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Pursuing Public Insecurity? The New Italian Decree on "Immigration and Security"

Abstract

In December 2018, the Italian Parliament definitely confirmed the so-called "Immigration and Security" Decree, which deeply reformed the regulation of Migration and Integration. The present work aims at summarizing the innovations introduced by the new Decree and confront them with the critical remarks and concerns of legal scholars and asylum experts, stressing its conceivable risks of unconstitutionality. Final goal of the article is to challenge what the real aim of the new Decree is: if it ends up increasing precarious and instable living conditions for migrants on Italian soil and therefore threatening social security, rather than improving public safety and protection for citizens and legal residents.

Key words: migration, security, integration, Italy, EU.
JEL Classification: K37, F22, O15.

Introduction

The Italian Government issued a new Law Decree on Migration at the beginning of October (Decreto Legge n. 113 of 4.10.2018). On December 3, 2018 the Italian Chamber of Deputies approved the Law n. 132/2018, the so-called "Immigration and Security" Decree, in the version amended and approved by the Senate of the Republic

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on the previous November 7 with 396 votes to 99 (Vedaschi 2008: 211–236). According to Art. 77 I of the Constitution, the Government may not enact any provisions having force of law: it is only given the opportunity to adopt measures with legal force in cases of "extraordinary necessity and urgency" adopting a so-called "*Decreto Legge*" (Legislative Decree). The decree has the same force of law as the laws enacted by the two Chambers of the Italian Parliament. By the way, in order to grant parliamentary control over the decree, the decree shall be sent to the Chambers on the same day it is enacted. They must "convert" the decree into an ordinary law, i.e. confirm it within 60 days. If the Parliament rejects the conversion or allows the deadline to expire, the decree is deemed to have been rejected. A rejected decree loses its validity retroactively (*ex tunc*) and is therefore treated as if it had never existed. Since the Government had asked for a vote of confidence on the conversion law, none of the more than six hundred amendments presented by the opposition were discussed, while the few amendments presented by the 5-Stars Movement were withdrawn. MPs of the Lega, 5-Stars Movement, Forza Italia and Fratelli d'Italia voted for the new law, while MPs of the Democratic Party, Liberi e Uguali and some 5-Stars representatives voted against it. After the General Elections of March 4, 2018, a new Government had been formed on June 1, 2018 under the leadership of independent Private Law Professor Giuseppe Conte, supported by the populist party Five-Stars Movement and the extreme right nationalist party *Lega*. The opposition consists of the centre-left party *Partito Democratico*, the conservative party *Forza Italia*, the new-fascist party *Fratelli D'Italia*, the left oriented party *Liberi e Uguali*, and several smaller movements holding the few seats left in both chambers of the Italian Parliament.

The decree intervenes on a wide range of matters (urban security, fight against mafia and terrorism), but above all it deeply changes the regulation of asylum, immigration and citizenship. The new provision is very controversial and raised criticism from several MPs belonging to the 5-Stars Movement, which is part of the current political majority supporting the right-oriented Government. In a letter addressed to the Prime Minister Giuseppe Conte the Head of State Sergio Mattarella stressed his strong expectation that the Decree respected the basic principles of the Constitution, as well as the international Conventions and the binding European Directives and Regulations on the matter: furthermore, this is what is expressly requested by Art. 117 I of the Constitution, which states: "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations". On the one hand, according to the Minister of the Interior Matteo Salvini, the Decree will improve the citizens' security and make immigration management more effective.

On the other hand, several experts accuse the new law of being unconstitutional, and claim it will cause counterproductive effects, increasing the number of foreign citizens who find themselves in situations of irregularities and reducing the effective public security.

The present work aims at summarizing the innovations introduced by the new Decree and confronting them with the critical remarks and concerns of asylum experts, stressing its conceivable risks of unconstitutionality (Algostino 2018: 165–199), in order to demonstrate that the Decree does not respect the constitutional provisions on many occasions, and that for this reason it could be declared unconstitutional by the Italian Constitutional Court.

However, a possible general cause of unconstitutionality could already regard the fact that, according to the Constitution, Law Decrees are admitted only in explicit conditions of extraordinary necessity and urgency, when a very rapid and specific regulation is requested. In fact, according to Art. 77 of the Constitution, "the Government may not, without an enabling act from the Houses, issue a decree having force of law. When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to Parliament for transposition into law. During dissolution, Parliament shall be convened within five days of such introduction". The Italian Constitutional Court stated that the requirements of necessity and urgency cannot simply be affirmed by the Government but must be verified by the objective conditions of the Decree issue (Corte Costituzionale 171/2007). In the meantime, however, migration is no longer an exceptional, but rather a structural phenomenon all over the Mediterranean Sea: even the Italian Ministry of the Interior informed on its site that the number of migrant landings in Italy in 2018 has decreased by 80 percent, compared to previous years. According to the *Dipartimento Libertà Civili e Immigrazione* (Department of Civil Liberties and Immigration) of the Ministry of Interiors, 23,011 migrants landed on Italian coasts from 1 January to 30 November 2018, 12,976 of them coming from Libya: 80.34 percent less than in 2017 and 86.70 percent less than in 2016 (Ministero degli Interni 2018). The most recent information show that between 1 January and 4 April 2019, only 532 migrants achieved the Italian coasts (Ministero degli Interni 2019a). Finally, according to Art. 15 III Law nr. 400 of 23.8.1988, which states: "The decrees must contain measures for immediate application and their content must be specific, homogeneous and consistent with their title", law Decrees should concern specific and homogeneous topics, while the so-called *Decreto Sicurezza* refers to heterogeneous matters unrelated to each other.

Another possible reason of unconstitutionality concerns the fact that the Decree is not just limited to regulating the forms of access to international protection for migrants and asylum seekers, but also contains a wide range of articles covering different matters (public security, prevention of and fight against terrorism and mafia crime, provisions on the organisation and functioning of the national Agency for administration and destination of the goods seized and confiscated from organised crime) (Ruotolo 2018: 173–176). The heterogeneity of the decree could indeed represent a sufficient reason to declare it unconstitutional, since the Italian Constitutional Court has expressly stated the unconstitutionality of a decree whose contents are too heterogeneous with respect to the objectives that it intends to achieve (Corte Costituzionale 2012).

