] Whereas the review of the IACommHR would be extremely limited, however, it seems plausible to argue that applicants would obtain a fair chance of advancing their claims before the ECtHR. In the case of Mr. El-Masri, since his action was dismissed entirely at the domestic level, an application to the ECtHR could well directly claim a violation of the procedural right of access to justice and of the right to a fair trial – like in the *Tinnelley* and *Devenney* cases – and (only) indirectly allege a limitation *inter alia* of the

[214] Id., at §25.
[215] Id., at §28.
[216] Id. Cfr. also *Tinnelly*, at §77.
[217] Cfr. also Iain Cameron, National Security and the European Convention on Human Rights (2000).
[218] Cfr. text accompanying supra nt. 189 & 198.

substantive provisions prohibiting torture and inhumane and degrading treatments.[219]

In the case of Mr. Abu Omar, on the contrary, since the criminal trial was not entirely trumped by the acknowledgment of a State secret privilege by the CCost, any possible recourse to the ECtHR would likely have to follow a different path. First of all, domestic venues of appeal would have to be exhausted with a final decision on the case by the Criminal division of the *Corte di Cassazione* – Italy's Supreme Court.[220] Secondly, whereas the public prosecutors would be unqualified to petition the ECtHR, Mr. Abu Omar would have to lodge a formal complaint[221] and either claim (and demonstrate) that his request for compensatory damages had not been adequately satisfied at the domestic level[222] or assert, as an alternative, that his allegations of torture and inhumane treatment were not fully investigated and prosecuted at the domestic level and that Italy had therefore failed to comply with its ECHR obligations.[223] In the first case, Mr. Abu Omar's action (provided it is admissible) could be based on the procedural right of access to court, whereas in the second case it would have to be based on the substantive provision of the ECHR prohibiting torture, inhumane treatment and detention without trial.

Be that as it may, although, at the moment, the possibility for Mr. Abu Omar to bring an action before the ECtHR seems mere speculation, it is remarkable that, instead, the scenario concerning Mr. El-Masri is coming into being. On 21 September 2009, in fact, Mr. El-Masri filed an application before the ECtHR against Macedonia (who is a party to the ECHR) asking the ECtHR to find that Macedonia, by unlawfully abducting him and transferring to CIA custody, had violated the prohibition of torture and inhumane treatment, his right to life, his right not to be detained without trial, his right of access to court and to a fair trial and his right to respect for private life.[224] Mr. El-Masri alleged that

[219] Of course, the US are not a party to the ECHR, so the hypothesis presented here is advance in the abstract. But cfr. infra text accompanying nt. 224.
[220] Cfr. supra text accompanying nt. 56.
[221] Cfr. supra text accompanying nt. 186.
[222] Cfr. supra nt. 58.
[223] Cfr. also Messineo (supra note 5), 1033 who explains that the investigations of the public prosecutors has only focused on the crime of abduction and not on the crime of (complicity in) torture and inhumane treatments that Mr. Abu Omar has suffered as a consequence of his extraordinary rendition to Egypt.
[224] Cfr. Application to the ECtHR, No. 39630/09, *El-Masri v. Macedonia* (available at:

Macedonia had failed to respond to his requests to open a criminal investigation to inquiry about his allegation and that the statute of limitations prevented any such initiative in the future. He also stated that a civil action for damages was pending before the Macedonian courts but that this process was not capable of providing an effective remedy for the violation of his ECHR rights[225] and asked the ECtHR to award him pecuniary and non-pecuniary damages. On 14 June 2010, with a noteworthy decision,[226] the ECtHR declared El-Masri's application as admissible and scheduled hearings to decide the case on the merits.[227]

A final pronouncement by the ECtHR reviewing the compatibility with the ECHR principles of the extraordinary rendition of Mr. El-Masri is therefore to be expected in the near future. This state of affairs starkly contrasts with what is going on, instead, within the Inter-American

www.soros.org/initiatives/justice/litigation/macedonia/Application-Public-Version-20090921.pdf (last accessed June 10, 2011)).

[225] Cfr. e.g. *Assenov v. Bulgaria* (Application No. 24760/94) [ECtHR] judgment Oct. 28, 1998 (holding that victim who has exhausted remedies within the domestic criminal system should not pursue remedies before the domestic civil system before being able to sue the ECtHR); *Dzeladinov et al. v. Macedonia* (Application No. 1325202) [ECtHR] decision of admissibility March 6, 2007 (idem).

[226] To appreciate the importance of the admissibility decision of the ECHR it may be noticed that only a very limited number of applications lodged before the ECtHR are actually declared admissible and considered in the merit. The *Annual Report of for the Year 2009* (2010), 146 (available at: www.echr.coe.int/NR/rdonlyres/C25277F5-BCAE-4401-BC9B-F58D015E4D54/0/Annual_Report_2009_Final.pdf (last accessed June 10, 2011)) states that of the 35,460 applications received by the ECtHR in 2009, only 2,395 were considered admissible for a judgment of the merit (this means that less than 7% of the case are declared admissible). Note further that with the entrance into force of the 14th additional Protocol to the ECHR on June 1, 2010 conditions for admissibility of the applications have been tightened with the expectation to reduce even further the amount of cases to be decided on the merit by the ECtHR and henceforth to address the ever growing backlog of cases that is threatening the effective functioning of the ECtHR. Cfr. Palmina Tanzarella, *Il futuro della Corte europea dei diritti dopo il Protocollo XIV*, Quaderni Costituzionali (2010), 423.

[227] *El-Masri v. Macedonia* (Application No. 39630/09) [ECtHR] decision of admissibility June 14, 2010. Cfr. Open Society Justice Initiative, Press release June 14, 2010 (available at *http://www.soros.org/initiatives/justice/focus/national-security/news/el-masri-rendition-20100614* (last accessed June 10, 2011)). On Oct. 8, 2010, the ECtHR communicated the decision to the Macedonian government asking it to reply to specific questions. Cfr. Open Society Justice Initiative, Press release Oct. 14, 2010 (available at http://www.soros.org/initiatives/justice/focus/national-security/news/el-masri-european-court-20101014 (last accessed June 10, 2011)).

human rights system. After the exhaustion of his US venues of redress, on 9 April 2008 Mr. El-Masri petitioned the IACommHR alleging that the US had violated *inter alia* his right to life, to personality and to protection against arbitrary arrest, as recognized in the ADRDM.[228] Because of the limited powers of the IACommHR *vis-à-vis* the US, however, Mr. El-Masri could only plea the IACommHR to investigate the facts, declare that the US is responsible for the violation of the ADRDM, and ask it to recommend adequate and effective remedies for addressing the violation of his rights, including requesting that the US government and those directly responsible for Mr. El-Masri's extraordinary rendition publicly acknowledge such involvement and publicly apologize. More than two years later, however, despite the decision of the IACommHR to accept the petition,[229] the proceedings have not moved forward since the US has refused to cooperate.[230]

In conclusion, as this Section suggests, a multilevel architecture for the protection of fundamental rights such as that existing in Europe today can have several advantages.[231] A supranational court such as the ECtHR can play a role in ensuring effective protection of fundamental rights, even where for reasons of national security – as invoked by national governments through the State secret privilege – municipal courts have been forced to step back from litigation involving cases of extraordinary rendition, leaving gaps at the domestic level. On this ground, there seems to be a remarkable difference between the regional human rights institutions supervising the action of Italy and the US: the Inter-American human rights systems binding the US is very weak compared to the substantive

[228] Cfr. Petition to the IACommHR, No. 419-08, *El-Masri v. US*, April 9, 2008 (available at: *http://www.aclu.org/files/pdfs/safefree/elmasri_iachr_20080409.pdf* (last accessed June 10, 2011)).

[229] *El-Masri v. US* (Petition No. 419-08) [IACommHR] decision of admissibility Aug. 27, 2009. Cfr. American Civil Liberties Union, Press release Aug. 27, 2009 (available at *http://www.aclu.org/human-rights_national-security/international-tribunal-takes-case-innocent-victim-cia-extraordinary-r* (last accessed June 10, 2011)).

[230] Cfr. Additional Information from Petitioner, No. 419-08, *El-Masri v. US*, July 27, 2010 (available at: *http://www.aclu.org/files/assets/P-419-08_Petitioners_Additional_ Information.pdf* (last accessed June 10, 2011)).

[231] Cfr. Marta Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 Eu. Const. L. Rev. (2009), 5 and Aida Torres Pérez, *Conflict of Rights in the Eurpean Union* (2009). For further reference to the literature cfr. then Federico Fabbrini, *The European Multilevel System for the Protection of Fundamental Rights: A 'Neo-Federalist' Perspective*, Jean Monnet Working Paper 14 (2010).

obligations and the adjudicatory and enforcement mechanisms established by the ECHR. On the other hand, as remarked above, the capacity of the ECtHR to review the action of national executives should not be overestimated, not least because the ECtHR can only award pecuniary damages when it finds a violation of the ECHR. Nevertheless, the precedents of the ECtHR in cases of States' abuse of the secrecy privilege, as well as the recent decision of the ECtHR to admit the application of Mr. El-Masri shed some cautionary optimism about the forthcoming litigation at the supranational level of claims of extraordinary renditions.

6. Conclusion

The purpose of this article was to analyze the application of the State secret privilege in litigations concerning cases of extraordinary renditions. With several caveats, the article has argued that, despite the gravity of the allegations of human rights violations made by the individuals who were subjected to extraordinary renditions, a common pattern of judicial retreat emerges both in Italy and in the US whenever the government invokes a State secret. In the *Abu Omar* case, in Italy, the CCost ruled that the government had legitimately asserted a State secret privilege barring public prosecutors and ordinary judges from utilizing the evidence on the relationship between the CIA and the Italian intelligence which was essential in proving the criminal liability of the Italian officers involved in the abduction of Mr. Abu Omar. In the *El-Masri* case (and, more recently, in *Mohamed*), US federal courts blocked the action for civil liability that Mr. El-Masri had commenced, recognizing that the State secrecy privilege invoked by the executive branch was valid and commanded *tout court* dismissal of the case.

The comparative constitutional analysis highlights that a similar approach of judicial deference *vis-à-vis* the executive branch in matters of State secret privilege prevails in both countries. The consequence of such a broad operation of the State privilege, however, is the impossibility for individuals allegedly subjected to extraordinary renditions to obtain justice through redress before domestic courts. How can this troubling trend be counteracted? This article has offered a nuanced answer. In a remarkably convergent mode, both the US and Italian courts have invited legislatures to exercise greater scrutiny over the action of the executive branch and to provide redress against human rights violations. The analysis has demonstrated, however, that both in parliamentary and in separation of

powers systems the willingness and the ability of Parliament or Congress to check the executive might be limited for political and institutional reasons. In fact, the cases of Mr. Abu Omar and Mr. El-Masri themselves prove how ill-fated the judicial call for legislative intervention might sometimes be.

As an alternative venue of redress, the article has examined the function of supranational courts. The existence of a multilevel system for the protection of fundamental rights, in fact, may help fill the lacunae of the domestic legal systems and ensure that individuals who have suffered infringements of their rights (e.g. by being subject to extraordinary rendition) have an additional forum in which to advance their claims. From this point of view, however, a major difference exists between Italy and the US: whereas Italy, as all other European countries, is subject to an external and compelling review exercised by the ECtHR, the US is not yet party to the ACHR and cannot be sued before the IACtHR. Petitions can still be brought by private persons before the IACommHR, but, as the case of Mr. El-Masri clearly proves, this process is hardly as effective as the one provided by the ECHR. Nevertheless, the role of a supranational court such as the ECtHR should not be overestimated. A number of substantive and jurisprudential factors constrain its action and might diminish its capacity to cope alone with the function of overseeing State actions and adjudicating human rights violations.

In the end, it is reasonable to argue that stronger constitutional checks and balances and more effective review by supranational institutions are not mutually exclusive. Rather they can, and should, complement each other to ensure that fundamental rights are not unduly sacrificed for reasons of national security. The examples addressed in this article, on the unsuccessful attempt of Mr. Abu Omar and Mr. El-Masri to obtain a domestic remedy for the extraordinary rendition they have suffered, show how problematic the executive's assertion of a State secret privilege can be when it is left unchecked and unreviewed. Domestic courts, domestic legislatures and supranational institutions have all a role to play in order to ensure that individuals who allege that they have experienced outrageous violations of their rights by the hand of our governments are not left without a remedy, simply because of the executive say so. The fight against terrorism surely requires the handling of confidential information. But the rule of law demands that fundamental rights be safeguarded before the "*arcana imperii*."[232]

[232] Tacitus, *Annales*, Liber II – 36.

