IMMIGRATION, PERSONAL LIBERTY, FUNDAMENTAL RIGHTS

edited by
MARIA GRAZIA COPPETTA

with the assistance of
LORENZO BERNARDINI

Wolters Kluwer

CEDAM

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INTRODUCTION

Maria Grazia Coppetta

The sensitive topic of migration management has long been at the centre of heated public debate and is the subject of an equally heated clash between Member States and the EU on the policies to be adopted in the future. The phenomenon, over the centuries, has grown to considerable proportions, to the point of being considered, in recent decades, a worrisome emergency for national security, a stable source of exceptional rules, i.e. a *lex specialis*.

It is in this context that the issues dealt with in this publication are rooted, issues that 'touch' on the central aspect of the immigration phenomenon – the protection of the fundamental rights of the individual. As is well known , the degree to which those fundamental guarantees are recognised in relation to foreigners, and in particular for irregular immigrants, is the touchstone of the adequacy of national, European and international legislation to meet the needs of those foreigners seeking more dignified living and working conditions than those they find in their countries of origin, and commits States, in defence of inalienable rights, to amend their domestic legal mechanisms that breach these prerogatives *vis-à-vis* migrants, so as to achieve solutions geared towards reception and solidarity.

Unfortunately, the COVID-19 pandemic has curtailed the planned survey methodology and made field research impossible.

Although limited to an in-depth study of the legislative texts on immigration, conducted in the light of the relevant case law of the European and Italian courts, the research has yielded interesting results, that have been illustrated throughout the year in thematic seminars that have stimulated lively discussions and enriched knowledge on the subject. In particular, the present publication, respecting the hierarchy of normative sources on the fundamental rights of migrants, considered first the supranational and constitutional levels, then the ordinary domestic legislation.

It is also well known that the European and the Italian legislators have been called upon to regulate the legal status of immigrants. This proved not to be an easy task given the scale and emotional impact of migratory flows, especially when they reach such high peaks, albeit in exceptional contexts (e.g. wars). This is not an easy task, but a necessary one, based on the effective protection of the dignity of the person, recognising first and foremost the fundamental legal interest of personal freedom and human rights, with all the guarantees provided by the Constitution, the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFR).

In the light of the above, the question posed by the researchers to themselves is the following – 'Have the European and Italian legislators fulfilled their task?'.

The critical aspects of the current legislation made it possible to achieve the objective of the research: 'to draw the *de iure condendo* lines for a reform of the discipline dedicated to the rights of migrants or refugees in order to contribute to foster and make effective their respect'.

The proceedings ended with the screening of the film 'My Class': a docu-fiction denouncing the rigidity of Italian law, which often turns out to be against the protection of migrants' fundamental rights. The movie focused mainly on the scope and content of a Legislative Decree issued on 4th June 2010.[1] In this context, the real-life story of a student who was informed about the rejection of his application for the residence permit pending the filming of the movie broke the flow of the docu-fiction. Notably, he did not accept his expulsion from Italy and did not want to return to his homeland.

The film director first engaged the students in a debate on the main topic addressed by the film – the contrast between the need to comply with the law and the right to a dignified life for each individual. Subsequently, he participated to the final seminar, as an expert on

[1] Article 9 of Legislative Decree No. 286 of 25 July 1998 (*Testo Unico Immigrazione – TUI*) provides that 'the issuance of an EC long-term residence permit is subject to the applicant's passing an Italian language knowledge test, the procedures for which are determined by decree of the Minister of the Interior, in agreement with the Minister of Education, University and Research'. Those procedures were eventually established by a Decree drafted on 4th June 2010—published on the Official Journal of the Italian Republic on 11th June 2010, No. 134—, issued by the Ministry of the Interior, in agreement with the Minister of Education, University and Research.

the social aspects of migration phenomena. In that occasion, also a magistrate, a lawyer and a Prisons Ombudsman were present, as experts who deal on a daily basis with the fundamental guarantees—both of the national and European legal framework—to be acknowledged *vis-à-vis* irregular migrants.

The purpose of this publication is to document the process of research activities. Yet, it is not intended to constitute a mere publication of the proceedings of the seminars. As has already been said, it contains contributions that further expand and articulate the themes discussed during the aforementioned events.

Part I deals with the supranational and (Italian) constitutional features of the research. As far as the ECHR and EU legal frameworks are concerned, the picture that emerges from the relevant analysis is not encouraging – the normative fragmentation does not seem adequate with regard to the complexity of the phenomenon. Nevertheless, from the perspective of the protection of the fundamental rights of migrants, in particular the protection of refugees and asylum seekers, the rich case-law of the ECtHR has developed—starting from the relevant norms of the ECHR—a list of guidelines that have been specifically investigated and with which the relevant Italian legislation must comply.

Furthermore, the constitutional analysis revealed that Italian Constitution does not contain a list of 'fundamental rights' and therefore does not stipulate whether they are to be acknowledged *also* to foreigners. However, constitutional jurisprudence has identified these fundamental prerogatives and has postulated that some of them are certainly to be ensured to non-citizens, while others may be subject to a distinction which must be made as to whether and to what extent their enjoyment must also be guaranteed to third-country nationals. The considerations developed in Part I also tend to cast light on the level of guarantees granted to foreigners and their resilience in the face of certain current emergencies, e.g. war and pandemics.

Specifically, the right to health of immigrants is given interesting consideration, albeit in the limited context of the prevention of infectious diseases among foreigners present in the national territory, a problem that was particularly in evidence in the era of Covid-19.

The publication also deals with the constitutional rights to be guaranteed to foreigners charged with criminal offences and to those detained in Italian penitentiary institutions. At the European level, the activity of the European Courts based on the provisions laid down in the ECHR and in the CFR, has extended fair trial rights to

foreign defendants; however, these guarantees have been applied differently according to the specific needs of migrants. It is noteworthy that, within the Italian legal framework, foreign detainees enjoy all the prerogatives to which Italians *in vinculis* are entitled.

Parts II, III and IV are devoted to the domestic discipline, in particular to the analysis of fundamental rights of first rank – the right to personal liberty, language assistance, judicial guarantees to be acknowledged during the asylum procedure.

Particularly, the right to personal liberty appears to be hindered by the Italian administrative detention discipline, which, on the one hand, does not seem to be in keeping with supranational regulations and, on the other hand, is based on a disputable juridical lexicon which has been adopted in order to deny the migrant any *habeas corpus* guarantees. In this regard, particular attention will be paid to the so-called 'hotspots', introduced in the national framework through the adoption of Law Decree No. 13 of 2017 ('Decreto Minniti').

Against this backdrop, language assistance is also crucial, as it constitutes a fundamental prerogative that must be guaranteed to the migrant. It is a 'meta-right', that is, a right that takes precedence over all other prerogatives, as it is of a paramount importance in guaranteeing the effective exercise of the migrants' defence rights. Language assistance is provided for in Directive 2010/64/EU, as interpreted by the CJEU—following a questionable approach according to some scholars, but it is also enshrined in Article 5(2) ECHR with regard to those foreigners who have been deprived of their liberty.

At the domestic level, it was emphasised that important steps forward had been taken, notably through the transposition of the aforementioned Directive. Yet, the persistence of a number of critical points was highlighted, with specific regard to the protection of the language of non-EU citizens, and a mixed balance was drawn – much has been done, but much still remains to be done to ensure quality language assistance for the non-EU citizens.

Part IV also looks at asylum and/or international protection procedures (administrative and judicial proceedings), criticising their inconsistencies with fair trial guarantees. The protection of migrants already faces enormous difficulties in terms of the competent judge – the provision of a 'dual system' with blurred boundaries often creates inequalities in the area of the protection for foreigners. In terms of legal protection, including linguistic protection, the picture is still extremely patchy, with no explicit guarantees in the ECHR,

the CFR or Italian law – the need for a reform of the subject, at least in these respects, is invoked by the researchers who were involved in Part IV.

The standpoints developed by the legal actors at the final conference—and included in Section V—also reveal the dysfunctions in the implementation of the protection of migrants' fundamental rights: the uncertainties and gaps in Italian and European legislation lead the experts to call for an organic reform of the subject, in relation to which some proposals are dedicated.

PART I

MIGRANTS' FUNDAMENTAL RIGHTS AS RECOGNISED BY THE EUROPEAN LEGAL FRAMEWORK AND THE ITALIAN CONSTITUTION

THE PROTECTION OF FUNDAMENTAL RIGHTS AND THE DIGNITY OF MIGRANTS IN EU LAW. AN OVERVIEW OF FAIR TRIAL RIGHTS AND DEFENCE RIGHTS

Silvia Allegrezza - Lorenzo Bernardini

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1. Fundamental rights, immigration and criminal proceedings: introductory remarks

The management of the so-called migration phenomenon has long been considered a real test case for the future of European identity. [1] On the one hand, the socio-political implications of controlling the presence of foreigners on national territory evoke securitarian impulses that are never entirely dormant. For a large part of the population, this phenomenon represents a fundamental issue on which to orientate their electoral choices. [2] On the other hand, and consequently, it poses a problem of competence for the European

[1] The development of a shared and coherent migration policy among the European Union (EU) Member States is considered crucial for the very future of the Union, according to M. Ambrosini, L*e sfide dell'immigrazione per l'Unione Europea*, in M. Lazar-M. Salvati-L. Sciolla (Eds.), *Europa. Culture e società,* Istituto dell'Enciclopedia Italiana, Rome, 2018, p. 59 ff.

[2] The discouraging picture according to which 60% of Europeans believe that there is 'too much immigration' in their countries and 45% think that immigration constitutes a 'threat to national identity' is provided by R. Brunelli, *Paura dei migranti: metà degli europei è a favore dei muri*, in *la Repubblica (web)*, 23 December 2021. For a more in-depth analysis of the reasons for being "afraid of the wave of migrants", with obvious repercussions on the choices of the electorate, see M. Pifferi, *Paure dello straniero e controllo dei confini. Una prospettiva storico-giuridica*, in *Quad. st. pen. giust*., 2019(1), p. 179 ff.

Union *vis-à-vis* the Member States, which jealously intend to keep the monopoly of coercive power (also) over 'non-citizens'.

Moreover, the migration phenomenon 'goes beyond the territorial borders of States and cannot find adequate solutions in a state dimension'. [3] Indeed, it would seem that a supranational organisation such as the EU, by virtue of its global dimension, should (and could) become the place of choice for the creation of binding norms capable of re-organising such a complex matter. Yet, the rise of 'sovereigntist populism' seems to be undermining the Union's aspirations, as 'national interests have consistently trumped the common European response to this influx of migrants'. [4]

This is also the reason why, despite the numerous European pieces of legislation regulating the issue (such as the so-called Return Directive, [5] the so-called Reception [6] and Procedures directives [7] or, finally, the famous Dublin III Regulation [8]), the EU response is far from being able to be defined as 'common'. The initiatives of the Visegrad Group (V4), a political alliance between Poland, the Czech Republic, Slovakia and Hungary could be mentioned in this context. This group supports, among other things, a policy of 'zero tolerance' in the management of migratory flows, through a securitarian twist in national and European regulations, [9] and opposes in particular the

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[3] S. GAMBINO-G. D'IGNAZIO, *Prefazione*, in S. GAMBINO-G. D'IGNAZIO (Eds.), *Immigrazione e diritti fondamentali*, Giuffrè, Milan, 2010, p. XIV.

[4] F. RATTO TRABUCCO, *La risposta alla crisi migratoria degli Stati membri UE nel quadro dell'apparente immobile Trattato di Dublino*, in *Amm. in camm.*, 29 September 2021, p. 16.

[5] Directive 2008/115/EC of 16 December 2008 of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (the so-called return Directive) [OJ L 348, 24.12.2008, p. 98–107].

[6] Directive 2013/33/EU of 26 June 2013 of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) [OJ L 180, 29.6.2013, p. 96–116].

[7] Directive 2013/32/EU of 26 June 2013 of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (recast) [OJ L 180, 29.6.2013, p. 60–95].

[8] Regulation (EU) 604/2013 of 26 June 2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [OJ L 180, 29.6.2013, p. 31–59].

[9] See, among others, M. KOß-A. SÉVILLE, *Politicized Transnationalism: The Visegrád Countries in the Refugee Crisis*, in *Politics & Governance*, 2020(1), p. 95–106, and W. TIEKSTRA, *The Future of the European Migration System: unlikely partners?*, available at the following URL: *www.clingendael.org*, Strategic Alert, 6th July 2018. For their radical positions, however, the members of the V4 have been

Union's attempts to redistribute fairly, among the various countries, the foreigners arriving on the continent, including many applicants for international protection. [10]

However, in this dialogue (oftentimes more political than legal) between the Member States and the EU on the migration policies to be adopted *pro futuro*, fundamental rights—which every human being should enjoy, regardless of his or her status as a citizen—should not 'pay the price'. [11] Analysing the context in which the EU's migration policies have been conceived, one can agree that the concern for the fundamental rights of foreigners is not a mere intellectual exercise, but an absolute urgency to which one should not remain indifferent.

A first element to be duly taken into account is the acknowledgement that migration issues have traditionally been treated by the EU legislator as an 'emergency', [12] or a 'crisis', [13] to be resolved as quickly as possible, according to a purely efficiency-based logic. [14] Another circumstance worthy of consideration is the situation of what could be labelled as the real 'object' of migration policies, namely an individual who does not hold the citizenship of an EU State. The combination of these two factors could create an explosive mix for the fundamental rights of the migrant concerned: from a perspective oriented towards the efficiency of procedures (whether for return or international protection), the recognition of certain rights *vis-à-vis* the person concerned constitutes an 'obstacle' for the national authorities which are eager, respectively, to remove

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called 'merchants of fear' (G. GIGITASHVILI-K.W. SIDLO, *Merchants of Fear. Discursive Securitisation of the Refugee Crisis in the Visegrad Group Countries*, available at the following URL: *www.iemed.org*, 7th January 2019).

[10] For an in-depth study on this specific issue, see G. MORGESE, *La riforma del sistema Dublino: il problema della condivisione delle responsabilità*, in *Dir. pubbl.*, 2020(1), p. 102 ff.

[11] See *infra* § 2, for a more in-depth analysis of the hierarchy of EU sources on the acknowledgement of fundamental rights of the individual.

[12] G. CAGGIANO, Are You Syrious? *Il diritto europeo delle migrazioni dopo la fine dell'emergenza alla frontiera orientale dell'Unione*, in *Freedom, Security & Justice: European Legal Studies*, 2017(2), p. 7–25. In the same sense, among others, see also C. FAVILLI, *L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'emergenza immigrazione*, in *Quad. cost.*, 2015(3), p. 785–788.

[13] H. CRAWLEY, *Managing the Unmanageable? Understanding Europe's Response to the Migration 'Crisis'*, in *Human Geography*, 2016(2), p. 13–23.

[14] EU policies oscillate between the intention to protect the foreigner—which is reflected in the possibility for the non-citizen to apply for international protection—and the need to maximise the efficiency of the relevant expulsion procedures, thus deterring irregular entries. In this respect, see A. TRIANDAFYLLIDOU-A. DIMITRIADI, *Governing Irregular Migration and Asylum at the Borders of Europe: Between Efficiency and Protection*, in *Imagining Europe*, 2014(6), p. 1 ff.

the unwanted foreigners from the territory [15] or, alternatively, to decide quickly on their application for international protection. [16]

The concerns briefly outlined above may be seen as the background to the standard situation of a third-country national, arriving in the territory of an EU Member State. It is this particular category of migrants that will be the focus of this analysis, given the high vulnerability that characterises them. [17]

However, the situation of the aforementioned category of migrants—already particularly problematic in itself [18]—may vary depending on whether they are involved in criminal proceedings, giving rise to a peculiar phenomenon of progressive extension of guarantees. In such a case, indeed, the attainment of a certain procedural *status*, be it that of suspect or defendant, naturally determines the activation of a series of further prerogatives (also included among the 'fundamental' ones) which are added to the the 'extra-judicial' ones.

In this sense, it should be noted that the EU legal framework has long embraced a 'universalist' view of human rights which it explicitly recognises. [19] Every individual is the holder of such guarantees, such

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[15] This could be, for example, an alien who is already irregularly present on the territory or a non-citizen who presents him/herself at the border of a Member State but does not fulfil the conditions for legal entry. On the other hand, the national authorities are obliged under EU law to 'adopt a return decision against any third-country national staying illegally on their territory', in accordance with Article 6(1), Directive 2008/115/EC.

[16] If the application for protection is accepted, *nulla quaestio.* If, on the other hand, the application is rejected, the national authorities will take steps to carry out the relevant return procedures for the foreigner, formerly an applicant, who has now become 'irregular' and must therefore be removed as soon as possible.

[17] C. O'CINNEIDE, *The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism*, in S. SPENCER-A. TRIANDAFYLLIDOU (Eds.), *Migrants with Irregular Status in Europe*, Springer-IMISCOE Research Series, Cham, 2020, p. 53.

[18] For example, the lack of knowledge of the language spoken in the country where he/she is staying or the absence of stable links with that territory or, finally, the presence of 'cultural barriers', e.g. religious ones, which make it difficult for the foreigner to come into contact with the first people he/she meets (often the border or public security authorities). This is, in fact, a situation of 'initial disadvantage' that characterises the migrant in relation to *cives*; it can be partially redressed, in particular, by hypothesising a series of 'corrective' measures that intervene in the foreigner's language gap.

[19] This is the opinion of P. LEINO, *European Universalism?–The EU and Human Rights Conditionality*, in *Yearbook of European Law*, 2005(24/1), p. 329 ff., where the Author focuses, in particular, on the content of the EU *position paper* to the 1993 Vienna Conference (Brussels 22nd November 1995, COM (95) 567 final, para. 18) and, more recently, on the formulation of the preamble to the Charter of Fundamental Rights of the European Union (CFR), signed in Nice in 2000.

as the right to life,[20] the right to physical integrity,[21] freedom and security,[22] to name but a few. Belonging to a particular national community should not, in principle, call this into question.[23] However, special circumstances may trigger additional safeguards in their favour: one of these, as already mentioned, is the institution of criminal proceedings. Among the guarantees recognised for anyone (notwithstanding *status civitatis*) suspected or accused of a particular crime are fair trial rights.

Still, the subject is of particular interest when it is the third-country national who is caught up in the meshes of criminal proceedings, given the frequency with which the problem of language assistance arises, a genuine 'meta-right'[24] for the person who does not understand the language of the proceedings, which is rightly considered to be the 'cornerstone of the quality of justice in Europe'.[25]

However, before analysing the EU's approach to this very sensitive issue, it is necessary to outline, albeit briefly, the constitutional framework that the EU legislature has developed over time with regard to fundamental rights, which is the regulatory framework from which fair trial rights have gradually evolved in the European legal area.

2. A multilevel constitutional framework for the protection of fair trial rights

The issue needs to be analysed using an 'inverted cone' methodology. The premise from which one must start is the

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[20] Article 1 CFR.

[21] Article 2 CFR.

[22] Article 6 CFR.

[23] Yet, a prerogative contained in Article 45(1) CFR, i.e. freedom of movement, is guaranteed to EU citizens—and to individuals treated as such—but not to third-country nationals, i.e. those 'persons who are not citizens of the European Union within the meaning of Article 20(1) of the Treaty on the Functioning of the European Union (TFEU) and who do not enjoy the right of free movement', according to Article 2(5) of the Regulation (EU) 2016/399 of 9 March 2016 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [OJ L 77, 23.3.2016, p. 1-52].

[24] The powerful expression is due to M. GIALUZ, *L'assistenza linguistica nel processo penale. Un meta-diritto fondamentale tra paradigma europeo e prassi italiana*, Wolters Kluwer-Cedam, Milan, 2018.

[25] Y. VANDEN BOSCH, *Adequate legislation to 'Equal Access to Justice across Language and Culture'*, in E. HERTOG (Eds.), *Aequalitas. Equal Access to Justice across Language and Culture in the EU*, Lessius Hogeschool, Antwerp, 2003, p. 32.

following – fundamental rights, within the EU legal framework, are acknowledged to each individual as such. The second is that these rights include the guarantees of criminal fair trial rights. The third, and final, logical step allows us to distinguish, alongside these, the content of the right to defence.

Respect for fundamental rights of the individual—whether suspect, accused or convicted—plays a fundamental role in criminal proceedings. Given that the conduct of the latter involves the 'vital interests' of the individual, on the one hand, and those of society, on the other, this circumstance clearly needs no elaboration.[26] At the end of criminal trials, moreover, the person found guilty runs the risk of being sentenced to a punishment, most often imprisonment, which irreparably affect his/her personal freedom.

Therefore, if one wishes to adhere to a liberal understanding of criminal law, based on the inescapable respect for the principle of legality, the due process of law and judicial review, there must be no room—in the absence of solid constitutional foundations—for the exercise of punitive powers by the State.[27] Hence the need for superordinate norms capable of reinforcing these foundations by providing, on the one hand, the legitimacy for the State to exercise its coercive power and, on the other hand, codifying the indispensable guarantees that the subject involved in the proceedings must be able to oppose to the *auctoritas*.

As will be seen, the European Union's legal system has attempted to develop a regulatory system that moves in this direction. The question, however, is how it has managed to ensure the protection of fundamental rights in criminal proceedings and to shape the physiognomy of a European criminal 'fair trial' in an area that is notoriously difficult for the EU legislator to penetrate.[28]

Leaving aside the pre-Lisbon framework—where it was left to the Court of Justice (CJEU) to perform the arduous task of bringing the category of fundamental rights into the framework of the general principles of European law[29]—the content of Article 6 of the Treaty

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[26] S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2005, p. 7.

[27] S. ALLEGREZZA, *Toward a European constitutional framework for defence rights*, in S. ALLEGREZZA-V. COVOLO (Eds.), *Effective Defence Rights in Criminal Proceedings*, Wolters Kluwer-Cedam, Milan, 2018, p. 26 ff.

[28] Reference to the traditional 'hostility of the Member States' to the idea that the EU could legislate in criminal matters has been made by K. LENAERTS-J.A. GUTIÉRREZ-FONS, *The European Court of Justice and fundamental rights in the field of criminal law*, in V. MITSILEGAS-M. BERGSTRÖM-T. KONSTANTINIDES (Eds.), *Research Handbook on EU Criminal Law*, Edward Elgar Publishing, Cheltenham, 2016, p. 7.

[29] The reference is, *inter alia*, to Case C-44/79, *Liselotte Hauer v Land*

on European Union (TEU), which is the central provision in the EU system of fundamental rights protection, must be taken into account immediately. Indirectly, as will be analysed later, Article 6 TEU has contributed to laying the normative foundations for the elaboration of acts of secondary law concerning—albeit not exclusively—the position of the foreign suspect/defendant as a third-country national.

Firstly, this provision gives the EU Charter of Fundamental Rights the same 'legal value as the Treaties' and acknowledges its 'rights, freedoms and principles'. [30]

The EU Charter of Fundamental Rights (CFR), signed in Nice in 2000, contains numerous provisions on fair trial rights that form part of the constitutional framework of the Union. Notably, Article 47 CFR is the key provision on fair trial rights in EU law: [31] it establishes the right to an 'effective remedy' for any individual whose rights and freedoms guaranteed by Union law have been infringed; [32] the right of the individual to have his/her case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal established by law'; [33] the right to legal aid, [34] including free of charge, 'in so far as such aid is necessary to ensure effective access to justice'. [35] This rule clearly covers all types of proceedings, whether administrative, civil or criminal.

Moreover, the Charter explicitly guarantees the 'respect for the rights of the defence', not for the benefit of any individual, but of 'anyone who has been charged'. [36] This detail is significant, because it allows Article 48(2) CFR to be seen as a precise affirmation of defence rights in criminal proceedings. Moreover, it makes it possible to extend the scope of application of the rule *ratione materiae* not only to criminal proceedings *stricto sensu,* but also to

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Rheinland-Pfalz, ECLI:EU:C:1979:290, para. 15, where it was also stated that 'in guaranteeing the protection of those rights, [the Court] is bound to be guided by the constitutional traditions common to the Member States and could not, therefore, admit measures incompatible with the fundamental rights recognised and guaranteed by the constitutions of those States' and that 'international treaties on the protection of human rights, to which the Member States have cooperated or acceded, may also provide elements which must be taken into account in the context of Community law'. According to the wording of these sentences, the reference to the ECHR is blatant.

[30] Article 6(1) TEU.

[31] On this point, see P. DE HERT, *EU criminal law and fundamental rights*, in V. MITSILEGAS-M. BERGSTRÖM-T. KONSTANTINIDES (Eds.), *supra* note 28, p. 117 ff.

[32] Article 47(1) CFR.

[33] Article 47 (2), first sentence, CFR.

[34] Article 47(2), second sentence, CFR.

[35] Article 47(3) CFR.

[36] Article 48(2) CFR.

those administrative proceedings where punitive sanctions are involved. [37]

Secondly, Article 6(2) TEU requires the EU to accede to the European Convention on Human Rights (ECHR), although 'such accession shall not modify the competences of the Union as defined in the Treaties'. This provision must be read in conjunction with the 'conformity clause' [38] enshrined in Article 52(3) CFR, which provides that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'. The *trait d'union* between the fundamental rights recognised by the Charter and those enshrined in the ECHR is thus traced in the terms just explained. However, since Article 48(2) CFR does not provide for a list of the rights it enshrines, the analysis of the ECHR, in particular Article 6 ECHR, is of particular interest.

As Advocate General Bobek pointed out in *Moro*, there is a twofold relationship between Article 48(2) CFR and Article 6(3) ECHR. [39] While, in principle, Article 6(1) ECHR is considered to correspond to Article 47(2) CFR––on the subject of fair trial rights [40]—, Article 6(3) ECHR is considered to be the expression of the 'rights of the defence', to use the EU legislator's expression, in the ECHR legal order. The use of the plural is, moreover, apt since this category in itself encompasses various prerogatives to be granted to the person concerned. In contrast to the CFR, there is here an exhaustive list of the latter, [41] including, first and foremost,

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[37] For further references, see S. ALLEGREZZA, *supra* note 27, p. 27 ff.

[38] G. CARLOS RODRÌGUEZ IGLESIAS, *Speech on the occasion of the Opening of the Judicial Year, 31 January 2002*, in EUROPEAN COURT OF HUMAN RIGHTS, *Annual report 2001*, Strasbourg, 2002, p. 31.

[39] Case C-646/17, *Criminal proceedings against Gianluca Moro*, Opinion of Advocate General Bobek, ECLI:EU:C:2019:95, para. 94.

[40] See *Explanations relating to the Charter of Fundamental Rights* [OJ C 303, 14.12.2007, p. 17-35].

[41] Among other guarantees, Article 6(3) ECHR confers on any person 'charged with a criminal offence' the right 'to have adequate time and facilities for the preparation of his defence' (Article 6(3)(b) ECHR), the right 'to defend himself in person or through legal assistance of his own choosing and, if he has not sufficient means to pay for legal assistance, to be assisted free of charge by legal counsel, when the interests of justice so require' (Article 6(3)(c) ECHR) and finally, the right to examine witnesses against him/her and to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him/her (Article 6(3)(d) ECHR).

the right of the accused 'to be informed, as soon as possible, in a language he understands and in detail, of the nature and cause of the accusation against him'. [42] This is followed, last but not least, by the right 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court'. [43]

Finally, the influence of the ECHR on EU law has made it possible to extend the guarantees of Article 48(2) CFR, not only to the *accused*–as would result from the wording of the latter provision—but, in principle, also in favour of the person *suspected* of a criminal offence. Indeed, the prerogatives enshrined in Article 6(3) ECHR—and acknowledged within the EU legal order as per Article 52(3) CFR—are triggered *vis-à-vis* the person concerned as soon as he receives 'the official notification [...] by the competent authority of an allegation that he has committed a criminal offence'. [44]

The rights of defence should therefore be seen in a different light, that of the migrant, a third-country national, who may—and this is not uncommon–find him/herself facing criminal charges without knowing the language of the relevant proceedings. He or she would also find him/herself in a real 'Kafkaesque trial', unaware of what was happening around him/her and unable to communicate with anyone: [45] the third-country national might not understand the nature of the charges against him/her, [46] for example, or not be properly informed of the consequences of not attending the trial [47] or of the possibility of having a lawyer [48] or of benefiting from legal aid. [49]

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[42] Article 6(3)(a) ECHR.

[43] Article 6(3)(e) ECHR.

[44] Among others, *Eckle v. Germany*, App. no. 8130/78 (ECtHR, 15th June 1982), para. 73.

[45] L. SIRY, *The ABC's of the Interpretation and Translation Directive*, in S. ALLEGREZZA-V. COVOLO (Eds.), *supra* note 27, p. 36.

[46] Directive 2012/13/EU of 22 May 2012 of the European Parliament and of the Council on the right to information in criminal proceedings [OJ L 142, 1.6.2012, p. 1-10].

[47] Directive 2016/343/EU of 9 March 2016 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [OJ L 65, 11.3.2016, p. 1-11].

[48] Directive 2013/48/EU of 22 October 2013 of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [OJ L 295, 6.11. 2013, p. 1-12].

[49] Directive 2016/1919/EU of 26 October 2016 of the European Parliament and of the Council on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [OJ L 297, 4.11.2016, p. 1-8].

As far as a third-country national is concerned, *ça va sans dire*, the right to linguistic assistance–as configured in the CFR in conjunction with the relevant provisions of the ECHR—obviously acquires a peculiar character, as a prodromal prerogative of all other forms of procedural safeguards, which becomes, in other words, 'a fundamental precondition, capable of influencing the effectiveness of the system of individual guarantees'. [50]

3. The right to linguistic assistance (referral)

Against the background of such European constitutional framework, the EU legislator has drawn up a series of acts of secondary legislation; on the one hand, in order to give substance to the prerogatives provided for the CFR and under the influence of the rules contained in the ECHR (as interpreted by the Strasbourg Court), on the other hand to strengthen mutual trust between the Member States, which, in turn, would imply a more effective judicial cooperation within the European legal area. Prominent in its importance is Directive 2010/64/EU, [51] the first Union act on the right to interpretation and translation in criminal proceedings and, more generally, aimed at 'protecting the rights of the accused'. [52] Its content, its inevitable impact and its relevance *vis-à-vis* the foreign suspect/defendant will be dealt with separately. [53]

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[50] L. PARLATO, *L'assistenza linguistica come presupposto delle garanzie dello straniero*, in V. MILITELLO-A. SPENA (Eds.), *Il traffico di migranti. Diritti, Tutele, Criminalizzazione,* Giappichelli, Turin, 2015, p. 87.

[51] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 *on the right to interpretation and translation in criminal proceedings* [OJ L 280, 26.10.2010, p. 1–7].

[52] L. SIRY, *The ABC's*, *supra* note 45, p. 39.

[53] See *infra* Part III, S. ALLEGREZZA, *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings*.

THE PROTECTION OF THE FUNDAMENTAL RIGHTS OF MIGRANTS WITHIN THE ECHR LEGAL FRAMEWORK. FROM UNIVERSALISM OF GUARANTEES TO LEGAL PARTICULARISM.

Lorenzo Bernardini

Table of contents: 1. Foreigners and the ECHR – 2. Jurisdiction. – 3. Control of territory. – 4. *Ad hoc* measures (referral).

1. Foreigners and the ECHR

Despite the fact that the legal status of foreigners is strongly influenced by 'the incidence of international and supranational sources', [1] the text of the European Convention on Human Rights (ECHR) does not reveal a specific *animus* aimed at regulating the *status* of 'foreigners', i.e. those persons whose *status civitatis* is not tied to a State Party to the Council of Europe. Indeed, the wording of the Convention does not make it possible to identify any provision that mentions "non-citizens", "aliens", "migrants", within its Section 1, entitled 'Rights and Freedoms'. This is supported not only by the *travaux préparatoires* of the document, but also by the fact that the legal regulation of foreigners was not a particularly relevant issue for the drafters of this text. [2]

Therefore, the ECHR system does not follow the approach of citizenship as a demarcation line for the enjoyment of certain rights, unlike what has happened within the EU legal system (where the concept of EU citizenship is functional in identifying a certain category of individuals––namely, "EU citizens"––who have a

[1] M.C. Locchi, *I diritti degli stranieri*, Carocci, 2011, p. 224.

[2] G. Clayton, *'The Right to Have Rights': the European Convention on Human Rights and the Procedural Rights of Asylum Seekers*, in A. Abbas-F. Ippolito (Eds.), *Regional Approaches to the Protection of Asylum Seekers. An International Perspective*, Routledge, 2014, p. 191.

privileged *status* in many areas compared to non-EU migrant-citizens, generally defined as 'third-country nationals'). [3]

However, if we move away from the conceptual level, there are in fact numerous provisions of the Convention that deal with aliens, albeit contained in Additional Protocols: Article 2 Prot. 4 ECHR (on the freedom of movement of migrants legally present in the territory), Article 4 Prot. 4 ECHR (on the prohibition of collective expulsions) and Article 1 Prot. 7 ECHR (on the procedural guarantees to be granted to the expelled person). These norms grant certain prerogatives to non-citizens by virtue of his or her *status*, thereby blurring the halo of universalism that characterises the Convention. On closer inspection, however, citizenship here becomes a criterion for extending the protection of a given subject in the *espace juridique* promoted by the Council of Europe: [4] *ad hoc* measures have been added, with the aim of enhancing the situation of the persons concerned—disengaged from the national community in which they reside—, with particular attention to their *status*.

Conceived as a 'universal legal tool', [5] in contrast to the international instruments in force at the time of its drafting, [6] the

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[3] For instance, EU citizens cannot be subject to the return procedures under Directive 2008/115/EU of 16 December 2008 of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals [OJ L 348, 24.12. 2008, p. 98-107] (so-called Return Directive).

On the contrary, the restriction of the EU citizens' freedom of movement (and possibly the expulsion from the territory of a Member State) can only take place in the event of a threat to 'public order, public security or public health' (Article 27(1), Directive 2004/38/EC of 29 April 2004 of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [OJ L 158, 30.4.2004, p. 77-123]), with strict compliance with the principle of proportionality in relation to the measure that may be imposed (Article 27(2) Directive 2004/38/EC) and should a very specific circumstance occur: 'the personal conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' (Article 27(3), Directive 2004/38/EC). The formulas used by the EU legislator outline a system that is much more guaranteeing for European citizens than for third-country nationals (the latter being subject, *inter alia,* to expulsion procedures from the territory of the Member State in which they are located on much more general grounds, e.g. in case of 'risk of absconding', as provided for in Article 15(1), Directive 2008/115/EC).

[4] On the process of 'shaping rights' by the Strasbourg Court, see E. BREMS-J. GERARDS, *Introduction*, in E. BREMS-J. GERARDS (Eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, 2013, p. 4 ff.

[5] On this point, see D. LOPRIENO, *"Trattenere e punire". La detenzione amministrativa dello straniero,* Editoriale Scientifica, 2018, p. 67 ff.

[6] The reference is to the International Covenant on Civil and Political Rights

Convention embarks on an unprecedented path: it strongly affirms the primacy of jurisdiction over citizenship, to the point that nationality, residence or domicile become irrelevant factors in establishing a violation of a right enshrined in the Convention. [7] In other words, what becomes central in the dogmatic approach promoted by the ECHR is the position of the individual (citizen or alien) who is within the jurisdiction of a State Party: it is only because of this that the individual at stake becomes the holder of the rights set out in the Convention. The *status civitatis*, so important in the past, is relegated to the background.

2. Jurisdiction

As noted above, the 'jurisdiction test' [8] contrasts with the concept of citizenship as a distinction for the enjoyment of certain fundamental rights. The notion of 'jurisdiction' is found in Article 1 ECHR which succinctly sets forth that State Parties shall ensure to all persons within their jurisdiction the enjoyment of the rights and freedoms enshrined in the Convention. In this way, jurisdiction becomes a criterion for allocating responsibility to national authorities; indeed, it becomes a 'necessary condition'—or '*conditio sine qua non*' [9]—for attributing to a State Party a breach of its obligations under the Convention itself. [10] In other words, for States, 'jurisdiction' means 'responsibility' in Strasbourg vocabulary. [11]

Literally speaking, however, there is no clear definition of that

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(ICCPR), which entered into force in 1976. In a 1986 General Comment, the UN Human Rights Committee stated that while the rights enshrined in the ICCPR shall be guaranteed without any discrimination between citizens and aliens, 'exceptionally some of the rights recognised in the Covenant are expressly applicable only to citizens' (HUMAN RIGHTS COMMITTEE, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11th April 1986, available at the following URL: *https://www.refworld.org/docid/45139acfc.html*).

[7] H. LAMBERT, *The position of aliens in relation to the European Convention on Human Rights,* Council of Europe Publishing, 2001, p. 7.

[8] The expression is retrieved from I. MOTOC-J.J. VASEL, *The ECHR and Responsibility of the State: Moving Towards Judicial Integration: A View from the Bench*, in A. VAN AAKEN-I. MOTOC (Eds.), *The European Convention on Human Rights and General International Law*, Oxford University Press, 2018, p. 204.

[9] *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], App. no. 36925/07 (ECtHR, 29th January 2019), para. 178.

[10] *Ilascu and Others v. Moldova and Russia* [GC], App. no. 48787/99 (ECtHR, 8th July 2004), para. 311.

[11] M. MILANOVIC, *Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court*, in A. VAN AAKEN-I. MOTOC (Eds.), *The European Convention on Human Rights and General International Law,* Oxford University Press, 2018, p. 97 ff.

concept; the Convention is silent on this point. [12] Nevertheless, since the notion of 'jurisdiction' is the backbone of each State Party's obligation to protect and guarantee the prerogatives contained in the ECHR, it is necessary to define the boundaries of such a concept.

The European Court of Human Rights (ECtHR) has therefore pointed out that the concept of 'jurisdiction' must be recovered from public international law. [13] The starting point is the undeniable fact that each State routinely exercises its coercive power over its own territory: [14] individuals located there are, in principle, subject to the jurisdiction of that State [15] and, as such, must enjoy the rights and freedoms provided for in the Convention. The Court has thus, in a first stage, adopted a territorial approach [16], provided that such a geographical area constitutes a space in which the national authorities are *presumed* to exercise exclusive jurisdiction. [17]

However, the Strasbourg Court has gradually amended its approach and embraced a more dynamic notion of jurisdiction: the so-called 'functional jurisdiction'. [18] It took the form of a strictly defined exception to the presumption that national authorities exercise their coercive powers exclusively within their own borders.

Without prejudice to the latter—which continues to embody the ordinary exercise of jurisdiction by States Parties—the ECtHR held that, in certain situations, national authorities may exercise their 'power' or 'control' over an individual also outside their territory. [19] This was the case, for instance, of the well-known *Hirsi Jamaa and Others* judgement, which concerned the *refoulement* of migrants to Libya, carried out by the Italian authorities in international waters south of Lampedusa. In that case, Italian jurisdiction against the foreigners involved in the operation was held to exist as they had

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[12] K.U. GALKA, *The Jurisdiction Criterion in Article 1 of the ECHR and a Territorial State*, in *International Community Law Review*, 2015(17/4-5), p. 478.

[13] See, for all, *Banković and Others v. Belgium and 16 Others* [GC] (dec.), App. no. 52207/99 (ECtHR, 12th December 2001), paras. 59–61.

[14] *Assanidze v. Georgia* [GC], App. no. 71503/018 (ECtHR, 8th April 2004), para. 139.

[15] *M.N. and Others v. Belgium* [GC] (dec.), App. no. 3599/18 (ECtHR, 5th May 2020), paras. 96–109 and case-law cited therein.

[16] See, *inter alia*, *Al-Skeini and Others v. the United Kingdom* [GC], App. no. 55721/07 (ECtHR, 7th July 2011), para. 131.

[17] There exists a 'territorial presumption', as per *Hirsi Jamaa and Others v. Italy* [GC], App. no. 27765/09 (ECtHR, 23rd January 2012), para. 71.

[18] For a reconstruction of the concept of functional jurisdiction see, for all, V. MORENO-LAX, *The Architecture of Functional Jurisdiction: Unpacking Contactless Control-On Public Powers,* S.S. and Others v. Italy*, and the 'Operational Model'*, in *German Law Journal*, 2020(21/3), p. 385 ff.

[19] The two terms were used, *inter alia,* in *M.N. and Others* (note 15), para. 112.

been under the 'continuous and exclusive *de jure* and *de facto* control of the Italian authorities'. [20]

Similarly, the Court has held that a State Party holds jurisdiction even in circumstances where it exercises *de facto* effective control (or, in the words of the ECtHR, its 'full authority') over a given territory, despite an alleged emergency situation at the border: this was the well-known case of *N.D. and N.T. and Others*, whose *thema decidendum* concerned the *refoulement* of foreigners attempting to cross the border between Morocco and the Spanish enclave of Melilla, in North Africa. [21]

By virtue of the evolutionary jurisprudence briefly recalled here, the concept of 'functional jurisdiction' has proved to be a valuable tool for defining the situation of certain foreigners who may find themselves at the borders of States Partiesand seek to enter their territory for a variety of reasons (e.g. to seek international protection). Notably, with regard to migrants rejected at the border—whether by land or sea—the assessment of a State Party's jurisdiction should be understood as a 'normative threshold and practical condition for [the recognition of] fundamental rights'. [22]

The numerous cases brought before the ECtHR by aliens—in different situations such as international waters, [23] border areas [24] or airport transit zones [25]—unequivocally show that the Court has based its decisions on the degree of intensity of the control actually exercised by the State authorities over the 'non-citizen', to the point that jurisdiction—in keeping with the universalist structure that characterises the Convention–– has been considered to exist whenever the migrant (*rectius*: the individual) comes into contact, in any way, with the authorities of a State Party.

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[20] *Hirsi Jamaa and Others* (note 17), para. 81. Moreover, the Court notes that the disputed events had indeed taken place in international waters, but on board of military vessels flying the Italian flag (para. 76).

[21] *N.D. and N.T. v. Spain* [GC], App. no. 8675/15 and 8697/15 (ECtHR, 13th February 2020). For a comment see L. BERNARDINI, *Respingimenti "sommari" alla frontiera e migranti "disobbedienti": dalla Corte di Strasburgo un* overruling *inaspettato nel caso* ND e NT c. Spagna, in *Cultura giuridica e diritto vivente*, 2020, pp. 1–13.

[22] In these terms, see S. BESSON, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, in *Leiden Journal of International Law*, 2012(25/4), p. 863.

[23] See, for instance, *Medvedyev and Others v. France* [GC], App. no. 3394/03 (ECtHR, 29th March 2010), paras. 62–67.

[24] Recently, *A.A. and Others v. North Macedonia*, App. no. 55798/16 *et al.* (ECtHR, 5th April 2022), paras. 57–64.

[25] *Amuur v. France*, App. no. 19776/92 (ECtHR, 25th June 1996), para. 52.

3. Territorial control

The analysis carried out so far concerns the 'point of view' of the migrant, i.e. the person who typically complains about having his or her fundamental rights breached by the allegedly unlawful conduct of the State concerned. The migrant claims jurisdiction, as a means of enforcing the ECHR guarantees in his or her favour. However, as can be easily understood, this claim is not considered "absolute".

As a matter of fact, States Parties typically seek to avoid being brought before the ECtHR to answer for the conduct of their own authorities towards 'non-citizens', who are deemed alien to the national community. With regard to the latter, States usually claim the right to control and protect their own territory from 'external' interference, a concept that is tailored to the situation of migrants.[26] The ECtHR has therefore been able to develop extensive case-law on this issue.

As can be inferred *ictu oculi*, the claims of the migrants and those of the States Parties are equivalent and conflicting: they are the concrete manifestation of the clash—which has never ceased and which today is gradually returning to the centre of the doctrinal debate—between the nature of fundamental rights (the so-called "universalism of rights") and "national sovereignty". The latter is the ideological 'hard core' and the ontological basis of the State's authority, through which coercive power is exercised on the territory, *a fortiori vis-à-vis* those who do not belong to the community of *cives*.[27] Against the backdrop of this contrast, it is possible to accept Zaccaria's observations: 'tying rights strictly to the State and making them dependent on the set of public institutions inevitably entails the loss of universality [...] If one wants to establish which rights are and can be considered truly fundamental, one can only refer to an anthropology of the person that sees in the dignity of the latter an inalienable, inviolable and unavailable character'.[28]

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[26] This is a 'prominent manifestation of their sovereignty', according to M. PICHOU, *'Crimmigration' and Human Rights: Immigration Detention at the European Court of Human Rights*, in V. FRANSSEN-C. HARDING (Eds.), *Criminal and Quasi-criminal Enforcement Mechanisms in Europe: Origins, Concepts, Future,* Hart Publishing, 2022, p. 251.

[27] See, M. FLYNN, *Immigration Detention and Proportionality*, Global Detention Project Working Paper No. 4, 2011, p. 10 ff. and, for an interdisciplinary perspective, M. INGHILLERI, *National Sovereignty versus Universal Rights: Interpreting Justice in a Global Context*, in *Social Semiotics*, 2007(17/2), p. 195–212. Notably, 'universality' represents a 'challenge' for the affirmation of fundamental rights according to A. ALGOSTINO, *I diritti umani e la sfida dell'universalità*, in *Rev. do Direito*, 2016(49/2), p. 4–21.

[28] G. ZACCARIA, *Universalità e particolarismo dei diritti fondamentali*, in *Persona y Derecho*, 2018(79/2), p. 149.

At the heart of the problem, therefore, is the claim by national authorities to the right to control their own territory, from which the right to take criminal or administrative measures against foreigners would be derived. Can such a claim undermine the universal nature of fundamental rights? In answering to this *vexata quaestio*, the Strasbourg Court has adopted a 'balancing' approach, recognising the sovereignty aspirations of the Contracting States while firmly reaffirming the binding nature of the guarantees enshrined in the Convention.

Firstly, within the ECHR legal framework, it cannot be 'underestimated the Contracting State's concern to maintain public order, in particular in exercising their right [...] to control the entry, residence and expulsion of aliens'.[29] This is '*un principe de droit international bien établi*',[30] which in the view of the ECtHR, seems to be linked to the need to maintain public order in each State.[31] A few years later, the Court defined the State's prerogative as an 'undeniable sovereign right to control aliens' entry into and residence in their territory'.[32] The adjective 'undeniable' reinforces the idea that, within this *champ juridique*, the State enjoys a wide margin of manoeuvre, as the Strasbourg Court itself would later state *expressis verbis* in a 2019 decision: the sovereign prerogative can be exercised by states 'at their discretion' (*sic*!).[33] More specifically, it should be recalled that the States' prerogative to control its territory incorporates the 'right of States to establish their own immigration policies, potentially in the context of bilateral cooperation or in accordance with their obligations stemming from membership of the European Union'.[34] Moreover, the entitlement to take 'measures'—it is not specified what kind of tool (criminal or administrative, for

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[29] *Moustaquim v. Belgium*, App. no. 12313/86 (ECtHR, 18th February 1991), para. 43.

[30] *Abdulaziz, Cabales and Balkandali v.* the *United Kingdom*, App. no. 9214/80 *et al.* (ECtHR, 28th May 1985), para. 67. The consolidation of this principle in public international law has been emphasised several times in the ECtHR case-law (see, for instance, 27 May 2008, *N. v. United Kingdom* [GC], App. no. 26565/05 (ECtHR, 27th May 2008) para. 30. and *Hirsi Jamaa and Others* (note 17), para. 113).

[31] Indeed, in *Moustaquim* (note 29), para. 43, the Court had emphasised this fact, which would serve as a teleological basis for the sovereign prerogative of territorial control. See, most recently, *Zakharchuk v. Russia*, App. no. 2967/12 (ECtHR, 17th December 2019), para. 46.

[32] *Amuur* (note 25), para. 41.

[33] *G.B. and others v. Turkey*, App. no. 4633/15 (ECtHR, 17th October 2019), para. 146.

[34] See *N.D. and N.T.* (note 21), para. 167, which recalls, by analogy, *Sharifi and Others v. Italy and Greece*, App. no. 16643/09 (ECtHR, 21st October 2014), para. 224: '*Sans remettre en cause ni le droit dont disposent les États d'établir souverainement*

example)—against migrants who circumvent the entry restrictions imposed by a Contracting State[35] should also be regarded as established.

As mentioned above, this is only one side of the coin of the ECtHR case-law on territorial control. Yet, it is a side that is particularly "weighty" in the overall analysis of the issue, as it is the expression of a solid normative framework in favour of the sovereign prerogative to control its borders, through measures aimed at controlling the entry, stay and expulsion of foreigners.

Nevertheless, the Strasbourg Court has repeatedly pointed out that States can only exercise this power '*sans préjudice des engagements découlant pour eux de traités, y compris la* Convention'.[36] In this regard, it has been rightly observed that the '*déférence de la Cour à l'égard du principe de souveraineté nationale est néanmoins tempérée par le fait qu'il existe au bénéfice de tous les êtres humains, y compris les irréguliers, un certain nombre de droits intangibles*'.[37] As a matter of fact, such rights are enshrined in the Convention—which acts as a limit to the exercise of sovereign prerogatives—but also in relevant international treaties, such as the 1951 Geneva Convention on the Status of Refugees. Thus, the guarantees deriving from these normative texts constitute '*important limitations*' to the possible abuse of States' prerogatives.[38] For instance, reference can be made to the peremptory prohibition of collective expulsions—provided for by Article 4 Prot. 4 ECHR, Article 19(1) of the EU Charter of Fundamental Rights and Article 22(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families—or the principle of *non-refoulement*, as defined in Article 33(1) of the Geneva Convention.[39]

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leur politique en matière d'immigration, éventuellement dans le cadre de la coopération bilatérale, ni les obligations découlant de leur appartenance à l'Union européenne [...]'.

[35] *Ilias and Ahmed v. Hungary* [GC], App. no. 47287/15 (ECtHR, 21st November 2019), para. 213 *in fine*.

[36] The statement—first made in *Abdulaziz, Cabales and Balkandali* (note 30), para. 67—has since been echoed in subsequent case-law (see, for instance, *N.* (note 30), para. 30 and *N.D. and N.T.* (note 21), para. 167).

[37] S. SLAMA-K. PARROT, *Étrangers malades: l'attitude de Ponce Pilate de la Cour européenne des droits de l'Homme*, in *Plein Droit*, 2014(101/2), p. I.

[38] L.S. BOSNIAK, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention*, in *The Int'l Migr. Rev.*, 1991(25/4), p. 743.

[39] See *infra* Part IV, L. BERNARDINI, *The guarantees provided for the foreigners in the European Convention on Human Rights legal framework*.

4. Ad hoc measures (referral)

It is in this context that a final rather fundamental aspect of the complex relationship between the guarantees protected by the Convention and the *status of* foreigners comes to the fore. In fact, the 'counter-limits' to the exercise of the national prerogatives mentioned above have not, however, prevented the Contracting States from exercising their sovereignty by imposing deprivation of liberty measures against 'non-citizens'; indeed, the use of detention measures against 'irregulars' has typically been considered a '*complementary aspect of that sovereign* power'. [40]

Notably, this approach has proved to be influential in relation to the European Union (EU) law in this area. The current regime and forthcoming reforms relating to administrative detention measures, together with a comparative reference to the ECH, will be the subject of further specific analysis. [41]

[40] M. PICHOU, *supra* note 26, p. 251.

[41] See *infra* Part II, L. BERNARDINI, *Detained, criminalised and then (perhaps) returned: the future of administrative detention in European Union law*, with specific regard to detention for the purpose of return.

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.

FUNDAMENTAL RIGHTS AND FOREIGNERS: A *VEXATA QUAESTIO*

GIULIASERENA STEGHER

TABLE OF CONTENTS: 1. A brief introduction. – 2. The fundamental rights of foreigners between law and jurisprudence. – 3. Concluding remarks.

1. A brief introduction

Nowadays, in the face of "new" emergencies, the political debate on massive migratory phenomena has gained new momentum. In this context, it may be useful to return to the issue of immigration and to consider its relevance, both in the light of current events and of the recent case-law of the Italian Constitutional Court.

Since February, the Ukrainian crisis has been attracting daily media attention, [1] given the implications of an armed conflict (or rather a nation's war against a sovereign state) at the international level.

For the first time since the last century, war has returned to the European continent. A war which in reality is an armed attack by the Russian Federation against Ukraine, justified by "ethno-territorial grounds", but which conceals economic interests and a revival of the imperialist tendencies of the early twentieth century.

At any rate, the migration's phenomenon has always marked the history of the world, even if today it occurs for different reasons. If we recall some data, albeit not recent, published in a report of the International Organisation for Migration', in 2019 alone there were as many as 271.6 million international migrants worldwide, representing 3.6% of the world's population. The data for 2020 show

[1] S. BONFIGLIO, *Il diritto del popolo ucraino alla legittima difesa*, in *Democrazia e Sicurezza*, 2022, f. 1; M. DOGLIANI, *Amica Ucraina*, sed magis amica veritas, in *costituzionalismo.it*, 2022, f. 1; G. DE VERGOTTINI, *La guerra in Ucraina e il costituzionalismo democratico*, *ivi*. About the geo-political aspects and different scenario on the Russo-Ukrainian War see P. SELLARI, *Conflitto russo ucraino: una visione geopolitica*, in *federalismi.it,* 29 giugno 2022.

281 million migrants, an increase of around 10 million people in just one year. [2]

However, these data should be analysed taking into account the different types of migrants. Indeed, migrants are divided into different categories – economic migrants, irregular migrants, asylum seekers and refugees. [3]

Although other definitions that are not reflected in international law, such as "clandestine", have also become widespread, the decisive factor in making a distinction among migrants is time. Indeed, the distinction concerns foreigners who leave their home country to settle in another country and those who move for work purposes and whose stay in a foreign country is temporary. Time is important because it affects not only communities but also policies and legislation.

In recent years, we have witnessed a constant and recurrent series of episodic events to which the various legal systems, first and foremost the Italian one, have responded with strategies and solutions aimed at resolving the individual emergency situation in the short term, excluding *a priori* systemic interventions. Perhaps it would have been preferable to favour a more systematic intervention, since migration is a structural phenomenon that deserves a satisfactory legal landing place towards full integration.

2. The fundamental rights of foreigners between law and jurisprudence

Defining the concept of a fundamental right, [4] as a right that

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[2] The 281 million people living in a country other than their country of birth in 2020 are 128 million more than in 1990. See the reports of the *International Organisation for Migration* (IOM) available at the following URL: www.iom.int/fr. From the outset, the IOM has pointed out that there is a complex relationship between migration and development. It is precisely the latter that can be negatively affected if migration is poorly managed, as migrants can be exposed to risks and communities can be put under pressure. As emphasised in the Global Compact for Safe, Orderly and Regular Migration, 'migration is a multidimensional reality that cannot be addressed by one governmental policy area alone'.

[3] In this regard, see the glossary developed by IOM, available at the following URL: *publications.iom.int/system/files/pdf/iml_34_glossary.pdf*.

[4] On the subject of fundamental rights, the literature is boundless. Reference can be made here to R. NANIA-P. RIDOLA, *I diritti costituzionali,* Giappichelli, Torino, 2015; E. MALFATTI, *I livelli di tutela dei diritti fondamentali nella dimensione europea*, Giappichelli, 2015; R. NANIA (Ed.), *L'evoluzione costituzionale delle libertà e dei diritti fondamentali: saggi e casi di studio*, Giappichelli, 2012; L. CALIFANO, *Corte costituzionale e diritti fondamentali,* Giappichelli, 2004; S. CURRERI, *Lezioni sui diritti fondamentali,* FrancoAngeli, 2018; M. OLIVETTI, *Diritti fondamentali,* Giappichelli, 2018; S. BONFIGLIO, *Intercultural constitutionalism: from human rights colonialism to a new constitutional theory of fundamental rights*, Taylor & Francis

belongs to a person as a human being irrespective of his or her relationship with a State, is a necessary precondition. The Italian Constitution does not offer a definition of what such a right is, not even in Article 2. [5] At any rate, although there is some uncertainty as to what they are, fundamental rights could be understood as 'the basic needs of every human being without the recognition (and [...] effective protection) of which a free and dignified existence could not take place'. [6] It is clear, therefore, that they are primary needs considered essential and strongly felt in any given society, the necessary satisfaction of which not only guarantees a dignified life for the individual, but also contributes to the realisation of the human person.

These include, of course, those expressly recognised by the Constitution, whether or not it refers to them as such in the text. In fact, the Italian Constitution contains an extensive catalogue of rights that can be described as a true "Bill of Rights". Then there are the rights recognised by international law, such as those enshrined in the 1950 European Convention on Human Rights (ECHR).

Furthermore, inviolable rights include those considered as such by constitutional jurisprudence (but also by the European Court of Human Rights) largely confirmed by the Italian Constitutional Court in several *sentenze additive di principio*, [7] without forgetting what is enshrined in the Charter of Fundamental Rights of the European Union (CFR). [8]

Group, 2019; I. DEL VECCHIO, *La massimizzazione dei diritti fondamentali e la struttura dell'argomentazione giuridica nel costituzionalismo pluralista*, Editoriale Scientifica, 2020; P. CARETTI-G. TARLI BARBIERI, *I diritti fondamentali: libertà e diritti sociali*, Giappichelli, 2022.

[5] A. RUGGERI, *Cosa sono i diritti fondamentali e da chi e come se ne può avere il riconoscimento e tutela,* in *Consulta OnLine*, 2016(2), p. 263 ff. In attempting to define fundamental rights, the author distinguishes between two levels: the theoretical-general or philosophical, on the one hand, and the dogmatic-positive, on the other. For a comprehensive reconstruction and analysis on the subject of fundamental rights and social rights of foreigners, see, see G. MAESTRI, *I diritti ai "non cittadini" come fattore di sicurezza?*, in *Democrazia e Sicurezza,* 2014(3), p. 20 ff.

[6] A. RUGGERI, *supra* note 5, p. 265. For further analysis, *ex multis*, E. GROSSO, voce *Straniero (*status *costituzionale dello)*, in *Dig. disc. pubbl.* vol. XV, Utet, 1999, p. 156 ff.; C. CORSI, voce *Straniero (dir. cost.)*, in *Enc. dir.* Annali VI, Giuffrè, 2013, p. 861 ff.; G. BASCHERINI, *Immigrazione e diritti fondamentali. L'esperienza costituzionale italiana tra storia costituzionale e prospettive europee*, Jovene, 2007; C. PANZERA-A. RAUTI-C. SALAZAR-A. SPADARO (Eds.), *Metamorfosi della cittadinanza e diritti degli stranieri,* Editoriale scientifica, 2016; F. BIONDI DAL MONTE-E. ROSSI, *Diritto e immigrazioni. Percorsi di diritto costituzionale*, Il Mulino, 2022.

[7] A. RUGGERI-A. SPADARO, *Lineamenti di giustizia costituzionale,* Giappichelli, 2022; M. RUOTOLO, *L'evoluzione delle tecniche decisorie della corte costituzionale nel giudizio in via incidentale. Per un inquadramento dell'ord. no. 207 del 2018 in un nuovo contesto giurisprudenziale*, in *Riv. AIC*, 2019(2), p. 644 ff.

[8] The EU Charter of Fundamental Rights, which became legally binding with the

Although the Italian Constitution tends to grant the rights enshrined in it only to citizens—as can be seen from the combined provisions of Articles 2, 3, 10(2) and 117—legal scholars have raised the question of identifying the rights that may be enjoyed by foreigners as well. In this regard, it is worth recalling a series of judgments of the Italian Constitutional Court, which, since its earliest decisions, has rejected a literal interpretation of constitutional provisions.

In recent years, in addition to a regulatory hypertrophy that has very often proved to be contradictory and hostage to the various political orientations, [9] the Italian Constitutional Court has repeatedly been called into question, elaborating a very complex jurisprudence, aimed at defining a sort of 'statute' of the foreigner.

Initially, thanks to the development of a particularly innovative decision-making, the Court intervened with several *sentenze additive di prestazione* which allowed it to declare the constitutional illegitimacy of certain provisions in so far as they 'did not provide for the application of a certain favourable treatment to all those who should benefit from it'. [10] However, these judgements were made without due consideration of the impact on the economic stability and the consequences for the increase in public expenditure, which is a burden that cannot be ignored. With regard to this first strand, the Court has changed its orientation, seeking to promote a principle of gradualism in social rights 'with regard to the implementation of constitutional values that impose significant burdens on the state budget'. [11]

Thus, thanks to the judgments of the Italian Constitutional Court:

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entry into force of the Lisbon Treaty on 1st December 2009, is a document that enshrines and acknowledges certain fundamental rights within the European Union. The Charter, which holds the same legal value as the Treaties, forests out certain rights enjoyed by EU citizens and residents. Indeed, there is a 'hard core' of human rights rules that go beyond the categories of "citizenship" and "residence", including access to necessary medical care for all, as well as emergency and primary health care; to health care for pregnant women and health care and education for children, without discrimination against nationals; and access to justice, with the introduction of a mechanism for a person to lodge a complaint and obtain redress.

[9] In this regard, see G. STEGHER, *Cittadinanza e immigrazione: tra crisi e sicurezza*, in M. CAVINO-L. CONTE-S. MALLARDO-M. MALVICINI (Eds.), *Dove va la Repubblica? Istituzioni e società ancora in transizione. 2017-2021*, Il Mulino, 2022, p. 283 ff.

[10] P. CARETTI-G. TARLI BARBIERI, *supra* note 4, p. 97.

[11] Const. Court, 25th May 1990, no. 260. On this matter, see M. LUCIANI, *Costituzione, bilancio, diritti e doveri dei cittadini*, in *Quest. giust.*, 2012(6), p. 92 ff. Indeed, scholars have pointed out that there is an undeniable link between social rights and the democratic principle and that, with regard to civil rights, social rights

(i) the so-called "hard core" rights—those that must be recognised by everyone, regardless of their citizenship status—have been progressively extended over time, and (ii) the scope of the rights to which only citizens are entitled has been narrowed.

The Italian Constitutional Court, in its judgement no. 120 of 1967 has, for the first time, extended the principle of equality beyond the wording of the Constitution, by including foreigners among those entitled to such a fundamental guarantee. [12] Nevertheless, few years later, in 1969, it returned to the issue in a new judgement, stating that in certain cases a difference in treatment in the enjoyment of rights might be justified. [13] This distinction is justified by the fact that citizens have a permanent and original relationship with the State, whereas foreigners have acquired this relationship subsequently and usually for a limited period of time.

Therefore, with regard to the right to personal liberty, the intervention of the legislator must be wisely balanced and oriented, on the one hand, to 'recognise the equality of subjective situations, but on the other to consider and regulate factual differences in its discretion, which finds no other limit than the rationality of its assessment,. [14]

This interpretation was confirmed several decades later by the Court, which affirmed the admissibility and legitimacy of differences of treatment 'which may be reserved to individual citizens only in the presence of a regulatory "reason" which is not manifestly irrational or, worse, arbitrary'. [15]

Within the broad topic of immigration, the area in which a real diversity of treatment is most evident is that of the right of foreigners to enter and reside on Italian territory. Here the criterion of nationality is in itself a reasonable ground for differentiating between foreigners and *cives*. However, the Court has slightly changed its position, stating in a subsequent judgment that 'once, however, the right of residence [...] is not at issue, foreigners cannot be discriminated against by imposing special restrictions on their enjoyment of the fundamental rights, which are granted to citizens'. [16] Specifically, it is at this point that the legislator's intervention has gradually moved away from providing for 'different and worsening treatment' of foreigners compared to citizens, on the

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are a condition for their implementation. On this point, see the opinion of M. LUCIANI, *Sui diritti sociali,* in *Studi in onore di M. Mazziotti*, vol. II, Cedam, 1995, p. 104 ff.

[12] Const. Court, 23rd November 1967, no. 120.

[13] Const. Court, 26th June 1969, no. 104, 'Law' part of the judgement, para. 4.

[14] Const. Court, 16th July 1970, no. 144; Const. Court, 23rd April 1974, no. 109.

[15] Const. Court, 2nd December 2005, no. 432.

[16] Const. Court, 30th July 2008, no. 306, 'Law' part of the judgement, para. 10.

grounds that the former (although not participating in the political community) are nevertheless human beings. [17]

In 2001, the Court was called upon to rule on a case of foreigners' accompaniment to the border, following administrative expulsion orders, in the absence of a decision by the authorities in that regard. On that occasion, the Court reaffirmed the universality of personal freedom, which cannot be weakened even when there are multiple public interests involved in immigration matters and even in the face of serious security and public order problems linked to uncontrolled migratory flows. From this perspective, it can be understood that the inviolability of fundamental rights 'belongs to the individual not as a member of a particular political community, but as a human being'.

From these considerations, it can be inferred how the link between individual and rights has gradually weakened, because if in the past it was the status (citizen or foreigner) that determined rights, today a diametrically opposite need has emerged, whereby it is rights that prevail because they are attributed to every person, regardless of their status and their legal relationship with a legal system.

It is therefore clear that there are situations in which the differences between Italian citizens, European citizens and foreigners are considered reasonable (particularly with regard to social benefits), while there are others in which the rights that the Constitution recognises only *vis-à-vis* the Italian citizens may be extended to foreigners, by legislation or by case-law, if the motives to the contrary are unreasonable. Thus, in the area of social benefits for foreigners, the Constitutional Court has intervened by declaring unconstitutional some regional laws which, in a totally arbitrary manner, restricted the enjoyment of certain rights to citizens only (judgments no. 432 of 2005 and no. 40 of 2011) or which made the enjoyment of these rights subject to a minimum period of residence (judgments no. 133 of 2013, no. 106 and no. 107 of 2018). [18]

During 2022, the Constitutional Court again issued two particularly interesting judgement. [19] Specifically, in judgement no. 54 of 2022 [20] the Court intervened with a declaration of

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[17] Const. Court, 10th April 2001, no. 105, 'Law' part of the judgement, para. 4.

