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Editoriale

THE RIGHT NOT TO BE CRIMINALIZED

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1. The systemic deficiencies in the asylum procedure and reception conditions for asylum seekers

On 6 May 2009, to 35 nautical miles south of Lampedusa (Agrigento), that is, within the Maltese Search and Rescue Region of responsibility, migrants were intercepted by three ships by the Italian Revenue Police (Guardia di finanza) and the Coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli. Migrants alleged that during that voyage the Italian authorities did not inform them of their real destination and took no steps to identify them. The persons intercepted should have to be informed in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of non-refoulement. The UNHCR stated that the principle of non-refoulement involved procedural obligations for States. Furthermore, the right of access to an effective asylum procedure conducted by a competent authority was all the more vital when it involved “mixed” migratory flows, in the framework of which potential asylum seekers must be singled out and distinguished from other migrants. The rejections on the high seas, according to a recent decision of the European Court of Human Rights (*Hirsi and other c. Italy*, February 23, 2012), are unable to distinguish between simple illegal immigrants and asylum seekers. And

this is very serious because «the right to have rights» (Arendt) should be at the global level as «a lawful incarnation of the right of asylum[1].

1.1 In asylum there are significant differences between national provisions and their application. For this reason, while in the past the Treaty of Amsterdam provided only the adoption of minimum standards, now the Article 78 of the Treaty on the Functioning of the European Union (TFEU) goes beyond the regulatory model of harmonization, establishing a uniform *status* of asylum valid in the European Union.

The European Council remains committed to the objective of establishing a common area of protection and solidarity based on a common asylum procedure and a uniform *status* for those granted international protection. According to the European Council: «The development of a Common Policy on Asylum should be based on a full and inclusive application of the 1951 Geneva Convention relating to the Status of Refugees and other relevant international treaties. Such a policy is necessary in order to maintain the long-term sustainability of the asylum system and to promote solidarity within the Union. Subject to a report from the Commission on the legal and practical consequences, the Union should seek accession to the Geneva Convention and its 1967 Protocol»[2].

[1] E. Larking, 'Human rights, the right to have rights, and life beyond the pale of the law', in *Australian Journal of Human Rights*, vol. 18, n. 1, 2012, p. 77. The High Court of Australia rules that using the outcome of an ASIO (Australian Security Intelligence Organisation) security assessment to deny a refugee a protection visa is invalid.

[2] European Council, The Stockholm programme – An open and secure Europe serving and protecting citizens (2010/C 115/01).

1.2 In some EU countries, such as Greece, there is a systemic deficiency in the asylum procedure and reception conditions for asylum seekers. The Court of Human Rights (*M.S.S. c. Belgium and Greece*, January 21, 2011) ruled not only that the Hellenic Republic had violated Article 3 of the ECHR because of the existential conditions of detention of the applicant on its territory, and Art. 13 of the ECHR in conjunction with the said Article 3, because of shortcomings in the asylum procedure followed for the applicant, but also that the Kingdom of Belgium had violated Art. 3 of the ECHR, exposing the plaintiff to risks related to the deficiencies of the asylum procedure in Greece and existential conditions of detention contrary to that Article. On the other hand, it must be said that in 2010 Greece was the entry point for about 90% of illegal migrants, so that the burden borne by that Member State in reason of this great flux was out of proportion to that sustained by other EU Member States and the Greek authorities were physically unable to cope with it. For this reason must prevail solidarity between the EU countries, according to the most recent case law of the European Court of Justice and as required by Regulation (EU) No. 439/2010 of the European Parliament and the Council of 19 May 2010, establishing the European Asylum Support Office. The function of this office is to strengthen practical cooperation between EU countries on asylum, supporting the countries of the EU in which asylum and reception systems are disproportionately subject to strong pressures, in particular because of their geographical or demographic situation characterized by the sudden arrivals of a large number of non-EU citizens who may be in need of international protection. It not is surprising, therefore, that the

European Asylum Support Office was opened in Valletta Harbour, Malta – the southern border of the EU – with the decision 2010/762/UE of the Representatives of the Member States, meeting on the 25 February 2010. The Office, which helps also to improve the implementation of the Common European Asylum System (CEAS), must support the EU countries by coordinating asylum support teams, as well as actions on the initial analysis of asylum applications and the rapid creation of adequate reception facilities.