Does There Exist an Epistemological Heritage of Democracies? The Necessary Relationship between Legal Universalism and Exclusion Practices

Vincenzo Rapone[*]

TABLE OF CONTENTS:

1. The universal and the exceptional in the social order according to Agamben

The aim of this study is to frame the reflections of an important philosopher, Giorgio Agamben, whose notion of sovereignty affects the contemporary debate in Italy and abroad. Like Bauman and many other scholars, Agamben puts the relationship between inclusion and exclusion at the centre concern of his inquiry, although, unlike Bauman[1], however, he does not regard this relationship with respect to the general features of the social order. Rather, he takes as his fundamental referent the notion of man as an uncertain, rather than a given presupposition: thus is always possible for any of us to wonder, using Levi's words, "*If this is a man*". At stake in the society of legal universalism, therefore, it is possible distinguish human and animal life, defining the latter as "bare life". In Agamben's thought, sovereignty is a biopolitical device able to regulate inclusion in the order of human beings. The degradation 'animalization', or 'bestialization' of human beings are the possibilities that Agamben

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[1] The differences between the approach taken by Bauman, although he too investigates the dimension of the general more than the universal, and by Agamben emerge from their treatment of the persecution of the Jews, of which the Nazis were protagonists. See Z. Bauman, *Modernity and Holocaust*, (1989).

considers to result from some 'original' force inherent in sovereignty itself and able to act as an 'exceptional' element[2].

By acting on the biopolitical entity that Agamben calls "bare life", sovereignty consists in exercising an exceptional power which is not proper of the legal order but is the expression of a force external to it. Constitute the human on the basis of the possibility of its inclusion in that order, thus differentiating it from an otherness coinciding with its possible 'animalization'. In both cases, the human order and "bar life", the exception explains "itself and the general", what happens as a rule.

However, in defining the processes constituting the animal as the 'other' with respect to the human, Agamben oscillates in evident manner: at first, and entirely correctly, he posits the possible animalization of man at the level of the 'end of history' propounded by Alexander Kojève in his commentary on Hegel's *Phenomenology of Spirit*[3]. For philosopher commentators on the Hegelian text – and Agamben initially seems to make their interpretation his own – the animalization of man is the progressive product of the advent of that servile discourse whereby man is reduced from his state as a desiring being (subject of desire) to a entity determined by need in constant search of pacification with his natural dimension, with his given being. Agamben lucidly argues for the notion that the 'animalization' of the human is made possible by the operation of a particular cultural mechanism within the equally particular relationship between the universal and particular. It is, however, language which marks the essential difference between man and animal so that the latter is always and only a product of man's interpretation. But Agamben's entirely pertinent observation to the effect that perhaps the body of the

[2] See G. Agamben, *The Open: Man and Animal*, (2004).

[3] For A. Kojève, *Introduction à la lecture de Hegel,* (1947) 434-5: "The disappearance of Man at the end of history is not a cosmic catastrophe: the natural world remains what it has been for all eternity. It is not a biological catastrophe either: Man remains alive as an animal *in harmony* with Nature or given Being. What disappears is Man in the proper sense – that is, Action negating the given and Error, or in general, the Subject *opposed* to the Object. In fact, the end of human Time or of History, that is, the definitive annihilation of Man properly so-called or of the free and historical Individual, means quite simply the cessation of Action in the strong sense of the word. Practically, this means the disappearance of wars and bloody revolutions. And also the disappearance of *Philosophy*; for since Man himself no longer changes essentially, there is no longer any reason to change the (true) principles which are the basis of his understanding of the World and of himself. But all the rest will be preserved indefinitely; art, love, play, etc.; in short, everything that makes Man happy".

anthropophorous animal (the body of the slave) is the unresolved remnant that idealism leaves as an inheritance to thought, and the aporias of the philosophy of our time coincide with the aporias of this body that is irreducibly drawn and divided between animality and humanity[4] progressively gives way to a problematization of the animal/man relationship in which the discriminant between the two elements is not mediated by the dimension of the universal, or by cultural discourse. Rather, it is a difference that ontologically exists previously, and not currently as an undiversified sphere, the object *par excellence* of sovereign power exercised on bare life. This is an obsessive endeavour both to classify or normativize it and to define the shifting and never definitive difference between human and animal. Thus conducted is an realist critique exemplary in its intelligence, brilliant as well as persuasive, which can be summarized in the following terms. Let us set aside the rhetoric of human rights, the lofty ideal of universal citizenship, and consider the exception on the basis of which the legal system is constituted as an attempt to confer order on society. A pre-legal power – political in Schmitt's sense – therefore exists, and it is able to confer on a particular subject or class of subjects the ability to recognize itself as human, and to say, once again with explicit reference to Levi's book, "if this is a man". The reference to Levi is deliberate: Agamben's context of reference is the destruction on racial grounds (and not national ones as in the case of enemies aliens) of identity.

A corollary to this reasoning is that if there indeed exists a pre-legal power *à la* Schmitt to declare the state of exception, with the purpose of performing its essential function, that of declaring the difference between friend and enemy, between similar and dissimilar, between human and non-human, and if this power is not a perverse effect of the legal order but an original possibility, then risk and the precautionary principle are lost as ideological, phantasmal elements to 'realize' themselves, to become concrete applications of this exceptional power. Risk and the precautionary principle thus become legitimate effects of a pre-political power of inclusion-exclusion which is exercised on that degraded, but always possible, state that is the animal, which is not the product of a non-recognition of the human, but rather the 'zero degree' of the living being, that 'bare life' understood (misunderstood?) in Foucaultian terms on which this original potential is exercised. For Agamben, this mechanism

[4] G. Agamben, *The Open: Man and Animal*, cit. at 2, 6.

is clearly exemplified by the situation of those beings whose existence paradoxically testifies to what – excluded 'by its nature' from linguistic exchange – is untestifiable; beings with the status of the *homo sacer* who, in the Nazi concentration camps, hovered between life and death and was called *der Muselmann?* or *die Muselweiber* by his or her companions[5].

The concentration camp provides paradigmatic testimony of the risk of exclusion from the human community because it allows internal differentiation between human and non-human with no reference to the universals of discourse and culture. The normal situation is given to the understanding only through exception, just as the political state of exception makes it possible to found and to define the juridical order as both legal and effective at the same time, and the concentration camp is the endpoint of the West as a whole. According to Agamben, whose ideas have had a notable impact on the European debate on exclusion, exceptional situations arise in which the boundary between "bare life" and the 'human' in the proper sense – of which he constantly, emphasises (moreover, with great philological rigour) the contingent nature, the fictitious structure, the constitution of the persona as a mask – disappears. To demonstrate this assertion, he traces backwards the path leading from Schmitt to Kirkegaard, finding in the latter the reasons for decisionism as a type of juridical thought[6].

Agamben opposes the semantic intransitivity of the *Muselmann* to the transcendental foundation of the community on communicative bases; a theory which in recent years has enjoyed a certain success in Germany through the work of Habermas and Apel. For the theories centred on 'communicative action', to the extent that people communicate, they are condemned, so to speak, to agree on sense and validity criteria for their communication. Because the *Muselmann* was in a position of semantic intransitivity, as the blind spot of every discrimination

[5] G. Agamben, *Remnants of Auschwitz: The Witness and the Archive*, (1999). Thus Améry-*Jenseits von Schuld und Sühne. Bewältigungsversuche eines Überwältigen,* (1977), 52: "The so-called Muselmann, as the concentration camp language termed the prisoner who had lost all hope and been abandoned by his comrades, no longer had consciousness of the contrasts between the good and bad, the noble and base, the spiritual and unspiritual. He was a walking corpse, a bundle of physical functions in agony. We must, however painful it may be, exclude him from our consideration".

[6] For Kirkegaard (cit. in G. Agamben, *Remnants of Auschwitz: The Witness and the Archive*, cit. at 5, 9): "The exception explains the general and itself. And when one really wants to study the general, one need only look around for a real exception".

policy, as the 'possible risk' of every inmate, he constituted the living antithesis of every (meta-)linguistic agreement among communicators. Although this observation by Agamben is impeccable, to be noted that it juxtaposes and puts on the same level membership of the linguistic community as a reciprocal accord on the sense and validity criteria of communicative action with egress from the linguistic dimension itself, from language understood as a symbolic restraint, a material egress from a transcendental dimension. But does the situation of the concentration camp truly constitute an exception to language as a transcendental dimension? Supporting this objection is that Agamben qualifies as an "apparent contradiction" the evidence that this exceptional situation – life in the concentration camp – appears to have been strongly normativized. Yet rejecting the dimension of exchange in a linguistic situation is not to be excluded from exchange as the condition for being: besides the *Muselmann*, other figures, among them the 'psychotic' psychiatric patient, well attest to this. In these cases, the alienation from language expresses a radical, albeit tragic, determination of the human being.

Just as 'bare life' is not given as a fundamental ontological possibility of humanity in the form of risk, so a pre-political power of exception is not given either. When Hitler assumed power, and on 28 February 1933 proclaimed the *Decree for the Protection of the People and the State* implying that these were 'at risk', and suspending articles of the Weimar Constitution safeguarding individual liberties, this action was possible because it was compatible with the objective possibilities of the legal order, and not as an expression of an 'original' power[7]. Likewise, the Patriot Act passed by the U.S. Congress on 26 October 2001, which allowed the Attorney General to "maintain custody" of aliens suspected of engaging in activities which endangered "national security", and then the military order issued by the President of the United States on 13 November of the same year and which authorized the indefinite detention and trial by military commissions of non-citizens suspected of involvement in terrorist activity, are expressions of the possibility of the legal order. We have not the constitution of its 'original' possibility to include the living being in itself through its own suspension, we have not the constitution of the legal order– where not understood formalistically – as a regulation of the living. If we were indeed in the presence of a state

[7] See G. Agamben, *The State of Exception*, (2005) 9-43.

of exception as an "original structure in which the law includes the living being in itself through its own suspension", why locate the Guantánamo Bay detention camp outside the borders of the United States? Or, rather, must the social practices and policies of partition, Auschwitz like Guantánamo, be considered a 'symptom', the 'removal' of the universal of science, therein including human rights?

2. Conclusions. The task of the realist critique

For the politics of human rights to be a practice of liberation and not the acritical exporting of an imperialism whose rationale resides in the growth of a 'will to power" which has little to do with the universal because it is rooted in the particular, the affirmation of democracy as a principle, must necessarily comprise critical analysis of the relationships between the universal of the law and the reality of the social constitution. Though gainsaying the alleged 'concrete universalism' of the law, this critique has the task of demonstrating that the obscenity of the exercise of power is a matter internal to the legal order, and especially to its social constitution, relative to that obscene substitute for the law which has nothing original about it but is the effect of a given social context, without denying, in conformity with Bloch's principle of hope, the universalizability of legal discourse as the effect of a 'distant utopian future', more than the certainty elevated by the will of contemporary Western man to the rank of truth.

Citizens, Aliens and Suspects in the Age of the War on Terror: The Question of Emergency Powers in Western Post-Democracies*

*Leopoldo A. Moscoso***

Abstract

If the nexus between post 09/11 counterterrorism and the encroachment of citizens' civil rights and individual and collective liberties seems to be already well established in the professional literature, there are other aspects of world politics in the age of the *war on terror* which deserve to be investigated. The connection between the 2001 turning point and the current international, economic crisis is of course one of them. Yet, the most interesting aspect might be the way in which the international, financial turmoil has been used for private interests around the world to advance their own agenda of privatization, deregulation, fiscal discipline and balanced government budgets. While the advancement of this agenda has often been wrapped in a type of rhetoric which time and again refers to the imperatives of governance in exceptional, hard times, this paper explores the possible implications of the *war on terror* tactics on the quality and sustainability of our democracies. By focusing on the notions of emergency powers and on the old, twentieth century controversy on the state of exception, this paper points to the difficulties inherent to violence control, to the emergence of private governments, and to the nation-state's loss of centrality in both domestic and international politics

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as the three main avenues through which the state of exception might become – as Walter Benjamin foreshadowed – a permanent trait of our systems, and our current crisis of governance might be recycled into something like the government of the crisis.

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1. The Politics of Terror

A decade after the Septtember-11 attacks, it seems to be about time to assess the balance-sheet of the *war on terror.* Under this label, one needs not to understand just the standard, state counter-terrorist strategies. The *war on terror* rather refers to a full constellation of policy measures, which include counter-terrorism, but go well beyond conventional counter-insurgency. Although the war on terror has taken different shapes across western countries, its most prominent features include participation on international, armed conflicts; extra judiciary executions; use of *intensive interrogation* techniques and justification of torture; creation of clandestine detention facilities; or even the enforcement of laws against the single citizens' civil rights, such as street video-monitoring, exhaustive controls and invasive searches at the airports, inspection of private communications (mobile phone conversations or messages, e-mail, internet searches, etc.), and a full array of other controls from GPS-monitoring of single citizens' movements, to the tracking of credit cards' activity, the introduction of new, digitalized and compulsory I.D. documents containing chips with personal information non accessible to the carrier, preventive measures against individual citizens and groups labeled as "radicals", restrictions to the mobility of certain groups across international borders, and restrictive immigration controls which criminalize immigrants.

Terrorism – understood as the use of terror with political objectives – is not either a clear-cut term to describe the full constellation of phenomena in which the deployment of violence – either on the part of

the state, or on the part of organized, non-government, opposition groups – is present. It should not be forgotten that the state is frequently the first agent to make use of violence – normally under the usual conditions of legitimacy, which invariably include the state's monopoly. Ambiguities concerning terror and terrorism come to be visible as soon as one looks not at those situations in which a conflict takes place within the state, but at those, different scenarios, in which the state exists within the conflict. A short detour follows.