[18] On this subject, see M. OLIVETTI, *supra* note 4, p. 108 ff.

[19] Const. Court, 4th March 2022, no. 54 and Const. Court, 16th March 2022, no. 67. Indeed, the Court intervened with a third judgment, 25th January 2022, no. 19, in which it ruled on citizenship income. For a comment on the point, see D. LOPRIENO, *Riflessioni sul reddito di cittadinanza e gli stranieri alla luce della sent. n. 19 del 2022 della Corte Costituzionale*, in *Osservatorio AIC*, 2022(3), p. 1 ff.

[20] See Const. Court, 4th March 2022, no. 54, 'Law' part of the judgement, para. 13.3: 'By making recognition of the childbirth allowance and the maternity allowance subject to the possession of a residence permit valid for at least five years, the

unconstitutionality on the issue of childbirth and maternity allowances, following a question of constitutional legitimacy raised by the Court of Cassation. The Constitutional Court declared that these measures could not be subordinated to the possession of an EU residence permit for long-term residents, as they constitute essential services for the satisfaction of a person's primary needs.[21] On the other hand, with

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possession of an income not less than the annual amount of the social assistance allowance and the availability of suitable accommodation, the legislature has laid down requirements which bear no relation to the need which the benefits in question are intended to meet. By introducing strict income requirements for the recognition of support measures for the neediest families, the challenged provisions establish an unduly burdensome system solely for third-country nationals, which goes beyond the legitimate aim of granting the benefits of the welfare state to those who reside in the country on a regular and non-periodic basis. Such a selective criterion denies adequate protection to those who are legally present on the national territory but who do not meet the income requirements for the granting of an EU long-term residence permit. Such a system discriminates against those workers who are most in need'. For a comment on the judgment, see B. SBORO, *Ancora in tema di assegni di natalità e maternità: la sent. 54 del 2022 della Corte costituzionale dopo il verdetto della Corte di giustizia*, in *Diritti comparati*, 31st March 2022.

[21] On this matter, the Italian Constitutional Court made a preliminary reference to the Court of Justice of the European Union (Const. Court, 30th July 2020, no. 182) in order to verify whether such measures are compatible with Article 34 CFR and to the principle of equal treatment and prohibition of discrimination provided for in social security. In this regard, see G. PISTORIO, *L'operatività multilivello della leale collaborazione. Nota all'ordinanza n. 182 del 2020 della Corte costituzionale*, in *Nomos*, 2021(1), p. 1 ff.

In its judgement of 2 September 2021 in Case C-350/20, the Court of Justice ruled on the question raised by the Italian Constitutional Court and confirmed that Article 12 of Directive 2011/98/EU on the right to equal treatment, recognises that workers from third countries referred to in Article 3(1)(b) and (c) enjoy the same treatment as nationals of the Member State in which they reside in respect of the branches of social security defined in Regulation 2004/883/EC. Accordingly, since the childbirth grant and the maternity allowance can be classified as social security and family benefits, they are subject to the principle of equal treatment, since the Italian State, in the exercise of its legislative discretion, has not made use of the right to derogation recognised by the Directive. Moreover, under Article 34(1) CFR, the Union recognises and respects the right of access to social security benefits and social services providing protection in cases such as maternity, sickness, accidents at work, dependency or old age, as well as in the event of loss of employment, in accordance with the procedures laid down by Union law and national laws and practices. Furthermore, Article 34(2) CFR provides that everyone residing or moving legally within the Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices. Italy did not made use of the possibility for Member States to restrict equal treatment under Article 12(2)(b) of Directive 2011/98/EU. The Court of Justice therefore answered the question by ruling that Article 12(1)(e) of Directive 2011/98/EU must be interpreted as precluding national legislation which excludes third-country nationals referred to in Article 3(1)(b) and (c) of that Directive from receiving the childbirth grant and maternity allowance provided for by that legislation.

judgement no. 67,[22] the Court declared inadmissible, on the grounds of lack of relevance, the questions of constitutional legitimacy of an article[23] concerning the allowance for the family unit. In this case too, the ruling follows a question of constitutional legitimacy proposed by the Court of Cassation (which also referred the matter to the Court of Justice) concerning the exclusion from the family unit (*nucleo familiare*), with regards to 'non-European Union citizens holding a long-term residence permit', of spouses, children, and equivalent individuals who do not have a residence in Italian territory (subject to the condition of reciprocity). In this case, the subject of the decision was the concept of family unit in relation to foreign citizens. As a matter of fact, for the purposes of recognising the right to family allowance, 'the condition of residence on Italian territory is not required for the members of the family of an Italian citizen, while it is required for the members of the family of a foreign citizen, unless there is a reciprocity regime or an international convention in force with the country of origin of the relative'.

With these last two judgements, the Italian Constitutional Court has reaffirmed that, when it comes to social rights,[24] the balancing act is very complex, given that that these rights have a cost[25] and affect the budgets of the State and the Regions. The Court therefore drew a distinction within the broad category of rights, stating that while there are rights to which everyone is entitled (including aliens and regardless of the legality of their residence), there are others (mostly social rights) in respect of which the legislature may make distinctions on the basis of the criterion of reasonableness. In judgement no. 432 of 2005, the Court, requested to decide upon the

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[22] Const. Court, 16th March 2022, no. 67. See, A. RUGGERI, *Alla Cassazione restìa a luogo all'applicazione diretta del diritto eurounitario la Consulta replica alimentando il fecondo "dialogo" tra le Corti*, in *Consulta OnLine*, 2022(1), p. 1 ff.

[23] Article 2(6a) of Decree-Law No. 69 of 1988, converted into Law No. 153 of 1988.

[24] A. BALDASSARRE, voce *Diritti sociali,* in *Enc. giur.* vol. XI, Istituto della Enciclopedia italiana, 1989, p. 1 ff.; M. LUCIANI, *supra* note 11, p. 104 ff.; M. BENVENUTI, voce *Diritti sociali,* in *Dig. disc. pubbl. ,* Agg., Utet, 2012, p. 219 ff.; I. CIOLLI, *I diritti sociali al tempo della crisi economica*, in *costituzionalismo.it*, 2012(3), p. 1 ff.; F. BIONDI DAL MONTE, *Dai diritti sociali alla cittadinanza: la condizione giuridica dello straniero tra ordinamento italiano e prospettive sovranazionali*, Giappichelli, 2013; F. DONATI, *Uguaglianza, diritti umani e vincoli di bilancio*, in *federalismi.it*, 2018(21), p. 1 ff.; L. DELL'ATTI, *I diritti sociali alla prova della crisi, fra Costituzione e* governance *economica europea. Verso la fine della storia?*, in *Democrazia e Sicurezza,* 2020(2), p. 13 ff.

[25] A. D'ALOIA, *Storie 'costituzionali' dei diritti sociali,* in *Scritti in onore di M. Scudiero*, Jovene, 2008, p. 689 ff.

free use of public transport, clearly stated that the distinction among Italian citizens, foreigners and stateless persons, 'ends up by introducing completely arbitrary elements of distinction into the regulatory framework, since there is no reasonable correlation between the positive condition of eligibility for the benefit (Italian citizenship) and the other specific requirements (100% invalidity and residence) that condition its recognition and define its *rationale* and function'. [26] Additionally, the Constitutional Court has been asked on several occasions to rule on regional legislation, since it is very common for the Regions to use the criterion of length of residence to restrict foreigners' access to certain rights, thus introducing real discrimination. [27]

However, the need to contain public expenditure cannot justify an excessive compression of fundamental rights, since an even minimal and essential content must always be guaranteed. The Constitutional Court was crystal clear about this profile. Asked to rule on school transport and assistance for disabled pupils in 2016, it recognised the legislator's discretion in determining the measures to protect rights, but reiterated that it was not possible to go beyond the insurmountable limit of 'respect for an inviolable core of guarantees for the parties concerned'. This is because there are intangible rights which, by their very nature, 'cannot be subjected to a sustainability test within the overall framework of available resources'. [28]

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[26] Const. Court, 2nd December 2005, no. 432, 'Law' part of the judgement, para. 5.2. See M. CUNIBERTI, *L'illegittimità costituzionale dell'esclusione dello straniero dalle prestazioni sociali previste dalla legislazione regionale,* in *Forum di Quad. cost.*, 2005.

[27] In this respect, see C. CORSI, *Stranieri, diritti sociali e principio di eguaglianza nella giurisprudenza della Corte costituzionale,* in *federalismi. it*, 2014(3), p. 1 ff.; and more recently L. MONTANARI, *La giurisprudenza costituzionale in materia di diritti degli stranieri,* in *federalismi.it*, 2019(2), p. 1 ff.

[28] "[...] although the legislature enjoys a margin of discretion in determining the measures for the protection of the rights of disabled persons, that margin of discretion finds an insurmountable limit in the need for intrinsic coherence of the regional law itself, which contains the contested provision and which establishes the inviolable core of guarantees for the persons concerned. [...] Once it has been normatively established that the insurmountable core of minimum guarantees for the effective exercise of the right to study and education of disabled pupils cannot be financially conditioned in absolute and general terms, it is quite clear that the alleged violation of Article 81 of the Constitution is the result of an incorrect understanding of the concept of budgetary balance, both with regard to the Region and to the co-financing Province. It is the guarantee of inalienable rights that affects the budget and not the balance of the latter, which is the condition for its proper provision': Const. Court, 16th December 2016, no. 275, 'Law' part of the judgement, paras. 10–11. See A. APOSTOLI, *I diritti fondamentali "visti" da vicino dal giudice amministrativo Una annotazione a "caldo" della sentenza della Corte*

With regard to political rights, and in particular the right to vote, [29] these are considered to be a fundamental element of differentiation between citizens and foreigners. Although foreigners do not have the right to vote (except in exclusively consultative bodies), they do have the right to meet and associate, including in trade unions (Law No. 203 of 1994). This is because the wording of Article 48 of the Italian Constitution restricts the right to vote to citizens. The interpretation offered by the majority of legal scholars is that it is impossible to go beyond the literal interpretation of the provision for all territorial levels of elections. [30] Nevertheless, the hypothesis of extending this right to foreigners at least for "administrative" elections at the local level has been put forward on several occasions.

A final remark on the topic of political rights concerns the difference between European citizens and so-called non-EU citizens. In the first case, it is worth recalling that both the Treaty on the Functioning of the Union (Article 22) and the Charter of Fundamental Rights of the European Union (Articles 39 and 40) recognise the right of European citizens to vote and to stand as a candidate in elections to the European Parliament in the Member State in which they reside and in municipal elections (with the exception of the top posts of mayor and deputy mayor). However, registration on the electoral roll of the municipality of residence is required.

On the other hand, as far as non-EU foreigners are concerned, it is not possible to speak of active and passive voters, not even at the local level. The reason for this limitation lies not only in what has just been said about the constitutional provision, but also in the fact that Italy has not yet ratified the 1992 Convention on the Participation of Foreigners in Public Life at Local Level. [31]

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costituzionale n. 275 del 2016, in *Forum di Quad. cost.*, 2017; R. CABAZZI, *Diritti incomprimibili degli studenti con disabilità ed equilibrio di bilancio nella finanza locale secondo la sent. della Corte costituzionale n. 275/2016*, in *Forum di Quad. cost.*, 2017; A. LONGO, *Una concezione del bilancio costituzionalmente orientata: prime riflessioni sulla sentenza della Corte costituzionale n. 275 del 2016*, in *federalismi.it*, 2017(10), p. 1 ff.

[29] On the right to vote, in addition to the famous studies by F. LANCHESTER, see specifically *La legislazione elettorale italiana e il voto ai non cittadini,* in *Nomos. Le attualità nel diritto*, 2007(1-2), p. 61 ff.; M. RUBECHI, *Il diritto di voto. Profili costituzionali e prospettive evolutive,* Giappichelli, 2016.

[30] G. BASCHERINI, *supra* note 6, p. 385 ff.; T.E. FROSINI, *Gli stranieri tra diritto di voto e cittadinanza*, in *Forum Quad. cost.*, 2004; A. ALGOSTINO, *Il diritto di voto degli stranieri: una lettura – controcorrente – della Costituzione*, in M. GIOVANNETTI-N. ZORZELLA (Eds.), Ius migrandi. *Trent'anni di politiche e legislazione sull'immigrazione in Italia*, FrancoAngeli, 2020, p. 450 ff.

[31] Article 6 of the Convention obliges States Parties 'to grant to every foreign resident the right to vote and to stand for election in local authority elections,

3. Concluding remarks

Although Article 10(2) of the Italian Constitution makes a distinction between the legal situation of citizens and that of non-citizens, it is necessary to understand whether or not (and if so, where and to what extent) such a difference in treatment is justified with regard to the enjoyment of fundamental rights. In particular, if this differentiation were to be applied to all the rights enshrined in the Constitution, it would lead to particularly serious discrimination, especially against foreigners residing permanently in Italy.

Recently, the Italian Constitutional Court reaffirmed the need to overcome 'the apparent obstacle posed by the literal wording of Article 3 of the Constitution (which solely refers to "citizens")', stating that 'while it is true that Article 3 expressly refers only to citizens, it is also certain that the principle of equality also applies to foreigners when it comes to respect for fundamental rights'. Therefore, the legislator cannot 'introduce different rules as to the treatment to be reserved to individual citizens unless there is a regulatory 'reason' that is not manifestly irrational or, worse, arbitrary'. [32] However, this consideration cannot lead to equal treatment *tout court* for everyone without distinction. If there are differences, they must be duly take into account because 'the acknowledged equality of subjective situations in the field of fundamental rights in no way excludes the possibility that, in concrete situations, there may be differences of fact between equal subjects, which the legislator may assess and regulate in his discretion, which has no other limit than the rationality of his assessment'. [33] In other words, the legislator may differentiate the rules (also) between citizens and foreigners, provided that this meets a significant need and is within the bounds of reasonableness.

The real problem is that there is an urgent need for general rethink of the relationship between fundamental rights, on the one hand, and the principles of equality and solidarity, on the other – a relationship that is severely strained by a whole series of difficulties relating to the status of legally resident foreigners, which is now almost entirely assimilated to that of citizens (with the sole, relevant exception, mentioned above, relating to the political sphere). [34] This is because it is not possible to reduce the issue of migration to a simple choice

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provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections'.

[32] Const. Court, 31st July 2020, no. 186.

[33] Ibid.

[34] A. RUGGERI, *supra* note 5, p. 265.

between entry-prohibition, stay-prohibition and expulsion. This has highlighted the inability of the institutions to deal adequately with the problem, which has become increasingly acute as a result of globalisation and other similar phenomena.

It has already been said, and not only here, that the phenomenon of migration affecting Italy is not new; on the contrary, there has been a gradual increase in the number of migrants, both regular and irregular, who arrive on the Italian territory with the aim of settling permanently on the peninsula or temporarily pending a possible transfer to another EU Member State. On the one hand, it would be necessary to prepare assistance, support and reception measures for those who need them and intend to settle in Italy; on the other hand, it would be necessary to prepare specific measures for those foreigners who, although irregular, need to find suitable accommodation and to be supported.

Recent emergencies, such as the pandemic and the Russian-Ukrainian conflict, must also be taken into account. With regard to the first emergency, the spread of the Covid-19 virus has affected all States and has tested respect for fundamental rights, including in the search for effective solutions to contain the epidemic and protect human health. The emergency measures taken to contain the virus have also affected the management of the migration phenomenon, the protection of the health of migrants and foreigners, and access to health and social services. It should be noted, however, that the pandemic has affected and worsened the living conditions of the migrant population. This is because the foreign population was not only more exposed to the risk of contracting the coronavirus, but also suffered the negative consequences in terms of the economy, employment, education, *etc*. Moreover, major difficulties have been encountered not only in terms of access to medical care and vaccination, but also in terms of the compression of fundamental rights, such as overcrowding in some reception centres and hotspots, as well as detention in so-called 'quarantine ships'. [35]

The second recent emergency, i.e. the invasion of Ukraine by the Russian Federation, is causing a massive wave of migration. The flight of thousands of Ukrainians in recent months, however, presents a not insignificant difference from previous emergencies: since it is caused by a military attack, it seems almost to produce a wave of pathos and a significant openness towards Ukrainians in exile, in contrast to the closed attitude reserved for other types of migrants, whose movement is in any case forced and dependent on emergency situations (such as internal conflicts, political regimes and

[35] F. BIONDI DAL MONTE-E. ROSSI, *supra* note 6, p. 219-222.

particularly difficult living, health and climatic conditions). However, two issues need to be taken into account. On the one hand, while the Russian-Ukrainian conflict is not the only cause of displacement (it is only one of many contingent cases that characterise geographical areas and historical periods) on the other hand, it almost seems as if Ukrainian refugees receive a more favourable attitude from neighbouring states than other types of migrants, who are not considered equally deserving of reception.

In any case, the phenomenon of migration and transnational mobility has grown exponentially in the last thirty years, as has the number of migrants who choose to settle in Italy, making it a place to put down roots. For this reason, a reform of the law on the acquisition of citizenship would be necessary in order to take into account the demographic and social changes that have taken place, within the framework of a process of integration of new members into the community.

Unlike in the area of citizenship, which is governed by a very old piece of legislation, [36] immigration has been the subject of numerous measures in recent years, often adopted on the emotional wave of the "crises" and the coexistence of migratory flows in the Mediterranean, where Italy is one of the first ports of arrivals. [37]

There are two observations to be made here. Firstly, in the field of immigration, it is the Italian government that intervenes more often by means of decrees, while Parliament seems to have "abdicated" its proper role as legislator. Secondly, immigration is closely linked to the issue of security. Since 2008, several attempts have been made to define and delimit the concept of "security". This was first done by the so-called "Maroni Decree", which was then taken up and expanded by the so-called "Minniti decree".

The justification for this choice could probably be traced back to

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[36] For several years now, the legislature has been examining draft amendments to Law No. 91 of 1992: the most recent attempts date back to the 17th legislature, with proposal A. C. No. 2092 of 2015 (which in turn re-proposed a text from the 16th legislature), and to the 18th with the proposal 'Amendments to Law No. 91 of 5 February 1992, containing new rules on citizenship' (A.C. No. 105 of 2018).

The Constitutional Affairs Committee of the Chamber of Deputies in recent months has worked, and continues to work, on a basic text, adopted on 9 March 2022, which is the result of a joint text (C. 105 Boldrini, C. 194 Fitzgerald Nissoli, C. 221 La Marca, C. 222 La Marca, C. 717 Polverini, C. 920 Orfini, C. 2269 Siragusa, C. 2981 Sangregorio and C. 3511 Ungaro). The measure came before the *plenum* on 29th June of the same year.

[37] On this topic, see the very recent volume by C. SICCARDI, *I diritti costituzionali dei migranti in viaggio. Sulle rotte del Mediterraneo*, Editoriale Scientifica, 2021.

certain factors, such as the existence of urban decay and social disorder, as well as the terrorist attacks that have occurred in the last two decades. In any case, the legislator has repeatedly referred to 'security' when intervening on the issue of immigration and the legal status of foreigners.

In fact, when analysing the approved legislative acts, it is possible to note the frequent use of that word, both in the individual provisions and, in other cases, in the title of the measures themselves, as in the case of the so-called "Security package" of 2008-2009 and the "Salvini's security decrees".

From this it can be concluded that, since security must be understood as a public or collective interest, it must be adequately protected. It is a situation characterised by exceptional necessity and urgency that deserves more than a regulatory intervention to be adopted immediately and that requires interventions of a predominantly securitarian and emergency nature. On the other hand, there is a clear asymmetry with regard to regulatory "apathy" on the subject of citizenship, which highlights an excessive legislative hypertrophy with regard to immigration.

Two final remarks before concluding. According to the work of eminent scholars, there are goods of paramount importance, 'the enjoyment of which the legislator [...] is obliged to facilitate whenever, in the context of the general protection of basic needs, a situation of serious de facto inequality is created [...] such as to make it extremely difficult, if not impossible, for certain categories of subjects to achieve minimum standards of dignified coexistence'. [38]

Finally, as immigration has become a structural phenomenon, it is hoped that the legislator's approach to immigration will change from an emergency strategy to a much more systematic one that can adequately regulate the phenomenon in the long term.

The European Pact on Migration and Asylum, presented by the European Commission on 23 September 2020, could provide an opportunity for a change in approach. This policy document, [39]

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[38] A. BALDASSARRE, voce *Diritti sociali*, in *Enc. giur.*, vol. XI, Istituto della Enciclopedia italiana, 1989, p. 1 ff.

[39] As stated in COM(2019)609, the Pact is mainly based on certain building blocks, such as: robust and fair management of external borders, including identity, health and security checks; fair and effective asylum standards; streamlined asylum and return procedures; a new solidarity mechanism for search and rescue, pressure and crisis situations; enhanced crisis prediction, preparedness and response; an effective return policy and a coordinated EU approach to return; comprehensive EU governance for better management and implementation of asylum and migration

which sets out the guidelines that will guide the European plan of action on migration over the next five years, was presented at the same time as a series of reforms that will substantially change the European asylum system.[40] Negotiations on the new legislative proposals were temporarily suspended, contrary to the established roadmap, which envisaged their conclusion by the end of 2021. The main objectives were set out in the Pact, namely the adoption by the European Parliament and the Council of several pieces of legislations (such as the one on asylum and migration management, the one on asylum procedures and the one on the EU Asylum Agency) or the revision of some acts already in force (such as the Return Directive). However, the only concrete step forward was the agreement on the establishment of the European Union Asylum Agency (EUAA).

The new agency, which replaced the former European Asylum Support Office (EASO), became operational last January. Its mission is to provide technical and operational assistance to Member States in asylum procedures (alongside or possibly replacing national authorities) and to promote greater convergence in asylum procedures and reception conditions.

Meanwhile, in addition to temporary asylum and return measures to help Latvia, Lithuania and Poland deal with the emergency situation at the EU's external borders with Belarus, the European Commission has proposed activating the Temporary Protection Directive to provide rapid and effective assistance to people fleeing the war in Ukraine, in line with temporary protection in the EU. This will allow those fleeing the conflict to obtain a residence permit and access to education and the labour market.[41]

With the exception of this parenthesis due to the emergency caused by the Russian-Ukrainian conflict, negotiations on the new Pact on Migration and Asylum only resumed on the 22nd of June. While Member States launched the voluntary solidarity mechanism by offering transfers, financial contributions and other support measures to Member States in difficulty, they also decided to start negotiations with the European Parliament on two key instruments

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policies; mutually beneficial partnerships with key third countries of origin and transit; the development of sustainable legal pathways for those in need of protection and to attract talent to the EU; and support for effective integration policies.

[40] On the topic of asylum, see V. CARLINO, *L'accesso alla tutela giurisdizionale nella procedura per il riconoscimento del diritto di asilo*, Cedam, 2021.

[41] For an overview of the measures taken, see Commission document 2022/0069(NLE). For a short summary, see also the press release of 8th March 2022: *ec.europa.eu/commission/presscorner/detail/en/IP_22_1610*.

for migration management, namely the Eurodac database [42] and the screening Regulation. [43]

Moreover, the European institutions have made it clear that they intend to discuss a roadmap with the aim of reaching an agreement on all proposals by the end of this legislature. The issue is of great interest and deserves proper attention, in order to understand whether the proposals under discussion could represent a concrete opportunity to rethink the general framework of the topic, ensuring the full guarantee of migrants' fundamental rights.

[42] As stated on the Commission's website, the Eurodac regulation aims to modernise the database on asylum seekers and irregular migrants in order to better manage applications and combat irregular movements.

[43] This Regulation introduces pre-entry screening to be applied to all third-country nationals found at the external border without fulfilling the entry conditions.

FOREIGN DEFENDANT AND CONSTITUTIONAL RIGHTS

NICOLA PASCUCCI

TABLE OF CONTENTS: 1. Equal treatment of Italian and foreign defendant. – 2. The right to an interpreter under Article 111(3) of the Italian Constitution. – 3. Right of defence and trusted language assistant: the intervention of the Italian Constitutional Court and the prolonged reluctance of the legislator.

1. Equal treatment of Italian and foreign defendant

It is well known that Article 3(1) of the Italian Constitution prohibits all discrimination, including those based on 'race' and 'language'. The provision only concerns citizens, but it can also be extended to foreigners. Since the 1960s, the Italian Constitutional Court has read the principle of equality in conjunction with Article 2 of the Constitution, stating that it applies 'to foreigners when it comes to the protection of inviolable human rights, which are also granted to foreigners also in accordance with international law'. [1] Even legal scholars, with various arguments, propose interpretations that go beyond the letter of the provision. [2]

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[1] Const. Court, 26th June 1969, no. 104; similarly, Const. Court, 23th November 1967, no. 120. Some scholars are puzzled by the distinction between the 'inviolable rights of man' and the other 'constitutionally guaranteed positions': M. CUNIBERTI, *La cittadinanza. Libertà dell'uomo e libertà del cittadino nella costituzione italiana*, Cedam, 1997, p. 161 ff., according to whom the constitutional text does not make any distinction and it is difficult to draw a line 'between what is "fundamental" and what is not'; moreover, this distinction seems to the Author to be insufficient 'to explain all the possible differences in treatment between citizens and non-citizens' in the Italian legal system.

[2] For all, see L. PALADIN, *Il principio costituzionale d'eguaglianza*, Giuffrè, 1965, p. 205 ff.; G. SILVESTRI, *L'art. 3 della Costituzione*, in *Commentario*, in *lamagistratura.it*, 3rd May 2022, who argues that 'the generalisation of the personalist principle induces us not to restrict the field only to those who possess the *status* of citizenship, with the sole exception of political rights'; A.S. AGRÒ,

The total equalisation between Italian and foreign defendants can be inferred from the constitutional system: Article 24 of the Italian Constitution defines the right of defence as 'inviolable' at 'every stage and level of the proceedings' and does not make any distinctions, attributing the right to all. Thus, the foreigner, like the citizen, is entitled to all the rights and faculties of defence. Likewise, personal liberty is 'inviolable' and Article 13 of the Italian Constitution does not distinguish between Italian citizens and foreigners, subjecting them to the same treatment and limitations. [3]

However, it is apparent that the foreign suspect or accused person, much more often than the Italian one, may find him/herself in a situation where he/she is unable to exercise these rights properly, in particular due to a lack of knowledge of the Italian language. Indeed, the ability of the suspect or the accused person to understand the charges and the acts carried out in the hearings, as well as the possibility to actively defend himself/herself, presupposes a good knowledge of the language of the proceedings, or at least the provision of tools capable of overcoming a possible state of linguistic incommunicability.

2. The right to an interpreter under Article 111(3) of the Italian Constitution

Even before the reform of Article 111(3) of the Italian Constitution by Constitutional Law of 23rd November 1999, No. 2, the Constitutional Court considered the right to an interpreter to be an 'ineliminable part of the right of defence' and defined it as an 'individual right of the accused person', aimed at enabling him or her to 'consciously participate to the proceedings'. [4]

Subsequently, the reformulated Article 111(3) of the Italian Constitution has explicitly granted the 'defendant' in a 'criminal

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Commento all'art. 3, 1° comma, in G. BRANCA (Ed.), *Commentario della Costituzione*, *Principi fondamentali. Art. 1-12*, Zanichelli-Soc. ed. del Foro italiano, 1975, p. 127. Differently, see C. ESPOSITO, *La Costituzione italiana. Saggi*, Cedam, 1954, p. 24 f., esp. footnote 19, who circumscribes the principle of equality to citizens, but also observes how 'individual proclamations of the Constitution' apply to both citizens and foreigners. Furthermore, according to the Author, the law can extend to foreigners a right that the Italian Constitution attributes to citizens and this extension can also be configured in the silence of the law, so that only in specific cases this is not possible.

[3] The only explicit reference to the addressees of Article 13 of the Italian Constitution is contained in its para. 4, which refers in general terms to 'persons', in order to prohibit any 'physical and moral violence' during the 'restrictions of freedom'.

[4] Const. Court, 19th January 1993, no. 10.

trial' the right to be assisted by an interpreter if he or she 'does not understand or speak the language used in the trial' and gave the law the task of implementing this provision.

The mere reference to an 'interpreter' is a legacy of the past: before Directive 2010/64/EU and Legislative Decrees No. 32 of 2014 and No. 129 of 2016, there was no distinction in criminal proceedings between the interpreter, appointed for oral acts, and the translator, appointed to transpose written acts. Nevertheless, even before Constitutional Law No. 2 of 1999, the Constitutional Court held that the right to an interpreter existed 'whenever the defendant' needed the transposition 'into the language he/she knows with regard to all acts addressed to him/her, whether written or oral'. [5]

The constitutional provision incorporates, albeit with important variations, [6] Article 14(3)(f) of the International Covenant on Civil and Political Rights (ICCPR) and Article 6(3)(e) of the European Convention on Human Rights (ECHR). [7] It safeguards the defence rights of individuals, either foreigners or Italian citizens, [8] although cases of linguistic ignorance are obviously more frequent in relation to foreigners.

A first difference with the ECHR concerns the extension of the guarantee. Article 6(3)(e) ECHR uses two different expressions in the official English and French versions: 'language used in court' and '*langue employée à l'audience*' respectively. The term 'criminal trial' in Article 111(3) of the Italian Constitution—interpreted in a non-technical sense, in order to also include preliminary investigations [9]—seems to encompass a broader notion of '*audience*' and to be similar to that of 'court', at least in the extensive meaning indicated by the Strasbourg Court, which applies fair trial rights to investigations, from the notification of the charge to the accused person [10] or, in any event, from the moment he/she is subjected to

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[5] Ibid.

[6] See M. Chiavario, *Così il «vizio assurdo» degli equilibrismi condiziona il difficile cammino delle riforme*, in *Guida dir.*, 1999(27), p. 10, who would have preferred a rigorous transposition.

[7] Legal scholars approve the inclusion of the right to an interpreter in the Italian Constitution, despite the 'serious *défaillances*' in the wording adopted: M. Gialuz, *L'assistenza linguistica nel processo penale. Un meta-diritto tra paradigma europeo e prassi italiana*, Wolters Kluwer-Cedam, 2018, p. 284.

[8] Therefore, the provision in itself is not aimed at the protection of ethnic minorities. In this respect, see M. Chiavario, *Giusto processo – II) Processo penale*, in *Enc. giur.*, vol. XV, Supplement, Istituto della Enciclopedia italiana, 2001, p. 13 f.

[9] P. Ferrua, *Il 'giusto processo'*, 3ª ed., Zanichelli, 2012, p. 126.

[10] The notice of investigation is sufficient (*De Blasiis v. Italia*, App. no. 33969/96 (ECtHR, 14th December 1999), paras. 7 and 17).

acts which are symptomatic of an accusation and which determine significant and detrimental consequences in his or her life, such as an arrest. [11]

The above-mentioned constitutional provision poses another problem: it is silent on the free provision of interpreter's services. Nevertheless, this gap can be filled precisely thanks to Article 6(3)(e) ECHR – an "interposed norm" under Article 117(1) of the Italian Constitution – which explicitly mentions it. [12]

For what is of interest here, there is another difference between Article 111(3) of the Italian Constitution and the corresponding provisions of the ECHR: the constitutional rule enshrines the right of an accused person to be, 'in the shortest possible time, confidentially informed of the nature and cause of the accusation' against him/her, [13] but it does not specify that the communication must be in a language which he/she understands. However, this specification is contained in Article 6(3)(a) ECHR. [14] Here too, the gap in the constitutional text is filled by the latter provision, as an "interposed norm" within the meaning of Article 117(1) of the Italian Constitution. On the other hand, as noted above, the Constitutional Court considered the information on the accusation in a known

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[11] *Maj v. Italia*, App. no. 13087/87 (ECtHR, 19th February 1991), para. 13; *Corigliano v. Italia*, App. no. 8304/78 (ECtHR, 10th December 1982), para. 34.

For a reflection about the different terminology used in English and French versions of the ECHR, see D. CURTOTTI, *Il diritto all'interprete: dal dato normativo all'applicazione concreta*, in *Riv. it. dir. proc. pen.*, 1997 (2), p. 474 footnote 44, who interprets the term 'court' as 'proceeding judicial office'; in similar terms, P.P. RIVELLO, *La traduzione degli atti*, in G. ILLUMINATI-L. GIULIANI (Eds.), *Trattato teorico pratico di diritto processuale penale*, vol. II, edited by P.P. Rivello, Giappichelli, 2018, p. 224.

[12] In relation to gratuitousness, also in the light of European and domestic legislation, see *infra*, Part III, N. PASCUCCI, *Linguistic assistance to foreigners in criminal proceedings: nature of the service and access requirements*.

[13] The words 'nature' and 'cause' indicate the profiles "in law" and "in fact" respectively: M. CHIAVARIO, *supra* note 8, p. 12.

In this case, too, the terms 'accused person' and 'accusation' have a broad meaning which also covers preliminary investigations, in line with the meaning adopted by Strasbourg Court. Otherwise, 'the guaranteeing function of the provision would be substantially lost': E. MARZADURI, *Art. 1 legge cost. 23 novembre 1999, n. 2 ("Giusto processo")*, in *Leg. pen.*, 2000, p. 776 f., who also observes that, if the rule applied only to the person whose charge was formally contested, the adverb 'confidentially' and the expression 'in the shortest possible time' would make little sense. Similarly, see P. FERRUA, *supra* note 9, p. 121. On this point, see F. CORDERO, *Procedura penale*, 9th ed., Giuffrè, 2012, p. 1296 f.

[14] The English version provides that the accused must be informed 'in a language which he understands', in the French version '*dans une langue qu'il comprend*'. Article 14(3)(a) ICCPR contains a similar provision.

language to be a fundamental expression of the right of defence, even before the reform of Article 111 of the Constitution. [15]

3. Right of defence and trusted language assistant: the intervention of the Italian Constitutional Court and the prolonged reluctance of the legislator

Art. 111(3) of the Italian Constitution concerns the right to an interpreter appointed by the proceeding authority, but not the right to an interpreter appointed by the defence, i.e. the trusted linguistic expert.

Despite the legislative silence, the practice has long recognised the possibility of appointing a trusted expert chosen by the defendant to supervise the work of the *ex officio* language assistant, chosen by the judicial authority. [16] The trusted expert has sometimes been essential in proving the innocence of the accused person. For example, in the case of a Bengali woman accused of murdering her husband and acquitted after a long pre-trial detention, the trusted expert pointed out the glaring errors in the linguistic transcription made by the court interpreter. [17] However, until the constitutional ruling of 2007 that resulted from this case, the expert's fee was paid

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[15] Const. Court, 19th January 1993, no. 10. Some scholars remedy the constitutional omission through interpretation, in the light of the reference to the 'interpreter' in Article 6(3)(e) ECHR and of the guidance provided by the aforementioned judgment of the Italian Constitutional Court, in relation to Article 143 of the Code of Criminal Procedure (CCP): M. Gialuz, *Commento all'art. 111 Cost.*, in S. Bartole-R. Bin (Eds.), *Commentario breve alla Costituzione*, 2nd ed., Cedam, 2008, p. 984 f.; P. Ferrua, *supra* note 9, p. 122.

[16] According to Italian Supreme Court (*Corte di Cassazione*), Joint Criminal Chambers, 26th June 2008, Akimenko, in *Cass. pen.*, 2009(2), p. 483, the trusted linguistic expert may be appointed, 'for example, to acquire full knowledge of the procedural acts, to verify the accuracy of the official translation, to draft written pleadings, to interact with lawyers, technical consultants, investigators'. Following the transposition of Directive 2010/64/EU, some of these tasks will also be attributed to the linguistic expert appointed by the proceeding authority, but other activities will necessarily remain the exclusive responsibility of the trusted expert. See, among others, M. Chiavario, *La tutela linguistica dello straniero nel nuovo processo penale italiano*, in *Studi in memoria di Pietro Nuvolone*, vol. III, Giuffrè, 1991, p. 126 f.; R.E. Kostoris, *La rappresentanza dell'imputato*, Giuffrè, 1986, p. 313 ff.

[17] In this regard, see C.J. Garwood, *Court interpreting in Italy. The daily violation of a fundamental human right*, in *The Interpreter's Newsletter*, 2012(17), p. 182 ff.; C. Falbo, *La comunicazione interlinguistica in ambito giuridico*, Eut, 2013, p. 88; L. Faraon, *Diritto di difesa dello straniero e interprete*, in *www.diritto.it*, July 2006.

exclusively by the defendant, even if he or she was indigent. It was not included in the cost of free legal aid. [18] Obviously, the problem is of paramount importance when the defendant is a foreigner with a low income who cannot afford the costs of the expert.

In this judgment, the Italian Constitutional Court reaffirmed the importance of this professional figure for the exercise of the right of defence, distinguishing him/her from both the linguistic assistant appointed by the judicial authority and the technical adviser. [19] Consequently, the Court has declared Article 102 of Presidential Decree 30th May 2002, No. 115 (Consolidated Law on costs of justice), relating to technical consultants, to be incompatible with the Constitution 'in so far as it does not provide for the possibility for a foreigner who is admitted to free legal aid and who does not know the Italian language' to appoint his/her own interpreter at the expense of the State, provided that he/she meets the relevant income requirements. However, the Court did not specify the *criteria* to be followed: thus, a trusted linguistic expert paid by the State could potentially be used for all the acts of the proceedings. Nevertheless, the constitutional judges hoped for a legislative intervention to better define the rules.

However, the legislator has never intervened, not even with the linguistic assistance reforms of Legislative Decrees No. 32 of 2014 and No. 129 of 2016, which transposed Directive 2010/64/EU. Consequently, according to some scholars, the judgement no. 254 of 2007 would be outdated, because these reforms have significantly extended the application of *ex officio* linguistic assistance and the new rules have eminently defensive purposes. They therefore consider that, in the absence of a specific legislative innovation, access to legal aid at the expense of the State would no longer be permitted in relation to the cost for the trusted interpreter. [20]

This approach does not seem acceptable: the aforementioned constitutional judgement mentions, in turn, the ruling no. 10 of 1993

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[18] Legal scholars considered the cost of the trusted interpreter to be indirectly reimbursable in the case of access to legal aid at State expense, if advanced by the lawyer: D. CURTOTTI NAPPI, *La spinta garantista della Corte costituzionale verso la difesa dello straniero non abbiente*, in *Cass. pen.*, 2007(12), p. 4443.

[19] Const. Court, 6th July 2007, no. 254. About this aspect, see, for all, D. CURTOTTI NAPPI, *supra* note 18, p. 4442 ff.

[20] M. GIALUZ, *L'assistenza linguistica*, cit., p. 311 ff., according to whom, pending a reform defining the boundaries of application of the institution, the figure of the state-paid language expert is '"frozen" and completely absorbed in into that of the court interpreter/translator'. *Contra* S. SAU, *Commento all'art. 143 c.p.p.*, in G. ILLUMINATI-L. GIULIANI (Eds.), *Commentario breve al Codice di Procedura Penale*, 3rd ed., Cedam, 2020, p. 513.

on court interpreters and states that the right to an interpreter is functional to the conscious participation of the foreign defendant in the proceedings, which is considered a 'fundamental part of the right of defence'. The accused, if indigent, has the right to free legal aid in relation to the fee of a trusted linguistic assistant, whenever it is actually necessary for his self-defence. [21]

Still, it is clear that the vagueness of the requirements of this right leaves a wide margin of discretion to the judge. Legislative reform is therefore essential in order to regulate the figure of the trusted linguistic assistant paid for by the state.

[21] For more details, see N. Pascucci, *La persona alloglotta sottoposta alle indagini e la traduzione degli atti*, Giappichelli, 2022, p. 187 ff.

RIGHT TO HEALTHCARE AND FOREIGNERS: OPERATIONAL PROFILES

EMANUELA VITTORIA

TABLE OF CONTENTS: 1. The migrant's right to medical treatment for Covid-19. – 2. The vaccine record.

1. The migrant's right to medical treatment for Covid-19.

Article 32 of the Italian Constitution states that the Italian Republic protects health as a fundamental right of both the individual and of the community as a whole. It also guarantees the right to free medical care to indigents.

This provision does not make any distinction in terms of its personal scope of application, i.e. it applies to "everyone", citizens and "foreigners", including those without a regular residence permit. However, the latter can only access to urgent medical assistance. There are many treatments that may be labelled as urgent, among which the vaccination against Covid-19, which is a pandemic-related disease, would be an example of a necessary assistance treatment.

Another example of necessary assistance is an emergency room visit, for instance, for an injured person with a broken arm. The assistance provided by the first aid is available to everyone, including those who do not have a healthcare card or social security number. Urgent and necessary care is provided to anyone who needs assistance.

Italy distinguishes between two categories of foreigners: temporary foreigners (TPF) and permanent foreigners (PPF). The first category includes people who do not comply with the rules on entry and stay on national territory and therefore do not have a social security number. They can only apply for a temporary card, valid for up to six months, to receive urgent and necessary medical assistance. The latter, on the other hand, refers to people who comply with the rules of entry and stay on the national territory and therefore have the relevant documents, a social security number and

a place of residence. PFFs have access to all the treatments provided by the Italian National Health Service.

The healthcare system in Italy is generally governed by the Regions, The healthcare system in Italy is generally govern by the Regions, with the central State retaining the obligation to provide guidelines and strategies for the regional governments to follow. Therefore, each local administration implements these guidelines independently. As a result, there may be differences in the timing and manner in which each region implements the State's instructions.

From a practical point of view, the above-mentioned differences may affect migrants on Italian territory. For example, there are differences in how the regional administration considers vaccination to be an urgent and necessary medical intervention. Thus, if a migrant with a TPF card is present in a Region that considers vaccination an urgent measure, the holder may have access to vaccination against Covid-19. Conversely, if the TPF holder founds him/herself in a Region where vaccination is not considered urgent, he or she may not have access to vaccination. Such unequal treatment is unacceptable, as both citizens and foreigners, as human beings, should enjoy the same fundamental rights.

2. The vaccine record

It is not exclusively a matter of Covid-19. In fact, there are many other infectious diseases that can be prevented by vaccination, including tetanus, diphtheria and hepatitis B. Of course everything is much simpler in the presence of the vaccination record (or "registry"). The latter contains the vaccination history of each individual, but if the individual is TPF, a blood sample can be taken to show the presence or absence of antibodies, which will indicate whether the individual has been exposed to the disease in order to proceed, should it be the case, with the vaccination.

We often blame foreigners for the presence of diseases on our national territory, but this is only a belief; diseases such as scabies, that we attribute to come from foreigners, are endemic diseases and therefore recur occasionally under certain conditions.

Preventive medicine is based on the prevention of infectious diseases: diseases can also be prevented by vaccination and, in the case of Covid-19, this method has proved to be particularly effective in preventing the development of the sever form of the disease.

The only important difference between Covid-19 and other infectious diseases lies in the natural history of the disease: Covid-19 is a disease that is still being studied, it is a young disease in

history, all the others are better known, but it seems that their existence has been forgotten.

Increased cooperation between Regions is therefore desirable and crucial. In fact, it is essential when it comes to foreigners who need medical assistance and should have equal access to health care everywhere.

Following the outbreak of the war between Ukraine and Russia, the Italian Ministry of Health issued a circular to all the Regions, [1] instructing them to provide for vaccination against Covid-19 for immigrants from those countries that have entered Italy starting from March 2022.

The reason behind the aforementioned circular is the low vaccination rate of around 35% against infectious diseases—not only Covid-19—in Eastern European countries.

The ministerial circular also stipulates that migrants coming from areas where war is raging must be given a health card code, which will give them access to medical care and, in particular, vaccinations. With particular reference to vaccination, once these foreigners have entered Italian territory, they have the right to be swabbed for Covid-19 within 48 hours and to be vaccinated with a preferential lane.

The Italian Ministry of Health, with this circular, has launched an alert to the Regions. Each Region then implements what the Ministry of Health has indicated. However, in addition to Covid-19, this circular also refers to other vaccinations for citizens coming from the Russian and Ukrainian territories.

In conclusion, this ministerial circular represents a step forward at the operational level, allowing foreigners, albeit from a limited number of countries, access to urgent and necessary medical assistance, such as vaccinations. The aim is to extend this treatment to all foreigners entering Italian territory.

[1] See *www.trovanorme.salute.gov.it/norme/renderNormsanPdf?anno=2022&codLeg=86063&parte=1%20&serie=null*.

PART II

IMMIGRATION AND PERSONAL LIBERTY

DETAINED, CRIMINALISED AND THEN (PERHAPS) RETURNED: THE FUTURE OF ADMINISTRATIVE DETENTION IN EU LAW

Lorenzo Bernardini

Table of contents: 1. Deprivation of liberty and EU governance of immigration flows. – 2. 'Changing everything to change nothing': reforming detention for the purpose of return. – 3. Criminalisation without safeguards and future developments.

1. Deprivation of liberty and EU governance of immigration flows.

The use of normative techniques for the orderly management of migratory flows, aimed at depriving a foreigner who arrives (or is already present) on the territory of an EU Member State of his/her personal liberty, is by now rooted in national legal systems and practices. [1]

According to the most sensitive scholars, a number of factors have led to the establishment of a semblance of 'legal normality' [2] for this legal instrument, labelled '*trattenimento*' in Italian law, or *rétention* in French law 'under the clear sign of ambiguity'. [3]

Firstly, it is provided for States at the domestic level in almost all EU Member States. It is also regulated by EU legislation. Finally, it has been codified *expressis verbis* in Article 5 of the European Convention

[1] This was noted recently by I. Majcher-M. Flynn-M. Grange, *Immigration Detention in the European Union. In the Shadow of the "Crisis"*, Springer, 2020, p. 453.

[2] R. Cherchi, *Il trattenimento dello straniero nei centri di identificazione e di espulsione: le norme vigenti, i motivi di illegittimità costituzionale e le proposte di riforma*, in *Quest. giust.*, 2014(3), p. 50 ff.

[3] R. Romboli, *Sulla legittimità costituzionale dell'accompagnamento coattivo alla frontiera e del trattenimento dello straniero presso i Centri di permanenza e Assistenza*, in R. Bin-G. Brunelli-A. Pugiotto-P. Veronesi (Eds.), *Stranieri tra i diritti. Trattenimento, accompagnamento coattivo, riserva di giurisdizione*, Giappichelli, 2001, p. 11.

on Human Rights (ECHR).[4] The practice implemented by the EU Member States seems indeed to support the idea of "normalizing" administrative detention, as a measure of absolute 'administrative banality',[5] teleologically oriented towards the securitarian control of borders.[6]

Irrespective of whether the foreigner is the subject of an expulsion order, or holds the status of "applicant for international protection", that alien may be deprived of his/her liberty, on the basis of an order issued by the administrative authority—usually the public security authority[7]—, alternatively: (a) for the purpose of return ("pre-removal detention" or "detention for the purpose of return");[8] (b) to allow asylum procedures to be carried out properly (namely, "asylum detention");[9] (c) finally, to allow the applicant to be transferred to the State competent to examine his or her application for international protection ("detention for the purpose of transfer").[10] A diachronic analysis of the three systems is useful in

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[4] L. BERNARDINI, *La detenzione amministrativa degli stranieri, tra "restrizione" e "privazione" di libertà: la CEDU alla ricerca di* Godot?, in *Dir. imm. citt.*, 2022(1), p. 75-78.

[5] G. CAMPESI, *La detenzione amministrativa degli stranieri. Storia, diritto, politica,* Carocci, 2013, p. 38.

[6] An objective that, to be fair, the available data shows is not being achieved at all (see the infographic elaborated by M. DÍAZ CREGO- E. CLARÓS, *Data on returns of irregular migrants*, in *www.europarl.europa.eu*, March 2021). Notably, migration policies based on administrative detention were described as being 'unjust and ineffective' (F. VASSALLO PALEOLOGO, *Detention* Centres*: An Unjust and Ineffective Policy*, in *European Social Watch Report*, 2009, p. 23-26, available at the following URL: *https://www.socialwatch.org/sites/default/files/ESW2009_asgi_eng.pdf*).

[7] In the Italian legal framework, for example, the competent authority is the *Questura* (lit., the police headquarters) of the Province in which the migrant is currently located (see Article 14(1) TUI). Similarly, in France, it is the *préfet de département*, an administrative authority whose tasks include maintaining public order and coordinating the police and the *Gendarmerie* (see Article R741-1, *Code de l'entrée et du séjour des étrangers et du droit d'asile* [CESEDA]).

[8] See Article 15 Directive 2008/115/EU of the European Parliament and of the Council of 16 December 2008 *on common standards and procedures in Member States for returning illegally staying third-country nationals* [OJ L 348, 24.12.2008, p. 98-107] (the so-called 'Return Directive').

[9] See Article 8 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 *laying down standards for the reception of applicants for international protection (recast)* [OJ L 180, 29.6.2013, p. 96-116] (the so-called 'Reception Directive').

[10] See Article 18 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* [OJ L 180, 29.6.2013, p. 31-59] (the so-called 'Dublin III Regulation').

order to highlight the shortcomings of the approach advocated by the EU legislator, and in particular to emphasise the criticality of the rules on detention for the purpose of return.

In a nutshell, the individual to be returned may be detained—for a maximum period not exceeding eighteen months [11]—in order to prevent him/her from absconding or if he/she hinders or thwarts the smooth course of the return procedure, [12] in compliance with the principles of necessity and proportionality. [13] Although, from a strictly literal point of view, [14] it appears to be an 'open' list—that is, one that can be extended by the Member States [15]—, it is considered more correct to take the view, indirectly endorsed by the Court of Justice of the European Union (CJEU), [16] that it is a *numerus clausus*. Given the exceptional nature of the deprivation of personal liberty suffered by the alien, this conclusion is necessary. [17] Nevertheless, the risk inherent in the elusive definition of "risk of absconding" has led some scholars to believe that the Directive lacks

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[11] Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, ECLI:EU:C:2009:741, para. 37.

[12] The grounds are set out in Article 15(1)(a) and (b), Directive 2008/115/EC.

[13] In Directive 2008/115/EC, see Recital 13 (concerning "coercive measures" *lato sensu*), Recital 16 (specifically concerning 'detention'), Article 8(1) ('Member States shall take all *necessary* measures to enforce the return decision') and Article 8(4) ('Where Member States use – as a last resort – coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force'). It is worth mentioning Article 15(1) of Directive 2008/115/EC, according to which, on the one hand, detention may only be used if in the specific case other sufficient but less coercive measures cannot 'be applied effectively' and, on the other hand, the deprivation of liberty 'shall be for as short a period as possible' and shall be 'only maintained as long as removal arrangements are in progress and executed with due diligence'. Finally, it must be taken into account that '[w]here there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted' (Recital 10 of Directive 2008/115/EU). In other words, the granting of a period for voluntary departure is regarded—at least formally— as the ordinary procedure within the system of the directive (see also Art. 7(1), Directive 2008/115/EC).

[14] In the English version, Article 15(1) reads as follows: 'Member States may only keep in detention a third-country nationals [...] in particular when [...]'.

[15] G. CAMPESI, *supra* note 5, p. 104, proposes this reading, based on the wording of Article 15 of the directive.

[16] Case C-146/14 PPU, *Bashir Mohamed Ali Mahdi*, ECLI:EU:C:2014:1320, para. 61, where the Court held that '[t]he second requirement under Article 15(4) of Directive 2008/115 entails re-examining the substantive conditions set out in Article 15(1) of the directive which have formed the basis for the initial decision to detain the third-country national concerned'. Thus, there does not seem to be any room for elaborating further grounds for detention, beyond those already codified in Article 15 of the Directive.

[17] Detention 'may be decided upon only if there is a risk of absconding or the

precise guarantees that could prevent Member States from 'systematically' detaining third-country nationals. [18]

Differently, in order to impose an administrative detention measure against the applicant for international protection, the EU legislator proved to be more deferential towards the Member States, by drafting Directive 2013/33/EU which '*apparaît particulièrement ouverte au principe de la retention*'. [19] Among the grounds for detention, it is worth mentioning: (i) the need for the authorities to decide on the foreigner's right to enter the territory and (ii) grounds of 'national security or public order'. [20] Circumstances which, at first sight, seem to extend the applicability of the detention measure to almost all possible situations in which the applicant may find himself. [21] The absence of any maximum period of detention, unlike that provided for irregular migrants, has also been described as 'indefensible' [22] by the most sensitive scholars, who have stressed its inconsistency with regard to the serious infringement of the personal liberty of the foreigner.

Finally, should another Member State be responsible for taking a decision on the application for international protection, in accordance with the criteria set out in the Dublin III Regulation, [23] the applicant concerned may only be detained if his or her behaviour depicts a 'significant risk of absconding'. [24] In this case, detention may not last longer than three months, a time limit derived from the temporal segments granted to States for the completion of transfer procedures. [25]

On the basis of such a threefold system, a third-country national

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third-country national concerned avoids or hampers the preparation of return or the removal process', according to the View of Advocate General Szpunar delivered on 14th May 2014, in Case C-146/14 PPU, *Mahdi*, ECLI:EU:C:2014:1936, para. 47.

[18] M.G. MANIERI-M. LEVOY, *PICUM Position Paper on EU Return Directive,* in *PICUM (web*), 2015, p. 15, available at the following URL: *www.picum.org/Documents/Publi/2015/ReturnDirective_EN.pdf.*

[19] C. BOITEUX-PICHERAL, *L'equation libertè, securitè, justice au prisme de la retention des demandeurs d'asile*, in V. BEAUGRAND-D. MAS-M. VIEUX (Eds.), *Sa Justice. L'espace de Liberté, de Sécurité et de Justice.* Liber Amicorum *en hommage à Yves Bot*, Bruylant, 2022, p. 611.

[20] Article 8(1)(e), Directive 2013/33/EU.

[21] R. PALLADINO, *La detenzione dei migranti. Regime europeo, competenze statali, diritti umani*, Editoriale Scientifica, 2018, p. 265.

[22] S. PEERS, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law*, Oxford University Press, 2016, p. 313.

[23] See Chapter III of the Dublin III Regulation.

[24] Article 28(2), Regulation (EU) No 604/2013.

[25] See Article 28(3) in conjunction with Article 27(3), Regulation (EU) No 604/2013. If the time-limits are not met, the applicant to be transferred must be released immediately (Article 28(3), Regulation (EU) No 604/2013).

who comes into contact with the border authorities of a Member State may therefore be deprived of his/her personal liberty not only because of his/her irregular status (for example, because he/she does not have an entry permit) but also because he/she is not in that situation, for example, because the latter has expressed the intention to apply for international protection.

In other words, EU law formally discerns the positions of foreigners, between a status of "irregularity" (those to be returned) [26] and a status of "legality" (applicants for international protection). [27] Nevertheless, as we have seen, this distinction is almost irrelevant from the point of view of the *favor libertatis*, [28] since both groups of third-country nationals are subject to administrative detention [29] and the only real, significant difference lies in the procedure in which foreigners are currently involved (one for the return, the other for the international protection).

Yet, a legal paradox, which has been underlined in various occasions, can be seen in this way – if, on the one hand, the status of irregular migrant, despite all its criticisms, could *in abstracto* justify the imposition of measures (including detention) by national authorities for the purpose of return, on the other hand, it is

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[26] The Return Directive applies to 'third-country nationals staying illegally on the territory of a Member State' (Article 2(1)). The latter circumstance occurs when the person 'does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State'.

[27] See Recital 9 of Directive 2008/115/EC, according to which 'a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force'. See also, Article 7(1), Directive 2013/33/EU, according to which 'applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State'. In this regard, the CJEU has acknowledged that the asylum seeker 'has the right to remain in the territory of the Member State concerned at least until his application has been rejected at first instance, and cannot therefore be considered to be "illegally staying" within the meaning of Directive 2008/115, which relates to his removal from that territory' (Case C-534/11, *Mehmet Arslan v. Policie CR, Krajské reditelství policie Ústeckého kraje, odbor cizinecké policie*, ECLI:EU:C:2013:343, para. 48) (hereinafter *Arslan*).

[28] With reference to the foreigner to be returned, and in light of the broadness of Article 15(1) Directive 2008/115/EC, legal scholars have already warned of the dangers of a '*recours généralisé*' to the '*privation administrative de liberté*' (see K. Parrot-C. Santulli, *La «directive retour», l'Union européenne contre les étrangers*, in *Rev. crit. dr. int. priv.*, 2009(98/2), p. 226 ff.).

[29] It is noteworthy that the possibility of detaining asylum seekers is considered to be the most problematic part of Directive 2013/33/EU (see S. Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts,* Springer, 2014, p. 65).

questionable whether the *same paradigm* of deprivation of liberty can also be applied to an individual who is *regularly* staying on the territory. [30]

Although based on different axiological assumptions, the same outcome—i.e. the possibility of detaining both irregular migrants and asylum seekers—was reached by the European Court of Human Rights ('ECtHR') in the well-known *Saadi v. United Kingdom* judgment: as long as States do not expressly authorise a foreigner to enter their territory, he/she remains 'unauthorized' and therefore subject to detention measures under Article 5(1)(f) ECHR. [31] Indeed, there is no longer any distinction between irregular migrants and applicants. As the ECHR provision allows for migrants' detention in order to prevent their 'unauthorized' entry, *Saadi* provided States Parties with a *chèque en blanc* to manage migration flows through a detention-based approach that also includes applicants for international protection. [32]

However, it could be argued that, by exercising a right stemming from the 1951 Geneva Convention, [33] applicants for international protection should not be considered 'irregular' in the territory of a State where they are physically present. Conversely, they should be considered 'temporarily, conditionally authorised entrants' [34] and not,

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[30] The practice seems to legitimise the use of detention in further, and much broader, situations: the applicant (not the irregular immigrant!) can be deprived of his liberty 'when protection of national security or public order so requires' (Article 8(3)(e), Directive 2013/33/EU). Moreover, it should be noted that the CJEU has attempted to narrow down the meaning of such—very broad—concepts, following a fundamental rights-based perspective. See Case C-601/15 PPU, *J.N. v. Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2016:84.

[31] *Saadi v. the United Kingdom*, App. no. 13229/03 (ECtHR, 29th January 2008) [GC], para. 65. For an overview of the ECtHR's case-law on administrative detention, see, *inter alia*, M. PICHOU, *"Crimmigration" and Human Rights: Immigration Detention at the European Court of Human Rights*, in V. FRANSSEN-C. HARDING (Eds.), *Criminal and Quasi-criminal Enforcement Mechanisms in Europe*, Hart Publishing, 2022, p. 251–270.

[32] According to the ECtHR, the mere fact that an asylum application is pending does not *per se* preclude the detention of the applicant under Article 5(1)(f) ECHR ('with a view to deportation') since the possible rejection of such an application could ultimately lead to the issuance of a return order. In this regard, see, *Nabil and Others v. Hungary*, App. no. 62116/12 (ECtHR, 22nd September 2015), para. 38.

[33] F. RESCIGNO, *Il diritto di asilo,* Carocci, 2011, p. 74, points out that 'although no obligation to admit refugees to its territory derives from the Convention, once they are materially in one of the Member States, a series of obligations are incumbent on it', including that of 'allowing access to the procedure for the recognition of status'.

[34] The citation is of C. COSTELLO, *Immigration Detention. The Grounds Beneath Our Feet*, in *Current Legal Problems*, 2015(68/1), p. 172 f., who also underlines the relevance of the principle of *non-refoulement* in arguing for the genuinely legal

in principle, subject to asylum detention.[35] Nevertheless, their subjection to an administrative detention regime, pending their application, has never been questioned even at the international level.[36]

As this brief *excursus* on administrative detention in Europe has shown, the exercise of 'State prerogatives of immigration control'[37] is a crucial factor which guides Member States' migration policies, which accordingly justifies the implementation of deprivation of liberty as a functional tool for the 'control of freedom of movement'.[38] Thus, irregular migrants and applicants for international protection are united by their 'detainability',[39] a concept developed by scholars to define the condition of the latter—but which *mutatis mutandis* also applies to the former—who, upon arriving on European soil, are subject *in concreto* to deprivation of liberty because of their status.

2. 'Changing everything to change nothing': reforming detention for the purpose of return

On 28 June 2018, a full ten years after the adoption of the Return Directive, the European Council acknowledged that 'more efforts are urgently needed to ensure swift returns and prevent the development of new sea or land routes',[40] and the 'necessity to significantly step

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presence of applicants for international protection on the territory of a State. See Case C-534/11, *Arslan*, *supra* note 27, Opinion of AG Wathelet, 31 January 2013, ECLI:EU:C:2013:52, paras. 64–65.

[35] The issue of "detainability" of asylum seekers cannot be analysed exhaustively here. Nevertheless, account must be taken of the protective position adopted by the Court of Justice, which, relying on the acts of secondary law referred to above (see *supra* notes 3, 4 and 5), has ruled that an asylum seeker 'has the right to remain in the territory of the Member State concerned at least until his application has been rejected at first instance, and cannot therefore be considered to be "illegally staying" within the meaning of Directive 2008/115, which relates to his removal from that territory' (Case C-534/11, *Arslan*, *supra* note 27, para. 48).

[36] See the well-known decision of the United Nations Human Rights Committee (HRC) in *A. v. Australia*, CCPR/C/59/D/560/1993, 3 April 1997, para. 9.2, which it is worth quoting at some length: 'there is no basis for the author's claim that it is per se arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary'.

[37] R. PALLADINO, *supra* note 21, p. 14.

[38] A. MCMAHON, The *Role of the State in Migration Control The Legitimacy Gap and Moves towards a Regional Model*, Brill-Nijhoff, 2016, p. 70.

[39] C. COSTELLO-M. MOUZOURAKIS, *EU Law and the Detainability of Asylum-Seekers*, in *Refugee Survey Quarterly*, 2006(35/1), p. 47–73, esp. p. 57 ff.

[40] European Council meeting of 28th June 2018 – Conclusions, EUCO 9/18, para. 4.

up the effective return of irregular migrants' [41] in order to 'further stem illegal migration on all existing and emerging routes', [42] welcoming 'the intention of the Commission to make legislative proposals for a more effective and coherent European return policy'. [43]

These statements followed the so-called European Agenda on Migration, a major policy document promoted by Jean-Claude Juncker as President of the European Commission in 2015, which *inter alia* recognised that the effective return of third-country nationals who have no right to stay in the EU is a key element of the European strategy on irregular migration. [44]

A few months later, in September 2018, the Commission drafted a proposal to recast the Return Directive, which had become necessary due to the increased 'overall migratory pressure' on Member States. [45] The Commission's proposal, which is still under discussion under the ordinary legislative procedure, [46] aims to change the legal framework of the Return Directive in three crucial aspects, one of which concerns the even wider use—and for this reason strongly

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[41] European Council meeting of 28th June 2018, *supra* note 40, para. 10.

[42] European Council meeting of 28th June 2018, *supra* note 40, para. 2.

[43] European Council meeting of 28th June 2018, *supra* note 40, para. 10. The Council also emphasised the need for 'flexible instruments, allowing for fast disbursement, to combat illegal migration' (para. 9).

[44] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,* European Agenda on Migration, 13th May 2015, COM(2015) 240 final. In this document, the Commission noted that '[o]ne of the incentives for irregular migrants is the knowledge that the EU's return system [...] works imperfectly. Smuggling networks often play on the fact that relatively few return decisions are enforced – only 39.2% of return decisions issued in 2013 were effectively enforced', urging States to 'apply the Return Directive', with the promise—later fulfilled—that 'a "Return Handbook" will support Member States with common guidelines, best practice and recommendation' (p. 9–10). The so-called 'Return Handbook' was then issued in 2017, with Commission Recommendation (EU) 2017/2338 of 16 November 2017 *establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks*, C/2017/6505 [OJ L 339, 19th December 2017, p. 83–159].

[45] Proposal for a *Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018*, COM/2018/634 final (hereinafter the *Proposal*), p. 1.

[46] The progress of parliamentary work—no. 2018/0329(COD)—is available on the official website of the European Parliament, at the following URL: *https://bit.ly/3Rh6Pea*. For a general overview of all actors involved in the ordinary legislative procedure, see also the Eur-Lex website, available at the following URL: *https://eur-lex.europa.eu/legal-content/IT/HIS/?uri=CELEX:52018PC0634*.

criticised by scholars [47]—of custodial measures against those migrants to be returned.

Firstly, the Commission proposes to define more precisely the notion of 'risk of absconding', [48] providing a (not exhaustive!) list of typical situations in which such a risk could be presumed to exist (e.g. where the alien lacks identity documents, or adequate financial resources, or has had a previous criminal conviction). [49] These circumstances must be transposed into national law, without prejudice to the possibility for the Member States to add others, and bearing in mind that the assessment of the risk of absconding must in any case be carried out 'on the basis of an overall assessment of the specific circumstances of the individual case, taking into account the objective criteria'. [50] The European Economic and Social Committee criticised the structure of the Proposal *in parte qua*, considering the list 'too broad' and strongly condemning the possibility that "risk of absconding" could be inferred from lack of financial resources: '[i]f we wish to avoid the possibility of ALL irregular migrants being accused of a risk of absconding [...] the risk of absconding cannot be defined using this kind of parameter'. [51] Another disappointing aspect of the *Proposal* is the specification that the "risk of absconding" will be *presumed* where four specific circumstances are present in the material case, [52] and—through an

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[47] I. MAJCHER-T. STRIK, *Legislating without Evidence: The Recast of the EU Return Directive*, in *Eur. J. Migr. Law*, 2021(23/2), p. 120 ff., esp. p. 126.