1. Abolition of Humanitarian Protection

Before the Law Decree came into force, the Italian system admitted three levels of international protection:

a) Refugee status. The legal basis for this right is the 1951 Geneva Refugee Convention, whose Art. 1 II 1951 grants the refugee status to asylum seekers "for reasons of race, religion, citizenship, belonging to a particular social group or for political opinions". Besides, EU Directives 29 April 2004 n. 2004/83/EC and 13 December 2011 n. 2011/95/EU extended the Refugee status to those migrants able to prove being victims of persecution due to their gender or sexual orientation.
b) Subsidiary protection. This kind of protection relies on European legislation and is acknowledged by all European Union Member States (Balioz, Ruiz 2016: 240–270). According to Art. 14 of the Legislative Decree n. 251/2007, implementing Art. 15 of the European Directive n. 2011/95/UE, it is assigned to those persons who, despite being unable to be considered as refugees, would face an "effective risk of suffering serious harm" if they were returned to their country of origin. Serious harm includes "death or execution", "torture or other forms of punishment or human or degrading treatment" and "the serious and individual threat to life or the person of a civilian resulting from indiscriminate violence in situations of armed conflict" (Albano 2018).
c) Humanitarian protection. This is a third level of protection, which should actually be called "residence permit for humanitarian reasons" (Benvenuti 2019): it was introduced in Italy in 1998 and has been granted by the Consolidated Immigration

Act (*Testo Unico sull'Immigrazione*) until October 2018 (Zorzella 2018). Many other European countries have alternative forms of protection in addition to refugee status and subsidiary protection. In Italy, humanitarian protection was a residual category, granted for different and rather discretionary reasons, which could vary from health problems to conditions of severe poverty in the country (or region) of origin of an asylum seeker. The maximum duration of the residence permit for humanitarian reasons was two years.

In its first article, the Decree abolishes the protection for humanitarian reasons, so far granted to foreign citizens who proved "serious reasons, in particular of a humanitarian nature or resulting from constitutional or international obligations of the Italian State", or to people fleeing emergencies such as conflicts, natural disasters or other serious events in countries outside the European Union. Art. 19 of the Consolidated Immigration Act extends humanitarian protection also to foreign citizens who cannot be expelled, because they would likely face persecution in their country, or if they were victims of exploitation or trafficking (Acierno 2018: 99–107). In these cases, the permit had a duration ranging from six months to two years and was renewable.

In recent years, humanitarian protection has been the main form of legal protection granted to foreign citizens reaching Italy. In 2017, 130,000 applications for international protection have been submitted: 52 percent of the cases were rejected, 25 percent were granted humanitarian protection, 8 percent were granted refugee status, another 8 percent obtained subsidiary protection, and the remaining 7 percent obtained other types of protection (Ministero degli Interni 2019b). In 2018, 67 percent of 53,600 submitted applications for asylum were rejected. From the remaining 33 percent, 21 gained humanitarian protection, 7 percent got asylum and 5 per cent subsidiary protection (Ministero degli Interni 2019c). According to the Researcher Matteo Villa of the *Istituto per gli Studi di Politica Internazionale* – ISPI (Institute for International Policy Studies), from June to December 2018 applications should have decreased by 20 percent compared to the same period of 2017 (Villa 2018), but it in the end over 76,400 application for asylum were submitted in 2018 – what demonstrates that Italy is no longer facing a "migrants' emergency" (Camilli 2018a).

With the new Decree, the residence permit for humanitarian reasons can no longer be granted, not even by a court appealed for a rejected asylum application. Since the Decree is not retroactive, it does not apply to those who submitted the asylum application before October 5, 2018 – the day the Decree came into force. The question has been recently explained by decision no. 4890/2019 of the Court of Cassation: the Italian Supreme Court was asked to clear the terms of temporal enforcement

of the provision contained in the Decree which repealed the residence permit for humanitarian reasons. It was necessary to understand whether this abrogation had immediate effects with the entry into force of the Decree also for pending procedures, or whether it concerned only applications for international protection submitted after the entry into force of the Decree on 5 October 2018. The answer given by the Supreme Court – which also conforms to all the jurisprudence issued by those Courts of Appeal that had ruled on the matter in the previous months – was clear: the repeal of the permit for humanitarian reasons is relevant only for those who have applied after October 5, 2018. Therefore, when the territorial commissions (the agencies responsible for examining applications for asylum) check an asylum application submitted before October 5, 2018, they must be able to recognise humanitarian protection. Should a territorial commission have given the new Decree retroactive effects, it would have to overrule its previous decisions to deny humanitarian protection to migrants who applied earlier than October 5, 2018. Furthermore, recent contributions suggest to challenge the constitutionality of the denial of humanitarian protection also for applications for asylum submitted after the deadline of October 5, 2018. Should the Constitutional Court declare the rule unconstitutional, the possibility of granting humanitarian protection would be restored for all migrants applying for asylum in Italy (Padula 2018; Serra 2019).

As long as the provision of the Decree remains in force, instead of humanitarian protection, a residence permit will be provided for some "special cases": victims of domestic violence or serious work exploitation, people in urgent need of medical treatment because of critical health conditions, people coming from a country in a situation of "contingent and exceptional calamity". Finally, a residence permit is conceded to foreign citizen who have distinguished themselves through "acts of particular civil value": this can be granted if the concerned person carried out acts of special moral courage, i.e. he or she has put his life in real danger: 1) to save people in immediate and grave danger; 2) to prevent or reduce the damage caused by a serious public or private disaster, 3) to restore public order, 4) to contribute to arrest criminals, 5) to promote scientific knowledge or 6) generally speaking, to take care of the wealth of human beings or uphold the name and reputation of the nation. This kind of permit is conceded on proposal of the Prefect, with the approval of the Ministry of the Interior, lasts two years and cannot be renewed, but can only be transformed into a working permit, if the necessary conditions apply.

