# THE AUTOMATISM OF EXPULSION AND ITS PROBLEMS OF CONSTITUTIONAL LEGITIMACY

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Abstract: The paper reconstructs in detail the regulations pertaining to the institution of automatic expulsion and investigates its constitutional legitimacy. From the discussion carried out it emerges how the approach adopted by the TUI, in fact, does not allow the administration to make assessments that can be subject to full and effective control by the court. For this reason, the administration is forced to take decisions bound to the conditions prescribed by the norms or on the basis of general clauses, the vagueness of which lends itself to favoring possible arbitrariness, relegatin judicial review to a formal control.
Immigrant law seems, therefore, to be located outside the perimeter of constitutional and supranational legality; a condition that requires a systematic reading of Articles 2, 3, 10 and 16 of the Constitution, in order to guarantee the constitutional freedoms of foreigners while respecting supranational sources.

Abstract: Il contributo ricostruisce dettagliatamente la normativa afferente l'istituto dell'automatismo espulsivo e ne indaga la relativa legittimità costituzionale. Dalla trattazione svolta emerge come l'impostazione adottata dal TUI, di fatto, non consente all'amministrazione di compiere valutazioni che possano essere oggetto di un controllo pieno ed effettivo da parte del giudice. Per tale motivo la stessa si vede costretta ad adottare decisioni vincolate alle condizioni prescritte dalle norme o sulla base di clausole generali, la cui indeterminatezza si presta a favorire possibili arbitrii, rilegando, di fatto, il sindacato giurisdizionale ad un controllo formale.
Il diritto degli immigrati sembra, dunque, collocarsi al di fuori del perimetro della legalità costituzionale e sovranazionale; condizione che impone una lettura sistematica degli artt. 2, 3, 10 e 16 Cost., al fine di garantire le libertà costituzionali dei soggetti interessati nel rispetto delle fonti sovranazionali.

*Summary: 1. Outline - 2. The expulsion automatism as a security measure - 3. Doubts about constitutional legitimacy - 4. Conclusions.*

## 1.Outline.

Fifteen years after the so-called Return Directive (Directive 16 December 2008, no. 2008/115/EC), although most of the rights enshrined in our Constitution continue to be put to the protection of every individual, many fundamental rights remain guaranteed to the citizen alone: among these, one of the most important, is the freedom of entry and permanence in the territory of the State[1]. Although the Constitutional Court[2] has repeatedly reaffirmed the inescapable task of the State to guard its borders and enforce the rules laid down for an orderly flow of migrants and an adequate reception, it is, in fact, not yet found, neither in international law[3], nor in constitutional law, a guarantee for the foreigner of entry and residence within the territory of a State of which he is not a citizen. The Court has repeatedly emphasized that the regulation of the entry and residence of foreigners derives from an assessment of the interests of ordinary legislator competence, limited, in the exercise of its powers only by the condition that the choices taken are not manifestly unreasonable.

In fact, any decision concerning the expulsion of foreigners must always be subject to compliance with the guarantees laid down in art. 13 Cost.

The first judgment of the Constitutional Court that led the doctrine to question the legitimacy of automatisms is the judgment n. 303 of 1996. However, the phenomenon is more recent and linked to the jurisprudence

[1] C. CORSI, *Il rimpatrio dello straniero tra garanzie procedurali e automatismo espulsivo*, in *La condizione giuridica dello straniero nella giurisprudenza della Corte costituzionale*, Giuffrè, Milano, 2013.

[2] Judgments June 26, 1969, No. 104; July 23, 1974, No. 244; ord. Dec. 10, 1987, No. 503; Judgments Feb. 24, 1994, No. 62; Nov. 21, 1997, No. 353; May 26, 2006, No. 206; ord. Oct. 31, 2007, No. 361; Judgments May 16, 2008, No. 148; July 8, 2010, No. 250.

[3] C. CAMPIGLIO, *Disciplina delle migrazioni: limiti internazionali,* in *Il diritto dell'immigrazione*, edit by GASPARINI C., Modena, Mucchi Editore, 2010, pp. 3 et seq. and S. QUADRI, *Le migrazioni internazionali*, Napoli, Editoriale Scientifica, 2006, 67 et seq.

born in the matter of personal security measures.

