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JUDICIAL DUALISM AND FOREIGNER PROTECTION: THE CASES OF ITALY AND FRANCE

Abstract: A correct analysis of the foreigner's condition must consider not only the tools crafted to deal with migrants and the fundamental rights granted them by the law, but it also has to consider their possibilities of protection and access to courts. Legal systems based on judicial dualism between ordinary and administrative judges, like France and Italy, may generate uncertainty, not allowing the foreigners to easily identify the authority to whom ask protection. On the one hand, the analysis of the concrete problems due to judicial dualism, existing in both countries, suggests a broader concentration of migrants claims in one jurisdiction. On the other hand, constitutional provisions and practical organizational issues put an obstacle to the unification. Therefore, the viable solution may be a simplification of the judicial protection tools and, even before, of the administrative measures to deal with foreigners, hopefully led by the European Union.

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1. Introduction

Facing the migrant crisis in the correct way does not mean only abstractly affirm foreigners' need of protection through law, and recognize their fundamental rights. It means above all provide appropriate tools of judicial protection, which ensure the access to a full and effective defence of recognized rights, even in emergency conditions that often characterize migrations.

Without a full, accessible judicial protection, the above-mentioned rights would remain mere principles on paper, without any real effect.

The issue of procedural protection becomes even more delicate in legislations such as the Italian and French ones, characterized by a judicial dualism, which sees ordinary judges flanked by administrative ones.

In a simple way, while the firsts intervene in disputes that involve interests of private nature, the latter take charge of cases in which private interests are connected with and opposed to public interests pursued by means of administrative action.

This considered, the position of the foreigner in the legislation of destination is defined in all its phases – entry, residence, expulsion – by administrative measures, which will influence the fundamental legal positions of the foreigner, first of all personal and movement freedom.

Understanding if a judge is more appropriate than another to provide this protection, and allowing a clear individuation of the authority the foreigner must direct to, become current central themes to guarantee an improvement of migrant's conditions. It cannot be ignored that, at the base of every consideration on this issue, there are subjects who are clearly in a difficult position, who have endured a hard journey, and who have to face a social and legal reality different from that of their country of origin.

This underlines two requirements: on the one side, it is necessary to guarantee that the protection of public interests does not cause a prior, disproportionate sacrifice of private interests, that has always to be taken into account. On the other side, to avoid that "war among ordinary and administrative judges" to identify their respective areas of intervention has migrants as its only victims, helpless audience of a conflict that risks to deprive them of a real possibility of protection.

Comparing two different systems, but with several similarities, allow to verify the different solutions adopted relating to the same issues and to suggest the implementation of the best practice in every country.

2. Criterion of distinction between ordinary and administrative jurisdiction

Identifying which is the judge assigned to the protection of fundamental rights of foreigners means, first of all, understanding the criterion of distinction between administrative and ordinary jurisdiction.

This criterion is formally different inside Italian and French legislation, but it presents various similarities, as there are various analogies in the evolution of the administrative judge.

In both legislations, the exigency of a special judge, different from the one who rules the relationships among citizens, originates from understanding the peculiarity of legal relationship in the public law,

where the claim of the private citizen is always mediated by the public interest. Thus the need of a peculiar control, that maintain the separation of judicial and administrative power, avoiding that the judge substitutes himself to public administration in the choices that are by right reserved to it.

In Italy, the system born at the end of the 19th Century¹ and confirmed by the Constitution² disciplines the criterion of distinction on the basis of the nature of the subjective legal position whose violation the individual complains about.

Originating a unique case on the international legal scenario, Italian legislation complements the figure of the individual right – which usually characterizes the relationships between private individuals or between private individuals and public administration who acts *iure privatorum* – with that of legitimate interest: a peculiar legal position, typical of relationships governed by public law, which originates from the exercise of the public authority and which reflects the peculiar position of public administration. Simplifying a controversial figure, the difference between legitimate interest and individual right is that an individual cannot claim, in presence of a discretionary administrative power, the certainty of obtaining or maintaining the usefulness (for example, pursuing an activity subject to authorisation) which constitutes the object of his pretense. What has to be guaranteed is instead the possibility to influence administrative choices, by taking part to the proceeding aimed at adopting the measure, and to judicially verify the legitimacy of the administrative decision.

In the presence of individual rights, the jurisdiction will belong in principle to the ordinary judge, while in the presence of legitimate interests to the administrative judge.

This rule, clear in the abstract, is not free of problems in its concrete application, because it is not always simple to understand when we are facing a legitimate interest rather than an individual right. A typical hypothesis is that of bound powers, where there is no possibility of balancing public and private interests by public administration, which has to act as punctually required by law, but the existence of subjective rights is not always recognized.

However, this criterion of distinction has been confirmed by several judgements of the constitutional Court³ and by the recent administrative process code (c.p.a.)⁴.