On the one hand – as it was said – terrorism seems to point to the use of violence with political objectives. These objectives, however, may be military goals of the state regarding targets which may lie either in or out of the state's territorial jurisdiction; or they may be military objectives of the opposition groups promoting an agenda for the alteration of the balance of power within the state. Such seemed to be the case for both the radical leftist and extreme right-wing groups operating within the European societies during the late sixties and the seventies, but such profile hardly fits – if at all – the contemporary, Islamic *jihad*.

On the other hand, the term terrorism seems to refer to that type of situation in which the objective appears to be that of spreading panic and eventually induce a shock on the public opinion or on a selected part of the population. There is the critical edge: terrorist groups looking to bring some *statu quo* to an end in order to sponsor an alternative rarely – if ever – have deployed that sort of nihilistic, indiscriminate terror. The only exception: nationalist terrorists when attacking the populations of those states considered as "oppressors".

This sort of contrast has been with us ever since the aftermath of the French Revolution. Against the Jacobin idea emphasizing the necessity of terror for the defense of the revolution, conservatives and monarchic legitimists looked at the Revolution as an atheistic catastrophe, while liberals entertained the idea of a revolution without terror. True, terrorist violence does not appear, in Robespierre, as blind or lacking objectives:

"Without, all the tyrants encircle you; within, all tyranny's friends conspire; they will conspire until hope is wrested from crime. We must smother the internal and external enemies of the Republic or perish with it; now in this situation, the first maxim of your policy ought to be to lead the people by reason and the people's enemies by terror. If the spring of popular government in time of peace is virtue, the springs of popular government in revolution are at once *virtue and terror:* Virtue, without which terror is fatal; terror, without which virtue is powerless. Terror is

nothing other than justice, prompt, severe, inflexible; it is therefore an emanation of virtue; it is not so much a special principle as it is a consequence of the general principle of democracy applied to our country's most urgent needs"[1].

Are we dealing here with a genuine form of *reine Gewalt* in the sense envisaged by Walter Benjamin back in 1921?[2] Benjamin's tenet was that there is a form of violence which can be described neither as a foundation of law nor as a mean to preserve it – it clearly goes beyond the Bodinian dialectic between *puvoir constituant* and *puvoir constitué.* This type of violence neither establishes nor maintains law – it rather suppresses it. If lawful and juridical violence are heavily dependent on instrumental reason, this form of *reine Gewalt* might be described as some sort of *means without ends*[3].

The answer to the former question is probably negative. Outbursts of revolutionary wrath, which cannot be described as means to an end, but rather as an extra-legal expression of the right of violence affirming itself against violence of the laws, seem to be closer to Benjamin's view of *reine Gewalt.* Yet, we would not probably be discussing Benjamin's view nowadays if it was not because of the exchange of ideas that it was subsequently originated with the German legal theorist Carl Schmitt. Schmitt wanted to bring dictatorship out of the realm of absolute politics and rewrite it as a constitutional means to preserve liberty. After all – Schmitt protested against the Russian Bolsheviks – it is impossible to work out a definition of dictatorship, if every legal order is seen as a dictatorship. Schmitt wanted to recycle the term dictatorship into a juridical concept and thus situate a, by then only imagined, German sovereign dictatorship, that would terminate the Republic of Weimar, into the broader context of historical development. That is why Schmitt's theory of sovereignty has often been read as a reply of Walter Benjamin's *Zur Kritik der Gewalt.* The state of exception (*Ausnahmezustand*) was the space Schmitt imagined to bring back Benjamin's *reine Gewalt* into the juridical order. Against the notion of pure violence, which Benjamin probably drew on Sorel, Schmitt opposed the idea of sovereign violence which is meant not to establish or to preserve the law, not even to

[1] Maximilien Robespierre, Discourse of February 5th 1794/17 Pluvious, year II of the Revolution (1987).
[2] Benjamin, (1921) 179-203.
[3] As in Agamben (2003), 80.

suppress it – it is rather meant to suspend the law. So violence is brought back into the sphere of law just in order to make possible the very self-exclusion of law: "Sovereign is he who decides on the state of exception" – such was the famous *lemma* at the opening of his *Politische Theologie* (1922).

The sovereign is thus legally out of the law – and Robespierre seems to agree:

"Let the despot govern by terror his brutalized subjects; he is right, as a despot. Subdue by terror the enemies of liberty, and you will be right, as founders of the Republic. The government of the revolution is liberty's despotism against tyranny"[4].

Yet, the sovereign seems to be within the legal order as well. It is at this point that the paradox of Schmitt's *decisionist* theory comes to the surface: the sovereign – who is both in and outside the legal order – might have to defend the existing laws by suspending them, or to enforce the existing legal order when it is no longer in force. The sovereign's decisiveness soon turns into the sovereign's indecisiveness, and the state of exception stands out as the awkward scenario in which he who ought to decide cannot do it, and he who can decide ought not to do it[5].

We may now go back to terror. British historian Paul Preston has comprehensively accounted for violence during the years of the Spanish War of 1936-39 and its aftermath[6]. He describes violence in both the republican and the fascist rearguards. It is interesting to see how his description of the civil and military violence unleashed against the insurgents within the republican zone closely fits Benjamin's *reine Gewalt*: a defensive and spontaneous reaction against the military *coup d'etat,* which episodically brings to a halt the normal restrictions on violence which are a constant in every civilized society. In fact, Preston describes these outbursts of popular violence as the reaction against a right-wing which represented the oligarchy and had been putting every possible obstacle against the II Republic's agenda for social reform. It is a chaotic, non programmed reaction which takes place despite authorities' efforts to prevent it, and almost never thanks to the public authorities.

Preston also describes enforcement and repression of civilians within the areas under the control of Spanish fascists after the July 1936 *coup*.

[4] Cfr. Robespierre, *ibid*, *infra.*
[5] Agamben (2003), 71-73.
[6] See Preston (2011), *passim*, for the following ideas.

The British historian provides a different description here: a sudden, paralyzing and devastating violence, that the regular, colonial troops under the command of the insurgents now deployed systematically against civilians in the framework of an operation which had been planned in every detail in order to produce terror and annihilation. The idea – which Preston attributes to a prominent official of the insurgent military, General Mola – was of course investing in terror in order to establish a dictatorship without resistance. In Mola's words: "the extermination of all those who do not think like us". In fact, Preston reports, this type of planned violence caused three times more casualties than the spontaneous violence unleashed in the republican rearguard. It left a trail of humiliation, economic deprivation, torture, rape and physical and psychic sequels.

This is an interesting contrast. If the first setting resembles Benjamin's *reine Gewalt*, the second one appears to be a clear case of *exceptionality* that brings regular political continuity to a halt. We may refer to those scenarios of human experience where usual norms are no longer in force. Primo Levi's well known *motiv „hier ist kein Warum"* may now migrate from the concentration camp, to the colony, to the detention facility, to the city under siege or under air attack, or to the civil rearguard under exceptional measures of enforcement and repression.

However, this is by no means the violence of the outcast, of the pariah who – exhausted and not able or willing to stand up for their rights – decide to take the law in their own hands, and they end up taking not simply justice but revenge: *vox populi, vox dei; fiat iustitia et pereat mundus.* We are in front of a different creature: a non humanistic terror, which often presents itself with a rhetoric couched in terms of the republican defense of the common good, and a *consequentialist* account of its own *modus operandi*. Everything will be understood, and eventually justified, from the standpoint of the forthcoming, prospect society[7]. The common good – as Saint Just said – is always terrible. And politics becomes an activity which is not just in the pursuit of emancipation, but also in the pursuit of truth.

Needless to say, this Robespierrean politics of truth cannot be pluralistic. Not just because it deploys violent means, but also because truth has a genuine totalitarian proclivity. Yet, if we accept the terrorist

[7] See Žižek (2008).

history of the modern state, should we accept its legacy and lean on the side of Saint Just? Shall we say – with Robespierre and Saint-Just – humanism *and* terror? Žižek suggests that such question stands on a verdict on the causes that brought to an end the majority of the revolutionary regimes: if humanistic goals remained unattained, might it not be so because the ideological projects of societal transformation still required an additional dose of terror[8]?

Žižek rhetorically asks if it was not the struggle against Stalinism, or the defense of Human Rights against totalitarianism, the right way to confront the humanism *or* terror dilemma. But there are those who assert that the *consequentialist* defense of the republic in terms of the common good no longer applies, and that it is, therefore, about time to affirm not humanism, but terror. Hawks, not doves, praise the power of the decision, the capacity to plough up history, to look at the human history from the standpoint of the Final Judgment. Rather than the common good, they say, the ends of history are the real consequences our judgments should care about. Those who believe that human history waits out there to be taken cannot afford to ask for permission – unless we forget that our modern liberal states are all the product of the revolution.

We are dealing – Žižek believes – with a state which is terrible in order for its single citizens not to ever be forced to become terrible themselves – a transfer of competences which we today call *depoliticization*. If the rebelling man cannot be explained, the state, imagined community opposed to every single imagination, can explain it all. Now that the state is widely discredited; when nobody believes in its power to cut on the course of history, it wants to persuade us that, deep inside its body of *Quasimodo,* it has a noble soul – as if it wanted to convince us that the problem lies, not on the state, but on the virtue of the single citizens. From Robespierre to General Mola … to the allies' *Shock & Awe* air-strike campaign over Bagdad in 2003 – explicitly designed to make people physically and psychically unable to fight back or to care for their interests, no matter what these were[9] – sovereign power invariably takes on the form of a decision on the state of exception where politics aim not to the institution of justice but to the imposition of some form of truth.

[8] *Ibid*, also for the following comments.

[9] On the topic of disaster capitalism, see the much criticized, but widely discussed contribution of Canadian activist Naomi Klein (2007).

2. The Control of Violence From the Prevention of Terror to Preemptive State Terrorism

The recent news is that our modern states are no longer the only actors on the stage – not even the main ones. In the mean time, academic empirical research has widely discussed the causes, the effects and the countermeasures which it would be lawful to resort to in order to meet the challenge of violence and terrorism. A short detour follows.

Concerning the etiology[10], the received view was that terrorist groups may be seen as the result of the alienation of one fraction of the intelligentsia with respect to the ruling classes and with respect to the population at large. That seemed to be the case of the Jacobin current in the French Revolution, but it also fits the profile of many anti-colonialists, in particular, the liberation movements' armed branches. A variant of the same view has it that the intelligentsia's alienation occurs when a program for social and political reforms has failed with a loud clash: that might well have been the case of the *jihad* in the Arabic world, which may be seen as the fundamentalist response to the failure of the Arabic nationalistic, socialist project[11]. This view is limited insofar it does not provide a full account on why the failure of the reformist program needs to result in the rise of *jihad* terrorism and not in some other denouement. Even if that has often been the case, in fact, it needs not. Be it as it may, the focus on national societies seems to be a good prevention against the risks of overlooking the fact that (even if its manifestations are clearly transnational), the not-so-new fundamentalist terrorism has strong local roots.

The abovementioned limitations call to develop more in-depth, empirical research. For instance, at the micro level, one should ask questions on the motivational structure that lies behind the single activist's political drive[12]. An interesting case in point is of course the

[10] A full-fledged account of the academic literature on the causes of pre-09/11 revolutionary movements was provided in Moscoso (1997).

[11] On these topics, the contribution by the Algerian anthropologist Sophie Bessis (2001) seems to be particularly eloquent.

[12] Both with macro- and with micro-level research designs, the so called *sociology of emotions* moves here on the ultimate frontier for empirical research on political activism and other forms of human action (see, *inter alia,* Scheff 1990, 1997; Barbalet 2001; Turner & Stets 2005; TenHouten 2007). Not just because it leaves behind the simplistic portrait of the *rational maximizer of private utility functions* which has lead so many sociologists to go blindfolded over the past three decades, but also because it emphasizes the importance

suicide bomber and, in general, the case of all ready-for-martyrdom activists, where one should look at those micro-situations of hindrance in which the agent finds impossible to proceed with social and interpersonal relations as usual. Confronted with gloomy outlooks, lacking any prospect of personal accomplishment, and unable – as the literature on *quality of life deficits* often points out – to proceed with the normal life-course of personal achievements, the kamikaze seems to handle a different (although not less *rational*) scale to assess the short and long-run consequences of her actions. At the macro level, in turn, research should proceed to the exam of the political ideology-religious beliefs nexus. This connection should be investigated, of course, at the level of organizations and their leaders' discourses, but it should also be confronted with the degree of awareness the activists show on the political-religious connection itself[13].