The multiple declarations of unconstitutionality dealing with so-called legislative automatisms have found explanation in the increasingly persuasive use of the canon of the reasonableness and in the fact that the criminal legislator has used instruments turned to a concrete neutralization of conduct deemed socially dangerous. The specific attention paid to security and public order issues has resulted, on the substantial level, in a *favor*[4] towards expulsion and removal measures, which means, at the judicial level, that there are no guarantees necessary to ensure effective protection for immigrants. In those circumstances, the administrative case law [5] defined the so-called automatism as that legal phenomenon in which it is the same legislator to qualify the subject, sentenced for crimes of gravity that raise social alarm, as a person dangerous to public order and security to whom the residence permit cannot be issued or renewed.

From here we can easily deduce that expulsion automatism is based on a real presumption of danger. Within the framework of immigration regulations, in fact, the expulsion of foreigner offenders responds to the need to balance the interest in opening borders with the protection of internal security and public order; in this respect, the use of automatism relieves the administration from the burden of assessing and proving, on a case-by-case basis, the social danger of the person, by virtue of the absolute presumptions provided by the legislator. It should also be specified that these automatisms were introduced, for the first time, by the law Bossi-Fini (law 30 July 2002, n. 189).

Therefore, in the current context, only for certain categories of foreigners the presence of a conviction does not constitute an automatic reason for refusing a residence permit, requiring a concrete assessment of the danger of the person, or in any case a balancing of his rights and interests, on the basis of preferential disciplines largely imposed by the law of the European Union and the ECHR (citizens of the European Union and their families[6], foreigners with family ties in the territory [7], and long-term residents)[8].

In all other cases, on the other hand, the refusal of the residence permit is a binding measure, that disregards the characteristics of the specific case [9].

**2. The expulsion automatism as a security measure.**

In the Italian legal system, there are two cases of expulsion automatism: a general one - provided for by the combined reading of art. 4, c. 3, 5, c. 5 and 13, c. 2, lett. b), TUI[10] - which concerns foreigner offenders legally residing; and the special one - from time to time provided for by regularization laws - which concerns the penal impediment to the regularization of foreigner workers *sine titulo*[11].

In fact, in the original wording of the 1998 Consolidated Immigration Act, there was no provision for the automatic expulsion of a foreigner convicted of a given offence. In fact, the only person entitled to order the expulsion of the criminal offender from the ter-

[4] Latin word meaning "favor".

[5] Tar Toscana – Firenze, sez. I, 30 July 2007, no. 1542.

[6] See art. 20 Legislative Decree No. 30 of February 6, 2007 (implementing Directive 2004/38/EC).

[7] See art. 5, para. 5, TUI, as amended by Legislative Decree No. 5 of January 8, 2007 (Implementation of Directive 2003/86/EC).

[8] See Art. 1 Legislative Decree No. 3 of January 8, 2007 (implementing Directive 2003/109/EC).

[9] Even administrative jurisprudence, while prior to 2002 required the administration to make a factual assessment of the foreigner offender's character when deporting him (see, e.g., Cons. Stato, sec. IV, Nov. 21, 2000, no. 5900, cited in C. CORSI, *Le nuove disposizioni del testo unico sull' immigrazione: tra inasprimento della disciplina e norme «bandiera»,* in *Foro amm. C.d.S.*, 2002, 3060), in subsequent years has tended to adhere to the thesis of automatic preclusiveness of convictions enumerated by the legislature (see C. RENOLDI, *L'impedimento penale al rilascio e al rinnovo del titolo di soggiorno*, in *Immigrazione e cittadinanza. Profili normativi e orientamenti giurisprudenziali*, edit by P. MOROZZO DELLA ROCCA, Torino, Utet, 2008, 119 and N. VETTORI, *Pericolosità sociale, automatismi ostativi e diritti dello straniero: un'importante evoluzione nella giurisprudenza della Corte costituzionale*, in *Il foro amm. C.d.S.*, 2012, 10, 2488-2504).

[10] The acronym stands for "Testo Unico sull'immigrazione", i.e. Legislative Decree 25.7.1998, No. 286 on "Consolidated Act of Provisions concerning immigration and the condition of third country nationals (also called Consolidated Immigration Act).

[11] Latin expression meaning "untitled".

ritory of the State was the criminal court which decreed the expulsion only after the concrete ascertainment of the danger of recidivism and therefore as a security measure[12]. Instead, the administration had the power to dismiss the foreigner not as a criminal but for the mere fact that he was a dangerous subject.

In any case, expulsion by the administration could be ordered by rejecting the application or renewal of the residence permit (order of the Quaestor[13]) or by directly ordering the expulsion (provision of the Prefect.).