[48] In Article 3(7) of the *Proposal,* it is defined as 'existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond'.

[49] See Article 6(1) of the *Proposal*. The fact that the list is non-exhaustive can be deduced from the wording of the text: '[t]he objective criteria [from which the existence of the "risk of absconding" can be deduced] shall include at least the following criteria [...]'.

[50] See Article 6(2) of the *Proposal*.

[51] Opinion of the European Economic and Social Committee on "Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast). A contribution from the European Commission to the Leaders' meeting in Salzburg on 19th-20th September 2018", EESC 2018/04780, [OJ C 159, 10th May 2019, p. 53–59] (hereinafter the *Opinion*), para. 5.2.1(c).

[52] This is the case where the third-country national concerned has used false documents or has destroyed his/her own documents or has refused to provide fingerprints (Article 6(1)(m) of the *Proposal*), or where he/she has re-entered the national territory in breach of a previous entry ban (Article 6(1)(p) of the *Proposal*), or where he/she has violently or fraudulently opposed a return decision (Article 6(1)(n) of the *Proposal*), or, finally, if he/she has violated the measures taken by the national authorities to mitigate the risk of absconding during the period of voluntary departure (Article 6(1)(o) of the *Proposal*).

inappropriate reversal of the burden of proof—it will be up to the migrant to rebut this presumption.[53] This is a striking departure from the general principle of the Return Directive which, as has been pointed out, provides for a rigorous examination of each individual case, according to its specific circumstances, and rejects any possibility of relying on legal (albeit rebuttable) presumptions. The assessment *in concreto* of the 'risk of absconding' is of paramount importance in the context of return procedures since its proven (or presumed) existence not only prevents the migrant from taking advantage of the period of voluntary departure to leave the territory in which he/she is located, but also allows the national authority to detain the returnee – here is the *punctum dolens*. Moreover, in the event of one of the four "relative presumptions" mentioned above, the non-citizen is detained *until proven otherwise*. This is a total distortion not only of the general principles enshrined in the Directive itself—i.e. the case-by-case approach[54]—but also of the idea that deprivation of liberty must always be the exception (and that, conversely, the *conditio libertatis* must be the rule).[55]

The second questionable aspect of the *Proposal* lies in an *ex novo* elaboration aimed at introducing the obligation to cooperate on the part of the foreigner into the general system of the Directive.[56] In order to understand the burdensome nature of the duties imposed on the migrant, it is worth quoting in full the content of the (again, non-exhaustive) list set out in Article 7(1) of the *Proposal*: '(a) the duty to provide all the elements that are necessary for establishing or

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[53] See ECRE (EUROPEAN COUNCIL ON REFUGEES AND EXILES), *Comments on the Commission Proposal for a Recast Return Directive*, November 2018, p. 7 ff. (hereinafter *ECRE Comments*). The ECRE suggests that not only the four "relative presumptions" should be completely deleted from the text of the *Proposal,* but also the remaining criteria from which the "risk of absconding" should be inferred. Notably, Article 6 of the *Proposal* is critically qualified as a 'catch-all provision'.

[54] See Recital 6 of Directive 2008/115/EC, not amended by the *Proposal*.

[55] It should be recalled, in fact, that both Article 5 ECHR and Article 6 of the Charter—read in conjunction with Article 52(3) of the Charter—share this approach. Interestingly, the ECtHR's case-law specified that '*l'article 5 de la Convention consacre un droit fondamental, la protection de l'individu contre les atteintes arbitraires de l'Etat à sa liberté*' (*Creangă v. Romania*, App. no. 29226/03 (ECtHR, 23rd February 2012) [GC], para. 84). The *status libertatis*—which constitutes the natural situation of every human being—can only be affected within those '*exceptions à la règle générale énoncée à l'article 5 § 1, selon laquelle chacun a droit à la liberté*' (*I.S. v. Switzerland*, App. no. 60202/15 (ECtHR, 6th October 2020), para. 42 and case law cited therein).

[56] Within the structure of the *Proposal,* this provision would be placed in Article 7. The former Article bearing the same number—and concerning voluntary departure—would thus become the "new" Article 9.

verifying identity; (b) the duty to provide information on the third countries transited; (c) the duty to remain present and available throughout the procedures; (d) the duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document'. On the other hand, national authorities will merely be obliged to inform the returnee of the consequences of non-cooperation (*inter alia*, being subject to detention for the purpose of return).[57] Notably, the concept of "cooperation" typically involves two subjects at the same level. Here, *a contrario*, the feeling is that there is a concrete disproportion between what is required of the migrant and what is required of the authority.

It is also worth noting that national authorities and migrants are legal actors who *in rerum natura* already have very different and unbalanced positions *ab origine*.[58] Moreover, at first sight, the cooperation required of the migrant seems to be a blatant breach of the 'fundamental right of not giving evidence against oneself'.[59] Finally, the migrant to be returned is deprived of any legal remedy to challenge the declaration of non-cooperation,[60] which would, however, have concrete consequences against him/her.

Indeed, among the grounds for concluding that the third-country national to be returned poses a "risk of absconding" is explicitly included that of 'not fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures'.[61]

Thus, the non-cooperative behaviour of the migrant to be returned is considered as a ground for determining the existence of the "risk of absconding" in the material case. This is tantamount to making "non-cooperation" a ground for taking detention measures against the foreigner.

Furthermore, the third innovative point of the *Proposal* concerns specifically detention for the purpose of return. In addition to the existing criteria ('risk of absconding' and hindering conduct of the migrant) the Proposal would add a further circumstance permitting administrative detention – a foreigner who 'poses a risk to public

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[57] Article 7(3) of the *Proposal*.

[58] This is the opinion of I. MAJCHER-T. STRIK, *supra* note 47, p. 116.

[59] In this regard, agreeably, para. 5.4. of the *Opinion*, where the Committee expresses its position: 'The obligations set out in this article can be boiled down to just one: to cooperate and collaborate during a procedure that is directed against oneself'. Analogously, see also *ECRE Comments*, p. 9 and, with specific reference to asylum seekers whose applications were rejected in the first instance, I. MAJCHER-T. STRIK, *supra* note 47, p. 116 f.

[60] *ECRE Comments,* p. 9.

[61] Article 6(1)(j) of the *Proposal*.

policy, public security or national security' can also be deprived of his/her liberty.[62] However, this amendment is not in keeping with the CJEU's settled case law. In *Kadzoev*, the Court had peremptorily ruled out the possibility that Article 15 of the Directive could authorise detention measures based on grounds of public order and national security.[63] But there is more: according to the first commentators of the *Proposal*, the inclusion of such additional grounds would contribute to the criminalisation of the latter,[64] since such circumstances would pursue objectives typical of criminal law (and not at all of administrative law).[65] On this point, the position of the Economic and Social Committee should also be shared, according to which the use of detention as a 'disguised form of imprisonment or punishment for irregular immigration must be ruled out'.[66] In this regard, the European Union Agency for Fundamental Rights has highlighted the need that detention based on such grounds 'should be addressed by using already available criminal law, criminal administrative law and legislation covering the ending of legal stay for public order reasons'.[67] Moreover, the difficulty in defining the scope of such circumstances could extend the power of national authorities to use such coercive measures in the context of return procedures, but outside the strong safeguards provided in criminal proceedings.

Two further amendments to the text of the Return Directive are worth mentioning here. With the first, the Commission proposes to make the list of requirements for detention for return purposes non-exhaustive[68] – this choice clashes with the degree of exceptionality that should surround the grounds in which the authority can deprive the individual of his/her liberty. The second, which equally problematic, sets a maximum detention period of at least three

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[62] See Article 18(1) of the *Proposal*. It is noteworthy that the *Proposal* leaves unamended the regulatory provisions concerning compliance with the principles of necessity and proportionality that must underlie the imposition of custodial measures.

[63] Case C-357/09, *Kadzoev*, *supra* note 11, paras. 69–71.

[64] *ECRE Comments,* p. 20.

[65] See I. MAJCHER-T. STRIK, *supra* note 47, p. 120 – the Authors mention *inter alia* 'deterrence, prevention and incapacitation'.

[66] *Opinion*, para. 5.10.

[67] FRA (FUNDAMENTAL RIGHTS AGENCY OF THE EUROPEAN UNION), *The recast Return Directive and its fundamental rights implications, Opinion of the European Union Agency for Fundamental Rights*, in *www.fra.europa.eu*, 10th January 2019, p. 53, (hereinafter *FRA Opinion*).

[68] In Article 18(1) of the *Proposal* the adverb 'only' is removed and the expression 'in particular when' is retained. This operation 'provides further flexibility for States as far as the detention grounds are concerned', according to *ECRE Comments*, p. 20.

months in each Member State.[69] This provision could obviously lead to the creation of 'three-months automatic detention' mechanisms in the EU, thus breaching the principles of necessity and proportionality that should, at least formally, underpin the general structure of the Directive.[70] Indeed, it is one thing to set a maximum period of detention—as is still the case—; it is quite another to set a minimum-maximum, mandatory period of detention which, as such, escapes any scrutiny of appropriateness.[71] This is all the more critical in view of the fact, corroborated by official statistics, that return, if possible, usually takes place at the very early stage of detention[72]—typically between thirty and sixty days[73] or, according to others, at least within three months[74]—, and the extension of the detention period has no concrete impact on the success of the procedure.[75]

3. Criminalisation without safeguards and future developments

The picture outlined so far clearly shows that the will of the EU legislator is to go on implementing administrative detention measures as the main legal instrument for the management of irregular immigration at supranational level. A measure which, as mentioned above, is ordered in the first instance by the administrative authority, and the legality of which can only be challenged *ex post* by the judicial authority.[76]

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[69] See Article 18(5) of the *Proposal*: 'Each Member State shall set a maximum period of detention of not less than three months and not more than six months'.

[70] I. MAJCHER-T. STRIK, *supra* note 47, p. 121.

[71] Of course, the third-country national who can be materially returned within this three-month period is likely to be removed from the territory as soon as possible. Therefore, the minimum-maximum three-month period represents a 'possibility on the books', according to S. PEERS, *Lock 'em up: the proposal to amend the EU's Returns Directive*, in *EU Law Analysis (web)*, 12th September 2018.

This does not alter the fact that the national authorities might be *de facto* obliged to deprive the alien of his/her liberty for at least three months, even if they themselves may consider a shorter period to be necessary in the specific case.

[72] I. MAJCHER-T. STRIK, *supra* note 47, p. 121.

[73] The figure is reported in *ECRE Comments,* p. 21.

[74] *Opinion*, para. 5.9.

[75] *FRA Opinion*, p. 53 f.

[76] Moreover, the subsequent filter of the judicial authority does not always work as an effective and timely control of the administrative act that originally ordered the detention.

The Italian practice may be enlightening in this respect. The legislature has in fact entrusted this extremely delicate task to the Justice of the Peace (*Giudice di pace*), a lay magistrate, thus undermining the 'substantial meaning of judicial

However, such a normative architecture raises two very specific problems.

Firstly, the framework advocated by the EU legislator seems to be excessively marked by the use of detention as a means to ensure the effectiveness of returns, a circumstance which—as several scholars have observed [77]—is not reflected in the available data and, more generally, in legal practice. [78] In other words, the use of detention for return purposes is not synonymous with the efficiency of return procedures.

Thus, the rationale for such widespread use of administrative deprivation of liberty across Europe should be sought elsewhere. Perhaps it should be stated *expressis verbis* that detention is preferred to other methods of implementing return procedures—such as the use of electronic bracelets, the obligation to stay, the obligation to report regularly to the authorities—because it ensures total control over the foreigner's body (a control that the authorities are typically allowed to exercise in criminal proceedings, either as a punishment or as a precautionary measure), without having to provide the migrant with traditional criminal law guarantees. [79] The outcome of such an approach is to criminalise the figure of the foreigners [80] and to jeopardise their fundamental right to *habeas corpus*. [81]

The reasoning could then be expanded as follows. It cannot but be

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review' (A. CAPUTO-L. PEPINO, *Giudice di pace e* habeas corpus *dopo le modifiche al testo unico sull'immigrazione*, in *Dir. imm. citt.*, 2004(3), p. 23 ff.). See also E. VALENTINI, *Detenzione amministrativa dello straniero e diritti fondamentali*, Giappichelli, 2018, p. 114–123.

[77] C. MAZZA, *La prigione degli stranieri. I Centri di Identificazione e di Espulsione,* Ediesse, 2013, p. 130: 'there is no direct link between detention (which is a restrictive measure) and the possibility to carry out expulsions (which depends on specific procedures and grounds). But what then is the real function of the Centres?'.

[78] Accordingly, I. MAJCHER-T. STRIK, *supra* note 47, considered that the Commission was legislating without an adequate scientific basis ('legislating without evidence'). See *supra* note 7.

[79] See, *amplius*, I. MAJCHER, *The Effectiveness of the EU Return Policy at All Costs: The Punitive Use of Administrative Pre-removal Detention*, in N. KOGOVŠEK ŠALAMON (Eds.), *Causes and Consequences of Migrant Criminalization*, Springer, 2020, p. 120 ff., where the Author *inter alia* notes that 'there is a dissonance between the administrative form of pre-removal detention and its punitive use in practice'.

[80] For the profiles specifically addressed here, see, A. CAVALIERE, *Le vite degli stranieri e il diritto punitivo*, in *Sist. pen. (web)*, 2022(4), *passim*, spec. p. 66 ff.

[81] See M. DANIELE, *Il diritto alla libertà personale e le manipolazioni dell'*habeas corpus, in D. NEGRI-L. ZILLETTI (Eds.), *Nei limiti della Costituzione. Il codice repubblicano e il processo penale contemporaneo*, Wolters Kluwer-Cedam, 2019, p. 225 ff.

noted that the adoption of administrative measures of deprivation of personal liberty against foreigners—despite the formal qualification "attached" by the EU legislator (and, consequently, by national legislators)—seems to obey 'the logic and rigours of the penal system, being loaded with para-punitive connotations' [82] or, as has been observed, seems to assume 'a meaning in many ways corresponding to that of personal precautionary measures'. [83] These considerations are not counterbalanced by a regulatory architecture of solid guarantees that allows, on the one hand, to consider migrants' detention as a measure of *extrema ratio* [84] and, on the other hand, to be satisfied with the level of safeguards guaranteed to the third-country national concerned, which are not even remotely comparable to those provided in criminal proceedings. [85]

[82] M. Pierdonati, *La restrizione della libertà personale nel "carcere amministrativo" dei C.I.E.: tradimento e riaffermazione del principio di legalità*, in R. Del Coco-E. Pistoia (Eds.), *Stranieri e giustizia penale. Problemi di perseguibilità e di garanzie nella normativa nazionale ed europea,* Cacucci, 2014, p. 233

[83] E. Marzaduri, *Un iter giudiziario più snello e veloce che risponda alle insofferenze della collettività*, in *Guida dir.*, 2009(33), p. 21 f.

[84] Indeed, it is one thing to argue that detention must be ordered in accordance with the principles of necessity and proportionality. It is quite another to lay down general requirements for the imposition of the detention measure thereby reducing the above guarantees to mere declarations of principle.

[85] Also I. Majcher, *supra* note 79, p. 120 ff.

FROM 'DETENTION' TO THE 'HOLDING' OF FOREIGNERS: A NUANCED *NOMEN IURIS* TO CIRCUMVENT THE *HABEAS CORPUS* GUARANTEES

Lina Caraceni

Table of contents: 1. Meanings and ambiguities in the lexicon of migration. – 2. Article 14 CIA: 'detention' degrades to 'holding'. Can we still speak of a right to *habeas corpus* in favour of the foreigner? – 3. A pseudo-judicial protection *vis-à-vis* migrants held for immigration purposes.

1. Meanings and ambiguities in the migration lexicon

There is a 'semantics of migration' to which the criminal procedure scholar must pay close attention when dealing with a 'borderline' issue such as that of the personal freedom of the foreigner; for there are words that profoundly change their meaning when brought together with the latter, starting with the very concept of freedom, which from identifying the primary value on which the enjoyment of the fundamental rights of the person depends, degrades to freedom of movement or residence for the foreigner; here, instead, other words are employed as substitutes: "restriction", "holding", "permanence" as pseudo-synonyms for detention.

The same word "migrant", apparently neutral, has gradually taken on well-defined meanings and a negative connotation. In general, the verb migrate describes the condition of someone (human or animal) who leaves his or her place of origin to settle, even if only temporarily, elsewhere, in search of new territories that may offer better living conditions. And it is a *status* that has always characterised living beings.[1] However, in recent years, the migration phenomenon has lost its organic dimension and has been regulated

[1] S. Allievi, *Immigrazione. Cambiare tutto*, Laterza, 2018, p. 3. See also V. Calzolaio-T. Pievani, *Libertà di migrare. Perché ci spostiamo da sempre ed è bene così*, Einaudi, 2016, *passim*.

and managed according to an emergency, occasional and contingent vision, so dominant that it has even changed the meaning of the words that define it. For example: from a technical-legal point of view, in the European context, after the fall of the internal borders and the attraction of the immigration issue (i.e., the external border control) in the orbit of EU legislation, [2] the term migrant (often replaced by the term immigrant, which we will use from here on for the sake of simplicity) identifies a foreigner who is a citizen of a country outside the EU. And in this sense the terms immigrant, foreigner and non-EU citizen are semantically and legally equivalent.

Not so if one looks at their use in everyday language, which tends to reflect the attitude of acceptance or rejection that a given community adopts towards the foreigner. [3] The concept of "non-EU citizen is equated in common parlance with "immigrant", but it is something different from "foreigner".

At the risk of oversimplifying, a foreigner is usually someone who, although not a member of the community established in a given territory, is willing to be received as a citizen, while an immigrant is someone whose presence is tolerated for a certain period of time but who is not, in principle, welcomed as a citizen. The former is generally used to refer to a person from a rich, developed country who can contribute to the community in terms of welfare, prestige, economic, social and cultural advancement, while the latter refers to foreigners who have come from poor countries, who are in need, looking for help, protection or work. [4] The same happens with the term "non-EU citizen": semantically and legally, it identifies a citizen who does not belong to one of the EU countries, but in the common lexicon the term is associated with that of an immigrant who comes from one of the poor countries. [5]

But there is more: the legal regulation of migration, the regulation of the external control of Europe's borders through the most recent

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[2] C. FAVILLI, *La politica dell'Unione in materia d'immigrazione e asilo. Carenze strutturali e antagonismo tra gli Stati membri*, in *Quad. cost*, 2018(2), p. 361 ff.

[3] The term 'foreigner' is etymologically derived from *extraneus*, as recalled by A. PUGIOTTO, *Prefazione*, in R. BIN-G. BRUNELLI-A. PUGIOTTO-P. VERONESI (Eds.), *Stranieri tra diritti. Trattenimento, accompagnamento coattivo, riserva di giurisdizione*, Atti del seminario, Ferrara, 26th January 2001, Giappichelli, 2001, p. XI.

[4] M. AMBROSINI, *Sociologia delle migrazioni*, 3rd ed., Il Mulino, 2020, p. 18, speaks of 'double otherness' associated with the term immigrant.

[5] To be clear, a famous Cameroonian footballer, an Argentinian model, a Chinese or Korean businessman, even if they come from a non-EU country, will never be identified as "immigrants", as "non-EU nationals"; on the other hand, Syrian or Afghan citizens seeking international protection because they are fleeing a country at war, or a Senegalese street vendor in search of a better life, will be.

legislation, has also contributed in no small measure to creating confusion, mistrust, changing semantics, reinforcing this attitude of closure, the widespread feeling of not accepting the foreigner. On the basis of identity, cultural or religious prejudices, the exodus of thousands of people to Europe has come to be associated with certain undesirable aspects that can be associated with the phenomenon, but which are rather marginal: just think of the repeated generalisations about migrants as vehicles for the spread of Islamic fundamentalism, jihadist terrorism, as the cause of the increase in many forms of crime, or as carriers of contagious diseases. In fact, in times of uncertainty, fear and social fragility, this mistrust has been 'fuelled' and often used as a vehicle for political and electoral consensus. [6]

And it is the criminal law that has provided the tools to respond to the security needs of the community, going so far as to criminalise the *status* of immigrants. The term *crimmigration* (crime+migration) [7], used by legal scholars to identify the criminalisation of the condition of the unwanted *extraneus* that one wants to remove, [8] expresses the concept well. As Massimo Pavarini has pointed out on several occasions, there has been an excessive recourse to the criminal law even for the purpose of social control: on the wave of cyclical emergencies—and migration has been considered as such for several decades now—today's criminology has set itself the goal of 'reducing the social risk stemming from crime by putting those perceived as dangerous in the condition of not causing harm'. [9] Following the logic of "zero tolerance", the punitive populism currently in vogue aims at repressing behaviours that are not particularly serious from an objective point of view, but which are the expression of forms of deviance, or rather of social marginality, that are perceived by the public opinion as extremely disturbing and capable of causing 'moral panic'. [10] The poor annoy, the marginalised hinder, the different frighten, and so the legal conditions are created for them to

[6] For an in-depth study of these profiles, see A. Sbraccia, *Pericolosi e funzionali, gli stranieri nel pensiero socio-criminologico*, in F. Curi-F. Martelloni-A. Sbraccia-E. Valentini (Eds.), *I migranti sui sentieri del diritto. Profili socio-criminologici, giuslavoristici, penali e processualpenalistici*, 2nd ed., Giappichelli, 2021, p. 27 ff.

[7] The expression is first due to J.P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, in *American University Law Review*, 2006, p. 367 ff.

[8] A. Spena, *La* crimmigration *e l'espressione dello straniero-massa*, in *Materiali per una storia della cultura giuridica*, 2017(2), p. 495 ff.

[9] M. Pavarini, *Dalla pena perduta alla pena ritrovata? Riflessioni su una "recherche"*, in *Rass. penit. e crim*., 2001(1-3), p. 119.

[10] M.L. Tasso, *Il diritto tollerante,* in *Materiali per una storia della cultura giuridica*, 2004(2), p. 436 ff.

"disappear" from reality, to be hidden from public view. The latest report by the National Guarantor for the Rights of Persons Deprived of their Liberty is a merciless description of the living conditions in centres for the detention of irregular foreigners [11] (not criminals, please note, but simply people who do not have the right to entry or stay or who have been ordered to leave the country). [12] The 'the administrative detention of foreigners takes on the characteristics of a mechanism of marginality, of social exclusion, of temporary removal from the gaze of the community'. [13]

However, in this hypertrophic drift, Luigi Ferrajoli argues that today's punitive populism, which governs the phenomenon of migration, has made a qualitative leap: whereas the old populism used fear of street and subsistence crime, for emphasised but still illegal facts to generate fear and obtain consensus for useless but legitimate measures, the new one goes in exactly the opposite direction, turning the legal into the illegal. Using incitement to hatred and defamation of actions that are not only lawful, but in many cases virtuous (just think of the rescues of human lives at sea by NGOs), the current securitarian demagogy is fuelling fears and racism in order to gain consensus for illegal measures, 'such as the closure of ports, the deliberate failure of rescue people, the violation of human rights, and the transformation of legal immigrants into irregular immigrants'. [14]

It is interesting to pause for a moment on this last point to consider the recent approach adopted by Italian legislation on the control of migratory flows, an issue closely linked to rescue at sea. It is the so-called 'hotspot method'. Legislative Decree No. 13 of 2017 (the so-called Minniti Decree) introduced Article 10b CIA (Consolidated Immigration Act, Legislative Decree No. 286 of 25th July 1998), which provides for the creation of so-called 'crisis points' (*punti di crisi*) at sea border posts for the holding of migrants in need of rescue and assistance. [15]

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[11] They are labelled as Centers for the Permanence and the Removal of Foreigners, referred to in Law Decree 17th February 2017, No. 13. See *infra* § 2.

[12] On the ambiguities of the concept of 'irregular immigrant', see M. AMBROSINI, *supra* note 4, p. 227 ff.

[13] *Rapporto sulle visite effettuate nei centri di permanenza per i rimpatri nel periodo 2019-2020*, in *www.garantenazionaleprivatiliberta.it/gnpl/it/dettaglio_contenuto.page?contentId=CNG10674*, p. 3.

[14] L. FERRAJOLI, *Diritti umani, diritto disumano*, in *Quest. giust.*, 25th October 2021.

[15] On the origins and multiform declination of hotspots, see M. BENVENUTI, *Gli* hotspots *come chimera. Una prima fenomenologia dei punti di crisi alla luce del diritto costituzionale*, in *Dir. imm. citt.*, 2018(2), p. 4 ff.

It is clear that this is a rule which, by degrading a right (the right to rescue and assistance under the law of the sea), [16] turns it into a pretext for "holding" migrants in that area, thus jeopardising another fundamental right (personal liberty) for reasons other than those which normally allow its restriction, with the sole aim of preventing the migrants' entry into the territory of the State. And perhaps these are people who would be entitled to international protection because their safety, their life, their dignity would be at risk if they were forced to return to their country of origin. And all this is happening in a "crisis area" – the hotspot.

Here, the words are terribly emblematic of what is happening: they describe a 'non-place'—to use Marc Augé's categories [17]—a space that is neither physical nor real; they define the dematerialisation of the structure where to hold (one does not know what kind of facilities and with what characteristics), for what is strictly necessary (even the time is indefinite), those who arrive from the sea in desperate conditions and must be rescued and assisted and sent back as soon as possible. [18] The dematerialisation of the place makes it possible to alienate it, to hide it from view, from control, to place it outside the system and thus to make it *legibus solutus*. [19] There are no provisions on the conditions of stay of migrants, the modalities of reception and rescue, or the guarantees to protect the freedom of those who are "withheld" in these 'non-places'. [20]

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[16] It is a right recognised and protected by a plurality of international texts; a few of them are: the United Nations Convention on the Law of the Sea (Montego Bay Convention of 10th December 1982 – UNCLOS), the treaty defining the rights and responsibilities of States in the use of the seas and oceans, the London Convention of 1st November 1974 (for the Safety of Life at Sea, also known as SOLAS) and the Hamburg Convention of 27th April 1979 (on rescue and salvage at sea, also identified by the acronym SAR).

[17] M. Augé, *Non-lieux. Introduction à une anthropologie de la surmodernité*, La librairie du XXIe siècle, Seuil, 1992.

[18] On this point, E. Valentini, *Il proteiforme apparato coercitivo allestito per lo straniero*, in F. Curi-F. Martelloni-A. Sbraccia-E. Valentini (Eds.), *supra* note 6, p. 270 ff.

[19] A. Mangiaracina, *Hotspots e diritti: un binomio possibile?*, in *Dir. pen. cont. (web)*, 9 December 2016, p. 7 ff.

[20] The situation of migrants "forced" into hotspots is well described in the words of the ECtHR, *Khlaifia and Others v. Italy* [GC], App. no. 16483/12 (ECtHR, 15th December 2016), which, in condemning our country for violating Article 5 ECHR, defined the holding on arrival as an *extra ordinem* detention, because it lacks a legal basis and the possibility of an effective appeal against the legality of the decision. For a comment, F. Cancellaro, *Migranti, Italia condannata dalla CEDU per trattenimenti illegali*, in *Quest. giust.*, 11 January 2017. See also F. Cassibba, *Il "trattenimento" del migrante irregolare nei "punti di crisi"* ex *art. 10*-ter *d.lgs. n. 286 del 1986 nel prisma della Convenzione europea*, in *Quest. giust.*, 24th July

The stark reality of the 'crisis points' is emblematic of the short-circuit we are witnessing in the policies of regulation and control of migratory flows: the questioning of the rule of law, of the founding values of Western democracies, and the creation of a state of exception, justified by the existence of a situation of emergency such as to legitimise extra-ordinary intervention. The notion of a state of exception is in the sense given by Carl Schmitt: it occurs when power breaks the rules in order to impose a new order.[21] And this is where the state of exception differs from the state of emergency, which is only a temporary suspension of those rules. In the field of migration today, in the name of the emergency—real, supposed or induced, it makes no difference—laws are being enacted to create a *lex specialis*, to violate international treaties, to undermine the rules we have pledged to respect and the fundamental rights on which the entire system of democratic values is based, first and foremost the right to personal liberty.

The concept of "personal liberty" associated with the immigrant condition changes its meaning, changes its denotative force as the supreme good from which all the other rights enjoyed by a person emanate, those original qualities that constitute the 'solid foundation of a model of social and political coexistence forged to the measure of man and his imperishable values'.[22] In the management of migrations, it is lawful to interfere with the sphere of personal liberty of non-EU citizens for reasons other than those that allow them to interfere with a legal interest described as inviolable by Article 13 of the Italian Constitution (usually the exercise of penal power). In order for the immigrant's personal liberty to be infringed, it is not necessary for him/her to have breached any criminal law provision, but it is enough for him/her not to have the proper documents allowing him/her to enter and/or stay in that State. Personal liberty is at the disposal of the authorities even when they want to make the "irregular" person leave Italian territory; this is a really strong paradigm shift in the relationship between the

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2017, which well portrays the absence of guarantees for the 'disguised detention' of migrants in crisis points. According to L. MASERA, *I centri di detenzione amministrativa cambiano nome ed aumentano di numero e gli* hotspot *rimangono privi di base legale: le novità sconfortanti del Decreto Minniti*, in *Dir. pen. cont. (web)*, 2017(3), p. 282, the disturbing consequence of the lack of guarantees for the detention in crisis points is that 'the personal freedom of the foreigner, in the first phases after the landing [remains] entrusted, tomorrow as yesterday, to the free discretion of the police'.

[21] C. SCHMITT, *Teologia politica*, in C. SCHMITT (Ed.), *Le categorie del politico,* Il Mulino, 1972, p. 34 ff.

[22] A. BALDASSARRE, *Diritti della persona e valori costituzionali*, Giappichelli, 1997, p. 87.

individual and power, because it not only extends the rigid exceptions that are constitutionally inviolable, but also condemns to oblivion the word "detention" when one wants to evoke the instruments with which the system "invades" the migrant's personal liberty. [23]

From the vocabulary of the Italian legislator (and even from the language of the living law) the word "detention" disappears, replaced by the more neutral and less impactful lemma, "holding'" a hypocritical term that evokes milder constraints (almost as if the immigrant's liberty were degraded to mere freedom of movement), but which conceals a real detention, so much so that legal scholars have qualified it as 'administrative detention', [24] a compression of personal freedom in the most invasive form not justified by the exercise of punitive power, but by the need to ensure a marked physical control over the irregular immigrant, with a view to his removal. This is why the legal instruments used are not those of criminal law and procedure, but those of administrative law [25], which are normally used by the public security authorities, not the judiciary.

2. Article 14 CIA: 'detention' degrades into 'holding'. Can we still speak of a right to habeas corpus *in favour of the foreigner?*

For a criminal procedure scholar, the study of these forms of coercion becomes a challenge (admittedly lost at the outset) to bring within the parameters of what is legally permissible a discipline that stubbornly eludes the principles and rules established to guarantee the right to personal liberty in the face of an alleged State interference. And there is no doubt that the personal liberty of foreigners is also protected by the Italian Constitution, since its Article 2 obliges the whole legal framework to recognise and guarantee the subjectivity and legal capacity of every person, while Article 3 proclaims the inviolability of fundamental rights (personal liberty *in primis*), through which human dignity is expressed and defended at the same time; these are rights, therefore, that are independent of the recognition of the

[23] The alien, as a disruptive factor, is able to bring out the ambiguities and anxieties that are usually latent within traditional legal categories, all the more so when it comes to sensitive categories such as the right to personal liberty. For a reflection on this point, see M.C. Locchi, *I diritti degli stranieri,* Carocci, 2011, p. 9.

[24] See for all, E. Valentini, *Detenzione amministrativa dello straniero e diritti fondamentali*, Giappichelli, 2018.

[25] See E. Valentini, *supra* note 6, p. 199 ff.

status civitatis.[26] And if this is the case, the guarantees that accompany personal freedom must also be acknowledged: *habeas corpus* (Article 13 Italian Constitution), the right to defence (Article 24 Italian Constitution) and, more generally, judicial protection (Articles 111 and 113 Italian Constitution), values that are not limited to the *cives*.[27]

What remains to be assessed is whether the discipline of administrative detention, that is the "holding" of irregular foreigners (to be clear, the one laid down in Article 14 CIA),[28] can be included in this constitutional framework. And the question is related to the recognition or not of the right to freely enter and stay freely in the territory of the State.

Neither the Italian Constitution nor European law, which is now responsible for regulating the matter, recognises a right for a citizen of a third country (non-EU) to enter and stay within the borders of the Union, to the point that Article 1 of the CIA (in accordance with European law, in particular Article 1 of the Convention implementing the Schengen Agreement)[29] defines the scope of application *ratione personae* of the law, stating that it applies to citizens of non-EU countries.[30] And this is a very relevant aspect in order to verify the legal position of the immigrant with regard to the State's power to exclude him/her from the national borders, both at the time of his entry and afterwards, and the possibility of adopting, to this end, forms of coercion that are functional to ensure the enforceability of an expulsion or refusal measure.[31] Therefore, the State may invoke a *ius excludendi* against the foreigner to enforce the ban on entry and residence.

All immigration law is imbued with the desire to provide

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[26] R. NIRO, *Spunti sul diritto speciale dei migranti e l'eclissi dei diritti,* in *Giur. cost*., 2021, p. 201 f.

[27] A. PUGIOTTO, *"Purché se ne vadano". La tutela giurisdizionale (assente o carente) nei meccanismi di allontanamento dello straniero*, in *AIC, Annuario 2009*, *Lo statuto costituzionale del non cittadino*, *Atti del XIV Convegno annuale, Cagliari 16-17 ottobre 2009*, Jovene, 2010, p. 341.

[28] This is the administrative detention of an alien who is to be removed from the territory of the State by means of a forced escort to the border, because he/she is recognised as an irregular, an escort that cannot be carried out immediately. There is another kind of detention foreseen in Article 6 of Legislative Decree No. 142 of 18th August 2015, concerning asylum seekers for which we refer to E. VALENTINI, *supra* note 18, p. 262 ff.

[29] Convention signed on 19th June 1990 by the signatory countries of the Agreement (Belgium, Germany, France, Luxembourg and the Netherlands).

[30] A. DI FRANCIA, *La condizione giuridica dello straniero in Italia nella giurisprudenza,* Giuffrè, 2006, p. 1.

[31] E. VALENTINI, *supra* note 24, p. 7 ff.

mechanisms for the physical control of irregular immigrants and the "holding" is the emblem of this. It entered our system with the Turco-Napolitano law[32] and is still resisting today, despite the fact that it has been the subject of repeated amendments that have changed its rules, its duration and even the names of the places of execution, although the substance has not changed. It is a coercive measure that should hold neither a punitive nor a preventive function, since it is applied against subjects who are brought together by the sole fact of being without authorisation to enter (or stay) within the borders of the State.

As mentioned above, the use of the word "holding" evokes legal instruments proper to administrative law and has the (undeclared, but obvious) purpose of creating a *lex specialis* for foreigners,[33] more consistent with the police subsystem, with the normative discipline of security and public order, in order to avoid the application of the guarantees inherent to the criminal justice system. According to Pugiotto, this lexical choice makes it possible to evade the comparison with Article 13 of the Italian Constitution, where detention appears among the forms of restriction of personal freedom: 'by avoiding this *nomen iuris*, the legislator thus tries to accredit the minimalist thesis of a detention that would only affect the freedom of movement and residence, without coercing the personal freedom of the foreigner, thus removing the new institution from the guarantees of *habeas corpus'*.[34]

Among the instruments of control envisaged (e.g., the forced removal of irregular migrants, the humanitarian confinement of asylum seekers)[35] the most invasive is the "holding"; which is carried out in the Centres for Stay for Repatriation (CSR), the latest name given to these facilities.[36] Once again, the names given to things are important and evocative: on the one hand, there is an

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[32] Law No. 40 of 6th March 1998.

[33] A. Caputo, *Irregolari, pericolosi, criminali. Il diritto delle migrazioni tra politiche sicuritarie e populismo penale*, in N. Giovannetti-N. Zorzella, (Eds.), Ius migrandi, *Trent'anni di politiche e legislazione sull'immigrazione in Italia*, Franco Angeli, 2020, p. 175 ff.

[34] A. Pugiotto, *La "galera amministrativa" degli stranieri e le sue incostituzionali metamorfosi*, in *Quad. cost.*, 2014(3), p. 577.

[35] G. Campesi, *Chiedere asilo in tempo di crisi. Accoglienza, confinamento e detenzione ai margini dell'Europa*, in C. Marchetti-B. Pinelli (Eds.), *Confini d'Europa. Modelli di controllo e inclusioni informali*, Cortina ed., 2017, *passim*.

[36] The CSRs were thus renamed by the Minniti Decree (Law Decree No. 13 of 2017), after having been born as Temporary Detention and Assistance Centres (TDAC, according to the wording of Article 12 Law No. 40 of 1998, then transferred to Article 14 CIA) and having also been transformed into Identification and Expulsion Centres (IECs, as advocated by the 2008 'security package' – Law

increasing attempt to highlight the instrumental nature of such places in relation to the objective pursued (detain in order to remove, a real oxymoron); on the other hand, there is a loosening of the threads that bind the means used (detention) to the legal good at risk (personal freedom).

"Holding" is functional for the purpose of enforcing expulsion when it cannot be carried out immediately due to temporary situations that hinder the preparation of the return or the execution of the expulsion – the need to assist the foreigner, the need to carry out additional checks on his or her identity or nationality, the need to obtain travel documents or the availability of suitable means of transport (Article 14(1) CIA). In fact, by referring to Article 13(4a) CIA, the provision identifies the risk of absconding as the first of the conditions justifying detention. This is the real risk that the system seeks to avert as a result of the delay in removal operations: the loss of "physical" control over the undesirable alien.[37] "Holding" is ordered by the Public Security Authority (*Questore*) for the time strictly necessary to overcome the difficulty of carrying out the expulsion.

The coercive nature of the instrument is undisputed: it is clear from the wording of both the Italian legislation and the Return Directive. Article 14(7) CIA provides for the use of public force to carry out appropriate surveillance measures to ensure that the aliens do not leave the centre, with the possibility of issuing a new "holding" order if they leave; Article 16(1) of Directive 2008/115/EC envisages prison as a place of "holding".[38] This was also

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Decree 23rd May 2008, No. 92, converted with amendments into Law No. 125 of 24th July 2008). On the scope of the novelties introduced by Law Decree No. 13 of 2017, see L. MASERA, *supra* note 20, p. 279 f.

[37] There are several indications that there is a risk of absconding (Article 13(4a) of the CIA): the absence of a valid passport or equivalent document; the absence of appropriate documents proving the availability of accommodation where the alien can be easily found; the fact that the alien has previously given false information about his or her identity; the fact that the alien has failed to comply with one of the measures taken by the competent authorities pursuant to paragraphs 5 and 13 of this Article and Article 14 of the CIA; the violation of one of the measures referred to in paragraph 5.2 of this Article; the fact that the alien has repeatedly refused to be photographed and fingerprinted (a requirement which constitutes a specific risk of absconding provided for in paragraph 3 of the new Article 10b of the CIA).

[38] The European provision reads as follows: '[w]henever a Member State cannot accommodate the third-country national concerned in an appropriate detention facility and has to place him in a prison, the detained third-country nationals shall be kept separate from ordinary prisoners'. 'Accomodate the third-country national', 'placing him in a prison': even the European legislator (at least in the Italian version of the text) softens the language, glossing over the use of the term "detention", almost as if to imply a voluntary choice on the part of the foreigner to "remain" within the borders of the State.

confirmed by the Italian Constitutional Court when it ruled that "holding" is a form of imprisonment that requires full compliance with Article 13 of the Italian Constitution [39] with the consequence that the guarantees provided for therein, the principle of legality and jurisdictional control (*riserva di giurisdizione*), should (the conditional is a must) also inform the rules set out in Article 14 CIA. Formal guarantees, since they do not indicate the reasons that can legitimise the coercion (the so-called 'emptiness of purpose'): [40] if, for the traditional forms of detention (by way of punishment, pre-trial and security measures), the rationale can be recovered by recourse to other constitutional norms, namely Articles 25 and 27 of the Italian Constitution (exercise of the punitive power within the limits of the presumption of innocence), [41] this enhanced protection cannot be recognised for the "administrative detention" of foreigners.

Moreover, the Italian Constitutional Court has repeatedly found the constitutional basis of the legislature's decisions to restrict the liberty of foreigners, even in the most serious form of detention, in the defence of the orderly management of migratory flows; management of flows that would be an instrumental need for the constitutional values of public safety and health, public order and international constraints that our country is obliged to respect. [42] According to the Italian Constitutional Court, the regulation of the entry and stay of foreigners in the national territory is linked to the balancing of the public interests mentioned above, the weighing of which is primarily the responsibility of the ordinary legislator, who has a wide discretion in the matter, provided that it respects the criteria of intrinsic reasonableness. [43] Certainly, at least in theory, it is more than legitimate to doubt the wisdom of adopting the most serious form of interference in the sphere of personal liberty in order to "manage" foreigners (to regulate their entry and stay). As has been noted, 'the regulation of migratory flows is the ratio of the entire administrative discipline of immigration and not a legal good deserving of protection, neither definitive nor instrumental'. [44] And

[39] Const. Court, 10th April 2001, no 105.

[40] The expression has been adopted by L. Elia, *Le misure di prevenzione tra l'art. 13 e l'art. 25 della Costituzione*, in *Giur. cost*., 1964, p. 951.

[41] Also, E. Valentini, *supra* note 24, p. 34 ff.

[42] Const. Court, 8th July 2010, no. 250 concerning the constitutional tightness of Article 10a CIA (illegal entry and stay of foreigners). See *contra* A. Cavaliere, *Le vite dei migranti e il diritto punitivo*, in *Sist. pen*., 2022(4), p. 58 ff.

[43] See, *inter alia*, Const. Court, 24th February 1994, no. 62; Const. Court, 26th May 2006, no. 206; and Const. Court, 6th July 2012, no. 172.

[44] On this point, F. Curi, *Il diritto penale speciale del testo unico immigrazione*, in F. Curi-F. Martelloni-A. Sbraccia-E. Valentini (Eds.), *supra* note 6, p. 149.

'criminal law cannot take as its object of protection a whole set of rules', unless, by identifying them, one confuses the purposes of the rule with the interest, the legal good to be protected. [45]

Even if one were to believe that there are values in the Constitution that could provide foreigners with the enhanced protection that normally accompanies the deprivation of personal liberty in criminal proceedings, one cannot, on the other hand, remain silent about the fact that when we speak of "holding", of administrative detention, even the formal guarantees of the rule of law and jurisdiction struggle to find recognition in the relevant legal framework. [46]

Article 14(1) CIA—which sets out the grounds for "holding" foreigners—is not exhaustive in nature, as the provision depicts an open-ended catalogue of circumstances that may justify it, thus leaving the *Questore* with a wide margin of discretion in identifying the grounds for detention. [47] Moreover, almost all cases of "holding" are due to circumstances that cannot be attributed to the foreigner; on the contrary, the restriction of a fundamental right is mainly justified by organisational needs and delays that are more likely to be attributed to the authority that has to carry out the removal of the irregular migrant. In fact, apart from the risk of absconding (which in any case should not be a condition *per se*, but rather the risk that one runs while awaiting removal), the situations justifying the aliens' holding can be found in the need to provide assistance to the foreigner concerned, to carry out further investigations into his/her identity or nationality, or to obtain travel documents, or in the availability of an appropriate means of transport; these are circumstances that do not depend in any way on conduct attributable to the alien and that correspond to his/her will to evade removal. Consequently, in the logic of reasonableness and the balancing of the constitutional values at stake mentioned above, they can hardly be considered legitimate grounds for holding. Moreover, apart from rescue, all the others are operations that do not require the physical availability of the foreigner and therefore would hardly justify their

[45] A. CAVALIERE, *supra* note 42, p. 59.

[46] The holding of migrants represents a 'legal monster', according to L. PEPINO, *Le nuove norme su immigrazione e sicurezza: punire i poveri*, in *Quest. giust*., 12th December 2018. It is a 'legal abracadabra' according to A. PUGIOTTO, *supra* note 27, p. 587.

[47] Indeed, Article 14(1) CIA states that 'among the situations justifying detention' are those listed, but there may be others that are not mentioned; thus, such provision arbitrarily allows the administrative authority to find them at its complete discretion.

detention if they were not accompanied by that risk of flight mentioned above, a powerful picklock to 'circumvent' the constitutional guarantees. [48]

It is not only a matter of grounds, but also of modalities: the legal control was not been respected in this case either. Article 14 CIA refers to detention centres for repatriation 'identified or established by decree of the Minister of the Interior'. [49] We are faced with a regulation of the places of administrative detention implemented by a ministerial decree, a "secondary" source, an act that does not have the "force of law" and is in no way comparable to it. The supremacy of the law with regard to the "modalities" of the restriction of personal liberty must at least concern the definition of the requirements of the facilities to be used for that purpose, whereas Article 14(1) CIA gives the government a *chèque en blanc* in the identification and construction of CSRs, even if some indicators can be found in paragraph 2 of the same Article, following the amendments made by the more recent Lamorgese decree: [50] the holding centre must guarantee 'adequate standards of hygiene and accommodation in such a way as to ensure the necessary information about their status, assistance and full respect for their dignity [...] freedom of correspondence with the outside world, including by telephone, is guaranteed in all cases'. [51] However, as can be seen, these provisions are so general that they are in no way prescriptive and binding, as the national guarantor pointed out in the last report on the state of the CSRs. [52]

The breach of the principle of legality in the modalities of detention is even more serious if one looks at the pseudo-legislative source that regulates the management of detention centres for third-country nationals to be returned. There is even a sub-regulatory source, the Ministerial Decree of 21 November 2008 (containing the 'outline of the tender specifications for the management of immigrant reception centres'), which in turn leaves a wide margin for the content of the individual agreements concluded between the Prefectures and the management bodies of the centres, thus approving a substantial 'privatisation' of the discipline in a matter

[48] E. Valentini, *supra* note 18, p. 242 ff.

[49] See the implementing regulation of the CIA (Presidential Decree No. 394 of 1999), Articles 20 et ff.

[50] This is Law Decree No. 130 of 2020, converted with amendments into Law No. 173 of 2020.

[51] Further indications, as to the location of CSRs and their capacity, can be found in the Minniti Decree (Article 19 of Legislative Decree No. 13 of 2017).

[52] See the *Rapporto sulle visite*, *supra* note 13, p. 5 ff.

subject to the principle of legality. [53] And if we take a final look at the rules governing the execution of detention in the centres, these rules do not respond to any of the other safeguards that normally accompany detention, starting with the role of control played by the supervising judges, [54] even if a very small step forward was made in this aspect, first with the implementation of the Minniti decree, then with the Lamorgese decree.

In the first case (Law No. 46 of 2017), access to the CSR is granted to a number of institutional figures, including the local guarantors of persons deprived of their liberty; in the second (Law Decree No. 130 of 2020), the person deprived of his/her personal liberty is given the possibility to address petitions or complaints to the national guarantor and to the regional guarantors (Article 14(2a) CIA). Obviously, one cannot speak of "jurisdictionalisation of detention", but at least there are independent authorities that can perform a certain control over the conditions of "forced stay" in the centres.

3. Pseudo-judicial protection vis-à-vis *migrants 'held' for immigration purposes*

A final mention is necessary on the issue of judicial control, which is enshrined in Article 13 of the Italian Constitution. The detention of foreigners with the purpose of return is anything but subservient to the constitutional provision, since it is ordered by the *Questore* and the judge intervenes only *ex post*. The ordinary discipline in this matter does not fall within the scope of article 13(2) of the Italian Constitution, but rather within that of paragraph 3, according to which, in exceptional cases of necessity and urgency established by law, the public security authority may adopt provisional coercive measures, which must be upheld by the judicial authority within ninety-six hours of their adoption, on pain of annulment. When it comes to the personal freedom of the foreigner to be returned, the rule-exception relationship between paragraphs 2 and 3 of Article 13 of the Italian Constitution is reversed: the rule becomes the exception, since judicial control is always characterised as an *a posteriori* intervention by the judge, whereas in terms of *ex post* validation it should only be justified in exceptional cases. As a

[53] Thus, E. VALENTINI, *supra* note 19, p. 247.

[54] See in this regard the observations of L. FERRAJOLI, *La criminalizzazione degli immigrati (note a margine della legge n. 94/2009)*, in *Quest. giust*., 2009(5), p. 16.

result, the immigrant's presence in the CSRs is usually the result of a decision by the public security authorities. Once again, therefore, we are witnessing a violation of the Constitution, also from the point of view of equality, since it seems acceptable for the foreigner to have a "degraded" protection of his personal freedom.

This is the umpteenth stretch: the *Questore* is the only body with the power to decide whether or not to apply administrative detention, on the basis of an unclear regulation with a potentially unlimited scope (which lends itself to an interpretation that is not as strict as the matter would require) and on the basis of informal criteria. As a result, the police are assigned tasks that the Italian Constitution normally reserves exclusively for the courts. And the authority's wide discretionary powers with regard to the grounds for detention reduce the judge's intervention to a mere formal control of compliance with procedures, thus once again reducing the scope of the constitutional guarantee. [55] Not only that. The violation of the immigrant's personal liberty in this case appears much more serious also because of the effects of the *ex post* judicial intervention. While, as a rule, the validation has an effect "for the past" and assesses the behaviour of the public security authority in temporarily restricting the liberty of an individual and if the judge intends to maintain the coercion adopts a new measure, [56] in the case of "holding" such validation spreads its effects also *pro futuro*, legitimising the continuation of the limitation of liberty on the basis of the same provisional title, for a prolonged period of time (thirty days extendable to a maximum of ninety). [57]

And if we analyse more closely the procedural aspects of the validation process, we can see other antinomies with regard to the guarantees that should protect the sphere of personal liberty, starting with the body to which it is entrusted, the Justice of the Peace. This choice testifies to a lowering of the level of jurisdiction: the Justice of the Peace is a lay body, born with conciliatory functions, from which any *de libertate* power is subtracted. A comparison with similar provisions establishing equivalent (if not inferior) forms of coercion, also adopted by an administrative authority, clearly shows that validation is always entrusted to a professional judge.

Two examples are worth mentioning: compulsory medical treatment (TSO), which requires the subsequent intervention of the

[55] E. Valentini, *supra* note 18, p. 251 f.

[56] See the rules on the validation of arrest pursuant to Article 391 of the Italian Code of Criminal Procedure (CCP).

[57] In exceptional cases, it may be up to one hundred and twenty days (Article 14(5) CIA).

giudice tutelare (guardianship judge), and the ban on attending sporting events (DASPO) with the obligation to report to the police authority, whose validation is even entrusted to the preliminary investigation judge.

Ultimately, the intervention of a professional judge should always be required, in the light of the deeper meaning of the principle of *habeas corpus*, whose jurisdiction is designated to protect the most delicate moment of the conflict between authority and individual freedom, [58] even in cases where personal liberty is constrained for extra-criminal reasons. But this does not apply to foreigners. An exception that confirms the rule is the case of the applicant for international protection: the validation of the latter's detention is entrusted to the ordinary court of the district where the specialised immigration section is located. [59]

The guarantee of the right of defence in validation proceedings is no less problematic: the characteristics of the procedure are totally unsuited to guaranteeing it and are only minimally comparable to those provided for in coercive measures of a criminal nature. In a non-exhaustive and very brief examination, here are some particularly problematic aspects of the procedure. [60] The exercise of the right of defence presupposes the right to know the exact content of the expulsion order. Article 13(7) of the CIA provides that the expulsion order and the detention order, as well as any other act relating to entry, residence and expulsion, 'shall be notified to the person concerned, together with an indication of the remedies available and a translation into a language known or, failing that, into French, English or Spanish'.

Here, the effectiveness of knowledge depends on the meaning given to the expression 'failing that', which may justify recourse to the so-called "vehicular languages" for communication, the knowledge of which is presumed on the part of the foreigner. But this is not the case: legal language is already a complex idiom for those who work in the country that expresses and uses it; just imagine the possibilities for a foreigner, often illiterate and coming from a different culture (even a different legal culture), to understand the reasons for the measure taken against him/her and to take action to assert his rights, if he/she has been informed of it in a

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[58] A. CAPUTO-L. PEPINO, *Giudice di pace e* habeas corpus *dopo le modifiche al testo unico sull'immigrazione*, in *Dir. imm. e citt*., 2004(3), p. 13.

[59] Article 6 Legislative Decree No. 142 of 2015.

[60] In this regard, see E. VALENTINI, *supra* note 24, p. 114 ff.

language that is not his/her own, but which, presumably, he/she is supposed to know – and which he/she almost never knows.

The impossibility of translation into the language known to the foreigner and its replacement by the "vehicular languages" is a parameter that the Italian Court of Cassation (hereinafter also 'Cass.') entrusts to the judge's assessment during the validation procedure:[61] this avoids abusive administrative practices which rely on standardised translations; in fact, however, it does not allow the foreigner to know exactly the content of the measures that, in the concrete case, expose him/her to the risk of expulsion, precisely because knowledge of the language is only a presumption.

With regard to the right of defence *stricto sensu*, it must be said that the time required for validation (ninety-six hours from the imposition of the measure) leaves the alien very little time to prepare his/her defence and that the right itself is therefore not very effective: (a) the detention order and the relevant documents must be sent by the *Questore* to the competent Justice of the Peace for validation within forty-eight hours; (b) the hearing requires the necessary participation of a lawyer, who has been informed in good time, but who is not given any time to study the documents and prepare the defence; (c) no time limit is granted for the defence. As a rule, the foreigner is assisted by a public defender who is appointed directly at the hearing, without the possibility of knowing the documents beforehand or consulting with his client, a situation that also jeopardises the right to self-defence of the person concerned, who has received a copy of the document subject to validation (i.e., the detention order), who has been informed of the hearing, who has been brought to the place of the hearing in time and who can be heard by the judge; but, should he/she cannot consult with his/her counsel (the legal expert) and prepare his/her defence, the hearing is unlikely to allow him/her to make an adequate contribution to the acceptance of his complaints (Article 14(3) and (4) CIA).

Moreover, the decision of the Justice of the Peace exhausts the merits of the case and is therefore the only means for the foreigner subject to detention to review the actions of the public security authority. It is true that the validation decision can only be appealed before the Court of Cassation, in accordance with Article 111(7) of the Constitution, but this is a mere appeal on points of law. Moreover, in the vast majority of cases, the decision of the Supreme Court intervenes once the administrative detention has been ended

[61] See, *inter alia*, Cass., 31st May 2006, no. 19132, in *C.e.d.,* no. 234218.

because the maximum time-limit has been passed (the period for appeal proceedings on points of law is much longer than that for detention), and therefore any findings of unlawfulness affecting the detention measure would be useless. And here we can see the difference with respect to the judicial guarantees granted by the Italian Code of Criminal Procedure in the case of the adoption of *de libertate* measures: as the Strasbourg Court has already stated, this is a non-protection, an ineffective remedy. [62] Moreover, it cannot be otherwise when the control on points of law takes place on a measure that might be without motivation. Indeed, the Justice of the Peace does not have a motivational burden: on this point, article 14 CIA is silent; a heavy silence that ends up legitimising essentially groundless measures, unless they are drawn up by resorting to forms with boxes to be ticked. [63]

There is only one conclusion to be drawn: the "holding" (i.e., the administrative detention of irregular migrants) is an eccentric instrument, out of tune with the constitutional system designed to protect the fundamental rights of the individual; its regulation (entrusted to article 14 of the CIA) reveals a chaotic discipline, lacking in overall vision, the result of a short-sighted and emergency approach, with consequent and inevitable repercussions on the constitutional rigidity of the entire *de libertate* system. Unfortunately, despite the issues highlighted, one must resign to accepting such a measure of coercion: to use the title of a recent conference on the subject, [64] far from being at a crossroads, the right to the inviolability of the personal liberty of foreigners is in a *cul de sac* and it has taken a dead-end road from which it will be very difficult to turn back.

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[62] *Richmond Yaw and Others v. Italy*, App. nos. 3342/11, 3391/11, 3408/11 and 3447/11 (ECtHR, 6th October 2016), which found that the Italian authorities have breached Article 5 ECHR by failing to ensure a minimum adversarial process in relation to the decision of the Justice of the Peace to prolong the applicants' detention and by subsequently failing to grant any redress for this unlawful prolongation.

[63] M. BELLINA, voce *Straniero (detenzione amministrativa dello)*, in *Enc. giur.,* Agg. XVII, Istituto della Enciclopedia italiana, 2009, p. 5.

[64] *La detenzione dei migranti tra restrizione e privazione della libertà: un diritto fondamentale al bivio?*, Seminario di studi, Urbino, 24th November 2021.

THE FOREIGNER *IN VINCULIS* AND THE DIFFICULT PROTECTION OF FUNDAMENTAL RIGHTS

RAMONA FURIANI

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1. Introduction

One of the most influential issues currently affecting the Italian prison system concerns the rights of foreigners *in vinculis*; this issue is particularly relevant today because it is almost always raised in the context of prison overcrowding, albeit in an objectively unfavourable way. Foreigners and prison overcrowding are in fact two closely related issues, for three reasons: firstly, because of the significant increase in migratory flows; secondly, because of the inevitable impact on the front line of crime; and finally, because of the subjection of immigration issues to criminal law.

The people who make up the majority of the "social" prison population in Italy are: the poor (given the high number of people in a state of indigence, with all the complications that this aspect entails in terms of survival within the prison); drug addicts (who make up more than 27% of the total); the physically ill, but above all the mentally ill (given the widespread use of medical treatment); and finally foreigners, whose over-representation has become a constant feature of the peninsular prison population.

In addition to the tightening up of the penal system as a whole, a series of strict immigration policies have played a fundamental role in the increase in the number of foreigners detained, [1] on the one hand, by

[1] See Law No. 40 of 6th March 1988, (so-called 'Turco-Napolitano'); Law No. 189 of 30th July 2020, (so-called 'Bossi-Fini'); Law No. 49 of 21st February 2006 (so-called 'Fini-Giovanardi') later declared unconstitutional. More recently Law Decree No. 125 of 24th July 2008, and Law No. 94 of 15th July 2009 (so called

drawing the attention of the police to the surveillance of migrants and, on the other, by making it easier for them to fall into an irregular situation, which increases the likelihood of their becoming involved in criminal activities and, consequently, of ending up in prison.

Thus, the re-educative function of punishment and a number of fundamental rights are downgraded in favour of the primacy of control and security.

In this scenario, foreigners seem to stagnate in a situation of further deprivation, since they are not only forced to survive the dramatic conditions of intramural life, but are also confronted with a series of xenophobic logics that jeopardise freedom of expression, thought and religion. [2]

In the 1990s, the number of foreigners in Italian prisons increased in percentage terms. Today, although the decline due to the pandemic years has to be taken into account, but nevertheless, the data for 2022 show a new sharp increase in the number of foreigners in prison : more than 17,000 *in vinculis* and about 160 in semi-custody out of a total of 54,600 inmates: more than 31% of the total. [3]

2. Prison legislation and constitutional guarantees

Despite a totally adverse and hostile political and legal climate, which focused on interpreting the immigration issue mainly in propaganda and electoral terms, the fundamental rights of foreign detainees were discussed as early as the 1970s.

Law No. 354 of 26 July 1975, entitled "Regulations on the Prison System and on the Execution of Measures for the Deprivation and Limitation of Liberty" (Prison Rules), in Article 1 sets out the guiding principles of prison treatment, which are firmly anchored in Article 3 of the Italian Constitution with regard to the protection of the national, cultural and religious identity of the foreign citizens (Article 1(2)), as well as the recognition of the inviolable rights of the individual, which are worthy of protection under Article 2 of the Italian Constitution.

On this point, the Italian Constitutional Court has also affirmed that detention in prison must not result in the 'civil death' of the

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2008-2009 'Security Packages'), Law No. 48 of 18th April 2017 (so called 'Minniti law'), Law Decree No. 113 of 4th October 2018 (so called 'Security Decree') and Law Decree No. 53 of 14th June 2019 (so called 'Security Decree *bis*').

[2] See Antigone's Thirteenth Report on the Condition of Detention 2017, available at *www.antigone.it/tredicesimo-rapporto-sulle-condizioni-di-detenzione/.*

[3] See the Reports on Prison population, drafted by the Ministry of Justice – update as of 31st March 2022, available at *www.giustizia.it.*

detainee, who is entitled to individual rights under the combined provisions of Articles 2, 13 and 27 of the Constitution. [4]

Despite the efforts of the legislator to give concrete form to this protection, the foreign detainee in prison faces objective difficulties that are different and greater than those faced by Italian detainees. For example, non-EU citizens who arrive in detention centres are those who do not have a regular job, do not have a residence permit, live by their wits, are deprived of any emotional support, some have developed forms of psychological disorder that prevent them from performing simple daily tasks, others suffer from illnesses due to neglected health care, and sometimes have problems with alcoholism or drug addiction.

These real conditions, combined with certain explicit legal provisions, give rise to a "double track" in the execution of sentences, a diversified right for foreigners, which subjects them to an excess of suffering compared to national prisoners. [5]

For this reason, there is a debate about the lack of effectiveness of the rights of foreign prisoners. The legal provisions define a model of prison treatment based on equality and impartiality ('without discrimination on grounds of nationality, race, economic and social conditions, political opinions and religious beliefs'), but in practice there are strong inequalities in the foreigners' conditions of detention, which are reflected in the internal organisation of the institution, and do not allow the principle of equal treatment enshrined in Article 1 of the Prison Rules to be fully implemented.

There is therefore a serious imbalance between the principle of formal and substantive equality. [6]

3. The modus *of foreigners' detention*

The investigation that will be carried out will examine the constitutional rights related to the ordinary course of life, and then approach the procedural aspect with particular attention to Article

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[4] G. SILVESTRI, *La dignità umana dentro le mura del carcere*, speech at the conference *Il senso della pena. Ad un anno dalla sentenza Torregiani della CEDU*, Rebibbia Prison, 28th May 2014.

[5] G. CAPUTO-D. DI MASE (Eds.), *Ministero della giustizia-Dipartimento dell'amministrazione penitenziaria-Dispense dell'ISSP, n. 2-Lo straniero in carcere*, in *www.ristretti.it/commenti/2013/ottobre/pdf2/issp_dispensa2.pdf*.

[6] A. CELOTTO, *Commento all'art. 3, 1° co., Cost.*,. in R. BIFULCO-A. CELOTTO-M. OLIVETTI (Eds.), *Commentario alla Costituzione*, vol. I, Utet, 2006, p. 65 ff.; A. GIORGIS, *Commento all'art. 3, 2° co., Cost.*, in R. BIFULCO-A. CELOTTO-M. OLIVETTI (Eds.), *op. cit.*, p. 88 ff.

27(3) of the Italian Constitution [7] and the alternatives to detention as a form of application of the principle of the re-educative purpose of punishment.

From the point of view of constitutional rights, the *modalities* of detention will be analysed, identifying the practical and legal aspects that characterise the detention of foreigners, since it is in these cases that these institutions discriminate against inmates on the basis on their nationality, [8] giving rise to the so-called "penitentiary double-track", i.e. a significant disparity of treatment despite the formal equality established by the Prison Rules.

Against this background, Articles 29 and 31 of the Italian Constitution [9] aim at guaranteeing and protecting parental and affective relations. Contact with the outside world is a fundamental possibility for prisoners, since family relations are a positive way of counteracting the harmful effects of prison. Not only that. Family support facilitates reintegration into the community and helps to reduce recidivism rates.

In this sense, Article 15 of the Prison Rules also provides that the treatment of convicts and prisoners shall be carried out by facilitating relations with their families, and Article 28 of the Prison Rules states that 'special care shall be taken to maintain, improve or restore relations between prisoners and their families'. In addition, Article 14c(4) of the Prison Rules limits the restrictions of the surveillance regime, which may not apply to interviews with spouses, cohabitants, children, parents and siblings, and Article 18 of the Prison Rules regulates the modalities and places of interviews. [10]

So far, it is clear that very few foreign prisoners are able to

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[7] R. CALVANO, *Commento all'art. 27 Cost.*, in F. CLEMENTI-L. CUOCOLO-F. ROSA-G.E. VIGEVANI (Eds.), *La Costituzione italiana. Commento articolo per articolo*, vol. I, 2nd ed., Il Mulino, 2021, p. 199 ff.

[8] E. GROSSO, *Cittadinanza e territorio*, Editoriale scientifica, 2015.

[9] See L. CALIFANO, *La famiglia ed i figli nella Costituzione italiana*, in R. NANIA-P. RIDOLA (Eds.), *I diritti costituzionali*, vol. I, 2nd ed., Giappichelli, 2006, p. 925 ff.; P. CARETTI-G.T. BARBIERI, *I diritti fondamentali. Libertà e Diritti sociali*, 5th ed., Giappichelli, 2022, p. 233 ff. and 403 ff.

[10] On this point, it is also relevant to draw attention to supranational legislation: Recommendation R (2006) 2 of the Committee of Ministers to the member States *on European Prison Rules*, adopted by the Committee of Ministers on 11 January 2006, in point 24 prescribes that 'prisoners shall be allowed to communicate as often as possible – by letter, telephone or other forms of communication – with their families, other persons and representatives of outside organisations, and to receive visits from these persons'. Point 4 provides that 'the arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible'.