Concerning the effects now, the study of the *new* manifestations of political violence requires, on the one hand, reconsidering the problem

of emotions, passions, sentiments and other, non rational, components of human action. The possibility that our self fails to meet the others' expectations, or one's own, may be seen as the great drama of modernity. When values cannot be easily dismissed but the rupture with social order is not at hand either, the social process is likely to produce an internal readjustment of the self. Shame – the most social of all emotions (that is likely to be why Socrates, Aristotle, Descartes, Spinoza, Hegel, Nietzsche, Darwin, Freud and other philosophers paid so much attention to it) is now again – as it was for Georg Simmel or Erving Goffman – very much at the forefront of sociologists' empirical research (Lewis 1992). The shame-wrath circuit has in fact been investigated as the driving force behind cases of warmongering (Scheff 1994). The connection of shame with identity and recognition, as both a cognitive and a moral demand, draws now our attention to topics such as visibility-invisibility, inclusion-exclusion, the sense of belonging, and stigma. The possibility, for instance, to read again Fanon (1961) under the socio-emotional key may cast a new light on Fanon's classic *loci.* For example, the idea that colonizers impose a derogatory image of the colonized peoples; that, in order to set them free, the colonized peoples have to overcome this derogatory image; that violence has to be exerted against the colonialists to set back the original violence of colonization; that the violence of the oppressed targets not just the oppressor but his conscience and the conscience of the oppressed – for, in the last analysis, colonialism is also a form of colonization of consciousness.

[13] Michael Walzer (1965) was probably the first scholar to see the strong links existing between an ideological party – which combines fanaticism and discipline – with radical religious fundamentalism. The connection between religion, sentiment, political radicalism and violence stands at the origins of radical politics and revolutionary movements, and inaugurates the era of what Alessandro Pizzorno has often labeled (2001, 2008, 2010) as ideological politics or the "station of programmatic politics" designed for the transformation of the system from outside.

of the rationality of action. Observers are well aware that suicide-bombers attempts are not tactic – they therefore cannot be accounted for in terms of the calculation of any utility function. The balance account of costs and benefits for the martyr is estimated, so to speak, *sub specie aeternitatis* – hence the enormous difficulties *experts* on violence face to predict (not to say prevent) this type of episodes. On the other hand, terrorist violence brings the observer back to the normative problem concerning the explanation/justification of political action through its consequences. If some political actions may find a warrant in their consequences, then the same principle might be applied when the time comes for the validation of counter-terrorist measures. Provided that its effects turned out to be as expected, would it be legitimate to vindicate the *war on terror* exclusively on the grounds of its effects? The answer is clearly negative as soon as other considerations are introduced, besides the government's responsibilities with the physical security of its citizens. Even under the threat of terror, societies have responsibilities with the humanity of the single activist, with the humanity of the activist's organizations, and with the humanity of their original communities. The use of beneficial effects/legitimate goals as an alibi to warrant the choice for immoral or illegitimate means eliminates whatever restrictions might remain for the party of violence to resort to the same scheme.

A final consideration might be in order concerning the moral quality of controls – no matter whether cultural controls or downright coactive ones – to the exercise of violence. The fight against terrorism has always remained under the shadow of inefficacy (Bauman 2006). Whatever the means deployed, they never yielded the expected results. It is the very lack of effectiveness of cultural, judiciary, or police controls on terrorism what casts doubts on our possibilities to control the exercise of violence both at the interpersonal and at the macro level. Consider, for example, the massacres perpetrated by students in American and German schools over the past few years. Further instances might be recalled at the macro level: consider the utter lack of control on the exercise of violence in the, so called, *failed states* such as Somalia, or those post-colonial states in which the process of decolonization did not turn the *good government* into an objective of the post-colonial rulers for – not having their borders under the threat of foreign powers – then, domestic security and public order was not on anybody's agenda either[14]. Consider, finally, the not so

[14] That the breakdown of state institutions needs not mean the complete breakdown of

low intensity violence in occupied Iraq and Afghanistan. Allies went into Iraq, among other declared objectives, to "prevent terrorism" and ended up generating more local terrorism than what they were meant to eradicate. Before the recent withdrawal of American troops – although not of all the private security contractors – we have been witnessing how the number of insurgents' violent attempts diminished while the overall figures relative to casualties in each attempt were on the rise. And here comes the moral consideration.

The question is in fact a well known one ever since the *fin de siècle*, when criminologists began to talk of crooks, tricksters, con artists, etc.,. Nowadays, neurobiologists look for deterministic explanations that undermine the credibility of the explanations offered by social scientists. Historical experience shows, however, that it has been neither the marriage of single activists, nor the imprisonment of the great majority of a terrorist organization' members, nor even the criminal laws that actively seek out the social reintegration of terrorist inmates, the main factors behind the decline of the activity of violent groups. It has more often been social change, not criminal laws or enforcement, the main predictor of the end of violence. What social change often leaves behind itself is a trail of ideological evolutions and reassessments, which leak into the internal atmosphere of violent organizations, and ultimately induce their members to give up their objectives or to continue in the pursuit of them by exclusively political, non violent means[15].

By violence, it should be understood the infliction of physical harm to others. Modern political violence exhibits a huge variability; it is often not preceded by warning signals; and still worse – we have a very limited

society is visible as soon as one looks at the proliferation of civil society organizations such as the groups of *vigilantes* in Nigeria. Not always, in violent societies, are these civil organizations entirely non violent. On the contrary, as the experiences of Colombia's paramilitary gangs, or the paramilitary *escuadrones* which perpetrated the genocide on the indigenous population of Guatemala clearly show, quite often, civil society organizations, responding to the organized violence of the state, or to the armed violence of non-government organizations operating in a territory where the state's authority is limited or has been openly challenged, are also non-government organizations, but certainly not civil organizations at all. In a period, as we will be discussing in turn, of contraction of nation-states' activity and leeway, it seems legitimate to ask up to which point is it reasonable to continue supporting state-building as a means to achieve control over the exercise of violence.

[15] See Reinares (1997), who also offers a sound description of the entire life-cycle of the militant.

knowledge on its triggering causes. Our old Machiavelli had already written on the unrealistic assumption of a conflict-free society: "*coloro che sperano che una republica possa essere unita, assai di questa speranza s'ingannono*" (*Istorie Fiorentine*: VII: 1) A lack of realism that might lead us to overlook the positive effects which even violent conflicts originate: "coloro che dannono i tumulti intra i nobili e la plebe mi pare che biasimino quelle cose che furono prima causa del tenere libera Roma, e che considerino piú a' romori ed alle grida che di tali tumulti nascevano, che a' buoni effetti che quelli partorivano" (*Discorsi,* I: 4, 1). Ever since Machiavelli, the question of social and political violence has been formulated in terms of which are the available resources that may be exploited in order to prevent its occurrence: socialization and redistribution, state monopoly of violence, and the law.

These are, in fact, the basic ingredients of every policy package designed for the prevention and control of violence. Two remarks are worth making here, however. The first: the above mentioned triad of controls presupposes the existence of a greater power – whether it be physical, military or legal – which is exercised through the spreading of collective diffidence, enforcement or the legal process. The state – a problem which will be dealt with below – is, therefore, back in. The second remark: every violence controlling-device may – no matter how sophisticated its engineering happens to be – feed back on the very scenario it was designed to keep under control, and bring about unintended consequences whose effects on violence will be a function of the institutional setting. In other words, attempts to control or limit the exercise of violence will inevitably result either in the raise or in the decline of violence – that the final result will be one thing or the other will depend on whether the controlling mechanism has been used in an authoritarian setting, or else, in a situation dominated by the rule of law, etc.[16] Even if the specification might appear obvious, it will be worth recalling one of its most important corollaries: Only under specific conditions will the introduction of control policies result in the inhibition of violence. The rest of the time, particularly when the socialization, redistributive and legal devices have failed, we will be sent back to the usual setting where violence only

[16] For these and the following remarks my discussion heavily relies on the contributors to W. Heitmeyer, H.G. Haupt, S. Malthaner & A. Kirschner (eds.) (2010). Although the entire book sets out a valuable, empirical research agenda, I found particularly illuminating Andrea Kirschner's and Stefan Malthaner's contribution.

engenders more violence, and where those sets of self-controls Norbert Elias once referred to will be replaced by the far more depressing scenario described by Max Weber: even if force is certainly not the only instrument available to the state, one should not forget, however, that force is distinctively an state-resource. Therefore, as long as states remain with us, even in the presence of other, new actors, the close connections between state and violence should not be underestimated.

True, the state may also try consensus, and it often does. Yet, it will be worth recalling that compromise may come to the surface along with a totalitarian or belligerent government's or parties' discourse. Consider the various courses recently taken by some European, right wing political parties – which visibly announce the type of political monsters we are going to have to deal with in Europe soon. With local variations, it would be easy to detect a *nativist* reaction in the domain of rights and labor market opportunities ("our folks first"), an authoritarian reaction ("let's get tougher" on such or such group or category which often have been previously associated with, for instance, rising crime rates), and a *populist* reaction (usually under the form of a moral indictment against such and such cases of political or corporate corruption, but which, on a closer scrutiny, turn out to be a genuine scapegoat and an easy target for a revenge perpetrated on the entire political, corporate and intellectual elite of the society). Be it as it may, in order for consensus to emerge, institutions (such as the schools, the organized religions, or the media), organized groups (such as those the police might want to infiltrate, including social networks, and every hierarchical, interpersonal relationship of supervision), the language (particularly the public discourse in the media, which has promoted the replacement of the *freedom fighter* label by that of the criminal gang) and the public spaces (such as public transportation, residential quarters or notorious public places amenable to be used for gatherings or demonstrations) must be mobilized and thus become a part of the controlling device.

No matter, however, the extent of socialization and redistribution, state monopoly of violence, and the presence the law, from school and mall shootings to the more diffuse fears concerning terrorist threats, it looks like violence is everywhere. Even if mass media often exaggerate the threats (not just those coming from terrorist groups: consider de 2009 international campaign on the A-flu pandemic threat) and blow the precautions out of every proportion, thus giving the impression of a general loss of control, the bad news is that most attempts to control the

proliferation of violence often fall short from bringing it to a halt and, still worse, they sometimes become themselves a source of conflict and violence. The violence-control-violence vicious circle casts no few doubts on whether unpredictable, or even random violence, may be efficiently arrested by traditional, controlling institutions oriented to either prevention or deterrence, such as the classical monitoring institutions of the state (the police, or the government's intelligence), the enforcement state-machineries (the police, or the military), multilateral institutions or international legislation[17]. In other words, relationships between prevention/control and political violence might be formulated under a trilemma.

First, there seems to be a type of situation in which the withdrawal, the reduction or the relaxation of controls may be seen as the immediate cause of violence. The interesting question is here that of under what set of conditions has the slackening of controls ever been the triggering factor in the causation of violence. Hypotheses have been advanced that emphasize on the nexus between structural disorganization and violence. The connection might work through the effects disorganized societies may have on would-be activists' capacity to control their own life-choices. The above mentioned, emotional perspective would inquiry into the effects that a drawn-out experience of humiliation and exclusion, or a prolonged deprivation of social relations and recognition, might have on the life cycle of prospective activists. Under these conditions the observer is likely to expect that the consideration of the consequences of one's own actions over the others will loose salience as an inhibitor of violence.

Second, there are those situations in which the very violence-control mechanisms may be seen as violence's triggering events. A case in point here is – both at the local and at the global level – the classic setting of the struggle against terrorism and its "collateral" effects. The Mexican experience under the administration of President Felipe Calderón since 2006 shows how the introduction of control mechanisms against violence (in this case, control was meant to be achieved through the militarization of public order in some regions in which public security was already very deteriorated) may easily be interpreted as violence-inducing events. The critical, triggering event that was to unleash pervasive violence here was not so much the increased police's pressure that was brought to bear upon the criminal gangs, but rather that this was going to be accom-

[17] See, again, and also for the following three paragraphs, (except for the cases of Mexico and Madrid), Kirschner & Malthaner's contribution in Heitmeyer *et al.* (2010), cit.

plished *manu militari.* Insofar as the selected device for control was itself violent (and there is, *prima facie*, no more violent state institution than the army), then it made no difference whether violence was meant to be used preventively (in which case, the violent reactions seek to eliminate controls), or as a *post hoc* dissuasion device (in which case we have a violent tool that is exploited in order to introduce new controls or to expand existing ones). Be it as it may, both scenarios immediately call in the question of legitimate means.

Third, it would still be possible to consider violence as the main predictor of a situation characterized by pervasive loss of control. Here, it is possible to begin with the old, Thomas theorem: once a situation has been defined as real, it will be real in its consequences, because what is important is not so much what happens but what the interpreters believe that is happening. Incomplete evidence, beliefs and prejudices will be real facts as long as they produce real effects – for it is the interpretation what causes the action. The classical view asserting that diffidence will be more pervasive in high crime rate societies seems to be consistent with a liberal, contractarian tradition, which had always seen the state as a guarantee for citizens' security – even to the extent that it was on the performance of precisely this type of assurance of citizens' physical integrity that the state's exceptional powers *vis-à-vis* its citizens had often been grounded. Now, when this function is no longer performed as usual, citizens under siege feel that the authority of the state has collapsed, that the threats are so unpredictable that they are no longer able to plan their own life, and that – as it was the case on March 11, 2004 in Madrid – the legitimization of government must be called into question. If the state seems not to be able to protect its citizens' life, it is only sound that its legitimization be reviewed, and citizens ask what do they want the government for.