The general criterion accepts some exceptions. Two of them are interesting for our purposes: the hypothesis of “exclusive jurisdiction” and that where public authorities affect the fundamental rights. The first case involves specific fields indicate by the law where the administrative judge can both know legitimate interests and individual rights⁵. The second hypothesis derives from court decisions for which the fundamental nature of the legal position should always guarantee the achievement and preservation of the related usefulness (health, individual freedom, freedom of movement, etc.) to its owner, in order to exclude its expendability by public administration⁶. In other words, in the case of

¹ Laws 20th March 1865, n. 2248 and 31st March 1889, n. 5992.

² Artt. 24, 103 e 113 Cost.

³ C. cost., 6th July 2004, n. 204; C. cost., 11th May 2006, n. 191; C. cost., 27th April 2007, n. 140; C. cost., 5th February 2010, n. 35; C. cost., 15th July 2016, n. 179.

⁴ Art. 7 c.p.a.

⁵ Art. 133 c.p.a.

⁶ *Ex pluribus*, Cass., sez. un., 9th March 1979, n. 1463, and Cass., sez. un., 6th October 1979, n. 5172.

a fundamental right, the existence of a public power, and therefore, the designation of the private judicial position as a legitimate interest are automatically denied.

This last exception is rooted in the belief of inadequacy of the instruments at the disposal of the administrative judge for the proper protection of individuals.

However, this belief does not seem to have any reason to exist anymore⁷. Not only the administrative process has become a process regarding the protection of the individual, rather than the legitimacy of administrative action. But above all, in the last twenty years, the evolution of the legal framework has provided the administrative judge with measures of inquiry, precautionary and compensatory powers, and powers of conviction suitable for providing a complete protection to the individual, even where the presence of a public power is recognized.

Nonetheless, the “fundamental rights exception” still exists.

The framework described above underlines the analogies with French legislation.

Here, the administrative jurisdiction has found its explicit guarantee in a famous ruling of the *Conseil constitutionnel*⁸ that explains that: “à l’exception des matières réservées par nature à l’autorité judiciaire, il appartient en dernier ressort à la juridiction administrative de connaître de l’annulation ou la réformation des décisions prises dans l’exercice de prérogatives de puissance publique par les autorités exerçant le pouvoir exécutif”.

This decision makes explicit a rule that has characterized French system since long time ago: this rule is centred on the distinction between administrative activity, expression of a public power, and activity of private law.

Also the French criterion, such as the Italian one, presents some exceptions, that can result from a need for simplification (with the exclusive assignment of specific fields to the ordinary judge), or can reflect the exigency of a more careful protection of fundamental rights.

These last exceptions are particularly interesting for the protection of migrants and are expressed in art. 66 of French Constitution, in art. 136 of criminal procedure code and inside the construct of the *voie de fait*.

By proceeding sequentially, art. 66 describes the ordinary judge as “*le gardienne de la liberté individuelle*”. This provision is applied first of all to the field of criminal law and it aims to prevent arrests and arbitrary detentions. Despite a first broad interpretation of individual freedom, nowadays case law is in favour of a restrictive interpretation⁹, corresponding only to “personal freedom”, in order to exclude that other fundamental rights (freedom of movement, privacy rights, etc.) should necessarily be the protected by the ordinary courts, if harmed by a public power.

The provision of art. 66 is followed by art. 136 of criminal procedure code, which affirms: “*dans tous les cas d’atteinte à la liberté individuelle, le conflit ne peut jamais être élevé par l’autorité administrative et les tribunaux de l’ordre judiciaire sont toujours exclusivement compétents. Il en est*

⁷ As recognized by C. cost., 27th April 2007, n. 140.

⁸ CC 23th January 1987, n. 224.

⁹ CC 28th July 1989, n. 261. Recently, CC 19th February 2016, n. 536.

de même dans toute instance civile fondée sur des faits constitutifs d'une atteinte à la liberté individuelle ou à l'inviolabilité du domicile prévue par les articles 432-4 à 432-6 et 432-8 du code pénal, qu'elle soit dirigée contre la collectivité publique ou contre ses agents." In this case too, the rule has undergone a restrictive interpretation, assigning to the ordinary judge only the compensation for damage and excluding any control of the legality of the harmful administrative measure¹⁰.

Finally, we refer to the construct of the *voie de fait*, which aims at empowering the ordinary judge in cases that usually belong to the administrative one. There are two conditions: the non-imputability of administrative action to the competences of public administration (because of a lack of power or because it is a seriously illegal enforcement of a measure), and a serious violation of the private property or of a fundamental freedom¹¹.

These three exceptions are themselves an expression of the fear of inadequacy of the instruments at the disposal of the administrative judge, so that it is legitimized the derogation to the ordinary criterion of distinction.

Also inside French legislation we have witnessed an evolution of the administrative judge and an enlargement of the tools of protection at his disposal (above all, the powers of conviction and precautionary powers, such as the *référé-liberté* regarding the urgent protection of fundamental rights¹²), that can threaten the basis of the exceptions under examination.