Before the issue of the new Decree, the Italian system offered two types of humanitarian protection. First, there was an "external" humanitarian protection "outside" the asylum procedure, based on Art. 5 par. 6 of the Consolidated

Immigration Act. Second, there was an "internal" protection on humanitarian grounds within the asylum procedure, which was foreseen in art. 32 par. 3 of the Legislative Decree no. 25 of 2008 (Morozzo della Rocca 2018: 108–116).

The first one – the humanitarian protection external to the asylum procedure – applied when "serious" reasons of a humanitarian nature, constitutional or international obligations of the Italian State arose. In such cases, the residence permit could not be refused or revoked. A "residence permit on humanitarian grounds" was thus issued by the *Questore* (Police Commissioner), who is the leading public official in charge of every *Questura*. According to case law, in these cases the applicant holds a subjective right, established and recognised by the administrative authority issuing the residence permit. Therefore, the competent authority had to obtain the necessary documents from the applicant, proving his/her objective and serious personal situation and excluding his/her deportation from Italian territory.

The second one – the "internal" humanitarian protection – intervened when the Territorial Commission was unable to accept an application for international protection because the necessary conditions were not met, but the applicant's personal situation showed "serious humanitarian reasons". In this case, the Commission had to transmit the application to the *Questore*, who was obliged to issue a residence permit on humanitarian grounds (Marengoni 2012: 59–86).

Praxis shows as, over time, humanitarian protection has become a substitute for the right of asylum provided by Art. 10 III of the Italian Constitution. The permit for humanitarian reasons was issued to grant the principle of non-refoulement. In examining the consequences of a possible repatriation, under the prohibition to send a refugee back to territories where his/her life or freedom would be threatened, the territorial commissions had to consider granting a residence permit for humanitarian reasons. The humanitarian permit was therefore shaped as a third form of asylum, a "minor" asylum compared to the recognition of status and subsidiary protection, offering a concrete possibility of granting asylum in problematic cases deserving legal protection (Benvenuti 2018: 14–27).

According to the new Decree, the Territorial Commission can now either recognize two forms of protection – refugee or subsidiary protection – or dismiss the application, cooperating with one of the 103 *Questure* (Police Headquarters). According to the new provisions, the Commission no longer transmits the practice of the rejected application to the *Questore* if it argues "that there may be serious humanitarian reasons", but it simply verifies if there are causes for refusing the deportation of the foreigner demanding protection. Should this be the case, the

Commission transmits the documents to the *Questore* for a "special protection" residence permit, valid for a maximum of one year.

1.1. Critical Remarks

According to a Report issued by the Study Center of the Senate (Senato 2018: 8–9) – the second Chamber of the Italian Parliament – in order to grant humanitarian protection there must be "serious" or "grave" humanitarian reasons (in the first case, to be verified by the *Questore*, in the second case by the Territorial Commission, by a binding decision for the *Questore*). The list of these reasons is published in Art. 19 I of the Consolidated Immigration Law (Legislative Decree 286/1998), which declares: "In no case a deportation or refoulement can be ordered to a State where the foreign citizen may be persecuted on the basis of race, sex, language, nationality, religion, political views, personal or social circumstances, or there is a risk for him to be transferred to another State where he is not protected from persecution". With a sentence of February 2018, the Court of Cassation affirmed that humanitarian protection "although not being explicitly based on the obligation to implement international or European standards, [...] is nevertheless recalled by the EU Directive n. 115/2008", which clarifies that EU Member States may issue at any time an autonomous residence permit or another kind of document "for charitable or other humanitarian reasons", granting a foreign citizen the right to remain in Italy even if he or she illegally entered the Italian territory. Besides, the judges specify that the "serious reasons" for granting humanitarian protection "are not [definitely] predetermined, [...] by the legislator, so that they represent an open catalogue" to be expanded for further motivations over time. These motivations, however, pursue "the goal to protect situations of current or verified vulnerabilities (...) as a consequence of the foreigner's repatriation, if a need identified as humanitarian occurs, for example concerning fundamental human rights protected at constitutional and international level". Finally, "humanitarian protection represents one of the forms of implementation of constitutional asylum (according to Art. 10 of the Constitution), together with political and subsidiary protection, putting under evidence also the open and not predetermined conditions for its recognition, consistently with the broad configuration of the right to asylum granted by the Constitution, expressly referred to the impediment in the exercise of democratic freedoms, i.e. to a formulation which is not clearly defined and still subject to wide debate" (Cassazione Civile 4455/2018). The Court of Cassation has

therefore confirmed the open character of the humanitarian protection, and has thus recognized the right of residence, as well as a limit to expulsion and forced repatriation in various circumstances: circumstances that cannot be pre-determined, including all those situations of particular vulnerability when a person, despite not being able to benefit from international protection, must nevertheless be granted refuge in Italy and a residence permit, because otherwise his/her fundamental rights would be seriously threatened (Favilli 2018).

According to Lorenzo Trucco, lawyer and president of the Association of Juridical Studies on Immigration (ASGI), the new Decree represents "a serious violation of the legal culture of our country, an attack on fundamental human rights". So far, affirms Trucco, the problem was to guarantee the effectiveness of these rights, but the new rules lead a "real attack on individual freedoms, which are the foundations of our civilization" (Fassini 2018). The abolition of humanitarian protection could be unconstitutional, since "humanitarian protection is one of the ways Art. 10 of the Italian Constitution guarantees the right to asylum", whose par. 3 and 4 clearly state: "The legal status of foreigners is regulated by law in conformity with international provisions and treaties. A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law. A foreigner may not be extradited for a political offence". A similar form of protection for foreigners exists in at least 27 European States (Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, the Netherlands, Poland, the United Kingdom, Slovakia, Slovenia, Spain, Sweden, Switzerland) (European Asylum Support Office 2017; EMN Ad-Hoc Query on ES Ad hoc Query on Humanitarian Protection 2017), and is consistent with the international asylum agreements. The new Decree risks turning many foreigners into illegal immigrants and increasing the number of judicial disputes, since all foreigners whose application for protection is dismissed will likely appeal recalling Art. 10 of the Constitution. According to Trucco, instead of increasing public security, the new provision will paradoxically create illegal migrants, due to the abolishment of humanitarian protection: thus, many people on the Italian territory will find themselves in an illegal situation.