Yet, as announced before, the state is no longer alone. Let's approach the end of this section with a few remarks on the private actors. Globally, the existence of a state's monopoly of violence seems to be more the exception than the rule. In many regions of the planet, control and governance is not the business of the state agencies. On the contrary, public order and violence monitoring may involve non state agents – which sometimes cooperate with existing state structures, and sometimes compete with them. Public-private cooperation, or conflict, where state hierarchies do not prevail but actors do nonetheless try to influence the citizens' behavior, looms in the near future as the most pervasive form of governance.

The public-private government scenario will take different roads to come to different parts of the globe. While some observers already point to a genuine withdrawal of the state in the governance of advanced democracies, others have identified an *exit from the state* in regions where the nation-state never came to be. In any event, the role of informal controls (such as those originated in the social classes, the popular cultures, or the life experience in suburban, not so marginal, residential quarters like the American *favelas,* the European *banlieus*, or the African and Asian *bidonvilles*), the cohesive function of family ties, and the rest of mechanisms that feed moral norms and set in motion the dynamics of inclusion and exclusion, they are all inclined to conflict with state controls, in particular when war, rebellion and uncertainty loom in the immediate future. Not even the role that organized religions, as private agencies, are likely to play in the future as violence-controlling devices is easy to elucidate. If, on the one hand, organized religions may amplify the existing drives towards the use of violence (as it has been the case in much of the postcolonial world, or as it was the case when religion was violently deployed against the moral enemy[18]), on the other hand religion may have, and it often does, a significant impact on prevention and control of violence.

A question that is often formulated is whether the coming future of violence against the institutions, as well as institutional, indiscriminate, violence will take us through both a qualitative change and a quantitative increase of violent attempts; and whether this new scenario might eventually lead to an unpredictable escalation that our societies will not be able to arrest by resorting to the conventional control tools such as the police, preventive monitoring, enforcement or the rule of law. It is in this setting that we have to think of the not so weak ties between the prevention of terrorism and pre-emptive terrorism. One of the emergent effects of the world-wide, aid-to-development industry has been the global growth of the constellation of corporate activities related to the prevention of terrorism and the strengthening of controls over the individual citizens. If our democratic, liberal states are bound to face the dilemma consisting in gaining additional capacity to set limits to the dangers inherent to the mere existence of terrorist groups, but only at the price of a significant expansion of police controls over single citizens, and the intensification of enforcement mechanisms, then the efforts made

[18] On this last case, again, Walzer (1965).

to gain in capacity of control will be likely to end up with the introduction of new restrictions on the exercise of civil liberties, the infringement of individual rights, or even with the division of state powers in jeopardy. It should not go unnoticed, moreover, how political movements and publicized opinions fomenting the approach based on *tough* responses to the challenge of social and political violence very much lean towards the obnoxious use of warmongering expressions and the partisan abuse of the victims and their rights for political purposes[19].

3. Citizens, Aliens, Suspects and the Transformation of Government

How far may go the encroachment of civil and political rights? Can our liberal democracies afford it? The question would be settled if it was not because, on these matters, the distinction between totalitarian and pluralistic regimes is less obvious that what one would expect. The deployment of violence-control and monitoring devices rather seems to be a permanent trait of all modern states[20]. Even if we recognize the complete defeat of Nazism, Roberto Esposito contends, its cultural defeat was not as complete. That is the reason why he openly proposes a *biopolitical* characterization of our liberal regimes. The central role played

[19] This is, in my view, the case of the very much brought into play ticking-time bomb scenario: Would you approve torturing a detainee if this was going to serve to save the life of hundreds of innocent citizens who happen to take a walk where the device is going to blast? The consequential thinking behind the question is obvious. If it wasn't because the imagined situation is dramatic, the question might seem hilarious. Incidentally, when terrorists use a ticking-time bomb they usually communicate the place where the device is going to detonate, in order for the spot to be evacuated. That's the rationale behind the chronometer device. And, when they do not communicate their targets in advance, does it make any difference that they employ a ticking-time device, a train or an airplane?

[20] Esposito (2008: 173 *et passim*) suggests that, if Nazism was defeated in 1945 and Stalinism collapsed in 1989, there are those who might have wanted to see that – in the end of these two forms of totalitarianism, there was a chance to return to the liberal political language. Yet, here again, he goes back to the end of World War II to affirm that this denouement did not mean the triumph of democrats and communists against fascists, but rather the victory of an alliance between liberals and Stalinists – both of whose political systems were founded on analogous *biopolitical* regimes. He goes even further to affirm that the conflict of the twentieth century was not one between totalitarianism and democracy, but a dilemma on whether making history out of nature (read Marx) or making nature out of history (read Spengler). For the Nazis, nature, in what it means for biology, is not, an anti-history, a philosophy or an ideology. Rather, nature is the negation of philosophy, and Nazism itself is not a political philosophy, but a political biology (177).

by the *bios* as both object and subject of liberal politics is confirmed – under the liberal view – not through the appropriation of the body by the state, but through the appropriation of the body by the individual (2008: 178). In other worlds, if for the Nazis man *is* nothing but a body (recall Agamben's *bare life*), man, for the liberal thinking, *has* a body. Yet, there is no rupture with the biopolitical lexicon – only that property has been transferred (when not?) from the state to the individual.

It is precisely the *biopolitical* characterization of liberalism that rules out any chance to bridge the gap that keeps it apart from democracy. Really existing liberal democracies have never become those democracies they originally claimed to be. The liberal logic (non egalitarian, individualistic, naturalistic) stands for something very different from democracy's universalistic and egalitarian drive[21]. Even the language of liberal democracy gives away its true *biopolitical* character. Liberal democracies have always ruled over a group of subjects that were thought equals because they had been separated from their bodies and conceived as atomized individuals – each endowed with a rational will (180). Abstract individuals so *dismembered* find their political correlate in the proposition

[21] Discussing Hannah Arendt's view, Esposito of course wants to do it away without the concept of totalitarianism. He claims that if every non liberal system has to be totalitarian, then, pretty much for the same reasons (say, that they both oppose liberalism in different ways and for equally different reasons) communism and Nazism cannot both fit together under the totalitarian category: "If we refuse to accept the premises of positivist historicism, and reject the idea of a time-sequence of totalitarian and liberal democratic regimes alternating each other over time, and replace it by a genealogic or a topologic approach, then it is possible for us to realize than the real breakthrough is not the vertical one that separates totalitarianism from liberal democracy, but the horizontal gap which separates democracy and communism (as the realization of democratic equality) from the Nazis tic and liberal states' *biopolitics*" (2008: 178). On several counts is Esposito right: The Nazi state's *biopolitical* inclinations should be clear as one examines eugenics and the Nazi obsession with the cleansing away of every "degenerated" form of life. Liberalism's *biopolitical* character is to be found, therefore, in its tendency to the governance of life, of the biological life of individuals and entire populations – a tendency which antagonizes every universalistic procedure of democracy and that can be detected in every significant political decision. It comes as no surprise that the model of medicine stands out at the core of each project. Medicine has become not just a privileged object of politics, but its most pervasive form. When the living or dying body becomes the symbolic and material epicenter of every dynamic of control and political conflict; when the single individual is more and more interrogated and objectively involved in questions having to do with the conservation, the confines or the exclusion of their own bodies, then we face a dimension which cannot any longer be called post-democratic, not even "beyond democracy". We are properly outside of democracy. (Esposito 2008: 179-80).

which wants (as in Thomas Hobbes' *Leviathan,* XVI) the *person,* not the body, at the center of political, democratic praxis. A person understood according to its original meaning: a *disembodied* mask, an emaciated subjectivity not under the influence of bodily necessities, impulses, or desires. Only under liberalism's *biopolitical* turn has it been possible for the body of the subject to be *remembered.* Yet, it is precisely this turn, which brings the bodies back into visibility as authors of the government, what ultimately puts in jeopardy the equality principle that cannot be applied to something – like the body – which is invariably different.

Once the equality principle has been jeopardized, Esposito writes (*cit., infra.)* doubts are cast on every distinction on which modern politics rests: Law and theology, public and private, artificial and natural… When the body comes to replace the abstract subjectivity of the artificial, legal person, it becomes difficult to distinguish between whatever refers to the public sphere and whatever refers to the private sphere. Public and private, natural and artificial, politics and theology are so closely intertwined in the flow of human life that no majority decision will ever be able to disentangle them. Esposito believes that to be the reason why the centrality of the body is not compatible with democracy's conceptual lexicon. The centrality of the body has rather been compatible with the decline of democracy and its conversion into a *biopolitical* democracy. Liberalism's *biopolitical* character is to be found, therefore, in its tendency to the governance of life, of the biological life of individuals and entire populations – a tendency which antagonizes every universalistic procedure of democracy and that can be detected in every significant political decision.

Our own reading of Esposito's, shrewd contribution is that it is the reflexive power of politics – that is, the capacity the political sphere has to determine its own confines from within – that explains how politics may become biology. From smoking bans to the regulation of drugs, from highway speed limits to biotechnology applied to the prosthetic or non prosthetic redesign of the human bodies, from human fertility technologies to the control of immigration, from dying with dignity to bioethics, from *neuropolitics* to *neurodidactics,* it is difficult to deny the pervasiveness of the biological element within contemporary political discourse. It remains to be seen, however, the extent to which these biotechnological innovations will make of totalitarianism a useless or a residual category, as Esposito believes. Yet, what is clear is that we are no longer going to talk politics as we used to do it before the *biopolitical* turn

that took place in the twentieth century. Furthermore, it was precisely this *biopolitical* element what the old discussion on the state of exception largely overlooked. For, if we reconsider again the logic of the concentration camp, the clandestine detention facility, the colonized territories where peace may not even be an objective for the colonialists, the city under siege or under punitive air strikes, or the civil rearguard under exceptional measures of enforcement, then it is clear that, under the state of exception, *biopolitics* may easily turn into *thanato-politics*.

Although the connection between *biopolitics* and *thanato-politics* has been well addressed by Esposito (2008, 177), it is Achille Mbembe's discussion on *necropolitics* (2003) that will be rescued here. Mbembe's tenet is that the transformation of contemporary politics has not been brought to a halt as it approached its *biopolitical* stage. Far from that outcome, transformations were meant to go far beyond. Yet, *necropolitics* must not be understood as the type of setting in which, say, an scared Russian Tsar orders his guards to shoot down the people gathering outside the Winter Palace during 1905, Bloody *Sunday* in St. Petersburg. Contemporary forms of life's submission to lethal powers include the acceptance, no matter whether consented or enforced, conscious or unconscious, regarding decisions and non decisions which may compromise the continuity of life for entire human populations. These decisions may even be non-political in the sense that they be taken in a non political-setting (for instance, in the markets), but they bring the liberal, *biopolitical* regime, to metamorphose into something different and unnoticed insofar. The recent, already visible trend of opinion, which openly recommends a coming back to torture, is a case in point here. Torture is wrong on many grounds well beyond the physical or moral pain inflicted to the victims and its sequels – as the doctrines which lend support to article § 5 of the 1948 Universal Declaration of Human Rights clearly indicate. Among other grounds, it is wrong because it infringes the principle of liberty (no one can be free under excruciating pain), and so it does with the principle of equality (the situation of the victim of torture and the executioner is obviously far from being symmetrical)[22].

[22] Having ignored freedom and equality, the executioners have also completely forgotten the entire humanity of the prisoner. The refusal to recognize the absolute other – an enemy alien, for instance – as a human being lies very much at the core of the logic of the ethnic cleansing, the concentration camp, etc. On the ethics of recognition, see Sparti (2003); on the moral implications of the oblivion of recognition (reification), see Honneth (2005).

However, the recent debate on torture (Ignatieff 2004; Harris 2005) clearly points towards some other kind of considerations, much closer to liberalism's *biopolitical turn*: namely, those having to do with the particular rapport between violence and truth, or between the politics of the body and the *body politique*.

It is in this sense that it would appear legitimate to talk of *necropolitics* as an entirely different setting of individuals or groups subjected to the arbitrary will of a *thanato-power* – a setting in which the existence of subjugated subjects could hardly be distinguished from the existence of genuine walking dead individuals (Mbembe: 2003). In other worlds, the same experience of the colony that directed Franz Fanon's glance towards the *damnés de la terre,* returns now in Abu Ghraib, Guantánamo Bay or Islamabad[23] under the form of extra judiciary executions, *intensive interrogations*, clandestine flights to hidden detention facilities, new limitations to the exercise of citizen's civil and political rights, invasive searches, validation of torture[24], restrictions to the free circulation of individuals around the world; criminalization of immigrants, or even, in Europe (as in Denmark, spring 2011), the reintroduction of police-border controls within the Schengen-area.

