Europe of Migrations: Policies, Legal Issues and Experiences

Edited by
Serena Baldin
and Moreno Zago

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Introduction

SERENA BALDIN, MORENO ZAGO*

According to Eurostat, in 2015 over 1.2 million asylum seekers applied for international protection in the EU Member States. It is a figure more than double that of the previous year. In the first quarter of 2016, the number of asylum applicants increased by more than 50% compared to the same quarter of 2015. These flows represent a crucial test to verify the institutional endurance of the EU and also a severe challenge to European countries. Indeed, there is little doubt that the unequal distribution of new arrivals among EU Member States and the increasing restrictive measures recently introduced by several countries in order to prevent the entrance of migrants in their territories call into question the survival of the EU policy in this regard. They also endanger the credibility of the EU as a whole. In addition, the migrant crisis in Western Balkan raises doubt about the EU enlargement process towards these countries. In parallel, migrations raise many issues for national and local authorities. Welcoming policies and welfare assistance have to be foreseen for migrants, both legal and illegal. Often these matters give rise to tough political debates, difficult practices, and normative obstacles, as is the concern related to ethnic diversity and cultural values potentially in contrast with those of the majority of the population.

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The collection Europe of Migrations: Policies, Legal Issues and Experiences brings together scholars from law, sociology, history, and political science with the aim of taking the stock of these topics. The volume focuses particularly on three aspects: firstly, how the European Union is facing to the emergency of great fluxes of migrants, while its policies and rules are explicitly questioned or opposed by some Member States; secondly, which are the major legal issues at stake regarding the integration of migrants in the European countries; thirdly, how welcoming policies are dealt with national and local bodies and which matters involving ethnic diversity and new migrant communities may arise from specific experiences.

In the first part, entitled "The European Union Migration Policy", Alessia Vatta introduces the theme highlighting the tension between Europeanisation efforts and national sovereignty in the evolution of the migration policy, in the attempt to identify possible developments in this field. With the aim of stopping large flows of irregular migrants, principally coming from Syria, EU and Turkey signed in 2016 a statement. Francesco Cherubini wonders if this statement is an international agreement, if it is compatible with the principle of non-refoulement, and if it is legal. While Turkey's role is of crucial importance in this context, the volume also focuses on the migration crisis managed by other Western Balkans countries. Ezio Benedetti privileges the perspective of the EU's enlargement policy to these countries for trying to demonstrate that the current approach is not responding to the basic need of a re-launch of this process. The Common European Asylum System and the role of the European Union in protecting the rights of asylum seekers is dealt with considering two vulnerable groups. Serena Baldin and Moreno Zago introduce the legal framework of asylum and illustrate the policies provided for unaccompanied foreign minors. Delia Ferri discusses how and to what extent EU directives ensure the protection of migrants with disabilities and meet the standard of protection of the UN Convention on the rights of People with Disabilities.

The second part is devoted to "Issues on Legal Integration of Immigrants". In a theoretical perspective, the issue of the emergence of a multicultural ideology and its compatibility with the idea of Constitution is deeply questioned by Carlos Ruiz Miguel. From a comparative point of view, Maria Chiara Locchi deals with the well-established phenomenon of the imposition, by many EU immigration countries, of linguistic and civic integration tests for migrants as pre-entry integration requirements. Given that the success of integration policies depends in a large extent on the recognition of social rights, further case studies are addressed to these rights in Spain, Ireland and Italy. Spain, despite being a gateway from the North African route, has traditionally accepted few refugees. And even if the rate of economic migrants is higher, in this country the main challenge is already that of establishing effective mechanisms for their integration, as revealed by Juan José Ruiz Ruiz. Historically, Ireland was a country of mass emigration, rather than net immigration. However, the continuous influx of refugees

during the mid 1990s imposed a revision to its immigration system. In this respect, the chapter written by Charles O'Sullivan provides an analysis of the Irish legal system in relation to third-country migration, and demonstrates two key characteristics of the employment permit system: ministerial discretion and the propensity to operate on almost purely administrative basis. In Italy, the welfare for migrants is conditioned by two factors, which recently have influenced policies at national and regional level, namely the economic crisis and the migratory emergency. The legal effects of continuous and chronic emergencies on the Italian social security system are highlighted by Maria Dolores Ferrara, while Davide Monego provides a framework of the application of the provisions set up by the legislative decree no. 286/1998 on immigration, that is the most effective measure to protect migrants' right to health.

The last part, "Experiences of Migration", opens with the exploration of the concept of ethnicity. Ornella Urpis analyses in depth the perspective of ethnic identity in its cognitive, evaluative and emotional dimensions, as well as the policy approaches of multiculturalism and interculturalism in relation to violence and social conflict. The following chapters are devoted to the study of specific cases. Giovanni Delli Zotti and Donatella Greco underline the "Protection System for Refugees and Asylum Seekers" (SPRAR), as a good practice implemented in the Region Friuli Venezia Giulia and in the town of Trieste. The North-Eastern part of Italy is examined also by the research group of the Institute of International Sociology of Gorizia (Anna Maria Boileau, Daniele Del Bianco, Olivia Ferrari, Ramona Velea, Chiara Bianchizza). Their chapter summarises the research's findings on Gorizia, proposing future actions to implement the adaptive capacity of the actors involved in the management of the migration fluxes. International trafficking from Punjab and exploitation of migrants workers in the Province of Latina are objects of the analysis by Marco Omizzolo, also conducted through the participant observation working as a farmhand. With a historical approach, the chapter written by Diego Abenante is devoted to the examination of the characteristics of the community of Pakistani immigrants in Italy. The essay focuses in particular on the demographic characteristics of this community, on its religious and social values, and on the structures of political authority. Pietro Neglie investigates the specific case of Armenian diaspora in Italy as the consequence of the massacres and genocide at the beginning of the XX century, and Cesare La Mantia examines the case of the Magyar refugees escaped from Hungary in 1956, highlighting Austria's, Yugoslavia's and Italy's welcoming before their departure towards other final destinations.

The interdisciplinary volume shows that the EU and the European States are managing with great difficulties the recent flows of migrants. Although they should have several years of experience in this field, and notwithstanding the fact that they need migrants for their labor markets and for contrasting the demographic decline, the reality is that different political views and interests, inside single States and among States, do not facilitate the development of co-

herent policies and legal frameworks to tackle this issue. In spite of a number of good practices arising from NGOs and civil society and also from local and national authorities, as a whole the "fortress Europe" still seems unable to adopt effective policies to welcome and integrate migrants in accordance to the Charter of Fundamental Rights of the European Union.

The European Union Migration Policy

The EU Migration Policy: between Europeanization and Re-Nationalization

ALESSIA VATTA*

1. Introduction: some historical and theoretical considerations on the migration policy of the European Union

According to a widespread opinion, the European Union's migration policy is historically a sort of "liberal paradox", since it shows a liberal approach regarding the free movement of EU Member States' citizens within the Union's territory, while being rather restrictive when third-country nationals (TCNs) are concerned (Givens, Luedtke 2003). Actually, this allegation is disputable, since in most cases "illegal" or "clandestine" migrants are people who regularly entered EU countries (or other countries included in the Schengen area), but remained after the expiry of their access titles (Guarino 2013). Moreover, in the case of refugees, the sole application of (non)refoulement rules stated by the Convention of Geneva constrains the freedom of each signatory state to decide on the admission of TCNs on its territory. Since there is no comprehensive international migration treaty or a global institutional system in force, the EU's goal of developing a common migration and asylum policy is a true exception, because States do not easily accept limitations on their regulatory capacity (Hampshire 2016a).

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On the contrary, they have generally conceived their immigration policies with respect to their security and economic interests (Adamson 2006).

Migration policies and their effectiveness are influenced by multiple objectives and competing political agendas of various actors and interest groups (e.g. politicians, voters, employers, trade unions and non-governmental organizations for human rights) (Czaika, De Haas 2013). In addition, international migration is often driven by factors – like labour demand, inequalities in wealth and political conflicts in departure countries – on which an effective policy impact is difficult to exert. In the case of the EU, while states have been reluctant to relinquish sovereignty, European institutions have developed their own positions. The European Commission, as policy starter, has tendentially followed a proactive strategy, while the Council has traditionally paid more attention to national needs. Instead, the European Parliament has gradually changed its view from a generally liberal one to a more restrictive, in coincidence with the adoption of co-decision, possibly in order to work better with the Council to pass legislation (Lopatin 2013; Hampshire 2016b). It has been argued that in this policy area Member States have increasingly approached the EU level because it is a policy venue where national governments can agree on salient policies more easily. They escape domestic opposition in parliaments and criticism from organized civil society. This strategy is named 'venue shopping' (Guiraudon 2000). Not by chance, within EU migration policy, directives are the most frequently used legal instrument, since they leave a certain discretionality to Member States on implementation, while regulations – which come directly into force – are rarer (Aja, Diez 2005).

While the Commission has historically favoured a "root causes" approach, in order to detect the "push-pull" causes of migrations, the Council has been more control-oriented. Checking and intercepting irregular immigrants remains predominantly a national matter, though the EU has legislated to establish common standards. The same can be said for asylum legislation and practices, where recognition rates, standards of decision-making and reception conditions are very variable among Member States. And, notwithstanding several directives, also economic and family migration still remains largely in the discretion of states. The Dublin rules themselves, though very discussed, constitute an attempt to come to terms with different national disciplines regarding asylum-seeking (Schuster 2009). In this sense, even the principal-agent approach has been applied (to Member States as principals and to the EU as the agent) (Menz 2015).

In the following paragraphs, the tug-of-war between Member States and EU institutions is reconstructed throughout the historical development of the policy, though especially after the Lisbon Treaty (2007, in force since 2009) the Europeanization process has maybe shown stronger signs of consolidation, also because of the economic and financial crisis.

2. From the origins of the policy to the Treaty of Amsterdam

Migration policy was originally dealt with at state level, outside EU institutions (Cellamare 2006). In the Maastricht Treaty (1992) the issue was included in the intergovernmental cooperation for Justice and Home Affairs (the JHA pillar). Ministers of Interior and Justice were involved in the Council activity through the K4 Committee, later substituted by the SCIFA (Strategic Committee of the Council for Immigration, Frontiers and Asylum) (Campesi 2015, 87). In 1997, the Amsterdam Treaty linked migration to the definition of an integrated European Area of Freedom, Security and Justice (AFSJ). But the history of foreign immigration in Europe dates back at least to the years following the end of the WWII. According to Delgado (2002), Europe attracted migrants due to the post-war economic recovery, though in the Northern States (United Kingdom, Ireland, Scandinavian countries) the regulation of the labour market was comparatively more accurate[1]. After the oil crisis (1973), more restrictive policies were adopted, particularly in France and Germany, but family reunification remained an alternative channel to import migrant labour (Czaika and De Haas 2013). The migration issue acquired a supranational dimension in the 1980s, with the development of the European Single Market, the accession of Greece, Spain and Portugal in the EEC, and the fall of the Berlin Wall. These events set the issue of border control: the Mediterranean area would soon become problematic under this profile, and the future membership of eastern European countries would involve organisational problems in terms of financial resources and personnel training. According to the White Paper on the Completion of the Single European Market (1985), European directives would be necessary for the coordination of visa regulation, the status of non-EEC residents and the asylum/refugees matters.

After the Single European Act (1986) an ad hoc group on immigration was established by initiative of the Council following the Schengen agreement (1985), signed by Germany, France and the Benelux countries and supposed to strengthen police and judicial cooperation. In 1990, the reunification of Germany and the application of the Schengen convention enhanced the pressure exerted on the other institutions by the Commission, for a communitarization of migration policy. This purpose was however difficult to achieve, because of the differences in national policies. In order to stimulate convergence, a Council Decision

[1] In 1961 a common European Economic Community (EEC) procedure for job offers was implemented, according to which – after three weeks since their publication – offers could be taken by non-nationals, with the release of job permits. Entry and exit visa within the EEC were abolished. In 1964 the three-weeks limit was eliminated, and family members of Community workers could also move abroad. Moreover, it was stated that the entry could be denied only for public safety reasons or individual illegal behaviour, a rule still currently valid (Recchi 2013, 45). In 1968, Regulation 1612 and Directive 360/CEE established the free movement of workers without discrimination in working conditions, with a valid ID document, for a renewable residency period of five years. Bilateral agreements between member states also favoured workers' movement within the EEC.

(1988/384) introduced a policy of information and consultation on migration flows. This process was supported by informal discussion groups (the ad hoc group, the TREVI group and the Schengen group)[2]. Within the ad hoc group the Dublin Convention (1990) was elaborated with the purpose of identifying the state responsible for the processing of each asylum request. Thanks to these efforts, national legislations on the treatment of foreign citizens gradually became more similar, but relevant differences remained regarding the conditions of migrants. Such differences were related to political and historical reasons (e.g. former colonial ties), with specific terms for asylum-seeking and family reunification.

In the meantime, the perception of the interdependence between the national migration policies grew stronger, also because of globalizing factors (like new information technologies, more intense public scrutiny on state authorities, a diffuse pressure in support of human rights). Overall, the position of the EU in this field remained cautious (Fielding 1993). The Commission gradually took the initiative on asylum and immigration, while states' discretionary power on labour immigration persisted. A common interpretation for such gradualism is neofunctionalist: economic integration (i.e. the Single European Market) was supposed to come first, other policies had to follow (the classical theorization of this approach is Haas, 1958). This may also explain why in 1985 – in coincidence with the White Paper – the Commission prepared for the Council the first proposals for a common policy on immigration. The main goals were the coordination of national legislations and the definition of a common position among the states, but informality (and secrecy) were the rule within the TREVI and the Schengen groups, mainly dealing with internal security. This approach was confirmed in the Single European Act, where intergovernmentalism prevailed in this field, with the exception of visas. The adoption of a common model for visas and the listing of countries for which visas were compulsory became a community issue. But unanimity was hard to achieve, decisions were mostly non-binding, and national parliaments proved slow in the ratification of international conventions related to migration issues. The communitarization of the policy was still difficult to reach. To gather and disseminate information on asylum, in 1992 the CIREA (Centre for Information, Reflection and Exchange on Asylum) was founded by a Council decision. In the same year the CIREFI (Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration) was established[3]. Simultaneously, after the end of the Cold War and the disgregation of Yugoslavia, new fluxes started to move towards the EU, also from Africa.

[2] TREVI was the acronym for Terrorism, Radicalism, Extremism and Violence International (Menz 2003). The *ad hoc* group issued recommendations on migration policy to national authorities. It was substituted by a new coordination body in 1993.

[3] Since 1999 it offers an early warning system for the transmission of information on illegal immigration. In 1998 the Council adopted *Odysseus*, a programme for training, exchange and cooperation in the field of asylum, immigration and the crossing of external borders. It was

A turning point was reached in 1997 with the Amsterdam Treaty (in force since 1999), which contemplated the institution of the AFSJ. This opened the way for the adoption common measures in immigration. Title IV of the treaty included dispositions on asylum, visas, migration and free movement of people, while Title VI regarded police and justice cooperation in crime issues. The communitarization of Title IV subjects included the Schengen agreements and norms on entry visas, residency permits and conditions. After five years, norms would have to be implemented on the abolition of controls at internal borders and their setting at external borders, on immigration terms, illegal residency and the travelling of TCNs within the EU territory for less than three months. After the adoption of the Vienna Programme for the AFSJ (2000-2004), the European Council meeting at Tampere in October 1999 proclaimed the equivalence of rights and duties of EU citizens and legal residents, the fight against racism and xenophobia, the convergence of national legislations on the admission to citizenship. Information campaigns on transit and legal migration were launched in third countries, with the first agreements on readmission and return, the definition of a common visa policy against false ID documents, the setting of measures against human trafficking and smuggling, the strengthening of cooperation between national border authorities. The Directorate-General for Justice and Home Affairs was constituted and the Commission prepared a working plan on the new AFSJ, including a section on asylum and immigration. Consequent provisions were to be adopted on the transmission of information and the definition of a common residence permit model. If the Council – as intergovernmental body – had a crucial decisional role, the Commission played a decisive political role, moving the migration issue to a supranational level. The European Parliament, generally favourable to integration policies, supported the establishment of the European Migration Forum (Favell and Geddes 1999), a body made by representative organizations of TCNs, and pushed towards communitarization (however, the Forum failed to find common ground due to internal differences among represented foreign communities; see Guiraudon 2003). In order to get consensual positions, the Commission regularly adopted rather generic and impartial stances, but consistently worked in three directions: the analysis and control of migratory pressures, the check on the number of migrants and the enforcement of norms on legal immigration.

open also to non-governmental organizations and private institutions (included research institutes and universities). In 2002 Odysseus'work was continued by ARGO (Action Programme for Administrative Cooperation in the Fields of External Borders, Visas, Asylum and Immigration), to promote cooperation among competent national administrations.

In 1998 another specific working group, the High Level Working Group, was established within the Council to deal with JHA issues. Following the Nice Treaty (2001) it was decided that, regarding the free movement of people, Council decisions would be taken by qualified majority voting (QMV). The Commission took advantage of this rule to formulate a new Directive (2004/38/EC), which still regulates entry and residency by European citizens in Member States. The directive defines the length of residency (short, long and permanent – after five years), stating that permanent residents must have access to the national welfare provisions. Some restrictions were applied to citizens of Central and Eastern Europe after the 2004 and 2007 enlargements, similarly to what had previously happened to Greece, Spain and Portugal upon their accession. However, codecision and QMV were postponed to 2004 for immigration issues, while for asylum and temporary refugee protection the Council was supposed to adopt common norms and principles beforehand[4]. At the same time, the adoption of five-year plans for the implementation of initiatives related to the Tampere meeting and the Vienna action plan led to the Hague Programme (2005-2009), which foresaw the consolidation of the Schengen system, the police cooperation in criminal matters and the setting of the common asylum policy (Nugent 2010). It also insisted once more on the fight against illegal immigration and in favour of legal migration and integration channels.

After the 2001 terrorist attacks in New York and Washington and the 2004 and 2005 bombings in Madrid and London, the securitization of the policy gained momentum, as did the distrust towards integration policies (Ceccorulli 2014)[5]. In spite of this, the early 2000s saw the enforcement of the legal texts which constitute the basis of the EU asylum law: the Reception Directive (2003/9/EC, amended as 2013/33/EU), the Qualifications Directive (2004/83/EC, amended as 2011/95/EU), the Procedures Directive (2005/85/EC, amended as 2013/32/EU), as well as the Dublin II and III Regulations (343/2003 and 604/2013)[6]. However, Member States insisted on keeping harmonization to a minimum, especially regarding procedures, while the European Parliament opposed their restrictive attitude (Ripoll Servent and Trauner 2014, 1146). Both the Commission and the

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[4] Before 2004 the Council still decided unanimously on Member States' proposals, after consulting the European Parliament. After 2004, the Commission would monopolize legislative initiative also in this field and the Council – at unanimity and with European Parliament's consultation – would be able to apply QMV and codecision with the Parliament.

[5] In 2011 the leaders of the three largest European countries (Sarkozy, Merkel and Cameron) would all denounce multiculturalism as a failure (Scholten and van Nispen 2015).

[6] Other two related texts – the Eurodac Regulation (2725/2000, revised as 603/2013) for the constitution of the European fingerprints database, and the Temporary Protection Directive (2001/55/EC) should also be remembered (Ripoll Servent and Trauner 2014). The Eurodac is an automated fingerprint identification system covering asylum-seekers and undocumented migrants. For a review of its use, see Aus 2006.

Parliament kept a more liberal position in comparison to the Council also during the revision of the Dublin regulation. As a result, Dublin III addressed previous shortcomings by establishing an early warning mechanism and an ad hoc support for frontline countries (like Greece and Italy), but did not introduce any real burden-sharing provision.

In 2007 the Lisbon Treaty (in force since 2009) affirmed that the AFSJ is a shared competence between the EU and the states, but communitarization – and the ordinary legislative procedure – are extended to nearly all the issues. States remain competent on border control, on part of the police and judiciary cooperation, and on the release of ID papers – but with a common policy on visas and short-stay permits – and reinforced cooperation among at least nine states is allowed. A common European asylum and temporary protection system and a common management of external borders were also anticipated. Art. 67, § 2 confirmed the principle of fairness towards TCNs and stateless people, as in the previous Tampere Programme. Common provisions on partnership and cooperation with third countries for the management of asylum- and protection-seekers' inflows were also provided. Art. 78, § 3 affirmed that if a Member State faces an emergency related to a sudden inflow of TCNs, the Council – on a Commission proposal – may adopt temporary measures in favour of the affected state, after consulting the European Parliament. Art. 79 declared the adoption of a common immigration policy, covering an efficient management of inflows, the fair treatment of legally-residing TCNs and the fight against illegal immigration and smuggling of human beings. The article also covers readmission agreements with third countries. Member states are however held responsible for integration policies and the definition of labour migrants' admission. The European Parliament and the Council may establish incentives and support for states' action. Art. 80 declares that solidarity and fair sharing of (also financial) responsibility shall govern EU policies in this field. Even if the competence of the EU is shared with Member States, the treaty puts an end to the "minimal norms" implied in Amsterdam to set comprehensive provisions. It remains in the competence of the states to decide on the number of migrants who are legally admissible (Favilli 2010), as in the Tampere Programme.

In 2005, the establishment of Frontex (via Regulation 2007/2004), the EU's border control agency, though conceived as a common patrolling instrument, raised further debates because of the limited initiative power of the agency and its dependency on states' resources (Rijpma 2010)[7]. A new Standing Committee on Internal Security was also established as a supporting arm of the Council with Frontex, Europol and Eurojust. Notwithstanding the treaty, a clear signal that states would not easily leave control on immigration policy to the EU was given by the French Presidency of the Council in 2008, when it presented a Pact on

[7] Differently from most interpretations of the agency's surveillance system, Neal (2009) maintains that Frontex is not the result of securitization, but rather of the ineffectiveness of the EU migration policy.

Immigration and Asylum right when the Commission was preparing the AFSJ's Stockholm Programme (Hampshire 2016a, 543).

4. After Lisbon: an assessment

In 2010 the Commission's Directorate-General Justice, Freedom and Security was split into two sections, the first responsible for justice and the second for the internal AFSJ and the protection from external risks. The latter section, renamed Home Affairs, deals with immigration, the common asylum system, the Schengen area, border controls and visas, internal safety, organized crime and terrorism, police cooperation and international affairs. Migration is divided into four sections: legal, and illegal, immigration, asylum and refugees, and integration. Apart from tourism and short-term visits, since legal immigration is related to the labour market situation of each state, the EU has intervened only to set entry and residency conditions for specific groups of workers (highly-skilled professionals, students and researchers) and to give guidelines on family reunification and long-term stays. Integration policies are also primarily a state charge, within a framework of general principles set by the EU. Asylum and refugees have already represented a serious problem due to the multi-level regime constituted by international obligations, EU guidelines and Member States' positions[8]. Concerning illegal immigration, EU intervention regarded human smuggling and trafficking, by creating control devices like Eurosur, the surveillance system for border information exchange[9]. Following the Hague Programme, the Stockholm Programme (2010-2014) stated the need to protect fundamental rights and to build the external security dimension in the AFSJ (Nugent 2010, 229). In 2011 the Commission launched the EU Immigration Portal, an online instrument which offers practical information for legal immigration. The Blue Card Directive (2009/50/EC) came into force to facilitate highly-skilled migration from third countries, harmonizing national approaches on the admission and residence of labour migrants. At the same time, the Commission tries to empow-

[8] The juridical basis for international protection of asylum-seekers in EU Member States are the Convention of Geneva (1951) and its 1967 Protocol, national legal and constitutional norms and other international conventions, like the European Convention for Human Rights and Basic Freedoms (1950), the Convention against Torture (1984), the Convention on the Rights of Children (1989) and the Charter of Fundamental Rights of the EU (2000) (Garlick 2010). National courts and the European Court for Human Rights can also give instructions in this sense (Nascimbene, Mafrolla 2002).

[9] The start of the European Border Guard, agreed in 2016, should potentiate Frontex activity, in view of the possible adoption of a new "entry-exit" registration system in the framework of the "smart border" project for the control of border-crossing by TCNs of the Schengen area, due to come into force by 2020 (European Commission 2016a).

er border controls and the governance of Schengen by the VIS system[10]. In 2011 the EASO (European Asylum Support Office) was inaugurated in order to support Member States in the implementation of the Common European Asylum System (CEAS). After the expiry of the Stockholm Programme, the European Council issued a series of strategic guidelines mainly related to the correct implementation of the existing legal discipline (particularly on family reunification, the Blue Card and the repatriation of immigrants). In the latter sense, agreements and partnerships were established with Jordan, Morocco, Turkey and Tunisia, also for the safe resettlement of migrants. Cooperation was also opened with Horn of Africa states in order to prevent smuggling and trafficking. A debate also started with the purpose of re-elaborating the Dublin III rules, and better defining Member States' obligations. In line with the Global Approach to Migration and Mobility (GAMM), the EU insisted on cooperation with third countries and regions, including eastern countries (like Azerbaijan, China and Armenia). The main instrument of the GAMM, originally born in 2005 but relaunched between 2011 and 2012, are the mobility partnerships. They are informal and flexible agreements between the EU and third countries. Though non-binding and based on the exchange between cooperation on migration issues and favourable visa conditions, the participation on the part of EU Member States is highly variable (Hampshire 2016b). Mobility partnerships may allow limited legal migration in specific sectors and in a time-limited scope (Cardwell 2013). The renewed Schengen Information System (SIS II) started operations in 2013, to alert border control customs and police authorities about wanted or missing people, objects (e.g. stolen vehicles) and documents. The European Refugee Fund, the External Borders Fund and the Return Fund have been part of a framework programme "Solidarity and management of migratory flows", financed with a total of € 5.8 billion for the period 2007-2013 (Trauner 2016).

More generally, in front of periodical emergencies (like summer mass arrivals in southern Italy or attempts to reach central Europe from Greece), the principle of burden-sharing does not seem to find a fluent application[11]. Though the Lisbon Treaty states that border controls, immigration and asylum policies are subject to the solidarity and fair division of responsibilities among Member States, in practice EU intervention is often difficult. The Directive 2001/55/EC provides extraordinary provisions for temporary protection of displaced people, but Frontex – which assist the states in checking the borders, also through the so-called RABITs (acronym for Rapid Border Intervention Teams) – has unclear competences with regard to Member States' authorities (Nascimbene, Di Pascale

[10] The VIS (Visa Information System) started working in 2011 at all visa-issuing consulates in North Africa, as a database to collect and exchange biometric data, digital photographs and fingerprints of visa applicants between Schengen States. It has been applied also in the rest of Africa, the Near East, the Gulf region, South America, Central and South-Eastern Asia.

[11] In 2015, 75% of all asylum applications were registered in just five Member States (Germany, Hungary, Sweden, Austria and Italy); see European Commission 2016b.

2011). At the domestic level, the effectiveness of policy measures can be conditioned by several factors, like the levels of economic development and unemployment in arrival and departure countries, or the existence of social and family networks, uneasy to control by states (Franchino 2009; Bertossi 2008).

A much discussed agreement has also been closed with Turkey in March 2016, whereby irregular migrants and asylum seekers arriving on the Greek islands may be returned to Turkey. For every Syrian returned to Turkey from Greece after an irregular crossing, the EU should take a Syrian from Turkey who has not sought to make this journey irregularly. Since doubts have been raised on the human rights' record of the country, this could offer a chance to courts (included the European Court of Justice) to have their say on asylum and immigration matters. In 2009, the adoption of the Directive 2008/115/EC on common standards and procedures for returning illegally-staying TCNs has tried to harmonize this process, ensuring rights-compatible practices and legal assistance to non-EU nationals, applying cooperation with third countries within the GAMM and among Member States through the European Migration Network information platform. The "external governance" of the EU migration policy has been translated into projects towards neighboring countries, using the Neighborhood Policy dimension of the common foreign policy and extending the range of European action (Wunderlich 2012). A streamlining of the common visa policy has also been recommended from the Commission to the Council and the Parliament in 2012 (European Commission 2012).

On the front of labour migration, within the application of the Blue Card Directive, Member States kept the option of running specific programmes for specialists and skilled labour, though EU citizens and legal residents are due to come first to cover a job before hiring a TCN (Roos 2013). Illegal immigration is negative both for immigrants (since their work is often exploited and they can be expelled legally) and for public administrations (since they ignore the number of overstayers and do not get fiscal benefits). Moreover, the diffuse perception of insecurity and social tensions with citizens and legal residents make illegal immigration a public order problem (Aja, Diez 2005). In this sense, the Directive 2009/52/EC provides minimum standards for sanctions against employers of illegally-staying TCNs (in addition, the Directive 2014/36/UE – about the so-called "circular migration" – determines entry and residency conditions of TCNs for seasonal jobs). However, these sanctions are mainly monetary, while inspections and legal support to workers are not so widespread to fight this form of black labour.

Frequent critical remarks have been made to the Dublin rules, deemed as too rigid. According to the evaluation of Dublin III (European Commission 2015b), the regulation was not designed to deal with mass inflows and, since it does not foresee a fair sharing of responsibility, its effectiveness is severely reduced. Its current application emphasizes only one of its guiding criteria (i.e. the country of first entrance is in charge of the asylum request processing). Bilateral relationships among potentially responsible states make such processes very time-con-

suming, and multiple asylum requests ("asylum-shopping") remain a problem. Moreover, transfers are made difficult by the length of appeals and procedures, the difficulties of inter-state coordination and the attempts by asylum-seekers to evade the system. The other criteria (presence of family members in a given state, the past issuing of a visa, the regular/irregular entry) should be more properly considered.

5. Future prospects and conclusions

In the latest years, the migration crises which took place in Greece, Italy and the Balkans have shown that the EU migration policy still lacks effectiveness. Besides, notwithstanding the increased police and judiciary cooperation, terrorism has repeatedly caused victims and raised deep worries in the political realm and in the public opinion in Europe. The control of the Commission and the action of the European Court of Justice are often invoked by experts who fear the effects of restrictive policies on asylum-seekers and refugees (Rossi 2015).

At the same time, the Dublin rules have proven increasingly inadequate, also because of non-compliance by Member States, especially regarding photo-identification and fingerprints collection. Even the proposal of extending the Open Method of Coordination to migration policy does not look promising, because the procedural differences among states make comparisons and benchmarking very arduous (Velluti 2007; the author mentions the INTI programme for integration of TCNs as an example of benchmarking application).

Another factor on which the EU should intervene regards undeclared labour. Especially in the case of African migration, a root cause is the demand for cheap migrant labour in sectors like agriculture, constructions, catering and services. Beside the implementation of the Directive on sanctions against employers exploiting migrant labour illegally, particularly Southern European countries should avoid mass regularizations. The frequency of regularizations may contribute to the perception that illegal entry is more effective than via the regular instruments of programmed flows and quotas (De Haas 2008). On the contrary, cooperation with third countries in patrolling the borders could more effectively curb illegal immigration – since expulsions and readmissions are far more expensive, also in terms of public opinion's reactions and State reputation[12]. In this sense, in 2015 the tensions regarding the relocation of 160,000 asylum-seekers (and the resettlement of 20,000) from Italy, Greece and Hungary, the building of fences or their reinforcement in Hungary, Greece and Spain, and the clashes in the migrants' camp of Calais confirmed the urgency to further clarify the policy categories within the notion of immigration (in July 2016, only 3,000 had been relocated, while 4,873 had been resettled, 79 within the EU Turkey agreement).

[12] Readmission destinations may not offer safe standards in terms of human rights' respect (Nascimbene, Mafrolla 2002).

Only a small proportion of international migrants are within the remit of the Geneva Convention, while labour migrants can be of interest to the national business communities (Geddes, Scholten 2016). Consequently, the political rhetoric on immigration control – so popular in electoral times – should leave the place to a closer attention to labour migration (Geddes, Scholten 2016, 7).

However, in 2014 the Pew Research Centre surveys showed that in European countries citizens tend to oppose current levels of immigration, and see it more as a burden than an opportunity, as far as their effects on labour markets and welfare provisions are concerned (Geddes, Scholten 2016, 13). Consequently, if States are responsible for integration policies, their legitimacy can be questioned by citizens if such inclusive policies do not produce positive results, with a precise 'cause-effect' connection (which also involves effective controls). Similar observations are made also by Hatton (2016a). According to his data, public opinion in Europe is increasingly favourable to genuine refugees, but strongly opposed to illegal immigration. Moreover, EU citizens also strongly support joint EU-level policy. This author stresses that refugees are mostly resettled to the United States, Canada and Australia, while EU countries do not easily accept them. His suggestions are that resettlement capacity should be improved through burden-sharing and that EU borders should be tightened, also in cooperation with transit countries (Hatton 2016b). In order to make relocations and resettlements more efficient, an improvement could imply the adoption of an exchange system between participant states, similar to the ETS environmental instrument, with the addition of sanctions or incentives, and taking – at least partially – refugees' preferences into account, in view of integration prospects (Fernández-Huertas Moraga 2016).

Since integration policies are still within the competence of Member States, their JHA ministers adopted a set of common basic principles (CBP) in 2004 (revised in 2014), which then produced a common framework for integration promotion (through the exchange of information and good practices) and a renewed European Migration Forum. In 2011 the Commission proposed a new European Agenda for the Integration of TCNs, and later (2015) a Common Agenda on Migration, based on four pillars: reducing the incentives for irregular migration, supporting effective border management (to save lives and secure external borders), implementing a strong common asylum policy and a renewed policy on legal migration. About funding, between 2007 and 2013 Member States could count on the European Fund for the Integration of TCNs (EIF), with a total budget of € 825 million. In 2014 it was replaced by the AMIF (Asylum, Migration and Integration Fund), which runs until 2020 and is a cofinancing instrument of national integration programmes. Of course, the European Social Fund (€ 80 billion for 2014-2020) and the Regional Development Fund (more than € 20 billion for 2014-2020) can also be used[13]. If «immigration works where immi-

13 Data taken from Servoz (2016). In June 2016 an Action Plan on the Integration of TCNs has been adopted by the Commission.

grants work›› (Hansen 2016), it is also true that skilled work has to be privileged and dumping on work conditions and wages by low-qualified immigrant labour must be avoided[14]. That was already a component of the Stockholm Programme, which insisted on the analysis of labour market requirements, the transparency of European online employment and recruitment information, skill matching and titles recognition (Official Journal of the European Union 2010). According to a recent analysis (Kobzar et al. 2015), migration flows in EU Member States are fluctuating since they depend on multiple interacting factors. In the next twenty years, Asia may be a new focus of immigration (Massey 2012)[15]. For this reason, besides insisting on implementing existing legislations and increasing coordination, the adoption of an asylum code, the mutual recognition of asylum decisions and the establishment of a single asylum decision process (according to the "one-stop shop" approach) should be combined with a strong mutualisation of resources (Vitorino, Pascouau 2015).

In addition, the internationalization of migration policy is already evident, with the involvement of international organizations (like the International Organization for Migration and the United Nations High Commissioner for Refugees) and the consequent multi-level stratification of the policy (Lavenex 2016). This involves also departure and transit countries (Bertossi 2008, 199). In the field of external cooperation, the EU has supported capacity-building in third countries, also through the Return Fund (2008-2013), for the constitution of national asylum systems, for readmissions and in the fight against organized crime (European Commission 2014)[16]. Linking incentives, like investment projects, assistance in resettlements, legal migration channels, to the foreign policy of the EU could better integrate migration policy in the external activity of the Union and make it more consistent. The issuing of EU-Africa bonds has also been proposed to facilitate the access of African countries to capital markets (Majocchi 2016). More accurate provisions should be taken for unaccompanied minors

[14] A comparative study of the EU, the United States, Canada and Australia showed that welfare benefits for refugees must be carefully evaluated in order not to displace work as an alternative, and that wage conditions must avoid dumping on nationals' wages and working terms (Legrain 2016). Under this profile, EU member states still present rather heterogeneous conditions, despite harmonization attempts. The Blue Card Directive should also be revised in order to attract qualified personnel from third countries. Until now, it has had scarce impact, since national similar schemes have overlapped with it unfavourably (van Riemsdijk 2012).

[15] According to Massey, the efficacy of restrictive immigration policy depends on the interplay of five basic factors: the relative power and autonomy of state bureaucracy, the relative number of people seeking to immigrate, the degree of constitutional protection of political rights of citizens and non-citizens, the relative independence of the judiciary, and the existence and strength of an indigenous tradition of immigration (Massey 2012, 20). Consequently, centralized and authoritarian states can more easily deploy harsher immigration policies. It is clearly not the case of the EU, but rather, for example, of the Persian Gulf countries.

[16] Between 2006 and December 2013 Frontex has returned 10,855 people. In spite of such limited numbers, the supposed "criminalization" of migration is the subject of a conspicuous literature (Parkin 2013).

and for illegal migrants released from detention (here conditions vary largely among states). Though a certain convergence has been registered regarding the definition of irregular stay and the release of residence permits for humanitarian reasons, Member States still apply different rules on apprehension and suffer from practical problems in the identification of returnees and in getting documents from non-EU authorities. This hinders a proper return policy (European Commission 2014, 30).

On the front of security, the European Agenda on Security (European Commission 2015a) focuses on terrorism, organized crime and cybercrime, arguing that a better implementation of EU legal instruments, transparency, accountability and compliance with fundamental rights are needed, together with a "cross-sectoral and inter-agency approach" (European Commission 2015a, 4). The reference is to the necessity that instruments like the SIS, the Interpol's Stolen and Lost Travel Documents (SLTD) and Europol work together effectively. The Prüm framework on data exchange (or Schengen III agreement) the coming Passenger Name Record (PNR) system[17] and electronic instruments like the ECRIS (European Criminal Records Information System) and the Maritime Common Information Sharing Environment (CISE) should also be of help, together with cooperation with third countries. An example is the EU-US Terrorist Financing Tracking Programme (TFTP), which allows financial search if there is a suspicion of terrorist activity. In spite of current difficulties, the Schengen system is supposed to stay in force (Guild et al. 2015; in the past, some countries had already suspended Schengen rules for health reasons, but such extraordinary measures had later been lifted). To stop irregular immigration, the EU has also resorted to reception "hotspots" and experts to help register people on arrival and coordinate returns, according to the 2015 Agenda on Migration.

In 2016, proposals have been made by the Commission for new rules on asylum. Basically, candidates should still apply for it in the first EU state they enter unless they have family ties elsewhere (European Commission 2016a). Bur fair sharing of responsibility within the EU should assist overwhelmed countries. Another recommendation regards regularizations, which should be individual-based, in order not to be perceived as "mass amnesties" (Bilgic 2013). Further legal channels for asylum demands could be established through resettlement agreements, the delegations of the European External Action Service in critical areas (in order to check asylum requests immediately) and capacity building initiatives in cooperation with third countries and regional organizations. European legislation should also better address the more recent root causes of migrations, like climate and environmental factors. To fix a long-term strategy, the "push factors" should be handled more decisively. Development plans (with conditionality and convergence clauses) for Africa and the Middle East, multi-lateral stabilization initiatives and support for a global approach to migration in the framework of

[17] The Passenger Name Record Directive (2016) obliges airlines to give EU countries their passengers' data in order to help the authorities against terrorism and criminal actions.

the United Nations would be possible solutions (Cofelice 2015)[18]. As far as the Dublin rules are concerned, they are not going to change in the foreseeable future, since the economic crisis still lingers and tends to circumscribe provisions for asylum-seekers because of financial reasons (Trauner 2016). With the hotspot approach, support for frontline states is supposed to be given through EU agencies if they cooperate with registration and fingerprinting of migrants. Here, adequate infrastructural and human resources will be important.

In conclusion, notwithstanding the large number of agencies, funds and legal rules, the EU migration policy still struggles to find a proper balance between different pressures. Another uncertainty regards the strategic guidelines for the AFSJ. In March 2014 the Commission presented its proposals for the new five-year programme. It was a communication, named "An Open and Secure Europe: Making It Happen", containing few new proposals and rather a warning on the need to implement existing norms and policies (Hampshire 2016a, 543). The ultimate version, presented at the European Council summit in Ypres that year, remained rather vague on future developments (Léonard, Kaunert 2016). About the hotspot approach, it is telling that even the European Parliament now insists on the duty of Member States to register and identify all migrants arriving in the hotspots to enhance both relocation and return procedures, and to improve overall security (European Parliament 2016, 44). But, in spite of the venue-shopping argument and of all the hardships, the EU cooperation on asylum matters has actually led to a rise in the legal standard applicable to asylum-seekers and refugees (Kaunert, Léonard 2012). It is maybe a good starting point to hope for effective developments in this contested policy area.

[18] However, the EU agreements with migrant-sending countries are criticized by some authors both because of conditional terms (Adepoju *et al.* 2009) and of the supposed "export" of EU migration policy (Boswell 2003). It is also objected that, in many participating countries, human rights records are not respected and refugee protection systems are not guaranteed (Lutterbeck 2006).

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The "EU-Turkey Statement" of 18 March 2016: A (Umpteenth?) Celebration of Migration Outsourcing

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1. The 18 March 2016 "Statement"

On the 18th of March, the "EU-Turkey Statement" was published on the website of the Council of the European Union. The "Statement" (ignoring, for the moment, its nature under international and EU law), which was made on the margin of the Brussels European Council meeting of 17-18 March 2016, followed quick and close negotiation begun in October 2015[1]. After the worsening of the migration crisis during the summer of 2015, on the 15th of October EU and Turkey adopted an Action Plan, where, apart from the usual diplomatic formulas and amongst other undertakings (on both sides), Turkey demonstrated its *intention* to «step up cooperation and accelerate procedures in order to *readmit* irregular migrants who are not in need of international protection and were intercepted coming

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[1] Preliminary meetings had been held previously: a working dinner on 17th of May and an informal meeting on 23rd of September 2015 «where EU leaders called for a reinforced dialogue with Turkey at all levels» (see European Commission, Fact Sheet, EU-Turkey joint action plan, Brussels, 15 October 2015, *Challenges are common and responses need to be coordinated. Negotiating candidate country Turkey and the EU are determined to confront and surmount the existing challenges in a concerted manner*).

from the Turkish territory in line with the established bilateral readmission provisions»[2]. A further development took place in November, when, in a "meeting of heads of State or government with Turkey", the Action Plan was activated: «As a consequence, both sides will, as agreed and with immediate effect, step up their active cooperation on migrants who are not in need of international protection, *preventing travel* to Turkey and the EU, ensuring the application of the established bilateral *readmission provisions* and swiftly *returning migrants* who are not in need of international protection to their countries of origin»[3].

Indeed, a readmission agreement was already in existence between EU and Turkey having been signed in 2013 (Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ L 134, 7 May 2014, 3 et seq.). The steps described above were, anyway, necessary: in fact, the section of the agreement concerning readmission to Turkey of third country nationals and stateless persons (i.e. non Turkish citizens) was destined to enter into force only after a period of three years (see art. 24(3) of the agreement), and in the meantime, existing bilateral readmission agreements between Turkey and single Member States of the EU continue to apply[4]. The meetings held were, therefore, in an attempt to strengthen the commitments *already* taken, especially on the Turkish side, awaiting the entry into force of the European readmission agreement (originally expected for 1st October 2017, but anticipated by the November "Statement" to 1st June 2016[5]).

The reason for this renewed interest of the EU and its Member States in readmission practices on the part of Turkey is clear: unequivocal statistics provided by Frontex show that, in 2015, the Eastern Mediterranean route (i.e. that using Turkey to get to Greece) was the most favoured. The second most popular one, the Western Balkans route (i.e. from Serbia towards Hungary and Croatia), was, according to Frontex[6], clearly nourished by the influx coming from Turkey. In this scenario, it was clear for the EU and its Members that Turkey's role was of

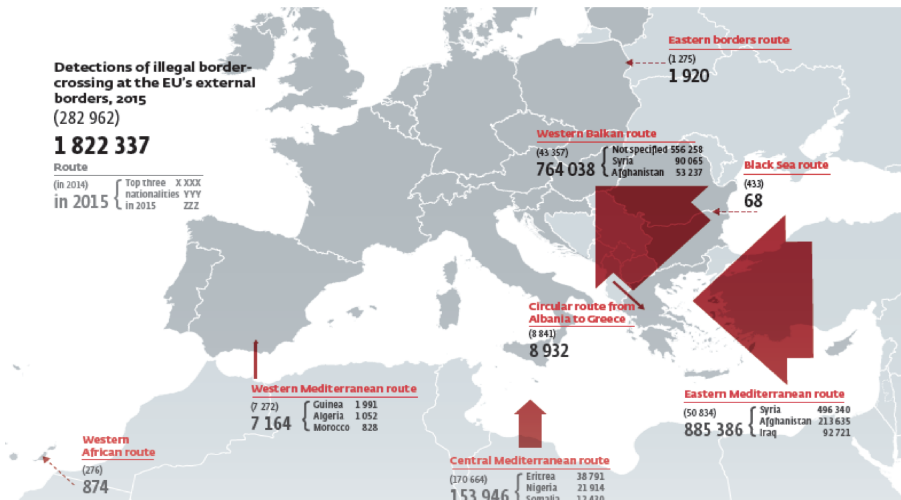
[2] *Ibidem* (emphasis added).

[3] Meeting of heads of State or government with Turkey – *EU-Turkey statement*, 29 November 2015, para. 7 (emphasis added).

[4] And in fact, both the Action Plan and the "Statement" of 29 November recall the existing bilateral provisions. Among the latter, the readmission agreement between Greece and Turkey (Protocol of 7 November 2001 for the implementation of Article 8 of the agreement between the government of the Republic of Turkey and the government of the Hellenic Republic on combating crime, especially terrorism, organized crime, illicit drug trafficking and illegal migration, signed 20 January 2000) should be mentioned. An English version is available on the website of the Bali process on people smuggling, trafficking in persons and related transnational crime.

[5] See European Commission, *Daily News*, 1 June 2016, Brussels, in the section «EU-Turkey Readmission Agreement: Provisions for Third Country Nationals Enter into Force».

[6] Frontex 2016, 16: «A total of 764 038 detections were recorded on the Western Balkan route, mainly on Hungary's and Croatia's borders with Serbia. Most of the migrants had arrived earlier on one of the Greek islands and then left the EU to travel through the former Yugoslav Republic of Macedonia and Serbia».



Frontex 2016, 16.

crucial importance in stopping these large flows of irregulars, principally coming from Syria.

The way the EU and its Member States tried to convince Turkey to play a more significant role in the management of irregular flows is anything but original: the synallagmatic relation is evident from the multiple offers made for Turkey's benefit. It was already clear from the "Statement" of November 2015 and it includes a revitalization of the accession process[7], a sort of unconcealed promise regarding the visa liberalization process[8], and, above all, an initial financial sup-

[7] See para. 4: «Both sides welcomed the announcement to hold the Intergovernmental Conference on 14 December 2015 for opening of chapter 17. Furthermore, they noted the European Commission's commitment to complete, in the first quarter of 2016, the preparatory work for the opening of a number of chapters without prejudice to the position of Member States. Preparatory work could subsequently begin also on further chapters».

[8] See para. 5. Needless to say, the visa liberalization process is expressly linked, in the "Statement", to the complete entry into force of the EU-Turkey readmission agreement: «Both sides agree that the EU-Turkey readmission agreement will become fully applicable from June 2016 in order for the Commission to be able to present its third progress report in autumn 2016 with a view to completing the visa liberalisation process i.e. the lifting of visa requirements for Turkish citizens in the Schengen zone by October 2016 once the requirements of the Roadmap are met». This is not news: the EU often negotiates visa liberalization agreements together with a readmission agreement, usually even linking the entry into force of the first to the entry into force of the second. See e.g. art. 15(1-2) of the agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation, *OJ* L 129, 17 May 2007, 27 *et seq*., according to which «1. This Agreement shall be ratified or approved by the Parties in accordance with their respective procedures and shall enter into force on the first day of the second month following the date on which the Parties notify each other that the procedures referred to above have been completed. 2. By way of derogation to paragraph 1 of this Article, the present Agreement shall

port of 3 billion euros (to be extended by a further 3 billion), aimed at helping Turkey face the considerably added expenditure due to the presence of such a large number of migrants in its territory. As has been mentioned, there is nothing new here: the EU and its Members took the path of outsourcing migration some years ago (we take the liberty to make a reference to Cherubini 2015b).

2. The Deal

To be honest, there is, however, something innovative in the 18th March "Statement" compared to the preceding ones (whether regarding Turkey or other third States). Not in the strategy, which is fully within the rationale of outsourcing migration policy[9]; but in the operational scheme of the reciprocal readmission duties. Normally, the core of a readmission agreement is the duty to take on the responsibility of managing the situation of people who have a certain link (whether strong or weak) with the readmitting State: one of citizenship, of course, but even possession of a visa, a residence permit, and, most of all, a previous illegal transit. The 18th March "Statement" introduces an element of "innovation"[10]: a (partially) blocked rate of reciprocal readmissions, set as a one-for-one on a restricted *ratione personae* basis concerning only Syrian citizens, however. In other words, for every irregular Syrian readmitted to Turkey[11], a Syrian will be handed from Turkey to a Member State of the EU[12]; a possible surplus of readmissions, on the Turkey side, would represent only non-Syrian citizens, concerning whom no rate has been established.

only enter into force at the date of the entry into force of the agreement between the Russian Federation and the European Community on readmission if this date is after the date provided for in paragraph 1 of this Article».

9 See *EU-Turkey statement*, 18 March 2016, especially its para. 5 *et seq.*, where the commitments of the EU are reiterated (e.g. «The EU, in close cooperation with Turkey, will further speed up the disbursement of the initially allocated 3 billion euros under the Facility for Refugees in Turkey and ensure funding of further projects for persons under temporary protection identified with swift input from Turkey before the end of March. A first list of concrete projects for refugees, notably in the field of health, education, infrastructure, food and other living costs, that can be swiftly financed from the Facility, will be jointly identified within a week. Once these resources are about to be used to the full, and provided the above commitments are met, the EU will mobilise additional funding for the Facility of an additional 3 billion euro up to the end of 2018»).

10 These elements were also outlined very briefly in a preceding "Statement": see Statement of the EU Heads of State or Government, 7 March 2016, where EU Member States (exclusively) «agreed to work on the basis of the principles» contained in some additional proposals made by Turkey. A similar precedent can be found in Clause 7 of the 25 July 2011 Arrangement between the Government of Australia and the Government of Malaysia on transfer and resettlement.

11 *EU-Turkey statement*, 18 March 2016, para. 1: «All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey».

12 *Ibidem*, para. 2: «For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria».

Such a mechanism poses two problems (which are normally beyond the remit of readmission agreements, whether or not the "Statement" we are analysing is one of them): the identification of *which* categories of migrants and Syrians have to be readmitted, respectively, to Turkey and the EU; the determination of the criteria for the settlement *from* Turkey, and particularly the quotas of Syrians distributed in each of the EU Member States.

As for the categories of migrants to be handed to Turkey, the "Statement" is apparently very clear: the deal concerns «new irregular migrants crossing from Turkey to Greek islands from 20th March 2016». The irregular nature of the migrant situation comes, presumably, from the non-compliance with the parameters provided by the Schengen Borders Code[13] (which is anyway not mentioned by the "Statement"). Consistently, the position of those who have applied for international protection has been considered regular: only after a negative outcome of the application (which has to be examined in full respect of the Procedures Directive[14]), or in the case in which the application has not even been presented, the migrant will automatically be in an irregular position[15]. Obviously, the "Statement" recalls the principle of *non-refoulement*: thus it shows an awareness of the fact that, before any readmission takes place (and not only readmissions following a negative result of the international protection application), Greece has to consider, *in singular cases*, whether or not the migrant will be exposed to renown risks in the country of destination, i.e. Turkey (Cherubini 2015a: *passim*, and the bibliography included).

The other side of the coin lies in its very newness, and this concerns only Syrian citizens. The reason for this choice is obvious: «to deter people from attempting unsafe journeys via smugglers» (Peers 2016a). Consistently, the "Statement" seems to repay a particular category of Syrian migrants, who are given priority: those «who have not previously entered or tried to enter the EU irregularly». Syrians, exclusively, have been identified, probably for two reasons: according to Frontex, their citizenship is by far the most numerous along the routes involving Turkey. It represents, in fact, 56% of the whole Eastern Mediterranean route (Frontex 2016, 17). In addition to this, the composition of the Syrian influx has a particular advantage in the perspective of their integration in the host coun-

[13] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* L 105, 13 April 2006, 1 *et seq.*

[14] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, *OJ* L 180, 29 June 2013, 60 *et seq.* Note that for some of its provisions the transposition deadline has not yet expired: for those, the old Procedures Directive applies (Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, *OJ* L 326, 13 December 2005, 13 *et seq.*).

[15] *EU-Turkey statement*, 18 March 2016, para. 1: «Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the [Procedures] directive will be returned to Turkey».

tries: almost in 2015, a study of the UNHCR, conducted among Syrians who had arrived in the Greek islands, proved that 86% of them held a secondary or university education level[16]. The only other indication given by the "Statement" is the reference to the UN Vulnerability Criteria, which, in its most recent version, privileges «[w]omen and girls at risk; survivors of violence and/or torture; refugees with legal and/or physical protection needs; refugees with medical needs or disabilities; children and adolescents at risk»[17].

Finally, the "Statement" relies on the results of the very hard won achievements of the previous months to solve the distribution problem: it recalls «the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 20 July 2015», where they agreed[18], following the Conclusions of the 25-26 June 2015 European Council[19], to a relocation programme for 40.000 «persons in clear need of international protection» from Greece and Italy. The formal Decision (2015/1523[20]) was taken on the 14th of September, but a few days later, following an agreement found in the Council on the same day, a more ambitious Decision (2015/1601[21]), concerning 120.000 persons, was taken. It is within this framework that the resettlement scheme created by the "Statement" operates: in other words, «Member States did not increase willingness to receive asylum seekers, especially Syrians» (see Favilli 2016, 6, translation added). And in fact, the Commission proposed a modification of Decision 1601, aimed at reducing the obligation of EU Member States proportionally to the number of Syrians relocated from Turkey[22]: Decision 1601 has then been amended by

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16 UNHCR, *Syrian Refugee Arrivals in Greece. Preliminary Questionnaire Findings*, April-September 2015, esp. 6.

17 As reported by the European Commission: Communication from the Commission to the European Parliament, the European Council and the Council, *First Report on the progress made in the implementation of the EU-Turkey Statement*, Brussels, 20 April 2016, COM (2016) 231 final, 7.

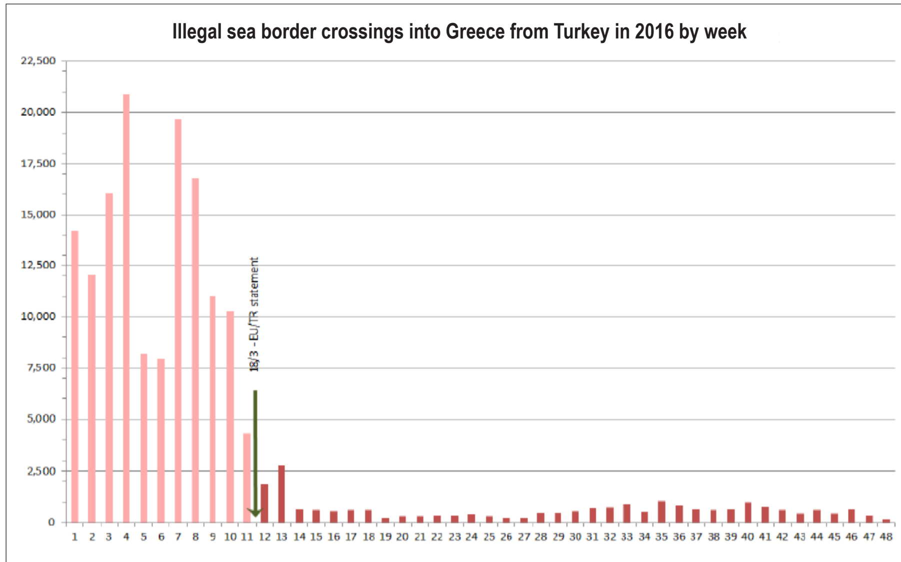
18 See *Outcome of the Council Meeting*, 3405th Council meeting Justice and Home Affairs, Brussels, 20 July 2015.

19 European Council meeting (25 and 26 June 2015), *Conclusions*, esp. 2.

20 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, *OJ* L 239, 15 September 2015, 146 *et seq*.

21 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, *OJ* L 248, 24 September 2015, 80 *et seq*. The mechanism was at first opened also to relocations from Hungary, which refused, and was not even satisfied with this: it challenged Decision 1601 for different reasons (see Action brought on 3 December 2015, C-647/15, *Hungary* v *Council of the European Union*, *OJ* C 38, 1 February 2016, 43). The very day before even Slovakia challenged, for similar reasons, Decision 1601: see Action brought on 2 December 2015, Case C-643/15, *Slovak Republic* v *Council of the European Union*, *OJ* C 38, 1 February 2016, 41. Both cases are still pending.

22 Proposal for a Council Decision amending Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, COM (2016) 171.



EU Commission, *Fourth Report on the progress made in the implementation of the EU-Turkey Statement*, Brussels, 2016, 3.

Decision 2016/1754[23], and its art. 4 has now a new para. 3a, which states that «[i]n relation to the relocation of applicants […], Member States may choose to meet their obligation by admitting to their territory Syrian nationals present in Turkey under national or multilateral legal admission schemes for persons in clear need of international protection, other than the resettlement scheme which was the subject of the Conclusions of the Representatives of the Governments of the Member States meeting within the Council of 20 July 2015. The number of persons so admitted by a Member State *shall lead to a corresponding reduction of the obligation of the respective Member State*» (emphasis added).

EU Commission completed a very speedy evaluation of the efficacy of the "deal" with Turkey: «in the three weeks preceding the application of the EU-Turkey Statement to arrivals in the Greek islands, 26.878 persons arrived irregularly in the islands – in the three subsequent weeks 5.847 irregular arrivals took place»[24], i.e. a reduction of 78%. Predictably, the mechanism of relocation and

[23] Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, *OJ* L 268, 1 October 2016, 82 *et seq.*

[24] *First Report on the progress made in the implementation of the EU-Turkey Statement*, 2. This trend has been confirmed in a *Second Report* (15 June 2016 COM (2016) 349 final) made by the Commission («[i]n the month before the implementation of the Statement, around 1,740 migrants were crossing the Aegean Sea to the Greek islands every day. By contrast, since 1 May the average daily number of arrivals is down to 47», 2), and in a *Third Report* (28 September 2016 COM (2016) 634 final, esp. 2-3). The average significantly increased to 81 daily arrivals in

resettlement was more complex: 325 persons who did not apply for international protection were returned to Turkey, while 103 Syrians were resettled from Turkey to Germany, Finland, the Netherlands and Sweden[25]. The whole scenario raises many problems, which may be reduced, more or less, to its compatibility with international and EU law.

3. Is the "Statement" an International Agreement?

The compatibility of the "deal" with international and EU law entails a pair of preliminary questions: is the "Statement" an international agreement? And, if this is the case, who are the parties to this agreement? These questions do not have a mere academic nature: as we will see, they have practical consequences, especially on the possible judicial scrutiny that may be carried out.

On the nature of the "Statement", we can record a certain tendency among legal scholars to affirm that it is an international agreement[26]. We think this prevalent opinion better reflects the nature of the "Statement" (which we can now call by name an agreement). On the one hand, there is convincing evidence in favour, while, on the other, the arguments denying that it is an agreement are not so solid. Starting from the latter, a mere formal analysis is not decisive: to say that such an act is not an agreement just because its formal denomination is "Statement" or it includes the "will" formula instead of "shall" is to deduce more than the data tells us. Both the International Court of Justice and the European Court of Justice have supported a substantial approach (see the references in den Heijer, Spijkerboer 2016). The latter is indeed the one suggested by the Vienna Convention on the Law of Treaties as it is widely interpreted. Particularly, its art. 2(1)(a), which may be considered part of customary international law[27], requests,

October and November, anyway «lower in comparison to the same period» in 2015 (see *Fourth Report*, 8 December 2016, COM (2016) 792 final, 2), and then again dropped to 43 in winter (see *Fifth Report*, 2 March 2017, COM (2017) 204 final, 2).

[25] *First Report*, 4 and 7. Even this (negative) trend has been confirmed in the following reports: 137 relocated in Turkey *vis-a-vis* 408 Syrians resettled in Europe (*Second Report*, 4 and 8), 116 persons v. 1.103 Syrians (*Third report*, 5 and 8), and 170 persons v. 1.147 Syrians (*Fourth Report*, 5 and 9). «The total number of migrants returned to Turkey since the date of the EU-Turkey Statement is 1,487», while «[a]s of 27 February 2017, the total number of Syrians resettled from Turkey to the EU under the 1:1 framework was 3,565»; «[a]s in the previous reporting period, the pace of resettlement is considerably advanced compared to returns from the Greek islands, and there is a regular pace of resettlements, which needs to be maintained and further strengthened» (*Fifth Report*, 5 and 8).

[26] See especially den Heijer, Spijkerboer 2016; Favilli 2016, 16; and Gatti 2016a; *adde*, almost implicitly, Roman 2016; Labayle and De Bruycker 2016; and Chetail 2016. *Contra* see Peers 2016a, and Babická 2016.

[27] See Gautier 2011, 45. More recently, the same idea was expressed in the analysis of the 18th March Agreement by den Heijer, Spijkerboer 2016.

in addition to the written form[28], that an agreement, to be as such, must be «governed by international law», which (also) means that it must have a minimum legal content[29]. As has been stated before, the contractual nexus is perhaps the most evident part of the deal: it is indisputable that the EU and its Members keep offering their neighbours money and other benefits (visa facilitation, an acceleration of the accession process, in the case of Turkey) in exchange for commitments in the management of irregular influxes. In other words, they are paying for non-entry measures, which is a more solid nexus than the ones contained in many other "ordinary" agreements. Formal elements, which as we have noted are not decisive, are anyway ambiguous: sometimes the wording is more appropriate for an agreement, sometimes it is less so (Favilli 2016, 14), but this might possibly be intentional, in an attempt to hide the real contractual nature of the act (Gatti 2016a).

As for the parties to this agreement, assuming that one of them is Turkey, the position of the EU and its Member States has still to be determined. There are three different hypotheses: that only the EU is part of it, that only its Member States are, or that both are. In the latter case, we would have a mixed agreement. A fundamental premise is that, in each of these three cases, the fact that internal legislation (the EU's or national ones) were not respected does not have any consequences on the agreement, unless, obviously, in the exceptional circumstances described in art. 46 of the Vienna Convention (den Heijer, Spijkerboer 2016), circumstances that are unlikely to appear in the case of the agreement with Turkey. If we do not take into consideration, as seems correct, internal legislation, then the content of the agreement would be decisive. If it were a pure readmission agreement, the mixed solution would be rather strange: such agreements do exist on a bilateral basis, with the third State on one side and the EU *or* one of its Member States on the other. The point is that the one with Turkey is not a pure readmission agreement, and since it involves both EU and Member States competences, it is a typical case of a mixed agreement (this is not, anyway, the position expressed by the General Court of the EU: see *infra*). In particular, the financial undertakings rest on both the EU and its Members, other "carrots" (benefits) have been offered by the EU (negotiations on visa liberalization and accession), the shared resettlement quotas have been/should be taken on by EU Member States, and finally some specific duties weigh exclusively on Greece's shoulders.

[28] But it is not excluded that an agreement may have an oral form: see Gautier 2011, 39.

[29] See Gautier (2011, 44): «The [International Law] Commission dropped the reference to this requirement because, faced with the difficulty "to find any convenient general phrase" [...]. In addition, it considered that such reference was not necessary since it was largely subsumed in the expression "agreement ... governed by international law" already contained in the definition of "treaty"».

4. Is the Agreement with Turkey Legal?

Before having a look at the consequences of the solution which has been proposed (most of all, in terms of justiciability), we should say something about the compatibility of the agreement with international and EU law. Here the problems have been widely underlined both in the legal literature and by NGOs reports (see footnote 26, *adde* the report of Amnesty International 2016). The greatest obstacle is represented by the principle of *non-refoulement*: the agreement does not have express provisions that infringe it (indeed, if it did, it would be rather bizarre), but the risk is inherent in *how* readmissions from Greece are carried out. As has already been stated, the above mentioned principle demands an individual examination of the risks implied by the transfer to another State, no matter whether an application for international protection has been presented or not. It is a procedural matter, and neither the Directive of the same name nor the Returns Directive give unyielding guarantees: the first one, which applies if a request for international protection is made, offers EU Member States the renowned concept of safe third country, which may jeopardise the full respect of the principle of *non-refoulement* by diminishing the guarantees that surround it; the second, which applies if a request for international protection is lacking, does not even "proceduralise" the principle of *non-refoulement*, being satisfied with many (unhelpful?) references to this principle and few (seemingly weak) procedural rules (see Cherubini 2015a, 247 *et seq*.).

This potential compression of the principle of *non-refoulement* via the absence of a solid procedural framework is alarming: in fact, it is questionable that a person who was returned to Turkey would not face the risk of persecution or any other serious violation of his/her fundamental human rights (e.g. torture; see Favilli 2016, 9 *et seq*.). Indeed, there is much more evidence regarding the opposite scenario: it is highly likely that such a risk materialises with little probability that this prevision could emerge from a less "guaranteed" procedure. To mention but one possible hypothesis: a weak procedure may misconceive the concept of a safe third country, bending it to the benefit of a disputable readmission. Considering that the destination country would be Turkey and what the definition of a safe place is, according to the Procedures Directive, the need for a stronger (instead of a weaker) procedure is evident.

The collision course between the principle of *non-refoulement,* on the one hand, and the "Statement" (with all the relevant EU rules, especially of procedural nature), on the other, is just one side of its invalidity. The other, which is even more crystalline, concerns EU treaty-making powers: if the "Statement" is a mixed agreement, then it is clear that it is has been concluded in serious violation of art. 218 TFEU. This, perhaps intentional, move by EU (and its Members) almost completely excluded the European Parliament (which in this case probably needed to approve it), the Commission (in its typical role of negotiator) and possibly the European Court of Justice (being impossible to ask its advisory opinion).

These different profiles of possible invalidity of the "Statement" have been the object of three individual applications to the General Court[30]: indeed, legal literature did hypothesise that an action for annulment was possible, under the conditions provided by art. 263 TFUE (den Heijer, Spijkerboer 2016, who maintain that even a validity preliminary ruling should be possible). The General Court concluded, just recently, for the inadmissibility of the applications, moving from the following reasoning: in order to exercise the competence laid down in art. 263 TFEU, the General Court has to assess whether the contested measure (the "Statement", in this case) is attributable to an EU institution (i.e.: the European Council)[31]; «[i]n order for such a measure to be excluded from review, it is […] necessary to determine whether, having regard to its *content* and all the *circumstances* in which it was adopted, the measure in question is not in reality a decision of the European Council»[32]; «Press Release No 144/16 relating to the meeting of 18 March 2016 states, first, that the EU-Turkey statement is the result of a meeting between the "Members of the European Council" and their "Turkish counterpart"; secondly, that it was the "Members of the European Council" who met with their Turkish counterpart and, thirdly, that it was "the EU and [the Republic of] Turkey" which agreed on the additional action points

[30] See Action brought on 22 April 2016, Case T-192/16, *NF* v *European Council*, *OJ* C 232, 27 June 2016, 25, Action brought on 22 April 2016, Case T-193/16, *NG* v *European Council*, *OJ* C 232, 27 June 2016, 26, and Action brought on 19 May 2016, Case T-257/16, *NM* v *European Council*, *OJ* C 251, 11 July 2016, 43. The pleas emerging from the three applications were identical: «First plea in law, alleging that the agreement between the European Council and Turkey […] is incompatible with EU fundamental rights, particularly Articles 1, 18 and 19 of the Charter of Fundamental Rights of the European Union. Second plea in law, alleging that Turkey is not a safe third country in the sense of Article 36 of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status […]. Third plea in law, alleging that Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof […] should have been implemented. Fourth plea in law, alleging that the challenging agreement is in reality a binding Treaty or "act" having legal effects for the Applicant and that the failure to comply with Article 218 TFUE and/or Article 78.3 TFUE, either together or separately, render the challenged agreement invalid. Fifth plea in law, alleging that the prohibition of collective expulsion in the sense of Article 19.1 of the Charter on Fundamental Rights of the European Union is breached». All the applications have been proposed by third country nationals (two from Pakistan, the other one from Afghanistan) staying in refugee camps in Greece: see De Capitani 2016. Apart from individual complaints, the most probable applicant, the European Parliament, did not challenge the "Statement": that is because, as Favilli (2016, 16) put forward, the Legal Service of the European Parliament did not qualify the "Statement" as an agreement (see (LIBE/8/06399) *Legal aspects of the EU-Turkey statement of 18 March 2016*).

[31] Order of the General Court of 28 February 2017, Case T-192/16, *NF* v *European Council*, paras. 42-44; order of the General Court of 28 February 2017, Case T-193/16, *NG* v *European Council*, paras. 43-45; order of the General Court of 28 February 2017, Case T-257/16, *NM* v *European Council*, paras. 41-43.

[32] *NF* v *European Council*, para. 45 (emphasis added). See also *NG* v *European Council*, para. 46, and *NM* v *European Council*, para. 44.

set out in that statement»[33]. Does «the use of those terms implies, as the applicant submits, that the representatives of the Member States participated in the meeting of 18 March 2016 in their capacity as members of the "European Council" institution or that they participated in that meeting in their capacity as Heads of State or Government of the Member States of the European Union»[34]? According to the General Court, «no conclusion can be drawn regarding the presence of those indications»: in fact, while the online version of the press release has «the indication "Foreign affairs and international relations", which relates in principle to the work of the European Council», its PDF version «bears the heading "International Summit", which relates in principle to the meetings of the Heads of State or Government of the Member States of the European Union»[35]. Nor is it possible to infer – following the reasoning of the General Court – something more decisive from the content of the "Statement": «taking into account the *ambivalence* of the expression "Members of the European Council" and the term "EU" [*sic*] in the EU-Turkey statement […] reference must be made to the documents relating to the meeting of 18 March 2016 in order to determine their scope»[36]. And «[i]n this regard, the Court finds that the official documents relating to the meeting of 18 March 2016, provided by the European Council at the Court's request, show that *two separate events*, that is to say, the meeting of that institution and an international summit, were organised in parallel in distinct ways from a legal, formal and organisational perspective, confirming the distinct legal nature of those two events»[37]. *Ergo*, the "Statement" (regardless of whether

[33] *NF* v *European Council*, para. 54. See also *NG* v *European Council*, para. 55, and *NM* v *European Council*, para. 53.

[34] *NF* v *European Council*, para. 54. See also *NG* v *European Council*, para. 55, and *NM* v *European Council*, para. 53.

[35] *NF* v *European Council*, para. 55. See also *NG* v *European Council*, para. 56, and *NM* v *European Council*, para. 54.

[36] *NF* v *European Council*, para. 61 (emphasis added). See also *NG* v *European Council*, para. 62, and *NM* v *European Council*, para. 60.

[37] *NF* v *European Council*, paras. 62 (emphasis added) and 63-71. The reasoning of the General Court seems particularly "original" when it deals with «the fact that the President of the European Council and the President of the Commission, not formally invited, had also been present during that meeting»: «Referring to several documents produced by its President, the European Council indicated that, in practice, the Heads of State or Government of the Member States of the European Union conferred upon him a task of representation and coordination of negotiations with the Republic of Turkey *in their name*, which explains his presence during the meeting of 18 March 2016. Likewise, the presence of the President of the Commission in that meeting is explained by the fact that that meeting was *a continuation of the political dialogue* with the Republic of Turkey initiated by the Commission in October 2015 at the invitation of the Heads of State or Government of the European Union made on 23 September 2015. As the European Council correctly points out, those documents refer explicitly and repeatedly, as regards the work of 18 March 2016, to a meeting of the Heads of State or Government of the European Union with their Turkish counterpart, and not to a meeting of the European Council» (emphasis added). See also *NG* v *European Council*, para. 63 *et seq.*, and *NM* v *European Council*, para. 61 *et seq.*

it is an agreement or not: a question that the General Court refrains from answering) is not attributable to the EU, thus falling outside the scrutiny of its Court of Justice.

In a surge of legal precision, urged by a specific (and more than suspect) wording of the "Statement" («the EU and [the Republic of] Turkey agreed on [...] additional action points»), the General Court underlines, «[f]or the sake of completeness», that, «even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016 [...], that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister»[38]. At the end of the day, the General Court seems to lever on formal evidence more than to investigate on the very content of the "deal": the latter suggests, as we tried to demonstrate above (see para. 3), a different result. There is something more, indeed: the cautious approach of the General Court arises in the very singular context where the EU and its Members, on one hand, subcontract non-entry measures to a neighbour country where, on the other, never miss the opportunity to accuse the very same country of seriously violating human rights. If domestic courts are seemingly unwilling to investigate this ambiguity, both on the Union side and on national ones, it is also clear that, at least EU Members (most likely Greece) may have to face scrutiny by the European Court of Human Rights. And in so far as they implemented the "deal", especially after the inadmissibility orders delivered by the General Court, the application of the *Bosphorus* doctrine could yield, for once, some unexpected results[39].

[38] *NF* v *European Council*, para. 72. See also *NG* v *European Council*, para. 73, and *NM* v *European Council*, para. 71.

[39] Judgment of the European Court of Human Rights of 30 June 2005, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim S irketi* v *Ireland*, where, as well-known, the Strasbourg Court held that «[i]f [...] the State had been obliged as a result of its membership of an international organisation to act in a particular manner, the only matter requiring assessment was the equivalence of the human rights protection in the relevant organisation» (esp. para. 109).

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The Balkan Route of Illegal Migration and the Role of EU in Facing this Emergency: a Stimulus or a Brake for Enlargement?

EZIO BENEDETTI*

1. The Western Balkans migration route and its impact on the EU

The refugee crisis which interested the Western Balkans' countries[1] since the end of 2014 until spring 2016 had as one of the most evident consequences the return of this sensitive European region back on the political agenda of EU governments and institutions after several years. This "revival" occurred when the Western Balkans seemed to be the periphery of Europe after the wars which unsettled the ex Yugoslavia in the Nineties and the struggle dedicated by the EU to better link this region to Europe and to foster a valuable and lasting recon-

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1 Even if we will extensively use the wording Western Balkans in the course of this article, as it occurs in all major political documents and legal procedures of the EU related to this area of Europe, there is the need to underline that this definition has been coined in the Nineties of the past century by several EU officials as a sort of geopolitical neologism to indicate the former Yugoslav Republics plus Albania. It is a matter of fact that by a strict geographic point of view these words have no scientific basis. The institutions of the EU have defined the Western Balkans as the south-east European area that includes countries that are not members of the EU. The Western Balkans is a «neologism coined to describe the countries of ex-Yugoslavia (minus Slovenia) and Albania» (Pond 2006, 5). Thus, the region would include: Croatia (an EU member since 1 July 2013), Serbia, Bosnia and Herzegovina, Montenegro, Kosovo, former Yugoslav Republic of Macedonia and Albania.

struction and peace in these countries. The political interest represented by the migration issue underlined once more the fundamental strategic importance of this geographic area for the EU's stability and security, especially in the light of the still missing common asylum and migration policy declared in the Treaty of Lisbon including the big difficulties faced by the EU in taking out from the intergovernmental ground this aspect of the EU integration (Benedetti 2010; O'Nions 2014). The need to face the emergency represented by over 800,000 irregular crossings of migrants on the Western Balkan route in 2015[2] was a clear sign that EU institutions and member States had to review their legal and political approach in the area adopting new legal measures and strategies to preserve the European perspective and the integration process of these countries and to tackle in an appropriate way the refugees' crisis in the light of and respecting EU's basic principles and not sacrificing them on the altar of political stability.

As for the above we believe that it is important to briefly focus our attention on the migration policy as a whole first. The point is that the migration issue within the EU is more and more linked to global processes and tendencies. The starting paradox is that Europe needs migrants due to its actual labor market and demographic trends[3], but European societies are still mainly unprepared to accept such flows of migrants, both on a cultural and legal grounds (Cherubini 2015).

Currently the international migrations flows are interesting Europe as a whole more than any other part of the world and are considered a severe challenge to the process of political integration of the EU member States (Cherubini 2015, 65). The evolution of a truly common EU migration and asylum policy is strictly linked to national policies in this sector, as it is clear that migration is a very sensitive issue both in electoral and social terms for European governments (Benedetti 2010, 175). The fact is that the approach of the EU member States to such a complex issue is very often largely inadequate and minimal in terms of resources and strategic vision. Each country is still mainly committed on bilateral approaches concerning the control of migration flows, while a real common policy in this field is still more a desire than a reality (Benedetti 2012). Besides this the different policies – restrictive or permissive – of each EU member State, due as said above to the electoral sensitivity of such an important and complicated issue, clashes with the need to pursue common approaches towards major transit and origin countries of migrants. The final result of such a confusion and inadequate approach is both the construction of a so called "fortress Europe" and the incapacity to elaborate constructive policies with third countries in this field. Moreover, the legislative tools enacted by the EU institutions are affected by this lack of clearness and determination, while the new provisions stated

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[2] Accordingly to the data published by the European Border Agency Frontex it was just 43,000 in 2014. See http://frontex.europa.eu/assets/Publications/Risk_Analysis/WB_Q4_2015.pdf and http://frontex.europa.eu/trends-and-routes/western-balkan-route.

[3] See http://ec.europa.eu/economy_finance/structural_reforms/ageing/demography/index_en.htm.

in the Chapter 2 of the Treaty of Lisbon (Hailbronner and Thym, 2016) seem to be in contradiction with precedent acts still in force as the Dublin Regulation, which main provisions (e.g. «the first country of entrance rules» which forces the country of first entrance of refugees to accept their asylum requests, causing a great imbalance in the geographical distribution of asylum seekers despite the principle of a sharen burden enacted in art. 79 TFEU) should be reviewed and renegotiated as soon as possible (Grassi, Spertini, Parolari 2016). The future of a real common policy on migration is linked to the political will of each member country to share such a burden and to accept common responsibilities and opportunities given by migration processes. We are convinced that these general critics are self-evident also in the approach used by EU institutions and governments in facing the refugee crisis in the Western Balkans in spring 2016.

Once the Balkan route has been definitively closed on 8 March 2016 after the decision of the Austrian government to drastically limit the number of migrants entering its territory, the overall number of entries dropped to almost zero in the following months. Even if the refugee crisis was not solved at all: thousands of hundreds of refugees and migrants were and sometimes are still waiting to enter the EU from Turkey and Macedonia and many others are looking for alternative routes to reach EU (e.g. Lybia). It is interesting to note that Austria's government decision to close the borders has been taken in agreement with the governments of the other countries located along the transit route.

The most evident and dramatic result of this approach was the sealing of Macedonia's border with Greece. Since March until end of July the UNHCR has not registered any arrival of refugees to Macedonia, Croatia, or Slovenia, and only a few hundred to Serbia via Bulgaria[4]. Another important step in the "new approach" of the EU towards the refugee crisis is represented by the entering in force on 20 March 2016 of the agreement between EU and Turkey[5], strongly sponsored by the German government, which shifted the burden of the crisis from the Greek border to the Turkish one with obvious political consequences on the side of Erdogan's government policy towards the EU, moreover if we consider the failed coup d'etat on 15 July 2016 and the suspension of most of the basic human rights in the country including the violation of most of the basic principles which should guide the enlargement process of EU to any third country. Since then the Turkish government had the obvious possibility to "blackmail" EU countries and institutions using the refugees leverage and threatening to unleash the borders if their requests would not have been considered by European elites. Anyhow it is a matter of fact that most of European countries (with the significant exception of Germany) and, what is most worrying, also EU institutions closed both eyes on the systematic violation of human rights committed

[4] See the UNHCR official website for more detailed information, at http://www.unhcr.org/registration.html.

[5] EU-Turkey Statement, 18 March 2016, available at http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.

by the Turkish authorities in the process of reaction and punishment of the alleged responsible for the failed coup. In any case most of the critics moved to this joint statement have been pushed on the background as the EU has been able to present to the public that this agreement would have represent durable halt to the inflow of migrants via the Aegean Sea and this was the first political priority for EU countries, pushing on the background once more the Western Balkans' problems and also the respect of human rights and international conventions on refugees actually in force, systematically violated by Turkey and several EU countries as Hungary. Some commentators highlighted how the EU sacrificed its principles and guiding rules to the altar of stability and control of borders (Kerem 2016, 3).

Another aspect which cannot be disregarded in this analysis is the fact that the migrant crisis in Western Balkan has to be viewed also through the broader perspective of the EU's enlargement policy to these countries. The 2015-2016 refugee crisis showed that EU did little to develop more strategic thinking on how to lastingly stabilize the countries of the region, ensure their sustainable democratic transformation and assist their economic development as a fundamental basis to tackle the migration from this area to the EU too. Thus this analysis focuses over the two aspects of the migration crisis in the Balkans, the internal one (i.e. migrants escaping from Western Balkan countries to EU ones to solve their economic situation) and the external one (i.e. mainly refugees from Syria and Afghanistan escaping from wars and persecutions) arguing that in both cases the EU's response has been mostly dedicated on short term approach to face the emergency, rather than on developing more long-term solutions. The feeling that fundamental European values have been horse-traded for geopolitical interests and stability seems to be more and more a reality in this case. As a result EU's credibility as a normative power has been strongly affected and weakened, short term approaches are not dealing at all with the analysis and the resolving of the underlying causes of the migrant crisis (Stivatchis 2016, 45).

2. The external dimension of the refugee crisis: the Western Balkans as a transit route

As stated above the snap explosion of the refugee crisis and the significant rise in the overall number of migrants trying to enter into the EU via the Aegean Sea brought the Western Balkan region back on the table of European politics after many years. We believe that at this stage of our analysis it could be useful to give some more precise numbers to depict the situation. It is a matter of fact that the Eurostat office reported a total of 1,255,000 first-time asylum applications over the course of 2015 in the 28 EU member States[6]. During the same period

[6] See http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics for more details.

the UNHCR registered 856,000 arrivals by sea to Greece, almost four times more than the 219,000 arrivals registered in 2014[7]. The Balkan route became more and more popular in 2015 putting the European politics in front of the evidence that this often disregarded and forgotten region is located in the very heart of Europe. One of the main paradoxes of this crisis has been the fact that hundreds of thousands of refugees crossed an EU and Schengen country as Greece is in order to go through two non-EU countries – Macedonia and Serbia – to eventually reach Germany, Sweden or UK. The main result of this situation has been the complete failure of the Dublin system and of related regulations (Grassi, Spertini, Parolari 2016; Hailbronner and Thym 2016).

Due to both the extremely high number of refugees and the hard economic crisis faced by the country, it was soon clear that Greece was unable to manage such a massive inflow of refugees. But the worst result of this incapability has been the severe problems faced by EU in trying to relocate them in the name of the "shared burden" principle which should govern the common asylum policy of the EU accordingly to Arts 67(2) and 78 of the Treaty on the Functioning of the European Union, stopped at the stake in front of the national selfishness and the political and even electoral interests which prevailed in many member countries instead of the flagship principles of solidarity and mutual assistance. Besides the manifest weakness and incapability of the EU in facing the emergency with a clear and commonly accepted strategy, the idea to build walls and borders prevailed on other humanitarian considerations, in other words security issues became more important than the respect and defense of human rights of these refugees and migrants. This situation led the EU becoming a «net exporter of instability to the Balkan region» (de Borja Lasheras, Tcherneva, Wesslau 2016, 7).

This instability became evident when the initial transit route passing through Macedonia, Serbia and then Hungary (used since 2013) has been hermetically closed due to the decision taken by Austrian government to close its borders in March 2015 and the consequent decision taken by Budapest to erect a barrier on its border with Serbia (and later Croatia). The decision was taken by Orban's government even if the European Commission initially criticized this option and despite the punctual accusations and reports on regular violation of basic human rights and refugees' rights by Hungarian border police made by the most prominent NGOs dealing with the protection of human rights in Europe and worldwide (Amnesty International 2015). The result was that this fence diverted the migrants to Croatia and Slovenia as of mid-September 2015 with huge human tides under the sun and the mud of the Balkans. This situation clearly caused a worsening in bilateral relations between Belgrade and Budapest first, and then between Belgrade and Zagreb. Croatia accused Serbia of scarce cooperation and of bucking the problem without any attention to the human dimension of this tragedy when about 44,000 entered on Croatian soil in a single week. Nevertheless

7 UNHCR, *Refugees/Migrants Emergency Response: Mediterranean*, Geneva, 2016. The full document is available at http://data.unhcr.org/mediterranean/country.php?id=83.

German pressure thankfully allowed for a swift resolution of this issue, as it has been agreed the transit of up to 9,000 migrants daily without major problems even by a humanitarian point of view.

It is important to stress that during this stage of the refugee crisis which interested the Western Balkans the situation could get even worst without the fundamental involvement of civil society organisations operating in the region. In fact they have been able and quick to fill the gap left by the almost total absence of State support to the mass of refugees pushing at the borders of Serbia first and Hungary then, this was especially evident in Macedonia and in Serbia where many national and international non-governmental organisations provided for shelter, food, clothes and even legal services and advice to migrants transiting through Macedonia, Serbia and Croatia towards the Schengen area. As of mid-November 2015 also Serbia, Croatia and Macedonia started to put restrictive measures to the entrance of refugees from Syria, Iraq and Afghanistan on their territory as the perspective of accepting more permanent and maybe also reception camps and facilities was in conflict with their strictly emergency related approach, in other words the political elites of these countries started fearing that the short duration of the presence of these migrants on their territory was not foreseen as temporary anymore. The welcome and the treatment reserved to these migrants became more and more less efficient and even disrespectful of the fundamental rights of these migrants as in the case of Macedonia where thousands of migrants have been beaten, pushed back by police and welcomed with tear gas launches at the borders with Greece (Amnesty International 2015, 36).

Going back to the thesis of our analysis it is self evident that the EU recipe used to face this external dimension of the refugee crisis in the Western Balkans has mainly been focused on containment rather than on a long term perspective and on a comprehensive strategy how to tackle the problem at its origins. In fact, if we analyse the 17-point plan agreed during a special summit held in Vienna on 23-24 October 2015 between eight member States (Croatia, Slovenia, Greece, Hungary, Germany, Austria, Bulgaria and Romania – significantly Italy has not been invited) several Balkan States (Albania, Serbia and Macedonia) and the European Commission it is clear that the decisions taken were aiming to set out a series of concrete measures including an improved exchange of information, the adequate registration of migrants and the creation of temporary reception capacities for 100,000 migrants along the Balkans route, including Greece[8]. But unfortunately the results of this agreement has been the opposite. In fact very little has been done to tackle the mostly dysfunctional asylum systems in the Balkan countries, an issue that will likely turn into a problem once higher numbers of refugees will be forced to seek asylum there. Moreover, even if the EU planned to deploy additional financial and technical means to coordinate the response to the crisis with the Western Balkan countries, such as the Western Balkans Risk

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8 For the complete list of taken decisions, see http://europa.eu/rapid/press-release__IP- 15-5904__en.htm.

Analysis Network, the concluded working arrangements of Frontex[9] with the countries in the region and the financial support of the European Commission, very little has been done so far if we look at the concrete results on the terrain and most of the Balkan countries involved have been left alone in facing the emergency, which has been solved only with the implementation bilateral agreement on readmission of the EC with Turkey (Benedetti 2008)[10] and the new agreement between EU and Turkey signed in June 2016[11]. The measures taken are not taking into account and cannot compensate for the impossibility to deploy Frontex in the region, as well as to make use of other existing security arrangements reserved for EU member states. As stated by several scholars, «the absurdity of the Western Balkans not being part of the EU» (Bieber 2015) has clearly demonstrated that the refugee crisis underlined once more the urgency of a serious step forward in the EU enlargement to Western Balkans. The enlargement of the EU to the Western Balkans can be considered as the only serious approach to ensure a lasting peace and stability in the region. Walls building and isolation of the Western Balkans on the geopolitical map will only brought additional conflicts and cleavages (Cremona 2003; Bieber 2015).

3. The internal dimension of the refugee crisis: the Western Balkans as an origin region

The external dimension of the refugee crisis in the Western Balkans put many challenges to the EU as for the first time in their recent history these countries became also an important transit route for migrants. We used the word "also" as it is well known that this region of Europe has been since the end of the wars which brought to the dismemberment of Yugoslavia in the Nineties of the past century a significant area of origins of refugees and migrants looking for a new life in Western Europe. This internal dimension of the migrant crisis in the region followed mild increases in mostly unwarranted asylum application from the region after the progressive introduction of visa liberalization to these countries since 2009. These numbers dramatically increased in 2015 and 2016 as many Western Balkans citizens saw the refugee crisis as an opportunity to present an asylum request as well. Not all countries have been interested by this phenomenon in the same manner, as the most striking numbers came mostly

[9] See more at http://frontex.europa.eu/partners/third-countries/.

[10] For a more detailed description of this agreement and its implementation in the last 6 months, see http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementationpackage/docs/20160615/2nd_commission_report_on_progress_made_in_the_implementation_of_the_eu-turkey_agreement_en.pdf .

[11] See http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal.

from Albania and Kosovo[12]. As for Albania from 16,000 Albanian asylum-seekers registered in 2014, the numbers raised up to almost 66,000 in 2015. On the other side the applications from Kosovo increased enormously from close to 17,000 in 2013, to 34,000 in 2014 and more than 66,000 in 2015. These numbers are striking both if we consider that Kosovo has less than 2,000,000 inhabitants and place the two countries among the top five countries of origin of asylum-seekers in the EU for 2015, just behind Syria, Afghanistan, and Iraq[13].

Also in this case, the reaction by the EU and its member States has been rather inconsistent and not effective in the long period as the main concern has been to tackle the symptoms rather than the causes of this sudden increase. Initially the European Commission and some member States opted for a clear accusation of the Western Balkans countries for this situation. These countries in turn started profiling their citizens upon departure, impeding to certain groups of citizens (as the Roma) leaving towards Western Europe. However, «it was the gradual harmonisation of the list of safe countries and the resulting speed-up of the asylum decision process that led to a decline in applications coming from the region» (Wunsch 2016, 12). It is a matter of fact that recognition of the refugee status to Balkan citizens had already been an exception, in Germany in 2015 it was around 0.3% compared to 96% for Syrians, in Italy it was about 1,5% compared to 90% of Syrians[14].

The fact that most of Balkan migrants were forced to return to their points of departure did not tackle at all the deep reasons beyond this exodus. On the first instance we can recall here the extremely difficult and poor socio-economic conditions which characterize the everyday life of citizens in the region, with very high rates of unemployment causing mainly economically motivated emigration (Henkel and Hoppe 2015). Another relevant aspect which is very often disregarded when an analysis of Balkan migration trends occurs is related with discrimination against Roma, in fact this group is one of the main groups of asylum applicants, which is largely ignored by regional governments (Ruggeri Laderchi and Savastano 2014, 51).

It must be highlighted that these migrants, who are coming from the Western Balkan countries and are leaving their homes mostly in search of a better and more stable life in EU, are very often characterized by an almost total lack of awareness of the rules governing asylum in Europe and are, even more often, convinced by false promises by profit-driven transport companies as well as by

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12 Kosovo is the only country in the region that has not yet been granted visa liberalisation for the Schengen area. This step was proposed in May 2016 by the European Commission, but remains to be endorsed by the Council.

13 Eurostat, *Countries of origin of (non-EU) asylum seekers in the EU-28 Member States*, available at http://ec.europa.eu/eurostat/statisticsexplained/index.php/File:Countries_of_origin_of_%28nonEU%29_asylum_seekers_in_the_EU28_Member_States,_2014_and_2015_%28thousands_of_first_time_applicants%29_YB16.png.

14 See http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report for all details.

the pull factors of free housing, schools, and decent health care. Also in this case these aspects should be seriously taken into account by both EU and Western Balkan governments as a worrying signal that something more concrete should be done to ensure this people a decent life in their origin country, at the end they are only looking for a better life and for basic "European standards" which could be granted in their countries of origin with a minimum effort, especially if we consider the fact that the former Yugoslav republics had in most of the cases standards which in 1989 were in full line with the EU ones (Ruggeri Laderchi and Savastano 2014, 36). The mass exodus of the local population, particularly the most marginalized as the Roma are, is a serious indicator of the widespread disillusion in the light of increasing poverty, growing long-term unemployment, and worrying inequality in «a region that still struggles to reach the GDP level of 1989, when Yugoslavia began to fall apart» (Relji 2015, 3). If we add also that most of Western Balkans citizens are more and more disillusioned with their political elites and governments in general as they declare to respect and to apply democratic principles and rule of law but in practice are keen to corruption and nepotism, it is even easier to understand why such a great number of people is willing to leave their countries of origin and seek for a better life in the EU States. Moreover, despite the official declaration made by the European Commission and member States that Western Balkans are priority to them, it seems more and more clear that both are applying in a pervasive way the stick and carrot strategy but with a growing evasive promise of EU membership in an indefinite future (Cremona 2003, 24).