The *United Nations Rules for the Treatment of Women Prisoners and Non-*

maintain constant contact with their relatives, due to difficulties related to distance, but also to illegal status and economic poverty, which prevent their relatives from visiting them in prison.

Recent domestic jurisprudence [11] has established that the presence of children in the country with their mother is not a sufficient reason for not issuing and enforcing the expulsion of a sentenced foreigner.

A restrictive and unbalanced interpretation of the legislation on family and related rights is also given by the Surveillance Court (*Tribunale di Sorveglianza*) of Turin, which held that 'in the matter of the expulsion of foreigners detained and convicted [...] for the purposes of applying the measure in question, family ties other than those expressly provided for in Article 19 of Legislative Decree 286/1998 are not relevant' (second-degree cohabitation or a spouse of Italian nationality).

However, some positive signs can be observed thanks to the reading that the Supreme Court [12] makes of Law Decree No. 130 of 21 October 2020, which, departing from the amended Article 19 of Legislative Decree No. 286 of 25 July 1998, does not consider the rejection of a foreigner to be admissible 'if there are well-founded reasons to believe that removal from the national territory would entail a violation of the right to respect for his private and family life'. [13]

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custodial Measures for Women Offenders also known as the Bangkok Rules, recognise the central role of both parents in the lives of their children and contain specific provisions to regulate family relationships.

[11] Cass., 19th December 2019, no. 278892: 'for the convicted foreigner: the relationship with two minor children who are not Italian citizens is irrelevant'. In its motivation, the sentence states: 'The presence of two minor children, who are also in Italy with their mother, is not sufficient to call into question the expulsion of an illegal alien who has been sentenced to imprisonment. The right to family unity concerns foreigners who are linked to close relatives who are not only effectively living together but, above all, have Italian citizenship, and this clarification also concerns parental ties with children who are minors but not Italian citizens (in the case in question, despite the defence's important reference to the protection of family unity, the judges considered the fact that the children were not Italian citizens to be decisive)'.

[12] Cass., 14th September 2021, no. 36513, in *www.migrazionieuropadiritto.it*.

[13] Article 19 of Legislative Decree No. 286 of 25th July 1998 includes cohabitation with second-degree relatives or with a spouse of Italian nationality among the situations that preclude the adoption of an expulsion measure – cohabitation *more uxorio* is also included in these circumstances.

This point has been the subject of two different interpretations: the first, stricter, considers the obstructive cause to be an exceptional circumstance that cannot be applied by analogy; the other, broader, strengthens the role of the supervising judge, who must not limit him/herself to verifying the absence of obstructive causes, but must also weigh up the concrete and current dangerousness in the light of the social path that the person has followed in our country.

The second approach, in the Court's view, should also be supported in the light of

Another relevant guarantee is the right to education, which is enshrined in Article 34 of the Italian Constitution. Education during the prison sentence is one of the main elements of the re-education of the subject, leading to human and cultural growth, but also to greater possibilities of social and professional reintegration of the prisoner after his or her release.

However, an analysis of the data shows how difficult it is to make this constitutionally guaranteed right a concrete and real reality. In the 2019/2020 school year, 20,263 students were enrolled (33.4% of the total). Almost half (9,176) were foreigners. [14]

It becomes clear that the problem of education belongs to the whole prison population, especially the foreign prisoners. The first major obstacle is the language of the foreigners, who in most cases receive only a basic education.

On the other hand, learning the Italian language is a positive element, as it is the first step that allows the foreigner to come out of a serious isolation, which can also have an impact on his state of health and therefore on his expectation of a dignified survival.

A factor that affects the quality of life in prison and is closely

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the amendment to the legislation introduced by Legislative Decree No. 130 of 21st October 2000, which introduced into the aforementioned Article 19 of Legislative Decree No. 286 of 25th July 1998 a new ground for expulsion that recognises the relevance of emotional ties, which were not previously specified. Indeed, the new Article 19(1.1) reads as follows: 'The refusal or expulsion of a person to a State shall also be prohibited if there are reasonable grounds for believing that removal from the national territory would entail a violation of the right to respect for his or her private and family life' and, again, 'in order to assess the risk of violation referred to in the previous sentence, account shall be taken of the nature and effectiveness of the family ties of the person concerned, his or her effective social integration in Italy, the duration of his or her stay in the national territory and the existence of family, cultural or social ties with his or her country of origin'.

[14] The data reported relate to the pre-pandemic period. According to the Antigone Observatory, in the last two years only 4% of the planned number of hours was allocated to training and education. Only 27% of the institutions where there was no face-to-face teaching used some form of videoconferencing (Meet, Zoom or similar) for all classes. To this percentage should be added the 8% where synchronous teaching was only available for some classes. In the remaining 62% of cases, there was no synchronous teaching. In general, when teachers were unable to come to the prison, they sent paper material (handouts, assignments and photocopies of various kinds) to help them assess the students. The distribution of material concerned 84% of the institutes where there was no face-to-face teaching (so in some cases there was an overlap with synchronous distance learning). In a few cases the distribution of materials was not followed by any feedback. In institutions where distance learning took place, many inmates were still excluded from the activities because of the difficulty of ensuring social distance in the classrooms. In 29% of the cases monitored, half of the students were involved, in 10% less than a quarter, in 5% between a quarter and a half and in 37% more than three quarters (in 18% of the cases this figure was not recorded).

linked to the re-educational function of punishment and the possibility of the prisoner's social reintegration is religious freedom, which is governed by Article 19 of the Italian Constitution, which guarantees the individual freedom to profess one's faith and to practise one's religion.

The growing phenomenon of immigration in relation to the use of prisons has led to an increase in the prison population and thus to an increasing ethnicisation of penal institutions, as well as to a high degree of cultural and religious pluralism. Despite this, prison legislation has not been adapted and is now highly anachronistic in relation to the regulation of multi-ethnic institutions. Even the linguistic and cultural mediation referred to in Article 35 of Presidential Decree No. 230 of 2000 seems inadequate, since such mediation 'must be encouraged', which is only a hope and certainly not a guaranteed, institutionalised legal tool. Moreover, a large proportion of the cultural mediators currently working in prisons carry out their work on a purely voluntary basis. [15]

Religion has always been a pillar within the prison and today it is an integral part of re-education. The Ministry of Justice ensures the stable and institutionalised presence of the Catholic chaplain in order to make religion a basic element of treatment.

On the other hand, as far as religious chaplains of other denominations are concerned, they can only enter the prison at the 'request' of the devoted prisoners, which can be authorised by the management of the institute in the case of religious denominations that have signed an agreement (*intesa*) with the Italian State, while in the case of religious denominations that have not signed such an agreement, the authorisation of the Ministry of the Interior is required. In fact, it is in this process that the fragility of the real application of the aforementioned substantive equality becomes apparent, thus penalising the foreign prisoner and often depriving him or her of an important network of voluntary work and social assistance.

The only positive aspect is that these difficulties have actually led to inter-religious exchanges between different sects and that some prison facilities are now equipped to allow foreigners to practise their religion, e.g., *Ramadan* for Muslims.

The right to work, understood as a founding element of the Italian

[15] The Ministry of Justice only provides 67 positions for cultural mediators nationwide. In 2018, thanks to the role of volunteers, there were 165 mediators regularly in prison facilities, a decrease from the previous year, when there were 223 of them (Antigone, 2019).

Republic, both as a right and as a duty, and provided for in Articles 1 and 4 of the Italian Constitution, is one of the most important aspects of prison life, especially from the point of view of the re-educational function of punishment, and, together with education, is one of the rights most closely linked to Article 27(3) of the Constitution.

Due to the irregular status of most foreign inmates, they end up doing more or less domestic work, as it is difficult for them to join prisoners' cooperatives for more skilled work or to have access to jobs outside prison.

The importance of work, combined with the re-educational function of punishment, is linked to the question of alternatives to imprisonment.

These include, in particular, the measure of community service (i.e., the probation), which gives the prisoner the opportunity to serve his or her sentence by performing socially useful work and is granted on the basis of precise conditions, such as a favourable prognostic assessment of the prisoner's chances of re-education.

With regard to the applicability of the measure to foreigners irregularly present in the country, due to the silence of the legislator, the jurisprudence has intervened, following two different approaches: in particular, the courts deciding on the merits, in favour of granting probation to such persons as well; the Court of Cassation (hereinafter: 'Cass.'), on the other hand, is opposed to this, on the grounds that it would encourage illegal residence on the territory of the State, since it cannot be accepted that the enforcement of the sentence violates, or in any case circumvents, rules that constitute such illegality. [16] The Joint Chambers (*Sezioni Unite*) of the Italian Court of Cassation, adhering to the more pro-guarantee thesis, affirmed that, if the legal conditions are met, the granting 'of one of the alternative measures to detention is destined to unfold in its fullness and effectiveness, because of the constitutional importance and the preceptive force of the principles concerning the equal dignity of the human person and the re-educative function of punishment'. [17]

Moreover, the Italian Constitutional Court, in its decision no. 78 of 2007, had considered the penitentiary benefits applicable to irregular foreigners, although preferring, however, the adoption of expulsion as an alternative measure, but the legislator, with Law Decree No.

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[16] See, F. SIRACUSANO-A. PRESUTTI, Sub *art. 47 ord. pen.* in F. DELLA CASA-G. GIOSTRA (Eds.), *Ordinamento penitenziario commentato*, 6th ed., Wolters Kluwer-Cedam, 2019, p. 653; Cass., 20th May 2003, in *Riv. Pen.,* 2004, p. 751; Cass., 5th June 2003, no. 225219; Cass., 11th November 2004, no. 230191; *contra* Cass., 18th May 2005, no. 232104; Cass., 18th October 2005, no. 232741.

[17] Cass., 28th March 2006, in *Riv. Pen.*, 2006, p. 793.

92 of 2008, converted into Law No. 125 of 2008, excluded the applicability of the suspension of the execution of the sentence with regard to these subjects, thus making access to alternative measures from the state of liberty impossible. [18]

The absence of *ad hoc* provisions, although aimed at safeguarding Article 3 of the Italian Constitution, in fact entails not only a violation of Article 27 therein, for the reasons already stated, but also a violation of the principle of substantive equality. It is therefore not a question of "institutional discrimination", but of a difference in treatment linked to the social, cultural and legal characteristics of the prisoner.

An *ad hoc* alternative measure has been introduced in Article 16 CIA (Consolidated Immigration Act, Legislative Decree No. 286 of 25th July 1998): judicial expulsion as an alternative sanction.

Article 16(5) CIA provides for the expulsion of an identified foreigner who must serve a prison sentence, even a residual one, of no more than two years. This provision raises doubts as to its real capacity to fulfil the re-educational function of punishment, as it appears to be aimed more at providing an alternative to the detention of irregular foreigners, in view of 'the complex needs of managing the phenomenon of immigration and regulating flows'. According to the jurisprudence of the Court of Cassation, the expulsion *de qua* is an atypical alternative measure to detention, aimed at combating prison overcrowding. [19] The 'condition of irregularity' is a substantial prerequisite for the measure, as is the fact of being detained. [20] Once the person has been identified, the public prosecutor forwards the documents to the competent supervisory magistrate according to the place of detention. A reasoned objection to the expulsion order may be lodged, within the terms laid down in law under penalty of inadmissibility, with the supervisory court, which will decide according to the procedure laid down in Article 666 of the Italian Code of Criminal Procedure.

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[18] G. MARINUCCI-E. DOLCINI, *Manuale di diritto penale. Parte generale,* Giuffrè, 2009, p. 572.

[19] Cass., 14th December 2010, no. 249175. The Constitutional Court has instead recognised the administrative nature of the alternative sanction of expulsion. See Const. Court, 15th July 2004, no. 226.

[20] Restrictive positions have been raised on the concept of detention status, whereby the condition of a foreigner in home detention should be excluded (see *ex multis* R. OLIVERI DEL CASTILLO, *L'ambito penale della legge 30 luglio 2002, n. 189: la costruzione della muraglia*, in *Dir. imm. citt.,* f. 3, 2002, p. 94 and Cass., 17th March 2008, in *Cass. pen.*, 2009, p. 1650), and less rigid positions that would include the semi-liberated (see G. PRELATI, *L'espulsione disposta dal magistrato di sorveglianza a titolo di sanzione alternativa alla detenzione*, in *Giur. it.* I, 2003, p. 623; Cass., 13th October 2005, no. 232514).

4. Concluding remarks

Until 2011, and for almost a decade, alien status was a concomitant cause of criminal liability; for two years in our system, it was the sole cause of the application of aggravated punishment. [21]

Overall, Italian primary and secondary prison legislation remains inadequate to deal with the specific situation of foreign prisoners. Legislative change would be necessary to adapt every aspect of prison life to the migrant prisoner.

Over time, the Council of Europe has shown a growing interest in the non-discriminatory treatment of migrant prisoners. Articles 37 and 38 of the 2006 European Prison Rules pay special attention to foreign nationals and ethnic or linguistic minorities.

In particular, Article 38 recognises the need for special measures for persons with social, legal or cultural needs related to a particular ethnic or linguistic minority.

Thus, in 2012, also in the light of the periodic reports of the European Committee for the Prevention of Torture and the judgments of the European Court of Human Rights, which over time have highlighted the complex issue of 'foreigners in prison', the Committee of Ministers of the Council of Europe drew up a recommendation (number 12) [22] dedicated exclusively to migrant detainees, identifying all their needs, and thus all the underlying rights. The Recommendation is a non-binding act, consisting of forty-one articles with an official commentary and addresses all the problematic aspects of the detention of foreigners, classifies all the rights to which foreigners are entitled as such, clarifies how the rights of all detainees can become effective for migrants, and finally identifies the major risks of discriminatory treatment. Recommendation No. 12 of 2012 is, therefore, not only an autonomous *corpus* of norms aimed at reducing protection gaps, whose transposition into domestic law is still awaited, but also an important viaticum for the concrete application of constitutional guarantees, first and foremost those contained in Articles 2 and 3 of the Italian Constitution.

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[21] Law No. 125 of 2008 introduced in Article 61(1)(11a) of the Italian Criminal Code. The aggravating circumstance of clandestinity was subsequently declared illegitimate by Const. Court, 8th July 2010, no. 249.

[22] Recommendation CM/Rec (2012) 12 of the Committee of Ministers to member states on foreign detainees, adopted by the Committee of Ministers on 10 October 2012.

RELIGION IN PRISON: UTOPIA FOR MIGRANTS?

ALBERTO FABBRI

TABLE OF CONTENTS: 1. The balance between custodial purposes and the exercise of the right to religious freedom. – 2. The effects of socio-religious evolution in prison. – 3. The understanding with Islamic faiths and the figure of the minister of religion. – 4. A space to pray. – 5. Concluding remarks.

1. The balance between custodial purposes and the exercise of the right to religious freedom

The subject of this brief intervention is the level of guarantees granted to the detained person and his or her right to religious freedom. A brief understanding on the position of a detainee in general is needed,[1] before moving on analysing the condition of migrants.[2] Indeed, a detainee is subject to measures aimed at restricting his or her personal liberty and is confined in a limited space. In such a situation, one might imagine that this person does not have the right to profess his or her own faith, especially in terms of worship or spiritual assistance. Nevertheless, Article 19 of the Italian Constitution grants the right of religious freedom to "everyone", which includes everyone present on the Italian territory, regardless of where they are under what legal reason they are in Italy. Therefore, even those who are in a prison facility have this right.

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[1] V. GREVI (Ed.), *Diritti dei detenuti e trattamento penitenziario*, Zanichelli, 1981.

[2] E. OLIVITO, *"Se la montagna non viene a Maometto". La libertà religiosa in carcere alla prova del pluralismo e della laicità*, in *costituzionalismo.it*, 2015(2); A. PALMA, *L'assistenza spirituale e la tutela del diritto di libertà religiosa nelle strutture segreganti*, in *www.salvisiuribus.it*, 2019; S. PAONE-C. VIGNALI, *La mediazione linguistica e culturale. Il carcere mondo di culture*, in *rapportoantigone.it*, 2021; C. PATERNITI MARTELLO, *Corpo e anima: la libertà di culto nelle carceri italiane*, in *Il carcere secondo la Costituzione. XV rapporto sulle condizioni di detenzione*, in *antigone.it*, 2019.

The problem is to identify the best model to adopt in order to strike a balance between the need to pursue the purposes of detention and the enjoyment of the rights guaranteed by the legal system. In this context, the benchmark of a "libra" should be adopted, where the need to strike a balance between different elements is the task to be achieved. In fact, on the one hand, there is the individual's right to religious freedom within a detention facility, while on the other hand, prison order and security must be respected in a very specific historical and social context.

2. The effects of socio-religious evolution in prison

The quest for a balance of interests is much easier in cases where the prison population professes the same religious faith. Indeed, until a few decades ago, when the majority of prisoners professed to be Christian, with a predominance of Catholics, the figure of the chaplain,[3] whose task it was to provide assistance to prisoners, did not raise questions of faith and guarantees of equality and non-discrimination, since the right to freedom of religion was widely exercised. Moreover, with regard to faiths other than Catholic, the agreements (*intese*) that may have been concluded between the religious denomination and the State, the appointment of chaplains,[4] as well as existing prison practices, did not give rise to any significant problems, given the small number of actively religious people.

The change in social reality brought about by the migration process has also profoundly altered the range of cults practised in prison. In particular, the presence of Islamic believers—a faith that is profoundly different from Christianity[5] (just think of the need to allow daily prayers to be held at specific times in relation to the daily services provided for in the prison regulations, or the observance of the month of *Ramadan*, with the serving of evening meals)—required a careful review of the criteria provided hitherto

[3] Article 26 of Presidential Decree no 230 of 30th June 2000 (hereinafter: 'Prison System Regulation') ensures the presence of a chaplain in each prison facility. See F. FRANCESCHI, *L'assistenza spirituale ai detenuti appartenenti alle confessioni religiose di minoranza nel nuovo regolamento penitenziario (D.P.R. 30 giugno 2000, n. 230): un caso evidente di "amnesia giuridica" da parte dell'Amministrazione dello Stato*, in *Il Diritto Ecclesiastico*, 2001, II, p. 74 ff.

[4] The confessions without an agreement are regulated by Law 1159 of 24th June 1929. On this point, see C. CARDIA, *Stato e confessioni religiose,* Il Mulino, 1992.

[5] L. MUSSELLI, *Islam, diritto e potere*, in *Il Politico*, 2007(2), p. 37 ff.

and adopted in the area of religious freedom, so that they could be fully applied to all inmates, regardless of their professed beliefs.

3. The understanding with Islamic faiths and the figure of the minister of religion

The situation is aggravated by the fact that the Islamic community has not signed an agreement (*intesa*) with the Italian State that would have been useful in regulating the position of Islamic prisoners.

In this respect, the figure of the religious assistant is particularly important.

However, the problem is not only a problem of the lack of an agreement with the Italian State, but also of the internal organisation of religious belief. In fact, the structure of Islam itself does not provide for the figure of a minister of religion (*ministro di culto*).

This aspect required a change in the model adopted until now, a model which consisted in identifying the figure of the minister of religion as a stable element within a religious organisation conceived on the Catholic hierarchical model. The need to guarantee the presence in prison of a religious assistant therefore requires the activation of open ways of calling on this figure, so that all the aspects involved—security and freedom of religion—are safeguarded and guaranteed.

For this reason, the prison system has increasingly advocated the use of people who, although not legally identified as ministers of religion, can perform a role of proximity and can be called upon the explicit request of the prisoner; we are talking about cultural assistants, recreational activity assistants, cultural mediators or simply imams. In terms of cooperation, it should be noted that in 2015 the Department of Prison Administration (DAP) signed an agreement [6] with the Union of Italian Islamic Communities (UCOII) to facilitate the entry into prisons of *imams* recognised and authorised by the Ministry of the Interior.

Admittedly, this is an agreement with only one of the Islamic actors, but the path taken has yielded encouraging results.

It is important to bear in mind that the recent episodes of religious

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[6] S. Angeletti, *L'accesso dei ministri di culto islamici negli istituti di detenzione, tra antichi problemi e prospettive di riforma. L'esperienza del Protocollo tra Dipartimento dell'Amministrazione penitenziaria e UCOII*, in *Stato, Chiese e pluralismo confessionale*, 2018(24), p. 1 ff.; A. Fabbri, *L'assistenza spirituale ai detenuti musulmani negli istituti di prevenzione e di pena e il modello del protocollo d'intesa: prime analisi*, in *Rassegna penit. e crim*, 2015(3), p. 71 ff.

fundamentalism [7] have had an impact on the prison administration and, specifically, on the regulation of the contacts that prisoners may have with the outside world. However, the full involvement of the religious communities themselves, giving them an active role in the arrangement of those figures who may enter prison, is a strategy to be encouraged and supported.

4. A space to pray

Another important issue is the availability of a place to pray, to be used individually or collectively for worship.

The changing prison population made it necessary to identify and provide spaces other than the Catholic chapels, suitable areas in which inmates could gather for prayer.

The solution adopted consisted, firstly, in the possibility of using one's own cell as a place for worship, even with the display of sacred images; [8] secondly, in the use of theatres, libraries, social rooms and even corridors as collective spaces, which could be reserved on a recurring basis, on fixed days and at fixed times, according to the requests made by the religious community, through the voice of the prisoners. Lastly, it is worth mentioning that religious practices can also take place in the absence of ministers of religion.

However, the use of multi-purpose spaces, which originate with a different destination and are adapted to religious needs, represents a temporary and occasional procedure, albeit repeated, which lacks the element of stability and exclusivity, just think of the difficulty of managing liturgical equipment, which has to be brought in and removed from time to time.

5. Concluding remarks

Within this framework, it is clear that religion plays a fundamental role in the personal and collective development that inmates undertake within prison facilities. This aspect is duly taken into consideration within the Prison Rules (*Legge sull'ordinamento penitenziario*, Law

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[7] D. MILANI-A. NEGRI, *Tra libertà di religione e istanze di sicurezza: la previsione della radicalizzazione jihadista in fase di esecuzione della pena*, in *Stato, Chiese e pluralismo confessionale*, 2018(23), p. 1 ff.

[8] Article 58(2) of the Prison System Regulation acknowledges the detainee's right to display images and symbols of his religious denomination in his individual room or in the common spaces.

No. 354 of 1975), whose Article 15(1) stipulates that '[t]he treatment of convicts and inmates shall be carried out mainly through education, vocational training, work, participation in projects of public utility, religion, cultural, recreational and sporting activities and by facilitating appropriate contacts with the outside world and relations with the family'.

The rehabilitative function that can be attributed to religion in the prison system cannot lead to considering and using the behaviour of the person concerned in the religious sphere as a criterion and parameter for evaluating his or her behaviour; the same applies to the modalities of exercising the right to freedom of religion, which must also leave equal space for the atheist, non-confessional and agnostic dimension.

Finally, the specific situation of foreign prisoners should be taken into account.

Undoubtedly, the condition of immigrants, due to their precarious and unstable situation, requires specific measures to be activated by the prison administration, in order to allow the detainee to express his "full potential". The available data [9] show that, over the years, the ratio between the number of foreign residents in Italy and the number of prisoners has fallen sharply, a sign that the condition of newcomers is better, with obvious positive repercussions also on the prison environment.

The "full potential" briefly mentioned above, means that, *in primis*, the prison authorities should activate a communication platform through which the immigrant detainee can understand the prison's rules and, secondly, be informed of his rights and duties. In this way, the immigrant prisoner will be able to make informed choices that would contribute to his redemption and effective human growth. The slower and more unprepared or disorganised the system is in preparing these instruments, the greater the risk that the immigrant will use religion as a social ransom, as an island to which he can retreat in order to find his own shared, protected space, or as a ransom from his condition. In this way, especially in a prison environment, religion would no longer represent a path to human

[9] The *Dossier Statistico Immigrazione 2021*, available at the URL: www.dossierimmigrazione.it, indicates that in 2008 the detention rate—calculated as the percentage of detained foreigners over the resident foreign population—was 0.71%, rising to a rate of 0.34% in 2020. The *Mid-year Report on the Condition of Detention in Italy 28 July 2022*, prepared by Antigone, records a detention rate of 0.35% for 2020, with a decrease for the year 2021 (0.34%) and 2022 (0.33%), in *www.antigone.it*.

completion, but the lesser evil in order to carve out a minimum space for survival.

The monitoring of these aspects becomes a priority in the assessment of behaviour that can spill over into religiously motivated fundamentalism. The consequences of this are, unfortunately, well known.

The supreme principle of active secularism therefore requires the prison administration to encourage, safeguard and promote the lawful expression of religious sentiments, not only in the provision of its services, but also by taking the necessary and useful measures to strengthen the civil and religious conscience of prisoners.

PART III

IMMIGRATION AND LANGUAGE ASSISTANCE

THE RIGHT OF 'HELD' MIGRANTS TO BE INFORMED ABOUT THE GROUNDS FOR DETENTION: A QUESTIONABLE APPROACH IN STRASBOURG?

Lorenzo Bernardini

Table of contents: 1. An outline of the problem. – 2. The ECHR legal framework: a general picture... – 3. ... and its specific application *vis-à-vis* detained migrants. - 4. *Ad hoc* lack of guarantees for 'held' migrants?

1. An outline of the problem.

The European legal systems, as already explained, [1] have set up para-criminal detention systems, to be applied to those foreigners who, finding themselves in certain situations, can be 'held'—this is the semantic sweetener used by the Italian legislator—in special facilities, distinct from prisons, according to the procedural steps provided for by *ad hoc* domestic provisions. In this way, national legal systems have welcomed the imperatives stemming from European Union ('EU') law and from the European Convention on Human Rights ('ECHR'), as interpreted by the Strasbourg Court.

In particular, as Cathryn Costello has sharply pointed out, EU law has progressively established a legal framework in which the applicant for international protection is considered as a "detainable subject", i.e. as a vulnerable individual who is perceived *in primis* as an ideal target for (formally) administrative and custodial measures. [2] This definition, tailored-to the applicant, may well be extended both *ratione personae* to 'irregular' foreigners, and *ratione materiae*, also in the light of recent developments of the ECHR legal system. Accordingly, the category of 'detainable subject' appears to be applicable to any

[1] See *supra* Part III, L. Bernardini, *Detained, criminalised and then (perhaps) returned: the future of administrative detention in European Union law.*

[2] C. Costello, *EU Law and the Detainability of Asylum-Seekers*, in *Refugee Quarterly Review*, 2016(35/1), p. 47 ff.

foreigner arriving on the territory of an EU Member State (or, similarly, of a State Party to the Council of Europe). Indeed, detention in centres, transit zones or *hotspots* is now a widespread administrative practice. However, migrants have not been left without any means of challenging the detention order issued by the authorities.

For instance, the Italian Constitutional Court has clearly acknowledged that the migrant 'enjoys all the fundamental rights of the human person, including the right to defence'.[3] The Court of Justice of the EU (CJEU) has repeatedly confirmed this assumption: the rights of the defence are fundamental rights which constitute an integral part of the legal order of the Union, as enshrined in the Charter;[4] the obligation to ensure their observance rests with 'the authorities of the Member States' which 'are, as a rule, subject to the obligation to observe the rights of the defence of addressees of decisions which significantly affect their interests',[5] such as administrative detention.

This has important consequences, especially those who are subject to 'holding': the effective exercise of the right of defence, in the words of the Italian Constitutional Court, implies that the addressee of a measure, which in any way restricts his or her personal freedom, must be able to understand its content and meaning.[6] The effectiveness of the linguistic assistance that must be provided to foreigners thus acquires particular importance, becoming prodromic to the exercise of all other procedural rights,[7] especially in relation to the very first moment in which the migrant may come into contact with the authorities of the country where he/she is, i.e. when—as soon as he/she is deprived of liberty for migratory reasons (whether irregular or asylum seeker)—he/she needs to know the reasons for such 'holding'. And this need can only be fully satisfied should the foreigner be informed in a language he/she understands.

At the supranational level, both the 1966 International Covenant on Civil and Political Rights (ICCPR) and the ECHR contain a specific provision on the right to linguistic assistance for the accused, i.e., that individual against whom criminal charges have

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[3] In this regard, Const. Court, 16th June 2000, no. 198.

[4] See, among others, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v. Kadi*, ECLI:EU:C:2013:518, paras. 98–99 and case-law cited therein.

[5] Case C-383/13 PPU, *G. and R.*, ECLI:EU:C:2013:533, para. 35.

[6] Const. Court, 16th June 2000, no. 198.

[7] See, by analogy, M. GIALUZ, *L'assistenza linguistica nel procedimento penale*, Wolters Kluwer-Cedam, 2018, p. 30: the purpose of language assistance is to 'give ears and a voice' to the accused and victims who do not know the language of the proceedings at stake, thus ensuring the effectiveness of the defence guarantees.

been brought.[8] Moving away from the strictly criminal *focus*, Article 5(2) ECHR guarantees anyone individual deprived of their liberty the right to be informed 'promptly, in a language he understands' of the reasons for his/her arrest.

While the safeguards set out in Article 5(2) ECHR largely concern individuals detained for various reasons in the context of criminal proceedings—and thus, for example, suspects in pre-trial detention or those who have been definitively sentenced—, the analysis in this chapter will focus on the right to linguistic assistance to be ensured to those migrants deprived of their liberty by administrative means (thus held in *ad hoc* centres).

Firstly, the prerogatives contained in the ECHR (§ 2), which apply to all individuals subject to detention measures *lato sensu*, will be considered. Secondly, a specific analysis of the Strasbourg Court's (ECtHR) case-law on language assistance for detainees (§ 3), will be taken into account. Lastly, some critical reflections on the approach proposed by the ECtHR case-law will conclude the analysis (§ 4).

2. The ECHR legal framework: a general picture...

The right to be informed about the grounds for detention is an 'elementary safeguard',[9] which constitutes 'an integral part of the scheme of protection afforded by Article 5 [ECHR]',[10] designed to prevent anyone from being arbitrarily deprived of his or her personal liberty. This prerogative embodies a 'legitimate confidence in the relations between the individual and the public powers'.[11]

Moreover, the ECtHR has long established a specific link between the guarantees under analysis and the right to *habeas corpus*, enshrined in Article 5(4) ECHR – a person who wishes to challenge the lawfulness of the deprivation of liberty suffered could not make effective use of this right without adequate and timely information on the grounds for the detention.[12]

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[8] The reference is to Article 14(3)(a) and (f) ICCPR and Article 6(3)(a) and (e) ECHR. In this regard, see at N. PASCUCCI, *La persona alloglotta sottoposta alle indagini e la traduzione degli atti*, Giappichelli, 2022, p. 6 ff.

[9] *Fox, Campbell and Hartley v. the United Kingdom*, App. nos. 12244/86 *et al.* (ECtHR, 30th August 1980), para. 40.

[10] *Shamayev and Others v. Georgia and Russia*, App. no. 36378/02 (ECtHR, 12th April 2005), para. 413.

[11] *X. v. United Kingdom*, App. no. 7215/75 (ECtHR, 5th November 1981), dissenting opinion of Justice Evrigenis.

[12] *Van Der Leer v. the Netherlands*, App. no. 11509/85 (ECtHR, 21st February 1990), para. 28.

According to Article 5(2) ECHR, anyone who is 'arrested' must be informed 'promptly', in a 'language he understands', of the 'reasons for his arrest' and of any 'charges' against him/her. This provision has three pillars.

Firstly, the information provided to the person concerned—or, where appropriate, to his lawyer or, if the detainee is a minor, to his or her legal tutor [13]—must be communicated to him/her as soon as possible, [14] i.e. immediately [15] or, at least, within an extremely short period of time. [16]

Secondly, the person concerned must be given a general picture that represents, in an 'essential' manner, the factual and legal circumstances underlying the custodial measure taken against him or her, [17] so that the individual can understand 'why he has been deprived of his liberty'. [18]

Thirdly and finally, communication with the prisoner must be carried out in a language that is 'a-technical', and 'simple', and that can be easily understood by the prisoner. [19] With regard to this last requirement, the problem of the effectiveness—but also the quality—of the linguistic assistance provided to the person concerned.

3. ... and its specific application vis-à-vis *detained migrants*.

There is no doubt as to the applicability of Article 5(2) ECHR to persons who are arrested, in various capacities, in the context of criminal proceedings. Indeed, the aforementioned provision explicitly regulates the situation of anyone who is 'arrested'. Therefore, the situation of migrants who are 'held'—not properly arrested—could fall outside the scope of the above-mentioned norm.

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[13] See, e.g., *Rahimi v. Greece*, App. no. 8687/08 (ECtHR, 5th April 2011), paras. 108–110.

[14] In the French translation of the ECHR we find the more effective expression '*dans le plus court délai*'.

[15] Yet, the ECtHR made it clear in *Bordovskiy v. Russia*, App. no. 49491/99 (ECtHR, 8th February 2005), para. 56, that the information foreseen in Article 5(2) ECHR 'does not necessarily have to be reported in its entirety by the police officer at the time of arrest'.

[16] *Fox, Campbell and Hartley* (note 9), paras. 37–43.

[17] For a comprehensive analysis on the scope of the information to be communicated to the detainee, see S. TRECHSEL, *Human Rights in Criminal Proceedings,* Oxford University Press, 2005, p. 457 ff.

[18] *Ladent v. Poland*, App. no. 11036/03 (ECtHR, 18th March 2008), para. 63.

[19] On this point, see *Abdolkhani and Karimnia v. Turkey*, App. no. 30471/08 (ECtHR, 22nd September 2009), para. 136, and *Z.H. and Others v. Hungary*, App. no. 28973/11, (ECtHR, 8th November 2012), para. 41.

However, such an approach would unduly distinguish the position of one who is deprived of his/her personal freedom—protected by Article 5(1) ECHR—by *arrest* from that of another person who is similarly deprived of his/her liberty by a measure of detention. Rejecting this artificial diversification, the ECtHR has emphatically ruled that the right to be informed of the reasons for detention also applies to migrants subject to administrative deprivation of liberty.[20] This equalisation, in particular, was justified by the fact that Article 5(4) ECHR makes no distinction between persons deprived of their liberty 'by arrest' or 'by detention'.[21]

Thus, even "held" migrants are entitled to a right to know the reasons for their stay in 'administrative prisons'[22] where they are confined, in the terms set out above. Nevertheless, the ECtHR's approach to the latter situation discloses several shortcomings.

The first of these concerns the content of the information provided. Although the ECtHR has repeatedly emphasised that the relevant information does not necessarily have to take the form of a written document,[23] it must nevertheless contain the essential information on the factual and legal grounds for the detention at stake. The surprise for the interpreter comes in the analysis of ECtHR's judgments relating to detained migrants where the Court's approach on the matter bizarrely reveals a weakening of ECHR standards. While it is certain that Article 5(2) ECHR also applies to administrative detention (as allowed as per Article 5(1)(f) ECHR), it is also clear from the ECtHR's standpoint that—unlike the cases covered by Article 5(1)(c) ECHR (i.e. the various types of 'criminal' detention)—the information provided to foreigners may be 'less complete'[24] or 'less detailed'.[25] However, the rationale which may explain this differentiated approach is not clear. Such a situation may risk to seriously undermine the effectiveness of the protection

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[20] *Abdolkhani* (note 19), para. 136.

[21] See *Shamayev* (note 10), paras. 413–414.

[22] The expression is due to by A. PUGIOTTO, *La "galera amministrativa" degli stranieri e le sue incostituzionali metamorfosi*, in *Quad. cost.*, 2014(3), p. 573.

[23] See, *inter alia, Nowak v. Ukraine*, App. no. 60846/10 (ECtHR, 31st March 2011), para. 63.

[24] *Kane v. Cyprus*, App. no. 33655/06 (ECtHR 13th September 2009) [dec.].

[25] *Suso Musa v. Malta*, App. no. 42337/12 (ECtHR, 23rd July 2013), para. 113. Still, the Court is careful to specify, in a kind of *excusatio non petita*, that this must be done without prejudice to the effective right to bring an action before a court to challenge the lawfulness of the detention, in accordance with Article 5(4) ECHR. However, it is difficult to see how it would be possible in practice to reconcile the approximate (or incomplete) information given to an alien with the effectiveness of the right of *habeas corpus* to which he or she is also entitled.

stemming from Article 5(2) ECHR to a specific category of aliens—those placed in administrative detention—who, on the contrary, need protection appropriate to their situation as vulnerable individuals. [26]

This excessively lenient attitude is all the more dangerous in view of the widespread practice of informing foreigners of the reasons for their detention by means of *dépliants*, usually consisting of standardised or stereotyped phrases, often in a 'vehicular' language. [27] These situations, which are not uncommon, have been the subject of several judgments of the ECtHR, sometimes condemning the States, sometimes ruling in their favour, thus confirming the difficulty of finding a coherent approach to the matter.

However, some firm points can be drawn. As a rule, standardised formulas constitute a violation of Article 5(2) ECHR, as they do not allow the migrant to identify the reasons for detention. Yet—bearing in mind that 'held' aliens can also be provided with information that is 'less detailed' in relation to other categories of prisoners foreseen in Article 5(1) ECHR—the ECtHR questionably found that the conduct of the Maltese authorities in informing the foreigner of the reasons for detention, without mentioning the violated legal provisions from which the lawfulness of the deprivation of liberty suffered could be deduced was lawful under Article 5(2) ECHR. [28]

Similarly, should a foreigner be held on the basis of a statement of intent, which contains impersonal declarations, and does not refer to the material situation, Article 5(2) ECHR is effectively breached. [29] Finally, in the case of a migrant held for the purpose of return, the ECtHR reiterated that the mere communication of information relating to the migration status—or on the possible measures of removal from the territory that could be taken against that individual—cannot suffice to ensure that the migrant concerned is

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[26] C. O'CINNEIDE, *The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism*, in S. SPENCER-A. TRIANDAFYLLIDOU (Eds.), *Migrants with Irregular Status in Europe*, Springer-IMISCOE Research Series, 2020, p. 53.

[27] For a critical analysis on the use of so-called 'vehicular languages' and the translation of acts in the Italian procedural-legal context, which can be shared *mutatis mutandis* here, see the analysis of N. PASCUCCI, *supra* note 8, p. 133 ff.

[28] *Suso Musa* (note 25), para. 116 and, similarly, *Rusu v. Austria*, App. no. 34082/02 (ECtHR, 2nd October 2008), paras. 37–42. Accordingly, the prerogative stemming from Article 5(2) ECHR is breached should the foreigner be merely informed that he is deemed to be an 'international thief', as pointed out in *Nowak* (note 23), para. 64.

[29] *Saadi v. the United Kingdom*, App. no. 13229/03 (ECtHR, 29th January 2008), para. 82.

aware of the grounds on which a deprivation of liberty has been ordered in the material case. [30]

Yet, in another judgment, the conduct of the national authorities in informing the detained migrant without providing 'details as to the method of instituting proceedings challenging the lawfulness of the detention' was held to be in keeping with the Convention, since Article 5(2) ECHR 'does not require the State to give such elaborate details, especially where it is not alleged that the applicant requested more information on the procedure [...] and that this request was refused'. [31] Thus, it appears that the content of the right to be informed as per Article 5(2) ECHR—which, if my reading is correct, should also include an explanation of the modalities by which the lawfulness of the detention suffered can be challenged [32]—is being "transformed" to the extent that it would impose an undue burden on the 'held' migrant to request 'more information on the procedure' concerning the detention measure.

A similar stance has been taken by the ECtHR with regard to the language assistance of the 'held' foreigner. He must have 'sufficient knowledge' of the language in which the reasons for the deprivation of liberty imposed on him/her are communicated. [33] Nevertheless, the migrant's allegedly negligent conduct could have an impact on the effectiveness of the prerogative under analysis. With the words of the ECtHR in *Suso Musa*—which rejected as manifestly inadmissible the applicant's complaints about the alleged violation of Article 5(2) ECHR—`[a]s to the language in which the information was given, the applicant did not specifically claim that he did not understand English or was unable to understand the information given on the bus or to communicate with the officers nor did he claim that he was unable to understand any other language in which the booklet was provided. Likewise, he did not submit that he had

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[30] *Khlaifia and Others v. Italy*, App. no. 16483/12 (ECtHR, 15th December 2016), para. 118.

[31] *Suso Musa* (note 25), para. 116.

[32] Other possible 'details on how to initiate the proceedings', might include the indication of the procedural deadlines for lodging the appeal, or of the manner in which the appeal is to be lodged (e.g. by electronic means or on paper). It is difficult to argue that these are 'such elaborate details' and that the States should not be burdened with the task of communicating them to the detained person should not be burdened on the States. *Quid iuris,* indeed, in the event of the expiry of the time-limits for filing a *habeas corpus* petition under Article 5(4) ECHR, in the face of the failure to communicate them? Can it be said that the right provided for in Article 5(2) ECHR is effectively guaranteed in such a case?

[33] *Nowak* (note 23), para. 64.

requested an interpreter and had his request refused'.[34] According to the literal wording of Article 5(2) ECHR, the burden of providing information in a language which the person at stake understands rests *entirely* with the national authorities and it does not seem acceptable that it should be the alien who has to 'take action' (e.g. by requesting an interpreter) in order to obtain respect for a prerogative which is already acknowledged *ipso iure* by the very wording of the ECHR.[35]

4. Ad hoc *lack of guarantees for 'held' migrants?*

At the end of these brief considerations on the right to be informed as per Article 5(2) ECHR, set in the peculiar context of "held" foreigners, one cannot help but notice a worrying trend underway in Strasbourg.

Similar to the determination of the existence of a 'deprivation' of liberty under Article 5(1)(f) ECHR[36], the ECtHR seems to have developed, over time, a lower level of protection for migrants placed in administrative detention with respect to the guarantee under examination. Why, one might ask, can information on deprivation of liberty be less comprehensive than for other categories (e.g., suspects in pre-trial detention)? And why should the migrant have to bear the burden of representing his or her status as an alien, in a context where he or she may not understand anything that is communicated to him/her or her by the authorities in a different language?

It is thus clear that the issue of linguistic assistance, for "held" foreigners, intersects with the question of the scope of the information provided on the grounds for detention. In this regard, the critical aspects of the case-law of the ECtHR on the right to be informed revolve around two conceptual lines: (a) the failure to acknowledge a right to receive detailed information that renders

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[34] *Suso Musa* (note 25), para. 117. The Court makes a reference, *mutatis mutandis,* to *Galliani v. Romania*, App. no. 69273/01 (ECtHR, 10th June 2008), para. 54.

[35] N. PASCUCCI, *supra* note 8, p. 16, rightly observes, contesting the position of the ECtHR on this point, that 'paradoxically, it is precisely the person who is most in need of linguistic assistance—i.e. the person who is totally ignorant of the language of the proceedings and of the criminal procedure of the country in which he is—who is in fact excluded from it, as he or she is neither aware of nor able to signal his *alloglossia*'.

[36] On this point, see L. BERNARDINI, *La detenzione dei migranti tra "restrizione" e "privazione" di libertà: la CEDU alla ricerca di* Godot, in *Dir. imm. citt.*, 2022(1), p. 90 ff.

effective the right of *habeas corpus* enshrined in Article 5(4) ECHR; (b) the requirement that a foreigner must engage in 'active' conduct, assisting the national authorities, in order to secure for him or her the protection of Article 5(2) ECHR, in full contrast with the purpose of the Convention, which is to 'ensure the effectiveness of the rights enshrined therein'. [37]

The final question can be summarised as follows: why is such a paradigm adopted only with regard to the held foreigner, a 'special approach' [38] that undermines the universalism with which the Convention was drafted?

[37] N. PASCUCCI, *supra* note 8, p. 16.

[38] The expression is taken, by analogy, by C. PITEA, *La Corte EDU compie un piccolo passo in avanti sui Paesi terzi "sicuri" e un preoccupante salto all'indietro sulla detenzione dei migranti al confine*, *Dir. imm. citt.*, 2020(3), p. 203.

DIRECTIVE 2010/64/EU ON THE RIGHT TO INTERPRETATION AND TRANSLATION IN CRIMINAL PROCEEDINGS

Silvia Allegrezza - Lorenzo Bernardini

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1. A historical framework

One of the main objectives of the European Union (EU) is to maintain and develop an Area of Freedom, Security and Justice (AFSJ). The aim is to promote judicial and police cooperation between Member States while ensuring respect for the human rights and fundamental freedoms of EU citizens.

Since the conclusions of the Tampere European Council of 15 and 16 October 1999—which followed the one held in Cardiff the previous year [1]—the principle of mutual recognition has been the cornerstone of judicial cooperation in criminal matters. [2] At that time, the EU did not strive for harmonising domestic legislation, but rather to promote 'inter-governmental cooperation' between national authorities based on the principle of mutual recognition, the 'cornerstone' of criminal cooperation between EU Member States. [3] Notably, mutual

[1] Cardiff European Council, 15th-16th June 1998, *Presidency Conclusions*, at *www.europarl.europa.eu*, para. 39. More specifically, the Council's wish was to 'extend the mutual recognition of each other's court decisions'.

[2] Tampere European Council, 15-16 October 1999, *Presidency Conclusions*, in *www.europarl.europa.eu*, para. 33.

[3] See, among others, J. Hodgson, *Criminal procedure in Europe's Area of Freedom, Security and Justice: the rights of the suspects*, in V. Mitsilegas-M. Bergström-T. Konstantinides (Eds.), *EU Research Handbook of Criminal Law*, Edward Elgar, 2016, p. 169; S. Gless, *Mutual recognition, judicial inquiries, due process and fundamental rights*, in J.A.E. Vervaele (Ed.), *European Evidence Warrant: Transnational Judicial Inquiries in the EU*, Intersentia, 2005, p. 121-129; S. Allegrezza, *Cooperazione giudiziaria, mutuo riconoscimento e circolazione della*

recognition is rooted in the mutual trust that Member States should place in each other's criminal justice systems. However, this climate of trust involves not only the judicial authorities but also 'all those involved in criminal proceedings', to ensure that they 'consider the decisions of the judicial authorities of other Member States as equivalent to those of their own State and do not call into question their judicial competence and respect for their rights to guarantee a fair trial'.[4] Therefore, the effective application of the principle of mutual recognition should also be achieved by enhancing common minimum standards on the fundamental rights to be acknowledged *vis-à-vis* the person involved in the criminal proceedings.[5]

The political difficulties in reaching agreement between the Member States on the harmonisation of procedural rules did not, however, prevent the creation of legal instruments based on mutual recognition aimed at strengthening judicial cooperation. Thus, both the European Arrest Warrant[6] and an initial mechanism for 'taking account of convictions in the Member States of the European Union in the course of new criminal proceedings'[7] were introduced.

Nowadays, as then, the key argument for overcoming the *impasse* revolves around the fact that all EU Member States are also Parties to the European Convention on Human Rights ('ECHR'). Yet, the recognition of the fundamental rights enshrined in the ECHR did not—and still does not—in itself allow for a sufficient degree of

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prova penale nello Spazio giudiziario europeo, in T. RAFARACI (Ed.), *L'area di libertà, sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia*, Giuffrè, 2007, p. 691-719; L. BACHMAIER, *Mutual Recognition Instruments and the Role of the Cjeu: The Grounds for Non-Execution*, in *New J. of Eur. Crim. Law*, 2015(4), p. 505–526.

[4] *Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union*, 2004/0113 (CNS), COM (2004) 328 final, Recital 4.

[5] See the *Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters*, 2001/C 12/02 [OJ C 12, 15.1.2001, p. 10–22], where it is expressly set forth that mutual recognition 'is designed to strengthen cooperation between Member States but also to enhance the protection of individual rights'.

[6] Council Framework Decision 2002/584/JHA of 13 June 2002 *on the European Arrest Warrant and the surrender procedures between Member States* [OJ L 190, 18.7.2002, p. 1–20], as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 *amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial* [OJ L 81, 27.3.2009, p. 24–36].

[7] Council Framework Decision 2008/675/JHA of 24 July 2008 *on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings* [OJ L 220, 15.8.2008, p. 32–34].

confidence in the criminal justice systems of the other Member States to be considered achieved. [8]

In 2010, it was EU Justice Commissioner Viviane Reding who understood the importance of the necessary harmonisation of domestic legal frameworks as a precondition for the approval of new mutual recognition instruments. She came down hard on the Member States, declaring that she would no longer approve any mutual recognition instruments unless they first agreed on certain procedural guarantees for suspects and accused persons in criminal proceedings. This led to the idea of providing the EU with a framework of European guarantees for suspects and accused persons in the context of criminal proceedings. [9]

This was not the first time that the EU had attempted to legislate on the subject. Indeed, for the sake of completeness, it should be recalled that in 2004 the European Commission had already presented a proposal for a Framework Decision on the subject of safeguards in criminal proceedings, [10] but the project failed within a short time, ending in a deadlock due to a political *impasse* that was difficult to resolve. [11]

Against this background, Commissioner Viviane Reding had a ingenious intuition – to "unpack" the content of the proposal for a Framework Decision into six "conceptual segments", each of which embodied a "portion" of guarantees, so as to facilitate agreements among Member States on single topics, on a case-by-case basis. Thus, on 30 November 2009, the Council of the European Union

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[8] S. GLESS, *supra* note 3, p. 124, notes that 'the common presumption in the discussion on 'due process' and the 'principle of mutual recognition', however, is that there will be no serious conflict, because all Member States are bound by the ECHR and thus are supposed to provide comparable protection of individual rights. While the premise is correct – all EU Member States are bound by the ECHR – the conclusion is not, I fear'.

In 2004, the EU was well aware that 'Member States are not always confident about the criminal justice systems of other Member States and this despite the fact that they are all signatories to the ECHR' (see Recital 4 of the Proposal for a Council Framework Decision *on certain procedural rights in criminal proceedings throughout the European Union, supra* note 4.). See M. GIALUZ, *L'assistenza linguistica nel procedimento penale,* Wolters Kluwer-Cedam, 2018, p. 79 – the Author observed that 'mere participation' in ECHR did not constitute 'sufficient grounds for ensuring equal protection of fundamental rights'.

[9] For the sake of completeness, it should be recalled that a political consensus on the protection of victims in the context of criminal proceedings had already been reached, through the approval of Council Framework Decision 2001/220/JHA of 15 March 2001 *on the standing of victims in criminal proceedings* [OJ L 082, 22.3.2001, p. 1–4].

[10] See *supra* note 4.

[11] On this point see, *inter alia,* C. ARAGÜENA FANEGO (Ed.), *Garantías procesales en los procesos penales en la Unión Europea*, Lex Nova, 2007, *passim*.

adopted a Resolution containing the so-called 'Stockholm Roadmap', which, from that moment on, would definitively mark the action of the EU legislator with regard to the procedural rights of defendants and accused persons. [12]

It was the same Commission that, a few months earlier, had called for the strengthening of an 'area of freedom, security and justice at the service of the citizen', which would take the form of a criminal justice system capable of protecting the individuals by enhancing the rights of persons involved in criminal proceedings, since '[p]rogress is vital not only to uphold individuals' rights, but also to maintain mutual trust between Member States and public confidence in the EU'. [13]

It was an ambitious project, which later came to be known informally as the 'Stockholm Programme', referring to the Swedish presidency of the Council of the European Union in the second half of 2009. [14] The Resolution on the so-called Roadmap—which was fully part of this programme—was the first concrete step towards the realisation of a framework of minimum European guarantees on the rights of suspects/accused persons.

In May 2010, the Stockholm Programme was published in the Official Journal of the EU. [15] It stated, with some emphasis, that 'the protection of the rights of suspected and accused persons in criminal proceedings' was a 'founding value of the Union', 'essential' for strengthening mutual trust not only "horizontally" (between States) but also "vertically" (between citizens and the EU itself). [16] The so-called Roadmap officially became an integral part of the Stockholm Programme and the Commission was formally mandated to present the relevant proposals. [17]

Among the issues mentioned in the table, the topic of translation and interpretation was at the top ("Measure A"): it was recognised that 'the suspect or defendant must be able to understand what is

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[12] Resolution of the Council of 30 November 2009 *on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* [OJ C 295, 4.12.2009, p. 1–3].

[13] Communication from the Commission to the European Parliament and the Council – *An area of freedom, security and justice serving the citizen*, COM(2009) 262 final, 10.6.2009, point 4.2.2.

[14] The programme was first discussed at an informal meeting in Stockholm in July 2009. The relevant documentation is still available on the archived website of the Swedish *pro tempore* presidency of the Council of the European Union, available at the following URL: *https://bit.ly/3ehVMne*.

[15] The Stockholm Programme – *An open and secure Europe serving and protecting citizens* [OJ C 115, 4.5.2010, p. 1–38].

[16] The Stockholm Programme, *supra* note 15, para. 2.4.

[17] Ibid..

happening and make him/herself understood', the 'need for an interpreter' was mentioned, and, finally, the need for 'translation of essential procedural documents' was supported.[18] This was not a random choice: the EU was based—and still is—on the well-known 'four freedoms', including the freedom of movement, and was founded on the protection of multilingualism. However, this richness could not translate into Kafkaesque scenarios, in which the monolingual individual would be swallowed up by the machinery of justice, unable to understand what was happening around him/her and therefore unable to defend him/herself.

Linguistic assistance, which makes it possible to understand and consciously participate in the proceedings, thus became the founding act of the European network of (criminal) procedural guarantees.

2. The main features of the Directive

The drafting of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings[19] is the first attempt by the EU legislator to 'ensure minimum standards for language assistance in criminal proceedings'.[20]

The Directive transposes into EU law the principles developed *illo tempore* by the ECtHR's settled case-law and even extends its scope.[21] Indeed, in order to strengthen mutual trust between Member States, the EU legislator insists on the need for 'more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR'[22]. The starting point consisted therefore in the relevant ECHR's provisions concerning a specific aspect of the right of defence, namely the right to interpretation and translation for those who do not speak or understand the language of the proceedings.[23] Accordingly, it was the 'paradigm' of the ECHR related to the 'rights of the defence'[24]

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[18] Ibid., Annex, Measure A.

[19] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 *on the right to interpretation and translation in criminal proceedings* [OJ L 280, 26.10.2010, p. 1–7].

[20] M. KOTZUREK, *Die Richtlinie 2010/64/EU zum Dolmetschen und Übersetzen in Strafverfahren: Neues Qualitätssiegel oder verpasste Chance?*, in *EUCRIM*, 2020(4), p. 314 ff.

[21] V. MITSILEGAS, *EU Criminal Law after Lisbon*, Bloomsbury, 2016, p. 161.

[22] Recital 7, Directive 2010/64/EU.

[23] Recital 14, Directive 2010/64/EU.

[24] L. SIRY, *The ABC's of the Interpretation and Translation Directive*, in S. ALLEGREZZA-V. COVOLO (Eds.), *Effective defence rights in criminal proceedings*, Wolters Kluwer-Cedam, 2018, p. 38.

that set the minimum standards followed by the EU legislature. But there is more: the so-called non-regression clause prevents Member States from reducing the procedural guarantees already in force in their own legal systems in the name of the Directive, and it is likewise imposed that '[n]othing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law'. [25] On the road to the guarantees, the Directive only intends to move forward.

That being said, the legal basis of the Directive is to be found in Article 82(2)(b) TFEU, which allows the European Parliament and the Council—by means of Directives and following the ordinary legislative procedure—to draw up minimum rules 'to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension', including 'the rights of individuals in criminal procedure'. Among these, the Commission has chosen to set minimum standards for linguistic assistance, taking due account, of course, of the multilingualism that has always characterised the structure of the EU. [26]

Notably, it should be noted that the provisions of Directive 2010/64/EU do not constitute European criminal procedure *stricto sensu*; they have become part of the criminal procedure of each Member State, since—and this is a fundamental aspect of the matter—the Union does not require a prior harmonisation of the basic substantive law or the mere presence of a transnational character as a "connecting factor". [27] Indeed, the scope of application of the prerogatives laid down in Directive 2010/64/EU does not depend on these grounds: it comes into play when a natural person—given the exclusion of legal persons—is suspected or accused in criminal proceedings, [28] even partially, i.e. even when only part of the

[25] Article 8, Directive 2010/64/EU.

[26] On this point, see, for all, M. GIALUZ, *supra* note 8, p. 19 ff.

[27] K. AMBOS, *European Criminal Law*, Cambridge University Press, 2018, p. 137. This is in spite of the wording of Article 82(2)(b) TFEU (see S. CRAS-L. DE MATTEIS, *The Directive on the Right to Information*, in *EUCRIM*, 2013(1), p. 23).

[28] Article 1(2), Directive 2010/64/EU. It applies, specifically, to individuals who have been 'made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings', as well as to proceedings for the execution of a European Arrest Warrant (Article 1(1), Directive 2010/64/EU), in the context of the execution of a European Investigation Order and also to investigations conducted by the European Public Prosecutor's Office.

proceedings involving him/her take place before a criminal court.[29] Moreover, the Directive also applies to special proceedings, as the Court of Justice of the European Union (CJEU) has ruled in a well-known judgment (*Covaci*).[30]

What is the incredible effect of the outcome of this "Europeanisation" operation? All criminal proceedings carried out in the EU will become *ipso facto* European 'criminal matters' and therefore, as an application of EU law, any of them could be brought before the CJEU.[31]

With regard to the content of the Directive on linguistic assistance, it should be noted at once that while it is true that the "mercantilist spirit" that underlines the EU is still present and sometimes manifests itself in an extreme concreteness—clearly visible in the "crude", or at any rate unrefined, drafting of certain acts of secondary legislation, such as the one under consideration—, it must be deeply appreciated that the Directive has provided guarantees for the most vulnerable. This proves to be "real" justice. Much more than has been done over the years both by national legislators and, to some extent, by the ECtHR. It is the last, the weakest—those who, due to socio-economic conditions, have neither access to a lawyer who speaks their language nor the language skills to understand the criminal proceedings conducted against them—who benefit from the rights conferred by Directive 2010/64/EU. In this case, the extreme concreteness of the Union ends up offering concrete guarantees to the individual.

As mentioned above, those on language assistance are a *species* of the broader *genus* of the 'right of the defence'. Yet, the idea of 'defence' advocated by the EU, differs from that of the Member States.

An example could pave the way – one could think of the Italian Code of Criminal Procedure. It sets up a "zone defence": by identifying specific legal areas, it moves from a phase (preliminary investigations) which 'does not count and does not weigh'[32] to

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[29] Reference could be made to traffic offences, which are often hinged on an administrative phase, in the first instance, after which, in certain situations, a criminal phase may be triggered. This circumstance is regulated by Article 1(3), Directive 2010/64/EU, which confirms the applicability of the Directive at stake to proceedings possibly brought, in the second instance, before a criminal court. See also Recital 16 of the same Directive.

[30] Case C-216/14, *Criminal proceedings against Gavril Covaci*, ECLI:EU:C:2015:686 (hereinafter *Covaci*), para. 27.

[31] This is, of course, without prejudice to the opt-outs of Denmark and Ireland *vis-à-vis* the AFSJ.

[32] M. NOBILI, *Diritti per la fase che "non conta e non pesa"*, in ID., *Scenari e trasformazioni del processo penale*, in ID., *Scenari e trasformazioni del processo penale*, Cedam, 1998, p. 35 f.

another one (trial phase) which, on the contrary, "does count and weigh", as it is the privileged place for evidence formation. This "zone" methodology is clearly not applicable in Europe: there are too many differences between the legal systems of the Member States.[33] The EU legislator has therefore opted for a "man-to-man defence", i.e. based on the specific safeguard to be protected (as was the case with the adoption of Directive 2010/64/EU).

The content of the latter must therefore be analysed on the basis of a preliminary consideration: it is not merely a question of "minimum standards" but of a very advanced offer of defence—centred on the right to linguistic assistance—if one looks at the rules that existed before the adoption of the Directive at stake.

The latter, as well as the others envisaged in the Roadmap (namely, the right to information,[34] legal aid,[35] certain aspects of the presumption of innocence,[36] legal aid[37] and procedural guarantees for suspected or accused minors),[38] is organised along three conceptual lines. First, it outlines the content and scope of the procedural guarantees enshrined therein: what rights are to be protected and how they are to be protected. Then, the possible control mechanisms to be activated in the event of a breach of the prerogatives *in parte qua* are

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[33] In many countries (e.g. France, Belgium, the Netherlands, Luxembourg) the figure of the Investigating Judge still exists. The "zone" of preliminary investigations, in these systems cannot be considered analogous to that of the accusatory criminal justice systems, where the real *dominus* of the investigation phase is the Public Prosecutor and there is an *ad acta* judge (e.g. the Italian Judge for Preliminary Investigations) who supervises certain specific acts of the latter (when, for example, when it comes to activities involving deprivation of personal liberty).

[34] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 *on the right to information in criminal proceedings* [OJ L 142, 1.6.2012, p. 1–10].

[35] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 *on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty* [OJ L 294, 6.11.2013, p. 1–12].

[36] Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 *on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings* [OJ L 65, 11.3.2016, p. 1–11].

[37] Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 *on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings* [OJ L 297, 4.11.2016, p. 1–8].

[38] Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 *on procedural safeguards for children who are suspects or accused persons in criminal proceedings* [OJ L 132, 21.5.2016, p. 1–20].

provided for. And here it is noteworthy that the more boldly the first part is structured, the more timidly the second part is elaborated. Finally, the third dimension of protection, that of effective sanctions in the event of a breach of the guarantees provided for by the Directive, is almost entirely absent. The EU's approach on this point is pilatesque: common rules are abandoned and Member States are given more room for manoeuvre to set up a system of procedural sanctions.

The Directive has two main focuses. The first concerns the right to oral interpretation for the benefit of those who 'do not speak or understand the language of the criminal proceedings in question', who must be assisted by an interpreter 'without delay' before investigative and judicial authorities in a wide range of situations (including 'police questioning, and at all hearings, including necessary preliminary hearings'). [39] The second relates to the right to written translation of 'essential documents', to be ensured to those who 'do not speak or understand the language of the criminal proceedings' and 'within a reasonable period of time' according to a teleologically oriented approach: the aim is to 'safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence'. [40] Yet, the lack of common criteria for establishing the "non-knowledge" (or "non-understanding") of the language of the main proceedings seems questionable. In the absence of further indicators set at EU level, each Member State may choose more or less effective forms of verification of knowledge. Anyone who has had the slightest contact with the practice knows how superficial such assessment can be, especially in simplified or accelerated procedures. Moreover, the reluctance to invest resources in developing methodologies that can be considered scientifically sound and oriented towards an effective defence of the underlying right is well known.

However, the cornerstone of the Directive lies in its Article 4, which stipulates that Member States shall bear the costs of interpretation and translation 'regardless of the outcome of the proceedings'. Even more incisive in terms of effectiveness is the recognition of free linguistic assistance for all individuals concerned, in particular as regards communication between suspects/accused persons and the defence. [41]

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[39] Article 2(1), Directive 2010/64/EU. It is noteworthy that also in the context of communications between suspects/accused persons and lawyers, the right to an interpreter must be guaranteed 'where necessary in order to safeguard the fairness of the proceedings' (Article 2(2), Directive 2010/64/EU).

[40] Article 3(1), Directive 2010/64/EU.

[41] See *supra* note 39.

On the basis of the aforementioned two main focuses of the Directive, some collateral considerations can be unravelled.

Firstly, the right of the person concerned to challenge the decision declaring the interpretation superfluous or to appeal against the poor quality of the interpretation should be mentioned[42] . The Directive does not oblige Member States to provide for an *ad hoc* appeal mechanism. There is no duty to establish a system of review exclusively dedicated to it. On the basis of the wording of the Directive, it may be assumed that the control requirements can be fulfilled if the main judgement is challenged—whether by way of review, appeal or cassation—in the name of the procedural autonomy granted to the Member States in this area.[43]

Secondly, account must be taken of the difficult conceptual delimitation of the category of 'essential documents' the translation of which must be guaranteed and the identification of which is partly left to the Member States. These undoubtedly include 'decisions depriving a person of his liberty, acts containing charges and judgments'.[44] Full recognition of the procedural autonomy of the Member States is more than appropriate here, as it is not possible to offer a common list of essential documents. Hopefully, it would be appropriate for each State to clarify its own "list" so as to reduce the room for discretion of national courts.

Some guidance can be found in the CJEU's case-law. According to the latter, an *inaudito reo* penalty order (*decreto penale di condanna*) is an 'essential document',[45] without prejudice to the power of the national authorities to 'decide whether other documents are essential' and the right of the persons concerned or his or her defence counsel to 'submit a reasoned request to that effect'.[46] It is therefore entrusted to CJEU's case-law to pursue an *actio finium regundorum*

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[42] Article 2(5), Directive 2010/64/EU.

[43] It is important to highlight the difference between certain French-influenced systems—which provide for the possibility of a continuous and progressive series of appeals before the so-called *chambres du conseils* throughout the criminal proceedings—and other systems (including the Italian one), where this modality is unknown and the main means of appeal against the judgement can be adopted solely at the end of the first instance trial. Yet, by bringing "forward" the time limit for lodging an appeal, the possibility of obtaining compensation for the damage suffered necessarily entails a regression of the proceedings. On closer examination, this problem does not exist in legal systems with progressive appeals, since the damage can be repaired immediately.

[44] Article 3(2), Directive 2010/64/EU.

[45] Case C-278/16, *Criminal proceedings against Franck Sleutjes*, ECLI:EU:C:2017:757, paras. 25–34.