The researcher Matteo Villa of the Institute for International Political Studies (ISPI) warns that the new Decree could produce further 60,000 new illegal immigrants in the next two years, since applications deserving a special residence permit will be very few. The 60,000 new illegal foreign citizens would add to the already foreseen

70,000, caused by denials of asylum, for a total amount of 130,000 in the next two years. A number which, at the current rate, would require 90 years to be repatriated – provided no further foreigners will reach Italy in the meantime. Therefore, the cancellation of humanitarian protection could deprive more than 40,000 migrants who applied for asylum in the period between October 2018 and February 2019 of any form of legal protection, making them irregular citizens (Villa 2018). Data provided by the Ministry of Interior indicate that in the period between December 2018 and February 2019, 19, 223 asylum seekers were denied any form of protection, while between December 2017 and February 2018 they were 11,043 (Ministero degli Interni 2019 d). This means that, with the entry into force of the Security Decree, the number of irregular citizens increased by more than 8,000 units, compared to the same period of the previous year.

Salvatore Fachile, ASGI lawyer and immigration law expert, believes that the new Decree violates both the Constitution and international law, as it authorizes a very limited and temporary form of protection for special cases, valid for only one year, not convertible into an official residence permit even if the migrant finds a stable accommodation. It can just be extended for one more year. Only those who already received humanitarian protection have time until it expires to prove that they have a work contract and stabilize their permit. According to Fachile, tens of thousands of migrants risk to become illegal, since many of them are socially integrated but work off the books.

Mario Morcone, former Head of Cabinet of the Ministry of the Interior, now President of the Italian Council for Refugees (CIR), believes that the new Decree aims more at creating irregularities than regulating immigration. According to Morcone, the new regulation intends to eliminate the possibility of granting a humanitarian permit to an asylum seeker who has completed a process of integration, increasing the precariousness of the migrant population in Italy (Fassini 2018).

According to Giuseppe Massafra, Confederal Secretary of the Italian General Confederation of Labor (CGIL), the repeal of the permit for humanitarian reasons will bring many workers back into the precariousness, especially in a moment when granting visas for work purposes has been blocked for years and since 2011 no plans grant access to the country for those looking for a job (Pollice 2018). CGIL source claims that the abolishment of residence permits for humanitarian reasons will leave or trap in precariousness many foreign citizens who held a residence permit so far, and will prevent almost all migrants from obtaining effective protection.

2. Extension of Detention in CPRs

According to the new Decree, foreign citizens held in Centers for Permanence and Repatriation (Centri di Permanenza per il Rimpatrio, CPR) – previously named Centers of Identification and Expulsion (Centri di Identificazione ed Espulsione - CIE) – waiting to be repatriated, may now be detained for up to 180 days (previously for a maximum of 90 days), in order to gain more time to complete their identification. Also asylum seekers may be detained in CPRs waiting to be identified.

The Decree is also controversial because in the past it was found that persons held in CPRs were held in very bad living conditions. After having visited four of the five operating CPRs between February and March 2018, in September 2018 the Independent Ombudsman for Prisoners' Rights published a report, condemning various critical issues such as "poor living and hygienic conditions, absence of psycho-physical activities, scarce openness to external initiatives, lack of transparency, i.e. absence of a recording system of critical events, carelessness for the legal conditions of the detained persons, their individual needs and vulnerabilities, difficulties in accessing information, absence of a complaint procedure against violations of prisoners' rights" (Garante Nazionale dei diritti delle persone detenute o private della libertà personale 2018a).

On 11 October 2018, the Head of the Immigration Department, Gerarda Pantalone, replied in a letter that Italy is "constantly engaged (...) in improving the structures and maintaining high standards of living, in full respect of individual rights", but that these efforts are "often thwarted by the continuous and violent behaviour of the guests [of the CPRs] against rooms and furnishing, with direct negative consequences on their own living conditions", with meaningful costs for the national budget (Dipartimento per le Libertà Civili e l'Immigrazione 2018).

2.1. Critical Remarks

On several occasions, the Italian Constitutional Court reminded that all restrictions of migrants' personal freedom must respect constitutional guarantees, even if they illegally entered the Italian soil (Corte Costituzionale 105/2001, 222/2004). Besides, prolonged detention time limits in CPRs could result in a violation of Art.

13 II of the Constitution, which declares "No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty, except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law". In 2016, the European Court of Human Rights condemned Italy for having held Ghanaian citizens applying for international protection in a CIE (now CPR) (ECHR 2016), in violation of Art. 5 I of the ECHR, which affirms "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law". The new Decree could therefore also be challenged in front of the Court of Strasbourg for the same reasons.

According to Patrizio Gonnella, President of both the Association "Antigone" and the *Coalizione Italiana Libertà e Diritti Civili* – CILD (Italian Coalition for Freedom and Civil Rights), due to the new Decree, the inefficiency of the Italian system in identifying refugees and asylum seekers could result in a limitation of their personal freedom, increasing the suffering of people held in CPRs without being convicted for any crime (Camilli 2018 b).