4. The enlargement policy as a tool to solve the Western Balkans cul-de-sac? some proposals

It is a matter of fact that the EU is currently living one of the most troubled moments in its history. The Brexit, economic crisis, terrorist threats and political instability in northern African countries and middle East are complicating its strategic views allowing more and more nationalist and populist movements to gain visibility and approval among less educated citizens across Europe. The response is very often inadequate and disregards some of the basic principles on which the EU and the idea of an unite Europe under the flags of rules of law and democracy has been conceived since its very origins almost 60 years ago. The striking attention to the economic stability dimension has its counterpart in the more and more astonishing laissez-faire and flexibility when the point is on the field of democracy and human rights protection in many associate and even member countries (Turkey, Hungary, Slovakia and Serbia are only some of the examples that can be made). The idea that the refugee crisis is a problem and not an opportunity and that the decision to build walls and barriers is somehow legitimate to protect European citizens has as its main consequence that the need for

stable partners allows the EU to close both eyes over the lowering of democratic standards in several candidate countries (Bieber 2015, 3). An interesting study drafted by Freedom House's Nations in Transit in 2016 shows that democracy in the Western Balkans has declined for six consecutive years, and is on average back at the levels of 2004[15].

In the cases of Macedonia (Dimitrov et al. 2016) and Serbia (Cviji 2016) it has been self-evident that the EU was ready to overshadow the growing violations of basic human rights of refugee seekers especially in Macedonia and the developing authoritarian tendencies showed by the political elites in both countries in the name of political stability. Significantly during his visit to Macedonia in January 2016, the current Commissioner for Enlargement Johannes Hahn said that «despite all the talk about new elections, we should not forget that there is a very serious migration crisis in Europe … it is also about the European, Euro-Atlantic perspective, where I believe a strong, decisive government, which can take decisions, is important»[16]. Disregarding that the Prime Minister at that time, Nikola Gruevski, was indicted for a number of violations of human rights in the country and abroad, nepotism and widespread corruption at all levels of public administration in the country, with a huge popular movement against him and his policy. On a similar plan also the, repression of media freedom in Serbia has not been tackled and condemned at all by the EU, the Serbian Prime Minister Vučić has been accused of sistematically violating the rights of freedom of expression and the media freedom in general[17]. Moreover, it is significant to underline that the EU's unassertive position, in the context of the refugee crisis, allowed Vučić to claim that the way Serbia has dealt with the refugees «makes us more European than some member states» (Avramović and Jovanović 2015, 2) and the Macedonian President Ivanov to proudly affirm that Macedonia following the closure of its border in Autumn 2015 and the violence perpetrated by its police officers towards many asylum seekers and migrants «is defending Europe from itself by doing the dirty job»[18].

The EU is making the big mistake to rely on corrupted and authoritarian leaders to contain the refugee crisis instead of using the strong political and economic leverage it still has in the Western Balkans – including also the tools of the EU enlargement policy – to seriously face both the internal and the external dimensions of the crisis in a concrete way. If in the next future the Balkan route will be

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[15] Available at https://freedomhouse.org/report/nations-transit/nations-transit-2016.

[16] Video of the statement available at https://youtu.be/JKLb56-P6rs.

[17] For more details, see the annual report of Freedom House, *Freedom of the Press 2016*, https://freedomhouse.org/report/freedom-press/freedom-press-2016?gclid=CJTaqaqVgs0CFZcy0wodWeoGCw.

[18] *Macedonia is defending Europe from itself*, The Telegraph. March 6, 2016, available at http://www.telegraph.co.uk/news/worldnews/europe/macedonia/12185464/Macedonia-is-defending-Europe-from-itself.html.

reactivated, very likely according to a number of concrete indicators[19], EU will be able to tackle it only if the coordination mechanisms between EU and non EU members will function properly, with a specific focus and support on concrete registration and reception capabilities on the ground, investing resources and allowing Frontex to operate directly in these transit countries. As for the internal dimension, the emigration from the Western Balkans can be tackled and solved only if the EU concretely helps these countries to become decent places where to live – through a credible accession process, jobs-generating investments and overall economic modernization –, we are strongly convinced that only such an approach could grant a development and a lasting peace in the region, otherwise we to be acquainted with the matter of fact that the Western Balkans are still the "black hole" of Europe, the living representation of its worst nightmares and the powder keg of its recent and future history. Even if it could seem strange, also the recent EU-Turkey agreement could be used as a tool to better link the Balkans to Europe.

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[19] See http://www.politico.eu/interactive/western-balkans-route-map-migration-refugees-crisis-europe-asylum/.

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The Common European Asylum System and the Social Emergency of Unaccompanied Foreign Minors

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1. Introduction

Asylum is a form of protection given by a State on its territory to persons escaping persecution. Historically, many ancient peoples recognized a sort of religious immunity or privilege that could be regarded as the precursor to the present right to asylum. In the past, certain places or buildings were inviolable so that persons could find refuge and enjoy protection from their pursuers. In those cultures, surrounded by superstitions and taboos, violation of a refuge was considered a sacrilege against the deity (Cherubini 2015, 1 ff.). Nowadays, in many European countries asylum is guaranteed by both constitutional provisions and international obligations. After a brief explanation of the progressive assimilation of the constitutional concept of asylum to the refugee status regulated by the 1951 Geneva Convention, that has as a consequence the restriction of the potential beneficiaries of the asylum, the following Sections intend to date back to the EU milestones in the ambit of the Common European Asylum System (CEAS) from

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the legal point of view (§ 2) and to put forward the present EU proposals elaborated to strengthen the asylum system in the Member States (§ 3). Subsequently, the phenomenon of unaccompanied foreign minors in the EU will be analysed (§ 4), pointing out the main aspects of "The Action Plan on Unaccompanied Minors" (§ 5), and the contributions that sociologysts and other experts can give in order to emphasize the importance of an approach that enables these minors to understand the new cultural references and to be understood with their own cultural heritage and their own experiences (§ 6).

In a nutshell, an asylum seeker is anyone who has fled persecution in her/his home country and is seeking safety in another country, but has not yet received any legal recognition or status related to the asylum. Each State may select the specific criteria useful in order to grant asylum to migrants. Several European countries specify in their respective constitution the requisites aliens must have in order to obtain asylum, as to be persecuted for their political opinion or activity in the defence of rights and freedoms (Bulgaria, art. 27.2; France, art. 53.1; Germany, art. 16A; Slovakia, art. 53; Slovenia, art. 48), or to be denied the right to exercise their democratic freedoms (Italy, art. 10.3), and in one case the constitution also paves the way for other grounds not indicated in the document (France, art. 53.1). In other cases there is only a mere referral to a statute (Poland, art. 56.1; Romania, art. 18.2; Spain, art. 13.4), or there are clear references to international and European agreements (Germany, art. 16A). Conversely, few constitutions point out the reasons for not granting asylum, i.e. having being prosecuted for non-political crimes and activities contrary to the fundamental principles of international law (Croatia, art. 33, recalling art. 14 of the Universal Declaration of Human Rights), and having violated the fundamental human rights and freedoms (Slovak Republic, art. 53).

Italy and France represent interesting examples of the distorsion of their respective constitutional concepts of asylum in light of the international obligations (on the Geneva Convention see below in this Section). In Italy, a foreigner who 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» (art. 10.3 Const.). Constitutional asylum has two characteristics that distinguish it from the instrument regulated in the Geneva Convention. Firstly, its reason for justification is solely the impediment of the right to exercise the democratic freedoms. Unlike other constitutions and international agreements, it is not necessary to have been persecuted or to be at risk of persecution in the event of the return to situations where the life and freedom of an asylee would be under threat. This broad provision, granting a right to aliens who come to countries that deny fundamental freedoms, a subjective right that can be claimed before a court, is thanks to some founding fathers who were opponents of the Fascist regime and experienced the value of international protection (Cosimo 2004, 49). Moreover, the reference to the freedoms recognised in the Italian Constitution is due to the consideration that other countries might

not have a long bill of rights, or it may not be effective. Secondly, the core of the right to asylum is given by another two rights: the right to entry and the right to reside in Italian territory (Benvenuti 2007).

Since the introduction of the Constitution in 1948, Italy has never passed an act to implement the constitutional provision. This does not imply a complete lack of protection, because the Court of Cassation declared the direct applicability of the right to asylum on behalf of any civil court (Court of Cassation, I civil law section, April 9th 2002, no. 5055; see also Olivetti 2008, 162 ff.). Hence, the right to asylum «is not only a right to apply, but it is also a right to be granted asylum when the specified conditions are met, even in the absence of a law governing the exercise of that right» (Nascimbene 2011, 230). In parallel to the very limited use of asylum in practice, partly because Italy has never been a country of immigration until the Eighties, there has been a systematic distortive reference to international refugee status instead of constitutional asylum in the normative system, starting with the first piece of legislation related to immigration only adopted in the Nineties. The act no. 39 of 1990 on «Urgent norms in matter of political asylum, entry and residence of the extra-communitarian citizens and regularisation of the extra-communitarian citizens and stateless people already present in the territory of the state» consists of an unique article devoted to «Refugees», where reference is made to the Geneva Convention and the related procedures for the asylum application are defined. The only matter being that the category of the beneficiaries of the conventional asylum is more restrictive than that of the beneficiaries of constitutional asylum. Even the subsequent piece of legislation follows this very imprecise linguistic approach producing undeniable legal effects (for further considerations, see Nascimbene 2011, 229 ff.; Grasso 2012, 1537).

In France, the right to asylum is regulated by art. 53.1 Const.: «The Republic may enter into agreements with European States which are bound by undertakings identical with its own in matters of asylum and the protection of human rights and fundamental freedoms, for the purpose of determining their respective jurisdiction as regards requests for asylum submitted to them. However, even if the request does not fall within their jurisdiction under the terms of such agreements, the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds». This provision was inserted in the text in 1993, after a constitutional ruling of the Conseil constitutionnel on the recognition of the fundamental right to obtain asylum as stated in the preamble of the Constitution of 1946, to which the preamble of the Constitution of 1958 expressly refers (Décision 92-325 DC of 12th August 1993). On that occasion, a reference to agreements with European States in this field was also made. Constitutional asylum is conceived both as a right of the individual and as a right of the State. This instrument would seem more restrictive than the conventional asylum because the former is referred to persons who must be involved in ac-

tivities in favour of freedoms (Lambert et al. 2008, 18). But the grant may also be justified on other grounds not formally specified, and this represents a form of «discretionary asylum» left in the hands of the State, completely free to grant asylum to whom it wants. Similar to the path followed by Italy, as a matter of fact the French constitutional asylum is an obsolete solution. Furthermore, the Act no. 98-349 of 1998 regarding the entry and residence of immigrants and the right to asylum, in force until 2003, regulated both the constitutional and the conventional asylum, without making any procedural distinction between these two instruments; a practice that is still prevalent today (Rescigno 2011; Lambert et al. 2008, 19 ff.).

International protection derives from art. 14 of the 1948 UDHR, that asserts: «1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations». In relation to the right to seek asylum, the drafting history of art. 14 demonstrates that this mechanism is not an effective right belonging to non-nationals, but rather a "gracious" concession entirely depending on the willingness of the State. Not the right to obtain asylum, but the right «to seek and to enjoy» asylum is affirmed in the Declaration: it was only perceived as a right to leave a country to escape persecution. It implies that States are not obliged to grant asylum or to take into consideration the request. For this reason, it has been said that art. 14 UDHR is «artificial to the point of flippancy» (in this sense Sir Lauterpacht, quoted by den Heijer 2012, 142). Likewise, the 1967 UN Declaration on Territorial Asylum asserts that the right to seek and to enjoy asylum is without prejudice to the sovereignty of States (art. 2.1).

Nonetheless, the principle laid down in art. 14 UDHR was of particular importance for the 1951 Convention relating to the protection of refugees (the so called Geneva Convention or Refugee Convention), where standards for the treatment of refugees are defined. As stated in this document, only persons facing persecution or having a well-founded fear of persecution in their country of citizenship and/or residence for reasons of race, religion, nationality, membership of a particular social group, or political opinion, and also those unable or unwilling to return to that State, are considered refugees (art. 1.A.2; see Chetail 2014, 24 ff.). Among the obligations which are crucial to achieving the goal of the Geneva Convention is the respect of the principle of non-refoulement, that is the duty not to return refugees to any country where they would be at risk of persecution (art. 33). Thus, refuge is understood as a protection against refoulement, and from which is also derived a sphere of rights, including access to courts, healthcare, public education, labour and social security.

Hence, even if constitutional asylum is different from refugee status, there has been pointed out the emergence of a trend regarding the EU institutions, and consequently diffused among its Member States, that has blurred this distinction by overlapping the refuge to the asylum, thus using the term asylum improperly

for the category of refuge in accordance with the Geneva Convention (Gil-Bazo 2015, 4; Grasso 2012, 1498 ff.). In other words, international and European obligations have "neutralised" the distinctiveness of the constitutional right to asylum, making it a redundant, almost obsolete concept (Lambert et al. 2008, 17).

2. The Common European Asylum System

According to the 1985 Schengen Agreement, an asylum seeker is any alien who has lodged an application for obtaining recognition as a refugee in conformity with the Geneva Convention and in respect of which a final decision has not yet been taken. The same approach characterised the so called Dublin Convention (Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities) signed in 1990 and the successive legal developments in this field. In order to prevent asylum shopping, i.e. the practise that occurs when asylum seekers move around EU countries in search of the best conditions to apply for asylum, the Dublin Convention established that an asylum claim would be assessed once, generally by the country of first entry. To summarise, in the EU perspective the difference between the legal status of an applicant for asylum (an asylum seeker) and that of a refugee consists in the fact that the first is a person who has sought protection as a refugee, but whose claim has not yet been assessed.

An EU policy on asylum has progressively emerged since the entry into force of the Treaty of Amsterdam in 1999 (Zagato 2006): Title IV concerned immigration and asylum and provided the passage from the third to the first pilar, from the intergovernmental to the communitarian level (arts 61-69). Member States agreed to create a common European asylum system to proceed with the harmonisation of their legislation setting up a legal framework defining common minimum standards ensuring fairness, efficiency and trasparency in these matters (Toscano 2013, 9). Since 2000, also art. 18 of the Charter of Fundamental Rights of the European Union mentions the right to asylum, making reference to the rules of the Geneva Convention on refugees and the associated Protocol. It has been underlined that the mention in the Charter of the right to asylum in addition to the prohibition of refoulement implies the recognition of the autonomous meaning of asylum as individual right, and that art. 18 may be conceived as a vehicle for invoking other Charter rights (den Heijer 2014, 522).

Following the Treaty of Amsterdam, the European Council envisaged a common European asylum system during the special EU Summit meeting in Tampere in 1999, affirming the principle of non-refoulement and ensuring that nobody would be sent back. Currently the CEAS consists of a legal framework covering all aspects of the asylum process and providing a common minimum standard for the treatment of asylum seekers on behalf of its Member States. Its core is founded on the mutual trust principle, namely that the national authori-

ties where an asylum seeker submit the application for the refugee status are required to transfer the applicant back to the Member State responsible under the rules. Other CEAS's main pillars are: legislative harmonisation, reinforced practical co-operation, enhanced solidarity, and the strategic development of the external dimension of the system (on the case law of the European Court of Justice in this field, see Ravo 2015, 245 ff.).

The CEAS is composed of a set of regulations, directives and other measures with the objective of dealing with the legal status of third country nationals, requiring the harmonisation of asylum legislation in the Member States. Legal harmonisation is a core instrument of the EU, with which it accomplishes its aims. Harmonisation implies a concern to mediate the interests of each Member State so as to avoid conflicts and clashes. It postulates an approach involving dialogue with due respect for all national perspectives, in order to preserve the diversity of the coordinated objects. This is why variable results are entirely compatible with the process of harmonisation (Boodman 1991, 701). Its scope is to introduce a set of minimum requirements or standards or principles, without any attempt to impose a uniform solution. On the contrary, unification means the voluntary or forced uniformisation of different legal systems; it requires greater sacrifices, with the aim to create specific shared rules in some form, i.e. to elimitate as much as possible the diversity in the rules of different jurisdictions (Meulders-Klein 2003, 106; Baasch Andersen 2011, 32).

At present, the Treaty on the Functioning of the EU allows the EU institutions to adopt measures which set out the standards in asylum protection, with the aim for further uniformity in this field. The measures deal with: «(a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection» (art. 78, para. 2).

Consequently, the EU asylum policy covers other fields than asylum seekers and refugees statutes, like temporary protection and subsidiary protection. The former garantees an appropriate status to each third country national who needs international protection. The latter applies to asylum seekers who do not qualify for refugee protection under the 1951 Geneva Convention but for whom substantial grounds have been found to demonstrate that persons concerned, if returned to their country of origin, or in the case of stateless persons, to their country of former habitual residence, would face a real risk of suffering serious

harm. Subsidiarity protection has a temporary nature, but generally those who benefit from this instrument have the same rights as the other asylum seekers.

The Tampere Programme pointed out that the CEAS should have been implemented in two phases. The first one focused on the harmonisation of national legislations, and the second one to improve the effectiveness of the protection granted (Toscano 2013, 10). Consequently, several acts setting minimum standards for asylum protection were adopted. The Regulation 2003/343/CE (so called Dublin II) replaced the Dublin Convention. It was introduced in order to avoid asylum seekers being sent from one country to another, and also to prevent abuse of the system by the submission of several applications for asylum by one person, in the meantime taking into consideration particular conditions, as the guarantee of family reunification. Joint to this act, three directives were subsequently added. The Reception Conditions Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers had the aim of ensuring that the applicants have a dignified standard of living (such as housing, health care, education) and that comparable living conditions were afforded to them in all Member States. At the same time, the directive also limited asylum applicants' secondary movements. The Qualification Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted had the aim of specifying the criteria for the qualification of asylum seekers for refugee or subsidiary protection. And the Asylum Procedures Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status attempted to ensure that all Member States introduced a minimum common framework on procedures.

Due to the increasing number of migrants and the evidence of considerable disparities in their treatment depending on the country of first arrival or of application for the status of asylum seekers, a few years after their adoption the EU had to admit that the CEAS instruments had failed to reach their objectives. This consideration led to a revision of the past legislation, taking into account the Southern countries' requests to find solutions to ensure shared responsibilities and a higher degree of solidarity between Member States. Despite dissenting voices, the EU confirmed with the Lisbon Treaty entered into force in 2009 its ambition to complete the process of inclusion of measures about asylum into common policies of the EU.

A new legislative programme for the CEAS was established at the 2009 Stockholm European Council for the period 2010-2014, with the goal to replace the previous asylum framework with a different set of rules. Consequently, the instruments in force were recasted in June 2013. The Dublin II Regulation was recasted by Regulation 604/2013 (Dublin III) establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. It is aimed at enhancing the effi-

ciency of the system as well as increasing the level of protection afforded to migrants subjected to the Dublin system so that refugees are not left "in orbit" with no Member State accepting responsibility for their application. The Regulation introduces a hierarchy of criteria to guide Member States in this procedure, from family considerations to possession of visa or residence permit, to whether the applicant has entered the EU irregularly or regularly. The Regulation 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints recasted the Regulation 2725/2000; it allows law enforcement access to the EU database of the fingerprints of asylum seekers under strictly limited circumstances in order to prevent, detect or investigate the most serious crimes, such as murder, and terrorism. The Directive 2013/32/EU on common procedures for granting and withdrawing international protection was adopted to recast the Directive 2005/85/EC. Its scope is to get closer national rules in order to limit the secondary movements of applicants for international protection between Member States, where such movements would be caused by differences in legal frameworks, and to create equivalent conditions for the application of Directive 2011/95/EU in Member States, on standards of qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. In particular, this Directive (so called recast Asylum Procedures Directive) aims at fairer, quicker and better quality asylum decisions. Asylum seekers with special needs will receive the necessary support to explain their claim and in particular there will be greater protection of unaccompanied minors and victims of torture. The Directive 2013/33/EU laying down standards for the reception of applicants for international protection was adopted to recast the Directive 2003/9/EC. This instrument (so called recast Reception Conditions Directive) ensures that there are humane material reception conditions (such as housing) for asylum seekers across the EU and that the fundamental rights of the concerned persons are fully respected. It also ensures that detention is only applied as a measure of last resort (Morgese 2013).

It has been noted that even in this phase of implementation of EU rules there are large-scale differences among the national legal systems and this constitutes a serious impediment to achieving a fully efficient CEAS. The main concerns regard the practical implementation of directives throughout the EU Member States. The standards vary dramatically from State to State, ranging from near perfect to non-existent procedures. As stated by many experts and scholars, asylum legislations in the EU Member States have little in common (Spijkerboer 2016). Some countries recognize almost no one as a refugee, while in other countries the majority of asylum seekers obtain asylum. In addition, judicial decisions have highlighted that the Dublin system violates fundamental rights in several respects. To sum up, the shortcomings of the CEAS and the disregard in its implementation reveal that the current harmonising approach has failed to provide a suitable legal framework.

The Dublin system, that is the mechanism for allocating responsibilities to examine asylum applications, is not working as it should (in 2014, five Member States dealt with 72% of all asylum applications EU-wide; see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, COM(2015)240 final, 13). Currently, the EU is seeking to pursue a more coherent and fair CEAS reinforcing its set of rules and imposing their real application in each Member State in order to avoid the collapse of its policy in this field. It is also increasingly engaged in the task of moving towards an asylum system which can function effectively both in times of normal and of high migratory pressure. For these reasons, the EU is considering the idea of implementing some new strategies. Its objective is to manage better migration flows in the medium and long term moving from a situation which encourages uncontrolled migratory flows and different recognition rates of asylum seekers between EU Member States to one which provides orderly and safe pathways to the EU for third country nationals and uniform standards of legal treatment.

Recognising that there are significant structural weaknesses and deficiencies in the European legal framework on asylum in force, in 2016 the European Commission presented a set of recommendations with the aim of strengthening the CEAS, through the amendment of the Dublin Regulation. These proposals are addressed to: a) discourage secondary movements of asylum seekers and increase integration prospects of those that are entitled to international protection, adapting the CEAS to deal better with the arrival of a high number of asylum seekers through specific points of entry and ensuring a high degree of solidarity and a fair sharing of responsibility between Member States through a fair allocation of asylum seekers; b) simplify, clarify and shorten the asylum procedures, create uniform standards for protection of asylum seekers, harmonise reception conditions; c) reinforce the Eurodac fingerprint database system, to support the application of the Dublin Regulation and to facilitate the fight against irregular migration; d) make the European Asylum Support Office (EASO) a genuine European asylum agency, in order to ensure the efficient and uniform application of EU rules between Member States (see European Commission, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and enhancing Legal Avenues to Europe, COM(2016) 197 final).

It then goes on to develop an alternative approach, where regulations are preferred instead of directives, with the intent to reduce intensively the margins of discretion that Member States have in the transposition of rules on asylum. Given that regulations are directly applicable being sufficiently detailed, this will leave Member States no discretion in the implementation of the CEAS. In particular, the aim of designing a more equitable and efficient common EU procedure

should be pursued by replacing with a regulation the current Asylum Procedures Directive. As regards the harmonised protection standards and rights, asylum seekers should be able to obtain the same form of protection regardless of the Member State in which they make their application and for as long as it is needed. In order to do so, the Commission has also suggested to replace the existing Qualification Directive with a new regulation. Concerning the reception conditions, it has been proposed a reform of the current directive to ensure that asylum seekers can benefit from harmonised and dignified reception standards throughout the EU. The improvement should be affected the assigned residence to asylum seekers and the discouragement from absconding. Furthermore, it should grant earlier access to the labour market and common reinforced guarantees for asylum seekers with special needs and for unaccompanied minors.

In the meantime, opposition of many EU Member States to the idea of strengthening the CEAS is apparent. The EU political fragility in front of solidarity issues poses a serious question to its future.

4. The social emergency of unaccompanied foreign minors

In the last years, starting from the Middle-Eastern and North-African crisis, the numbers, the provenance and the typology of minors involved in the immigration flows have changed. Situations linked to war, social and economic deprivations, better opportunities have increased the presence of unaccompanied foreign minors (Ufm). Following the Unicef's report (2016), in five years, at worldwide, child refugee numbers have jumped by 75%, 50 million of minors, more than half of the world's refugees.

For the Ismu Foundation, on the occasion of the World Day of Migrants and Refugees (January 15, 2017), over 25,000 Ufm arrived in Italy in 2016, almost twice the one recorded in the previous year. Most of them are from Eritrea (15%), Gambia (13%) and Nigeria (12%). Only 2,400 are the foreign minors arrived with their parents (Lunghini 2017a). In the first three months of 2017, as many as 24,000 immigrants reached the Italian coast, of which 2,293 were unaccompanied minors. Furthermore, from the beginning of 2017, over 150 minors drowned in an attempt to reach Italy from North Africa by sea. During the Eastern week-end, more than 8,300 people have been saved in the waters between Libya and the Italian peninsula (Lunghini 2017b).

The number of Ufm in Italy in 2016 was 17.373, 45.7% more than the previous year. The main Ufm countries are Egypt, Gambia, Albania, Eritrea and Nigeria. Taken together, these five citizenships represent more than half of the Ufm present (54.5%). At December 31, there were 6,561 unaccompanied minors unavailable, the majority of which were Egyptian (22.4%), Eritrean (21%) and Somali (19.1%) (Ministero del lavoro, 2016). In the first semester of 2016, Ufm seeking asylum in Italy were 2,416. They were from Gambia (752, over 31% of the total),

followed by Nigerians (297, 12.3%) and Senegaleses (227, 9.4%). As in 2015, a great part of minors has been offered the proposal to receive a residence permit for humanitarian reasons (58% of the total of decisions: 1.013). Refugee status was recognized at 4% of children, while subsidiary protection at 3%. Net increase compared to the previous year, however, are the lowest for whom no form of protection has been recognized (33%). On the total number of applications examined for individual nationality, in the first semester of 2016, among the top ten nationalities, which are recognized to a greater extent by some form of protection, are the Egyptian minors (85% of the total number of questions examined for this nationality) and it is always the Egyptian minors who are largely granted humanitarian protection and recognized subsidiary status, while refugee status is mainly granted to young Nigerians (Anci 2016, 94).

The definition of asylum-seeking unaccompanied minors, as stated in the Italian Legislative Decree 85/2003, refers to non EU-country nationals or stateless persons below 18 years of age who enter the national territory without being accompanied by an adult and who apply for international protection. After the involvement of the guardianship judge (giudice tutelare), the minor is entrusted to the so called System of protection for asylum seekers and refugees (Sprar). The Commission for the recognition of refugee status examines the asylum application. If the answer is positive, the Ufm will receive a residence permit for asylum reasons; otherwise, the minor may be granted subsidiary protection or humanitarian protection. This type of protection gives the opportunity to convert the residence permit for humanitarian reasons even after the Ufm has reached the age of 18 (Accorinti 2015, 64; Giovannetti 2016a).

Concerning the phenomenon of Ufm, significant relevance must be given to the Dublin III Regulation. It determines which State is responsible for examining an asylum application, normally the State where the asylum seeker first entered the EU. Asylum applications in Europe in 2016 were 1,204,300. Germany is the country with more requests in absolute terms and in comparison of population: 722,000 applicants, 63% more than in 2015. In Italy, applications were over 123,000, or 47% more than in 2015. In 2016, the territorial commissions examined over 90,000 applications, and for 60% of the cases the results was negative (Ismu 2017)

In order to avoid their disappearance and a negative impact on their wellbeing, the country responsible for examining the asylum requests of minors should be the one where the most recent application has been made, in order to avoid unnecessary movement, except when the transfer aims to reunite families. The Dublin Regulation has to be revised. The proposed changes to article 3 of the Dublin Regulation intend to exclude certain types of applications from the procedure, namely: applicants coming from a country of first asylum; a safe third country; a country that is listed in the EU common list of safe countries of origin; and asylum applicants considered for serious reasons a danger to the national security or public order of the Member States, or who have been forcibly expelled for the above reasons.

The European agency of fundamental rights (Fra 2016b, 13) suggests to excluding children (and also applicants listed as vulnerable) in need of special procedural guarantees from admissibility and accelerated procedures. «Asylum procedures must allow for sufficient time to assess and respond to such specific needs; otherwise, Member States would not comply with the duty to provide the protection and care necessary for a child's well-being as required by Article 24 of the Charter of Fundamental rights of the European Union. The two weeks and one month timeframes envisaged in article 24 (1) of the proposed recast Dublin regulation will raise serious challenges in this regard». Furthermore, the «EU legislator should allow a rejection of an asylum application as inadmissible or through an accelerated procedure only after having examined the rules to protect unaccompanied children and promote family unity included in Articles 8 to 11 of the current Dublin regulation». The right to respect for private and family life, guaranteed by art. 7 of the Charter of Fundamental Rights of the European Union and by art. 8 of the European convention on human rights, requires that any restriction to this right be justified in each individual case. Even if, according to Eurostat, between 2008 and 2014 only 6,672 transfers were requested and 2,087 made based on family and dependency criteria, for those who were transferred, the Dublin Regulation resulted in an important tool to uphold the right to family life and the rights of the child.

Most of Ufm in Europe are minors who arrive with specific migration projects, with well-defined family expectations and with very strong parenting and reference networks. Often, they do not trust to reach their target destinations following official channels and, therefore, they take the trip illegally. Many of them disappear after identification and assignment to a host community for choice or because they fall into the network of criminal organizations. The Bulgarian Ombudsman highlighted the risk of unaccompanied children being subjected to trafficking and smuggling, problems with appointing children's representatives, and the lack of efforts to organize protected spaces (Fra 2016a). The European Intelligence Agency Europol denounced the disappearance of at least 10,000 unaccompanied minors after their arrival in Europe. In Germany, the Federal criminal police reported that 4,749 unaccompanied minors were missing (2016). In Sweden, the coastal town of Trelleborg reported the disappearance of 1,000 of the 1,900 minors who had arrived in September 2015. In Italy, there are 6,135 minors reported to the Ministry of labor for getting away from the host structures (2015) and 5,200 in the six months of 2016 (Fcapp 2016). For the Ecpat Uk and Missing People (2016), nearly 30% of all United Kingdom child trafficking victims and 13% of unaccompanied children disappeared from care services. Illegal work, sexual exploitation, market, drug, kidnapping, trafficking, smuggling and begging are possible reasons and for this it is urgent to introduce child-specific training on child trafficking, unaccompanied children and missing.

A study of Terre des hommes-Child relief foundation carried out on the disappearance of Ufm underlined that the disappearance of minors from institutions

is not a marginal or rare phenomenon: the percentage can reach 50% (Terre des hommes-Child relief foundation 2010, 11). All professionals reckon that most of the "disappearances" occur very shortly after the minors are taken into care by the institution. The term disappearance seems to be inappropriate, as for some operators this would call for the initiation of a judicial investigation; a very small minority of these people consider the disappearance to be simply the minor's free choice. Some operators recognize their direct professional responsibility in the phenomenon; the principle of actively searching for a minor who has disappeared from an institution is very rarely implemented, in contrast to the immediate search which is initiated when a national child disappears.

The study coordinated by Missing children Europe (2016) identified four possible areas for intervening: prevention of the disappearance, response of institutions to the disappearance, approach to the missing child who has returned, operator training. The prevention means an accurate assessment of the risk of the minor going missing at the moment of initial reception and a response by the security forces where the child has gone missing. The disappearance of an Ufm does not have the same priority and the same attention as that given to non migrant citizens. Furthermore, the minors found involved in criminal activities, are not always treated as victims. This has a negative impact on the welfare of children and often puts them at risk of a relapse. A personal talk with a trained professional is considered the most effective way to gather the necessary information not only for the development of a proper care plan for the child but equally for investigations into criminal organizations.

5. Policies and practices for unaccompanied foreign minors

Following the Directive 2011/95 of European Commission, the unaccompanied foreign minor is classified «as the minor who arrives in the Member State unaccompanied by an adult responsible for them whether by law or by practice of the Member State concerned, or until the moment that the minor is actually entrusted to such a person. The term includes the minor who is abandoned after entering the territory of the Member States». In 2011, the Council of Europe stated that «a child is first and foremost just a child, and then a migrant». In consideration of that, the EU Agency for fundamental rights (Fra 2017) in the last monthly data collection on the migration situation, underlined some critical situations, i.e.:

- In Sweden, Ufm are increasingly anxious about the results of age assessments and their chances of staying in the country when they turn 18. Reports of deteriorating mental health and suicide attempts among Ufm reflect this.
- In the Slovakian detention Centre at Medve ov, the police did not initiate an age assessment of detained people claimed as minors and they treated them as adults.

- In Greece, on March 2017, there were 891 children on the waiting list to be referred to the National center for social solidarity for accommodation.
- In Melilla, Spain, there are more than 540 Ufm, including some one hundred sleeping in the streets; many are not registered and have no access to child protection, education or healthcare services.
- In Germany, a government report highlights the lack of trained staff and adequate accommodation facilities in some municipalities and the extreme stress that affected many children.
- In the Netherlands, the physical and mental health of so-called rooted children was at risk when children and their families were returned after a long asylum procedure. In addition to developing physical and mental problems, these children lack knowledge of the language of their country of origin, have no social connections, have no plans for the future, live in poverty and, because of their otherness in behavior, are considered outsiders by the local community.

For every child, there is a specific world behind, a direct or indirect migratory path, a different situation in the arrival. Concerning the last point, Unicef (2016) stressed that they often face discrimination and xenophobia, living at high risk of exploitation and social exclusion. A refugee minor is five times more likely to be out of school than a non-refugee minor is and when he/she is able to attend school, he/she often encounter unfair treatment and bullying. In general, Ufm suffer of low level of schooling and educational opportunities, poor housing conditions and generalized lack of access to any protection service (Delbos 2010; Valtolina 2014; Giovannetti 2016b; Momo 2014; Prandelli 2015; Tomasi 2016).

The Ufm phenomenon has received particular attention at European level. With "The Action Plan on Unaccompanied Minors" (2010), the EU addressed the need to prevent the hazardous migration of these children and, once arrived, to ensure their protection with long-lasting interventions. The Plan proposes three level of actions to increase the overall protection.

a) Prevention of unsafe migration and increasing protection capacities in non-EU countries:
   - Address root causes of migration and create safe environments for children to grow up in their countries of origin by integrating the issue of unaccompanied minors into development cooperation (poverty reduction, education, health, labor policy, human rights and democratization and post-conflict reconstruction).
   - Identify and protect potential victims of trafficking in human beings through targeted awareness-raising activities and training in countries of

origin and transit to children, their families and any other people that are (or will most likely be) in contact with them.

- Develop child protection systems that link services across all social sectors to prevent and respond to risks of violence, abuse, exploitation and neglect of children, to support children who are not in the care of their families and to provide protection to children in institutions.
- Finance protection programmes in non-EU countries (projects that include at least education facilities, medical care and information on minors' rights and on procedures) to prevent minors from embarking on dangerous journeys to the EU to seek international protection.

b) Increasing protection by procedural guarantees and other measures:

- Appoint a representative for all minors from the moment they are detected.
- Separate minors from adults to protect them from traffickers or smugglers and, thus, prevent (re-)victimization.
- Provide appropriate accommodation (detention should only be used in exceptional situations).
- Create common guidelines on age assessment and family tracing.

c) Finding durable solutions.

- Develop innovative partnership solutions with countries of origin and transit for the return and reintegration of unaccompanied minors (when in the minor's best interest and by prioritizing voluntary return).
- Grant refugee or subsidiary protection status to unaccompanied minors falling under these categories and assist in their integration into the host society (minors who cannot be returned and who do not fall under these two categories should be granted appropriate legal status and given accommodation – national rules apply for the granting of residence permits).
- Resettle to the EU unaccompanied minors who are refugees in non-EU countries if, after a careful assessment in collaboration with the Unhcr and relevant civil society organizations, no other durable solution is available.

The EU Commission reaches to include as many actors as possible: the countries of origin, transit countries, civil society organizations and international organizations. Together with the European Agenda on migration (2015), the Plan develops a strategy to protect Ufm rights, especially those who have disappeared. In Italy, the legislative decree 142/2015, Rules for the reception of foreign children, represents a further step forward concerning the reception and protection

of Ufm. According to the decree, the child must always be listened in order to identify its experience and assess the risk as possible victim of trafficking but also to investigate the possibility of the child to be reunited with family members who may be present in another EU country. Moreover, operators dealing with children should receive special training and guardians must have the skills needed to do their duties and perform their tasks in accordance with the minor's best interests.

The European Parliament resolution of September 12, 2013 recalls that: an unaccompanied minor is above all a child who is potentially in danger and that child protection, rather than immigration policies, must be the leading principle for Member States and the EU when dealing with them, thus respecting the core principle of the child's best interests. The recent Italian statute 47/2017, Regulations about measures to protect unaccompanied foreign minors, called Law Zampa, can be described as the first European law that consider migrant children first and foremost children. It introduces important principles for Ufm:

- An organic and specific reception system with facilities dedicated to the first reception-identification of minors (where the maximum residence time is halved: from 60 to 30 days) and the subsequent transfer to the second reception system in centers that adhere to Sprar. The law also promotes the development of family foster care as a priority way of reception compared to staying in structures.
- Homogeneous standards for age detection and identification with the presence of a cultural mediator during the interviews.
- The protection of the child's interest through: the establishment of clearer rules for the guardians with the establishment of a register of voluntary guardians by the juvenile courts.
- The right to health and education is enshrined in the law. As regards the right to health, enrollment in the National health system and on education, the introduction of specific apprenticeships and the possibility of acquiring the final qualifications of the courses even when, at the age of majority, there is no longer a residence permit.
- The right to be listened to for unaccompanied foreign minors in the administrative and judicial proceedings (even in the absence of the guardian) and legal assistance, at the expense of the State.
  The research of Accorinti (2015, 70-72) for the European migration network on the policies and practices on unaccompanied minors in Italy underlines some important recommendations that could be applied on European level in order to solve the fragmented interventions.
- Informal network of support. The network of countrymen or relatives without a legal residence permit exerts a strong influence on Ufm lives. A signifi-

cant proportion of children for whom a guardianship case for Ufm is opened have, in fact, been present within the territory of the State for a long time. It is necessary to understand with whom, for how long, doing what and why they decide to rely on institutional guardianship at a given moment.

- Need to provide consistent rules. A unified legislation would consolidate all rules governing the matter, in a consistent and coordinated fashion. This approach would contribute to permanently separate the legislation on foreign minors from immigration legislation in general, and from controlled flow policies, as is actually the case when these subjects turn 18.
- Local authorities as guarantors of Ufm's rights. They have the task of enforcing the rights that the law grants to minors, on behalf and under the supervision of the guardianship judge but, concerning the welfare services, their rights are not implemented because of difficulties in using such services: healthcare services to protect mental health or integration into compulsory education, or job placement services, or other leisure time and socialization services.
- Central role of the educational project. Social workers claim that they work on an emergency basis, with their job being based on providing assistance in most cases. However difficult, it is necessary to shift from an approach based on assistance to education and promotion. The child should be first and foremost considered as the holder of rights and not just a recipient of varied interventions.
- Relationship with street minors and fight the problem of missing children. In the field of social interventions, it is a common practice to report the presence of children in the street who avoid any contact with the social services. They are part of circuits of exploitation that which are hard to counter. These minors often flee the initial reception Centre after a very short time.
- Education and training. Training and employment are crucial tools for the integration of Ufm. This highlights the importance of system actions offering students aged 15-18 the possibility to attend courses conducive to the diploma or qualification.
- Cultural mediation and peer education. Multicultural and multidisciplinary teams are an appropriate way to work with Ufm. These teams often avail themselves of cultural mediators. The nature of interventions, professionalism and skills of mediators varies with the context. Analyses show that these professionals are involved mainly in emergency situations, instead of working with project teams on a regular basis.
- Coming of age, a true challenge. The path to protect Ufm on the part of local authorities is put to the test during the transition to adulthood, when many rights are lost. Job placement is fundamental to successfully address two important aspects: the residence permit (as an adult) and an independent living arrangement.

- Girls are more vulnerable. Girls should be helped remove any obstacles they may encounter during the integration process due to mere fact of being female (besides being alone and being migrants). This extra effort should also aim at protecting them against the risk of being victims of the trafficking of human being and prostitution, and the risks connected to being alone asylum-seeking girls in their teens.

  Save the Children Italy (2016, 15-16) is calling on European States to:

- Adopt and implement an ambitious, comprehensive European action plan for all refugee and migrant children. Concrete and measurable policy initiatives must be suggested in order to provide a continuum of protection, care and support for all children on the move involved in cross-border migration, regardless of their legal status, whether it is forced or voluntary, and through all stages of their migration journey.
- Establish a European fund for refugee and migrant children policies should be matched by resources. Funding needs to be made available to support an innovative, comprehensive operational response by the Commission and Member States both within and outside the EU and to identify proper solutions for refugee and migrant children in countries of origin, transit and destination, including access to healthcare, education and protection.
- Harmonise better standards of protection. The reformed asylum regulations should ensure that all EU Members contribute and share responsibility for ensuring that child migrants receive similar levels of protection wherever they go, guaranteeing the strongest possible protection for children.
- Ensure thorough assessment of the protection risks faced by children in migration. There is insufficient knowledge of the concrete protection risks faced by children in countries of destination, origin and transit.
- Strengthen Member States' accountability. More accountability mechanisms need to be put in place to ensure that Member States comply with their legal commitments.
- Establish and ensure more safe and regular ways to reach Europe. The EU and Members States should ensure safe and legal routes such as increased resettlement aimed at the most vulnerable, humanitarian visas, increased flexibility in family reunification processes, private sponsorship programmes, and student scholarship schemes.
- Develop an external migration policy guided by human rights, not political interests. Migration has many drivers, and any cooperation to manage migration should take into consideration this complex and multi-faceted reality, be evidence and needs-based, and ensure that the benefits of migration are maximized and the risks are mitigated.

The main changes related to migration can be summarized in the concepts of experiential relativization and identity reconstruction (Mansoubi 1995, 42). Experiential relativization consists in the maturation of a new gaze of one's own past and beliefs. It is the experience where there is no the way of living but a way of living and the one's own history-memory is not the only possible but one of the many possible and imaginable. Migration experience, however, in the direct or indirect (i.e., experienced by parents) involvement of a minor is an element of identity laceration, which often creates a silent distress that is difficult to understand (Cnda 1997).

In the concept of identity, two dimensions are met: the psychological one – that is, the perception that the subject has of himself in relation to another – and the social one – that is, the relationship aspects. Situations of social friction occur when these two dimensions come into conflict or when the way in which each one is seen by others conflicts with the way in which each one sees him/herself or how he/she wants to propose outside (Murer 1994, 22). Thus, the status of Ufm does not exist in itself, but in the gaze of the other. In fact, the identity attributes arising from the reception group become true prescriptions that lead to identity crises that frustrate the desire for immigrant recognition by society. The clash is right on the ground of recognition as the arrival community will try to protect its identity while the immigrant community will try to protect itself by resisting domination strategies of indigenous peoples. Because who has less economic resources, decision-making, etc. – or immigrants – will suffer more, the latter are to choose between two alternatives: to distance themselves from their own group or to accept the dominance of the dominant group. These conflicting aspects are manifested not only in immigrant adults, but also in children who are faced with a completely new reality. Although these children have a higher adaptation capacity than adults, they are at risk for the lack of valid reference points. The process of rebuilding the ego becomes so difficult: conflicts of values and roles and the dissolution of goals and projects incline the positive image of self, producing anxiety, disorientation and frustration (Murer 1994, 29).

This process of destroying/reconstructing one's own identity accompanied by a process of depersonalization as a cause of the negative image that the receiving community transmits to the minor lead the latter to isolate himself or try to be assimilated to the host society. In the first case, the minor reacts with isolation and marginalization mechanisms that result in possible deviance, in strong nostalgia, in resignation attitudes that block vitality and proactivity. In the second case, there is an attempt to insert, also taking on the distinguishing features: dressing methods, food tastes, and so on (Murer 1994, 31).

The European reception system provides for protection of migrant minors and Ufm represent a sort of paradox: they are at the same time minors to be protected and also migrants to be controlled. The question of Ufm is complex

and multifaceted: some of them are escaping from wars and poverty in search of a better life, others are vulnerable minors exploited by criminal networks. Anyway, each minor has his/her own story, a migration story that often changes over time. Considering the sociological and psychological aspects of Ufm who are faced with a different reality, it is necessary to keep in mind some peculiar aspects related to the status of immigrant and the consequences that this implies with reference to past and consequent experiences to this changes in the emotional development (Pinausi 2002; Giannotta 2015).

• *Emotional experiences*. The psychological balance of immigrant minors may affect traumatic experiences that have occurred in the countries of origin or on the road from the country of origin. Particular attention should be given, especially if the minor is from areas involved in war conflicts or in which there are political, social, religious, racial persecution, or dramatic economic poverty situations, or areas disrupted by natural cataclysms. In such situations, the child may have been subjected to trauma caused by situations of exploitation or deprivation, from personal or family violence, or by seeing violence to others, wartime or cataclysmic destruction. For this reason, it is emphasized the importance of understanding the reasons why a minor emigrated, in order to assess the hypothesis of bringing the signs of psychological discomfort manifested by some immigrant children to possible traumatic experiences in critical contexts of origin.

• *Cultural factors*. A particular influence in determining some of the psychological aspects of the Ufm in relation to the new social context is attributed to the comparison between the culture of origin and that of the new reality. For example, in some cultures, traditions are invested of a very important meaning and social roles, even within the family, are very well structured; in western cultures, references are much more flexible and traditions have lost much of their social relevance. Having a personality in formation, with an identity still to be structured, it may sometimes be difficult for these children to reconcile the family culture of prosperity with that proposed in school and in every context. For example, a teenager arriving in Italy can confront for the first time with mixed school classes while in his country of origin he only had classes with peers of the same sex, so he must mediate the pattern of relationships with the other sex.

• *Language aspects*. In order to allow for greater or lesser accessibility to communication with peers and the possibility of using territorial resources, linguistic factors are of crucial importance to avoid cultural and personal isolation phenomena. The aptitude with which foreign minors learn the new language, as well as age, depend on other factors, such as the similarity of the mother tongue to the second language, the time spent in the new country, the language used in the familiar environment and, in general, the opportunities for second-language stimulation outside the school context. The usefulness of the presence of cultural mediators belonging to the same ethnicity as foreign students has been recog-

nized, not only to facilitate the acquisition of language, but also to facilitate their acceptance and to prevent possible refusal.

• *Childhood culture*. One of the first aspects to consider is the possible different conception of children's rights and the culture of childhood between the country of origin and that of destination. There are realities where children's rights are not taken into account. Due to precarious socio-economic conditions, minors are required to work to contribute to the nourishment of the family, with excessive responsibility, in working conditions that are often at risk or in situations of sexual exploitation. There are realities in which the right and the duty to study are still scarcely accessible. There are realities where punishments in the form of physical or psychological maltreatment are legitimate. There are realities in which there is a strong discrimination in personal freedom for girls and boys compared to peers. For these reasons, it is crucial to understand what is the awareness of foreign children about their rights and to help them to have an adequate information on the new social and legislative reality of childhood culture. Attention to this aspect allows younger immigrants to live with the utmost serenity of the changes required by the new social reality.

• *Environmental acceptance.* Attitudes towards acceptance or refusal by the environment undoubtedly play a fundamental role in determining psychological experiences and the social inclusion of immigrant children. In particular, the lack of knowledge of minorities' cultures and the values or behaviors that regulate social relationships can lead to prejudices or misunderstandings. Difficulties of understanding between different cultures and prejudices based on stereotypes related to the area of origin of the Ufm can create the fear of being rejected only because it comes from another country, with the consequent reactions that could be the repetition of the culture of belonging and the rejection of the new one.

• *Economic conditions*. The economic chances can affect the amount of opportunity offered to the child to socialize: for example, poor availability of money can preclude a minor from participating in a school trip, going out with peers, taken part in recreational, sports or cultural activities. These aspects, which may seem marginal, are often very important for children and young people, and can create discomfort or inadequacy with respect to their home and family, especially in situations where the difference in economic resources compared to households of peers is wide.

• *Attitudes of families*. The psychological development of immigrant children is also determined by the attitudes and experiences of parents and relatives, on a personal level and towards the new cultural reality. In understanding some attitudes of immigrant children to the new cultural reality, it is necessary to consider the expectations and imagination of the parents towards this new reality: i.e. the ease with which work and accommodation in a European country can easily be found. Given that parents' attitudes also affect children's attitudes, it is impor-

tant to understand what are the expectations and fantasies that immigrant children have towards the new environment, aspects that may partly explain some of the difficulties that may arise in school and society.

In conclusion, the presence of Ufm in Europe is a reality that has significant relevance and that is an important resource, given the demographic decline. As put in evidence by White et al. (2013, 1-7), the perspectives of children and their own experience of migration are not well documented and their «lives are silenced through adultist discourses about migration decision-making and experience». Viceversa, contributions from sociology, psychology and anthropology stress the evolving capacities of children, and their right to development and participation and not only seen as passive victims (Bracalenti, Saglietti 2010; Zamarchi 2014; Rotondo 2016). To foster a harmonious development of all these immigrant minorities, it is fundamental to emphasize the importance of an approach that enables these minors to understand the new cultural references and, at the same time, to be understood with their own cultural heritage and their own experiences. Such attention is essential to avoid cultural isolation and, consequently, greater risks of psychological and social discomfort, often aroused by the fear of approaching different cultural values and favored by the difficulty of approaching to the new reality and to understand its meaning. The possibility of proposing interventions aimed at mutual knowledge of different cultures undoubtedly represents an opportunity for growth for each person and a precious tool for preventing possible forms of social marginalization.

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The Role of the European Union in Protecting the Rights of Asylum Seekers with Disabilities

DELIA FERRI*

1. Introduction

The war in Syria, the harshening of civil conflicts and political divisions in several Mediterranean countries during the aftermath of the Arab Spring, the spread of dictatorial regimes across African countries and the persisting and severe civil repression in Eritrea have contributed to the displacement of millions of people globally[1]. These factors have all facilitated an unprecedented flow of migration towards Europe, which, according to the United Nations High Commissioner for Refugees (UNHCR), is the largest occurred since the World War II[2]. The International Organization for Migration (IOM) affirmed that, in 2015, 1.046.599

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1 In June 2016 the Commission of Inquiry on Human Rights in Eritrea, set up by the United Nations Human Rights Council, released its second report. The Commission concluded that Eritrean officials repeatedly committed crimes against humanity, such as enslavement, imprisonment, enforced disappearances, torture, persecution, rapes, since 1991 (see at http://www.ohchr.org/EN/HRBodies/HRC/CoIEritrea/Pages/commissioninquiryonhrinEritrea.aspx). On the Arab spring and the consequent migration flow on the Italian coasts from North Africa see *inter alia* Nascimbene, Di Pascale 2011.

2 UNHCR, *World Refugee Day: Global Forced Displacement Tops 50 Million for First Time in Post-World War II Era*, available at http://www.unhcr.org/news/latest/2014/6/53a155bc6/world-refugee-day-global-forced-displacement-tops-50-million-first-time.html.

persons reached a European country, by land or sea[3]. In the same year, according to European Union (EU) Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (Frontex), recently renamed and revamped as European Border and Coast Guard[4], people crossing into the EU totalled more than 1.800.000.

Many of these migrants are refugees, i.e. individuals unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, as recognised under the 1951 Convention relating to the Status of Refugees (hereafter, 1951 Geneva Convention) and its Protocol[5]. Many are asylum-seekers, i.e. individuals who lodge claim for refugee status without having obtained it prior to their arrival. In this respect, Eurostat recorded that, in 2015, the overall number of asylum applications was close to 1.3 million[6]. In 2016, the migratory pressure against the EU borders has not diminished and asylum requests are extremely high in volume. The latest updates from the European Asylum Support Office (EASO), in August 2016, calculated within the so called "EU+ area" (i.e. EU-28 plus Norway and Switzerland), 137.688 applications for international protection (all the data are available at https://www.easo.europa.eu/analysis-and-statistics). This, according to EASO, represents the peak of asylum applications lodged in a single month across in 2016 (albeit the figure is slightly lower than the number registered in August 2015).

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[3] The data are available at http://www.iom.int/news/iom-latest-data-europe-migrant-emergency.

[4] Until September 2016, Frontex was the EU agency supporting the Member States in the border control and monitoring the different routes migrants use. On 14 September 2016, the Council gave its final approval to the European Border and Coast Guard (EBCG). The EBCG replaces Frontex and seeks to reinforce external border control, in order to face the migratory pressure at the external Schengen borders (Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16 September 2016, p. 1 *et seq.*).

[5] Convention relating to the Status of Refugees, Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 [1950] 189 United Nations Treaty Series 150 and Protocol relating to the Statue of Refugees 1967, [1968] 606 United Nations Treaty Series, http://www.unhcr.org/3b66c2aa10.html (last accessed 10 October 2016). The prohibition of return or *refoulement* as set down in art. 33 of the 1951 Convention provides additional protection for a refugee when in another State. It prohibits State Parties from returning a refugee 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».

[6] See http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics. See also the data presented and discussed by the EU Fundamental Rights Agency (*Fundamental Rights Report 2016*, at p. 7, http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-fundamental-rights-report-2016-2_en.pdf).

Even though, «persons with disabilities make up around 15% of the global population, and comprise a significant minority of refugees and migrants»[7], none of the statistics released by international organization or EU bodies include figures on migrants, refugees or asylum seekers with disabilities. Straimer suggests that «disability may interact with asylum in various ways», as it can be either a cause or consequence of displacement[8], and most significantly can «become a multi-fold barrier to accessing both protection and assistance». However, asylum seekers with disabilities have remained largely invisible (Straimer 2011, 537). In a similar vein, in July 2016, the Fundamental Rights Agency of the European Union (FRA), while releasing a thematic focus on migrants with disabilities (the very first of its kind), claimed that there is virtually no information as to whether migrants have pre-existing physical, sensory, intellectual or psychosocial impairments, or have developed a disability during the migration process.

This dearth of data seems to reflect little political awareness of the challenges people with disabilities face in the context of migration, and of their rights. At the international level a general debate and a commitment towards rendering humanitarian action inclusive of persons with disabilities, and towards combating the intersecting forms of discrimination that exacerbate the exclusion of all persons with disabilities, has started to emerge. In 2011, the UNHCR recognized «that the specific needs of persons with disabilities are often overlooked, especially in the early phases of humanitarian emergencies»[9] and called upon States «to protect and assist refugees and other persons with disabilities against all forms of discrimination and to provide sustainable and appropriate support in addressing all their needs».

[7] This figure was reported in the booklet released in 2011 by the UNHCR (*Working with persons with disabilities in forced displacement*, at http://www.unhcr.org/4ec3c81c9.pdf). The figure was also reported by the Fundamental Rights Agency, *Thematic focus: Migrants with disabilities*, 2016, at http://fra.europa.eu/en/theme/asylum-migration-borders/overviews/focus-disability, and by several authors (e.g. Fay 2015).

[8] For example, Roberts and Harris found that asylum seekers with disabilities experienced isolation which contributed to deteriorating mental health (Robert, Harris 2002). Quinn reports that asylum seekers often experience destitution, «which has severe mental and emotional effects such as acute anxiety and stress, feelings of extreme vulnerability and powerlessness» (Quinn 2014: 59). Morville *et al.* (2014) conducted a study on Danish asylum seekers and found debate that significant ability impairments in tortured as well as non-tortured newly arrived asylum seekers. In 2016, one of Mental Health Europe members (BPtK) reported «50% of migrants and refugees are inclined to suffer from depression and 40% to experience post-traumatic stress which would require suitable psychological support». See MHE position paper at http://www.mhe-sme.org/fileadmin/Position__papers/Position__Paper__The__need__for__mental__health__and__psychosocial__support__for__migrants__and__refugees__in__Europe__.pdf.

[9] UNHCR, *EXCOM Conclusions on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR*, No. 110 (LXI), 12 October 2010 http://www.unhcr.org/excom/exconc/4cbeb1a99/conclusion-refugees-disabilities-other-persons-disabilities-protected-assisted.html.

The growing debate has also prompted the adoption of a non-binding Charter on Inclusion of Persons with Disabilities in Humanitarian Action, in May 2016[10]. The Charter, which stems from the collaboration among different players, such as NGOs, UN agencies and organisations of persons with disabilities, was strongly endorsed by the UN[11], and by the UN Committee on the Rights of Persons with Disabilities (hereafter, UN Committee). By contrast, in the EU policy discourse, as denounced by the European Association of Service Providers for Persons with Disabilities (EASPD), there is virtually no discussion on the rights of migrants with disabilities. Amidst the current migration crisis, this results in a lack of implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD), ratified by the EU alongside its Member States (infra Section 2). The UN Committee on the Rights of Persons with Disabilities in its «Concluding observations on the initial report of the European Union»[12] expressed "deep concern" on the precarious situation of migrants with disabilities, who are «detained ... in conditions which do not provide appropriate support and reasonable accommodation». It *inter alia* recommended that the EU mainstream disability in its migration and refugee issue. Analogously, the UN Committee expressed concern about the challenges encountered by refugees arriving in some Member States, and, for instance, recommended Italy adopt appropriate support and rehabilitation services through strengthened systems to migrants with disabilities (in particular psychosocial disabilities)[13].

The European Parliament, in its report on the implementation of the CRPD released in June 2016, requested the Commission and the Council to provide for special care for persons with disabilities when making proposals for resolving the refugee question[14]. The Parliament's report supported the UN Committee's recommendations, urged mainstreaming of the human rights of persons with disabilities who suffer double discrimination, and stressed the need for measures that take into account the specific needs of persons with disabilities.

Against this background, the overall aim of this chapter is to briefly discuss the Common European Asylum System (CEAS) in light of the CRPD. The chapter does not endeavour to investigate the effects of whole bulk of EU migration policies or the EU migration agenda on people with disabilities. Nor does it engage in a lengthy discussion of the CEAS itself. Rather, the chapter, building on

[10] The charter is available at http://humanitariandisabilitycharter.org/.

[11] See http://www.un.org/apps/news/story.asp?NewsID=54025#.WAuQiy0rIdU.

[12] UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the European Union*, 2 October 2015, at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/226/55/PDF/G1522655.pdf?OpenElement.

[13] UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Italy*, 6 October 2016, at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fITA%2fCO%2f1&Lang=en.

[14] European Parliament Committee on Employment and Social Affairs, *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities, with special regard to the Concluding Observations of the UN CRPD Committee* -(2015/2258(INI)), 9 June 2016.

existing literature (*inter alia* Beduschi-Ortiz 2010, Straimer 2011, Conte 2016), attempts to examine the extent to which EU legislation on asylum[15] can be considered compliant with the CRPD[16]. Building on existing scholarship, it focuses on asylum seekers with disabilities, and discusses the protection of their rights within the EU legal framework. Further having recalled the content and the main obligations that stem from the CRPD, as well as, its position in the EU legal order (Section II), the main gaps in terms of legal protection of asylum seekers with disabilities in the CEAS will be examined (Section III). The chapter then concisely examines the Dublin III regulation and discusses whether the EU proposal of May 4, 2016 to amend the regulation (so called Dublin IV) will enhance compliance with the international standards set forth in the CRPD[17]. Finally, the contribution will provide some concluding remarks on the current CEAS and on the challenges in implementing the CRPD in the context of asylum policies will be highlighted.

2. The CRPD in the EU Legal Order and the Obligations it purports in the Context of Migration

The CRPD, approved by the UN General Assembly on December 13, 2006, was ratified by the former European Community (now the EU) alongside its Member States[18], and entered into force for the EU in January 2011. Since then, it has become an integral part of EU law[19], and, by virtue of art. 216(2) TFEU, is binding on the EU and its institutions. In hierarchical terms, the CRPD enjoys a quasi-constitutional status in the EU legal system, beneath the Treaties but above secondary law (Ferri 2010, 47 et seq.; Ferri, Favalli 2016, 542-543). As a consequence, the CRPD embodies the benchmark against which to gauge EU disability policy.

[15] While acknowledging that the new Long Term Residents Directive (Directive 2011/51/EU amending Directive 2003/109/EC, OJ L 132, 19 May 2011) extends the scope of EU rules on long-term residents so as to include refugees and beneficiaries of subsidiary protection, this chapter does include a discussion of this piece of legislation.

[16] As mentioned above, asylum is granted to people fleeing persecution or serious harm in their own country in compliance with the 1951 Geneva Convention on the protection of refugees.

[17] Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Brussels, 5 May 2016, COM(2016) 270 final.

[18] Council Decision 2010/48/EC, OJ L 23, 27 January 2010. The procedure of conclusion was, however, finalized only one year later, on December 23, 2010, when the instrument of ratification was officially deposited. Except for Ireland, which is still in the process of ratifying it, all the Member States have ratified the Convention.

[19] CJEU, C- 337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation (C-337/11)* ECLI:EU:C:2013:222.

In addition, as the Court of Justice of the European Union (CJEU) has repeatedly held, EU secondary law must be interpreted in light of the Convention[20].

Having regard to its content, the CRPD supports the official recognition of disability as a human rights issue. As commonly acknowledged, it embraces the social model, i.e. the view that disability stems primarily from the failure of the social environment to meet the needs and aspirations of people with disabilities[21]. Its scope is extremely broad, in both ratione personae and ratione materiae. On the one hand, the CRPD provides an open-ended conceptualization of disability in art. 1 (Quinn 2009, 9), and states that: «[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others». On the other hand, the CRPD does not simply prohibit discrimination on the grounds of disability, but covers civil, political, economic, cultural and social rights. It is informed by and built upon general principles, which include: respect for individual dignity, autonomy, and independence; respect for difference and acceptance of disability as human diversity; non-discrimination; equal opportunity; complete and meaningful participation; accessibility; gender equality; and respect for children's rights and support for their evolving capabilities.

As such, the Convention does not include any explicit reference to migrants with disabilities. However, as well as imposing several specific obligations on State Parties, such as the prohibition of any discrimination on the grounds of disability[22], and the implementation of accessibility with regards to the physical environment and information and communications, the CRPD requires them to mainstream the rights of persons with disabilities in all of their policies and programmes. The latter clearly encompass migration and asylum policies. This means that every right set forth in the CRPD must be enjoyed by asylum seekers with disabilities on an equal basis with others. It is evident that asylum seekers must also be provided with reasonable accommodation, where this is necessary to enable them to enjoy or exercise their rights. Reasonable accommodation duties extend across «all human rights and fundamental freedoms». The CRPD also include explicit reference to the obligation on States to introduce reasonable accommodation duties in a number of areas, including that of liberty and security of the person, which is particularly relevant in this context. Art. 14 reads as follows: «(1) States Parties shall ensure that persons with disabilities, on an equal

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[20] Among others, CJEU, Case C-363/12, *Z.* v *A Government Department and The Board of management of a community school* ECLI:EU:C:2014:159.

[21] For an overview of the Convention *ex pluribus* see Kayness, French 2008.

[22] The CRPD adopts a very broad notion of discrimination that encompasses «any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field». The denial of reasonable accommodation is also considered a form of discrimination (art. 2 CRPD).

basis with others: (a) Enjoy the right to liberty and security of person; (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty. (2) States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation». It can be inferred that asylum seekers with disabilities in reception and detention centres must be provided with additional, reasonable adjustments where needed (including for instance, assistive devices such as wheelchairs).

Various other articles are of immediate and direct relevance in the context of migration policies, and, in particular, with regard to asylum legislation. Art. 11 CRPD on situations of risk and humanitarian emergencies requires Parties to the Convention to take «all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict [and] humanitarian emergencies». According to Conte the latter provision «constitutes fertile grounds to include the protection of refugees with disabilities within the CRPD's scope» (Conte 2016, 332). Art. 15 CRPD requires States Parties to take effective measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment. Art. 16 CRPD obliges Parties to protect people with disabilities from all forms of exploitation, violence and abuse. Furthermore, and more generally, art. 31 requires States Parties «to undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention». This latter provision has so far been ignored with regards to migrants with disabilities arriving into the EU. As noted above, although the availability of information on the situation of people with disabilities is vital to development of effective strategies, at present there is a clear lack of such data.

All in all, the CRPD constitutes a yardstick for the protection of asylum seekers with disabilities in the EU. In fact, as noted by Conte, persons who forcibly flee from their country of origin are entitled to enjoy the legal guarantees of the 1951 Geneva Convention, but in this case people with disabilities «should also benefit from the rights enshrined in the CRPD, as it applies in situations of risk and humanitarian emergencies» (Conte 2016, 333). The CRPD, which is now an integral part of EU law, therefore provides minimum grounds to be fulfilled by supranational legislation, and by Member States when implementing EU law.

3. Asylum Seekers with disabilities in the EU Legislative Framework: Rights and Procedures

Following the commitment undertaken in Tampere in 1999[23] and since 2003, the EU has established a Common European Asylum System (CEAS), with the intent of adopting a joint approach to asylum (Zagato 2006), to harmonise certain aspects of asylum procedures across Europe, and in order to create fairer and more effective ways to process asylum claims (Cherubini 2015). Three key pieces of legislation which form part of the CEAS will be considered in this section vis a vis the CRPD[24]: the Directive for a uniform status for refugees (Qualification Directive), the Directive on minimum standards on procedures in Member States for granting and withdrawing international protection (Procedures Directive), the Directive laying down minimum standards for the reception of applicants for international protection (Reception Conditions Directive)[25].

3.1. The Qualification Directive

The Qualification Directive lays down standards for the qualification of third-country nationals or stateless persons as refugees or persons eligible for subsidiary protection, and for the content of the protection-granted (Peers 2012). The text of the directive, which builds upon the international standards provided in the 1951 Geneva Convention, approximates the rights granted to the beneficiaries of international protection (i.e. refugees and those qualifying of subsidiary protection), but allows for Member States to set higher standards. The effect of granting refugee status or subsidiary protection within the EU permits the applicant to remain in the country where he or she is present and to access employment, welfare, and healthcare services.

To be declared a refugee and to obtain asylum in the EU, an asylum seeker must establish a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion

[23] Presidency Conclusions, Tampere European Council, 15-16 October 1999, at http://www.europarl.europa.eu/summits/tam_en.htm.

[24] The CEAS also includes the so called EURODAC Regulation (Regulation (EU) No 603/2013 on the establishment of "Eurodac" for the comparison of fingerprints OJ L 180, 29 June 2013), which allows access to the EU database of the fingerprints of asylum seekers in order to prevent, detect or investigate serious crimes, such as murder, and terrorism.

[25] Respectively, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, (recast), OJ L 337 20 December 2011; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180, 29 June 2013; and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L180 29 June 2013.

(art. 2(d) of the Qualification Directive, which echoes the wording of the 1951 Geneva Convention). The meaning of persecution is defined in art. 9 to be «an act sufficiently serious» as to be «a severe violation of basic human rights» of the Convention or «an accumulation of various measures, … which is sufficiently severe as to affect an individual in a similar manner». Art. 10 sets out concepts of elements of race, religion, nationality, social grouping and political opinion, which must be taken into account when assessing the reasons for persecution.

According to this provision, a group is to be considered a «particular social group» where two conditions are met. Firstly, its members «share a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it». Secondly, «that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society». Disability is not explicitly mentioned amongst the grounds of persecution that qualify for international protection. However, Strainer suggests that claims of persecution for reasons related to the applicant's existing disability may be considered under the ground of membership of a particular social group (i.e. the group of persons with disabilities). He also suggests that person with disabilities, further to the entry into force of the CRPD, can be recognised as a protected group under international law. This Author, however, argues that there is currently no guidance capable of ensuring a «disability-sensitive interpretation» of this provision (Straimer 2011, 540). Conte, by contrast, adopts a more sceptical approach. He claims that the directive constitutes a missed opportunity «to clearly include the vulnerable category of persons with disabilities within the definition of refugee» (Conte 2016, 341). He also affirms that while the «directive explicitly regards acts of a gender-specific or child-specific nature as peculiar forms of persecution», it leaves out «those acts based on disability grounds» (art. 9(2f)).

The lack of any explicit reference to disability may reduce the chances of disabled asylum seekers to be considered eligible for international protection. However, it is suggested here that, should the Court of Justice be asked to interpret the provision in question, it would most likely attempt to provide an interpretation consistent to the CRPD. The CJEU has in fact attempted to interpret EU legislation (mainly in the field on non-discrimination) in light of the CRPD, even though with mixed results (Ferri, Favalli 2016; Waddington 2015). It is therefore probable that, if the Court is confronted in the future with the interpretation of art. 10 of the Qualification Directive and with the meaning of social group, it will adopt what Strainer calls a disability-sensitive interpretation.

The directive explicitly mentions people with disabilities in another provision, in the context of the rules on the content of international protection[26]. Art. 20(3) of the Directive requires Member States to «take into account the specific

[26] Art. 15(c) of the Qualification Directive qualifies the requirement for eligibility for subsidiary protection where there is «serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict».

situation of vulnerable persons such as minors, unaccompanied minors, *disabled people* [emphasis added], elderly people, pregnant women, single parents with minor children, victims of human trafficking, *persons with mental disorders* [emphasis added] and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence». Notably the provision uses two different terms: disabled people and people with mental disorders. The latter could encompass people with intellectual or psychosocial disabilities, creating an overlap between the two categories of people identified in the directive. The extent of the obligation that the States bear in this circumstance is not immediately evident. It is nonetheless apparent that Member States must evaluate the individual situation of the person (art. 20(4)), including his or her own disability. In addition, the directive requires Member States to provide refugees with adequate healthcare, including treatment of mental disorders and acknowledge the special needs of *inter alia* disabled people (art. 30). Strainer suggests that wording of the directive is heavily influenced by the medical model, and by an «image of persons with disabilities as patients». However, the recognition of vulnerability of persons with disabilities seems to be welcomed. If interpreted in light of the CRPD, these provisions can open the door to reasonable accommodation and substantive equality for refugees with disabilities.

3.2. The Asylum Procedures Directive

The Asylum Procedures Directive establishes common standards for asylum procedures. Compared to the previous directive (Directive 2005/85/EC OJ L 326 of 13 December 2005; for a comment see Costello 2006), which was based on a minimum harmonization rationale, the new one attempts to lay down more precise provisions with the view to creating more efficient and quicker procedures. In particular, this directive require that any person who arrives at the frontier of an EU Member State be allowed to make an application for asylum or subsidiary protection, and to remain lawfully in that State while an application for a grant of either status is decided.

The directive requires applicants to be informed «in a language which they understand or are reasonably supposed to understand» about the asylum procedure and its functioning. This clearly affirms that applicants with disabilities must be given information in a format accessible for them (e.g. sign language, braille, or easy-to-read language). Art. 14 of the directive requires, before a decision on asylum is taken, that the applicant is given «the opportunity of a personal interview on his or her application for international protection». There is no unambiguous inclusion of accessibility requirements, but these should be provided taking into account what is provided in arts. 15 and 24 of the directive. Under art. 15(3)(a), Member States must guarantee that interviewers are «sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulner-

ability». The directive explicitly recognises that «[c]ertain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, [emphasis added] serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence» (Preamble, para 29). It also necessitates Member States to identify, within a reasonable period of time after an application for international protection has been lodged, «applicants in need of special procedural needs» (art. 24(1) of the directive). The assessment should be integrated into national procedures and/or into the assessment that is carried out according to the Reception Condition Directive (infra, Section 3.3). The directive also requires that those applicants should be provided with «adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection». In addition, Member States have to ensure that the need for special procedural guarantees is addressed, at any stage of the procedure, where such a need becomes apparent.

Fahy, from a practical standpoint, affirms that applicants with disabilities face different challenges, including «difficulties in understanding questions and instructions, difficulties in communicating answers intelligibly, behavioural difficulties, difficulties in delivering a coherent and consistent testimony and/or difficulties in recalling and recounting events» (Fahy 2015, 13). As a result, an applicant with disability (especially applicants with intellectual disabilities), if not provided with support, might find it difficult to substantiate his/her asylum request. In this respect, one might argue whether art. 24 of the directive provides sufficient guarantees for such persons. In line with Straimer (2011, 542), Conte affirms that art. 24 is quite vague, but does «set out a clear duty to assist and sustain vulnerable individuals during the intricate asylum procedure» (Conte 2016, 344). It is here suggested that the broad wording of art. 24 covers both accessibility requirements and/or specific reasonable adjustments, and can ensure (if properly implemented by the Member States) that people with disabilities have full and equitable access to the asylum procedure[27]. Especially if interpreted in light of the CRPD, this provision can be read as to impose on national competent authorities a duty to make reasonable procedural accommodations.

3.3. The Reception Conditions Directive

The Reception Conditions Directive lays down harmonised standards for reception conditions for asylum seekers while they wait for the examination of their claim and ensures that applicants have access to housing, food, employment,

[27] Conte also notes that the directive requires persons interviewing asylum applicants to have acquired general knowledge of problems which could adversely affect the applicants' ability to be interviewed, which means that the individual background of the applicant and his/her special requirements must be taken into account (Conte 2016: 345).

as well as healthcare. As highlighted by Thorton, some of the obligations under the Reception Directive include the recognition of a dignified standard of living, some (circumscribed) freedom of movement rights, the right to be provided with some form of shelter, the right to receive certain material reception conditions, a circumscribed right to education for children under 18, and a limited right to work (Thorton 2014, 21 et seq. On minimum condition for reception see Case C-179/11, *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 27 September 2012, ECLI:EU:C:2012:594).

Without engaging in a comprehensive analysis of the directive, there are a few strengths of the text that must be highlighted in a disability perspective, while acknowledging that the directive is often a "paper tiger". First, this piece of legislation, similarly to the previously analysed directives, recognises the vulnerability of people with disabilities (art. 21). As Conte highlights, «[t]he Reception Directive expressly mentions persons with disabilities as vulnerable individuals and represents an important step forward for the international protection of refugees with disabilities» (Conte 2016, 347). In a similar vein to the Asylum Procedure Directive, art. 22 of the Reception Conditions Directive requires Member States to assess whether an applicant «is an applicant with special reception needs», and must indicate these needs. It also requires that this assessment is «initiated within a reasonable period of time after an application for international protection is made». Special reception needs must be also taken into consideration throughout the duration of the asylum procedure. According to Conte (2016, 347), these provisions require Member States to «accommodate the ... needs of applicants with disabilities», and could be substantially assimilated to a duty to provide reasonable accommodation within the meaning of art. 2 CRPD.

All these rules could generally be considered compliant with the CRPD and represent an important step forward for the international protection of refugees with disabilities. Nonetheless, the FRA has highlighted that their implementation at the Member State level is grossly deficient[28]. Firstly, according to the FRA, «legally defined procedures to identify people with disabilities in reception and detention centres are lacking», and many «people with disabilities are identified on an informal or ad hoc basis». «[A]necdotal evidence based on the low numbers of persons with disabilities recorded suggests that many people with disabilities remain unidentified in practice». This is mostly and quite evidently the case where the disability is not clearly visible. Consequently, reasonable accommodation is not ensured. Secondly, art. 17 of the Reception Conditions Directive requires that «material reception conditions provide an adequate standard of living for all applicants», which «protects their physical and mental

[28] *Supra* nt. 7. It should be noted that a few Member States have not yet implemented the CEAS. In February 2016, the European Commission issued reasoned opinions against several Member States for their non-transposition of the CEAS. See at http://europa.eu/rapid/press-release_IP-16-270_en.htm.

health». It also requires Member States to ensure that such «standard of living is met in the specific situation of vulnerable persons». In the case of detention – which must be as short as possible and occur in specialised detention facilities – Member State must provide particular care to vulnerable people (including people with disabilities). Health, including mental health of asylum seekers in detention, must be ensured (art. 11). Even though these provisions fulfil (at least to some extent) the obligations established in the CRPD, their implementation is problematic. Again the FRA's report affirms that, while some form of psychosocial support and treatment is available, this is still limited and often «staff in primary healthcare facilities lack the necessary training to identify and provide support for people with mental health issues». In October 2016, Mental Health Europe (MHE) issued a position paper on the need to reinforce mental health and psychosocial support for migrants and refugees. MHE claimed that many migrants and refugees still face barriers to accessing mental healthcare and support services, and asked Member States to «invest in the development of culturally appropriate and accessible mental health support in a manner that respects the principle of non-discrimination and with specific attention to the needs of migrant and refugee women and child». Finally, the directive also provides that during the application process the UNHCR may have access to applications and deliver assistance. Although this provision is not strictly related to disability, the work of the UNCHR has so far been important in highlighting asylum seekers with disabilities and their needs. Hence, the provision might contribute, at least to some extent, towards ensuring that procedures are as accessible as possible.

4. The Dublin III Regulation and the proposal for reform in light of the CRPD

The Dublin III Regulation is another important pillar of the CEAS. It determines which EU Member State is responsible for examining individual asylum applications. It includes enhanced procedural safeguards for applicants, including a right to information (art. 4) and a personal interview (art. 5), the right to an effective remedy (art. 27), a revision to the time limits (arts. 21, 22, 23, 24, 25 and 29), and restrictions on detention (art. 28), in line with the Asylum Procedure Directive. The Regulation gives general responsibility to undertake the examination of the asylum application to the Member State in which the applicant has (irregularly) arrived (art. 13). If the applicant has a family member who is a refugee or who has lodged an asylum application, the State examining that application will be responsible (art. 10). In the absence of a family member, responsibility to examine the application falls on to any Member State that issued the applicant with a valid residence permit or valid visa (art. 12). The best interests of the child and respect for family life in principle appear to be protected in the Regulation.

The criteria for establishing the Member State competent to examine the application do not include or mention disability. However, art. 16 of the Regulation affirms that «[w]here, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing». Hence, when there is «a relationship of dependency» (art. 16) the Member State responsible for examining the dependent person's application is the one where the child, sibling or parent is legally resident, unless health issues prevent the dependent applicant from travelling for a significant period of time (art. 16(2)). If this is the case, the Member State responsible for examining the dependent person's application is the one where the dependent applicant is present (art. 16(2)). This provision mentions severe disability, but there are no specific parameters to qualify the disability. It is apparently up to the Member States to identify what constitutes a severe disability for the purpose of art. 16, thus clearly creating disparities across the EU. Under the Dublin III criteria, to facilitate the process of determining the Member State responsible, Member States must conduct a personal interview of applicants in a language that they understand or are reasonably supposed to understand. Although, similar to art. 14 of the Asylum Procedure Directive, there is no express inclusion of accessibility requirements, this provision should be read as encompassing sign language, and easy to read expressions. For the purpose of this analysis, another provision should be mentioned. Art. 32 of the Regulation requires, where there is a transfer of an asylum seeker from one Member State to the Member state competent to examine the asylum request, that information on any special needs of the person are transferred for the purpose of medical care. This provision, in line with what provided in the Asylum Procedure Directive, is clearly aimed at ensuring that persons with disabilities are provided with the healthcare needed.

The text of the Dublin Regulation is not per se in breach of the CRPD. However, from a disability perspective, it provides insufficient protections capable of effectively vindicating the rights of persons with disabilities. In addition, from a general historical perspective, the Dublin system has been largely ineffective. The regulation is based on the presumption that all Member States operate a fair and effective asylum system, including the provision of suitable reception conditions, respect for the rights of applicants and the grant of protection in accordance with international and European law. However, a common criticism is that major disparities between the different asylum systems still exist and are not

taken into account by the Regulation[29]. In an attempt to address this fundamental deficiency, on May 4, 2016, the European Commission introduced a proposal to reform the current Dublin III Regulation[30].

The so called Dublin IV proposal acknowledges that the Dublin III Regulation has failed to provide effective access to asylum procedures for applicants. The Dublin IV proposal is intended to ensure a fair distribution of responsibilities among Member States and discourage abuses from applicants within the EU. Unfortunately, in order to achieve this objective, the prospective Regulation increases the obligations and sanctions imposed on asylum seekers in order to stop them from moving from one Member State to another (Maiani 2016), rather than emphasising the obligations of the Member States themselves. Such an approach is unlikely to aid in the protection of such persons and the vindication of their human rights. Further, from a disability perspective, there are no significant innovations that would improve the specific protections necessary for such persons. The proposed Regulation does not include any explicit reference to the CRPD, reiterates the dependency relation criteria, again mentioning severe disability with no further explanation, and does not introduce any reference to accessibility or reasonable accommodation. It remains to be seen whether and to what extent this proposal will be modified by the Parliament and the Council, and whether it will ultimately be approved. It is entirely possible that, further to the European Parliament recommendations of 2016, during the legislative process amendments will be introduced to ensure compliance of this new regulation to the CRPD.

5. Concluding Remarks

Under the current CEAS, the various asylum directives, and to some extent the Dublin III Regulation, mention persons with disabilities, and recognize their particular vulnerability. They all provide for procedural safeguards for asylum seekers with special needs. For example, as discussed above, the Reception Conditions Directive necessitates an individual assessment in order to establish the applicant's special needs. Nevertheless, none of these directives explicitly mentions or imposes accessibility requirements, or a duty to provide reasonable accommodation to disabled asylum seekers. The implementation of the provisions within these directives are therefore first and foremost linked to the iden-

[29] For an account of the failures of the Dublin III system see the study commissioned by the European Parliament and authored by Maiani on the reform of the Dublin III (Maiani 2016) at http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf.

[30] The Dublin IV proposal is part of a reform package that includes proposals to reinforce the EASO and transform it into a European Union Agency for Asylum and to recast the EURODAC Regulation.

tification of people with disabilities. Being identified as a person with a disability is of course crucial in terms of qualification for protection, accessing adequate accommodation and support when filing an asylum application. However, even this initial obligation appears to be deficient, as clearly shown by the FRA.

So far, the CRPD has not been implemented effectively in the context of asylum legislation and the current Dublin IV proposal does not make any clear advances from a disability perspective. More generally, the European Agenda on Migration, which set forth future goals for the EU action «to reap the benefits and address the challenges deriving from migration»[31], focuses on addressing the root causes behind irregular migration in non-EU countries, on dismantling smuggling and trafficking networks, and securing the external borders. It does not properly embrace a comprehensive human rights perspective, and certainly neglects the rights of persons with disabilities within this group. It remains to be seen whether the strengthening the EU asylum policy, a current objective of the Union, will involve the development of new disability provisions, as well as strengthening the Union's compliance with the CRPD within the asylum field, as requested by the CRPD Committee.

[31] Communication from the Commission to the European Parliament, the European Council and the Council, *A European Agenda on Migration*, Brussels, 13 May 2015, COM(2015) 240 final.

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Issues on Legal Integration of Immigrants

Multiculturalismo e Costituzione

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1. Premessa introduttiva

Il mondo occidentale sta assistendo a una straordinaria trasformazione sociale che trova la sua causa ultima in motivi di ordine demografico ed economico. La stagnazione, se non la diminuzione, del numero di abitanti in Europa e nell'area occidentale conosciuta come Primo Mondo contrasta, in generale, con lo spettacolare aumento del numero di individui nelle zone geografiche meno occidentalizzate distinte dal Primo Mondo. Questo squilibrio demografico si pone in una relazione inversamente proporzionale all'aumento del benessere in occidente o Primo Mondo e nel mondo non occidentale o Terzo Mondo. Il risultato è una emigrazione dalle aree del Terzo Mondo verso il Primo. Il fenomeno migratorio da un determinato spazio geo-culturale verso altri non è nuovo. Tuttavia, è nuovo il fatto che questa emigrazione avvenga in modo così consistente e in un lasso di tempo tanto breve. L'elevato numero delle nuove popolazioni e la rapidità di ingresso hanno un impatto nel Primo Mondo con vaste conseguenze sociali, economiche, politiche e culturali. Il diritto in genere, e la costituzione in particolare,

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si trovano dinnanzi a una sfida inattesa e imprevista. Le istituzioni del diritto privato relative al diritto di famiglia e delle successioni e le istituzioni del diritto pubblico quali i diritti fondamentali, così come cristallizzate nel moderno Stato occidentale, sono messe in discussione.

Il proposito di questo studio è di offrire una risposta alla delicata questione se l'emergente ideologia "multiculturalista" sia compatibile con l'idea di costituzione. A tale fine, in primo luogo si chiarirà cosa si intende in questa sede per cultura e multiculturalismo. Nel prosieguo, si esamineranno le relazioni fra la cultura e il diritto. In terzo luogo, si rifletterà sulla relazione tra cultura e costituzione. Qui si analizzerà, da un lato, come determinate culture abbiano richiesto o reso possibile l'idea di costituzione e, dall'altro lato, come la costituzione abbia promosso o salvaguardato una cultura. In quarto luogo, si tenterà di verificare se l'esistenza di "multiculture" possa esigere o rendere possibile l'idea di costituzione e se la costituzione possa promuovere o salvaguardare qualsiasi cultura. In finale, si tenterà di argomentare perché l'idea di costituzione potrà forse sopravvivere separata da questa determinata idea di cultura che si rintraccia in origine, ma non potrà coesistere con l'ideologia del multiculturalismo o con qualsiasi altra cultura essenzialmente incompatibile con l'idea costituzionale.

2. Cultura e multiculturalismo

Non vi è accordo su cosa debba intendersi per cultura. Si contano centinaia di definizioni (Prieto de Pedro 1983, 25; Tajadura Tejada 1997, 107 ss.), che si sono provate a raccogliere attorno a quattro tipi di idee: quella dell'educazione classica greca; della combinazione dei risultati uniti agli sforzi dello spirito; dell'ideale o della finalità spirituale; della soluzione che offrono i comportamenti degli uomini o dei gruppi umani nella vita, nella natura o nella società (Uscatescu 1973, 30 s.). Tuttavia queste definizioni, come vedremo, ammettono sovrapposizioni che le rendono poco utili nella pratica: si pensi, ad esempio, al caso di un individuo che rafforzi la propria cultura (nel primo significato) avvalendosi di una serie di ideali o di finalità spirituali (terzo significato). Pertanto, in questa sede optiamo per una nozione di cultura diversa e ritenuta correttamente operativa.

L'idea di cultura che ci accingiamo a impiegare è quella esposta dal grande Hermann Heller. Secondo questo studioso, la cultura appare come «l'inserimento dei fini umani nella natura» (Heller 1942, 50). L'autore concepisce due significati di cultura: «cultura soggettiva» e «cultura oggettiva». La cultura soggettiva è «quella parte del mondo fisico concepita come formazione umana diretta verso un fine». L'uomo, arando la terra, costruendo case, creando opere d'arte o formando se stesso o gli altri in modo cosciente o inconsapevole, è portatore di cultura: possiede e crea cultura. La cultura oggettiva, d'altro canto, è quella in cui appaiono riunite, come patrimonio culturale o come spirito oggettivo, tutte le formazioni dell'uomo prodotte dalla connessione con le sue esperienze, essendo

irrilevante che si siano proiettate al di fuori della psiche, inserendosi nella natura o meno. Dunque, come afferma Heller, in ultima istanza esiste solo cultura soggettiva, poiché tutti i beni culturali (la cultura oggettiva) sono soltanto una "possibilità" di cultura. Così, per esempio, i prodotti tecnici dei greci e dei romani non costituirono un bene di cultura per i barbari. Da cui si può affermare che «la cultura sta con l'uomo e solo con lui» e che «lo spirito oggettivo diviene realtà solo come spirito soggettivo e difetta, in assoluto, di esistenza se non è vissuto e compreso, nella realtà psichica, dagli uomini» (Heller 1942, 54).

Sembra esserci maggiore accordo riguardo alla nozione di multiculturalismo. Seguendo Sartori, si può intendere in due modi: da una parte, come un fatto, un'espressione che registra l'esistenza di una molteplicità di culture; dall'altra parte, come un valore, che implica una politica di riconoscimento delle diverse culture. Questo riconoscimento esige che tutte le culture non solo meritino rispetto (come nel pluralismo), bensì un eguale rispetto, per la semplice ragione che secondo il multiculturalismo tutte le culture hanno eguale valore (Sartori 2001, 61 e 79). Questo assioma è stato duramente criticato da Sartori con un ragionamento difficilmente confutabile: ossia che «attribuire a tutte le culture "eguale valore" equivale ad adottare un relativismo assoluto che distrugge la nozione stessa di valore», poiché «se tutto vale, nulla vale: il valore perde ogni valore» (Sartori 2001, 79 s.).

3. Cultura e Diritto

Una volta esposti i concetti di cultura e di multiculturalismo, il passo successivo è quello di chiarire la relazione che la cultura intrattiene con il diritto. A tale scopo, occorre precisare cosa intendiamo qui per diritto. Partendo dall'idea di un autorevole teorico della politica, secondo il quale il diritto è una «dialettica della politica e dell'etica» (Freund 1965, 5), facciamo un passo avanti proponendo di definire il diritto come una decisione politica con aspirazioni etiche articolata in una forma normativa (Ruiz Miguel 2002). Il diritto, pertanto, non è qualsiasi dialettica fra politica ed etica, bensì solo la dialettica formulata in modo normativo. Allora, se l'elemento formale del diritto (l'articolazione di questo in via normativa) può considerarsi neutro dal punto di vista culturale, lo stesso non accade con gli altri suoi elementi sostanziali: la politica e l'etica. Per verificare la connessione che la cultura ha con il diritto, proveremo a dimostrare la connessione della cultura con questi due elementi del giuridico, la politica e l'etica.

Il già citato Freund ha segnalato, accogliendo la tradizione hobbesiana, che uno dei presupposti della politica è la relazione fra il comando e l'obbedienza (Freund 1965, 101 ss.). Il comando è durevole se mette radici profonde nella società alla quale si dirige. Il comando, con le sue decisioni, leggi e altre istituzioni, modella l'ordine sociale; allo stesso tempo, il comando può vivificare o deteriorare la propria autorità a seconda di come pretenda obbedienza e della forma dei

suoi ordini. In questo modo, il comando necessita, da una parte, del consenso tacito della società e, dall'altra, dell'appoggio diretto o della partecipazione più o meno attiva di certi strati sociali convinti della bontà della sua causa e dell'orientamento della sua politica. La "sede sociale" del comando, in tanto in quanto trovi il sostegno di una o più classi sociali, si chiama potere. Nella teoria politica si rinviene la figura del "sostenitore" o del "partigiano", colui che rivendica (giustificatamente o meno) il dominio privilegiato su una certa classe o strato sociale. Il potere è rintracciabile in tutti i luoghi in cui esiste il dominio dell'uomo sull'uomo: non solo mediante la costrizione fisica, bensì anche mediante il dominio ideologico o spirituale dei mezzi di informazione o della cultura (Freund 1965, 246 s., 249).

Secondo quanto finora espresso, si va profilando una relazione tra politica e cultura. Così, da un lato, sappiamo che la cultura soggettiva è «quella parte del mondo fisico concepita come formazione umana diretta verso un fine». Dall'altro lato, si è detto che la politica ha fra i suoi presupposti la relazione fra il comando e l'obbedienza, che tale comando acquisisce un'efficacia duratura soltanto qualora si radichi in strati sociali convinti della bontà della sua causa, e che il conseguente dominio si ottiene non solo con la costrizione fisica ma anche con il dominio culturale. La conclusione è che alcuni dei fini verso cui si indirizzano certe azioni umane nel mondo fisico possono coincidere con i fini del dominio stabiliti in un comando che pretende obbedienza. Come afferma Heller, «un potere politico è tanto più fermo quanto più riesce a fare in modo che sia riconosciuta la pretesa di obbligatorietà per le sue idee e sistemi normativi e per le regole di costume, morale e diritto da esso accettate e che sono, allo stesso tempo, il suo fondamento». In effetti, «il suo prestigio politico cresce se si ottiene che il tipo di cultura rappresentato politicamente da esso sia adottato come modello per la formazione della vita» e così «le stesse forme del linguaggio, della letteratura, della musica e delle arti plastiche possono, in determinate circostanze, operare efficacemente a vantaggio del potere politico». La conclusione a cui perviene Heller, allora, è che «nessuno Stato può rinunciare all'utilizzo dei poteri spirituali per i suoi fini» (Heller 1942, 225). Dunque, la politica non è la stessa cosa della cultura, ma una politica durevole pretende sempre di basarsi su una cultura.