This approach, full of guarantees has been affected by the definitive introduction of expulsion automatism in the immigration legislation that took place with the so-called law Bossi-Fini (l. n. 189 of 2002), which in turn modified the Consolidated Act. According to current legislation, therefore, entry or residence in the Italian territory is prohibited to the citizen of a third country not only when this «is considered a threat to public order or security» - as was already foreseen in the original version of art. 4, para. 3, TUI - but also when the same one is condemned, with not definitive sentence, for some offenses[14], or, by irrevocable judgment for one of the offences in the matter of copyright or counterfeiting [15]. The conviction appears to be an obstacle to residence even for those who reside permanently in Italy [16], and entails, for the latter, the refusal to renew or the withdrawal of the residence permit resulting in expulsion [17], unless it belongs to one of the categories protected by Community law [18].

More specifically, art. 13, para. 2, TUI, provides for three situations in which a foreigner may be removed from the territory of the State: a) he entered illegally and was not refused; b) he stayed on Italian territory without a valid residence permit, or when this has been revoked or cancelled or refused or, still, has expired for more than sixty days and has not been asked for renewal or if the foreigner is staying in violation of art. 1, para. 3, L. 68/2007; c) belongs to one of the categories subject to preventive security measures, pursuant to art. 1, 4, 16, of the D.Lgs. 159/2011, since habitually dedicated in criminal trafficking or belonging to criminal or terrorist associations.

It should be noted that the presumption of danger of the foreigner offender has been extended to the scope of the so-called regularizations: the foreigner who works but are ille-

[12] Art. 15, para. 1, TUI, which should be coordinated with the similar provisions laid down in the Criminal Code and in Art. 235 and 312 of the Criminal Code.

[13] This measure required to be issued based on the combined provisions of Art. 5, para. 5. TUI (which, in turn, for the conditions of stay refers to Art. 4) and para. 3 of the same Art. 4, TUI (which, in the original version, contemplated, among the conditions for the entry of the foreigner, the fact that the same does not constitute "a threat to public order and state security"). The automatism under discussion here was generated precisely by the latter provision (Art. 4, para. 3) in 2002. In this sense see M. SAVINO, *L'incostituzionalità del c.d. automatismo espulsivo*, in *Diritto, immigrazione e cittadinanza XV*, 3-2013., supra note 8, at 40.

[14] These are the crimes provided for in Article 380, para. 1 and 2, c.p.p., and for crimes related to narcotics, sexual freedom, aiding and abetting illegal immigration to Italy and illegal emigration from Italy to other states, or for crimes directed at recruiting persons for prostitution or exploitation of prostitution or minors to be engaged in illegal activity (Art. 4, para. 3, TUI).

[15] Art. 26, para. 7 *bis*, TUI.

[16] M. SAVINO, *L'incostituzionalità, L'incostituzionalità del c.d. automatismo espulsivo,* in *Diritto, immigrazione e cittadinanza,* XV, 3-2013, at 41-42.

[17] The prefect orders the expulsion of the foreigner even when the residence permit has been revoked, annulled, or refused [Art. 13, para. 2, lett. b), TUI]. A foreigner whose residence permit is revoked or denied renewal is generally given a period of 15 days in order to allow him or her to leave voluntarily, in accordance with the provisions of Article 12, para. 2, of Presidential Decree No. 394 of Aug. 31, 1999 (implementing regulations of the TUI). However, the same Art. 12, para. 1, is without prejudice to cases in which immediate execution with forcible accompaniment to the border must be carried out, and these include cases in which expulsion has been ordered as a consequence of a criminal sanction [Art. 13, para. 4, lett. f), TUI].

[18] Indeed, EU law has required the national legislature to replace the mechanism of automatic expulsion with a discretionary assessment by the public administration whenever: the crime is committed by EU citizens or their family members (See Art. 27, para. 2, Directive 2004/38/EC and Art. 20, para. 2, Legislative Decree No. 30, 6.2.2007, transposing the same directive, as amended, by Legislative Decree No. 89, 23.6.2011); when the offender is a non-EU citizen who has exercised the right to family reunification (art. 5, para. 5, last sentence, TUI, as amended by Legislative Decree 8.1.2007, no. 3); to the offender who has acquired long-term resident status (art. 9, para. 4, TUI, as replaced by art. 1, Legislative Decree 8.1.2007, no. 3).

gally present in Italy may not avail themselves of the rules which would enable him to acquire a residence permit when, despite being in possession of the other requirements laid down by law, is convicted of one of the aforementioned obstructive offences. According to the doctrine [19], this hypothesis would seem to stand halfway between the expulsion of the offender, provided for the prevention of recidivism, and the expulsion of the so-called clandestine, which, on the contrary, does not have a preventive purpose since it aims to sanction the violation of the entry rules[20]. In reality, the refusal of regularization and the consequent expulsion are ordered against the foreigner not as an illegal person but as a criminal. It follows, therefore, that the interest promoted by the legislator is not so much border control but rather the safeguarding of internal security conditions.