This has caused a reduction of the scope of the *voie de fait*, in addition to the already explained narrow interpretation of art. 66 of the Constitution and art. 136 of the criminal procedure code. If the first condition remains unchanged, the latter has been limited to the hypothesis of the extinction of property rights (not any violation), and of infringement of personal freedom (not any fundamental freedom)¹³. Moreover, the administrative judge has asserted his shared competence, through the *référé-liberté*, to put an end to behaviours traceable to the *voie de fait*, that is no more an exclusive of the ordinary judge¹⁴.

Therefore, under French law the administrative judge seems fully entitled to protect fundamental rights, when affected by a public power.

The brief overview described above has allowed us to outline the context where the judicial dualism involving migrant protection develops.

But it has also allowed us to recognize the fullness of powers of the administrative judge, answering one of the first questions: at present, the problem is no more to identify the judge who is more appropriate for the protection of foreigners, but it is to understand if the judicial dualism constitutes an obstacle to their full protection, generating confusion where there should be clearness.

¹⁰ TC 12th May 1997, n. 03056, *Préfet de police de Paris c/ TGI de Paris*.

¹¹ CE, Ass., 18th November 1949, n. 91846, *Carlier*.

¹² Art. L. 521-2 CJA.

¹³ TC 17th June 2013, n. 3911, *M. Bergoend c/ Société ERDF Annecy Léman*.

¹⁴ CE ord. 23th January 2013, n. 365262, *Commune de Chirongui*.

3. The protection of the migrant in Italy

Starting from the Italian legislation, it is now possible to concentrate on the hypothesis where public administration affects the fundamental rights of migrants and the related protections.

In this subject, unlike others, the legislator¹⁵ clearly identifies the fields of the ordinary judge and those of the administrative judge.

In particular, the ordinary judge has to handle appeals against administrative measures regarding the entry for family reunification and the related residence permits, actions against decisions on applications for asylum and for the granting of international protection; and also civil actions against discrimination on grounds of race and ethnic origin, even when damaging behaviours come from a public subject. Moreover, the justice of the peace – honorary judge – is responsible for disputes related to prefectural expulsion orders, he has powers of validation of forced escort to the border and administrative detention inside the “detention for repatriation Centres” (Centri di permanenza per i rimpatri – CPR)¹⁶. On the other hand, the administrative judge has to handle disputes over the measures of issuing entry visa and over the issue, renewal and revocation of residence permits – with the above-mentioned exceptions – and also disputes over expulsion orders adopted by the Ministry of the Interior on grounds of public order and security of the State. Nothing is said by the legislator about applications for humanitarian protections and for appeals against refusals of entry.

The resulting framework is thus anything but clear. Uncertainty arises first of all from the variety of administrative instruments with which public administration can undermine foreigners' freedoms. Some of these instruments are partly overlapping with each other: for example expulsion orders and “deferred” refusals of entry. In fact, next to the traditional refusal of entry, with which border police prohibits the entry of foreigners into the territory, the Italian law includes the figure of “deferred” refusal of entry, decided by the quaestor towards the foreigner stopped “immediately after” his entry¹⁷. Its execution takes place in the same ways of forced expulsion, with forced escort to the border and possible temporary administrative detention in a CPR; moreover, a broad interpretation of the word “immediately after” can allow refusals of entry which are not too immediate, with the consequence of depriving the foreigner of the major protections (procedural and judicial) provided for the expulsion.

At the same time, the complexity results from the existence of different jurisdictions in relation to similar cases. For example, the hypothesis of prefectural and ministerial expulsions¹⁸.

In addition to this abstract uncertainty, there are concrete problems due to legislative gaps or to the difficult coordination of the various means of protection.

The most relevant ones are described hereafter.

First of all, as already explained, the legislator has not explicitly established before what judge the measures of refusal of entry shall be subject to a right to appeal, whether this refusal is immediate or

¹⁵ The fundamental rules about immigration are included in the Legislative Decree 25th July 1998, n. 286, amended several times till 2017.

¹⁶ As recently renamed by the Decree Law 17th February 2017, n. 13, which has also increased their total amount.

¹⁷ Art. 10, Legislative Decree n. 256/1998.

¹⁸ Art. 13, Legislative Decree n. 256/1998.

postponed; this because it was initially conceived as a simple material act of competence of border police. Currently, its being a proper administrative measure is confirmed explicitly by the law that requires its communication with written reasoned statement. The existence of "deferred" refusal of entry, which broadens the scope of this tool enabling it to substitute itself to the expulsion orders, has then stressed the need for a judicial protection suitable for the subjects the measure is addressed to. Between the two strands – those who underlined the imperative nature of the act such as to relate to a legitimate interest of the foreigner and those who affirmed its traceability to a *species* of prefectural expulsion, so as to subject it to the same regulation – the one in favour of the jurisdiction of the justice of the peace has prevailed, as now supported by majority case law¹⁹.

Judges had therefore to fill the gap left by the legislator, whose discipline remains incomplete, and that has caused an uncertainty for 15 years, hardly justifiable inside such a delicate subject.