Il dato fondamentale da cui muove l'etica non è altro che la libertà, come evidenziato da Savater in un'opera oramai classica. Ciò che accade nella nostra vita è, almeno in parte, il risultato di ciò che vogliono tutti. E, in effetti, se la nostra vita non fosse altro che qualcosa di completamente determinato e fatale, irrimediabile, tutte le disquisizioni etiche non avrebbero il benché minimo significato. Non ci sono animali buoni o cattivi in natura (Savater 2000, 23). L'essere umano, certamente, non può fare qualunque cosa desideri, ma non è meno sicuro che non sia obbligato a voler fare una cosa soltanto. Savater precisa inoltre la portata della libertà in due sensi. In primo luogo, sebbene non siamo liberi di scegliere ciò che ci accade, siamo liberi di reagire in un modo o in un'altro a quello che ci accade. In secondo luogo, l'essere liberi per provare qualcosa non ha nulla a che vedere con

l'ottenerlo immancabilmente, dunque la libertà non è uguale all'onnipotenza: «ci sono cose che dipendono dalla mia volontà (e questo è essere liberi), ma non tutto dipende dalla mia volontà (allora sarei onnipotente)». Si deve riconoscere che esistono molte forze che limitano la nostra libertà, ma anche che la nostra libertà è una forza nel mondo: la nostra forza (Savater 2000, 28 s.).

Se il dato fondamentale dell'etica è la libertà, il suo fine è la felicità. Già Aristotele sostiene, in una sua classica opera, che qualsiasi arte, dottrina, azione o elezione mira a qualche bene, questo definendosi come ciò cui ogni cosa tende (Aristotele 1984, 47, nr. 1094a). Per lo stagirita, l'ultimo e sommo bene di tutte le nostre azioni è la felicità, il vivere bene e l'operare bene (Aristotele 1984, 50, nr. 1095a). La felicità è qualcosa che «scegliamo sempre per se stessa e non mai a motivo di altro», la felicità è usare l'anima secondo la ragione, è una «attività dell'anima secondo perfetta virtù» (Aristotele 1984, 57, nr. 1097b, 58, nr. 1098a, 68, nr. 1102a). La virtù nell'ambito dei comportamenti non è altro che ciò che è in noi naturalmente, perché per Aristotele quello che siamo è naturalmente predisposto a riceverla; riceviamo potenze, ma dobbiamo svilupparle in atti. Così, compiendo cose giuste diventiamo giusti, dato che le abitudini sorgono dagli atti (Aristotele 1984, 75 s., 1103a-1103b).

La cultura, nel significato offerto da Heller e qui accolto, non si può confondere con l'etica. Ricordiamo che, per questo autore, la cultura soggettiva è «quella parte del mondo fisico concepita come formazione umana diretta verso un fine». Tuttavia, se è certo che la cultura non è equiparabile all'etica, non per questo ne è aliena. Invero, le finalità a cui l'essere umano può indirizzare alcune parti del mondo fisico possono essere fini etici. La cultura può essere creata, dunque, per perseguire il fine etico per eccellenza che è la felicità.

4. Cultura e Costituzione

Si sono proposti molteplici concetti di costituzione (Schmitt 1982, 29 ss.) ma, al giorno d'oggi e nella nostra civiltà, nessuno mette più in dubbio che la costituzione sia una norma giuridica, la norma giuridica suprema nelle relazioni politiche. Come abbiamo detto, il diritto è, a nostro avviso, una dialettica tra la politica, l'etica e la logica: è una decisione politica dal contenuto intenzionalmente etico formulata in modo normativo. In quanto politico, tutto il diritto ha sempre presente la cultura per cercare di consolidare la sua presenza. In quanto etico, il diritto può perseguire gli stessi fini a cui si rivolge la creazione della cultura. La costituzione, proprio essendo diritto, è cultura, dato che «la cultura di oggi è una cultura giuridica» e, di conseguenza, «è la stessa cultura quella che, in quanto cultura giuridica, restituisce, se necessario, giuridicità alla costituzione» (Cruz Villalón 1998, 21).

Si è inoltre segnalato che la costituzione non è una norma giuridica ordinaria, bensì peculiare. Questa peculiarità di norma giuridica costituzionale è che giu-

stamente è la norma più politica e più etica dell'ordinamento e, per questo, anche la più culturale. Queste idee, benché si avvicinino a quelle formulate da Häberle, non coincidono con esse. Secondo il giurista tedesco, la costituzione non è solo un testo giuridico o un insieme di regole normative, bensì è anche espressione di un determinato livello di sviluppo culturale, è espressione dell'auto-rappresentazione culturale di un popolo, specchio del suo patrimonio culturale e fondamento delle sue aspettative (Häberle 1982, 19). In questo senso, tutta la costituzione è cultura. Questo ci conduce a un paradosso.

Da un lato, una costituzione è un oggetto o una creazione di una data cultura e, giustamente, si può dire che l'idea di costituzione sia una creazione della cultura occidentale o che una determinata costituzione (ad esempio la costituzione degli Stati Uniti d'America) sia espressione di una determinata cultura (nel caso menzionato, quella anglosassone). L'espressione cultura costituzionale o costituzionalista ci avvicina alla comprensione della relazione fra questi concetti. Ora, dall'altro lato, la cultura è oggetto o creazione di una data costituzione e non è azzardato affermare che il rispetto per certi beni culturali (in senso ampio, ad esempio, il patrimonio archeologico) possa essere creazione di una data costituzione o che una costituzione crei in un paese una cultura (cultura democratica, partecipativa, ecc.) che prima poteva non esistere. In quest'ultimo significato si può parlare di costituzione culturale.

Nel presente lavoro utilizziamo ambedue i concetti, di cultura costituzionale e di costituzione culturale e, in questo senso, tenteremo di dimostrare i legami che esistono tra essi e che spiegano il diverso modo in cui si sono prodotte le relazioni fra cultura e costituzione nei due ultimi secoli.

4.A. La cultura costituzionale

4.A.1. Il presupposto etico-religioso della cultura costituzionale

Se, come sopra chiarito, l'idea di costituzione è quella di una legge (ossia una decisione politica di ispirazione etica formulata in modo logico-normativo) di natura superiore, quest'idea è possibile solo in una cultura che ammetta il carattere supremo di una legge statale, quanto meno nelle questioni politiche. La cultura europea ha storicamente presentato le condizioni affinché si potesse sviluppare siffatta concezione, per tre motivi. In primo luogo, sin dall'antichità greca si rintraccia una tradizione politica di governo limitato, con l'intento di sostituire il governo degli uomini con il governo delle leggi, che si è mantenuta, almeno in linea teorica, fino al sorgere del costituzionalismo. Questa tradizione ha reso certamente molto più accettabile l'idea di costituzione intesa come un nuovo strumento per garantire il governo delle leggi e per evitare l'arbitrarietà degli uomini. In secondo luogo, in Europa esiste una tradizione etica, anch'essa derivante dal pensiero greco, che è plurale, come varie furono le proposte relative al modo migliore per perseguire la felicità. Tale pluralismo etico ha conferito al

diritto e, di conseguenza, all'idea di costituzione la flessibilità sufficiente per svilupparsi. Infine, dall'accettazione del cristianesimo si è posta la premessa affinché la religione così unanimemente condivisa non bloccasse il pensiero politico. La premessa, fondamentale, è la separazione tra la sfera religiosa e quella politica, che si ritrova in due importanti passaggi del Nuovo Testamento («Date a Cesare ciò che è di Cesare e a Dio ciò che è di Dio» e «Ogni persona stia sottomessa alle autorità superiori; perché non vi è autorità se non da Dio; e le autorità che esistono sono stabilite da Dio») e che si sviluppa durante il Medioevo.

4.A.2. La cultura costituzionale liberale

Il costituzionalismo, ossia l'idea secondo cui le relazioni politiche di una società devono essere rette da una costituzione, sorge alla fine del XVIII secolo ed è la cristallizzazione nella sfera politica di una serie di idee imperanti nella cultura dell'epoca che plasmeranno un ambito specifico, che possiamo chiamare cultura costituzionale.

La prima concezione a presiedere tale fase è quella della razionalità. Il paradigma filosofico dell'epoca moderna si basa su un postulato di fondo: la divisione della realtà in res cogitans e res extensa ad opera di Cartesio (Cartesio 1983, 72). Siffatta separazione ed emancipazione della res cogitans è un corollario del principio teologico del libero arbitrio. La scissione si radicalizzerà fino a considerare la res extensa come qualcosa di totalmente subordinato alla res cogitans. Da tale prospettiva sorgerà il costruttivismo razionalista che considera la res extensa come inerte e illimitatamente malleabile dalla res cogitans, ossia dalla ragione. Questo schema di pensiero domina l'epoca moderna e si manifesta in molteplici forme, riempiendo di contenuto i concetti di res cogitans e res extensa. Anche altri postulati caratterizzano la Modernità, che si articolano insieme alla divisione cartesiana configurando tale paradigma: l'ottimismo antropologico e il suo corollario, l'idea di progresso, il meccanicismo, la tecnica, ecc.

Per ciò che concerne lo Stato, la prospettiva cartesiana si applica per la prima volta alla teoria politica grazie all'opera di Hobbes (Freund 1990, 17 s.). La considerazione del legislatore o del governante come strumento razionalizzatore (res cogitans) della società (res extensa), oltre a essere motivo della comparsa delle ideologie e delle utopie, determina, dal punto di vista giuridico, una specifica forma di intendere il diritto, che assegna autonomia allo Stato per la configurazione attiva, dall'alto, della realtà sociale (Porras Nadales 1989, 70). La costituzione qui si considera come un «codice scritto – razionale, ordinato e sistematico –, che regola in modo organico e funzionale lo statuto dei poteri dello Stato, promanante dal potere costituente, che può essere modificato solo in via espressa mediante un procedimento di riforma previsto nello stesso testo costituzionale» e che contiene i «principi politici fondamentali di una comunità» (Blanco Valdés 2000, 106). Pertanto, la costituzione è, essenzialmente, un intento razionale di organizzare la comunità politica (Blanco Valdés 2000, 98, 104), ossia l'applicazione in ambito politico di un'idea (il razionalismo) dapprima formulata nel campo

filosofico e che va a definire una nuova tappa della storia della cultura, alla quale si attribuisce il nome di Modernità.

La seconda idea a presiedere la cultura in questo periodo è l'omogeneità. La società in cui si produce tale cultura, la società europea, in siffatto contesto storico può considerarsi omogenea. Si tratta principalmente di una omogeneità spirituale e anche, per certi aspetti, socio-economica, che subirà una mutazione sostanziale con l'avvento del costituzionalismo.

L'omogeneità spirituale si fonda sulla comune accettazione dell'idea di ordine. Così, per quanto taluni prendano a unità di riferimento della cultura l'umanità e altri un determinato popolo (Tajadura Tejada 1997, 107 ss.), non v'è nessun dubbio che esista un'accettazione volontaria e spontanea di alcuni principi accolti in via generale nell'unità di riferimento considerata: c'è una cultura umana, o una cultura spagnola, o una cultura tedesca. La proclamazione e l'esercizio della libertà di pensiero non costituisce un impedimento all'esistenza di tale omogeneità (Lucas Verdú 1984, 356), poiché l'omogeneità rappresenta proprio l'humus, il sostrato preliminare su cui si sviluppa la libertà. E, infatti, le dichiarazioni della libertà di pensiero sono la conseguenza di una preventiva affermazione della libertà religiosa che, peraltro, è il risultato di una diversità di interpretazioni sull'unica religione generalmente accettata in Europa, il cristianesimo. La libertà religiosa si proclama nell'ambito di un pluralismo limitato di religioni. In questo pluralismo religioso si trovano anche, da un lato, il giudaismo, la cui presenza in Europa precede la nascita del cristianesimo e con il quale ha vincoli di parentela e, dall'altro lato, il deismo (nelle sue diverse manifestazioni). Nondimeno, il pluralismo non si estende a tutte le religioni. Quando si proclama la libertà religiosa in Europa o in America non si pensa all'induismo o all'islam (ed è proprio nello stesso momento in cui tale diritto si afferma che si combatte questa religione volta a conquistare con le armi il vecchio continente). Il dato è chiaramente evidente nel processo di stesura della costituzione statunitense. Lì Jay può affermare che l'America indipendente è un paese unito grazie agli stessi avi, alla stessa lingua, alla stessa religione e agli stessi principi di governo (Hamilton, Madison, Jay 1961, n. 2, 38). Si potrebbe sostenere che Madison parli di pluralità di opinioni religiose o di sette religiose (Hamilton, Madison, Jay 1961, n. 10, 79, n. 51, 324). Tuttavia, una interpretazione congiunta delle idee di Jay e di Madison rivela che tale pluralità di sette o di opinioni religiose hanno "qualcosa in comune" e non si fondano su qualcosa di radicalmente opposto.

Esiste, di conseguenza, il riconoscimento di un ordine divino che precede la formazione di un quadro comune, l'elemento dell'omogeneità, sopra cui si edifica la cultura europea in questo momento storico. Ora, non è meno certo che, con l'avvento del costituzionalismo, tale ordine venga a essere interpretato in modi molto distinti dal cristianesimo da un lato, e dal deismo dall'altro. Questa credenza fondamentale in un ordine divino è la base su cui si sorreggono le costituzioni, da quelle democratiche liberali dell'epoca (come la statunitense, resa «il

17 settembre dell'Anno di Nostro Signore 1787» o la spagnola del 1812 adottata «in nome di Dio onnipotente») fino ai postulati antidemocratici tradizionalisti.

Oltre all'omogeneità spirituale di fondo esiste una finzione di omogeneità socio-economica. Infatti, sebbene sia nell'ancien régime sia nel nuovo regime che avanza si noti una diversità di status sociali e di situazioni economiche, questa resta occultata dal fatto che solo le classi socio-economiche elevate (nell'antico regime, i nobili e il clero; nel nuovo, anche la borghesia) possono stabilire ciò che debba intendersi per cultura di una società. Gli apporti delle altre classi sociali rimangono ai margini e, pertanto, difettano di visibilità, di ripercussioni e di rilevanza; di conseguenza, l'immagine offerta è di una notoria omogeneità, sebbene si tratti solo di una finzione. Ma già sappiamo che anche le finzioni operano sulla realtà.

4.A.3. La cultura costituzionale socialista

Dopo i momenti fondativi dello Stato costituzionale, andiamo a osservare che, durante il secondo terzo del XIX secolo, si generano mutamenti nei fattori essenziali della cultura costituzionale liberale: meno radicali nell'elemento della razionalità, maggiori in quello della omogeneità.

La teoria marxista, in contrapposizione alle idee liberali, conserva l'idea della razionalità ma la mescola con elementi che la deterioreranno. L'elemento della continuità è espresso nell'undicesima delle Tesi su Feuerbach (1845) di Marx, secondo cui fino ad allora i filosofi si erano limitati a interpretare il mondo in modi diversi, mentre è giunto il momento di trasformarlo (Marx, Engels 1985, 372). Questa tesi, in fondo, non è che la logica conseguenza dell'idea del razionalismo cartesiano: se il mondo ha una logica, la sua conoscenza può utilizzarsi per operare nel mondo. In questo senso, il marxismo non costituisce, propriamente parlando, un momento di rottura con la cultura che alimenta il costituzionalismo. La pretesa trasformatrice trova accoglienza nel testo costituzionale mediante l'inclusione delle norme sui fini dello Stato o norme programmatiche. Siamo di fronte a ciò che Gomes Canotilho chiama «costituzione dirigente» (Gomes Canotilho 1982).

Il marxismo introduce varie idee che minano la visione classica dell'idea razionalista. Così, in primo luogo, e contro la tradizione precedente, la teoria della conoscenza di Marx (esposta in L'ideologia tedesca, 1846) sostiene che non esiste un ragionamento "puro" e che tutti i giudizi razionali, tutta la conoscenza, sono contaminati, deliberatamente o inconsapevolmente, dalla presenza e al servizio di interessi determinati: è il passaggio dalla razionalità all'ideologia. In secondo luogo, e in relazione con il primo punto, vi è l'idea espressa da Marx nella Critica dell'economia politica (1859) secondo cui la cultura, le idee, non costituiscono altro che una sovrastruttura che è determinata costantemente dalle condizioni economiche del momento, ossia l'infrastruttura (Marx, Engels 1985, 335 s.). Il determinismo economico e gnoseologico di queste proposizioni conduce a un intenso dibattito sulla razionalità come principio guida della cultura. Peraltro,

e qui si rinviene l'elemento che ancora vincola Marx alla tradizione, queste idee contro la posizione della razionalità nel mondo sono esposte razionalmente.

Il mutamento sostanziale si produce nei riguardi dell'idea di omogeneità, ponendo in dubbio il fatto che la società europea sia omogenea tanto dal punto di vista spirituale che da quello socio-economico. La messa in discussione dell'omogeneità spirituale della nuova società si articola lungo due direttrici. Da una parte, i difensori del pensiero tradizionale e del mondo pre-costituzionale reputano che il costituzionalismo costituisca un movimento incompatibile con i principi tradizionali. Questo contrasto si ravvisa in molti modi e luoghi; valga come esempio la lotta di cui fu testimone la terra spagnola fra i tradizionalisti (i carlisti) e i liberali e che condusse a una guerra sanguinosa. Dall'altra parte, i difensori delle nuove idee socialiste, come Engels, considerano lo Stato (vale a dire il costituzionalismo) non una creazione del pensiero umano (da una prospettiva universale) o del pensiero nazionale di un dato paese, bensì più semplicemente una creazione del pensiero della classe sociale dominante, la borghesia, in antitesi agli interessi delle altre classi sociali (Marx, Engels 1985, 570 ss.).

La messa in discussione dell'omogeneità socio-economica discende dal rilievo che il socialismo dà all'esistenza delle diverse classi sociali e, più in concreto e come espresso nel Manifesto del partito comunista (1848), all'importanza che la lotta di classe, la contrapposizione fra queste, ha per il cammino della Storia (Marx, Engels 1985, 26). Da tale prospettiva, la costituzione è intesa, come fece Lassalle, quale espressione del rapporto tra le forze di potere (Lassalle 1984). Di conseguenza, la messa in discussione dell'omogeneità, in fondo, verte sull'affermazione dello stesso principio precedente, ossia la possibilità di definire un ordine socio-politico nuovo, distinto, ma uno.

4.A.4. La cultura costituzionale nichilista

Agli albori del XX secolo si nota in tutti gli ambiti della cultura, in senso lato, lo sgretolamento delle idee di razionalismo e ordine. In tal modo, il processo iniziato nella fase dello Stato sociale si accentua. Sebbene lo sviluppo economico dei popoli occidentali (il Primo Mondo) mitighi le divisioni socio-economiche, il fallimento dell'omogeneità spirituale si fa più marcato, amplificando gli effetti della perdita di centralità dell'elemento razionale. Invero, le creazioni culturali che appaiono nel XX secolo sembrano cospirare per allontanarsi dalle idee guida del paradigma culturale precedente.

L'idea di razionalità viene attaccata da molti fronti. Da un lato, la teoria della psicoanalisi di Freud sottolinea l'importanza dell'inconscio; dall'altro, lo sviluppo dei nuovi mezzi di comunicazione audiovisivi, con l'enorme capacità di influenzare la psiche del soggetto che riceve l'immagine e per la facilità con cui l'immagine può raggiungere la sensibilità neurovegetativa, annullano i filtri del razionale (Gómez de Liaño 1989, 193 ss.).

Anche le idee di principio e di ordine vengono gravemente colpite dagli attacchi provenienti da diverse angolature. In primo luogo dalla filosofia della co-

noscenza, dove gli apporti convergenti di Nietzsche e del pragmatismo hanno effetti devastanti sull'idea di "principio". Secondo l'autore tedesco, i punti di vista o le prospettive umane sulla realtà sono, in modo irriducibile, tante quanti gli individui che le contemplano o quante le situazioni dalle quali sorge la riflessione (Galán y Gutiérrez 1947, 345). Il pragmatismo, da parte sua, considera l'uomo non come un soggetto razionale o consapevole, bensì come un essere volitivo e attivo il cui compito fondamentale consiste nell'azione (Galán y Gutiérrez 1947, 183). In secondo luogo dall'arte, tanto il cubismo nella pittura (Picasso) quanto la dodecafonia nella musica (Schönberg) prescindono completamente dall'idea di un principio guida di un ordine.

La sostituzione dell'idea di principio con quella di relazione e dell'idea di ordine con quella del caos, in definitiva l'espansione del nichilismo, conduce a una perdita di referenti. Questo fenomeno sarà molto più accentuato in Europa che negli Stati Uniti. Dal punto di vista della libertà religiosa, ciò porta a un'espansione inusitata e illimitata. Dato che non si accetta l'esistenza di un'omogeneità spirituale né positiva (affermazione del cristianesimo come base) né negativa (affermazione dell'ateismo), il risultato è una posizione che oscilla tra l'indifferenza religiosa e la cooperazione con le religioni. Ben inteso, in entrambi i casi non si fanno distinzioni di sostanza tra le fedi, qualunque sia il loro contenuto. Si potrebbe dire che, da tale prospettiva, tutte le religioni sono uguali per lo Stato, sia che si tratti di ignorarle che di disciplinarle, indipendentemente dai loro contenuti.

Lo sviluppo della cultura europea, in questo contesto, conduce a una disintegrazione interna delle società a causa della mancanza di un elemento di coesione spirituale. In tale circostanza, la costituzione è intesa in due modi. In primo luogo, come una semplice regola del gioco (concetto procedimentale della costituzione); e, in secondo luogo, come la fonte dei valori e non già come il prodotto di un'idea etico-religiosa (concetto sostanziale della costituzione).

Entrambi i concetti di costituzione vengono duramente criticati da Schmitt. Nel primo significato, la costituzione procedimentale configura regole del gioco nelle quali il premio per il vincitore è la conquista dello Stato. Un impianto basato solo su queste caratteristiche postula un serio rischio per la stabilità dello Stato e la sopravvivenza stessa della costituzione (per una critica del concetto procedimentale è imprescindibile la lettura del saggio di Schmitt Legalità e legittimità, 1932, ora riprodotto in Aguilar 2001). Sartori afferma che, certamente, «il consenso più importante di tutti è il consenso sulle regole di risoluzione dei conflitti» ma, avverte, il pluralismo liberal-costituzionale esige qualcosa di più: un consenso «sul terreno dei fundamentals, sui principi fondamentali» (Sartori 2001, 36). Nel secondo significato, il ricorso ai valori è una scappatoia di fronte al legalismo positivista formalista o al normativismo puro. Ora, la costituzione sostanziale dei valori pone il problema di quali valori si stabiliscano e di chi li interpreti o eventualmente anche li crei. Qui si presentano problematicità enormi attorno al ruolo dei tribunali nella misura in cui, nel normativizzare costituzio-

nalmente alcuni determinati valori, i giudici pretendano di erigersi ad autorità etiche nell'interpretare le clausole di valori e nell'imporre certe esegesi su altre che, forse, hanno il sostegno della maggioranza popolare (sembra che il primo critico dei valori nella costituzione fu Schmitt, che applicò al diritto la critica che Heidegger rivolse ai valori sul piano filosofico; Schmitt 1961, 65 ss.).

Per questi motivi, il metodo per valori dell'interpretazione costituzionale genera forti resistenze, principalmente con riguardo alla certezza giuridica. Forsthoff si confronta col metodo da egli denominato scientifico-spirituale (che deriva in ultima istanza da Smend) per ricondurre l'ordine giuridico a un ordine di valori, privo di contorni nitidi, che sta dietro a questo e che, a suo avviso, non consente una determinazione sufficientemente chiara, per cui non è adeguato per interpretare le norme giuridiche (Forsthoff 1959, 35 ss., 40. Non è casuale che Forsthoff sia stato un allievo di Schmitt). A suo parere, nel passare a una interpretazione guidata a contenuti materiali, il diritto costituzionale perde in razionalità ed evidenza (Forsthoff 1959, 51, 60), il che porta a una situazione di parziale dissoluzione (Forsthoff 1959, 59).

4.B. Il costituzionalismo culturale

4.B.1. Il costituzionalismo culturale liberale

Abbiamo analizzato quale sia la cultura costituzionale in questo momento storico. Ora ci chiediamo cosa sia la costituzione culturale. Un'analisi superficiale potrebbe condurci a una conclusione sorprendente, ossia che non esiste nessuna costituzione culturale per la semplice ragione che la cultura è del tutto assente dalle costituzioni di epoca liberale (Prieto de Pedro 1983, 16, 21). Si potrebbe anche dire che in questo periodo esiste uno Stato di cultura, inteso quale libertà statale per la cultura (Huber 1958, 126). Partendo dall'assunto che la costituzione è un codice scritto – razionale, ordinato e sistematico – contenente i principi politici fondamentali di una comunità, il fatto che in esso non si riconoscano espressamente riferimenti alla cultura (il cui legame con la politica è già stato evidenziato) può portare a due interpretazioni opposte.

In primo luogo, che proprio il carattere spiritualmente omogeneo delle società che si danno queste costituzioni e il conseguente carattere indiscusso dei loro principi a supporto della cultura, rende inutile proclamare con la solennità e le garanzie tipiche di una costituzione ciò che viene comunemente considerato ovvio. In tal modo, l'assenza espressa della cultura in costituzione si traduce in realtà in una presenza presupposta e inconfutabile della cultura medesima. Tuttavia, in secondo luogo, bisognerebbe capire che, proprio in quanto l'omogeneità della società che si dota di una costituzione è solo fittizia, la società positivizza una determinata cultura, ma lo fa in modo implicito. Così, sarebbe proprio nell'intero disegno politico dello Stato a trovarsi plasmata una certa cultura, escludendo le altre; e questo sarebbe il motivo per cui la costituzione venne contrastata tanto pugnacemente dalle correnti tradizionaliste prima e da quelle socialiste poi.

Tanto l'una quanto l'altra interpretazione consentono di capire perché l'assenza "costituzionale" della cultura non sia un'assenza giuridica, come prova il fatto che nell'ambito meno "politico" della legalità ordinaria si trovino diverse norme relazionate con essa (Prieto de Pedro 1983, 17 s.; Alegre Ávila 1994, 41 ss.).

4.B.2. Il costituzionalismo culturale socialista

La nuova realtà culturale prodotta dalla formulazione del socialismo non può non avere un riflesso nella costituzione e nella legge. Non cessa di essere significativo che le prime menzioni expressis verbis della cultura nelle costituzioni si trovino nei testi reputati essenziali per la configurazione dello Stato sociale: la costituzione messicana di Querétaro del 1917, la costituzione tedesca di Weimar del 1919 e la costituzione spagnola del 1931 (a cui vanno aggiunte la costituzione peruviana del 1920 e quella polacca del 1921). All'art. 3 della costituzione messicana del 1917 si fa riferimento alla cultura in un contesto importante: l'educazione. In conformità a questo precetto, l'educazione è democratica e nazionale. Tanto il richiamo democratico che quello nazionale si definiscono non solo con riguardo alla politica, bensì anche in relazione alle sfere economica, sociale e culturale. L'educazione e la cultura si convertono così in un fine dello Stato, che prova in questo modo a guadagnare un consenso messo in crisi dal deterioramento dell'omogeneità interna. L'art. 18 della costituzione tedesca del 1919, da parte sua, allude al fattore culturale come criterio per determinare le unità politiche della Federazione. La costituzione spagnola del 1931, infine, accoglie ampiamente il fenomeno culturale sintetizzando e approfondendo le due precedenti esperienze: da un lato, considera la cultura un fine dello Stato da realizzarsi mediante un sistema educativo unificato, che consente di ricostruire l'omogeneità socioculturale oramai in crisi (art. 48); dall'altro lato, considera la cultura come un fattore importante per definire la struttura territoriale dello Stato (art. 11). Oltre a ciò, la cultura si traduce in un elemento di integrazione territoriale interna e di identificazione rispetto all'esterno (art. 50).

Lo Stato liberale, minacciato nei suoi fondamenti dalle nuove idee del socialismo e dalle profonde fratture sociali, tenta di integrare in sé i settori che progressivamente si stanno allontanando. Si radica così il telos dello Stato sociale. L'integrazione si effettua fondamentalmente attraverso il «servizio dello Stato alla cultura» (Huber 1958, 129). Il presupposto di questa costruzione è che esiste una cultura, autonoma rispetto allo Stato, non creata da esso, che si considera dotata di virtualità sufficiente per fornire omogeneità sociale allo Stato.

4.B.3. *Il costituzionalismo culturale nichilista*

Le conseguenze della trasformazione della cultura europea per opera del nichilismo si notano nello Stato e nella costituzione – dopo tutto, parti della realtà culturale. L'irruzione dell'inconscio in un ambito fino ad allora dominato dall'idea di razionalità ha il suo primo impatto nell'art. 118 della costituzione tedesca di Weimar, che esclude la cinematografia dal regime generale della libertà di

espressione. Questa scelta non è casuale dato che «il problema politico dell'influenza sulla massa da parte della cinematografia è tanto significativo che nessuno Stato può lasciare senza controllo questo potente strumento psico-tecnico; deve sottrarlo alla politica, neutralizzarlo, il che in realtà significa – posto che la politica è inevitabile – porlo al servizio dell'ordine esistente, anche quando non lo si voglia utilizzare apertamente come mezzo per l'integrazione di una omogeneità psicologico-sociale» (Schmitt 1982, 173).

Il secondo e più brutale impatto (lasciando ai margini il caso della Russia sovietica, non completamente sussumibile nelle categorie europee) di questa disintegrazione delle idee classiche si produce con l'avvento dello Stato totalitario nazional-socialista. Tale Stato, che si presenta come un modello di anti-costituzionalismo, si fonda sul disprezzo per la razionalità (a differenza della Russia sovietica che cade nell'estremo opposto) e sul "trionfo della volontà" (per usare il titolo di un famoso film di Leni Riefenstahl). Qui ha un ruolo importantissimo l'uso della propaganda audiovisiva.

Dopo alla sconfitta del nazismo, lo Stato europeo ritorna al costituzionalismo; ma la cultura è sostanzialmente cambiata e ciò si deve tradurre in un nuovo modo di concepire la costituzione. Così, in primo luogo, si mantiene l'idea della razionalità, senza ignorare l'importanza dell'inconscio; uno dei nuovi temi della costituzione è infatti quello del regime dei mezzi di comunicazione (in particolare gli audiovisivi), che sono uno dei veicoli fondamentali della creazione, trasmissione e recezione della cultura suscettibile di giungere all'inconscio senza passare per il filtro della razionalità. La costituzione conferisce poteri allo Stato per controllare la cinematografia e, soprattutto, la televisione. Già in un testo "quasi costituzionale" come la Convenzione europea dei diritti umani del 1950, dove si afferma il diritto alla libertà di espressione, di opinione e la libertà di ricevere o comunicare informazioni o idee, si prescrive che non è impedito «agli Stati di sottoporre a un regime di autorizzazione le imprese di radiodiffusione, cinematografiche o televisive» (art. 10.1). Disposizioni simili o analoghe si trovano nella costituzione irlandese del 1937 (art. 40.6.1.i), nella legge fondamentale tedesca di Bonn del 1949 (artt. 5 e 18), nella costituzione greca del 1975 (art. 15), portoghese del 1976 (art. 38), spagnola del 1978 (art. 20.3) e olandese del 1983 (art. 7).

Come suesposto, la sostituzione dell'idea di principio con quella di relazione e dell'idea di ordine con quella del caos, in definitiva l'espansione del nichilismo, conduce a una perdita di referenti. Lo sviluppo della cultura europea, in questo contesto, genera una disintegrazione interna delle società, prive di un elemento di coesione spirituale. Qui la costituzione è intesa come una mera regola del gioco dove il premio per il vincente è la conquista dello Stato, ossia un apparato repressivo ed esattore. Il consolidarsi di queste caratteristiche mette in serio pericolo la stabilità statale e la sopravvivenza stessa della costituzione. Un triste esempio è offerto dal destino subito dalla Germania di Weimar.

Davanti a una situazione del genere, lo Stato cerca di sopperire al deficit di omogeneità prodotto dalla cultura nichilista. In assenza di una cultura autonoma

e antecedente alla costituzione che rappresenti la base dell'omogeneità, allo Stato diviene necessaria una cultura creata a posteriori rispetto alla costituzione con il fine di raggiungere l'essenziale omogeneità. Ci troviamo di fronte allo Stato di cultura, inteso come Stato che realizza una «attiva configurazione della cultura» (Huber 1958, 130). L'attiva configurazione della cultura si determina, fondamentalmente, nell'ambito educativo. Pertanto, si trovano testi che conferiscono allo Stato la competenza a realizzare una data educazione o che almeno garantiscono in quest'ambito l'esistenza di certi principi o idee da rispettare in via tassativa: così la costituzione finlandese del 1919 (art. 80), irlandese del 1937 (art. 42.3.2), francese del 1946 (preambolo), italiana del 1948 (art. 33), tedesca del 1949 (art. 5.3), greca del 1975 (art. 16.1 e 2), portoghese del 1976 (art. 23.2), spagnola del 1978 (art. 27.2), olandese del 1983 (art. 23.2), belga del 1994 (art. 24.3). Da quanto detto sopra, si comprende che alla base dello Stato democratico moderno, dell'attuale Stato di cultura, non vi è solo un apparato coercitivo bensì anche uno persuasivo. Di tal modo, si è potuto sostenere che: «La cultura non è più solo un mero ornamento, la conferma e la legittimazione di un ordine sociale che fu anche sostenuto con procedimenti più violenti e coercitivi; attualmente è il mezzo comune necessario, il fluido vitale [...], l'atmosfera comune minima e unica in cui i membri della società possono respirare, sopravvivere e produrre. Trattandosi di una società determinata, dev'essere un'atmosfera in cui tutti possano farlo, di modo che debba essere una stessa cultura» (Gellner 1988, 56).

5. Multiculturalismo e Costituzione

5.1. Multicultura costituzionale?

L'accettazione del multiculturalismo implica la possibilità di dare eguale valore a tutte le culture. Il problema è che, malgrado la retorica e l'accusa già trita di etnocentrismo, la libertà politica e l'idea costituzionale sono nate nel contesto di una cultura (la cultura europea, occidentale o cristiana) e sono state accolte solo da alcune culture (per esempio, la giapponese), non da tutte. Non è un mistero che la cultura più resistente alle idee di libertà politica e di costituzione sia l'islamica. E qui si pone la questione. Il dare eguale valore alla cultura europea e a quella islamica costituisce, o può costituire, il presupposto per creare una cultura costituzionale? O, in altri termini, si può conferire alla cultura islamica il valore di cultura "costituzionalmente adeguata"?

Sartori si è pronunciato contro questa possibilità. Nella cultura islamica, «anche quando non c'è fanatismo, resta che la visione del mondo islamica è teocratica e non accoglie la separazione tra Stato e Chiesa, tra politica e religione». Eppure, prosegue lo studioso, tale è «la separazione sulla quale si fonda oggi – in modo davvero costitutivo – la città occidentale». E sottolinea che «la legge coranica non conosce i diritti dell'uomo (della persona) come diritti individuali

universali e inviolabili» che sono, ricorda Sartori, un altro cardine «della civiltà liberale». In chiusura, egli aggiunge che «l'occidente non vede l'islamico come un infedele, ma per l'islamico l'occidente lo è» (Sartori 2001, 53). Il fatto certo, innegabile, è che la cultura islamica – come si è configurata sinora – riconosce come legge suprema in tutti gli ambiti della vita la sharia (ossia la "legge islamica", composta dal testo del Corano e anche da quanto detto e fatto da Maometto[1]) e non consente che alcuna legge possa essere superiore ad essa. E questo fatto certo, innegabile, pone la questione se una cultura che non ammette alcuna legge superiore alla sharia in alcun ambito della vita possa accettare che la costituzione sia la legge suprema e, pertanto, legge superiore alla sharia, anche se solo per alcuni aspetti della vita. Perché è qui che si radica propriamente la questione: mentre il cristianesimo e altre religioni ammettono che in alcuni ambiti, come la politica, la legge laica, la costituzione possa essere suprema, l'islam non accetta che alcuna legge laica possa essere superiore alla legge islamica in alcun settore.

Che nel futuro tutto rimanga eguale non si può sostenere con certezza. È sempre possibile (sebbene ora sia altamente improbabile) che si generi una nuova lettura della religione islamica tale da rompere con quanto accaduto per quattordici secoli. Del resto, qualcuno potrebbe addurre l'esempio della Turchia, anche se ritengo che forse sia un richiamo poco opportuno. Non è casuale che la Turchia, l'unico paese che si sia avvicinato alla cultura occidentale senza finora raggiungerla, abbia fatto ciò al prezzo di reprimere duramente le manifestazioni pubbliche della cultura islamica (divieto per le donne di portare il velo nei luoghi e uffici pubblici, divieto per i funzionari statali di portare la barba[2], autorizzazioni per la vendita di alcolici, ecc.). E tutto questo senza dimenticare che, prima di tale laicizzazione, accaddero due fatti significativi: il primo genocidio del XX secolo (contro gli armeni, tra l'altro cristiani) e l'espulsione massiccia di greci (cristiani, non a caso). Dunque, la laicizzazione si compie all'interno di un'autentica pulizia etnica della popolazione non islamica del paese.

5.2. Costituzionalismo multiculturale?

Come sopra chiarito, la costituzione finora è stata la salvaguardia giuridica di una cultura sia previamente esistente o sia posta al suo servizio dalla costituzione stessa. In entrambe le ipotesi, le disposizioni costituzionali a difesa della cultura non hanno fatto altro che rinforzare i presupposti culturali senza i quali non esisterebbe l'idea di costituzione. Tuttavia, il multiculturalismo critica tre principi

[1] Qui si rinviene la radice di alcune pratiche islamiche contrarie ai diritti umani. A volte si argomenta, a ragione, che queste non si trovino nel Corano; però, basta che siano state dette o fatte da Maometto perché abbiano lo stesso valore giuridico che se stessero nel Corano e, per questo, fanno parte della *sharia*. Solo per ignoranza di cose così elementari sulla religione islamica o per malafede si capisce perché alcuni insistano nel difendere la compatibilità della religione islamica, così come la conosciamo oggi, con i diritti costituzionali.

[2] Solo dal 2013 è ammesso per le donne di portare il velo negli spazi e uffici pubblici e per i funzionari statali di portare la barba (N.d.T.).

basici del costituzionalismo: la neutralità dello Stato; la separazione dell'incarico dalla persona che lo detiene; la generalità (omni-inclusività) della legge (Sartori 2001, 92 ss.). L'ultimo è forse l'aspetto fondamentale.

La politica del riconoscimento delle culture che il multiculturalismo esige implica leggi settoriali e, pertanto, diseguali. Così, in nome del multiculturalismo si può impedire che nelle scuole pubbliche tutte le alunne si vestano in modo uguale, che nelle mense pubbliche (scolastiche, militari) tutti i commensali abbiano lo stesso menù, o che le leggi sanitarie sulla macellazione degli animali non siano identiche per tutti. Si afferma il rispetto delle culture per introdurre differenze ma, in questo modo, si spezza il presupposto su cui si fonda l'idea di costituzione, l'eguaglianza giuridica dei cittadini. La questione dunque è: la costituzione può proteggere le culture che non solo rinforzano l'idea di costituzione ma anche quelle che la respingono? Per fare un caso estremo, immaginiamo che lo Stato firmi un'intesa con una certa religione affinché nei luoghi pubblici e con docenti pagati con fondi pubblici si istruiscano gli alunni di quella fede. Che accadrebbe qualora quegli insegnanti difendessero, nelle scuole pubbliche e pagati con fondi pubblici, una cultura che nega che la costituzione possa essere la norma suprema?

6. Conclusioni

L'idea di costituzione non è sorta dal nulla. È un'idea che è stata resa possibile in una certa cultura. Ed è un'idea che si è potuta adattare a una determinata cultura, distinta da quella che la originò. Addirittura, scomparsa quella cultura che fu la "condizione di possibilità" dell'idea di costituzione, questa ha potuto sopravvivere creando una propria cultura. Ciò che pare molto più discutibile è che l'idea di costituzione possa sopravvivere ammettendo, coesistendo e proteggendo culture che non la accettano e che finora hanno dimostrato di non poterla accettare. Se nel futuro lo potranno fare è una cosa che non siamo in grado di prevedere. Quello che sappiamo è che nelle attuali configurazioni (per diverse che siano) di queste culture, l'idea di costituzione non può esistere.

Le conseguenze che possono farsi derivare da tali idee sono molteplici, e questa non è la sede per svilupparle. Basti qui segnalare che, se le conclusioni a cui si è giunti sono vere, è necessario riformulare urgentemente alcuni concetti essenziali del nostro diritto costituzionale (come il diritto fondamentale alla libertà religiosa, il diritto alla nazionalità) i quali, creati in un contesto anteriore al multiculturalismo, possono essere letali nella nuova situazione post-multiculturalista. Letali per l'idea di costituzione e letali anche per noi.

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Immigration Policies and the "Unbearable Lightness" of Integration: The Case of Pre-Entry Integration Requirements in Europe

MARIA CHIARA LOCCHI*

«The man who finds his country sweet is only a raw beginner;
the man for whom each country is as his own is already strong;
but only the man for whom the whole world is as a foreign country is perfect»
(Todorov 1999, 249-250, quoting the XII century's theologian Hugh of St. Victor)

1. Integration as a "duty" in European immigration countries

In the framework of European policies on immigration and acquisition of nationality the imposition of civic and linguistic "integration tests" on migrants who want to legally reside or to become nationals of European States can be regarded as a well-established trend (Guild, Groenendijk, Carrera 2009; van Oers, Ersbøll, Kostakopoulou 2010; Strick, Böcker, Luiten, van Oers 2010; Joppke 2012; Locchi 2012; Cuttitta 2016). In fact, since the 2000's decade, both at EU and national level (especially in the "older" European immigration countries), specific provisions promoting or imposing an evaluation of the knowledge of national language and/or principles and values have been adopted, in order for migrants to obtain an entry visa, a residence permit or nationality by naturalization. In

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some cases, in addition to the language proficiency requirement, dedicated civic education courses are provided for; sometimes migrants have to pass a final test, in order to assess the level of knowledge and skills considered to be useful for an effective integration in the host society[1]. This normative trend is based on the idea of a double conditionality: language and civic knowledge conditions the integration of migrants in the host society and integration is a condition of migrants' legal entry and/or stay (and, later, of the acquisition of nationality by naturalization).

The EU legislation on immigration deals with the issue of migrants' integration measures and conditions in three Directives: the Directive 2003/86/EC on family reunification (see below, Section 2.1), the Directive 2003/109/EC on long-term residents, and the Directive 2009/50/EC on highly qualified employment. If the 2009 Directive only derogates from the 2003 Directive on family reunification – by stating that the integration conditions and measures referred to therein may only be applied after the persons concerned have been granted family reunification – the Directive on long-term residents allow Member States to require migrants who aspire to obtain a permanent status to comply with integration conditions[2].

As already mentioned, several States already opted for mandatory integration programmes in their national laws: while only six countries, as we will discuss in more detail later, impose migrants integration requirements before they enter the national territory (Austria, Denmark, France, Germany, the Netherlands, and the United Kingdom), a larger number of EU States developed post-arrival mandatory integration measures or conditions, which migrants have to comply with in order to reside and stay on the territory (Austria, Belgium-Flemish Region, Belgium-Wallonia Region, Bulgaria, Germany, Denmark, France, Italy, Latvia, the Netherlands)[3]; lastly, a significant number of States have already established integration requirements for the acquisition of a long term or permanent residence permit (the requirement to demonstrate integration skills for the acquisition of such a status is not applicable in Belgium, Finland, Poland, Ireland, Slovakia, Spain, and Sweden; see Pascouau 2014, 91). Citizenship tests are also widespread in European countries' nationality laws, raising a very interesting

[1] Mandatory integration programmes – which show a great variety of measures, conditions and sanctions among EU States – must be distinguished from voluntary integration programmes – which can be joined by migrants on a voluntary basis and are not associated to sanctions weighing on the residence permit or status in the case of a negative evaluation.

[2] Art. 5.2. In addition, if a person who is a long-term resident in one Member State applies for a residence permit in a second Member State, the second Member State may, under art. 15.3 of the Directive, require the person concerned to comply with integration measures, in accordance with national law, provided he has not already been required to comply with integration conditions in order to be granted long-term resident status.

[3] National provisions on integration measures know many differences, with regard to mandatory or voluntary participation of refugees, reasons for exemptions, the content of the integration programmes, the regime of sanctions and remedies, costs and fees.

debate over the citizenship model implied by the use of tests for naturalization and, in particular, the potentially illiberal character of some State practices (although differentiated in contents and procedures, citizenship tests have been introduced in Austria, the Czech Republic, Denmark, Estonia, France, Hungary, the Netherlands, Spain, and the United Kingdom; see Van Oers 2014).

The strengthening of the idea of integration as a condition for migrants to access to a more stable legal protection and full national membership is directly connected to the crisis of European multiculturalist and differentialist policies, which were set in the 80's and 90's and have been thereafter challenged by a different conceptualization of social cohesion, more focused on the need for integration with respect to some constitutive elements of national community. Even if it is not correct to refer to a EU common policy on the integration of migrants – since national States still retain their sovereignty on the issue – it is yet possible to identify the main characters of what can be depicted as the "European model of integration" of migrants in the host societies. In fact, on the one hand, many normative and policy instruments have been lately adopted at EU level with a view to promote integration, which is a mandate assigned to the European Union by several fundamental legal acts and documents (the Amsterdam and Lisbon Treaties, the EU Charter of Fundamental Rights, the multi-annual programmes for Justice and Home Affairs, the Europe 2020 Strategy). On the other hand, many EU States' integration policies have been converging on common paradigms and tools, including language and civic integration tests; interestingly, this convergence seems to have taken place more in terms of sharing policies and strategies than complying with legally binding EU normative acts, in light of what has been described as «discursive isomorphism» (Kostakopoulou 2010, 938).

This "horizontal transfer" among national States is largely based on the crucial role of policy instruments and soft law, such as the Common Basic Principles on Migrant Integration[4], the European Integration Fund, Handbooks on Integration and the European Website on Integration, «through which member states have been encouraged to stimulate migrants to learn about their host society's language, institutions, and culture» (Bonjour 2014, 205); this phenomenon is particularly evident in the field of pre-departure integration requirements, with the Dutch policy serving as a model that has inspired other Member States (Goodman 2011, 250-252). As Bonjour (2014, 212) points out, the negotiations that led to the adoption of the 2003 Directive on family reunification represent a crucial episode in this regard: in fact, the Directive's art. 7.2 – which allows Member States

[4] The "Common Basic Principles" for immigrant integration policy in the EU, adopted by the Council in 2004, plays a decisive role as a common framework for orienting policy and legal development at national level. The Principles contain some important statements, such as: «integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of EU Member States, and implies the respect for the basic values of the European Union»; in addition, «employment is a presented as a key part of the integration process and is central to the participation of immigrants in the host society»; see Council of the European Union 2004, 19-20.

to require migrants to comply with integration measures – was introduced at the initiative of some countries (Germany, Austria, the Netherlands) with a stricter approach towards immigration (Groenendijk 2004).

Legal scholars, sociologists and political theorists, for a long time now, have critically examined the ambiguities of the concept of integration, with particular reference to the shifting from its promotional potential to its punitive effect. In fact, integration appears to have been converted from a goal of national and European policies aimed at the promotion of immigrants' rights and respect of their diversity, into a condition, a duty, which migrants must comply with, with serious consequences on their right to stay in the case of a negative evaluation.

The coexistence of two different strategic objectives – a promotional one, oriented to the integration of legal immigrants, and a repressive one, aimed at fighting against illegal immigration – has always characterized national and EU migration policies. However, the recent trend in most EU immigration countries shows that this binary logic does not simply mean that the two objectives are juxtaposed, but rather that the integration programmes and the securitarian apparatus are mutually implied, with integration being converted from a right and an opportunity into an «alibi de la précarité du séjour» (Lochak 2004).

Therefore, the elements of the relation between (formal) legal inclusion and (substantial) social integration seem reversed: the access to an increasingly stable right to stay is no longer conceived of as a precondition for both a growing familiarity with the cultural and linguistic context and socio-economic inclusion, but, on the contrary, these last conditions are framed as devices aimed at selecting future migrants, residents and citizens (Council of Europe: Parliamentary Assembly 2014). This paradoxical situation has been recently stigmatized by the Council of Europe's Commissioner for Human Rights by highlighting that «the current approach of focusing on migration control as a top priority of European states risks stalling or even undermining integration efforts at the time when we need them the most to maintain Europe's high levels of social cohesion, protection and security» (Council of Europe: Commissioner for Human Rights 2016, 9).

The diffusion of integration tests in the field of immigration and nationality policies raises some important questions, starting, as already noted, from the meaning of the very concept of integration: in fact, what does integration really imply?

On the one hand, the question is intimately connected to the important debate on cultural identity in contemporary societies and, in particular, on the fluidity and porosity of migrants' identity in multicultural contexts. In this regard, Amartya Sen has very effectively expressed the multiplicity of personal identity's overlapping dimensions:

> «There are a great variety of categories to which we simultaneously belong. I can be, at the same time, an Asian, an Indian citizen, a Bengali with Bangladeshi ancestry, an American or British resident, an economist, a dabbler in philosophy, an author, a Sanskritist, a strong believer in secularism and democracy, a man, a feminist, a hetero-

> sexual, a defender of gay and lesbian rights, with a nonreligious lifestyle, from a Hindu background, a non-Brahmin, and a nonbeliever in an alterlife (and also, in case the question is asked, a nonbeliever in a "before-life" as well). This is just a small sample of diverse categories to each of which I may simultaneously belong – there are of course a great many other membership categories too which, depending on circumstances, can move and engage me» (Sen 2007, 18).

The multifaceted nature of identity has inevitable consequences also in terms of the integration of these complex selves in likewise complex societies, in so far as determining contents and limits of integration becomes a really controversial operation. A good example of the difficult recognition of this complexity is the attitude toward multilingualism in Europe: while multilingualism is generally perceived as something positive and usually promoted by both EU and national institutions as an added value in increasingly globalised societies, things change when it comes to the integration of migrants. In fact, although migrants are often proficient in many more languages than nationals, «their plurilingualism is not usually recognised or acknowledged», and rather considered «as an obstacle in the process of the acquisition of the dominant language, in a process of participation and integration»; in opposition to the dominant discourse on the importance of multilingualism in the contemporary world, «migrants have to adapt to a monolingual policy [...] that promotes monolingualism as the norm» (Van Avermaet 2009, 20). Concerns and doubts about the use of language integration tests as repressive tools in migration policies have also been expressed by the Council of Europe, which has strongly stigmatized the risk of language integration requirements having the effect of precluding, rather than facilitating, mobility and integration (Council of Europe 2014, 20-22; on language integration and migration policies, see Piergigli 2013, Strazzari 2015).

On the other hand, the definition of the concept of integration is also demanding since it requires both academics and policy makers to qualify different, although not easily distinguishable, conditions and processes, such as assimilation, insertion, interaction, and, precisely, integration. In this respect, while the ambiguity of the words used by policy makers and legislators is a symptom of the uncertainties about the meaning of "national identity" in contemporary European States, the notion of integration, at least in the mainstream version sanctioned by immigration laws, seems indissociable from cultural homologation (Zagrebelsky 2007, 124).

Another problematic aspect concerning the process of integration is the one related to its temporal dimension, which is not adequately taken into account by integration programs based on integration tests, especially with regard to pre-entry integration requirements. Integration, in fact, is best conceivable as an ongoing process, marked by the increasing degree of migrants' social attachment to the host society (Schnapper 2007). Sayad, for example, raised doubts about integration being voluntarily oriented or supported, preferring to see integration as a conflictual process being ascertainable only a posteriori: according to the

distinguished sociologist of migration processes, using an approach that is both moralistic and "technicistic" to a social problem such as migrant's integration ultimately provokes its neutralization on a political level (Sayad 2002, 287-288).

2. Pre-entry integration requirements in Europe: a controversial tool for migration restriction?

2.1. Rationale and national solutions

In light of the many ambiguities inherent in the concept of integration, an even more problematic aspect is that of pre-departure/pre-arrival measures, especially in family reunification domain (Human Rights Watch 2008; Carrera, Wiesbrock 2009; Guèvremont 2009; Goodman 2011; Groenendijk 2011). In particular, the paper will focus on those European countries that have been designed integration measures as selective tools, but it must be stressed that many States also provide future immigrants with a different kind of pre-entry measures, aimed at giving newcomers useful tips and information to help them to undergo integration in the new reality[5].

The idea of using language skills as a selection requirement in immigration policies is not a new one, with several European countries having experimented for a long time language selection, especially for migrant workers or ethnic migrants; however, the pre-entry integration requirements currently implemented in Europe differ from these previous experiences, in so far as now language and civic knowledge is considered necessary also in relation to family reunification, raising many ethical and legal problems (Groenendijk, 2011).

The harshest criticism against pre-departure integration measures focuses on the disclosure of their real goal, which is migration restriction rather than migrant integration (Goodman 2011). Therefore, these measures should be read in connection with the restrictive turn in the immigration policies of most European countries since the beginning of the XXI century, and namely as tools expected to contribute to the selection of the most "integrable" – and thus adaptable and "useful" – migrants. As pointed out with regard to the British experience, «integration as a tool of immigration policy, while it may be based around civic rather than racial forms of belonging, is nonetheless linked to discourses of exclusion, and remains liable to manipulation» (Wray 2016, 150).

This restrictive trend has also affected family migration, which is suspiciously framed, by the political and legal discourse, as a phenomenon "imposed" by international, supranational and national fundamental principles and rights,

[5] Austria, the Flemish Region of Belgium, the Czech Republic, Denmark, Greece, Norway and Sweden, for example, provide pre-entry information on immigration country's language and society: for all migrants (Austria, Flemish Region, Czech Republic), only resettled refugees (Denmark, Sweden, Norway) or only for migrant workers (Greece).

and therefore unmanageable by socio-economic selection procedures: national measures aimed at restricting income, age, and housing requirements for family migration must be considered in this light. Another problematic aspect related to family migration refers to cultural concerns, especially with regard to personal and marital choices of second-generation immigrants in European countries. On the basis of the continuously high incidence of transnational marriages (between a person, born in a Western country, from foreign parentse, grown up in that same foreign country, who then migrates for family reasons) and small numbers of ethnic intermarriages with Western-country natives, both policy makers and the general public almost automatically link immigrants' personal choices in family matters and cultural integration in the host society. The assumption on which this "logic of suspicion" is based is that the strong influence of traditional (usually intended as underdeveloped) non-Western norms forces young people with migrant background to reproduce "failing" values, customs and lifestyle patterns (Sterckz 2015).

If, from a theoretical perspective, the rationale of pre-entry integration requirements is under scrutiny because of its problematic connection with restrictive trends in migration policies, at the legal level a controversial point surrounding their introduction in national legislation is the compliance with EU law and, in particular, with Directive 2003/86/EC on family reunification.

The 2003 Directive, in establishing common rules for exercising the right to family reunification in EU Member States, determines the conditions under which family reunification is granted, as well as the rights of the family members concerned. Among the many requirements for the exercise of the right to family reunification, applicable to both the foreigner already residing in Europe and the family member still residing abroad, art. 7.2 of the Directive mentions integration measures, which migrants may be asked to comply with in accordance with national law[6]. Also art. 4.1, in dealing with minor children whose primary residence is not with the "sponsor" who already lives in Europe, allows Member States to verify their degree of integration before authorising entry and residence, in order to be sure of the children's capacity for integration at early ages and ensure that they acquire the necessary education and language skills in school.

After the adoption of the 2003 Directive, six European States have introduced pre-entry integration requirements on the basis of art. 7.2, namely the Netherlands (2005), Denmark (2006, but the law entered into force in 2010), Germany (2007)[7], France (2008), the United Kingdom (2010), and Austria (2011).

[6] Art. 7 also specifies that, with regard to refugees and/or family members of refugees, the "integration measures" may only be applied once the persons concerned have been granted family reunification. In all EU countries that have opted for pre-entry integration tests, family members of refugees are thus exempted, as are family migrants who have completed a certain level of education in the host country.

[7] Germany was the first European country (with the 1990 *Aliens Act*) to introduce the obligation, for family migrants, to fulfil integration conditions: foreign children between 16 and 18 years old, in fact, were required to prove either basic language proficiency or, on the basis of the

Soon, however, it was evident that the measures introduced by national States were likely to raise serious doubts as to the conformity with the Directive and, especially, with the Directive's aims.

In its 2008 Report on the application of the Directive, the EU Commission pointed out the controversial aspects of pre-entry integration measures, clarifying that – since the objective of such measures should be to facilitate the integration of family members – «their admissibility under the Directive depends on whether they serve this purpose and whether they respect the principle of proportionality [...] Their admissibility can be questioned on the basis of the accessibility of such courses or tests, how they are designed and/or organised (test materials, fees, venue, etc.), whether such measures or their impact serve purposes other than integration (e.g. high fees excluding low-income families)» (European Commission 2008, 7-8).

In 2011 a public consultation was launched, with the aim to collect opinions from the different stakeholders (EU institutions, national, regional and local authorities, intergovernmental and non-governmental organisations, academia, civil society organisations, etc.) on how to have more effective rules on family reunification at EU level and to provide factual information and data on the application of the Directive. The Commission, in reasserting that integration measures were among those Directive's optional provisions that leave too much discretion to Member States, dedicated a specific question to this aspect, asking stakeholders if, on the one hand, these measures efficiently serve the purpose of integration and which integration measures are most effective in that respect, and, on the other hand, it could be useful to further define these measures at EU level. With regard to pre-entry measures, the Commission was interested in deepening the issue of the possible safeguards to be introduced in order to ensure that national measures do not de facto lead to «undue barriers for family reunification (such as disproportionate fees or requirements) and take into account individual abilities such as age, illiteracy, disability, educational level» (European Commission 2011, 4-5).

The Commission's Green Paper received 120 contributions, including 24 from Member States (European Commission 2012). On the topic of pre-entry integration measures the opinion were diversified. On the one hand, Member States defended the idea of integration as a matter of national competence and generally opposed EU binding rules on integration measures[8], with the Netherlands even asking for a series of amendments to the Directive so as to introduce additional restrictions on family migrants and a more binding integration policy stressing

child's education and way of life to date, the ability to integrate into the German way of life; see Seveker and Walter 2010.

8 It must be specified that Bulgaria, Finland, Portugal, Romania, Slovakia, as well as Turkey, expressed their clear opposition to pre-entry integration requirements on the grounds that they compromise the right to live as a family, particularly for those with fewer financial resources and qualifications.

migrant responsibility. On the other hand, international organisations, social partners and NGOs strongly criticized pre-entry integration measures on the basis of little evidence for effectiveness and possible human rights violations, while expressing some concerns on the accessibility to post-arrival ones. Integration measures, especially language tests, were also contested by many individuals who responded to the public consultation, in view of the abuse of such tests for limiting family reunification.

Despite the serious criticism addressed to national measures, the six EU States are still implementing pre-entry integration requirements in the context of migration policies, although showing considerable variability. Austria, Germany and the United Kingdom, for example, introduced only language requirements for spouses/partners (in Austria, also for adult children), while Denmark, France and the Netherlands ask family members (in France, also children aged 16) to undergo both language and civic integration tests. While in all six countries family migrants' knowledge of language is tested at a very basic level (generally the A1 of the Common European Framework of Reference for Languages), differences concern both the preparation for the test and the connection between the test and the residence permit (Bonjour 2014, 217-218). As for the first aspect, while France provides for free courses on language and fundamental values, none of the other countries does the same and family migrants are to find and finance these courses themselves. Furthermore, France is the only country where the law imposes an obligation of effort, rather than an obligation of result, in so far as family migrants do not have to pass a test in order to be admitted to the national territory, but they are only asked to participate in a test of their skills and, in the case of an insufficient evaluation, in a course that is offered for free. According to Bonjour, this different approach to pre-departure integration can be explained in terms of the specific French domestic context, marked by a strong left-wing opposition to restrictive migration policies and a more cautious attitude of governments towards negative judicial decisions (Bonjour 2010). On the contrary, Austria, Denmark[9], Germany, the Netherlands, and the UK require that applicants pass the test before they are granted a residence permit.

In its recent Action Plan on the integration of third country nationals the EU Commission has tried to clarify that pre-departure/pre-arrival integration measures may have a positive potential as tools useful to speed up migrants' integration in their future environment. In fact, according to the Commission, while «the innovative use of technology, social media and the internet needs to be harnessed at all stages of the integration process [...]», pre-arrival measures could also help preparing receiving communities for the arrival of third country na-

[9] Anyway, it must be noted that in Denmark family migrants are allowed to enter the national territory with a 28-days short-term visa to take the test; once in Denmark, they can extend this special visa to three months and they are allowed to follow a course for the preparation of the test. If the test is not passed within three months, the residence permit is refused and the applicant must leave Denmark.

tionals, «contributing to building empathy and understanding to overcome prejudices and fostering an open and welcoming attitude» (European Commission 2016, 5-6). For these reasons the Commission commits to launch projects supporting pre-departure and pre-arrival measures for local communities, as well as to engage with Member States to strengthen cooperation with selected third-countries on pre-departure measures.

2.2. Compliance with fundamental principles and rights

Pre-entry integration requirements have been scrutinized and challenged by both legal scholars and courts with respect to the possible violation of fundamental principles and rights.

A first controversial aspect refers to the principle of non-discrimination, which must be taken into account with regard to the exemptions from pre-entry integration requirements included in national legislation, usually related to age, physical and mental capacity, nationality and educational background (Pascouau 2014, 40). In fact, while some exemptions can result in the infringement of the non-discrimination principle, treating different situations in the same way (namely, applying the mandatory integration requirement) can also have a discriminatory effect.

As for the first aspect (like cases treated alike), both the Netherlands and Germany include exemptions on behalf of third country nationals coming from some Western countries, or from countries considered to be "close" to Europe (for example: Australia, Canada, Japan, New Zealand, South Korea and the United States), in consideration of those countries' alleged political and cultural proximity and, therefore, on the presumption that migrants from those countries will be easily integrated in the host society (Bribosia 2012). This kind of provisions appears to be in conflict with important international documents, including the ECHR, because of the disproportion between the goals pursued and the means used, as well as the application of an afflicting measure (the pre-entry integration test) on the basis of race and national origin.

As for the second aspect (unlike cases treated alike), it must be observed that illiterate persons, or migrants with very little skills in written language comprehension, are generally not exempted from pre-entry integration tests (see, for example, the Bibi and Ali case, discussed later in this Chapter).

A second problematic point is represented by the integration measures' proportionality, which has also been highlighted, as already noted, by the European Commission. Again in 2014, the Commission stressed the necessity for integration requirements on family members to be reasonable and proportionate to the objective of integration measures, which is to facilitate the integration of migrants' family members: therefore, national requirements «may not amount to an absolute condition upon which the right to family reunification is dependent» (European Commission 2014, 15).

A third problem is related to the fundamental right to the respect for family life, sanctioned by international conventions, EU law and many national constitutions. Although academic scholars have been warning for a long time about the serious threats posed by pre-entry integration requirements to the right to respect for family life and family reunification, the UK Supreme Court recently took a very cautious position on the matter. With a 2015 decision, in fact, the Court unanimously dismissed Mr. Bibi and Mr. Ali's claim that pre-entry English test breaches their right to a private and family life (R v Secretary of State for the Home Department, 18 Nov 2015; on the decisions involving aspects of family migration that have been heard by the Supreme Court in recent years, see Wray 2013, 838-860). The two appellants – both British citizens married to foreign nationals who couldn't speak English and wished to join them in the UK – claimed that the pre-entry requirement was unreasonable, disproportionate and discriminatory, breaching their right to a private and family life under art. 8 of the ECHR. The Supreme Court, upholding earlier rulings by the High Court and the Court of Appeal, found that the pre-entry measure, as such, did not disproportionately interfere with the ECHR, but that problems may arise in single cases due to the way in which that same measure is applied: the Court, in particular, focused on the way in which the Guidance for the application of the pre-entry test is drafted[10]. Therefore, the deputy President of the Supeme Court, Lady Hale, suggested that «the appropriate solution would be to recast the Guidance, to cater for those cases where it is simply impracticable for a person to learn English, or to take the test, in the country of origin, whether because the facilities are non-existent or inaccessible because of the distance and expense involved»; in particular, «the guidance should be sufficiently precise, so that anyone for whom it is genuinely impracticable to meet the requirement can predictably be granted an exemption» (R v Secretary of State for the Home Department, para. 55)[11].

Although the ECtHR has not dealt with the legitimacy of pre-entry integration requirements so far, its decisions have marked the limits of States' powers

[10] See Home Office 2015. In fact, although the Guidance considers "exceptional circumstances" exemptions to the English language requirement (art. 7), only a small number succeed in entering the country through these routes, since the Guidance is drafted in very strict terms. The impracticability of acquiring the necessary tuition and practice or of accessing a test centre, as well as financial impediments, for example, are not enough. Furthermore, since July 2014, applicants who are resident in a country with no approved A1 English language test are expected to travel to another country to take such a test; only where they can demonstrate in their visa application that it is not practicable or reasonable for them to do so will they be exempt from the requirement prior to entry to the UK.

[11] Those granted an exemption could be required to undertake, as a condition of entry, to demonstrate the required language skills within a comparatively short period after entry to the UK. Indeed, in the present case, the two foreign husbands were in highly problematic situations: while Mr. Ali, who lived in Yemen, had no formal education and could not reach the required level in the knowledge of English because of the lack of approved test centres in Yemen, in the case of Mr. Bibi, who was a resident of Pakistan, the nearest approved test centres were at least 70 miles away; in addition, both men would have to learn computer skills.

in the field of family migration. In fact, if it's true that the ECHR does not directly protect the family members' right to entry and stay on the territory in order to join the migrant who already resides in Europe, art. 8 of the ECHR undoubtedly represents a strong limitation on State sovereignty, by asking national States to balance migrants' right to respect for family life and public interests involved in immigration control. Therefore, the Court has been clarifying the elements that States must take into account in managing family migration, such as migrants' ties with both the country of origin and that of residence and the family situation. Compared to the ECtHR's case-law on aliens' expulsions under art. 8, the Court's decisions on state refusals of entry for family reunification purposes certainly leave to States a wider margin of appreciation; on the other hand, that same art. 8's case-law on the limits to expulsions, although elucidating the indicators of migrants' "social attachment" to the host society, is not likely to depict a clearly defined concept of their integration under the ECHR[12].

Recently the Strasbourg Court's decision Biao v. Denmark, 24 May 2016, dealing with the complex link between migration national policies and right to a family life, gave an important contribution to the conceptualisation of integration in the European legal space. The case was raised by Mr. Biao, a naturalised Danish citizen of Togolese origin, and his Ghanaian wife, who could not settle in Denmark having being refused, by the Danish authorities, to access family reunion, as they did not comply with the "attachment requirement" under the relevant domestic law[13]. Although the Court mainly focused on the legitimacy of legal differences between "Danish nationals of Danish ethnic origin" and "Danish nationals of non-Danish ethnic extraction", the ascriptive and «rather speculative» arguments on "integrability", which were at the basis of the different legal treatment, have been strongly called into question. In fact, on the one hand, it's very hard to identify, in general, the conditions to which «it can be said that a Danish national has created such strong ties with Denmark that family reunion with a foreign spouse has a prospect of being successful from an integration point of view»: since the length of nationality does not seem to be sufficient, the Court opted for a more concrete approach, so as to appreciate substantial aspects such as the length of residence, proficiency in the Danish language and knowledge of Danish society, the requirement of self-support. On the other hand, the

[12] See *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, 28.05.1985; *Ahmut v. The Netherlands*, 28.11.1996; *Gül v. Turkey*, 14.12.2000; *Sen v. The Netherlands*, 21.12.2001: *Tuquabo-Tekele a. o. v. The Netherlands*, 1.12.2005; *Osman v. Denmark*, 14.06. 2011.

[13] The "attachment requirement", under the Danish law, means that the person must not have stronger ties with another country (Ghana, in the Biao case). The two applicants also complained that a 2003 amendment to the *Aliens Act* – exempting those who held Danish citizenship for at least 28 years from the attachment requirement – resulted in a difference in treatment between those born Danish nationals and those, like Mr Biao, who had acquired Danish citizenship later in life. The Court found that the Government had failed to show that there were compelling or very weighty reasons, unrelated to ethnic origin, to justify the indirect discriminatory effect of the 28-year rule, and that there had been a violation of art. 14 read in conjunction with art. 8 of the Convention.

Court also criticized the arguments advanced by the Danish Government with regard to the alleged "marriage pattern" of Danish nationals of non-Danish ethnic origin, which reflected a negative attitude towards their lifestyle, largely based on biased assumptions and social prejudice, and contributed to «hampering the integration of aliens newly arrived in Denmark». In his concurring opinion, Judge Pinto de Albuquerque even more explicitly highlighted the risk of using cultural arguments in order to limit what is to be considered a fundamental right descending from art. 8, that is the right to family reunification[14]; in view of that, and since the Convention does not allow any differentiation of treatment of both nationals and lawfully resident aliens on the basis of their ethnic origin, birth, nationality or length of nationality for the purpose of family reunification, the Court is called to take a coherent stand, «like a boat sailing against the wild current of populist rhetoric».

On the contrary, the CJEU has ruled on integration requirements on several occasions. In 2006, with Parliament v Council, 27 June 2006, the Luxembourg Court found that art. 4.1 of the 2003 Directive (on the integration conditions to which EU States may subordinate the entry of children over 12 years) cannot be regarded as violating the fundamental right to respect for family life, the principle of the best interests of the child and that of non-discrimination on grounds of age. On the other hand, the Court stressed the need for interpreting the restrictive provisions of the Directive according to the ECHR fundamental rights. This position was reasserted with Chakroun v Minister van Buitenlandse Zaken, 4 March 2010 (on income requirements for family reunification), while Imran v Minister van Buitenlandse Zaken, 10 June 2011 (on the refusal of a provisional residence permit to an Afghan migrant who did not pass the civic integration test) was a missed opportunity to assess the compliance of Dutch integration conditions with EU law: the Court, in fact, deemed the ruling unnecessary because, in the course of the proceedings, the Dutch government granted a permit to the Afghan woman whose husband had initiated the case.

In 2013 the application by a Turkish national who requested a visa for the purpose of family reunification with her spouse, also a Turkish national already residing in Germany, was the occasion for the Court to rule on the legitimacy of the pre-entry language requirements imposed by Germany (Dogan v Bundesrepublik Deutschland, 10 July 2014). However, again the Luxembourg judges did not consider the compliance of the national measures with the 2003 Directive, answering only to the first question referred by the Administrative Court of Berlin, concerning the interpretation of the Additional Protocol to the Association Agreement between the European Economic Community and

[14] According to the Portuguese judge, «concerns about cultural tensions, social exclusion and professional maladjustment in Europe serve, most of the time, the hidden purpose of closing down European societies to the most vulnerable and the least well-off. It is well known from experience that the most vulnerable family members, such as those who are ill, disabled, elderly, poorly educated, living in developing or conflict or post-conflict countries, have the greatest difficulty in meeting integration and knowledge-based requirements».

Turkey. Anyway the CJEU's decision is surely relevant to the broader issue of language and civic pre-entry integration tests as tools for immigration control. In fact, the Court noted that a national restriction on Turkish nationals' freedom of establishment in national territory is prohibited, unless «it is justified by an overriding reason in the public interest, is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it». Furthermore, while assuming that German pre-entry integration requirements were justified by «overriding reasons in the public interest», such as the prevention of forced marriages and the promotion of integration, «it remains the case that a national provision such as that at issue in the main proceedings goes beyond what is necessary in order to attain the objective pursued, in so far as the absence of evidence of sufficient linguistic knowledge automatically leads to the dismissal of the application for family reunification, without account being taken of the specific circumstances of each case». Therefore the Court concluded that the EU-Turkey Association Agreement precludes a national measure that imposes on Turkish migrants, who wish to enter national territory for the purposes of family reunification, the condition of demonstrating beforehand a basic knowledge of the State's official language.

Recently the Dutch legislation on pre-entry requirements has been also referred to the CJEU, with regard to the application of two foreign citizens (K, an Azerbaijani national, and A, a Nigerian national) who contested the rejection of temporary residence permits by the Dutch authorities, even after they had invoked health and psychological problems as reasons for exemptions. With Minister van Buitenlandse Zaken v K and A, 9 July 2015, the Court finally ruled on the legitimacy of pre-entry integration requirements under art. 7.2 of the 2003 Directive: after having reasserted that, in the context of family reunification other than that of refugees and their family members, the 2003 Directive does not preclude Member States from subjecting the granting of entry visa and residence permits to pre-entry integration measures, the Court also warned that art. 7.2 must be interpreted strictly. This means that – since authorisation of family reunification is the general rule – the margin given to the State must not be used in a manner that would undermine the objective and effectiveness of the Directive (namely, the promotion of family reunification). Therefore, in accordance with the fundamental principle of proportionality, national integration measures can be considered legitimate, under art. 7.2 of the Directive, only if they are capable of facilitating the integration of the migrant's family members. The application of these general principles to pre-entry civic and language integration test led the Court to state that, on the one hand, the requirement to pass a pre-entry integration test at a basic level may ensure foreigners to acquire knowledge that is undeniably useful, but, on the other hand, this requirement must not undermine the aim of family reunification. Consequently, the application of that requirement must not «systematically prevent family reunification of a sponsor's family members where, despite having failed the integration examination,

they have demonstrated their willingness to pass the examination and they have made every effort to achieve that objective». Furthermore, «specific individual circumstances, such as the age, illiteracy, level of education, economic situation or health of a sponsor's relevant family members must be taken into consideration». The Court has also considered the financial aspects, concluding that, if the Member States are free to require foreigners to pay various fees related to integration measures as well as to determine the amount of those fees, «the level at which those costs are determined must not aim, nor have the effect of, making family reunification impossible or excessively difficult».

In conclusion, the case of pre-entry language and civic integration requirements seems to be at the forefront of the very complex conceptualisation of integration in the pluralistic societies of contemporary immigration countries, showing the ambiguities of policy orientations and legislation that try to keep together the need for selecting "useful" persons (as migrants) and the obligation to protect fundamental rights and freedoms of migrants (as persons).

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The Asylum Legal Framework and the Social Integration of Refugees in Spain

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1. Evolution of Asylum in Spain

Asylum legal framework in Spain has undergone an evolution that initially has followed the first impulse to adapt the asylum to constitutional provisions (Law 5/1984); later Spain adapted the legislation to adjustments claimed by the doctrine and case law (Law 9/1994), such as linking the protection of asylum to the recognition of refugee status. Finally, Law 12/2009 was enacted for the transposition of EU directives in the field of asylum and refugees (Pérez Sola 2011, 91).

In the Law on asylum of 1984 the recognition of refugee status implied a certain degree of legal protection, although it should be understood of less scope and intensity than that resulting from granting the asylum. Consistent with compliance with international commitments concerning refugees, and in line with the discretionary will of the government to grant asylum, the possibility of granting work permits and residence for people who have obtained this condition were envisaged, whenever requested to exercise a lucrative profession (art. 22.3). The obtaining of refugee status was one of the legal requirements for granting asylum eventually, so that in many cases, as demonstrated by the experience, although the aim of the applicant was obtaining asylum, he sought first the recognition of

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refugee status as it was easier to demonstrate the concurrence of the objective requirements under the Convention of Geneva of 1951. The recognition of refugee status did not automatically lead to the granting of residence and work permits. In this aspect was appreciable the difference between the regulation of the right of asylum and refugee status. The fundamental difference from the legal point of view between immigrant and refugee is that the former has right to leave their country of origin but in parallel has not the right to entrance to another country, because it is dependent on the situation socio-economic in another country, in the case of Spain, the national employment situation. By contrast, given the vital character of asylum, refugees have right to leave their country and entrance into another, although being subject to a prior request. However, the entrance's right is not dependent on the economic situation of the State of destination.

The scholar criticism focused therefore in the aforementioned atypical double status of asylum and refuge, the former being conceived as a discretionary award (in line with the traditional concept of asylum as an act of sovereignty), although the alleged grant provided to the applicant more favorable treatment than that accorded to the rest of foreigners. Legislation relating refugees deserved a generally favorable opinion, it cannot be said the same about that of asylum because of the indeterminacy of the legal requirements, the broad discretion granted to the public administration in implementation and the absence of adequate judicial guarantees (art. 21 of the Act did not even make mention to the availability of administrative appeal). Hence the doctrinal thesis according to which while in the regulation of refuge the previous law included fully legal concepts liable – in its application – to the control of courts, the legal provisions relating the asylum did the same with open and vague clauses determining therefore the exercise of discretionary powers (Parejo Alfonso 1995, 91).

The discretionary decision had justification in extralegal criteria, based on reasons of political expediency, of living together or national security not predetermined by the law, but they should be mentioned in the corresponding administrative resolution and necessarily they should be supported by the existence of objective data consistent with factual reality. Similarly, the discretion was limited by the international instruments signed by the Spanish State, including the principle of non refoulement. As noted above, the administration was not constrained to grant asylum, but the applicant was entitled to request and obtain it.

In the same way, for recognition of the right of asylum on humanitarian grounds, case law had required the concurrence of special qualifications of the grounds invoked by the applicant, justified by the recognition of the principle of international solidarity, projected onto the fundamental value of the dignity of human person, so that only the presence of these values would be justified the existence of humanitarian grounds for granting asylum. It must be said that after the successive legal reforms considerations of humanitarian grounds have remained as a way to authorize the stay in the territory even if the protection is not granted (Pérez Sola 1997, 43).

In 1994 a major reform of the 1984 Act took place involving the elimination of double regulation of asylum and refugee status that was not present in the surrounding countries, and introduced a phase of admissibility in the procedure for recognition of refugee status inspired by the guidelines of the European Union, in order to create an area of freedom, security and justice. The absolutely discretionary possibility for the Government to recognize asylum was removed, redirecting the question to the strict terms of the Geneva Convention of 1951. As a result of the Law 9/1994, the discretionary character of the granting of asylum disappears. The new wording of this rule – in relation to art. 1 – shaped this right fully in accordance with the wording and spirit of art. 13.4 of Spanish Constitution.

The essential elements of this constitutional right are the following:

- definition of asylum recognized in art. 13.4 Const. as a subjective right, also according to its domestic-international two-faced nature (necessarily referred to a foreigner);
- characterization of the enjoyment of the right as a result of an operation of simple recognition (declarative, not constitutive) of the subjective situation determinant of its entitlement: refugee status, defined as the characteristic of a qualified foreigner, resulting in such qualification from international law and specifically from the Geneva Convention;
- internal configuration (by act of Parliament) of the right by relation to two objective elements that make up a legal status: a) one international, that is non refoulement or expulsion under the terms of art. 33 of the aforementioned Geneva Convention); b) other internal, that is to say, the variable requirements or prerequisites for the ownership of rights and obligations under Spanish legislation: access to territory and residence in it, identity and travel documents, access to and development of lucrative activities (employment, professionals and commercial), any other that may be included in refugee conventions signed by Spain (international opening clause); the access to and enjoyment of benefits of economic and social assistance.

The right to asylum from the 1994 reform became: firstly, a subjective right susceptible of enjoyment after individual recognition of the subjective condition determining its entitlement and therefore a pre-existing right to such recognition, as its function is the mere finding of such condition, therefore right's recognition effectiveness is merely declaratory (Parejo Alfonso, 1995, 96); secondly, a right whose enjoyment enables the application of art. 13.1 Const. and, consequently, the expansion of the sphere of the holder to all constitutional rights and civil liberties (except those of political nature strictly reserved for Spanish nationals).

Partly the legislative reform was a response to the judgments of the Constitutional Court (no. 115/1987 of 7 July and no. 107/1984 of 23 November),

which had considered unconstitutional: a) the adopting by the Council of Ministers of the suspension of the activities of the associations promoted and integrated mainly by foreigners (for violation of art. 22.4 Const.); b) the requirement of prior administrative authorization for indoor or public places meetings of foreigners and for demonstrations (for violation of art. 21 Const.); c) the impossibility (in general) of judicial suspension of administrative decisions concerning foreign people (for violation of art. 24.1 Const.); d) the need of an administrative requirement (the obtaining of residence permit) for the recognition to foreigners of legal capacity for the purposes of valid formalization of employment contracts; e) regulation on preventive custody for expulsion purposes (for violation of art. 24.1 Const.).

The right to asylum in Spanish law, consists therefore of twofold elements (Parejo Alfonso 1995, 97):

- The first is formal-procedural right to apply, which is recognized to any foreigner without limitation (even foreigners located outside the borders, ie. outside the proper limits of Spanish law). The effectiveness of the right of asylum depends on the legal status of this right, as already mentioned. It is, in the first instance, a real subjective right of procedural or formal character. It is a right to an express decision and in accordance with law on recognition of asylum, i.e. the statement of a concurrence of the subjective condition of qualified foreigner.
- The second element is the substantive level, i.e. the right to the status of asylee, i.e. asylum with content materialized by the act of granting it, under the legally declared and previously established framework (material dimension of asylum), during the time of persistence of the determining circumstances (temporal dimension without precise legal limitation).

The reform introduced by Law 9/1994 must be completed with a brief reference to the transposition into domestic law of the Directive 2001/55 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, which has allowed the configuration of a temporary protection status. Indeed, through Royal Decree no. 1325/2003 approving the Regulation on temporary protection regime in the case of a mass influx of displaced persons, a temporary protection under the new status of the displaced has been formalized.

However, the confusing profiles that marked both figures and the need to standardize the Spanish asylum system with those of the surrounding states, among others factors, forced to address a fundamental reform of asylum, a reform which implied, on the one hand, the suppression of double regulation of asylum and refugee status that was not present in the surrounding countries, and introduced a phase of admissibility in the procedure for recognition of ref-

ugee status inspired by the guidelines of the European Union, in order to create an area of freedom, security and justice. The possibility for the Government to recognize on a discretionary basis the asylum, was removed redirecting the question to the strict terms of the Geneva Convention of 1951 on the interpretation and application of the grounds of persecution contained in the Geneva Convention in accordance with the reality of new forms of persecution, among which we can mention the persecution of gender suffered by women in many countries for “moral or religious” reasons (Arenas Hidalgo 2009). In other cases, persecution may find their origin in sexual assaults of women for hypothetical reasons of “honour”. Of particular relevance is female genital mutilation, as well as the imposition and celebration of forced marriages founded on cultural traditions or economic reasons (Valero Heredia 2007).

With the new Law 12/2009 an uniform treatment is provided to the two forms of international protection, so that the new law provides the same single procedure for examining applications, whether asylum or subsidiary protection (Pérez Sola 2009). Therefore, the situation triggered by the 1984 Act, whose application during its ten years of existence was characterized by dilatory practices caused by the inefficient design of a dual system of successive procedures (first the refuge one and after the asylum one), has been overcome (Pérez Sola 2015). Although the new law continues to identify the right of asylum with the refugee status, it has incorporated the new subsidiary protection status as a requirement of EU law, but configuring it broader than required by the Directive and subjecting to precise rules what previously was in Spain a discretionary power of the Minister of the Interior. The refugee status, as established in the art. 3 LAPS, it is recognized to «every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, political opinions, membership of a particular social group, gender or sexual orientation, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country» (Díaz Lafuente 2014). Regarding the reasons for persecution included in the Geneva Convention, it is noticeable that the new law seems to add one more to the traditional five reasons for persecution: the gender or sexual orientation (Merino i Sancho 2011).

From the right of asylum shall be excluded foreign persons of whom there are serious reasons for considering that: «… b) they have been committed a serious crime outside the country of refuge before being admitted as refugees, that is to say, before issuing the residence permit based on the recognition of refugee status. Serious crimes are those under Spanish Penal Code affecting life, liberty, indemnity or sexual freedom, integrity persons or property, provided they were made with violence against objects, or violence or intimidation in people, as well as the cases of organized crime» (Díaz Lafuente 2014, 69-92).

The new Law has also abandoned the discretionary power on authorizing the residence permit for humanitarian reasons which prevented a procedure for examining the protection needs except for refugee status. Scholars have con-

sidered that the extention to subsidiary protection of the asylum procedure has been an undoubted advance to which Spain was not required under EU law as the Procedures Directive, unlike the Qualification Directive, only applies to refugee status (arts. 1 and 2; see Sánchez Legido 2010, 32).

The guarantees which must be respected in the process are another area in which there have been significant advances in the new law. This is the case for example with the specification that the information to asylum seekers will be «in a language they can understand» (art. 17.3) and not in «a language that can reasonably be expected to understand» as merely requires the directive (art. 10.1.a). The same is true of the rule establishing that the date of the application for protection is the starting date for counting of deadlines for processing (art. 19.5), and not the date of the submission of the application, which avoid asylum seekers to bear the consequences of delays in the formulation of the application due to the Administration.

Another achievement in the new law is the establishing of the aim to be pursued in the interview by which the application is formalized in the Office of Asylum and Refugees (OAR), which is to assist applicants to complete the application and collaborate with them to establish the relevant facts (art. 17.6). As required by the Directive, the Law 12/2009 includes as guarantees the confidentiality of personal hearing (art. 16.4 and 26), the staff competence (DA 3rd), the right to an interpreter (art. 16.2), and the individual character of the hearing.

To address the practice developed under the previous Act, the Law 12/2009 introduces significant improvements to the right to legal assistance. For example, the Act provides that legal aid will be extended to the formalization of the application and all the proceedings (art. 16.2.1). Consequently, the law puts an end to a widespread view in the Administration according to which legal aid was not necessary for the initial phase, but was conceived for a later stage (Sánchez Legido 2010, 34). The new law has also established that legal assistance shall be mandatory in border procedure (art. 16.2.2). The particular vulnerability in which are commonly found the applicants newcomers at a border post, as well as the situation of deprivation of liberty to which they are subject as a result of the ban on access to Spanish territory and the extraordinary speed of its processing, make legal aid in these cases particularly necessary (Pérez Sola 2012, 613). Finally, the new law puts an end to unjustified restrictions of legal advisers access to the facilities of border posts and the immigration detention (art. 19.4).

Another improvement introduced by the new Asylum Act which is not required by EU legislation has been to grant suspensive effect to administrative appeals against the decisions of reject of admission or dismissing, which under the previous law did not exist, causing return or expulsion in the form of return, removal, expulsion or compulsory departure or transfer of failed asylum seekers. The only exception in previous legislation was that the resolution had been delivered in a border procedure in which UNHCR had supported the acceptance

of the application. The suspensive effect however is not automatic and must be requested (Sánchez Legido 2009, 21).

The new law has marked however some backward steps over the previous legislation. The first is the elimination of the possibility to seek protection at embassies and consular offices of Spain abroad (Galparsoro 2010, 82; García Mahamut 2010a, 82). Because of the tightening of borders control it is increasingly difficult for asylum seekers to make their application on European soil. Spain has also raised border walls, promotes and finances the strengthening of controls on the outflow of immigrants by sea in third countries, aides the creation in them of detention centers and penalizes transport companies that bring asylum seekers on European soil without the proper documents and whose application has not been declared admissible.

As for grounds for refusal of leave under the new law, the legislator has opted for a more protective model than the previous law. In this new legal framework, the mere granting of protection in a third country or the mere transit through the country are circumstances which do not allow itself the refusal of the application, especially if that third State does not offer effective guarantees of human rights and refugee protection (Borrajo Iniesta 2012). On the other hand, the concepts of first country of asylum and safe third country do not exclude the right to an individual examination, objective and impartial of the application, since it is one of the essential guarantees of the Asylum Procedures Directive (art. 8.2.a). Thus, if one takes into account the speed of these procedures, it must be draw as an inevitable consequence that the reasoned invocation of plausible circumstances that question the respect of those guarantees in the third country, should be sufficient reason for the application to be not accepted for processing and examined at greater length under the ordinary procedure. An application of this type would not fit in those admissible in accelerated or abbreviated procedures, since such application must be, as noted by the Executive Committee of UNHCR, «those which are clearly fraudulent or not relate to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention Relating to the status of Refugees nor to any other criteria justifying the Granting of asylum».

The new law introduces therefore indisputable improvements such as a better definition of the circumstances of eligibility for the recognition of the right of asylum, extending the grounds for recognition, or the proclaimed willingness to participate in resettlement programs (García Mahamut 2010b). Also noteworthy the unification almost complete from procedural and substantive point of view of the right of subsidiary protection as well as the undoubted improvements in the field of procedural safeguards, as with legal aid and the postponement of the enforceability of decisions of inadmissibility or denial in case of judicial challenge.

According to art. 4 of Royal Decree 203/1995, of 19 February, the asylum application must be filed in person at the offices of asylum and refuge, at the border of Ceuta and Melilla in foreign offices and police stations. People who are in immigration Detention Center may also lodge asylum application by communication to the Center Director. Applications must be filed within one month from the entry into national territory (art. 17.2 of Law 12/2009), although the appointments are delayed between 5 and 7 months. By emergency procedure the admission to process of the application must take place in four days, while the normal term is 1 month (art. 21). The silence of the administration implies positive effects.

The Processing of asylum applications follows these key lines: the submission of the application determines the initiation of the procedure and the prohibition of rejection at the border (Ruiz Sutil 2016) or expulsion from the territory of the asylum seeker until effective resolution of admission or inadmissibility has been issued (although in the meantime precautionary measures can be taken wherever applicable; see Moya Malapeira and Hernández Calero 2012).

Such a procedural legal relationship generates for foreigners specific duties besides the right to be informed about their rights and, in particular, the right to legal assistance (Navarro Gandullo 2006): the full cooperation with the authorities for accreditation and verification of their identity and of the facts and arguments relied on in support of the application as well as the duty to report – as soon as possible – on his residence or any change in it and on members of the family group. The processing is the responsibility of the Minister of the Interior, but the formulation of the resolution proposal is the responsibility of the Interministerial Commission established within the Minister of the Interior. The power for the final decision lies on the Minister of the Interior except in cases of disagreement with the proposal in which the decision shall be taken by the Council of Ministers (which proves the protective nature of the intervention of the Interministerial Commission).

Under previous legislation, the enjoyment of certain social benefits stemmed from the filing of the application, including the possibility of employment, as enshrined in the Immigration Regulation. The members of vulnerable population groups (single parents, elderly, disabled, etc.) could also receive social assistance from the time of filing the request for asylum. When asylum seekers were under eighteen and were in a situation of distress, they were under the protection of the competent services, having being communicated their situation to the Prosecutor, as well as a guardian were appointed who represented them in the corresponding procedure.

The inadmissibility of application was subject to review, which was justified when new facts were presented or when the facts that prompted the application were specified in more length.

The immediate effect of the inadmissibility was notification of the rejection, which was accompanied by the order of compulsory departure of the petitioner or expulsion when applicable, except when the petitioner fulfilled the requirements of the legislation on immigration for stay in Spanish territory or when a humanitarian or public interest exists, in which case the Minister of the Interior could authorize, at request of the Interministerial Commission for Refugees and Asylums, their stay in Spain for not less than six months. The reform introduced by Royal Decree 2939/2004, of December 30th, which amended the content of Article 31 of Refugee and Asylum Regulation allowed the Minister of the Interior to approve the stay in Spain when "serious and reasonable grounds to determine that the return to the country of origin would be a real risk to life or physical integrity of the person".

The resolution declaring the inadmissibility needed to be motivated and to be adopted on a case-by-case basis, besides informing the applicant of the options that the system offered after the rejection.

Thus, the asylum-seeker could request a re-examination of the application or leave the country, but in the latter case the processing of the application could continue through the Spanish embassy in the country which the asylum-seeker has reached.

Especially controversial resulted in the past the provision regarding the submission of the application for asylum at the border, since legislator had foreseen the remain in it of the applicant while this procedure were resolved. Indeed, the asylum seeker, which submitted the request at the border, could not be expelled while not solved the admission procedure and should remain at the border post in adequate rooms, the stay should not last more than seventy-two hours since the filing of the application.

This issue was the subject of a constitutional appeal raised by the Ombudsman and resolved by the Constitutional Court in judgement no. 53/2002. In this regard, the Constitutional Court considered that such provisions were «provisional modulations restricted to the way in which certain individuals enjoy, in very specific and not generalizable circumstances, of their right to personal liberty».

Under the previous Act, once made filed the application at the border, the asylum seeker could make request, within twenty-four hours from notification, for review of his application, being suspended the effects of the refusal decision (Domínguez Luis y Nieto Menor 2003).

The resolution that decided the request for review ended the administrative procedure and could be appealed to the administrative courts; the bringing of this action produced suspensive effect of the administrative act, provided that the asylum-seeker declared his intention to lodge an administrative appeal and that the representation in Spain of UNHCR had issued a favourable report on the admissibility of the request. The entry and stay in the country were then authorized until courts resolved on the suspension of the administrative act.

The previous Law on asylum provided that the stay in Spain could be authorized on humanitarian grounds or public interest despite the inadmissibility or the refusal of the application (art. 17.2); although the legislator placed particular emphasis on those who although do not yet meet the requirements of the law «as a result of conflict or serious disturbances of political, ethnic or religious nature», would have had to leave their country but whose return was not possible with the due guarantees in the present situation in that country. The inadmissibility determined the border rejection of the asylum seeker and their return to the point of origin (Julien-Laferriere 1990).