[46] Article 3(3), Directive 2010/64/EU.

precisely in order to draw the line between 'essential' documents and those which, on the contrary, do not belong to this category.

Thirdly, the implications of the situation (which arose in the *Covaci* case referred to above and which is likely to occur frequently in practice) where a person wishing to lodge an opposition to a penalty order, lodges that appeal in his or her mother tongue (contrary to the domestic provisions requiring the use of the language of the proceedings, on pain of inadmissibility of the appeal), have been clarified. Is the person concerned entitled to a free translation of the document in question? The CJEU referred the case back to the Member States on the following grounds: if, on the one hand, 'to require Member States [...] not only to enable the persons concerned to be informed, fully and in their language, of the facts alleged against them and to provide their own version of those facts, but also to take responsibility, as a matter of course, for the translation of every appeal brought by the persons concerned against a judicial decision which is addressed to them would go beyond the objectives pursued by Directive 2010/64 itself',[47] it must however be acknowledged that the Directive 'ensures [...] the benefit of the free assistance of an interpreter' where the person concerned 'orally lodges an objection against the penalty order of which he is the subject at the registry of the competent national court, so that that registry records that objection, or, if that person lodges an objection in writing, can obtain the assistance of legal counsel, who will take responsibility for the drafting of the appropriate document, in the language of the proceedings'.[48] This being said, it is left to the national authorities to decide whether or not to accept an appeal lodged in a language other than the language of the court,[49] without prejudice to the possibility for Member States' to consider the opposition lodged[50] as 'fundamental' and thus to provide for its translation.

3. Perspectives de iure condendo

The future of Directive 2010/64/EU hinges on three very recent rulings rendered by the CJEU.

The first of these is an indication of a possible extension of the scope of application of the Directive also to the so-called punitive

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[47] *Covaci*, *supra* note 30, para. 38.
[48] Ibid., para. 42.
[49] Ibid., para. 47.
[50] Ibid., para. 50.

or 'criminal-coloured' administrative law.[51] The case, which was discussed in October 2021,[52] concerned a fine imposed by the Dutch authorities on a Polish lorry driver. Dutch authorities subsequently sought recognition of the decision by which they had imposed that fine on the Polish authorities, on the basis of a 2005 Framework Decision.[53] The Court accepted that the executing State (Poland) may well refuse to enforce that decision, where the latter 'has been notified to the addressee thereof without a translation, into a language which he or she understands, of the elements of the decision which are essential in order to enable him or her to understand the charge against him or her and fully to exercise his or her rights of the defence, and without that addressee being afforded the opportunity to obtain such a translation on request'.[54]

The second decision to be mentioned was drafted in November 2021.[55] The person concerned, a Swedish citizen of Turkish origin, had been served with a summons, which he had not withdrawn, in the context of criminal proceedings—conducted in Bulgaria—for offences related to the illegal use and possession of firearms and ammunition.[56] The suspect had been previously arrested and questioned by investigators in the presence of a Swedish-speaking interpreter. However, according to the national court that heard that case, there was 'no information as to how the interpreter was selected, how that interpreter's competence was verified, or whether the interpreter and [the suspect] understood each other'.[57]

Therefore, the referring court wondered 'as to the consequences of a breach of the accused person's right to information where it cannot be established that he or she knew of the suspicions or accusation against him or her owing to a failure to provide adequate interpretation, for the conduct of criminal proceedings against him or

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[51] The expression is widely adopted by, among others, A. DI PIETRO-M. CAIANIELLO (Eds.), *Indagini penali e amministrative in materia di frodi IVA e doganali. L'impatto dell'*European Investigation Order *sulla cooperazione transnazionale*, Cacucci, 2016, *passim*. On this topic see G. LASAGNI, *Processo penale, diritto amministrativo punitivo e cooperazione nell'Unione europea*, in *Dir. pen. cont.*, 2016(2), p. 137 ff.

[52] Case C-338/20, *D.P.*, ECLI:EU:C:2021:805 (hereinafter *D.P.*).

[53] Council Framework Decision 2005/214/JHA of 24 February 200 *on the application of the principle of mutual recognition to financial penalties* [OJ L 76, 22.3.2005, p. 16–30].

[54] *D.P.*, *supra* note 52, para. 44.

[55] Case C-564/19, *Criminal proceedings against IS*, ECLI:EU:C:2021:949 (hereinafter *IS*).

[56] Ibid., paras. 25–28.

[57] Ibid., para. 27.

her in absentia'. [58] In other words, the question can be summarised as follows – is the Hungarian legislation which allows proceedings to be conducted *in absentia*—on the basis of a summons which has not been withdrawn by the person concerned—in a context where it is impossible to establish whether the accused person has been informed of the suspicion or accusation against him or her in keeping with Directive 2010/64/EU? The Court provides a peremptory interpretation: 'if [...] it were to prove impossible to ascertain the quality of the interpretation provided, such a circumstance would also preclude the criminal proceedings from being continued in absentia. Indeed, the fact that it is impossible to ascertain the quality of the interpretation provided means that it is impossible to establish whether the accused person was informed of the suspicions or accusation against him or her'. [59] Consequently, *in absentia* proceedings cannot take place, if the interpretation at stake is inadequate or—and this is the *novum* of the decision—if it is impossible to ascertain the quality of the interpretation provided and thus to establish that the accused person has been informed of the charges against him or her in a language he understands. [60]

Lastly, the third ruling of the CJEU, issued in August 2022, [61] adds a further piece to the development of the case-law on the content of the Directive under analysis.

The Portuguese authorities charged a Moldovan citizen (Mr. TL) with various offences, including resisting a public official and driving without a licence. The 'indictment report' was translated into Romanian, Moldova's official language, while the so-called DIR (declaration of identity and residence) was not. [62] The defendant was sentenced to three years' imprisonment, suspended for the same period with probation. In order to execute the latter, the competent authorities tried in vain to contact Mr. TL at the address indicated in

[58] *IS*, Opinion of Advocate General Pikamäe delivered on 15 April 2021, ECLI:EU:C:2021:292, para. 67.

[59] *IS, supra* note 55, para. 136.

[60] Ibid., para. 137.

[61] Case C-242/22, *Criminal proceedings against TL*, ECLI:EU:C:2022:611 (hereinafter *TL*).

[62] This is an official document, drawn up by the judicial authority or the competent judicial police body, provided for by Article 196(1) of the Portuguese Code of Criminal Procedure (CCP). During its drafting, the accused is asked to indicate 'his residence, his place of work or another domicile of his choice' (Article 196(2) CCP). The DIR also indicates a series of information and obligations that must be communicated to the defendant, including 'the obligation not to change residence or to be absent from it for more than five days without communicating his new address or the place where he can be found' (Article 196(3)(b) CCP).

the DIR. Subsequently, he was summoned by the competent court, for the execution of probation, but to no avail, as he did not appear for the hearing. As a result, the judge revoked the suspended sentence in a decision written in Portuguese, which then became final. The person concerned was finally arrested and then detained at his new address for the purpose of the execution of the sentence.

In his application to have the DIR declared null and void, Mr. TL claimed that he had ignored the obligation to notify his change of address, since the DIR had not been drafted in Romanian, and he had had not the opportunity to be assisted by an interpreter. The competent court, before which the case was brought, rejected the application for annulment 'on the ground that, although the procedural defects invoked by TL were established, they had been rectified, since TL had not invoked them within the periods laid down in Article 120(3) of the CCP'. [63]

The referring court therefore asked the CJEU to interpret Directives 2010/64/EU and 2012/13/EU in relation to the nullity of acts performed in breach of their provisions. [64]

In a nutshell, the CJEU accepted that the effectiveness of the right to interpretation and translation, [65] together with the 'right to information about rights', [66] is undermined where the inflexibility of the time limit for raising a breach of the right is such as to exclude an effective remedy, as was the case here, where the time limit had expired even before Mr. TL became aware of the measure. [67] This decision sheds light in the opaque world of procedural defects, characterised by rigid time scales that are often in conflict with the reading of the substantive effectiveness of the rights enshrined in the EU legal framework.

The latest approach of the CJEU ultimately allows the interpreter

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[63] *TL*, *supra* note 61, para. 24.

[64] *TL*, Opinion of Advocate General Campos Sánchez-Bordona delivered on 14 July 2022, ECLI:EU:C:2022:580, para. 3.

[65] See Article 2(1) and (3) Directive 2010/64/EU.

[66] See Article 3(1)(d), Directive 2012/13/EU.

[67] *TL*, *supra* note 61, para. 86: 'a person in a situation such as that of TL is deprived, *de facto*, of the possibility of pleading its nullity. Where that person, who does not know the language of the criminal proceedings, is unable to understand the meaning of the procedural act and its implications, he or she does not have sufficient information to assess the need for the assistance of an interpreter when it is drawn up or for a written translation of that document, which may appear to be a mere formality. Furthermore, the possibility of invoking the nullity of that act is subsequently prejudiced, first, by the lack of information as to the right to such a translation and to the assistance of an interpreter and, secondly, by the fact that the period for raising that nullity expires, in essence, instantaneously, solely on account of the finalisation of the act in question'.

to hope that the person involved in criminal proceedings—who does not speak or understand the 'language of the proceedings'—will in any case be guaranteed adequate and effective linguistic assistance, a prerogative which is 'of vital importance' not only for the person concerned,[68] but also for the Member States, which—as has been pointed out at the beginning of the chapter—must be able to have 'trust in each other's criminal justice systems'[69] given the undeniable fact that '[m]utual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own'.[70]

[68] L. SIRY, *supra* note 24, p. 48 f.
[69] Recital 3, Directive 2010/64/EU.
[70] Recital 4, Directive 2010/64/EU.

LANGUAGE ASSISTANCE TO FOREIGNERS INVOLVED IN CRIMINAL PROCEEDINGS: NATURE OF THE SERVICE AND ACCESS REQUIREMENTS

NICOLA PASCUCCI

TABLE OF CONTENTS: 1. Evolution and general coordinates of linguistic assistance to foreign accused who does not know the language of the proceedings. – 2. The free of charge linguistic assistance for the accused person. – 3. Identifying the beneficiaries: the assessment of linguistic proficiency. – 4. General features of language assistance. – 5. Oral translation or oral summary translation and use of remote communication technologies. – 6. Nullity for insufficient or lack of linguistic assistance of the foreign accused who does not know the language of the proceedings. – 7. Other cases of appointment of interpreters and translators. - 8. The meagre legislative interventions on quality of service.

1. Evolution and general coordinates of linguistic assistance to foreign accused who does not know the language of the proceedings

Language assistance is a heterogeneous set of activities, requiring different skills depending on the act in question. The first and fundamental distinction to be drawn is between interpretation, which concerns oral acts, and translation, concerning written acts. This distinction was first provided in the Italian legal system by Legislative Decrees No. 32 of 2014 and No. 129 of 2016, which transposed Directive 2010/64/EU on interpretation and translation in criminal proceedings. Until then, the Italian Code of Criminal Procedure ('CCP') had referred only to the interpreter, thus creating an undue overlapping between the two figures.

As mentioned above, these are different activities: the interpreter assists the accused person in acts that take place orally (e.g. hearings, questionings and meetings with his/her lawyer), whereas the translator transposes written acts that are essential for the exercise of defence rights (e.g. notices of investigation and about the

right of defence, notice on the conclusion of investigations, judgements).

With the adoption of the new Italian Code of Criminal Procedure in 1988, the concept of the linguistic expert underwent a radical change: in addition to its traditional role as assistant to the proceeding authority, appointed to cooperate with the latter in the investigation and establishment of the facts, it was given the additional role of collaborating with the defence, in order to enable the suspect or accused person to fully exercise his/her rights and ability to defend himself/herself. [1] Even the Italian Constitutional Court, since judgement No. 10 of 1993, [2] has acknowledged that the access to an interpreter laid down in Article 143 CCP [3] is an individual right of the accused, which must be interpreted extensively, on the basis of international provisions and Article 24(2) of the Constitution. Article 143(5) CCP is emblematic of this change of perspective: it provides that the linguistic expert shall also be appointed even if the proceeding authority (judge, public prosecutor or criminal police officer) personally knows the language or the dialect used by the accused person.

The provisions are contained in Articles 143-147 CCP—which are, in turn, embodied in Title IV of Book II, entitled 'Translation of acts'—and in the implementing provisions of the Code. However, this title is misleading: it would be appropriate to refer to both 'interpretation and translation of acts and documents' and not only to translation. [4]

These two services, although different, are crucial for non-native speakers to be able to exercise their right of the defence: they are the fundamental prerequisite for the accused person (but also for the victim) to consciously participate in the proceedings. Without them,

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[1] On this subject, *ex multis*, see M. CHIAVARIO, *La riforma del processo penale. Appunti sul nuovo codice*, 2nd ed., Utet, 1990, p. 112; P.P. RIVELLO, *La struttura, la documentazione e la traduzione degli atti*, Giuffrè, 1999, p. 219 f.; D. VIGONI, *Minoranze, stranieri e processo penale*, in M. CHIAVARIO (Ed.), *Protagonisti e comprimari del processo penale*, Utet, 1995, p. 356 f.; A. ZAPPULLA, *Giustizia penale e stranieri: il processo è uguale per tutti?*, in C. CESARI (Ed.), *Stranieri in Italia. Una riflessione a più voci. Atti del Convegno. Macerata, 25 novembre 2021*, Wolters Kluwer-Cedam, 2022, p. 195 ff.

[2] Const. Court, 19th January 1993, no. 10.

[3] At that time, as mentioned, the Italian Code of Criminal Procedure did not distinguish between translator and interpreter, referring exclusively to the latter.

[4] The inadequacy of the current reference is also noted, for example, by M. GIALUZ, *È scaduta la direttiva sull'assistenza linguistica. Spunti per una trasposizione ritardata, ma (almeno) meditata*, in *Dir. pen. cont.*, 4th November 2013, p. 10, note 26, who, even before Legislative Decree No. 32 of 2014, proposed to change the title to 'interpretation and translation of acts'.

his/her presence would represent a "mere 'appearance'", as authoritative doctrine stated several decades ago.[5] In fact, the accused is unaware of the proceedings and is unable to defend him/herself should he/she be unable to communicate with his/her lawyer, with the judicial authority and with other operators, or when such an individual cannot understand what is said in hearings or the content of the written documents he/she receives. Accordingly, linguistic assistance can be defined as a 'second-degree' fundamental right[6] or a 'fundamental meta-right',[7] without which the other prerogatives and faculties related to defence rights could not be effectively exercised.[8]

2. The free of charge linguistic assistance for the accused person

One of the main characteristics of linguistic assistance derives from its nature as a "second-degree" right: the fact that it is free of charge. Indeed, the costs of the linguistic expert cannot be borne by the accused person who does not know the language, precisely because this service is an indispensable condition for the conscious participation in the proceedings. Language assistance logically precedes the legal assistance provided by a lawyer and this is the fundamental difference between them. Notably, the defence counsel's services, as a rule, are not free of charge,[9] except in cases where the income requirements for legal aid at the expense of the State are met,[10] in line with the minimal guarantee enshrined in Article 24(3) of the Italian Constitution, which ensures that 'indigent persons are

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[5] G. Giostra, *Il diritto dell'imputato straniero all'interprete*, in *Riv. it. dir. proc. pen.*, 1978, p. 441.

[6] N. Pascucci, *La persona alloglotta sottoposta alle indagini e la traduzione degli atti*, Giappichelli, 2022, p. 27.

[7] M. Gialuz, *L'assistenza linguistica nel processo penale. Un meta-diritto tra paradigma europeo e prassi italiana*, Wolters Kluwer-Cedam, 2018, *passim*, spec. p. 138 ff.

[8] In general, for the concept of 'second-degree' right or 'meta-right', that is a "right concerning rights", see R. Guastini, *Filosofia del diritto positivo. Lezioni*, edited by V. Velluzzi, Giappichelli, 2017, p. 81 f.

[9] This is without prejudice to the possibility of requesting, under certain conditions, the reimbursement of legal costs from the complainant (Articles 427 and 542 CCP), the *partie civile* (Article 541 CCP) or the State (Article 1(1015) *et seq.* of Law No. 178 of 2020 and Ministerial Decree 20th December 2021).

[10] M. Gialuz, *supra* note 7, p. 181 f. For a different perspective, see L. Parlato, *La rifusione delle spese legali sostenute dall'assolto. Un problema aperto*, Cedam, 2018, p. 93 s., according to whom this diversification between the assistance of linguistic experts and that of defence counsels is a systematic inconsistency.

entitled by law, through appropriate legal tools, to act and defend themselves in all courts'.

Art. 111(3) of the Constitution does not mention the free nature of linguistic assistance, [11] perhaps because of concerns about the high cost of the service itself. It simply enshrines the right of an accused person to be 'assisted by an interpreter if he does not understand or speak the language used in the proceedings'. [12] However, this feature has been acknowledged by both Article 6(3)(e) ECHR [13]—which, in Italian legal framework, holds a higher rank than ordinary law, on the basis of Article 117(1) of the Italian Constitution—and by Italian law, following the amendments made by Legislative Decree No. 32 of 2014. [14]

Notably, for several decades now, the European Court of Human Rights ('ECtHR') has rightly interpreted the guarantee in question by following the common meaning of these expressions, which indicate an absolute impossibility of recovering the costs of language assistance from the accused person who does not know the language of the proceedings, even if he/she is subsequently convicted. According to the Court, the term 'free' indicates a definitive exemption and not a 'conditional remission', a 'temporary exemption' or a 'suspension' of payment. In the view of the ECtHR, the very prospect of having to reimburse the fees in the event of conviction could, *inter alia*, influence the accused person's behaviour: it induces him/her to adopt an attitude of renunciation or to conceal his/her linguistic ignorance in order to avoid the appointment of an expert, thereby jeopardising his/her right to participate in the criminal proceedings. [15]

Similarly, M. CHIAVARIO, *Giusto Processo – II) Processo penale*, in *Enc. giur.*, vol. XV, Supplement, Istituto della Enciclopedia italiana, 2001, p. 14, who considers, in principle, more appropriate to apply the same rule to both kinds of assistance.

[11] In this regard, see M. BARGIS, *Studi di diritto processuale penale*, vol. I, Giappichelli, 2002, p. 44 f.

[12] According to some scholars, this omission is deliberate, due to State's concerns about service costs: see M. CHIAVARIO, *supra* note 10, p. 14; M. BARGIS, *L'assistenza linguistica per l'imputato: dalla direttiva europea 64/2010 nuovi* inputs *alla tutela fra teoria e prassi*, in M. BARGIS (Ed.), *Studi in ricordo di Maria Gabriella Aimonetto*, Giuffrè, 2013, p. 117; A. ZAPPULLA, *Giustizia penale e stranieri*, cit., p. 202.

[13] This provision uses the terms 'free' and '*gratuitement*' in the official English and French versions respectively.

[14] According to P. FERRUA, *Il 'giusto processo'*, 3rd ed., Zanichelli, 2012, p. 126, it is not understandable why Article 111(3) of the Italian Constitution unlike the ECHR makes no reference to gratuitousness. However, in his opinion, "it would be arbitrary to attribute to silence the meaning of a deliberate deviation from the choice made by the ECHR, *a fortiori* in view of the fact that the CCP also provides for such a feature.

[15] *Luedicke, Belkacem and Koç v. Germany*, App. nos. 6210/73, 6877/75, 7132/75 (ECtHR, 28th November 1978), para. 40 ff. In this regard, see D. CURTOTTI NAPPI, *Il problema delle lingue nel processo penale*, Giuffrè, 2002, p. 264.

Following this reasonable approach, Article 4 of Directive 2010/64/EU explicitly provides that 'Member States shall meet the costs of interpretation and translation [...], irrespective of the outcome of the proceedings'. This solution is indirectly confirmed by the general non-regression clause laid in Article 8 thereof, according to which the Directive may not be interpreted in such a way as to limit or derogate from the standard of rights and guarantees enshrined in the ECHR.

Article 143 CCP already provided for a free service before Legislative Decree No. 32 of 2014. However, a widespread restrictive approach allowed the State to obtain reimbursement of the costs of language assistance in the event of a conviction, in clear contradiction with the ECtHR's settled case-law and Article 4 of the aforementioned Directive. [16]

In light of this, Legislative Decree No. 32 of 2014 amended Article 143 CCP in a more precise manner. Specifically, Article 143(1) CCP, which concerns the right to interpretation, provides for a free-of-charge service 'regardless of the outcome of proceedings'; Article 143(3) CCP, which concerns the right to translation of acts considered essential by the judge on a case-by-case basis, provides for assistance free of charge. [17] However, in this case too, the normative drafting reveals significant shortcomings: the sentence 'regardless of the outcome of proceedings' does not appear in the paragraphs devoted to translation, and the fact this service is free of charge is not mentioned in paragraph 2, which concerns the mandatory translation of the acts listed therein. This scant attention to translation activity is perhaps the legacy of an outdated approach that almost entirely circumscribed the guarantees to the interpreting activity and paid little attention to translation. Nevertheless, the general and unconditional provision of free linguistic assistance to the accused persons who do not know the language of the proceedings cannot be called into question, even if the trial results in a final conviction. It would be manifestly unreasonable to distinguish between 'interpretation' and 'translation', as well as to foresee the cost-free characterisation of the assistance solely for certain fundamental written acts or documents. Even a reading in line with Article 4 of Directive 2010/64/EU upholds the absolute and general free-of-charge nature of language assistance.

In support of this approach from a teleological and systematic

[16] In this regard, see M. Gialuz, *supra* note 7, p. 349.

[17] D. Curtotti, *La normativa in tema di assistenza linguistica tra direttiva europea e nuove prassi applicative*, in *Proc. pen. giust.*, 2014(5), p. 125.

point of view, it is noteworthy that Legislative Decree No. 32 of 2014 also intervened in Article 5(1)(d) of the Consolidated Text on Legal costs—i.e. Italian Presidential Decree 30th May 2002, No. 115—by introducing an exception to the rule on the reimbursement to the State of the fees, expenses and travel allowances of the magistrate's assistants: the reform expressly excludes interpreters and translators appointed on the basis of Article 143 CCP. This amendment definitively overcomes the aforementioned restrictive orientation and it is therefore to be welcomed. [18] However, even in this case, the legislative technique opens the way to hermeneutical problems. First of all, as critically noted by some legal scholars, [19] the provision in question, together with Article 3(1)(n) Presidential Decree No. 115 of 2002, includes the linguistic expert among the assistants, which is contrary to the notion of "judicial assistant" derived from the Italian Code of Criminal Procedure and generally accepted by the relevant case-law, which circumscribes the figure to the staff of Public Prosecutor's Clerk's Office and Court Registry. [20] Such provisions, if misinterpreted, could be used to reaffirm the primacy of the traditional role of linguistic assistants, as an auxiliary of the proceeding authorities, to the detriment of the role of defence assistants, now established by the new Code of Procedure. It is then necessary to consider whether the term 'judicial assistant' in the Presidential Decree No. 115 of 2002 can also include the language expert appointed by the judiciary police. The literal wording would exclude him/her. This would give the State an unreasonably justification to ask the suspect for reimbursement of the costs for linguistic assistance, if the expert was appointed by a police officer. In any case, such a practical result should be avoided, taking into account both Article 143 CCP—which, as mentioned, enshrines a free service—and an ECHR-based interpretation of the relevant domestic legal framework, also in line with Directive 2010/64/EU.

[18] See, in this regard, D. CURTOTTI, *supra* note 17, p. 125; M. GIALUZ, *supra* note 7, p. 350.

[19] S. SAU, *Lingua, traduzione e interprete*, in G. SPANGHER-A. MARANDOLA-G. GARUTI-L. KALB (Ed.), *Procedura penale. Teoria e pratica del processo*, vol. I, edited by G. Spangher, Utet, 2015, p. 472.

[20] Among others, see Italian Court of Cassation (*Corte di Cassazione*, hereinafter: 'Cass.'), 7th February 2020, in *C.e.d.*, no. 279175-02; Cass., 28th May 2014, in *C.e.d.*, no. 259691.

3. Identifying the beneficiaries: the assessment of linguistic proficiency

The linguistic guarantees are ensured to the accused person 'who does not know the Italian language', pursuant to Article 143(1) CCP, to which the following paragraph 2 also refers. The expression is rather generic, since the relevant abilities are different depending on whether the act is written or oral, and whether it has to be translated from Italian into the idiom used by the defendant (the most frequent hypothesis) or *vice versa*. In fact, it is necessary to focus, from time to time, on oral comprehension or production skills, or on written comprehension or production skills. According to some scholars, the presence of the expert is usually superfluous when the language proficiency is good, i.e. at a medium level.[21] In this way, there is a very wide margin of discretion in assessing when this level is actually met. In fact, the CEFR descriptors formulated within the Council of Europe could help to better define such a nuanced concept.[22] Moreover, it is the Italian Constitutional Court itself[23] that points out the close link between Article 143 CCP and the safeguards offered by the Council of Europe in Article 6(3) ECHR.[24]

Moreover, Article 143(4) CCP requires the judicial authority (i.e. the Public Prosecutor and the judge) to verify the knowledge of the Italian language if the accused is a foreigner. In spite of some resistances in the case law, this provision should overcome the previous orientations of the Italian Supreme Court, which, focusing only on the efficiency of the proceedings, considered it legitimate to refuse assistance if the lack of knowledge of the language did not emerge from the case file. This approach required an active behaviour on the part of the accused person, who had to inform the

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[21] *Ex plurimis*, see G. DI TROCCHIO, *Traduzione dell'estratto contumaciale ed imputato straniero*, in *Giur. it.*, 1982, II, c. 403; D. CURTOTTI NAPPI, *supra* note 15, p. 351 f. On the other hand, certain judgements revealed that, for this purpose, the Supreme Court is satisfied with a 'discrete understanding of Italian language': Court of Palermo, 24th September 2001, No. 1431, in *Dir. pen. proc.*, 2002, p. 77.

[22] V. COUNCIL OF EUROPE, *Common European Framework of Reference for Languages: Learning, Teaching, Assessment. Companion volume*, Council of Europe, 2020, *passim*.

[23] Const. Court, 19th January 1993, No. 10.

[24] In this regard, see N. PASCUCCI, *supra* note 6, p. 128 ff., who, with specific regard to translation, identifies the threshold at which linguistic assistance is normally unnecessary in level B2, that is the "vantage level" proper to an autonomous user. In some cases, this threshold could be at B1 or C1 level. On the contrary, with regard to linguistic assistance in general, see M. GIALUZ, *supra* note 7, p. 387, who states that B1 is usually sufficient, although the Author does not exclude the need for a B2 level for some acts.

authorities of his/her linguistic situation.[25] The inconsistency of this approach is evident: it is unreasonable to expect a person who does not understand the language of the proceedings to promptly disclose his/her own linguistic ignorance. He/she may not even understand what is happening around him/her. Not only does he/she lack the communicative tools to report his/her situation, but the latter may not even realise that is required to do so.[26] Therefore, Article 143(4) CCP should specifically overcome this issue by imposing on the judicial authority the obligation to verify, as soon as possible and also *ex officio*, the suspect/accused person's lack of knowledge of the language. The law does not specify the methods of this assessment, therefore the authority can use—albeit with the necessary caution and distinguishing among the different linguistic abilities[27]—all the information available in the case file (such as the time spent in Italy, the attestation by the accused that he/she knows Italian language, the socio-cultural environment, the work tasks, the answers given to the criminal police).[28] In doubtful cases, technical consultancy or an expert evidence may be requested. Once the insufficient knowledge of Italian language has been established, the proceeding authority must identify the mother tongue of the suspect/accused person in order to appoint the appropriate linguistic assistant. Unlike the assessment of ignorance of the Italian language

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[25] Among others, see Cass., 9th October 2012, in *C.e.d.*, no. 253841; Cass., 6th February 1992, in *C.e.d.*, no. 189475. The majority of legal scholars disagreed with this interpretation and considered that the assessment should be made *ex officio*: for all, see M. CHIAVARIO, *La tutela linguistica dello straniero nel nuovo processo penale italiano*, in *Riv. dir. proc.*, 1991, p. 353; D. VIGONI, *supra* note 1, p. 380 ff.

[26] On this point, in the case where a person who does not know the language finds him/herself "catapulted into the trial" after the direct trial, see C. CALUBINI, *"Svista" della Suprema Corte: negato al difensore il diritto di eccepire la violazione dell'art. 143 c.p.p.*, in *Proc. pen. giust.*, 2012(3), p. 73.

This approach is maintained even if the accused person has Italian citizenship but does not have a sufficient command of Italian language, since Article 143(4) of the Code of Criminal Procedure expressly establishes a presumption of linguistic knowledge, which may be rebutted by the accused person's active conduct.

[27] Often the distinction between the different skills is not properly considered by proceeding authorities: see, for example, CORTE DI APPELLO DI MILANO-TRIBUNALE DI MILANO, *D.Lgs. 4 marzo 2014 n. 32 in materia di interpretazione e traduzione nei procedimenti penali: prassi applicative*, in *www.corteappello.milano.it*, 12th June 2014, p. 1, where different elements that can be inferred from acts are enunciated without distinguishing between oral comprehension and production, and written comprehension and production.

[28] These elements are also emphasized by ECtHR's settled case-law. See, *inter alia*, *Hermi v. Italy* [GC], App. no. 18114/02 (ECtHR, 18th October 2006), para. 90; *Kajolli v. Italy*, App. no. 17494/07 (ECtHR, 29th April 2008); *Katritsch v. France*, App. no. 22575/08 (ECtHR, 4th November 2010), para. 45.

– in which the criminal police can only assist the judicial authority, to which the Code of Criminal Procedure reserves the decision – the verification of the language used by the suspect/accused person is not expressly regulated by the Code. In the legislative silence, it can also be carried out by the judiciary police officer.[29]

Another aspect that is not strictly regulated by the law concerns the hypothesis that the proceeding authority cannot find an expert because a certain language is not widely used. The habitual language or dialect should be preferred,[30] but the appointment of an interpreter or translator in a *lingua franca*—i.e. an internationally spoken language such as English, French and Spanish—is possible, as there is no legislative prohibition. However, the person must have a good command of such a language in order to be able to exercise his/her defence rights effectively.[31]

4. General features of language assistance

Article 143(1) CCP is devoted to interpretation and it provides, in its first sentence, that the accused person who does not understand the language of the proceedings has the right 'to be assisted by an interpreter' in order to 'understand the charges against him' and 'the acts and hearings in which he participates'. The second sentence establishes the right to an interpreter to communicate with the defence counsel for the purpose of questioning or for the purpose of submitting motions or pleadings.[32] This provision should be read in

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[29] For further details, see N. Pascucci, *supra* note 6, p. 168.

[30] *Contra* M. Chiavario, *supra* note 25, p. 354, who reverses the perspective: he considers that first the knowledge of internationally widespread languages should be assessed and then, if the person concerned does not master these languages, an expert in his mother tongue can be appointed. This would avoid 'the tiresome search for (often mediocre) 'practitioners''.

[31] In the absence of express legal prohibitions, the technique known as "relay" is practicable. With this method, the authority appoints several experts: one from Italian into a *lingua franca* and the other from the latter into the language used by the person, and *vice versa*. It must be used as a last resort, as it involves considerable risks for the authenticity of the message. On *linguae francae* and relay interpreting, see, for all, M. Gialuz, *supra* note 7, p. 319 f., 340 s.

[32] The notions of 'motions' and 'pleadings' are debated. Some legal scholars consider it in a broad sense, including appellate remedies. See D. Curtotti, *supra* note 17, p. 126; M. Gialuz, *La riforma dell'assistenza linguistica: novità e difetti del nuovo assetto codicistico*, in *Leg. pen.*, 2014, p. 195. For a different systematic interpretation, see N. Pascucci, *supra* note 6, p. 149, who argues, on the basis of Article 121 CCP, that the notion of "motions" and "pleadings" cannot also include appellate remedies.

conjunction with Article 51a(1) of the rules for the implementation of the CCP, which limits the right to a single consultation for each of these situations, except for 'special facts or circumstances' for the 'exercise of the right of defence'.

Article 143(2) and (3) CCP are instead devoted to the translation of written acts that are essential for the exercise of the right of defence. There are two categories, along the lines of Article 3(2) and (3) of Directive 2010/64/EU – Article 143(2) CCP sets out the types of acts for which there is an absolute presumption of essentiality, which must always be translated within a reasonable period of time 'such as to allow the exercise of the rights and faculties of the defence': notices of investigation and of the right to defence, decisions applying personal precautionary measures, notice on the conclusion of investigations, decrees ordering preliminary hearings, decrees of summons for trial, judgements and *inaudito reo* penalty orders. On the other hand, according to Article 143(3) CCP the judge—*ex officio* or at the request of a party—orders the free translation of other documents, if they are considered essential for the defence. The judge's reasoned order may be appealed with the judgment.

However, there are differences between the documents listed in Article 143(2) CCP and those listed in Article 3(2) of Directive 2010/64/EU, according to which 'essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment'. First of all, Article 143(2) CCP broadens the obligation to translate decisions ordering precautionary measures: not only those depriving a person of personal liberty (i.e., in particular, house arrest and pre-trial detention), but all decisions ordering personal precautionary measures. The vagueness of the provision also raises doubts as to whether the category also includes orders revoking, modifying and replacing measures: in the light of Article 3(2) of Directive 2010/64/EU, which refers in general terms to decisions depriving a person of his/her liberty, it would seem appropriate to include at least modifying and replacing measures, even if they are issued following an appellate remedy. [33] However, the list in Article 143(2) CCP does not include orders confirming arrest and temporary detention, which legitimise a deprivation of

[33] Similarly, see S. SAU, *Commento all'art. 143*, in G. ILLUMINATI-L. GIULIANI (Eds.), *Commentario breve al Codice di Procedura Penale*, 3rd ed., Cedam, 2020, p. 520, according to whom, however, decisions about lifting of measures should also be included. Differently, for a restrictive solution, see S. RECCHIONE, *L'impatto della direttiva 2010/64/UE sulla giurisdizione penale: problemi, percorsi interpretativi, prospettive*, in *Dir. pen. cont.*, 15th July 2014, p. 9.

liberty *ex tunc*: [34] this is probably a legislative oversight that can be remedied by an interpretation that includes them among the essential acts and documents on the basis of Article 143(3) CCP.

Moreover, the concept of 'charge' in Article 3(2) of Directive 2010/64/EU should be understood in a broad sense, as it should also include provisional charges formulated during preliminary investigations: this is why Article 143(2) CCP includes the notices of investigation and on the right to defence (Articles 369 and 369a CCP) and the notice on the closure of preliminary investigations. [35] The fact that judgments are also included in the list should overcome the previous inconsistency in case-law regarding the need to translate them. [36]

The translation of acts pursuant to Article 143(2) CCP shall be complete. Partial translation, that is, limited only to certain parts of the document at stake, is not allowed: in this regard, the national legislation deviates from Article 3(4) of Directive 2010/64/EU.

In addition to the acts foreseen in Article 143(2) CCP, there are other acts and documents, for which the law provides for translation in any case if the addressee does not know Italian: the first notification to the accused person abroad pursuant to Articles 169 CCP and 63 of the rules for the implementation of the CCP, and the so-called letters of rights to be delivered to persons under arrest, temporary detention, house arrest and pre-trial detention, as per to Articles 386 and 293 CCP.

As mentioned above, acts which are not listed in Article 143(2) CCP, but which are essential for the defence, must be translated in

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[34] On this subject, see D. CURTOTTI, *supra* note 17, p. 128.

[35] On this point, see M. GIALUZ, *supra* note 7, p. 232. The implicit reference is to the broad notion of 'charge' as elaborated by the Strasbourg Court, which includes not only the notification of the formal charge, but also the notification of the provisional charge or, in any case, the acts likely to make the accused person aware of the criminal charge against him/her.

[36] According to the settled case-law, translation was not necessary. See, *ex multis*, Cass., 18th March 2011, in *C.e.d.*, no. 250636; Cass., 31st March 2010, in *C.e.d.*, no. 247760. *Contra* Cass., 23rd November 2006, in *C.e.d.*, no. 236409.

However, even after the Legislative Decree No. 32 of 2014, some legal scholars, unacceptably straining the text of the provision, continued to limit it: see R. BRICCHETTI-L. PISTORELLI, *Atti fondamentali scritti nella lingua dell'imputato*, in *Guida dir.*, 2014(16), p. 66, who limit the obligation to translate judgements to cases where the accused has 'abstractly the right (and perhaps even concretely the interest) to appeal them'; G.P. VOENA, *Atti*, in M. BARGIS (Ed.), *Compendio di procedura penale*, 10th ed., Cedam, 2020, p. 210, according to whom it is not compulsory to translate judgements of acquittal where the offence did not occur or the accused person has not committed it, since there is no interest in appealing against them 'even in the abstract'.

accordance with paragraph 3. The assessment of essentiality pursuant to Article 143(3) CCP must be made on the basis of the concrete situation in individual proceedings: the same act could be essential in one proceeding and not essential in another, depending on the particular circumstances. For example, the decision ordering a precautionary measure in respect of property may be defined as essential, and therefore to be translated, in a very large number of hypotheses, given the economic interests often underlying it.[37] However, there may be a case where the act does not reach the threshold of essentiality, perhaps because of the low value of the property seized.

Article 143(3) CCP, unlike Article 143(2) CCP, also allows the partial translation of acts, i.e. limited to the parts that are essential for defence purposes. In fact, Article 3(4) of Directive 2010/64/EU allows partial translation even more broadly than the Italian legislator, permitting it for all essential written acts, including acts depriving a person of his/her liberty, those containing charges and judgements. Nevertheless, the legislator's choice to limit the scope of partial translation is acceptable, as it circumscribes the discretionary power of the proceeding authority.

5. Oral translation or oral summary translation and use of remote communication technologies

Initially, Italian Legislative Decree No. 32 of 2014, in transposing Directive 2010/64/EU, did not provide for an oral translation or an oral summary translation, although this possibility was granted by the Directive itself. However, Legislative Decree No. 129 of 2016, faced with the concrete difficulties arising from the mandatory obligation of a written translation, introduced it in paragraphs 2, 3 and 4 of Article 51a of the rules for the implementation of the CCP. According to the aforementioned Article 51a(2), it is possible to orally translate, even in summary form, one of the written acts in the list of Article 143(2) CCP, provided that two grounds are met: there must be 'particular reasons of urgency' and the oral translation must prejudice 'the accused person's right of defence'. In any case, under Article 51a(4) of the rules for the implementation of the CCP, the oral translation must be documented by means of an audio recording. This guarantee

[37] On this subject, see D. CURTOTTI, *supra* note 17, p. 128, according to whom 'there is no explanation for the exclusion of precautionary measures relating to property' from the list in Article 143(2) CCP, given that their afflictive character is often greater than that of personal measures.

represents a higher standard than that of Article 7 of Directive 2010/64/EU, which merely prescribes the recording 'in accordance with the law of the Member State concerned'. This procedure is intended in particular for decisions ordering precautionary measures, given the very tight timeframe for their translation, which must in any case take place before to the so-called *interrogatorio di garanzia* (i.e., the questioning of the person subject to a personal precautionary measure). Yet, according to some scholars, decisions ordering personal precautionary measures may not be orally translated (let alone in summary form). They consider that the rights of the defence would be hampered. In fact, a written translation is very different from a sight translation: only the former allows the suspect/accused person to reflect deeply on every single expression used by the judge, and thus to understand the content of the act in a much more thoughtful manner.[38] Even the linguistic expert may, in the case of a written translation, be better able to reflect on the choice of terms than if he/she had to perform an oral translation "on the spur of the moment". However, the assessment of the above-mentioned requirements must be made in the light of the concrete situation. Consequently, it cannot be ruled out *a priori* than an oral translation (provided it is not summarised) of decisions ordering personal precautionary measures with a very simple content is sufficient.[39]

Unlike the EU legislator, the Italian one does not allow the defendant to completely waive the translation of essential documents altogether, but only the written translation. However, in the event of a waiver, an oral translation or an oral summary will be made, with the obligation of audio recording. The waiver must be made expressly and in full knowledge of the facts, 'also having consulted the defence counsel for this purpose', pursuant to Article 51a(3) of the rules for the implementation of the CCP.

In order to facilitate the search for an interpreter, in particular where the person concerned knows only an uncommon language or dialect, Article 51a(5) of the aforementioned provisions allows the use of remote communication technologies, provided that this is not likely to cause a 'concrete prejudice to the right of defence'. This provision should be read in conjunction with Article 146(2a) CCP, which, if the linguistic expert resides in another district, allows the proceeding authority to ask the Preliminary Investigations Judge in that place to appoint the interpreter or the translator. This allows for remote assistance, e.g., by means of a remote connection, is possible.

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[38] See M. Gialuz, *supra* note 7, p. 434, 450.
[39] For further details, see N. Pascucci, *supra* note 6, p. 213 f.

Article 51a(5) of the rules for the implementation of the CCP expressly refers only to interpreter, but the provision should be coordinated with the aforementioned Article 146 CCP. It refers to both the interpreter and the translator, not only because of the explicit mention of those professionals in its paragraph 2a, but also because of the extension of the rules for interpreters to translators under Article 143(6) CCP. In addition, the aforementioned Article 146 provides that, once the task has been assigned, the authority will ask the expert 'to provide his services': if the appointment is made at a distance – i.e., in a district other than that in which the proceeding authority is located – it is necessary to employ the appropriate technologies, with the limits imposed by respect for the right of defence, as enshrined in Article 51a of the rules for the implementation of the CCP. [40]

6. Nullity for insufficient or lack of linguistic assistance of the foreign accused who does not know the language of the proceedings

With regard to sanctions, Italian law mostly leaves the regulation of the consequences of omitted or poor quality interpretation or translation to general provisions. [41] The breaches of Article 143 CCP often relate to the participation and assistance of the accused person and therefore fall within the scope of the intermediate nullity (*nullità a regime intermedio*) pursuant to Article 178(1)(c) CCP: [42] a

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[40] Instead, some legal scholars consider that the aforementioned Article 51a(5) does not apply to the translator, even though he or she may also use 'technological devices in support of transposition' (M. GIALUZ, *supra* note 7, p. 447).

[41] The provision on the appealability of the judicial decision under Article 143(3) of the Code of Criminal Procedure does not seem to provide any significant additional protection, since the ordinary rules about regularisation of nullities may be applied. On the contrary, it raises further problems of interpretation: for more details, see N. PASCUCCI, *supra* note 6, p. 257 f.

[42] Among legal scholars, see, for all, G. BIONDI, *La tutela processuale dell'imputato alloglotta alla luce della direttiva 2010/64/UE: prime osservazioni*, in *Cass. pen.*, 2011, p. 2425; D. CURTOTTI NAPPI, *supra* note 15, p. 397, who traces the provisions on the appointment of the language expert to the notion of "assistance"; M. GIALUZ, *supra* note 7, p. 414 f., who frames the discipline at stake in the concept of "participation"; P.P. RIVELLO, *supra* note 1, p. 253 f.; S. SAU, *Le garanzie linguistiche nel processo penale. Diritto all'interprete e tutela delle minoranze riconosciute,* Cedam, 2010, p. 219; G. UBERTIS, *Commento all'art. 143*, in E. AMODIO-O. DOMINIONI (Ed.), *Commentario del nuovo codice di procedura penale*, vol. II, Giuffrè, 1989, p. 149. In case-law, see, among others, Cass., Joint Criminal Chambers (*Sezioni Unite Penali*), 24th September 2003, in *Cass. pen.*, 2004, p. 1563 ff.

According to some scholars, the omission of a translation of the summons to appear in court causes an absolute nullity of that summons. They equate the omitted

procedural sanction which, as is well known, has little dissuasive effect because of its regularisation provisions (so-called *deducibilità* and *sanatorie*) which are often broadly interpreted by the courts in accordance with an efficiency-based approach, and are intended to prevent the procedure from reverting to the stage at which the invalid act was performed in order to renew it. The fact that the waiver of a written translation must be explicit, according to Article 51a(3) of the rules for the implementation of the CCP, does not seem to create any exceptions to Articles 182(2), 183(1)(a) second part, 183(1)(b), 184 and 438(6a) CCP.[43] They operate at different levels: Article 51a(3) CCP outlines the modalities and conditions for waiving written translation, whereas the other norms, being part of the rules on non-absolute nullity, deal with the consequences of infringement of specific categories of provisions.[44]

Overall, the legislator has therefore made little effort to ensure the effectiveness and quality of linguistic assistance, aspects to which, on the contrary, Directive 2010/64/EU devotes particular attention.

With regard to translation, the case-law adopts an "eclectic" approach:[45] it considers that the untranslated act is not null and void, but ineffective, so that, in the case of decisions on precautionary measures and judgments, the accused person may lodge an appeal even after a long period, since the time limit has not yet expired.[46]

7. Other cases of appointment of interpreters and translators

Interpreters and translators are appointed not only to enable suspects and accused persons who do not understand the language of the proceedings to fully exercise their defence rights. To complete the framework concerning the cases of appointment of interpreters and translators, it is necessary to mention two other fundamental

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translation with its absence, as it is completely unsuitable 'to communicate to the addressee the essential elements' for his/her 'conscious presence in court': G. UBERTIS, *supra* note 42, p. 149; in the same sense, for all, see D. CURTOTTI NAPPI, *supra* note 15, p. 397 s.

[43] *Contra*, see D. POTETTI, *Commento al nuovo art. 51*-bis *disp. att. c.p.p., in tema di traduzione degli atti*, in *Cass. pen.*, 2017, p. 1537 ff.; M. GIALUZ, *supra* note 7, p. 462.

[44] For more details, see N. PASCUCCI, *supra* note 6, p. 271 ff.

[45] A. ZIROLDI, *Commento all'art. 143*, in A. GIARDA-G. SPANGHER (Eds.), *Codice di procedura penale commentato,* 3rd ed., t. I, Wolters Kluwer, 2017, p. 1532.

[46] In this way, such pronouncements aim to avoid the expiry of time limits for appealing decisions against decisions on precautionary measures and judgements. Among others, see Cass., 14th April 2017, in *C.e.d.*, no. 270318; Cass., Joint Criminal Chambers, 26th June 2008, in *C.e.d.*, no. 240507.

figures: the expert appointed for the needs of the proceeding authority and the linguistic assistant of the victim, whose main discipline in both cases is contained in Article 143a CCP, introduced by Legislative Decree 15th December 2015, No. 212.

The traditional function of interpreters and translators as collaborators of the proceeding authority has been maintained in Article 143a(1) CCP, which reproduces the content of the former Article 143(2) CCP, according to which the latter appoints 'an interpreter' in two cases: 'when it is necessary to translate a document written in a foreign language or in a dialect that is not easily intelligible' and 'when the person who wishes or is required to make a statement does not know the Italian language'. This provision should be read in conjunction with Article 242(1) CCP, which provides that the judge shall order the translation of a document written in a language other than Italian 'if this is necessary for its comprehension'. The provision uses very imprecise terms, as it refers to the 'interpreter' also to include the translator. [47] In this case, the service is not free of charge: the State may obtain the reimbursement after a subsequent conviction, as it is not, in itself, functional to the intervention and assistance of the accused person. Moreover, Article 143a(1) CCP does not mention the free of charge nature of the assistance, nor does Article 5 of Presidential Decree No. 115 of 2002 contemplate such cases. [48]

Victims who do not understand the language of the proceedings are now also entitled to receive a linguistic assistance: Legislative Decree No. 212 of 2015, which transposed Directive 2012/29/EU on the rights of victims, has regulated it in paragraphs 2, 3 and 4 of Article 143a CCP. Further provisions are contained in Articles 90a CCP and 107b of the rules for the implementation of the CCP. Article 90a contains a series of information to be provided to the victim 'from the first contact with the proceeding authority' in a 'language that he understands'. The aforementioned Article 107b provides for the possibility of submitting a report or a complaint in a language known to the person him/herself and for the right to receive, upon request, a certificate of receipt of the translated report or complaint. The right to an interpreter is enshrined in Article 143a(2) CCP when a victim who does not know the language of the proceedings is to be examined and, upon request, when that person wishes to participate in a hearing. Even in this case, remote

[47] For a general treatment, see S. SAU, *Commento all'art. 143*-bis, in G. ILLUMINATI-L. GIULIANI (Eds.), *supra* note 33, p. 523 ff.

[48] Similarly, see M. GIALUZ, *supra* note 7, p. 350 f.

communication technologies may be used, provided that his/her rights are not thereby compromised (Article 143a(3) CCP). Paragraph 4 of Article 143a CCP establishes the right to a full or partial translation of acts, containing 'useful information for the exercise of his rights'. Both oral and summary oral translations are allowed, on condition that they do not affect his/her rights. [49] The criterion used by the Italian legislator to determine which acts must be translated is questionable, as it is broader than that of Article 7 of Directive 2012/29/EU. Article 143a(4) CCP provides for the translation of acts that are 'useful' for the exercise of the victim's rights, whereas Article 7 Directive 2012/29/EU speaks of 'essential documents'. The mere "usefulness" of an act or a document also diverges from its "essentiality", which, as noted, is instead the parameter used *vis-à-vis* the accused person. [50]

Although Article 7 of Directive 2012/29/EU provides that the service shall be free of charge, para. 2 *et seq.* of Article 143a CCP are unclear: they say nothing about the interpreter, while they speak fleetingly of about the free nature of the translator without further specification, unlike Article 143 CCP in relation to the accused person. Even Presidential Decree No. 115 of 2002 does not contain any specific provision in this respect, so that, at first sight, it might appear that the State may recover these costs. [51] However, the very concept of "free of charge" excludes this interpretation, considering that its nature is unconditional and independent of the outcome of proceedings.

There are almost no procedural sanctions for breaches of the rules on the victim's linguistic assistance: the rules do not fall within the nullities of Article 178(1)(c) CCP, as the victim is not considered a party in Italian criminal proceedings. Only the failure to translate the summons to the trial can lead to a nullity on the basis of this provision. [52]

8. The meagre legislative interventions on quality of service

There is a fundamental difference between Directive 2010/64/EU

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[49] Article 143(4)-(5)-(6) of the Code of Criminal Procedure can also be considered applicable to the victim, as the provisions on victims were designed to be supplemented by Article 143 CCP. In this regard, see M. Gialuz, *supra* note 7, p. 472 note 32.

[50] In this regard, see V. Bonini, *L'assistenza linguistica della vittima*, in *Leg. pen.*, 4th July 2016, p. 46 ff.

[51] Legal scholars highlight the disparity between the discipline of the victims and the discipline of accused persons, who do not know the language of the proceedings, as regards the gratuitousness of the service: V. Bonini, *supra* note 50, p. 45 f.

[52] On this point, S. Sau, *supra* note 47, p. 526.

and Italian Legislative Decrees No. 32 of 2014 and No. 129 of 2016, which indicates a formalistic and, ultimately, deficient internal transposition: the Directive is very diligent in enhancing the quality of the linguistic assistance for the accused person, while the domestic Legislative Decrees pay little attention to it.[53] The only profile explicitly regulated concerns a specific aspect of the expert's specialisation: the inclusion of a special section for interpreters and translators in the district registers of experts, pursuant to Article 67(2) of the rules for the implementation of the CCP[54] and the creation of a national list of interpreters and translators under the following Article 67a,[55] in which those registered in the local sections are included. The latter must be made available to lawyers and the judiciary police through the institutional website of the Ministry of Justice. However, years later, the national list is still not operational, due to the lack of the Ministerial Decree that should regulate the methods of consultation, on the basis of Article 67a (2) of the rules for the implementation of the CCP.

Another worrying element, which in practice does not make it possible to create the conditions for a high-quality service in Italy, is the linguistic expert's fee. At present, it is little more than symbolic: according to Law No. 319 of 1980 and Ministerial Decree 30th May 2002, the fee is EUR 14,68 for the first period of service (*vacazione*), which is equivalent to two hours, and then EUR 8,15 for subsequent periods, up to a maximum of four periods (eight hours) per day.[56] This is an issue that the Italian legislator needs to resolve urgently, because without a decent remuneration, any reform aimed at improving the quality of services is doomed to failure.

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[53] It would have been appropriate—in the light of Articles 2(5)-(8), 3(5)-(9) and 5, Directive 2010/64/EU—to intervene at a legislative level in order to enhance the impartiality, objectivity and professionalism of experts, also through a deep review of Articles 144 and 145 CCP on the grounds of incapacity and incompatibility and on the cases of abstention and recusal. These provisions reflect the outdated concept of the linguistic assistant as a mere tool for translating a message from one language to another, underestimating the margin of appreciation that characterises the service.

[54] The paragraph was amended, as already said, by Legislative Decree No. 32 of 2014.

[55] Article introduced by Legislative Decree No. 129 of 2016.

[56] Legal scholars are very critical of the meagreness of the sums: see M. BOUCHARD, *Osservazioni allo schema di decreto legislativo di attuazione della delega normativa conferita al governo dalla l. 6 agosto 2013, n. 96 con particolare riferimento alla Direttiva dell'Unione europea 2012/29/UE che istituisce norme minime in materia di diritti, assistenza e protezione delle vittime di reato*, in *www.giustizia.it*, p. 6.

THE LINGUISTIC PROTECTION OF THE VICTIM AS PART OF THE CRIMINAL PROCEEDINGS

Cecilia Ascani

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1. The national and supranational legal framework on language assistance to the victim

The idea for this chapter arose from the daily experience of the judicial environment and the need for greater linguistic protection for victims of crime.

The previous chapter outlined the national and supranational legal framework concerning the right to interpretation and translation of documents for those persons charged with a criminal offence.

As noted above, Directive 2012/29/EU, referred to as the 'Statute of Victims' Rights', essentially replaced Framework Decision 2001/220/JHA, by setting the goal of harmonising, in all EU Member States, the means of protecting victims throughout criminal proceedings, from the investigation stage until the post-sentencing phase. [1] This introduction is the latest step in a European regulatory "journey", that was initiated by the adoption of the 'Budapest Roadmap' as part of the broader 'Stockholm Programme'. [2]

A first contribution from the European side was linguistic, in the form of a precise, and broader, definition of the so-called 'victim of a criminal offence'. The European notion includes, in fact, both the

[1] S. Sau, *Brevi note in tema di tutela linguistica della vittima del reato nel processo penale*, *www.dirittopenaledp.it*, visited on 11.04.2022.

[2] The Stockholm Programme set a new agenda for the European Union (EU) in the Area of Freedom, Security and Justice for the period 2010-2014, aiming *inter alia* at strengthening the rights and protection of victims.

person who has suffered a direct harm as a result of the commission of a criminal offence and, in the event of his/her death as a result of the crime, his/her family members, including cohabitants in a stable and continuous affective situations.[3] The broadening of the concept of 'family unit'—advocated in the supranational legal framework—has led to an amendment in the Italian Code of Civil Procedure, which legitimised the dignity of non-formalized romantic relationships.

Albeit belatedly, Italy transposed the aforementioned Directive through the introduction of Legislative Decree No. 212 of 15 December 2015, which introduced multiple amendments to the Code of Criminal Procedure (CCP) as highlighted below and remedied a situation of 'particular backwardness' in the provision of language assistance to foreign victims.[4]

2. The amendments made to the Code of Criminal Procedure in the implementation of EU Directive 2012/29

Among the novelties, it is worth mentioning, first of all, the introduction of Article 90a of the CCP under the heading 'Information to the victim' – the victim shall be informed of a series of guarantees[5] that will be attributed to him/her from the moment he

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[3] See Article 2, Directive 2012/29/EU, which defines victim as 'a natural person who has suffered harm, including physical, mental or emotional harm, or economic loss that was directly caused by a crime', and extends the definition to include the so-called indirect victim, i.e., 'the family member of a person whose death was directly caused by a crime and who has suffered harm as a result of that person's death', with 'family member' meaning not only a consort but also a *more uxorio* cohabitee, as well as 'relatives in the direct line, brothers and sisters, and dependents of the victim'.

[4] M. GIALUZ, *L'assistenza linguistica nel processo penale. Un meta-diritto fondamentale tra paradigma europeo e prassi italiana*, Wolters Kluwer-Cedam, 2018, p. 463.

[5] According to Article 90a CCP, in its original drafting as per Legislative Decree No. 212 of 2015, the victim is guaranteed that 'from the first contact with the prosecuting authority, he shall be informed, in a language which he understands, of (a) the modalities of lodging the complaint or the action, his role in the course of the investigation and the trial, the right to be informed of the date and place of the trial and of the indictment and, if he is a *partie civile*, the right to be informed of the judgment, even in extracts, (b) the right to be informed of the state of the proceedings and of the entries referred to in Article 335(1) and (2) CCP (d) the right to legal advice and assistance; (e) the modalities for exercising the right to interpretation and translation of the case file; and (f) any protective measures that may be agreed in his or her favour; (g) the rights granted by law if he or she resides in an EU Member State other than the one in which the offence was committed; (h) the rights granted by law if he or she resides in an EU Member State other than the one in which the offence was committed; (i) the authorities to

or she lodges a complaint, as well as the right to linguistic assistance from the moment it is formalised. [6]

This provision is redolent of a discipline that was partially provided for in the Italian legal framework, albeit in a rather fragmentary manner.

Of particular importance is the introduction of Article 90b CCP, which gives victims of crimes committed with 'violence against the individual' the right to be informed immediately, upon explicit request, of the release or termination of the pre-trial detention, as well as of the evasion of the suspect or the convicted person in pre-trial detention, in addition to the voluntary removal of the inmate from the custodial security measure. Lastly, it is worth mentioning Article 90c CCP, which provides for a different regime for the taking of statements from victims who are in a particularly vulnerable condition, where appropriate and where specific language assistance is required.

In fact, the linguistic barrier contributes significantly to the increase of the so-called 'dark figure' for those categories of crime that already record impressive numbers: we can mention as an example the crimes under the so-called 'red code'. [7] For certain types of criminal offences, it is therefore essential that victims are aware of their right to receive adequate language assistance from the

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which he/she may apply for information on the proceedings; (l) the arrangements for reimbursement of expenses incurred in connection with participation in the criminal proceedings; (m) the possibility of claiming compensation for damage caused by the offence; (n) the possibility of settling the proceedings by remission of the charge, where applicable, in accordance with Article 152 of the Penal Code, or by mediation; (o) the capacity of the offender in proceedings in which the defendant requests the suspension of the proceedings with probation, or in proceedings in which the grounds for exemption from punishment on account of the particularly leniency nature of the offence are applied; (p) the health care facilities in the area, family homes, anti-violence centres and shelters'. Subsequently, Article 90a of the CCP has been amended and supplemented by Law No. 69 of 19th July 2019, and most recently by Legislative Decree No. 150 of 10th October 2022. Regarding the latter, particular attention is drawn to the information concerning domicile, notifications, and the victim's opportunity to participate in restorative justice programs.

[6] On this point, Article 107b of the rules for the implementation of the CCP ('Assistance of interpreter for the lodging or presentation of denunciation or complaint') provides that when lodging a denunciation [*denuncia*] or a complaint [*querela*] before the public prosecutor's office attached to the court placed in the district capital, the offender, is he or she does not know the Italian language, is entitled, upon request, to have the certificate of receipt of the denunciation or complaint translated into a language known to him/her.

[7] Law No. 69 of 19 July 2019, labelled as the 'Red Code'. It made amendments to the Criminal Code, the CCP and other provisions on the protection of victims of domestic and gender-based violence with the main purpose of tightening their repression.

moment they lodge a complaint, so that the social isolation they face as a result of the ill-treatment they have suffered does not also translate into an inability to access justice.

Furthermore, in order to provide victims with immediate linguistic assistance, Article 143a CCP requires the judicial authority to appoint an interpreter if the victim do not speak Italian. In this way, an attempt has been made to give the victim a more balanced role in the proceedings than that of the suspect, [8] since the victim is not only a mere 'source of information' but also a 'subject' of the proceedings. [9]

The provision on the right to an interpreter also for the victim has attracted some criticism, especially in cases where it has created an imbalance between the right of the victim and the right of the accused person to linguistic assistance. The lack of any provision in Directive 2012/29/EU on the appointment of an interpreter in interviews between the victim and the accused person has indeed allowed the Italian legislator to disregard this aspect; moreover, it has not been clarified whether the victim's linguistic assistance activity should be free of charge, since the new Article 143a CCP makes no reference to this aspect, [10] unlike what has been provided for the accused person.

Furthermore, Article 143a(2) CCP foresees two hypotheses for the appointment of an interpreter: (a) when 'even *ex officio*' it is necessary to proceed with the hearing of the victim who does not know Italian; (b) when the victim expresses his/her wish to participate in the hearing by requesting to be assisted by an interpreter, even though he or she is not a 'party' to the criminal proceedings.

With a view to ensuring the reasonable duration of the trial, it has been set forth that these forms of assistance may also be provided through the use of remote communication technologies, 'unless the physical presence of the interpreter is necessary to enable the victim to properly exercise his/her rights and fully understand the course of the trial', as per Article 143a(3) CCP.

Conversely, the scope of Directive 2012/29/EU would seem to be limited by the content of Article 143a(4) CCP, which provides that the victim has the right to a free written translation of the acts containing

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[8] D. PERUGIA, *Processo penale allo straniero: alcune osservazioni sul diritto all'interprete e alla traduzione degli atti,* in *Dir. pen. cont.*, 2018(7), p. 125.

[9] V. BONINI, *L'assistenza linguistica della vittima*, in P. SPAGNOLO-H. BELLUTA-V. BONINI (Eds.), *Commento alle nuove norme in materia di tutela della vittima del reato*, in *Leg. pen. (web)*, 4th July 2016, p. 43.

[10] By contrast, Article 143a(4) CCP mentions, albeit briefly, the fact that translations shall be free of charge.

information useful for the exercise of his or her rights without, however, specifying the types of acts that must be translated. This implies that national courts are left with a certain margin of discretion to decide which acts would fall into this category, i.e. which acts should be translated free of charge into a language that the victim understands. [11]

On the other hand, these tools must be applied in a concrete and systematic way in everyday judicial activity also in the light of the provision of Article 7 of Directive 2012/29 EU, [12] which recognises the possibility for the victims to challenge a decision that has excluded the need for interpretation or translation. [13] Notably, Article 7(3) of the aforementioned Directive obliges Member States to provide for the translation of all decisions ending a stage of the proceedings. Moreover, Article 7(4) thereof provides that 'Member States shall ensure that victims who are entitled to information about the time and place of the trial in accordance and who do not understand the language of the competent authority, are provided with a translation of the information to which they are entitled, upon request'.

3. Concluding remarks

If, on the one hand, Legislative Decree No. 212 of 15 December 2015 has brought major innovations to the former discipline—as well as new approaches to the position of the victim in criminal proceedings—on the other hand, it will be crucial to assess whether the set of information and rules imposed on the judicial authority will be adequate in order to avoid the so-called phenomenon of 'secondary victimization' of the victim.

Given that 'understanding and the possibility of being understood

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[11] M. GIALUZ, *supra* note 4, p. 477.

[12] That provision should be read in conjunction with Recital 35, Directive 2012/29/EU, which reads as follows: 'the victim should have the right to challenge a decision finding that there is no need for interpretation or translation, in accordance with procedures in national law. That right does not entail the obligation for Member States to provide for a separate mechanism or complaint procedure in which such decision may be challenged and should not unreasonably prolong the criminal proceedings. An internal review of the decision in accordance with existing national procedures would suffice'.

[13] Despite the fact that Directive 2010/64/EU had already foreseen the need to provide for an appeal mechanism to challenge unjustified refusals of language assistance, the Italian CCP only provides that the decision to refuse the optional translation can be appealed together with the judgment.

represent the essential coordinates of a judicial system', [14] it cannot be ignored that the guarantee of an informed participation to criminal proceedings remains *de facto* entrusted to the choices of the judicial authority, which is called upon to judge the necessity of interpretation and the essentiality of translation on a case-by-case basis.

It is hoped that the Italian legal system will be able to meet the standards set out in the EU Directives, so that victims are also guaranteed a full and effective participation in the criminal proceedings.

[14] S. ALLEGREZZA, *Il ruolo della vittima nella Direttiva 2012/29/UE*, in L. LUPARIA (Ed.), *Lo statuto europeo delle vittime di reato. Modelli di tutela tra diritto dell'Unione e buone pratiche nazionali*, Wolters-Kluwer-Cedam, 2015, p. 8.

PART IV

THE GUARANTEES ACKNOWLEDGED TO THE APPLICANTS FOR INTERNATIONAL PROTECTION

THE HUMAN RIGHTS OF ASYLUM SEEKERS WITHIN THE EUROPEAN LEGAL FRAMEWORK

FEDERICO LOSURDO

"The notion of human rights, based upon the assumed existence of a human being as such, collapsed at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relations except that they were still human. The world found nothing sacred in the abstract nakedness of being human".

[H. ARENDT, *The Origins of Totalitarianism*, New York, 1966, p. 290 f.]

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1. Introduction. Human rights without citizenship

As is well known, the cornerstones of the contemporary doctrine of human rights are 'inviolability' and 'jurisdiction'. These are two postulates whose combination makes the grammar of human rights constitute the Alpha and Omega of any systematic normative discourse. If 'inviolability' prescribes that human rights must not be breached, the existence of a 'jurisdiction' guarantees that they cannot be violated since, should this happen, the legal system intervenes to concretely reaffirm their intangibility. [1]

The foundations of the principle of 'inviolability' lie in the

[1] P. COSTA, *Dai diritti naturali ai diritti umani. Episodi di retorica universalistica*, in M. MECCARELLI-P. PALCHETTI-C. SOTIS (Eds.), *Il lato oscuro dei diritti. Esigenze emancipatorie e logiche di dominio nella tutela giuridica dell'individuo*, Dykinson, 2014, p. 27 ff.

presentation of human rights as moral rights – universal rights of the human being as such, absolute rights which cannot be hampered by higher values and which can be asserted against private and public powers.

