

IMMIGRATION, PERSONAL LIBERTY, FUNDAMENTAL RIGHTS

edited by
MARIA GRAZIA COPPETTA

with the assistance of
LORENZO BERNARDINI



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IMMIGRATION AND FUNDAMENTAL RIGHTS: INTRODUCTORY REMARKS

LICIA CALIFANO

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1. Introduction.

Immigration, due to its complexity and the strong legal, social and political repercussions it has, is today a central issue, not only for Italy, but certainly for Europe as a whole. A common challenge that, at the national level, invokes the constitutional principles; whereas, at the European Union (EU) level, it calls for reflection on the process of developing the values of the Union, as well as a tradition of peace and freedom that should shape a society characterised by the principles of pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women.

Immigration is an age-old social phenomenon, with deep roots in human history, which evokes a strong emotional impact and that requires the development of appropriate and effective legal responses.

Reflecting on the legal status of foreigners, considered both as refugees and asylum seekers—starting from the reasons that determine the migration phenomenon—, it is necessary to consider and compare, on the one hand, the political choices (not always plain and organic) aimed at guaranteeing the security of citizens (who may perceive the presence of migrants on the territory of the State as a threat), and, on the other hand, the reasons of solidarity as an instrument of integration, an expression of the practice of the democratic principle, on the other hand.

These reception policies are linked to regulatory solutions (at the different territorial levels and, in terms of sources, at the primary and secondary levels) in relevant sectors, ranging from the labour market to personal services (health, education, housing, social services), to the sustainability of the welfare system and, finally, to a more complex

weighing of the costs and benefits of the immigrant presence for the public budget.

Moreover, immigration legislation has been the subject of a dispute between the State, which has tightened the regulation of migratory flows, and the Regions. As a matter of fact, the latter have been called upon to manage the coexistence of citizens and migrants in their territories. In some cases, the approach of the local administrations has been to protect foreigners as human beings regardless of their residence permit, and, in others, to exclude foreigners from experiencing the same standard of living as citizens.

The relationship between the regional and central levels of administration is not a straightforward matter. Indeed, it opens up a reflection, first and foremost, on the tasks that the central State should have, given the vertical division of legislative powers that must be consistent with the protection of fundamental rights.

Secondly, it opens up a reflection on the role of the criterion of residence (in the face of the forms of extension of citizenship), which, if it is considered as an indication of concrete participation in the life of the community on the territory, can nevertheless turn out to be an instrument of exclusion from the universal protection of social rights.

Against this background, shaken by contrasting visions that are still struggling to find a coherent composition, the constitutional framework and the development of constitutional principles are outlined, starting from the principle of human dignity that must guide European, national and regional action.

2. Citizens' and foreigners' freedom rights.

The constitutive relationship with fundamental rights and freedoms is the defining feature of democratic constitutions, which determines their openness to a pluralist society whose unifying framework is based on the common and shared values and principles they express.

In liberal democratic constitutionalism, state sovereignty is the other side of the coin of individual freedom: the moment of authority and the moment of freedom are symmetrically opposed but, at the same time, inseparably linked.

The existence of a strong and intangible core of individual freedom rights, and of collective rights (of social formations) that complement them, is based on the defence of the dignity of the person, which must be recognised and granted to every human being.

The Italian Constitution is founded on several principles of paramount importance, such as: a *pro persona* paradigm (*principio*

personalista), pluralism, democracy, freedom, social justice, widespread organisation of State's power (ensuring balance and mutual control), a system of guarantees leading to the establishment of the Constitutional Court.

The Constitution is therefore the normative act that "positivises" the fundamental legal rules of the political order of the State while at the same time outlining an ideal model for the development of the society hinged on the inseparable link between the function of limiting political power and guaranteeing the individual rights under conditions of equality.

It is from the principle of equality—understood both as the prohibition of discrimination and as the fundamental canon of the adequacy of legal treatments to social situations, which is combined with the irrepressible and inviolable value of the human person—that the Constitution derives the right to work and all the other civil rights, such as: personal freedom, inviolability of the home, freedom and secrecy of correspondence, freedom of movement and residence, freedom of assembly, association, thought, *etc.*; and, in the same direction, the active task entrusted to the public authorities to promote freedom and equality and to guarantee fundamental social rights.

Indeed, on closer examination, the constitutional guarantee of social rights, as well as civil, economic and political rights, is conceived by the Italian Constitution as a dynamic, evolving reality, in respect of which State intervention becomes crucial.