Given all the above, it must be specified that art. 13 TUI, in establishing that the removal decree must be adopted "on a case-by-case basis", would seem to allude to the need to assess the specific situation of the subject in order to verify the existence of legal positions worthy of protection, against which to balance the public interest requirement imposed by the rule[21].

In this regard, part of the doctrine in commenting on the provision of art. 13, para. 2, lett. b), had evidenced that when the prerequisite of the expulsion is the loss of the residence permit, the administration would not have had some margin of appreciation regarding the subjective situation of the foreigner[22]. In particular, those provisions which associated the adoption of measures which impede the stay of foreigners in the territory of the State with the disappearance of the entry requirements were the subject of criticism, including, such as conditions of automatic expulsion, the sentence for one of the crimes indicated in art. 4, c. 3, TUI. After a criminal conviction, the competent administrative authority is in the situation of necessarily having to carry out a constrained activity, consisting in adopting an act (i.e. a refusal to renew or revoke the residence permit) which leads to his exclusion from the territory. In fact, the refusal to renew or the withdrawal of the permit would be justified, as established by the same provision of the law, in the *ex lege*[23] assessment of the alleged danger of the foreigner and, therefore, in such cases, as noted in part of the case law «there is no residual sphere of discretion for the Administration, which is obliged to give immediate application of the regulatory provisions». The danger of the foreigner is, therefore, ascertained with a revocation order, precluding any additional investigations by the prefect, for the purposes of the expulsion order[24].

In fact, the legislator has regulated certain limits to the return of foreigners in order to mitigate the automatic procedures provided for in the field of returns and places to guarantee situations worthy of particular protection, not only through the introduction of D.L. 21 October 2020, no. 130 (so-called decree Lamorgese), converted to L. 18 December 2020 no.173, but also providing for some mandatory cases where art. 13 TUI does not apply.

Starting from D.L. 130/20, this has the merit of having aligned the Italian legislation to the standards of assurance indicated by the jurisprudence of the European Court of Human Rights in this matter, overcoming the strictness of expulsion automatism through the extension of the prohibition of rejection and expulsion for family reasons also to the labor and social constraints of the foreigner (art. 19, paragraph 1.1, TUI). This amendment has in fact introduced the possibility of balancing the State's interest in the forcible removal of the criminal or socially dangerous foreigner

[19] M. SAVINO, *L'incostituzionalità, work cit.* 42.

[20] For a more detailed discussion see M. SAVINO, *Le libertà degli altri. La regolazione amministrativa dei flussi migratori,* Milano, 2012, 297 et seq.

[21] In this sense, M. INTERLANDI, *Potere amministrativo e principio di proporzionalità nella prospettiva dell'effettività delle tutele e della persona immigrata*, in *Dirittifondamentali.it,* 14 march 2018, dossier 1/2018,12.

[22] G. BASCHERINI, *Immigrazione e diritti fondamentali*, Napoli, 2007, 7.

[23] Latin for "according to law".

[24] For a critical view see G. BASCHERINI, *Immigrazione, work. cit.*,; M. SAVINO, *La libertà degli altri, Le liberà degli altri. La regolazione amministrativa dei flussi migratori, Milano, 2012,* 268; S. D'ANTONIO, *Il riparto di giurisdizione in materia di ingresso, soggiorno e allontanamento dello straniero dal territorio dello Stato italiano*, in *Riv. Dir. proc. amm.*, 2017, no. 2.

and the individual's interest in not being deprived of their loved ones and work[25].

Specifically, the art. 19 TUI provides that «in no case may expulsion or rejection be ordered to a State in which a foreigner may be persecuted on grounds of race, sex, language, nationality, religion, political opinion, personal or social conditions, or could risk being sent back to another state where it is not protected from persecution»[26].