3. Detention in Hotspots and Border Crossings

According to Art. 3 of the Decree, asylum seekers can be held for up to thirty days in so-called Hotspots and first reception facilities (CAS – *Centri di Accoglienza Straordinaria*, Extraordinary Reception Centers, and CARA – *Centri di Accoglienza per Richiedenti Asilo*, Reception Centers for Asylum Seekers) to ascertain their identity and citizenship. If their identity is not verified within thirty days, asylum seekers may be held in CPRs for up to 180 days, which makes a possible maximum detention time of 210 days, only to verify and determine their identity, without them having committed any crime. The new rules also apply to minors who are part of a family unit, although the current legislation does not consent to such long detention times for minors. The Decree also allows to detain illegal immigrants in border offices, if no places are available in CPRs: such a measure must be authorized by the Justice of the Peace in charge of the procedure on request of the *Questore*, and it restrains migrants as long as they are not repatriated. If it seems necessary, the Justice of the Peace can authorize their stay "in suitable facilities" at the border office until their repatriation, but "no longer than 48 hours".

3.1. Critical Remarks

On 19 November 2018, in a hearing at the Constitutional Affairs Commission of the Chamber of Deputies, the Ombudsman for Childs' Rights Filomena Albano raised concerns about the consequences of the Decree for foreign minors. According to Albano, Hotspots are administrative detention centers not suitable for hosting foreign minors with their families or adults, who should therefore be housed in different facilities. All minors entering Italian soil should instead receive special residence permits, to be extended to all foreign adults who, with the abolition of humanitarian protection, would otherwise remain without any form of legal protection (Camilli 2018c).

On 15 October 2018, in a statement addressed to the Constitutional Affairs Commission of the Chamber of Deputies, the National Independent Ombudsman for Prisoners' Rights expressed strong concerns about the inadequacy and indeterminacy of new facilities designed to host migrants awaiting identification, since he would be prevented from controlling the quality of living conditions in such structures (Garante Nazionale dei Diritti delle Persone Detenute e Private della Libertà Personale 2018b).

4. More Funds for Forced Repatriation, Less for Voluntary Repatriation

On the one hand, the Decree allocates more funds to the repatriation of illegal migrants: € 500,000 more in 2018, € 1.5 million more in 2019 and another € 1.5 million more in 2020. On the other hand, the Decree reduces the resources granted in 2017 by the Gentiloni Government to the municipal bodies for assisted voluntary repatriation, provided for foreigners who would freely return to their country of origin. In particular, € 3.5 million had been assigned for the three-year period 2018–2020: € 500,000 for 2018; € 1.5 million for 2019 and another € 1.5 million for 2020, which can now be used for any measures, not necessarily in support of voluntary repatriation.

5. Revocation or Denial of International Protection

The new regulation extends the list of crimes involving the revocation of refugee status or subsidiary protection. This happens when the refugee is definitively condemned for certain crimes, such as: threat or violence to a public official, serious and very serious personal injuries, practices of female genital mutilation, aggravated theft, housing theft and teared theft. Besides, the application for international protection may also be suspended when the applicant has a criminal proceeding in progress for one of the crimes that would result in the denial of asylum in the event of a final conviction. Furthermore, if the refugee returns to the country of origin, even temporarily, he or she will lose international and subsidiary protection.

5.1. Critical Remarks

According to the constitutional law scholar Gaetano Azzariti, this provision has the risk of being unconstitutional, because it can cause the suspension of the application for international protection and the consequent expulsion of asylum seekers still on trial or sentenced without final judgment: this would result in a violation of the presumption of innocence granted by art. 27 II of the Constitution, which states: "A defendant shall be considered not guilty until a final sentence has been passed".

Furthermore, the repatriation of foreign citizens not definitively convicted could infringe the principle of non-refoulement established by art. 33 of the Geneva Convention on Prohibition of expulsion or return ("refoulement"), which affirms: "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country". According to this principle, a refugee cannot be prevented from entering the territory, nor can he or she be deported, expelled or transferred to

territories where his/her life or freedom would be threatened. The European Court of Human Rights decreed that the prohibition of refoulement applies regardless of whether the person has been recognized as a refugee, and/or whether he/she formalized a request to obtain such recognition. Refoulement consists of any form of forced removal to an unsafe country, and is in any case prohibited by international law, even against illegal immigrants sentenced without final judgment.

According to Luca Maria Negro and Giovanni Comba, respectively President of the FCEI – Federation of Evangelical Churches in Italy and President of the CSD-Diaconia Valdese, with the new Decree "we approve norms that seriously limit the right to asylum, coming to cancel the humanitarian protection [which helped] tens of thousands of people […] to rebuild their lives in Italy, escaping violence and persecution in their countries, or in those of transit like Libya. The possibility of forcing asylum seekers into closed prison facilities [...] criminalizes vulnerable people at a time when they would instead be more entitled to protection and integrated relief action." (Federazione delle Chiese Evangeliche in Italia 2018).

6. Accelerated Procedure Before the Territorial Commission

Art. 10 of the decree introduces an immediate proceeding before the Territorial Commission, the administrative authority responsible for examining applications from asylum seekers. Migrants facing a trial for certain kinds of crimes, or convicted by a court of first instance, must cope with an immediate procedure before the Territorial Commission. Appeal against a rejection of international protection by the Territorial Commission does not have suspensive effect: therefore, the protection seeker can be immediately expelled, even if the trial against him or her is not concluded or he/she is not serving a definitive conviction.

6.1. Critical Remarks

Comments about the new rules on revoking international protection apply in this case as well: expulsion is carried out in circumstances where no final conviction was

issued, or with the trial still in progress, when the expelled migrant should be still considered innocent according to the Italian constitutional warrants.

7. The List of Safe Countries

Article 7 *bis* of the new law establishes also for Italy a list of safe countries of origin. Both International (Geneva Convention) and EU law (Asylum Procedures Directive) classify a country as safe if it has a democratic system and hosts no persecution, torture or inhuman or degrading treatment or punishment, threat of violence and armed conflicts. The Ministry of Foreign Affairs – together with the Ministries of the Interior and Justice – draws up a list of safe countries of origin, on the basis of information provided by the National Commission for the Right to Asylum (*Commissione Nazionale per il Diritto d'Asilo*) and European and international agencies active in the field like EASO (European Asylum Support Office), UNHCR (United Nations High Commission for Refugees), Council of Europe.