The novelty of the contemporary doctrine of moral rights is that they are also inextricably positive rights. They are morally inviolable claims, since respect for the life and dignity of every human being belongs to the sphere of the intangible claims, which are acknowledged and safeguarded by the sphere of positive law.

The emancipation from natural law conception ('jusnaturalism') is the result of an account that has taken note of the historical character of human rights: [2] in particular, it has traced the genesis of human rights within the anti-totalitarian philosophies of the 1930s and 1940s and within the Universal Declaration of Human Rights (UDHR) drafted in 1948. It is a legal theory embodied in the Nuremberg trials, the event that made juridically fruitful the concept of humanity, in order to render human rights the "matrix" of both international and national legal systems. At Nuremberg, human rights showed that they had an excess of normativity that could transcend any formal legality. Their intangibility together with their jurisdictional nature ensures that human rights must not, and shall not, be violated.

With regard to the specific aspect we are dealing with, the migrants' human rights, the legal implications are quite revolutionary. What is virtually weakened is the institution of citizenship, the belonging to a political community as a condition of access to rights. It is the meaning that Hannah Arendt evoked when she drew attention to the drama of the stateless people: holders of human rights and, however, devoid of any protection, demonstrating that only the right to citizenship is the true human right and that human rights without political affiliation remain mere *flatus vocis*. [3]

The response of the post-war legal systems to this cry of pain was, at least formally, unequivocal. The Italian Republic according to Article 2 of Italian Constitution acknowledges the intangible rights of human beings. The inviolability of human dignity is enshrined in the German Constitution, as well as in the Charter of Fundamental Rights of the European Union (CFR), in its Article 1). And there is

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[2] N. BOBBIO, *L'età dei diritti*, Einaudi, 1990, p. 5 ff.

[3] H. ARENDT, *Le origini del totalitarismo*, trad. it., Edizioni di Comunità, 1967, p. 367 ff. Notably, Article 15 UDHR sets forth that every person has 'a right to a nationality'. To implement and strengthen this principle, the New York Convention relating to the Status of Stateless Persons, drafted in 1954, was adopted. On this matter see T. GUARNIER, Vacatio. *Ovvero la condizione giuridica dell'apolide nell'ordinamento italiano*, in *Costituzionalismo.it*, 2014(1).

no constitutional and supranational case-since the Second World War that has not emphasised, in principle, the absolute inalienability of human rights and their cogent application to humankind. [4]

In the light of these strict ethical and juridical principles, the administrative detention of migrants and asylum seekers in spaces of uncertain qualification and in disregard of the minimum guarantees of the rule of law is perceived by a disheartened literature as the result of unlawful provisions. [5] It is a legal framework that should be removed from the European and national legal systems because of its disturbing systematic implications. [6]

Hannah Arendt, referring to the situation of stateless persons during the Second World War, pointed out that 'the best criterion for deciding whether someone has been forced outside the law is to ask whether he would benefit from committing a crime', because in this way he would at least be protected by the guarantees of the rule of law against police abuse until the trial and after the imposition of a certain sentence. [7]

2. From political-constitutional asylum to humanitarian asylum

The progressive collapse of the legal condition of migrants has its roots in the shift from the figure of 'political asylum'—in the forms in which it was enshrined into the European constitutions after the Second World War—to the different notion of 'humanitarian asylum' which was at the heart of the 1951 Geneva Convention. [8]

The right to political asylum, laid down in Article 10(3) of the Italian Constitution, sees its fundamental purpose in the

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[4] Italian Constitutional Court, since the historic judgment of 23rd November 1967, no. 120, adopted a systematic interpretation of Articles 2, 3 and 10 of the Italian Constitution, recognizing that 'everyone, citizens and foreigners, is holder of inviolable human rights'. On this topic M. RUOTOLO, *Sicurezza, dignità e lotta alla povertà. Dal diritto alla sicurezza alla sicurezza dei diritti*, Editoriale scientifica, 2012.

[5] E. RIGO, *Spazi di trattenimento e spazi di giurisdizione. Note a margine di materiali di ricerca sulla detenzione amministrativa dei migranti*, in *Materiali per una storia della cultura giuridica*, 2017(2), p. 482 ff.

[6] L. FERRAJOLI, Principia juris*. Teoria del diritto e della democrazia*, Laterza, 2007, p. 305 ff.

[7] H. ARENDT, *supra* note 3, p. 286.

[8] A. CANTARO-F. LOSURDO, *La libertà personale del richiedente protezione internazionale*, in *Dir. pen. cont.-Riv. trim. (web)*, 2020(3), p. 417 ff.; and G. MICCIARELLI, *Il diritto d'asilo dimenticato:* displacement *o rinuncia di un attributo fondamentale della sovranità*, in A. DI STASI-L. KALB (Eds.), *La gestione dei flussi migratori tra esigenze di ordine pubblico, sicurezza interna ed integrazione europea*, Editoriale scientifica, p. 265 ff.

emancipation of a person from his/her condition of 'naked life' and the acknowledgment of his/her full human dignity.[9] Political asylum takes the form of precise and binding legal claims: the subjective right to entry, with the consequent prohibition of *refoulment* and, on the other hand, the subjective right to stay (initially a temporary residence permit then, after verification of the requirements, a permanent one) with the consequent prohibition of expulsion.[10] These are two functional rights that consolidate the bond of belonging to the host State and to open the door to the citizenship, as proclaimed in Article 17 UDHR.

On this basis, the tool of "administrative detention", being a measure functional to the return of the irregular migrant (when there are reasons that prevent its immediate execution)[11], was not considered in no way applicable to the political asylum seeker.

The basic purpose of the 1951 Geneva Convention, which belongs to the broader *corpus* of international humanitarian law, is significantly different. The refugee is considered mainly in his or her biological condition as a suffering and traumatized human almost as a passive object of care. This explains, on the one hand, the lower cogency of the right of entry and the right of stay[12] and, on the other hand, the fact that the Geneva Convention of 1951, while acknowledging the principle of the prohibition of refoulment (art. 33), recognizes the possibility, albeit in exceptional cases, of a detention of the refugee for 'humanitarian' purposes.[13]

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[9] On the evolution of the right to political asylum in the German legal system, see G. MANGIONE, *Il diritto di asilo nell'ordinamento costituzionale tedesco*, Giuffrè, 1999. The right to political asylum is also acknowledged in the French Constitution (Article 53), in the Portuguese Constitution (Article 33) and in the Spanish Constitution (Article 13).

[10] This thesis dates back to C. ESPOSITO, *Asilo (diritto di) – Diritto costituzionale*, in *Enc. Dir.*, vol. III, Giuffrè, 1958, p. 222 ff. See, more recently, M. BENVENUTI, *Il diritto di asilo nell'ordinamento costituzionale italiano. Un'introduzione*, Cedam, and P. BONETTI, *Il diritto di asilo nella Costituzione italiana*, in C. FAVILLI (Eds.), *Procedure e garanzie del diritto di asilo*, Cedam, 2011, p. 33 ff.

[11] Administrative detention is deemed to be an 'administrative procedural sanction established by the legal system to protect the reasonable duration of the expulsion procedure', according to PIERG. GUALTIERI, *Il trattenimento dello straniero nel prisma sanzionatorio italiano*, in A. MASSARO (a cura di), *La tutela della salute nei luoghi di detenzione. Un'indagine di diritto penale intorno a carcere, REMS e CPR*, Roma Tre-Press, Roma, 2017, p. 361.

[12] F. MASTROMARTINO, *Il diritto d'asilo. Teoria e storia di un istituto giuridico controverso*, Giappichelli, 2012, p. 275 ff.

[13] This approach is reminiscent of the tradition of so-called "humanitarian detention" in the period between the two World Wars. In fact, the need to protect the refugee ended up justifying a substantial restriction not only of his political and social citizenship, but also of his or her personal freedom. See on this point G.

The distinction between the right to political asylum and the refugee status becomes even clearer in the light of Italian Constitution. While, in fact, the granting of refugee status is based on a *positive* assessment on an individual basis of the serious risk of being persecuted, the right to political asylum only requires a *negative* assessment: the existence of a situation that prevents the effective exercise of the democratic freedoms recognised by the Constitution (Article 10).

The "transition" from 'political asylum' to 'humanitarian asylum' can also be explained by the decline of the ideological tensions, which, at the time of the Cold War, had favoured attitudes of political-ideal recognition of asylum, especially *vis-à-vis* asylum-seekers from the 'Soviet bloc' countries. There is a paradigm shift in the European Member States' policies, especially when immigration became a mass phenomenon mainly oriented along the South-North axis. Even when the reasons for openness and hospitality could prevail, we no longer welcome heroic political opponents, but traumatised people who are increasingly treated as simple economic migrants who intend to abuse the generous forms of protection offered by Western legal systems.

The shift of asylum from the emancipatory sphere of human rights to that of compassionate assistance to a victim of persecution is particularly evident in the European legal framework from the 1990s onwards – a securitarian logic is gaining ground in the collective imagination, legitimised by the alarm with which the qualitative and quantitative leap in the migratory phenomenon and the growing danger of international terrorism are perceived.

3. The European governance between humanitarian and securitarian paradigm

Originally, the European legal order did not address the issue of asylum. The European Convention on Human Rights (ECHR) does not mention the right to asylum. Similarly, the European Community (EC) law was also silent for a long time on the right to asylum and, more generally, on the regulation of entry and stay on the national territory, since this was one of the exemplary manifestations of sovereignty that the Member States didn't want to relinquish. [14]

CAMPESI, *La detenzione amministrativa degli stranieri. Storia, diritto, politica*, Carocci, 2013, p. 23 ff., who notes that the ambiguous wording of Article 31 of the Geneva Convention legitimized the application of measures restricting the freedom of refugees who find themselves in an irregular situation.

[14] C. CORSI, *Lo Stato e lo straniero*, Cedam, 2001, p. 25 ff.

The need for a common immigration and asylum policy became more pressing when, after the fall of the Iron Curtain, continental Europe was exposed to migratory waves from Eastern Europe and Africa. The abolition of internal borders, following the Schengen Agreements of 1989, increased the will to curb 'secondary movements' of migrants from one Member State to another. The main objective was to avoid the phenomenon of the so-called 'asylum shopping', i.e., the movement of migrants, who ended up in the peripheral countries of the Union, in search of a more 'generous' legal system in the field of asylum rights. The German constitutional revision of 1993—which aimed to introduce the category of the so-called 'safe country' with the consequent distinction between 'refugees' and 'economic migrants' [15]—has triggered a competition between Member States, to reduce the forms of protection granted to migrants and asylum seekers.

Within this framework, the Maastricht Treaty and Amsterdam Treaty introduced a common policy on immigration and asylum, with the aim to contain the 'race to the bottom' between Member States and guaranteeing aliens a single framework of substantive and procedural rights enforceable throughout the territory of the EC (and later the EU).

It is, however, extremely significant that the EU law has chosen the 1951 Geneva Convention as the cornerstone of the new provisions, based on the category of the applicant for international protection. [16] It is a category that proves the ambiguous overlap between the figure of 'political asylum', linked to the emancipatory concept of human dignity, and the figure of 'humanitarian asylum' linked to the idea of the compassionate assistance to a victim of persecution.

It is noteworthy to briefly summarise the EU model for international protection regulated by Directive 2011/95/EU of 13 December 2011. This model is based on two status to be granted to

[15] The constitutional revision of 1993, on the one hand, excluded the jurisdiction of the German courts on asylum applications advanced by subjects coming from EC Member States or third States Parties to the ECHR (Article 16(2)); on the other hand, it established that the application for asylum lodged by subjects coming from "safe" third countries are deemed presumptively unfounded and examined within summary procedures (Article 16(3)-(4)). See M. HUNT, *The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future*, in *Journ. Refugee Studies*, 2014(26), p. 500 ff.

[16] The Union 'shall develop a common policy on asylum [...] This policy must be in accordance with the Geneva Convention of 28 July 1951' (Article 78 TFUE). Moreover, 'the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951' (Article 18 CFR).

the third-country national: (a) the status of 'refugee' which recalls the relevant provisions of the Geneva Convention; (b) the 'subsidiary protection' which is granted when the applicant runs the risk of suffering a 'serious damage' consisting in the death penalty, torture, inhuman or degrading treatment or the serious and individual threat by reason of indiscriminate violence in situations of armed conflict, if returned to the country of origin. To these two statuses, the Italian legal system, in accordance with the discretion granted by Article 6(4) of Directive 115/2008/EU of 16 December 2008, has added "humanitarian protection" (Article 5, paragraph 6, Legislative Decree no. 286/1998 - Consolidated Immigration Act). [17]

The progressive breakdown of migrant's lives is made evident by the complex procedural rules contained in the Dublin Convention (1990), later included in the EU legal order through a Regulation. [18] The Dublin rules—which are based on the logical assumption that all Member States are to be considered inherently 'safe'—aim to clearly determine the Member State responsible for examining an application for international protection. In the first instance, the State responsible for examining such an application is the State of first illegal entry, unless other grounds linked to the subjective condition of the applicant are applied (the existence of stable family ties) and without prejudice to the application of the 'sovereignty clause'.

The principle of the so-called "one chance rule"—according to which only the country of first entry is responsible for the asylum application—and, more recently, the "mandatory" relocation mechanisms, have all but eliminated the freedom to choose the country that will grant international protection. [19] The asylum seeker, rather than being the holder of a subjective right, appears to be the 'object' of a rational administrative procedure, aimed at distributing migrants among the Member States, a distribution based on criteria of efficiency and rapidity, without serious consideration of their will.

Analogously, the breakdown of personal freedom is reflected, for

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[17] This unspecified form of protection has been used by case law to ensure an independent application of constitutional asylum rights (among others, Cass., 11 December 2018, no. 32177 and no. 32044). As known, humanitarian protection was abolished by Law Decree No. 113 of 2018 (so-called security decree). See G. TRAVAGLINO, *La protezione umanitaria tra passato e futuro*, in *Dir. imm. citt.*, 2022(1), p. 97 ss.

[18] Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* [OJ L 180, 29.6.2013, p. 31–59].

[19] M. BENVENUTI, *supra* note 10, p. 179.

instance, in Italian legal framework, which does not apply the standard constitutional guarantees envisaged for citizens with regard to the restrictive measures *vis-à-vis* third-country nationals (e.g., refusal of entry, detention and expulsion).

This happens with prejudice of two fundamental principles enshrined in Italian Constitution – the so-called "reserve of law" (*riserva di legge*) and "reserve of jurisdiction" (*riserva di giurisdizione*), both laid down, also, in Article 5 ECHR and in Article 6 CFR. On the one hand, the definition of the "grounds" and the "ways" in which administrative detention can be applied to the migrant concerned on the basis of legal sources of various kinds (not only laws *stricto sensu*, but also government regulations, circulars, soft law) has created a wide margin of manoeuvre in the hands of the public authorities. On the other hand, the essence of the "reserve of jurisdiction" is betrayed, since the non-validation of the provision restricting freedom does not necessarily suspend its enforceability, the relative procedure takes place in the forms of voluntary jurisdiction and the decision is entrusted to an honorary judge (the so-called Justice of the Peace [*Giudice di pace*]) to whom the law entrusts mainly conciliatory functions. [20]

4. The systematic legitimation of administrative detention

The violation of the human rights of applicants for international protection reached its peak with the institutionalization of administrative detention, [21] introduced into Italian legal framework with the Turco-Napolitano Law (Law No. 40 of 1998) and then upheld by EU law. [22] Indeed, we are dealing with people who, because they do not have a permit to enter and stay on the territory of the State, are subjected to a measure of deprivation of their personal liberty without having committed any crime, with fewer guarantees than those provided by the criminal justice system.

Originally conceived as a precautionary toll to make the procedure of refusing entry and expelling migrants more efficient, [23] the

[20] The gap between the current Italian immigration legal system and the constitutional guarantees provided by Article 13 of the Italian Constitution has been effectively highlighted by A. PUGIOTTO, *La "galera amministrativa" degli stranieri e le sue incostituzionali metamorfosi*, in *Quad. cost.*, 2014(3), p. 576 ff.

[21] See D. LOPRIENO, *Trattenere e punire. La detenzione amministrativa dello straniero*, Giappichelli, 2018, and E. VALENTINI, *Detenzione amministrativa dello straniero e diritti fondamentali*, Giappichelli, 2018.

[22] Article 8(3), Directive 2013/33/UE.

[23] According to the Italian Constitutional Court, the main purpose of

administrative detention has become a systematic practice—especially since the so-called Bossi-Fini law (Law 189 of 30th July 2002)—a also *vis-à-vis* applicants for international protection. For the latter, detention can be ordered by the Chief of the Public Security Authority [*Questore*], a weak and subsequent control on the measure being assigned to specialised courts – the latter have to assess the legal basis of the detention, which is typically enforced in places of uncertain normative qualification, on the basis of indefinite grounds (e.g. the 'risk of absconding' of the applicant). [24]

Against this backdrop, many have invoked the "salvific" intervention of the higher national and supranational courts which were called upon to remove this fragment of "unlawfulness" from the legal system. However, expectations have been disappointed; on the contrary, it is precisely the judicial review that underpinned the legitimacy of administrative detention. [25]

Italian constitutional case-law, for example, on the basis of a balance between the personal liberty of non-citizens and the overriding value of public security, [26] has indeed censored the modalities of administrative detention, in particular with regard to the necessary verification of compliance with both the reserve of law and jurisdiction; [27] but it has avoided addressing the preliminary

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administrative detention of illegal foreigners is 'to avoid their dispersion throughout the territory and thus to allow the execution of the expulsion orders' (Const. Court, 15th April 2010, no. 134).

[24] D. LOPRIENO, *supra* note 19, p. 27 ff.

[25] E. RIGO, *supra* note 5, p. 478; C.F. FERRAJOLI, *Un rifugio senza libertà. Il trattenimento del richiedente asilo nei centri di identificazione*, in *Pol. dir.*, 2007(2), p. 175 ff.

[26] According to the case-law of the Italian Constitutional Court, this supreme value includes 'public health and safety, public order, defence of the national community, international bonds and national immigration policy' (see e.g., Const. Court, 6th July 2012, no. 172; Const. Court, 8th July 2010, no. 250; Const. Court, 16th May 2008, no. 148; Const. Court, 26th May 2006, no. 206, Const. Court, 24th February 1994, no. 62). On this case-law, see M. RUOTOLO, *Sicurezza, dignità e lotta alla povertà*, *supra* note 4, and F.T. GIUPPONI, *Le dimensioni costituzionali della sicurezza*, Bonomo, 2008.

[27] Const. Court, 10th April 2001, no. 105. Administrative detention, 'even if it is not separate from a purpose of assistance, causes the humiliation of human dignity that occurs in any circumstance of physical subjection to the power of others'. Consequently, detention 'in view of its content' falls within the category of 'other restrictions of personal freedom' mentioned in Article 13 of the Constitution. With regard to deferred deportation (*respingimento differito*), the Constitutional Court, in its judgement No. 222 of 15th July 2004, stated that 'if the foreigner is expelled before the judge has had a chance to rule on the restrictive measure, the guarantee contained in Article 13(3) of the Constitution is nullified and both the personal freedom and the right of defence of the foreigner are breached'. On the same issue, the Constitutional Court, in its judgement No. 257 of 6th December 2017, while

question of the constitutional compatibility of such a deprivation of liberty completely detached from any criminal law basis.

Equally ambiguous has been the case-law of the supranational Courts, which have struck a balance between the right to liberty and the right to security (a balance expressly referred to in Article 6 CFR). There is no doubt that the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have condemned methods of detention that affect the essential content of human dignity (especially in relation to the most vulnerable people).[28] Specifically, the ECtHR undertook to uphold the integrity of the *ius cogens* principle which underpins the prohibition of *refoulement*.[29] The CJEU proposed a reading of the Dublin Regulation that seeks to maximize the scope of the aforementioned sovereignty clause.[30]

Yet, in the name of the principle of proportionality, the two supranational Courts ultimately ended up legitimising the functionalist *ratio* of administrative detention, which consists in making the procedure for refusal of entry and expulsion of migrants more efficient and rapid. The ECtHR considered it admissible to detain migrants pending expulsion proceedings under Article 5(1)(f) ECHR, without requiring the State to prove an actual risk of absconding or of committing an offence, provided that the alien's deprivation of liberty is proportionate with the aim of promptly carrying out the return.[31] In turn, the CJEU held that administrative

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declaring the questions raised inadmissible for lack of relevance, emphasised the need for the legislator to intervene in the legal regime of deferred expulsion in order to bring it into line with Article 13 of the Constitution.

[28] According to Case C-233/18, *Haqbin*, ECLI:EU:C:2019:956, para. 56, 'a Member State cannot, among the sanctions that may be imposed on an applicant for serious breaches of the rules of the accommodation centres as well as seriously violent behaviour, provide for a sanction consisting in the withdrawal, even temporary, of material reception conditions [...] relating to housing, food or clothing, in so far as it would have the effect of depriving the applicant of the possibility of meeting his or her most basic needs'.

[29] Among many see *Sharifi and Others v. Italy and Greece*, App. no. 10664/05 (ECtHR, 21st October 2014); *Hirsi Jamaa and Others v. Italy* [GC], App. no. 27765/09 (ECtHR, 23rd February 2012); *Čonka and Others v. Belgium*, App. no. 51564/99 (ECtHR, 5th February 2002); *Soering v. the United Kingdom*, App. no. 14038/88 (ECtHR, 7th July 1989).

[30] See Case C-4/11, *Puid*, ECLI:EU:C:2013:740 and Joined Cases C-411/10 and C-493/10, *N.S. and Others*, ECLI:EU:C:2011:865.

[31] *Saadi v. Italy* [GC], App. no. 37201/06 (ECtHR, 28th February 2008) and *Mikolenko v. Estonia*, App. no. 10664/05 (ECtHR, 8th October 2009). If the prospects of removal diminish to the point of becoming evanescent, the possibility of resorting to the derogation referred to in Article 5(1)(f) ECHR also ceases. See *Raza v. Bulgaria* (ECtHR, 11th February 2010), App. no. 31465/08 and *Nabil and Others v. Hungary* (ECtHR, 22nd September 2015), App. no. 62116/12.

detention is compatible with Article 6 CFR in so far it pursues an objective of general interest recognised by the Union, namely the protection of national security and public order. [32]

5. Concluding remarks. War and asymmetric solidarity in the European Union

According to the treaties (Article 78 TFUE) and the principal pieces of EU legislation, the main purpose of the immigration and asylum policy would be to achieve solidarity between Member States and a fair sharing of responsibility, including its financial implications. Finally, it is worth asking whether this solidarity between Member States also translates into an effective solidarity of the EU towards the migrant as a human being.

In the light of the previous considerations, it emerges that the migrant is treated as an 'object' of a highly formalised procedure rather than as a 'subject' of rights; a procedure which aims, firstly, to distinguish rapidly between an economic migrant to be expelled or a potential applicant for international protection to be conditionally admitted to the European territory: it is the principle of the 'safe country'. [33]

Secondly, the Member State responsible for examining application for international protection is established on the basis of criteria that disregard the will of the person concerned (with the possibility of a forced transfer from one Member State to another): it's the 'Dublin principle'.

Pending these assessments, the non-citizen may be subjected to administrative detention on the basis of vague grounds, ultimately left to the discretion of the competent administrative authorities with evanescent judicial guarantees.

The "administrative trend" in depriving migrants of their personal freedom [34] has culminated in recent years with a distortion of the concept of security: from the idea that a well-organised State must preserve the "security of rights" for everyone (especially the vulnerable people) to the idea that there is an individual "right to

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[32] Case C-601/15 PPU, *J.N.*, ECLI:EU:C:2016:84, para. 53.

[33] From a procedural point of view, it is assumed that anyone coming from a safe country does not have the right to protection, unless they can provide counterevidence. Furthermore, an 'accelerated' procedure is foreseen in such cases (see Article 31(8), Directive 2013/32/EU).

[34] See M. SAVINO, *L'«amministrativizzazione» della libertà personale e del due process dei migranti: il caso Khlaifia*, in *Dir. imm. citt.*, 2015(3-4), p. 50 ff.

security": a right of dubious constitutional basis that the stronger part of society could claim against the weaker in order to maintain the *status quo*.

In recent years, the exasperation of the securitarian paradigm has inspired the practice of "outsourcing" the management of migrants towards third countries (e.g., Turkey, Libya), on the basis of international agreements artificially subtracted from the jurisdiction of European courts and at the price of blatant human rights violations.

When the mechanism for the relocation of applicants for international protection—which has been proposed as a compensation for the establishment of hotspots [35] in coastal Member States—failed, due to the firm opposition of the 'Visegrád group' (opposition also in relation to a ruling by the CJEU which found that Slovakia and Hungary did not comply with the aforementioned mechanisms) [36], the same countries of first arrival (and also Italy) did not hesitate to close the harbours, in order to prevent applicants from benefitting from their jurisdiction with regard to any applications that might be lodged.

Lastly, the tragic Russo-Ukrainian war broke out in the heart of Europe, a war which among its many deleterious consequences led to the flight of millions of refugees. The EU's response was generous (especially with regard to those countries that had proved hostile to any form of relocation in the past). However, the spirit of solidarity and hospitality has not been applied equally towards all refugees, thus exacerbating hateful discrimination between them.

With unprecedented speed and determination the Council of the European Union adopted on 4 March 2022 (upon a proposal from the Commission) an Implementing Decision aimed at ascertaining the existence of the condition of "temporary protection" and ordering its consequent activation in accordance with Directive 2001/55/EC. [37] This decision grants a one-year residence permit (irrespective of the outcome of the application for international

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[35] On the 'hotspot method' see S. PENASA, *L'approccio 'hotspot' nella gestione delle migrazioni: quando la forma (delle fonti) diviene sostanza (delle garanzie). Efficientismo e garantismo delle recenti politiche migratorie in prospettiva multilivello*, in *Riv. AIC*, 2017, f. 2, p. 1 ff.

[36] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, ECLI:EU:C:2017:631.

[37] Council Implementing Decision (EU) 2022/382 of 4 March 2022 *establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection* – ST/6846/2022/INIT [OJ L 71, 4.3.2022, p. 1–6]. Notably, 'temporary protection' is characterized by being a collective, exceptional, flexible measure, with discretionary activation and automatic application. It allows Member States to

protection) with the possibility of access to employment and the basic forms of protection and social assistance. In addition, an innovative provision allows Ukrainian refugees to choose the country in which they wish to receive the protection by exercising their freedom of movement within the territory of the Union within ninety days of their arrival in Europe.

The sore point is that the privileged status is not granted to "all" war refugees, but only to specific "categories" of these. The granting of temporary protection status, in fact, is left to the discretion of the national authorities in the case of stateless persons and nationals of third countries other than Ukraine who can prove that they have been residing legally on the basis of a valid permanent residence permit.

How can we fail to see the abnormal contradiction of an EU member state like Poland, which has taken in some three million Ukrainian refugees, while at the same time closing its doors to a few thousand refugees from Syria and Afghanistan who are crowding the borders with Belarus?

Finally, the example of the selectivity of the reception procedures for refugees from Ukraine does not seem to augur well for the epochal exodus from Africa that Europe will face in the coming decades. Not only does the EU lack the appropriate regulatory instruments (the 'new EU Pact on Migration and Asylum' reproduces the limits of current legislation), it also seems culturally incapable of acting as a global actor and shouldering the burden of (regional) hegemony, i.e. bearing the consequences of its decisions.

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adopt immediate protection measures in favour of groups of individuals without the need to go through the slower and more cumbersome procedure of individual recognition, case by case, of international or subsidiary protection.

THE GUARANTEES PROVIDED FOR FOREIGNERS WITHIN THE ECHR LEGAL FRAMEWORK

LORENZO BERNARDINI

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1. Introduction

In recent years, the management of the migration phenomenon, especially in the aftermath of the so-called European migrant crisis of 2015, which has never fully ended, [1] has become an increasingly central issue on the political agendas of European governments. Curiously, priority has often been given to the fight against irregular immigration, without the 'counterbalance' on the 'equal and opposite' issue of international protection. On closer inspection, they are two sides of the same coin.

To simplify, and using the categories sketched in the European Union (EU) legal system, [2] a foreigner who arrives on the territory of a Member State (or who is found to be already present on that territory) may alternatively hold two positions: either he/she is an 'irregular' migrant—and must therefore must be returned as soon as possible—or he/she is an applicant for international protection, in which case his/her application for protection must be examined. *Tertium non datur*. However, as a matter of fact, the two situations

[1] See, on this subject, Y. PUNDA-V. SHEVCHUK-V. VEEBEL, *Is the European migrant crisis another stage of hybrid war?*, in *Estonian Journal of Military Studies*, 2019(13), p. 116-136, and, more recently, V. VEEBEL, *Is the European Migration Crisis Caused by Russian Hybrid Warfare?*, in *J. Pol. L.* , 2020(13/2), p. 44 ff. With reference to the Russian invasion of Ukrainian territory and the migration crisis following this event, see I. GERLACH-O.RYNDZAK, *Ukrainian Migration Crisis Caused by the War*, in *Studia Europejskie – Studies in European Affairs*, 2022(2), p. 17 ff.

[2] The reference is to the well-known Directives 2008/115/EC (so-called Return Directive), 2013/32/EU (so-called Procedures Directive), 2013/33/EU (so-called Reception Directive) and Regulation (EU) No 603/2013 (so-called Dublin III).

are oftentimes intertwined: one can think of the expelled person who applies for protection while the removal procedure is pending. Similarly, one can think of the applicant whose application is definitively rejected and who *ipso facto* acquires the status of 'irregular' (and, is therefore to be expelled). Nevertheless, it is difficult to make a clear distinction between the two categories, since, to give just one example, an application for international protection may be submitted by a third-country national at any time, even in different States. The attribution of a specific status to a 'non-citizen'—which is in any case not definitive—proves to be a complex task. Yet, the due diligence of the authorities required in such an assessment should not be abdicated in the name of 'security' or 'public order'.[3] The specific analysis of the situation of the applicant for international protection must also take into account the scope of the right to asylum and the related principle of *non-refoulement*.

The very brief examination carried out so far aims to sketch out the intrinsically complex picture of the issue, which has a transnational character, based on the triangular relationship between the migrant, the State of origin and the country of destination.

There are nonetheless few common principles and rules on the matter: the entry of foreigners into national territory is, in fact, largely a matter for domestic legislation, given the reluctance of Member States to discuss the issue from a supranational perspective.[4] Although the transnational nature and current scale of migratory flows have highlighted the inadequacy of managing the phenomenon at national level,[5] as has been properly observed, it seems that 'a comprehensive framework for migration governance is still lacking'.[6]

In the absence of a unified framework to refer to, the current

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[3] On this point, see the references of L. MELICA, *Libertà e sicurezza in Europa in materia di migrazione e asilo: profili giuridici sull'immigrazione nell'ordinamento europeo*, in *Lingue e linguaggi (web)*, 2005(16), p. 509-527 and, with specific reference to the axiological opposition between "freedom" and "security" in EU asylum policies, C. KAUNERT, *Liberty versus Security? EU Asylum Policy and the European Commission*, in *Journal of Contemporary European Research*, 2009(5/2), p. 148-170. See also C. GUIDA, *L'accoglienza emergenziale. Pratiche di resistenza dei richiedenti asilo e il ruolo dell'antropologo*, in *Antropologia Urbana*, 2017(3), p. 129, who observed that there exists a 'securitarian management of asylum seekers'.

[4] F. CRÉPEAU, *Promotion and Protection of Human Rights: Human Rights Questions, including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, UN General Assembly, doc. A/68/283, 7 August 2013, para. 8.

[5] Ibid., para. 27.

[6] Ibid., para. 8.

international discipline is 'fragmented' [7] into a multiplicity of normative acts that regulate specific profiles of the phenomenon, such as the protection of the human rights of migrants, the repression of illicit trafficking of migrants, the protection of refugees and asylum seekers, and the regulation of labour migration. In these areas a florid case-law has been developed by the European Court of Human Rights (ECtHR), which, based on the relevant provisions of the European Convention on Human Rights (ECHR), has outlined a list of guidelines on the fundamental rights of migrants.

The focus of this chapter will be on the analysis, in the ECHR legal order, of two specific prerogatives guranteed to foreigners: the principle of *non-refoulement* and the prohibition of collective expulsions, a direct emanation of certain sources of international law.

2. *The principle of* non-refoulement

The principle of *non-refoulement* is codified in Article 33 of the 1951 Geneva Convention, which states that no refugee may be expelled or returned to a particular country where his/her life or liberty would be threatened on account of persecution falling within the definition of 'refugee' laid down in Article 1 of the same Convention. [8]

The principle cannot, however, be invoked by a refugee who, for serious reasons, is to be considered a danger to the security of the

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[7] In this regard, S. PAMPALONI, *Il fenomeno migratorio via mare. Caratteristiche e percezione*, in S. BASTONI-F. BOCCI-P. PAMPALONI-G. QUILGHINI (Eds.), *Il contrasto all'immigrazione irregolare via mare: attività di polizia e salvaguardia della vita umana. Rapporti tra sistemi giuridici e prospettive future*, 2020, p. 19, available at the following URL: *https://scuolainterforze.interno.gov.it/wp-content/uploads/2021/02/Quaderno-2-2020.pdf.*

[8] The Convention relating to the status of refugees (Geneva, 28 July 1951) (hereinafter: Refugee Convention), leaving aside the geographical and temporal restrictions in Article 1—amended by the adoption of the Protocol Relating to the status of refugees (New York, 31st January 1967)—, set forth in Article 1(a)(2) the definition of 'refugee' – a person 'who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out-side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. The Refugee Convention does not lay down a specific procedure for determining refugee status, but requires States Parties to assess the particular situation of each asylum seeker on the basis of a series of requirements set out in the Convention, which in principle oblige the authorities of those States to recognise refugee status if these requirements are met.

country in which he or she resides or by a person who, 'having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'. [9]

It should be added that Article 32 of the Refugee Convention expressly prohibits the expulsion of a 'refugee' (i.e. a person who has already been granted international protection) lawfully residing in the territory of State Party 'except for reasons of national security or public order'.

The importance of this principle has proved so important over time that it has been enshrined in numerous international and regional treaties (e.g., Articles 2 and 3 ECHR, [10] Article 22(8) of the Inter-American Convention on Human Rights [11]), and is now traditionally considered to be an expression of a rule of customary international law, applicable to all migrants, including 'irregular migrants', in accordance with a progressive approach. [12]

An analysis of the perspective followed by the settled ECtHR's case-law highlights the latter's driving role in guaranteeing every human being the right not to be pushed back or returned to a country where there could be a risk of serious violations of the Convention.

Although the right to political asylum as such is not expressly provided for in the Convention or its Protocols, its protection within the ECHR legal framework is unquestionably guaranteed by Article 3 ECHR. [13] According to the latter, the expulsion, extradition or any other removal measure of an alien could raise issues of violations of Article 3 ECHR—and thus involve the responsibility of the

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[9] Article 33(2), Refugee Convention.

[10] These are the right to life (Article 2 ECHR) and the absolute prohibition of torture and inhuman and degrading treatment (Article 3 ECHR).

[11] `In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions'.

[12] See, *ex multis*, INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), *Note on immigration and the principle of* non-refoulement, in *Int'l Rev. Red Cross*, 2018, p. 1–13 and the Report of the EUROPEAN AGENCY FOR FUNDAMENTAL RIGHTS (FRA), *Scope of the principle of* non-refoulement *in contemporary border management*, in *fra.europa.eu*, 2016, p. 15 ff.

[13] *N.D. and N.T. v. Spain* [GC], App. nos. 8675/15 and 8697/15 (ECtHR, 13th February 2020), para. 188. Conversely, the right to asylum, within the EU legal framework, is expressly and autonomously protected by Article 18 of the Charter of Fundamental Rights of the European Union (CFR), which reads as follows: 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community'.

Contracting State under the Convention—if there are substantial grounds for believing that the person concerned, if removed, would run a real risk of being subjected to treatment contrary to the aforementioned provision in the receiving State.[14] In such circumstances, the Convention imposes a 'negative' duty on the State Party, i.e. an unconditional obligation not to remove the person to that country. This 'negative' conduct is not, however, counterbalanced by 'positive' behaviour, such as ensuring that foreigners have effective access to asylum procedures.[15]

At any rate, as regards to the specific cases of prohibition of *refoulement* addressed by the ECtHR, it should first be pointed out that the States Parties to the ECHR may not return an individual to a State where there is a real risk that he or she would be in danger of death,[16] or would be subjected to torture or inhuman or degrading treatment.[17] This indirect protection (or *par ricochet* protection)—which the ECtHR has linked to Articles 2 and 3 ECHR which enshrine rights that cannot be suspended even in emergency situations—is absolute: it also applies to persons deemed to be a threat to national security.[18]

It follows that the ECHR legal framework is violated whenever an alien is subject to an expulsion measure to a State (whether of origin or transit) where he runs the risk of being subjected to the conduct prohibited by Articles 2 and 3 ECHR. Although this *ex ante* risk assessment is inherently complex, it must be acknowledged that the ECtHR's case-law has attempted, not always with rigorous linguistic results, to outline a number of general principles to be applied to the concrete case, for example by recalling the need for the risk to have the characteristics of concreteness, personality and actuality.[19]

Should the alien suffer from a serious physical or mental illness, expulsion to a State where he or she would not be able to receive

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[14] *Ilias and Ahmed v. Hungary* [GC], App. no. 47287/15 (ECtHR, 21st November 2019), paras. 125–126.

[15] S. CARRERA, *The Strasbourg Court Judgement* N.D. and N.T. v Spain *A* Carte Blanche *to Push Backs at EU External Borders?*, in *EUI Working Papers RSCAS 2020/21*, 2020, p. 20.

[16] *Bader and Kanbor v. Sweden*, App. no. 13284/04 (ECtHR, 8th November 2005), paras. 42–43.

[17] *Soering v. the United Kingdom*, App. no. 14038/88 (ECtHR, 7th July 1989), para. 90.

[18] *Saadi v. Italy* [GC], App. no. 37201/06 (ECtHR, 28th February 2008), para. 138.

[19] On the scrutiny carried out by the ECtHR, and the terminological perplexities regarding the choices of the Court, see the considerations of F. DE WECK, Non-refoulement *under the European Convention on Human Rights and the UN Convention Against Torture*, Brill, 2016, p. 232 ff.

adequate medical treatment may—in exceptional cases based on 'considerations of humanity'—also constitute an indirect violation of the prohibition of torture and inhuman or degrading treatment. [20]

The considerations briefly outlined above paint a picture of an absolute prerogative which cannot be derogated from, even on grounds of public order or national security, and which therefore cannot be balanced against other circumstances which, *in abstracto*, would invalidate its scope (e.g. control of migratory flows or the need to serve a final sentence in the State of destination). [21]

3. The prohibiton of collective expulsions

Together with the principle of 'non-refoulement', a further guarantee for foreigners comes to the fore which is expressly provided for in the ECHR legal framework – the prohibition of collective expulsions. Article 4 of Protocol No. 4 to the ECHR, which together with Article 3 of the ECHR is one of the shortest provisions of the Convention, states laconically that 'collective expulsions of foreigners are prohibited'.

The ECHR was the first international treaty to include such a provision, based on a twofold rationale: on the one hand, to prevent States Parties from implementing expulsion measures without analysing the 'personal circumstances' of the migrants concerned; on the other hand, to enable the persons concerned to effectively defend their standpoint 'against the measure taken by the relevant authority', [22] according to the ECtHR's reading of the Convention whereby the latter aims to guarantee rights in a 'practical and effective' manner. [23]

It should be specified that the term 'collective expulsion' must be interpreted according to its common meaning and in the light of its current usage, i.e. in the (a-technical) sense of 'removal from a place'. [24] In other words, the term is to be understood as any

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[20] *D. v. United Kingdom*, App. no. 30240/96 (ECtHR, 2nd May 1997), para. 54.

[21] E. HAMDAN, *The Principle of Non-Refoulement under the ECHR and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Brill, 2016, p. 338 ff.

[22] Among others, see *N.D. and N.T.* (note 13), para. 138, with reference to *Khlaifia and Others v. Italy* [GC], App. no. 16483/12 (ECtHR, 15th December 2016), para. 238.

[23] See, *inter alia*, *Airey v. Ireland*, App. no. 6289/73 (ECtHR, 9th October 1979), para. 24.

[24] In this sense, *Hirsi Jamaa and Others v. Italy* [GC], App. no. 27765/09 (ECtHR, 23rd February 2012), para. 174.

measure requiring aliens—as a group—to leave the territory of the State concerned, unless such a measure is adopted as a result of (and on the basis of) a reasonable and objective examination of the individual situation of each alien belonging to the group.[25] This is a 'dynamic' interpretation of the Convention, according to the majority of legal scholars, bordering on an 'evolutionary' interpretation, albeit in keeping with its purposes.[26] Indeed, it is the coercive measure taken by the State against the foreigner that is significant *in parte qua*, regardless of whether the alien—individually or as part of a group—was already present on the territory (and then subsequently expelled) or was rejected directly at the border: both measures undoubtedly fall within the normative scope of Article 4 Prot. 4 ECHR.

According to the ECtHR, this means that each member of the group must be given an effective opportunity to present his/her standpoint against expulsion, and that this must be properly examined by the competent State authorities.[27] If this condition is met, the fact that the several individuals are expelled almost simultaneously is not a sufficient condition for such an expulsion to be classified as 'collective'.[28]

It follows that, as has been observed, 'the prohibition of collective expulsions has come to take on a predominantly "procedural" dimension consisting in the obligation for States to provide sufficient guarantees attesting to an effective, differentiated and detailed examination of the individual situation of the foreigner'.[29] This characterisation of Article 4 Prot. 4 ECHR is, however, 'nuanced' by a line of reasoning that is progressively gaining ground within the ECtHR, according to which the culpable conduct of the alien could—in certain circumstances—exempt the State from taking an individual expulsion decision.[30]

Thus, some cases have been analysed by the ECtHR – it appears that the obligation to provide the usual guarantees under Article 4 Prot. 4 ECHR might suffer a clear setback. It is significant, for example, the case of two spouses who, after submitting a joint application for

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[25] *Čonka v. Belgium*, App. no. 51564/99 (ECtHR, 5th February 2022), para. 59.

[26] D. RIETIKER, *Collective Expulsion of Aliens: The European Court of Human Rights (Strasbourg) as the Island of Hope in Stormy Times*, in *Suffolk Transnat'l L. Rev.*, 2016(39/3), p. 673.

[27] *Khlaifia and Others* (note 22), para. 248.

[28] Ibid., para. 252.

[29] A. SACCUCCI, *Il divieto di espulsioni collettive di stranieri in situazioni di emergenza migratoria*, in *Dir. um. dir. int.*, 2018(1), p. 34.

[30] See, most recently, *A.A. and Others v. North Macedonia*, App. nos. 55798/16 *et al.* (ECtHR, 5th April 2022), para. 112 and case law cited therein.

international protection, received a joint rejection of the same application and, as a result, a single expulsion measure against them: in this case, the ECtHR, in rejecting the appeal of the two migrants as inadmissible, was clear in stating that this situation 'was a consequence of their own conduct'.[31] Similarly, the ECtHR declared inadmissible the application of three migrants—part of a larger group of people—who had refused to show their identity documents to the police, thus forcing the border authorities to reject them all away without being able to identify the individual migrants involved (behaviour which, the Court observed, could in no way be attributed to the defendant government).[32] In both cases, the obstructive behaviour of aliens could justify the failure of States to examine the individual situation of each alien.

But the decision that clearly pictured this securitarian approach—and which has not been wrongly labelled as a 'huge concession to States pressure'[33]—is undoubtedly the recent judgement *N.D. and N.T.*, delivered by the *Grande Chambre* of the ECtHR in 2020. In a nutshell, the ECtHR held that Article 4 Prot. 4 ECHR had not been breached by the Spanish authorities – the failure to 'further individualise' the expulsion procedures against the two applicant migrants was directly attributable to their intentional conduct, as they deliberately took advantage of the large number of people present at the border and of the use of force by the group of foreigners to which they belonged, who were attempting to cross the protective barriers in order to enter Spain. In the ECtHR's view, the aliens thus endangered public order and security at the border by deliberately and unjustifiably choosing not to make use of the procedures provided for by Spanish law.

The worrying trend underway in Strasbourg—and upheld in a recent judgment concerning the conduct of the Macedonian authorities at the border with Greece, which has already become final[34]—is that the allegedly culpable behaviour of foreigners, couped with the lack of 'cogent reasons' that might justify it, exempts States Parties from individualising expulsion procedures. An argumentative mechanism which is redolent of the well-known

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[31] *Berisha and Haljiti v. former Yugoslav Republic of Macedonia*, App. no. 18670/03 (ECtHR, 16th June 2005), para. 2 of 'The Law' part.

[32] And that, accordingly, should be attributed to the applicants. The reference is to *Dritsas and Others v. Italy* (dec.), App. no. 2344/02 (ECtHR, 1st February 2011), para. 7.

[33] M. PICHL, *"Unlawful" may not mean rightless*, in *Verfassungblog (web)*, 14th February 2020.

[34] *A.A. and Others* (note 30).

penal criterion of *versari in re illicita*, questionably applied by analogy in the situations under examination here,[35] and also unclear as to its practical profiles – 'how' and 'when' should the existence of justifying cogent reasons be examined when, in cases such as N.*D. and N.T.*, there is no prior contact with the foreigner, who is "instantly" deported?[36] Can the behaviour of those migrants who seek to enter the territory of a State Party to the Council of Europe in order to apply for international protection (arguably not slavishly following the—often inefficient—procedures laid down) be defined as "culpable"?

This line of reasoning can be further developed, in the light of paragraph 113 of a recent judgement of the ECtHR, in which the Court held that Article 4 Prot. 4 ECHR was not breached by the Macedonian Government. Due to its relevance, it is worth quoting the wording of that decision at some length: 'The Court notes that it has not been disputed by the respondent Government that the migrants were removed from the respondent State without being subjected to any identification procedure or examination of their personal situation by the authorities of North Macedonia. This should lead to the conclusion that their expulsion was of a collective nature, unless the lack of examination of their situation could be attributed to their own conduct [...]. The Court will therefore proceed to examine whether in the circumstances of the present case, and having regard to the principles developed in its case-law, in particular in its judgment in *N.D. and N.T.* [...], the lack of individual removal decisions can be justified by the applicants' own conduct'.[37]

The analysis developed by the ECtHR now seems to downplay the lack of individualisation in the expulsion procedure (the first logical-argumentative step), while emphasising—in the lack, however, of any reference to the text of Article 4 Prot. 4 ECHR—the nature of the applicants' conduct, who allegedly "illegally" crossed the border in question (second logical-argumentative step), in order to finally analyse whether, in the light of the actual existence of legal means of access to the territory of the respondent State, the migrants were able to adduce 'cogent reasons not to do so, which were based on

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[35] See L. BERNARDINI, *Respingimenti "sommari" alla frontiera e migranti "disobbedienti": dalla Corte di Strasburgo un* overruling *inaspettato nel caso* ND e NT c. Spagna, in *Cultura giuridica e diritto vivente*, 2020(7), p. 10.

[36] This is an 'unclear' point of the ruling, notes R. WISSING, *Push backs of 'badly behaving' migrants at Spanish border are not collective expulsions (but might still be illegal refoulements)*, in *Strasbourg Observers (web)*, 2020.

[37] *A.A. and Others* (note 30), para. 113.

objective facts for which the respondent State was responsible' [38] (third logical-argumentative step).

Accordingly, a securitarian conclusion is drawn by the ECtHR: '[w]here such arrangements exist and secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner, the Convention does not prevent States, in the fulfilment of their obligation to control borders, from requiring applications for such protection to be submitted at the existing border crossing points. Consequently, they may refuse entry to their territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons, to comply with these arrangements by seeking to cross the border at a different location, especially, as happened in this case, by taking advantage of their large numbers'. [39]

What is astonishing about the latter decision is the assertion that the applicants did not actually "use force" to cross the Greek-Macedonian border, but merely took advantage of the numerical strength of the group to which they belonged; nevertheless, their conduct was deemed "culpable" due to the lack of cogent reasons for not using 'legal channels' for entry (the applicants had, moreover, provided full evidence of the actual lack of 'legal channels' in this case!). [40]

It is at this point that the short-circuit of the ECHR approach to Article 4 Prot. 4 ECHR reveals itself. In the face of a telegraphic and clear literal tenor prohibiting collective expulsions, the 'legal field' of the guarantee *de qua* has been narrowed, to the point where even "passive" conduct—consisting in the mere 'use of muscular strength to scale a fence' [41]—can be considered culpable, and therefore capable of exempting the State Party from the individualisation of removal procedures, where there are legal and effective points of access to apply for international protection, and the migrants have not put forward cogent reasons for not using them. One might wonder whether non-violent behaviour could prevent the enjoyment of an absolute guarantee such as the prohibition of collective expulsions. [42]

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[38] *A.A. and Others* (note 30), para. 114. The Court also specifies that this test must be carried out without prejudice to the guarantees provided for in Articles 2 and 3 ECHR.

[39] Ibid., para. 115.

[40] See V. VRIEDT, *Expanding exceptions? AA and Others v North Macedonia, Systematic Pushbacks and the Fiction of Legal Pathways*, in *Strasbourg Observers (web)*, 30th May 2022.

[41] H. HAKIKI, *N.D. and N.T. v. Spain: Defining Strasbourg's Position on Push Backs at Land Borders?*, in *Strasbourg Observers (web)*, 26th March 2020.

[42] See L. BERNARDINI-S. RIZZUTO FERRUZZA, *Closing eyes on collective expulsions at the border: is the ECtHR still a guarantor of foreigners' fundamental rights?*, in *ADiM Blog (web)*, 30th June 2022.

As Judge Pinto de Albuquerque had well noted in a powerful Concurring Opinion in 2018, 'to allow people to be rejected at land borders and returned without assessing their individual claims amounts to treating them like animals. Migrants are not cattle that can be driven away like this'. [43]

4. Concluding remarks

If, as has been argued, 'migration is in essence a fundamentally human phenomenon' that requires a regime that is 'strongly focused on human rights', [44] the rigour of the two guarantees briefly analysed here evidently plays a crucial role in ensuring that foreigners enjoy the prerogatives enshrined in international law and in the ECHR legal framework.

The principle of *non-refoulement* appears to have retained a robust structure in the case-law of the ECtHR, while the prohibition of collective expulsions has been weakened, almost taking a back seat to the (albeit legitimate) demands of States Parties for border control. [45]

In the absence of a highly improbable reversal in stance by national governments, it shall be incumbent upon the ECtHR to undertake the formidable responsibility of bolstering its distinctive character as a 'island of hope' for the safeguarding of foreigners' fundamental rights. [46] This endeavour necessitates safeguarding against their erosion, a regrettable development currently observable within the precincts of the ECtHR itself. [47]

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[43] *M.A. and Others v. Lithuania*, App. no. 59793/17 (ECtHR, 11th December 2018), Concurring Opinion of Judge Pinto de Albuquerque, para. 29.

[44] F. CRÉPEAU, *supra* note 4, para. 8.

[45] The ECtHR's settled case-law seems to provide a *carte blanche* to the States Parties, according to D. VITIELLO, *Il diritto di asilo in Europa e l'eterogenesi dei fini*, in *ADiM Blog (web)*, 30th April 2022. Moreover, given that the failure to analyse the migrant individually could be a 'consequence' of the latters' allegedly 'culpable' conduct, such a situation could actually lead to a *de facto* suspension of the States Parties' obligations under Article 4 Prot. 4 ECHR, according to S. PENASA, *La gestione dei confini nazionali ed europei nella più recente giurisprudenza della Corte EDU: costanti e variabili di un approccio ondivago*, in *ADiM Blog (web)*, 30th May 2022.

[46] L. RIEMER, *The ECtHR as a drowning 'Island of Hope'?' Its impending reversal of the interpretation of collective expulsion is a warning signal*, in *Verfassungsblog*, 19th February 2019.

[47] V. STOYANOVA, *The Grand Chamber Judgment in Ilias and Ahmed v Hungary: Immigration Detention and the How the Ground beneath our Feet Continues to Erode*, in *Strasbourg Observers (web)*, 23th December 2019.

PROTECTIONS AND *XENÌA* OF THE IMMIGRANT IN THE LAND OF LEGALITY

ALBERTO CLINI

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1. European legal civilisation 'crossed' by migratory flows

With a certain cyclicity, the media report on the migratory flows that affect our borders, marked many times by tragic events that testify to the failure of crossings or by episodes, equally pitiless, that denounce a situation of human stockpiling rather than reception, to ensure the "security" of the landing lands. [1]

The focus on the increase in migratory flows could not fail to arouse interest in scientific studies and, in particular, in the development of ethical and legal studies that have begun in the last two decades. [2]

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[1] In addition to reporting on the misfortunes of immigrants, the media very often feed a sense of social insecurity, which is closely linked to the idea that there is an increase in crime in proportion to the increase in migration.: R. BIANCHETTI, *La paura del crimine*, Giuffrè, 2018, p. 568 ff.

[2] A paradigmatic case of the enduring disinterest is derived *a contrario* from the setting of the famous work of John Rawls (J. RAWLS, *A Theory of Justice*, Harvard University Press, 1971, transl. it. by U. SANTINI, *Una teoria della giustizia*, Feltrinelli, 1982): 'at the time of its publication, hundreds of thousands of foreigners crossed the border each year to seek work in the United States, but Rawls' doctrine of domestic justice was designed in such a way that it could not even consider the existence of immigration, since it dealt with a society that was supposedly completely closed and impermeable to external relations' (V. OTTONELLI, *Immigrazione, territorio, democrazia,* in *Riv. di filos.,* 2021, p. 403), as well as, for a review of the most significant works, C. FUMAGALLI, *Una definizione di*

The human impact of these events has thus led to multiple and dense levels of analysis, all of which are highly relevant (think of unaccompanied foreign minors; [3] or the interactions between migration and crime and the consequences of this approach in terms of socio-political management measures). [4] From a humanitarian point of view, however, the claim to an individual right of residence is generally met with a twofold form of resistance (if not, at times, outright violence): the first is triggered by the migrant's inability to remain in the territory where he or she was born and lives; the second occurs when the foreigner fleeing persecution is denied international protection in the country that should receive and protect him or her. [5]

«migrante», in *Riv. di filos.,* 2021, p. 409. For the topic discussed here, among the most recent studies on the functionalisation of public power on migrant law, see L.R. PERFETTI, *I migranti portatori di una domanda di legalità*, in *www.giustamm.it,* 2018(8); L.R. PERFETTI, *La legalità del migrante.* Status *della persona e compiti dell'amministrazione pubblica nella relazione paradigmatica tra migranti respinti, irregolari, trattenuti minori e potere pubblico*, in *Dir. e proc. amm.*, 2016, p. 396; M. SAVINO, *La libertà degli altri. La regolazione amministrativa dei flussi migratori*, Giuffrè, 2012; F. FRANCARIO, *Pubblica amministrazione e multiculturalismo*, in *Corr. del mer.*, 2012, p. 643; M. CONSITO, *La tutela amministrativa del migrante involontario. Richiedenti asilo, asilanti e apolidi*, ESI, 2016, p. 41; M. INTERLANDI, *Fenomeni immigratori tra potere amministrativo ed effettività delle tutele*, Giappichelli, 2018. For a synoptic analysis upon the two jurisdictions ('ordinary' jurisdiction and 'special' jurisdiction)—within italian legal framework—which are competent in immigration issues, see G. TROPEA, Homo sacer? *Considerazioni perplesse sulla tutela del migrante*, in *Dir. amm.*, 2008, p. 886; finally, for an examination of the largely discretionary choices on the adoption of provisions *vis-à-vis* foreigners and the limits of the administrative judge's review, A. CASSATELLA, *Il sindacato di legittimità sulle decisioni amministrative in materia migratoria*, in *Dir. proc. amm.*, 2017, p. 816.

[3] Legal doctrine has progressively focused on this topic. See M. INTERLANDI, *Potere amministrativo e tutela delle relazioni familiari tra esigenze di ordine pubblico e "superiore interesse" del minore straniero,* in *www.giustamm.it,* 2017, f. 4.

[4] Unfortunately, this is now a global trend that is summed up in the term *crimmigration*, describing a combination 'between criminalising logic and administrative efficiency in the pursuit of what seems to have become the crucial objective of the migration policies of many western countries, namely the exclusion of the foreigner (qualified as) undesirable' (A. SPENA, *La crimmigration e l'espulsione dello straniero-massa*, in *Materiali per una storia della cultura giuridica*, 2017(2), p. 495 ff.). The distinction between 'regular' and 'irregular' immigration and the conception that the latter is the source of an increase in crime is, however, refuted by econometric analyses regarding the existence of any link with the rising of criminal offences (see M. BIANCHI-P. BUONANNO-P. PINOTTI, *Immigration and crime; an empirical analysis*, in *www.bancaditalia.it/pubblicazioni*, 2008).

[5] The search for a 'place of peace', also in the philosophical perspective, 'restores not only the importance of the relationship with the territory (of origin and destination) in the very definition and understanding of migration as an individual life path, but also the diachronic and projectual dimension of migration paths, since the migrants'

It is against this background of reflection that some brief reflections will be made on the value of the founding principles of European legal civilisation in the face of the demand for access by other human beings. In other words, with regard to the complex phenomenon of migration, one should start from a statement that is as simple as it is essential and, for this very reason, is often ignored (or embarrassed): 'Migrants – whatever their status – are bearers of a claim that touches on the founding principles of our communities and our Western civilisation'. [6]

Therefore, without going into the causes of this exodus—which is not difficult to understand, as it is mostly an exodus from countries where people are subjected to unacceptable political, religious, social and economic conditions (conditions that are the projection of despotic or only formally democratic regimes) [7]—it seems central to understand the reason that drives this emigration towards Europe (and, for geographical reasons, mostly towards the Italian coasts). Always following an essential and immediate line of analysis, the flight towards an unknown destiny, by makeshift means, at the risk of one's own life and often of the loved ones with whom one undertakes the journey, is driven precisely by the impulse towards a free and civilised country. [8] It is a need that everyone understands in

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relationship with the destination begins well before their stable and permanent settlement and can only be understood in reference to their life plan, which is necessarily projected into the future' (V. OTTONELLI, *supra* note 2, p. 406). Thus, one cannot resign oneself to what has been labelled as the 'birthright lottery', as if that random contingency of the subjective prerogatives deriving from belonging to one state with respect to another were unchangeable (see A. SHACHAR, *The Birthright lottery*, Harvard University Press, 2009). For a historical reconstruction of the migration phenomenon, see P. CORTI, *Storia delle migrazioni internazionali*, Laterza, 2015.

[6] 'Theirs is a claim to legality, to respect for the rules that we have enshrined so seriously and as an essential legacy of centuries of legal culture. We cannot, therefore, fail to be scandalised by the contradiction in which our countries are acting: (i) we affirm as fundamental rules of coexistence that (ii) attract migrants at the risk of their lives and (iii) we violate them almost entirely' (see L.R. PERFETTI, *supra* note 2, p. 2).

[7] The figure of the migrant becomes a powerful reading lens on the State model as well as on government policies, whenever there is a shift from the security of fundamental rights to the priority of the right to security. In this regard, see M. RUOTOLO, *Sicurezza, dignità e lotta alla povertà*, Editoriale Scientifica, 2012, p. 111.

[8] The reference is to the categorisation of migrants defined as "involuntary", according to a distinction that is now established in our legal system, mainly for the purpose of allocating jurisdiction. As will be explained *infra*, the involuntary (or economic or, again, non-forced) migrant is forced to leave his or her country because of the serious humanitarian conditions imposed on him or her; the voluntary (or forced) migrant, on the other hand, leaves his or her country for reasons of study or work. For an analysis of the distinction, L. TRIA, *Stranieri, extracomunitari e apolidi. La tutela dei diritti civili e politici,* Giuffrè, 2013, p. 402

the suffering of a situation deprived of it, a need so radical that the migrant seeks it even at the cost of survival.

Faced with this horizon, it seems almost natural to ask whether Europe, and also Italy (as the State of first reception), are in line with the principles on which their legal systems are based, which show a strong commitment on the part of the public authorities to respect inviolable rights and human dignity, as well as adequate judicial protection in response to any unjust violation of them.

Finally, it should be pointed out that these introductory passages deliberately ignore the issue of security – understood not only as a bulwark for the defence of the subjective prerogatives of European citizens *vis-à-vis* non-EU citizens, but also as a "totem" of legality for any (supposedly) legitimate reaction to the physical defence of territorial borders against the threat of foreigners. This is due to the intention to avoid, for the time being, the traditional approach of "weighting" legal values – namely to highlight the risk of shifting the focus to problems that, although related, appear to be consequential and distinct. [9] In other words, the emphasis will be on the catalytic core of humanitarian (universal) values enshrined in human dignity, as opposed to a geometrically successive moment, which will then be left to balance with other interests involved. [10]

Therefore, among the many spiritual and material needs that accompany this diaspora towards Europe, the question must be

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ff.; M. CONSITO, *supra* note 2, p. 51 ff. For others, the distinction appears as rigid and simplistic, especially in reference to the current mixed flows (see, among others, G. CATALDI, *La distinzione tra rifugiato e migrante economico: una dicotomia da superare?* in G. NESI (Ed.), *Migrazione e diritto internazionale verso il superamento dell'emergenza?*, Editoriale scientifica, 2018, p. 585 ff.).

[9] In general, there is a common sequence of arguments according to which, in a nutshell, the emergency nature of the phenomenon "justifies" the specific and derogatory nature of the immigration law with respect to the normative framework regulating the relations between the public administration and the citizen; however, the specific nature of the legislation cannot go so far as to compress the fundamental rights of the migrant and therefore, instead of withdrawing from them, it must be balanced with them. See, in this regard, M. CONSITO, *I procedimenti amministrativi sul riconoscimento allo straniero degli* status di *protezione internazionale*, in *Dir. amm.*, 2017, p. 412 ff.; M. CONSITO, *supra* note 2, p. 41 ff.; S. D'ANTONIO, *Il riparto di giurisdizione in materia di ingresso, soggiorno e allontanamento dello straniero dal territorio italiano*, in *Riv. trim. dir. proc. amm.*, 2017, p. 534; M. SAVINO, *supra* note 2, p. 357 ff.

[10] This is because 'transferring the most difficult problem to be solved to an "elsewhere" that does not directly concern us is an understandable conceptual strategy, but it leaves the fundamental question unanswered and implies an abandonment of the role of the jurist, which in public law is that of constructing conceptual and normative structures in order to control and somehow dominate power, not that of submitting to it and providing exegesis, paraphrases, rearrangements, adaptations' (L.R. PERFETTI, *supra* note 2, p. 397).

asked whether Italy is willing to impose on these people those inalienable principles of legal civilisation that belong to centuries of European and Italian culture and that constitute the model of coexistence of European citizens.

2. The intangible human dignity in the European ubi consistam

It is not difficult to find the basis of a now universal concept of fundamental rights, which abandons the criterion of territoriality and, consequently, the relevance of the concept of citizenship, in order to guarantee protection to aliens on the basis of the immaterial principle of human dignity.

In the European framework, the immediate reference is the Charter of Fundamental Rights of the European Union ('the Charter'), which sets out fundamental rights in a way that is binding on the Member States and has the same legal value as the Treaties.

The Charter's Preamble states that '[t]he peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values'. Consequently, the European Union, 'conscious of its spiritual and moral heritage', affirms as founding values the 'indivisible [and] universal values of human dignity, freedom, equality and solidarity' and bases its institutional system 'on the principles of democracy and the rule of law', placing 'the individual at the heart of its activities' so that the territory represents 'an area of freedom, security and justice'. [11]

The Charter's normative prologue makes it clear that the EU's commitment to creating legal and safe channels of entry for people on the move [12] cannot be ignored.

The 'enjoyment of these rights', the Preamble of the Charter goes

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[11] On this topic the literature is endless. See, recently, P. GIANNITI (Ed.), *I diritti fondamentali nell'Unione Europea. La Carta di Nizza dopo il Trattato di Lisbona*, Zanichelli-Soc. ed. del Foro italiano, 2013; A. AGOSTINO, *Lo straniero "sospeso" fra tutela dei diritti fondamentali della persona umana e esigenze di un efficiente controllo sull'immigrazione*, in *Giur. it*, 2002, p. 1345; C. FAVILLI, *L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'emergenza immigrazione,* in *Quad. cost.*, 2015, p. 785 ff.

[12] A New Pact on Migration and Asylum was recently adopted, COM (2020)609 of 23rd September 2020, with attached the Recommendation (EU) 2020/1364 *on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways*. However, humanitarian admission pathways raise many perplexities, as they recognise 'reintegration' as a central instrument of the policy of legal entry of applicants, but above all, the Pact as well as the Recommendation register the difficulty of envisaging a compulsory participation of Member States in the wake of an evident political and solidarity crisis on the issue,

on to complete, brings with it an awareness among the peoples of Europe, as it 'entails responsibilities and duties with regard to other persons, to the human community and to future generations'.