Expulsion is also not allowed [27]: a) for foreigners aged eighteen[28], without prejudice to the right to follow expelled parents or guardians; b) in the case of foreigners in possession of long-term EC residence permits [29]; c) in the case of foreigner cohabitees with second-ranking relatives or with their spouses, of Italian nationality; d) in the case of pregnant women or during the six months following the birth of the child to which they care for[30].

It was then provided that «expulsion is not ordered, nor carried out if the measure was adopted, against the foreigner identified by police checks at the external borders while leaving the national territory»[31].

Moreover, pursuant to art. 3, para. 3, D.Lgs. no. 144 of 2005[32], the prefect may also omit, suspend or revoke the expulsion order pursuant to art. 13, para. 2, TUI, informing the Minister of the Interior beforehand, when the conditions for the issue of the residence permit for investigative purposes are met, or when it is necessary for the acquisition of information concerning the prevention of terrorist activities, or further, to continue investigations or information activities aimed at the detection or capture of those responsible for crimes committed for the purpose of terrorism. This is a hypothesis in which the pre-

[25] Other jurisdictions have also provided exceptions to the mechanism of automatic expulsion. In particular: France, in Article 131-30-2 of the Criminal Code, lists, in an exhaustive list, all the factors indicative of the foreigner offender's rootedness in the territory, which may justify the non-application of the complementary punishment of the ITF (interdition du territoire); Spain, in Article 89.4 of the Criminal Code, provides that the judge may exclude the use of deportation as a substitute sanction in cases where it appears disproportionate to the act and the offender's personal conditions, which include being rooted in the territory. Thus in L. SIRACUSA, *Sulle tracce della crimmigration in Europa: l'espulsione dello straniero in un confronto tra Spagna, Francia e Italia*, in *Riv. it. dir. e proc. pen.*, 2019; L. SIRACUSA, *Espulsione tra apparenza e realtà*, in *Diritto e immigrazione. Un quadro aggiornato delle questioni più attuali e rilevanti*, *Il Foro Italiano, Gli speciali*, no. 3/2020.

[26] See on the international level the principle of *non refoulement* in Article 33 of the Geneva Convention Relating to the *status* of fefugees. The prohibition in Art. 19 TUI has, however, a broader content and does not protect only refugees; moreover, it does not allow any kind of balancing with assessments about the dangerousness of the subject and concerns both administrative and judicial expulsions and cannot be derogated from the possibility of expelling a refugee or a foreigner admitted to subsidiary protection (Art. 20, Legislative Decree No. 251 of November 19, 2007). In cases where it is determined that the foreigner may be the object of persecution, a residence permit for humanitarian reasons is issued (Art. 28, Presidential Decree No. 294 of August 31, 1999).

[27] Except for the deportation provided for by the minister of the Interior.

[28] Art. 31, para. 4, TUI, stipulates that if the deportation of a foreigner minor must be ordered, the measure is taken at the request of the Quaestor and the Juvenile Court; this provision applies in cases where it is necessary to deport the minor for reasons of public order or state security by the Minister of the Interior. See also, art. 33, TUI, on assisted repatriation.

[29] However, this is not an absolute limitation in this case, but the application of a different and more favorable regulation in Article 9 of the TUI, which, moreover, provides significant room for evaluation by the administration. According to Art. 9, para. 10, TUI, expulsion may be ordered: a) for serious reasons of public order or state security; b) in case of belonging to one of the categories referred to in Art. 18 of Law No. 152, or in the event that remaining in the territory of the State may in some way facilitate terrorist organizations or activities, including international ones; c) in the event of belonging to any of the categories of dangerous persons for whom preventive measures would be applicable, provided that some of the patrimonial preventive measures referred to in Article 4, Law No. 55 of 1990 have been applied.
The next paragraph specifies that for the purpose of adopting the deportation order referred to in paragraph 10, the age of the person concerned, the length of stay on the national territory, the consequences of deportation for the person concerned and his family members, and the existence of family and social ties in the national territory shall also be taken into account. Of the absence of such ties with the country of origin».

[30] The Constitutional Court, in an additive ruling of July 27, 2000, No. 376, extended the ban on deportation to the cohabiting husband of a woman who is pregnant or in the six months following the birth of her child.

[31] Art. 13, para. 2-*ter*, TUI; see G. SAVIO, *La nuova disciplina delle espulsioni conseguente al recepimento della direttiva rimpatri,* in *Dir. Imm. Citt.,* 2011, no. 2, at 35, For a critique of the continuation of the expulsion decree where it has already been adopted, with the rule limiting itself to providing for non-enforcement.