An asylum seeker coming from one of the countries on the list will have to prove to have serious reasons for applying for asylum, and his/her application is to be examined under a "fast-track" procedure, whose time limits will be doubled compared to the usual procedure: 14 days for transmission to the Territorial Commission and 4 days for decision. According to art. 28 *bis* of Legislative Decree 25/2008, as soon as the application has been received, the Police Headquarter (*Questura*) in charge will immediately transmit the necessary documentation to the Territorial Commission, which will provide for the hearing of the asylum seeker within 7 days of receiving the documents, and must decide on the application within the following two days. Besides, an asylum application will now be considered as "manifestly unfounded" if related to following categories of migrants: citizens coming from countries of origin classified as safe, persons who made inconsistent statements, persons who gave false information or showed false documents, persons who refused to submit to fingerprints, persons already subject to administrative expulsion, persons who constitute a danger to law, order and security, foreigners who have irregularly entered Italian territory and have not immediately applied for asylum. In addition to the list of safe countries of origin, the decree introduces the principle of "internal flight", or "internal flight alternative": if a foreign citizen can be returned to certain areas of the

country of origin where it is assumed there is no risk of persecution, the application for international protection is rejected.

7.1. Critical Remarks

The Italian Council for Refugees (CIR) underlines that the new rule introduces an unfair "reversal of the burden of proof, contrary to the general principle of a shared burden between the state and the asylum seeker". In fact, it is now up to the applicant for international protection from a country classified as "safe" to prove there are serious reasons to consider the country of origin as unsafe. Moreover, the principle of "domestic flight" introduces "strong discretion in the examination of asylum applications" and "severely limits the possibilities of protection for asylum seekers", as it is easier to repatriate to areas considered safe in countries overall classified as unsafe (Consiglio Italiano per i Rifugiati 2018). The risk of repatriating migrants to dangerous areas is very high, also because many African countries have a very large territory, and a return away from the community of origin would entail serious difficulties for rejected migrants to reintegrate into politically unstable countries.

8. Restriction of the Reception System

In recent years, Italy has made great efforts to improve its reception system, in order to overcome emergency management of migrants. In 2018, there were 877 SPRAR (*Sistema di Protezione per Richiedenti Asilo e Rifugiati* – Protection System for Asylum Seekers and Refugees) projects providing reception services throughout the country, involving 1,200 Italian municipalities funded by the Ministry of the Interior. In 2009, SPRARs housed three thousand people, while in 2018 they hosted 35,881 migrants (Sistema di Protezione per Richiedenti Asilo e Rifugiati 2018). The idea behind this system was to distribute care services through the national territory, in accordance with the principle of solidarity and shared responsibility. From 2014 onwards, Italy has heavily invested in making the ordinary reception system predominant over the extraordinary one, even if 70 percent of asylum seekers are still hosted in CAS (*Centri di Accoglienza Straordinaria* – Extraordinary Reception Centres), i.e. in hotels, sheds and former barracks (a total of 136,978 places) (Centro

Studi e Ricerche IDOS 2018, 142), often far from urban areas, and in CARA (*Centri di Accoglienza per Richiedenti Asilo* – Reception Centres for Asylum Seekers). These facilities hosted people for months, even if the law prescribes a maximum stay of 35 days. CAS centers are managed by Prefects who can occasionally assign funds to private individuals, if it is necessary to create or enlarge local hosting capacity.

There are two fundamental differences between SPRAR and CAS centers: the kind of services offered for the same contribution (€ 35 per person per day) and the rules that apply in the two systems. SPRAR centers are subject to stricter reporting duties, offer higher quality standards and more articulated services. They are managed by local authorities and are obliged to spend all funds received in the project, since they are not allowed to make a profit. CAS centers, on the other hand, are managed by private individuals, which are directly funded by the Ministry of the Interior. They usually gather asylum seekers in large structures, with low standard services and no obligation to report expenses. CAS centers' hosting capacity can vary from few asylum seekers and refugees to hundreds of migrants. Fact is that so-called "Extraordinary Reception Centres" have become the main kind of facilities available to refugees in the Italian reception system, while SPRAR centers, which facilitate their real integration, remained the exception.

The new Decree states that SPRAR will be limited only to those who already enjoy international protection or are unaccompanied foreign minors. The entire local reception system will therefore be scaled down, while the name of the project will change from SPRAR (Protection system for asylum seekers, refugees and unaccompanied foreign minors) to SIPROIMI – *Sistema di protezione per titolari di protezione internazionale e per minori non accompagnati* (Protection system for holders of international protection and for unaccompanied foreign minors). Other asylum seekers, i.e. those who have applied for international protection and are awaiting a response, will be accepted by CAS and CARA.

8.1. Critical Remarks

Reducing the SPRAR system in favour of CAS and CARA centres could affect the quality of the integration process of asylum seekers, as so far migrants' integration projects have been mainly driven by SPRAR network. In fact, CAS and CARA centres focused on first reception measures, and did not carry out any projects aimed at

education, language teaching or vocational training. These are fundamental actions that enable holders of international protection to integrate into the social, civic and economic life of a country. SPRAR projects target smaller groups of migrants, are implemented on initiative of the related local authorities, and offer foreign people easier integration. CAS and CARA centres, on the other hand, are usually implemented by the Prefectures after consulting local authorities.

In cases of extreme urgency, however, the new Decree allows the Prefecture to enact procedures of direct entrustment, that is, without consulting, for example, the Municipality where the reception center is to be established. Moreover, reception projects in CAS and CARA usually host high numbers of applicants for international protection, with a much stronger impact on the affected local area. This can increase the risk of negative reactions from the local communities, especially when local authorities are not involved in creating and developing such centers. Finally, the projects carried out in CAS and CARA are subject to less strict controls than those prescribed for SPRAR projects: this could result in a higher danger of mismanagement of public funds than with SPRAR projects.

According to Daniela Di Capua, Director of the SPRAR Central Service, "since 2014 the Ministry [of the Interior] has decided to invest in the SPRAR system, because it was understood that it was important to finance integration, namely internships, work grants, language courses and then because in the SPRAR system there is a system of national control and coordination that prevents anomalies and criminal infiltration" (Camilli 2018d).