2. Administrative detention of irregular migrants

It has been said that the Italian law-maker has adopted some unlawful provisions in order to address the complex phenomenon of immigration, often with public safety measures. Although not declared unconstitutional, other provisions adopted and still in force are difficult to implement, ineffective and useless. This is the case of the rules introduced by Law 15.07.2009, n. 94. The main novelty of this law is to have introduced into the Italian legal system a new crime, that of illegal immigration[3]. There is therefore a real turning point in the regulatory system on immigration: the violation of the rules

[3] T. Catananti T., 'I reati in materia di immigrazione dopo la legge n. 94 del 2009, in *Rivista dell'Associazione italiana dei Costituzionalisti*, del 02.07.2010, p. 1; C. Renoldi C., 'I nuovi reati di ingresso e di permanenza illegale dello straniero nel territorio dello Stato', in *Dir. imm. citt.* XI, 4-2009, p. 38 e ss; M. Donini, 'Il cittadino extracomunitario da oggetto materiale a tipo d'autore nel controllo penale dell'immigrazione', in *Quest. Giust.*, 2009, p.127 e ss.

concerning the entry and residence in the territory of the State, up until now punished by expulsion, is raised to criminal illicit. The criminalization of illegal status is likely to devalue the fundamental liberal principle of the criminal law of the fact – based on Article 25, paragraph 2, of the Italian Constitution – according to which the penalty may be lawfully provided only with respect to material facts and not prejudicial to the legal interests than mere subjective personal conditions, such as those of migrants.

The Law 15.07.2009, n. 94, punishes the illegal entry into the territory of the State, which classifies illegal entry as a crime to commit instantly, by passing illegally the borders. But this first provision of law is useless, because the problem is not so much the entry (which in most cases is legal), but the permanence of illegal non-EU (citizens of non-EU countries). In addition, a final assessment of the ineffectiveness of the financial penalty: illegal immigrants without a residence permit do not have the resources to pay the penalty, because certainly they do not have a regular job.

Italian law-maker has adopted another ineffective provision, which allowed the extension of the time of detention in Centers for Identification and Expulsion (CIE) for up to eighteen months, in order to allow the identification and expulsion procedure. When they were opened in Italy, with the Law Turco-Napolitano of 1998, under the name of the detention centers (CPT), the maximum limit of detention was thirty days. The limit then became sixty days in 2002 with the Bossi-Fini law. The so-called security package in 2009 had already tripled the limit from two to six months. The decree 23 June 2011, No 89, once again, extended the duration of the detention from six

to eighteen months, in art. 3 on "Changes and additions to Legislative Decree 25 July 1998, No 286 implementing Directive 2008/115/EC "European Parliament and the Council of 16 December 2008 laying down rules and procedures applicable in Member States for returning citizens of third countries whose stay is illegal. In fact, the Directive 2008/115/EC - Return of third-country nationals illegally staying - provides for administrative detention of irregular migrants for up to 18 months. Of course, in regulating the manner and timing of the return of third-country nationals illegally staying, it stipulates the gradual series of administrative actions, favoring voluntary departure of foreigners irregularly and, above all, conceiving the detention as a last resort. However, it is desirable to amend the EU and Italian regulatory framework to provide for a shorter duration of the maximum period of detention and the identification of modern and effective tools for establishing the identity and nationality or for the acquisition of documents.

Detention cannot actually turn into a sort of alternative to prison detention, because of its long duration; but personal liberty is inviolable and more important than securing of borders. For this reason administrative detention is a legitimate limitation of personal autonomy only if required for a short duration aiming to the identification and the departure of irregulars and, as such, if it is not violating the right not to be criminalized as irregular[4]. According to the European Court of Human Rights, the principle of proportionality requires that the detention of nationals illegally staying or extradition procedure

[4] Dennis J. Baker, *The Right Not to be Criminalized, Ashgate*, Farnham, Surrey, UK 2011.

does not go beyond a reasonable time, it does not exceed the time required to reach the goal pursued (see, inter alia, *Saadi v. United Kingdom*, January 29, 2008). Can it be assumed for illegal immigrants detained in the identification centers a stay which exceeds the 20 or 35 days provided for foreign asylum seekers without identification or who have escaped the border control? Maybe. Certainly a stay for up to 18 months in the identification centers cannot be considered reasonable. Furthermore, adequate reception facilities for unaccompanied minors should always be provided, ensuring that they are not imprisoned and that they are kept separate from adults.

Any person may dispose of (or deliberately put at risk) his freedom, while every political institution may take legitimate and effective measures in proportion to the losses suffered by the social community due to misconduct, and yet, in the Constitutional State as each person cannot dispose of his dignity, so the authority is obliged to respect the very value of human dignity.