A second problem, clear expression of an insufficient coordination between the means of protection of the ordinary judge and those of the administrative one, presents with regard to prefectural expulsions. They represent one of the two types of expulsion provided for in the Italian system. The first can be provided for by the Ministry of the Interior on grounds of public order and security of the State: it is therefore characterized by a wide discretion that legitimizes the jurisdiction of the administrative judge. On the contrary, prefectural expulsions are necessarily disposed in the hypothesis strictly required by law, thus originating a bound power, with a subsequent subjective right against expulsion when not included inside these hypothesis: therefore the jurisdiction of the ordinary judge.

Problems at this point arise from the fact that most prefectural expulsions follow the failed issue and renewal or the revocation of residence permits, which represent measures falling within the administrative jurisdiction.

It is clear that this procedure is too cumbersome for the damaged subject, that has to address himself to two different judicial bodies, to deal with two cases which are strictly linked one another, all at the expense of the effectiveness of his right of defence.

The Constitutional Court, called upon to give its opinion, has nonetheless claimed the accordance of this discipline with the Constitution, recognizing the possibility for the justice of the peace to know and disapply as an incidental question the conditional measure regarding the residence permit, causing the derived illegitimacy for the prefectural expulsion²⁰.

However, the Court of Cassation has not conformed to this decision, by excluding that the justice of the peace could know about the legitimacy of the conditional administrative measure, because in this way it should become the main object of his judgement, while it belongs *ex lege* to the jurisdiction of the administrative judge²¹. The justice of the peace has therefore to limit itself to verifying the existence of conditions for the expulsion, imposed by law, among which the mere existence of the measure related to the residence permits whose possible defects cannot be known by him. This causes a clear impoverishment of his control, because the reasons that cause the expulsion are concretely

¹⁹ Cass., sez. un., 17th March 2013, n. 15115.

²⁰ C. cost., 18th April 2001, n. 414.

²¹ Cass., sez. I., 1st April 2004, n. 6370.

included inside the refusal of the residence permit, whose rationality and proportionality could be questioned only before the administrative judge.

If this is not enough, just consider that the judgement before the justice of the peace usually takes a shorter time than the administrative one, with the risk that the expulsion will take place even before any possible pronouncement on the legitimacy of the refusal of the residence permit.

A last profile which is important to dwell on is that of the measures with which, in execution of expulsion or refusal of entry, the detention in CPRs or the forced escort to the border are decided.

In relation to these hypothesis, there are few doubts that the personal freedom of the foreigner is affected, so that the functioning of the guarantees provided for by art. 13 of Italian Constitution is required. First of all, a “statutory reserve” comes into play, for which the restrictions to personal freedom must be entirely provided for by the law, in order to remove them from the administrative discretion. Secondly, a “judicial reserve” takes place, according to which the restrictive acts should directly come from the judicial authority or, if decided by administration (in the exceptional cases provided for by law), be the object of a judicial validation at very short notice.

Here follows the need for requesting that the justice of the peace gives his decision to validate the measures of administrative detention or forced escort, within ninety-six hours from the notification of the act to the affected person²². At this point, the judge primarily evaluates the legitimacy of the decision with which the detention or the escort are ordered, but he also incidentally knows the legitimacy of the measure of expulsion. In other words, he can refuse the validation not only when the conditional act is missing, but also when it is illegitimate²³.

Besides the complained violation of constitutional provisions (that allow the recourse to validation only in exceptional cases, while administrative detention seems now an ordinary hypothesis in the context of extradition), a clear breach is the absence of any judicial protection in relation to detentions in the phase of first entry, in first aid and reception Centres. If this lack is due to the belief (*rectius*, hope) of the legislator that these detentions will last a very short time, reality is different, with atypical administrative detentions that last various weeks in conditions that does not always respect migrants' dignity.

We must also consider how, in case of execution of a deferred refusal of entry, the validation is required only for measures of administrative detention and not for the forced escort to the border, according to the hypothesis that this is not a real limitation of the personal freedom of the foreigner. More rationally, if this reasoning could be valid for immediate rejection – where the foreigner is not limited in his personal freedom but he is only prevented from accessing Italian soil – it hardly works with a foreigner who is already in Italy, also considering the strong similarity with expulsion measure.

In conclusion, with a reference to Italian law, during the last 25 years an erosion of the jurisdiction of the administrative judge has taken place, in favour of that of the ordinary judge²⁴.

²² Artt. 13 and 14, Legislative Decree n. 256/1998.

²³ C. cost., 22nd March 2001, n. 105.

²⁴ We must recall the Law 28th February 1990, n. 39 which allocated to the administrative judge the majority of litigations about immigration.

This has been justified by the claim of the bound nature of the administrative powers or, above all, by considering the "fundamental" nature of the rights harmed by administrative action, which would guarantee the qualification of the legal position of the migrant as a subjective right and would deprive the public administration of any authority.

4. The protection of the migrant in France

Now considering the French legal system, it is possible to understand how the approach of the last years has been different from the Italian ones, with an almost total assignment of the field of immigration to the administrative judge, except the limits resulting from art. 66 of the Constitution²⁵.