However, the growth of SPRAR centres will suffer a sharp slowdown, as the new Decree will gradually leave in these projects only the holders of international protection and unaccompanied foreign minors – several thousands of people. The number of the people hosted in reception facilities will instead depend on the number of landings on the Italian coast. If they remain very low, as they have been since June 2017, the number of asylum seekers in these facilities will also be low. However, the most important consequence of the new Decree could be that asylum seekers will not have access to integration services guaranteed by SPRAR projects: language lessons, vocational training, support for social inclusion through sporting, cultural or voluntary initiatives (Colombo 2018).

According to Gianfranco Schiavone, one of the creators of the SPRAR system and a member of the ASGI, over time CAS became infiltrated by criminal organisations, because the extraordinary reception system does not provide for any "expenditure control". While the 2015 law sought to unify SPRAR and CAS, according to Schiavone

with the new Decree the steps of reception are clearly separated: asylum seekers are housed in the emergency system, while refugees and minors are hosted in SPRAR centers, without any form of collaboration and convergence between the two networks. Schiavone emphasizes that CAS centers remain emergency structures violating European standards, while the detailed reception aimed at integration should be provided in SPRAR projects. Instead, the Decree will result in a drastic cut in the SPRAR network's resources, with a consequent loss of hundreds of jobs, especially in the South and in peripheral areas, in structures that will no longer have a reason to exist (Camilli 2018b).

According to Antonio Decaro, Mayor of Bari and President of ANCI (National Association of Italian Municipalities – *Associazione Nazionale Comuni Italiani*), "the SPRAR system has allowed the distribution of migrants throughout the national territory, avoiding the concentration of people in large centers and consequently reducing the social tensions created by these centers" (Camilli 2018b).

In a press release, Father Camillo Ripamonti, President of *Centro Astalli*, which is the seat of the Jesuit Refugee Service (JRS) in Italy, stated that the reduction of SPRAR projects is "a step backwards that does not take into account, on the one hand, the lives and stories of people and, on the other hand, the efforts of many humanitarian and civil society organizations to build in close collaboration with institutions, particularly local authorities, in a relationship of subsidiarity that has been the lifeblood of the welfare of our country. Criminalising migrants is not the right way to manage the presence of foreign citizens in Italy. Increasing grey areas, not regulated by law, and making the paths of legality less accessible and more complicated, contributes to making the country less safe and more fragile" (Centro Astalli 2018).

The Combonian fathers share the same opinion, and in a note on the Nigrizia.it website considered "a mistake the downsizing of the Protection System for Asylum Seekers (SPRAR) – one of the few successful examples of integrated reception carried out by municipalities in collaboration with voluntary associations – which will increase the number of illegal immigrants destined to languish in Extraordinary Reception Centres (CAS)" (Missionari comboniani 2018).

According to *Médecins sans Frontières*, the transition from SPRAR to CAS will reduce the quality of assistance for vulnerable people such as elderly, pregnant women, people with disabilities, single parents with minor children, torture or violence, which will be placed in centers providing no appropriate measures to their specific vulnerabilities (Medici Senza Frontiere 2019).

9. Exclusion from the Register of Asylum Seekers

Article 13 of the Decree states that the residence permit issued to asylum seekers is no longer valid for registration in the city registry office. Enrolment in the registry office is a prerequisite for accessing social assistance and being granted subsidies or benefits, access to other social rights, rights of popular participation in the local administration, right to submit statements in front of the registrar regarding citizenship, issuance of identity cards and certificates (since in Italy the identity card is a personal identification document that can be applied for by any foreign national older than 15 years of age holding a valid residence permit and a personal stay on Italian territory), and obtaining the Italian driving license or the conversion of a foreign one (Di Filippo 2018). The new Decree requires that access to those services is now available in the place of residence, while the previous regulation established that the reception centre or the hosting facility of an applicant with residence permit is the usual place for registration. It is worth noting that, according to Italian civil law, the residence is the usual place where a person is registered for social and fiscal purposes, while the domicile is an occasional place where the person stays for a certain period of time.

Finally, the Decree repeals Article 5-*bis*, which established the compulsory registration of the resident population of those applicants for international protection hosted in reception centres who are not already individually registered. The person in charge of the cohabitation is obliged to inform the competent registry office of the occurred change within twenty days. The provision applies to those hosted in first reception centres, temporary reception centres and centres of the protection system for asylum seekers and refugees – SPRAR, but not to asylum seekers detained in the former CIE, now CPR. Finally, the Decree provides that the communication of the revocation of the reception measures or the unjustified removal of the applicant for international protection is a reason for his/her immediate removal from the residents' registry.

9.1. Critical Remarks

The Decree justifies the prohibition of recording migrants in the population register with the argument that a residence permit for an asylum seeker is always temporary. The Decree also prescribes that the asylum seeker's legal status must be determined before he/she is entered in the register, since as long as his/her legal status has not been clarified, he/she cannot be included in the population register. The Italian Immigration Act, on the other hand, provides that insertion and changes into the residents' register of foreigners legally living in Italy are to be carried out under the same conditions as for Italian citizens, as stated by Art. 6 VII of the Legislative Decree 25 July 1998, n. 286, „*Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*". The documented stay of the foreigner in a reception centre for more than three months allows the center to be considered a place of residence.