However, when immediate refoulement could not be carried out due to insufficient documentation or the unavailability of adequate means of transport, the entry into national territory can be adopted notwithstanding precautionary measures that deemed appropriate to the case. However, despite the rejection of the asylum application, it could be agreed by the Minister of the Interior to enter the country and stay in it for humanitarian reasons and for a period not less than six months (Salamanca Aguado 2009).

Under the new Law 12/2009 two aspects are especially noteworthy: the regulation of applications for asylum in embassies, and care for people with some kind of special vulnerability, added to their status as asylum foreign seekers (Morgades Gil 2010). The regulation of submission of an application for international protection in embassies is incomplete and does not clarify neither the determination of the specific conditions of access to an asylum procedure nor the procedure to be followed by ambassadors to assess relocation needs, nor adequate guarantees for seekers (access to interpreter, legal aid, etc.) are established.

The most criticized aspect regarding the proposed regulatory regulation of the rights of the asylum seeker is related to insufficient regulation of legal assistance. The possibility of access to a lawyer for the asylum seeker both before and after submit of the application at the border or in detention centers is not envisaged as well as essential aspects of legal aid are not included[1], such as the fact that the appointment of attorney should allow enjoy legal aid in the initial application, in the reassessment and in the appeals[2].

[1] Royal Decree 162/2014 approving the Regulation of Operation and Internal Affairs of the immigration detention states that income may only be made by a decision of the competent judicial authority in the cases and with the effects provided in the Act organic Foreigners. It may not exceed 60 days.

[2] In particular, the detainees asylum-seekers are accorded, since its admission and during the time spent in the center, the following rights: to be informed in a language they understand; to respect for their dignity and integrity; the exercise of the rights that the law recognised them (especially those established by international protection); to not be discriminated against for any reason; a medical and health care; to communicate the admission or transfer to the person chosen, a lawyer and to communicate with him; to communicate with their families; to an interpreter; to be accompanied by their minor children; a contact with non-governmental organizations, to make two free telephone calls at his entrance, to submit complaints and petitions to defend their rights and interests; the protection of personal data, especially data on the health of each person; to lodge complaints and petitions and appeals, in the registration of the center

Art. 19 of Law 12/2009, para. 4, provides that persons who have applied for asylum have the right to meet with an attorney in immigration detention centers (CIE) in order to learn about the formalization of the asylum application (Donaire Villa 2012, 517). Art. 25 of Law 12/2009 on the processing of emergency provides that applications for asylum lodged in a CIE shall conform to the procedure established for applications at border posts. Once admitted such applications will be dealt by the emergency procedure. Art. 34 provides that UNHCR (United Nations High Commissioner for Refugees) may have access to applicants for international protection who are in immigration detention centers. The submission of applications for international protection will be communicated to the UNHCR, which may obtain information on dossiers, and may be present at hearings of the person who requested the protection as well as may present reports for inclusion in the dossier of the applicant.

3. The Adaptation to European Union Law

The need to reach a joint interpretation of refugee definition, of subsidiary protection and the adoption of a single asylum procedure currently constitute the major challenges facing the European Union in this area (López-Almansa Beaus 2014). In fact, the adoption of the Common European Asylum System (CEAS) should allow the alignment of rules on the recognition and content of refugee status as well as the adoption of measures relating to other forms of subsidiary protection for those persons in need of protection (Santolaya Machetti 2006). With the approval of the European Pact on Immigration and Asylum at the European Council of October, 15th 2008 it was intended to give a new impetus to EU policy on asylum in the European Union and was continued with the Stockholm Program.

The option of current Dublin Regulation III is the result of incorporating the second phase of the CEAS to the ECJ case law in the K case, in which the Court addressed the extent to which a State was obliged to hold together or reunite a refugee dependent regarding, in the case, her mother-in-law. The ECJ considered that the mention in the Dublin II Regulation (343/2003) to the fact that states "normally" would be required to reunite this kind of people meant, if there was a relationship of dependency (of the applicant with regard to refugee or vice versa), and if family ties existed in the country of origin, that states could only «stop applying this obligation to keep together people interested whether that non application is justified by the existence of an exceptional situation». In Dublin III Regulation, dependence is foreseen both in case of parents and sons (regardless of age), as well as brothers.

itself, must having the center a logbook of requests and complaints. In this regard, a request for a personal interview with the center's director may be submitted.

Through Law 12/2009 of 30th October, on the right of asylum and subsidiary protection, the Directives 2004 and 2005 were transposed, as well as Chapter V of the Directive of 2003. In addition with this Act the measure 108 of the First National Plan for Human Rights (2008) is deemed to be fulfilled, as set out in the European Pact on Migration and Asylum., whose fourth commitment refers to the distribution between the states of those who have obtained the status of refugee and to relocation policy, in close collaboration with UNHCR, which will be re-launched in order to relocate in the territory of the Union European people who are under the protection of that body abroad.

It should be recalled that resettlement programs are not a substitute for, or incompatible with, individual asylum systems. It is about complementary policies that give answers to different needs. National systems for determining refugee status of persons applying for such protection are the mechanism through which States meet its international obligations by providing international protection to those who arrive on its territory claiming such protection. Resettlement policies, on the other hand, are a manifestation of voluntary solidarity of States towards refugees and towards the countries of first asylum.

The first additional provision of the new LAPS (Law on the right of asylum and subsidiary protection) states as follows: «The framework of protection under this Act shall apply to persons covered in Spain under resettlement programs developed by the National Government, in collaboration with the high Commissioner for Refugees United Nations, and, where appropriate, other relevant international organizations. The Council of Ministers, on a proposal from the Minister of the Interior and Labour and Immigration Ministers, once heard the Interministerial Committee for Asylum and Refuge, shall adopt annually the number of persons who may be subject to resettlement in Spain under these programs. Resettled refugees in Spain have the same status as refugees recognized under the provisions of this law».

Spain thus responds to one of the challenges inherent the Common European Asylum System (CEAS) in which the resettlement is an important part of the external dimension of asylum policy of the European Union, understood as an instrument that contributes to solving protracted situations and difficult humanitarian emergencies. It is not to be forgotten that resettlement is considered the last resort for the refugee who can neither return to their country of origin nor remain in the third country with security guarantees. Neither can it be forgotten that these refugees are precisely the most vulnerable (children, single women with children, people traumatized or seriously ill).

The Law 2/2014 of Action and the State Foreign Service, March 25th, has amended the para. 1 of art. 40 resulting an extension of the expectations of enjoying the right to family life in two cases: In the case of children with respect to their parents refugees or with respect to the beneficiary of subsidiary protection, since the requirement of dependence of the former with respect to the latter is removed; and in the case of unmarried minors beneficiaries of international pro-

tection with respect to adults who are not ascendants and are responsible for the minor (in any case the extended family as a child's right is articulated, but states that it is the Spanish administration who "may" ensure the restoration of the family unit in these cases). The new text improves the wording and clarity of the cases in which the asylum or subsidiary protection by family extension would apply, and the circumstances that would justify their exclusion in each case (Sales i Jardí 2016).

The first resettlement program based on this provision was approved on 7th October 2011 by the Council of Ministers which authorized the resettlement up to hundred refugees. The second resettlement program based on the provision of Law 12/2009 was approved on December 28, 2012, to be implemented between 2013 and 2014. Upon request by UNHCR to Spain to increase the quota of resettlement, especially for Syrian refugees, by the saturation of camps closer to places of conflict in Lebanon, Jordan, Turkey and Iraq, the Cabinet approved the third program of resettlement of refugees in Spain to receive up to one hundred refugees from Syrian conflict. This resettlement program is part of the Joint Program of the European Union for resettlement, which provides for the determination of annual geographical priorities, in addition to providing resettlement of refugees from countries or regions with regional protection programs or identified to establish refugees. The Council of Ministers approved in December 2014, the last resettlement program for 2015 so far, for a total of 130 refugees fleeing from the Syrian conflict who are in neighboring countries in the region (equal to the total number for the previous year).

Regulation of the Law of 2009 should provide Spain with the instrument of transposing, at least, the three main Directives of the second phase of the CEAS (Directive 2011/95/EU Directive 2013/33/EU Directive 2013/32 / EU) and Dublin III Regulation (Regulation (EU) No 604/2013), although the text of the draft bill expressly refers only to the Directive on requirements for refugee status or subsidiary protection benefit (Directive 2011/95/EU). The overall objective of the Regulation of Asylum Act is to provide security to the legal administrative processing and, if necessary, granting international protection with a detailed regulation, both the procedure and the protection status.

Directive 2013/33/EU refers specifically to the conditions attached to the reception, ie. the initial period of the asylum seekers in the Member State of reference, during which they need greater attention and support because of their recent arrival and given that the legal constraints that determine that they still cannot procure for themselves the means of life. It is noteworthy that this standard, fully effective on July 21, 2015, establishes important provisions that require that «the Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection» (art. 17.1) providing, likewise, «an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health» (art. 17.2). However, Spain has not established nor legal nor adequate

material support to the obligation imposed by the Directive. In fact, at present the reception conditions of asylum seekers are laid down in Chapter III of the Act 12/2009, which opens the art. 30.1 which states that «it shall be provided to applicants for international protection, social and hosting services necessary in order to ensure the satisfaction of basic needs in dignity if they lack of economic resources» (art. 30.1). However, the development and realization of all this it has been referred to a statutory regulation still nonexistent (art. 31.1 of Act 12/2009).

With the Directive 2013/33/UE is intended to set a series of reception conditions that the Member States should take into consideration while applicants are waiting for the review of their applications, conditions that must be coupled with a decent standard of living (Pérez González, Ippolito 2016). The intention not to encourage secondary movements plays an important role in the adoption of the text.

This directive has replaced the previous Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers in the states members. With the adoption of this text it is intended to prevent that reception conditions do not have a poor effect for applicants for international protection and also contains a number of notable changes.

The scope of the directive has been enlarged to all applicants for international protection at all stages of the process, including also procedures subject to Regulation Dublin III. Thus, the directive now applies to the border, territorial waters and transit zones; previously Directives only mention the border and the territory of a Member State.

On the other hand, Member States shall provide legal assistance and free legal representation with the aim of ensuring effective judicial protection in appeals against the decisions of granting the asylum, withdrawal or reduction of benefits of the directive, although it cannot be provided if the State considers that it will not reach a favorable outcome (art. 26).

Given the categories of people who can fit within the scope of the directive it can be deemed that if the directive on temporary protection would be applied, refugees, people fleeing armed conflict, violence and violations of human rights could be protected as groups under the implementation of the directive for a period of three years. The directive provides a temporary protection status conferring temporary residence permits, health insurance emergency shelter, social services, education for children as well as a limited access to the labor market and a right to limited access to family reunification (Pauner Chulvi 2011, 104). These rights standards suggest some better protection than those received by asylum seekers and migrants in Greece and Italy. A substantial number of Member States, rather than implementing temporary protection under a formalized scheme, have opted to introduce a national model of temporary protection.

In April 2016 the intentions to reform the Common European Asylum System (CEAS) have been resulted in a Communication from the Commission to the European Parliament and the Council. The main problems of the current

regulation focus on the inability to achieve an equitable distribution of applicants when they involve a large number (Thielemann, Williams, Boswell 2010), and the difficulty of preventing secondary movements within the territory of the EU (Collett 2014).

Although the CEAS' main objective was to establish a common asylum system in the EU, is still far from being achieved, since the reforms of the domestic systems are being slow, and since the demand for harmonization leaves room in practice for modulating the implementation of legislation for reasons of internal security (Brouwer 2013) or by expanding the list of countries considered safe (De Lucas Martín 2016).

The creation of a corrective mechanism of allocation has been called "equity mechanism" which allows considering that an EU Member State is managing a large number of asylum applications if it exceeds 150% of a reference amount with regard to the size of the country and its wealth. In this case the corrective mechanism allows the relocation of applicants from this country to other EU States. The new Dublin system should reduce the time of transmission of requests for transfer, reception response and execution of transfers between EU Member States, besides of being suppressed the possibility of change of responsibility (Chetail, De Bruycker, Maiani 2016).

Other measures to address the reform of Dublin focus on preventing abuse and secondary movements, what is known as asylum *à la carte*, on improving the provisions concerning the rights and obligations of the asylum seekers, and also ensuring the interests of minors accompanied (López Ulla 2013) and practices aiming to achieve family reunification (Gómez-Urrutia 2006).

The Commission has proposed that the current EASO (European Asylum Support Office) becomes a European Agency for Asylum (Morgades Gil 2015b). Among the tasks to be referred to this new institution, once modified the Dublin system, are suggested the use of the aforementioned reference amount which will determine the implementation of the mechanism of equity.

Convergence when assessing applications at EU level, cooperation and exchange of information between EU States, the potential deployment of teams of asylum and the support and willingness to provide technical and operational assistance to those States that are in a situation of disproportionate pressure in its asylum are other functions that would assume this Agency.

A second issue of particular importance in access to asylum is the international protection in Spain of nationals of Member States of the European Union. With the transposition of mentioned Directives 2004/83/EC and 2005/85/EC, the Law 12/2009 determined its subjective scope in nationals of third countries and stateless persons. This was one of the reasons why the Ombudsman was asked to present appeal of unconstitutionality, against the above law, understanding that it excluded the possibility of applying for asylum to nationals of EU Member States. However, according to that institution the inability for citizens of the

Union of benefiting from international protection in Spain, does not correspond "fully with the norm", therefore he did not file an appeal of unconstitutionality.

To achieve the correct implementation of the different phases of the CEAS and to consolidate it in Spain, it is essential the 110th measure envisaged in the first National Human Rights Plan, which according to its assessment in November 2012 should be continued. In fact, it is essential to establish a training program for judges, prosecutors, officials of the Administration of Justice, lawyers, police and civil society, on the issue of international protection of refugees (Solanes Corella 2014). This commitment in the National Human Rights Plan was incorporated in the Additional Provision Three of Law 12/2009 on Asylum.

4. The Effects of Granting Asylum

The grant of asylum or subsidiary protection implies (art. 36 of the LAPS) the recognition of the rights enshrined in the Geneva Convention relating to the Status of Refugees, in the current legislation on foreigners and immigration, as well as in the regulations of the EU and, in any case, a number of rights such as:

a) protection against refoulment under the terms established in international treaties signed by Spain;

b) access to information on the rights and obligations related to the content of international protection granted, in a language that is understandable to the beneficiary of such protection;

c) the residence and permanent work authorisation, in the terms established by the Organic Law 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their social integration;

d) the issuance of identity and travel documents to those who has been recognized the refugee status, and, when necessary, to those who benefit from subsidiary protection;

e) access to public employment services;

f) access to education, healthcare, housing, social assistance and social services, to the rights recognized by the law applicable to the victims of gender violence, where appropriate, to social security and integration programs, under the same conditions as Spanish (Triguero Martínez 2010, 201);

g) access, under the same conditions as Spanish, to continuing or vocational training and work practices and procedures for recognition of diplomas and academic and professional certificates and other official transcripts issued abroad;

h) freedom of movement;

i) access to integration programs with general or specific nature to be established;

j) access to assistance programs for voluntary return that may be established;

k) the maintenance of the family unit in the terms provided in the Act and access to support programs that may be settled for that purpose (Sánchez-Rodas Navarro 2006).

In addition, they will still benefit from programs and services in order to facilitate their integration.

On the other hand, the special situation of asylum seekers in Ceuta and Melilla is relevant. The European Commission against Racism and Intolerance (ECRI) had already expressed the Spanish authorities concerns about the situation of people who came to these cities. Thus, in its third report, the ECRI made various recommendations: that the Spanish authorities must investigate the situation including attention to immigrants and asylum seekers from sub-Saharan Africa trying to reach Spanish territory through Ceuta and Melilla; that authorities would ensure that the right of people to access to the asylum procedure is fully respected in practice; that they must redouble their efforts to provide training on human rights to the border authorities and law enforcement officials established in Ceuta and Melilla, including the right not to be discriminated and the right to seek asylum; and that they would ensure that no one was "deported" of Ceuta and Melilla, which will contravene art. 3 of the European Convention on Human Rights and the principle of non refoulement. Recently, the Final Provision 1.1 of Organic Law 4/2015, on Protection of public safety, has included the 10th Additional Provision of the Aliens Act, according to which aliens detected on the border line of the territories of Ceuta and Melilla while trying to cross the border irregularly, may be rejected in order to prevent their illegal entry into Spain.

The Special Rapporteur of the United Nations on racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteerem made an official visit to Spain in January 2013 in which drew attention to the reality of specific groups that are often marginalized, as immigrants and asylum seekers. Regarding the situation of asylum seekers in Ceuta and Melilla, the Rapporteur highlighted the difference in treatment they receive compared with asylum seekers in different parts of Spain: they have no freedom of movement for the Spanish territory and them are not allowed to go to the peninsula until a decision on their asylum claims has been taken, which can take from six months to several years. This situation may be prompting some people who need international protection not to seek asylum or to waive their applications in order to cross the peninsula and risk their lives in the attempt in some cases (González García 2015, 321). As the rapporteur pointed out: «In the opinion of this institution, the explanation provided in the report is not sufficient to prevent the free movement within the national territory of the asylum seekers who have been admitted to the request». Finally, the High Court of Andalusia has declared null and void administrative

detention measures in Ceuta applied to people whose asylum applications have been deemed admissible.

The increasing complexity of so-called mixed movements in which people move using the same routes with different objectives and means of transport or the services of the smugglers, is a major challenge. Identify refugees who are in irregularly mixed flows can be extremely complex, especially when the same individuals have no single reason for mobility. Once they are identified, refugees need protection against refoulement and access to durable solutions (Fernández Pérez, 2014).

One of the keys in the identification of asylum seekers is their almost automatic consideration, a priori, as economic migrants. In 1994 a reform of the effects of the refusal of asylum was carried out in order to avoid the situation of privilege of those subject to this specific legislation compared with the normal foreigner, with the consequence of attracting economic migrants to the asylum system. Here it is where we can show more clearly the tension between status of asylum-status of immigrating as a cause of the legal reform.

The effects of the negative decision are now specified in leave the country, unless the conditions to enter or remain in accordance with the general regime of foreigners or those of exceptional referred to reasons of humanitarian or public interest are met.

Another of the groups in which the lack of proper identification is concerning is that of minors. UNHCR recalls some basics in the case of minors potential asylum seekers, including: it is vitally important to immediately detect the presence of any unaccompanied minors among foreigners entering the country, putting their cases to the competent authorities in child protection; tests to determine the age which generally are made to unaccompanied minors are not accurate because they do not take into account racial aspects, ethnic, nutritional, environmental, psychological and cultural, that have a direct influence on the development and child's growth (Alonso Sanz 2012, Claro Quintans 2010, Belinchón Sánchez 2006, Arce Jiménez, 2006).

To promote good practices in this regard the so-called plan of 10 points of UNHCR has been launched, under which Spain has carried out various activities that are part of the catalog of good practices, some related to sensitive entry systems protection. However, despite efforts in recent years, confusion persists especially among certain groups to identifying potential asylum seekers.

As regards to the applications in border and, in particular, those that have been processed but rejected by the Office of Asylum and Refuge (OAR), even with a favorable report from UNHCR, it is important to consider the role being played by the European Court of Human rights in order to guarantee the rights of applicants against a possible expulsion (Guild 2004, Staffans 2010). The OAR believes that human trafficking is not subsumed in the institution of asylum, even though the official interpreter of the 1951 Convention believes otherwise and therefore, although there are evidences, decides to reject the application and reassessment.

Another reason used by the OAR when refusing requests at the border, is the fact that applicants express their intention to seek international protection once it has been denied access to Spanish territory, when in fact this motivation has no legal basis. In this situation, it is essential to stress that the mentioned measure 110 of the First National Plan on Human Rights will continue to be developed. This is a matter to be reviewed in the Spanish practice in the light of the proposed interpretations from an international dimension which provides a more extensive protection of the rights of applicants.

The Minister of the Interior also may refuse applications for various reasons legally established for that purpose, including, where the examination of the application does not correspond to Spain according to the aforementioned Dublin Regulation and other international conventions ratified by Spain (Morgades Gil 2014). In this case, the Ombudsman found that sometimes applicants await the transfer to the General Headquarter for Immigration and Border. Until the transfer is done to the country responsible for addressing the application, the asylum seeker is in a situation of undesirable vulnerability. This contrasts with the protective spirit that should prevail in asylum procedures and the accountability of the State in the reception of asylum seekers. In these cases, the asylum application has not been addressed in depth yet, so that the applicant lacks protection in practice until the transfer is made, which means that in many cases these people can fall into marginality lacking aid, and can be arrested and placed in detention centers (Ilesic 2013). Therefore, as that institution pointed to the General Secretariat for Immigration and Emigration, we must insist on the need to consider these people must enter in a Refugee Reception Centre (CAR) until the transfer becomes effective. Spain, like Austria, Sweden, Estonia and Greece, does not have appeal with suspensive effect, which has entailed a condemnation by the ECtHR[3]. Nine other States, such as the Netherlands and Italy, provide for the suspensive effect on any of its courts, while other fourteen states, including Portugal, foresee the suspensive effect in all instances (Bay Larsen 2016).

[3] See *AC and Others v Spain*, Application no. 6528/11. The 30 applicants, all of Sahrawi origin, arrived in and lodged applications for international protection. They had reached Spain's Canary Islands on makeshift boats between January 2011 and August 2012, having fled their camp in the Western Sahara after it was forcibly dismantled by Moroccan police. The 30 applications were rejected, as were the applicants' subsequent requests to have them reconsidered. The applicants then applied for judicial review of the decisions to reject their applications, at the same time seeking a stay of execution of the orders for their deportation. After ordering the administrative authorities to provisionally suspend the applicants' removal, the *Audiencia Nacional* rejected the 30 applications for a stay of execution. Following requests by the applicants for interim measures, the European Court indicated to the Spanish Government under Rule 39 of the Rules of Court that the applicants should not be removed for the duration of the proceedings before it. The *Audiencia Nacional* rejected the applications for judicial review lodged by some of the applicants, who then appealed on points of law to the Supreme Court. By the date of its judgment, the Court had had no information as to the outcome of those appeals. The ECtHR found a violation of Article 13 of the Convention.

According to the Geneva Convention (arts 32 and 33.2) in the event that the individual who looms a threat to security or public order meets the requirements to be considered a refugee, a balancing can be made and, if the threat is very high, it can get to justify the return to the country of origin of the refugee. In contrast, such return is not possible when the asylum seeker meets the requirements to be covered by subsidiary protection, at least when there is a real risk that the asylum seeker may be subjected to torture or inhuman or degrading treatment (Morgades Gil 2015a). Those people are in a kind of legal limbo and should probably request the authorization or residence on humanitarian grounds referred to art. 37.b of the law. The protection of a certain idea of the security of the host society and the migration challenge (even if forced migration) continues to have an important role too.

As for the regulation of illegal entry attempts in Spain, the Constitutional Court in its judgment 17/2013, dated 31 January, analyzed the nature of the return, and established that return is not, in legal and technical sense, a sanction but a measure gubernatorial of immediate reaction to a disturbance of the legal order, articulated through a flexible and fast way. Despite flexibility and speed, the resolution adopting the return must also respect the guarantees provided by the general law on administrative procedure. The Constitutional Court refers specifically to the need for the decision issued in the return procedure to attend the principles of publicity of law, contradiction, hearing the person concerned and a reasoned decision. With regard to immigration procedures, the mentioned STC 17/2013 also established that there is no right to complete the processing of an administrative proceeding on foreigners which should conclude, in any case, with a decision on the merits.

On the other hand, Directive 2013/32/EU on procedures, provides that the main guarantees that must be taken into account in the development of the procedure in order to ensure effective access to the examination procedure, must include adequate training to officials who first come into contact with persons seeking international protection, in particular those carrying out surveillance of land or maritime borders or carrying out border checks. In addition, Member States should strive to identify applicants in need of special procedural guarantees (on grounds, among others, of age, gender, sexual orientation, gender identity, disability, serious illness, mental illness or consequences of torture, rape or other serious forms of psychological, physical or sexual violence).

It is urgent the modification of the operating criteria of the officials responsible for border control in order to deliver to the National Police people detected trying to enter illegally into the national territory in order to carry out the formalities established by the law of immigration and in order to inform immigrants about the possibility of requesting international protection.

The development of immigration provoked by political and economic causes has led to the emergence of new categories that fall outside of the Geneva Convention of 1951, such as refugees “in orbit”, de facto refugees, economics

refugees, those fleeing natural disasters, among others; this has led to an assimilation of the figures “asylum” and “refuge”.

Seven years later, the Spanish law on asylum still does not have a regulation that develops it, and does not incorporate the European directives on the second phase of the Common European Asylum System. Last September 2015, the European Commission announced its intention to initiate the infringement procedure for failure of Spain in the implementation of the Directive on requirements for asylum (2011/95/EU), having ended the deadline for transposition in December 2013. Likewise, the European Commission has directed letters of formal notice in relation to the transposition of the revised directive on asylum procedures (3013/32/EU) and of the Directive on reception conditions (2013/33/EU), the deadline for transposition expired on 20 July 2015.

Neither the Law 5/1984 which for the first time regulated the right to asylum enshrined in the Spanish Constitution nor its implementing regulation of 1985 established what should be the reception conditions or the aid provided for applicants during the processing of their asylum claim. After its reform in 1994 neither the law nor the new regulatory development of 1995 also established a reception system for asylum seekers. It is only in 2005 – and after amendment through the Regulation implementing the Law on Immigration – when Regulation on asylum introduces the possibility for applicants to benefit, provided that they suffer from a lack of financial resources, social services, educational and health provided by the competent authorities, within their means and budget availability. The possibility of establishing special or general programs to facilitate the integration of refugees, in case they have no means of subsistence is also envisaged. However, it is configured as a facultative aid and not as a subjective right of the applicant.

Before the vacuum in the law and the absence of regulation, over the years a system of hosting has been developed by rules of low rank emanating from the Ministry of Employment and Social Security, mainly through a Ministerial Order of 1989 developed through a resolution in 1998. These are, therefore, the body rules by which the reception system for asylum seekers in Spain is established (Monereo Pérez 2016).

The operation of the Office of Refugee presents deficiencies affecting the processing of files which affect the quality of the procedure. Some of them, such as delays in resolving applications for international protection and notification, disturb the processing of reception resources. The increase in applications for international protection causes major delays in the granting of appointments for that process and causes damage to the applicants. There are gaps in information on international protection; especially the lack of a gender perspective in the information provided and in a language not tailored to people with a low level of training. The number of applications for international protection filed by unaccompanied foreign minors in Spain is very low. A need has been raised to improve the training of staff serving in the child protection centers to provide adequate information.

Despite the provisions of the Dublin regulation, most applicants conceive Spain more like a transit country to the north of Europe as a place to settle. This reality basically responds to two intertwined aspects: adverse characteristics of the Spanish labor market and the lack of a model of long-term social and labor integration (Miñarro Yanini 2016).

One of the main obstacles is the legal access to the labour market (Gutiérrez-Solar Calvo 2003). Spain is one of the European countries in which the asylum application process is more intricate. The processing of applications is inefficient and causes delays in the decision process, with thousands of applications piling up in the Office of Attention to Refugees (OAR). A process that should last six months can get a year and a half, entailing the enlargement of the period of red card -the temporary accreditation granted to the asylum seekers- are granted so that they can start looking for work after six months from the admission to procedure of the application. This length has negative effects on the demand and supply of employment. On the one hand, employers feel that they are legitimised to offer temporary contracts until there is a final decision, and secondly, asylum seekers lose bargaining power, as well as the option to attest or enhance their studies through scholarships, for example.

For integration to be effective it is needed a long-term model. In Spain, the lack of regulation for the implementation of the law on the right of asylum and subsidiary protection (Law 12/2009), pending for seven years, is the biggest legal impediment to socio-economic integration of refugees and asylum seekers. In the absence of a model, the national integration system is basically funded through Royal Decrees (see e.g. Royal Decree 816/2015), which focuses on a service provider profile subject to circumstantial economic criteria rather than on an articulated system. The limited flexibility, with annual funding plans also creates mismatches between needs and resources. The system was designed for a small number of people.

On the other hand, the recognition of educational qualifications and professional skills is key to labour integration. While it is true that since the nineties Spain has moved towards the model of competency assessment, the Spanish labour market is still a certifying model, in which the process of recognition of qualifications and professional skills is dull and wearisome. In addition to the problems relating the lack of documentation due to the extreme conditions that the asylum process entails, temporary and economic costs should be added. Formal recognition of academic qualifications and validations, if it is resolved favorably, can last between two to four years depending on the particularities of each case.

Labour integration takes place locally, but in Spain the system is over-centralised. There is little synergy between the central and the regional/local administrations, although the autonomous communities have powers in areas that

directly affect the employment of refugees and asylum seekers (Donaire Villa, Moya Malapeira 2012).

In Spain the social protection of asylum seekers and refugees is carried out through joint direct participation of public resources and compacts with specialized organizations, as established by the National Plan for Social Inclusion 2013-2016. This protection has as central reference the stay in refugee reception centers (CAR) and the similar care establishments of NGOs that have signed an agreement. CARs are regulated by Order of January 13, 1989, developed by an Order of 13 January 1998. They are centers of temporary stay dependent on social services in which accommodation, food, social assistance and urgent psychological assistance are provided. These centers have therefore nature of comprehensive care centers of asylum seekers which are not limited to give them accommodation, but offer all necessary services during their stay and the necessary attention to their social integration, such as advice and information on validation titles, language teaching, information on the labour market, and professional contacts. To be welcomed in these centers it is necessary not to have infectious or mental illnesses that may disturb peaceful coexistence, to be asylum seeker and to lack of economic resources (art. 4 of the Order). Resolution 1998 also included as beneficiaries of these centers the refugees, although the rigorous application of the maximum period prescribed for the stay and because of the slowness of the procedure, it is rare the presence of refugees in the centers. Priority is given to stay in the CAR to couples with minor children, single parent families, individuals or families at high risk for socio-political reasons in their home countries, people with special psychosocial risks and those with non-communicable chronic diseases.

The length of stay, set to a maximum of six months (art. 5 of the Order), which for exceptional reasons can be extended, makes that measures provided for the reception are not applied correctly. The period of stay in effect coincides with that for work authorization (21st Additional Provision of Royal Decree 557/2011), so that there is a connection between both that suggests the legislator considers that after those six months, the asylum seeker or the refugees are now able to satisfy their material needs and that they are integrated. However, it is a period unrealistic because it does not take into account the length for the recognition of studies, the length of learning the language and especially something as obvious as the difficulty in finding a labour at 6 months of filing the application. It must be added that there are only 4 CAR belonging to the public network of migration, which is insufficient, so it has been necessary to use the Centers for Temporary Stay of Foreigners (CIE) although they do not have adequate infrastructure, provided that asylum seekers have the right to stay with their families (art. 4.2 of the Order), as these centers do not allow adequate family privacy (Martínez Escamilla 2010).

The same goes for financial aid, to which the applicants are only entitled during the six months following the application for asylum provided they remain

in the center. Besides, obtaining this aid it is dependent on the existence of sufficient credit (RD 865/2006) (Zambonino Pulito 2009, 402). For this reason the amount and types of aid are reviewed annually. The Decree of 2006 foresees the following kinds of aid: aid to cover personal first-need expenses, depending the amount on personal/family situation of the beneficiary, aid transport, aid for the purchase of clothing, health aid, aid for educational, training and leisure, aids to get administrative documentation; aids for interpretation and translation (Pardo Iranzo 2010), expenses following a death, aid to facilitate the autonomy of beneficiaries outside the center, aid for the subsistence of persons who began training courses.

Regarding professional training, the system established in collaborative agreements of public employment services with private employment agencies for the placement of unemployed people sets some requirements that favour large companies-agencies, leaving out of these programs most NGOs and associations to support vulnerable groups that are also employment agencies and are specialized in recruiting people with insertion difficulties such as applicants for international protection.

With regard to other services, such as education, health or social assistance, the system provided for foreign residents applies to asylum seekers (art.15.1 of RD 203/1995 for referral to arts. 9, 12 and 14 LO 4/2000 on the rights and freedoms of foreigners in Spain and their social integration). The enjoyment of these benefits and services are organised through registration, belonging to regional and local public services.

On the other hand, the art. 36 of Law 12/2009 establishes rights to social benefits attached to the refugee status, including the access to public employment services, education, healthcare, housing, protection against gender violence, and continuous and occupational training, among others (Alonso Moreda 2013). The implementation of these programs is organized by agreement with NGOs, leaving the concretion of funding subject to the availability of budgetary allocations.

Thus, from six months, the material support for integration becomes more uncertain, since it depends on the signing of compacts and protocols which, in turn, depend on budgetary availability. NGOs helping refugees apply comprehensive intervention plans – which also provide for material support – and that, even with variations, are generally divided into three phases, whose full length is 18 to 24 months. After the reception (which can last up to 9 months) these plans foresee an integration period (up to 11 months) followed by a third phase of eventual assistance.

The European Parliament resolution of 5th July 2016, dedicated to social inclusion and integration of refugees in the labour market, distinguishes, for legal purposes, those who have refugee status, asylum seekers, and those who are beneficiaries of subsidiary protection, and propose that integration policies to be put in place must be adapted and must take into consideration the specific needs of each group. The resolution notes that the possible integration into the

labour market cannot abstract from the reality of the labour market in the host country and the employment situation of insecurity and/or unemployment in which a part of the population can be, such as young people and long-term unemployed, so it is necessary to achieve a proper balance between supply and demand for labour, which for foreigners depends previously on the recognition of their training and their professional qualifications to enable them regularly access to market as well as it depends on training policies that would allow their adaptation, where appropriate, to the productive specificities of each territory, not to mention the high importance of knowledge of the language or languages of the host country.

The integration, will be only possible, as the European Parliament reminds, if the channels of legal safe migration are improved, and effectively implemented (unfortunately, that is not the reality) a policy based on solidarity and the effective sharing of responsibility between the Member States. Given the existing regulatory differences between refugees and those who migrate for economic reasons, the European Parliament advocates for establishing a clear distinction between the two, not to reduce rights of each group, but for the purposes of implementing the various European and international policies which pay due attention to the needs of each group. However these own rules should not mean in any case the creation of labour markets differentiated for refugees, or lower wages than those of the native population (proposals that in contrast are emerging in some countries). It should be noted that the integration of refugees may pose specific needs that are different from that of economic migrants and maybe more complex, by traumas that they can drag and their initial frequent complete ignorance of the country of destination.

The European Parliament has called for the creation of a "truly uniform" common European asylum system and legal migration policy in the Union, «comprehensive and sustainable legal migration policy in the EU that meets labour market demands in terms of skills, in which social inclusion and active integration policies play a central role global».

To facilitate the integration of third country nationals in labour markets of host countries it is necessary not only to implement policies that facilitate regular access to the labour market, but also to identify their skills, so it is necessary, according to the European Commission, a mapping of the skills profile of third-country nationals already living in the EU, as stated in a Communication issued on June 10th, and entitled "An Agenda for new skills and jobs: A European contribution towards full employment". Concrete measures announced by the Commission are as follows: a) to launch a "Skills Profile Tool for Third Country Nationals". The tool will assist services in receiving and host countries to identify and document skills, qualifications and experience of newly-arrived Third Country Nationals; b) to work with national authorities to support recognition of migrants' skills and qualifications, including refugees', support the training of staff in reception facilities to speed up recognition procedures, and promote the

sharing of information and best practices on understanding and recognition of skills and qualifications; c) to make available online language learning for newly arrived migrants, including refugees, through Erasmus+ online linguistic support (100.000 licences for online language courses will be made available to refugees over three years).

6. Concluding Remarks

Under the Dublin Regulation, Spain is in a key position for being a Southern European border, and therefore, the gateway from the North African route. Given the particular and enhanced protection of the right of asylum, it would be logical that the recognition procedure was simple and more flexible than the procedure for the regularization of economic migration. However, in Spain the procedure is underdeveloped and very slow (Morgades Gil 2015c).

Spain is a country that has traditionally accepted few refugees, arguing to have a large flow of economic migration. Since the adoption of the first Law on Asylum in 1984 Spain has given asylum to 180,500 people, representing 0.95% of asylum seekers in the EU.

In the current wave of refugees, which occurred also when many spoke of economic recovery in macroeconomic indicators and the exit of the crisis, some media have put the spotlight on the economic implications-whether positive or negative that the arrival of these flows of people may have. However, as it has been revealed repeatedly in some of the States with the greatest tradition of welcoming refugees, it is not the main challenge, but to establish effective mechanisms of social integration, since it determines either a failure or an opportunity.

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Conceptualising the Irish Immigration System for Third-Country Migrants

Charles O'Sullivan*

1. Ireland in Context

Ireland has always maintained a difficult relationship with migration. For most of its history, it has been a country of emigrants with a declining population (Sinnott 1995, Figure 1.1). This outward migration was so significant «that the electorate of the early and mid-1960s was pronouncedly middle aged» (Sinnott 1995, 5) and among those that remained roughly 30-40% were self-employed or agricultural employers and over 50% were involved in agriculture in some manner (Coakley, Gallagher 2005, figure 2.1). Less than 10% of the population represented a well-educated, upper middle-class strata (Sinnott 1995, figure 1.4). Secularisation was equally low, with data from the early 1970s demonstrating that weekly mass attendance was still above 90% (Coakley and Gallagher 2005, figure 2.2). The resulting society was one which was largely homogenous, despite the existence of indigenous minority groups such as the Travelling Community (Doyle 2004, 20) with whom the State has had an uneasy relationship based on their failure to recognise their distinct ethnic, social and cultural values.

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Scholars have long argued that as a result of this isolation and lack of social and economic development at a national level historically, Ireland has had great difficulty in reconstituting itself as a society which celebrates multiculturalism and diversity (MacEinri 2005; Fanning 2002; Fanning 2009).

In principle, Ireland would also have been forced to reexamine its own identity and views on and immigration with its accession, along with the United Kingdom, to what is now the European Union (EU) in 1973. The free movement of persons remains a fundamental cornerstone of EU law through Articles 18-21 (on the rights of citizens) and 45 (on the rights of workers) of the Treaty on the Functioning of the European Union (TFEU). Yet even in 2002, almost 30 years after joining the EU, Ireland's largest group of immigrants came from the United Kingdom and exceeded the next largest group of non-EU nationals by a factor of 10 (Gilmartin 2013). French and German citizens equally represented 15% of this total, demonstrating that even among EU nationals (Gilmartin 2013), the nature of those arriving in Ireland remained largely homogenous. Similarly, despite no executive since its accession to the Union demonstrating a marked degree of "euroskepticism" or negative attitudes towards further integration, the Irish State and its representatives have never shown a strong propensity to engage at an EU level. Instead, the government has constructed a passive relationship based on what one former Minister for Justice considered to be one of mutual self-interest[1]. The result is that the State has been happy to reap the benefits of EU membership so long as the costs do not outweigh them.

What seems instead to have led to a re-evaluation of Ireland's position on immigration was its first continuous influx of refugees during the mid 1990s (Lentin 2007; White and Gilmartin 2008). This in turn led the State to legislatively implement the relevant United Nations Convention (1951 and 1967 respectively) for the first time through the Refugee Act, 1996, however within a short period of time the executive were arguing that subsequent legislation focused on the State's control of third-country migration flows into Ireland was necessary in light of the "new realities" of immigration within Ireland (O'Donoghue 1999). This can be seen in the number of legislative provisions which focus on issues of control, including trafficking[2], and those focused on the liability of carriers[3] or deportation and detention[4]. This has also fed back into the State's relationship with the EU, and its continually evolving competence to legislate in the fields of third-county immigration and asylum. These competences are now formally established within Articles 107-109 TFEU, and allow the Union to adopt legislative

[1] Michael McDowell, 18th June 2001, quoted in the *Irish Times*, 19th June 2001.

[2] Child Trafficking and Pornography Act, 1998; Illegal Immigrants (Trafficking) Act, 2000; Criminal Law (Human Trafficking) Act, 2008.

[3] Immigration Act, 2003, Section 2.

[4] Immigration Act, 2003, Section 5 as amended by the Immigration Act, 2004, Section 16(8); Section 34 of the Civil Law (Miscellaneous Provisions) Act, 2011 amending Section 11 of the Immigration Act, 2004.

measures which will lay down common standards for the entry of such persons, as well as control measures against unlawful migration and border crossings. Both Ireland and the United Kingdom have at their discretion the ability to "opt-out" of any legislation in this field based on their potential to negatively impact on the CTA operating between both States, although it remains possible for both States to do so for ancillary reasons.

The purpose of this contribution is to provide an overview of how the Irish legal system governs third-country migration. It is anchored on a discussion of the two primary characteristics of the Irish immigration system: ministerial discretion and as the propensity to operate large sections of it on an almost purely administrative basis. This inevitably leads to circumstances within which a migrant's rights and personal welfare are not the primary focus of the law in this area. In order to highlight these points, the contribution compares the Irish regime for long-term residence to the Long-Term Residence Directives[5], and the Critical Skills Employment Permit to that of the Blue Card Directive[6].

The contribution will be structured as follows. It will firstly discuss the relationship between Ireland and the EU with an particular emphasis placed on the area of third-country migration and on the opt-outs created by virtue of Ireland's Common Travel Area with the United Kingdom. Then it will briefly look at the general mechanics of the Immigration Acts and the stamp system for residence before exploring the right to long-term residence at both an Irish and Union level. Section 4 will engage in a cursory examination of the employment permit system for third-country labour migrants and how the Irish and EU approaches differ in relation to highly-skilled workers. Finally, it will offer some concluding remarks which suggest that the relationship between Irish and EU law, and of Ireland's decision to opt-out of the majority of EU legislation in the field of migration may merely be a means of ensuring that these characteristics are left unchanged and to the benefit of the executive.

2. Conceptualising Irish Immigration Law in Light of EU Membership

In light of the gradual expansion of the Union's competences within the areas of immigration and asylum, both Ireland and the United Kingdom sought remove themselves from the scope of the legislation enacted under these provisions. This discretion to 'opt-out' from the application of legislation enacted under Articles 77-79 TFEU as contained within Protocol 21 TFEU[7] allows both States to

[5] Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[6] Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly-qualified employment [2009] OJ L155/17. Ireland and the United Kingdom do not participate.

[7] See also Protocol on the Application of Certain Aspects of Article 26 TFEU, art. 3.

impose restrictions on internal migration from other Member States[8] where it relates solely to the common border/travel area[9], and to choose which new legislative acts to adopt under each of these Articles. Article 3(1) of Protocol 21 allows Ireland or the United Kingdom to notify the Council within three months of the proposal of a new legislative act that it wishes to take part in it, with the result that it can choose where and to what it extent it takes part within the overall EU legal frameworks relating to immigration and asylum matters. Denmark operates a similar opt-out in these material fields[10], but it is also a signatory State to the Schengen Convention et al., meaning that its ability to limit internal movement is further restricted again.

The justification for these opt-outs is generally tied to the operation of the Common Travel Area in place between Ireland and the United Kingdom. Although it exceeds the material scope of this chapter to examine it fully, the CTA facilitates a right to travel freely between the United Kingdom and the Republic of Ireland without a passport or onerous restrictions for citizens of both States. It was adopted in 1922 when Ireland became a dominion of the UK, and possesses no constitutional or formal legal basis. Instead it operates at an administrative level (Ryan 2001), and allows both States to navigate the complex social and political realities surrounding Northern Ireland in particular. In many respects the CTA operates in a similar manner to the Schengen Area[11], which allows for borderless travel between the majority of EU Member States as well as certain additional signatory States. Due to the politically sensitive nature of Northern Ireland and the common border operating between both it and the Republic of Ireland, The Irish State sought an exemption to the Schengen rules based on its supposed threat to the sanctity of the CTA[12]. The UK by comparison, expressed concerns over the removal of border checks and its impact on illegal migration[13], with Ireland countering that while it did not necessarily agree with this approach[14], it was politically necessary to ensure parity with the UK position and to seek an

[8] *Ibid*., art. 1.

[9] *Ibid*., art. 2.

[10] Protocol on the Position of Denmark, arts 1 and 2.

[11] Decision 1999/436/EC determining the legal basis for each of the provision or decisions which constitute the Schengen Acquis [1999] OJ L 176/19, Article 1; Schengen Implementing Convention, 1990, [2000] OJ L239,19; Regulation (EC) No 562/2006 establishing a community code on the rules regulating the movement of persons across borders (Schengen Border Code), [2006] OJ L105/1.

[12] Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland, Treaty of Amsterdam Amending the Treaty soon European Union, The Treaties Establishing the European Communities and Certain Related Acts.

[13] Parliamentary Debates (Hansard). United Kingdom: House of Commons. 12 December 1996. col. 433–434.

[14] Minister for Justice, Nora Owen, Dáil Debates volume 450 column 1171 (14 March 1995).

opt-out from Schengen[15]. This was subsequently incorporated into the Treaty of Amsterdam in three separate protocols, which allowed the UK and Ireland to opt-in to certain instruments underpinning the Schengen system with the consent of the other Schengen Area Members.

However, this opt-out cannot be entirely divorced from Ireland's own engagement with the EU as a set of supranational institutions and as a distinct legal order. Membership of the EU was at first seen as integral to the economic development of the Irish State, and its benefits were primarily couched in these terms. It also had the additional benefit that it decreased Ireland's reliance on trade with the United Kingdom, and consequently their political reliance on them (Laffan and O'Donnell 1999, 156). By the turn of this century, there were suggestions that the relationship between Ireland and the EU had matured into something more complex and sceptical (Gilland 1999). As the former Minister for Justice Michael McDowell argued, this change would be explicitly based on enlightened self-interest, necessitating a periodic cost-benefit analysis based on the economic costs of further legal and constitutional changes in light of the ongoing benefits of Union membership[16]. This increasingly acknowledged skepticism had little to do with the Union's policies or the ideological differences that might exist between Ireland and the EU: Ireland has primarily been characterised as strongly centrist in its outlook, with no strong ideological divides or agendas existing at a governmental and societal level. Instead, it was an open acknowledgement of the "conditional" nature of Ireland's acceptance of further integration.

The Irish government had to some degree always expressed a lack of interest in joining the burgeoning Common Foreign and Security Policy being developed by the EU, based partly on Ireland's status as a neutral State (Laffan 2001, 8). This meant that Ireland generally sought to ensure that the Common Foreign and Security Policy, and any area dealing with the external sphere did not impinge on that neutrality, whilst simultaneously taking a more active role as a sovereign nation in diplomatic affairs (Tontra 2002, 43). That this was soon followed by the opt-out from the application of the Schengen Area, and the differing reasons put forward by both Ireland and the UK for doing so would not be damaging by itself. However, there have been multiple occasions since this time that both Ireland and the UK have acted in ways that could threaten the CTA themselves rather willingly, or would at the very least call the sanctity of it into question.

Next, at different points in time Ireland and the UK have expressed an interest in taking part, at least partially, in the Schengen Area. In 1999, a short time after the adoption of the Treaty of Amsterdam, the UK House of Lords Select Committee argued that full participation in respect of border controls, policy co-operation, and policy relating to immigration, asylum and visas was in the best

[15] Minister for Justice, John O'Donoghue, Dáil Debates volume 501 column 1506 (9 March 1999).

[16] Michael McDowell, 18th June 2001, quoted in the *Irish Times*, 19th June 2001.

interests of the United Kingdom[17], and they chose to take part in the Schengen Acquis governing other headings within the Schengen Area[18]. Ireland also sought to take part in the Acquis, but did so three years after the United Kingdom, and has yet to have this formally recognised[19]. More recently, Ireland chose to remove the barriers to free movement for citizens from the most recent EU accession states prior to the United Kingdom taking the same initiative (Shatter 2013).

That both countries have effectively chosen to integrate these provisions asymmetrically demonstrates the limited impact Schengen would have on the CTA, and that there are other interests involved in choosing what measures to enact, and which to ignore. Instead, it goes towards another form of enlightened self-interest, where it is in the best interest of both to be able to choose where it participates rather than being uniformly bound by it. The net consequences of this approach is that Ireland has been to some extent able to use the CTA as reason for not participating in an area of EU law for which it was already somewhat unwilling or uninterested in participating. It could then initiate legislation at a national level within this field, that of third-country migration, which would gain it political capital nationally and ensure that any resulting system remained firmly within their control to the detriment of the migrants in question.

3. The Immigration Acts and Stamp System in Brief

The conditions governing the entry of persons from outside the EU/EEA are primarily established within the Immigration Acts.

For example, Section 17 of the Immigration Act, 2004 grants the Minister for Justice the power to require persons from specific countries to obtain a visa prior to landing in the State. It stipulates that «the Minister may, for the purposes of ensuring the integrity of the immigration system, the maintenance of national security, public order or public health or the orderly regulation of the labour market … by order declare» that specific nationalities hold a valid visa on arrival in the State, a transit visa when passing through Ireland, as well as granting the Minister the power to issue new orders or revoke or amend this section to re-

[17] European Communities Select Committee of the House of Lords (2 March 1999), Part 4: Opinion of the Committee, Schengen and the United Kingdom's Border Controls, retrieved 21 February 2010, «We believe that in the three major areas of Schengen-border controls, police co-operation (SIS) and visa/asylum/immigration policy-there is a strong case, in the interests of the United Kingdom and its people, for full United Kingdom participation».

[18] Council Decision (2000/365/EC) of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, OJ L 131, 1 June 2000, 43; Council Decision (2004/926/EC) of 22 December 2004 on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland (OJ L 395, 31 December 2004, 70.

[19] Council Decision (2002/192/EC) of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis, OJ L 64, 7 March 2002, 20.

flect changes necessary to pursue these objectives. Such orders primarily tend to list the countries for whom its nationals must possess a visa, or who are not required under Irish law and have had that requirement waived[20]. The Acts also govern the granting of permission to land[21] for all those who do not intend to claim asylum[22], the removal from the State for persons refused this permission[23], the execution of a deportation order[24], and orders excluding a person from entering the State[25].

From a more practical perspective, any person, even EU citizens, must present themselves at the Irish border along with valid travel documentation and a passport to the immigration official on duty[26]. For third-country nationals, the immigration official may grant them "leave to land", otherwise known as leave to enter the State, where they deem the requirements for this to have been met[27]. For EU citizens, due to the rights existing under the Treaties, this constitutes a formal acknowledgement of their legal status due primarily to Ireland's opt-out out from the Schengen Area outlined above. Their leave to land in or enter the State is implicit outside of a very narrow set of exceptions. Immigration officials do however possess a wider degree of discretion to refuse entry to third-country nationals based on their delegated powers, although this cannot excuse clear or spurious errors in fact or in law[28]. Even where a third-country national possesses a valid visa, the immigration official still retains the power to refuse entry to the State[29], and it must be noted that the process for granting a visa is equally subject to a high degree of discretion and a lack of formality[30].

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20 See the Immigration Act 2004 (Visas) Order 2014, S.I. No. 473 of 2014 and Immigration Act 2004 (Visas) (Amendment) Order 2015, S.I. No. 175 of 2015 for examples of this. In addition, there are also "short-stay" visas for visits lasting less than three months detailed here: http://www.inis.gov.ie/en/INIS/Pages/short%20stay%20visas%20(less%20than%203%20months).

21 Immigration Act, 2004, Section 4.

22 Refugees Act, 1996, Section 9.

23 Immigration Act, 2003, Section 5 (as amended by the Immigration Act, 2004, Section 16(8)).

24 Immigration Act, 1999, Section 3.

25 Immigration Act, 1999, Section 4.

26 This is a requirement of Section 34 of the Civil Law (Miscellaneous Provisions) Act 2011 which amends Section 11 of the Immigration Act 2004 (so long as they are not coming as a citizen of the Irish State, Great Britain or Northern Ireland when it is not a requirement – Section 11(4)).

27 Immigration Act, 2004, Section 4.

28 *Nantharatnam v Minister for Justice*, Irish Times, October 4, 1983 (brought up in Hogan & White (eds), *Kelly: The Irish Constitution* (3rd ed) (Butterworths, 1994), 872); *State (Kugan and Elamkumaran) v The Station Sergeant, Fitzgibbon Street Garda Station* [1985] IR 658; High Court, July 1, 1985; *Gulyas and Borchardt v Minister for Justice, Equality and Law Reform* [2001] 3 IR 216; High Court, June 25, 2001.

29 *VI v Minister for Justice, Equality and Law Reform* [2007] 4 I.R. 42.

30 *T.A.R. and I.H. v Minister for Justice and Equality* [2014] IEHC 385; High Court, 30 July, 2014: it is only necessary that where a visa is refused the grounds for that refusal are given; *Ezenwaka &*

Once a third-country national has entered the State, it is necessary for them to register with Garda National Immigration Bureau (GNIB) or their nearest Garda station and present themselves to the Immigration Officer within that station[31]. They will be issued with a Certificate of Registration, which takes the form of a GNIB card detailing their immigration status and pay the required fee[32]. Persons must only register when they intend to remain in the state for a period exceeding 3 months in duration. There are broadly speaking eight stamps in total that can be given to third-country nationals by Immigration Officer representing the GNIB and along with their GNIB registration card, constitutes leave to remain within the State. These include[33]: Stamp 0 (Temporary and Limited Permission)[34]; Stamp 1 (permitted to remain on conditions that the holder does not enter employment unless the employer has obtained a permit, does not engage in any business or profession without the permission of the Minister for Justice and Equality and does not remain later than a specified date); Stamp 1A (permitted to remain in Ireland for the purpose of full time training with a named body until a specified date – Other employment is not allowed); Stamp 2 (permitted to remain in Ireland to pursue a course of studies on condition that they do not engage in any business or profession other than casual employment (defined as 20 hours per week during school term and up to 40 hours per week during school holidays) and does not remain later than a specified date); Stamp 2A (permitted to remain in Ireland to pursue a course of studies on condition that they does

Anor v MJELR [2011] IEHC 328, a Nigerian man was granted a visa in error and forced to return home. The Court only required that a fresh application be considered by the minister; *RMR & Anor v Minister for Justice, Equality and Law Reform* [2009] IEHC 279: «It is clear that the Minister is under no legal obligation to grant a visa – the grant or refusal of visas is entirely within his discretion and it is for the visa applicant to convince the Minister that he or she should be granted a visa. Government policy determines which foreign nationals require visas to visit or transit the State and whether they can work in the State. The inherent executive power and responsibility of the Government to formulate immigration policy is supplemented by statutory provisions including the Aliens Act 1935 and the Immigration Acts 1999, 2003 and 2004. There is at present no statutory framework for issuing visas» [para. 25].

[31] The Immigration Act, 2004, Section 9 creates the legal obligation to register, while Schedule 2, Section 9 sets out the documentation required for this process.

[32] Persons exempt from paying the fee: Convention Refugees; Persons who have been reunified with such refugees under section 18 of the Refugee Act 1996; Persons who are under 18 years of age at the time of registration; Spouses, widows and widowers of Irish citizens; Civil partners or surviving civil partners within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 of Irish citizens; Spouses and Dependants of EU nationals who receive a residence permit under EU Directive 38/04; Programme Refugees, as defined by section 24 of the Refugee Act, 1996.

[33] Irish Naturalisation and Immigration Services, Stamps – Main Immigration http://www.inis.gov.ie/en/INIS/Pages/Stamps.

[34] Irish Naturalisation and Immigration Services, Temporary and Limited Permission as indicated by Stamp 0, http://www.inis.gov.ie/en/INIS/Stamp%200.pdf/Files/Stamp%200.pdf. Holder must receive no State benefits other than emergency medical assistance. Depending on the duration of their stay, they may require private medical insurance. Immigration status is sought in the normal way – there is no specific Stamp 0 application/approval process.

not enter employment, do not engage in any business or profession); Stamp 3 (permitted to remain in Ireland on conditions that they not enter employment, does not engage in any business or profession and does not remain later than a specified date); Stamp 4 (permitted to remain in Ireland until a specified date); Stamp 5 (Without Condition As To Time (WCATT))[35]; and Stamp 6 (Dual Citizens) – Without Condition Endorsement[36]. Those with Stamp 0, Stamp 2 and Stamp 2A are specifically barred from making recourse to State funds, meaning that they cannot draw welfare payments of any kind unless otherwise specifically provided for. Persons falling under Stamp 3 are also limited in what benefits they might access due to the fact that they are barred from engaging in employment. This means that they cannot accrue contributory benefits, and will also be limited by the Habitual Residence Condition with regard to the means-tested social assistance benefits they might access.

This residency stamp system operates on an administrative basis and falls within the discretion extended to the Minister, primarily by virtue of Section 4(5) of the 2004 Immigration Act. Section 4(7) of the same Act allows the Minister or their representative to renew or vary their permission to remain, but it does not emphasise at any point the rights of the migrant in question. The only obligation on the Minister or their delegated Immigration Officer is to consider the circumstances of the particular case before them (Section 4(10)). Section 9 then places an obligation on the migrant to register. It can therefore be considered a quite clear example of where the wide discretion granted to the executive is utilised to create an equally broad framework governing the relationship between the State and third-country migrants, with the emphasis unequivocally being placed on the rights of immigration officials.

3.1. Long-term Residence in Ireland and in EU law

The Immigrant Council of Ireland has highlighted that at present there is no legislation which establishes how long-term residence is granted, renewed, or revoked (Immigrant Council of Ireland 2001). Until 2005, there was in fact no system for granting anything other than short-term, temporary immigration statuses for third-country migrants unless they were considered to qualify for Stamp 5. This status presently requires that an individual has completed 8 years of lawful residence, having continually maintained a valid employment permit and having entered under an ordinary Stamp 1, a Stamp 4, where the individual has not acted as a temporary worker, or a Stamp 3 where the individual is not

[35] Irish Naturalisation and Immigration Services, Without Condition As To Time Endorsements, http://www.inis.gov.ie/en/INIS/Pages/Without__Condition__As__To__Time__Endorsements.

[36] Irish Naturalisation and Immigration Services, Without Condition Endorsement (Stamp 6), http://www.inis.gov.ie/en/INIS/Pages/Without__Condition__Endorsement%20(Stamp%2 6).

linked to temporary employment. This remains an exceedingly high bar, particularly in light of how little information is given in relation to periods spent outside of the State during this time and how they might impact on this 8 years term. In 2005, it was made possible for third-country migrants to acquire long-term residence subject to certain administrative conditions being met. As with the similar status granted under Stamp 5, such persons need to have fulfilled 5 years (60 months) of continuous residence under either Stamp 1 or 4. Any period spent outside of the State has historically not considered towards this period (Immigrant Council of Ireland 2001, 16), and those who leave on a regular basis due to their ties in other countries will be most heavily penalised. Those who are successful will be granted a Stamp 4 that recognises their long-term residency.

The rationale for maintaining two different statuses with a difference of three years between their respective residency requirements is unknown. Equally unknown is what rights accrue to such persons by virtue of their long-term residence status due to the lack of information put forward by INIS. It is reasonable to assume that they have a greater right to remain than those who have shortened periods, but this has not been made overt or explicit. From a statutory perspective, there is nothing to suggest that they are less likely to deported or have their status revoked on the same basis as those with other lesser residency periods. One example put forward by the Immigration Council of Ireland suggests that such persons can have their status revoked without a reason being given and be placed in a more precarious position once again (Immigrant Council of Ireland 2001, 19). Similarly, these statuses must be renewed whenever the holder obtains a new passport, which means there is an equal lack of clarity in what is required to maintain their status.

The High Court has confirmed the lack of a right to long-term residence even where a third-country national had complied with the necessary residency period and continuous employment. In Muhammed Saleem v Minister for Justice, Equality and Law Reform[37], the applicant had fulfilled the required residency period of 5 years necessary to apply for long-term residency and applied for the same. After 14/15 months of waiting, he brought forward judicial review proceedings regarding the delay in releasing a decision on his residency status. In the same month he was made redundant and became an undocumented migrant. When the Minister finally issued his decision on the matter, the application was refused on the basis that the applicant had not kept his permission to remain in the State up to date. The Court found against the applicant on the basis that there is no right to long-term residency and it is at the Minister's discretion. Lawful residence in the State and employment is always a necessary condition of being granted residency status also. The Court finally found that it was impossible to call the delay unreasonable.

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[37] *Muhammed Saleem v Minister for Justice, Equality and Law Reform*, judgement of Mr Justice Cooke, 2nd June 2011.

The Minister retains an almost absolute discretion to refuse residence and naturalisation, with the only exceptions to this being where the process is unduly long, or where the refusal is not accompanied by a reason for the same[38]. In such instances, the length must exceed what is considered to be patently unreasonable, and a reason must be given though it need not be detailed – it must simply provide some basis on which to challenge the decision or to allow for an amended application to be resubmitted having taken the grounds for refusal into consideration. The protections granted by even the Court in ensuring that the Minister does not misuse their power is therefore very limited, and consequently the level of procedural and rights-based certainty is lacking in almost every context where long-term residence is concerned. This does however ensure that the executive has the largest discretion possible in relation to granting and revoking it.

Under EU law, long-term residence is regulated by the Long-Term Residence (LTR) Directives. They allow third-country migrants legally residing in a host Member State a far greater level of certainty and protection than the parallel Irish system. These are Directives 2011/98/EU[39] and 2003/109 EC (amended by Directive 2011/51/EU)[40]. A Freedom of Information request was submitted in order to discover why these Directives were not adopted in Ireland, but this request was still pending at the time of publication.

Directive 2011/98 establishes that its primary material scope includes those from outside the Union as being tied to economic activity by linking residence to work and then by establishing that any resulting rights arise from being a worker. Articles 3.b and 3.c. of Directive 2011/98/EU reiterate that the essential precondition for gaining the right to long-term residence is lawful residence, but also provides for admission into a host Member State to not be directly for the purposes of work, potentially expanding this scope even further. The likely intention of art. 3 is however not to disadvantage family members of working TCNs, who although not generating economic activity themselves, are symbiotically tied to the worker as part of a familial unit. Refugees and those beneficiaries of ancillary/subsidiary forms of humanitarian protection may now also benefit from the LTR Directive since 2011 due to a series of legislative changes[41].

[38] *K M AND D G v The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2007] IEHC 234; [2007] 321 JR; and *Mallak v Minister for Justice Equality & Law Reform* [2012] IESC 59.

[39] Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/1 – Ireland and the United Kingdom do not participate.

[40] Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44 amended by Directive 2011/51/EU [2011] OJ L132/1 – Ireland, UK do not participate.

[41] Council of the European Union, “Proposal for a Directive of the European Parliament and of the Council amending Council Directive 2003/109/EC to extend its scope to benefi-

The procedures and conditions as laid down in the Directives maintain a degree of flexibility, whilst also providing for a far greater degree of certainty than those who must rely solely on the Irish system of residency. Art. 4.1 states that residence within a state must be habitual but not necessarily continuous for a period of 5 years. It further allows for statuses to create a cumulative right to long-term residence (such as a TCN student becoming a researcher and then gaining a work permit, all of which amount to 5 years in total; this is further supported by Directive 2003/109, art. 3.2). This is significant as it means that an individual can leave for short periods without risking the loss of their accrued time, and also facilitates an individual who transitions from one status to another throughout their life to consider each of these statuses cumulatively. The Irish system by comparison, appears to penalise those who create short gaps in their registration periods. It also does not provide for statuses that fall outside of those governed by the limited number of recognised stamps to be used in accruing the necessary 5-8 period depending on which long-term residence status is being applied for.

The LTR Directives also create statutory rights to information, equal treatment, and procedural guarantees (respectively arts 9, 12, and 8) that are absent from the Irish system due it being almost entirely administrative. Similarly, there are provisions dealing specifically with the withdrawal and loss of status and protections against expulsion (arts 9 and 12) which would render situations like those put forward by the Immigration Council of Ireland largely moot.

Thus, while the EU system as governed by the LTR Directives may be imperfect, it easily surpasses that which is in place in Ireland. The Irish system lacks almost any concrete statutory basis which consider the best interests of the migrant in question, and potentially renders them more precarious than they would otherwise be if Ireland had chosen to adopt EU law in this area.

4. Third Country Labour Migration and the Employment Permit System

Prior to 2003, work permits were employer-led, and operated almost entirely on a non-legal, administrative basis, with minimal intervention from the Irish State. This meant that between 2000 and 2004, almost 100,000 work permits and visas were granted across multiple sectors, and often encompassing positions of employment with low or marginal levels of remuneration. Work permits bound third-country labour migrants to their employer for a term of one year. There was little or no policy on how this should system overall should operate (Ruhs 2005, 31).

ciaries of international protection" 8427/11 ADD1 REV1 and also European Parliament and Council, "Directive of the European Parliament and of the Council amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection" PE-CONS 66/10 leading to the new Recast Directive.

This change within the system took place at roughly the same time as the 27th Amendment to the Constitution, and was arguably facilitated by a growth in anti-immigrant sentiment within Eurobarometer polls. This amendment diluted birthright citizenship for children born in Ireland who did not possess at least one Irish citizen as a parent at the time of their birth. The executive at the time argued that this constitutional change was necessary to ensure that persons, particularly asylum seekers, did not come to Ireland in order to acquire citizenship through their Irish-born children while their claim was being assessed. This issue had however already been dealt with judicially, rendering the referendum and amendment unnecessary (Mulally 2004). Regardless, polls highlighted a growing distrust of such persons due to the belief that immigrants were attracted to Ireland due to its increased economic prosperity and many would take advantage of this in order to extract more generous social benefits, often referred to as the "benefit tourist" (Crepaz 2007). The executive merely seized upon this negative sentiment to instigate a series of reforms which centralised their authority while tackling these perceived threats.

With regards to the adoption of the Employment Permits Act, 2003 in particular, it formalised the procedure for granting work permits by introducing a State-controlled system that attempted to regulate the issuance of the same. This applied to four broad categories of permits: work visas; work permits; intra-company transfers; as well as trainees. There were also separate permits issued for third-country nationals attempting to establish a business within Ireland. The 2003 Act has been amended substantively twice since that time[42]. Additional Acts and legal instruments, guidelines, etc., have been implemented, but these generally refer back to and support the original. Section 2 governs the employment of non-nationals, and specifically outlines that a permit is required to enter employment within the State, carry out work as a contractor within the state, or any arrangement with similar effect[43]. Employment permits are defined legislatively as being granted by the relevant Minister[44], although in reality this is the purview of the Department of Jobs, Enterprise and Innovation on her/his behalf and with their consent[45]. This provision is key to the functioning of the system as a whole, as it facilitates the use of a Minister's near absolute discretion in issuing, refusing and administering the process. The Acts provide a sizeable definition of the addressee or person to whom these pieces of legislation apply,

[42] Number 16 of 2006, Employment Permits Act, 2006 and Number 26 of 2014, Employment Permits (Amendment Act, 2014. Although there was also Number 21 of 2013, European Union (Accession of the Republic of Croatia) (Access to the Labour Market) Act, 2013 which dealt specifically with the accession of Croatia to the EU and allowing access to the labour market for its citizens.

[43] Employment Permits Act, 2003 (as amended by Employment Permits Act, 2006, Section 2, 2(1).

[44] Employment Permits Act, 2006, Section 8.

[45] This delegation of functions is dealt with in Section 36 of the 2006 Act.

with Section 3 defining the exclusionary zone for the Acts' application i.e. the nationals of certain states to whom it does not apply[46]. The broader functioning of the permit system is however left to other sections, with Section 4, 7, 16 and 20 of the 2006 Act outlining how to apply for a permit, the information to be provided, as well as revocation and renewal procedures respectively. These provisions can be quite general in their application and effect. For example, Section 12 allows the Minister to refuse the granting of an employment permit where it is not in the public interest to do so, or where they deem the qualifications of the candidate to be incompatible with or unnecessary for the employment position they have been offered. It is unlikely that these provisions would be applied so broadly in reality, yet the lack of clear legislative definitions for these concepts within the Act remains somewhat troubling. The latter ground for refusal in particular allows the Minister to supersede the employer as an adequate judge of the candidate's suitability. Equally, the Minister may refuse the employment permit where the fee has simply not been included with the application.

Whilst it is a procedural requirement that failed applicants and those who have had their permits revoked may appeal against any such decision being rendered by the relevant Department, it must be borne in mind that the Acts overall do not place an emphasis on the rights of the applicants. The procedural safeguards that do exist within the Acts are proposed in terms of the Minister and their representatives' power to act. Similarly, neither the Employment Permit Act of 2003 or 2006 contain any sections which relate the social, civil and political rights that will accrue to successful candidates, again reinforcing that the Acts are focused on the executive's control of the process, as distinct from the State's obligation towards such persons. These may exist elsewhere in additional legislation, but the diffusion of these rights points to the potential lack of a centralised structure and clarity within the employment permit system by design.

The 2014 Employment Permits Act did however see a marked expansion in the variety of employment permits available. Almost none of these implement EU law pertaining to third-country migration, as the Irish executive has decided to almost uniformly opt-out out of any directives in this area. The only directive Ireland is currently bound by is the Researchers' Directive[47]. This is in the process of being recast[48] due to perceived failures in its implementation across the EU Member States, as well as the general limitations of it as recognised by the

[46] Persons from a State which «becomes a member of the European Union after the passing of this Act».

[47] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research OJ L 289/15.

[48] Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing [recast] COM(2013)151 final – 2013/0081.

European Commission Impact assessment[49]. The Recast Directive would see additional categories be added, as well as Students Directive be incorporated into it, and as Ireland has chosen to opt-out out of this latter instrument, it is difficult to forecast whether or not the executive will simply choose to remain bound by the original Researchers' Directive alone.

The 2014 Act instead recognises nine categories of permits which replace the original four, as well as an Atypical Work Scheme which facilitates short-term periods of employment that are not covered by the Employment Permits Acts or the administrative procedures that give effect to them[50]. The permits themselves are broadly provided for within the Acts, but are expanded upon in Statutory Instrument 432/2014[51].

4.1. Critical Skills v Blue Cards

A Critical Skills Employment Permit is intended to «attract highly skilled people into the labour market with the aim of encouraging them to take up permanent residence in the State»[52] That the Blue Card Directive establishes its primary concern as being highly-skilled employment of longer than 3 months in duration demonstrates how easily they align from this perspective. What is noticeable however, is that the Directive also emphasises the need to ensure comparative economic and social rights with EU citizens for such persons (recital 7), illustrating that its material scope extends beyond that of the Permit and that such rights will be codified rather than being left to ancillary legal instruments and systems. In 2008, the then Minister Micheál Martin inferred that the Directive, despite being commendable, was unnecessary in light of the existing scheme in place[53], a position which was subsequently adopted by the Government in choosing to opt-out. The justification therefore has nothing to do with Ireland's CTA with the United Kingdom, but rather that the existing standard was more amenable to the executive.

It should be noted that with regard to the overall intake of third-country migrants (Art. 8(2)), Member States maintain a discretion in relation to how many

49 Impact Assessment (SWD (2013) 77, SWD (2013) 78 (summary)) for a Commission Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing, recasting and amending Directives 2004/114/EC and 2005/71/EC (COM (2013)151 final.

50 Irish Naturalisation and Immigration Service, *Atypical Working Schemes*, www.inis.gov.ie/en/INIS/Pages/Atypical%20Working%20Scheme%20Guidelines.

51 S.I. No. 432/2014, Employment Permits Regulations 2014.

52 Department of Jobs, Enterprise and Innovation, *Critical Skills Employment Permit*, https://www.djei.ie/en/What-We-Do/Jobs-Workplace-and-Skills/Employment-Permits/Permit-Types/Critical-Skills-Employment-Permit/.

53 Dáil Debates, *Written Answers*, 30 April 2008, https://www.kildarestreet.com/wrans/?id=2008-04-30.620.0&s=%27blue+card+directive%27#g622.0.r.

Blue Cards it chooses to issue to such persons. This means that if Ireland had concerns regarding how many third-country migrants could enter under the Directive and how this would effect the CTA, the Directive would not immediately impact upon this.

From a legislative perspective, there are a mere 5 provisions within Part 3 of SI 432/2014 (Sections 14-18) which specifically refer and apply to the Critical Skills Permit. Although the previously outlined sections of the 2006 and other Employment Permit Acts supplement these heavily, those within the SI primarily deal with the name and purpose of the Permit, the minimum hours of work and qualifications required based on the level of remuneration received on the applicant. Two further sections consider the list of qualifying and non-qualifying categories of employment, as well as providing an example of the form to be filled out by applicants. This is quite similar to the Directive 2009/50/EC which establishes that the salary of the individual in question must be 1.2-1.5 times the national average (art. 5), rather than emphasising the nature of employment that qualifies, granting a large degree of flexibility to employers to bring employees into the Union under its material scope. Guild further suggests that the income criteria also allows the Member States a discretion, in so far as it sets a standard or ratio and not a particular amount (Guild 2007, 5). Therefore Ireland could for example, implement the highest ratio, impinging on those who fall below that standard and it would mitigate once again the potential impact this would have on the national system.

As outlined above, the Employment Permits Acts broadly outline the procedures that must be followed in applying for, granting, refusing, and revoking employment permits. These provisions are often quite broad, and couched in terms of the Minister and her/his department's discretion rather than the rights that are extended to persons applying for a critical skills permit. Comparatively, Article 7 of the Blue Card Directive outlines that Member States shall grant an applicant every opportunity to obtain a Blue Card, and outlines that the duration can be from one to four years in total. It also provides for circumstances within which a contract for work is less than the proscribed period of the blue card within the host Member State. The two subsequent Articles deal with the conditions under which a Blue Card may be refused, withdrawn or not renewed respectively (Articles 8 and 9). Article 11 then provide for specific procedural safeguards that Member States shall enact, such as that where an application is refused, withdrawn or not renewed, it must be sent to the applicant in writing, as well as outlining the grounds for doing so. Similarly, where the information given is insufficient to process the claim fully, the applicant must be made aware of this and what other forms of documentation are required. Despite the similarities between the Irish and EU legislation, the emphasis is entirely different, and under the latter, it is the individual that is the addressee of the legislation. It is as such, an important inversion in may ways.

As the previous subsection relating to the Long-Term Residence Directives has highlighted, the EU legislation in this area is far from perfect. However like them the Blue Card Directive and its minimum standards generally exceeds those set down by the comparative Irish system created through the Employment Permits Acts. It also highlights that the justification of the CTA in creating this opt-out has subsequently been used for other purposes, and that a consequence of this has been to create a far less migrant-friendly system, which demonstrates a high degree of deference towards the Irish State in this area.

5. Concluding Remarks

This chapter has attempted to outline the Irish immigration system in brief and concise terms. It has done so by primarily engaging with how Irish law relates to EU law, and the latter's growing competence within this material field and by looking more specifically at the legislation governing the entry and residence of third-country labour migrants from a comparative perspective.

Ireland's relationship with the EU in general terms can be characterised as one of low engagement. As a long-standing Member State, Ireland has never demonstrated a strongly integrationist attitude, nor has it attempted to engage with its citizens regarding the scope, importance, or general mechanics of the EU and its institutions. Instead, Ireland has sought to benefit from EU membership without bearing any significant costs being imposed on it. In particular, Ireland had often expressed a reticence towards the EU acting on its behalf on the global stage, albeit without making any overt criticisms of the Union in this regard. Instead, it has sought and been granted opt-outs in several key external fields under the Treaties based on the Common Travel Area shared with the United Kingdom, and the politically sensitive nature of Northern Ireland. Ireland has then sought to use these opt-outs to almost unilaterally avoid the imposition of EU legal instruments and rules in relation to third-country migration.

Although it is not possible to make a conclusive argument on this point, the chapter has argued that through the opt-outs from the Long-Term Residence Directives and the Blue Card Directive, Ireland has managed to operate a comparative legal system for third-country labour migrants which has granted the executive a far wider discretion in how it must treat such persons. The long-term residence system nationally is almost entirely administrative and as such is almost solely within the purview of the relevant Minister. At no point does this status appear to offer migrants within its scope a substantive right, or set of procedural guarantees similar to even the minimum or common standards laid down in EU law. Similarly, the executive chose to opt-out of the Blue Card Directive based on their assessment of the existing national system as being sufficient. through the use of these opt-outs Ireland has managed to maintain parallel systems which impose a far lower burden on the State, and speak to its conception of Union

membership as being a constant cost-benefit analysis driven by enlightened self-interest. Ireland will predominantly try to avoid new measures within this field at the Union level which place any additional burden on them, even if this would benefit the addressees of such laws. Given that the Irish executive has once again signalled that it will not take part in the recast Blue Card Directive (see European Commission 2016), this self-interest and ability to avoid higher burdens being imposed on it is likely to continue.

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Migrants and Welfare between Social Rights and Status Issues in Italy

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1. Migrants and Social Security Benefits: Definitory Problems

The recognition of social rights to foreigners is a fundamental condition for the success of the migrants integration policies within the national territory (Chiaromonte, 2013, 205; Sciarra, Chiaromonte 2014, 121; Chiaromonte 2016, 117). Current scenarios, however, reveal many crisis signs relating to this initial assumption attributable to many factors, but especially to the cramped spaces in which the principle of solidarity is confined in the context of the national and European immigration policies (for a critical analysis see Calafà 2012, 64).

Faced with such numerically relevant and emotionally painful phenomena as can be observed in recent years it is necessary to reflect on the importance of solidarity instruments and related financial allocations to support them (Sciarra 2016, 2; Apostoli 2016, 14). And yet in the management of the financial crisis as in the managing of the migration emergency this perspective is ancillary at national and intergovernmental level despite the fact that in recent solemn occasions this issue has been crucial[1]. Next to this (non-) perspective, the analysis of

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[1] See, in particular, the first speech on the state of the EU held by J.C. Junker, President of the European Commission, of 9 September 2015, at www.europarl.it/it/succede_pe/news_2015/

migration phenomena and the consequent policy choices seem to be characterized by another paradox, consisting in the terminological and definitional proliferation of those in need of protection: migrants, refugees, asylum seekers, illegal immigrants, occupiers and so on are only the most common semantic variants used to identify the different status of foreigners who are in the national territory. In my opinion, the multiple identities of the migrants create a dissonant interpretation of the needs of protection, leaving each of them to a different representation of the migrant, as well as that from a legal point of view.

This definition fragmentation, on the one hand, prevents the disclosure of a simple and direct message and, on the other hand, can have a concrete impact on the application of the rights guaranteed to these subjects.

From this point of view, a first observation can be made for systematically describing the evolution of the regulatory steps in the field of social protection of these subjects.

The generic term «foreigner» often occurs in constitutional sources, such as art. 10, para. 2, of the Italian Constitution, and in the international sources, especially in the older ones (D'Orazio 1992). It must be said, however, that compared with the constitutional paradigm, in the international rules the concept of foreigner is defined mainly by different adjectives in order to reduce the range of the rights owners. The principle of equal treatment among foreigners and citizens, therefore, solemnly affirmed in the various texts is filled with meaning as the definitions of «foreigners» become progressively articulated.

The protection of foreigners consists mainly in the protection of foreign workers or aspiring workers (art. 6, Convention no. 97 of 1949, of the International Labour Organization, henceforth ILO), in some cases independently from the legal entry into the national territory (art. 10, ILO Convention no. 143 of 1975). Under these Conventions, therefore, the equal treatment of citizens and foreign workers is declined in terms of equal working conditions and equal social security benefits and in relation to a wider range of interested parties without specific distinctions[2].

This trend is confirmed by the subsequent evolution of the international regulatory framework and, in particular, by the rules for uniformly governing national systems (ILO Conventions no. 102 of 1952 and no. 118 of 1962; on the distinction between the international sources which explicitly enshrine equality between citizens and foreigners and those that sanction a uniform framework for social security, see in more detail Chiaromonte 2013, 210; Ferrante 2008, 122). In these Conventions, the concept of foreigner is also defined by the principle of residence, so that residents who are not citizens should have the same

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settembre_2015/state_eu_juncker_pe.html; and also the last speech on the state of the EU of 15 September 2016, in https://ec.europa.eu/italy/news/20160915_discorso_juncker_it.

[2] It must be said that the Convention no. 97 of 1949 admits the possibility for Member States to refer the equal treatment only to pension benefits, excluding those based on the non-contributory systems.

rights as residents who are citizens (art. 68, Convention no. 102 of 1952, already cited), and by the notion of citizenship, because the principle of equal treatment in matters of social security apply for working citizens in the States that have ratified the Convention n. 118 of 1962.

In the perspective of social security protection the history of equal treatment between citizen and foreigner has been realized, therefore, also through evolution oriented, as said before, to define by adjectives the notion of foreigner. This conclusion can also be deduced from the analysis of the EU regulations (for general profiles see Gottardi 2003 and 2009, 517; Tursi 2005). In the EU rules, the definition of foreign undergoes a marked evolution towards a geographical connotation of the subjects who need protection: the foreigner is the third-country citizen legally residing in a Member State and employed in a EU Member State as well as their family members and survivors (Regulation no. 859/2003/EC then repealed by Regulation no. 1231/2010/EU)[3]. The geographical demarcation of the foreigner notion is probably the consequence of the progressive implementation of the coordination policies imposed by the EU on its Member States in the field of social security, but is also the effect of the increasing specification and delimitation of the general principle of equal treatment between foreigners and citizens.

This trend is also evident in the many existing bilateral agreements between non-EU States and Italy through which the coordination of social security in its so-called «external» dimension is managed (about this aspect, see also the European Commission Communication COM (2012) 153 of 30 March 2012 on «The external dimension of the coordination of social security in the European Union») and it is also present in Italian national immigration law. These agreements, which in the Seventies had primarily the goal of protecting Italian emi-

[3] As is known, in the EU Member States there is not a common scheme of social security, but since the early years of the EC Treaties, the EU institutions have pursued a coordination policy of national social security systems in order to facilitate the implementation of the pillars of free circulation and establishment freedom within the Member States. The first provisions relating to this subject date back to 1958 (Regulation no. 3/1958/EEC and its implementing regulation no. 4/1958/EEC). The basic text on which the subsequent secondary legislation was founded was Regulation no. 1408/1971/EEC (with its implementing Regulation no. 594/1972), modified over the years, and that today has been repealed by Regulation no. 883/2004/EEC, introducing simplifications and implementing a greater coordination in matters of social security (on the European Regulations in the field of social security and on the related judicial interpretation see Chiaromonte and Giubboni 2014, 482). Compared to the previous rules, the main novelty is that the current regulation no longer applies only to the EU workers but to all EU citizens who reside or have resided in several EU Member States independently of the reason for their residence abroad (work, study. etc.). Moreover, the new EU Regulation on social security no. 883/2004, which was initially applicable only to EU citizens, stateless persons and refugees residing in the EU, was extended to third country citizens legally resident in the territory of a Member State as a result of Regulation no. 1231/2010. The second condition laid down by the Regulation stresses the fact that the rules do not apply when the situation of foreigner has links only with one third country and with a single Member State. The Regulation was amended and extended in some aspects by EU Regulation no. 465/2012 which, for example, introduces some new features with respect to cross-border self-employed and posted workers (for details of the coordination policies in the field of social security, see especially Pessi 2016, 202).

grants citizens, are designed to ensure the equal treatment of workers and pensioners who move from one country to another through the application of general protection principles such as, for example, the territoriality of compulsory insurance, the totalization of insurance periods, the exportability of benefits accumulated in the State of residence (see, in particular, Piperno, Tognetti Bordogna 2012; Chiaromonte 2010, 248). Art. 1 of the Italian Immigration Act (Legislative Decree no. 286 of 25 July 1998, henceforth T.U.) includes under the term foreigners the citizens of third countries outside the EU and stateless persons, even if subsequently it limits the definition to the concept of foreigner legally residing under the rules of the T.U. when it is necessary to define the status of foreign worker and the subsequent social rights attributed (art. 2, para. 3). At the same time, in accordance with the EU legal framework to promote the integration of third country migrants who are long-term residents in the EU Member States as a key-element for promoting the economic and social cohesion of the Union, the notion of foreigner is also enriched with the temporal dimension (Directive 2003/109/EC of 25 November 2003 relating to the status of third country citizens who are long term residents; see also art. 9 of T.U. on immigration). For long-term resident migrants a special status is recognized which, as it will be discussed below, is the starting point for selecting the subjects who are beneficiaries of certain social protection treatments.

Apparently *sens adjectif* is the concept of refugees and more generally of the international protection subjects in the perspective of social legislation. In the European and international lexicon, the definition of the subject who is in need of international protection contains and, at same time, consumes this concept. From the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967, and especially in successive EU texts and national transpositions (Directive 2004/83/EC of 29 April 2004, repealed and replaced by the subsequent Directive 2011/95/EU of 13 December 2011, on the minimum standards for the qualification of third country citizens or stateless persons as refugees or as persons who need the international protection, adopted in Italy by legislative decree no. 251 of 19 November 2007, as amended by legislative decree no. 18 of 21 February 2014), the definitions of subjects in need of international protection also become a definition of its relative status in terms of rights and social protection[4]. Since the entry into force of

[4] For reasons of brevity, it is not possible to analyse the considerable debate on the international and European rules on asylum, international protection and humanitarian protection, as well as in relation to the Italian Constitution (art. 10, para. 3, Const.). As is known, according to the international, European and national law cited above in the texts for refugee shall mean a citizen of a third country who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country, or a stateless person who is outside the country in which he had previously habitual residence for the same reasons mentioned above is unable or, owing to such fear, is unwilling to return. At the same time, the person entitled to qualify for subsidiary protection means a third country citizen or a stateless person who does not qualify

Regulation 883/2004/EC, the conditions of equal treatment and the subsequent coordination policies on social security are based on the equality of EU citizens, stateless persons and refugees residing in a Member State who are or were subject to the legislation of one or more Member States, including their families and survivors (art. 2); indeed, for them too, the definition from a social perspective is completed by a link to the criterion of residence, which then becomes an integral part of the status of these subjects.

Instead, neither the Directive for the recognition of international protection status nor the subsequent implementing legislation seems to decline the definition of socially protected subject even at the level of residence, being limited, as discussed below, to fixing in principle a broad equal treatment in relation to employment, social and health assistance. Of course, this detachment is not only of theoretical importance, but it can have practical consequences, because, unlike other areas of social protection, in terms of social security benefits, the equality between citizens and applicants for international protection would be compatible with the setting of selective criteria based on residence. It is hardly superfluous to point out that this could weaken the position of these subjects, but it is clear that this mechanism could be a good instrument for governing social security benefits expenditure.

From this short analysis a first final observation can be drawn, susceptible of course to future and more penetrating investigations, namely that the thousand faces of foreign migrants have committed legislators at various levels to the task of circumscribing their status not only in a defining plan but, as discussed below, especially in the perspective of equal treatment and equal social protection: the qualification of the foreigner through more and more adjectives was accompanied by a simultaneous limitation of the principle of equal treatment between foreign migrants and citizens.

2. The Migrants Welfare between Equal Treatment, Performance Regionalization and Status Differences: Systems Resilience or Institutional Vulnerability?

The analysis of migrants welfare is conditioned by two factors which in recent years have operated simultaneously and have influenced the policies at national and regional level, namely the economic crisis and migratory emergency on the Italian coast. It is not possible to analyze all issues related to these aspects (see Keskinen, Norocel, Jørgensen 2016, 3). In the following pages the effects of these continuous and chronic emergencies on the Italian system of social security will

to be recognized as a refugee but in respect of whom substantial grounds for believing that, if returned to his country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm, and is unable, or, owing to such risk, unwilling to avail of the protection of that country.

be analyzed more in depth in order to outline the main characteristics of the migrants welfare in Italy. Despite the progress made in the EU immigration and asylum policies, many critical issues still persist in the European and individual Member States legislation (see, among others, Adinolfi 2015, 3; Vonk, 2012).

The introduction of the long term resident foreigner status (Directive 2003/109/EC of 25 November 2003), aimed at enhancing a regular and lasting connection of migrants with the host State, the repression of the exploitation phenomena such as trafficking in human beings (Directive 2004/81/EC of 29 April 2004 and the Directive 2011/36/EU of 5 April 2011), the definition of a common European asylum system through the effect of the so-called Dublin system and the provisions on family reunification (Directive 2003/86/EC of 22 September 2003) represented an advance in the planning of European Union immigration policies (see Nascimbene 2015, 395). For months the sad news concerning immigration urge the scholars of different disciplines to question the limits of this legal framework. As also noted at the conclusion of the first Section of this paper, it is increasingly clear that «the status of the foreigner and the fundamental guarantees that compose it appear ever more fragmented» (Nascimbene 2015, 398) due to a disorganized plethora of tools and specific categories of subjects.

However, the perceived incapacity to manage the recent migratory crisis is probably not caused only by the regulatory fragmentation, but by the type of consideration of these phenomena (see also McConnachie 2014; for an analysis on human rights, in general, refer to Dembour and Kelly 2011). It is not at all trivial to say that the current connotation of the migratory crisis is one of forced migration, caused by numerous, uncontrollable, widespread scenarios of war, terrorism, persecution of peoples, that from one continent to another force armies of foreigner to seek shelter and safety in Europe.

The European systems, especially the welfare systems, have been designed, not only at the level of principle but also at operational level, to operate in the presence of a selected public of migrants. It is clear, however, that due to the enlargement of the number of foreigners with a special status such as that of the international protection seekers or the migrants for humanitarian reasons, the national social security system and its funding sources are under pressure. The conclusion appears obvious, almost banal therefore that any analysis or future proposal cannot ignore the sad metabolization of the fact that the foreigner is becoming less migrant and increasingly a subject in need of protection.

It is not only the quality (and quantity) of the migratory phenomenon of these years and its impact on the national social security system (for a statistical analysis on migrant access to the welfare measures see Istituto Nazionale della Previdenza Sociale, 2011, 43), but also the terrible economic crisis ranging in Europe since 2009 has caused radical changes and strategic choices in the context of national welfare systems (and thus also in the field of the social security of foreigners).

In an intertwining of destinies, the two tsunami that have dramatically befallen Europe, on its coasts and borders, namely the migratory crisis and the economic crisis, suffer a strong reciprocal conditioning. It is desirable that the interconnection is not limited to only negative effects, but that it should stimulate the search for wide ranging and common solutions, therefore for both the economic crisis and the migration one. The clash is between the open and closed approach so that on both playing fields the decisive role is the search for a new balance between national sovereignty, democracy and the welfare state (Ferrera 2016, 104).

Among the various effects of this discordant situation, an important role is played by the continuous transformations of principle of equal treatment between citizens and foreigners in relation to social assistance and security, caused by the different status of migrants. Without ignoring the diversity and specificity of many profiles that need a more detailed analysis, within the permitted limits of space, in the following pages I will try to focus on the evolution of the relationship between the principle of equality and the most important exceptions to this principle and the attempts to eliminate them through judicial interpretation.

2.1. The Limits and Counter-Limits to Equal Treatment in the Social Security System: The Recent Debate

A double order of limits to equality must be preliminarily identified, namely legal limitations and factual limits, resulting from the adaptation of the rules to the affairs and condition of foreigners. In this dual perspective the problematic issues will be analyzed, referring untreated profiles to other and more detailed examinations (among others, Chiaromonte 2013, 222; id. 2006, 697; id. 2009, 587; id., 2011 657; Calafà 2012; Nunin 2015, 91).

Taking into account the traditional distinction in the Italian law between contributive and non-contributive social security systems (art. 38 Const.), it can be said that the factual limits are mainly in the field of contributive social security, nevertheless the principle of equal treatment is solemnly proclaimed under art. 2, para. 3, of the T.U. on immigration according to which «the Italian Republic, in the implementation of ILO Convention no. 143 of 24 June 1975, ratified by Law 10 April 1981, no. 158, guarantees equal treatment and full equality of rights comparable with those of Italian workers to all foreign workers and their families legally residing in its territory». The contributive social security system for migrants, who carry out their work in Italy, is based on the principle of full equality between citizens and foreign workers and on the principle of territoriality of social legislation. Hence, workers are subject to the social security regulations of the country in which they actually work.

Leaving aside the analysis on the complex issue of the foreign workers residing in an EU country as a result of temporary postings (about this, see Chiaromonte 2013, 217), in the following pages some problems relating to the principle of territoriality that emerged from the most judicial practice are high-

lighted. The core of the international conventions is the institution of aggregation, as a result of which a worker can virtually add up the contributions paid in the systems of two countries that have signed the convention if the period spent in the signatory country does not achieve the seniority contribution requirements for the eligibility for pension benefits; in this way it is possible to avoid any damage arising from the fragmentation of working career. If this is the legal framework, two observations stand out clearly. The delicate weaving of guarantees is based not only on the agreements signed by the Italian State[5] but also on the effects of the binding association and cooperation agreements on social security signed by the EU with third countries that extend the EU regulatory framework for social security coordination or directly ratify the principle of protection relating to social security[6]. The factual limit represented by the absence of new bilateral agreements signed by Italy is filled by the expansive effectiveness of the EU cooperation agreements and by the EU Court of Justice interpretation (see Giubboni 1998, 108). The Luxembourg judges have referred the principle of equal treatment contained in the EU conventions not only to the contributive benefits, but also to the non contributive welfare treatments[7]. Above all they declared this principle to be applicable immediately even if the bilateral agreement has not be implemented in the Member State in which the foreign worker is resident and stays and to whom the convention applies in accordance with the criterion of nationality[8].

