STATE OF NECESSITY?

Concerning a Securitarian Attitude in Recent Legislation of Western Democracies

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1. - The last few years have seen our democracies produce an extraordinary amount of exceptional legislative and administrative measures which seriously limit traditional individual liberties in the name of emergential conditions.
The most evident examples:

1.1. - The *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* (better known as "Patriot") *Act*, enacted in its final form on October 25, 2001 by the United States Senate; apart from providing stricter immigration procedures, strengthening the powers of investigative forces with regard to suspected terrorist activities, and creating new federal crimes, this bill enables the U.S. Attorney General to detain alien terrorist suspects for up to seven days under a mere certification that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. This order of detention can be reviewed only in a limited number of cases.
As an even more serious limitation of the traditional principle of *habeas corpus*, the President's Military Order of November 13, 2001, allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without express limitation or condition except with regard to minimal survival rights (food, water, medicine): this is the basis for the continuing detention of prisoners not only at Guantanamo, but also at an unspecified number of secret locations in the world and especially within war theaters such as Afghanistan and Iraq.

1.2. - The "*Prevention of Terrorism Bill*" approved in March, 2005, by British Parliament, to supplement existing anti-terrorism laws. This bill endows the Secretary of State with the power to impose so-called "*control orders*", containing a variety of obligations on the recipient (such as, for example, prohibition on possession of certain items, restrictions of movement, restriction on communications or association, as far as "house arrest"):

- without prior hearing of the concerned person;
- without prior judicial control over the measure, except in the more serious cases (which lead to what are defined as "*derogating control orders*", where the derogation is to the rights and liberties laid down in the European Convention of Human Rights), and even then, limited to deciding whether a *prima facie* case exists;
- with a very limited *ex post* review on part of the judiciary, of an entirely supervisory nature (i.e., limited to the control over the abstract recurrence of the conditions requested by law), in a hearing in which the evidence against the individual is kept secret from him and in which he does not have the right to appoint his own defensive counsel but is, instead, represented by a "*special advocate*" appointed by the Government; and, last
- without any limitation as to duration of the order, with unlimited possibility for renewal and even, should the measured be quashed by a court ruling, the possibility to restore it in the exact form and terms as before.

1.3. **-** Law 2004-204 approved by French Parliament on March 9th, 2004 ("*Loi Perben 2*"), providing special measures and jurisdiction for a number of crimes which only in part can be connected to the fight against terrorism: among others, the law bestows the Public Prosecution but especially Police forces with especially penetrating powers of investigation and even deprivation of personal freedom (e.g., the power for police forces to hold suspects for up to 96 hours delaying the first contact of the detained with his legal counsel for up to 48 hours). The law also contains provisions limiting the powers of the judicature in favor of public prosecution (and especially heads of office, who are appointed by the government), provisions for the collection of data concerning persons even only suspected of having committed sex-related crimes, and provisions seriously limiting freedom of the press.

1.4. **-** If such examples stem from the sector of fight against terrorism, an area in which are concentrated the most serious concerns of European public opinion, it must be noted that other legislative and administrative measures, taken in fields other than anti-terrorism action, present some remarkable similarities to the guidelines of the above recalled bills.

As an example, in October 2004 Spanish Parliament approved a vast reform of its criminal and criminal procedure codes, which has been accused of transforming the concept of "*security*" in "*street security*", in that it provided at the same time for a strong rise in penalties for "common crime" (rise in penalties for crimes against private property, harsh treatment of repeated offenders, reintroduction of short prison terms as opposed to alternative penalties) and for a slackening of the penal response towards "white collar criminality" (partial abrogation of crimes such as tax frauds or insider trading). This reform followed a bill approved at the end of 2003 which has made pre-trial imprisonment almost mandatory for repeated offenders and in all other cases much more the rule than the exception it should represent.

1.5. **-** I will bring only one small example of this tendency from my own Country, by reminding that as of September 2004 the penalty for clandestines found on Italian territory without authorization who do not obey the Police's injunction to leave the Country within five days has been raised from the previous maximum imprisonment of 1 year a term from 1 to 4 years. To give a comparative idea, this penalty is higher than that provided for theft (6 months to 3 years imprisonment), higher than that provided for bribing a witness (8 months to 3 years), higher than that provided for creating an illegal hazardous waste deposit (1 to 3 years and a fine), higher than that for public servants who abuse their office (6 months to 3 years), equal to that provided for favoring mafia affiliates (up to 4 years).

This last example allows me to observe how the entire sector of immigration laws throughout Europe can be inscribed in the tendency outlined above. Looking at our national experience, one can see in first place how this sector has always been characterized by a strong administrativization of procedures, stressing the concept that the discipline of immigration is a largely political issue which should therefore be taken care of by the executive and its ramifications. On the contrary, the powers of the judiciary in a sector which evidently involves many of the fundamental rights of the migrant person has always been relegated on the margin, through the designing of procedures so curt that the space for judicial review is virtually annihilated.