Are all these events the ultimate expression of the adoption, on the part of Western democracies, of a genuine emergency legislation? How far on this direction the 2001, American *Patriot Act,* or the 2002, German *Terrorismusbekampfungsgesetz* go? Will exceptional measures become permanent? Recall that such was Benjamin's (1942) depressing prediction in his thesis § VIII on the philosophy of history: "The tradition of the oppressed teaches us that the "state of emergency" in which we live is

[23] The May 2011, Islamabad military operative designed to assassinate Osama bin Laden and kidnap his body presents of course many interesting sides. Why now, when hundreds of thousands claim in the streets of the Arabic countries for the end of the authoritarian and corrupt regimes that Western diplomacies had been actively supporting? Is it that – as some conservative media claim – the Arabic world is not ready for democracy? Might it not be that the Western world is not ready for democracy in the Arabic world? Western experts on the *jihad* assert that – after the Islamabad operative – the *jihads'* backfire will inevitably follow. Will such defensive response follow because the *experts* say it will, or do the *experts* say there will be a backfire because it will come? Be it as it may, it is difficult to stay away from the thought that the true, undemocratic aim behind the *experts*' comments can be nothing but the reinstallation of fear.

[24] Even if the above mentioned events require no further specification, on this particular question of *hard interrogation* of detainees, it will be useful to refer, as a remainder, to the explicit contributions of Harvard law professor, Alan Dershowitz (2002, 2006a, 2006b).

not the exception but the rule. […]. The current amazement that the things we are experiencing are 'still' possible in the twentieth century is *not* philosophical. This amazement is not the beginning of knowledge – unless it is the knowledge that the view of history which gives rise to it is no longer tenable". Insofar, very few facts about emergency powers appear to be conclusive, and besides it is difficult to assess when enough time has elapsed so as to declare that something has become "permanent". Agamben (2003, 24-25) warns that, if the Nazis eventually made it to seize power, that was in part due to the fact that, under article § 48 of the 1919, *Weimarer Verfassung*, most articles of the constitution concerning civil and political liberties[25] had been suspended for years before the Nazis took the power of the state – thus anticipating the modern tendency to use the exceptional character of a protracted economic crisis as an alibi to impose the political and military emergency.

Do we face something like this? In most cases, the blacklisting of suspect organizations or individuals, and the endorsement of *ad hoc* legal and administrative measures seems to be present. In both the United Kingdom and in the United States, there are indications in the sense that extra judicial arrest might have been implicitly sanctioned. Moreover, in the United States, a special jurisdiction has been pre-fabricated in order for the principle of *habeas corpus* to be easily abandoned when it is seen fit, and the same principle has undergone severe *de facto* restrictions in the United Kingdom.

Even if these developments do not indicate that we are sliding down into the permanent state of exception, they do suggest, however, a dangerous drift towards pre-emption and preventive enforcement against individual profiles which cannot, as such, fulfill the requirements of a punishable behavior. Here, some observers have often referred to G.W.F. Hegel's prediction in his remarks on the consequences of the French Revolution concluding his monumental *Vorlesungen über die Philosophie der Geschichte*, where he wrote that when one moves – as it was the case under Jacobin terror – from the fact-informed suspicion to the attribution of intentions to suspects, the rule of law will, sooner or later, be replaced

[25] Notably articles 114, 115, 117, 118, 123, 124 and 153. Except the last one, which refers to the protection of private property, the other articles refer to such sensitive issues as, for instance, censorship and freedom of speech (§ 118), freedom of assembly (§ 123), or freedom of association (§ 124). Once the state of exception was last declared in 1933, it was of course never revoked until the complete defeat of Nazism (Agamben 2003, 75).

with the rule of the guillotine. This is the case when the investigation of suspects is no longer under the lead of the district attorneys or the public prosecutors, but under the control of police authorities; or when criminal law is deployed on the basis of a subjective conception of procedural truth, in which – after the fabrication of the "right" profile of behavior for terrorist criminals – judicial certainty is obtained by simply *fitting* the suspect into that, fabricated profile, so that penalties do not ultimately come to punish singular, well investigated crimes but the *terrorist-like* profile of the alleged perpetrators, and the procedure of empirical substantiation of the prosecutor's allegations inevitably degenerates into an inquisitorial prosecution of the suspect. Our legal systems are designed to prosecute and punish offences and criminal acts, not individuals, and much less their ideas, beliefs or "intentions", nor do they assemble the courts of justice depending on who the suspect happens to be. Should it be otherwise, we would have moved from the prevention of terrorism to the terror of prevention.

One interesting point about state terrorism was made by Michael Walzer (2006). He claims that the ends and scope of political action cannot validate the means employed, nor do they serve to single out the agents according to the ends they pursue. Political ends are pursued by right and wrong means alike, and it is, precisely, the disapproval of some of them that allows us to lend support to the same objectives that violent organizations or individuals promote employing the wrong means. Yet, and here comes the puzzle, if terrorists are judged according to the consideration deserved by the means they employ, and are never simply condemned because we do not agree with their objectives, if there are – in other words – no illegitimate objectives, then it is hard to understand why we obstinately want to look at the state's action only from the standpoint of its – presumably legitimate – goals, and not from the consideration of the means it employs. Terror – Walzer writes – is a choice, not the general will of any group[26]. The question remains as to whether terror is a strategic choice which is later on validated on moral grounds, or it is rather a moral choice which is later on justified on strategic considerations[27]. That is,

[26] And this is a good, *prima facie,* reason to think that Benjamin's *reine Gewalt* may hardly be considered a form of terrorism. Even if it takes place outside every possible law, as long as it is aimless, it will also be short of the intentional, purposive element.

[27] Truth has always been the first victim of every war, and in no other occasion the inconsistency of the values we are proud to cherish becomes as clear as during the war.

General Mola *versus* Robespierre. Are there any two better illustrations of *necropolitics*?

The future of every society is a function of its capacity to avoid violence or to channel its exercise through some alternate sacrificial ritual. Modern states have historically claimed exclusive rights over the exercise of violence. As the international, state system came to be regulated, the critical issue was no longer that of the conflict between states (certainly not because these, inter-state conflicts ceased to exist, which they of course did not, but rather because there was a clear route-map after the notion of sovereignty was worked out), but that of the conflict within the state. That was the viewpoint of Machiavelli and Hobbes. It was not until Marx that the state was rediscovered as part of the conflict: then it was possible to talk again, not of the conflict within the state, but of the role of states as parties involved in conflicts. Not just class conflicts, however; as the clashes originated in disputes concerning self-determination rights of various stateless communities across Europe offer an unambiguous example. When the state becomes itself a party in the dispute, the entire image of the civilizing process, according to which physical violence is bound to be exclusively incorporated to the state's *potestas*, will inevitably fall apart. The recent, above mentioned discussion on the legitimacy of torture may be seen as a clear indicator of a coming crisis of state's authority and, still worse, of the collapse of the ensemble of attitudes which stand, historically, at the critical core of the way in which tolerant societies have dealt with violence[28].

Michael Walzer (1977), who exploits the distinction between just and unjust wars, sees truth as a victim when war is unjustly declared or when the rules of the *ius in bellum* have been infringed by combatants and statesmen alike. For example, *ius in bellum* is often cited as a warrant of the immunity of non-combatants. However, as soon as we look at the wars of our twentieth century ancestors, we quickly realize that most of the victims were disarmed civilians. The same goes, of course, for the Balkans and Iraq. That is the reason why Walzer finds comforting that soldiers and politicians try to hide their wrongdoings from the sight of the public opinion (consider, for instance, the case of Abu Ghraib). As if that was an indicator that there is some kind of shared moral subsoil. The idea is quite simple: hypocrisy is not an indictment we are ready to use against the absolute other. With the radical alien there is no moral negotiation, and resentment – as philosopher P.F. Strawson saw – is an indicator that the crime is seen as something engendered within a shared moral community. That explains the pervasiveness of hypocrisy as the bottom-line of every form of moral critique, which shows that – beyond partisan alignments – there still remains a compromise between the critic and his target.

[28] Even if, according to human rights organizations, torture has been, and still is, a routine in too many societies, a legitimate question might be to ask about the institutional contexts

We may now go back to the link between the bodily policies and the *body politique;* for, in fact, torture and the liberal state's *necropolitical* turn are not the only two dimensions this rapport exhibits. An additional dimension may be found in the deployment of the human body as a weapon for the exercise of violence – sometimes, indiscriminate violence. As we have mentioned, the attempts which, over the past decade, have taken place in New York, Bali, Casablanca, Madrid, London, or Mumbai are increasingly difficult to predict and prevent. This brings in the question concerning the extent to which the threats we face now are substantially different from the threats we used to face in the past. On this aspect, remarks are frequently made that point to the fact that the "new" violent threats challenge the controlling capacities of state and non state institutions alike. The view has it, on the one hand, that the increasing transnational dimension of the "new" terrorist threats makes it far more difficult to trace its origins. On the other hand, Al' Qaeda and their associates seem to be a pretty *modern* creature: if terrorist organizations were, in the past, well established within the territorial confines of nation-states (consider, for instance, most of the Latin American *guerrillas* during the sixties through the eighties, and their surviving remnants), and therefore they had well known objectives within that territorial domain, such as the alteration of the *statu quo* within the society in which they operated, it looks as if their nowadays' counterparts were short of any such objective[29]. A genuine case of Benjamin's *reine Gewalt*, that is, of

in which torture occurs. At the aggregated level, the question of course resembles that one which asks whether the new, unconventional counter-terrorist policies are compatible with the continued viability of our rule-of-law governed, democratic states. On these matters see, *inter alia*, Cole (2003), and J. Hocking & C. Lewis (2007).

[29] Likewise, as mentioned before, control and monitoring of violent actions may have as an objective either the continuity or the change of power structures. Recall that a threat may be used to shock the population and find an alibi to impose a dramatic turn of the institutional arrangements. Yet, from the standpoint of political continuity, the control of violence is a strategic component of every policy that wants to be sustained over time. That seems to be the case, in particular, during times of instability or discontent, or when the shocks that put the *statu quo* under threat are propagated by the media. Under these conditions, threatened institutions become vulnerable if they fail to manage the time and space dimensions of violence control. On the temporal dimension, if violent organizations proceed rapidly towards the consecution of their objectives (however short of *ends* these might happen to be), then state institutions will be forced to fine-tune on the time lag between decision and action in order to efficiently respond to the challengers' own time lag. On the space dimension, when the city has become the dominant form of organization

violence outside any law? The answer should now be probably affirmative. The massive coming back of kamikaze warriors, ready for self-sacrifice, whose rationality cannot be assessed with the language of *Zweckrationalität*, as well as the religious scheme behind violent activism, might lead us to speak of *means without ends.* If we ignore the critical question concerning the fighter's identity, then, in fact, as the old ideology-supported, *programmatic politics* looses salience; as the old *guerrillero* is transferred to the past, made part of history, and quickly replaced – in particular in the suicide-bombings – by women and extremely young combatants; this *fuga in avanti* seems to indicate that we face an unprecedented transformation.

Now, the problem is that agents involved either in the exercise or in the control of violence may all fail. This is probably where our current concerns with governance have originated. Governance, however, also stands for monitoring the activity of all those value-charged institutions, among which there are schools and other civil society institutions that are responsible for the primary and secondary socialization of the would-be violent activists. Yet, as the array of monitored organizations increases, and an increasing diversity of controls is needed, then, direct, state controls seem to be bound to give way to civil society, indirect controls. These developments appear to question the ubiquitous presence of the nation-state.

Over the past few years, analysts have begun to speak of post-democracy[30]. The scheme may be controversial as it somehow takes a time-sequence for granted, even if it is plain that some of the traits of post-democracy are, in fact, rather pre-democratic. Yet the scheme manages to introduce some order on a number of useful insights. First, there is the suspicion that powerful minorities' interests receive a far greater consideration than the common interests, or the interests of normal citizens, when the time comes for making political decisions. Second, a well entrenched belief seems to propagate, which has it that state institutions are inefficient, while private corporations are better

of working and residential spaces for the large majority of mankind, state institutions will have to understand how sub-spaces of social discontent (such as ghettoes, slums or *banlieues*) have massively accrued within the complex, contemporary urban setting, and what sort of specific problems of control do they entail when rapid social change turns these spaces into the backstage for the activity of violent organizations which operate at a not very well defined territorial level.

[30] On this matters, see Colin Crouch's seminal contribution (2003).

designed and more resistant against collusion and corruption – the corollary being that public sectors around the world should be downsized and governments should adopt private sector criteria when it comes to the provision of public services. Third, if the rapport between citizens and governments takes place through the electoral process, but the rapport between government and the outsourced, public service providers takes place through a complex fabric of regulations, then it appears that voters have no leverage whatsoever over the service providers while these, in turn, are not subjected to any form of accountability. Last, if we consider the classic, concentric model of political involvement whereby voters originate affiliates; affiliates originate activists, and the leaders' elite emerges out of this last group, a radical innovation sets in – now leaders include powerful owners of corporations, consultants and a legion of *experts* in the pursuit of money, prestige, power, or any blend of the three.