Also in France there is a wide variety of instruments that can affect the fundamental freedoms of migrants, similar to the ones provided for by Italian system. We remind the issuance of entry visa and of residence permits, the measures on family reunification, right of asylum and international protection, the refusal of entry into French territory, the order to leave France, the administrative prohibition of returning to French territory, the decision of escort to the border, prefectural and ministerial expulsions. To all these we must add the enforcement measures connected to expulsion and refusal of entry, among which the maintain in waiting zone, administrative detention and forced escort to the border.

Consequently, it recurs the problem of a proliferation of similar institutions, which have an impact on migrant's freedom, thus creating confusion on the nature of the procedure he is subjected to and on the instruments of defence at his disposal.

Suffice it to say that a foreigner who is considered dangerous for public order could be recipient of an order of leaving France, but also of a procedure of expulsion or escort to the border.

In the first case, the foreigner has to independently abandon (within forty-eight hours) the French territory, and the prefect can decide upon the interdiction on his return. If the deadline is not respected, the administration can undertake forced expulsion, deciding the country of destination, and, where necessary, ordering administrative detention before expulsion. Similar provisions regulate the hypothesis of a measure of escort to the border, while the procedure in case of expulsion is much more complex. Not only the foreigner will be convened at a specific committee, whose decision is however not binding for the prefect, but he will also be subject to measures of administrative detention till the execution of forced expulsion. Moreover, re-entry ban will work automatically.

The chaoticness is increased by the existence of different disciplines that refer to the same instrument. We remind the three types of expulsion, organized according to the gravity of the danger for public order, and, consequently, conferred to the competence of the prefect or the Minister of the Interior. In relation to them, for example, there are different categories of protected subjects.

From the point of view of judicial protection, however, there seems to be a major linearity, because the actions challenging the above-mentioned decisions are subjected only to the administrative judge. Nonetheless, this does not mean uniformity of appeal procedures. It is enough to mention the variety of time limits for lodging the appeal (thirty days, fifteen days or forty-eight hours for the different

²⁵ The whole regulation is included in the Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA).

types of order to leave France; forty-eight hours for the escort to the border, two months for expulsion).

An exception to the jurisdiction of the administrative judge is naturally constituted by the acts which have a concrete impact on the personal freedom of the foreigner (above all, the maintain in waiting zone and administrative detention), in respect of which the intervention of the ordinary judge is provided for by art. 66 of the Constitution. It is indeed the responsibility of the *juge des libertés et de détention* to validate the measures taken by public authority.

It is precisely this area that has for a long time represented the field where problems derived from judicial dualism mostly occurred. On the one side, indeed, it has always been recognized the constitutional illegitimacy of law provisions that entrusted the administrative judge with the power of validating detention orders²⁶. On the other side, however, both the *Tribunal des Conflicts* and the *Conseil constitutionnel* have denied the possibility for the ordinary judge, in the context of the validation, to judge on the legitimacy of the conditional administrative acts, included the act that ordered the administrative detention, considering it a preliminary issue belonging only to the administrative judge.²⁷

However, this approach emptied the review of the ordinary judge, allowing him a mere examination of the formal correctness of the prefect's request to extend the detention.

On the one side, this has caused the reactions of the Court of Cassation that has tried to extend its review to the conditional measure²⁸. On the other side, it has brought the administrative judge to baroque solutions, for which, till validation, the defects of the detention measure should fall within his jurisdiction, while, from validation on, the ordinary judge should be responsible for knowing all the reasons apt to determine the release of the foreigner²⁹.

Beyond the most recent judgements of the *Tribunal des conflicts*³⁰, with which the judges have produced a sea change, the problem seems to have finally been defined by the legislator. The version in force from the 1st of November 2016, art. L. 512-1 CESEDA, if on the one side does not affect the jurisdiction of the administrative judge for the acts previous to the measure of administrative detention, on the other side it explicitly states that "*la décision de placement en rétention ne peut être contestée que devant le juge des libertés et de la détention, dans un délai de quarante-huit heures à compter de sa notification*", in the context of the validation procedure of the same decision.

Therefore, the ordinary judge can evaluate the legitimacy of the detention order, but he cannot still evaluate the legitimacy of the act with which the expulsion is decided, this resulting the object of the exclusive knowledge of the administrative judge. In this context, the difference with the Italian system is clear.

²⁶ CC 25th February 1992, n. 307.

²⁷ CC 28th July 1989, n. 261 and the above-mentioned TC 12th May 1997, n. 03056, *Préfet de police de Paris c/ TGI de Paris*.

²⁸ C. cass, civ. 2, 28th June 1995, n. 93-21.764, *Bechta*.

²⁹ CE, 15th April 2016, n. 398550.

³⁰ TC 9th February 2015, n. 3986.

5. Conclusions

Starting from the above described context, it is possible to compare the dualistic systems of judicial protection of migrants we have analyzed, in order to evaluate their legal correctness and their effectiveness and appropriateness.

Considering the Italian system, judicial dualism has originated a contorted structure regarding migrants, that is certainly difficult to interpret by the foreigner, who is often obliged to act rapidly considering the short timeframe in which expulsion measures can produce their effects.