Secondly, the leading idea that lies behind the statute of immigration is the illegality of unauthorized entry in the territory of the State: it therefore produced a category of quasi-criminals defined as "clandestines". It must be pointed out that the definition is not natural but strictly legal, deriving from the global consideration underlying the discipline of immigration. In Italian legislation, the consideration is, at least, two-sided: there is no outright definition of the unauthorized migrant as criminal (although the suggestion keeps surfacing now and then in certain more xenophobe sectors of Italian politics, and although certain legal provisions subtly point in this direction: e.g. the misdemeanor consisting of being found without valid identification on the State territory, which, considering the normal economic and social situation of clandestines, borders with the overt punishment of clandestinity); there is, however, an evident unspoken conviction that a clandestine is a potentially or actually dangerous subject to be withheld from the territory of the State.

The fight against clandestinity takes place in three phases: rejection of incoming migrants: through a widespread militarization of frontiers with the attribution to Naval Forces of penetrating police powers to be exercised also outside the territorial waters; also, Italy has started a campaign to establish control structures abroad, in countries where migrations originate or transit (e.g. Lybia); pursuit of clandestines: and, if found, expulsion: this measure is the final answer of the Italian legal system to unauthorized immigration. No stable mechanism for naturalization or de-illegalization is provided, short of periodic (and widely expected) mass regularizations.

What is evident from the analysis of this rules is that, in application of the securitarian logic, there is no effort to realistically face the fact that migrations take place and to discipline and govern this phenomenon in respect of the basic rights of those involved: there is rather the utopistical (or, more often, demagogical) pursuit of a fight against immigration through prohibition and through the criminalization of the "other", in a vain effort to protect individual rights and expectations of residing citizens who are brought to identify the migrant as the source of their insecurity.

2. - It is this point which brings us to some general considerations.

2.1. - It is evident that our societies are gripped by a widespread fear of attack from the outside. In very simplistic terms, it can be stated that this fear arises from the combination of economic prosperity and uncertainty that it can be maintained in the future. This insecurity creates, as a subproduct, the willingness to accept limitations on individual liberties, if such is presented as necessary reaction to the alleged causes of insecurity and to confront what comes to be regarded as "enemy"; limitations whose acceptance would have been unthinkable a few years ago, when the struggle to obtain the civil liberties at stake was still in progress or fresh in the memories of all.

2.2. - National governments today find themselves in an ambiguous position: on one side, there seems to be, on part of certain national authorities, a tendency to foster these fears, perhaps to profit from the slackening of the populations' jealousy of their individual liberties, in order to introduce more penetrating measures of control over society as a whole.

On the other hand, there is an openly admitted submission to public opinion, which pushes national authorities to confront these phenomenons by overreacting or by reacting in a populist direction so as to second what are largely irrational fears.

I was very impressed by reading in an official report of the Joint House of Lords-House of Commons Committee on Human Rights concerning the Prevention of Terrorism Bill (Tenth Report of Sessione 2004-2005), of which I've said above, that "*both the Home Secretary and the Prime Minister have been very candid in saying that they are proposing legislation of this exceptional kind because they do not want it to be possible for them to be accused of not doing more to protect the public in the event of a terrorist attack succeeding*". If one must appreciate the outright pragmatism of this answer by the British government, one must at the same time agree with the reply given immediately thereafter by the Committee: "*Although we find this sentiment entirely understandable in elected representatives who are directly accountable to the public, we also consider that it demonstrates precisely the reason why independent safeguards for individual liberty are essential*".

3. **-** It is exactly this aspect which binds all legislative measures recalled above: the exercise of exceptional political power in a certain chosen direction is coupled with the removal of all obstacles which could slacken its immediate effects: and among these is judicial control over the exercise of this power, either annihilated or reduced to a superficial or formal assessment.

It is maybe early to state whether this brings a change in the quality of our democracies.

It is, on the contrary, already possible to conclude this much: that what appears to be changing, even mutating, is the traditional relationship among "*reduction of individual rights*" and "*security*".

If we are to accept the validity of the traditional system of checks and balances as it has developed in our European tradition we must stress the need for the respect of the deepest implications of the tripartition of powers.

Therefore, we must accept that the concept of security is first and foremost collective, and measures taken to protect it can, and often must, look beyond the immediate protection of individual liberties, rights, and expectations: as such, it is entrusted on the executive branch, within the legal framework laid out by the legislative and, today, by the complex of supranational rules in the field of human rights.

However, the system can only function and be protected, first of all from itself, if the protection and balancing (and, where necessary, negation) of individual rights against such measures is fully confided to the judiciary.

It is therefore necessary to ask ourselves to which extent the limitation of individual liberties must lie outside the powers of the executive or transient parliamentary majorities. It is this level which constitutes the real "quality" of a democracy: in this framework, the correct exercise of political power must rely on respect of the founding and common principles, the "constitution" of any democracy, and on the protection of this area from political power itself by appointing independent guardians to watch over the respect of these principles.

Indeed, we will continue to side with Lord Atkin who, during one of the darkest moments of World War II, wrote, in a memorable dissenting opinion: "*in this Country, amid the clash of arms the laws are not silent. They may be changed but speak the same language in war as in peace*".

We think that the interest to self-preservation of society must be pursued with the same means, regardless of historical contingencies, for this is the true foundation of democracy.