The current transformation of party politics; the extraordinary relevance of private corporations; the weakening of citizens' political influence, are all elements that point towards a more radical metamorphosis underlying the ongoing changes. This deeper metamorphosis refers to the state and reflects – as Pizzorno suggests[31] – a trend which is internal to the development of the nation-state, and not just an emergent effect of globalization. The idea is that the state is no longer the authority it used to be – an authority which does not trade with private interests, while private interests are not directly present in the making of state-decisions that concern them. On the contrary, Pizzorno speaks of state's *contractualization* ("*contrattualizzazione dello Stato*") and "negotiated rulemaking" that replaces public representation with private representation. It is as if a different, private body, which is at the same time legislative and judiciary, was going to replace the legislative and judiciary powers of the state. The consequences of this new position of the state are felt in the very nature of the legal process: mobility of the normative universe (continuous creation of *ad hoc* regulations coming from different sources and built "from the bottom up", not supported by a broader doctrine or legislation, and constantly reinterpreted and redesigned in the courts through litigation or judicial review); self-legislation (in which private agents make it to impose through contract negotiations with the state the most favorable set of regulations); expansion of self-governing

[31] Cfr. Alessandro Pizzorno (manuscript).

legal activity (where the law is originated in the headquarters of consultants, *experts,* but not exclusively in the legislative institutions of the political system whose legislative power declines). Obviously, the tendency exacerbates when it is considered at the international level – where, as Pizzorno writes, there seems to be a genuine return to the pre-industrial *lex mercatoria*.

4. Political Violence and Truth

Do the revolutionary and the Fabian portraits of liberal democracies' recent developments exclude each other? The former, as indicated, turns its sight towards exceptional powers and the *biopolitical turn*, while the latter mainly point to the detectable losses in the quality of our democratic, representative systems. Liberalism's *biopolitical* turn seems to constitute a better portrait of recent transformations than the old, radical assumption concerning the increasingly permanent character of exceptional measures. Even if some of the recent legal, political and military developments closely resemble the Benjamin-Schmitt state of exception scenario, it still remains to be seen whether current transformations have come to stay. Instead, the *biopolitical* component does seem to have produced, since the last century, some permanent social and political changes. While the state of exception hypothesis needs to rely on the assumption that nation-states will stay with us as we have known them during the past two centuries, the *biopolitical* qualification is fully compatible even with a stateless scenario in which nation-states and public governments would have disappeared, or lost much of their centrality, and left the stage for other, private actors to come to the foreground. Whether the new coming, private governments will become the agents of some form of *necropolitics* – even to the extent that would make them look like, not just emergency governments, but genuine states of exception – it will depend on the way citizens will react to the changes already under course. That is obviously a question on whether citizens around the world and, in particular, in advanced democracies, will easily let go the world they have known hitherto – that is, the world of individual and collective rights they might be about to loose.

Writing before the 09/11 events, Alessandro Pizzorno said that there was to be expected a return of politics into ethics (2001). This turn needs not simply mean that in the coming future politicians will be increasingly judged according to a variety of moral standards. This is nothing but

logical if one considers that morality is much easier for the average citizen to handle than other, more complex technical questions referring to, say, economic governance, which is often used as an excuse for the growing privatization of government activities. The new politics of the *ethos* will in fact be originated in a different set of transformations: when the decisions concerning the material life of the populations appear not to offer relevant alternatives; when the capacity of the state to influence and change the structure of inequalities and social exclusions is limited to short-term, cosmetic effects; then, a return to the local *ethos* is to be expected (2001: 231-ff). If not for other reasons, so it would be because – facing the loss of the world they have known – people will most certainly cling to the values of the societies they thought they had a right to live in. Their defensive response will be the reaction of those who want to continue living in a society in which certain, non negotiable rules are still in force. Even if symbols built on a distorted, or just imagined past that never was, these rules are of course a sign of their identity, and everything taking place in the political sphere will be judged according to them. It is from here that one can foresee the type of political creatures we are likely to live with in the near future.

If not on other counts, Walter Benjamin was right to point to the strong nexus between violence and the law. First, law is a form of violence. This is not just because – to the extent that it should be possible to talk of legal violence – most of the latent violence which is present in our societies adopts a judicial appearance. Second, violence invariably stands at the origin of any law. Whether violence establishes the law or simply conserves it, the resulting legal body can only intend to either preserve the life as bare life (Benjamin's *das bloße Leben*) or to destroy it (*necropolitics*). Yet, it will not let it manifest itself as a common life or as a just life (not to say a good life). Politics is, in this respect, one way human beings have employed to correct the laws' scarce sense of justice.

But consider again war as a form of organized violence having the objective of creating law or of keeping the existing legal system. Are we in front of a case of *reine Gewalt*? Most certainly not; for war is a purposely conducted business with a clear design to accrue power, profit or both. That is why – no matter how conspicuously our actual wars usually infringe every possible law – our concept of war is so difficult to separate from the law.

Now, can war, impelled as it is by force and fraud, remain within the law? Not even the Grocian notion of just and unjust wars is endorsed by

the majority of the citizens in our liberal democracies[32]. Many of them believe instead, with Kant, that there cannot be a just war —that war cannot, in other words, be the activity of decent citizens. According to this view, war stands beyond any regulation, beyond the distinction between good and evil, or between justice and injustice. War would just express pure necessity, a primary impulse for self-preservation which rules out every chance for justice and keeps moral laws silent. *Salus populi suprema lex* is not very different from Hobbes' first law of nature (*Leviathan,* XIV) which prescribes that "every man ought to endeavour Peace, as farre as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of Warre". Once war is not a matter of justice, but a matter of necessity, it looks like the only way to fight in a just war is being the victim of an aggression.

Yet – as Judith Shklar wrote (1984, 80) – every enemy can easily be made to look the aggressor. The 1964 affair in the Gulf of Tonkin or the business of the alleged MDW in Iraq provide two illustrative examples. The natural law based, Grocian distinction between just and unjust wars conceives war as the opposite of consent and concord – yet, war is to be found at the end of the same continuum. This is the reason why war cannot stand out of the reach of morality and the law. The Kantian *doves* see clearly that justice and morality cannot depend on what we believe about the world (not even on what we believe we can possibly do on it), and will charge the party of the just war as guilty of moral hypocrisy.

If unable to defend themselves morally, *hawks* will try to appeal to necessity, whose military expression is *strategic imperative*. Strategic choices will later on be validated on moral grounds, of course: whatever brings about the common good is always terrible – Saint Just once said. Of course, the strategic imperative is hypothetical and depends on the assessment of consequences (recall that Robespierre asks what would the effectiveness of virtue be without terror). Personal motives and persuasions are ruled out, and the strategist has to coldly distance himself from his own values. Only results count, and the failure to attain the desired outcomes is not seen as hypocrisy but as ineptitude. Instant, strategic decisions do not bear on hypocrisy or on brutality – they just dwell on efficacy. The strategist stands to necessity. For him, necessity does not boil down to just the constrains of human nature or the imperatives of

[32] On the following topics, see Shklar (1984, 78-ff).

history. Necessity is the inextricable bond between means and ends. Nature and history are of course not moral; that is why virtue without terror is powerless.

In the sometimes called *open societies*, war may be openly discussed in the public sphere – even while the military campaign is under way. This means that what is to be understood by strategic imperative or necessity will also be subjected to interpretation[33]. The public debate sets back in, and the *public opinion,* as it is fabricated and publicized by a legion of non-elected *experts,* is bound to play a prominent role in the business of war. Such role consists in the establishment of some form of public, accepted truth that prevents citizens from asking why the commanders in charge of the air campaigns over Faluya or Tripoli should not be considered as criminals as the commands that planned and executed the air-strike against NYC's twin towers.

Finally, there is the moral crusade. The opposite to the employment of morality at the service of politics (what would otherwise be the rationale of *virtue* in politics for Machiavelli or Robespierre?) is the use of politics at the service of a moral, or even a religious cause. A moral choice that will be justified on strategic considerations: not Robespierre, but Mola. Moral imperatives are not hypothetical, and take the form of and end that has to be accomplished by any means. Under a moral imperative, necessity does not manifest itself as a relationship between means and ends. Necessity is an absolute. Here, the enemy is not just a stranger, an unarmed dissident, or the foreigner's institutional otherness. The enemy is the absolute other – with whom there is no room for negotiation[34]. When the absolute other is identified as evil, then its eradication will imply to exterminate every ideological opponent. Under Mola, Queipo de Llano or Franco, that was not ethnic or racial, but ideological cleansing – even, as Preston reports (2011), where there was no resistance at all.

Under the strong consensus of a moral crusade, protests against the hypocrisy of war will no longer be heard. When violence has been

[33] Including Walzer's own interpretation (1977) according to which soldiers' military ideology and considerations on strategic necessities are often nothing but an alibi to promote the strategists' careers.

[34] See Pizzorno (2007, 278) for the scheme on the stranger's various possible situations. There is much more on this in the rest of Pizzorno's book, but on citizens and aliens see also Benhabib (2002, 2004).

employed to promote a moral cause, it will be hardly possible to claim that there is no right use of violence – not, in particular, if the cause is already triumphant. Out there, there is only the absolute other, the radical alien, the unfaithful, the unredeemed, with which there will be no negotiations. Under the perspective of the politics of the *ethos,* enemy aliens can only be exterminated, because their bid is not for power or profit – it is a bid for truth. Many European veterans have already been there. In the language of Spain's insurgent officials, the *rojos* were not just the enemy, but the radical alien – they were the *anti-España* that the crusade was going to annihilate. If the definition of the enemy is an important component of every ideology, a somewhat more worrisome signal appears when those definitions begin to be couched in moral terms.

No war can be legal. What war determines is, precisely, who will decide on the state of exception and, therefore, on the laws. Yet, war takes place between societies and societies cannot claim to stand, in relation to each other, in the state of nature. Even if war created the state (not the other way around) wars are waged by more or less organized societies. That is why the shared, moral subsoil is still there; and that explains why today's Spanish right wing extremists keep on opposing the laws that order the exhumation of the communal graves where thousands of republican civilians, killed during the Spanish War and the post-war, still rest more than seventy years after they were executed.

While some have seen ideology and collective identity as the immediate antecedents of violence (Sen, 2006), it is clear that some of the horrors we have seen in the twentieth century may as well be originated in the innocuous moral persuasions of the common citizen. Hannah Arendt carefully distinguished between political power and political violence (1969). The latter may take place in the absence of any visible, organized political power. That is also the distance between *biopolitics* and *necropolitics,* between political continuity and exceptionality, between the rule of law (however oppressive it might be) and the law of the ruler. Exceptional political power shows a clear totalitarian proclivity: it not only expects citizens to put up with the laws of the rulers, but also craves for them to believe and think in a certain, preordained way. Exceptional powers seek to produce some form of truth. Such request is not just wrong and illegitimate; it is *impolitic*. Politics, however, is about facts and how to change them. Only science has to do with truth. Yet, truth is not very democratic either. Even if it was desirable that truth was the basis of every political persuasion, politics has not the truth among its

goals (Arendt, 1967). The ends of politics are rather practical – and some of them may appear to us more acceptable than others on moral grounds. Morality may sometimes become the objective of politics, although we would all be better off if it was just its premise. When truth and morality become the objectives, rather than the premises, of public life, it is only normal that some will want to situate their points of view beyond the reach of every critical scrutiny. Then, as expected, some others will try to turn facts into opinions.

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REVIEW ARTICLE

European Constitutionalism and National Identities: the Need for a Debate

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Armin von Bogdandy & Jürgen Bast (eds.), *Principles of European Constitutional Law*, Oxford-München, Hart Publishing - Verlag C.H. Beck, 2010, 2nd revised edition, p. 806.

Diana-Urania Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study of the "Functionalized Procedural Competence" of EU Member States*, Berlin-Heidelberg, Springer, 2010, p. 145.

I

One of the most widely debated books on European Union law to appear in the last years has been the *Principles of European Constitutional Law*, first published in English in 2006 and which has now been published in a revised and widened edition. Since many books have been published on the public law of the EU, especially after 2000, three basic features of this book ought to be pointed out: whether it can be properly categorized as a textbook, the overall meaning of the project carried out under the leadership of Armin von Bogdandy, and the influence of German public law doctrines.

From the first point of view, as Anne Peters observed in her review of the original edition [A. von Bogdandy (Hrsg), *Europäisches Verfassungsrecht*, Heidelberg, Springer, 2003], the German publisher erroneously included this book in the category of "textbooks" [42 Common Mkt L. Rev. 861 (2004); Jost Dülffer called it a '*kompendium*' in his review article, in 44 *Archiv für Sozialgeschichte*, 524, 553 (2004)]. It

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is true, as the editors argue in their introduction, that there is not a single category of textbooks, but a variety, and that not all of them constitute "introductory work [...] addressed to the novice who seeks an accessible grasp on the topic" (p. 5), and are characterized by easy language and definitions. However, with its 800 pages, this book certainly differs from a concise "*précis*", to mention a fortunate French literary species. Nor does it provide an easily readable summary of the state of the issues concerning EU law, as well as notions that can be immediately used for practical purposes. Indeed, as the editors recognize, the book is concerned, rather, with theoretical and doctrinal questions. Moreover, unlike not only textbooks but also most treatises, this book offers very differentiated points of view about the same reality. Consider, for example, the essays written by Paul Kirchof and Manfred Zuleeg on the "European Constitution". Consider also Cristoph Moellers's essay on the concepts of *pouvoir constituant* and constitution. Whatever the intellectual and political soundness of the institutional project that began with the Laeken Declaration and failed in the last decade, such essays provide the reader not only with "contending visions" of European integration, but also with a variety of insights into the possibility to give effect to the basic principles of constitutionalism beyond the Nation-State and, therefore, to lead to a transplant of those concepts. Precisely for this reason, the book is particularly helpful for doctoral studies.