Starting from an abstract evaluation, the reasons at the base of the assignment of specific fields to the ordinary judge do not seem so solid anymore.

With the exception of the hypothesis of the effective limitation of personal freedom (above all, administrative detention and escort to the border), where art. 13 of the Constitution precludes margins of discretion to the public administration and guarantees the ownership of a subjective right to freedom, the "fundamental" nature of the individual legal position can hardly justify the assignment of the dispute to the ordinary judge.

Not only because the regulation of the entry and staying of foreigners is a typical field of the *ius imperii* of the State, but also because it is undeniable that, in various hypothesis assigned to the ordinary judge, administrative action involves the exercise of discretionary powers, that can entrust the individual a legitimate interest. Just consider prefectural expulsions that follow an evaluation of the social danger of the foreigner.

Secondly, the Italian administrative judge is nowadays provided with resources suitable for offering a complete defense of the fundamental freedoms of the individual, affected by a public powers, guaranteeing even a better protection than that of the ordinary judge.

This becomes clearer as a result of the assignment of various questions to the justice of the peace, a non-professional judge, whose powers relating to the administrative measures are not always sufficiently clear and effective, unlike those of the administrative judge, whose intervention is traditionally centered on the control of the legitimacy of the administrative action.

From a theoretical point of view, there would be no effective limits – unless those of the above-mentioned art. 13 – to gather the protections regarding migration in the administrative jurisdiction, bringing the Italian and the French systems closer. This should be the consequence of a correct application of the current criterion of distinction, so that the intervention of the legislator to provide for an “exclusive jurisdiction” of the administrative judge would only value as an explicit manifestation of the intention to reorganize the current field.

The merger of the protections in the hands of a single judge, then, would allow to compensate for the underlined inconsistencies – above all, the one concerning appeal against expulsion and refusal of residence permit – beyond helping the foreigner to identify the competent authority, bringing a better fulfillment of the right of defence provided for by the Constitution.

Consequently, the French dualistic system appears more linear and effective.

Except for the limits derived from art. 66 of the Constitution, assigning the complete migration field to the administrative judge has been the result of recognizing the possible coexistence of fundamental freedoms and public powers, and of admitting the full capacity of the administrative judge to protect all private positions affected by public administration.

But issues also exist in this legal system, due to the impossibility for the ordinary judge to incidentally review the conditional administrative measure when he has to validate the acts limiting the personal freedom of the foreigner. This principle restricts the extension of his review and it forces the migrant to lodge an appeal also to the administrative court, in order to fully satisfy his right of defence.

Regardless of the dualism, the existence of various appeal procedures, with different time limits for proceeding to trial, may cause troubles to the foreigner who, in case of mistaken timing, could lose the possibility to challenge the administrative measure.

Therefore, is gathering all the judicial protections under the jurisdiction of one judge the solution to all problems? If it is, why do not the legislators of both countries do so?

Looking at the concrete reality, we must underline that both the French and the Italian Constitutions prohibit a total and complete assignment of the migration field to only one judge, administrative or ordinary. On the one hand, the articles concerning personal freedom force the intervention of the ordinary judge in case of administrative detention and escort to the border. On the other, the constitutional recognition of the administrative jurisdiction precludes the ordinary judge to intervene in hypothesis where no doubts exist about the acting *iure imperii* of the public administration, like in case of expulsion adopted by the Ministry of the Interior.

Secondly, we must consider that the choice of the judge may depends not only on legal criteria, but also on pragmatic, organizational needs of the justice system. This was crystal clear, in Italy, by the choice of entrusting the justice of the peace of some of the foreigners' disputes, as a consequence of its wider spread on the territory and the possibility of recruiting new justices of the peace more easily, in case of need. In this way, the legislator tried to avoid the congestion of both ordinary and administrative courts, which could have produced more serious damages to the effectiveness of foreigners' protection.

In conclusion, it seems clear that any attempt to improve foreigners' judicial safeguards must come from a rationalisation of the system which, before dealing with tools of judicial protection and coordination of judges, has to deal with the instruments the public administration may harm the migrants' fundamental rights by.

Their uncontrolled proliferation, besides being a clear expression of the growing and unjustified fear for all that is "foreign", stranger to our society, flows from an unequal European policy which, violating the solidarity principle, sacrifices the Countries characterised by a greater immigration, not ensuring the reallocation of migrants and the sharing of economical burdens³¹.

Thus, it is the European Union which has to intervene in order to solve the above-mentioned need for rationalization. A time like the present, characterized both by a strong migrant crisis and by a crisis

³¹ We can recall the European refugee crisis of 2015, which mainly affected Greece and Italy.

of the EU project itself, must be the occasion for the EU to fully exercise its powers, arising (finally) as main character for the pivotal choices concerning a truly united Europe.