A model of society in which political power is based on the consent and participation of citizens in the formation of the collective will within the constitutional limits.

The main lines of the Italian constitutional system find their fundamental point of intersection in the statement of the democratic nature of the State, an expression that characterises the community of the States and bases it on the values of freedom and equality. A democratic principle whose constituent elements are to be found in the majority principle, in the legal instruments for the protection of minorities, in the transparency of the decision-making processes, in the protection of civil liberties – in short, a widespread organisation of powers that ensures balance, mutual control and conditions for effective participation. The entire Constitution is built on political, territorial, linguistic and religious pluralism.

The practical scope of these statements might be more complex, as there is no agreement on the content of such assertions, since it is possible to argue about what constitutes human dignity, what constitutes inviolable rights and how they are related.

Jurists and philosophers will continue to discuss and debate the nature and basis of these principles: whether they should be seen as

the expression of a new kind of “natural law” or whether they are valid only as “positive law”.

On the other hand, the constitutive relationship between fundamental rights and the Constitution is undergoing a process of weakening in relation to the extension of social rights, the realisation of which is shifting the centre of gravity from the constitutional provision—which is no longer sufficient—to the implementing legislation referred to the legislature.

Besides, the international and supranational frameworks for the protection of rights are necessarily shifting their anchorage from the exclusive interests of the State to the supranational circuit, that flanks and integrates the internal constitutional circuit; a process of mutual integration that is growing exponentially if one considers only the dialogue and the role that the European courts are gradually assuming.

The inadequacy of the constitutional scheme that produces, or rather reproduces, the relationship between rights and ethical values in all its unresolved complexity is highlighted in particular by the ongoing process of multiculturalisation in the Western world and the integration policies that accompany it.

Nevertheless, it should be noted at the outset that human rights concern a *status libertatis*, a condition of liberty which the State guarantees by preventing any form of their unlawful infringement. The constitutional protection which underpins them, and which refers to the self-limitation of public authority, is certainly the most appropriate expression of the affirmation of the rule of law.

On the specific point of the legal status of foreigners, to the extent that human rights are considered to be closely related to the human person and, consequently, legal protection is seen as the recognition of values that pre-exist the State and are essential to the freedom and dignity of the individual (it is no coincidence that they are currently referred to as *fundamental* or *inviolable* rights), the content does not prevent them from also being attributed to foreigners.

It follows that the individual right to liberty is conferred irrespective of the existence of a citizenship relationship, unless the Constitution explicitly restricts its entitlement to citizens only: in such a case, it should be noted that the foreigner loses only the constitutional guarantee and not any entitlement conferred by ordinary law.

In other words, the problem of defining the subjective scope arises in relation to the extension to foreigners of rights that the Constitution expressly reserves to citizens. An extension that cannot be considered automatic on the basis of the principle of equality (which the Italian Constitution refers to citizens), taking into account the wording of Article 10(2) of the Constitution, which states that ‘the legal

condition of foreigners shall be regulated by law in accordance with international provisions and treaties’.

On the basis of this provision, extensions of fundamental rights can be justified even in cases where the Constitution seems to reserve them for citizens only.

An extension that has its roots in the inviolability of human rights (Article 2 of the Italian Constitution), which is extended by the international circuit of rights—European Convention of Human Rights (ECHR)—(Article 10(2) of the Italian Constitution) and which finds expression in Article 16 of the Preliminary Provisions of the Italian Civil Code, the rule that allows foreigners to enjoy, on condition of reciprocity, the ‘civil rights attributed to citizens’.

It remains possible for the legislature to assess, according to its discretion (which has no other limit than the rationality of its assessments), how to regulate the condition of foreigners on the Italian territory. This implies that, although citizens and foreigners are equal in the entitlements of certain freedom rights, there may exist differences in the recognition of such rights, as well as a different treatment in the enjoyment of those rights, as the Italian Constitutional Court has observed (Constitutional Court, Judgement no. 104 of 1969).

In an attempt to frame the position of immigrants in the Italian constitutional order, the reflection may start from the strong statement of principle that fundamental rights are due to citizens and foreigners alike, but it finds expression in normative provisions that may maintain certain distinctions given that equality does not exclude differentiation, albeit strictly linked to the test of reasonableness and proportionality of the Constitutional Court.

These profiles lead to the limits that can be placed on the exercise of the constitutional right to enter, stay and move freely within the territory of the State (time limits, residence permits, possibility of expulsion, *etc.*), as well as to the different treatment in the field of political rights; issues that will be developed and discussed in depth in the following contributions.