[32] Entitled «*Misure urgenti per il contrasto del terrorismo internazionale*».

fect is called upon to assess the situation of the subject liable to expulsion, in the face of an interest of the State to keep the person on Italian territory for the purpose of combating terrorism [33].

**3. The doubts of constitutional legitimacy.**

The measures that provide for the automatic removal of the foreigner serve to balance the interests of the foreigner, but also of the community that welcomes them and that can benefit from their presence to the temporary opening of borders, with the safeguard of security and public order. The expulsion of foreigner offenders is intended to play a greater deterrent or general prevention function: the message that is in fact sent is that the foreigner can be accepted and authorized to stay permanently in the territory of the State provided that they respect the domestic rules of civil coexistence. Actually, the institute of expulsion automatism, as part of the doctrine has noted[34], poses three problems of constitutional legitimacy.

The first concerns the impossibility for the administration and for the judge to balance the public interest in the prevention of crimes with the interest of the addressee of the act. Since "balancing" is carried out by the *ex-ante*[35] legislator, the measure is operated in the exclusive and presumed interest of public safety: in fact, regardless of the gravity, it is sufficient as a condition for the removal of the foreigner from the national territory, to commit one of the offences provided for by the legislator, supplementing a clear violation of the principle of proportionality of administrative action. On this last point, it should be pointed out that Community law has required national legislators to replace expulsion automatism with a discretionary assessment not only when the offence is committed by European citizens or their families[36], but also when the offender is a non-EU who has exercised the right to family reunification [37] or acquired long-term resident *status*[38]. This approach, however, does not consider all other cases in which the offender, in fact, remains exposed to automatism.

On the other hand, the Constitutional Court emphasizes the violation of the principle of proportionality in relation to art. 3 Const., only in the event of an infringement of a fundamental right of the foreigner such as, for example, the right to respect for family life[39] but not also the right of residence itself. From this it follows that for the non-citizen the provision of art. 16 Const. doesn't not apply[40]. Part of the doctrine [41] considers that the prevalence of such an approach can only serve to change the scope of the legal arrangement in

[33] A limitation on the removal of a foreigner, which the legislature came to configure as a need for a comprehensive assessment of the person's position regarding his or her family ties, was introduced when transposing Directive 2003/86/EC on the right to family reunification. Legislative Decree No. 5 of January 8, 2007 amended Art. 13 TUI to which paragraph 3-*bis* was added, which introduced a hypothesis in which expellability/inexpellability is subject to evaluation and concerns the expulsion of the foreigner who has exercised the right to family reunification or of the reunified family member: in this case it is necessary to take «also into account the nature and effectiveness of the family ties of the person concerned, the duration of his stay in the national territory as well as the existence of family, cultural or social ties with his country of origin». In such cases, the prefect must balance the state's interest in repatriating the foreigner with the interest in seeing the person's family ties and attachment to our country respected. A further case in which expulsive removal finds an exception, of a temporary nature, concerns the possibility of suspending the removal of a foreigner against whom urgent or otherwise essential treatment is provided, even if it is continuous, limited to the duration of this treatment.

[34] M. SAVINO, *L'incostituzionalità, work cit.*, 38 et seq.

[35] Latin term meaning "before"

[36] See art. 27, para. 2, of Directive 2004/38/EC and art 20, para. 2, Legislative Decree no. 30, 6.2.2007, transposing the same directive, as last amended by Legislative Decree no. 89, 23.6.2011.

[37] Art. 5, para. 5, last sentence, TUI, as amended by Legislative Decree 8.1.2007, no. 5, implementing Directive 2003/86/EC on family reunification.

[38] Art. 9, para. 4, TUI, as replaced by Art. 1, Legislative Decree No. 3, 8.1.2007 (Implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents).

[39] See Const. court, sent. 3.7.2013, no. 202.

[40] The position of the Constitutional Court, regarding Article 16 Const. is summarized in the statement that «the lack in the foreigner of an ontological link with the national community, and therefore of a constitutive legal nexus with the Italian state, leads to denying him or her a position of freedom with regard to [...] the permanence on Italian territory». (Const. Court. 24.2.1994, n. 62). On the advisability of revising this approach, based on an overextension of the citizenship criterion, let us refer to M. SAVINO, *Le libertà degli altri, work cit.*, 34 et seq.

[41] M. SAVINO, *L'incostituzionalità, work cit*, 39.

question, but not to call into question its constitutional basis.