We cannot forget that, according to the art. 67 TFUE, the Union “*shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals*”. This rule, truly mandatory and not only programmatic, enlightens the needs for a full and more uniform application of the existing regulations³², as actually recognized³³, but also the necessity of a deeper intervention. This must lead to the reorganization and specification of the administrative measures limiting fundamental freedoms of migrants and of their judicial safeguards, making Europe “*an area of freedom, security and justice with respect for fundamental rights*”³⁴ not only for its own citizens, but for everybody who seeks the adequate protection of these values.

³² Directive 2008/115/EC of the 16th December 2008.

³³ Communication from The Commission to the Council and the European Parliament on EU Return Policy, COM/2014/0199.

³⁴ Art. 67 TFUE.

6. References

Section 2

About the Italian criterion of distinction:

- Articles in journals: Bassi, Franco (1988), “Diritti fondamentali e art. 4, secondo comma, L. 20 marzo 1865, n. 2248, all. E”, in *Dir. proc. amm.*: 613; Pace, Alessandro (1980), “Diritti degli handicappati e inadempienze della pubblica amministrazione”, in *Giust. civ.*: 1995 ss.; Orsi Battaglini, Andrea (1988), “Attività vincolata e situazioni soggettive”, in *Riv. trim. dir. proc. civ.*: 3 ss.; Romano, Alberto (1980), “Diritto soggettivo, interesse legittimo e assetto costituzionale”, in *Foro it.*, V: 258 ss.; Scoca, Franco G. (2010), “Riflessioni sulla giurisdizione esclusiva”, in *Giur. cost.*, 439 ss.; Scoca, Franco G. (2011), “Attualità dell’interesse legittimo”, in *Dir. proc. amm.*: 379 ss.
- Books: Cannada-Bartoli, Eugenio (1964), “La tutela giudiziaria del cittadino verso la pubblica amministrazione”, Milano: Giuffrè; Gallo, Carlo E. (2016), “Manuale di giustizia amministrativa”, Torino: Giappichelli; Nigro, Mario (2002), “Giustizia amministrativa”, Bologna: il Mulino; Scoca, Franco G. (1990), “Contributo sulla figura dell’interesse legittimo”, Milano: Giuffrè; Scoca, Franco G. (2014), “Giustizia amministrativa”, Torino: Giappichelli; Travi, Aldo (2016), “Lezioni di giustizia amministrativa”, Torino: Giappichelli; Travi, Aldo (2016), “Colloquio sull’interesse legittimo: atti del Convegno in memoria di Umberto Pototschnig”, Napoli: Jovene; Villata, Riccardo and Ramajoli, Margherita (2017), “Il provvedimento amministrativo”, Torino: Giappichelli.
- Contributions to books: Allegretti, Umberto and Pubusa, Andrea (1997), “Giurisdizione amministrative e diritti fondamentali”, in Lanfranchi, Lucio, “Garanzie costituzionali e diritti fondamentali”, 417 ss., Roma: Istituto della Enciclopedia italiana; Ramajoli, Margherita (2012), “Le forme della giurisdizione: legittimità, esclusiva, merito”, in Sassani, Bruno and Villata, Riccardo (2012), “Il codice del processo amministrativo”, 141 ss., Torino: Giappichelli; Tonoletti, Bruno (2010), “Le situazioni soggettive nel diritto amministrativo”, in “Quaderni del Seminario di Studi e Ricerche Parlamentari Silvano Tosi”, 20, 132 ss., Torino: Giappichelli.

About the French criterion of distinction:

- Articles in journals: Normand, Jacques (1998), “Le juge judiciaire, juge d’exception des atteintes portées par les autorités administratives à la liberté individuelle”, in *RTDC*: 181 ss.
- Books: Auby, Jean-Marie and Drago, Roland (1984), “Traité de contentieux administrative”, Issy-les-Moulineaux Cedex: LGDJ; Bretton, Philippe (1964), “L’autorité judiciaire gardienne des libertés individuelles et de la propriété privée”, Issy-les-Moulineaux Cedex: LGDJ; Broyelle, Camille (2016), “Contentieux administrative”, Issy-les-Moulineaux Cedex: LGDJ; Chapus, René (2004), “Droit administrative général”, Paris: Montchrestien; Chapus, René (2008), “Droit du contentieux administrative”, Issy-les-Moulineaux Cedex: LGDJ; Dupuis, Georges et al. (1991), “Le contrôle juridictionnel de l’administration”, Paris: Economica; Falgas, Anthony (2015), “La voie de fait administrative”, Paris: L’Harmattan; Frier, Pierre-

Laurent and Petite, Jacques (2015), “Droit administratif”, Issy-les-Moulineaux Cedex: LGDJ; Gonod, Pascale and Melleray, Fabrice et al. (2011), “Traité de droit administratif”, Paris: Dalloz; Le Bot, Olivier (2007), “La protection des libertés fondamentales par la procédure du référé-liberté”, Issy-les-Moulineaux Cedex: LGDJ; Le Bot, Olivier (2013), “Le guide des référés administratifs”, Paris: Dalloz.