There are, however, no counter-limits to curb the restrictions in relation to equal treatment between citizens and foreigners in the area of pensions. As is well known, the pension reform of 2011 (the so called "Fornero" Reform, launched by Law 24 December 2011, no. 214), has worked in many directions seeking to stem the hemorrhage in public debt, to restrict the numbers of beneficiaries and to delay their retirement through various instruments including the generalization of the contributory criteria, raising the age requirement and, especially as regards the subject of this paper, fixing the 20 years contribution seniority with the further condition that the total contribution arising from that

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[5] Italy has signed bilateral social security agreements with Argentina, Cape Verde Republic, Australia, Republic of Korea, Brazil, the Republic of San Marino, Canada and Quebec, the Holy See, with the countries of the former Yugoslavia, Tunisia, Israel, Turkey, Channel Islands and Isle of Man USA (United States), Mexico, Uruguay, Monaco Venezuela. See table and the texts contained in the website of the National Social Security Institute (Istituto Nazionale di Previdenza Sociale, henceforth INPS) in www.inps.it.

[6] The EU has association agreements on social security with the following countries: Algeria, Morocco, Tunisia, Croatia, Macedonia-FYROM and Israel. With Turkey exists a Convention signed in the framework of the Council of Europe in 1972.

[7] See CJEU, 31 January 1991, C-18/90, *Kziber*; CJEU, 20 April 1994, C-58/93, *Yousfi*; CJEU, 15 January 1998, C-113/97, *Henia Babahenini*; CJEU, 12 February 2003, C-23/02, *Alami*.

[8] See CJEU, 31 January 1991, C-18/90, *Kziber*, cit. About the implementation of this principle in the Italian law see Court of Cassation, 1 September 2011, n. 17966; in *Massimario di Giustizia Civile*, 2011, 9, 1265.

seniority is such as to determine the disbursement of an income amount not less than 1.5 times the social allowance (see, among others, Cinelli 2015, 544; Pessi 2016, 407) .

Formally these two conditions (time and quantity of the minimum contribution) are fixed for Italian citizens and foreigners, but it is evident that this scheme could represent a factual limit in the future to complete equality between the two groups in terms of pension treatments. The time condition is a requirement that seems very expensive to reach for foreigners in view of their fragmented careers, characterized by alternating periods of work in Italy and in other countries including the one of origin, because of the possible returns to their homelands by the expire of the residency permit. In this already complex situation there is another possible emergency that could occur in a few years. The recent migration crisis in Italy is causing a flow of foreigneirs who were workers in their countries of origin and for many of them there will be the issue of recognizing these working periods for valid pension contribution in the absence, at the time, of specific bilateral agreements regulating mechanisms such as the contributions totalization. In my opinion, the future sustainability of this migration crisis passes necessarily through the opening of a new bilateral negotiation season in the field of social security at the level of individual Member States, or better yet at the EU level for implementing the right to the enjoyment of pension benefits.

In addition to these factual limits, there are also legal constraints which have created a sort of migrants welfare in spite of the principle of equal treatment. Most of the time these come down to differences dictated by the diversity of status (for example, seasonal foreign workers[9], foreigners with the right to international protection[10], workers who return in the country of origin[11]). Very often these diversities are necessary to adapt the guarantee of rights to the sustainability of the pension system even if they raise concerns because they represent

[9] Due to the particular job characteristics, the so-called seasonal workers (because they have a residence permit not exceeding nine months or maintain the residence in their countries of origin or have affixed to the passport a visa with the words “visa for seasonal work”) do not have the guarantee of certain social security treatments, such as unemployment benefits, family allowances, return of contributions in cases of repatriation. Instead, they enjoy insurance against disability, old-age and survivors pensions, insurance against accidents at work and occupational diseases, insurance against sickness and maternity (art. 25, para. 1, T.U.). In place of the contributions for non-services provided, the employers must pay a contribution to INPS that flows into the National Fund for social policies (art. 25, para. 2, T.U.).

[10] The foreign citizens that have the refugee or international protection *status* shall be treated as Italian citizens in matters of public assistance, social insurance and in relation to labor standards.

[11] As is known, within the meaning of the T.U. (art. 22, para. 13) the foreign worker that repatriates, although seasonal (art. 25, para. 5), retains his social security rights and social security accrued, being able to enjoy them regardless of valid bilateral convention, on the occasion of requirements maturity provided by law, at the age of sixty-five years, even departing from the minimum contribution condition fixed by art. 1, para. 20, law of 8 August 1995, no. 335.

a possible violation of the equal treatment principle (Bonardi 2008, 583; Vettor 2005, 293).

Problems of compatibility with the right to equal treatment occur mainly in relation to the issue of family benefits and repatriation. The long and harrowing story of the possibility for a foreigner who repatriates to preserve the acquired pension rights must be examined in the light of the need to balance the right to equality with the system's economic tolerability. There has been gradual and inexorable shrinking process of the right to portability of social security guarantees. From the mechanism of contributions reimbursement (art. 3, para. 13, law 6 August 1995, no. 335, absorbed by art. 22, para. 11, T.U. on immigration in the original version), we have passed to a system that attributes pension benefits corresponding to the amount of contributions paid at the age of sixty-five years, a threshold that equalizes foreign men and women despite the permanent difference in pensionable ages in the private sector for Italian man and female workers. Beyond the various problematic aspects, including those in relation to constitutional compatibility (see Chiaromonte, 2013, 229), the aim of limiting the treatments payment is clear, also in the light of the subsequent judicial interpretation that has substantially emptied these guarantees also in the quantum of their recognition. Even if some sentences relate to the previous reimbursement mechanism, according to the Italian Supreme Court[12], the payment of contributions to the foreigner that repatriates must take place with the exclusion of contributions concerning some treatments, such as maternity, illness, unemployment and health care. The Court considers that this exclusion is justified because in the Italian social security system there is no right to the return of contributions paid in relation to requirements for maturation of the right to specific social security benefit that no longer will apply nor will apply in the future. Therefore, according to the general principles mentioned above, the reimbursement under art. 22 T.U. on immigration, must concern only the amounts allocated to the insurance coverage of future events that allow the payment of social security benefits at the time of maturity of the related requirements, excluding events (such as maternity, illness, unemployment, health care) which find their cause in the insurance risk coverage for as long as the employment relationship, now ended, was held.

From a different perspective, it is possible to observe the most critical profiles in relation to foreign family equal treatment. In addition to the treatments for supporting families without income (law no. 448/1998; law no. 388/2000) fixed by the municipalities, by the National Social Security Institute or by some regional laws (which will be described in the next Section) because they have a non-contributive social treatment nature and therefore are within the notion of social assistance, the social security system supports the families with insufficient incomes because the sum of each family member income is not adequate (family allowances under law no. 153/1988). Compared to the previous institu-

[12] See Court of Cassation, 30 September 2015, no. 19469, in *Diritto & Giustizia*, 2015.

tion of family allowances (Presidential Decree no. 797/1955), the actual rules for this type of benefits does not presuppose the requirement of the dependent cohabitation because the family is the referent for the treatment in relation to its needs (Pessi 2016, 324).

So, if this is the purpose of the treatment, the limit established by the Italian law which reserves the benefit to the foreign workers whose family members are resident in Italy appears problematic. In the absence of a bilateral convention which provides otherwise or reciprocal conditions, the residence abroad of the family members prevents the fruition of the allowance under law no. 153/1988. On the contrary, in the case of the family members of Italian and EU Member States citizens and for the relatives of a person who has refugee or international protection status, the residence of family members is not a condition for access to the social security benefits in question (art. 2, para. 6, law no. 153/1988).

This rule is an evident limit to equal treatment, especially if we consider the purpose of this treatment, which, as mentioned before, does not imply the requirement of the dependent family members. To soften the effects of this rule the judicial interpretation has intervened, especially in recent years, establishing the non-application of the aforementioned art. 2, para. 6, because the requirement is contrary to the principles of equal treatment and there is an objective diversity in the treatment compared to that of the Italian citizens (see Tribunal of Brescia, 7 March 2016; Tribunal of Brescia, 9 October 2015; Tribunal of Brescia, 14 April 2015; Court of Appeal of Brescia, 20 April 2016). However, in some sentences the Judges apparently complicate the exegetic interpretation, because they qualify the providence in question as a non-contributive benefit, and as discussed below, on this level equal treatment for long-terms residents foreigners is susceptible to exceptions (art. 11 of Directive 2003/109/EC; see also Court of Cassation, 30 March 2015, no. 6351, in Massimario Giustizia Civile, 2015). But to overcome this possible risk, some judges of first and second order, on the basis also of the EU Court of Justice interpretation (CJEU, 24 April 2012, C-571/10, Kamberaj), have qualified the subsidy as an essential treatment for supporting family needs and therefore it is not possible to include it among the exceptions hypothesis, because it represents a minimum income support (Court of Appeal of Brescia, 20 April 2016).

2.2. The Limits and Counter-Limits to Equal Treatment in the Non-Contributive Social Security System: Current Developments

In the area of social assistance characterized by a non-contributive system it can certainly be said that the antibodies to counter the disparities between migrants and citizens have been injected by the interpretation of the Italian Consititutional Court. With a relentless sequence of pronunciations from 2005 to today, the Court has taken steps to eliminate the inequalities reserved to foreign workers. Although the profiles which can be dealt are numerous, due to rea-

son of space, specific and problematic aspects will be analyzed below in relation to certain case law and, as will be discussed in the final Section, in view of some recent and important national and regional laws.

In the presence of the pendulum case law and the contradictory legislative actions it is possible to make some summary remarks on the current state of health of the equal treatment principle in favor of foreigners.

For over a decade this topic has intrigued and divided the judges, by registering, on the one hand, a certain anarchy of interpretation in the Constitutional Court decisions and, on the other hand, an obvious reluctance on the part of the national and regional law-makers to implement the principles and their interpretation affirmed by the constitutional judges. I have referred here to an interpretive anarchy because the right to equality content is subjected to an opposing trend, expansive and restrictive.

The initial point of discussion is the regulatory level, national or regional, of rules subjected to the constitutional compatibility judgment. In this field we find a greater exegetic coherence in the judgments relating to the regional standards. A certain continuity prevails in pointing up the unreasonableness of the criteria of nationality or citizenship[13] and, above all, of qualifying residence[14] in relation to the access to welfare benefits. With the exception of an isolated contrary judgment[15], in the group of sentences concerning qualifying residence it is possible to find the most extensive interpretation of the equal treatment notion, because the judges seem convinced that the rule of a differential requirement based on continued residence for a predetermined and significant minimum period of time is not respectful of the principles of reasonableness and equality since it introduces an arbitrary distinction into the regulatory framework. This is because there is not a reasonable correlation between the duration of the residence and situations of need or distress, directly referable to the person as such, that constitute the presumption of use of these benefits. But especially in a sentence it is possible to observe an interpretation that may be an important perspective (Constitutional Court, 19 July 2013, no. 222). Even if the law may reserve certain welfare benefits only to citizens and to persons assimilated to residents in Italy, whose status is valid to generate an adequate link between political, economic and social participation and the delivery of the benefit, however, it is also possible that a link deserving of the same protection could emerge with regard to the position of the persons who, though lacking the status mentioned earlier, have

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[13] See Constitutional Court, 2 December 2005, no. 432.

[14] See Constitutional Court, 9 February 2011, no. 40, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 2012, II, p. 155, with comment of Nunin and in *Le Regioni*, 2011, 4, p. 1257 with comment of Corvaja; Constitutional Court, 25 February 2011, no. 61, in *Foro Italiano*, 2012, I, 389; Constitutional Court, 19 July 2013, no. 222, in *Giurisprudenza Costituzionale*, 4, 2013, p. 3291D; Constitutional Court, 7 June 2013, no. 133.

[15] See Constitutional Court, 28 May 2014, no. 141, in which qualifying residence fixed by the regional law in the field of baby bonus does not seem unreasonable because it is useful to favour the birth rate and the stable presence on the regional territory.

a strong bond with the community having established stable work, family and affective life.

Therefore, time is only an indication of the migrant's participation in the economic and social life, because, according to the Constitutional Court, what counts most is the effective participation in the organization of the community, participation that should be found in the work links and family relations established within the community itself. But clearly this is just a hint of a new perspective, which is not gone into more in-depth in this and in the other judgments.

The judgment of the Constitutional Court on national legislative measures is more inconsistent. In relation to this category, indeed, the Court still holds different positions. The debate is focused on the compatibility of art. 80, para. 19 of the Finance Law for 2001 (law 23 December 2000, no. 388), which has subordinated the fruition of the economic and social assistance benefits to the possession of a residence permit, that today is the EC residence permit for long-term residents and, therefore, to foreigners who have been legally resident in Italy for at least 5 years. Before, access to the social security system was permitted to migrants who had a residence permit not less than one year, as fixed by the art. 41 of T.U. on immigration in the original version (see more fully Chiaromonte 2013, 231; De Martino 2013, 55).

The conviction of the Constitutional Judges has undergone a clear evolution, from considering the unconstitutionality of the norm for issues regarding a simple income requirement (*ratione census*)[16] to reputing the rule to be incompatible because of the temporal requirement of residence permit (ratione temporis). It is evident that the reasonableness of the limits in the field of the migrants access to the social security system is still an open question (Iurato 2015, 2; Turatto 2013, 549). In particular, in the recent sentences of 2015 on this point, among the wrinkles of the sentence can be seen the effort to consider the equal treatment principle not only in terms of the discrimination prohibition, but as an instrument for implementing a more consistent social integration.

This is without doubt a perspective that is lacking in Italian case-law (see Chiaromonte 2013, 242), because the legal framework is based only on the discrimination prohibitions. At same time, the equality between foreigners and Italian citizens is only under the perspective of ensuring the satisfaction of the basic and essential needs for the sustenance and the safeguarding of human life. This is also confirmed by the tenor of other judgments of the Constitutional Court in relation to the requirement of legal and continuous residence for a certain period of time for some benefits, and in particular that of staying for at least ten years before enjoying the social allowance under art. 3, para. 6, of law no. 335/1995[17]. Even if at the legal level the right to this benefit is recognized for

[16] See Constitutional Court, 6 October, 2006, no. 324 and 23 January 23, 2009, no. 11, in relation to incapacity pensions; Constitutional Court, 30 July 2008, no. 306 and 15 March 2013, no. 40, relating to disability benefits.

[17] See Constitutional Court, 15 July 2016, no. 180, and 17 July 2013, no. 197.

Italian and other EU citizens, and for non-EU citizens with a residence card or a residence permit for EC long-term residents (Pessi 2016, 472), it is clear that the ten years residence condition is more penalizing for foreigners. Yet, even if there is not an express endorsement of the restrictive logic for government reasons relating purely to public expenditure, the judges legitimize it, because according to the Court, the provision of a stable residence seems not a merely restrictive choice, but a response to the need to select those having the right with more intense and continuous roots in the national territory.

3. The Principle of Equal Treatment as a Right to Social Integration: The Backward Step of the Law and the Good Practices of Collective Bargaining

From the brief discussion of the most recent law cases on the equal treatment between Italian and foreign citizens as discussed above, it is possible to deduce two trends that, in my opinion, represent real cracks in the protection system.

Equality in the field of social security ignores the perspective of the need to promote the social integration of foreigners and their families. Equal treatment has been seen as equality in the area of essential and basic needs useful for protecting and safeguarding the life and health of the subjects (on this point see also Codini 2012, 607). Although national and European regulations affirm that it is possible to limit equal treatment in respect to the essential treatment[18], the ancillary role reserved to integration and social purposes in the evaluation of the reasonableness and legitimacy of the restrictions is an incoherent passage in the legal framework.

To this observation it is possible to add another second trend that emerges strongly from the analysis of the limits to equal treatment as previously summarized in broad terms. The most striking issues and problems concern family welfare. It is evident that the presence of this trend is alarming, considering the importance of family integration into the social and work community as a tool for the prevention of segregation and ghettoization. The greatest economic cost of expansionary welfare policy in favor of migrant families is obvious; but in my opinion, similar approaches represent a cultural investment, because the integration of the whole family helps foreigners to establish roots within the basic social community. This is only an exemplifying consideration added to the numerous other possible observations under this perspective.

The guarantee of equal treatment at the lowest possible level, without any consideration of family social inclusion and integration seems to be a constant in the political agenda. Even in the recent welfare measures, enacted by the na-

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[18] See, for example, the art. 11, para. 4, of Directive 2003/109/CE relating to the *status* of third-States citizens who are resident for a long period; but it is possible to fix exceptions to equal treatment also under art. 9, para. 12, lett. c), of T.U.

tional and regional lawmakers, it is possible observe a backward step even regarding the principles deriving from constitutional jurisprudence. In the recent important measures to combat poverty and social exclusion there are still the same selective and restrictive mechanisms to limit the numbers of potential beneficiaries, limits clearly inspired by the necessity to govern public spending. In the most recent national[19] and regional[20] actions, the income support for citizens and their families who are in a fragile and vulnerable situation is attributed to those selected according to the criterion of the qualifying usual residence in the Region, from a minimum of 12 months in the case of the dignity income in Puglia, to a maximum of 60 months in the case of the Sardinian inclusion income and autonomy income in Lombardy. In some of these measures (in particular, the Active Inclusion Measure in the Region Friuli Venezia Giulia) and in the national income support, in addition to the residence condition in the regional territory, the enjoyment of these social security measures is limited only to the foreigners who have the EC permit for long-time residents, which requires as a precondition the legal presence in the Italian territory for at least five years. Then the problem of the reasonableness of a limit to the equal treatment between citizens and foreigners returns because of the usual canon of qualifying residence.

It is not possible to predict here if there will be other disputes over these rules, but it is certainly possible to see that the delimitation of the scope of these measures which are finalized to support the integration and inclusion of the vulnerable and fragile persons, as stated in the preambles of the laws, seems unreasonable because it excludes individuals and households at greater risk of segregation. It seems, after all, that there is an unreasonable and contradictory lack of coherence between the objectives of these treatments and the selection of beneficiaries. Even under another perspective, these new limits generate some perplexity. In the recent labour law reforms[21] and in the national and regional laws which are analyzed here there is a marked use of the principle of conditionality, as a result of which the supply, enjoyment and successive maintenance of the social security treatments are subject to the assumption of specific and detailed activation obligations on part of the beneficiaries. The recipient is obliged to subscribe to a compulsory and personalized agreement with the employment or so-

[19] The Support for Active Inclusion has recently been revisited with the Interministerial Decree of 26 May 2016, in implementation of the art. 1, para. 387, letter a), Law of 28 December 2015, no. 208. In relation to the issues of the beneficiaries, see in particular the art. 4 of the Inter-Ministerial Decree mentioned above.

[20] See the Regional Law of Friuli Venezia Giulia no. 15 of 10 July 2015 (art. 3), the Regional Law of Sardegna no. 18 of 2 August 2016 (art. 3), the Regional Law of Puglia no. 3 of 14 March 2016 (art. 5), the Regional Law of Valle d'Aosta no. 18 of 10 November 2015 (art. 3), the Regional Resolution of Lombardia no. 5060 of 18 April 2016, the law of Provincia Autonoma di Trento no. 13 of 27 July 2007 (art. 35, para. 2) e subsequent implementations.

[21] See, in particular, the law of 10 December 2014, no. 183 and the legislative decrees on the labour market and on the unemployment benefits (Legislative decrees of 14 September 2015, no. 148 and of 14 September 2015, no. 150; about these issues see also Ferrara 2015).

cial services so that an inclusion plan for the beneficiary and his family made up of disparate actions (orientation and job placement, school dropout prevention etc ...). This mechanism introduces into the system a type of integration that can be called assisted, because the integration process should be created, guided and controlled by different parties, and should satisfy different stages of need.

Especially under this last perspective the limits of access for migrants and foreigners, mentioned before, seem unreasonable, because, on one hand, these limits could be an economic disadvantage in the short term, but, on the other hand, foreigners that are excluded from these processes are deprived of future integration opportunities.

The persistent legitimacy of the regional citizenship (Dinelli 2011, VI; Zonca 2016, 107) as parameter for access to welfare impacts on an already strong status fragmentation which, as I have tried to highlight in the first Section, could derive also from the different definitions of foreigners in the national and supranational legal framework. The same heterogeneous notion of qualifying residence in the different regional standards seems more inspired by the confused logic of a mosaic in which the tiles are randomly ordered, rather than inspired by the necessity to link the enjoyment of social benefits to the concept of local roots.

In this scenario, the guarantee of equal treatment particularly in case of foreigner social integration is rather a perspective that, especially in the most recent practices, begins to characterize the collective bargaining experience.

Although it is not possible to have a complete and comprehensive survey of the collective agreements in the private sector, especially at the enterprise level where there is not a complete database, at the conclusion of this study it seems appropriate to focus on the some good practices that the social partners have implemented.

From the reading of some collective rules it emerges that collective bargaining has realized the equal treatment essentially through integration tools within the working community and in the social and productive local area. In addition to the simple commitment statements for introducing at decentralized bargaining level good practices to promote the participation of migrants workers[22], in some contracts the effort is much stronger, because the social parties fix with specific guarantees and rights for satisfying the needs of the immigrant workers. This is the case, for example, of the rules that permit a modality of enjoyment of vacation and permits compatible with the return home of foreigners (for example, in a single period) and with the technical and production needs by an agree-

[22] See, for example, art. 4 of Labour National Collective Contract (Contratto Collettivo Nazionale Lavoro, henceforth C.C.N.L.) for agricultural cooperatives and associations (ESAARCO) of 5 August 2016; the Agreement of 29 November 2013 for renewal of C.C.N.L. for the employees of small and medium wood and furniture industries; C.C.N.L. of September 2013 for the glass sector employees (Industry); article 91 of C.C.N.L. September 2013 for the employees of industrial laundries.

ment with the employer[23]. In another perspective, equal treatment is guaranteed even on the training plan necessary for an effective integration and respect of the culture of origin: it should be noted that in some collective agreements there are provisions that offer the possibility of using hours of paid leave for attending Italian language courses, under the same conditions as the right to study, or the possibility of using unpaid leave for respecting the religious holidays not covered by national law[24].

These good practices are a positive signal; but there is also good news in relation to the method used for trying to face the problems. In this respect, especially in 2016, there was a resumption of the dialogue and of the collective consultation between the Government and the social partners at least in this area in order to set up measures and policies finalized to a rapid and effective integration of foreign workers. In June 2016 two protocols between Confindustria (the main association representing manufacturing and service companies in Italy) and the Interior Ministry[25] were signed in which the parties have tried to simplify some administrative procedures, but especially have tried to involve the companies in the management of migration crisis, promoting pathways for the integration of international protection beneficiaries.

In this case the Framework Agreement of 22 June 2016 moves precisely in the direction of creating a collaboration between companies and institutions in order to promote the integration of the refugees who have obtained international protection status through internships, job opportunities and formative initiatives.

The projects just described above represent good practices which could be further encouraged and supported, because they aim to promote a model of active integration and, at the same time, could help to mitigate the impact of the needs for public spending containment which often serve to justify the presence of limits to equal treatment in the field of social security system. These new perspectives could represent an effective antidote for the chronic institutional vulnerability of foreigners integration system caused by the lack of resilience of the social security model.

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[23] See art. 63 of the C.C.N.L. 10 June 2015 for the enterprises of chemical, plastic, glass, ceramic sectors; art. 64 of the C.C.N.L. 25 July 2014 for textile, clothing, footwear, eyewear enterprises; art. 32 of the C.C.N.L. 28 November 2011 for the employees of small and medium food industries; arti. 36 of the C.C.N.L. 7 November 2013 for the employees of manufacturers of elements and components and prefabricated brick companies; the C.C.N.L. of December 2010 for the employees of textile, clothing and fashion sectors.

[24] See art. 29*bis* of the C.C.N.L. for employees of tobacco companies. In other contracts the creation of specific courses for migrants to train in health and safety is encouraged: see the CCNL of December 2010 for the employees of rubber and plastic sector.

[25] See the Protocol of 20 June 2016 finalized to facilitate the release of the EU Blue Card to the highly qualified foreign workers. The goal is to reduce the process time through simplified management procedures for the companies associated to Confindustria which look for highly qualified foreign workers.

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Il diritto alla salute dello straniero nell'ordinamento italiano

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1. Il diritto alla salute nella costituzione italiana

Per affrontare i profili concernenti la posizione del migrante in relazione al diritto alla salute è opportuno, in via preliminare, ricordare i tratti salienti di tale diritto costituzionale.

Come è noto, l'art. 32 cost. pone a carico della Repubblica il dovere di tutelare la salute, sia nella sua dimensione di diritto individuale che in quella di interesse della collettività. Trattasi di una disposizione a contenuto multiforme, posto che plurime sono le situazioni soggettive che vi trovano origine. Da un lato trova riconoscimento il fondamentale diritto dell'individuo a non essere leso nella propria integrità psicofisica e a rifiutare la cura, cioè a non essere sottoposto a trattamenti sanitari senza il suo consenso, se non nei casi previsti dalla legge e pur sempre nel rispetto del suo essere persona; dall'altro emerge il profilo attivo, ovvero il diritto a essere curati, gratuitamente qualora l'interessato versi in condizioni di indigenza (Minni, Morrone 2013). Si affiancano dunque aspetti tipici delle tradizionali libertà, nei termini di un dovere di astensione da parte dei terzi, siano essi soggetti pubblici o privati, tenuti a non pregiudicare il bene salute, secondo la logica dei diritti assoluti, di tradizione liberale, ad altri, peculiari inve-

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ce della tipologia dei diritti sociali, quali diritti relativi a prestazione, rivolti alla Repubblica, quale insieme di poteri pubblici chiamato a soddisfarlo[1].

E se pure risponde al vero che nessuna delle situazioni soggettive sopra citate è soddisfatta dalla sola previsione costituzionale, dato che lo stesso diritto a non veder compromessa la propria salute per fatto altrui richiede, quanto meno, un apparato giurisdizionale che ne assicuri protezione, seppure ex post, mediante il risarcimento del danno[2], lo è anche che, quale diritto a ricevere assistenza sanitaria, esso presuppone un apparato rivolto in modo specifico alla sua attuazione, oltre a quello giurisdizionale, destinato a proteggere, in generale, qualsivoglia diritto costituzionale. Con l'effetto di porre un serio problema, a tutti noto, di compatibilità finanziaria, particolarmente stringente in un momento storico in cui le risorse pubbliche sono limitate, comportando allora una corrispondente contrazione dello stato sociale come l'abbiamo conosciuto nel passato (Morana 2013).

Ciò ovviamente incide sul quantum di tutela, ma non sul fatto che l'intervento legislativo di attuazione dell'art. 32 cost. sia, e rimanga, imprescindibile. Al più si potrebbe pensare che la citata disposizione costituzionale, in sé e per sé considerata, possa essere evocata quale limite a un regresso di tutela che il legislatore adottasse in assenza di una giustificazione di bilancio, cioè in una, al momento inesistente, situazione di benessere economico; oppure qualora la riduzione delle prestazioni a disposizione dei singoli fosse talmente rilevante da apparire manifestamente irragionevole, finendo per annullare, o gravemente menomare, quel nucleo irriducibile del diritto, di cui la Corte costituzionale ha ragionato in più occasioni (v. infra). E anche in tal caso rimane delicata la posizione del Giudice delle leggi, chiamato a effettuare uno scrutinio che rischia di tradursi in – o almeno di apparire nei termini di – un'interferenza nella sfera di discrezionalità parlamentare, chiamata in causa a fronte di decisioni attinenti alla misura delle risorse disponibili per sostenere la sanità pubblica. Va da sé che anche in tal caso si è comunque di fronte a una precedente disciplina legislativa, con cui confrontare eventuali scelte riduttive, in assenza della quale il precetto costituzionale non potrebbe svolgere la sua funzione programmatica.

La concretizzazione del "programma" costituzionale sulla salute è passata attraverso l'introduzione del Servizio sanitario nazionale (S.S.N.), coi suoi principi informatori di universalità dei destinatari e globalità delle prestazioni, nel senso di assicurare a tutti, a prescindere dalla situazione reddituale, l'intera gamma delle prestazioni sanitarie utili alla stregua delle conoscenze scientifiche disponi-

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[1] Per una evidenziazione dei due aspetti del diritto alla salute, rilevante sia quale diritto assoluto che come diritto relativo, si veda, fra le molte, Corte cost., sent. n. 455/1990. In questa sede non ci si occupa, invece, dell'aspetto passivo, ovvero quello dei limiti che alla libertà del soggetto possono essere imposti a tutela del benessere collettivo, nel caso della previsione legislativa di trattamenti sanitari, come le vaccinazioni, gli interventi di profilassi e via dicendo.

[2] Ed è noto che sul punto si è da tempo assestato il principio della risarcibilità, ai sensi del combinato disposto degli artt. 32 cost. e 2043 c.c., del danno biologico, conseguente alla lesione del diritto alla salute (cfr. Corte cost., sent. n. 186/1986), in quanto appunto diritto valevole *erga omnes* (Corte cost., sentt. nn. 247/1974 e 107/2012).

bili (legge n. 833/1978, art. 1). Trattasi di un'attuazione legislativa non obbligata dell'art. 32, che, come sopra ricordato, limita la gratuità ai soli casi di indigenza, per il resto riservando alla legge la decisione circa il porre o meno, e in che misura, a carico della fiscalità generale il costo dell'assistenza sanitaria (Morana 2013). La situazione di crisi finanziaria ha, come noto, inciso sul modello, nel senso della compartecipazione dei singoli alla spesa sanitaria, sotto forma di ticket per la singola prestazione, salvo i casi di esenzione per chi rimanga al di sotto di determinati livelli reddituali. L'ambito stesso degli interventi sanitari rischia di entrare in (ulteriore) crisi qualora la situazione economica peggiorasse al punto da rendere non ulteriormente finanziabili le prestazioni abitualmente garantite nel passato.

2. Il diritto alla salute e lo straniero

La questione della spettanza del diritto alla salute allo straniero extracomunitario[3] può essere affrontata in due modi, a seconda che si guardi al problema generale circa l'intestazione dei diritti elencati nella Parte I della costituzione, fra i quali rientra quello in discussione, e con salvezza di quelli politici, maggiormente refrattari a essere scollegati dalla cittadinanza, seppure anche questo principio sia messo in discussione da una parte della dottrina (Ruggeri 2015), o a quello, più ristretto, dell'intestazione del diritto alla salute, in base all'idea che esso presenti talune peculiarità che, in ipotesi, sciolgano il dubbio a prescindere da come si argomenti relativamente agli altri diritti, o ad alcuni di essi. Pare peraltro che, quale che sia la via prescelta, a un risultato comune comunque si giunga, per lo meno qualora si consideri, accanto alla fonte costituzionale, quella legislativa, così da valutarle nel loro reciproco rapporto.

In effetti, anche da parte di coloro che circoscrivono la portata delle disposizioni costituzionali sui diritti ai soli cittadini (Pace 2010), si afferma la possibilità del potere politico di operarne l'estensione a favore del non cittadino, qualora questa non risulti un obbligo ai sensi dell'art. 10, c. 2, cost., che, come si sa, pone una riserva di legge rinforzata (dalla necessaria conformità alle norme e convenzioni internazionali) per la disciplina della condizione giuridica dello straniero. E se anche si revochi in dubbio che un tanto possa avvenire per quella peculiare sottospecie rappresentata dai diritti elettorali, altrettanto non vale per il diritto alla salute, pacificamente predicabile a favore della persona in quanto tale. Ovviamente, a maggior ragione così conclude chi invece ritiene che i diritti inviolabili menzionati in genere dall'art. 2 cost., e fra questi anche (ma di certo non solo) quello di cui al successivo art. 32, spettino all'uomo, anziché al cittadino, o direttamente in virtù del testo costituzionale, o in virtù (o anche in virtù) delle fonti internazionali che riconoscono a ciascuno i diritti fondamentali e, in particolare, quello alla salute[4].

[3] Ci si occuperà infatti solo di questa *species* del più ampio *genus*.

[4] Si pensi alla Dichiarazione universale dei diritti dell'uomo del 10 dicembre 1948, al Patto sui Diritti economici, sociali e culturali del 1966, al Trattato istitutivo dell'organizzazione mon-

Fra l'altro, l'art. 32, oltre a non circoscrivere la titolarità del diritto al solo cittadino, nel sancirne il carattere fondamentale sembra difficile da assoggettare a una lettura restrittiva, se dell'aggettivo si dà un'interpretazione che lo colleghi, da una parte, ai diritti inviolabili dell'uomo, che la Repubblica riconosce nel loro insieme (art. 2 cost.); dall'altra al concetto di pari dignità di cui all'art. 3 cost.: tutti elementi convergenti nel farne un tratto essenziale – per l'appunto "fondamentale" – della nostra forma di Stato democratico sociale.

In questa direzione si è mosso il legislatore nazionale, attraverso il testo unico sull'immigrazione (d.lgs. 286/1998, di seguito t.u.), che pare fondato su di un'impostazione inclusiva[5], nella misura in cui accoglie fra i principi generali quello della piena equiparazione fra cittadino e straniero, «comunque presente alla frontiera o sul territorio dello Stato», quanto ai diritti fondamentali previsti dalla normativa interna e internazionale (art. 2, c. 1), riconoscendo poi a chi soggiorni regolarmente i diritti civili attribuiti al cittadino (art. 2, c. 2) (Immordino 2014). Ne segue che, oltre a introdurre la distinzione fra lo straniero entrato e rimasto in Italia nel rispetto delle norme che ne disciplinano le condizioni di ingresso e permanenza – dunque regolarmente soggiornante –, in quanto tale parificato al cittadino (salvo che con riguardo a certi diritti, in primis quelli politici[6]) e quello comunque presente, viene riconosciuta a tutti la spettanza dei diritti fondamentali. Diritti identificati mediante rinvio alle fonti di diritto interno e sovranazionale, ma alcuni dei quali sono poi trattati all'interno del medesimo testo unico, come accade proprio per ciò che attiene alla materia sanitaria (Capo I, Titolo V), in cui sussiste una sorta di gradazione a seconda della posizione del non cittadino, muovendosi da una tutela piena, o comunque parametrata a quella riconosciuta all'italiano, a una più ridotta per lo straniero non legalmente soggiornante.

Nel primo caso, di presenza legale, vi è l'obbligo di copertura sanitaria, in taluni casi attraverso la necessaria iscrizione al S.S.N., in altri con possibilità di

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diale della sanità, del 22 luglio 1946, ratificato con decr. legisl. C.P.S. 4 marzo 1947, n. 1068, che riconoscono il diritto alla salute, fra l'altro dandone una definizione di ampia portata, che lo porta a includere la situazione di complessivo benessere della persona (cfr. l'art. 25 della Dichiarazione, l'art. 12 del Patto, nonché quanto previsto nel Preambolo del Trattato OMS), che necessariamente implica non solo il tradizionale aspetto della cura delle patologie, ma anche la disponibilità di quelle risorse che sono il presupposto per una vita dignitosa (cibo, vestiario, abitazione), nonché i profili di tutela ambientale: anche se ciò comporta un riflesso di non poco momento in fase attuativa, posto che, in un sistema policentrico com'è il nostro, le competenze legislative sono ripartite fra Stato e Regioni a seconda della materia che viene in considerazione. Altro è, ad esempio, ragionare di tutela della salute (potestà concorrente), altro è farlo con riguardo all'assistenza sociale (potestà residuale delle Regioni).

[5] Per lo meno quanto al tema che qui interessa, mentre, quanto al modo in cui è affrontata la questione dell'ingresso dei migranti nel paese, agli strumenti di respingimento, alle modalità di identificazione – aspetti tutti oggetto, fra l'altro, di successive, rilevanti modifiche, in senso restrittivo – il discorso è ben diverso (Pugiotto 2009).

[6] Ma anche la libertà di circolazione di cui all'art. 16 cost. subisce limitazioni sconosciute al cittadino.

scegliere, in alternativa, la via dell'assicurazione privata[7]. Qualora lo straniero sia invece in una situazione di irregolarità, gli vengono comunque assicurate, ex art. 35, c. 3, «le cure ambulatoriali ed ospedaliere urgenti o comunque essenziali, ancorché continuative, per malattia e infortunio», oltre a essere soggetto ai programmi di medicina preventiva a tutela della salute individuale e collettiva. Il diritto all'assistenza sanitaria, in quanto fondamentale, spetta quindi alla persona come tale, cittadino italiano o no che sia, ma lo stato di irregolarità ne riduce la portata, sulla base dell'alternativo criterio dell'urgenza della prestazione, o della sua essenzialità.

Trova dunque riscontro in sede legislativa il principio del nucleo irriducibile dei diritti fondamentali, affermatosi nella giurisprudenza costituzionale, anche con riguardo al diritto alla salute, al fine di sottrarne una dimensione prestazionale – funzionale al rispetto della inviolabile dignità umana – all'onnipresente criterio del necessario bilanciamento con altri interessi di rango costituzionale, che varrebbe altrimenti a giustificarne eventuali compressioni, specie considerando che nella categoria degli interessi di pari rango al giorno d'oggi domina l'equilibrio di bilancio, cioè l'argomento finanziario, stabilmente evocato dalla Corte a fondamento di scelte normative limitative anche in materia di diritti. In effetti, il testo unico sull'immigrazione sembra porsi in linea di continuità rispetto alle indicazioni emergenti dalla prassi, benché la Corte non abbia mai spiegato in che cosa consista il "nucleo essenziale" o "irriducibile", limitandosi a menzionarlo quale argine a un uso irragionevole della discrezionalità legislativa e a giudicarlo rispettato o leso nelle singole scelte normative volta a volta sindacate. Sotto l'influsso dei casi concreti, esso ha preso forma proprio sui due versanti poi ripresi dall'art. 35: quello dell'urgenza della prestazione[8] e quello della sua indispensabilità, benché, in ipotesi, non si traduca in un trattamento indifferibile[9]. Semmai si può osservare che il riferimento normativo alle cure es-

[7] Le varie ipotesi sono disciplinate nell'art. 34 del testo unico, il quale prevede anche casi di iscrizione meramente facoltativa al S.S.N., qualora il soggiorno, pur regolare, sia fisiologicamente temporaneo, come nel caso della presenza legata a motivi di studio.

[8] Cfr. Corte cost., sentt. nn. 267/1998 e 509/1999, che si sono occupate delle regole sul rimborso delle prestazioni rese all'estero o comunque da strutture diverse da quelle pubbliche o convenzionate: rimborso condizionato, in violazione del contenuto essenziale del diritto alla salute, a una preventiva autorizzazione, anche qualora l'intervento fosse indifferibile, e non fosse possibile ottenere tempestiva assistenza nell'ambito del S.S.N. Nello stesso senso, Corte cost. sent. n. 304/1994, che distingue le prestazioni indifferibili e urgenti, come tali oggetto di assistenza indiretta, da quelle riabilitative a carattere continuativo e prolungato nel tempo, viceversa escluse in quanto eccedenti i confini del nucleo irriducibile di cui all'art. 32 cost.

[9] Cfr. Corte cost., sent. n. 992/88, con riguardo al caso di una prestazione erogabile solo da un centro privato, come tale in astratto esclusa da ogni possibilità di rimborso, in violazione dell'art. 32 cost. Meno probante sul punto, benché la Corte evochi l'ambito inviolabile di tutela del diritto alla salute, è Corte cost., sent. n. 309/1999, un'additiva di principio volta ad assicurare, ai cittadini italiani che si trovino all'estero, che non facciano parte di alcune categorie legislativamente previste, e versino in disagiate condizioni economiche, l'assistenza sanitaria gratuita, nelle forme che spetta al legislatore definire. Qui infatti, ai fini della dichiarazione di

senziali, anche a carattere continuativo, vale a meglio precisare, e probabilmente ad ampliare, l'ambito di tutela "irriducibile".

3. Il diritto alla salute dello straniero non regolarmente soggiornante

Successivamente all'entrata in vigore del T.U. sull'immigrazione nel 1998, la Consulta ha avuto modo di fissare una serie di principi di tutela dello straniero, non regolarmente soggiornante, in materia sanitaria. La sent. n. 252 del 2001, infatti, chiarisce che anche il non cittadino, in quanto persona presente sul territorio, beneficia del "nocciolo duro" del diritto in questione; che tale ambito comprende le prestazioni urgenti ed essenziali, di cui all'art. 35, c. 3, t.u. il quale offre la misura legislativa del quantum costituzionalmente necessario ai sensi dell'art. 32 cost.; che pertanto questa sfera di tutela non è negoziabile, né cedevole rispetto ad altri interessi interferenti col fenomeno migratorio (quello – di ordine pubblico – al controllo sui flussi, al pari di quello attinente al contenimento della spesa pubblica). Benché a essere impugnato nel caso di specie non fosse l'art. 35, la Corte avalla dunque, come conforme a costituzione, la distinzione fra chi gode del solo nucleo essenziale e chi invece dispone di un'assistenza sanitaria di più ampia portata, pur lasciando perplessi il fatto che, per giustificarla, il Giudice delle leggi la ritenga attinente alle sole "modalità di esercizio" del diritto, sulle quali il legislatore può intervenire, come ha fatto con la disciplina degli artt. 34 e 35. Uguale titolarità, differenti modalità di esercizio, quindi, stando al ragionamento della Corte.

Si può tuttavia osservare che una cosa è ragionare di un medesimo ambito prestazionale, da garantirsi in modi diversi ma di analoga effettività, come nel caso in cui sia possibile scegliere se affidarsi al S.S.N. o piuttosto ricorrere a una copertura assicurativa. Altro è distinguere fra la posizione di coloro che, in quanto cittadini o stranieri regolarmente soggiornanti, sono iscritti al S.S.N. e/o tenuti a procurarsi analoga copertura, godendo pertanto di piena tutela sanitaria – fermo restando che la pienezza è pur sempre condizionata al livello di finanziabilità dei livelli essenziali (Cavasino 2012) – e coloro i quali, come avviene per gli stranieri irregolari, siano destinatari di una protezione comunque più limitata. In tal caso sembra più realistico ragionare di sfere di tutela di diversa estensione, una garantita a tutti, più contenuta rispetto all'altra, che si arricchisce di una componente ulteriore, che, in quanto eccedente il minimo garantito, può essere assegnata dal legislatore solo ad alcuni (Randazzo)[10], sempre che non risulti irragionevole da altro punto di vista. Sembra insomma che la prospettiva della

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incostituzionalità, basta l'obbligo di garantire cure gratuite agli indigenti, esplicito nell'art. 32 cost., che ne rappresenta una distinta situazione giuridica.

[10] La tesi sul nucleo irriducibile spettante all'immigrato in quanto persona è poi ripresa, seppur nel contesto del rapporto fra potestà legislativa statale e ruolo regionale, nelle decisioni nn. 269 e 299/2010, nonché nella n. 61/2011, su cui *infra*.

Consulta guardi al contenuto del diritto, anziché limitarsi, come afferma, a legittimare scelte parlamentari circoscritte alle sole modalità di esercizio.

Altro aspetto di cui si occupa la sentenza n. 252 del 2001 è il raccordo fra tutela del diritto alla salute ed espulsione dell'immigrato privo di permesso di soggiorno, profilo lasciato privo di regolamentazione espressa dall'art. 19 t.u., che tratta i casi di non espellibilità dello straniero, impugnato appunto perché avrebbe consentito l'allontanamento dell'immigrato nonostante necessitasse di cure mediche, in violazione dell'art. 32 cost. Alla prospettazione di tipo additivo la Corte risponde con un'interpretativa di rigetto, con cui peraltro perviene a identico risultato, leggendo l'art. 19 come ostativo all'espulsione qualora appunto l'interessato versi nella condizione di bisogno di cui al successivo art. 35 t.u. Lo scopo è ovviamente assicurare effettività al diritto alla salute, garantendo la permanenza sul territorio nazionale sino al completamento del trattamento. In questa logica lo straniero non dispone di uno specifico permesso di soggiorno, ma nemmeno può essere espulso, potendo far valere le sue ragioni in sede di giudizio di convalida del provvedimento espulsivo avanti al giudice di pace e poi, se del caso, di fronte alla Corte di cassazione. La soluzione non appare del tutto appagante, sia nel caso di espulsione con accompagnamento immediato alla frontiera, con conseguente necessità di impugnare l'atto quando ormai si è fuori dal paese (Algostino 2002), ma anche in senso più in generale, essendo chiaro che la posizione del non cittadino irregolare, per ottenere piena protezione, richiede un titolo di soggiorno, che egli possa esibire in occasione di un qualsiasi controllo, piuttosto che incentrarsi sulla possibilità di difendersi contro un decreto di espulsione già adottato nei suoi confronti.

È probabilmente per questa ragione, pur non esplicitata, che nella giurisprudenza amministrativa si ritiene possibile ottenere tale titolo per cure mediche, benché non formalmente previsto dal testo unico[11], anche se questa impostazione non appare monolitica. Vi sono certamente decisioni che vanno in questa direzione, pur sulla base di fondamenti normativi non sempre omogenei[12]. Ma ve

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[11] Non si tratta infatti del permesso per cure mediche previsto dall'art. 36 t.u., riguardante l'ingresso dello straniero non iscritto al S.S.N. per usufruire di cure mediche, anche diverse da quelle urgenti e/o essenziali, condizionato per conseguenza a una serie di particolari requisiti (dichiarazione della struttura sanitaria, cauzione a garanzia del costo presumibile delle prestazioni, disponibilità di un alloggio e via dicendo).

[12] A volte la possibilità del rilascio di un permesso di soggiorno per cure mediche è data per implicita (T.A.R. Trentino Alto Adige, Trento, sent. n. 139/2012; T.A.R. Molise, sent. n. 276/11), a volte invece è fatta oggetto di specifico esame, attraverso linee interpretative che, pur diverse fra loro, convergono in un risultato favorevole al richiedente, risultato che ne rappresenta il comune denominatore e la *ratio* unificante. T.A.R. Veneto, sent. n. 1168/11, ragiona di un'autorizzazione atipica, fondata su di una lettura estensiva dell'art. 28 D.P.R. n. 394/1999, il quale tratta dei permessi di soggiorno da rilasciare nei casi in cui la legge vieti l'espulsione, riferendosi anche al caso delle cure mediche, ma con limitato riferimento alle donne in stato di gravidanza. T.A.R. Lombardia, sent. n. 315/2014, evoca il complessivo quadro normativo-giurisprudenziale ormai affermatosi, mentre C.d.S., sent. n. 4863/2010, T.A.R. Campania, sentt. nn. 3847/2015 e 2530/2014, valorizzano il combinato disposto degli art. 35 e 36 t.u., e T.A.R. Sicilia, sent. n. 1872/2009 insiste proprio sull'art. 36. Quest'ultimo è ritenuto applicabile anche allo stra-

ne sono anche altre che, all'opposto, evidenziano come l'unico permesso relativo alla cure mediche sia quello contemplato dall'art. 36 t.u., finalizzato a una diversa fattispecie: non solo perché chiaramente pensato per lo straniero che dal suo paese di provenienza voglia venire in Italia, ma anche perché non circoscritto al nucleo essenziale del diritto alla salute, ricomprendendo invece anche altre prestazioni (l'art. 36 t.u. si riferisce infatti allo «straniero che intende ricevere cure mediche in Italia», senza altra determinazione). È dunque evocato il principio di tipicità dei provvedimenti amministrativi, in relazione al diverso ambito oggetto dell'art. 36 e al silenzio sul punto dell'art. 35, ritenendo in sostanza sufficiente la protezione assicurata dalla non espellibilità (T.A.R. Calabria, sent. n. 700/2011, T.A.R. Piemonte, sent. n. 665/2010).

Un discorso simile può essere ripetuto in relazione a un altro aspetto su cui i giudici comuni, ordinari e amministrativi, non paiono aver ancora trovato una soluzione condivisa: la spettanza stessa della giurisdizione, qualora venga in gioco il nucleo irriducibile del diritto alla salute, a volte negata ai magistrati amministrativi a favore di quelli ordinari – in conformità a quanto ritenuto dalla Corte di cassazione –, a volte al contrario affermata in capo ai primi, in modo esplicito o implicito[13]. Essendo ormai prevista ex lege la possibilità di riassunzione dinanzi al giudice che risulti dotato di giurisdizione, la situazione dello straniero che impugni il diniego del permesso di soggiorno per cure mediche dinanzi al T.A.R. e se lo veda respingere per difetto di giurisdizione non è irrimediabile, ma di certo onera l'istante di un'ulteriore attività processuale, che non va di certo a migliorare la qualità della sua permanenza nel Paese, in un momento di particolare difficoltà, com'è quello di chi necessiti di assistenza sanitaria.

Vi sono dunque profili su cui un assestamento della giurisprudenza sarebbe quanto meno auspicabile, alla luce degli interessi dello straniero.

4. Il nucleo irriducibile: le cure "urgenti" ed "essenziali"

Può risultare discutibile, non solo in termini di opportunità, ma anche di compatibilità costituzionale, che un diritto fondamentale sia "spezzettato", ancor più qualora ciò avvenga sulla base di un criterio giustificativo incentrato sul titolo di presenza del soggetto nel territorio, ma, salvo tornare sul problema, è chiaro che esso si presenta tanto più acuto quanto più si allarghi il divario fra le categorie

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niero che sia già presente in Italia in condizione di irregolarità. Il che però va ben oltre – forse sarebbe meglio dire contro – quanto risulta dal testo, pensato per chi entra regolarmente nel paese per curarsi, e genera qualche confusione, data la diversa portata della disposizione rispetto all'art. 35, in quanto estesa alle cure anche non urgenti né essenziali.

[13] Nel senso della giurisdizione ordinaria, cfr. T.A.R. Sicilia, Catania, sent. n. 1325/2016, TAR Lombardia, sent. n. 2964/2014, T.A.R. Trentino Alto Adige, Bolzano, sent. n. 156/2014. Nel senso di quella amministrativa vedi invece T.A.R. Trentino Alto Adige, Trento, sent. nn. 139/2012 e 71/2010, che affrontano il problema in modo esplicito, nonché le decisioni di cui alla nota n. 12, che invece si pronunciano nel merito, implicitamente affermando quindi di averne la potestà.

dei beneficiari delle prestazioni sanitarie: e cioè a seconda di quanto si ritenga far parte del nucleo irriducibile, individuato non solo guardando alla sua delimitazione legale, ma anche alla prassi applicativa, nonché alla tutela giurisdizionale a esso pertinente. "Urgenza", "essenzialità", anche "continuativa", dell'assistenza cui ha diritto la persona in quanto tale, sono formule destinate a riempirsi di significati in via interpretativa, potendo allora estendersi o viceversa contrarsi, pur nei limiti consentiti dal testo. Soprattutto il riferimento a ciò che sia essenziale è «effettivamente non traducibile in significati univoci, oggettivi» (D'Aloia 2003).

Le definizioni legislative sono state seguite da linee guida interpretative di matrice ministeriale che, pur non essendo vincolanti all'esterno della pubblica amministrazione, e quindi in primo luogo per i giudici, sono pur sempre utili, anche perché, pur raramente citate, nemmeno sono state misconosciute dalla giurisprudenza. L'urgenza rimanda alle «cure che non possono essere differite senza pericolo per la vita o danno per la salute», secondo quanto risulta dalla nozione comune del termine, rinviando a una valutazione caso per caso da parte del personale sanitario (circolare interpretativa n. 5/2000, adottata dal Ministero della Sanità, pubblicata nella G.U., Serie generale, n. 126 del 2000, p. 41).

Sul versante delle cure essenziali, è lo stesso art. 35, c. 3, t.u. che, per meglio specificare il concetto, qualifica tali non tanto certe tipologie di prestazioni, ma l'intera gamma di trattamenti inerenti a determinate situazioni concernenti la persona, quali la gravidanza, la maternità, la minore età, inducendo anzi a pensare che, in tale ambito, sussista quanto meno una presunzione in questo senso. Senza con ciò prodursi in un'elencazione tassativa, come la stessa Corte ha avuto modo di riconoscere, e come peraltro si deduceva dalla stessa formula utilizzata, la quale premette all'indicazione delle citate condizioni del soggetto le parole «in particolare», che evidentemente non escludono ulteriori situazioni e/o prestazioni.

Al di fuori di questa cornice, essenziali sono le «prestazioni sanitarie, diagnostiche e terapeutiche, relative a patologie non pericolose nell'immediato e nel breve termine, ma che nel tempo potrebbero determinare maggiore danno alla salute o rischi per la vita (complicanze, cronicizzazioni o aggravamento)» (circolare n. 5/2000, p. 41). Prevale un'interpretazione ampia dell'art. 35, c. 3, t.u., che consente alla struttura interessata di erogare una nutrita serie di prestazioni, anche a carattere continuativo, posto che, a fronte di una patologia, non sarà difficile diagnosticare possibili complicanze o aggravamenti, che la rendano meritevole di cura. Dirimente è l'accertamento medico circa la natura del problema e i conseguenti trattamenti sanitari, come la Corte ha esplicitamente affermato nella decisione 252 del 2001. Da questo punto di vista, la tutela dello straniero non legalmente soggiornante potrebbe trovare ostacolo in una prassi amministrativa restrittiva, favorita dall'incompiutezza delle formule legislative utilizzate, ma non sembra sussistere un corrispondente, corposo, contenzioso a dimostrarlo.

La magistratura si è occupata del problema definitorio soprattutto al momento di decidere su ricorsi contro il rigetto di permessi di soggiorno fondati sul bi-

sogno di cure in sede di giurisdizione amministrativa di legittimità e anche su contestazioni riguardanti decreti di espulsione adottati in spregio ad analoghe esigenze sanitarie in sede di giurisdizione ordinaria.

Entrambi gli ordini si muovono nella prospettiva delineata dalla Corte costituzionale e dal t.u. sull'immigrazione, confermando l'esistenza di un nucleo irriducibile protetto dall'art. 32 cost., in presenza del quale cedono tutti gli altri interessi confliggenti, *in primis* quello al controllo sui flussi migratori, inerente alla tutela dell'ordine pubblico e della pubblica sicurezza[14]. La categoria di interventi sanitari che appare collocata sulla china più scivolosa è quella delle cure essenziali, non essendo sempre semplice determinarne i confini nel concreto dell'esperienza (Morana 2010). Vi rientrano, oltre alle prestazioni per così dire principali, anche «quegli interventi, e solo quelli che, successivi alla rimozione chirurgica della patologia, od alla somministrazione immediata di farmaci essenziali per la vita, siano indispensabili al completamento dei primi o al conseguimento della loro efficacia, nel mentre restano esclusi quei trattamenti di mantenimento e controllo che, pur se indispensabili ad assicurare una *spes vitae* per il paziente, fuoriescono dalla correlazione strumentale con l'efficacia immediata dell'intervento sanitario indifferibile ed urgente» (Corte cassazione, sentt. nn. 7615/2011, 1531/08). Ne segue che è essenziale un trattamento di dialisi (T.A.R. Veneto, sent. n. 1168/2011), mentre non lo sono i controlli per prevenire una recidiva dopo l'asportazione di un sarcoma, oppure una terapia anticoaugulante accompagnata da controlli della coaugulazione o un trattamento di mantenimento su soggetto affetto da diabete, correlato al «monitoraggio dei parametri bioumorali ...pur indispensabile per il paziente» (v., rispettivamente, T.A.R. Molise, sent. n. 276/2011; Corte di cassazione, sent. n. 1531/2008; T.A.R. Trentino Alto Adige, sent. n. 139/2012). La Corte di cassazione ha sottolineato che queste cure, pur non garantite, ben possono essere prestate allo straniero che si munisca di un permesso di soggiorno ai sensi dell'art. 36 t.u.: il che però pare poco convincente se si considera che esso presuppone, fra l'altro, la disponibilità di un reddito adeguato, che potrebbe difettare nel caso singolo[15], con una conseguente lacuna nella tutela dell'interessato. In generale, la distinzione che emerge dalla citata giurisprudenza appare frutto di un'interpretazione restrittiva rispetto alle potenzialità espansive consentite dal riferimento all'essenzialità, anche continuativa, in relazione all'importanza del bene garantito ex art. 32 e 2 cost. (Pezzini 2009).

Sembra poi che la categoria delle prestazioni essenziali si determini non solo guardando ai contenuti in relazione alla patologia del soggetto che ne ha bisogno,

[14] Così T.A.R. Sicilia, sent. n. 1325/2016, in cui si afferma che qualora la situazione soggettiva del migrante non sia da ricondurre alla componente irriducibile del diritto alla salute, la pretesa andrà valutata «unitamente agli altri interessi pubblici di rango primario rilevanti in tema di soggiorno e permanenza».

[15] Cfr. Corte cassaz., sentt. nn. 7615/2011 e 1531/08. Fermo restando il fatto che il permesso di soggiorno previsto dall'art. 36 t.u., come già sottolineato, riguarda l'ingresso dello straniero, tenuto non a caso a munirsi di apposito visto.

ma anche alla luce di un ulteriore criterio, e cioè l'impossibilità che l'assistenza, non urgente, sia resa nel paese di origine, verso il quale il soggetto è, o potrebbe essere, espulso. La stessa Corte costituzionale ha affermato che la non espellibilità è condizionata al fatto che l'esecuzione del provvedimento rechi un «irreparabile pregiudizio» alla salute dello straniero, il che non è, ad esempio, qualora sia necessario provvedere a un intervento chirurgico che può essere rinviato, seppur entro un ragionevole lasso temporale, e dunque eseguito nel paese di origine. In tal senso si spiegano le valutazioni sulla disponibilità, all'estero, delle tecniche necessarie all'erogazione delle prestazioni per le quali l'interessato chiede un permesso di soggiorno per cure mediche (T.A.R. Campania, sentt. n. 2530/2014 e 3847/2015, T.A.R. Molise, sent. n. 276/2010), o che l'interessato richiama per congelare gli effetti dei provvedimenti di espulsione. E in tal senso muove anche il parallelismo fra la situazione dello straniero, ai sensi dell'art. 35 t.u., e quella del cittadino italiano che si rechi all'estero per usufruire di interventi che rimangono pur sempre a carico del bilancio pubblico, in quanto oggetto di rimborso. I giudici amministrativi, appoggiandosi alla giurisprudenza della Corte di cassazione, sottolineano che la disciplina sulle cure all'estero, risultante dal combinato della legge n. 595 del 1985 e del D.M. 3 novembre del 1989, rappresentando «la positivizzazione delle ipotesi in cui le cure richieste devono ritenersi come attinenti al nucleo essenziale del diritto alla salute», che evidentemente non può mutare a seconda della nazionalità della persona, offre la chiave per interpretare l'art. 35 relativamente allo straniero (T.A.R. Sicilia, Catania, sent. n. 1325/2016; T.A.R. Lombardia, sent. n. 2964/2014).

Se il cittadino può recarsi all'estero per beneficiare non solo di prestazioni che il S.S.N. non è in grado di rendere «tempestivamente», ma anche nell'ipotesi in cui non le assicuri «in forma adeguata» (art. 3, c. 5, l. n. 595/1985); e se la mancanza di adeguatezza rispetto alla «particolarità del caso clinico» si ha quando la prestazione «richiede specifiche professionalità ovvero procedure tecniche o curative non praticate ovvero attrezzature non presenti nelle strutture italiane pubbliche o convenzionate con il Servizio sanitario nazionale» (art. 2, c. 4, D.M. 3 novembre 1989), altrettanto dovrà essere garantito allo straniero comunque presente in Italia, in relazione a trattamenti inesistenti nel suo paese o comunque non corredati da sufficienti livelli qualitativi, e di cui necessita per far fronte a patologie significative.

Sul punto due sono i rilievi da effettuare: il primo di ordine normativo, il secondo attinente invece alla prassi amministrativa. Il testo dell'art. 35, al pari delle disposizioni "circostanti", affronta la questione sotto il profilo prettamente interno, guardano cioè alla natura (urgente, essenziale) del trattamento richiesto, senza attribuire rilievo alcuno al livello di assistenza sanitaria che il medesimo richiedente troverebbe nel suo paese di provenienza. Da questo punto di vista la giurisprudenza pare aver introdotto un ulteriore requisito, che vale a restringere la portata dell'art. 35, utilizzando a tal fine la legislazione sulle cure dell'italiano all'estero, il riferimento all'irreparabilità del pregiudizio che il malato subirebbe

in caso di espulsione (Corte cost. sent. n. 252/2001), e in generale operando un bilanciamento, potrebbe dirsi, fra tutela della salute e tutela dell'ordine pubblico[16].

Quanto alla prassi amministrativa, va notato che risulta difficile immaginare che, nel concreto dell'esperienza, le strutture sanitarie siano gravate, e comunque intendano provvedere, agli accertamenti del caso, verificando di volta in volta – per le cure in astratto essenziali – se siano o meno una "esclusiva" italiana, per decidere se erogarle o meno. È quanto meno ipotizzabile che prevalga un'istanza di accoglienza, salvo situazioni di immediata evidenza. D'altronde, è probabile che ciò accada, a monte, anche per la determinazione di cosa sia essenziale o non lo sia, per lo meno in virtù di un principio di precauzione, che dovrebbe fungere da guida quando si tratta della salute delle persone. In questa logica, per lo straniero irregolare è più rischioso, probabilmente, chiedere alla questura un permesso per cure mediche, che potrà essere rifiutato con conseguente necessità di ricorso giurisdizionale, piuttosto che rivolgersi alla struttura sanitaria, facendo per il resto affidamento sullo stato di inespellibilità ai sensi dell'art. 19 t.u., per come inteso dalla Corte costituzionale.

Un'ultima notazione circa lo spettro di prestazioni sanitarie a favore del soggetto irregolare. Dal momento che esso risulta più circoscritto di quello assicurato allo straniero regolare (e al cittadino, cui questi è equiparato), e che tuttavia taluni interventi, non garantiti ex art. 35 t.u., sono comunque indispensabili per assicurargli una speranza di vita, come afferma la giurisprudenza, bisogna chiedersi se l'assenza di tale assistenza nel paese di origine del malato possa pregiudicarne la cura in Italia, in base al fatto che non si tratti di prestazioni essenziali e che, nel caso concreto, non siano nemmeno urgenti[17].

O si pensa che un'organizzazione sanitaria deficitaria fuori dai confini renda essenziali anche quegli interventi che, ai sensi della nostra legislazione, come filtrata dalla prassi giudiziaria, non lo sarebbero; oppure si cerca un'altra soluzione normativa, non potendosi pensare a una terza ipotesi, consistente nel lasciare il malcapitato a se stesso, ciò che rappresenterebbe una palese violazione di elementari doveri di solidarietà (art. 2 cost.) e, direttamente, un irreversibile pregiudizio al bene salute e dunque all'art. 32 cost. Sembra che, anziché forzare l'interpretazione dei disposti sin qui esaminati, si possa impiegare quella clausola residuale, potrebbe dirsi, rappresentata dal permesso di soggiorno per «seri motivi in particolare di carattere umanitario o risultanti da obblighi costituzionali», di cui ragiona l'art. 5, c. 6, t.u., con formula tanto flessibile da poter acco-

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[16] D'altra parte, va osservato che il condizionale è d'obbligo, poiché la comparazione fra prestazioni disponibili in Italia e altrove non è un passaggio argomentativo costante nelle decisioni in materia di diritto alla salute dello straniero irregolare, a volte essendo del tutto inesistente (così in T.A.R. Veneto, sent. n. 1168/2011), il che dimostra la presenza di diverse sensibilità, e di diverse letture della normativa rilevante.

[17] Se lo fossero, ogni rischio per la salute conseguente alla mancata, immediata, erogazione rappresenterebbe infatti una lesione del nucleo irriducibile, come configurato dal più volte citato art. 35 t.u.

gliere simile fattispecie, come del resto già accaduto[18]. Così ragionando la tutela sanitaria del non cittadino irregolare acquista un'ulteriore dimensione, che la completa rendendola maggiormente effettiva.

Tutto ciò non toglie che le modalità con cui il legislatore ha fissato le condizioni di accesso all'assistenza sanitaria, la rendano dipendente, in modo determinante, dall'applicazione che ne viene fatta prima di tutto dal personale sanitario, che è a diretto contatto con la richiesta dello straniero, poi – o parallelamente – dalle autorità di pubblica sicurezza, cui questi si rivolga per ottenere il permesso di soggiorno per cure mediche, o dalle quali si difenda in caso di espulsione nonostante la sussistenza di motivi clinici in contrario; infine, dagli organi giurisdizionali, chiamati a risolvere le conseguenti, eventuali, controversie, fra i quali rientra ovviamente anche la Corte costituzionale. Il risultato complessivo può evidentemente mutare a seconda di molteplici variabili, e forse non sarebbe inutile una novella legislativa che, senza entrare in un'elencazione dettagliata e tassativa di prestazioni erogabili, introducesse qualche elemento di maggiore certezza, magari indicando alcune categorie generali, quand'anche non esaustive, e dunque non tali da esaurire il margine di apprezzamento dell'amministrazione nei casi concreti.

5. Ragionevole differenza o discriminazione fra straniero regolare e non?

A monte, resta peraltro aperta la questione sulla costituzionalità della differenza di protezione del bene fondamentale in discussione, in quanto basata sullo *status* del soggetto, che a sua volta dipende dal fatto che la sua presenza sia oppure no conforme alle norme sull'ingresso e soggiorno in Italia. Questione che non si pone nella giurisprudenza, che si conforma da tempo a tale criterio distintivo, tanto se si tratta della Corte costituzionale, quanto presso i giudici comuni, come si è visto sin qui, ma che non appare sopita nelle riflessioni della dottrina. Sembra contraddittorio qualificare il diritto alla salute come fondamentale, con ciò affermandone la spettanza alla persona in quanto tale, per poi ritagliarne una parte destinata, solo quella, agli stranieri non legalmente soggiornanti (Randazzo 2012). «Non è chiaro dove riposi il fondamento della distinzione fra 'parte' e 'parte' della struttura dei diritti» (Ruggeri 2011, anche con riguardo al diritto alla salute). Ciò che ripropone il problema della ragionevolezza di tale scelta normativa, ovvero di individuare una *ratio* giustificativa, che non trasformi una differenziazione in una vera e propria discriminazione.

[18] Cfr. Tribunale di Roma, ord. 04.05.12, che accoglie la domanda di protezione umanitaria presentata, ai sensi dell'art. 5, c. 6, t.u., da una donna nigeriana affetta da HIV e bisognosa di un trattamento con farmaci antivirali dal costo inaccessibile nel proprio paese e non disponibili nella maggior parte degli Stati africani. In alternativa, sembra utilizzabile allo scopo il permesso di soggiorno di cui all'art. 36 t.u., già ricordato, nell'interpretazione ampia che ne offre certa giurisprudenza amministrativa (v. nt. 12), che lo trasforma anch'esso in una norma di chiusura del sistema.

Può pesare il profilo della sostenibilità finanziaria, in base al presupposto per cui, salvo eccezioni, chi non risiede legalmente nel territorio presumibilmente difetta di un reddito che gli consenta di pagare l'assistenza, anche nella sola misura del ticket previsto per tutti (art. 35, c. 4, t.u.). Con l'effetto che, allargare l'ambito garantito, oltre ciò che sia ritenuto urgente o essenziale, comporterebbe un ulteriore aggravio alle condizioni della finanza pubblica, oggi ben più in difficoltà di quanto probabilmente avveniva alla fine degli anni '90, quando ha visto la luce la disciplina in tema di immigrazione. Tuttavia, al netto del rilievo secondo cui il bilanciamento andrebbe effettuato fra entità omogenee – dunque non fra diritti ed esigenze di bilancio – e che comunque l'interesse prevalente non dovrebbe essere quello economico (Luciani 2016), la limitatezza delle risorse disponibili può giustificare una *deminutio* di tutela per tutti, salvo che non si arrivi al punto di renderla puramente fittizia, negando nella sostanza il diritto alla cura, ma è più che discutibile che altrettanto valga quando solo una certa categoria di persone subisce un trattamento meno favorevole.

Il criterio che presiede alla determinazione della categoria penalizzata – rispetto alla generalità dei consociati stanziati nello stesso luogo – è poi quello della presenza regolare o meno, che a sua volta dipende da una qualificazione legislativa circa la posizione del soggetto rispetto alle regole sull'ingresso e soggiorno, dettate dal medesimo legislatore in una logica di contenimento del fenomeno migratorio, ispirata a finalità di ordine pubblico. Ed è da chiedersi se simile interesse abbia legittimamente a prevalere sul diritto alla salute, soprattutto considerando che il principio che anima il nostro sistema costituzionale è quello della dignità dell'individuo (artt. 2 e 3 cost.; Ruggeri 2011), e che questa si misura anche sulla sfera di protezione della salute, quale stato di benessere psico fisico: circoscrivere le prestazioni per alcuni rispetto a quelle offerte agli altri rende i primi "meno degni" dei secondi. Lo stesso dovere di solidarietà, declinato, ai sensi dell'art. 2 cost., a prescindere dalla regolarità della presenza del singolo, spinge nella direzione di un'assimilazione, o almeno di un avvicinamento alla posizione del cittadino/straniero regolare, in questo delicato settore.

Anche la previsione dei livelli essenziali di assistenza sanitaria (LEA), che il legislatore statale fissa con validità estesa all'intero territorio, vincolando pertanto la normazione regionale di dettaglio, offre spunti di riflessione utili sul tema. Tale previsione, e relativa concretizzazione, precede la riforma del Titolo V cost., che peraltro in materia di tutela della salute non innova quanto al tipo di competenza riconosciuta alle Regioni, e anzi generalizza lo schema con riguardo alle «prestazioni concernenti i diritti civili e sociali che devono essere garantiti su tutto il territorio nazionale» (art. 117, c. 2, lett. m), quale titolo statale traversale. Emerge quindi un riferimento a ciò che viene ritenuto essenziale nella salvaguardia di un diritto, che connota anche la tesi del nucleo essenziale (o irriducibile, che dir si voglia) dei diritti fondamentali. È vero che la funzione dei due elementi non è la stessa (Rovagnati 2003): nel primo caso siamo di fronte a un titolo competenziale, che consente allo Stato di intervenire con una disciplina

uniforme, in cui "essenziale", in sostanza, è ciò che in un determinato momento storico il legislatore ritiene che sia[19]. Dall'altro lato, la teoria del contenuto essenziale risponde al fine di limitare la discrezionalità legislativa nel tratteggiare i contenuti di un diritto fondamentale, sicché, una volta individuato, dovrebbe essere stabile, o almeno relativamente stabile nel tempo. Ne deriva che i livelli essenziali possono coincidere col nucleo, o andare oltre, nel senso di essere maggiormente garantisti: purché non si spingano al di sotto del livello di tutela che esso esprime (Cavasino 2012).

Tuttavia è sensato pensare che, una volta stabilito in un dato contesto, e quindi *rebus sic stantibus*, che un determinato ambito di prestazioni, in quanto essenziale, vada garantito ugualmente in tutta Italia, divenga difficile affermare al contempo che per una data fascia di persone – gli stranieri irregolari – le medesime prestazioni perdano quel connotato, non siano essenziali, e quindi non vengano loro erogate[20]. A meno che non si ravvisi una ragione costituzionalmente significativa, il che, come sopra riferito, lascia perplessi qualora la si identifichi nello stato di non regolarità.

Spesso, quando si propugna un innalzamento della tutela a favore degli immigrati, anche al di fuori del campo delle prestazioni sanitarie, si invoca la maggiore conformità al nostro sistema costituzionale, visto anche nella sua apertura alle norme sovranazionali (Ruggeri 2015), di una politica inclusiva, in antitesi a una esclusiva, che fra l'altro ha spesso ispirato le scelte statali e a volte anche regionali, in materia di immigrazione (Pugiotto 2009 e Patroni Griffi 2009). Rapportato al tema in discussione, ragionare di inclusione forse non è del tutto appropriato, per lo meno se con ciò si vuole alludere a prestazioni o provvidenze che siano funzionali a uno stabile inserimento della persona in una data comunità, visto che lo straniero, in quanto irregolare, è normalmente destinato all'espulsione. Tuttavia non è sempre detto che sia così, visto che spesso l'immigrato irregolare vive in uno stato di "sospensione", in attesa di una regolarizzazione di massa che prima o poi arriva, in quanto resa necessaria dalla sproporzione fra gli ingressi reali e quelli programmati, in una sorta di «tempo di mezzo fra titoli di soggiorno differenti all'interno di un percorso migratorio e residenziale sostanzialmente stabile» (Bascherini 2010). E comunque, anche nel caso in cui la vicenda del singolo si concluda con l'uscita dal nostro territorio, una volta ultimata la cura, resta nondimeno intatta l'istanza di non discriminare nel godimento di un diritto fondamentale, che presuppone una situazione di bisogno, cui dare una

[19] Il *quantum* di assistenza sanitaria erogabile in un dato momento storico dipende, prima di tutto, come già ricordato, dalle risorse disponibili, ma anche dall'idea di tutela sanitaria che un certo ordinamento assume come propria. Si tratta dunque di una nozione non solo indeterminata, sino a che non è riempita di contenuti, ma anche mutevole in base al singolo contesto.

[20] Cfr. Vosa 2016. Il fatto che, secondo l'art. 35, c. 3, t.u., all'irregolare sia assicurata protezione per quel che attiene alle cure essenziali, oltre che urgenti, non toglie infatti che esse non coincidano con l'intera gamma dei LEA, cioè con quanto ritenuto essenziale per i cittadini e gli stranieri regolarmente soggiornanti.

risposta piena, senza che questa implichi appunto alcuna definitiva stabilizzazione del soggetto[21].

6. Il riparto di competenze in materia di tutela della salute

Residua l'aspetto del riparto di competenze legislative, qualora venga in gioco la salute del non cittadino, comunque presente sul territorio nazionale. Sul punto vengono in considerazione da un lato la riserva di legge sulla condizione giuridica dello straniero, in relazione alle materie statali «condizione giuridica dei cittadini di Stati non appartenenti all'Unione europea» e «immigrazione» (artt. 10, c. 2, e 117, c. 2, lett. a e lett. b, cost.); dall'altro il titolo di competenza concorrente «tutela della salute» (art. 117, c. 3, cost.). In generale, può dirsi ormai consolidato il principio secondo cui i titoli di competenza statale non legittimano una sorta di assorbimento di ogni aspetto attinente al fenomeno migratorio. Al contrario, la Corte ha più volte riconosciuto che, ove sussistano attribuzioni regionali, di tipo concorrente o residuale, coinvolgenti i diritti fondamentali, ben può trovare spazio la legislazione regionale. Così nel settore dell'assistenza sanitaria, del diritto all'istruzione, dell'assistenza sociale, coinvolgenti a ogni evidenza anche lo straniero. Tutt'altro discorso quando invece entri in gioco la disciplina sugli ingressi e sulle condizioni di permanenza nel paese, aspetti che invece rappresentano il *proprium* della competenza statale (Corte cost., sentt. nn. 134/2010 e 300/2005).

Da qui il rigetto di una serie di impugnative governative, volte invece ad affermare il carattere pervasivo della competenza centrale, verso leggi regionali che disciplinavano, per quel che qui interessa, l'erogazione di trattamenti sanitari a beneficio dei non cittadini, quand'anche non in regola con le norme sul permesso di soggiorno. Vertendo le singole controversie nell'ambito della materia concorrente «tutela della salute», il ragionamento della Corte si sviluppa su di una verifica di conformità del dettato regionale all'impianto del testo unico statale, in quanto espressivo dei principi fondamentali, codificati negli artt. 34 e 35 (Corte cost., sentt. nn. 269, 299/2010, 61/2011). Le Regioni intervengono dunque per organizzare, favorire, rendere maggiormente fruibili, quelle prestazioni – e quelle soltanto – che già lo Stato riconosce, contenute, come già detto, nel nucleo irriducibile delle prestazioni urgenti ed essenziali[22].

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[21] È realmente accettabile negare a chi sia stato operato per rimuovere un tumore la possibilità di sottoporsi a controlli volti a verificare l'efficacia dell'intervento e comunque ad evitare la recidiva, come sembra emergere da T.A.R. Molise, sent. n. 276/2011?

[22] D'altronde, come la Corte ha evidenziato nelle sentenze appena ricordate, lo stesso testo unico, insieme al relativo regolamento di attuazione, valorizzano il ruolo delle Regioni nei confronti dello straniero, vuoi chiamandole ad adottare i «provvedimenti concorrenti al perseguimento dell'obiettivo di rimuovere gli ostacoli che di fatto impediscono il pieno riconoscimento dei diritti e degli interessi riconosciuti agli stranieri ... nel rispetto dei diritti fondamentali della persona umana» (art. 3, c. 5, t.u.), vuoi stabilendo che «le Regioni individuano le modalità più

La Consulta non chiarisce però se le Regioni possano andare oltre al nucleo irriducibile. Nei casi concreti non era necessario risolvere la questione, visto che le discipline impugnate non avevano tale finalità. Al giorno d'oggi il problema non pare concreto, dato che non sono probabili politiche sanitarie locali espansive, le quali presuppongono una disponibilità di risorse che fa difetto a ogni livello di governo[23]. Tuttavia, dal punto di vista giuridico ha senso porsi il problema. Mentre infatti non è dubbio che le autonomie territoriali possano legiferare per incrementare i livelli di assistenza fissati a livello centrale (Cavasino 2012), lo è il fatto che possano superare la linea distintiva fissata dal testo unico rispetto agli immigrati non regolari, dal momento che questa potrebbe essere qualificata come un principio fondamentale, come tale inderogabile ex art. 117 cost. (Mabellini 2011), oltrepassato il quale si sconfina nel settore delle «politiche dell'immigrazione», di spettanza statale (Strazzari 2010).

Il discorso sarebbe diverso se si trattasse della legislazione regionale sulle provvidenze sociali, poiché si verte in una materia – l'assistenza sociale – residuale, dove quindi il margine di manovra aumenta in modo significativo. In questo settore si è infatti formata una consistente legislazione locale, e una altrettanto rilevante giurisprudenza costituzionale, la quale ha riconosciuto il citato titolo di competenza, negando pertanto che, in questo settore, mantenga rilievo l'impostazione peculiare al t.u. sull'immigrazione, secondo cui le relative norme costituiscono principi fondamentali per le Regioni ordinarie e norme fondamentali di riforma economico sociale per quelle speciali. Impostazione questa superata dalla successiva riforma costituzionale. Nell'esercizio delle proprie attribuzioni le Regioni a volte hanno seguito logiche di chiusura verso lo straniero, discriminandolo in base alla nazionalità[24], oppure facendo leva, al fine di ridurre la platea dei beneficiari, sul requisito della residenza "qualificata", che, pur se affermato come presupposto per tutti gli interessati, produce effetti maggiormente penalizzanti nei riguardi dei non cittadini: incontrando talora la sanzione della dichiarazione di incostituzionalità, talaltra venendo invece salvate – le relative discipline – dal Giudice delle leggi[25]. Ne deriva allora una normativa sociale "a

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opportune per garantire che le cure essenziali e continuative ... possano essere erogate nell'ambito delle strutture della medicina del territorio» (art. 43, c. 8, D.P.R. n. 394/1999).

[23] Come ben sanno le Regioni per prime, posto che, in ossequio al principio di leale collaborazione, sono sempre coinvolte nel procedimento di determinazione dei LEA che, a sua volta, implica una valutazione delle risorse disponibili (Vivaldi 2012).

[24] Cfr. Corte cost., sent. n. 432/2005, riguardante una legge lombarda che circoscriveva dati benefici – il trasporto gratuito sui mezzi pubblici – ai soli cittadini, nonché Corte cost., sent. n. 40/2011 su legge del Friuli Venezia Giulia che faceva altrettanto relativamente al godimento di un intero sistema di provvidenze, variamente articolato al proprio interno.

[25] Cfr. Corsi 2014. La discriminazione in ragione della mera nazionalità è stata ritenuta non conforme a Costituzione (cfr. sentt. nn. 432/2005 e 40/2011). Più complessa la situazione che si ravvisa in Corte cost., sentt. nn. 2, 133, 172 e 222/2013, 168/2014, riguardanti leggi della Provincia di Bolzano, del Trentino Alto Adige, della Provincia di Trento, del Friuli Venezia Giulia, ed, infine, della Regione Valle d'Aosta, le quali prevedevano, in capo ai beneficiari delle provvidenze ivi contemplate, una residenza nel territorio regionale o provinciale di varia durata. In

macchia di leopardo", che peraltro, salvo il rispetto dei livelli essenziali riservati allo Stato (art. 117, c. 2, lett. m), e salva la verifica di ragionevolezza, risponde al pluralismo istituzionale accolto dalla nostra carta fondamentale.

Il che però non risolve il problema, poiché è difficile costruire un parallelismo fra le politiche di assistenza sociale (competenza residuale) e quelle sanitarie (competenza concorrente), non fosse altro perché le prime, pur nella versione maggiormente favorevole allo straniero, ne presuppongono pur sempre la condizione di soggetto in regola con le norme di ingresso, implicita nel requisito della residenza, quand'anche "istantanea".

Allo scopo di legittimare norme regionali volte a trattare in modo unitario il diritto alla salute dello straniero, regolare o meno, è semmai più utile seguire altre vie, valorizzando il richiamo al ruolo delle Regioni da parte dello stesso t.u. o, in alternativa, puntando sulla distinzione giurisprudenziale fra titolarità del diritto e modalità di esercizio del medesimo, pur in precedenza posta in discussione. Sul primo versante, si è già ricordato che la disciplina statale prevede una collaborazione fra centro e periferia, là dove chiama i poteri locali ad adottare i provvedimenti funzionali all'attuazione dei diritti fondamentali. Al prezzo di forzare un po' la lettura del disposto, in una logica di accentuazione del policentrismo (art. 5 cost.), lo si potrebbe intendere come attributivo di una facoltà di intervento finalizzata a incrementare i livelli di tutela a favore anche dei migranti irregolari, andando oltre il nucleo essenziale, più volte nominato, che quindi sarebbe norma di garanzia di uno standard minimo, elevabile in sede locale. Oppure si potrebbe pensare, nell'identità del risultato, che, parlando di modalità di esercizio del diritto disponibili da parte del legislatore, la Corte si sia riferita anche a quello regionale (Bascherini 2010). Tutte ipotesi peraltro sulla cui conformità a costituzione non si può fare troppo affidamento, sino a che la Corte non abbia a pronunciarsi in merito.

queste fattispecie la Corte ha differenziato a seconda che le prestazioni fossero legati ai bisogni primari della persona, come tali da assicurare a coloro che semplicemente risiedessero *in loco*, o non si trattasse piuttosto di interventi non essenziali, rivolti al sostegno dei membri della comunità, per i quali una stabile permanenza si giustifica, a condizione che non sia irragionevolmente lunga.

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Experiences of Migration

Ethnicity: Some Conceptual Definitions

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1. Introduction

Migration has always characterised the experience of human beings and their evolution. Migration always involves upheaval in the structure and organization, of both the societies that are left behind and the societies where migrants arrive. Migration is thus an element of great social innovation. From the evolutionary perspective, the most important process is that which produces the best capacity for adaptation, through cultural diffusion and the use of a combination of factors, to the new type of social structure (Parsons 1975).

However, every innovative social event generates insecurity and fear, and can degenerate into social conflict and even violence. When we talk about the conflictual relationship between culture and society often we confuse the conceptual level. Violence in human and social relations is present in many shades. This brief essay aims to clarify some definitions on the topic of violence and conflict in relation to cultural diversity and more specifically to deepen the controversial concept of ethnicity, ethnic identity through the exploration of classical literature.

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In the social sciences, few concepts are so controversial as that of ethnicity. In general, we may define ethnicity as the character or quality of an ethnic group (Glazer and Moynihan 1975). Defining this character is problematic. As with other concepts of status (those of nation and nationality, for example), the definitions are situated in the space between two poles: the objective and the subjective.

The objective definitions identify ethnicity in relation to a (variable) set of observable traits. The subjective definitions by contrast, identify ethnicity in relation to a categorization (provided by members of an ethnic group or by others) not necessarily linked to objective traits (language, culture, etc.), or to a general sense of belonging. Subjective definitions of ethnicity blur the concept with ethnic identity.

A famous example of an objective definition is that of M. G. Smith, for whom the concept of ethnicity denotes a common source and [is seen] as a unit of the hallmarks of biological and social reproduction, and consequently it connotes internal consistency and external distinctions in biological endowment, perhaps in language, kinship, culture, religion and other institutions (Smith 1969).

One famous example of subjectivism is provided by F. Barth (1969), for whom actors, to the extent that they employ ethnic categories to categorize themselves and others form ethnic groups, where these categories are only presumed to be linked to the origin of groups.

The idea of ethnicity as an objective phenomenon is usually associated with other ideas, like that of its "primitive" character or ascriptive nature. The idea of ethnicity as a subjective phenomenon (categorization) is often (though not always) linked to the idea that ethnicity is "instrumental" (manipulated or constructed to obtain benefits in favor of some group) or 'symbolic' (totally detached from observable traits or practices) or "elective" (such that it can be, at least within certain limits, the subject of a choice). Some authors believe that the process of modernization implies the transformation, in whole or in part, of ancient ethnicity, which is rigid, primordial, and ascriptive into a more open, fluid, subjective and elective neo-ethnicity, a set of symbols emptied of any drawn social distinction and thus able to operate freely and smoothly in our social system (Schneider 1968).

The bulk of the definitions, however, fall halfway between what we have called the objective and subjective poles, in that they combine a varying mix of the two dimensions. For Smith (1984), an ethnic group is a social group whose members share a sense of common origins, claim a historical past and a common and distinctive destiny, possess one or more specific attributes and perceive a sense of collective unity and solidarity or a group of people designated by a name, with a territory, and with shared myths of descent, history and culture.

To reduce ethnicity to a categorization is to rule out that relations (of conflict or collaboration) between people from different backgrounds could be influ-

enced by cultural patterns learned in the family. On the other hand, to give little importance to the categorization factor is to preclude any understanding of the continuous and often strongly marked redefinition of their own identity which young people face when they enter pluralistic contexts. But to understand these issues, we believe that the concept which really matters is indeed that of ethnic identity, which covers the subjective aspect of ethnicity and also allows us to take advantage of the powerful instruments provided by the sociological and psychological theories of identity and identification processes.

3. Ethnic identity and cultural stereotypes

Ethnic identity is an identity expressed in terms of belonging to an ethnic group. It is the subjective dimension of ethnicity. As an identity, it is a very inclusive categorization of the subject, which is superordinate to other categorizations, e.g. categorizations in terms of roles and social status. In Parsons' framework, in fact, identity (which for him is always both individual and social) represents the structure of codes which, linking personality with the cultural system, gives meaning and unity to the various roles played by the subject (Parsons 1975). Similarly, according to Epstein (1978), identity is the process by which the person seeks to combine his or her various roles and status in a coherent image of him or herself.

Ethnic identity, as a social identity, includes a cognitive, evaluative and an emotional aspect. It may be defined as that part of the image that an individual has of him or herself, resulting from the awareness of belonging to a social group, combined with the value and emotional significance attached to that membership (Tajfel 1981). The relationships between these components are the object of debate.

The categorization of "me" as an Italian, Frenchman / woman, Serbian, Croatian, etc. is a cognitive process, which consists in separat[ing] and aggregat[ing] the population into a number of categories defined in terms of "us" and "them". This process involves the definition of the other, and is particularly important when (as e.g. in migration contexts) individuals and groups are forced to confront their own identity, which stimulates the strengthening of already established forms of distinction and the emergence of new forms of exclusion and separation (Epstein 1978). In a context such as that of our research, in which ethnic identity is rendered particularly malleable by both the environment and the young age of the subjects, ethnic categorization and the specific traits that are used to construct the categories and define their boundaries are extremely important. Particular attention should be paid to avoiding confusing the hallmarks of the group and those that are used to categorize and define the boundaries between groups. It may happen that the weakening of the former does not match the weakening of the latter and the boundaries are maintained or reinforced, though constructed of purely symbolic materials.

Categorization is based on and / or produces assessments that can be (in varying degrees) positive or negative. The mark of the assessments being made of an ethnic group will contribute powerfully to determine the propensity of individuals to identify with and (in a context of choice), adhere to it, or to not identify themselves with it and abandon it (Tajfel 1981). The main source of the mark of the evaluation is the origin of the categorization. A self-categorization will almost invariably produce a positive evaluation, while an externally imposed categorization will usually promote negative assessments.

Ethnic identity, like any social identity, particularly any community identity, is based on strong affective components. A. L. Epstein tends to recognize a kind of primacy of affective (or emotional) components in the formation of ethnic identity. «The perception of shared economic interests or ethnic mobilization for political purposes are, according to Epstein, the product of the emotional bonds that hold the members of a certain group together: in other words, the cognitive (not to mention the evaluative) dimension of identity is largely a function of the emotional dimension» (Urpis 1994, 280). Ethnic groups are secondary groups, but the ethnic environment of individuals is structured through personal ties, the attachment to family, involvement in networks of relations with one's 'fellows' and participation in circles of close friends, an encapsulation which not only reinforces the sense of identity, but also enriches these personal ties with a powerful emotional charge (Epstein 1978, cf. D. Bell 1975). The intensity of affective bonds explains the particular importance, in the expressions of ethnic identity, of symbolism, which is the traditional channel through which feelings arise and operate.

In migration processes the question of identity (and its ethnic and psychological component) is crucial in the adaptability and social inclusion. Understanding these concepts favors good social policy practices. «The concept of integration does not encompass adequately issues of psycho-social adaptation, including identity and a need for stability, although identity has become a crucial category for both theoretical considerations and sociological research due to its significance for understanding individuals and society as a whole (Jenkins, 2004). Identity has gained importance as a fundamental category which mediates between individuals and society» (Paddock 2016, 1124).

4. Different social and political approaches: multiculturalism and interculturalism

Multiculturalism is an ethical-political position according to which a democratic state should ensure their "recognition" to cultural communities, which are collective subjects, going beyond traditional liberalism, which recognizes only individual rights (Habermas and Taylor 1999). Multicultural policies are designed to defend and promote rights specific to each cultural group. The defense / promo-

tion of the (collective) rights of a cultural group, however, could collide with the rights of (individual) of their members. Moreover, recognition of special rights of the individual groups, presenting a variety of plural and separate nationalities 'breaks up' an open society, which is the condition for the recognition of all rights, and subdivides it into closed societies (Sartori 2000).

What is now described as "strong" multiculturalism not only takes cultural diversity within society into account, but also takes into consideration the demands of those claiming the recognition of special rights and preferential treatment in regard to specific needs of each group (Martiniello 2000). There is also, according to Martiniello weak (soft) multiculturalism, which is the enhancement of cultural diversity when this does not require special legal measures and does not create problems with other groups or society as a whole (e.g. eating habits, forms of artistic expression, etc.). However it is not always easy to discriminate between the two forms of multiculturalism. While the kebab is not a problem, indeed it is welcome, the chador is, because more than an article of clothing it is a product (and a symbol) of a regulatory system concerning the rights of women, which is largely incompatible with that of the West.

We believe that multiculturalism must be taken generally for some purpose only in the strong sense, however difficult it is to define its boundaries. In fact, strong multiculturalism solves some problems, particularly the collective identity of people, but (as mentioned) it produces more. At the social level, it tends to encapsulate collective groups of people in poorly communicating and tendentially conflictual communities. This requires "subsidiary" political readjustments which, recognizing shares of representation and power in each group, further institutionalize those groups and reinforce the segmentation of society. For these reasons, as well as the unavoidable tension between individual rights and collective rights which multiculturalism would produce, those today who hold culture dear, but see relations from a perspective of integration rather than separation, prefer to speak of "interculturalism".

The concept of interculturalism, by contrast, is diametrically opposed to strong multiculturalism. It represents an ethical-political project, which is realized in "intercultural" practices aimed at solving the problems of coexistence between cultural groups in multiethnic societies by promoting active engagement and constant communication between them. Like multiculturalism, interculturalism recognizes and values cultural groups, but unlike multiculturalism it does not invoke the protection and promotion of collective rights if they are incompatible with individual rights and the universalistic principles from which they derive. In the words of Marazzi (1998), while multiculturalism suggests a static situation of basic co-existence of groups of different origins, without reciprocally productive encounters interculturalism proposes understanding and mutual exchanges, resulting in cultural enrichment of both individuals and groups in society in general.

At the basis of interculturalism is a dynamic concept of culture, which may be continuously redefined and reshaped, and it is hence a more elective than ascriptive vision of ethnicity. It involves the abandonment of all forms of dogmatism and the willingness of each culture to engage with and to draw on the best that other cultures have to offer. Underlying this position is the basic idea that all cultures have a common foundation in belonging to the human race and are therefore naturally inclined to unite people on the grounds of shared universal principles. Intercultural practices are designed primarily to be applied in education.

