IMMIGRATION, PERSONAL LIBERTY, FUNDAMENTAL RIGHTS

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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*

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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'

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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

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

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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

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).

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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

[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,

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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

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).

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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]

[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.

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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.

[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.

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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).

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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

[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).

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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

[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

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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]

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

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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]

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.

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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.

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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.

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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 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)'.

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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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[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.

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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.

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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.

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