Section 3

- Articles in journals: Caponigro, Roberto (2004), “La tutela giurisdizionale dello straniero avverso l'espulsione amministrativa prefettizia”, in Foro amm. Tar: 3564 ss.; Civinini, Maria Giuliana and Proto Pisani, Andrea (2000), “La tutela dei diritti dei cittadini extracomunitari”, in Foro it., I: 3346 ss.; Cuniberti, Marco (2000), “Espulsione dello straniero e libertà costituzionali”, in Dir. Pubbl.: 817 ss.; Stanziola, Maurizio and Pagliano, Antonio (2008), “Le competenze del giudice di pace in materia di immigrazione”, in Quaderni del giudice di Pace, 12; Tropea, Giuseppe (2008), “Homo sacer? considerazioni perplesse sulla tutela processuale del migrante”, in Dir. amm.: 839 ss.; Vettori, Nicoletta (2008), “Doppia giurisdizione ed (in)effettività della tutela giurisdizionale dello straniero”, in Diritto, immigrazione e cittadinanza: 54 ss.; Vettori, Nicoletta (2012), “Amministrazione e diritti fondamentali dello straniero: verso un nuovo modello di tutela giurisdizionale?”, in Dir. pubbl.: 681 ss.; Zorzella, Nazzarena (2006), “Giudizio avverso il diniego del titolo di soggiorno e giudizio relativo all'espulsione: due mondi non comunicanti? Spunti di riflessione per una nuova considerazione dello status di migrante in termini di diritto soggettivo”, in Diritto immigrazione e cittadinanza: 27 ss.
- Contributions to books: Bonetti, Paolo (2004), “Ingresso, soggiorno ed allontanamento”, in Nascimbene, Bruno, “Il diritto degli stranieri”, 203 ss., Padova: CEDAM; Rolli, Renato (2010), “Immigrazione e giurisdizione”, in Gambino, Silvio e D'Ignazio, Guerino, “Immigrazione e diritti fondamentali. Fra costituzioni nazionali, Unione Europea e diritto internazionale”, 553 ss., Milano: Giuffrè.

Section 4

- Articles in journals: Fabre-Alibert, Veronique (1999), “L'entrée et le séjour des étrangers en France depuis la loi du 11 mai 1998: de l'immigration à l'intégration”, in Rev. tr. des Droits de l'homme: 199 ss.; Guimezanes, Nicole (1996), “La rétention administrative des étrangers frappés d'une mesure d'éloignement du territoire”, in RCDIP: 275 ss.; Guimezanes, Nicole (1999), “Le juge judiciaire ne contrôle pas la régularité de la consignation d'un étranger à bord d'un navire”, in RCDIP: 500 ss.; Guimezanes, Nicole (2000), “De la compétence du juge judiciaire en matière de rétention administrative des étrangers”, in RCDIP: 697 ss.; Guimezanes, Nicole (2009), “Des pouvoirs du juge des libertés et de la détention qui statue sur une mesure de rétention d'un étranger”, in RCDIP: 47 ss.; Guimezanes, Nicole (2012), “Répartition des compétences judiciaire et administrative dans le droit des étrangers”, in RCDIP: 849 ss.
- Books: Aubin, Emmanuel (2012), “Droit des étrangers”, Paris: Gualino; Bioy, Xavier (2016), “Droits fondamentaux et libertés publiques”, Issy-les-Moulineaux Cedex: LGDJ; Renoux, Thierry (2011), “Protection des libertés et droits fondamentaux”, Paris: La documentation

Française; Ribémont, Thomas (2012), “Introduction au droit des étrangers en France”, Paris: De Boeck Supérieur; Robert, Jacques and Duffar, Jean (2009), “Droits de l’homme et libertés fondamentales”, Paris: Montchrestien; Vandendriessche, Xavier (2011), “Le droit des étrangers”, Paris: Dalloz; Seguin, Denis (2013), “Guide du contentieux des étrangers”, Paris: LexisNexis.

- Contributions to books: Sala Chiri, Guido (2010), “Il diritto dell’immigrazione in Francia”, in Cordini, Giovanna and Gasparini Casari, Vittorio, “Il diritto dell’immigrazione”, 449 ss., Modena: Mucchi.

Section 5

- Articles in journals: Favilli, Chiara (2015), “Reciproca fiducia, mutuo riconoscimento e libertà di circolazione dei rifugiati e dei richiedenti protezione internazionale nell’Unione Europea”, in Riv. dir. internaz.: 701 ss.; Mendez, Augustín José (2016), “The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration”, in Europ. Law. J., 22: 388 ss.; Savino, Mario (2015), “La crisi dei migranti: l’Europa oltre gli Stati-nazione”, in Giornale dir. amm.: 729 ss.
- Contributions to books: Favilli, Chiara (2012), “Immigrazione (diritto dell’Unione Europea)”, in Enc. dir. Annali, IV, 675 ss., Milano: Giuffrè.
- Unpublished Works: Tonoletti, Bruno (2016), “Confini diritti migrazioni. Catastrofe e redenzione del diritto pubblico europeo”, seminar “Confini diritti migrazioni”, Università degli Studi di Trento, 21st April 2016.