5. Social conflict and different forms of violence

Conflict and violence are different things. Social conflict (psychological conflict is something else) can be defined as a competitive situation where the parties are aware of the incompatibility of potential future positions and in which each party seeks to occupy a position that is incompatible with the aspirations of the other (Boulding 1962). Conflict is thus an extreme form of competition characterized by a distribution of pay-offs that tend to be zero sum. It can be solved, or mitigated, turning this situation into a distribution of joint payoffs. As highlighted by some classic authors, conflict is not necessarily a bad thing either, because it may lead to new forms of integration between the parties (Coser 1956) and because it is an important way of giving a certain direction to social change (Dahrendorf 1959).

A conflict is not necessarily violent, nor does its possible violent character necessarily depend on its intensity. In its narrowest sense, violence is a physical action of an individual or group against another individual or group, or even against itself; where such action is voluntary, it is usually exercised against the will of those who suffer (with the obvious exception of violence against oneself), and aims to destroy, offend, oppress (Stoppino 2001). Narrow definitions of this type are also present in the work of major sociologists such as T. Parsons (1968) and others.

However, in everyday but also in scientific language "violence" goes beyond the boundaries of mere physical intervention, including for example "potential" violence, which consists in the threat of physical intervention, or "psychological" or "moral" violence. In our opinion it is necessary to take account of these more extended uses, without however stretching the concept to the point where the phenomena covered by it are too dissimilar to be usefully included in a single category.

Potential violence, or the threat of violence falls within the category of violence because, although a form of communicative action, it is inextricably linked to actual violence (Nieburg 1969). On the one hand, actual violence is a frequent consequence of the threat of violence, being typically used when threats have no

effect. On the other hand, violence may be imposed to make future threats credible, and hence establish a coercive power based on violence.

Psychological violence, consisting of conduct that has as its object not the physical but the mental state of the other, should also be considered a form of violence, for several reasons.

1. It has some important features in common with violence in the strict sense: it is intentional, it is meant to inflict damage and even extreme suffering, and it is an operation conducted against the wishes of those who suffer (although they may not be fully aware of this).
2. It's hard to say where psychological suffering ends and where physical suffering begins, on account of the obvious connection between the two (a depression caused by the withdrawal of esteem or affection always compromises bodily functions more or less seriously).
3. Psychological violence can push those who undergo it to acts of physical violence toward others or, more importantly, towards themselves (suicide, self harm).
4. In some situations, physical and mental violence are used together to annihilate the other. The most extreme cases are torture and brainwashing. But the use of insults and beatings are a common practice outside of these extreme phenomena, and widespread in relationships between young people.

On the basis of these considerations, we will define violence as any action on the physical status of the other intended to destroy, offend or coerce; any threat of such action, any intervention intended to cause severe emotional distress. The 2002 WHO Report on Violence and Health defines violence not dissimilarly as the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, which results in or has a high degree of probability of resulting in injury, death, psychological harm, poor development or deprivation (WHO 2002).

In the category of interpersonal violence the above-mentioned WHO report identifies three types of violence: self-inflicted violence (suicide and self-abusive behavior), interpersonal violence (domestic violence and in the community), collective violence (social, political and economic). Omitting self-inflicted violence (suicide o self-abuse interest us as possible consequences of other acts of violence), interpersonal violence differs from collective violence in that the perpetrators are individual and not collective subjects.

Violence in school is considered a form of interpersonal violence "in the community", which also includes: youth violence, random acts of violence, rape, violence in workplaces, prisons, etc.

The distinction between interpersonal violence and collective violence is not always easy to draw on the basis proposed, namely that of the "individual" or

"collective" nature of the actors. An act of violence committed by a protester in a peaceful protest will be considered an act of interpersonal violence by the event organizers, who disassociate themselves from it by stressing the peaceful nature of their initiative, but it will be branded as an act of "political" (and therefore collective) violence by political antagonists, who would prefer to qualify the event as a whole as violent. On the other hand, an act of violence committed by one person against another person in the name of a nation, an ideology, or a political party will be considered interpersonal by those who wish to disassociate themselves from it, but political (and therefore collective) by the political forces with an interest in criminalizing the action, party, or ideology and all those aligned with it.

For us this is a difficult problem, because conflict and ethnic violence, or situations of conflict or violence involving actors from different ethnic groups, but which somehow refer to collective categorizations (ethnic groups), are a central theme. If the actors were acting completely outside of any reference to their ethnicity, it would be misleading to speak of ethnic conflict and violence.

To talk about conflict and ethnic violence means to speak of collective phenomena or (if preferred) of collective relief. As is known, collective phenomena (or collective relief) can hardly be explained by psychological variables – psychological reductionism – and by idiosyncratic factors related to the life situation of the actors. Rather, interpersonal violence is usually attributed to micro phenomena: experiences such as abuse, social isolation, discomfort, poor control, the family, dis-adaptive socialization (Vergati 2003), etc. Invoking causes of this kind to explain inter-ethnic violence or inter-ethnic conflict, would be far too inadequate unless in the context of theories at the macro level of social process. The same goes for any other forms of violence involving the presence of reference groups or systems of collective ideas.

For these reasons we define interpersonal violence as any violent behavior by individual actors directed against individual actors, with the exception of those behaviors that have the same characteristics but which are adopted in the name of some collective actor or take place in the context of a collective action.

Within behavioral acts of interpersonal violence we find violence between peers. A peer group is a voluntary group of individuals who share a common set of traits or personal situations, mainly age, school or work, leisure activities, and are bound by affective ties. Usually groups of teenagers (or in some cases, preteens) are defined in this way, and the important role these traits play in the socialization of the young is stressed (starting with work by Riesman 1950).

The peer group is accompanied, even when its function is antagonistic, by the family group as a source of standards and values, and is the context in which the young person starts to become autonomous, to learn alternative behavior patterns, to develop a new identity, different from that of son or daughter. The peer group provides a tendentially egalitarian, free and open environment for the young, unlike the relatively immutable family environment.

In fact there is no ready-made organization, or fixed hierarchy, or any indisputable standards or values sanctified by tradition. The only absolute value is loyalty to the group, which is non-negotiable, and the only rule is not to betray one's friends. Numerous opportunities for violent behavior arise from this situation. The first and most obvious, is the ultimate sanction: expulsion from the group / ostracism, which serves to reinforce the boundaries of the group against the outside environment. Other occasions concern the internal life of the group. Between members there are exchanges of course, of positive (rewards) and negative values (penalties). The internal hierarchies depend on the results of these exchanges. An actor X will make a positive value (i.e. his or her competence in some useful activity, or the garage of his or her father for the holidays) available to others. If others are unable to reciprocate with positive values, X will acquire a place in the hierarchy of status and power. However, if Y, who practices martial arts, finds an opportunity to humiliate X physically, this will be seen by all as a challenge, and as a new claim. This may trigger an escalation and re-define the hierarchy: over time this model gives rise to the pecking order and respect for the pyramids that form the basis of hierarchical social organization (Nieburg 1974). There is no shortage of opportunities for violence among groups of teenagers when they begin to compete for respect and power, whether it is to redefine roles or to assert their sexual identity. We should keep in mind that most young people do not have (or at least do not directly control) large amounts of positive values other than those related to personal qualities such as beauty, intelligence, charm, and so on. Therefore, they are often forced to exchange negative sanctions, amongst which physical or psychological actions or threats are common currency.

In addition, as noted, the peer group is typically an "audience" for the deeds of its members, which amplifies their meaning and, in some cases exhibits them with pride and defiance to the outside world. This happens especially with delinquent groups: whoever commits a crime always feels supported by a system of values. What he wants and is seeking is the recognition of his peers, and he'll go happily to the electric chair, because the sympathy and admiration they reward him with mean that he feels enveloped in an aura of martyrdom and immortality (Nieburg 1974). However, given the structural antagonism between the peer group and the environment, it is common for transgressive or violent acts, to have this function even in more integrated groups. In this case, however, we are faced with violent acts committed by the peer group and its members, towards actors outside the group, and therefore not an act of violence between equals. Given the importance of this phenomenon, we believe it should be taken into account.

We therefore define violence in the peer group as any act of violence perpetrated by one or more members of a group against other members in order to consolidate the group's boundaries or to redefine the group hierarchy. To these uses of violence we should add violence of the same group members towards actors external to it, with the intention of enhancing the prestige (or menace) of the group for other groups and, in general, to the outside world.

There are a great many current uses of the term "institutional violence", covering a range that goes from abuses by institutional actors in the performance of their duties, domestic violence, laws that are thought to damage the interests or the dignity of social categories (e.g. gender discrimination), or the dignity of human beings (e.g. laws on euthanasia). The concept is thus too broad and unwieldy.

We believe that the term institutional violence should cover only acts of violence (physical violence, threats of physical violence, emotional abuse) committed by institutional actors whilst exercising their functions; that it is necessary to distinguish at least two types of institutions, and that it is appropriate to distinguish between the acts of violence committed by the institutions towards other actors and those carried out between the staff members of institutions.

For some institutions, such as the military, police and prisons, the use of physical violence is, in varying degrees, the very raison d'etre. These institutions possess to a considerable extent and in an organized manner the means of physical violence (weapons, detention centers, etc.). And their staff is trained to use them with external actors (other armies, criminals, etc.). We could call these institutions "constitutionally violent". In principle "legal" acts of violence should be distinguished from illegal ones, although sometimes the distinction is difficult because of the presence of many borderline cases. In some cases it may be useful for the institution to stretch the limits of legality (e.g. during interrogations, or in certain military operations). In other cases, the mere possession of instruments of violence and habits of violence may lead staff to commit abuses (cases of beatings in prison, the raping of prostitutes by police, etc.). Acts of violence perpetrated by staff from these institutions outside of their duties (e.g. a police officer who beats up his wife, or even policemen who improvise as vigilantes outside the institution and secretly use violence against others) should not be considered acts of institutional violence. The case of institutional violence "in disguise" is common in authoritarian regimes, where acts of apparently non-institutional violence (assassinations of opponents, provocations, etc.), are actually orchestrated under the direction of the secret police.

In institutions functionally equipped to exercise some degree of physical violence, recourse to emotional abuse is of course common, often in combination with physical violence.

In other institutions, like schools, hospitals, etc., which we define as "constitutionally non-violent", the use of violence is not only an unforeseen function, but it is explicitly banned. Psychiatric hospitals are (and in Italy were) the exception, where the use of physical violence (straitjackets, bed restraint, perhaps electric shocks, the administration of abnormal amounts of drugs) is (or was) routine for "therapeutic" purposes. In school, the institution that interests us, institutional violence of a physical nature is not only forbidden, but is also quite rare. So much so that cases of abuse (especially in preschools) cause a stir and are widely covered in the media. The case of emotional abuse is different. Each institution is hierarchically structured, and those with power can abuse it often

through practices that are less visible, but whose effects can be severe. A teacher who systematically commits injustices against a student, will produce in him or her psychological reactions, the extent of which is incalculable. A teacher can easily discriminate the less gifted students within his or her class, increasing their frustration and leading to aggression towards others or themselves. One of the most serious cases is the discrimination against students of certain ethnicities, invoking formally unobjectionable, universalistic criteria: the student does not fail because he or she is Chinese, but because he or she does not know good Italian. In general, universalism used as a cover for particularism is one of the ugliest forms of emotional abuse.

Violence also occurs between the staff of institutions. In constitutively violent institutions faults or failures are sometimes punished with physical violence (punishment cell), often accompanied by heavy mockery, insults, etc. In addition, the training of these personnel often involves the use of varying measures of physical and psychological violence (we may recall the instructor in Full Metal Jacket). In constitutively non-violent institutions, as in any organization, violence (in this case mental) between staff is always enabled by the hierarchical structure and the possibility of blackmail by superiors towards their inferiors and by the envy of those of equal status. This may involve sexual harassment, bullying and other forms of abuse that have recently attracted the attention of scholars and the public.

We conclude with an observation. In general, institutions have varying degrees of "closure" to the outside, i.e. they are worlds in themselves. This closure facilitates violence because it conceals the institution from external observers and guarantees a certain internal solidarity. In addition, it also encourages "horizontal" violence between the recipients of institutional functions. A lot of peer violence occurs in school. The closure is greatest in so-called total institutions: prisons, mental hospitals, etc. (Goffman 1961); it is smaller but still significant in other institutions such as barracks and colleges, which reproduce in an attenuated form some of the traits of total institutions. In fact it is in these institutions that violence is more widespread, whether vertical – perpetrated by staff on the "inmates" – or horizontal – amongst the inmates themselves (fights, injuries and killings of prisoners, harassment of university students, etc.). According to our definition, horizontal violence amongst inmates is not institutional, but it is institutionally induced, and because it is not uncommonly tolerated or even encouraged by those responsible for the institutions, it should be taken into account.

6. Ethnic conflict and ethnic violence

We define as "ethnic" any conflict motivated and / or symbolized in terms of the ethnicity of the actors. The distinction between motivation and symbolism is important. We give three typical cases.

1. A conflict may be motivated by reasons other than ethnicity but symbolized in ethnic terms. For example, the conflict between two children can be motivated by personal or social factors, but symbolized (and justified) in ethnic terms: he's a "nigger", a "Jew", a "foreign" and that is why I have it in for him. In general, this situation arises where ethnicity is a sufficiently widespread social category to provide an accepted criterion of justification for actions not motivated by ethnic factors, and thus to "ethn-icise" virtually everything.
2. Another, opposite case is that of a conflict motivated by ethnic hostility, but justified in extra-ethnic terms, which may in turn refer to circumstances related to persons or to social status. Such conflict is likely to occur in contexts that reject ethnic categorizations as morally unacceptable or politically incorrect, and hence translate conflicts whose basis is in fact ethnic, into ethical or social terms.
3. The third and final case is one where reasoning and symbolization are the same, because they are both ethnic.

We believe the moment of symbolization, which reveals the nature of the conflict and therefore its collective and social relevance, to be decisive. Although it occurs between individual actors, in fact, an ethnic conflict (as well as an act of ethnic violence) should be considered collective (or of "collective significance") because it brings into play collective entities, such as ethnic groups, whose relations it can influence. Conflicts related to the latter are not strictly speaking inter-ethnic. We are inclined to consider them as "racially motivated" forms of interpersonal conflict.

Like any form of conflict, inter-ethnic conflict, is also defined on the basis of incompatibility. Incompatibilities may include interests (i.e. positions of social status, wealth, power) or values (i.e. beliefs, religions, customs, etc.). What makes the conflict ethnic is the fact that these interests or incompatible values are attributed to ethnic groups, and not to other formations.

Contemporary literature often interprets ethnic conflict privileging the category of "interests." These are related to ethnic conflict in two different ways, depending on the theoretical model adopted.

The theory of "competition for resources," argues that ethnic conflict arises from competition between ethnic groups for the same resources. Barth, in one of his papers (1969) suggests that the very genesis and persistence of ethnic boundaries, and the structure of inter-ethnic relations, depend on factors that affect competition for resources. This theory leads to a view of ethnicity which is biased towards the "subjective", "instrumental" and "elective" side, because ethnic groups are formed from the identity that actors use to categorize themselves and others in the competition for resources. It also implies that the social environment is quite fluid and egalitarian in its distribution of opportunities to allow at least some groups access to real competition, even if the competition outcome

may be the formation of a very rigid system of stratification of class and ethnicity (Van den Berghe 1975).

The theory of "reactive ethnicity" (Hechter 1975) is founded on the assumption of a rigid system of stratification in which class and ethnic group membership overlap. According to this approach, the mere fact of belonging to a cultural group does not by itself generate ethnic conflict unless it is accompanied by a disadvantage in the distribution of resources. Coincidence between membership of a particular cultural group and a situation of social deprivation mobilizes ethnicity and triggers conflicts (symbolized in ethnic terms) that are also driven by reasons of class.

For our purposes, both theories have merit. The theory of competition for resources highlights the dynamics and conflicts that are largely evident in today's society, characterized by the presence of substantial numbers of immigrants, often regarded as dangerous competitors in the competition for scarce resources: jobs, especially, but also housing, health care, etc. A study in Trieste (Urpis 2010) reveals that Italian students, perhaps influenced by their families, strongly share this sense of threat. Competition involves the spatial proximity and communication between groups. And as already noted by Deutsch that the chances of violent conflict will increase with the volume and variety of transactions (1953). In this regard, see Kriesi (2000).

The theory of reactive ethnicity highlights an important wellspring of the stereotypes that accompany and symbolize ethnic conflict: the overlap between certain cultural traits and disadvantageous position in social stratification. Gellner (1983) finds that the concentration of people at the bottom of the social ladder who have a particular cultural trait activates negative prejudice according to which the low socioeconomic status is attributed to a supposed inferiority of those with that trait. In addition, the theory of reactive ethnicity, combining in one postulate the severity of socio-economic deprivation and affectivity proper to ethnic identity (see below), helps to account for the intensity and intractability of ethnic conflict.

Ethnic violence is a possible mode of inter-ethnic conflict. It consists in the use of physical violence, threats of violence, psychological violence during ethnic conflict. The targets of ethnic violence are individual or collective actors symbolized as belonging to ethnic groups.

Ethnic violence may occur as a result of non-violent ethnic conflict. The prejudices and stereotypes (especially those which are degrading or dehumanizing) facilitate inter-ethnic violence, as does the state of "relative deprivation" of those on the last rung of the social ladder, generating frustration and aggression (Gurr 1971). However, relative deprivation does not adequately explain violence, and the function of stereotypes is more to justify or reinforce than to trigger violent behavior.

The degree of perceived deprivation is influenced by the prevailing value system. A member of a socially disadvantaged ethnic group can accept his or her

position if s/he thinks it is imposed by a god or by nature, or if s/he believes it can be bettered with knowledge and hard work. Deprivation is furthermore unlikely to turn into conflict (and even less into violence) if the use of violence is not profitable or if the situation appears unchangeable and if the violence is effectively socially and institutionally sanctioned. In other words, given a psychological propensity of ethnic conflict (as in all conflicts) to escalate to more extreme tactics, many cultural, cognitive and structural factors intervene to promote or to discourage it (Gordon 1975). These observations are relevant in the case of European countries affected by immigration where the level of ethnic violence (i.e. symbolized in ethnic terms) is low, and where the commitment to education of foreign students, which is on average higher than that of Italian children, is motivated by the expectation that study will open the way to jobs and prosperity.

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L'esperienza italiana e triestina nell'accoglimento dei titolari e richiedenti protezione internazionale

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1. Le origini del sistema di protezione per richiedenti asilo e rifugiati in Italia

I sempre più numerosi migranti forzati che, nel corso degli ultimi anni, sono approdati sulle coste italiane hanno rappresentato una sfida crescente per il sistema di prima e seconda accoglienza italiano che si trova a fronteggiare un crescente numero di richieste di protezione internazionale. La rete dei progetti SPRAR, i cui interventi sono basati sul concetto dell'"accoglienza integrata", è stata progettata per fornire assistenza e supporto anche al di là del soddisfacimento di bisogni essenziali legati al vitto e all'alloggio. Essa è una delle risposte messe in campo dal Governo italiano a sostegno dei cosiddetti "migranti forzati[1]" che

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[1] La distinzione tra migrante volontario e migrante forzato si inserisce in un dibattito che svela l'imperfezione insita in molte definizioni, convenzionalmente stabilite per analizzare l'universo migratorio nel suo insieme. Infatti, come segnala Zanfrini (2007, 42), tradizionalmente il termine migrante era riservato a chi lasciava volontariamente il proprio paese, mentre i protagonisti delle migrazioni forzate, generate per esempio da guerre o da persecuzioni di varia natura, erano identificati quali profughi o *displaced persons*. Tuttavia, in un contesto internazio-

giungono sul territorio italiano attraverso diversi canali. SPRAR sta per Sistema di Protezione per Richiedenti Asilo e Rifugiati; esso viene istituito ai sensi dell'articolo 32,1-sexies della legge 189/2002 (Bossi-Fini) e si configura come una rete strutturata di enti locali (il cui coordinamento è affidato dal Ministero dell'Interno all'Associazione Nazionale dei Comuni Italiani – ANCI) che accedono, nei limiti delle risorse disponibili, al Fondo Nazionale per le Politiche e i Servizi dell'Asilo (FNPSA). Tale rete si prefigge di realizzare progetti di accoglienza integrata i cui destinatari sono soggetti richiedenti protezione internazionale, rifugiati, titolari di protezione sussidiaria e umanitaria. I progetti vengono realizzati con la partecipazione di soggetti del terzo settore (cooperative, associazioni, ecc.) la cui collaborazione attiva rappresenta uno dei valori aggiunti che qualifica questo sistema di accoglienza.

Contrariamente a quanto si può pensare, dunque, la nascita dello SPRAR (e quindi di un sistema organico di accoglienza, seppur non scevro da diverse problematiche) è un elemento abbastanza recente nel contesto italiano, così come recente è la normativa giuridica di riferimento che disciplina la gestione e l'accoglienza dei richiedenti protezione internazionale nel nostro Paese. I due elementi, infatti, risultano strettamente interconnessi: come afferma Benedetti (2010, 263), il pluriennale "limbo normativo", in cui la regolamentazione del diritto d'asilo in Italia è rimasta per lungo tempo, ha generato un quadro di riferimento attraverso il quale va letta anche l'evoluzione delle prassi di accoglienza. Ne consegue che un breve approfondimento diacronico in questa sede può risultare utile alla comprensione del percorso che ha portato all'attuale assetto italiano relativo al sistema di accoglienza e protezione dei rifugiati e dei richiedenti asilo.

1.1. L'evoluzione della normativa in tema di asilo in Italia: breve excursus diacronico

In Italia si comincia a parlare in modo insistente di rifugiati e richiedenti protezione internazionale dal principio degli anni Novanta[2], in concomitanza con

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nale come quello odierno dove la commistione tra povertà, conflitti, disastri ambientali spinge sempre più spesso le persone a spostarsi, diventa in effetti alquanto complesso distinguere tra migrazioni economiche e migrazioni forzate. Nonostante questo *empasse* terminologico, appare invece più che mai importante distinguere tra la figura del migrante forzato (seppur con tutte le sue commistioni) e quella del rifugiato: ai sensi della Convenzione di Ginevra. Infatti, in quest'ultima categoria vanno ascritti solo coloro che effettivamente hanno ottenuto, ai sensi della procedura vigente, lo status di rifugiato politico. Tale discorso porta a sottolineare un elemento altrettanto importante: non tutte le richieste di protezione internazionale esitano automaticamente nel riconoscimento effettivo di uno status (rifugio, protezione sussidiaria). A titolo di contesto si segnala come, in Italia, da gennaio a settembre 2016 siano pervenute 70.000 richieste, di cui 58.000 hanno ricevuto risposta dalle 20 commissioni territoriali competenti. Di queste ben 34.000 (circa il 58,6%) hanno ricevuto un diniego, ovvero ai soggetti richiedenti non è stato riconosciuto alcuno status e devono, pertanto, far rientro nel proprio paese (https://goo.gl/5DfIFH- ottobre 2016).

[2] Il picco più alto di richieste di asilo nel nostro Paese viene registrato proprio nel 1991: a titolo di contesto si segnala che, secondo i dati del Ministero dell'Interno rilasciati dalla Commissione Nazionale per il diritto d'Asilo, le richieste di asilo (ovvero il numero di persone

arrivi consistenti sulle nostre coste di cittadini provenienti da territori allora in guerra: Albania, Somalia ed Ex-Jugoslavia (Petrovic 2013, Maciotti e Pugliese 2003); circostanza storica, quest'ultima, particolarmente rilevante per la regione Friuli Venezia Giulia e per la città di Trieste. Rispetto all'immigrazione, infatti, il nostro Paese in quegli anni comincia a cambiare in modo sostanziale il suo volto, manifestando nei fatti i meccanismi di un processo che stava, oramai da un ventennio, sempre più convertendo l'Italia da paese (prevalentemente) di emigrazione a paese (anche) d'immigrazione. Nonostante l'esplosione degli anni Novanta, va ricordato che l'Italia, già a partire dagli anni Settanta, si trovava ad essere protagonista di una pluralità di sistemi migratori strutturati (Castels e Miller 2012) che la ponevano in relazione, in qualità di paese ricevente (o di arrivo), con altri contesti nazionali che, al contrario, drenavano in modo significativo flussi di popolazione diretta anche verso la nostra penisola[3]. Tra questi flussi, già negli anni Settanta vi era anche una quota di migranti forzati provenienti principalmente da Medio Oriente (Iran, Iraq, Palestina, Siria, Kurdistan) e America Latina (Cile e Argentina): ufficialmente si trattava di migranti per ragioni di studio ma, molto spesso, essi erano rifugiati *de facto* e questo perché tra i *push factor* all'origine della loro migrazione vi erano ragioni collegate al loro attivismo contro i regimi politici dei paesi di origine (Caponio 2004). Nonostante, quindi, l'assenza di norme che regolamentassero lo status di richiedente asilo e di rifugiato, negli anni Settanta l'Italia è già meta di migranti forzati sebbene il nostro Paese, sia a livello legislativo sia a livello di accoglienza, non fosse ancora attrezzato a gestire questa emergenza.

Già in quegli anni il vuoto legislativo legato alla regolamentazione di questi flussi risulta evidente. Nonostante il primo e fondamentale riferimento al diritto di asilo nel nostro ordinamento giuridico si ritrovi proprio nella Carta Costituzionale del 1948 (art. 10§3, nella rosa degli immodificabili) è stato osservato come la mancanza di un corpus legislativo organico in materia di asilo e di accoglienza abbia accompagnato l'Italia fino e oltre le soglie degli anni Novanta.

La Convenzione di Ginevra del 1951, ovvero il testo a cui ancora oggi si fa riferimento per il riconoscimento dello status di rifugiato e, in subordine, per la protezione sussidiaria, entra in vigore in Italia nel 1955 a seguito della ratifica avvenuta con la L n. 722/1954. Al tempo la Convenzione presentava due grandi limitazioni:

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presenti in Italia che hanno inoltrato tale richiesta a mezzo del modello C3 in uso dalle questure) sono state 4.573. Nel 1991, secondo la stessa fonte, sono stati registrati ben 28.400 nuovi arrivi: a predominare nettamente erano le richieste di asilo inoltrate da cittadini provenienti dall'Albania (21.404 richieste di asilo) Per un approfondimento sul tema si veda: https://goo.gl/VfWF0L (ottobre 216); https://goo.gl/pYOTii (ottobre 2016).

[3] Per un'analisi dei diversi flussi migratori in Italia nel Secondo dopoguerra si veda Colombo e Sciortino (2004).

– limitazione geografica: venivano individuati come potenziali rifugiati solo coloro che provenivano dall'Europa[4] (c.d. riserva geografica);

– limitazione temporale: la richiesta di protezione era valida per avvenimenti antecedenti al 1/1/1951.

Tali limitazioni erano anche la ragione per cui il numero di rifugiati presenti in Italia, al tempo, risultava particolarmente esiguo. L'Italia abolisce la limitazione temporale nel 1970 (L n. 95/70), come peraltro previsto dal Protocollo di New York del 1967, mentre la c.d. riserva geografica viene abolita appena negli anni Novanta con la L. N. 39/70 (c.d. Legge Martelli[5]). Tra gli anni Sessanta e Ottanta, di fatto, il legislatore non si occupa in modo stringente del tema nonostante l'intensificarsi dei flussi. Infatti, nella L. n. 943/1986, non compaiono previsioni specifiche per rifugiati e richiedenti protezione internazionale, trattandosi per lo più di una legge finalizzata a regolamentare aspetti lavorativi di migranti extracomunitari immigrati presenti sul territorio nazionale. Tuttavia, la sanatoria scaturita a seguito dell'emanazione di questa legge e, contestualmente, l'analisi sulla base della cittadinanza degli stranieri che hanno beneficiato di tale provvedimento, ha portato a supporre che tra i clandestini regolarizzati ci fosse anche una buona parte di potenziali rifugiati che non trovavano adeguata risposta nel sistema italiano di protezione[6].

A livello legislativo, nella prima metà degli anni Novanta la pressione migratoria generata dagli arrivi sulle coste italiane mette il Governo di fronte alla necessità di una regolamentazione più organica in tema di asilo e accoglienza ma, almeno nel primo quinquennio, i diversi governi hanno regolamentato tale materia attraverso interventi ad hoc che non affrontavano in modo strutturato e unitario l'importante questione dell'accoglienza e, più in generale, l'assenza di una normativa sul tema. In questi anni, infatti, il Decreto Ministero degli Esteri del 9/9/1992 venne emanato per affrontare per l'emergenza Somalia, la L n. 390/92 per far fronte alla crisi dell'Ex-Jugoslavia mentre l'emergenza albanese venne, invece, affrontata soprattutto attraverso ordinanze ministeriali e circolari interministeriali.

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[4] Al tempo i potenziali richiedenti asilo di origine extra-europea potevano eventualmente rimanere in Italia in via temporanea solo esclusivamente sotto il mandato dell'Unchr, ovvero l'Alto Commissariato delle Nazioni Unite per i Rifugiati che si occupava poi del loro riallocamento. In alternativa, questi potevano permanere sul territorio ma ottenendo uno status diverso da quello di rifugiato. Ne consegue che l'Italia, di fatto, in quegli anni si configurava più come un paese di transito per i rifugiati che come luogo di accoglienza e/o permanenza (Caponio 2004).

[5] La Legge Martelli inoltre, sul tema dell'asilo, regola per la prima volta alcuni aspetti dell'accoglienza e del riconoscimento dello status, accordando ai richiedenti asilo privi di mezzi di sussistenza o ospitalità in Italia un contributo di prima assistenza (34 mila lire per massimo 45 giorni) (Caponio 2004).

[6] Per un approfondimento sul tema di veda Caponio e Finotelli (2004).

La prima normativa di riferimento in tema di asilo risale alla prima metà degli anni Novanta; più precisamente al 1995 con il D.Lgs n. 451/1995, convertito poi nella c.d. Legge Puglia (L. n. 563/1995): a quest'ultima si deve la creazione e l'apertura dei primi Centri di Accoglienza nel triennio 1995-1997. Sulle coste sud-orientali d'Italia vennero aperte delle strutture ricettive per far fronte alle esigenze di prima accoglienza e soccorso degli stranieri che sbarcavano in Italia. In questi centri l'accoglienza era definita solo come temporanea ed era teoricamente prevista fino al rilascio di un permesso di soggiorno (Save the Children 2010). La successiva L. n. 40/98 (c.d. Turco-Napolitano) che confluirà poi nel D.Lgs. 286/1998 (c.d. Testo Unico) introduce poi i centri di accoglienza e detenzione per richiedenti asilo e rifugiati, ovvero i Centri di Permanenza Temporanea e Assistenza (CPTA) a cui poteva avere accesso chiunque si trovasse sul territorio nazionale privo di permesso di soggiorno. Nell'ottica del legislatore i CPTA erano la risposta alla difficile applicazione della precedente normativa (Legge Martelli) che prevedeva il rilascio da parte delle Prefetture di un foglio di via obbligatorio che imponeva allo straniero irregolarmente presente sul territorio di abbandonare il paese alla notifica dello stesso. Tuttavia, era molto elevata la percentuale di coloro che non rispettavano tale prescrizione permanendo, di fatto, illegalmente sul territorio nazionale. La Turco-Napolitano e il Testo Unico tentano, di fatto, di dare unitarietà agli interventi legislativi sul tema dell'immigrazione superando il precedente approccio emergenziale degli anni Novanta, ma non apportano sostanziali modifiche né alla Legge Martelli né, più in generale, al tema dell'asilo. Infine, nel settembre 2002 la normativa è stata ulteriormente modificata con la L. n. 189/2002 (c.d. Bossi Fini), attuata appieno nel 2005 (DPR 303/2004). Questo provvedimento, contrariamente ai precedenti, ha influito notevolmente sul tema dell'asilo: in prima istanza sono state istituite le Commissioni Territoriali (in origine 9 oggi 20[7]) che hanno il compito di esaminare le istanze di riconoscimento di protezione internazionale. Esse sono indirizzate e coordinate dalla Commissione Nazionale per il Diritto di Asilo, un tempo unica titolare della funzione. Tra le diverse novità introdotte dalla Bossi-Fini (provvedimento largamente criticato dagli esperti per il generale inasprimento delle procedure che ha prescritto) vi è proprio l'introduzione della rete SPRAR: vengono normate quindi, per la prima volta nel nostro Paese, le modalità operative della gestione dell'accoglienza dei rifugiati e dei richiedenti asilo.

A completamento del panorama legislativo qui brevemente proposto va ricordato che, tra il 2003 e il 2008, i governi italiani emanano diversi decreti legislativi atti a recepire le Direttive europee il cui scopo è quello di tentare di creare una base comune con la finalità di unificare il diritto d'asilo a livello europeo[8]. Con il D.Lgs 140/2005 l'Italia recepisce la Direttiva Accoglienza ove sono contenute le norme minime legate al diritto di accoglienza; con il D.Lgs 251/2007 invece

[7] L'elenco completo e aggiornato delle Commissioni territoriali è visionabile sul sito del Ministero dell'Interno: https://goo.gl/ThS7ak (dicembre 2016).

[8] Sul tema di veda: Masiello, 2007; Ferguson e Sidorenko, 2007.

viene recepita la Direttiva Qualifiche che tenta di stabilire parametri comuni a livello europeo per il riconoscimento dello status di rifugiato e per la protezione sussidiaria con l'intento di livellare progressivamente le diversità che attualmente esistono tra i paesi europei nel riconoscere la protezione internazionale al cittadino asilante. Infine, nel 2008 l'Italia attua con il D.Lgs 25/08 la Direttiva Procedure (e in seguito modificata da tre D.Lgs tra il 2008 e il 2011) che introduce norme minime per gli Stati rispetto al riconoscimento e alla revoca dello status di rifugiato. Va poi ricordata la L. n. 94/2009 (Legge sulla sicurezza pubblica): il c.d. Pacchetto Sicurezza, infatti, inasprisce le procedure, legando l'immigrazione a una crescente esigenza di sicurezza per il Paese, apparentemente invaso dagli stranieri. Infine, a livello diacronico l'ultimo decreto legislativo emanato è il n. 142/2015, contenente nuove norme su accoglienza e procedure per i richiedenti asilo[9].

Quanto posto in rilievo fino a questo momento, restituisce un quadro in continua evoluzione della normativa in tema di asilo nel nostro Paese che risulta, nonostante i diversi cambiamenti, ancora manchevole di una legge organica in grado di apportare un miglioramento sostanziale alla situazione dei rifugiati e richiedenti asilo. Di una maggiore organicità legislativa beneficerebbe anche il sistema di accoglienza, sia dal punto di vista degli utenti, che potrebbero così usufruire di un sistema più organico e maggiormente coordinato, sia dal punto di vista dei soggetti attuatori (enti locali, amministrazioni, terzo settore e volontariato e, non da ultimo, gli operatori di settore) che vedrebbero potenzialmente ridotte le difficoltà operative nell'attuazione dei progetti. Considerando, dunque, che si tratta di una materia in costante evoluzione, appare utile tracciare un breve riassunto relativo all'evoluzione delle diverse modalità di accoglienza dei rifugiati e dei richiedenti asilo nel nostro Paese, funzionale a comprendere i cambiamenti e le continuità che si sono sviluppate a partire dagli anni Novanta ad oggi.

1.2. L'evoluzione dell'accoglienza in Italia: dagli anni Novanta ad oggi

A partire dalla prima metà degli anni Novanta la questione dell'accoglienza e della tutela dei migranti forzati si ripropone con forza. Nell'ondata migratoria proveniente dai Balcani e dalla Somalia, tra i vari tipi di migranti che arrivano vi è anche una quota considerevole di richiedenti asilo, la cui numerosità nettamente superiore al passato costringe il territorio ad interrogarsi sui meccanismi e i servizi della prima accoglienza. A tal proposito Olivieri (2005, 66) afferma:

> "(...) Comitati locali e gruppi di sostegno erano sorti soprattutto in Friuli Venezia Giulia, Piemonte, in Emilia Romagna e Toscana. Coinvolgevano l'associazionismo ma anche singole famiglie, cercavano il dialogo e la collaborazione degli enti locali, erano propensi alla costruzione di reti, come sedi di confronto ed elaborazione di strategie di intervento, e si interrogavano su cosa si intendesse per accoglienza (...)"

[9] Per approfondimenti sull'evoluzione giuridica della normativa in tema di asilo si veda: Caponio, 2004; Masiello, 2007; Petrovic, 2013.

Nel momento di crisi a mobilitarsi sono i vari attori sociali (particolarmente in alcune regioni d'Italia, tra cui anche il Friuli Venezia Giulia) che si attivano "prendendo in carico" i soggetti più deboli nell'ottica del welfare di comunità. Il senso di comunità, inteso quale "sentimento che gli individui hanno di appartenere e di essere importanti gli uni per gli altri e una fiducia condivisa che i bisogni dei membri saranno soddisfatti dal loro impegno ad essere insieme" (McMillan e Chavis, citati in Allegri 2015, 43) è stato, in questa fase, l'elemento propulsore che ha fatto nascere progetti di accoglienza dal basso che hanno posto in rilievo diversi elementi. Seppur pregevoli, è stato osservato come queste iniziative rimanessero indipendenti e poco collegate le une alle altre, evidenziando la necessità di un coordinamento centrale che conferisse loro carattere di omogeneità, aumentandone l'efficacia e, allo stesso tempo, contribuendo ad innescare un processo di riconoscimento sia presso gli enti locali sia presso i soggetti beneficiari. L'onere dell'assistenza ricade, dunque, sulle amministrazioni e sul no-profit locale[10]: nell'assenza generale di una normativa di riferimento, infatti, non tutte le regioni hanno previsto strutture destinate ai rifugiati e richiedenti asilo. Si osserva come, in questi anni, il protagonismo del Terzo Settore abbia fatto prevalere un approccio più orientato alla solidarietà che al riconoscimento di uno specifico diritto alla protezione e che, di conseguenza, non appariva sempre pronto a soddisfare tutte le esigenze manifestate dagli individui lungo l'iter della procedura d'asilo (CeSPI 2003).

Cercando di tracciare una breve analisi delle diverse forme di accoglienza per i richiedenti protezione internazionale implementate in Italia negli ultimi 20 anni, una delle prime esperienze da cui discende l'attuale organizzazione della rete SPRAR va rintracciata sul finire degli anni Novanta. La svolta nei sistemi di accoglienza dei richiedenti asilo in Italia arriva nel 1999 quando l'Unione Europea finanzia, con il supporto del Ministero dell'Interno, un progetto annuale finalizzato al sostegno dei profughi provenienti dal Kosovo. Viene così implementato Azione Comune, che aveva tra i suoi obiettivi vi la fornitura ai migranti di beni e servizi di prima necessità (vitto, alloggio, vestiario ecc.), l'assistenza ai singoli attraverso operazioni di supporto medico, psicologico e sociale, nonché la fornitura di servizi di interpretariato e mediazione culturale e, più in generale, di un supporto tecnico-legale a 360 gradi. L'approccio di Azione Comune intendeva superare la logica assistenzialista del tipo *food and shelter* cercando di offrire ai migranti una serie di servizi trasversali (Caponio 2004, 8). Nonostante la sua breve durata (luglio-dicembre 1999), Azione Comune appare, sin dal principio, una modalità operativa valida per fronteggiare, nell'immediato, l'emergenza alloggiativa e di protezione sociale dei profughi giunti in Italia. É, infatti, per queste e

[10] Secondo quanto previsto dall'art. 40 del D.Lgs 286/1998 (Testo Unico) spetta alle Regioni, in collaborazione con province, comuni, associazioni e organizzazioni di volontariato, la predisposizione di centri di accoglienza destinati a ospitare i cittadini stranieri regolarmente presenti in Italia e impossibilitati a provvedere autonomamente alle loro esigenze abitative.

altre ragioni che esso viene riproposto anche nel 2000[11] con alcune novità: viene infatti esteso il target dei beneficiari anche ai richiedenti asilo, profughi e rifugiati, indipendentemente dal loro paese di origine, nonostante per l'edizione 2000 l'impegno economico risultasse inferiore rispetto a quello dell'anno precedente.

Le linee direttrici di Azione Comune possono essere così sintetizzate:

- fornire un'accoglienza qualificata per garantire sicurezza e dignità ai beneficiari e favorire così la realizzazione concreta di ogni singolo progetto di vita, sia esso di rimpatrio o d'inserimento in Italia;
- offrire attività trasversali (orientamento sociale, legale, corsi di lingua, di formazione al lavoro, sostegno medico e psicologico, etc.) necessarie per la definizione del progetto di vita e per l'inserimento territoriale dell'individuo, che vengono svolte all'interno e all'esterno dei centri di Azione Comune.

Si può affermare, infatti, che l'impianto metodologico di Azione Comune (e il suo assetto organizzativo) abbia gettato le basi per i successivi progetti di accoglienza e inserimento dei rifugiati e richiedenti asilo in Italia. Alla fine del 2000, infatti, Azione Comune era strutturata in modo da ricomprendere due reti di partenariato, una di primo e una di secondo livello[12], con al vertice un nucleo ristretto di coordinamento formato da ICS, Cds e CIR. Quest'ultimo ente, inoltre, ricopriva funzioni di tipo amministrativo e organizzativo strategiche. Come afferma Olivieri (2005), l'eterogeneità del primo livello ha implicato un certo livello di complessità e difficoltà nella gestione e nell'organizzazione delle attività ma, allo stesso tempo, ha rappresentato un importante momento di confronto diretto e costante sui temi dell'accoglienza e della protezione dei richiedenti asilo e dei rifugiati convertendo, a posteriori, Azione Comune in un vero e proprio "laboratorio di idee" funzionale all'individuazione di standard minimi di accoglienza per questa particolare categoria di migranti. Nonostante le problematiche emerse nel corso e a seguito della sua implementazione, il progetto ha certamente rappresentato un avamposto importante nel processo di accoglienza almeno sotto diversi punti di vista (CeSPI 2003):

- le modalità di individuazione dei beneficiari;
- il coordinamento con le aree di frontiera;

[11] Per maggiori dettagli tecnico-organizzativi sul progetto Azione Comune e per consultare i dati di attività dei progetti si vedano i seguenti link: https://goo.gl/DscZtb (annualità 1999) e https://goo.gl/JVOhdU (annualità 2000).

[12] Nella partnership di primo livello erano compresi: il CIR (Consiglio Italiano per i Rifugiati) in qualità di capofila amministrativo del progetto, ICS Trieste, Acli, Caritas, Casa dei Diritti Sociali di Roma, Cies, Cisl, Ctm-Movimondo, Federazione delle chiese Evangeliche e Uil. La rete di secondo livello faceva riferimento al partenariato relativo alla rete Ics composto da: Arci di Toscana, Arezzo, Empoli, Napoli, Pisa, Caritas di Siena, Comitato Cittadino di Solidarietà con le popolazioni dell'Ex-Jugoslavia di Ivrea, Comune di Cremona, Facciamo Pace! di Torino, Ics Trieste, Il Mondo nella Città di Schio, Mondo Senza Frontiere di Siena, Reti di Enti di Udine (Olivieri 2005, 127).

- il lavoro di orientamento sul territorio;
- la formazione degli operatori;
- l'assetto decentrato dell'accoglienza in strutture abitative di piccole dimensioni e diffuse sul territorio.

In particolare, si vedrà come quest'ultimo aspetto rappresenterà una costante anche nei programmi successivi (PNA e SPRAR), divenendo, specie nella città di Trieste, uno degli elementi qualificanti il sistema di accoglienza. Capitalizzando l'esperienza di Azione Comune, nel momento in cui quest'ultima era ancora in fase di svolgimento, su input del Ministero dell'Interno, venne convocata una riunione con le Ong e le associazioni del territorio per discutere la possibilità di accedere ai fondi della quota Irpef dell'Otto per Mille, con la finalità di realizzare interventi straordinari di accoglienza per i richiedenti asilo. Le direttrici che furono da subito chiare e si concentravano fondamentalmente su tre aspetti (*Ibidem*):

- il progetto doveva essere unico ma suddiviso, nella sua applicazione, tra diversi progetti territoriali: tale elemento doveva garantire, seppur nel rispetto delle differenze territoriali e dei diversi assetti che naturalmente i vari progetti avrebbero assunto, un certo grado di omogeneità e connessione nel più ampio quadro generale del sistema nazionale di accoglienza che andava delineandosi;
- nei progetti dovevano essere presenti e garantiti standard comuni di accoglienza, a partire da quanto sperimentato nel biennio di implementazione di Azione Comune;
- la presenza del lavoro di rete, inteso sia a livello nazionale sia territoriale, che avrebbe così garantito le connessioni tra i vari soggetti, elemento fondamentale per razionalizzare risorse, capitalizzare gli sforzi e condividere i *know how* acquisiti anche grazie all'esperienza sul campo.

Si delineavano così le caratteristiche del cosiddetto Programma Nazionale Asilo[13] (PNA), implementato a partire dal 2001 e finanziato appunto dal fondo Otto per Mille e dal Fondo Europeo per i Rifugiati: tra i principali obiettivi del PNA vi erano l'accoglienza, l'integrazione e il rimpatrio assistito. Vengono inoltre previsti interventi diretti a soggetti particolarmente vulnerabili come, per esempio, persone con disabilità e vittime di tortura. A monte, un'altra importante

[13] A seguito dell'esperienza di Azione Comune e prima dell'implementazione del PNA, va citata l'esperienza del progetto Nausicaa, promosso da ICS, in partenariato con ACNUR e Censis, finanziato dall'Unione Europea. Il progetto si configurava quale osservatorio sui servizi dedicati a cittadini stranieri, esuli, richiedenti asilo e rifugiati in Italia. Esso ha avuto il pregio di "fare il punto" sulle potenzialità e i limiti dell'accoglienza e ha, ulteriormente, messo a disposizione un team di 18 operatori che hanno fornito consulenza legale e sociale direttamente ai beneficiari presenti sul territorio.

caratteristica del PNA era rappresentata dalla stretta collaborazione tra enti locali, associazionismo e terzo settore. Nel segno di quanto era stato sperimentato positivamente attraverso le precedenti esperienze di accoglienza, anche il PNA puntava molto sul concetto di governance[14] orizzontale, dove la forza del sistema risiedeva, appunto, nella capacità di mobilitare le caratteristiche specifiche del capitale sociale di ogni soggetto, facendo leva sulle reti degli attori locali coinvolti (Forrest e Kearns, 2000). Sul piano organizzativo però, l'innovazione apportata dal PNA rispetto ad Azione Comune è l'introduzione di un principio di governance verticale nella gestione delle attività del programma. Al vertice del PNA vi era, infatti, una cabina di regia formata da Ministero dell'Interno, ACNUR e ANCI: questi tre soggetti, ognuno secondo il loro specifico mandato, rappresentavano l'espressione di tre livelli di azione e governo (internazionale, nazionale e locale). Nel dettaglio, al Ministero dell'Interno (dicastero in Italia responsabile delle politiche di asilo) spettavano funzioni d'indirizzo in merito alla legislazione e di raccordo con la Commissione europea per il co-finanziamento delle domande presentate. Ad ACNUR spettava, invece, una funzione di indirizzo sui diritti e la protezione dei richiedenti e rifugiati: inoltre, la presenza dell'agenzia ONU legittimava e accreditava politicamente l'intero sistema del PNA. L'ANCI, infine, svolgeva funzioni organizzative, necessarie per lo svolgimento del programma come, per esempio, la stipula di convenzioni con soggetti esterni e il raccordo con i comuni che erano i responsabili a livello territoriale dei progetti. In sintesi, ciò che differenziava il PNA dai progetti precedenti era la volontà di creare un sistema di accoglienza quanto più organico, integrato e diffuso sul territorio possibile: in quest'ottica i primi "terminali di attuazione" (Caponio 2004) del sistema erano necessariamente i comuni, ovvero gli enti locali più prossimi ai cittadini in grado operativamente di attuare concrete strategie per soddisfare i principi di *burden sharing* e *resource pooling*[15]. Il PNA prevedeva, infine, anche una Segreteria Centrale che assumeva funzioni tecniche e di coordinamento: consulenza tecnica ai comuni e agli enti gestori, monitoraggio dei progetti, formazione degli operatori, coordinamento con la Commissione Centrale per il riconoscimento dello status nonché la gestione di tipo finanziario e contabile.

[14] Per govenance si fa riferimento a un modello di formulazione e gestione delle politiche pubbliche caratterizzato da un ruolo più ridotto dello Stato quale unico attore competente rispetto alle questioni di sviluppo e dalla scomposizione funzionale dei ruoli propositivi e gestionali nelle politiche pubbliche, coinvolgendo sia soggetti pubblici sia privati. Nello specifico, per *governance* multilivello si intende quel sistema in cui il ruolo di interlocutore principale nell'attuazione delle politiche pubbliche non è più dello Stato, ma viene progressivamente sostituito da un sistema di livelli di governo con precise competenze. Per approfondimenti sul tema si veda Scavo (2015).

[15] Per *burden sharing* s'intende la ripartizione dei costi derivanti dall'accoglienza dei cittadini stranieri che necessitano di protezione; per *resource pooling*, invece, la condivisione delle risorse dell'accoglienza non limitate a far fronte alla situazione contingente ma messe a disposizione dell'intero PNA.

Dal consolidamento dell'esperienza del PNA e dall'analisi dei positivi risultati prodotti da questo sistema[16], i soggetti coinvolti nell'esperienza orientano i propri sforzi affinché quanto implementato con il PNA venga ufficialmente riconosciuto anche a livello legislativo: è la Bossi-Fini che, come detto, nel 2002 regolamenta la presenza in Italia di un programma di accoglienza rivolto ai rifugiati e ai richiedenti asilo. Nasce così lo SPRAR e viene contestualmente istituito un Fondo Nazionale per le Politiche e i Servizi dell'asilo (Censis 2005). L'Italia arriva, quindi, all'implementazione dello SPRAR a seguito di un percorso (Azione Comune, progetto Nausicaa e PNA) che ha portato, alla soglia degli anni Duemila, alla sua attivazione con l'ottica di rendere sempre più organico il sistema di accoglienza per i migranti forzati.

Concretamente lo SPRAR è costituito da una rete di centri di c.d. "seconda accoglienza", destinati ai richiedenti e ai titolari di protezione internazionale. A differenza dei CDA e dei CARA, originariamente lo SPRAR era stato progettato per favorire l'interazione e l'inclusione sociale ed economica dei soggetti già titolari di una forma di protezione internazionale (rifugiati, titolari di protezione sussidiaria o umanitaria). Tuttavia, già dai primi anni di attività, lo SPRAR ha dovuto supplire alle mancanze della rete della c.d. "prima accoglienza[17]", dedicando una quota di posti (seppur decrescente negli anni) anche ai richiedenti protezione internazionale[18]. Lo SPRAR è composto da una rete di enti locali che, accedendo al Fondo Nazionale per le Politiche e i Servizi dell'Asilo (FNPSA), svolgono progetti di accoglienza per i beneficiari sopra indicati. A loro volta gli enti locali sviluppano le progettualità in collaborazione con il Terzo Settore. Il coordinamento della rete SPRAR è affidato al Servizio Centrale, un organo tecnico istituito dal Ministero dell'Interno; la sua gestione è stata affidata in convenzione all'ANCI. Il Servizio Centrale ha funzioni d'informazione, promozione, consulenza, supporto tecnico e monitoraggio sull'intero Sistema di Protezione. Come per Azione Comune e in seguito per il PNA, anche la rete SPRAR vuole andare oltre la fornitura di beni e servizi primari e si propone di offrire ai beneficiari, oltre misure di assistenza e di protezione, l'avvio di un percorso di integrazione volto anche al recupero dell'autonomia, nell'ottica di empowerment del soggetto. Emerge, dunque, la volontà di capitalizzare le esperienze precedentemente implementate al

[16] Per una valutazione del PNA si veda: CeSPI (2003).

[17] Il sistema della c.d. "prima accoglienza" prevede l'inserimento dei migranti, dopo la loro identificazione, nei CARA, CPSAS e nei CDA. Si tratta di centri che il Ministero dell'Interno, di concerto con le Regioni e gli Enti locali, finanzia per fornire accoglienza a stranieri già sottoposti alle procedure di foto-segnalamento e al primo screening sanitario e che, in fase di soccorso, abbiano espresso la volontà di chiedere protezione. Di norma, la permanenza in questi centri è limitata funzionalmente alla formalizzazione della domanda di protezione (modello C3) e alla conclusione della procedura di esame della domanda da parte della competente commissione territoriale, in vista di un trasferimento nella rete SPRAR (Aa.Vv. 2015).

[18] Il richiedente protezione internazionale è una persona che ha presentato richiesta di protezione internazionale ed è in attesa della decisione sul riconoscimento dello status di rifugiato o di altra forma di protezione (Aa.Vv. 2015).

fine di giungere alla definizione di un modello di accoglienza unitario e organico (ancora incompiuto) che possa rispondere in modo sempre più sollecito alle esigenze dei migranti forzati che giungono nel nostro Paese. In questo senso, l'implementazione e il progressivo allargamento negli anni della rete SPRAR costituisce un importante *work in progress* per l'Italia che, come anche i dati hanno posto in evidenza, si è trovata a fronteggiare la crescente emergenza della gestione dei rifugiati e richiedenti asilo in tempi molto brevi che hanno notevolmente sollecitato le istituzioni e gli enti locali su questo tema. Da un punto di vista organizzativo, inoltre, va sottolineato come il modello di governance dello SPRAR sia stato costruito nel tempo e sia nato, a partire dall'esperienza di Azione Comune, dal sedimentare di azioni positive sviluppate sul campo. Tuttavia non è possibile negare che, nonostante i suoi molti elementi positivi, il sistema da solo non basta a soddisfare il fabbisogno e la domanda di protezione che arriva dai soggetti in fuga. Da questo punto di vista le istituzioni devono probabilmente entrare nell'ottica che, da sola, la rete SPRAR non può rispondere in modo soddisfacente e continuativo alla crescente domande di protezione internazionale. L'instabilità e la vulnerabilità politica, economica e sociale che sta caratterizzando molti paesi nel mondo, infatti, si riflette direttamente sui flussi migratori ed è oramai chiaro che l'Europa deve farsi carico dell'accoglienza e dell'integrazione di queste persone. L'Italia inoltre si trova al centro di due delle rotte più battute dai migranti forzati, ovvero la rotta Mediterranea e quella Balcanica, quest'ultima particolarmente rilevante specialmente per la regione Friuli Venezia Giulia e per la città di Trieste[19].

2. I residenti stranieri a Trieste e in Italia

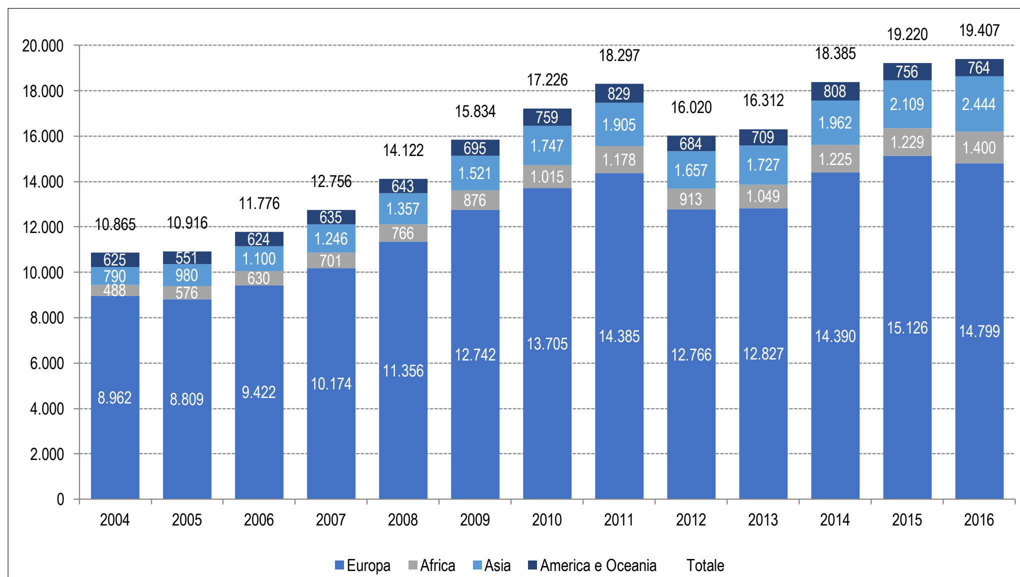
La presenza di stranieri a Trieste è notevolmente aumentata, da meno di 11.000 unità nel 2004 alla situazione attuale, nella quale si sfiorano le 20.000 presenze, con un'incidenza sulla popolazione che raggiungeva il 9,5% alla fine del 2015 (leggermente superiore all'8,9% dell'intera regione Friuli Venezia Giulia).

Pur con qualche oscillazione, negli ultimi anni gli stranieri residenti di origine europea si attestano stabilmente intorno alle 14/15.000 unità e rimangono dunque largamente maggioritari; crescono però anche gli stranieri provenienti dall'Africa (attualmente 1.400) e dall'Asia che raggiungono ora quasi 2.500 unità, che sono dunque entrambi triplicati in poco più di dieci anni.

Osservando con maggiore dettaglio la situazione "fotografata" all'inizio del 2016 (Fig. 2), la comunità più numerosa è costituita dai serbi (4.698), seguiti dai rumeni (2.746); sopra il migliaio di presenze troviamo poi i croati e i kosovari. In termini percentuali i serbi (24,2%), con rumeni (14,2%), croati (6,0%) e kosovari (5,8%), nel complesso, assommano a metà della presenza straniera a Trieste.

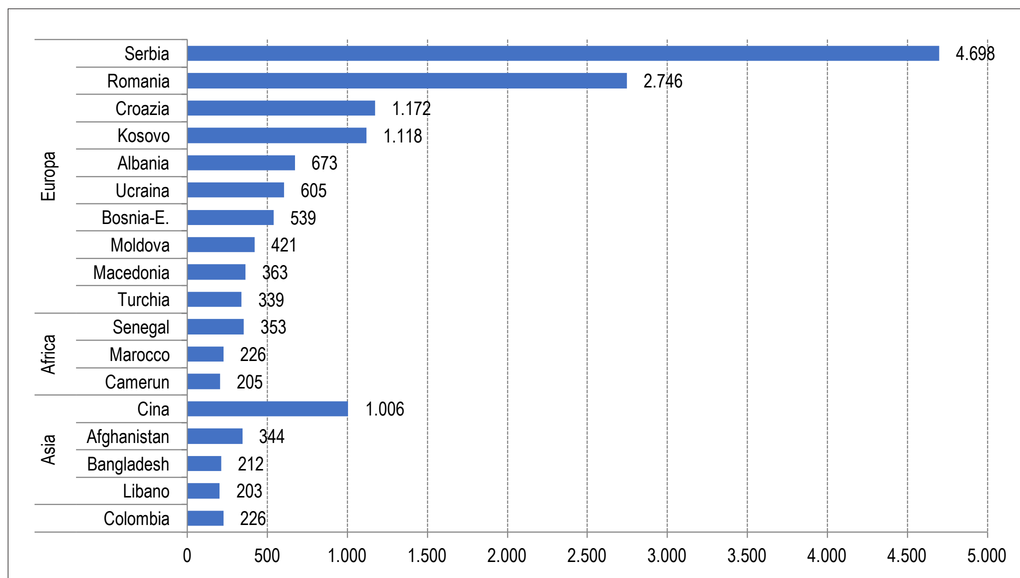
19 Per un approfondimento sulla mappa degli itinerari dei migranti e rifugiati verso l'Europa si veda Crawley *et al.* (2016).

FIGURA 1 – Stranieri residenti a Trieste al primo gennaio 2004-2016



FONTE: Istat (dati.istat.it)

FIGURA 2 – Comunità di stranieri residenti a Trieste al 1 gennaio 2016 di dimensione superiore a 200 unità



FONTE: Istat (dati.istat.it)

Il migliaio di cinesi costituiscono di gran lunga la comunità più numerosa di provenienza asiatica e sono seguiti da afghani (344), bengalesi e libanesi (sopra le 200 unità). Tra gli stranieri di origine africana, la comunità più numerosa è quella dei senegalesi (353); sopra le 200 unità si collocano poi i marocchini e i camerunensi. Infine, tra gli stranieri di altre aree extraeuropee, la comunità più numerosa è costituita dai colombiani (226).

Tabella 1 – Stranieri residenti a Trieste al 1° gennaio per cittadinanza (numerosità superiore a 200 unità)

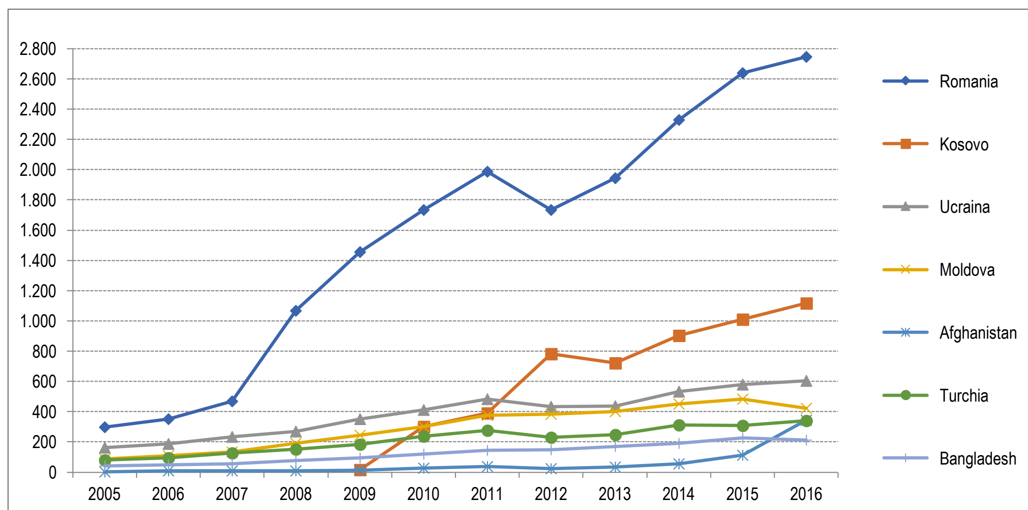
	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
EUROPA	8.809	9.422	10.174	11.356	12.742	13.705	14.385	12.766	12.827	14.390	15.126	14.799
Serbia	4.315	4.585	4.967	5.232	5.741	5.775	5.860	4.931	4.824	5.158	5.251	4.698
Romania	299	352	468	1.069	1.457	1.735	1.986	1.733	1.944	2.330	2.638	2.746
Croazia	1.356	1.382	1.400	1.376	1.368	1.357	1.372	1.025	1.004	1.092	1.143	1.172
Kosovo	-	-	-	-	17	303	392	784	722	904	1.009	1.118
Albania	724	757	803	833	899	915	943	803	763	805	769	673
Ucraina	161	186	235	271	352	412	484	432	437	534	579	605
Bosnia-Erzegovina	364	438	477	510	550	591	622	609	603	653	673	539
Moldova	86	108	134	190	245	300	377	382	401	451	484	421
Macedonia	150	184	183	204	247	266	281	269	295	339	361	363
Turchia	81	96	127	151	183	238	276	230	249	312	308	339
AFRICA	576	630	701	766	876	1.015	1.178	913	1.049	1.225	1.229	1.400
Senegal	180	187	199	207	211	220	286	211	233	296	315	353
Marocco	84	93	102	112	140	154	183	186	209	231	250	226
Camerun	61	78	90	105	122	151	164	128	142	177	190	205
ASIA	980	1.100	1.246	1.357	1.521	1.747	1.905	1.657	1.727	1.962	2.109	2.444
Cina	592	660	747	812	886	984	1.040	917	905	1.000	1.022	1.006
Afghanistan	2	8	8	9	13	27	36	23	33	57	112	344
Bangladesh	42	48	55	77	94	118	145	147	169	191	228	212
Libano	64	86	94	107	127	157	172	168	172	191	218	203
AMERICA/OCEANIA	551	624	635	643	695	759	829	684	709	808	756	764
Colombia	108	134	152	170	184	210	243	212	218	232	233	226

Fonte: Istat (dati.istat.it)

Dalla Tab. 1 si vede chiaramente che la presenza di cittadini dei Paesi nati dalla dissoluzione della Jugoslavia rimane relativamente stabile nell'arco di poco più di un decennio (con qualche erosione negli ultimi anni). Tra le comunità che crescono invece in modo rilevante (Fig. 3), emergono quelle dei cittadini provenienti dagli altri paesi dell'Europa orientale, in particolare rumeni (da circa 300 e poco meno di 3.000 unità) e, pur con una consistenza numerica molto meno elevata, ucraini (da meno di 200 a 605), moldavi (da circa un centinaio a oltre 400) e bulgari (da una quarantina a 200).

Mentre la presenza degli albanesi rimane piuttosto stabile (con un leggero declino negli ultimi anni), è notevole, invece, la crescita dei kosovari, distinti dai serbi solo a partire dall'anno successivo alla proclamazione dell'indipendenza (2008); se ne deduce che rimane grosso modo stabile complessivamente la componente di cittadini dall'ex-Serbia, con un aumento dei kosovari. Tra le comunità extraeuropee, mentre la crescita dei cinesi è costante e segue l'andamento del loro progressivo insediamento nel tessuto produttivo e commerciale, si registrano incrementi ben più consistenti per alcune comunità di origine africana: in poco più di un decennio raddoppiano i senegalesi, triplicano i marocchini e quasi quadruplicano i camerunensi e le comunità asiatiche di bengalesi e libanesi. È invece "esplosiva" la crescita degli afgani che arrivano in Italia tramite la "rotta balcanica", alla ricerca di protezione in quanto rifugiati e/o richiedenti protezione internazionale (il gruppo costituiva una presenza marginale all'inizio del periodo ed è diventato uno dei più consistenti, tra quelli extraeuropei, negli ultimi anni).

Figura 3 – Cittadini stranieri residenti a Trieste con i più elevati tassi di crescita



Fonte: Istat (dati.istat.it)

Tabella 2 – Bilancio stranieri residenti in Italia, Friuli-Venezia Giulia e a Trieste

	Italia 2015	2015-2011	Diff. %	Friuli-Venezia Giulia 2015	2015-2011	Diff. %	Trieste 2015	2015-2011	Diff. %
Pop. straniera 1° gennaio	5.014.437	986.810	24,5	107.559	10.680	11,0	19.192	3.254	20,4
Nati vivi	72.096	53.409	285,8	1.433	1.036	261,0	213	162	317,6
% Nati su pop. straniera	1,44	0,97	209,9	1,33	0,92	225,1	1,11	0,79	246,8
Morti stranieri	6.497	5.100	365,1	177	147	490,0	40	35	700,0
Saldo naturale stranieri	65.599	48.309	279,4	1.256	889	242,2	173	127	276,1
Saldo migratorio interno	4.812	5.643	-679,1	580	494	574,4	99	61	160,5
Saldo migratorio estero	205.330	135.625	194,6	3.163	2.045	182,9	873	633	263,8
Saldo altri motivi	-85.990	-34.163	65,9	-1.811	-954	111,3	-179	46	-20,4
Acquisizioni cittadinanza	178.035	168.152	1.701,4	5.525	5.259	1.977,1	769	725	1.647,7
% Cittadinanza su pop. straniera	3,55	3,31	1.346,9	5,14	4,86	1.770,8	4,01	3,73	1.351,4
Totale iscritti	613.923	449.100	272,5	12.593	9.070	257,5	1.694	1.251	282,4
Totale cancellati	602.207	461.838	329,0	14.930	11.855	385,5	1.497	1.109	285,8
Saldo totale pop. straniera	11.716	-12.738	-52,1	-2.337	-2.785	-621,7	197	142	258,2
Pop. straniera 31 dicembre	5.026.153	974.072	24,0	105.222	7.895	8,1	19.389	3.396	21,2

Fonte: Istat (dati.istat.it)

Lasciando al lettore l'apprezzamento dettagliato dei dati della Tab. 2, ci limitiamo ad indicare alcune specificità che contraddistinguono la popolazione straniera insediata a Trieste, rispetto a quanto si riscontra in Friuli-Venezia Giulia e in Italia. Dalla tabella si vede dunque che, mentre la presenza di stranieri è aumentata a Trieste di circa il 20% (allineata grosso modo alla crescita italiana del 25%), quella registrata in Friuli-Venezia Giulia è limitata all'11%.

Pur con valori percentuali non molto elevati, è significativo l'aumento di nati all'interno della popolazione straniera che, in soli quattro anni, a Trieste passano da una cinquantina a 213; anche tenendo conto della contestuale crescita di oltre 3.000 stranieri, l'incidenza dei nuovi nati quasi triplica e ciò indica di per sé una stabilizzazione della popolazione straniera, sempre più costituita da famiglie e meno da singoli. Anche a Trieste, dunque, si amplia la base delle cosiddette seconde generazioni di cittadini stranieri, ovvero bambini e ragazzi nati da famiglie di origine straniera o da coppie miste arrivati in diverse fasi del loro percorso di crescita nel paese ricevente[20].

[20] Sotto il cappello del termine "seconde generazioni" infatti, ricadono a livello concettuale casi e background migratori tra loro molto diversi: dai bambini nati e cresciuti nelle società ri-

Incrementi ancor più significativi si registrano riguardo alle acquisizioni di cittadinanza italiana, che passano a Trieste da 44 nel 2011 a 769 nel 2015, e anche questo è un chiaro segnale di stabilizzazione, in quanto indica che per molti stranieri la presenza nel nostro Paese è ormai di lungo periodo.

3. Cittadini non comunitari e motivi della presenza

I soli cittadini non comunitari, in Italia sono più di un milione e mezzo, 350mila dei quali risiedono regolarmente nel Nord-est e un po' meno di un decimo di questi nelle quattro province del Friuli Venezia Giulia (Tab. 3). Le differenze "di scala" della dimensione territoriale costringono ovviamente a utilizzare il parametro dell'incidenza sul totale dei residenti, il cui valore è 2,3% in Provincia di Trieste (i dati dell'Istat non prevedono una disaggregazione al livello comunale). L'incidenza è dunque leggermente inferiore a quella che si registra in Italia e in Friuli Venezia Giulia (2,6%), perché il valore è più elevato a Gorizia (3,0%) e Pordenone (4,0%); inferiore invece a Udine (1,9%).

Con la Tab. 3 ci avviciniamo ulteriormente al tema del presente lavoro perché i dati sono disaggregati secondo il motivo della presenza[21] di cittadini non comunitari che non possiedono già un permesso di lungo periodo o una carta di soggiorno. La componente dei "regolarmente residenti" per motivi di asilo e

ceventi, agli adolescenti ricongiunti nelle società di arrivo dopo aver trascorso infanzia e parte dell'adolescenza nei paesi di origine. Tra questi due poli, molte altre condizioni che la letteratura ha, negli anni, cercato di codificare: da situazioni spurie ed eterogenee, come i figli di coppie miste o appartenenti a minoranze riconosciute, passando per i minori stranieri adottati che, pur divenendo a tutti gli effetti cittadini italiani, rimangono comunque portatori di eterogeneità culturale. Per un approfondimento sul tema si vedano Besozzi (2001) e Rumbaut (1997).

[21] I motivi del rilascio dei permessi che consentono la presenza sono aggregati nelle seguenti modalità (fonte: www.istat.it):

Lavoro – Il cittadino straniero deve possedere al momento dell'ingresso un visto per motivi di lavoro a seguito del rilascio del nulla osta da parte dello Sportello Unico competente e sono comprese le persone in attesa o in cerca di occupazione.

Famiglia – Può essere rilasciato al familiare di uno straniero regolarmente soggiornante, titolare di un valido permesso di soggiorno di durata non inferiore a un anno; vengono considerati anche i permessi concessi per adozione/affidamento.

Studio – Richiesto all'Ambasciata italiana nel paese di residenza dello straniero, ha validità pari al corso che si intende seguire e permette di svolgere attività lavorative part-time con contratto di lavoro non superiore alle 20 ore settimanali.

Asilo – Rilasciato ai rifugiati che hanno ottenuto il riconoscimento a godere dell'asilo politico da parte del nostro Paese.

Richiesta Asilo – Rilasciati a chi fa domanda di asilo politico ed è in attesa che la richiesta venga valutata.

Motivi Umanitari – Tutte le forme di protezione diverse dall'asilo politico che l'Italia riconosce ai cittadini di paesi terzi.

Altri motivi esplicitamente considerati, in quanto statisticamente rilevanti, sono: religione, residenza elettiva, salute e "altro" (motivi di giustizia, integrazione minori, apolide riconosciuto, attività sportiva, etc.).

protezione umanitaria (Fig. 4) registra in provincia di Trieste una percentuale più elevata (16,7%) di quella italiana (9,7%) e ciò non sorprende, visto che Trieste e Gorizia (dove si raggiunge quasi il 30%) sono i terminali della c.d. "rotta balcanica". Altrettanto ovviamente si spiegano le alte incidenze registrate in Italia del Sud e nelle Isole, terminali della c.d. "rotta mediterranea".

La Tab. 3 e la Fig. 4 fotografano la situazione al 1° gennaio 2016 risultante da ingressi e uscite di stranieri che si sono succeduti nel tempo. La Tab. 4 mostra invece, secondo la cittadinanza di provenienza, i soli ingressi nel 2015 (con le differenze rispetto al 2014) e la ripartizione percentuale secondo il motivo (con le differenze rispetto al 2014 per la sola voce "asilo e protezione umanitaria"). I dati si riferiscono al complesso degli arrivi in Italia, non essendo disponibile sul sito dell'Istat la disaggregazione territoriale (fortunatamente, per il territorio triestino sono reperibili dati disaggregati forniti da fonti alternative).

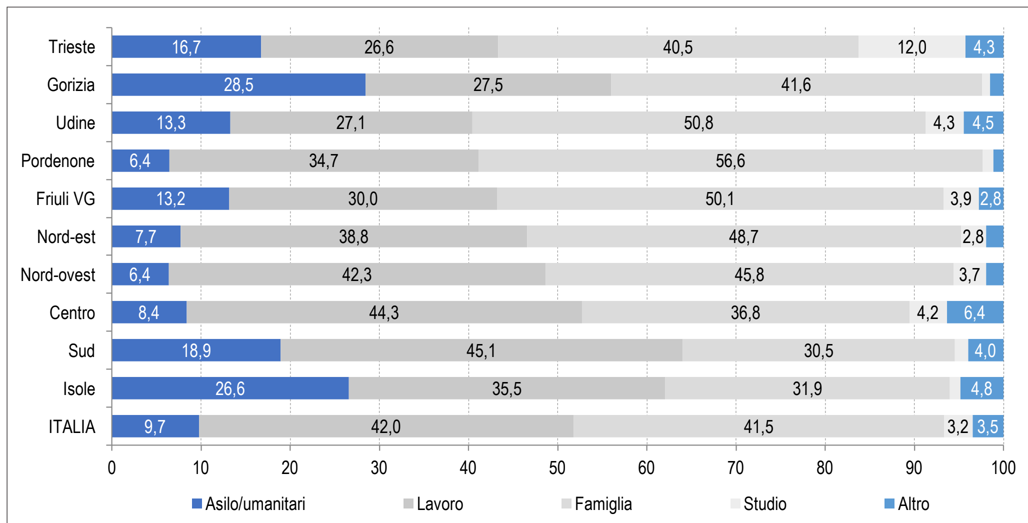
TABELLA 3 – Cittadini non comunitari regolarmente presenti al 1° gennaio 2016 per motivo della presenza [(a)]

	Asilo/ umanitari	Lavoro	Famiglia [(b)]	Studio	Altro	Totale	Popolazione	% su pop.
Nord-ovest	35.786	237.410	256.980	20.564	10.815	561.555	16.110.977	3,49
Nord-est	27.014	135.953	170.372	9.856	6.812	350.007	11.643.501	3,01
Pordenone	799	4.310	7.030	147	141	12.427	312.794	3,97
Udine	1.362	2.787	5.218	440	459	10.266	533.282	1,93
Gorizia	1.190	1.150	1.740	37	64	4.181	140.268	2,98
Trieste	895	1.426	2.169	644	228	5.362	234.874	2,28
Friuli Venezia Giulia	4.246	9.673	16.157	1.268	892	32.236	1.221.218	2,64
Centro	33.979	179.471	148.909	16.873	25.774	405.006	12.067.803	3,36
Sud	36.972	88.155	59.695	2.841	7.803	195.466	14.110.771	1,39
Isole	21.426	28.630	25.760	970	3.878	80.664	6.732.399	1,20
ITALIA	155.177	669.619	661.716	51.104	55.082	1.592.698	60.665.551	2,63

[(a)] Sono esclusi coloro che hanno un permesso di lungo periodo o una carta di soggiorno
[(b)] Sono compresi i minori registrati sul permesso di un adulto anche se rilasciato per motivi di lavoro

FONTE: elaborazioni Istat su dati del Ministero dell'Interno

Figura 4 – Cittadini non comunitari regolarmente presenti al 1° gennaio 2016 per motivo (percentuali)



Fonte: elaborazioni Istat su dati del Ministero dell'Interno

Tabella 4 – Ingressi in Italia di non comunitari nel 2015 e differenze con 2014 per le cittadinanze con la maggiore incidenza del motivo "asilo/umanitario"

	Totale 2015	Diff. 2014	Lavoro	Famiglia	Studio	Altro	Asilo/ umanitario	Diff. 2014
Nigeria	16.813	1.303	1,8	11,0	0,8	6,0	80,5	17,0
Ghana	4.482	1.322	2,9	27,2	1,9	3,4	64,6	15,8
Pakistan	14.437	740	6,6	31,0	2,0	1,1	59,4	19,3
Senegal	9.844	1.069	4,5	35,3	0,3	4,9	55,0	17,8
Bangladesh	10.662	-4.082	9,6	35,7	1,1	6,0	47,7	28,3
Ucraina	10.543	434	8,8	47,8	2,5	11,9	29,0	17,8
Serbia/Kosovo/Montenegro	5.115	740	11,3	61,8	5,9	13,8	7,2	1,2
Egitto	7.328	-2.805	15,6	55,3	5,0	17,2	6,8	-0,8
Tunisia	3.875	-728	13,9	70,0	7,3	5,0	3,8	-0,1
Mondo	238.936	-9.387	9,1	44,8	9,6	8,3	28,2	8,9

Fonte: Istat (dati.istat.it)

La comunità per la quale si registra la maggiore incidenza di permessi rilasciati per ragioni umanitarie è la Nigeria (80,5%) che, con quasi 17.000 ingressi, è anche il paese da cui proviene il maggior numero di cittadini non comunitari. L'incremento rispetto all'anno precedente è di 1.300 unità e si nota anche un notevole aumento della motivazione umanitaria, che peraltro già nel 2014 si collocava oltre il 60%. Al secondo posto si colloca il Ghana (64,6%) perché, pur essendo molto meno elevata la numerosità di ingressi nel 2015 (circa 4.500), registra un generale incremento rispetto al 2014 (oltre 1.300 unità) e un aumento dell'incidenza della motivazione umanitaria (sotto al 50% nel 2014).

Guardando invece alla sola consistenza degli ingressi nell'anno, il secondo gruppo è quello pakistano (oltre 14.000), con un'incidenza della ragione umanitaria poco meno elevata di quella dei ghanesi (quasi il 60%). Seguono senegalesi e bengalesi, con circa 10.000 ingressi e un'incidenza di motivi umanitari intorno al 50%, in notevole aumento rispetto al 2014 (in particolare per i bengalesi). Infine, anche gli stranieri provenienti dall'Ucraina entrati nell'anno sono poco più di 10.000 e in questo caso l'aumento d'immigrazioni motivate da richiesta di asilo è più che raddoppiato.

Focalizzando ulteriormente riguardo ai soli richiedenti protezione umanitaria, possiamo avvalerci di una pubblicazione specifica che l'Istat dedica annualmente a questa componente dell'immigrazione in Italia che, nell'ultima edizione, riassume in questo modo la situazione:

> Da qualche anno il nostro Paese è interessato sempre più da flussi migratori che non seguono i tradizionali network migratori attivati per lavoro o ricongiungimento familiare. Si tratta di flussi che si muovono nell'emergenza e che per questo mettono a dura prova il sistema di accoglienza del nostro Paese. Nel 2015 sono sbarcati sulle coste italiane oltre 149mila migranti e sono state presentate 85mila domande di protezione internazionale (Rapporto Annuale SPRAR, 2015). Da una parte, quindi, si assiste a un consolidamento dell'integrazione degli stranieri che vivono ormai da anni nel nostro Paese e che, in molti casi, ci sono addirittura nati. Dall'altra, l'Italia è interessata da ondate migratorie, non facilmente prevedibili, legate alla ricerca di asilo e protezione da parte di stranieri in fuga da conflitti e persecuzioni. Si tratta di due aspetti che coesistono e caratterizzano l'attuale fase matura dei fenomeni migratori in un Paese di frontiera rispetto ad aree ad alta instabilità politica" (Istat 2016, 6).

Come visto in precedenza, fra il 2014 e il 2015 è proseguita la crescita della componente "asilo e protezione" che nel 2015 ha rappresentato più del 28% dei nuovi ingressi e la Tab. 5 mostra che in circa il 90% dei casi si tratta di uomini, con l'eccezione, tra le prime dieci cittadinanze, dell'emigrazione ucraina (componente femminile oltre il 51,7%) e nigeriana (le donne sfiorano il 20% dei nuovi ingressi).

I minori sono poco più di 2.000 e rappresentano il 4% dei flussi in ingresso per queste motivazioni, con una percentuale di bambini e ragazzi che varia molto a seconda delle collettività: l'incidenza è massima per l'Ucraina (oltre il 9%) e minima per il Pakistan (meno dell'1%).

Tabella 5 – Cittadini non comunitari entrati in Italia per asilo politico e motivi umanitari nel 2015

Paesi	Totale	%	% maschi	Variazione % su 2014	% Permessi per asilo	Quota minori
Nigeria	13.739	20,4	80,9	94,5	80,5	3,2
Pakistan	8.571	12,7	99,2	56,1	59,4	0,7
Gambia	7.229	10,7	99,0	24,0	96,9	6,0
Senegal	5.411	8,0	98,3	65,7	55,0	3,3
Mali	5.240	7,8	99,2	-26,2	97,8	2,9
Bangladesh	5.085	7,6	99,6	78,3	47,7	1,9
Afghanistan	3.731	5,5	97,6	43,4	95,0	2,8
Ucraina	3.058	4,5	48,3	170,1	29,0	9,1
Ghana	2.896	4,3	96,5	87,6	64,6	3,7
Costa d'Avorio	2.501	3,7	93,6	140,9	74,6	3,0
Altri Paesi	9.810	14,6	82,2	-1,4	6,5	8,5
Totale	67.271	100	90,2	40,5	28,2	4,1

Fonte: Istat, 2016

Va anche rilevato che, considerando la sola "motivazione umanitaria", pur emergendo paesi non presenti nelle tabelle precedenti (ad esempio, Gambia e Mali), si conferma al primo posto la Nigeria, che da sola copre oltre il 20% dei nuovi ingressi per asilo e protezione umanitaria. L'aumento degli arrivi è generalizzato, con l'eccezione del Mali che vede diminuire il numero di permessi concessi tra il 2014 e il 2015. Escono dalla graduatoria dell'anno precedente Somalia ed Eritrea, mentre entrano tra i primi dieci paesi Ucraina e Costa d'Avorio, anche in virtù della notevole accelerazione negli ingressi registrata nel 2015.

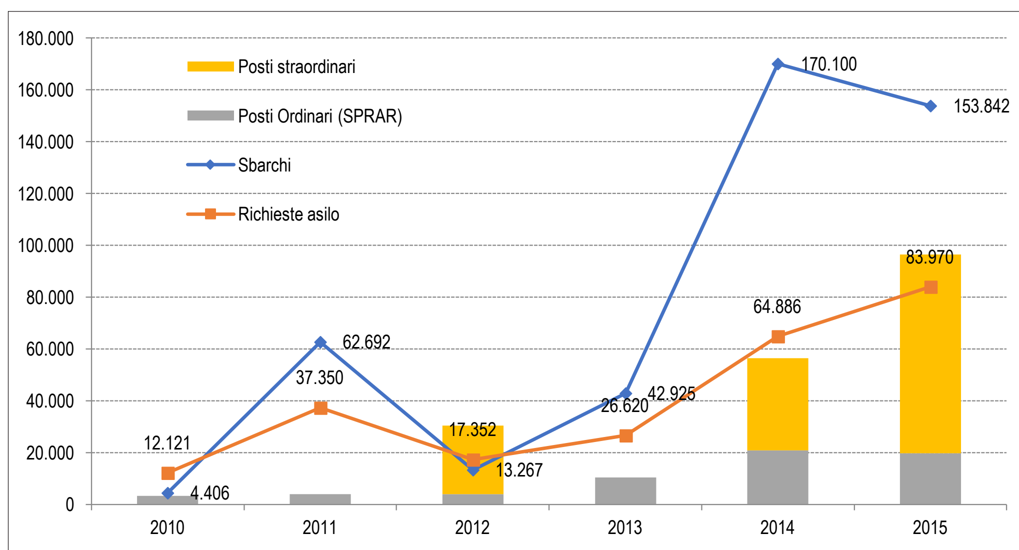
Nel rapporto dell'Istat si sottolinea anche che cresce, rispetto al 2014, la rilevanza delle province del Nord rispetto alla Sicilia, quale probabile conseguenza della maggiore distribuzione del sistema di protezione su tutto il territorio nazionale, che prevede se necessario anche il trasferimento e l'eventuale re-distribuzione dei richiedenti asilo in aree diverse da quelle di sbarco. Il rapporto rileva anche l'emergenza di un chiaro "dualismo dell'accoglienza": al Centro-Nord prevale il modello migratorio della stabilità (prevalenza di flussi per ricongiungimento familiare); nel Mezzogiorno, nonostante le politiche volte a favorire un'accoglienza diffusa, prevale invece il "modello" dell'emergenza, con un elevato numero d'ingressi per asilo e più contenuto per migrazioni di tipo familiare.

Nel rapporto si sostiene infine che si modifica la propensione al radicamento sul territorio dei nuovi entrati:

> Considerando l'insieme dei nuovi ingressi del 2007, la quota di quanti risultano ancora presenti al 1° gennaio 2016 è del 64,9%, notevolmente più elevata di quella rilevata per la coorte di ingressi del 2011 per la quale si può stimare che solo il 50,4% sia ancora in Italia all'inizio del 2016. La differente propensione a permanere sul territorio italiano registrata per le due coorti può essere in parte riconducibile alla crescente incidenza dei nuovi permessi rilasciati per richiesta asilo. Questa tipologia di permesso implica, infatti, una più elevata quota di mancati rinnovi: tra coloro che hanno avuto nel 2011 un primo permesso per richiesta asilo la percentuale di ancora presenti al 1° gennaio 2016 è pari al 38,0% e quindi inferiore di oltre 12 punti percentuali rispetto alla media. Con l'ampliarsi dell'importanza relativa degli ingressi per richiesta asilo si può, quindi, ipotizzare che l'Italia dovrà gestire una quota crescente di migrazioni temporanee destinate a non stabilizzarsi sul territorio (Istat 2016, 8).

La richiesta di asilo fornisce comunque solo un'idea approssimativa di quanti potenziali rifugiati sono entrati nei diversi paesi, perché solo una parte otterrà tale status. Lo scarto tra queste quantità si può apprezzare, ad esempio, dal Rapporto di Medici Senza Frontiere "Richiedenti asilo e rifugiati in Italia insediamenti informali e marginalità sociale" (2016) nel quale per gli ultimi anni sono forniti dati riguardanti gli sbarchi e i richiedenti asili, assieme a informazioni sulla dotazione di posti per l'accoglienza ordinari (forniti dal sistema SPAR) e straordinari.

FIGURA 5 – Sbarchi, richieste di asilo e posti ordinari e straordinari negli insediamenti per l'accoglienza



FONTE: Medici Senza Frontiere (2016)

Il grafico di Fig. 5, realizzato utilizzando i dati contenuti nel rapporto, mostra che negli ultimi anni in effetti aumenta il divario tra le prime due quantità perché una quota rilevante degli sbarcati non chiede asilo. Il grafico mostra inoltre che la somma dei posti negli insediamenti per l'accoglienza formali e informali, inizialmente del tutto insufficiente, negli ultimi anni riesce a fare fronte alla richiesta, sia pure facendo ampio ricorso agli insediamenti informali; inoltre (come si precisa in nota), ai posti visualizzati nel grafico si possono aggiungere quelli disponibili nei centri governativi di prima accoglienza (circa 7.400 al 31 dicembre 2015 secondo il Ministero dell'Interno).

4. La percezione del fenomeno migratorio da parte dei cittadini

Come illustrato già nella prima parte del presente lavoro, il sistema dell'accoglienza in Italia ha cercato di favorire la strada dell'accoglienza con lo scopo di arrivare all'integrazione che, come ben sintetizza il titolo del rapporto del Migration Policy Centre (MPC) dell'Istituto Universitario Europeo di Firenze "From Refugees To Workers" (2016), si realizza pienamente quando il rifugiato diventa un lavoratore. L'ambizioso risultato si potrà però raggiungere solo eliminando alcune barriere che, per quanto riguarda le caratteristiche soggettive dei migranti, il rapporto identifica fondamentalmente in carenze linguistiche, di adeguata formazione e mancanza di esperienza di lavoro nel paese di accoglienza che comporta scarsa comprensione della cultura del lavoro e conoscenza delle procedure per ottenerlo e su come far coincidere la propria esperienza con quanto richiesto. Si tratta dunque di operare con programmi specifici per superare le oggettive carenze culturali e formative del migrante, tenendo conto che a esse si assommano problemi più generali, quali la mancanza di relazioni sociali, causa ed effetto di incomprensioni interculturali che possono portare a sospetto e ostilità.

Secondo il Rapporto della Fondazione Moressa (2016), sebbene esistano già virtuose esperienze locali di processi di accoglienza efficace e sostenibile, faticano a diventare prassi perché manca una strategia complessiva e misure specifiche volte a favorire tale percorso. Inoltre, le strutture temporanee portano tensioni con la popolazione locale ed è pertanto utile monitorarne gli atteggiamenti. Cesareo parla infatti della necessità di combattere gli atteggiamenti ostili verso i migranti, "altrimenti i buoni propositi rischiano di confliggere con il clima di diffusa ostilità che permea le società europee, nelle quali i partiti politici mettono in campo programmi elettorali pesantemente restrittivi nei riguardi dell'immigrazione, usando a volte motivazioni esplicitamente xenofobiche" (2015, xxiv).

Per quanto concerne le spiegazioni di questa crescente ostilità, oltre a fattori oggettivi esogeni ed endogeni, quali i proclami dell'ISIS per quanto concerne i primi e gli effetti della crisi economica per i secondi, si possono chiamare in causa anche tratti culturali più di fondo, quali l'accentuazione di un esasperato

iper-individualismo, che alcuni analisti definiscono “narcisismo minimalista” (Cesareo, Vaccarini 2012), che comporta diffidenza verso gli altri e nel futuro, egoistico rifugio nel presente e in sé stessi. Cesareo poi sostiene che:

> il dibattito pubblico sull’immigrazione nei media può essere riassunto in tre atteggiamenti prevalenti: umanitario, caratterizzato da sentimenti di fratellanza e totale disponibilità ad accogliere i migranti; utilitaristico, contrassegnato da valutazioni razionali di convenienza e calcolo di vantaggi e svantaggi, costi e benefici derivanti da una maggiore o minore grado di apertura all’immigrazione; e, infine, un atteggiamento di paura e ostilità che comporta una chiusura intransigente verso gli stranieri, che sono visti come “nemici” che mettono in pericolo una presunta identità collettiva. … La vera sfida sta dunque nell’individuazione di strategie realistiche in grado di conciliare l’opzione “porta aperta” con la sostenibilità sociale ed economica, rinunciando alla logica “aut-aut”, per adottare una logica “e-e” perché, per quanto sia difficile tradurre questo principio in pratica, non si deve rinunciare al rispetto dei diritti umani universali, un pilastro della comune identità europea che ancora oggi spesso non è rispettato (2015, xxvii, *passim*).

I buoni propositi comunque si scontrano con la realtà che spesso non è nemmeno percepita correttamente; come riporta l’Annuario Statistico Immigrazione della Regione FVG (2013), l’Istat ha condotto nel 2011 un’indagine sulla diffusione degli atteggiamenti e comportamenti discriminatori, e l’indagine rileva innanzitutto che quasi un terzo degli intervistati ritiene troppo elevato il numero degli immigrati (percentuale che decresce con l’età degli intervistati)[22]. Al fenomeno migratorio viene comunque riconosciuto un ruolo positivo perché oltre il 60% ritiene che la presenza degli immigrati permetta il confronto con le altre culture e circa l’80% è poco o per niente d’accordo su: “meglio che italiani e immigrati stiano ognuno per conto proprio” e “l’Italia è degli italiani e non c’è posto per gli immigrati”. L’atteggiamento favorevole si attenua invece, e di molto, per temi quali l’acquisizione della cittadinanza e la partecipazione attiva alla vita politica.