It is very helpful also because it devotes considerable attention to issues that often are not adequately considered by legal analysis. This applies to von Bogdandy's essay on the "Founding principles", which opens Part I, and to Ulrich Haltern's essay "On finality" (of European integration), which concludes it. While Part II, which covers institutional issues, is more in line with traditional approaches (it ought to be mentioned, however, that the chapter written by Jurgen Bast on legal instruments has been enriched with a discussion of remedies, in addition to Franz Mayer's analysis of multilevel constitutional jurisdiction), part III deals with a wide range of issues concerning the legal position of the individual. It considers both the status of EU citizen and the fundamental rights and freedoms recognized to every person. Once again, the analysis is not limited to the rules of law and the operating mechanisms, but is completed by a solid analysis of the underlying theoretical constructs and is, thus, likely to draw the attention especially of those continental lawyers who are interested in the traditional structures of public law thought. A different perspective is offered by Part IV, which deals with the

constitution of the social order, with an interesting distinction between the economic constitution (Armin Hatje) and the labour constitution (Florian Rödl). Finally, part V adds to the contending visions of European integration proposed by Kirchhof and Zuleeg, Ulrich Everling's study of the EU seen as a "federal" association of states and citizens.

II

The second basic feature of the book emerges from the short description just carried out: all the essays have been written by a group of German scholars (and one from Austria) who belong to different academic generations and express a variety of opinions. From this point of view, it is questionable whether it is correct to say that the book was written by "younger scholars", as Anne Peters did in her review (though she specified that the authors "had already excelled in the concrete and specific fields" covered in the book) or that it involved the participation of "the principal actors of Germany's next generation of European lawyers", as Daniel Thym suggested in his review of the first English edition of the book [44 Common Mkt L. Rev. 837 (2006)]. What really matters is not the age of the authors (*tempus fugit*…). It is the fact that this book is not simply the product of a group where most of the actors are either a pupil of the leading figure or a colleague in the same university. This book was, rather, supported both by distinguished scholars and former judges, such as Kirchof and Zuleeg, and a number of younger academics who excel in a variety of legal fields and work in several German universities. Whether, and the extent to that, such group may either be regarded as a fairly distinctive group or as a representative group of the Austro-German tradition [as suggested by Massimo Panebianco in his review of the German edition, in 41 *Diritto comunitario e degli scambi internazionali*, 642 (2003)], it remains to be seen. However, the book can properly be regarded as a major contribution of German scholarship in the field of EU law and the influence of the ideas expressed therein is likely to be widely felt.

In order to clarify this feature, a parallel may perhaps be made with Vittorio Emanuele Orlando's treatise of administrative law (*Primo Trattato Completo di Diritto Amministrativo Italiano*, edited in several volumes during the first two decades of the twentieth century). Since 1881, Orlando had a very clear project, that is to say the building of a "new public law". He did not mean simply to provide a full coverage of the fields of public law that arose in connection with the widening of the

electorate. He meant to replace existing doctrines of public law, because they were – according to Orlando – conceptually unsound and insufficiently "legal", due to the excess of sociological and philosophical elements, with new doctrines. German public law doctrines, with their strong emphasis on the supremacy of the State over citizens and territorial authorities and their solid base in post-pandect legal theory, were at the base of his attempt. That attempt succeeded, due to Orlando's talent as a leader. Some scholars of his generation and virtually all the best scholars of the next generation contributed to his treatise. The importance of that treatise did not depend so much on the variety of fields that it covered, but, rather, on the use and crystallization of "the" legal method, in itself a very questionable approach, though a very productive one for some years [as I pointed out elsewhere: G. della Cananea, *On Bridging Legal Cultures: The Italian Journal of Public Law*, 11 German Law Journal 1281-1291 (2010)].

III

This leads us to the third, and by no means the least important, feature of the book edited by von Bogdandy and Bast, that is to say the strong influence played by German public law doctrines. A first problem is that such doctrines, especially when dealing with sovereignty and constitutions, are overly conceptualistic. The question thus arises whether such doctrines can really be helpful to re-orientate the focus of EU public law from theoretical concerns and towards an examination of the powers and functions of public authorities in the light of the principles of transparency and participation which Armin von Bogdandy examines in the first essay of this book. A work on legal protection of individuals should also look more deeply at the procedural aspects of good administration, especially as these feature most prominently in recent developments of EU law, both in judicial decisions and in the recent codes of practice.

Another question is whether the legal approach to the study of constitutional law, that characterised German doctrines, make them more suitable for the EU than others, such as the less recent English doctrines of public law that put so much emphasis on the "political constitution" [the best account is still that of Martin Loughlin, *Public Law and Political Theory* (1992)], or Italian and Spanish views of constitutional law as inherently "political" [see Claudio Martinelli, *Gaetano Mosca's Political Theory: a Key to Interpret the Dynamics of the Power*, 1 It. J. Public L. 67

(2009)]. A formalized legal approach may be more suitable for the study of constitutional adjudication, but not for other important aspects of a polity, for example the organization and functioning of political parties. Nor does it look the most suitable approach for the study of some specific features of the EU, such as the economic and monetary union, with its strong connection with economic science (as observed by Hatje, p. 590).

Finally, the question arises whether this book may contribute to the evolution of a common legal culture in Europe. It ought to be said since the outset that in this specific area there is both a strong tradition of studies of legal culture and a tradition of learning from what has been done in other European countries. The study of legal culture within the European Union as such, instead, has started very recently. We may even ask whether there is such thing as a European legal culture, seen as distinct from the Western legal tradition [as identified, for example, by J. M. Kelly, *A Short History of Western Legal Theory* (1992)]. We may ask, moreover, whether a European legal culture may flourish only through common enterprises, as opposed to the products of 'national' cultures. The fact that this book brings these problems within the current debate is a considerable achievement and confirms, in my opinion, that this is a solid and outstanding work in a crowded field.

IV

Unlike the other book, that written by Diana-Urania Galetta (which is not simply a translation, but a revised edition of an essay first published in Italian: *L'autonomia procedurale degli Stati membri dell'Unione europea: Paradise Lost? Studio sulla c.d. autonomia procedurale: ovvero sulla competenza procedurale funzionalizzata*, Torino, Giappichelli, 2009) is a monograph. It has a well defined object - the principle of procedural autonomy of EU member states. However, as we shall see later, the conclusions reached by the author may be combined with those of the book edited by von Bogdandy and Bast, confirming the importance of constitutional and administrative law approaches in order to shed light on the dynamics and tensions of public law.

The book starts with an analysis of the notion of 'procedural autonomy'. This is a very good methodological choice for two reasons. First, even a rigorously empirical analysis of phenomena, observable in the real world, requires at least an idea of that kind of phenomena. Second, most doctrinal works on this topic focus analytically on the evolution of the case-law of the European Court of Justice, and take for

granted the notion of procedural autonomy. This notion, according to the author, is a sort of synthetic way to refer to the 'autonomous choice of the means' though which the Member States exercise their competence to 'sanction' the respect of EU law. Of course, although much ink has been spilt by judges and lawyers in the attempt to separate questions of process and substance, the attempt can never be fully successful because those questions are hardly separable. Indeed, although the notion of 'procedural autonomy' suggests that the ECJ is willing to defer to the substantive choices made by national governments and parliaments, its review has cast limits on the permissible choices made by national institutions.

That said, Galetta is well aware of this problem. And she convincingly argues that the concept of (procedural) autonomy has, *inter alia*, a clear advantage, since it may express also the external limits inherent in the competence enjoyed by the Member States (as Remo Caponi has pointed out in his review of this book published in the *Rivista trimestrale di diritto e procedura civile*, 2010, n. 3, p. 1105). Such external limits are effectiveness and equivalence. While effectiveness derives from the need to ensure the *effet utile*, as the ECJ has held since its celebrated judgments in *Van Gend es Loos* and *Costa*, equivalence had a more complex evolution. Initially, the *Saarland* ruling stated that in the absence of Community rules on a specific subject, it was for the domestic legal system of each Member State to determine the protection of the rights which citizens have from the direct effect of Community law, unless procedural rules were either less favourable than those governing similar domestic actions or rendered virtually impossible or excessively difficult the exercise of rights conferred by Community law. In later rulings, including *Factortame* and *Francovich*, the ECJ has deferred much less to national choices, with the effect of promoting a more uniform interpretation and eroding national procedural autonomy.

This shift, pointed out at the end of the first chapter, is confirmed by the analytical study of the case-law that is carried out in the second. The material covered in this chapter is very familiar to those who follow the case-law of the ECJ and who read the literature published in the last years. The material is clearly and thoroughly presented. But the strength of the work lies in the analysis of the trend as well as of its implications. Not only has the case-law gone well beyond the *Saarland* ruling, but the standards of procedural justice have been levelled in a way that would have been unthinkable some decades ago. Recent judgments of the ECJ,

for example in *Kapferer*, imply that even fundamental legal principles such as that of *Res Judicata* must be reconsidered in the light of EU law.

The third chapter considers both the causes and the effects of such trend. The author convincingly demonstrates that the evolution of the case-law of the ECJ would have been impossible without the growing activism of national courts, through the preliminary reference procedure, often 'unnecessary or tailor-made' (p. 115). To take a concrete case, Galetta examines public procurements, an area where procedural autonomy was increasingly limited, although there is not a full competence of the EU in this respect, but only that to remedy differences between national rules that may harm the functioning of the common market. She comes, therefore, to the conclusion that the influence of 'the EU towards a partial harmonization of the national procedural systems is undeniable' (p. 115). It is a pity that the concluding section of just three pages is too brief to give us not simply a synthesis, but also at least a sketch of a more theoretical approach concerning the 'broader framework of relationships between legal orders' (p. 121). If the external limits have reduced the (procedural) autonomy of the Member States, the question arises whether the concept of autonomy must be revised. A key to understand it may be offered not only by the growing body of literature on legal pluralism within the EU, but also by less recent studies, particularly that of Santi Romano [*L'ordinamento giuridico* (1946, 2nd), recently republished in French].

V

Galetta's metaphor of the 'lost paradise', which conveys the idea that national competence has been 'functionalised' by the EU, raises also another interesting question, that is to say whether the process of "constitutionalisation", whereby EU law can penetrate the area of procedures previously regarded as a province of national legal orders, is unlimited. She rejects the 'criticism of certain scholars heavily attacking the ECJ' [particularly Carol Harlow, *Voices of Difference in a Plural Community*, 50 Am J. Comp. L. 339, 2002] as 'somewhat out of place' (p. 116). The reason is, according to Galetta, that national legal systems are 'necessarily broken down' in a new system of legal sources.

What is at issue, however, is not simply whether national legal systems are not anymore to be regarded as separate and 'closed' to external influences. This is recognized by all national higher courts, as well as by most, if not all, scholars. What is really at issue is, rather, whether the

functionalist process of "constitutionalisation", carried out by the EC/EU may be regarded as unlimited. The use of framework directives, that left enough room to national implementing rules, could be viewed as a method of efficiently allocating legislative tasks. By relieving the 'legislator' of the EC of responsibility for details, this could concentrate on major issues. Furthermore, national legal orders could deal with matters of detail and find an appropriate balance between what Edmund Burke called the two great principles of conservation and innovation [*Reflections on the Revolution in France* (1790)]. Whether a single court of law, though connected with national courts, is aptly equipped for the task of rationalizing national systems is questionable, to say the least, from an institutional point of view.

It is questionable also for another reason, which emerges from Armin von Bogdandy's essay on the "Founding Principles" of European constitutional law. He does not only observe the diversity of national constitutions, though there are some common traditions, but he also argues that a 'principle of homogeneity could scarcely be justified (p. 40; see also A. von Bogdandy, *The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship*, 19 Eur. J. Int'l L. 249 (2008)], especially in the light of Article 4(2)TEU' according to which the Union 'shall respect the equality of the Member States', as well as 'their national identities'. Individuating the meaning of 'national identity', of course, is not an easy task. However, if respect for national identity is a constitutional principle of the EU [as Francis Snyder, among others, argued: *The Unfinished Constitution of the European Union*, in J.H.H. Weiler & M. Wind (eds.), *European Constitutionalism Beyond the State*, 68 (2003)] and must, therefore, be taken seriously, it adds a further and more powerful arguments to the main argument which is often used against uniformity, that is to say the risk of precluding experiment. There is, too, a threat to differences, for example with regard to adversarial and inquisitorial procedures, that reflect a cultural variety, which ought not to be neglected. It is in this sense that a 'substantive' limit to the erosion of national procedural autonomy may, and perhaps should, be found.

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