It is therefore clear, and legally binding on the Member States, what Europe's task is towards humanity, a task which consists in the responsibility for respecting human dignity and the universal values which it embodies, as a paradigm of civilisation which cannot be ignored by anyone, whatever their nationality. [13]

The foundations of European legal civilisation, briefly summarised in the framework just mentioned, are rooted in the list of fundamental rights, whose scope—over and above their specific content—also recognises the global vocation of the values expressed. They are therefore inviolable prerogatives of the human person, which must be guaranteed to everyone who sets foot on European soil.

It is therefore not difficult to see how the cosmopolitan effect they express has been seriously undermined by the migration phenomenon of recent years.

Thus, from the very first articles of the Charter it is stated that 'human dignity is inviolable' (Article 1) and 'every person has the right to life' (Article 2) and to his 'physical and mental integrity' (Article 3).

Unfortunately, it cannot be said that Member States' actions are in keeping with these rules, with regard to migrants, taking into account the recent practices of port closures and the deaths at sea that are somehow connected to it. [14]

As for fundamental freedoms, limited to those that must be guaranteed to every human being, wherever they may be, the right to liberty and security (Article 6), private and family life, home and confidentiality of communications (Article 7), the protection of personal data (Article 8), freedom of thought, conscience, religion, worship, propaganda (Article 10), expression, opinion, information

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as noted by A. DEL GUERCIO, *Canali di accesso protetto al territorio dell'Unione europea: un bilancio alla luce del nuovo Patto su immigrazione e asilo*, in *Dir. um. e dir. int*., 2021, p. 138 ff.

[13] In the wake of that legal thought which considers the link between citizenship and the conferment of fundamental rights to be evanescent, whereby human being brings with him/her an ineliminable core linked to respect for his own dignity (see M. LUCIANI, *Cittadini e stranieri come titolari di diritti fondamentali. L'esperienza italiana,* in *Riv. crit. dir. priv.*, 1992, p. 203 ff.).

[14] The reluctance of the European institutions to adopt effective solutions to make human mobility safer remains a fundamental fact: 'Every attempt by the Parliament to guarantee the issue of a humanitarian visa to enable a person in need of protection to enter European territory legally and safely has come up against the Commission's and the Council's fear that such a provision could become a factor of attraction for Europe' (A. DEL GUERCIO, *supra* note 12, p. 167).

and information, correspondence, communication of one's 'ideas without interference by public authority and regardless of frontiers' (Article 11), of associating oneself, founding parties or trade unions (Article 12), to freely profess the arts, carry out scientific research and academic activity (Art. 13), to receive education—free of charge in the compulsory grades—and to found free institutions that provide it (Article 14), to work and 'exercise a freely chosen or accepted occupation' (Article 15), to enjoy property (Article 17).

Article 18, in particular, provides—as a fundamental rule for Europeans in matters of freedom—that the right to asylum is 'guaranteed with due respect for the rules of the Geneva Convention of 28th July 1951 and the Protocol of 31st January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union'. [15]

In the case of removal, expulsion and extradition, Article 19 provides not only for the prohibition of collective expulsions, but —even more—that 'no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. The significance of this provision to the considerations made so far is clear; unfortunately, there are continuous forms of violation of the provisions regulating the entry into European territory. One might think, for example, of the application for international protection of aliens whose countries of origin are included in the so-called 'black list'; in their regards, it is not possible to issue them without the prior visa requirement granted—surprisingly—by the very State from which they are fleeing. [16]

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[15] In fact, there are several preventive obstacles to disembarkation on European territory, which can be easily identified, e.g. in the Union's cooperation with third countries to prevent exoduses, in the operations of the European Coastguard and Border Agency (FRONTEX), in the withdrawal of Member States from search and rescue operations. See E. ZANIBONI, *Money for Nothing, Push-back "for Free": on the (missed) implementation of the CEAS and the new Italian Agenda for asylum seekers reception*, in *Dir. um. e dir. int*, 2019, p. 257 ff.

[16] This is Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018, *listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*, [OJ L 303, 28.11.2018, p. 39–58], which adopts the list of blacklisted third countries on the basis of 'criteria relating, in particular, to illegal immigration, public order and security' (Article 1). The perverse effect of imposing a visa requirement on the country of origin is to deny access and protection to the very people fleeing systems of violence and suppression of human rights, in blatant contradiction to Article 19 of the EU Charter of Fundamental Rights.

Equally significant is the legal protection of the rights granted to every human being on European territory.

In relation to public administration, everyone has the right to good administration (Article 41); this means that everyone has the right 'to have his or her affairs handled impartially, fairly and within a reasonable time'. Furthermore: the right to good administration includes the right to be heard 'before an individual measure which would affect him or her is taken' as well as access to the file containing the information on the proceedings and to address the institutions in one of the languages of the Treaties; for the administration, the duty to give reasons and to compensate for damage unjustly caused. [17]

Finally, in the courts, '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal', to have his or her case heard fairly, publicly and within a reasonable time, by an independent and impartial tribunal established by law. In addition, 'every person' may be advised, defended and represented and those without sufficient means shall be granted legal aid (Article 47).

We can therefore understand how, with regard to the figure of the migrant, a kind of serious crisis inherent in the principles of our democratic systems is unfolding, in which these values—which are deliberately recalled here in detail—make it clear that the European *ubi consistam* has roots that are completely alien to any political form of punitive populism, so that a governmental action that leads to the systematic rejection of the foreigner [18] cannot find any legal (or even humanitarian) basis.

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[17] The effectiveness of the right to asylum is often subject to mechanisms that impede its enjoyment, such as certain accelerated procedures at the border, or the problematic distinction between 'safe country of origin' and 'safe third country', or finally, as in the Italian case, the abnormal use of administrative detention. (see *infra* note 27): FRA-EUROPEAN UNION FUNDAMENTAL RIGHTS AGENCY and ECtHR, *Handbook on European law relating to asylum, border and immigration*, Publications Office of the European Union, Luxembourg, 2020.

[18] Instead, there is an "unhealthy" mix in European countries: 'on the one hand, the tendency of arriving irregular immigrants to claim to be refugees, even when there is no reason to do so, for the sole purpose of activating the relevant procedures and thus avoiding immediate expulsion; on the other hand, the parallel tendency of our public opinion and of some of our own governments, already forced to "tolerate" the massive arrival of (real) refugees for ethical and legal reasons, to automatically brand immigrants who are not entitled to asylum as economic migrants, as such destined for rejection, i.e. expulsion and repatriation', G. AMATO, *Immigrazione e asilo: problemi e prospettive*, in *Riv. trim. dir. pubbl.*, 2019, p. 555.

3. The foundation of human dignity and the regime of 'special' law in our national context.

After the analysis of the European framework, it seems appropriate to focus on the Italian system. The following analysis has a twofold objective: firstly, to compare the national legislation with the principles recalled in the previous paragraph and, secondly, to evaluate the measures adopted by the Italian public administration—caught between the requirements of public order and respect for the dignity of the migrant as a human being—through the use of the current instruments of judicial protection.

As was partly expected, behind the individual regulatory choices that each EU Member State can make, there is very often an irreducible distributive tension between the rights and benefits that liberal states reserve for their citizens while affirming their universalist and egalitarian scope.

These security and control requirements in the Italian legal system are still reflected in Legislative Decree No. 286 of 1998 (hereafter: "TUI") and its numerous amendments (including Law No. 189 of 2002, the so-called "Bossi-Fini Law"). The significant growth of the migratory phenomenon has led the legislator to make constant amendments, resulting in a highly articulated and specialised body of law. This has led many legal analysts to describe immigration law as *lex specialis*, in the sense that the status of foreigners has been entrusted to a 'special' discipline due to the growth of the phenomenon and the emergency aspects that have been recorded as a result.

For what "special" reason?

Certainly, the choice of a regime that deviates from the normal rules for the exercise of public power is presented as a need to protect citizens and the state against the "invasion" of foreigners. [19] Thus, by reaffirming the position of the migrant as an exception to the rules of public power and citizenship, many have sought to weaken the primary objective of a securitarian system and its *regime*-oriented results of rejection and expulsion, and to recover the

[19] The 'speciality' of immigration law is noted both with regard to criminal law (A. CAPUTO, *Verso un diritto speciale degli immigrati?*, in *Quest. giust.*, 2000, p. 1179) as well as for the administrative one, on the idea that the relationship between authority and freedom is particularly special when the recipients of public power decisions are persons without citizenship (M. SAVINO, *supra* note 2, p. 357 ff.). For these reasons, immigrants 'enjoy a lower level of protection of their freedoms than that guaranteed to citizens' (S. D'ANTONIO, *supra* note 9, p. 535).

need for a balance between control measures and respect for fundamental rights of a European and constitutional nature. [20]

The dominant approach has, at least in theory, recomposed the tensions highlighted in the basic idea of balancing the interests of public protection with respect for the fundamental rights of migrants. The consequences of focusing the entire debate on this "mediation process" have often led to frustrating results, precisely because, on the one hand, any abstract point of balance is destabilised as soon as it is dropped into the complexity of concrete situations and, on the other hand, there is no possibility of choosing a common orientation, a common basis on which to build a composition of the various interests at stake. [21]

In fact, a methodological choice remains in the shadows, which, as mentioned in the introduction, deserves to be studied in greater depth in order to help overcome the imbalances that undermine the structure of public power relations with the migrant.

The perception that can be grasped in most descriptions of the migration phenomenon is that of allocating the 'basic problem' ahead of the 'basic issue', both: (a) in the implicit demonstration of indulgence towards legislation with special connotations compared to the general principles of administrative law; and (b) in the hope of a possible balancing between emergency law and fundamental rights. The logical-legal leap that is made at this junction is inherent in the risk of considering the basic issue as taken for granted, pre-existing to the concatenated passages of 'tolerance' and 'balancing'.

In short, it is considered necessary to look at the phenomenon

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[20] The Italian Constitutional Court has drawn a line of demarcation on the relationship between measures for the detention of foreigners in detention centres and Article 13 of the Constitution, which are provided for by national legislation (Law no. 40 of 1998, known as the "Napolitano-Turco law"), according to which 'although many public interests are involved in the question of immigration, and although the problems of security and public order linked to uncontrolled migratory flows may be considered serious, the universal nature of personal freedom cannot be undermined in the slightest, which, like the other rights declared inviolable by the Constitution, is due to the individual not as a member of a given political community, but as a human being' (Const. Court, 10th April 2001, no. 105, in *Giur. it.,* 2002, p. 1345). On this subject, see F. CORTESE, *I diritti inviolabili dell'uomo*, in D. FLORENZANO-D. BORGONOVO RE-F. CORTESE (Eds.), I *diritti inviolabili, doveri di solidarietà e principio di eguaglianza. An Introduction*, Giappichelli, 2015, p. 1 ff.

[21] The strengthening of the primacy of the defence of collective security has led to the recognition of the latter's role traditionally assigned to it by authoritarian regimes, 'namely that of justifying the increasingly pervasive interference of public powers in the sphere of individual freedom of individuals, often in familiar forms and perhaps considered a legacy of the past (e.g. the use of torture), sometimes in new and more insidious ways' (G. TROPEA, *supra* note 2, p. 848).

from a different angle, focusing first on the prodromes that lead to the invocation of the 'state of emergency' in terms of discipline and administrative practice, and then on the effects that need to be harmonised. It is precisely in this context that the 'state of emergency' and the 'special' qualifications seem to constitute a kind of legal 'hiatus' of suspension of the law, in which 'force' often prevails over 'the normality of the rule of law'. [22]

Faced with the fragility of the migrant in his/her claim to respect for principles and legality, the emergency, as shared and recounted, leads only to show the authoritarian face of our power system, through forms of legitimised violence. [23] Therefore, the focal point is not in the attempt—vainly pursued—to inscribe an 'accommodation' upstream in the law or to ensure it, at least downstream, in administrative action or, ultimately, in the decisions of national courts, but rather to agree to entrust the status of migrant to the paradigm of the specialty of law. This is the choice that leads to a hairpin turn that conditions the subsequent expressions of power, because if one does not recognise a pre-existence in the roots of human dignity at the moment of legalisation, one ends up overriding it and placing it, as in fact happens, right from the start in an exclusively relational relationship with other principles or public interests.

With what consequences?

If at the crossroads one takes the 'emergency route', the risk that is likely to recur is that of finding oneself in the presence of power mechanisms that decline towards that relationship of subjection explained in the theory of special supremacy. [24]

Indeed, in the relationship between the migration phenomenon and administrative action, it is sufficient to observe that (i) the measures

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[22] For a systematic reconstruction of the topic, see A. CLINI, *Specialità e ordinarietà nei modelli di riforma del diritto amministrativo*, in *Studi Urbinati*, Nuova serie A, 2021(3-4), p. 173 ff.

[23] The reference is to the studies that have revealed the presence of a monopoly of the legal assumption of coercive powers in the affirmation of the 'state of exception': 'the counterweight to this constitutive fact has always been the *nomos*, the claim of the law to regulate the legitimate use of power and force with legal discipline, legalising the fact and with it the power that, outside formal legality, remains a pure act of force' (L.R. PERFETTI, *supra* note 2, p. 398 ff., with further references).

[24] In the procedure for verifying the existence of the conditions necessary for the adoption of the extension measure, the mechanism that is always repeated is that of the authority interpreting general clauses in pursuit of an indeterminate public interest, or rather one that is determined only a posteriori to support the decision taken. In other words, a decision-making process is assumed that favours an exercise that is purely discretionary and therefore not neutral; for a reconstruction of the category of

concerning immigrants are qualified as largely discretionary,[25] (ii) the rules on administrative procedure (consistent with the EU right to good administration) are largely derogated, (iii) the preliminary investigation is simplified, while the right to be heard in one of the languages of the Union is seriously limited. In this sense, the discipline of administrative detention appears indicative, as a measure devoted to an administrative efficiency of assistance (as opposed to a clear custodial nature of a penal nature), which provides for, from the initial 30 days, a deprivation of liberty *vis-à-vis* the foreigner for up to 180 days, upholding the special supremacy of the legislation.[26]

Administrative action is carried out by an authority that, in the name of an indeterminate public purpose (public order, public safety, etc.), sets itself on a course that derogates from the general (indeed 'special') order, with unilateral and imponderable choices on the definition of the relationship with those who are merely recipients of authoritatively taken decisions.[27]

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special supremacy, albeit applied in the sphere of savings and credit, let us refer to A. CLINI, *Ordinamento sezionale del credito e diritti fondamentali della persona*, in *P.A. Persona e Amministrazione*, 2019(1), p. 145 ff.

[25] It is recalled, by way of example, among the general concepts those of 'nature', 'effectiveness of family ties' or the 'family and social ties with the country of origin' (for the purposes of the issuance, renewal or revocation of the residence permit, as per Article 5(5) of Legislative Decree No. 286 of 1998); or with reference to the 'dangerousness of the foreigner' (in support of the refusal or revocation of the permit, as per Article 5(5a) of Legislative Decree No. 286 of 1998): 'the vagueness of the terms used by the legislator in defining the rule of attribution of power thus poses the essential problem of identifying and selecting the methods by which the administration is obliged to give legal relevance to certain facts, i.e. the nature and characteristics of the covering (or modal) rules foreseen to integrate the normative case' (A. CASSATELLA, *supra* note 2, p. 821).

[26] The administrative detention of foreigners for the purpose of return is certainly one of the most emblematic cases. The measure introduced in Law No. 40 of 1998 (the so-called 'Napolitano-Turco Law'), although providing for a maximum duration of treatment equal to thirty days, was immediately stigmatised as it outlined a regulatory framework in which 'the foreigner to be expelled is subjected to a *lex specialis*, which relies on the non-criminal dimension only to neutralise the substantial and procedural guarantees of the criminal system, being based, in reality, on coercive measures of personal freedom which in the criminal system are absolutely exceptional': A. CAPUTO, *Espulsione e detenzione amministrativa degli stranieri*, in *Quest. giust.*, 1999(3), p. 430. After alternating legislative changes, with the first security-decree (Law Decree No. 118 of 2018), the detention term was raised to 180 days, showing in fact the functional shift from the temporary alleged 'welfare need' to a more congruous timeframe for the adoption of the expulsion measure, with total disapplication of the principle of personal freedom of the migrant and proportionality of the administrative measure (see A. DE MARTINO, *Centri, campi, Costituzione. Aspetti di incostituzionalità dei CIE*, in *Dir. imm. citt.*, 2014, p. 17 ff.).

[27] Every decision therefore contains a significant margin of uncertainty as a result of the 'complexity of the cognitive and evaluative activity that characterises the

The basic objection is therefore to assume the normality of a two-tier system, composed of ordinary and special models, and then to try to mitigate distortions and abuses of power in their combination. In fact, behind this approach lies the idea of a "sovereignty" that is fully at the disposal of the State and that "distributes" the principle of legality between regularity and exceptionality on the basis of interests chosen by the State and imposed from above.

Instead, the perspective attempted here aims to reverse the source of power: just as the Italian Constitution is based on the sovereignty of the people, a horizon of justice will be difficult to identify if the migrant is not given the normative value of the person and his or her minimum rights. [28]

4. Inequality and domestic justice in the distribution of jurisdiction

The critical problems encountered are not overcome even in the description of the justice system, which is characterised by an articulated combination of criteria to identify the "natural" judge of the immigrant. [29]

Towards the end of the 1990s, the need to reduce inequalities by rethinking and expanding the paradigm of national justice arose in the context of legal protection based on the concept of global justice. [30]

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concretisation of the individual provisions of the law, due to their very formulation': indeed, the legal discipline proceeds on the basis of open cases in this matter, so that the administration has 'the duty to verify the subsistence of the factual and legal premises of the decisions through an activity of integration and completion of the rule formulated by the legislator through 'vague' and 'elastic' expressions' (A. CASSATELLA, *supra* note 2, p. 820).

[28] The normative dimension of the person 'is not the concession of a given legal framework, it is the normative substance that opposes the 'localisation of national law" and the "juridification" of power [...] It is juridical, but its legality is external to that of the State, it exists independently of the national power and, as such, survives any local authority' (L.R. PERFETTI, *supra* note 2, p. 404). For a general reconstruction of the centrality of the normative value of the person in relation to the positioning and exercise of public power, please refer to the focus contained in some issues of the online journal *P.A. Persona e amministrazione*: in particular, L. R. PERFETTI, *Organizzazione amministrativa e sovranità popolare. L'organizzazione pubblica come problema teorico, dogmatico e politico*, *ivi*, 2019(1), p. 7; M. MONTEDURO, *Doveri inderogabili dell'amministrazione e diritti della persona: una proposta ricostruttiva*, *ivi*, 2020(2), p. 543; D. VESE, *L'efficienza dell'organizzazione amministrativa come massimizzazione dei diritti fondamentali*, *ivi*, 2020(1), p. 279.

[29] On the complexities of the system of allocation of judicial competence in immigration matters, see, among others, S. D'ANTONIO, *supra* note 9, p. 534 ff.; M. NOCCELLI, *Il diritto dell'immigrazione davanti al giudice amministrativo*, in *www.federalismi.it*, 2018, p. 1 ff.; C. FELIZIANI, *Giustizia amministrativa ed immigrazione. A proposito di alcuni nodi irrisolti*, in *Dir. pubbl. com.*, 2019, p. 267 ff.

[30] V. OTTONELLI, *supra* note 2, p. 404.

The Italian judicial system, with regard to the protection of foreigners with regard to entry and residence on Italian territory, the right of asylum and citizenship, provides for a divided jurisdiction, with certain disputes being referred to the so-called 'ordinary judge', as judge of subjective rights, and others to the 'administrative judge', as judge of legitimate interests. [31]

The two-pronged system that has been set up poses numerous difficulties in ensuring effective protection, as the migrant has to move between jurisdictions and is subject to unfavourable measures that are, moreover, of uncertain qualification and recognisability. [32]

Another problem is the fact that, in all borderline cases, which are not rare, the public administration can "choose" the judge: by naming the decision in one way or another, it will define the competence, so that the judge is not predetermined by the law, but is indirectly

[31] In particular, it is necessary to make a distinction between the position of the foreigner who voluntarily chooses to leave his or her country in order to enter and reside in Italy and that of the foreigner who, instead, is forced by serious events in his or her own country to leave it and take refuge in Italy, considered respectively as a voluntary (or economic) migrant and as an involuntary migrant. This distinction is made in order to identify the legal position of the foreigner and the corresponding judicial protection guaranteed to him/her in the Italian system, since it is mainly to the voluntary migrant that the main lines of the "TUI" discipline on entry and stay in Italy apply. Differently, the involuntary alien situation is affected by: (i) Legislative Decree No. 251 of 2007, with regard to refugees and persons otherwise in need of international protection; (ii) by Legislative Decree No. 25 of 2008, with regard to the procedures relating to the recognition and revocation of refugee status; (iii) and by Legislative Decree No. 142 of 2015, with regard to reception measures intended for asylum seekers. See M. NOCCELLI, *supra* note 29, p. 4.

[32] The system of distribution is traced by the jurisprudence in correlation to the subjective juridical position held to be injured: 'unlike the residence permit in general, which is governed by Article 5 of Legislative Decree no. 286 of 25 July 1998, which is characterised by a wide margin of discretion for the public administration, with which are correlated positions of mere legitimate interest that can be protected before the administrative judge, the residence permit for family reasons provided for by Article 30 of the same Legislative Decree is a compulsory act in the presence of the specific situations exhaustively listed, and therefore involves subjective rights, with the consequent transfer of the relevant dispute to the ordinary court, as can be deduced from paragraph 6 of the aforementioned Article 30, which expressly provides for the possibility of appealing against the refusal of a residence permit for family reasons before the ordinary court of the place of residence (a provision that remained unchanged even after the innovations introduced by Article 1 of Law Decree No. 241 of 2004, pursuant to paragraph 2a of the same Article 1, inserted by conversion law No. 271 of 2004)', see Italian Court of Cassation (hereinafter: 'Cass.'), Joint Civil Chambers, 12th January 2005, no. 383. Thus, in the case of entry visas, the measures of refusal, non-renewal and revocation fall under administrative jurisdiction, whereas in the case of refusal, non-renewal and revocation on grounds of humanitarian protection or the protection of family unity, jurisdiction is entrusted to the ordinary judge.

determined by the authority. The argument is clarified by the investigative task that the administration has to carry out in order to find out the reasons for the foreigner's flight: the preliminary investigation becomes essential in order to be able to classify the subject in the category of voluntary or involuntary migrant—forms of identification that are, moreover, very summary—in order to be able to (i) apply very different normative disciplines, (ii) apply equally heterogeneous measures, and then, finally, (iii) receive alternating forms of protection between ordinary and administrative justice. [33]

[33] Schematically, with regard to the so-called economic or voluntary migrant, the competence of the administrative judge is established, pursuant to Article 6(10) TUI, for disputes concerning the issuance of visas and residence permits on the national territory, with the exception of those relating to the matter of residence permits for family reunification, whose cognisance is now devolved to the specialised sections by Article 3(1)(e) of Law Decree No. 13 of 2017. The latter provision, on the other hand, devolves to the competence of the ordinary judge the disputes concerning the refusal of the authorisation for family reunification and the residence permit for family reasons, as well as those relating to the other measures of the administrative authority concerning the right to family unity, referred to in Article 30(6) TUI. It is then up to the latter judge, pursuant to Article 13(8) TUI, to regulate matters relating to refusal of entry, expulsions and the related enforcement measures, consisting of forced accompaniment to the border, detention in detention centres for repatriation (Article 19 of Law No. 46 of 2017, converting Law Decree No. 13 of 2017) and the order to leave the territory of the State. There is an exception in this area: these are the expulsions decreed by the Ministry of the Interior for 'reasons of internal order or State security', provided for by Article 13(1) TUI, and those, also ordered by the Ministry of the Interior, for reasons of prevention of terrorism (Article 3 of Law Decree No. 144 of 2005), both entrusted to the competence of the administrative judge (on these cases, see Cass., Joint Civil Sections, 27th July 2015, no. 15693 according to which 'if the expulsion measure has been adopted for reasons of prevention of terrorism or, more generally, because of the danger the alien poses to public order or national security [...] the legal position of the interested party is of legitimate interest, and the administrative judge has jurisdiction in the relevant dispute [...], since the administration is not entrusted with a mere technical and exploratory discretion in the face of hypotheses already identified and defined by the legislator in their scope of application, but with an evaluative balancing of the interests at stake').

On the other hand, with regard to the so-called involuntary migrant, the issues concerning him/her are brought under the jurisdiction of the ordinary judge, who is entrusted with the protection on applications for any form of international protection. However, even this criterion is subject to exceptions, such as for the temporary protection measures adopted by a Prime Ministerial Decree pursuant to Article 20 of the TUI in case of conflicts, natural disasters or other particularly serious events, occurred in non-EU countries, which are attributed to the jurisdiction of the administrative judge. Not only: it is up to the latter judge to decide on the revocation of reception measures, which the Prefect may order, pursuant to Article 23 of Legislative Decree no. 142 of 2015, as a sanctioning function of the foreigner's non-compliance with the reception conditions.

Thirdly, there is also uncertainty within the judiciary as to the "natural" judge in certain specific matters. Jurisprudence is replete with cases in which both administrative and ordinary courts have denied jurisdiction, with the result that no court has found itself competent. [34]

It should be added that the legislature designates two different "ordinary" courts, namely the specialised Chambers in immigration matters of the ordinary court (*Sezioni specializzate in materia di immigrazione*)—with further confusion of competences with those of the juvenile court—and the Justice of the Peace (*Giudice di Pace*). [35] The problem is at its most problematic when it comes to a series of procedures that are interlinked by a link that is divided between "ordinary" and "administrative" jurisdiction. [36]

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[34] Consider the well-known case on the rejection orders pursuant to Article 10 TUI, where a position expressed in favour of the administrative judge (Council of State, 4th February 2011, no. 571) was contrasted with the ruling in favour of the ordinary judge, on the consideration (also not without uncertainties) of an administrative activity merely ascertaining the factual assumptions contained in the legislative precept, without any need for weighing the opposing interests (Cass., 10th June 2013, no. 14502 and Cass., 17th June 2013, no. 15115); on the subject, R. CHIEPPA, *Quale giudice per gli immigrati? Questioni di giurisdizione e di competenza*, in *Giurisd. amm.*, 2012, p. 63.

[35] For a foreigner who applies for international protection as a refugee or in the form of so-called subsidiary protection, jurisdiction is granted to the specialised sections on immigration matters, established in the ordinary courts pursuant to Article 3(1)(c) of Law Decree No. 13 of 2017. See A. DE SANTIS, *Le novità in tema di tutela giurisdizionale dei diritti dei migranti. A critical analysis*, in *Riv. dir. proc. civ.*, 2017, p. 1218.

[36] A typical example of this "ramification" can be found in the case of an alien whose residence permit has been revoked for employment reasons (refusal to issue, renewal or revocation), followed by an expulsion order. Challenging the first decision by appeal to the Regional Administrative Tribunal therefore runs the risk of completely frustrating the need for protection if the second measure is implemented *before* the suspension or annulment by the Administrative Tribunal. The issue is confirmed by Cass., Joint Civil Sections, 16th October 2006, no. 22217, according to which 'with regard to immigration matters, the expulsion of an alien is a mandatory measure of a binding nature, so that the ordinary judge before whom it is challenged is obliged only to verify the existence, at the time of the expulsion, of the legal requirements for its issuance, which consist in the failure to apply for a residence permit or its revocation or annulment, or in the failure to apply for its renewal in due time, which has led to its refusal; on the other hand, the court hearing the appeal against the expulsion order may not assess the legality of the decision of the public security authority refusing, revoking or cancelling the residence permit or refusing to renew it, since such a review is the exclusive competence of the administrative court, whose decision is in no way a logical precursor of the decision on the expulsion order. It follows, on the one hand, that the pendency of the proceedings before the administrative court challenging the abovementioned measures of the Public Security Agency does not justify the

The problem is exacerbated by linguistic assistance, the cost of defence (it should be noted that the judge is "entrusted" with the power to withdraw the benefit of legal aid), the time taken and, for example, the fact that the acts of refusal are in effect police acts, their execution often precedes the court's decision (which therefore extinguishes the case, as it has become pointless). [37]

5. 'O forestier [...] non patirai disagio'. [38]

The combination of these procedural shortcomings—almost all of which conquerable with an organic reform of the system of guarantees—compose a system far removed from the parameters of the principle of due process, in the well-known declinations of the right of defence, equality and effectiveness of any judgement. [39]

The 'diaphragm' with the constitutional corollaries of due process

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suspension of the proceedings before the ordinary courts challenging the expulsion order, given the absence of the necessary legal precedence between the administrative proceedings and the civil proceedings; and, on the other hand, that the ordinary court before which the expulsion order has been challenged cannot set aside the previous administrative act of the Public Security Agency (refusal, revocation or annulment of the residence permit or refusal to renew it)'.

[37] After overcoming the hermeneutic problems, which are not insignificant, of identifying the criteria of jurisdictional distribution, some scholars have attached importance to the assessment of how the specificity of the relationship between the administration and the immigrant recedes before the cognitive powers, in particular of the administrative judge, since 'the review of decisions on migration does not appear to be exceptional, but expresses the general characteristics of the legal system of reference, without the legal situations involved in the dispute having a significant impact on the scope of judicial review' (A. CASSATELLA, *supra* note 2, p. 892).

[38] Lit. 'O stranger [...] thou shalt not suffer discomfort'. The full passage concerns a speech that Nausicaa addressed to Ulysses: 'O stranger, you do not seem to me foolish and unwise. The Olympian Jupiter, who often dispenses happiness to the sad as well as to the good, sent misfortune to thee, and thou shalt bear it strongly. But, since it has been fitting for thee to land on our shores, thou shalt not suffer discomfort by clothing, or by anything else that is due to the supplicants and the petty' (*Odyssey,* Book VI, paraphrase, vv. 165-280).

[39] As is well known, there appear to be five constitutional principles that can be considered an inescapable corollary of due process: '(a) that of the subjection of the rules deriving from the principle of due process to a reservation of the law; (b) that of parity between the parties; (c) that of the third and impartial judge; (d) that of the cross-examination expressly including the moment of the formation of evidence; (e) that, lastly, of reasonable duration, borrowed from Article 6 of the European Convention on Human Rights', G. VASSALLI, *Introduzione al tema*, in *Il giusto processo*, Atti dei convegni Lincei, Accademia Nazionale Lincei, 2003, p. 25; for a reconstruction of the dogmatics on due process, see A. CLINI, *La forma semplificata nel "giusto" processo amministrativo*, Cedam, 2009.

also confirms in this respect a blatant dissociation with the European principles referred to above.

This element, together with those already analysed, which concern the choice of a special legislation generating "emergency" public powers, lead to a foregone conclusion, in the sense that they cannot fail, by their tenor as described, to constitute a framework of strong restriction of the fundamental rights of the individual. On closer inspection, a further aspect can be grasped: the problematic nodes indicated do not constitute insurmountable criticalities for both the national and the supranational legal system, insofar as they do not represent an unsustainable financial constraint or even an unprecedented form of jurisdictional cognition. The incomplete and partial forms of protection, the alibi of an apodictic "special" right for foreigners, the withholding of the legal foundations of European civilisation, are the most striking features of a concept that is undoubtedly hostile to the migrant's claim to legality. From a legal point of view, one does not believe in the possibility of reversing the situation by simply modifying certain rules or unblocking certain technical mechanisms; just as the conventional approach of balancing is not satisfactory, which, although rewarding as a method of balancing values of constitutional rank,[40] in the case under consideration, discounts the elision of an irreducible premise, such as the dignity of the human person.

It is therefore necessary to isolate an organising concept of law from which to proceed in order to reach internal balances within each legal system; the composition of the interests involved is thus a successive, unstable step, modulated as a consequence of particular events and historical moments, but without any centripetal value.

Perhaps if we look back to more recent history, we find an implicit recognition of this normative dimension of the person, as has been the case since ancient Greece: the epic poems tell of the reception of the stranger (*xenìa*) as an act between courtesy and legal obligation, in

[40] It is an operation that is repeated over and over again because of the pluralistic nature of our legal system, in order to prevent one value from taking precedence over another. In this context too, the technique of balancing must have a starting point, a guiding star, in order to achieve a balance between all the positions at stake, and for some the guiding criterion lies in the 'fundamental principles of reasonableness and proportionality', in order to arrive at the possibility of 'equating citizens and foreigners when this seems reasonable' (G. TROPEA, *supra* note 2, p. 847 ff.). In the perspective taken in this chapter, these principles do not orbit outside the balancing activity, but are absorbed in the modalities of its development and in the implementation of the balancing itself; the position we take, on the other hand, tends towards the search for the matrix that constitutes the dignity of the person, in its essential embryo, in order to protect it from any balancing.

order to provide the guest with food, shelter and protection. [41] The normative value of the person was found within the perimeter of the essential needs that reception satisfied, on the basis of an original recognition of a fundamental right to hospitality and protection. An original right inscribed in the human person, so much so that hospitality and shelter were provided regardless of the origin of the foreigner or the legal regime of the host. [42]

Here, then, is a lesson to be recovered from the ancient hymns: hospitality was not considered merely a custom or a sacred act, but above all a sign of the civilisation and values of a people. [43]

[41] M.E. LA TORRE, *Premesse generali per uno studio sull'ospitalità fra rapporti di cortesia e autonomia negoziale*, in *Giust. civ.*, 2009, p. 105.

[42] Therefore, the right that is assumed to be inscribed also in migrants 'is a first, significant emergence of a global *nomos*, a-territorial, in movement, whose decisive claim is to be common, independent of borders and systems, global because it is destined to be recognised by any local system': L.R. PERFETTI, *La legalità del migrante.*, *supra* note 2, p. 408.

[43] W. NIPPEL, *La costruzione dell'«altro»*, in S. SETTIS (Ed.), *I Greci. Storia cultura arte società,* I, Einaudi, 1996, p. 165-196.

MIGRANTS' PROTECTION. AN UNCERTAIN SHIPWRECK BETWEEN PROCEEDINGS AND COURTS

Loriano Maccari

1. Introduction

The Italian Constitution is based on the principle of an accessible and purposeful judicial protection, which should tend towards a decision on the merits of the case.

The legal system has established legal instruments aimed at guaranteeing the effectiveness of the protection, returning to the jurisdiction of the competent judge those proceedings brought before non-competent authorities.

Article 113(2) of the Constitution sets forth that judicial protection cannot be excluded or limited to particular means of appeal or categories of acts. The following paragraph entrusts to the law the identification of the organs of jurisdiction that may annul acts of the public administration.

The so-called *translatio judicii* (lit., transfer of the judgment) as per Article 11 of Legislative Decree, 2nd July 2010, No. 104 (hereinafter 'CPA') [1], allows the recovery of substantial and

[1] It is the Code of Administrative Trial [*Codice del processo amministrativo*]. Essentially, that provision allows the preservation of the procedural and substantive effects of the application if the case is resubmitted by the party with an interest in it within three months of the publication of the decision of the Joint Chambers

procedural effects of an appeal which has been wrongly lodged before a non-competent court.

Moreover, Article 4 of Legislative Decree, No. 150 of 1st September 2011, foresees that where a court has been wrongly summoned (namely, where wrong proceedings have been requested by a party), the latter can convert the proceedings in the lawful one, *motu proprio* with an *ad hoc* ordonnance. In this case, Article 4(5) therein provides that substantial and procedural effects of the summoning—that have occurred before the conversion of the proceedings—hold their consequences, without prejudice to the 'forfeitures' (*preclusioni*) of certain prerogatives, possibly accrued before the conversion of the proceedings. [2]

Article 50 of the Code of Civil Procedure (hereinafter: 'CCP') provides for the reinstatement (*riassunzione*) of the case before the competent court and allows the continuation of the proceedings without hindering substantive and procedural rights.

In the particular area of the protection of migrants, procedural obstacles—which often give rise to forfeitures to the detriment of the defence reasons—are more numerous and this ends up debasing the constitutional purpose.

Legal remedies are spread among: (a) the Justice of the Peace (*Giudice di Pace*); (b) a specialised judge (*Giudice specializzato*), foreseen in Law No. 46 of 2017; (c) the ordinary judge (*Giudice ordinario*) and (d) the administrative judge (*Giudice amministrativo*), the latter being available merely within the circumstances listed down in Article 119(1)(m-*sexies*) CPA, for challenging expulsion orders of foreigners adopted by the Minister of the Interior.

This composite distribution of competence has been labelled 'jurisdictional nomadism' – such an expression suggests the title of this chapter. [3]

[*Sezioni Unite*] of the Court of Cassation (hereinafter: 'Cass.'), or within three months from the issuance of the definitive judgment of the first court rejecting jurisdiction.

[2] The settled case-law concerning the expulsion of EU citizens from Italy—with regard to the possibility for the migrant concerned to challenge such a decision—provides that if the relevant appeal is not lodged in the forms provided for by Article 4 of Legislative Decree No. 150 of 2011, the order for the conversion of the proceedings may also be pronounced *ex officio* by the judge no later than the first hearing and—in issuing such a conversion—must require the appellant to complete the application with the omissions found that make it unsuitable for the applicable procedural model, or to file another application with the simultaneous amendment of the defects (see Court of Varese, First Chamber, 1st February 2012, not published).

[3] In this regard, see A. CASSATELLA, *Il sindacato di legittimità sulle decisioni amministrative in materia migratoria*, in *Dir. proc. amm.*, 2017, p. 816 ff.; G. TROPEA, *Homo sacer?*, in *Dir. amm.*, 2008, p. 839 ff.; S. D'ANTONIO, *Il riparto di giurisdizione in materia di ingresso, soggiorno e allontanamento dello straniero dal*

What follows is a concise review of the jurisdictional procedures provided by the Italian domestic system governing the forms of protection for migrants.

The following reflections aims at offering a contribution to make the "wreckage" between proceedings and judges less uncertain.

2. Proceedings before the specialised Chambers, attached to certain Courts of first instance.

Notably, Law Decree, 17th February 2017, No. 13—which has been converted in law by Law, 13th April 2017, No. 46—provided for the creation of so-called 'specialised Chambers in matters concerning international protection' (*sezioni specializzate in materia di protezione internazionale*) before certain courts of first instance (i.e., those courts of first instance which are based in the same city where a Court of Appeal has, in turn, been established). The purpose was essentially to create *ex novo* a "skilled judge", to whom a specific competence is assigned *vis-à-vis* those cases concerning the rejection of the application for a residence permit and several other circumstances laid down in Article 3 of Law Decree No. 13 of 2017. [4]

The latter provision highlights a substantial *répertoire* of cases that clearly suggest that the legislature aimed at concentrating forms of protection so as to prevent obstacles and uncertainties that may limit *de facto* the access to forms of protection.

The same purpose seems to be shared by the composite discipline laid down in Article 6 of Law Decree No. 13 of 2017, which provides for *ad hoc* summary proceedings which are hold *in camera*. Moreover, the hearing for the appearance of the parties is set only when the judge considers it necessary for the decision. The trial shall be concluded within 60 days after the appeal is lodged. Finally, Article 19 of Legislative Decree No. 150 of 2011 has been repealed, which provided for the application of different summary proceedings as per Articles 702a *et seq.* CCP.

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territorio dello Stato italiano, in *Dir. proc. amm.*, 2017, p. 534 ff.; L. Galli, *Quale giudice e quale giustizia: lo straniero e il confine tra giurisdizione ordinaria e amministrativa*, in *www.diritto.it*, 3rd September 2019, p. 1 ff.

[4] Article 3 of Law Decree No. 13 of 2017 contains the discipline concerning the competence *ratione materiae* of specialised Chambers. Moreover, Article 4 therein regulates the competence *ratione loci* of the same Chambers.

3. Summary proceedings before the ordinary court.

Article 28 of Legislative Decree No. 150 of 2011 regulates those controversies concerning 'discrimination' – several matters are embodied in the latter definition, such as: (a) those laid down in Article 44 of Legislative Decree No. 286 of 1998; [5] (b) those regulated by Article 4 of Legislative Decree No. 215 of 2003; (c) those laid down in Legislative Decree No. 216 of 2003; (d) those listed down in Article 3 of Law No. 67 of 2006; (e) those foreseen in Article 55d of Legislative Decree No. 198 of 2006. [6]

Competence *ratione loci* is determined at the place where the applicant has his/her residence. Summary proceedings (*rito sommario di cognizione*) are expressly provided for as per Articles 702a *et seq.* CCP. Finally, the parties can be present personally at the hearing, but only during the first instance proceedings. [7]

4. Proceedings before the Justice of the Peace

Article 18 of Legislative Decree No. 150 of 2011 attributes disputes on the expulsion of citizens of States that are not members of the EU to the Justice of the Peace (*Giudice di Pace*) of the place where the authority that ordered the expulsion is based, observing summary proceedings (*rito sommario di cognizione*), provided for in 702a *et seq.* CCP.

The legislative solution seems a bit too superficial, because the expulsion order, even in its executive phase, is endowed with a consistent detrimental scope. If we add that the time limit for appeal is only thirty days, that the judgement must be defined 'in any case within twenty days from the date of filing of the appeal' and that the order concluding it is not subject to an ordinary appeal on the merit

[5] It is the so-called Consolidated Act on Migration (*Testo Unico sull'Immigrazione*), shortened as 'TUI'.

[6] Legislative Decree No. 215 of 2003, 'Implementation of Directive 2000/43/EC for the equal treatment of persons irrespective of racial or ethnic origin'; Legislative Decree No. 216 of 2003, 'Implementation of Directive 2000/78/EC for equal treatment in employment and occupation'; Law No. 67 of 2006, 'Measures for the judicial protection of persons with disabilities who are victims of discrimination'; Legislative Decree No. 198 of 2006, 'Code of equal opportunities between men and women, pursuant to Article 6 of Law No. 246 of 28 November 2005'.

[7] Summary proceedings are characterised by a particular streamlining, as it normally provides for the conclusion of the trial in a single hearing. However, if the judge considers that the issues put forward by the parties require a non-summary instruction, he fixes—with an ordonnance not subject to appeal—the hearing envisaged for ordinary proceedings [*rito ordinario*], as per Article 183 CCP.

(but only to an appeal before the Court of Cassation), the opinion that the legislative choice was made in a superficial way does not appear entirely peregrine.

Through a joint analysis of the discipline laid down in Article 28 of Legislative Decree No. 150 of 2011 read in conjunction with the one described at Article 702a(3) CPC, a controversial inconsistency between the two provisions arises. Notably, the latter provision, that is Article 702a(3) CPC requires compliance with the time limit for service on the defendant of 'at least thirty days for the date fixed for his appearance'. One instinctively wonders how the conclusion of the case within twenty days is compatible with the minimum time limit for appearance. Immediate coordination intervention by the legislature seems necessary.

The judgement of the Justice of the Peace can only be challenged before the Court of cassation, which determines the need at this stage for legal assistance reserved for lawyers registered with the higher courts.

5. Proceedings before the administrative court

Administrative courts are competent to decide upon issues concerning the expulsion of foreigners as per Article 119(1)(m-*sexies*) CPA, the latter provision being shaped *ex novo* by Article 16(1) of Law Decree No. 13 of 2017, converted in law by Law No. 46 of 2017.

Notably, it is the same Law Decree that has established the aforementioned 'specialised Chambers in matters concerning international protection' and that, as per its Article 3(1)(b), confers to the latter the competence to decide upon 'those cases relating to the challenge of a decision to expel EU citizens or their family members on imperative grounds of public security and for other grounds of public security referred to in Article 20 of Legislative Decree No. 30 of 2007, or on the grounds referred to in Article 21 of the same Legislative Decree, as well as for proceedings to validate the measures provided for in Article 20b of Legislative Decree No. 30 of 2007'.

The appeal against an expulsion order or a removal can be lodged before different courts, depending on the body adopting it, even though it performs a function preordained to the protection of the same legal assets, public order and State security.

When the expulsion of a foreigner is ordered by the Ministry of the Interior, the competence *ratione loci* to challenge such a measure is given to the Regional Administrative Court of Lazio, based in Rome, as per Article 135(1)(l) CPA.

6. The distribution of competence among different jurisdictions.

National courts have set forth several times that the appeal against those orders concerning expulsion or removal of the foreigner is to be decided by 'ordinary' judges (and not, administrative judges), except for those matters expressly foreseen in the CPA, considering that the right at stake shall be labelled as 'fundamental' – hence, it shall not be defined as a 'lawful interest' (*interesse legittimo*). [8]

Yet, this conclusion does not appear convincing, firstly because it tends to graduate the fullness of protection on the basis of the distinction between the two orders of judges, as if the administrative one did not possess the right equipment to provide full protection to subjective rights when their position tends to be affected by the exercise of administrative power.

The argument is far from easy to resolve and the rationale that led to that conclusion—based on the nature of the subjective position at issue—certainly do not appear convincing.

However, that qualification does not appear to be decisive for the purposes of identifying the court holding jurisdiction, considering that—within the legal system subjective situations—there exist situations of the same rank, expressly attributed to the exclusive jurisdiction of the administrative court.

Notably, Article 133(1)(p) CPA confers exclusive jurisdiction to the administrative judges in those matters concerning 'orders adopted by commissioners in emergency situations, as per Article 5(1) of Law 24th February 1992, No. 225 [...] and in those matters concerning the waste management, albeit conducted through Public Administration's behaviours linked to the exercise of a public power, even when related to constitutional rights'.

This provision expresses the content of a ruling rendered by the Constitutional Court, i.e. judgement no. 140 of 2007, where Article 1(552) of Law No. 311 of 2004—which assigned the matters related to the electric energy's procedures to the exclusive jurisdiction of administrative judges—was deemed to be in keeping with the Italian Constitution.

In that case, the Constitutional Court applied the principles already

[8] The Joint Civil Chambers of the Court of Cassation (Cass., 17th June 2013, no. 15155) annulled the decision of the Justice of the Peace of Agrigento by which the latter had first found that he lacked jurisdiction in favour of the administrative court. An appeal was lodged against this decision before the Court of Cassation. The latter annulled that decision on the basis of the qualification of the right, threatened or injured, to be considered as 'fundamental' and as such insusceptible of any form of 'prejudice' by the public administration.

developed in its judgement no. 204 of 2004, [9] related to the definition of 'exclusive jurisdiction' of administrative judges, by placing the concrete exercise of an authoritative power of the public administration at the heart of the ruling.

In particular, the Court considered irrelevant—for the purposes of identifying the competent judge—the fundamental nature of the substantive position relied on in the main proceedings (in that case the right to health, which, according to the referring court, would have entailed *ex se* the assertion of the jurisdiction of the ordinary court).

On that occasion, the Constitutional Court denied the existence of 'any principle or rule of our legal system that reserves exclusively to the ordinary courts the protection of constitutionally protected rights to the exclusion of the administrative courts'.

Interestingly, the Italian Court of Cassation shared the same approach in several decisions rendered in 2007 and 2010. [10] Yet, in 2013 with the aforementioned ruling no. 15155, and recently in other judgements, the same Court decided that those cases concerning the appeal against the orders issued by sport federations (which are to be considered 'administrative decisions' holding a certain relevance *vis-à-vis* national legal framework) shall be attributed to the jurisdiction of ordinary judges – their purpose is to protect a subjective right, labelled as 'absolute right'. [11]

Other rulings linked the jurisdiction of the administrative judge to the discretional character of the denied order (e.g. the request of Italian citizenship). [12]

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[9] This judgment reiterated that the prevailing principle in the matter of the allocation of jurisdiction lies in the legal nature of the positions that are scrutinised, 'lawful interests' (*interessi legittimi*) and 'subjective rights' (*diritti soggettivi*). It also emphasised that 'the legislature may well extend the area of exclusive jurisdiction provided that it does so with regard to matters (in this particular sense) that, in the absence of such a provision, would still contemplate the general jurisdiction of legitimacy because the public administration-authority operates therein. Mere conduct unrelated to the exercise of administrative power would therefore be excluded from jurisdiction.

[10] Cass., Joint Civil Chambers, 28th December 2007, no. 27187, in *C.e.d.*, no. 600348; Cass., Joint Civil Chambers, 5th March 2010, no. 5290, in *DeJure*.

[11] See, e.g. Cass., Joint Civil Chambers, 1st February 2022, no. 3057, in *C.e.d.*, no. 663838.

[12] Cass., Joint Civil Chambers, 21st October 2021, no. 29297, in *C.e.d.*, no. 662592; Cass., Joint Civil Chambers, 14th January 2022, no. 1053, in *C.e.d.*, no. 663589. Both rulings are based on the discretional character of the order at stake. See v. M. Mazzamuto, *La discrezionalità come criterio di riparto della giurisdizione e gli interessi legittimi fondamentali*, in *www.giustiziaamministrativa.it*, 13th January 2020.

The theory of the legal nature of the subjective position that comes to the fore does not represent a criterion that guarantees sufficient resilience of the system, as the Constitutional Court has repeatedly affirmed, going beyond a widespread but not rigid principle based on the legal nature of the subjective position at stake. Indeed, the Constitutional Court has stated that 'the "principle of application", as per Article 5 of Law No. 2248 of 1865, Annex E, concerning to administrative proceedings and its related limit to the powers of ordinary judges *vis-à-vis* an unlawful administrative order, do not constitute a constitutional rule that the legislature shall respect in any case'. [13]

Subsequently, the Constitutional Court set forth that 'the legislator's choice is part of the tendency to strengthen the effectiveness of judicial protection, so as to make it immediately more effective also through a better distribution of jurisdictional competences and attributions, depending on the subject matter'. [14]

This possibility is expressly foreseen at Article 113(3) Const. Currently, the same issue is also embodied in Article 3(1)(a)(b)(c)(d)(d-*bis*)(e)(e-*bis*) of Law Decree No. 13 of 2017, converted in law by Law No. 46 of 2017, which refers to those orders issued by the public administration *vis-à-vis* foreigners in the context of administrative powers.

From a systemic point of view, there is no rational reason why the protection against such measures has been removed from the jurisdiction of the administrative court, which, moreover, has been endowed since 1998 with effective and timely procedural tools, [15] now provided for in Articles 53, 54 and 55 CPA.

One can spontaneously observes whether it is not a contradiction

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[13] See Const. Court, 17th May 2001 (ord.), no. 140, para. 3 of "In Law" part. About the notion of 'fundamental right', see A. PACE, *La garanzia dei diritti fondamentali nell'ordinamento costituzionale italiano: il ruolo del legislatore e dei Giudici "comuni"*, in *Nuove dimensioni nei diritti di libertà. Scritti in onore di Paolo Barile*, Cedam, 1990, p. 109 ff.

[14] See Const. Court, 17th May 2001 (ord.), no. 140: 'There is no constitutional principle that excludes the possibility for the legislature—in certain cases, left to the discretionary choice of the same legislature when entrusting the jurisdictional protection of subjective rights against the public administration—to attribute to the ordinary judge also a power of annulment and special effects sometimes substitutive of administrative action, non-fulfilment, with respect to rights that the legislature considers to be priority, even if this may entail the need for the Judge to make assessments and evaluations that are not entirely binding, but always concerning situations regulated by a series of legislative provisions, which provide for the exercise of such powers'.

[15] By Legislative Decree No. 80 of 1998, entitled 'New provisions concerning the organisation and labour relations of public administrations, jurisdictions in

to strengthen and increase the administrative judge's instruments of protection, including precautionary ones, and to entrust to the ordinary judge—even the honorary one (i.e., the Justice of the Peace)—, issues closely related to the exercise of administrative power, such as deportation and accompaniment to the border.

On the other hand, the attribution to the administrative judge's jurisdiction of those matters related to Article 119(1)(m-*sexies*) CPA—that is, expulsion orders issued by the Ministry of the Interior as per Article 13(1) of Legislative Decree No. 286 of 1998, and those orders issued as per Article 3 of Law Decree No. 144 of 2005, converted in law by Law No. 155 of 2005—can be debatable, since it is based solely on the different type of issuing authority (that is, the Ministry of the Interior instead of the Prefect).

The doubt remains as to whether the type of authority can justify different jurisdictional treatment, given the general principle whereby the administrative court's review focuses on subjective positions coexisting, even occasionally, with the exercise of power, as per Article 7(1) CPA: 'Administrative jurisdiction shall be reserved to the administrative courts in disputes concerning legitimate interests and, in the particular matters indicated by law, subjective rights, relating to the exercise or non-exercise of administrative power, concerning measures, acts, agreements or conduct attributable even mediately to the exercise of such power, carried out by public administrations. Acts or measures issued by the Government in the exercise of political power cannot be challenged'.

The means of protection provided by the legal system must aim at the full recognition, at the trial stage, of those rights and positions exposed to the exercise of administrative power that must guarantee its authoritativeness, built on widespread and shared values by means of participatory instruments in order to use it to save fundamental rights in the face of imminent dangers. [16]

The considerations on the concentration of remedies, which should tend to improve the quality and also the accessibility of

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labour disputes and administrative jurisdiction, issued in implementation of Article 11(4) of Law No. 59 of 1997'.

Notably, Article 34(1) therein had attributed to the exclusive jurisdiction of the administrative judge the disputes concerning the acts, measures and behaviour of public administrations and their equivalent subjects in urban and building matters.

The Constitutional Court (Const. Court, 6th July 2004, no. 204) declared the unlawfulness of this paragraph, as substituted by art. 7(1)(b) of Law No. 205 of 2000, in the part in which it provides that disputes concerning acts, measures and behaviour are also subject to the exclusive jurisdiction of the administrative court.

[16] See L.R. Perfetti, *Sullo statuto costituzionale dell'emergenza. Ancora sul diritto pubblico come violenza o come funzione dei diritti della persona*, in *Persona e amministrazione*, 2020(2), p. 51.

justice, are nothing new, if one considers that in Law No. 39 of 1990 converting Law Decree No. 416 of 1989 (the so-called 'Martelli Law'), jurisdiction against any measure of the public administration was entrusted exclusively to the administrative judge of the place of the foreigner's elected domicile.

For better efficiency and speed of protection, ordinary procedural deadlines were halved. [17]

The question remains whether the distribution of the forms of protection among the ordinary judge—in a dual capacity (i.e. the specialised Chambers and the ordinary court)—the Justice of the Peace and the administrative judge corresponds to a legislative choice based on the need to avoid an overcrowding of judgments before the administrative courts, or by other reasons attributable to the legislative merit, even if scientifically unproven or in any case extraneous to the consolidated principles that have hitherto drawn the boundary between the jurisdictions.

This is not a problem of constitutionality, but of just attribution to the organs of justice, observing the well-established principles that have drawn over time the distribution of jurisdiction and the attribution to the administrative one of the syndication 'in particular matters', in which the intimate relationship between subjective rights and legitimate interests arises in the confrontation between a subjective position and a public power that can modify it on the basis of substantive law, in the procedural dynamic.

7. Concluding remarks.

The examination of situations in any case related to the exercise of public power is intended to reach the judge identified by the system, whether ordinary or administrative, called upon to pronounce on measures and conduct that have as their "common denominator" the relationship between authority and freedom.

For the purposes of identifying the judge holding the power to decide, reference must be made to the constitutional rules governing the attribution of jurisdiction (Article 113 of the Constitution), to the effectiveness and fullness of protection, which experience teaches us

[17] Article 5 of Law No. 39 of 1990, heading 'Communications to interested parties and rules on judicial protection', conferred jurisdiction on the administrative courts to challenge measures refusing recognition of refugee status and expulsion orders. Moreover, Article 8 of the aforementioned law, as a rule, conferred to the same court the jurisdiction in matters of appealing against orders of expulsion from the territory of the State, again with reduced procedural deadlines.

cannot be dissociated from the principle of the concentration before the same judge of particular matters, whether they consist of legitimate interests and subjective rights also defined as fundamental.

Within Italian legal framework this result does not seem to have been achieved and a complete overhaul of the system would be necessary to concentrate the protection of migrants in the same judge, which necessarily involves a review of the exercise of administrative power, whether it is aimed at adopting extension or repressive measures.

The attribution to the ordinary courts of jurisdiction solely on the basis of the nature of the position to be protected and its fundamental character does not stand the test of the jurisdictional system, organised on two orders of judges.

Neither can the binding or discretionary legal nature of the final measure serve as a direct criterion for the allocation of jurisdiction, because it is not reflected in the Constitutional Charter and rests only on one aspect of the administrative measure—undoubtedly not irrelevant—but not on the entire exercise of the function.

The typical criterion concerning the distribution of jurisdiction, as shaped by Italian Constitutional Courts (see judgements no. 204 of 2004 and no. 191 of 2006), that assigns to the legal nature of the position that comes to the fore and to its connection with the exercise of power, must be accompanied in the identification of matters by reason of their possible particularity. This is with a view to extending the jurisdiction of the administrative court to subjective rights, including those traditionally considered fundamental, so as to put an end to 'jurisdictional nomadism', which translates into an uncertainty of protection, which corresponds to its "depotentiation", at least in time, and with reference to the reasonable length of the trial.

This solution should also be recognised as having the merit of not making it necessary to overcome the traditional external limitation of the ordinary court's jurisdiction represented by the impossibility of annulling the unlawful administrative measure, as per as per Article 4 of Law No. 2248 of 1865, Annex E.

The administrative judge would offer a protection response that would include the removal of the harmful measure from the legal system, so that the original physiognomy of the administration in an objective sense—altered by the illegitimate exercise of power—could be recomposed.

Mere behaviours, including discriminatory ones, adopted *vis-à-vis* migrants would naturally remain within the jurisdiction of the ordinary courts.

LEGAL ASSISTANCE PENDING ASYLUM PROCEEDINGS

PAOLA GRAZIOSI

TABLE OF CONTENTS: 1. The right to asylum and its legal framework. – 2. The asylum application process. – 3. Language assistance pending asylum proceedings.

1. The right to asylum and its legal framework

Article 10(3) of the Italian Constitution sets forth that 'a foreigner, who is prevented in his country from effectively exercising the democratic freedoms guaranteed by the Italian Constitution, is entitled to the right to asylum in the territory of the Republic', in accordance with the provisions laid down by law. Therefore, the right to asylum consists in an individual prerogative, which allow certain individuals to ask the host State for protection and to be able to remain in its territory, in conditions of security, pending the assessment of the asylum application.

In Italy, the legislation that regulates the matter is the Legislative Decree No. 251 of 19th November 2007 (aimed at implementing Directive 2004/83/EC within Italian legal framework), which sets forth organic norms on the attribution of the status of beneficiary of international protection to third-country nationals or stateless persons.

Moreover, reference should be made to the Legislative Decree No. 25 of 28th January 2008 (aimed at implementing Directive 2005/85/EC within Italian legal framework), which regulates the procedures for the examination of applications for international protection submitted in the Italian territory. It should be pointed out that the notion and content of the right to asylum, in Italian legislation, holds the same meaning of those to international protection; hence, in the present paper, the terms 'asylum' and 'international protection' will be used promiscuously.

In order to identify the beneficiaries of international protection, it is necessary to refer to the forms of international protection

acknowledged by the Italian legal system, namely 'refugee status' [1] and 'subsidiary protection'.

Legislative Decree No. 251 of 2007 defines as a "refugee": (a) a foreign national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the territory of the country of his/her nationality and cannot—or, due to this fear, does not—wish to avail him/herself of the protection of that country; (b) a stateless person who is outside the territory of his habitual residence and, for the same reasons, cannot or does not wish to return there.

The same legislation, on the other hand, defines as a 'person eligible for subsidiary protection' a foreign national who, firstly, does not qualify as a 'refugee'. Yet, there exist well-founded reasons to believe that he/she, if returned to the country of origin or, in the case of a stateless person, if returned to the country of former habitual residence, would run a real risk of suffering serious harm—e.g. *inter alia*, a death penalty, torture or other forms of inhuman or degrading treatment or punishment—and therefore cannot or, because of that risk, does not wish to avail him/herself of the protection of that country.

In both cases, the individual concerned who wants to ask for international protection is burdened to submit an application for this purpose attaching all the elements and documentation necessary to motivate such a request. Afterwards, a procedure involving an examination, on an individual basis, and a complex evaluation of all the available data, is expressly foreseen in Article 3(3)-(5) of the aforementioned Legislative Decree No. 251 of 2007.

2. The asylum application proceedings

As mentioned above, the procedure for examining an application for international protection is governed by Legislative Decree No. 25 of 2008. The process is split into two phases: the administrative one and the judicial one, the latter not being compulsory in every proceeding.

The administrative phase begins with the foreigner's declaration of willingness to apply for asylum, which can be made at the border

[1] The recognition of refugee status entered in the Italian legal system with the accession to the Geneva Convention of 28 July 1951 (ratified by Law No. 722 of 1954).

police station on entering Italian territory or at the competent police station depending on the applicant's place of residence. This is followed by the formalisation of the asylum application, which takes the form of the collection of data on the foreign national (such as personal details, nationality, ethnicity, religion, education, profession, languages spoken, date of departure from the country of origin, date of entry into Italy, border crossed, countries of residence and transit, reasons for leaving the country of origin and possible consequences of return, *etc*.) and the collection of photodactyloscopic data. The formalisation of the application has the effect of authorising the asylum seeker to stay legally on Italian territory until a decision has been taken on the asylum application, except in certain circumstances. Accordingly, the person concerned is issued with a residence permit with the wording 'asylum application', valid on Italian territory for six months, renewable, which allows the foreigner to work after the first sixty days.

Once the application has been formalised, the police headquarters transmits the documents without delay to the competent territorial commission for the recognition of international protection, which is the authority that practically examines the asylum application. The territorial commissions are established in the regional capitals; their competence, except in certain situations, is settled on the basis of the territorial district in which the asylum application is submitted. The territorial commission arranges for the hearing of the person concerned, i.e. a personal interview in which the foreigner has the opportunity to present all the elements on which the application for protection is based, also presenting any useful documents.

At the end of this procedural step, the territorial commission issues a decision by which it may grant the applicant the 'refugee status' or 'subsidiary protection status' (which entitles him/her to a five-year residence permit), or it may reject the application if the conditions for international protection are not met. Alternatively, even if the asylum application is not granted, the territorial commission may still assess the existence of the grounds prescribed by law for the issuance of a different residence permit, such as that for 'special protection'. [2]

In the event that the examination of the asylum application has a negative outcome (even a partial one), the foreigner holds the right to

[2] The grounds related to the recognition of a residency permit for special protection (lasting two years) are listed in Article 19(1) and (1.1.) of Legislative Decree No. 286 of 1998 (Consolidated Act on Immigration, so-called 'TUI').

appeal against the decision issued by the territorial commission, thus eventually opening the second phase, the judicial one.

It takes place, except in special cases, before the 'specialised section on immigration, international protection and free movement of European Union citizens' attached to the court of first instance, the latter being the court located in the capital of the district of the Court of Appeal in whose territory the authority that adopted the decision is located.

The judicial phase is regulated by the provisions laid down in Articles 737 *et seq.* of the Italian Code of Civil Procedure. Essentially, it consists in an appeal that is lodged, under penalty of inadmissibility, within thirty days from the notification of the negative outcome of the administrative phase (or within sixty days if the applicant resides abroad), except in particular cases where the term is halved.[3] The lodging of the appeal suspends the enforceability of the contested measure, except in certain specific cases,[4] with the effect that the asylum seeker may continue to stay on the national territory until the outcome of the decision of the competent court.

The judicial procedure was profoundly reformed by Law Decree No. 13 of 17th February 2017 (so-called 'Minniti decree', from the name of the proponent Ministry of Interior) which made numerous amendments such as *inter alia*:

(a) the applicable trial procedure – currently it is a summary procedure (*in camera* procedure), with the setting of an appearance hearing, which should only be possible (and not compulsory in every circumstance) but *de facto* is always foreseen, since the technical means for the video recording of the hearing before the territorial commission (a circumstance which could have led to exclude the appearance hearing within the judicial phase) have never been issued;

(b) the means of appeal against the decree issued by the court – Minniti Decree repealed the possibility to lodge an appeal against the decision rendered *in prime cure* by the court (thus deleting a stage of the existing procedure); contextually, it provided for the possibility to lodge an appeal against that decision directly before the Court of Cassation within the short term of thirty days, without automatic suspension of the effects of the decision.

[3] See in this respect Article 35a(2) of the Legislative Decree No. 25 of 2008.
[4] See in this respect Article 35a(3) of the Legislative Decree No. 25 of 2008.

3. Language assistance in the asylum procedure

The analysis carried out hitherto provides an understanding of which kind of guarantees are acknowledged to asylum seekers throughout the application for international protection procedure, with specific reference to the right to receive communication in a known language and the right to linguistic assistance.

Starting from the domestic framework, Article 10(4)-(5) of the Legislative Decree No. 25 of 2008 states what follows: 'All communications concerning the procedure for the recognition of international protection shall be given to the applicant in the first language indicated by him/her, or, if this is not possible, in English, French, Spanish or Arabic, according to the preference indicated by the person concerned. At all stages of the procedure related to the submission and examination of the application, the applicant shall be guaranteed, if necessary, the assistance of an interpreter of his own language or of another language that he understands. Where necessary, the documentation produced by the applicant at each stage of the procedure shall be translated. In the event of an appeal against the decision in the courts, the foreigner shall be guaranteed the same prerogatives as those referred to in this article during the proceedings'.