Vengono inoltre condannati i comportamenti discriminatori a scuola e sul lavoro: il 92,1% degli intervistati del Nord-est ritiene non ritiene giustificabile prendere in giro uno studente straniero e oltre il 90% trattare un lavoratore immigrato meno bene dei colleghi. Maggiore giustificazione trovano invece i comportamenti discriminatori nella scelta di un dipendente (12,3%) o degli affittuari (21,8%).

La percezione del fenomeno migratorio è spesso formata attraverso luoghi comuni che persistono, soprattutto tra i più anziani. In positivo, il più diffuso sostiene che gli immigrati sono necessari per fare lavori rifiutati dagli italiani: sono infatti d’accordo circa due terzi degli intervistati e tale posizione è coerente con la convinzione che gli immigrati non tolgono lavoro agli italiani (68,6%). In negativo, è molto presente la convinzione che vi sia una connessione tra criminalità e immigrazione: nel Nord-est il 56,8% ritiene che l’aumento degli immi-

[22] I dati qui riportati sono tratti dalla pubblicazione della regione FVG che ha analizzato i dati originali forniti dall’Istat.

grati favorisca il diffondersi di terrorismo e criminalità; inoltre, più che in Italia si ritiene che lo spaccio della droga e la prostituzione siano legati alla presenza di alcune nazionalità straniere. Per tutti gli altri problemi le quote dei "preoccupati" sono marginali (intorno o molto sotto al 10%).

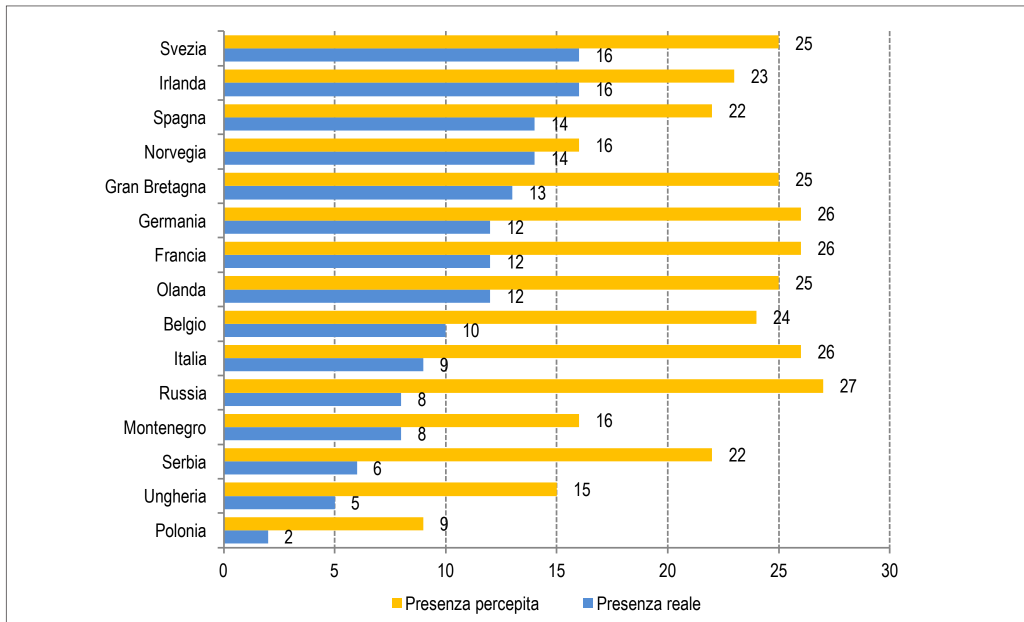
Le nazionalità più frequentemente indicate come causa di problemi sono quella rumena (34,5%), albanese (25,1%) e marocchina (12,1%) che corrispondono alle nazionalità più diffuse sul territorio. La percezione della minaccia dipende dunque da un dato fattuale, ma non si tratta di oggettiva "pericolosità", comunque rilevata, di una specifica etnia; è la numerosità in sé causa di preoccupazione e la numerosità stessa è spesso percepita, ma non necessariamente reale. Infatti, un problema particolarmente sentito nel Nord-Est è la possibilità che le pratiche religiose di alcuni immigrati minaccino il modo di vivere degli italiani: circa il 46% degli intervistati è d'accordo molto (22,2%) o abbastanza (23,8%), a fronte di un 33,9% che non è per niente d'accordo. Si potrebbe obiettare che quasi tutti i rumeni e metà degli albanesi sono cattolici (e molti italiani decisamente secolarizzati); dunque, la minaccia alle tradizioni religiose del Paese non dovrebbe coinvolgere più di tanto.

Riguardo alla presenza degli stranieri la "presunzione di conoscenza" è assai lontana dalla realtà ma, come è noto, la "costruzione sociale" determina le conseguenze. Nell'ambito del suo progetto di misurazione dell'ignoranza, Ipsos Mori conduce in diversi paesi una serie di rilevazioni che mostrano uno "scollamento" particolarmente evidente riguardo alla percezione del fenomeno migratorio, spesso sovrastimato. In Italia gli intervistati ritengono che gli emigranti costituiscano più di un quarto della popolazione, mentre in realtà erano sotto al 10%. È una delle sproporzioni più ampie registrate nei paesi nei quali si è svolta l'indagine (superata solo dalla Russia) e la Fig. 6 mostra anche che l'incidenza degli stranieri in Italia è meno elevata di quella che si riscontra in molti altri paesi europei.

Una preziosa fonte di informazioni sugli atteggiamenti è costituita dalle indagini che Eurobarometro effettua con cadenza semestrale. Le domande sull'immigrazione mostrano che, in generale, gli intervistati discriminano alquanto tra quella da paesi dell'UE (quasi il 60% la considera positiva) e da paesi non membri (si scende a circa il 30%). Le risposte alla domanda sul diritto/dovere di asilo ("il paese dovrebbe soccorrere i rifugiati"), che più specificamente si riferisce al tema del presente lavoro, mostrano che è maggioritario l'atteggiamento positivo, condiviso dal 60%, ma in diversi paesi le percentuali sono decisamente più basse: da circa il 20% in Repubblica Ceca a poco più del 40% in Italia. In sintesi, agli ultimi posti in termini di apertura (anche nel caso di rifugiati o richiedenti asilo) si collocano i paesi dell'ex-blocco sovietico e, all'opposto, la Svezia e altri paesi del nord dell'Europa (Olanda, Germania Ovest, Danimarca e Lussemburgo).

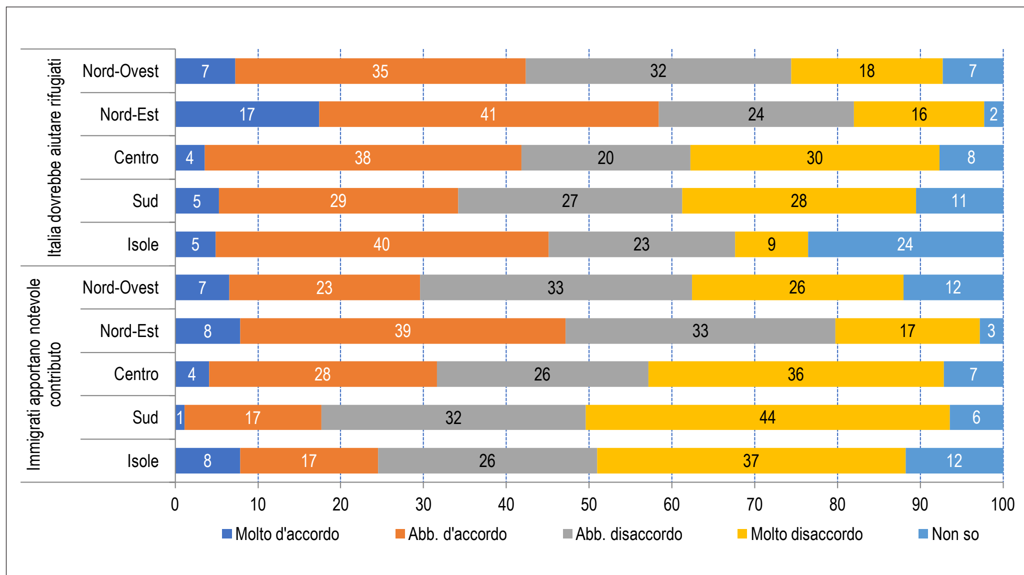
Le risposte del campione italiano (Fig. 7) mostrano che il sentimento di apertura verso questa esigenza umanitaria si registra particolarmente proprio nel Nord-Est, seguito dalle Isole dove, con quasi un quarto di "non so", si rileva anche un elevato grado di incertezza. Nell'indagine di Eurobarometro si poteva mostra-

Figura 6 – Quota di stranieri nella popolazione: percezione e realtà (2013)



Fonte: Ipsos Mori (2015)

Figura 7 – Accordo/disaccordo su "l'Italia dovrebbe dare aiuto ai rifugiati" e "gli immigrati apportano un notevole contributo all'Italia" (2015)

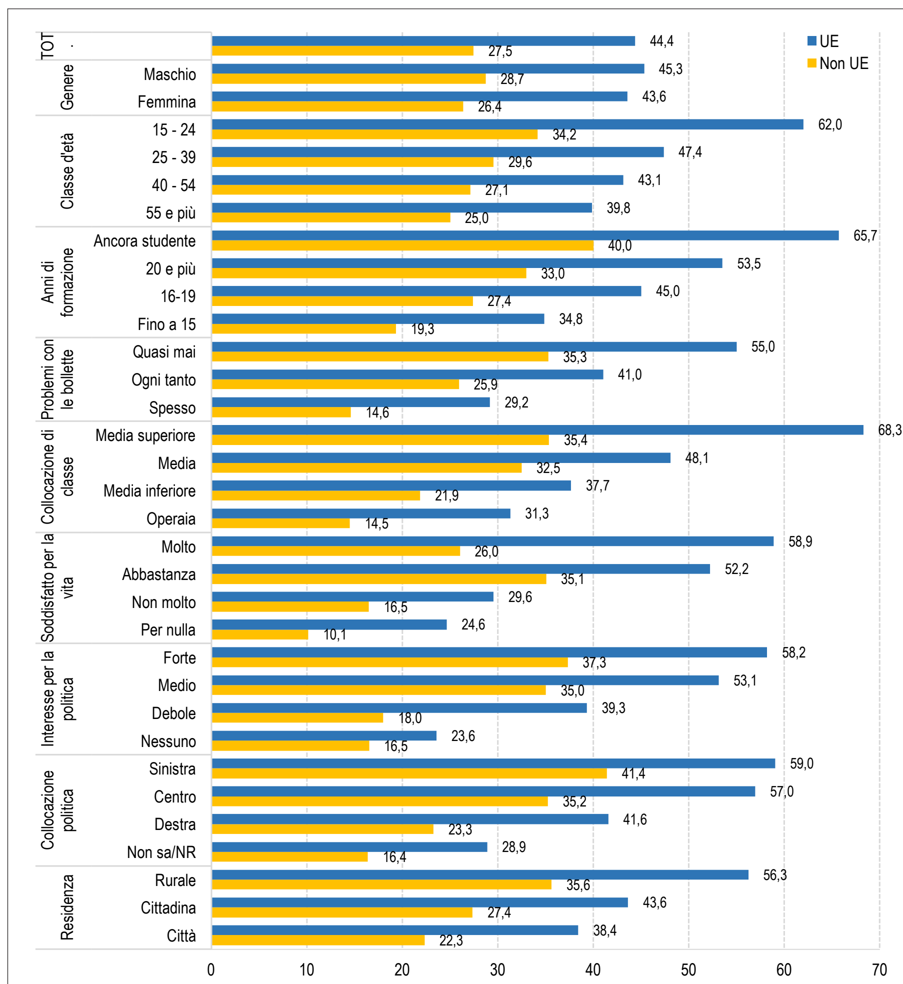


Fonte: Eurobarometro EB85.2

re un atteggiamento di apertura anche rispondendo a una domanda sul "notevole contributo" che i nuovi residenti possono portare allo sviluppo del Paese. Il campione italiano concorda complessivamente ("molto" o "abbastanza") nel 30% dei casi, valore inferiore alla media europea (intorno al 35%), ma anche in questo caso il Nord-Est si distingue in positivo da tutte le altre aree, con una percentuale non lontana dal 50%.

Entrando ora nel merito delle caratteristiche personali dei rispondenti, riguardo all'immigrazione da paesi appartenenti all'UE, in Italia l'apertura primi supera largamente il 40% e verso i paesi non UE è ben al di sotto del 30%; uno scarto che si riproduce grosso modo in tutte o quasi le categorie sociali (Fig. 8).

FIGURA 8 – Atteggiamento molto e abbastanza positivo sull'immigrazione da stati membri e non membri dell'UE (2015)



FONTE: Eurobarometro EB85.2

L'appartenenza di genere, come ormai spesso si nota spesso analizzando gli atteggiamenti, anche in questo caso non possiede efficacia discriminante (i maschi dimostrano solo lievemente una maggiore apertura). Non è così per l'età, con una differenza di oltre 20 punti a favore dell'immigrazione da paesi membri dell'UE e intorno al 10% per quella dagli altri paesi, confrontando le risposte dei più giovani (15-24enni) con quelle dei più anziani (55 anni o più) e le differenze sono ancor più evidenti per livello d'istruzione, al punto da far pensare che la diminuzione dell'atteggiamento di apertura con l'aumento dell'età sia anch'essa dovuta al livello di istruzione, dal momento che gli anziani sono mediamente molto meno scolarizzati dei più giovani. Il grafico mostra in effetti che per l'immigrazione da paesi membri le risposte positive quasi si dimezzano passando da chi è almeno laureato (o ancora studente) a chi non ha studiato oltre l'obbligo, e decisamente si dimezzano se si tratta di extra-comunitari (da 40% a meno del 20%).

Differenze ancor più estreme si notano osservando l'azione di altre caratteristiche, quali la situazione economica, rilevata chiedendo se l'intervistato riscontra difficoltà a pagare le bollette o di indicare la classe sociale di appartenenza: in entrambi i casi l'atteggiamento positivo più che raddoppia passando dalle categorie più forti a quelle più deboli socialmente. Lo stesso trend si nota confrontando chi si dichiara complessivamente molto soddisfatto per la vita che attualmente conduce e chi si dichiara invece per nulla soddisfatto.

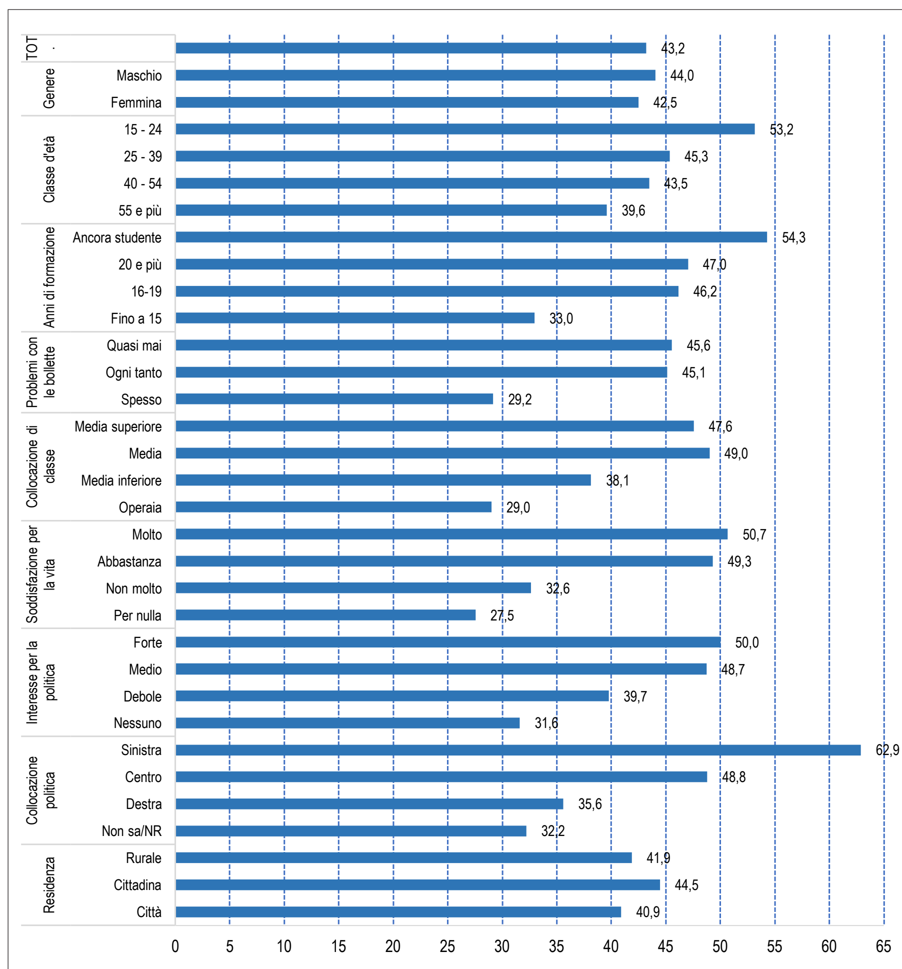
Anche l'interesse per la politica dimostra una notevole capacità esplicativa: chi si definisce molto interessato è di gran lunga più disponibile e aperto nei confronti del fenomeno migratorio (quasi il 60% se si parla di immigrazione da paesi membri e quasi il 40% per gli extra-comunitari), rispetto a chi dichiara scarso o nessun interesse (si scende a meno del 25% al 16,5%, rispettivamente per i comunitari e gli extra-comunitari). Come è intuibile, anche la collocazione sul continuum sinistra-destra influisce notevolmente: chi si dichiara di sinistra si dichiara molto più favorevole a confronto dei simpatizzanti per la destra e di chi non rivela le sue simpatie politiche (questi ultimi sono pari a circa un terzo dell'intero campione ed è per questo che la categoria è stata visualizzata nel grafico).

Anche nel caso della stratificazione secondo la residenza (villaggio o area rurale, piccola o media cittadina o grande città) le differenze sono assai rilevanti, ma vanno nella direzione contraria a quanto ci si potrebbe attendere. Infatti, le popolazioni residenti nelle grandi città sono tendenzialmente più scolarizzate, mediamente più giovani e comprendono quote più consistenti di appartenenti alle classi sociali più elevate; ciononostante, i residenti in città valutano positivamente il fenomeno migratorio in percentuale assai più ridotta rispetto ai residenti nei piccoli centri rurali. La concentrazione degli stranieri nei centri urbani, con conseguente maggiore "visibilità", rende infatti la loro presenza minacciosa, cosa che non accade nei piccoli centri dove le presenze sono sporadiche, confermando la saggezza del progetto SPRAR, la cui politica dell'accoglienza "diffusa" intende proprio diluire il fenomeno sul territorio per renderlo più accettabile socialmente.

Passando alla domanda sul diritto dei rifugiati a ottenere aiuto (e al dovere dell'Italia di fornirlo) (Fig. 9), va innanzitutto sottolineato che i rifugiati provengono da paesi non membri dell'UE ma, se si esplicita questa loro condizione, i livelli di accoglienza si allineano con quelli che si è inclini ad accordare agli stranieri provenienti da paesi membri dell'UE.

La disaggregazione delle risposte mostra differenze di simile entità passando dalle categorie socialmente più forti (più garantiste) a quelle più deboli (meno inclini a riconoscere questo diritto ai rifugiati). La divaricazione è però un po' più ridotta a seconda della condizione economica e ciò è del tutto comprensibile; le domande precedenti facevano riferimento agli immigrati in generale, dun-

FIGURA 9 – Molto e abbastanza d'accordo su "l'Italia dovrebbe dare aiuto ai rifugiati" (2015)



FONTE: Eurobarometro EB85.2

que anche immigrati economici, e le risposte riflettevano la tendenza al rifiuto dell'accoglienza di chi è visto come un potenziale concorrente sul mercato del lavoro; queste preoccupazioni sono però un po' più attenuate, almeno nell'immediato, se si tratta di rifugiati.

L'interesse per la politica, e ancor più la collocazione sul continuo sinistra-destra, mantengono intatto il loro potenziale esplicativo, anche perché il tema è utilizzato con forza nella disputa politica, a partire della negazione della condizione di rifugiato per parte degli immigrati che la utilizzerebbero strumentalmente per nascondere la loro reale condizione di immigrati economici. Per quanto concerne la residenza degli intervistati le differenze invece si attenuano alquanto, forse perché la loro specifica condizione fa considerare questi immigrati come meno "invadenti" numericamente.

Come ultimo elemento di valutazione, offriamo al lettore alcuni dati di Demos che, con il suo "Osservatorio del Nord-Est" rileva, anche più volte all'anno, gli atteggiamenti dell'opinione pubblica nei confronti del fenomeno migratorio. L'indagine più recente (novembre 2016) rivela che per il 32% degli intervistati gli immigrati sono una minaccia per l'occupazione; una quota sostanzialmente analoga (31%) li giudica invece una risorsa per l'economia. Combinando le due risposte, Demos ha costituito una tipologia di orientamenti che classifica il 29% degli intervistati come complessivamente pessimista rispetto alla presenza di immigrati, il 28% come relativamente ottimista, mentre la maggioranza relativa (44%) mostra atteggiamenti contrastanti, con una tendenza alla diminuzione degli intervistati che esprimono una valutazione positiva.

Secondo i ricercatori: "l'orientamento negativo è più presente tra gli adulti e gli anziani, tra le persone in possesso di un titolo di studio basso o medio, tra le casalinghe e i pensionati. La visione ottimista, invece, sembra crescere tra i giovani con meno di 25 anni, tra chi possiede una laurea e quanti non frequentano i riti religiosi. Professionalmente, invece, la quota di ottimisti tende ad aumentare tra impiegati, imprenditori, liberi professionisti e studenti" (Porcellato, 2016).

5. Accoglienza diffusa: cosa significa? l'esperienza della città di Trieste

L'accoglienza e l'integrazione locale dei rifugiati e dei richiedenti asilo nel tessuto sociale del paese di accoglienza si realizza se e quando questi migranti diventano, in qualche modo, parte della comunità ospitante. Ciò avviene attraverso l'attivazione di una serie di processi di varia natura: legale, economica ma anche sociale e culturale. È importante, infatti, sottolineare un elemento: l'accoglienza dei rifugiati e la loro integrazione impone degli obblighi parimenti ai territori che li ospitano e ai soggetti stessi beneficiari dell'accoglienza, i quali si devono impegnare a vivere secondo il rispetto delle norme dei paesi ospitanti. Nel momento in cui un territorio entra in contatto con la diversità di cui i cittadini stranieri in generale sono portatori, c'è sempre la necessità della ricerca di un

nuovo equilibrio, di un principio di mediazione tra le differenze, della ricerca di una sintesi in grado di rispettare e valorizzare le diversità. Tale principio vale ancor di più quando ci si relaziona con i migranti forzati che, in virtù della loro storia, sono caratterizzati da una particolare vulnerabilità che non viene sempre compresa e riconosciuta dalla popolazione, la quale spesso fa fatica ad accettare la loro presenza nel tessuto sociale locale. Da questo punto di vista, la narrazione che viene spesso prodotta dai mezzi di comunicazione contribuisce a fomentare un atteggiamento di rifiuto e una visione sempre più stereotipata dei rifugiati e dei richiedenti protezione internazionale, frutto anche di una scarsa conoscenza dei meccanismi e delle procedure a cui, sia i migranti sia gli Stati devono sottostare. Inoltre, il clima d'insicurezza generato e alimentato dalla crisi economica ha contribuito a sedimentare, specie negli ultimi anni, un sentimento di rifiuto o, nel peggiore dei casi, di ostilità nei confronti dei cittadini stranieri, in particolare, rispetto alla specifica categoria dei rifugiati e dei richiedenti asilo. In virtù di questo clima, il sistema di accoglienza ha un duplice e complesso mandato: accogliere i migranti in difficoltà e cercare di costruire una relazione tra questi e la popolazione locale, aspirando a una convivenza pacifica e reciprocamente arricchente.

Rispetto al circuito della seconda accoglienza, l'esperienza che la città di Trieste sta vivendo da oltre un decennio, e in particolare dal 2013, è particolarmente rilevante poiché rappresenta un esempio concreto di come un sistema integrato con il territorio, supportato da un principio di governance multilivello, sia non solo auspicabile ma anche possibile. Come affermato in precedenza, la caratteristica principale del sistema di accoglienza in Italia è che esso non è strutturato in modo unitario e non vede lo stesso impegno di tutte le Regioni: infatti, poiché i Comuni non sono obbligati a impegnarsi nell'implementazione di un progetto SPRAR sul proprio territorio, accade che lo sviluppo di tali esperienze a livello nazionale non sia equilibrato[23]. Parallelamente, a contribuire a rendere disomogeneo l'intero apparato, interviene anche l'organizzazione essenzialmente bicefala del sistema di accoglienza italiano che, ad oggi, prevede un doppio binario: da un lato il sistema SPRAR, in capo ai Comuni e al Terzo settore, e dall'altro la rete dei Centri di Accoglienza Straordinaria (CAS), questi ultimi in capo alle Prefetture. La necessità di uscire da una logica che vede la presenza dei richiedenti protezione internazionale come una situazione emergenziale e temporanea per il nostro

[23] Il Decreto Ministeriale (DM) n.200/2016 ha, di fatto, contribuito a modificare le procedure di accesso e adesione da parte dei nuovi Enti Locali che decidono di accedere alla rete dei progetti SPRAR. Tale decreto dà attuazione alla riforma di accesso al Fondo nazionale con il duplice intento di dare stabilità alla già esistente rete di accoglienza e, contemporaneamente, facilitare l'accesso dei nuovi Enti Locali interessati. Tra le modifiche introdotte da tale DM, infatti, quella secondo cui gli Enti Locali che intendono accedere ai finanziamenti non devono più attendere la periodica pubblicazione di bandi di adesione ma possono avvalersi di liste sempre aperte. Il Servizio Centrale, infatti, accoglierà le domande in base alla disponibilità di fondi. Tale modifica è stata introdotta proprio per stimolare la partecipazione dei Comuni ad aderire alla rete SPRAR in modo da rendere, a livello nazionale, la geografia degli interventi più omogenea e meglio distribuita. Per la consultazione del DM si veda: https://goo.gl/vly2dR (dicembre 2016).

Paese imporrebbe, infatti, un maggiore investimento in termini di risorse e di organicità degli interventi, in modo da rendere l'intera gamma dei servizi più omogenea e maggiormente rispondente alla crescente domanda di rifugio e di integrazione. La struttura della governance multilivello su cui il sistema SPRAR si poggia è, infatti, certamente un ottimo punto di partenza, giacché ha consentito a diversi attori (istituzionali e del terzo settore) di dialogare e lavorare assieme (Di Ciò e Pasquinelli 2016), alimentando e rinnovando il circuito dell'accoglienza in un'ottica reciproca e incrementale. L'auspicio è, negli anni, che tale sistema diventi il sistema di accoglienza in Italia e che come tale tutti i territori lo recepiscano e lo attuino.

Il principio su cui si basa la rete SPRAR è quello della cosiddetta accoglienza integrata, con alla base una logica di decentramento degli interventi sul territorio (Pacini, 2016): accoglienza integrata vuol dire anche accoglienza diffusa e rappresenta una delle principali caratteristiche dei progetti SPRAR che, nello specifico, nella città di Trieste trova un esempio particolarmente valido. È infatti dal 2002 che il Consorzio Italiano di Solidarietà (Ics), insieme alla Caritas, ha in gestione diversi progetti aderenti alla rete SPRAR. Storicamente, infatti, la città di Trieste ha aderito allo SPRAR già dal 2002 e prima ancora, nel giugno del 2001, l'amministrazione comunale aveva aderito al PNA: inoltre, il piano di accoglienza organizzato a partire dal 1998 dal Comune per l'accoglienza dei cittadini provenienti dal Kosovo ha rappresentato certamente una buona pratica che ha sostenuto la nascita e lo sviluppo della rete dei progetti SPRAR.

Il costante impegno ravvisato nella gestione e nell'accoglienza dei richiedenti protezione internazionale ha così sedimentato nel corso degli anni una cultura della gestione dell'accoglienza, in termini di strategie gestionali e know-how degli operatori, che ha portato a far vincere l'ordinarietà sull'emergenza nella gestione della domanda di accoglienza e integrazione dei migranti sul territorio locale[24]. Tale approccio ha portato a costruire, nel contesto cittadino, un "unico sistema di accoglienza pubblico, fortemente integrato con il territorio e con un'uguaglianza di trattamento per tutti i beneficiari" (Comune di Trieste, 2015). Questo sistema è stato ulteriormente incrementato dal 2013 per far fronte all'aumento delle richieste di accoglienza dei cittadini che giungevano a Trieste dalla cosiddetta "rotta balcanica". A tal fine è stata sottoscritta una convenzione tra Comune e Prefettura di Trieste per la gestione "extra-SPRAR" di tutti i richiedenti protezione internazionale presenti a Trieste[25]. A giugno 2015, infatti, la capacità complessiva del sistema di accoglienza territoriale triestino contava 757 posti

[24] Per un approfondimento sul tema si veda: https://goo.gl/Co4Cwp (novembre 2016).

[25] Si segnala che, nel giugno 2016, a seguito delle elezioni amministrative, il Comune di Trieste non ha più rinnovato la convenzione sottoscritta con la Prefettura di Trieste per la gestione "extra-SPRAR" dei richiedenti asilo presenti sul territorio. La gestione delle strutture SPRAR ed Extra SPRAR rimane però correntemente attiva e affidata a Caritas e Ics che continuano a gestire le strutture e le progettualità dedicate all'accoglienza e l'integrazione dei richiedenti protezione internazionale presenti sul territorio triestino.

così suddivisi: 119 posti relativi alla rete SPRAR (109 richiedenti collocati in 16 appartamenti gestiti da Ics e 10 persone in 2 strutture –una casa e un appartamento- gestite da Caritas) e ben 638[26] posti afferenti alla rete "extra-SPRAR" (Comune di Trieste, 2015)[27]. Nel corso del 2016, in considerazione del sostenuto e generalizzato aumento degli arrivi, accanto all'articolazione in piccoli appartamenti, si è reso necessario predisporre anche dei centri collettivi di piccole dimensioni e una struttura che ha assunto il ruolo di centro di prima accoglienza (CAS): tuttavia negli intendimenti delle istituzioni si è trattato di strutture temporanee necessarie per far fronte alle esigenze contingenti (Famulari 2016, 49-50).

La caratteristica che accomuna l'accoglienza dei richiedenti e titolari protezione internazionale inseriti nei circuiti SPRAR ed extra-SPRAR consiste nell'essere entrambe realizzate fisicamente in piccole unità abitative gestite secondo gli stessi principi e le stesse modalità. Tipicamente si tratta di appartamenti, massimo 4/6 persone per ogni abitazione (concessi in locazione da privati per quanto riguarda l'extra-SPRAR, mentre nel circuito SPRAR sono presenti anche abitazioni di proprietà del Comune e dell'AAS n. 1 Triestina), collocati in zone non periferiche della città dalle quali è relativamente facile e agevole raggiungere i centri di interesse e di pubblica utilità.

Quest'ultimo aspetto è particolarmente rilevante, in quanto collocare i migranti in zone centrali della città e non ai margini o nelle periferie rappresenta un doppio vantaggio. Da un lato la popolazione locale entra direttamente e quotidianamente in contatto con l'alterità di cui i migranti sono portatori e questo consente di "normalizzare" la loro presenza nel contesto locale. Contemporaneamente, distribuire la presenza dei cittadini stranieri in piccoli nuclei posti al centro e non nelle periferie delle città consente anche alle istituzioni (e agli enti gestori dei progetti) di controllare e amministrare meglio le attività in corso. Tale approccio, infatti, risulta specularmente antitetico alla logica dei grandi centri di accoglienza che, invece, appaiono inadatti per varie motivazioni e rappresentano, spesso, potenziali serbatoi di scontento, violenza e disagio. In genere, in ragione

[26] Nell'ambito della già citata convenzione, al 31/12/2013 le persone accolte nella rete "extra-SPRAR" erano 202 e 474 al 31/12/2014, fino a giungere a 638 nel giugno 2015. In meno di due anni di attività, dunque, l'incremento dei numeri dell'accoglienza in centri "extra-SPRAR" è stato costante, complici anche gli arrivi derivanti dall'operazione Mare Nostrum a partire dall'aprile 2014 (Comune di Trieste 2015, su dati forniti dalla Prefettura di Trieste).

[27] Dal momento che la città di Trieste si trova territorialmente ad essere uno dei passaggi dei migranti provenienti giornalmente via terra dai Balcani, vi è un numero modesto di soggetti (non quantificabile e non rilevabile dalle statistiche ufficiali) che, una volta giunti sul territorio, non hanno trovato immediata collocazione. Ciò accade perché sul territorio manca una struttura di primissima accoglienza: per sopperire a tale mancanza, al verificarsi di queste situazioni, i soggetti c.d. "senza destinazione" in genere vengono ospitati per circa un paio di settimane (il tempo utile affinché questi possano essere inseriti nel circuito SPRAR o extra-SPRAR) in strutture quali dormitori o luoghi adibiti temporaneamente all'accoglienza (es. palestre). A questi soggetti la succitata convenzione garantiva comunque il pacchetto di servizi essenziali quali: il servizio pasti (forniti da Caritas), l'uso delle docce comunali, le prime visite mediche e l'assistenza legale (fornita da Ics) per il tempestivo avvio delle pratiche per la richiesta di protezione internazionale (Comune di Trieste 2015 e Famulari 2016).

delle loro dimensioni, essi sono collocati nelle periferie o comunque lontani dai centri; inoltre, l'elevata concentrazione di ospiti in questi luoghi aumenta la possibilità di scontri, tensioni sia tra i conviventi sia tra i migranti e la popolazione locale che, alla lunga, vivrà questi agglomerati come dei corpi estranei che disturbano la comunità. Si tratta, dunque, di una diversa modalità di appropriazione dello spazio urbano e di un conseguente diverso approccio della comunità locale a questi nuovi cittadini.

Certamente, come afferma il presidente di Ics dott. Gianfranco Schiavone in un'intervista sul tema rilasciata a Redattore Sociale (www.redattoresociale.it) nell'estate del 2015, la conformazione della città di Trieste ha agevolato l'implementazione di questo sistema; tuttavia, nei suoi principi fondamentali, il sistema di accoglienza SPRAR ed extra-SPRAR realizzato negli anni a Trieste può rappresentare un modello, una buona pratica potenzialmente replicabile anche in altri contesti. Infatti, collocare i richiedenti protezione internazionale in luoghi dove il loro potenziale livello di mobilità è piuttosto alto assegna loro uno spazio potenziale di attività (Schönfelder e Axhausen 2003 in Osti 2010, 65) altrettanto vasto che allontana i migranti da spazi di isolamento o segregazione dove le relazioni sono principalmente instaurate su base etnica, rallentando così il reciproco e necessario processo di conoscenza e interazione. Dotare i migranti di un discreto livello di motilità, quest'ultima intesa nell'accezione di Kaufmann (2005) quale particolare forma di mobilità che collega tre aspetti fondamentali (infrastrutture, accessibilità alle stesse e competenze e rappresentazioni[28]) è infatti un elemento importante che, in prospettiva, può facilitare l'integrazione del richiedente protezione internazionale, processo di per sé molto difficoltoso e spesso discontinuo a causa di diverse variabili contingenti. La logica vincente che sta alla base del sistema di accoglienza triestino risiede ulteriormente nel sistema di governance, uniformemente esteso grazie alla convenzione sia ai posti di accoglienza SPRAR sia a quelli extra-SPRAR: uno degli obiettivi della convenzione, infatti, era quello di rendere (nei limiti dei posti disponibili) subito possibile la sistemazione del soggetto richiedente in una delle strutture presenti della città. Tale elemento risulta particolarmente rilevante in considerazione della tipologia di migranti che giungono sul territorio triestino: accade spesso che i migranti raggiungano direttamente le sedi della Questura presentandosi di loro spontanea volontà presso gli uffici preposti per la richiesta di asilo (Famulari 2016, 48). Il sistema così impostato consente alle istituzioni e agli enti gestori dei progetti SPRAR ed extra-SPRAR di governare con maggiore flessibilità un sistema artico-

[28] Per Kaufmann la motilità indica l'insieme di aspetti strutturali e soggettivi che permettono a una persona (o ad un gruppo) di padroneggiare la mobilità in una data area. La motilità viene utilizzata da Kaufmann per collegare tre aspetti fondamentali della mobilità. Le infrastrutture: si tratta di presenza di strade, stazioni ferroviarie, trasporto pubblico, ecc. Secondariamente l'accessibilità universale di queste e, infine, le competenze e le rappresentazioni ovvero il fatto che i soggetti abbiano la cognizione (intese quali per esempio, patente di guida, spirito di esplorazione, capacità di muoversi autonomamente nello spazio, ecc.) e le competenze per appropriarsi concretamente dello spazio (Osti 2010, 65).

lato, che è così in grado di soddisfare una parte consistente, seppur non sufficiente, della domanda di accoglienza e integrazione espressa dai cittadini stranieri che giungono attraverso diversi canali sul territorio regionale.

6. In conclusione: quali i punti di forza del modello di accoglienza triestino?

Dall'analisi di quanto esposto è stato posto in evidenza come, nel corso degli anni, il nostro Paese sia stato chiamato a confrontarsi con le migrazioni e, in particolare, anche con i flussi dei richiedenti protezione internazionale. Si tratta per diverse ragioni, come detto in precedenza, di soggetti particolarmente vulnerabili per i quali è necessario impostare non solo un percorso di accoglienza ma anche un processo di integrazione e inclusione sociale, sostenuto specialmente a livello locale. Ciò che, a livello nazionale, l'esperienza SPRAR ha evidenziato nei quasi quindici anni di attuazione, è che la dimensione locale dell'integrazione rappresenta la vera chiave di volta che consente ai migranti progressivamente di inserirsi. Tale percorso ha inizio proprio durante l'accoglimento nella rete SPRAR dove, oltre alla primaria e pressante esigenza di accoglimento, si cerca di soddisfare anche il bisogno di orientamento e integrazione dei migranti, elemento che sostiene e qualifica i diversi percorsi di autonomia socio-economica (Atlante SPRAR 2015, 79). La conoscenza del territorio, il fondamentale tassello dell'apprendimento della lingua italiana, l'acquisizione e l'eventuale e fondamentale recupero delle proprie conoscenze e competenze in campo formativo, professionale e lavorativo sono, infatti, gli elementi fondamentali da cui muovere affinché le vite di questi giovani possano ripartire.

Il buon esito dei percorsi di accoglienza e d'inclusione dei titolari e/o richiedenti protezione internazionale così impostati deriva molto anche dalle scelte operate a livello locale, in particolare dai Comuni da cui dipende la programmazione di lungo periodo di strategie e risorse da mettere in campo su questo tema. In questo, probabilmente, un maggiore supporto e indirizzo a livello nazionale consentirebbe ai diversi contesti locali di integrare in modo più sistematico le politiche messe in campo per questo particolare segmento della popolazione nel più complessivo sistema di welfare locale (Pacini 2016). Nel caso specifico della città di Trieste il sistema SRAR ed extra-SPRAR, considerato nel suo complesso, consente di porre in evidenza come, da una sinergia tra istituzioni e terzo settore, possa nascere un virtuoso circuito di accoglienza che, seppur perfettibile, è certamente in grado di rendere un positivo servizio alla popolazione (locale e immigrata). Ovviamente, anche nella città di Trieste, complice il non positivo clima di pregiudizio e paura che viene costantemente alimentato da una parte della politica e dell'opinione pubblica sia a livello nazionale sia internazionale, non sono mancati recentemente episodi di intolleranza che, tuttavia, non vanificano gli esiti certamente positivi che sono stati prodotti.

In prima istanza, l'imposizione di criteri chiari e uniformi di gestione e di servizi erogati sia all'interno dello SPRAR sia nella rete extra-SPRAR ha consentito di implementare e alimentare progressivamente un sistema "resiliente" (in particolare la rete extra-SPRAR che percentualmente soddisfa più dell'84% della domanda complessiva), ovvero in grado di far fronte anche all'improvviso aumento della domanda a seguito dei nuovi arrivi, senza che questa situazione generasse rilevanti episodi di allarme e disordine sociale. Secondariamente, la scelta di collocare i migranti in piccoli nuclei abitativi ha consentito di poter delegare parte della gestione del ménage della quotidiana convivenza direttamente ai beneficiari, supportati da un operatore che supervisiona e interviene qualora necessario. Questo elemento contribuisce a collocare l'esperienza dell'accoglienza su un piano di normalità, dove anche i piccoli gesti quotidiani di cui una semplice convivenza spesso tra coetanei è fatta, hanno la loro importanza. Va anche considerato che il reperimento sul libero mercato di strutture di appartamenti di proprietà di privati ha altresì incentivato il locale mercato di locazione con un duplice vantaggio sia per il locatore, che per tutta la durata del contratto ha un'entrata economica assicurata, sia per il locatario, che può scegliere così la collocazione urbana degli appartamenti che ritiene ottimale. Infatti, come detto, inserire i migranti in contesti centrali e non periferici della città ha contribuito a dimostrare che una civile e pacifica convivenza è possibile. Inoltre, si prevengono così potenziali episodi di emarginazione e devianza sociale, includendo nei confini della città anche chi, potenzialmente, può rimanerne escluso. Infine, una gestione attenta degli interventi di accoglienza, basata su un'intesa collaborazione tra Stato, Enti Locali e Terzo Settore, consente di porre in evidenza come tale impostazione rappresenti un arricchimento sia a livello nazionale, dove l'esistenza di una buona pratica efficacemente implementata può dar seguito a ulteriori positive esperienze, sia a livello locale, dove le risorse possono così, in prospettiva, essere sempre più ottimizzate in termini di servizi offerti e acquisizione e arricchimento di competenze da parte degli operatori coinvolti (Comune di Trieste 2015; Pacini 2016).

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The Hope Boats of the Balkans. Field Research on Asylum Seekers in Gorizia

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1. Introduction to the research

From September 2014 to March 2015 an increasing amount of asylum seekers reached the region Friuli Venezia Giulia and the town of Gorizia, on the Italian-Slovenian border. The presence of the asylum seekers in town caused an increasing interest in the media, especially local newspapers, and a growing discontent among citizens. At the same time, the local administration was dealing with the need to provide asylum seekers' temporary allocation and access to the Commission evaluating their protection request. In order to start responding to the growing questions of the community about this phenomenon, and to analyze the organizational system in place, in spring 2015 ISIG engaged in a field research on this topic.

2. Field work objectives

The first objective of the research has been to define the reasons for the presence of asylum seekers in Gorizia and their expectations for the future, so to contribute to the local debate on the presence of these new migrants in the northern

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Italian town. A secondary goal was also to start a pilot research on management models to be extended in the future on a broader territory.

This goal is connected to the consideration that the situation in Gorizia, if approached on the basis of objective data, could be analyzed so to devise a model for the evaluation of the assets a community can activate in response to external stresses.

3. Methodology

The pilot survey focused on the migration routes reaching Gorizia from Afghanistan and Pakistan and on the personal stories of 30 immigrants.

In the period between May 5 and May 7, 2015, thirty semi-structured interviews were conducted with asylum seekers in Gorizia, at the CARITAS refectory and at the "Nazareno" premises (see further), being authorized by the institutions responsible for the hospitality.

The interview outline was structured as follows:

- Identification of the interviewee's profile;
- Tracing of the journey faced by the asylum seeker from the country of origin;
- Identification of the main reasons that brought the interviewee to Gorizia;
- Respondents' legal status and related legal issues;
- Exploration of the interviewee's perception on the reception system;
- Interviewee's expectations for the future;

Each interview was conducted in English by ISIG researchers and lasted 15 minutes on average. The interview development did undergo differences in duration and content detail, due to language barriers (in many cases it was necessary to have a support in translation, often from other asylum seekers speaking English) and/or the complexity of the respondents' personal stories.

4. Interviewees profile

Respondents were Pakistani (18) or Afghan (12) nationals. All the interviewees were males, aged (allegedly) between 18 and 38 years. Several respondents did not know their exact year of birth thus it was impossible to trace their exact age.

The interviewees' profile seems to mirror the finding of other studies. The most represented age group for Afghan migrations is between 12 and 30 years, and the migrants are mostly male travelling alone (as confirmed by the work done by Dimitriadi, 2013). Also, a study on migration of Afghans moving from the mountains to the cities in Iran (Monsutti, 2007) highlights that, in Afghanistan, men often move to fight or to work, staying away from the family

sometimes for years, while women living in rural areas tend to move less and almost never alone. In both countries, women move less often from rural areas, and only if widowed or ostracized by the community. In 2008 a study commissioned by UNHCR highlighted that, also with regard to migratory movements between Afghanistan and Pakistan, most migrants were male (75.3% of the sample). Many of them moved regularly between the two countries in search of a job (Kuschminder and Dora 2009).

The majority of Pakistani national respondents came from the region of the FATA – Federally Administrated Tribal Areas, a semi-autonomous region in northeastern Pakistan, politically and administratively unstable, due to the presence of Taliban who, after the battle of Tora Bora in December 2001, took refuge there (Javai 2011). As for the Afghan respondents, their provenance was more heterogeneous, although most came from provinces located in the northeastern region of Afghanistan (with the exception of the Kandahar province, which lies to the south, along the border with Pakistan).

The Pakistani respondents were find to have a higher level of schooling than those of Afghan nationality. In fact, while among Pakistani respondents many had a university degree (e.g. in biology, medicine, computer science, economics), almost everyone had finished a secondary school (i.e. "intermediate level") and only a few had stopped their studies after middle school, most Afghan respondents declared not to have any qualifications, others to have studied up to secondary school, a few to have finished high school and only one to have a university degree.

The differences that emerged between Pakistani and Afghan for what concerns the level of studies was mirrored also by the typology of employment they were engaged in before leaving their country. Among Pakistani respondents, almost everyone had had a specific job (e.g. shopkeepers, taxi drivers, etc.) and many had an occupation that required a secondary school diploma or a university degree (employees in international organizations such as UNHCR or WHO, professors, etc.). Many Afghan interviewees, instead, stated not to have been employed prior to the migration or to have had a job that did not require a high school diploma (painter, mechanic, managing the family shop, etc.); only one respondent reported being a National Army officer and one of being employed in a building agency as administrative supervisor.

Almost all of the respondents started their journey towards Europe on their own (only two traveled with a relative – a cousin or brother), leaving at home parents, brothers, sisters and sometimes even wife and children.

The main reasons of migration, common to both Afghan and Pakistani respondents, were related to:

- The need to protect themselves from the (local) government;
- the need to protect themselves from the Taliban, especially in the face of death threats caused by a refusal to enroll (as a young man who walked almost all the route on foot from Afghanistan reported: "My father was forced to fight

for the Taliban: then he was killed. The Taliban came to my house, and told my mother to send another man to fight or they would have killed us all. I was the older man in the family after my father. My mother cried. Then in the night she told me to run away and go far");

- religious persecution (i.e. towards "Shiite" or "ahmadyya" minorities);
- war and corruption in the country.

5. The journey

For the majority of respondents, both Afghans and Pakistani, travel arrangements were entrusted to what they called an "agents", passeurs that were well known for organizing the journey to Europe.

The facilitation of the trip was paid on average between 8,000 and 13,000 US dollars, a sum that respondents reported was collected with the aggregated effort of the all extended family, often over long periods of time. In most cases the sum was paid to the agents by the families in tranches, either before the journey or when each agreed step along the route towards Europe was reached.

In some cases, the agent remained the same throughout the journey; in other cases, along the route, new agents were entrusted to bring the migrants forward.

The stages of this journey and the amount of agents involved were closely related to the payment amount and method. As reported by one of the respondents: «At each stopping point, the local contacts communicated the arrival [of the migrants] to the agent who had organized the whole thing, which in turn communicated with the family, who then paid for the next part of the journey».

Other respondents undertook the journey on their own, without relying on an agent. The majority of respondents spent 3 to 6 months, to arrive from the country of origin to Italy, even if the identified time span expands from 1 month to 2 years and it is not necessarily influenced by the country of origin. Longer duration journeys are often due to stays in other countries en route. As reported by the young man from Afghanistan who was sent away from home by the mother, to prevent him to be abducted by the Taliban:

> «I escaped to Iran on foot. I had no money and when I got there I had to find a job. A good man took me as his apprentice in a barber shop. I worked with him for a year, then I had enough money to move on and I went to Turkey. When I reached Turkey I had finished my money. I stopped there another year and worked in a barber shop. Then I started the journey to Europe».

The longer stops in countries along the route were not always voluntary as in the example reported. When reaching Bulgaria or Hungary migrants report to have been stopped by the police and kept in custody, in refugee camps or prison camps. Some of the interviewees reported:

«We were kept in custody by the police for one month in a refugee camp»
«We arrived in Bulgaria and the police did not ask anything. They just took us to a place that looked like a cave. We had no food nor water for two days. It was weekend and there was no one that could help us there»
«I managed to run away and reached Switzerland, where they arrested me for one month».

In other cases the permanence in other countries before reaching Italy was deliberate. Those stays, often registered in Germany and the UK, were then interrupted by a formal denial of the asylum request, the re-adressing to the country of fist entry in Europe and/or the deportation back to the home country. One respondent had even been living for many years as child with his parents in the UK as a refugee. When he turned 18 his protection as member of the family expired, and he was sent back to Pakistan to start the journey again and have his request for protection re-evaluated in Europe.

The life stories collected through the 30 interviews enabled the identification of two macro-routes from the country of origin to the city of Gorizia:

5.1. EU external route – from the country of origin to Italy (Gorizia)

Within the EU external macro- route, there are two main routes to Italy: the so called 'Balkan route' and the sea route (on boat from Greece).

The starting point of all routes was Iran, while the second common stop to all was Turkey, identified by all as an important hub for the different pathways to Europe. Iran and Turkey were reached on foot, or by bus.

a) *The main Balkan route -via Turkey*

After Turkey, asylum seekers reached Bulgaria (where a first detection of fingerprints was made and then they were arrested and put in refugee camps, with forced residence). Interviewees that were stopped in Bulgaria declared that, despite having been registered and their fingerprints taken, they were not allowed by the police to make a request for asylum.

The detention camps in Bulgaria were also a place where new contacts were made with other migrants or agents. Interviewees report to have escaped Bulgarian camps due to police's initiative («The policeman opened the cell and told us to go away and move to richer countries in Europe») or with the support of agents known by other migrants («I met a man who had contacts in Bulgaria. He made some phone calls and we were set free»). After fleeing Bulgaria most interviewees passed through Serbia (reached on foot or hidden inside trucks, after paying a 'transport' fee to the drivers) and reached Hungary, where they were again stopped and arrested by the police.

Some respondents arrived in Gorizia directly from Hungary:

> «From the camp Bicske in Hungary I found a contact that drove me and other 4 in a car – we paid 500.00 euro per person. He told us that he would take us to Milan. He left us in front of the Gorizia station and told us that we were in Milan. Only after asking people in the streets, I realized that we were in another city. But to us it was enough that it was Italy».

Other respondents left Hungary to move to Austria or Slovenia. From there, the majority of entrances in Italy took place by train, with regular tickets or illegally, hidden in trucks.

a.1) *The secondary Balkan route – via Greece and FYROM*

A secondary route was identified from the reports of few respondents, that from Turkey reached Greece, and then crossed FYROM. From there, they also reconnected with the main Balkan route: Serbia-Hungary-Austria-Italy, or Serbia-Croatia-Slovenia-Italy.

b) *The sea route (Greece)*

After the stop in Turkey, some respondents undertook the journey to Italy by sea from Greece. In most cases, migrants travelled hidden in containers and/or trucks on ferries linking Greece to the Italian Adriatic coast. Some arrived in southern Italy, others in Trieste.

5.2. EU internal route – from another EU country to Italy (Gorizia)

A second macro-route, inside the EU, was covered by asylum seekers who were denied international protection in Germany and the United Kingdom and were sent back to their country of entry (Bulgaria), with a view to being deported to their home country. These represent the so-called "Dublin positive" cases.

These respondents turned towards Italy as a "last hope" for the approval of the asylum application. Respondents declared that Italy's image as a good country to have the asylum request approved was widespread among the other asylum seekers met on the route and that «people who already have made it to Europe write on Facebook that Italy is the best country for asking for protection».

6. The reasons for the presence in Gorizia

Most respondents claimed not to have Italy as their established goal, but to want to get to Europe, «in any place in Europe». As seen in the previous paragraph, however, Italy become to be considered along the route as an ideal country, «both from the point of view of the reception and from the point of view of the rapid bureaucratic procedure to receive refugee status". As a respondent reported: "everyone [who has already done the route] knows that [in Italy] there are more chances of having a positive outcome of the [asylum] request».

In this sense, the choice for Italy as the destination country was made by some even before starting the journey, thanks to information gathered from acquaintances that had already reached Europe; for example, a respondent said that another asylum seeker already in Italy «had posted a video on Facebook saying that Italy is ideal for getting approval».

The choice of respondents was thus not much to come to Gorizia specifically (almost all of them in fact knew "nothing" about Gorizia before they got there). Only one interviewee said that he went intentionally to Gorizia «to be closer to his brother [who lives in Austria]».

Arrivals in Gorizia were mostly related to the city's proximity to the border with Slovenia and Austria and to the fact of being passing and «stopped by the police». Some respondents stated that they arrived in Gorizia because 'agents' dropped them off immediately after the border or on the highway near Villesse, in an isolated spot where «there are not so many police checks».

Other respondents declared to be in Gorizia due to information received by personal contacts or acquired indirectly (internet, Facebook, etc.).

For asylum seekers who arrived in northern Italy, the re-direction to Gorizia was suggested by other immigrants, or volunteers of reception centers in bigger cities, such as Milan or Trieste, due to the overflow of temporary shelters in those cities.

Another factor determining the advice to move to smaller centers might be related to the bureaucratic timing for the submission of the asylum request, longer for larger cities. Some respondents in fact declared to have reached Gorizia after the advice of policemen in bigger Italian cities, where the waiting list for the access to the shelter facilities and to the Commission evaluating asylum requests was longer.

The arrivals of asylum seekers in Gorizia then seemed to follow three different paths:

- Directly, from the border with Slovenia or Austria;
- From other Italian cities such as Milan, Trieste and Udine, where it was often difficult to find acceptance and to apply for asylum;
- From southern Italy, to the north first and then to Gorizia.

Research findings show that the orientation of migrant fluxes toward the Friuli Venezia Giulia Region first and then to Gorizia seems to respond to a 'law of supply and demand' dynamic, since already saturated systems act for their self preservation and re-direct asylum seekers towards less exploited centers.

As one respondent reported: «I arrived in Trieste and there I asked a black man where I could find food and shelter. He said there was no more space there, bought me a train ticket and sent me to Gorizia».

Once in Gorizia, the main expectations of asylum seekers interviewed were connected to the possibility of finding protection, shelter and hospitality in a

structure “more quickly than in larger structures”. The added value of Gorizia was also perceived in it being a “safe” and “quiet place”, after the turmoil in their own country and the harshness of the route.

7. The reception system in Gorizia

At the time of the survey, the shelter system for asylum seekers in the Province of Gorizia was based on formal agreements between the Prefecture of Gorizia and the following:

Figure 1 – The reception system in the province of gorizia

STRUCTURE	MAXIMUM CAPACITY	ATTENDANCE MAY 11, 2015
Nazareno (run by il Mosaico Consortium)	150	150
Internazionale Hotel	40	37
Dormitory Faidutti (run by Caritas)	-	29
San Canzian d’Isonzo Municipality	-	15
CARA Gradisca	-	236
TOTAL		468

Source: Gorizia Municipality–Welfare Department (2015)

The interviewed sample was divided, almost equally, among the asylum seekers housed at the “Nazareno” premises and those staying at the dormitory “Faidutti”.

As a general trend, the two sheltering facilities seemed to accommodate two different types of applicants:

1) Those who had just arrived, or had been in Gorizia from a few days up to a period of 2 months, were hosted at the Dormitory “Faidutti”

2) Those who had been in Gorizia for a period between 2 month and 1 year were hosted at “Nazareno” premises.

The aid and the material benefits/services that respondents said to have received in the reception centers were a bed, clothes and meals at Caritas refectory. Some also received some pocket money for daily necessities (37.5 € every 15 days). In addition, some respondents highlighted the role of the Red Cross for what concerned primary medical care. All interviewees, except those who had just arrived in town, were attending Italian language courses.

In the words of the beneficiaries:

> «I get food, a place to stay, hot water, a place to pray and follow the Italian language courses».
> «I get blankets, towels, soap, toothpaste, food, accommodation. I have not yet received money but I will receive it after 15 days».

In most cases the respondents did not know the other asylum seekers living in the same accommodation facilities upon arrival in Gorizia. Out of 30 cases, only two had traveled with a relative (cousin and brother) and only one claims to live with «friends made on the go».

Solitude and the impossibility to work were declared by most as the worst things to endure. However, compared to their previous situation, all respondents stated to be very happy to be in Gorizia, «Very good in Gorizia, much better than the other stages of the journey»; «I love Gorizia so much, it is a clean and quiet town»; «I love Gorizia, mainly because the people have been very welcoming and helpful. When I lived in the tent in via Brass, every day volunteers and citizens from Gorizia passed with aid and to give assistance. In Italy there is a lot more human respect than in other European countries».

8. Legal status and legal issues

The respondents could be classified in three main categories for what concerned their legal status:

- Asylum seekers on the waiting list for the interview with the evaluation Commission (this was the situation of most interviewees);
- Asylum seekers waiting for the outcome of their asylum request, after having been interviewed by the Commission;
- Refugees, who had been given permission to stay since several months (just three cases among the respondents) and were looking forward to the residence in order to obtain all the necessary documentation (i.e. health card, social security number, etc.).

Interviewees gathered information on how to request for international protection through different means, closely linked to their level of education. Those who spoke English and worked in collaboration with international organizations in their home country gathered relevant information already before starting the journey, either consulting websites of international organizations, or Facebook profiles of acquaintances that had made it already to Europe. In most case, however, respondents declared to have understood what they could and had to do only on-site (when reaching Gorizia) from:

- police officers – met on the street or at the police stations;
- other applicants – met both along the way and in Gorizia. As a respondent summarized it: «I am neither the first nor the last one to make this journey. There will always be someone who can give you advice on how to move forward»;
- social workers – at the "Nazareno" premises, for example, a course was organized by volunteers on major aspects of the asylum request and the interview procedures. Volunteers at the Caritas premises also provided support to applicants on the official presentation of the asylum request;
- Through a previous experience as asylum applicant either in Italy or in another European country.

Only one respondent reported being followed by a lawyer «representing a number of asylum seekers», whose contact was provided to him by the Red Cross.

9. Prospects for the future

One point addressed during the interview concerns the respondents' prospects for their future.

As far as preference toward the city or the nation in which to live in the future, the respondents' answers could be summarized as follows:

- Some expressed the desire to live and find work «preferably» in Gorizia, generally regarded as «a quiet town»;
- other would prefer move to other major Italian cities, especially Milan and Rome, due to the larger array of possibilities offered by a big city, both for what concerns finding a job («Gorizia is too small to get a job, «finding a job is more difficult in a border area») and meeting new people, even «more people from the same community [as from the country of origin] »;
- Most saw the possibility to find a job as the main criterion for choosing the place to live, «no matter where».

The importance played by the possibility to work was also mirrored by the fact that most respondents were clear on the activity they would have liked to carry out in the future. "Working in a hospital» opening «a grocery shop, with Italian and Pakistani products», «opening a business as a barber» were some of the answers that were given for what concerns the respondents' hope for the future. Working or finding a job was seen by some as a very important aspect related also to the possibility for their family to join them as soon as possible.

Some respondents were not able to express a preference, because when interviewed they had just arrived in Gorizia, because they felt still confused as to their future or because they were waiting to receive «recognition or refusal of the refugee status» before making a decision.

10. Summary of findings and insights for a management model

Many of the questions raised by the public opinion (e.g. Why are they only men?, Why are they in Gorizia?, How come they all have a cell phone and no shoes?) have found an articulated response in this study.

As revealed by the field work conducted, the profile of the asylum seekers Gorizia is that of a male between 20 and 30 years of age. The reason why they are mostly men (and young) is rooted both in:

a) a consolidated tradition (revealed also by the other studies summarized) of male migration for the improvement of the economic situation of the family;

b) in the physical and mental harshness of the journey along the migration routes, a journey that can be endured only by the strongest/fittest.

The reason why asylum seekers end up in Italy is mostly because it seen as a 'last chance' if asylum request has been denied in other European countries (Germany, UK, etc.) and because humanitarian standards are perceived to be higher in Italy than in other countries (i.e. their arrival in Europe often starts with a forced detention in prison camps in Bulgaria). The presence in Gorizia is mostly motivated by mere chance. No respondent knew of Gorizia before arriving there. Gorizia is the first town in Italy at the end of the Balkan route and migrants are intercepted there by police or dropped there by smugglers. If arriving in bigger Italian cities (such as Milan, Rome or even Trieste), asylum seekers are redirected to smaller centers (such as Gorizia) where assistance and volunteers' aid is still available and not overflowed.

Asylum seekers present in Gorizia declared not to care where they could settle down, be it Gorizia or another town, as long as they could be safe and start reconstructing their own life (e.g. finding a job, a house, having medical assistance, etc.).

For what concerns the fact that all asylum seekers had a phone or a smartphone, this is related to the fact that the generation of migrants reaching Europe is now a 'digital generation'. Smartphones are an accessible commodity all over the world and once the extended family gathers the necessary amount of money to finance the journey of one family member to Europe, the investment includes a smartphone to keep in touch and also to be able to use GPS when having to walk long distances on foot. What strongly emerged from all the stories collected was the key role played by smartphones in the successful outcome of the journey.

Smartphone was needed to communicate with the family, as well as with the agents and further contacts made along the route. It was used to contact via email or social networks persons that could provide help. It was also very important to be able to rely on the phone's GPS system when walking long distances on foot towards Europe without a guide.

Starting from the research findings, the further research goal for the future is to frame and contextualize the situation in Gorizia, with specific reference to the possibility of receiving and integrating refugees.

This goal is connected to the consideration that the situation in Gorizia (as pilot area, but the same applies to any other town interested by these new migrations have chosen) if objectively approached on the basis of scientific data, could be analyzed so to devise a model for the evaluation of the assets a community can activate in response to external stress.

The baseline theoretical framework, for the envisaged assessment, could be the Rural Livelihoods Approach, as set out by Scoones (1998) for IDS (Institute for Development Studies) and subsequently adopted by international organizations such as DFID (Department for International Development, UK), and FAO.

Although the proposed model is applied by Scoones to a rural context hit by an external stress brought about by socio-environmental changes, in our case its theoretical valence could be a starting point for structuring an integrated analysis of the adaptive capabilities of Gorizia in front of the new migration occurrence.

The starting assumption of the model is that each community (and therefore any individual inside the community) holds four types of resources: financial, natural, human (knowledge, perception, awareness, skills, etc.) and social (presence of formal and informal networks, operation of institutional systems, etc.).

Each community has these elements in different proportions and sizes, which determine unique and contextually specific arrangements which define the characteristics of every community, as well as its resilience, i.e. its capability to answer to an external stress, adapting itself and preserving (or even enhancing) its abilities.

According to this approach, an external stress can be a great opportunity for a community to increase its own resources, since it drives the concerned community to revise them creatively and to make them available for overcoming the crisis.

The identification of the 'starting point' (i.e. sequencing) of a community, the trade offs and the connections among the different types of resources is the basis for the assessment of the system is sustainability and for the assessment of the fluidity of communication among the different nodes, which allows each of them to function in a simpler and more effective way.

The field work detailed in this article is the first step of analysis for the development of such sequencing. The perceptions and perspectives of a sample of asylum seekers have been collected in order to better understand the characteristics of this new migration flow, its reasons and the future projections of the phenomenon, through the stories of the individuals that shape it.

In order to develop a model of sustainable management for receiving and responding to asylum seekers requests for international protection, a precise analysis also of the four resources shaping the receiving community is required.

Since the theoretical framework adopted (Scoones) is based on an assessment of resilience to purely environmental stressors, in our context the model would have to be adapted to embody the specificities of the study case.

To this end, an assessment is appropriate for the following elements:

- natural capital, as "physical" capacity of the reception system (number of beds, meals, etc.);
- human capital, as the set of resources and reception capacity of volunteer networks and/or private initiatives (associations, willingness on the part of citizens, etc.);
- social capital as the set of networks/rules at the institutional level for the reception and for handling asylum applications;
- financial capital as the set of available economic resources (at the institutional, private, voluntary, etc., level).

In addition, it would be important to assess the connections and relationships between the four dimensions. It is evident that, for example, the financial capacity is closely linked to the effectiveness of the social capital and of the human one. Similarly, the natural capital per se is not existing and quantifiable merely as "number of available spaces", but is instead the result of a combination of factors, including one of a purely physical nature and one institutional (existence of conventions/protocols for the reception management).

Through this study, understanding on the one side the needs and perspectives of migrants (as done in the pilot in Gorizia) and on the other the characteristics of the receiving system, a clearer view on the social change that is occurring (and can no longer be called 'emergency' since it is consolidate and constant within the last years) could be available. This in turn could result in a viable support for informed decision making on allocation of resources, both to guarantee the right to international protection to asylum seekers and to allow the community to adapt and benefit from the potential of social growth always hidden in moments of great change.

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Tratta internazionale nell’area del Mediterraneo e sfruttamento lavorativo: il caso della comunità indiana in provincia di Latina

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1. Introduzione

Questo articolo analizza, sia pure in modo sintetico, le principali caratteristiche della tratta internazionale di esseri umani di cui sono vittime centinaia di migliaia di persone, soprattutto migranti, nell’area del Mediterraneo e introduce alcuni elementi propri dello sfruttamento lavorativo degli stessi migranti generalmente ad essa collegato. L’articolo si concentra, infine, sul caso specifico della tratta internazionale che caratterizza parte dell’immigrazione indiana, soprattutto punjabi di religione sikh, presente in provincia di Latina. La prima parte di questo contributo riguarderà, dunque, il tema della tratta internazionale a partire dalla scarsa disponibilità di dati statistici attendibili, a dimostrazione, in primis, di analisi quantitative ancora difficili da produrre e, secondo, dell’intrecciarsi di dati ufficiali e non frutto di esperienze maturate da organizzazioni internazionali non governative e diversi enti di ricerca.

Si analizzano anche le principali problematiche connesse all’immigrazione in Italia e l’organizzazione propria del realtivo mercato del lavoro italiano con particolare riferimento a quello in cui trovano impiego molti migranti (compresi coloro che sono privi di regolare permesso di soggiorno), ossia quello agricolo.

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Questo genere di analisi ambisce a tenere insieme l'aspetto della tratta internazionale con lo sfruttamento lavorativo avendo come area di riferimento il bacino del Mediterraneo dove il fenomeno risulta particolarmente evidente eppure ancora poco analizzato.

Rispetto alla comunità indiana pontina, si comprenderà, alla luce di una lunga esperienza di ricerca che ha compreso l'osservazione partecipata condotta nei campi agricoli pontini svolgendo l'attività del bracciante e continuata al seguito di un trafficante indiano nella regione del Punjab, la relativa tratta internazionale e i suoi caratteri originali, comprendendo le modalità di impiego degli indiani nel bracciantato pontino e le relative condizioni socio-economiche.

2. Le principali caratteristiche della tratta internazionale di esseri umani

Il fenomeno della tratta di esseri umani è in continua evoluzione e comprende modalità sempre nuove ed aggiornate di azione, nuove tipologie di vittime e forme di sfruttamento sempre più complesse. Si tratta in realtà di un fenomeno antico che ancora oggi presenta forme tradizionali (tratta sessuale o lavoro forzato) alle quali se ne affiancano altre finalizzate a scopi sempre più specifici (tratta a scopo di furto, accattonaggio, spaccio di droga…) insieme a persone soggette contemporaneamente alla tratta e allo sfruttamento (sessuale e lavorativo ad esempio). Le analisi sinora prodotte si sono interessate del fenomeno nella sua complessità e articolata organizzazione oppure alla sua presenza e relativa organizzazione con riferimento a una specifica nazionalità (es. la tratta internazionale a scopo di sfruttamento sessuale delle donne nigeriane) o a un singolo paese (come per il caso italiano).

Le stesse modalità di reclutamento e impiego del trafficato cambiano a seconda dei contesti e delle situazioni contingenti nonché delle politiche migratorie dei singoli paesi interessati (siano essi di transito o di destinazione) e relative politiche di contrasto. Resta però una caratteristica fondamentale che riguarda tutti i trafficati e ogni forma di tratta e cioè il carattere coercitivo (diretto o indiretto) che si esercita nei confronti del trafficato e la sua condizione di vulnerabilità che influisce pesantemente sulla sua capacità di autodeterminazione. D'altro canto, i contesti di origine della tratta sono spesso caratterizzati da povertà endemica, conflitti armati, crisi sociali, economiche o ambientali particolarmente gravi, discriminazione e persecuzione (per ragioni religiose, sessuali, politiche, di genere…)[1].

I trafficanti, invece, si servono di una rete o network transnazionale che coinvolge numerosi soggetti consapevoli del proprio ruolo, funzionale alla buona riuscita del viaggio e alla speculazione massima nei riguardi del trafficato, sia esso uomo, donna o bambino. Secondo l'Europol, le organizzazioni criminali mag-

[1] È significativo il caso eritreo (Drudi, Omizzolo 2015).

giormente impegnate nel traffico di esseri umani in Europa sono composte su base etnica. Generalmente si tratta di gruppi rom, nigeriani, romeni, albanesi, russi, cinesi, ungheresi, bulgari e turchi. A questi, nel corso degli ultimi anni, si sono aggiunte altre organizzazioni etniche dedite al traffico di esseri umani come quella indiana, bangladese, cinese e sudamericana. I cinque principali paesi europei destinatari del traffico di esseri umani risultano essere Belgio, Germania, Italia, Grecia e Olanda, seguiti da Austria, Spagna, Danimarca, Francia e Svizzera, generalmente legati all'industria del sesso, dell'accattonaggio e del lavoro forzato, mentre i principali paesi di origine delle vittime di tratta sono Bulgaria, Moldavia, Nigeria, Romania, Russia e Ucraina.

3. La tratta internazionale di esseri umani nell'area del Mediterraneo

In tutta l'area del Mediterraneo il sistema di tratta internazionale, sia pure variamente declinato, e lo sfruttamento lavorativo, interessano soprattutto migranti esposti a ricatti di varia natura da parte di datori di lavoro, trafficanti, caporali e approfittatori vari[2]. Ciò si lega a vari aspetti che non possono essere analizzati qui nel dettaglio. Resta però doveroso ricordare la complessità del fenomeno che pone un'obiettiva complessità di rilevazione statistica. In Italia, ad esempio, dove si registrano episodi inquietanti di tratta internazionale e sfruttamento lavorativo sino alla riduzione in schiavitù, manca un organismo istituzionale qualificato in grado di rilevare il fenomeno sul piano quantitativo, dunque statistico, e di monitorarlo adeguatamente[3].

La medesima considerazione può essere avanzata con riferimento all'area del Mediterraneo in cui tratta e sfruttamento risultano presenti e in continua evoluzione, tanto da poterle considerare endemiche e dunque strutturali ma, appunto, di difficile rilevazione statistica. Lo riconosceva già, ad esempio, il rapporto globale sulla tratta (Global Report on Trafficking) redatto dall'Ufficio delle Nazioni Unite sulla Droga e il Crimine nel 2012, segnalando che, tra tutti i paesi del Medio Oriente sollecitati a rilevare dati sulla tratta, solo dodici avevano provveduto in tal senso. Questo studio rilevava che «quasi tutti i flussi di tratta che hanno origine in Africa sono infra-regionali, con destinazione altri paesi africani o mediorientali, alternativamente sono diretti verso l'Europa (...) Per quanto riguarda le vittime dei paesi nordafricani, cittadini di nazionalità marocchina sono stati individuati in 9 Paesi dell'Europa Occidentale e Orientale, includendo Belgio, Francia, Italia, Olanda e Spagna. Vittime di nazionalità algerina sono state

[2] Non si esclude a tale riguardo la formazione di organizzazioni mafiose internazionali o transnazionali in grado di gestire la tratta internazionale e poi lo sfruttamento lavorativo, generando anche forme di riduzione in schiavitù e segregazione sociale.

[3] Esistono numerosi centri di ricerca che si occupano di questo tema, alcuni anche particolarmente qualificati, ma nessuno di essi ha ancora elaborato una metodologia di indagine capace di riflettere quella complessità statistica così da restituire un quadro realistico del fenomeno.

individuate invece in Francia e Norvegia, e tra il 2007 e il 2010 cittadini di paesi nordafricani sono stati individuati in paesi mediorientali» (Unodc 2012, 82).

Altri studi hanno invece rilevato la presenza di cittadini marocchini che lavoravano in condizioni di grave sfruttamento in Belgio, mentre molti cittadini nordafricani sono stati impiegati alle medesima condizioni sia nel Sud Italia sia in Spagna nelle relative campagne (Cthb-Osce 2009). Una quota rilevante di migranti sub-sahariani è sfruttata anch'essa in alcune aree del Mediterraneo come Italia, Grecia, Spagna, Libia, Algeria e Marocco. Sono persone spesso giunte nei paesi di destinazione, dopo un percorso assai lungo e difficile attraverso il deserto del Sahara e, se giunti in Europa, anche attraverso il Mar Mediterraneo a bordo di imbarcazioni precarie, esposti al pericolo di naufragio e di morte conseguente per annegamento (come molti casi di cronaca drammaticamentre rilevano).

Tra i paesi dell'area mediterranea, Spagna e Italia (con l'aggiunta della Romania) hanno raccolto i dati più interessanti e specifici sul fenomeno della tratta e del grave sfruttamento lavorativo. A gennaio del 2017, per citare uno dei casi più recenti, la polizia di Ancona, in una operazione che ha coinvolto anche quella federale tedesca, è riuscita a sgominare un'associazione a delinquere finalizzata all'immigrazione clandestina gestita da pakistani. L'accusa è di associazione a delinquere e favoreggiamento dell'immigrazione clandestina, la quale interessava la c.d. rotta balcanica. L'associazione a delinquere aveva a capo un pakistano residente poco lontano dal centro cittadino di Macerata il quale ad ogni vittima di tratta chiedeva tra i 3.500 euro e gli 8.500 euro per la sua entrata illegale in Germania e in parte in Francia, transitando per la Turchia, Grecia-Macedonia, Serbia, Austria fino in Ungheria oppure, per giungere in Francia, dall'Italia. I migranti giunti a destinazione attraverso viaggi sfiancanti, costretti anche a camminare a piedi per zone impervie, richiedevano asilo politico. Questo almeno quanto verificato durante l'indagine, con un giro di affari stimato in circa cinquecentomila euro[4].

[4] L'epilogo si è avuto in Baviera dove due pakistani vittime di tratta hanno denunciato gli abusi subiti. Una volta arrivati in Bosnia i criminali li hanno ricattati e minacciati di morte chiudendoli in uno scantinato se non avessero fornito altro denaro per passare il confine ed arrivare in Germania, dove i due hanno richiesto asilo. L'operazione denominata "Venezia" ha visto la collaborazione della Polizia federale tedesca e quella dorica coordinate dalla Procura della Repubblica-Direzione Distrettuale Antimafia di Ancona e della Procura della Repubblica di Hof in Baviera. Non si esclude inoltre che la banda pakistana lavorasse da molti anni, visto il "meccanismo rodato" e i vari complici tra Serbia e Ungheria al confine con l'Austria ed addirittura con guardie di frontiera consenzienti pagate dai malviventi per assicurarsi l'impunità. Ulteriori tre componenti sono stati individuati in Germania; dei sei componenti l'organizzazione, il capo della "cellula" italiana e quello della "cellula" tedesca sono stati tratti in arresto all'alba in esecuzione di un mandato di arresto europeo. Le abitazioni degli altri quattro componenti (due in Italia e due in Germania) sono state tutte perquisite, su delega rispettivamente del Sostituto Procuratore della Repubblica-D.D.A. e del Procuratore della Repubblica della città tedesca di Hof con il sequestro di materiale probatorio utile per le indagini.

I dati rilevano la maggiore esposizione delle comunità di migranti originarie del Nord e Centro Africa. I lavoratori di origine nordafricana sono tra i più impegnati come manodopera agricola e spesso sono vittime di sfruttamento lavorativo e caporalato con episodi registrati sistematicamente in tutto il territorio nazionale. Non a caso essi sono, dopo i migranti originari di paesi dell'Europa orientale, quelli che hanno il maggior numero di persone assistite (Carchedi 2012).

Tra le altre comunità esposte alla tratta e allo sfruttamento si deve citare, come nel caso che si analizzerà, quella indiana originaria del Punjab e residente in provincia di Latina. Si tratta di una comunità presente nel pontino da circa trent'anni ed esposta a varie forme di sfruttamento lavorativo nelle relative campagne, insieme ad un originale sistema di tratta.

La dinamica migratoria che interessa l'area del Mediterraneo risulta assai complessa. È utile ricordare che, nonostante alcune norme restrittive adottate dai singoli paesi europei volte a scoraggiare l'immigrazione, quest'ultima resta comunque elevata, compresa quella irregolare. Tale flusso è rimasto elevato anche dopo il 2008, ossia dopo l'inizio della crisi economica che ha colpito con particolare durezza l'Europa e soprattutto i paesi dell'area Nord del Mediterraneo. Questi ultimi, infatti, in particolare Spagna, Italia e Grecia, negli anni hanno ospitato una quota crescente di immigrazione la cui origine risulta sostanzialmente riconducibile ad alcune aree specifiche come il Nord Africa, l'America Latina e l'Asia (Cyrus 2009). I paesi del Sud del Mediterraneo, come Egitto, Algeria, Marocco, Giordania, Libano e Libia sono anch'essi divenuti aree di transito e di destinazione di vari flussi migratori e, in particolare, di profughi e richiedenti asilo, sebbene con una crescita esponenziale nel corso degli ultimi anni (Khachani 2008; De Haas 2008; Bel Hadj Zekri 2009).

I flussi migratori in entrata nei paesi arabi della sponda Sud del Mediterraneo risultano ancora in crescita. Sono poche le analisi che indagano le loro origini, compreso il sistema di tratta che spesso caratterizza gli stessi. Essi generalmente considerano i paesi arabi della sponda Sud del Mediterraneo quali luoghi di transito, particolarmente pericolosi, dove svolgere solo attività faticose e mal retribuite ma utili per reperire i fondi necessari per continuare il viaggio. Il caso libico è in tal senso emblematico. I conflitti in Siria, Libia, Nigeria, Yemen e Mali hanno rafforzato i flussi migratori in uscita. La loro composizione è varia. Una rilevante percentuale è composta da richiedenti asilo e da altri migranti vulnerabili (vittime di tratta e rifugiati). Rispetto ai primi si possono citare numerosi casi che, a fronte della loro migrazione gestita da trafficanti giunti in Europa, sono state impiegate in attività illecite e in condizioni paraschivistiche. Un considerevole numero di donne nigeriane, ad esempio, arrivano generalmente sulle coste italiane e spagnole come richiedenti asilo e poi vengono sfruttate come prostitute fuori dai centri di accoglienza (Womenslinkworldwide 2009).

Non si deve poi trascurare il flusso migratorio eritreo in fuga da una delle peggiori dittature al mondo (il dittatore è Isaias Afewerki).

4. Le principali caratteristiche della tratta internazionale dell'area mediterranea

Le principali caratteristiche dei flussi migratori nell'area mediterranea possono essere così sintetizzate:

1. La complessità delle rotte migratorie: esse sono divenute più complesse e pericolose che in passato. Ciò riguarda tutte le rotte dirette verso l'Europa e in particolare quelle verso la penisola iberica, Italia e Grecia. I viaggi seguono generalmente percorsi tortuosi, costosi ed espongono i migranti, in particolare coloro che sono vittime di tratta, a pericoli e violenze continue. Nonostante questa complessità, l'industria dei passaggi irregolari o della tratta resta organizzata e particolarmente ampia (Monzini 2010).
2. La crescita dei problemi sociali connessi alle migrazioni: ciò riguarda in particolare lo sfruttamento lavorativo dei migranti e dei richiedenti asilo nei paesi del Mediterraneo. Alla geografia delle migrazioni globali corrisponde una geografia dei problemi sociali associata con l'immigrazione e lo sfruttamento delle vulnerabilità dei migranti e relativo aumento di povertà, segregazione e abusi (Hammouda 2008).
3. La complessità del sistema di tratta internazionale di esseri umani: essa presuppone una composizione tra gruppi criminali e intermediari di varia natura. Secondo le ricerche più recenti, i migranti e i richiedenti asilo che viaggiano verso il Nord Africa vivono spesso in condizioni di completa esclusione sociale, violenza, pressione costante di stringenti richieste economiche dagli stessi trafficanti. In tutti i paesi del Meditterraneo, i trafficanti non controllano sempre le proprie vittime sino al loro arrivo nel luogo di destinazione e i migranti possono passare da un trafficante ad un altro come da un'organizzazione ad un'altra. È emblematico il caso libico.

5. Sfruttamento e segregazione dei migranti nell'area del Mediterraneo e il caso italiano

I migranti sono spesso vittime di sfruttamento lavorativo sia nei paesi di transito sia in quelli di destinazione. Alcuni settori lavorativi sono, anche nei paesi a Nord del Mediterraneo, contenitori di situazioni di grave sfruttamento lavorativo. Essi sono soprattutto l'agricoltura, l'edilizia, la ristorazione e l'assistenza familiare. In questi settori vige una forte competizione e regole, formali e informali, che inducono il migrante ad accettare condizioni lavorative di particolare sfruttamento e segregazione. La combinazione di questi due aspetti ne determina la grave vulnerabilità e subordinazione nei riguardi del datore di lavoro. A queste condizioni si sommano altri aspetti non secondari, a partire dal razzismo e forme varie di discriminazione e xenofobia. Le donne e i bambini sono particolarmente espo-

sti alla discriminazione e allo sfruttamento lavorativo. Casi emblematici hanno riguardano forme di sfruttamento e ricatto sessuale nei riguardi di lavoratrici originarie del Nord Africa, dell'Est Europa e dell'India impiegate come braccianti nelle campagne del ragusano oppure in quelle pontine.

Esiste inoltre una questione di genere sia dello sfruttamento lavorativo sia della tratta internazionale nel Mediterraneo. Non solo il loro impiego è settorializzato in alcuni ambiti specifici come il bracciantato agricolo ma anche in attività come la tratta internazionale a scopo di matrimonio forzato (Encscr 2011). Il rapporto tra genere e discriminazione razziale produce abusi e ne aumenta la vulnerabilità. Ciò è evidente nel caso delle donne subsahariane e soprattutto nigeriane con una costante in tutti i paesi del Mediterraneo (Osce 2009). Negli ultimi venticinque anni la tratta internazionale di donne nigeriane ha conosciuto una grande espansione in tutta l'area del Mediterraneo con casi particolarmente drammatici in Libia, Mali, Egitto, Tunisia, Marocco e Niger. Quest'evoluzione è indotta dal complicarsi della tratta internazionale, dalla politica estera dei principali paesi di arrivo del Mediterraneo del Nord (Italia in primis) e dell'Unione Europea in particolare, dal diffondersi di conflitti armati e del terrorismo jihadista (Siria, Iraq, Nigeria).

Stante queste condizioni qui sinteticamente ricostruite è interessante focalizzare l'analisi sul caso italiano. La sua complessità richiederebbe, proprio sul rapporto immigrazione, lavoro e accoglienza, un'analisi assai più complessa rispetto a quella qui possibile. Eppure richiamarne gli elementi centrali, sintesi delle principali ricerche, aiuta a coglierne alcune caratteristiche.

È bene precisare che la relazione tra bracciantato, immigrazione e sfruttamento rischia, per le dimensioni che ha assunto, di diventare sistemica. Tutto ciò è particolarmente evidente in alcuni territori del Paese, come la provincia di Latina con riferimento in particolare alla comunità indiana, il casertano e la Piana del Sele in Campania, le piane di Sibari e Gioia Tauro in Calabria, il siracusano, il ragusano e il trapanese in Sicilia, la Piana di Metaponto e la zona dell'Alto Bradano in Basilicata, la Capitanata, il Nord Barese e la zona di Nardò in Puglia. In realtà, in alcune aree del Nord il fenomeno è sottovalutato e non certo assente, come alcuni studi iniziano a rilevare. Il Piemonte, ad esempio, è direttamente interessato dal fenomeno dello sfruttamento lavorativo dei migranti, come anche la Lombardia, il Veneto e l'Emilia, spesso nelle cooperative della logistica o nelle aziende di confezionamento[5]. Le varie modalità di sfruttamento dei lavoratori e delle lavoratrici immigrate in Italia, compresi i casi estremi di riduzione in schiavitù, non sono imputabili a fattori straordinari, a interessi particolari riconducibili solo alle organizzazioni criminali, nazionali o internazionali o a casi contingenti. Una parte rilevante dell'agricoltura italiana è fondata sullo sfruttamento dell'uomo sull'uomo e dell'ambiente. Una pratica quotidiana che riguarda circa

[5] Sistemi di impresa come le cooperative, sorte in opposizione ai processi di sfruttamento, risultano invece utilizzare spesso braccianti e operai con modalità simili a quelle che doveva contrastare.

450mila lavoratori agricoli, di cui più dell'80% stranieri. Sono invece 100mila quelli che vivono una grave condizione di sfruttamento lavorativo, oltre al grave disagio abitativo e igienico-sanitario: il 62% dei lavoratori immigrati impegnati nelle stagionalità agricole non ha accesso ai servizi igienici, il 64% non ha accesso all'acqua corrente e il 72% dei lavoratori che si sono sottoposti ad una visita medica dopo la raccolta presenta malattie che prima dell'inizio della stagionalità non si erano manifestate. In Italia sono almeno 80 i distretti agricoli in cui si pratica il caporalato: in 33 si sono riscontrate condizioni di lavoro indecenti, in 22 condizioni di lavoro gravemente sfruttato, negli altri si consuma l'intermediazione illecita di manodopera. Secondo la testimonianza di alcuni braccianti, nelle campagne di Foggia, in Puglia, a Palazzo San Gervasio in Basilicata, in provincia di Latina o a Cassibile in Sicilia, i braccianti migranti sono pagati 4 euro il cassone per la raccolta dei pomodori, mentre si raggiungono i 5 euro l'ora nelle campagne di Saluzzo nel Piemonte, a Padova nel Veneto o a Sibari in Calabria per la raccolta degli agrumi. Si tratta di somme percepite senza contratto, su giornate lavorative che vanno dalle 10 alle 16 ore consecutive di lavoro, a cui vanno tolte le somme ancora percepite dai caporali.

Le mafie fanno di questa condizione un business redditizio. Il caporalato ha alcune regole non scritte che restituiscono la dimensione del fenomeno. La metà del salario va direttamente ai caporali. La quota di reddito sottratta dai caporali ai lavoratori si attesta attorno al 50% della retribuzione prevista dai contratti nazionali e provinciali di settore. I lavoratori percepiscono un salario giornaliero tra i 25 e i 30 euro, per una media di 10-14 ore di lavoro. I caporali impongono anche le proprie tasse giornaliere ai lavoratori: 5 euro per il trasporto sui campi, 3,5 euro per un panino e 1,5 euro per ogni bottiglia d'acqua consumata. In alcuni casi fanno pagare anche il fitto degli alloggi fatiscenti in cui stipano i braccianti. Se questi ultimi poi sono immigrati, magari irregolari e non conoscono l'italiano, il cerchio dello sfruttamento si chiude perfettamente. Lo sfruttamento della manodopera immigrata (discorso analogo vale per gli italiani anche se con espressioni in parte diverse) si alimenta della tratta degli esseri umani.

Le agromafie rappresentano un settore strategico per molti clan e occasione per riciclare e fatturare milioni di euro. Ben 3.600 organizzazioni criminali di stampo mafioso operano in Europa; la commissione antimafia istituita presso il Parlamento Europeo valuta che il processo d'infiltrazione della "Mafia SPA" nell'economia legale abbia determinato all'economia comunitaria un danno pari a oltre 670 miliardi di euro di mancati ricavi. Soldi e consenso che dagli Stati passano alle mafie e ai nuovi schiavisti. Un autorevole centro di ricerca sulla criminalità transnazionale, Transcrime, ha stimato che solo in Italia i ricavi delle organizzazioni mafiose sono almeno di 33 miliardi di euro, pari all'1,7% dell'intero prodotto interno lordo. La criminalità organizzata nel settore agroalimentare è arrivata a controllare e condizionare l'intera filiera agroalimentare, dalla produzione agricola all'arrivo della merce nei porti, dai mercati all'ingrosso alla grande distribuzione organizzata, dal confezionamento alla commercializzazione, dai

grandi mercati ortofrutticoli (ad esempio quello di Fondi, città del Sud pontino) alla logistica, con un fatturato pari a 12,5 miliardi l'anno. Sono 27 i clan malavitosi che hanno come settore di business le agromafie; in particolare la tratta di esseri umani finalizzata allo sfruttamento lavorativo e il caporalato, il riciclaggio di capitali illeciti attraverso il lavoro nero, investimenti industriali legati al ciclo della trasformazione, il racket e l'usura a danno degli imprenditori in difficoltà, la gestione della logistica e del trasporto dei prodotti ortofrutticoli e alimentari di derivazione industriale, la gestione diretta dei mercati generali con l'obiettivo di condizionare la borsa dei prezzi, nonché l'infiltrazione mafiosa nella filiera della distribuzione e dell'export. Tale contesto può favorire sia la formazione di una sorta di criminalità organizzata etnica o ibrida attraverso l'evoluzione e organizzazione dei fenomeni ora sinteticamente analizzati, sia il radicamento nel settore agricolo della criminalità organizzata tradizionale[6].

Quando vengono imposti i prezzi dei prodotti all'origine, soprattutto per volere mafioso e delle regole proprie della Grande Distribuzione Organizzata, si impone lo sfruttamento nei campi agricoli ad opera di caporali e alcuni datori di lavoro. Il settore primario è ancora quello dove è più rilevante la percentuale di valore aggiunto prodotta dal sommerso, ossia il 36% dell'economia di settore, e la percentuale di lavoro nero; dunque, è più facile occultare fenomeni di illegalità per le caratteristiche endemiche del settore. L'agricoltura e l'agroindustria pagano la crisi meno degli altri e gli investimenti sono fortemente redditizi anche in relazione all'export. Nei territori a tradizionale presenza mafiosa, il controllo della terra significa ancora controllo di una parte rilevantissima dell'economia e del relativo consenso sociale.

Con riferimento ai salari è importante sottolineare che, anche se i migranti irregolari tendono a essere pagati meno di quelli regolari, una situazione migratoria regolare non garantisce paghe migliori o un contratto regolare. Si può essere

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[6] Si citano le inchieste Bilico, La Paganese e Sud Pontino condotte dalla DDA di Napoli che hanno svelato un patto d'affari tra Camorra, 'Ndrangheta e Cosa Nostra e portato ad importanti arresti. Con l'inchiesta Bilico il 22 febbraio del 2014 è stato portato alla luce, nella zona di Fondi (LT), dove ha residenza il MOF (Mercato Ortofrutticolo Pontino), un giro di documenti falsi per l'assunzione fittizia di cittadini indiani e bengalesi e relativa denuncia di 34 persone, di cui uno solo straniero; si trattava di finti imprenditori che richiedevano centinaia di nullaosta per lavoro dietro compenso, tentando di sistemare le pratiche senza formalizzare le assunzioni dei migranti. L'inchiesta La Paganese ha invece prodotto 9 condanne e 6 assoluzioni per il patto tra il clan dei Casalesi e il gruppo dei corleonesi nella gestione di vari mercati ortofrutticoli in tutta Italia e il trasporto di frutta e verdura, così riconoscendo un rapporto tra le due organizzazioni mafiose che secondo la Procura di S. Maria Capua Vetere sarebbe nato per controllare un settore strategico dell'economia e i mercati dei prodotti ortofrutticoli. L'inchiesta nacque dall'operazione "Sud Pontino" della Dda di Napoli coordinata dal dott. Cafiero De Raho, culminata con oltre 60 arresti, le cui ordinanze furono notificate, tra gli altri, a Gaetano Riina e Nicola Schiavone, già detenuti, ma anche a importanti personaggi anelli di congiunzione con il clan Mallardo di Giugliano e con Cosa Nostra. Le indagini ricostruirono un intero decennio di storia dei rapporti di interessi economici e imprenditoriali tra le due mafie. Da una parte, i Casalesi che, tramite la gestione monopolistica di un'agenzia, La Paganese, controllavano tutti i trasporti dei mercati ortofrutticoli ai mercati di Palermo, Trapani e Fondi; dall'altra, i corleonesi che avevano così libero accesso per i loro prodotti nei mercati della Campania e del Lazio.

regolarmente presenti sul territorio nazionale e regolarmente contrattualizzati e contemporaneamente sfruttati al pari di un lavoratore migrante irregolare. Spesso, infatti, indipendentemente dalla regolarità formale e contrattuale, i lavoratori migranti sono pagati meno del salario ufficiale dichiarato in busta paga. Ciò significa essere esentati da una serie di agevolazioni e servizi sociali di cui avrebbero invece pieno diritto.