The decision not to allow the registration of asylum seekers with a valid residence permit could lead to a violation of Art. 3 of the Constitution, which protects the principle of equality before the law. Secondly, this prohibition will prevent access to social benefits and a wide range of public services, with a likely increase in the precariousness of foreign nationals seeking asylum in Italy. In particular, the lack of registration in the city registry office prevents access to basic health services. This could lead to a further cause of unconstitutionality, since the Decree prevents foreign citizens from enjoying the healthcare system, while the Italian Constitution grants this right not only to Italian citizens, but also to all individuals present on domestic territory. The non-enrolment in the city register could also hinder the exercise of some urban security functions assigned to mayors (including the duty to report to the judicial authorities and public security foreign EU and non-EU citizens present in the municipality, in order to eventually proceed to their expulsion or estrangement from the national territory, as foreseen by Art. 54 V of the Local Authorities Act), since for the proper exercise of these functions mayors must be able to know the place of habitual residence of individuals present in their municipality. In fact, Art. 54 IV of the Local Authorities Act requires the Mayor to take measures "to prevent and eliminate serious risks to public safety and the security of the city". According to Art. 54 IV *bis*, these measures on public safety "are aimed at protecting the physical integrity of the population, measures relating to urban safety are aimed at the occurrence of criminal phenomena or illegality, such as exploitation through

prostitution, trafficking in human beings, begging with the employment of minors and disabled people or phenomena of abuse such as illegal occupation of public spaces or violence, including those related to alcohol abuse or use of narcotics". If foreign asylum seekers are no longer registered in the local registry office, it becomes much more difficult to know their residence.

10. Withdrawal of Citizenship

The new Decree introduces the possibility to revoke citizenship of those who acquired it not for *Ius Sanguinis*: this affects foreign nationals who acquired the citizenship after ten years of residence in Italy, stateless persons who acquired citizenship after five years of residence in Italy, sons of foreigners born in Italy who acquired citizenship after 18 years, spouses of Italian citizens, foreigners of legal age adopted by Italian citizens, if they committed some terrorism-related crimes. The revocation is possible within three years from the final conviction for terrorism related crimes, by decree of the President of the Republic on proposal of the Minister of the Interior. The new Decree also extends from 24 to 48 months the deadline for concluding the procedures of granting citizenship.

10.1. Critical Remarks

According to the CIR, this provision creates "two categories of citizens: those by birth, whose citizenship cannot be withdrawn, and those who have acquired it for other reasons, whose citizenship can be unilaterally withdrawn" (Camilli 2018e). This provision is suspected to be unconstitutional for violation of Art. 3 of the Constitution, which protects the principle of equality before the law without distinction. Experts pointed out that this rule may favour the creation of stateless persons, in contrast with the prohibition of creating new stateless persons laid down in Art. 8 of the Convention on the Reduction of Statelessness adopted on 30 August 1961, stating that "a Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless", to which Italy adhered in 2015.

According to the Constitutional Law scholar Gaetano Azzariti, this provision is at great risk of unconstitutionality, because it states that even if the immigrant succeeds, after such a long bureaucratic process, to obtain Italian citizenship, he/she will never be considered as an equal of other Italian citizens. This aspect violates the equality rule (Art. 3 of the Constitution), because the Decree introduces unreasonable discrimination between citizens into the Italian legal system, and the prohibition of the deprivation of citizenship for political reasons (Art. 22 of the Constitution). In other words, if two individuals are found guilty of the same crime, those who have acquired citizenship for *Ius Sanguinis* would be treated differently from those who have acquired it by other means, because only the latter could lose citizenship. The already mentioned Research Dossier of the Senate of the Republic also stresses the need to verify that the new Decree does not introduce different categories of citizens suffering inappropriate unequal treatment (Senato 2018: 120).

Conclusions

On 7 January 2019, the Regional Council of Tuscany announced that it would challenge the decree before the Constitutional Court by the end of January. The announcement mentioned reasons, contradictions and suspected violations of the Decree: violations of fundamental rights; violations of the Regions' competing and exclusive jurisdictions; unconstitutional revocation of the residence permit for humanitarian reasons; unconstitutional prohibition of its renewal for those who have already received the permit; illegal prohibition of the enrolment of migrants in the local population register, even if they own a residence permit. Shortly after Tuscany's decision, the Regional Councils of Umbria and Emilia Romagna also agreed to challenge the Decree before the Constitutional Court, while Lazio, Sardinia and Piedmont are considering doing the same (Gagliardi 2019). Once the constitutional complaint has been lodged, however, it will take at least a year for the Constitutional Court to reach a decision. In view of the various questionable contents of the Decree, though, there are high chances that it might be declared unconstitutional. If it were to happen, the Decree would become ineffective.

According to legal scholars, the new Decree would even attempt to deprive migrants who arrived in Italy of their own fundamental rights (Curreri 2018). In this regard, it should be emphasized that when it comes to the legal status of the foreigner,

the Italian legislator must not only respect the constraints arising from EU Law and international obligations (according to Arts. 10 II, 11 and 117.I of the Constitution) but first of all the inviolable rights to be granted to each person under Art. 2 of the Constitution. In fact, even if formally referred only to citizens, Art. 2 "also applies to the foreigner, when it comes to respecting [his/her] fundamental rights" (Corte Costituzionale 120/1967). Therefore, the removal of any reference to compliance with international conventions and obligations, such as the refusal, revocation and renewal of residence permits (see, respectively, Arts. 5 VI of Legislative Decree 286/1998 and 13 I of Presidential Decree 394/1999) has no legal relevance, since they remain interposed parameters of constitutionality under Arts. 10 II and 117 I of the Constitution.

For all the above-mentioned reasons, therefore, the new Decree appears unconstitutional in many of its basic contents. The choice of a discipline so indifferent to constitutional guarantees shows that the current Government is trying to impose a very strict political position on the management of migrants, probably because it believes that for the moment the majority of public opinion is in favour of a worsening the reception system, regardless of the medium and long-term effects of the reform.

Irrespective of the eventual decision of the Constitutional Court, the new Decree will not only restrict the access to legal protection, but also gradually reduce services and benefits to migrants, an act unwise and potentially dangerous, because it will deprive more and more "irregular" foreigners of health protection, education and vocational training, pushing them towards precariousness, unevenness and unemployment. The final effect of this measure will therefore likely result in a gradual marginalization of foreign citizens, who will probably try to lead an existence at the limits of legality or even beyond, with a consequent increase in social insecurity: exactly the opposite of what the new Decree claims to want to achieve.

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