IMMIGRATION, PERSONAL LIBERTY, FUNDAMENTAL RIGHTS

edited by
MARIA GRAZIA COPPETTA

with the assistance of
LORENZO BERNARDINI

Wolters Kluwer

CEDAM

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FUNDAMENTAL RIGHTS AND FOREIGNERS: A *VEXATA QUAESTIO*

GIULIASERENA STEGHER

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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.