Another doubt of legitimacy derives from the administrative nature of expulsion automatism. The measure, as already mentioned several times, has a *post delictum*[42] prevention function, since it presupposes the commission of a crime and aims to prevent the risk of recidivism. However, in Italian law, all measures that prevent such a risk are criminal and are governed by articles 199 et seq. of the penal code as security measures. It has been asked[43], therefore, why the expulsion automatism escapes this discipline.

The answer to this question was provided by the Constitutional Court and appears to be a formalistic one. In particular, the Court stated that the automatic expulsion is not subject to the discipline of security measures not because it does not have the characteristics, but because it is configured by the legislator as an (administrative) police measure. In reality, the doubts of legitimacy linked to the decision to "administrativize" a pre-ordered measure to *post delictum* prevention stem from the fact that in post delictum prevention is the same fact-crime which qualifies the measure in criminal law terms, and which therefore determines the attribution of the related questions to the criminal court.

The third doubt of constitutional legitimacy concerns the presumption of danger which is at the basis of automatism. In fact, the measure in question, despite its ability to be particularly distressing, cannot in any way be qualified as a penalty, otherwise it would lead to an unreasonable disparity in the treatment of nationals and foreigners in the penalty treatment. It follows, therefore, that if the aim is not repressive the same must necessarily be preventive. However, if this is the case, it should be concluded that the adoption of the measure cannot depend exclusively on the commission of the offence but should rather be based on a prognosis of danger to the subject, in other words, an assessment of their persistent propensity to commit crimes. The question raised by the latter approach relates mainly to the actual possibility that a breach of criminal law committed in the past may be capable of justifying the presumption of danger on which the removal of the convicted foreigner is based[44].

This question was first asked in 1977 by the Community Courts in the *Bouchereau* case [45].

Pierre Bouchereau was a French worker who had emigrated to the United Kingdom and was convicted of drug possession. The Metropolitan Police of London maintained that this conviction alone was sufficient to result in Mr Bouchereau's expulsion on public order grounds. Otherwise, the administration would have borne the burden of a *probatio diabolica*[46] about the possibility that the foreigner could, in the future, continue to commit crimes. Bouchereau's defense, however, had rightly observed that «if it were admitted that a criminal conviction, regardless of any present or future tendency to commit a new crime, is sufficient to justify expulsion, it would mean that the protection of public order would be an instrument for the repression of criminal offences rather than for the protection of the State»[47] and the consequence would be to confuse prevention with repression. In response, the Court of Justice stated that «the existence of criminal convictions can only be taken into account because the circumstances which led to such convictions prove personal conduct constituting a current threat to public order» thus expressing a principle that is still the cornerstone of its jurisprudence and European expulsion legislation.

From the arguments put forward by the Court of Justice, it is clear that only those who, because of their personality, represent a present threat to the community can be removed. This means, therefore, that the judgment of dangerousness cannot be inferred from the mere commission of a given crime but the same must be ascertained in relation

[42] Latin for "after the crime".

[43] M. SAVINO, *L'incostituzionalità, work cit*, 39.

[44] In this sense see M. SAVINO, *L'incostituzionalità, work cit.*

[45] Court of Justice, Case 30/77, Bouchereau, 27.10.1977.

[46] Latin expression used in procedural language in all cases in which the establishment of a right or the demonstration of one or more facts depends on extremely complex evidentiary reconstructions or logically derived procedures based on probabilistic calculations.

[47] Court of Justice, Case 30/77, *Bouchereau*, Oct. 27, 1977, factual part.

to the behavior subsequently held by the offender.

Actually, according to the Court itself, not even a repeated series of convictions is in itself sufficient to highlight the offender's attitude, so much so that, in the *Orfanopoulos* case (2004), the Luxembourg courts observed that «the existence of a sentence can justify an expulsion only in so far as the circumstances which led to such a sentence prove personal behavior constituting a current threat to public order»[48] adding, moreover, that the existence of several convictions does not change this principle and does not authorize presumptions[49]. Community law, therefore, does not allow any form of expulsion automatism [50] and this has led the supranational legislator to affirm that the mere existence of criminal convictions does not automatically justify the adoption of such measures[51]. The Italian legislator had, therefore, to comply with the guidelines adopted by the Court of Justice on the subject, excluding any automatic protection of the right of residence for EU citizens.

It is clear, therefore, that the rules on the expulsion of foreigners from outside the Community are, in some respects, discriminatory when compared with those laid down for European citizens. According to d.lgs. 30/2007 as amend. and supplemented by D.Lgs. 31/2008, the expulsion of a foreigner who is a national of a Member State of the Union may be ordered only if there are particularly serious grounds relating to State security, public security or other reasons of public order.