It appears that the asylum seeker, at all stages of the asylum application procedure, must be guaranteed: (a) communication in the first language indicated by him/her or in one of the vehicular languages chosen; (b) the assistance 'if necessary' of an interpreter in a language he understands; (c) translation 'if necessary' of the documentation produced. These guarantees must be guaranteed to the migrant concerned in both administrative (and judicial, in the event of an appeal) proceedings.

It is appropriate to review the individual stages of the asylum application, as outlined in the preceding paragraph, to understand how the rules translate into facts.

As mentioned above, the asylum application begins with the formalisation of the request for international protection at the competent police office. This is a very delicate phase, as it is the first contact that the foreigner has with the Italian authorities, during which 'data collection' is carried out, i.e. all the personal information concerning him/her (personal data, religion, ethnicity, *etc.*) is recorded on a special form (so-called 'form C/3').

When submitting the application, the police office, in accordance with Article 10 of Legislative Decree No. 25 of 2008, 'shall inform the applicant of the procedure to be followed, of his rights and duties during the procedure and of the time and means available to him/her to accompany the application [...] and to this end gives the applicant

the information leaflet'. In this stage, the assistance of an interpreter assumes a crucial role, but in practice, in most cases, the linguistic assistance is not guaranteed, given the absence in police offices of qualified personnel capable of communicating with the migrant concerned in a language he understands. This shortage is often compensated for by the asylum seekers themselves (who present themselves at the time of formalisation with nationals who might have mastered the Italian language) or by reception centres where the asylum seekers reside, which provide interpreters *motu proprio*.

This is not the case in the phase relating to the examination of the asylum application, which takes place before the competent territorial commission, where linguistic assistance is instead guaranteed. As mentioned above, the foreigner is summoned to a personal interview, in which he/she may exhibit all the elements on which the asylum application is based, in the presence of a member of the territorial commission with investigative duties (so-called 'investigating officer') and of an interpreter.

In the absence of a video recording of the interview,[5] a record of the hearing is drawn up in Italian, which is read to the applicant by the interpreter, who then signs it together with the migrant concerned and the investigating officer. If the applicant produces documentation, the interpreter, at the officer's request, orally translates its contents. The decision adopted by the territorial commission, which contains a detailed reasoning of the grounds that led to the approval or refusal of the asylum application, is drafted in Italian, with the exception of the *decisum* and the procedures and timeframe for challenging the decision, which are also transcribed in the so-called 'vehicular languages' (English, French, Spanish and Arabic).

Within the judicial phase, which, as said, is only 'optional' (as it stems from the asylum seeker's need to oppose the negative decision adopted by the territorial commission), the guarantees prescribed by Article 10 of the Legislative Decree No. 25 of 2008 are weakened. The absence of the video recording of the hearing before the territorial commission compels the judge to schedule an appearance hearing, at which the applicant *should* be heard.

The purpose of the applicant's personal hearing before the magistrate is to verify the coherence of his/her version of the events, its plausibility, completeness and exhaustiveness, in order to allow the ascertainment of the facts as depicted by the applicant. Experience shows that many of the alleged inconsistencies

[5] Currently, video recording of the interview is not carried out due to the lack of technical specifications.

highlighted in the administrative phase (and often the result of incomplete and consecutive hearings in the unfolding of the questioning) are explained and clarified by the applicant at that hearing.

Therefore, even at this stage, the personal hearing is of a paramount importance, being the main investigative means and basic tool for assessing the reliability of the applicant – such an hearing becomes *de facto* the mean by which the duty of inquiry cooperation of the magistrate is fulfilled. Moreover, the complexity of the interview, which also involves ethnic, psychological and anthropological profiles, would require the presence of highly qualified interpreters, as they are the authors of a true cultural mediation that requires skills that are not solely of a linguistic nature.

Nevertheless, in practice, the prevailing orientation in courts is to skip the personal hearing of the applicant, and replace the latter by a merely paper-based discussion. Even with regard to the appointment of an interpreter by the judge, the practice tends to omit it, despite the central role it would play in the establishment of a procedural dialogue. Thus, the principle of effective protection—as set out in Article 47 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 46 of Directive 2013/32/EU and Articles 6 and 13 of the European Convention on Human Rights—risks being seriously undermined.

PART V

EXPERTS' STANDPOINT

Opinions submitted in the context of the seminar 'Immigration, Personal Liberty, Fundamental Rights', following the screening of the movie 'My Class', presented by the film director Daniele Gaglianone (Urbin, 11th May 2022)

THE LAWYER'S STANDPOINT

LORENZO TRUCCO

My topic, i.e. 'administrative detention', is closely related to the fundamental right of personal liberty. I am reminded in this regard of what Luigi Di Liegro used to say [1] – in his opinion, no field of law, except for immigration law, can show us what are the fundamental principles we refer to, the values on which we believe our society should be based.

This is a sensitive focus and finds its first confirmation, in a negative sense, precisely in relation to 'administrative detention': to speak of "administrative detention" is basically an oxymoron. This term has been adopted as a concept essentially limited to the situation of Palestinian citizens, who have been and can still be detained in various ways for a range of simple administrative offences.

Administrative detention, in our system, mainly concerns individuals who are irregularly staying on our territory but have not committed any crime and is therefore a problematic institution, introduced into the legal system in 1998. Initially envisaged for a limited duration, its applicability was then extended according to old and new emergencies and political contingencies, reaching even up to a year and a half of possible detention. Luckily, Law Decree No. 130 of 2020 has decreased that time-limit to a maximum of ninety days, which could be further extended for thirty days whether the individual concerned would come from a country that has signed return agreements with Italy.

This is, however, a considerable period of time, considering that, in the case of the commission of a criminal offence, an actual period of imprisonment already presupposes a certain 'track record' – for

[1] Priest particularly committed to the social field (especially *vis-à-vis* of vulnerable individuals and minorities, including immigrants). He worked mainly in Rome, where he founded the diocesan *Caritas* in 1979. Amongst his works, it is worth mentioning *Immigrazione. Un punto di vista*, with F. Pittau, Sensibili alle Foglie, 1997. See *amplius www.treccani.it*.

example, the convicted person must have already "gambled" with the suspended sentence. It is therefore a considerable period of time, although fortunately less than under the previous legislation. Above all, however, the severity of the penalty is remarkable, both in terms of the place of detention and the way in which it is administered.

The essential core is that the detained person is subject to a deportation order and is considered to be at risk of absconding and thus hindering the execution of the measure. In fact, the term 'expulsion' refers to different measures, both administrative and judicial, with a very wide scope of application. The most common is the administrative expulsion ordered by the Prefect, which is based on the irregularity of the stay and, as such, can be determined by many components. It is therefore a very complex issue, since circumstances that may be linked to the loss of a job, for example, are intertwined with other factors, such as those triggered by the rejection of the application for international protection, in a very complex field of assessment.

The person involved in expulsion procedures is detained in a Centre for Stay and Repatriation (*Centro di permanenza per I rimpatri* – CPR), but a judicial review, through a validation, is necessary. It was precisely on this point that the Constitutional Court intervened in a judgement rendered in 2001 [2], by openly stating that 'detention' constitutes a deprivation of liberty, for which the guarantees of Article 13 of the Constitution are required, i.e. principle of legality and necessity of a judicial review.

As already mentioned, administrative detention needs to be upheld by the judicial authority (*convalida*), which is assigned to the Justice of the Peace (*Giudice di Pace*). I have the greatest respect for these magistrates, many of whom are highly competent, but there is one critical point. While in general this judge cannot impose imprisonment or probation, but only fines, in this case he is deciding on the personal liberty of the individual. It should also be noted that, in practice, "upholding" decisions are essentially formalistic. And very often the intervention of the defence lawyer is also formalistic.

But what does this administrative detention lead to? It leads to a very severe isolation of the person. In other words, it is a situation in which the person has practically no contact with the outside world. All the forms of intervention in prisons, which come not only from legislation but also from the presence of social services in various forms, are very limited in relation to people held in CPRs. It is no coincidence that the CPRs have been called 'places of non-

[2] Const. court, 10th April 2001, no. 105.

law'. And it is not by chance that the National Ombudsman for the rights of persons detained or deprived of their liberty (*Garante nazionale delle persone private della libertà personale*) has often intervened in a very clear manner highlighting their serious criticalities.

Acts of self-harm are unfortunately commonplace in CPRs, partly because of the way in which the subject is deprived of personal liberty.

Although the Constitutional Court, in its Judgment no. 105 of 2001, explicitly proclaimed that administrative detention is tantamount to 'deprivation of liberty' and therefore constitutional guarantees are needed on the manner in which it is carried out, domestic law does not provide specific provisions *in parte qua*. We only have a provision of primary rank, that is, Article 14(2) of Legislative Decree No. 286 of 1998 (so-called 'TUI') which is, however, very broad. Although it was slightly amended by Law Decree No. 130 of 2020, the substance does not change, because the provision only provides that the person is detained in such a way as to ensure the necessary assistance and dignity. Then some elements are added, but they are merely "prospective interventions", e.g. the possibility of sending written petitions, even in a sealed envelope, to the National Ombudsman and to the regional or local ones.

The domestic framework regulating administrative detention is laid down in an *ad hoc* regulation for the organisation and management of centres, which only has been drafted in 2014. Being a decree of the Minister of the Interior, the breach of the principle of legality (foreseen in the Italian Constitution) is blatant, with major practical consequences, taking into account that—differently from what happen *vis-à-vis* those detained within criminal proceedings—there is no judicial body equivalent to the 'supervisory court' (*Tribunale di Sorveglianza*) for those deprived of their liberty in CPRs.

Recently, the Italian Constitutional Court intervened with Judgement no. 22 of 2022, which could lead to important reflections on the subject, although it concerns the different but similar issue of security measures in the "residences for the execution of security measures" (*Residenza per l'esecuzione delle misure di sicurezza* – 'REMS'). The judgement stresses that, even in this case, the modalities of deprivation of liberty must be regulated by a law (i.e. a "primary" source of law), since a "secondary provision" is not sufficient.

I believe that anyone who has ever been in contact with people who have been locked up in a psychiatric hospital has experienced the harshness and futility of such institutions. And anyway, it is precisely this highly repressive attitude, in a climate of constant isolation, that then leads to acts of self-harm or even suicide.

Within the Association for Legal Studies on Immigration

(*Associazione per gli Studi Giuridici sull'Immigrazione* – 'ASGI'), we felt it was very important to try to make these places, which are not by chance called "places of no law", essentially impenetrable, more transparent and open. We had asked for access on several occasions and had always been refused. Recently, despite some difficulties, we are beginning to enter the centres because, after appealing against the denial of access, we have obtained decisions in our favour from various regional administrative courts (*Tribunali Amministrativi Regionali* – 'TAR').

On ASGI's website, [3] some of the results of these visits already appear, revealing a series of more or less serious illegalities and, above all, the way in which people stay in these centres. The injustice is such that it led, following the suicide of a detained person, to a demonstration in the square, in front of the Office of the Prefect (*Prefettura*), by lawyers wearing robes, the symbol of the reaffirmation of fundamental rights. [4]

I must say, for the sake of intellectual honesty, that following these meetings and verifications, the situation in Turin is fortunately changing, both in terms of the attitude within the CPR and in terms of the relationship with the authorities that run these centres.

One of the main problems was the fact that, although the discipline also guaranteed freedom of communication with the outside world, in most cases this was essentially denied, for various reasons. For this reason, together with the University of Turin and with the contribution of the local ombudsman, we thought it necessary to draw up a small manual—deliberately written in a very simple way and translated into several languages—in order to be able to give information directly "from the inside" to people deprived of their liberty, not only to prisoners. It was presented in the Turin prison and will be extended to other places of deprivation of liberty.

The subject of administrative detention—needless to say—is of fundamental and central value in the system of rights and is currently the subject of debate in the European Union (EU), since the European Commission chaired by Ursula von der Leyen, taking up the path of the previous Commission, has presented an impressive "package" for the complete reform of the Asylum system, called the "New Pact". [5]

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[3] See *www.asgi.it*.

[4] The programme of the event together with the statement of ASGI and other associations promoting the event is available at: *www.bit.ly/3D2TQJ5*.

[5] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM(2020) 609 final, 23rd September 2020.

This impressive proposal has not yet been approved, but some elements have been anticipated at national level.

One of these is the development of the "hotspots", which are used for identification [6] of applicants for international protection – although in theory they are not places of total deprivation of liberty, in practice they are, [7] and there is no judicial upholding either. [8] Their purpose is actually to constitute a sort of filter', a pre-assessment with respect to subsequent routes: international protection or deportation.

The creation of hotspots is part of the more general problem of the so-called 'externalisation' of the right to asylum, which has the effect of preventing or making it as difficult as possible for asylum-seekers to enter European territory, through the identification of "safe countries of origin", "safe countries of transit" and the creation of "filters" to prevent the entry of people.

One of the most worrying aspects of the "New Pact" reform proposal is the establishment of border centres where people are detained for a limited period of time and subjected to "pre-entry screening". In practice, the centres are located on EU territory, but formally, through an unbelievable fiction, the persons are not considered to be legally present on EU territory, in order to facilitate the possibility of deportation. The person concerned is therefore placed in a kind of legal limbo, leading to a situation of absolute precariousness. Moreover, the "New Pact" stipulates that, among those who manage to pass this screening, access to the asylum procedure will only be granted to those who come from a country with a recognition rate of at least 20% of applications for international protection, which excludes most countries of origin. [9]

In addition, there is the problem of introducing assessment

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[6] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda on Migration*, COM(2015) 240 final, 13th May 2015, p. 6, where the Commission recognises the need to establish 'a new 'Hotspot' approach, where the European Asylum Support Office, Frontex and Europol will work on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants'.

[7] See M. PICHOU, *Reception or Detention Centres? The detention of migrants and the EU 'Hotspot' Approach in the light of the European Convention on Human Rights*, in *KritV*, 2016(2), p. 114-131.

[8] See M. BENVENUTI, *Gli* hotspot *come chimera. Una prima fenomenologia dei punti di crisi alla luce del diritto costituzionale*, in *Dir. imm. citt.*, 2018(2), p. 13 ff.

[9] See Recital 39a, Amended proposal for a Regulation of the European Parliament and of the Council *establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, COM/2020/611 final, 23rd September 2020: 'Member States should accelerate the examination of applications of applicants who are nationals or, in the case of stateless persons,

methods that have nothing to do with the reasons why the person sought protection.

This is just one example of how the issue of international protection is very sensitive and deserves more attention, even from us lawyers and legal scholars.

I therefore believe that the attention you have given to this issue is of fundamental importance. We must never stop asking ourselves certain questions when it comes to the freedom of the individual. The concrete ways and means of controlling these deprivations of liberty are essential in order to ensure that the fundamental values enshrined in our Constitution do not remain "on paper", but become effective, all the more so with regard to vulnerable subjects such as migrants.

formerly habitual residents of a third country for which the share of decisions granting international protection is lower than 20% of the total number of decisions for that third country'.

THE MAGISTRATE'S STANDPOINT

SERGIO SOTTANI

Issa, in the movie 'La mia classe', said:
'If they send me back to my country,
I will kill myself'.

The vision of the movie 'La mia classe' [*My class*] by Daniele Gaglianone well expresses the violence of bureaucracy that disrupts the sense of community and belonging to a community, so painstakingly sought and achieved thanks to the composition of different languages and cultures, in the school class led by the teacher, performed by Valerio Mastrandrea.

The ferocity of the bureaucratic apparatus is not displayed in the conduct of the policemen—who merely execute an administrative measure, which they do not even appreciate in its innermost meaning—but is expressed in the objective breaking of the balance.

The teacher's sense of inadequacy, helpless in the face of the administrative order to expel his pupil from Italy because he does not have a residence permit, depicts all the impotence of those who do not have sufficient strength to oppose an act—which seems profoundly unjust to them—and who cannot find the right words to explain what they cannot understand, even though they fully grasp its meaning.

It may perhaps appear to be a semantic and metaphorical stretch, but it does not seem inappropriate to borrow that mixture of impotence, resignation and inadequacy also to the magistrate who finds him/herself having to apply criminal law to regulate a phenomenon as socially demanding as migration.

The legislator's duty to intervene in an attempt to regulate an event of transnational dimensions is certainly not disputed, but it must be understood what the prerequisite is that allows the use of criminal sanctions in the matter at hand.

Migration flows do not seem to have been managed by the instruments of ordinary Italian legislation (even though it has changed profoundly over the years), if only one considers that from

1977 to 2010 governments and parliaments of different political composition passed no less than ten amnesties.

Similarly, domestic provisions have not stopped the massacre of migrants to be returned or transferred to another EU Member State, which, according to official data, has resulted in over 10,000 deaths in the five-year period between 2017 and 2021 alone and, as far as the Mediterranean Sea is concerned, over 21,000 people have died or gone missing since 2015.

Criminal penalties, the most repressive of those provided for by the legal system, are invoked and adopted to punish certain behaviours that occasionally are not harmful *per se* (e.g. irregular migration) – yet, they can became dangerous whether they are committed by a large number of people, in a limited time context. Moreover, in the different hypothesis of rescue at sea, criminal penalties may be adopted to repress certain conducts, in theory oriented towards saving human lives (e.g., to help 'irregular' migrants).

Moreover, the tone of the debate is exasperated by the media hype and political dramatisation that is periodically offered on this topic.

From this standpoint, the simplistic recourse to criminal law is the repressive shortcut—moreover conceptually questionable and in fact ineffective—that a society uses to evade its political-constructive tasks. Practically, the penal *régime* involves at least three different aspects: (i) the condition of the 'foreigner' (i.e., 'non-Italian citizen'); (ii) the policy of pushing back 'irregular' migrants (due to their lack of documents proving their origin); (iii) migrants' forced detention in centres functionally oriented towards the identification of non-citizens.

Considering the first issue, it should be analysed how many rights a migrant is entitled to hold. Theoretically, there can be a full correspondence between a 'foreigner' and a 'citizen', bearing in mind the prohibition of all forms of discrimination laid down in Article 3 of the Italian Constitution (hereinafter: 'Const.') and according to a universalism-based conception of that constitutional provision that recalls the fundamental prerogatives of every human being, enshrined by the Universal Declaration of 1948. Or, conversely, one can assume that states might limit the rights of foreigners, distinguishing among 'persons' and 'non-persons'.

The first approach is upheld by both considerations of systematic interpretation—inasmuch as on the subject of human rights no distinction linked to citizenship appears to be acceptable—and the reference to constitutional principles on the inviolability of the rights of the person (Article 2 Const.), the task of the Republic to remove the obstacles that prevent the full development of the human person (Article 3(2) Const.), the recognition of the right to asylum (Article

10(3) Const.) and the recognition of the freedom to emigrate (Article 35(3) Const.).

They are not merely provisions recalling *theoretical* values – the right to asylum, for instance, has been made immediately enforceable by domestic case-law, when Law No. 132 of 2018 repealed the so-called 'humanitarian protection' and the related residence permit.

With regard to the condition of 'migrants', two rulings rendered by the Italian Constitutional Court (i.e. judgments no. 249 and no. 250 of 2010) still provide a first key to interpretation. The second judgement, in particular, set forth what follows: 'The management of immigration flows—which the State is undoubtedly responsible for (see Constitutional Court, Judgment no. 5 of 2004), in order to protect constitutional values and for the fulfilment of international obligations—necessarily involves the configuration of the violation of the rules in which that control is expressed as an illegal act. Determining the most appropriate sanctioning response to this offence, and in particular to establish whether it should have a criminal nature, rather than a purely administrative connotation (as it was before the entry into force of Law No. 94 of 2009), falls within the discretionary choices of the Parliament, which may well modulate differently over time the quality and level of repressive intervention in the field, in relation to the changing characteristics and dimensions of the migration phenomenon and the different significance of the needs related to it'.

The criminal control of migratory flows, the latter being considered as a legal interest, was therefore deemed constitutionally lawful, even when it entailed rules limiting the prerogatives of third-country nationals, provided that the balance was appropriate and reasonable.

Also, in the same judgment, the Italian Constitutional Court set forth that 'with regard to the principle of solidarity, it follows from the settled case-law of this Court—called upon to deal with the issue particularly in relation to the regulation of the prohibitions of expulsion and refoulement and of family reunification (Articles 19 and 29 of Legislative Decree No. 286 of 1998)—that, with regard to immigration issues, 'the reasons of human solidarity cannot be uphold outside of a correct balancing of the values at stake' (Constitutional Court, judgement no. 353 of 1997). Notably, the reasons of human solidarity are not per se at odds with the immigration rules provided for a smoot management of migration flows and an adequate reception and integration of foreigners' (Constitutional Court, ordonnances Nos. 192 and 44 of 2006, no. 217 of 2001) – this should happen in the context of a 'legislative framework [...] which regulates in a different way—even at a

constitutional level (Article 10(3) of the Constitution)—the entry and stay of foreigners in the country, depending on whether they are asylum seekers or refugees, or so-called 'economic migrants' (Constitutional Court, Judgment no. 5 of 2004; Constitutional Court, ordonnances no. 302 and no. 80 of 2004).

In this matter, therefore, the legislature enjoys a wide discretion in placing limits on the access of third-country nationals to the territory of a State, at the outcome of a balancing of the values in question: a discretion whose exercise may be reviewed by this Court only if the choices made are manifestly unreasonable (*ex plurimis*, Constitutional Court, judgments no. 148 of 2008, no. 361 of 2007, no. 224 and no. 206 of 2006), and which extends, according to what was previously observed, also to the side of the selection of the repressive instruments of the offences perpetrated. The reasons of solidarity find, in this sense, expression—as well as in the aforementioned regulation of the prohibitions of expulsion and rejection and of family reunification—in the applicability vis-à-vis irregular foreigners, of the regulations on refugee assistance and international protection, as per Legislative Decree No. 251 of 19th November 2007 (Implementation of Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted); expressly, the provision as per Article 10a(6) of Legislative Decree No. 286 of 1998 provides for the suspension of the criminal proceedings for the offence in question in the event of the submission of the relevant request and, in the event of its being granted, the pronouncement of a judgment of non-prosecution (Analogous judgment is also rendered in the case of the issuance of the residence permit in the hypotheses of Article 5(6) of the Legislative Decree No. 286 of 1998 – that is, when, even in the presence of the obstructing conditions indicated therein, there are 'serious reasons [...] of a humanitarian nature or resulting from constitutional or international obligations of the Italian State")'.

From a separate point of view, in judgement no. 249, the Italian Constitutional Court declared the constitutional unlawfulness of Article 61(11a) of the Criminal Code, which provided for the aggravating circumstance in respect of the offender who commits an offence 'while unlawfully on national territory', on the grounds that 'in the light of the above, it must be concluded that the substantive purpose underlying the provision at stake is a general and absolute presumption of greater dangerousness of the irregular immigrant, which is reflected in the punitive treatment of any violation of criminal law committed by him/her. This Court has already proclaimed that the same case of undue detention in the national

territory, which implies the specific failure to comply with an individualised expulsion order, is limited to punishing an illegal conduct and 'does not depend on an ascertained or presumed dangerousness of the responsible subjects' (Constitutional Court, judgment No. 22 of 2007). The violation of the rules on the control of migratory flows can be criminally sanctioned, as a result of a political choice of the legislator that cannot be censured in the review of constitutional legitimacy, but it cannot automatically and preventively introduce a judgement of dangerousness of the subject responsible, which must be the result of a particular assessment, to be carried out case by case, with regard to the concrete objective circumstances and personal subjective characteristics. Consistent with this orientation, this Court has had occasion to affirm that 'the lack of a permit to stay in the territory of the State [...] is not unequivocally symptomatic [...] of a particular social dangerousness' (Constitutional Court, Judgment no. 78 of 2007). Ultimately, the quality of "irregular" immigrant—which is acquired with the illegal entry into the Italian territory or with the detention after the expiry of the residence permit, also due to the culpable failure to renew the latter within the established time—becomes a "stigma", which serves as a premise for a differentiated criminal treatment of the subject, whose behaviour appears, in general and without reservations or distinctions, characterised by an accentuated antagonism towards legality. The qualities of the individual to be judged flow back into the general feature established in advance by law, on the basis of an absolute presumption, which identifies an "author" subject, always and in any case, to stricter treatment. This gives rise to a conflict between the discipline at stake and Article 25(2) of the Constitution, which places the actus reus at the basis of criminal liability and therefore strictly prescribes that a person must be punished for the conduct he has committed and not for his personal qualities. A principle which undoubtedly also applies in relation to the accidental elements of the offence. The provision in question ultimately wounds the principle of offensiveness, since it is not intended to configure the offending conduct as more seriously offensive with specific reference to the protected legal interest, but serves to connote a general and presumed negative quality of its author. Nor could it be objected that the quality of being an immigrant in an irregular condition still derives from an original transgressive conduct, which is useful to legitimise a legislative presumption of an absolute nature concerning the subjective dimension of the offence or the offender's capacity to commit crimes. In fact, it has already been seen how this conduct—previously punished only at the administrative level, today also at the criminal one—cannot affect all the subsequent conduct of the subject, even in the absence of any

link with the original transgression, distinguishing *in peius* the treatment of the offender compared to that provided by law for the generality of citizens'.

Ultimately, the Constitutional Court upheld the prohibition *in parte qua* of incriminating the conduct represented by mere disobedience, as any formulation of a 'criminal law of disobedience' is unacceptable.

Similarly, the Court of Justice of the European Union (CJEU), in its judgment of 28th April 2011 (*El Dridi*), found a contrast between the Return Directive 2008/115/EC and the provision in Article 14(5b) of Legislative Decree No. 286 of 1998 ('Consolidated Immigration Act' – TUI).

Notably, the Return Directive aims to strike a balance between the effectiveness of return procedures and the protection of a foreigners' fundamental rights, *in primis* their personal liberty. To that end, the CJEU has stated a detention measure—that is to say, 'the most serious constraining measure allowed under the Directive under a forced removal procedure'—is strictly regulated, 'in order to ensure observance of the fundamental rights of the thirdcountry nationals concerned', whereby the fixing of a mandatory maximum duration of detention serves 'the purpose of limiting the deprivation of third-country nationals' liberty in a situation of forced removal'.

The Court observed that Article 8(4) of Directive 2008/115/EC allows the State to take all coercive measures necessary to enforce the return decision by means of the alien's removal, even those of a criminal nature, 'aimed *inter alia* at dissuading those nationals from remaining illegally on those States' territory'. Yet, 'detention' as foreseen by Article 15 of the Directive is quite different from the criminal penalties of 'imprisonment' and 'arrest' provided for by domestic law.

Consequently, Member States may not introduce a detention penalty—such as that provided for in Article 14(5b) of Legislative Decree No. 286 of 1998—merely because a third-country national, after having been served with an order to leave the territory of a Member State, remains irregularly on the national territory. In fact, a custodial sentence, in addition to hindering the protection of the fundamental rights of individuals, leads to the result of delaying the execution of the return decision, thus jeopardising the achievement of the objective pursued by the Directive, namely the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals.

Following *El Dridi*, Italian Parliament passed Law No. 129 of 2011, though which the prison sentence at stake was replaced with a fine for all cases of irregular stay and entry, except for the case of irregular re-entry, whose penalty remains the prison sentence.

The migration phenomenon shall be examined not only individually, with regard to the condition of the individual, but also with reference to the flows of people who move *en masse* from their country of origin to their country of destination, whether temporary or permanent.

Collective relocation often takes place in tremendous situations, which put migrants' living conditions under severe strain.

In this respect, the national legislation, which until 2014 privileged rescue activities at sea within the Italian operation called *Mare nostrum*, then made a torsion towards the fight against irregular immigration, and then adopted a policy of outright rejection and contrast to the rescue activities of non-governmental organisations (NGOs), starting with the request—urged in 2017 by the Minister of the Interior at the time—for NGOs to enter into administrative agreements, condensed into a so-called 'code of conduct'.

The policy of *refoulement* continued in 2018 with the setting of an entry ban of civilian vessels into ports, and the creation of *ad hoc* administrative measures that, moreover, were sometimes annulled by administrative courts, as in the case of the NGO *Open Arms*, whose ban on landing was annulled by the Lazio Regional Administrative Court in August 2019.

Criminal law legislation was decisively refreshed in the two-year period 2018-2019 with the 'crimmigration policy' enshrined in Law Decrees No. 113 of 2018 and No. 53 of 2019. Despite the Italian government's change of policy orientation in September 2019, it was not until December 2020, with Law No. 173, that an attempt was made to reconcile respect for fundamental rights, including asylum rights, with the need to fight the aiding and abetting of irregular entry.

As regards, in particular, conduct aimed at facilitating the entry of foreigners into the national territory, the Constitutional Court, in its judgment no. 63 of 2022, in declaring the constitutional illegitimacy of Article 12(3)(d) of Legislative Decree No. 286 of 25th July 1998 ('TUI') limited to the words 'or by using international transport services or forged or altered documents or documents obtained illegally', expressly stated that 'From the "Martelli law" onwards, the main provision on which the fight against illegal immigration was based (i.e. Article 6(8) of Law Decree No. 416 of 1989, as converted, and then Article 12 TUI) has progressively distinguished—with ever greater clarity [...]—the punitive treatment of two distinct classes of conducts. On the one hand, aiding the illegal entry into the territory of the State vis-à-vis third-country nationals, for *lato sensu* altruistic purposes; on the other hand, the activity carried out, for economic purposes, by organised criminal groups vis-à-vis an ample number of migrants destined to be

illegally transported into the territory of the State. The higher penalty provided for the latter behaviour reflects the obvious distinction, on a criminological level, between two radically different phenomena, as this Court has already had occasion to point out in its judgment no. 331 of 2011.

In declaring constitutionally unlawful the presumption of adequacy of pre-trial detention in prison for all the hypotheses covered by Article 12 TUI, the Court observed that 'the criminal offences to which the presumption in question refers can take on the most disparate connotations – from the fact ascribable to an international association, rigidly structured and endowed with considerable means, which habitually speculates on the conditions of need of migrants, without having any scruple about exposing them to danger of life; to the illicit act committed *una tantum* by individuals or groups of individuals, acting for the most varied motivations, even simply solidarity in relation to their particular links with the facilitated migrants, the purpose of profit being provided for by law as a mere aggravating circumstance'.

Indeed, the two criminological 'types' are also kept quite distinct by the supranational sources that are binding on our country. The Palermo Protocol only targets the phenomenon of international migrant smuggling, which is mostly managed by large criminal organisations that make huge profits from this activity; whereas the European Union's "Facilitators Package" does indeed aim to strike at both phenomena (with respect to the objective of controlling migratory flows within, in particular, the Schengen area), but it calibrates its obligations of incrimination and punishment separately for the two types of conduct, reserving the obligation to adopt severe deprivation of liberty sanctions only for those attributable to international migrant smuggling.

Moreover, the position of the foreigner in the structure of these two macro-hypotheses appears quite different. Compared to "individual", or "altruistic" aiding and abetting, laid down in domestic law by Article 12(1) TUI, the third-country national whose unlawful entry is facilitated appears as a subject who is in substance the "beneficiary" of the unlawful conduct, his interests remaining in any case outside the focus of the protection provided by the provision, which is entirely positioned on the legal interest of the smooth management of migration flows. With respect, on the other hand, to the various aggravated hypotheses provided for by Article 12(3), (3a) and (3b) TUI, the migrant undoubtedly becomes the holder of the other legal interest protected from time to time, constituting first and foremost the 'victim' of the criminal conduct: exposed at times to danger to his life or safety, at times to inhuman and degrading treatment, at times to the risk of being sent into

prostitution or exploited in labour activities, and in any case—in the ordinary case in which the conduct is carried out with a view to making a profit—forced to shell out large sums of money in exchange for help in crossing the border.

Thus, the parity for punitive purposes of the two forms of conduct at stake before this Court—the use of international transport services, and the use of forged, altered or illegally obtained documents—with numerous other forms of conduct consistent with the criminal type of international migrant smuggling constitutes a manifestly unreasonable legislative choice. In fact, none of the conducts now under consideration, when carried out for non-profit purposes, are plausibly indicative of the agent's involvement in an international migrant smuggling activity, being, on the other hand, ordinarily compatible with situations in which the third-country national is helped to enter Italy illegally for purposes far removed from those of international trafficking: this was already emphasised in Judgment no. 311 of 2011. Situations, the latter, emblematically exemplified by the case at issue in these proceedings, in which the protagonist is a woman accused of having illegally accompanied to Italy her daughter and granddaughter, both minors'.

With regard to rescue at sea, the ECtHR, in its judgment of 23rd February 2012 in the *Hirsi Jamaa and Others v. Italy* case, criticized the unlawfulness of push backs carried out in Libya directly by Italian naval forces. Notably, the Court recalled that the Parliamentary Assembly of the Council of Europe (PACE), when conducting maritime border surveillance operations, whether in the context of preventing smuggling and trafficking in human beings or in connection with border management, urged Member States to '9.1. fulfil without exception and without delay their obligation to save people in distress at sea; [...] 9.3. guarantee for all intercepted persons humane treatment and systematic respect for their human rights, including the principle of non-refoulement, regardless of whether interception measures are implemented within their own territorial waters, those of another State on the basis of an ad hoc bilateral agreement, or on the high seas; 9.4. refrain from any practices that might be tantamount to direct or indirect refoulement, including on the high seas, in keeping with the UNHCR's interpretation of the extraterritorial application of that principle and with the relevant judgments of the European Court of Human Rights; 9.5. carry out as a priority action the swift disembarkation of rescued persons to a 'place of safety' and interpret a 'place of safety' as meaning a place which can meet the immediate needs of those disembarked and in no way jeopardises their fundamental rights, since the notion of 'safety' extends beyond mere protection from physical danger and must also take into account the

fundamental rights dimension of the proposed place of disembarkation; [...] 9.8. ensure that the placement in a detention facility of those intercepted – always excluding minors and vulnerable categories – regardless of their status, is authorised by the judicial authorities and occurs only where necessary and on grounds prescribed by law, that there is no other suitable alternative and that such placement conforms to the minimum standards and principles set forth in Assembly Resolution 1707 (2010) on the detention of asylum-seekers and irregular migrants in Europe; 9.9. suspend any bilateral agreements they may have concluded with third States if the human rights of those intercepted are not appropriately guaranteed therein, particularly the right of access to an asylum procedure, and wherever these might be tantamount to a violation of the principle of non-refoulement, and conclude new bilateral agreements specifically containing such human rights guarantees and measures for their regular and effective monitoring'.

The problem of so-called *respingimenti per procura* [lit., 'delegated refusals of entry'] carried out, for instance, by the Libyan coast guard, remains unresolved.

The rescue operation is followed by the reception and then 'classification' of the migrants in the areas of destination, which do not necessarily coincide with those of disembarkation.

Even for what concerns the Identification and Removal Centers (*Centri di Identificazione ed Espulsione* – 'CIE'), established by Law Decree No. 92 of 2008 and then labelled Centers for Stay and Removal (*Centri di Permanenza per i Rimpatri* – 'CPR') as per Law Decree No. 13 of 2017, there are problems of legal framing. Although their nature is essentially administrative, in practice they turn out to be places of detention. On this point, the ECtHR has recalled since 1976 in *Engel*—and reiterated in 2014 in *Grande Stevens*—that in order to speak of a "criminal charge", it is sufficient, beyond the formal designation, that the offence in question is of a criminal nature for the purposes of the ECHR, or that it has exposed the person concerned to a sanction which, by its nature and seriousness, generally falls within the scope of criminal matters. This does not preclude the adoption of a cumulative approach if the separate analysis of each criterion does not lead to a clear conclusion as to the existence of a criminal charge, but there remains the need to avoid adopting administrative sanctions which turn out to be penalties to be imposed only after a criminal trial.

Having drawn up this necessarily very brief and concise balance sheet, it remains to address the question of prospects, which is one of the main themes of this conference.

These can be seen, in the light of EU law, in the need to save lives

at sea, in the reduction of incentives for irregular migration, in a strong and common asylum policy.

On the other hand, various commentators on the subject have reiterated that every fleeing migrant is a sign of an unresolved global problem and that the massacres in the Mediterranean risk constituting a crime against humanity.

Within this framework, it is clear that criminal policy is necessarily marginal and residual compared to far-reaching integration policies. The same legislative technique should reject the emergency logic and move in a prospective context, capable of grasping the understandable inconveniences caused by integration, which is not easy, and at the same time knowing how to control and manage them.

Unfortunately, the grim scenario of everyday life, embodied in a language that is often "crude" in its treatment of this difficult subject and reminiscent of war and apocalyptic scenarios, makes the whole thing seem like a fairy-tale dream.

THE PRISONS OMBUDSMAN'S STANDPOINT

LAURA CESARIS

1. I would like to thank Professor Coppetta for the invitation and for reminding us of the common root that has united us for so many years: the teaching of Professor Vittorio Grevi, to whom—although he passed away almost twelve years ago—we have remained attached and deeply indebted, particularly for the lessons he taught us on the subject of personal freedom and rights that are often neglected or worse trampled upon.

Before talking about my experience as a guardian of persons deprived of their liberty in the Province of Pavia, I think it is appropriate to make a preliminary remark on the role, functions and instruments of the territorial guardians of persons deprived of their liberty, their subjective positions and, at the same time, from the observation that the supervisory jurisdiction was (and still is) unable to fulfil one of the fundamental tasks assigned to it, namely that of supervising respect for fundamental freedoms, which do not cease with the deprivation of liberty, as the Italian Constitutional Court has repeatedly pointed out. This is neither the place nor the time to analyse the reasons for this lack of protection. Rather, it is worth pointing out that the observation of this lack of protection has convinced practitioners and academics of the need to establish, alongside the supervisory magistracy, an "ombudsman", an impartial figure who is familiar with the problems of prisoners and the various situations in which they find themselves, and who can offer prompt and effective protection.

Moreover, it should be recalled that international conventions were also pushing in this direction: one may recall the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, [1] or the Optional Protocol to the UN

[1] The Convention was adopted by the Council of Europe in 1987 with a preventive aim and established a Committee for the Prevention of Torture (CPT), which periodically visits prisons and places of detention in the Contracting States.

Convention Against Torture,[2] which provides in Article 1 for the establishment of 'independent national mechanisms for the prevention of torture at the domestic level' (Article 17), the European Union Directive 2008/115/EC (whose Article 8(6) provides for the establishment of an independent body to monitor forced returns) or the European Prison Rules (2006), which in Rule 9 emphasise the need to provide for 'qualified and experienced inspectors' appointed by a competent authority and put in a position to regularly inspect 'penitentiary institutions and services' or even the UN Standard Minimum Rules for the Treatment of Prisoners revised in 2015, which entrust inspections to 'body independent of the prison administration, which may include competent international or regional bodies' (Rule 83).

In Italy, the parliamentary process for the recognition of this third figure has been long and conflicting: the first draft laws date back to the late 1990s, but in the meantime 'guarantors' (this is the term that has prevailed) have been appointed on the territory at the local level gradually more and more widespread (at the regional, provincial, municipal level) and recognised only with Law Decree No. 207 of 2008, converted in Law No. 14 of 2009, until arriving precisely under the pressure of the ECtHR ruling *Torreggiani v. Italy* of 2013 to the institution by Law Decree No. 146 of 2013 converted in Law No. 10 of 2014, of a 'national guarantor of the rights of persons deprived of their liberty'.[3] It should be noted that the choice made by the Italian Parliament (like that of France and Germany) was in the sense of creating an *ad hoc* independent body, while other countries have attributed the mandate indicated by the Optional Protocol against Torture to the already existing ombudsmen (e.g. Portugal, whose ombudsman is the *Provedor de justiça* provided for by the Portuguese Constitution itself, which is now also the 'independent national mechanism for the prevention of torture at the domestic level').

The territorial guarantors were appointed gradually over time, as already mentioned, and their institution predates the national guardian; in order to gain visibility and strength, they have joined together in a *Coordination of territorial guarantors of persons deprived of their liberty*, which includes provincial and municipal

[2] Adopted on 18th December 2002, it entered into force in 2006.

[3] Formula that was amended (by Law Decree No. 130 of 2020, converted into Law No. 173 of 2020) by dropping the adjective 'detained' and the disjunctive conjunction "or", consistent with the definition of deprivation of liberty given in the United Nations Optional Protocol to the 2002 Convention for the Prevention of Torture, ratified by Italy in 2012.

ombudsmen and is therefore the institutional representative body of the guarantors appointed by local authorities.

Alongside the Coordination, the National Conference of Regional Guarantors operates, which—as its name clearly indicates—brings together all these actors, plans initiatives at a national level aimed at detecting problems and critical issues in the protection of persons, identifying common intervention strategies, sharing experiences and solutions or good practices.

2. It is useful to define who the guarantor is: it has already been mentioned that it is a third party, external to the prison administration, independent from it and also from other administrations (for example, the local health authorities, which are one of the most frequently involved administrations).

However, concerns have been expressed about the nature of the independence: the territorial guarantor is appointed by the municipal, provincial or regional council, and its term of office often corresponds to that of the council; or it is appointed by the President of the Region (as in Sicily, for example): these appointment mechanisms expose it to the risk of interference and political influence.

The national guarantor is appointed 'after deliberation by the Council of Ministers, by decree of the President of the Republic, after consulting the competent parliamentary commissions'. It is supposed to be established at the Ministry of Justice, and the resources are to be made available by the minister, the staff is to be from the same ministry. These elements have given rise to many perplexities and criticisms, which have been rejected by the current national guarantor.

The national guarantor consists of a panel: a president, Professor Mauro Palma and the other two members, lawyer Emilia Rossi and Dr Daniela De Robert.

3. As far as tools the guarantors have, they are:

- the 'visit';
- the 'request' for information and documents from the administrations responsible for the penitentiary structures;
- 'interviews', which may be subject to 'visual and non-auditory control by the penitentiary staff' in accordance with the provisions of Article 18 of the Penitentiary Legal Framework, in order to ensure the necessary confidentiality of the interviews themselves.

The visit, provided for in Article 67 lit. l-*bis* of the Penitentiary Legal Framework, consists in the possibility for the guarantor—whether territorial or national—to enter, without prior notice and without authorisation, adult and juvenile penitentiary institutions, and the security rooms of the Carabinieri, Police and

Guardia di Finanza barracks. These places constitute the so-called 'criminal intervention area'. The other areas of intervention concern migrants (for instance, detention centres for repatriation, hotspots, 'suitable' and border premises for the detention of migrants); and health (psychiatric diagnostic and treatment services, nursing homes for the elderly or disabled).

While there is no doubt that the mandate of the national guarantor extends to these areas, thereby fulfilling Article 7 of the Protocol, some doubts may arise in relation to the territorial guarantors. The solution to these doubts and perplexities can be found in the founding regulations of the individual guarantors. In the regulation establishing the prison ombudsman of the province of Pavia, for example, there is a reference to both 'persons deprived of their liberty' and 'persons subjected to measures restricting their liberty': this implies the possibility of entering any place of deprivation of liberty, including detention centres for migrants.

It is worth highlighting a progressive extension of the competence of the territorial guarantors with regard to the protection of the rights of persons restricted in their personal liberty, and therefore of persons interned in residences for the execution of security measures (REMS), of those present in detention centres for repatriation (CPR), and also of those guests in psychiatric diagnostic and treatment services (SPDC) and in nursing homes (RSA), both as a result of sector regulations and as a result of the analogical extension of the competences of the national guarantor.

In support of what has now been observed, it is worth recalling the Italian Constitutional Court's ruling on detention centres, according to which 'if one looks at the content, holding is at least to be traced back to the "other restrictions on personal liberty" mentioned in Article 13 of the Constitution'. [4]

It seemed appropriate to me to dwell on this point in view of what lawyer Trucco said in his speech, who described places of administrative detention as 'essentially impenetrable'.

Having clarified this point, it is appropriate to consider the content of the visit, which does not only consist of an inspection of the premises, but also includes the possibility of conducting interviews in order to obtain clarifications on what has been seen (or not seen), as well as the possibility of retrieving useful documents.

Over time, the Department of Penitentiary Administration has

[4] See Const. Court, 22nd March 2001, no. 105, which declared the question of the constitutional legitimacy of Article 13(4)-(5)-(6) and of Article 14(4), of Legislative Decree No. 286 of 25th July 1998 to be unfounded.

issued various circulars aimed at regulating visits and the related procedures, and recently the legislator has introduced very stringent limits with reference to the institutes or sections intended to host persons subjected to the differentiated regime *in peius* referred to in Article 41a (2) of the Penitentiary Legal Framework, called hard prison.

While the national guarantor may have access without any limitation in the special sections and hold confidential visual interviews without time restrictions (Article 41a paragraph 2-*quater*.1 of the Penitentiary Legal Framework), the regional guarantors, on the other hand, may have access to visit and conduct visual interviews exclusively by video recording; the territorial guarantors (municipal, provincial or metropolitan areas) are allowed access 'exclusively on accompanied visits to the institutions where inmates are detained' under the differentiated regime and only to verify their living conditions, while visual interviews are excluded (Article 41a paragraph 2-*quater*.3 of the Penitentiary Legal Framework). We will not comment on that provision in this paper, but one cannot fail to point out a progressive delimitation of the powers and attributions of the local guarantors: [5] it would suffice to recall that Article 18 of the Penitentiary Legal Framework—as reformulated by Legislative Decree No. 123 of 2nd October 2018—states the right of prisoners to 'have interviews and correspondence with the guarantors of prisoners' rights' (paragraph 2). This formulation with the use of the plural, and no longer the singular 'guarantor' recognises the right to an interview with all guarantors whatever their denomination. Specifically, the provision of paragraph 2c.3 of the Penitentiary Legal Framework, which refers generically to the 'institutes where they are detained' and not only to the special sections, could be understood in a broad sense, so as to include in their entirety the institutes in which special sections are set up for the regime pursuant to Article 41a(2) of the Penitentiary Legal Framework and thus determine a compression of the attributions of the local guarantors by preventing them from carrying out their mandate with respect to the rest of the persons detained in that institute.

As already mentioned, another tool that guarantors can use is the request for information and documentation, which is addressed not only to the prison administration but also to other administrations,

[5] For further details see L. CESARIS, La *conversione in legge del d.l. n. 28 del 2020 con legge n. 70 del 2020 non elide i dubbi e le perplessità sulle scelte del legislatore*, in *Giur. pen. (web)*, 2010, f. 7-8.

e.g. the local health authorities, hospitals, or the provincial school office.

The most direct means of acquaintance are interviews with persons deprived of their liberty: interviews, which are subject only to visual and not to auditory control by prison police personnel, as provided for in Article 18 of the Penitentiary Legal Framework. And this, of course, in order to ensure the necessary confidentiality of the interview.

The guarantor may receive, in accordance with Article 35 of the Penitentiary Legal Framework, applications and complaints in a sealed envelope, which should be marked "confidential" on the outside.

Awareness of the guarantor, and thus the activation of interventions, therefore, takes place through interviews, letters, oral or written reports, which come from inmates or their relatives or other people (e.g. volunteers, prisons' employee or even other persons).

Complaints may concern the entire prison universe: the absence of heating in sleeping rooms and common rooms, the lack of hot water in showers, the absence of running water in sleeping rooms, poor hygienic conditions, poor quality or insufficient food, fears for one's health or specific complaints concerning one's state of health.

The shortage of health personnel (which, it should be remembered, depends on local health authorities) leads to inadequate care for detainees, and limited assistance, even at a specialist level. The Sars-CoV-2 pandemic has had an even greater impact on access times to hospital facilities, on the performance of examinations, especially instrumental ones, as well as on hospitalisations and surgeries. And in this regard, the situation for inmates of the Pavia prison is particularly difficult, as the Pavia Polyclinic, since the Department of Emergency and Acceptance (DEA) was established in 2013, has no space dedicated to the hospitalisation of inmates. This choice has led to very serious problems, especially in the 2020-2021 period, because in the event of the need for hospitalisation, one has to resort to the protected medicine facility of the San Paolo hospital in Milan, which is already burdened with all the demands of the Milan area penitentiaries.

The health issue is particularly serious and heartfelt, not least because of the spread of certain diseases in prisons, such as tuberculosis, which was thought to be extinct in Italy thanks to vaccinations, as well as hepatitis. Moreover, concerning health, the problem of vaccinations deserves to be mentioned, which was very much felt during the pandemic, because there was a strong resistance to vaccination, specifically among people from Eastern European countries.

The issue of re-educational treatment, and more specifically the failure or delay in drafting treatment programmes, may also be the subject of reports.

It seems very useful that, for the purposes of ascertaining what has been complained of, the guarantor tries to draw information from different and reliable sources, and this also for the purposes of deciding what action to take.

I close this introduction on the figure of the guarantor to speak now about my experience.

4. As already mentioned, I am a provincial guarantor, appointed in July 2020 by the Provincial Council, in service since September 2020 after the handover from the predecessor guarantor. The lockdown due to the COVID-19 pandemic has significantly affected my activity.

I am in charge of three penitentiary institutions: two prisons for less serious offences (in Pavia and Voghera), and a prison for serious offences in Vigevano.

As of 2nd May 2022, the Pavia penitentiary facility housed 579 persons compared to the regulatory capacity of 518 persons: [6] the capacity—it should be recalled—is determined by the Department of Penitentiary Administration, and the management of the institution can have very little influence on the attendance, except by reporting the criticalities that gradually appear.

There were 327 foreigners on 2nd May, well above 50% of those present, and the figure has remained constant over time. It should be noted that it is significantly higher than the national index, which stood at just over 30.0% in 2021, but it is not surprising when one remembers that Lombardy is one of the regions with the highest presence of foreign detainees.

Another fact deserves attention, namely the particularly high number of people who have been definitively sentenced, around 60% of the total number of people present, and these include life prisoners.

Among the foreigners, 217 have been condemned with a final sentence, 14 are in mixed positions and 96 are defendants.

Approximately one third of the total number of those present are followed by the territorial addiction service (SERT).

It should also be pointed out that of the 579 inmates a high percentage were convicted of sexual offences, apart from the so-

[6] Presences tend to increase—and by a lot—in the summer months; in 2021 there were well over 600, and even as of 31st August 2022 there were 615, of whom 352 were foreigners. See statistics compiled by the Ministry of Justice.

called abusers, i.e. those who violated Articles 572 and 612 of the Italian Criminal Code: these are 63, 37 of whom are foreigners.

The total number of sex offenders considered is 215, of whom 164 are foreigners and more specifically for violation of Article 609-*bis* of the Italian Criminal Code the inmates are 189 (of which 73 Italians, 116 foreigners), whereas for violation of Article 609-*quater* of the Italian Criminal Code these are 26 (of which 15 Italians and 11 foreigners).

Thus, the district house is *de facto* a facility largely dedicated to 'final imprisonment', betraying its original purpose as an institution intended for short periods of detention in prison as pre-trial detention and for the execution of sentences of less than five years (or with a residual sentence of less than five years).

The Pavia prison is divided into two pavilions: one dating back to the 1990s (rather decadent), and a more recent one, opened in 2013. The latter is intended for the so-called protected detainees: this expression includes, in addition to sex offenders, those who need protection because of the position they held when they were free (e.g. law enforcement officers, priests) or because they have come out of a protection programme, but still require care and attention to safeguard their integrity.

It must also be pointed out that the facility houses a section for 'fragile' patients, i.e. people who have become mentally ill during their pre-trial detention or sentence (about 10, including some foreigners). This is the mental health section, currently composed of 12 spots, which the Dap would like to double, to about 22-24 spots.

5. The Voghera prison has a small "medium security" section and a very crowded "high security" section, intended for exponents of criminal organisations, and for this reason there are very few foreigners (34 out of 341).

The Vigevano detention centre has a high presence of foreigners: 194 out of 375 detainees, well above 50%, and the same applies as for the Pavia detention centre. There is also a women's section, which houses 73 women: about half of them are classified as high security, and they are mostly Camorra members. There are few foreign women.

6. Interviews with foreigners are not easy: apart from the fact that they have difficulty relating to a woman (but this sometimes also concerns Italians), the greatest problem relates to language comprehension, and in this regard it should be pointed out that the request for an interview or the report sent to the province's mailbox is often written by the 'scribe', so that the interview, which should serve to acquire more information, is then stalled, leaving me with many questions to which I attempt to give an answer by trying to

get useful information from the operators, particularly the educators, with great caution so as not to compromise the subject's position.

I also find it difficult for foreign interlocutors to understand the mechanisms of the process and in general the Italian regulations that might affect them. One of the problems that recurs periodically is the one concerning the allocations of housing managed by the Lombardy Housing Company (ALER) (i.e., social housing). They find it hard to understand that incarceration and conviction entails the loss of housing.

The problem of language comprehension and consequently of the school offer, of the possibility of attending Italian language courses, emerges, which unfortunately is not guaranteed to all those who have expressed the desire to access training courses. However, the number of aspirants is not very high.

The grievances concern aspects of prison life and are often common to Italians and foreigners: the quality of the food (but I have never received any complaints so far about the food not conforming to religious dictates), the hygienic conditions of the sleeping quarters, the heating, etc.

At the beginning of my term of office, it struck me that those who come from reception centres expect free distribution of telephone cards and cigarettes. Consequently, they expect material assistance from me, but since I am neither a social worker nor a 'lady of St Vincent' I do not fulfil these requests, especially as I do not have a budget for these activities.

In the most serious cases of material difficulties, I report the situation to the prison chaplain, Caritas and volunteers so that, if possible, they can provide assistance.

Requests for interview and intervention also concern, very often, the issue of documents, which should be taken care of by the network agent, a liaison figure between the prison institution and the territory (inside the prison, in collaboration with the operators, prisoners are in fact met, right from the first reception, to know their specific situation and identify their needs). Unfortunately, in Pavia the network agent is only one, so that his activity ends up being not very effective.

I do not notice any difference in the requests depending on whether inmates are detained for sex offences or other type of crimes. I note that mostly requests for an interview and for my intervention come from persons detained for common offences and from drug addicts. The latter mainly request interventions by the SERT, whose operators are in short supply. And in this regard, relations with ASST (territorial social health authority) are not easy.

Interacting with sex offenders and abusers is a different problem, as they often find it difficult to accept the conviction and require

interventions concerning their family situation, interviews with their children, which are sometimes precluded, sometimes take place in the presence of social workers.

The relationship becomes more difficult with foreign sex offenders, who for reasons of culture, or values of their society, tend to maintain a denialist attitude. The reference to the founding values of Italian society, but most importantly understanding of these values appear of fundamental importance for both foreign and Italian offenders.

There is a problem, which was mentioned by lawyer Trucco, and on which unfortunately I am unable to make much of an impact: foreigners tend to commit acts of self-harm as a means of protest or as an opportunity to draw attention to themselves, to their own problems (sometimes of little relevance), or even as blackmail. From time to time, there is a very clear disproportion between the self-inflicted wounds and the issue for which they have 'cut themselves', to use prison jargon.

The problem in Pavia (and also in the other two institutes) is very serious and widespread: in this respect, it has been observed that in prison facilities with a higher overcrowding rate the number of self-harm episodes is directly proportional. What is worrying, as I mentioned, is not only the disproportion, but also the widespread recourse to these acts even among Italian inmates.

Acts of self-harm include suicide: in Pavia last year between 25th October and 29th November three people took their own lives. [7]

I carry a great weight within me, for not having understood the gravity of the situation, for not having found words of comfort. I was unaware of the situation, of the third person's state of mind. He was a foreigner, who was very close to the 'end of his sentence' in early 2023. And he probably saw nothing in front of him/her and so at a certain point, without a family unit, without points of reference outside, he thought that death might be the only solution.

I do not want to end on such negative notes and I will mention an initiative of the territorial guarantors, which I think may be interesting: it is aimed at collecting information (through a prepared form) on the various projects launched in prison establishments specifically involving foreign prisoners, in order to ascertain the state of the art and especially to verify the replicability of such projects.

This initiative was only recently launched, so I can only provide

[7] By the time this intervention was revised, the number of suicides in the Pavia prison had worsened: in June and July 2022, two more people, Italians, had taken their own lives.

the data from the forms filled in by the legal-pedagogical officers of the three institutes in the province of Pavia.

Precisely, because of the high presence of foreigners, there are more initiatives in the Pavia institute: two religious confrontation projects aimed at supporting and integrating foreigners, one a follow-up to the previous one. And Italian language learning projects have been launched, albeit with difficulty, in the face of a lack of cooperation and sensitivity on the part of the provincial school office. A desk was also opened for the various bureaucratic procedures (residence permits, identity documents), with an Arab-speaking cultural mediator, a Chinese-speaking mediator, a Nigerian-speaking mediator and a Senegalese-speaking mediator.

In the Voghera prison only A1 level Italian language learning courses (i.e. elementary courses in understanding and using Italian) were activated.

In the Vigevano prison, on the contrary, no initiative specifically addressed to foreigners was started, apart from the literacy courses: the motivation expressed by the management is to be found 'in a perspective of integration and sharing' and in the intention 'not to increase cultural differences but to make them become the heritage of all'.

It is easy to see, from these albeit brief outlines, very different approaches and equally different initiatives, which highlight the difficulties of dealing with foreigners: as mentioned above, sharing experiences could be not only interesting but above all useful both for a more constructive approach to foreigners and for the training of prison staff.

THE FILM DIRECTOR'S STANDPOINT

DANIELE GAGLIANONE

I am happy and intrigued to be here, even if I feel unease as I have a fear that this context could be both the best and the worst place to testify to my experience, to tell what I have done and what I try to continue doing. My perspective is not as solid as the perspectives I have just heard. I am not a specialist in this field, nor do I have a legal background. I am a citizen, a human being who goes through his own time and tries to understand it and, in doing so, also tries to understand him/herself.

After watching the film 'My Class', some reflections emerged this morning and it is from those reflections that I would like to start again. My speech, forgive me, will not be as well structured as the previous ones, partly because I cannot help but be influenced by what I heard today and which in some way connects with my film and with the path that led to the making of the film as you have seen it.

The impression I get after listening to the speeches and testimonies of the lawyer Trucco, the magistrate Sottani, and the guarantor Cesaris is that of living inside the dissociated democracy of a state that, if it were an individual, would be declared clinically bipolar.

In this sense, as a storyteller, I am proud to have made a film like 'My Class', which is also a reflection on the schizophrenic nature of our state of affairs, of our increasingly self-styled democracy. As a citizen, on the other hand, having 'hit the jackpot' as an author does me no favours at all.

'My Class' tells not only the choral story of a group of people but also tells an allegory of a social space. The classroom, also understood as the actual physical space, and the set become the metaphor of a social space that defines itself with the rules of democracy. These, however, enter deeply into crisis when faced with physiologically borderline situations between the 'inside' and the 'outside'. As Dr Sottani mentioned earlier, quoting the Italian Constitution, all citizens have equal rights: but are people always considered citizens? If person and citizen are considered synonymous by politics and the

law, everything is (almost) fine; but if this is not the case, then there are boundaries that are always constantly subject to negotiation. And it is a boundary that is literally played out on people's bodies. The lives of many can change radically if this boundary moves a little in a direction or in another...

Let us think of a dramatic example where this has happened and continues to happen and where there is nothing allegorical but very concrete: the border between Ukrainian refugees and Syrian refugees in Poland. That border is not an established one, it is a changing border. How much can societies that are founded on democratic principles, and that base the narrative they make of themselves on these principles, move those borders with such ease?

We are constantly faced with this dichotomy, which is already an aberration, between 'us' and 'them', as if this dichotomy really existed and was not the product of a cultural and political choice. The situation is made even more complex by the fact that linguistically, we just cannot get away from this dichotomy! The latter seems to have to exist and we are prisoners of it. I believe that in the end the only real discriminator is between those who are poor and those who are not.

Years ago, with 'My Class' I was invited to the Ancona prison for a screening and talking to the organiser of the meeting about the situation of prisons in Italy, at one point she asked me: 'In your opinion, in a prison population [pardon the imprecision] of more or less 45,000 people, how many of them are currently in prison for financial crimes?' In a country like Italy you had, and continue to have, the feeling that financial crime is particularly recurrent. I could not give a specific number and she replied: 'Eleven'. Then I asked: '11%?'. She repeated: 'Eleven'. That is, 11 people out of 45,000.

As someone who tries to tell stories, who tries through these stories to bring out the contradictions within society, when faced with a situation like this I say to myself: 'Oh God, where are we?'. Let us think of another unfortunately paradigmatic issue that lawyer Trucco mentioned, namely the institution of administrative detention that was created in Italy in 1998. It is a total legal aberration, in a country where there is a Constitution that declares that all citizens have equal rights, but in an Orwellian way: the same country decides, when faced with people whose only fault is that they exist without a document but have committed no crime, to deprive them of their liberty by changing the name of the 'detention' to call it CPR or CIE or who knows what. Back to the boundary being moved: person and citizen are not synonymous.

I was struck by the fact that Dr Sottani experienced the film in such a personal way, translating it into his profession as a magistrate who has to make decisions that affect the lives of others. I will tell

you briefly how the final monologue of the movie came about: what Valerio Mastandrea says is something that happened to me in 1998, one night in Sarajevo. Not that I had forgotten about it, but in 2013 while I was shooting the film, the story of this dog came flooding back. That memory did not let me sleep for two or three nights during the filming period and I said to myself: 'There must be a reason why this dog asks to be told so insistently'.

Thus, on the penultimate day of work, during my lunch break, I wrote that monologue, had Valerio Mastandrea read it, and we decided to shoot it. That episode recounts the schizophrenia of this state of affairs, which not only dwells in those who knowingly choose to discriminate but which pervades the lives of everyone, even those within our 'privileged' world who would not want these boundaries.

In a globalised world, we find ourselves living with the splinters of a total war that is fought even when it does not seem to touch us personally. Every now and then, however, a splash of the mud of this war reaches us. I actually believe that this mud is in danger of engulfing us like a flood that is perceived as sudden and unexpected but which has actually been simmering for some time under a veneer of apparent serenity. We think not only of the consequences of the ongoing war, but we think of the climate and environmental crisis, and we think that perhaps the migrations, the real ones, because of all this, have yet to begin. In the face of all this, how long will we be able to cross this minefield where, for now, the mines only explode for others and not for us?

Future generations, when and if things get better, will ask us: but how did you live? How did you go on living every day while thousands of people were dying at sea? Not because nature was Leopardi-like indifferent and evil, but as a consequence of a legal system, of a political system, not only Italian, but European?

If there is *Mare Nostrum* I have less chance of dying; if there is no *Mare Nostrum*, I almost certainly risk dying. How long will this situation last? Europe, the bearer of certain values and principles, the bastion of democracy and freedom, finances the Croatian police on the border with Bosnia, who in fact torture those who try to enter Europe, attempting to exercise their right to seek asylum, a right promoted and recognised by the European legal framework.

That is why it is so important to reflect on immigration, because it is a way of reflecting on ourselves, on what the state of affairs is in our world, always in the light of this dichotomy that is absurd but that is unavoidable to use.

In another documentary of mine, titled 'Where to Be', four women from different backgrounds, of different ages, of different geographical origins, try to give an answer to the issue of migration. In their actions,

by dealing with migrants, they implicitly propose a new model of society, a new way of being together. Two of the protagonists of my documentary are cyclically subjected to legal proceedings that fortunately end in nothing, accused basically of solidarity, obviously in the guise of other crimes, because they cannot be accused directly of any guilt, since the crime of solidarity does not yet exist. They are accused of things that are patently ridiculous and grotesque, given their limpid intentions, such as aiding and abetting illegal immigration for profit or things of that nature.

Punctually, the accusations are all debunked, but the fact remains that this is an intimidating retaliation; we are talking about people like Lorena Fornasir, a retired neuropsychiatrist, who every day at 5 p.m. in the square in front of Trieste station, together with her husband, treats the wounds of people from Afghanistan and Pakistan who survived torture by the Croatian police during the Balkan route. She goes there and bandages their feet, cleans their wounds, disinfects them.

I do not know if our work as storytellers can be of any use: can trying to tell stories help people starting from more professionally structured perspectives to understand what else can be done and where to stand? I hope so. Surely it is necessary to try to change direction.

This volume brings together the contributions of the participants in the research project 'Immigration, personal freedom and fundamental rights', sponsored by the Faculty of Law of the University of Urbino 'Carlo Bo'. The discipline of fundamental rights for immigrants, which is extremely broad and fragmented, is the subject of reflection from different perspectives. Firstly, the research focuses on European legislation, in particular the European Convention on Human Rights (as interpreted by the European Court of Human Rights), the EU Charter of Fundamental Rights (as interpreted by the Court of Justice of the European Union) and the relevant EU directives. From the European legal framework, the study moves to the Italian legal system, starting with an analysis of the Italian Constitution. The Constitution guarantees non-citizens rights similar to those of citizens in criminal and judicial matters, particularly in terms of individual liberty, access to justice and legal representation, including the right to language assistance, which is the focus of this research. However, it is the domestic legislation that presents a worrying scenario, both because of its lack of conformity with the European framework and because of significant shortcomings, particularly in relation to individual liberty. In particular, administrative detention of foreigners is a measure that falls outside the criminal justice system, is often characterised by inadequate legal safeguards and is used as a means of controlling and reducing migration. In light of the problematic legal framework examined by the Authors, interpretive solutions are proposed and recommendations for reform are made to ensure greater respect for the fundamental rights of all individuals.

Maria Grazia Coppetta, Associate Professor of Criminal Procedure at the University of Urbino 'Carlo Bo', has published '*La riparazione per ingiusta detenzione*' (CEDAM) and many minor writings on the right to personal liberty in criminal proceedings, criminal execution and juvenile criminal justice.

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