Moreover, according to art. 30 of D.Lgs. 30/2007 the above reasons apply when the person to be removed could facilitate the organization of criminal or terrorist activities; or when they have behaved in a manner that constitutes a real threat, to the fundamental rights of the person or to public safety. With regard to the latter cases, the adoption of the restrictive measure shall also take into account the presence of any convictions relating to crimes, not committed, consumed or attempted, against the life or safety of the person[52].

In the light of the above, we can observe how the danger of the Euro-European foreigner is tied to specific and objective circumstances and not to legal presumptions.

Actually, the procedural rules which apply in the event of expulsion in favour of European citizens are also different from those laid down for non-Community foreigners.

Art. 31, Directive 2004/58/EC provides, in fact, specific procedural guarantees to ensure the effectiveness of the protection, specifying that «the means of appeal shall include an examination of the legality of the measure and of the facts and circumstances justifying its adoption». The same provision further specifies that the judgment must also extend to the question of the proportionality of the contested decision with respect to the elements suggesting the subject's stable settlement in the host territorial community[53].

**4. Conclusions.**

Legislation on the conditions of entry and residence of non-EU immigrants should be read from a systematic perspective, based on a combined reading of Articles 2, 3, 10 and 16 of the Constitution, according to which it

[48] Court of Justice, Joined Cases C-482/01 and C-493/01, *Orfanopoulos and Olivieri*, 29.4.2004, para. 67.

[49] Court of Justice, Joined Cases C-482/01 and C-493/01, *Orfanopoulos and Olivieri*, 29.4.2004, para. 38, where it is stated that provisions that «result in the expulsion of EU citizens following a criminal conviction without systematic consideration of either the personal conduct of the offender or the present danger that the offender poses to public order» are contrary to EU law.

[50] As reiterated in Court of Justice, Case C-50/06, 7.6.2007, Commission v. Netherlands, para. 45.

[51] The principle, already established in Article 3 of Directive 221/64/EEC, is now enshrined in Article 27(2) of Directive 2004/38/EC.

[52] For further discussion see B. NASCIMBENE, *Le migrazioni tra sovranità dello Stato e tutela dei diritti della persona,* in *Immigrazione, frontiere esterne e diritti umani. Profili internazionali, europei ed interni*, edited by M. CARTA, Roma, 2010, 18-33.

[53] See Art. 31(3), which states that legal remedies must ensure «that the measure is not disproportionate, in particular in relation to the requirements laid down in "Article 28"». Article 28, in turn, states «Before taking an expulsion decision on grounds of public policy and public security, the host Member State shall take into account factors such as the duration of the person's stay in its territory, his or her age, state of health, family and economic situation, social and cultural integration in the host Member State and the importance of his or her links with the country of origin».

would be up to the legislature to perform the arduous task of guaranteeing the exercise of the fundamental freedoms protected in the current system of normative sources, both national and European.

From the discussion carried out, it emerges how the approach adopted by the TUI, despite the introduction of some provisions that require favoring special subjective situations, in fact does not allow the administration to make assessments that can be subject to full and effective control by the court.

Indeed, administrations, on the basis of the regulation of the exercise of public power, are either forced to adopt decisions bound by the conditions prescribed by the rules or are forced to adopt decisions on the basis of general clauses, the vagueness of which lends itself to favoring possible arbitrariness, relegating, judicial review to a formal control.

In addition, the relevant regulations would seem to reserve differential legal treatment based on the citizenship of the person to be removed. In particular, the treatment appears to be more favorable for European foreigners and totally discriminatory for non-EU immigrants. It is therefore a legislative framework that has serious shortcomings in terms of constitutional guarantees (especially as regards to the personal freedom of foreigners, whose limitation in the context of expulsion procedures would be the rule and not the exception) but also in terms of European legislation.

Foreigners' rights thus seem to be located outside the perimeter of constitutional and supranational legality; a condition that both national and European jurisprudence has sought to compensate for by identifying the obligation to weigh and balance the interests at stake as the benchmark for the competent authority's application of prescriptions restricting the freedom of foreigners.

In conclusion, it should be stressed that the public interest in controlling migration flows cannot automatically override the individual interest in preserving emotional, social and economic ties and the simple right to remain in the territory where one has settled.

And it is in this sense that organic action by national and European legislators is expected and hoped for.

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