Le difficoltà riscontrate dal sistema dei controlli nell'intercettare queste pratiche e contrastarle efficacemente derivano da vari fattori: le ristrettezze economiche che impediscono i necessari investimenti nelle strutture utile all'individuazione del fenomeno e relativo superamento, un'arretratezza amministrativa, sia nelle pratiche che nella lettura e interpretazione del fenomeno, letto secondo schemi concettuali non adeguati alla sua complessità, la sottovalutazione del tema, derivante probabilmente anche dalla predominante presenza di immigrati, lentezze amministrative che impediscono un reale contrasto, strumenti legislativi non adeguati. Sotto questo profilo oltre a controlli più capillari e continui da parte dei corpi ispettivi deputati, è indispensabile un controllo puntuale sulle bustepaga e l'incrocio dei relativi dati capaci di mettere in luce incongruenze gravi che denotano casi di sfruttamento e sopraffazione. È per questa ragione fondamentale impostare una nuova governance della repressione. Il coinvolgimento dei braccianti è fondamentale. Essi sono la parte offesa, testimoni delle ingiustizie di cui sono quotidianamente vittime, depositari di informazioni, legate ai protagonisti del malaffare, alle pratiche adottate, agli aspetti logistici che lo caratterizzano. Senza un nuovo rapporto tra i sistemi pubblici di indagine e repressivi con le comunità di immigrati si agirà sempre in maniera superficiale, non adeguata, parziale, con conseguente spreco di risorse economiche, sociali e culturali.

Un tema che non può essere eluso riguarda il sistema di compravendita di visti. Individui che si fingono futuri datori di lavoro ricevono denaro per presentare la domanda di nullaosta, ma nella maggior parte dei casi non intendono impiegare i migranti appena arrivati (Capasso 2012, 212-213). Spesso i "contratti" non vengono firmati e dopo poco il loro arrivo in Italia, la posizione dei migranti diventa irregolare; oppure i "contratti" vengono firmati affinché le autorità rilascino un permesso di soggiorno, ma senza una reale relazione di lavoro. Alcuni lavoratori migranti indiani hanno riferito di aver pagato 1 milione di rupie (circa 14.300 euro) ciascuno a un agente in India per un permesso di soggiorno di lunga durata e un lavoro, per poi ricevere un visto e un permesso di soggiorno stagionale, ma senza lavoro. Un altro lavoratore avrebbe pagato 450.000 rupie, circa 6.500 euro, per un permesso di soggiorno e un lavoro ben pagato; ha ricevuto un nulla osta, ma non il resto della documentazione necessaria per ottenere un permesso di soggiorno. Si vuole infine ricordare che, secondo l'art. 18 del Testo unico sull'immigrazione, i cittadini stranieri vittime di tratta devono ricevere un «permesso di soggiorno per motivi di protezione sociale» che permette di beneficiare di programmi di assistenza e integrazione sociale. Il sistema dei permessi di soggiorno ex art. 18 è stato il principale meccanismo di protezione per i lavoratori migranti

vittime di sfruttamento, ma è ancora inadeguato a proteggere i lavoratori che ambiscono ad uscire da condizioni di grave sfruttamento lavorativo. La segregazione sociale delle comunità di immigrati impiegati in agricoltura non agevola la denuncia, mentre le minacce, le violenze subite, i ricatti, la scarsa conoscenza della lingua italiana rappresentano ragioni che impediscono l'emersione del tema se non in casi emergenziali; infine, la sfiducia nei riguardi delle istituzioni più prossime non consente sempre lotte diffuse per il riconoscimento dei propri diritti. Sebbene inizino i primi processi contro caporali e sfruttatori[7], il fenomeno non è ancora adeguatamente contrastato. I tempi della giustizia e le relative prassi non agevolano il contrasto e l'emersione di un clima di fiducia e dunque collaborativo.

6. Il caso della tratta internazionale grigio-nera della comunità indiana della provincia di Latina e lo sfruttamento lavorativo

Nel corso degli ultimi anni è emersa con sempre maggiore evidenza, un'attenzione specifica sul tema della tratta internazionale a scopo di sfruttamento lavorativo di consistenti gruppi di lavoratori e lavoratrici immigrati punjabi[8]. Siamo in presenza di una forma specifica di tratta internazionale, che rimanda ad organizzazioni criminali che la pongono in essere e che gestiscono i relativi proventi economico-finanziari (Carchedi, Omizzolo 2016). Un sistema collaudato caratterizzato dalla compresenza di aspetti coercitivi e di altri non coercitivi, finalizzati, questi ultimi, ad acquisire il consenso delle persone che fruiscono dei suoi servizi illegali.

La criminalità organizzata, come prevedono le norme correnti, in particolare la legge del 13 settembre del 1982 n. 646 (con l'introduzione dell'art. 416bis e modificazioni successive), è definita come una struttura minimale di almeno tre persone che perseguono mediante «intimidazione e forme variegate di assoggettamento un ingiusto guadagno». In tale ottica possono rientrare anche le organizzazioni criminali a carattere transnazionale che contraddistinguono la tratta dei lavoratori punjabi dalle aree di origine a quelle di sfruttamento, ovvero l'area pontina, organizzata mediante catene migratorie gestite anche da gruppi criminali capaci di offrire, al momento del reclutamento, un intero pacchetto di servizi comprensivo dei costi di trasferimento, dell'accoglienza all'arrivo (con alloggio incluso) e dell'inserimento al lavoro perlopiù nel settore agro-alimentare. Alla sua organizzazione e azione criminale si aggiungono due sotto-sistemi di micro-delinquenza: quello formato dai caporali di origine punjabi e quello for-

[7] Si cita il processo Sabr a Lecce e un processo presso il Tribunale di Latina contro un imprenditore agricolo del Comune di Fondi accusato di falsità documentali con la coop. In Migrazione e gli stessi lavoratori maliani costituitisi parte civile.

[8] Il Punjab è uno Stato dell'India (situato a Nord-Est, con capitale Chandighar) con una estensione territoriale di circa 40mila km (pari al territorio del Lazio e della Toscana insieme) con circa 2.770mila abitanti (3,5 volte in meno degli abitanti del Lazio e della Toscana).

mato da impiegati o funzionari corrotti o corruttibili per la fornitura di atti amministrativi su richiesta di pochi imprenditori agricoli locali disonesti.

7. La criminalità organizzata e la tratta grigio-nera dal Punjab

Il sistema di tratta internazionale[9] finalizzata al lavoro forzato formatasi negli anni nell'area pontina presenta alcune caratteristiche che ne fanno un caso originale. Può essere definito un sistema di tratta di esseri umani a cromatura grigio-nera, supportato da strutture organizzate che si interfacciano con le utenze di riferimento (imprenditori, amministratori locali, liberi professionisti, caporali e lavoratori migranti) senza i caratteri immediatamente coercitivi e violenti riscontrabili invece in altri sistemi di tratta di persone a scopo di sfruttamento sessuale o lavorativo. Al front office dialogante si innesta però un back office che persegue prevaricanti interessi economici resi possibili mediante un sistema di convenienze intrecciate che colloca in modo diversamente funzionale le figure apicali dell'organizzazione, ossia il trafficante indiano, l'imprenditore italiano e il gruppo di indiani reclutati e interessati ad arrivare in Italia (Omizzolo, Sodano 2016). Le apparenze collaborative e perfino consensuali nascondono un agire criminale di livello paritetico alle altre organizzazioni specializzate nella tratta di esseri umani, la cui differenza risiede nel fatto che la violenza e la prevaricazione non viene comunemente ostentata.

I membri apicali di queste organizzazioni criminali sono prevalentemente della stessa nazionalità dei migranti punjabi. Queste organizzazioni sono in grado di governare tutto il ciclo della tratta di esseri umani. Dispongono, infatti, di strutture dedicate al reclutamento, altre specializzate nel viaggio e nel trasferimento transnazionale di migranti, altre ancora, nelle zone pontine, competenti all'inserimento al lavoro, nonché al monitoraggio/accompagnamento delle relazioni che si instaurano con i datori di lavoro (Omizzolo 2017).

Tali relazioni determinano la peculiarità delle organizzazioni punjabi. Esse riescono a garantire, già prima che il migrante parta dal suo paese, la possibilità di avere un'occupazione. I trafficanti punjabi, invece, forse al pari di quelli cinesi, hanno la capacità di stringere relazioni strutturate con segmenti dell'imprenditoria italiana per l'approvvigionamento di manodopera. In pratica l'imprenditore si rivolge (in maniera consapevole o inconsapevole) al mercato internazionale delle braccia mediante queste organizzazioni specializzate a soddisfare il suo pe-

[9] Il Protocollo addizionale della Convenzione delle Nazioni Unite contro la criminalità organizzata transnazionale, per prevenire, reprimere e punire la tratta di persone, in particolare donne e bambini, indica la tratta degli esseri umani come «il reclutamento, trasporto, trasferimento, l'ospitare o accogliere persone, tramite l'impiego o la minaccia di impiego della forza o di altre forme di coercizione, di rapimento, frode, inganno, abuso di potere o di una posizione di vulnerabilità o tramite il dare o ricevere somme di denaro o vantaggi per ottenere il consenso di una persona che ha l'autorità su un'altra a scopo di sfruttamento».

culiare fabbisogno occupazionale. Tra i gestori della tratta e alcuni imprenditori pontini, dunque, vige un rapporto interdipendente e strettamente funzionale.

Questa peculiarità, ossia il raccordo tra trafficanti e imprenditori che occupano i lavoratori appena arrivati, si riscontra in maniera manifesta solo nell'area pontina e in particolare nei Comuni di Sabaudia, San Felice Circeo, Terracina, Fondi e nelle zone limitrofe al Comune di Latina. Tale connubio appare un'opportunità, almeno nella narrazione che ne fanno i lavoratori punjabi e le loro famiglie. Una volta arrivati nell'area pontina questi lavoratori hanno la garanzia di essere rapidamente occupati e alloggiati in prossimità o in convivenza con altri connazionali già residenti con i quali sono in genere imparentati[10]. La tratta punjabi si determina, in definitiva, mediante una iniziale e ben strutturata relazione tra un imprenditore agricolo locale e un esponente di rilievo della comunità indiana pontina. Quest'ultimo, definito comunemente sponsor o capo dell'organizzazione criminale, dispone di risorse economiche e relazionali di carattere transnazionale che gli consentono di svolgere un ruolo fondamentale nel sistema criminale che governa le differenti fasi della tratta e spesso un ruolo di rappresentanza anche per la stessa comunità punjabi pontina.

8. Le connessioni tra gli sponsor indiani e gli imprenditori

Il rapporto privilegiato che la figura dello sponsor mantiene con alcuni imprenditori agricoli pontini è basata essenzialmente sulla fiducia, sulla comune volontà di arricchimento, sulla non pubblicizzazione degli interessi e delle relazioni criminali che sostengono il medesimo rapporto fiduciario. Il sodalizio tra gli imprenditori agricoli pontini e gli sponsor indiani risiede nella necessità di entrambi di trovare soluzioni vantaggiose al fabbisogno di manodopera necessario alle aziende locali. In tal senso l'imprenditore, oltre a soddisfare il proprio fabbisogno di manodopera, soddisfa anche quello delle altre aziende a cui offre i suoi servizi illegali (tramite uno o più caporali in qualità di uomini di fiducia). Le ragioni legate all'attività e agli obiettivi attinenti alla produzione (stagionale o annuale) dell'azienda sono assolte dallo sponsor su indicazione dell'imprenditore. Questi utilizzano la forza lavoro già presente nell'area pontina, oppure, avvalendosi dei rapporti internazionali con il Punjab, facendo arrivare in breve tempo gruppi di braccianti da impiegare nell'attività agricola dell'imprenditore richiedente.

L'arrivo organizzato dei nuovi braccianti non è sempre correlato alle necessità immediate dell'imprenditore. Questa manodopera non immediatamente impiegabile fungerà da contingente di riserva per il mercato del lavoro locale. Essa è altamente disponibile, anche su chiamata, e dunque mobilitabile in poche ore, da

[10] In particolare molti punjabi oggetto di tratta trovano residenza presso il consorzio BellaFarnia Mare nel Comune di Sabaudia (LT) e nei pressi di Borgo Hermada, piccola frazione rurale del Comune di Terracina (LT). Le stime parlano di circa 3.500 residenti complessivi nei suddetti complessi residenziali.

occupare di rincalzo e in maniera avventizia in attività particolarmente faticose, da retribuire in modo parziale e spesso anche irregolare.

L'imprenditore riconosce la convenienza economica che l'azione intermediatrice di natura illegale dello sponsor determina a suo vantaggio e ripaga questo prezioso faccendiere versandogli per ogni lavoratore illecitamente reclutato in Punjab una cifra che varia dai 1.000 ai 3.000 euro. Questi introiti formano, nel loro insieme, il guadagno dello sponsor, capo criminale dell'organizzazione, per la sola attività di intermediazione internazionale di manodopera. I guadagni dell'imprenditore, invece, si determinano con l'arrivo dei nuovi migranti punjabi direttamente dal loro paese di origine e dalle conseguenti plusvalenze che acquisisce impiegandoli nella propria attività secondo orari e ritmi di lavoro elevati e pagandoli con salari irrisori. Queste pratiche risultano organizzate e possibili in virtù dell'assenza di controlli adeguati.

9. Il network illegale e criminale

Le organizzazioni criminali punjabi che operano a livello transnazionale (Sciacchitano 2015, 153 ss., 346 ss.) non sono molte. Ciascuna di esse sembrerebbe associare un numero variabile di persone sulla base della forza economica a disposizione e della forza che le proviene dalla caratura dei rapporti che stabiliscono con gli imprenditori disonesti dell'area. Esse presentano delle caratteristiche strutturali facilmente intercambiabili, in modo che possano disporre con relativa agilità di network flessibili, soprattutto quando si verificano delle varianze che in modo accidentale si frappongono all'andamento prefigurato degli affari illegali perseguiti. In aggiunta la loro forza si incrementa anche sulla base della qualità delle relazioni che stabiliscono con altri collaboratori attivi non solo nelle aree di reclutamento, ma anche nelle aree di transito. Nelle aree di origine le figure tipiche dei consociati appartengono in genere alla stessa famiglia (ristretta o allargata) dello sponsor o degli sponsor, con le quali governano alcune fasi iniziali del ciclo più generale della tratta dei connazionali.

Nelle aree di transito, invece, le figure predominanti sono estranee al clan familistico, anche se non mancano relazioni strutturate con immigrati punjabi stabilitesi precedentemente in queste stesse aree. Queste strutture logistiche sono in grado di garantire non solo la loro presenza funzionale agli scopi richiesti (un vincolo associativo criminale transnazionale), ma anche la necessaria discrezione e omertà richiesta dalla chiara consapevolezza che si tratta di operazioni illegali. Consapevolezza che emerge anche dalle numerose interviste condotte con molti lavoratori punjabi impiegati nelle campagne pontine e coi punjabi residenti nei paesi di transito (Omizzolo 2010; id. 2013; id. 2015).

Il capo o i capi dell'organizzazione sono in genere indiani che hanno maturato una lunga permanenza in Italia e nell'area pontina in particolare, e con una notevole esperienza relativa alle modalità di ingresso irregolare di migranti, alle

prassi ufficiali e quelle non ufficiali per inserire lavoratori in aziende, nonché una capacità di lettura della realtà amministrativa e burocratica non indifferente. Questa loro capacità è di fondamentale importanza per riuscire a svolgere nella comunità punjabi il ruolo di benefattore-erogatore di servizi, mascherando, in tal maniera, il loro volto criminale.

Il disbrigo di pratiche e di certificazioni di soggiorno o di rinnovi di documenti oppure di richieste per facilitare i ricongiungimenti familiari sono questioni a cui l'organizzazione riesce a dare risposte adeguate. Gli sponsor, probabilmente in collaborazione con loro sodali italiani (avvocati, consulenti del lavoro, professionisti di diversa estrazione professionale), conoscono le norme vigenti e le modalità per aggirarle se necessario. Ciò accade, di fatto, poiché lo sponsor è in grado di mobilitare una rete composita di conoscenze che non disdegnano la loro collaborazione (anche illecita) dietro compensi monetari. Tra questi, come rilevato dalle autorità giudiziarie di Latina, si riscontrano anche impiegati della pubblica amministrazione, in quanto disponibili a compiere atti illegali e corruttivi sulla base di concrete convenienze economiche. Gli sponsor, pur tuttavia, rappresentano un punto di riferimento essenziale per l'intera comunità punjabi. Essi appaiono, in pratica, come dei facilitatori-esperti al servizio della stessa comunità, nonostante si arricchiscano alle spalle della stessa. Sono altresì considerati dei benefattori, anche se ricorrono a pratiche illegali. Queste condotte, nel loro insieme, sono agite sulla linea di demarcazione che metaforicamente divide il lecito dall'illecito e assumono per tale ragione la cromatura del grigio.

10. I pagamenti in contanti, la suddivisione delle parti e il riciclaggio di denaro

Tutte le transazioni economiche tra l'organizzazione (comprensiva della componente punjabi e da quella imprenditoriale italiana)[11] e la sua clientela (ossia gli altri imprenditori che ne acquistano i servizi e i lavoratori migranti coinvolti) avvengono immediatamente e con denaro contante, salvo diverse modalità che si stabiliscono specificamente tra le parti. Per i pagamenti che devono sostenere i lavoratori sono possibili delle agevolazioni. Quella più diffusa è la suddivisione dell'intero ammontare concordato in diverse quote solvibili a scadenze temporali. Le quote, tra l'altro, sono calibrate nel loro ammontare per non apparire sproporzionate, evitando la generazione di sospetti da parte delle forze dell'ordine. Ciò indica una elevata capacità di programmare la riscossione dei crediti economico-finanziari da parte dell'organizzazione criminale e al contempo la consapevolezza che entrambe le parti in causa hanno della natura illecita delle condotte che mettono in essere.

[11] Questa stretta collaborazione tra alcuni sponsor capi dell'organizzazione e alcuni imprenditori locali rientra nella fattispecie di reato contestato dalla Procura distrettuale antimafia di Lecce con la c.d. "Operazione Sabr".

Una volta che le aziende hanno dato l'ordine allo sponsor per la richiesta di lavoratori da occupare al loro interno, questo attiva i membri delle sue strutture reticolari dislocate in Punjab allo scopo di reclutare indiani disposti ad emigrare alle condizioni richieste. Tale ricerca ha sempre esito positivo, poiché è rafforzata dalla promessa di fruire di una futura collocazione lavorativa e allo stesso tempo dei servizi correlati, a partire dalla residenza o dall'alloggio.

L'intera operazione rende all'organizzazione una somma che varia dai 5.000 ai 12.000 euro a persona[12]. Questa ampia variazione dei costi richiesti per l'emigrazione permette all'organizzazione di disporre di una fascia più ampia di potenziali clienti in considerazione dello status economico di coloro che richiedono l'emigrazione e per apparire ancora come dei benefattori a cui conferire rispetto.

In tal senso esiste una contrattazione tra le parti con l'obiettivo di trovare una soluzione soddisfacente per entrambe. Infatti, i reclutatori valutano le disponibilità economiche delle quali i potenziali migranti sono detentori e in base personalizzano il costo dell'emigrazione. Oltre a questi aspetti, i reclutatori valutano anche il grado di vicinanza o lontananza parentale con lo sponsor capo dell'organizzazione o dei suoi stretti collaboratori. Una prima quota viene pagata anticipatamente, le altre con tranche successive e con quote differenziate da corrispondere soprattutto una volta a destinazione. La cifra compresa tra 5.000 e 12.000 euro verrà trattenuta per intero dallo sponsor trafficante indiano che la utilizzerà per sopportare i costi reali del viaggio mentre la parte restante costituirà il suo profitto illecito. Considerando che ogni arrivo comprende un numero di lavoratori variabile dalle 5 alle 20 unità, ne deriva che il trafficante indiano sviluppa un volume d'affari illegale derivante dalla tratta (in questa fase storica) che varia dai 25.000 ai 240.000 euro al netto di qualsiasi onere fiscale. Cifre dunque rilevanti che rendono questa attività particolarmente vantaggiosa[13].

11. La funzione mediatrice dell'organizzazione: evitare i conflitti e perpetuare gli affari illeciti

L'organizzazione governata dagli sponsor riceve somme cospicue per l'emigrazione in Italia e per la successiva collocazione occupazionale. L'arricchimento è garantito, così il prestigio dell'organizzazione criminale e dunque la capacità di riprodurre operazioni similari. Ciò che interessa un sodalizio economico (legale o illegale) è la capacità di perpetuazione del reddito d'impresa e possibilmente

[12] Come si è detto lo *sponsor* riceve da ciascun imprenditore una cifra compresa tra 1.000 e 3.000 euro per ciascun lavoratore che va ad aggiungersi o sottrarsi, a seconda del legame che l'imprenditore/gli imprenditori, ha/hanno con lo stesso *sponsor*: più è stretto il legame tra le parti e allora le cifre vengono sottratte, di converso più larghi sono i legami e allora le cifre tendono a sommarsi.

[13] A partire dal 2005 si stima l'arrivo di circa 20.000 lavoratori punjabi (quasi la metà erano arrivati nel decennio precedente). Moltiplicando 20.000 per 8.500 euro (media aritmetica tra 500 e 12.000 euro, cioè l'esborso di ciascun lavoratore per espatriare), si raggiunge una cifra pari a 170 milioni di euro (dunque 17 milioni all'anno).

aumentarli nel tempo. Appare del tutto chiaro, pertanto, che le relazioni che si instaurano tra lo sponsor indiano e i migranti coinvolti per lavorare nelle campagne pontine sono variamente articolate e la componente fiduciaria non è secondaria. In tale relazione manca il fattore minaccia/violenza e ricatto, quantomeno nelle relazioni immediate in assenza di contrasti e conflitti latenti. Della stessa natura sono i rapporti che l'organizzazione mantiene con gli imprenditori.

Rispetto ai lavoratori, mancando in genere l'elemento coercitivo, l'organizzazione si manifesta come caratterizzata da valori condivisi sulle quali l'intera comunità si identifica e si riconosce agevolmente. Ciò produce, inevitabilmente, rapporti a-conflittuali che sono la garanzia della buona riuscita dell'affare. La capacità degli sponsor di fare apparire l'intera operazione di emigrazione illegale e insediamento nell'area pontina come un favore personalizzato ai membri di quella specifica famiglia permette di operare a bassa intensità conflittuale[14]. In queste relazioni, dunque, non sono ravvisabili elementi di coercizione psico-fisica nelle forme conosciute in altri sistemi di reclutamento, trasporto e collocazione al lavoro nell'Agro Pontino o in altre aree del territorio italiano[15]. La violenza, in questi casi, non è necessaria e sarebbe solo controproducente.

L'organizzazione criminale con tali strategie prevengono le contestazioni, l'inimicizia e le possibili denunce che ne potrebbero conseguire. Da questo punto di vista si considerano penalmente non perseguibili, anche se la coesione interna alla comunità punjabi al riguardo inizia a sfilacciarsi (ci sono state manifestazioni contro le pratiche di sfruttamento nell'estate del 2013 dei caporali e degli imprenditori che fruiscono dei loro servizi e importante è stato il primo sciopero dei braccianti indiani pontini organizzato il 18 aprile del 2016 con un impegno particolare della coop. In Migrazione).

La forza mediatrice dell'organizzazione e dello sponsor che interloquisce sia con i sodali interni che con l'ambiente esterno (lavoratori e imprenditori in primis)[16] si orienta particolarmente in una triplice direzione e coinvolge direttamente o indirettamente altrettante figure sociali con interessi diversi ma concomitanti. La prima figura sociale interessata è senz'altro l'imprenditoria locale, in genere quella maggiormente strutturata con volumi di produzione agro-alimen-

[14] Si tratta di una forma di reclutamento internazionale finalizzato allo sfruttamento lavorativo che costringe centinaia di braccianti indiani a vivere condizioni di lavoro para-schiavistiche, sebbene attraverso un originario accordo.

[15] Ciò non vuol dire che si tratti di un'organizzazione inoffensiva; essa invece assume strategicamente un profilo basso e di particolare *savoir-faire* per non incombere davanti all'offensiva delle forze dell'ordine, magari attraverso una conflittualità insostenibile con la comunità di riferimento (anche perché si tratta di una comunità che insiste su un territorio ben delineato, cioè l'area pontina). I reati previsti dalla tratta internazionale di esseri umani rientrano nell'art. 416bis e sono in sintesi: associazione di stampo mafioso: tratta di esseri umani, riduzione in schiavitù, immigrazione clandestina, sfruttamento e lavoro forzato, guadagni ingiusti e riciclaggio di denaro sporco.

[16] E questa attenzione alle dinamiche interne ed esterne all'organizzazione si determinano non solo nell'area pontina, ma anche nei luoghi dove è presente una struttura di supporto all'azione criminale dell'organizzazione e dunque nei paesi di transito e nelle aree di reclutamento.

tare medio-alta. L'imprenditore è interessato ad avere manodopera ricambiabile al fine di non alimentare la propensione fideistica dei braccianti e non accumulare spettanze di natura previdenziale e pensionistica.

Il continuo ricambio di manodopera implica un rapporto organico con lo sponsor/organizzazione di trafficanti disponibile al sodalizio e al rifornimento stagionale di nuove maestranze da occupare in azienda. Le squadre di braccianti che arrivano dal Punjab sono meno attente e preparate alle dinamiche occupazionali esistenti nell'Agro Pontino e non secondariamente sono all'oscuro dei diritti del lavoro e delle prassi amministrative legali. In altre parole sono più facilmente utilizzabili, sfruttabili e allontanabili se le esigenze produttive aziendali vengono meno o sono state stagionalmente soddisfatte. A fianco degli imprenditori è presente, in maniera non secondaria, un caporale o più caporali, in particolare quelli della stessa nazionalità punjabi, sebbene si registrino diffusi casi di caporali di origine bangladese e di donne di origine rumena[17].

La seconda figura sociale direttamente coinvolta sono i lavoratori. Nell'Agro Pontino se ne stimano circa 30.000 (di cui quasi i due terzi arrivati negli ultimi dieci anni), quale risultato di una efficace catena migratoria incentrata sui nuclei familiari estesi. Da questi la catena migratoria si alimenta tramite contatti con esponenti di altre famiglie, giacché manifestano una chiara disponibilità ad emigrare in Italia. Si tratta, in definitiva, di famiglie divise e separate: una parte resta nelle aree di origine, l'altra nel Pontino. Gli scambi e le comunicazioni tra le diverse componenti della famiglia sono continui, alimentano la propensione emigratoria dei membri più giovani e le entrate delle organizzazioni criminali. Nelle prime fasi, come esplicitato, vige un rapporto sereno tra i lavoratori/trici e gli sponsor, poiché questi li collocano direttamente sul lavoro. Dopo qualche tempo, arrivati a Latina, apprendono le modalità lavorative basate su principi antitetici rispetto a quelli prospettati prima dell'insediamento, determinando i primi conflitti. Lo sponsor e i suoi affiliati o sottoposti iniziano un'operazione di mediazione significativa, al fine di non far deflagrare la relazione fiduciaria ed evitare così micro-conflitti interni.

12. Truffe, minacce e sfruttamento lavorativo dei braccianti punjabi pontini

La componente "nera" delle organizzazioni criminali punjabi è fortemente antitetica a quella che abbiamo definito grigia. È nera poiché si manifesta in maniera illegale e svela il mascheramento degli sponsor e dei loro imprenditori. L'arricchimento illecito, mediante sfruttamento lavorativo, è la mission dichiarata dell'organizzazione criminale.

Negli anni l'arrivo di numerosi immigrati dal Punjab ha prodotto una fascia di lavoratori con poche possibilità di perseguire il progetto migratorio che li ha

[17] Si stanno rilevando, nel Pontino, i primi casi di caporali indiani di genere femminile.

spinti all'emigrazione. Pertanto, con la presenza di queste fasce di lavoratori impoveriti, l'organizzazione criminale si avvale organicamente del caporale/dei caporali di nazionalità italiana (in misura minore) e punjabi (in misura maggiore), entrambi alle dirette dipendenze dello sponsor capo della struttura. Essi costituiscono l'ossatura dell'organizzazione criminale, direttamente funzionale alla collaborazione che l'organizzazione stessa mantiene con quella parte disonesta dell'imprenditoria locale[18].

L'organizzazione assume una doppia fisionomia in considerazione di una altrettanta doppia competenza e specializzazione operativa: una transnazionale, orientata principalmente al reclutamento, al trasferimento dei migranti e alle relazioni con le strutture operative al di fuori dei confini italiani e l'altra localistica, maggiormente concentrata sull'intermediazione quotidiana di manodopera. I profitti per l'organizzazione provengono pertanto dall'uno e dall'altro settore e in entrambi i casi si registra un connubio funzionale tra delinquenti punjabi e italiani: sia per gli affari transnazionali (sponsor e imprenditori che reclutano manodopera direttamente dall'estero) che quelli locali (caporale italiano e caporale indiano che intermediano manodopera a livello territoriale). Il caporale indiano svolge una funzione funzionale agli interessi del datore di lavoro, spronando i suoi connazionali a lavorare con ritmi e una intensità voluti dallo stesso datore[19]. Viene dunque praticata una sorta di pressione orientata allo sfruttamento dei lavoratori punjabi attraverso l'esercizio o la semplice minaccia di un potere coercitivo avallato dal datore di lavoro. Il caporale è una figura ambigua e socialmente complessa, poiché deve mantenere e tutelare diverse relazioni contemporaneamente e quasi tutte potenzialmente conflittuali in grado di generare contrasti affrontabili solo con la forza e la violenza materiale. Oltre a questo svolge una funzione strumentale anche tra i lavoratori suoi connazionali e i referenti del sistema pubblico, soprattutto istituzionale, italiano, garantendo l'ottenimento di servizi essenziali in cambio di notevoli somme di denaro.

13. Conclusioni

La tratta internazionale di esseri umani ha conosciuto nel corso degli ultimi anni, in coincidenza col generarsi della cosiddetta società delle migrazioni, un'accele-

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[18] Da un'intervista riportata dalla coop. In Migrazione (in Dossier *Sfruttati a tempo indeterminato* 2014), si rileva che un bracciante indiano di 30 anni è stato derubato dal suo datore di lavoro. Così il bracciante riferisce la vicenda: «Il mio ex padrone è un ladro. Volevo la carta d'identità perché senza incontro sempre molti problemi coi Carabinieri. Lui mi ha chiesto 800 euro per fare la mia carta d'identità. Il mio stipendio mensile è di 650 euro. Ho dato i soldi ma poi non ho ricevuto la carta d'identità. Sono così rimasto senza soldi per un mese. Non è possibile questo, non è giusto. Io ho lavorato tanto, pago l'affitto di casa, mando soldi alla mia famiglia in Punjab (...) Sono un lavoratore bravo e non ho mai creato un problema. La carta d'identità è importante per me».

[19] Sono numerosi i casi riscontrati di datori di lavoro italiani che pretendono dal lavoratore indiano di essere chiamati "padrone".

razione ed estensione nelle sue tradizionali modalità organizzative ed operative ed è esattamente in questa direzione che si dirige il presente lavoro. Tra le aree di maggiore interesse, insieme a quelle di origine e di transito dei migranti e soprattutto delle vittime di tratta, anche per la complessità geopolitica che la caratterizza, va annoverata quella mediterranea.

Dal saggio risulta una relazione articolata tra i paesi della sponda Nord e Sud del Mediterraneo, a dimostrazione della vastità del relativo sistema di tratta internazionale e il suo rapporto con il mercato del lavoro mediterraneo, formale e informale. La natura segmentata del mercato del lavoro italiano, ad esempio, sia nei suoi aspetti formali sia informali, accoglie le vittime di tratta (donne e bambini compresi) ed in virtù della loro obiettiva condizione di fragilità sociale, culturale ed economica ne determina spesso lo sfruttamento che persiste anche nel lungo periodo con alcuni casi di riduzione in schiavitù. Ciò riguarda sia il Sud che il Nord del Paese seppure con espressioni diverse sul piano quantitativo.

Il rapporto tra sfruttamento del lavoro e migranti, soprattutto vittime di tratta, consente di raccogliere dati a sufficienza relativi alle caratteristiche principali di tale rapporto che sono stati sinteticamente ricostruiti nel saggio. Tra i diversi sistemi di tratta e sfruttamento lavorativo si è analizzato quello pontino avente ad oggetto la comunità indiana e soprattutto punjabi di religione sikh. Le sue caratteristiche ne agevolano la mimetizzazione e questo rende ogni ricerca, soprattutto se condotta sul campo mediante approcci etnografici, particolarmente preziosa.

Il carattere grigio-nero di tale tratta, espressione di una particolare azione reclutatoria del trafficante indiano, del suo network criminale e del suo committente italiano (imprenditore agricolo), sembra rappresentare una strategica forma di autodifesa atta all'autoreplicazione, peraltro fondata sulla ricerca del consenso sociale in primis dei lavoratori indiani trafficati e delle loro famiglie. L'intrecciarsi di diffuse convenienze economiche, la relativa facilità di reclutamento della vittima punjabi di tratta, la sua subordinazione indotta, la collaborazione strumentale di un network vasto di professionisti e imprenditori committenti che agevolano più o meno consapevolmente tale sistema, insieme alla contemporanea subordinazione della famiglia dell'indiano trafficato al trafficante e per il relativo debito economico generalmente assunto, costituiscono gli elementi cetnrali di questo caso di specie, da tenere presente per l'elaborazione di qualunque azione volta al suo contrasto.

Ogni raccomandazione possibile dunque rispetto al contrasto di questa forma illegale e truce di reclutamento illecito internazionale deve necessariamente passare per una riforma della normativa vigente sulla tratta, comprendendo aspetti sinora trascurati, una tutela effettiva delle vittime e dei loro testimoni, anche mediante premialità e riforme qualificate del mercato del lavoro centrate sul contrasto al lavoro nero e grigio, ad ogni sfruttamento e alle agromafie e nuove e migliori azioni di controllo e contrasto al caporalato e al grave sfruttamento lavorativo nelle campagne italiane.

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The Pakistani Community in Italy: Religion, Kinship and Authority

DIEGO ABENANTE[*]

1. Introduction

Pakistani migration to Italy is a relatively late phenomenon in the general framework of the movement of laborers from the South Asian region to the West. Not only it has emerged late in comparison with the long-established flux to northern Europe, but it has also been slow in its growth, a fact that has led the observers to give only sporadic attention to this phenomenon (there seems to be in fact a paucity of studies on Pakistani migration to Italy, although this vacuum may soon be filled by a growing quantity of research devoted to the topic; see, for example, the doctoral thesis by Cavenaghi 2013). In fact, the presence of the Pakistani communities in Italy is a factor which can no longer be considered temporary, given that it has already led to the formation of households on Italian soil, especially in the urban areas of northern Italy. It is therefore important to understand the evolution of the Pakistani community in Italy, its structure and its cultural dynamics.

The movement of Pakistani workers to Europe has obviously developed in connection with colonial rule, and has therefore interested Britain in the first place. The Pakistani presence in Britain has to be seen as the continuation of a

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stable flow of migrants from different parts of India that began in the late-nineteenth century, and that after the end of the British *Raj* led to the creation of large migrant communities of Indian, Pakistani, and, later, Bangladeshi origin, especially in the urban areas of London and Manchester. The flow followed the three-stage mechanism described by Lewis (Lewis 1994, 16-17): first, the generation of the "pioneers"; secondly, the formation of households through family reunion; finally, the formation of a British-born Pakistani generation. This steady flux of migrants would later be affected by the decision of the British authorities – with the 1962 Commonwealth Immigration Acts, and then with the Immigration Act of 1971 – to abolish the automatic entry of Commonwealth citizens to the United Kingdom, and to link it to specific requirements. The '60's and '70s were therefore a watershed for South Asian migration: the reduction of work opportunities in the United Kingdom, together with the rapidly growing force of both skilled and unskilled laborers in South Asia, which could not be absorbed by the local job market, saw the flow redirecting towards other destinations.

This movement initially interested the Scandinavian and Middle Eastern countries. Pakistani workers, in particular, migrated to Denmark, Norway and Sweden between the late 1960s and early '70s (Rytter 2010, 94). During the same period, the increasing demand for workers from the oil-producing countries of the Middle East emerged as a major economic opportunity for South Asian workers. In the first half of the '70s Saudi Arabia, the United Arab Emirates and Oman had hired mainly workers from the neighboring Arab countries; however, from 1975 onwards the Arab workers became no longer sufficient to meet the demand of the oil and infrastructure industries in the Gulf. Religious and cultural reasons made Pakistan, India and Bangladesh the favored choices for hiring laborers (Brown 2006, 50-52). The movement from South Asia to the Gulf Countries was important for two reasons: first, the remittances of the workers to the home countries during the '70s became one of the most important sources of public income for the South Asian economies. Secondly, the religious connections, which were established through the channel of migration, were to become a major factor for the growth of revivalist Islamic trends in the South Asian States, especially Pakistan: the influence from the Gulf States' conservative religious environment contributed to the increasing radicalization of Pakistani society during the '70s and '80s (Talbot 1998; Nasr 2000; Zaman 1998).

It is to note, however, that the migration from South Asia to the Middle East was significantly different from the older flux to Europe. The legal obstacles posed by the Arab States to the permanence of the workers in the countries, after the expiry of their contract, made the migration of South Asians to the Gulf a temporary phenomeon. This circumstance has prevented the creation of a South Asian community in the Gulf States, while creating the ground for further migration routes (Arif 1998, 99-100). Other relevant factors were the introduction of stricter immigration laws by the Northern European governments during the '60s and '70s, and the decline of work opportunities in the Middle East due to the

political turmoil of the following years, especially the first Gulf War. The combination of these factors led to a gradual shifting of the migration route away from the traditional North-European and Arab destinations, towards Southern Europe, especially Italy, Spain, and Greece. In recent years, the emergence of the «Arab springs» in the Middle East in 2010-11 – especially the collapse of the Syrian State – has reinforced the migration trend. The flux of refugees caused by these crises has strengthened the older migration routes from Central and South Asia, particularly Pakistan, Afghanistan and, to a minor extent, India and Bangladesh. However, the connection of this late flux of migrants to the political crises is to be taken with caution; more often than not, it may be seen as the reemergence of the old economic migration patterns, which have spontaneously amalgamated with the political asylum seekers from the Middle East.

The following analysis of the Pakistani presence in Italy moves from the assumption that their community is not a homogeneous one, being composed of at least two different waves of migration: the most recent immigrants have settled in an environment characterized by a network of communities who have been residing in Italy since the 1990s; while the older settlers have made their choice of living permanently in Italy – and have reunited with their families or married in Pakistan through traditional patterns – the more recent settlers still perceive Italy as an intermediate step. They have not chosen Italy as their ultimate destination and, therefore, their attitude to Italian society is influenced by this condition.

2. Migration in Pakistani Culture

The idea of migration is central to both Islamic and Pakistani imagination. As it has been correctly noted, Islam itself was born through the experience of migration, or *hijra*. According to Muslim tradition, the Prophet Muhammad migrated from Mecca to Medina to establish the first political and religious community of Islam (Allievi 2002, 40; Abenante, Battera 2011, 125). Islamic culture has therefore developed around the idea of migration as a step towards the implementation of God's message. In this context, the sacrifices and difficulties that the migrant encounters in order to fulfil the divine command are particularly meritorious, and deserving the community's praise. According to this concept, the act of migration has mainly been conceived as the pattern towards the establishment of an Islamic society. From the Islamic point of view, at least in theory, migration should not lead the Muslims to be a minority in a largely non-Muslim society, but only to the establishment of a *dar al-islam*, the land where Islam predominates (Allievi 2002, 40). This said, the historical phenomenon of migration has *de facto* created a new dimension – which has been called *dar al-hijra* (abode of migration) – that, although ambiguous in Islamic terms, has nevertheless imposed itself in practice (Castro 1996, 271; Abenante, Battera, 126).

Moreover, other authors have argued that migration has added a new meaning to the concept of *hijra*: this would no longer be a movement from a non-Muslim to a Muslim land to live an Islamic way of life, but a movement to a non-Muslim land with better economic opportunities (Metcalf 1996, 19). In this context, the case of South Asian Muslims would have a special significance, in so far Islam in the Subcontinent has shaped its own ideas and values in a period when it had no political power and was numerically a minority.

The experience of migration for the Muslims is also particularly powerful, because it leads the believers to move from an environment where Islam is «visible» in every aspect of daily life, to a dimension where it is almost absent in the public sphere. This shift may lead the Muslims towards a condition of «disorientation», or uncertainty about their identity and place in society (Roy 2003, 64-69; Allievi 2002, 40-41). The psychological strain brought by the necessity to adapt to the new reality is also accompanied by the contact with Muslims coming from other societies. For many migrants, the experience of living near people who practice a different form of Islam is a deeply touching one, and it may lead to reflect on their own religious identity, and on the relationship between Islam as a universal religion and the diversity of Muslim societies (Eickelman, Piscatori 1990, XV). In other words, they may begin to "objectify" Islam, in the sense of «self-examination, judging others, and judging oneself» (Metcalf 1996, 7). For this reason, «migrant Islam» may tend naturally to emphasize its universal, «orthodox» interpretation at the expense of the local practice. Therefore, migration brings into question the unresolved contradiction between unity and diversity in Islam, which has been at the core of Muslim life for much of its history. This sociological process of adjustment and reflection, which has been termed «islamization of the self» (Metcalf 1996, 7), bears a particular importance for the Italian experience where – unlike France, Britain or Germany – there is no dominant ethnic community of migrants.

There is also a historically rooted connection between the cultural value attached to migration and the formation of the Pakistani State. In fact, in Pakistan as in few other countries – notably the State of Israel – the concept of the Nation-State has developed with a strong connection with the idea of the physical movement of people. Just as with the Islamic *umma*, the State of Pakistan was created in 1947 through the migration of millions of Muslim citizens who left India to reach the newly created «Muslim homeland». The ordeal of the migrants has been equated, in the Pakistani political discourse, with that of the first Arab migrants in the history of Islam, and has been attributed the symbolically important title of *muhajir* (those who made the *hijra*). Their experience has become enshrined with the identity of Pakistan itself, as the symbol of courage and selflessness for the benefit of the community. This discourse has contributed to the development, not only symbolically but also politically, of Pakistan as a «migrant State» (Shaikh 2009, 47). However, the centrality of the idea of physical movement of people in the process of State building brought with it an ambiguity be-

tween the crucially important role played by migration, and the difficulties that the State itself has encountered in developing its own national identity. Unlike Israel, Pakistan had to face the difficult task of amalgamating the migrants from India with the 70 million local Muslims already living in the land, at the time of the foundation of Pakistan. The difficulties of this encounter, and the cultural obstacles defying the efforts to defining who is «the true Pakistani», have contributed to the State's struggle to establish its own identity (Shaikh 2009, 46-57). There was certainly an ambiguity in the definition of Pakistan as a «homeland», while at the same time emphasizing migration as its core meaning. Moreover, the connection between Pakistan ideology and Islam was, at once, crucial and problematic: it was crucial for the definition of Pakistan *vis-à-vis* India; but it was also bound to create further cultural ambiguities, because it called into question the nature of Islam in South Asia, whose «local» or «foreign» nature had been debated at least since the nineteenth century.

Therefore, Pakistan has always been a destination – perhaps a *utopia* – as much as a place of departure in search for the true self. This ambiguity must not to be neglected in any analysis of migration to Europe: the fact that the migrants' parents were, very often, migrants themselves – or descendants of migrants – add a lay of complexity to their adaption to the new society. The ambiguity of the Pakistani sphere of belonging and the migrants' effort to relocate into the European society are very much interconnected (Shaikh, 2009).

3. Pakistanis in Italy: who are they?

We have seen that the Pakistani migrants in Italy are, generally speaking, of recent arrival in the country, the early communities having settled in the 1990s. The developing nature of Pakistani presence may also explain some of the basic sociological characteristics of the community, which stands apart from other Asian or Middle Eastern groups. These features are the relatively low age of the community, and it being mostly made of unmarried male members. Taking as a reference the already quoted pattern of migration outlined by Lewis, Pakistanis in Italy are for the most in the early stage; the family reunion process appears to be still in its initial phase (Lewis 1994, 17).

According to the most recent available data, there are about 116.000 Pakistanis in Italy, representing about 3% of the non-EU citizens (Ministero del Lavoro 2015, 6). However, the community is rapidly growing: the number of registered Pakistani citizens has increased of about 9%, between 2014 and 2015, which has allowed the community to move from the 14th to the current 11th place among the migrants' nationalities in this country. Interestingly enough, this trend contradicts the evolution of other, long-established non-EU communities, as the Moroccan, the Tunisian, and the Albanian, which after years of stable growth have registered a marked decrease in 2015. The growing Pakistani – and, gener-

ally speaking, South Asian – presence is gradually changing the landscape of the non-EU immigrant communities in Italy; a fact that should be taken into account by the authorities and the analysts, given that it is bound to have relevant consequences from the religious, cultural and political points of view.

The average age of the Pakistani citizens is 28, which is sensibly lower than the general population of non-EU migrants. Moreover, 28% of the community is of minor age, which amounts to approximately 3.5% of the total non-EU migrant population (Ministero del Lavoro 2015, 7). However, the fact that the percentage of minors has reduced from 30.9% in 2013 to 28% in 2015 seems to indicate a tendency to conform to the general socio-demographic trend (IDOS 2013, 1-2). The same may be said of the gender-related structure: as noted above, the Pakistani population is currently overwhelmingly male (69%), still, the process of family reunion will probably reduce this imbalance. In 2015, about 26% of the new entries from Pakistan to Italy were due to family reunions. Two further features characterize the community, as compared to other nationalities: one is the almost total absence of the female component from the workspace; only about 4.5% of the women of the community are employed, as compared to 46.8% of the non-EU migrant population. This data may certainly be explained with the conservative character of Pakistani society, taking also into account the rural background of many migrants. This factor must be placed in the context of a low level of employment of the community. According to the latest data, only about 57.9% of the male Pakistani population is employed, which is significantly lower than the average data for non-EC migrants (64.7%). The low rate of working activity of the Pakistanis is mirrored by their poor level of education: about one fifth of its members (18.3% as compared to 11.7% of the general non-EC citizens) have completed only the primary school, while the secondary school diploma is possessed by a half of the community (49.8%). It is important to note that the placement of the Pakistani community in the job market may be influenced by its preference for autonomous work, rather than dependent employment. In fact, the rate of Pakistani citizens working as autonomous dealers and artisans is considerably higher than that of the other non-EU communities, and place the Pakistanis as the ninth community in Italy, when ownership of individual companies is considered (Ministero del Lavoro 2015, 9).

The analysis of the motivations to migrate shows a slow but steady process of change, which is clearly connected to the evolution of the political scene in the region of origin. The economic factor as the main reason to migrate, which predominates among the old-established Pakistani families in Italy, has gradually given way to a mixed economic-humanitarian motivation. In 2015, the applications by Pakistani citizens of residency permits for political and humanitarian reasons have been 18.7%, as compared to about 7% of the non-EU population. The high number of the applications is connected with the deteriorating political situation in Pakistan, particularly along the Northwestern regions of Khyber Pakhtunkhwa and the Federally Administered Tribal Areas (FATA) bordering

Afghanistan. However, war and political turmoil often play the role of the ultimate factor, in a decision process mainly determined by the need for better life conditions, work opportunities and familial economic improvement. In fact, although a large number of the Pakistanis applying for residence in Italy tend to indicate the FATA as their region of origin, in many cases they are not able to provide evidence of their connection with this region. It seems likely, therefore, that political and humanitarian factors often conceal economic motivations as the main reasons to migrate. Not surprisingly, the majority of Pakistani citizens have settled in the urban areas of Northern and Central Italy, where there are better employment opportunities. The two regions with the larger Pakistani population are Lombardia (38.4%), and Emilia-Romagna (21%), followed by Toscana (6.2%). The community shows a clear tendency to settle down, as compared to other communities of Asian origin. In fact, the number of Pakistanis applying for long-term stay in Italy is sensibly superior to those from other communities from the Indian subcontinent or from other regions of Asia (Ministero del Lavoro 2015, 7). Moreover, the number of marriages between a Pakistani and an Italian citizen has increased considerably in the past three years. This fact, together with the relatively high number of Pakistanis who have received the Italian citizenship through marriage, residence or transmission, seems to confirm the tendency towards their stabilization in the country (Ministero del Lavoro 2015, 11).

It is also important to note that, apart from the skilled and unskilled laborers, there is also a phenomenon of intellectual migration that, although numerically marginal, is nonetheless significant from the cultural point of view. This Pakistani diaspora is made of scientists and intellectuals that have migrated to Italy for study, research or family reasons. One interesting example of this phenomenon is given by the group of Pakistani scientists that have been present since the 1960s at the International Centre for Theoretical Physics (ICTP) of Miramare, near Trieste. The Centre itself was founded by the Pakistani Nobel laureate Abdus Salam (1926-1996), and it has led to a stable presence of scientists from Pakistan, among whom we may mention the late theoretical physicist prof. Faheem Hussain (1942-2009), who had also been a professor at the Lahore University of Management Sciences. The Muslim intellectuals living in the West have often claimed for themselves a role as a «heroic» and more progressive élite; similarly, Pakistani intellectuals in Europe have frequently taken a strong stance about the issue of democracy in their country of origin, or have expressed modernist views on the relation between Islam and society (Metcalf 1996, 19). The intellectual diaspora adds, therefore, yet another significance to the act of migration, where *hijra* acquires the meaning of liberating oneself from the bounds of an oppressive regime, or from a State-sponsored vision of Islam.

4. A Multifaceted Islam

Pakistani presence in Italy obviously brings with it the peculiarities of South Asian Islam. Approximately 96.5% of the Pakistani population is Muslim; the religious minorities, mainly Christian and Hindu, constitute about 3.5% of the population. In the Indian Subcontinent, Islam has been historically plural, and different schools of religious and legal thought have traditionally coexisted, from Sunni to Twelver *shi'a*, to Ismaili. Moreover, the early and long-lasting contact of South Asian Muslims with European rule produced «different ways of being Muslims», which are also relevant to our discourse because they «can have significantly different attitudes to the State, in particular the non-Muslim State» (Robinson 1988, 3). Most of these responses have emerged between the second half of the nineteenth and the early-twentieth century, and have their roots in ideas of religious reform and revival. These trends still characterize Muslim societies in India, Pakistan and Bangladesh today.

Paradoxically, the same religious currents that were born during the colonial era with the aim of enabling Islam to survive in an environment dominated by European power, have been brought to Europe through the migration channel. The model of Islam it envisaged was based on the idea of ignoring political power: it was an apolitical version of Islam. For the majority of Muslims in South Asia, in the nineteenth and early-twentieth century, the State was irrelevant because it was in European hands. The Muslim learned men – or *'ulama* – who lived in this environment tried to build a model of Islam based only on the social and religious institutions – mosques, schools –, without any interference from the State. This attitude was shared in particular by the Deobandi and Ahl-i Hadith schools. A sensibly different attitude was offered by the Barelwi school, which emerged around the same time as a reaction to the reformist view of the two former schools. Religiously speaking, the Barelwis differ from the Deobandis and the Ahl-i Hadiths because the former defend the custom-centered, popular Islam of the saints' shrines, while the latter have a critical attitude towards popular religious practices. Apart from their religious ideas, however, there is no great difference in the attitude of the three schools towards the State, although the Barelwis may have a more sympathetic approach towards political institutions (Robinson 1988, 3-6). The greatest difference in relation to power may be found between the above three schools and the supporters of the Jama'at-i-Islami party. This organization is part of the twentieth century Islamic revival, often called in the West «fundamentalist», and has been since 1941 its main representative in South Asia. The Jama'at's attitude to political power is radically different from the nineteenth century schools. The State, in the Jama'at's vision, is the main instrument in order to obtain the islamization of society, which constitutes the main goal of the party. This project, however, according to the founder of the movement, Abu-a-la Maududi (1903-1979), has to be carried on along strictly peaceful lines,

and through the participation of the party in the democratic process (Robinson 1988, 10-4).

In sum, it is reasonable to expect, from Pakistani Muslims belonging to the Deobandi, Ahl-i Hadith or Barelwi schools, an attitude centered on the founding and managing of their own institutions, free from government control; while an active participation in the political process is less likely. A more politically minded approach may be expected from the Jama'at-i-Islami supporters, as an emphasis on participation to elections and on working within the political institutions at local or national level. It is also important to emphasize that all the religious groups we have seen have a tendency to engage in bitter polemics with each other. In contemporary Pakistan, religious debates have also created the ground for increasing sectarian violence (Nasr 2000; Zaman 1998). It is reasonable to infer that this tendency to religious fragmentation may become a feature of the Pakistani migrants' life. The experience of the Pakistani migration in Britain, for example, seems to indicate that migration may export the migrants' religious networks, as well as the existing sectarian tensions. This trend may emerge also among the migrants' community in Italy.

The tendency to religious confrontation may also affect any attempt to organize an institutional representation of the communities. The existence of a plurality of religious views make South Asian Muslims generally not inclined to accept being represented by a single voice. Given the already divided landscape of Muslims in Italy – due to the absence of a dominant national or ethnic origin – the flow of migrants from South Asia may increase this fragmentation. In this view, the Italian government's declared goal of the agreement – or "Intesa" – with the Italian Muslim community may become a more difficult task to achieve. On the other side, it is interesting to emphasise that the role played by Muslim clerics among the Muslims of Pakistani or Indian origins is generally more influential than among the Arab communities. The *'ulama* of South Asia have managed to maintain a certain level of autonomy from the State, which has enabled them to be influential in society. This factor may work, at least in part, as a counterbalancing factor to the fragmentation already observed among the Muslim migrants in Italy.

5. Creating a Cultural Space: *Biradari* and the State

The above analysis on the religious currents is not intended to suggest the idea of an «inherent religiosity» of the Pakistani population, which is a common stereotypical assumption on South Asians abroad. Obviously, the adherence to religion is a matter of personal choice; however, this attitude is also influenced by regional culture, and by the social environment of origin. In a society characterized by strong local identities, this dimension acquires an even greater relevance. Therefore, the regional and social background bears much importance in defin-

ing the immigrants' attitudes to religion and society. Given the overwhelming presence of migrants from Punjab – and, to a minor extent, of Pashtuns from the areas of North-Western Pakistan – among Pakistanis in Europe, the specifically *punjabi* attitude to religion has tended to become largely dominant (Lewis 1994, 27-35). It has to be noted, however, that this conception has not necessarily much to do with «orthodox» Islam; rather, it will probably be indebted to a series of ideas and values that are connected with the rural Punjabi worldview. Such a conception will also have much in common with the Sikh or Hindu Punjabi culture. We may summarize this worldview in two basic notions: the first is the idea of mediation, which is indebted to a popular or «folk» understanding of Islam. According to this view, a central role is played by the sufi *pirs* – or «saints» – who are the embodiment of the sacred on earth, and can play a role of intercession between men and God. The *pirs* may assist the believer in everyday life, and protect him or her from the uncertainties of life (Gilmartin 1988; Liebeskind 1998; Ewing 1997). Far from being only an understanding of Islam, the concept of mediation is part of a whole worldview. In fact, the same notion permeates one's behavior in society, and even in political relations. In order to find a proper place in society and to obtain justice, a person will normally require a powerful mediator to interact with the authority. Just as one would need a *pir*'s intercession to obtain protection from the evil, so a powerful patron will be necessary to obtain the favor of a distant and arbitrary government. The idea of mediation is therefore at the root of the system of patronage and patron-client relations in Punjabi society and politics, as indeed in much of South Asia (Piviliasky 2014).

The second notion relates to the working of power, and its relations with the individual. The basic idea is that the State will never interact with individuals, but only with groups. These groups, in Pakistani society, are based on kinship, and are structured as clan or «caste» (*biradari*, «brotherhood»). In spite of the theoretical egalitarianism of Islam, therefore, the Pakistani society presents a form of hierarchical segmentation based on descent that for many aspects relates to the caste system. There is no single, universally accepted definition of *biradari*. The term comes from the Persian language and indicates the group made up of individuals and families who recognize each other as descendants from a common male ancestor; therefore, the base of the system is patrilineality (Abenante 2014). The term is used mainly in Punjab, however, the centrality of this province in public life in Pakistan has meant that gradually the Punjabi vocabulary has come to extend to the whole country. The terms *biradari* – and «*biradarism*» – have thus become widespread expressions, which indicate the dependence of the political system from balances, alliances and conflicts between ethnic and interests groups. Other frequently used terms are *qaum* and *zat*: the former is variously translated as «community» or «nation», and seems to indicate a larger ethnic group, comprising different *biradari*. The second relates to the existing subdivisions within a *biradari*. In this sense, *zat* may be used as a synonym for «faction». However, these terms are used in Pakistan to indicate different levels

of identities, according to the circumstances. The main reason is that in Pakistani society, as in the Subcontinent as a whole, identities are flexible, and people are able to shift from one level of identity to another depending on the context. Like the caste in India, *biradari* in Pakistan is an element of «a complex, layered and pluralistic social system» (Weiner 2001). At various levels, the *biradari* will have different political relevance: in the wider, national dimension, the *biradari* will not be very influential politically; still, the people will be able to recognize themselves in this category, and this recognition will have a meaning for their status. Even at this broader level, the *biradari* can sometimes play a role in national politics, although this is more the exception than the rule. A national leader may use his *biradari* as part of his or her public image. It is at the local level that the *biradari* will play its most important role in politics. In this sense, it may be correct to define Pakistan a «patronage democracy», although the concept has been more commonly applied to India (Chandra 2004).

This aspect is also of crucial importance in shaping the political attitudes of the migrants, and their approach to the State. In their relations with the authorities, the communities will very likely tend to reproduce the model of power and authority of the Punjabi society. This model is based on *biradari* connections, and will seek the intervention of the most influential members of the *biradari*, rather than seeing the individual members of the community directly approaching the authorities. Moreover, the idea of community representation will probably be marginal, if not totally absent (Lewis 1994, p. 21). It is easy to see how such vision may influence the relations between the community and the State, and that the understanding of its underpinning on the part of the authorities may play a decisive role in the process of integration.

The Pakistani community is one of the most recently settled groups of migrants in Italy. However, it shows clear signs of an ongoing stabilization process. The community has strong social and religious peculiarities, as compared to other Muslim groups from the Middle East or North Africa. In this sense, it constitutes an additional element of complexity for an already heterogeneous landscape. At the same time, the Pakistani appears to be a more «traditional» and less individualized community. The relevance of local and kinship bonds might play a stabilizing role for the migration phenomenon in Italy. At the same time, the experience of European countries with long-established Pakistani communities shows that patronage and patron-client relations may constitute a challenge, in the long term, towards the goal of inclusion of the community into the political process.

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Gli Armeni in Italia: emigranti per bisogno, profughi per necessità. La diaspora dopo i grandi massacri e il genocidio

PIETRO NEGLIE*

1. Migrazioni e nazionalitarismo

Le migrazioni individuali e collettive sono un dato strutturale e permanente della storia umana di cui in occidente si è smarrita la memoria, sebbene solo alla fine del diciannovesimo secolo le plebi della progredita Europa diedero vita ad uno dei più massicci trasferimenti di popolazioni mai viste prima. Il mondo che oggi definiamo moderno ha perso memoria di quando il binomio stanzialità-nomadismo secoli fa era lungi dal risolversi, e le migrazioni di tribù alla conquista di nuovi spazi che garantissero il sostentamento erano pratica diffusa anche sul territorio europeo. Nel corso del tempo gli spostamenti di popolazioni hanno risposto ad esigenze differenti ed assunto forme diverse: dal trasferimento forzato all'espulsione delle minoranze religiose, dalla ricerca di migliori condizioni di vita alla conquista di altri territori e popolazioni all'insegna del moderno colonialismo e della sua evoluzione imperialistica. C'è stato anche un periodo in cui l'emigrazione era vietata perché privava il paese di fondamentali risorse umane, necessarie per lo sviluppo. (Enzensberger 1993, 23)

Gli specialisti della materia li chiamano push and pull factors, cioè fattori che spingono a migrare ed altri che attraggono: ricerca di fonti alimentari o ca-

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lamità, colonizzazioni ed espulsioni di minoranze, movimenti liberi e/o forzati (Chiarelli 1992, 5). Si trattò di grandi migrazioni che non hanno nulla a che fare con gli esodi che accompagnarono e seguirono la formazione degli stati nazionali, soprattutto quelli formatisi in seguito alla frantumazione dei quattro imperi coinvolti nella Prima guerra mondiale: l'impero austro-ungarico, quello tedesco, quello russo e l'Impero Ottomano.

Il problema delle minoranze nazionali alla ricerca di un proprio spazio territoriale, uno specifico ambito istituzionale ed economico, una dimensione statuale propria indipendente e sovrana, si pose con forza in conseguenza di quel passaggio epocale. Da allora si innescò un processo che coinvolse milioni e milioni di persone, le cui identità nazionali, religiose, etniche e razziali si accordavano con difficoltà, trovando un punto di ricongiungimento e "fusione" nella richiesta di uno stato nazionale che le contenesse e le rappresentasse. In particolare, l'area di contatto fra gli imperi austro-ungarico e Ottomano fu quella più travagliata da contrasti di varia natura difficilmente riconducibili a sintesi, se non ricorrendo a soluzioni arbitrarie che per il modo in cui vennero assunte e per la loro stessa natura, prefigurarono le condizioni "ideali" per alimentare anziché sopire tensioni secolari, facendole sfociare, in presenza di molteplici condizioni "facilitanti", nel secondo conflitto mondiale. Laddove vivevano, spesso mescolate fra loro, popolazioni di diversa estrazione culturale, religiosa, etnica e linguisticamente eterogenee, in modo arbitrario i grandi, i vincitori, disegnarono i confini di nazioni che spesso soddisfacevano i loro interessi, più che quelli delle popolazioni coinvolte. Queste si trovavano a vivere in un contesto politico, istituzionale, amministrativo completamente differente dal passato: ad esempio i 3,3 milioni di tedeschi che vivevano su un territorio in parte tedesco in parte austroungarico si ritrovarono cittadini cecoslovacchi, o il quasi milione e mezzo di magiari che diventarono di colpo cittadini romeni, o quel milione e mezzo di tedeschi che si svegliarono polacchi… una situazione che preannunciava i gravissimi problemi che poi si manifestarono con enorme virulenza, specialmente perché la Società delle Nazioni che avrebbe dovuto rappresentare una garanzia di rispetto dei trattati e, dunque, di progressivo seppur lento consolidamento della situazione, non aveva alcuno strumento, alcuna forza esecutiva per ottenere il rispetto degli stessi. Questa condizione, ideale per l'elusione e la violazione delle norme, fu uno sfondo esemplare per quello che ancora oggi siamo soliti definire "l'intrico balcanico". Con questo binomio indichiamo una realtà territoriale, politica, religiosa, etnica di indicibile confusione, alimentata e rafforzata dall'assenza di una tradizione di tipo nazionale, simile a quella degli stati nazionali europei di più antica formazione, priva di quella consolidata esperienza e tradizione che ne avevano favorito la trasformazione in senso democratico. L'Italia iniziò a guardare verso quell'area solo quando anch'essa avviò una politica coloniale ed ambì a sedere nel consesso internazionale delle grandi potenze. Da allora guardò alla "quarta sponda", quando oramai Francia e Inghilterra erano padrone assolute della maggior parte dei territori appetibili di Africa, Asia, Medio oriente (Saiu 2005; Mammarella-Cacace 2010).

L'ultimo scorcio dell'Ottocento aveva già messo in risalto l'importanza del territorio armeno, un corridoio fondamentale fra est ed ovest, un'area strategica per chiunque ambisse ad esercitare un ruolo – politico ed economico-commerciale – in direzione dell'oriente; un "cuscinetto" naturale per evitare l'attrito fra Russia e Impero Ottomano, storici avversari che competevano per il controllo degli Stretti e delle vie di comunicazione verso l'area asiatica più ricca ed importante: Caucaso, Persia, Mesopotamia, Afghanistan.

L'Italia entrò in contatto con la realtà armena, con i problemi complessi di quell'area dopo la guerra russo-turca del 1877, allorché alla vigilia del Congresso di Berlino del 1878, la delegazione armena transitò da Roma, dove incontrò il nostro ministro degli Esteri, Luigi Corti. Da allora fu un crescendo che si manifestò con l'apertura di più consolati in Anatolia, ottimo punto di osservazione per l'Ambasciata italiana di Costantinopoli. E da allora, l'attenzione verso l'Armenia e la situazione di quel popolo alimentò l'interesse e l'attenzione da cui si sviluppò la catena di solidarietà che si attivò dopo i primi massacri del 1895. Un ruolo importante in tal senso ebbe anche un dettagliato documento redatto dal Console italiano ad Aleppo, Enrico Vitto, nel quale erano descritti fedelmente i massacri, pubblicato nel 1897 con lo pseudonimo Anatolio Latino (Manoukian 2014).

La diaspora armena iniziò allora e toccò molti paesi, in particolare si diresse verso gli Usa, destinazione comune a tante altre popolazioni che fornivano la manodopera necessaria che consentì a quel paese di avviare un processo di industrializzazione, di modernizzazione e sviluppo economico unici per velocità, efficienza e profondità. L'esodo armeno fu determinato dai massacri turchi a cui le grandi potenze assisterono inerti e gli stessi armeni non seppero opporre resistenza, tanto meno sviluppare un'azione preventiva anche a causa delle profonde differenze interne, oltre che per un sentimento di lealtà verso l'Impero che non avrebbe mai fatto immaginare simili misure. Le divisioni fra gli armeni erano marcate al punto che alla Conferenza di Versailles, dopo la Grande guerra, parteciparono due distinte delegazioni; ma di questo verremo a capo soffermandoci su alcuni aspetti particolari della storia armena, per indagare motivi e caratteri assunti dalla diaspora in Italia.

Dopo il conflitto russo-turco, la minoranza armena – considerata fedele e leale verso l'Impero tanto che in Turchia riferendosi all'Armenia si diceva "Nazione fedele" (Ternon 2003, 86) – chiedeva riforme in senso autonomista, sostenuta da Russia e Inghilterra, i cui fini erano naturalmente differenti. Queste avevano tutto l'interesse a vedere indebolito l'Impero, che dava segni di progressiva decadenza, per potersi appropriare delle aree considerate strategiche: il Caucaso per la Russia, con il Mar Nero e gli Stretti; la Mesopotamia per l'Inghilterra.

A Berlino la richiesta di una maggiore autonomia dell'Armenia fu presentata e discussa come un problema di autonomia regionale (Sisakian 1981, 26), dal momento che nemmeno i promotori della "Questione Armena" pensavano a staccarsi dall'Impero. Tuttavia, il sultano Hamid II (detto "il sanguinario") temeva che dalla semplice autonomia si passasse all'indipendenza, minando l'Impero,

per cui adottò un atteggiamento intransigente che diede argomenti ad alcune frange di armeni più radicali, residenti nelle regioni orientali, i quali – a differenza della maggioranza della popolazione – miravano all'indipendenza da un Impero violento e aggressivo, negatore delle componenti essenziali di una comunità nazionale: la lingua e la cultura.

2. Pensarsi come nazione. i primi massacri genocidiari

Sulla scorta di quanto era accaduto in Europa, specie nel corso del 1848, e poi dopo la guerra franco-prussiana e l'unificazione italiana, anche in nell'area caucasica armena attecchirono gli ideali nazionalitari indipendentistici, portati avanti da società segrete fondate per questo scopo. Nel 1885 veniva fondato il partito Armenakan, che si poneva l'obiettivo di raggiungere l'autogoverno per via rivoluzionaria. Due anni dopo fu la volta del partito, tuttora esistente, Hntčhakian[1], il quale non escludeva metodi terroristici e perseguiva l'indipendenza politica e nazionale cercando di penetrare anche fra le masse turche, senza però riuscirci grazie alle campagne panislamiche alimentate dal sultano. Nel 1890 fu la volta della Confederazione Rivoluzionaria Armena (Dashaktusfiuri), molto popolare per venti anni fra gli armeni, ispirata al socialismo, membro della Seconda Internazionale e partito dominatore nel biennio 1918-1920, durante l'indipendenza della prima Repubblica democratica armena. La caratteristica della Confederazione era appunto il pluralismo di partiti e movimenti raccolti sotto un'unica bandiera; ma nell'insieme la nascita di questi partiti dava alla questione armena nuove prospettive e nuovi strumenti. Il punto è che essi ebbero scarsa presa sia sulla popolazione armena, sia su quella turca che cercavano di "conquistare" operando una distinzione fra popolo turco e governo ottomano. La rinascita armena era alimentata soprattutto dalla borghesia della capitale, profondamente divisa dalle masse artigiane e contadine delle province. La situazione interna, da questo punto divista, era simile a quella caratterizzante il nostro Risorgimento, la cui conclusione fu possibile grazie alla convergenza di interesse fra la nostra borghesia settentrionale e le grandi potenze (Francia e Inghilterra) interessate ad avere in quell'area geopolitica di fondamentale importanza un paese unito, stabile politicamente e condizionabile, a vocazione agricola. Anche in Armenia la rinascita culturale precedette e preparò quella politica, che si orientò, dopo i primi massacri, verso la soluzione violenta, rivoluzionaria, per risolvere allo stesso tempo il problema della miseria e dell'indipendenza. E come in Italia, anche in Armenia la maturazione della borghesia nazionale avvenne all'ombra della massoneria francese. L'élite finanziaria e intellettuale armena di Costantinopoli era

[1] Fondato a Ginevra da studenti armeni era un partito socialista perché invocava la lotta di classe, e nazionalista perché reclamava l'indipendenza dell'Armenia dalla Turchia, unendo le "tre Armenie": quella russa, quella persiana e quella ottomana, facendone una Repubblica democratica e socialista.

raccolta nella loggia Ser[2], obbediente al Grande Oriente di Francia, e fu particolarmente attiva nel campo della cultura, a cui gli armeni tradizionalmente rivolgono grande attenzione e cura.

Nel 1895, il 30 settembre, il partito Hnčhak organizzò una manifestazione per reclamare l'applicazione delle riforme nelle province, così come si era stabilito a Berlino, assicurando le autorità che sarebbe stata una manifestazione pacifica. Il corteo intendeva consegnare «al gran Visir un memorandum in cui si denunciano i massacri degli armeni, le sevizie ai danni dei prigionieri, le estorsioni da parte dei curdi e la corruzione degli esattori, e si richiedono di conseguenza l'amnistia e delle riforme» (Ternon 2003, 105 e ss). Durante il corteo, uno studente uccise a colpi di pistola un maggiore di polizia che lo aveva colpito con la spada per impedirgli il passaggio e da lì si scatenò un vero piano messo a punto tempo prima. L'ordine era chiaro: non colpire tutti i cristiani, lasciare in pace i greci e colpire quanto più armeni fosse possibile. In città, tutto sommato le violenze furono contenute per l'intervento degli ambasciatori delle grandi potenze. Grazie a loro furono tolti gli assedi alle chiese dove si erano rifugiati gli armeni, ma nei vilayet, lontano da occhi indiscreti si consumarono orrendi massacri (Ternon 2003, 107-119).[3]

«I massacri d'Armenia costituiscono una misura amministrativa presa dalla Sublime Porta che non hanno altro movente e altro scopo che quello di rendere definitivamente ineseguibili per l'annientamento della nazione armena, le riforme chieste dalle grandi potenze» (Sisakian 1981, 28).

Le cifre turche parlarono di circa 80 mila morti mentre il Patriarcato armeno sostenne fossero circa 300 mila, a cui andavano aggiunte circa 100 mila donne rapite e deportate negli harem, 2500 villaggi distrutti, centinaia di conventi e chiese saccheggiate, demolite o convertite in moschee, 100 mila conversioni forzate e altrettanti esuli nella regione transcaucasica, 60 mila in Europa occidentale e Usa, circa 12 mila in Bulgaria. Tutti i loro averi furono confiscati. Questi massacri non sono considerati genocidio ma preparano quello che verrà portato a termine dopo venti anni (Ternon 2003, 123 ss.). Essi tuttavia erano parte di una campagna preordinata, tesa a perseguitare, massacrare, eliminare gli armeni, che avvenne in spregio a qualsiasi idea di diritti umani ma anche dell'accordo sottoscritto a Berlino nel 1878, secondo il quale alla Sublime Porta era imposta la garanzia della sicurezza degli armeni contro qualsiasi sopruso o violenza. La Russia, la Francia e l'Inghilterra, fra i firmatari del trattato, presentarono proteste formali ed inef-

[2] Loggia fondata nel 1866; Ser in armeno vuol dire amore. In Italia invece tale processo avvenne sotto la tutela e la guida della Loggia "Ausonia", antico nome originario di Italia, usato nei documenti e negli scritti dei fra' massoni.

[3] Su sollecitazione degli ambasciatori di Francia, Russia e Inghilterra, il Sultano firmò un pacchetto di concessioni per i Vilayet, un insieme di riforme di carattere autonomistico. Ma egli stesso nel corso degli ultimi anni aveva alimentato una campagna d'odio verso gli armeni, contro i quali furono aizzati i curdi. Questi insieme alle truppe obbedienti al sultano furono fra i protagonisti dei massacri. I Vilayet interessati erano Trebisonda Erzurum, Van, Harput, Dijarbakir, Sivas, Aleppo, Adana, Angora.

ficaci mentre si svolgeva la mattanza. In Francia fu Jean Jaures, allora deputato socialista, poi segretario del partito dal 1905, a cercare di portare all'attenzione del paese la grave sciagura degli armeni, e sollecitare i poteri pubblici, lo Stato, a fare qualcosa. Alla Camera pronunciò discorsi molto critici in cui stigmatizzava l'ipocrisia delle grandi potenze, che alla tutela delle minoranze perseguitate e dei diritti umani avevano anteposto i loro interessi economici. Nonostante potesse contare su documenti di prima mano, resoconti e analisi redatte dall'ambasciatore francese a Costantinopoli, Paul Cambon, le sue accuse ed in suoi inviti ad agire rimasero una testimonianza morale priva di effetti pratici[4] (Jaures 2015).

Nel frattempo era sorto il movimento dei "Giovani turchi" che si ispirava alla Giovine Italia e mirava a trasformare l'Impero autocratico del sultano in monarchia costituzionale, attuare riforme di carattere politico ed economico, liberare il paese dalla sudditanza economica verso le potenze occidentali. Il movimento era formato prevalentemente da giovani ufficiali, aveva carattere clandestino e una struttura militare. I suoi obiettivi di carattere liberal-democratico gli attirarono le simpatie della Confederazione Rivoluzionaria Armena, che offrì appoggio e collaborazione. Tuttavia i suoi militanti non colsero la predominanza di caratteri panturchi nel movimento, il nazionalismo esasperato con forti venature di turanismo[5] e quando i Giovani Turchi marciarono su Istanbul, il 22 luglio del 1908 e dopo un tentativo di reazione del sultano, nel 1909 lo deposero, gli armeni videro in loro una svolta epocale. Sembrava possibile concretizzare le riforme e avviarsi all'indipendenza, che come valore gli armeni vedevano ora condiviso e affermato nel movimento rivoluzionario turco. Al contrario di ciò che gli armeni immaginavano, la componente nazionalistica era predominante in assoluto e la loro ideologia rappresentava la base necessaria per realizzare il sogno di una Grande Turchia, che si manifestò con il massacro di circa 20 mila armeni nella provincia di Adana, del quale furono incolpati i residui elementi reazionari del vecchio regime.

Rispetto alla "questione armena", dunque, si rileva una continuità fra il Sultano Hamid e Mustafà Kemal con il suo partito "Unione e Progresso", che in una riunione segreta a Salonicco, nel 1911, fece propria la linea della "ottomanizzazione" di tutti i sudditi turchi, non per via pacifica ma con la forza delle armi. Il regno doveva essere islamico e nessun diritto di organizzazione sarebbe stato concesso alle altre popolazioni, poiché «decentralizzazione e autogoverno sono un tradimento al regno turco: le nazionalità costituiscono una quantità trascura-

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[4] Si tratta di tre discorsi pronunciati alla Camera il 3 novembre 1896, il 22 febbraio 1897 ed il 15 marzo 1897, nei quali il deputato socialista denuncia quanto accaduto in Anatolia, nell'indifferenza anche del suo paese. Si tratta di un documento importante perché allo stesso tempo in essi vi è la ricostruzione e dunque una precisa informazione di quanto accaduto, la denuncia dell'operato delle grandi potenze, l'interpretazione storica e politica sia dei fatti, sia del contesto geopolitico che l'ha determinato e, agli occhi dei grandi, reso accettabile.

[5] Tendenza nazionalistica esasperata, panturca, che deriva dall'ideologia sorta nell'area turco-ungherese e si estendeva in Asia centrale, Turchia, Caucaso che opponeva gli eredi di Turan a quelli di Ario, dei popoli germanici e indoeuropei.

bile. Esse possono mantenere la propria religione, ma non la lingua. La diffusione della lingua turca sarà uno dei mezzi principali per assicurare la supremazia islamica ed assimilare gli altri elementi» (Sisakian 1981, 29). L'ala più radicale guidata da Mehmed Pascia Taalat – uno dei protagonisti del genocidio, ministro dell'Interno dal 1913 al 1918 – non condivideva questo programma, considerato troppo benevolo, moderato e tollerante. Nel 1913 così egli compì un colpo di Stato con cui si introdusse una dittatura militare capeggiata da 3 Pascià: Taalat, Enver e Djemal, al potere fino alla fine della Prima guerra mondiale.

Una prima ondata migratoria si ebbe quindi dopo i massacri di fine Ottocento, sebbene il popolo armeno – al pari di tanti altri, all'epoca – fosse già soggetto ad una costante emigrazione. Motivi fra i più disparati e comuni, come il lavoro per migliorare le proprie condizioni di vita, motivi religiosi, di discriminazione etnica o religiosa, esilio politico. Per gli armeni l'"Italia è stata a lungo sia un territorio di transito, sia una meta dove soggiornare per perfezionare la propria formazione religiosa, la propria cultura, sia per commerciare. Le presenze armene non sono mai state rilevantissime ed una radiografia precisa di quelle temporanee e quelle trasformatisi in stabili è difficile da realizzare. Certamente l'Italia ha sempre avuto una notevole importanza dal punto di vista religioso, in quanto sede del cattolicesimo mondiale. I rapporti con Roma furono alla base di acuti contrasti all'interno della comunità cristiana armena, fra i favorevoli ad una totale fusione nella fede, nella prassi liturgica, nel rituale, e chi era contrario. L'abate Mechitar di Sebaste (1676-1749) aveva professato la necessità dell'unione della Chiesa armena con quella di Roma e in quanto "fautore dei latini" fu perseguitato dai turchi. Dopo un soggiorno nel Peloponneso, a Modon, allora possedimento veneziano, si fermò a Venezia nel 1715, dove gli venne concessa l'isola di San Lazzaro. La città lagunare era sede e meta di facoltosi commercianti armeni, fin dal Seicento. Commercio e religione erano i cardini che legavano l'Armenia all'Italia, dove in seguito alla controriforma il culto di San Gregorio Armeno era assurto a tale importanza da far diventare festa di precetto il giorno in cui si celebrava il santo. A Napoli sorge persino un quartiere dedicato a questi, celeberrimo perché ospita un mercatino dei presepi natalizi famoso in tutto il mondo.

Fin dal 1715, con la fondazione del Monastero Mechitarista sull'isola, questo diventò meta per molti giovani armeni, un luogo in cui incontrarsi, studiare, crescere, e arrivare a gradi di istruzione allora accessibili solo a pochissimi. Possiamo assumere come testimonianza del reciproco interesse fra chiesa di Roma e chiesa armena, il Pontificio Collegio armeno di Roma, fondato nel 1883 da Papa Leone XIII per formare sacerdoti armeni destinati a svolgere opera pastorale laddove vivevano famiglie armene di fede cattolica. Ad esso il Papa assegnò poi la chiesa di San Nicola da Tolentino (Macioti 2015, 320-322). D'altra parte il cardinale armeno-cattolico Hassunian aveva già promosso una comunità religiosa femminile, che prese avvio nel 1847 con la Congregazione delle Suore dell'Immacolata Concezione, impegnata fino al 1915 nell'apertura e gestione di «scuole e orfanotrofi nelle diverse località dell'Anatolia dove risiedono gli armeni». Dopo

il genocidio, queste strutture vennero abbandonate e nel 1922 la casa madre si spostò da Costantinopoli a Roma, punto di riferimento per la tradizione religiosa e culturale armena, che qui venne tenuta in vita (Manoukian 2014, 23).

Nella loro lunga tradizione di migranti/esuli, gli armeni affermano orgogliosamente che «le prime cose che un armeno costruisce in un paese sono la chiesa e la scuola. È la difesa della propria identità attraverso la religione e la cultura. […] Uno dei segreti dell'unità è proprio l'unità religiosa, ma non fanatica, e la difesa della cultura e del libro» (Sivazliyan 2000, 106; Aznavour 2004, 320-321).

Non solo Roma era meta di rifugiati, esuli, studiosi e studenti, religiosi e uomini d'affari armeni. A Milano si registrava una presenza significativa, e proprio in quella città si costituì nel 1912 una sezione italiana della Union Général Arménienne de Bienfaisance. Motore trainante della comunità era la famiglia di Garbis Dilsizian e i suoi fratelli, arrivati agli inizi del secolo con una importante attività di import-export. In questo settore gli armeni potevano vantare competenze e spirito dinamico, accompagnati ad una grande abilità nel costruire reti organizzative commerciali con il Medio oriente. (Manoukian 2014). Ma c'era anche Trieste, meta di molti armeni soprattutto nel '700 grazie al porto franco istituito dall'Imperatrice Maria Teresa d'Austria. Questa comunità si compenetrò nella società triestina in modo da rendere gradita, oltre che prestigiosa, la presenza armena. Costruirono un ospedale psichiatrico per la città, edifici nel "borgo armeno" (area di via dei Giustinelli, via Tigor), un Ginnasio Reale Commerciale di lingua italiana (il primo in città) nel collegio dei Mechitaristi (1859), una fabbrica di dolci orientali, quindi «il rinomato gabinetto ottico scientifico aperto da Vahe Zingirian e continuato poi dal figlio Giorgio fino al 2010 col nome di "Ottica Zingirian"» (Manoukian 2014, 28).

Tuttavia la vera migrazione di massa si ebbe con il genocidio, quindi dopo la guerra e in seguito all'assestamento della Russia rivoluzionaria che sovietizzò l'area caucasica.

3. Verso il genocidio

Il piano elaborato dal partito Unione e Progresso dei Giovani Turchi ebbe nella guerra la condizione ideale per essere realizzato e trasformare così gli sporadici massacri in piano risolutivo del "problema armeno": senza più armeni, niente questione armena. Dopo l'accordo dell'8 febbraio 1914 fra Impero Ottomano e Russia in cui si accettavano la creazione di due province armene in Anatolia con facoltà di istituire scuole armene, e si ammetteva l'uso della lingua armena nei tribunali e nell'Amministrazione pubblica, gli armeni diventarono sempre più "il" problema per i giovani turchi, l'ultima minoranza non musulmana presente sul territorio. La semplice presenza evocava il pericolo della frantumazione, un timore accentuato dalle particolari condizioni che viveva la Turchia in quegli anni: la Bosnia Erzegovina era stata annessa dall'Austria nel 1908, la Tripolitania

all'Italia, la Bulgaria era diventata indipendente, gli armeni tornavano sotto l'ombrello protettivo della Russia, certi che sotto il suo protettorato essi avrebbero finalmente trovato l'autonomia tanto desiderata. Le guerre balcaniche avevano manifestato, semmai ce ne fosse stato bisogno, il crescente interesse delle potenze occidentali in quell'area. La Francia otteneva diritti speciali in Siria e il riconoscimento dei suoi interessi nell'Anatolia occidentale ed in Armenia (accordo del 9 aprile 1914), la Germania vedeva riconosciuti i suoi interessi attorno alla ferrovia Anatolia-Baghdad, con una zona di influenza nella Turchia asiatica, l'Inghilterra accettava la costruzione della ferrovia di Baghdad fino a Basra da parte tedesca e in cambio otteneva il controllo sul Golfo Persico. La Russia cercava uno sbocco sul Mediterraneo, attraverso il controllo degli Stretti, e una frontiera sicura con l'Impero Ottomano nella regione transcaucasica. Da qui l'attenzione e l'interesse verso l'Armenia.

Gli imperialismi europei si preparavano dunque alla grande spartizione dello scricchiolante Impero Ottomano in fase di declino inarrestabile, pronto ad essere smembrato. La Turchia sembrava essere l'unica parte dell'Impero in grado di conservare i caratteri propri di uno stato nazionale forte militarmente ed economicamente, con una lunga tradizione alle spalle e il cemento unificante di un credo religioso vissuto come precetto quotidiano. Ma la Turchia temeva di non potersi identificare totalmente e completamente come nazione se non risolveva il problema delle minoranze, che «all'epoca costituivano la maggioranza dell'Impero Ottomano» (Ternon 2003, 13). Ai confini dell'Impero restavano ben due milioni di armeni che reclamavano le riforme promesse e non mantenute; una minoranza non integrabile – sebbene tradizionalmente leale e fedele al Sultano – che difendeva strenuamente la propria lingua, la sua religione, la cultura nazionale. Con lo scoppio della guerra, le frontiere vennero chiuse e le comunicazioni civili si fecero difficoltose ed inefficienti; tutto ciò messo in relazione al mito della purezza razziale dei Giovani Turchi, della grandezza nazionale e dell'indipendenza, alimentò la tensione e favorì il genocidio quale risoluzione alla radice della "questione armena". Fra la primavera del 1915 e l'autunno del 1916 il Partito Unione e Progresso elaborò e portò a compimento «un progetto di sterminio dei cittadini armeni dell'Impero Ottomano» camuffato da deportazione (Ternon 2003, 10).

Il 24 aprile 1915 iniziò la grande carneficina e solo un mese dopo l'Italia entrò in guerra avendo una "giusta causa" contro l'Impero Ottomano, che alimentò i sentimenti interventisti antiturchi e antitedeschi. Si svolse allora quello che oggi è riconosciuto, non ancora all'unanimità, il primo genocidio della storia; un massacro preordinato, pianificato, portato avanti con lucidità e consapevolezza, teso a cancellare un popolo[6]. Ci sembra che due testimonianze siano particolarmente degne di nota sia per via dell'impegno che i protagonisti, il Console italiano a Trebisonda e l'Ambasciatore statunitense, sollecitarono ai rispettivi paesi, sia per l'organizzazione della catena di solidarietà concreta che ne seguì, specie

[6] Sulla delicata questione della definizione di genocidio si rimanda a Y. Ternon, *Lo stato criminale*, op. cit., pp. 5-51.

a favore dei profughi rifugiatisi in Italia e negli Usa. L'Ambasciatore americano Henry Morgenthau, il quale etichettò i giovani turchi al potere come "una banda di gangster irresponsabili dediti al loro potere personale", definì le vicende di cui fu testimone "il più terribile episodio della storia del mondo". Nonostante il suo impegno e la sua influenza, egli non riuscì a condizionare l'operato dei giovani turchi né ad ottenere dalla Germania un diverso atteggiamento. Questa fu, secondo l'ambasciatore, direttamente coinvolta nell'organizzazione e esecuzione del piano genocidiario, dal momento che erano tedeschi i consiglieri militari e i metodi di deportazione utilizzati. La Germania aveva fatto esperienza di tali pratiche contro gli Herero, nell'attuale Namibia allora appartenente all'Impero guglielmino, fra il 1904 e il 1907. Nei confronti degli armeni perfezionò i metodi che saranno poi tragicamente sperimentati dal popolo ebraico e conosciuti dalla comunità internazionale. Però nemmeno il Dipartimento di Stato Usa ascoltò il suo ambasciatore e nel 1916 Morgenthau tornò in patria, dove sviluppò una costante attività a favore degli armeni, sia sotto forma di raccolta fondi e fornitura di una rete si supporto e di assistenza, sia favorendo la conservazione della memoria di quel popolo, della loro cultura e tradizioni (Morgenthau 2010)

Testimone di primaria importanza per l'Italia fu Giacomo Guerrini, Console italiano a Trebisonda dal 1911, il quale subito dopo la dichiarazione di guerra dell'Italia fu richiamato d'urgenza in patria, dove arrivò fortunosamente a Roma, il 25 agosto del 1915. Qui rilasciò un'intervista al quotidiano "Il Messaggero", dopo esser stato autorizzato dal Ministero, in cui raccontò i massacri di cui fu testimone. La sua intervista rappresentò fin d'allora un documento importantissimo che testimoniava stragi «"abilissimamente occultate dalle autorità e dai musulmani di Turchia"» (Manoukian 2014, 49). Da allora il Guerrini si impegnò come meglio poteva per la causa armena, fornendo concreto supporto ai profughi e redigendo il Memoriale che venne presentato dall'Italia, nel 1918, al Congresso della Pace. In seguito, la stampa dedicò crescente attenzione al problema armeno: cronache (in verità sempre di meno vista l'impossibilità di testimoniare direttamente) e analisi furono pubblicate da l'Avanti!, Il Corriere della Sera, L'Osservatore Romano, L'Italia. Questa produzione testimoniava l'impegno pro Armenia ma anche il senso di una mobilitazione collettiva contro i tedeschi e gli ottomani, nostri nemici, che tuttavia risultava insufficiente a fronte delle mostruosità in corso. Inoltre le esigenze belliche indussero a seguire con maggiore attenzione altri fronti, considerato che quanto accadeva in Armenia non poteva essere seguito direttamente a causa della censura ottomana, della inaccessibilità delle zone interessate e della segretezza con cui venivano effettuate i rastrellamenti, le deportazioni, i massacri. Ciò nonostante, le notizie che trapelarono crearono le condizioni per una convergenza fra «mondo culturale e politico italiano e gli armeni», basti pensare alla rivista "Armenia. Eco delle rivendicazioni armene", voluta da Zanotti Bianco e pubblicata a Torino fino al 1918. Diretta da Der Stepanian, questa registrò la collaborazione di esponenti della cultura italiana in appoggio alla causa armena; oppure si rammenti la nascita di comitati per sen-

sibilizzare i cittadini, a cui parteciparono intellettuali e politici, fra cui Gaetano Salvemini. Il periodico "Armenia" ebbe il plauso di Antonio Gramsci, che lamentando il silenzio che accompagnava i fatti d'Armenia, ne parlò come di esperienza seria perché un popolo per continuare ad esistere deve poter dire cos'è, cosa vuole e cosa vuole essere[7] (Gramsci 1972, 29-30).

4. Gli armeni in Italia

In Italia c'erano delle piccole comunità armene che abbiamo visto si erano insediate per motivi diversi, prima temporaneamente poi stabilmente. Costoro intendevano operare a favore dei propri connazionali stimolando e favorendo un moto di simpatia a favore della causa armena. Per fare ciò, accentuarono quelle forme di "buon vicinato" e disponibilità che erano caratteristiche della comunità armena verso il paese ospite. Così il ricco Garbis Dilsizian partecipò ed alimentò questo spirito teso ad avvicinare la comunità e lo stato ospite, istituendo 5 premi da 5.000 lire per onorare la memoria dell'aviatore Francesco Baracca, da assegnare a 5 piloti che avessero abbattuto 34 velivoli nemici. Gli armeni presenti nell'Associazione pro Armenia di Milano, invece, lanciarono una sottoscrizione a favore dei profughi friulani, mentre i primi profughi armeni che anticiparono il grande flusso degli anni Venti si presentarono come comunità intenzionata a interagire con i poteri locali. Costoro non avevano più niente alle spalle, non un governo con cui lo Stato ospite potesse dialogare, non una patria, non un'identità giuridica valida sul piano internazionale; per questo motivo essi avevano un estremo bisogno di essere accettati, perché erano davvero soli e non era rimasto loro nulla (Manoukian 2014, 48-52). L'Italia si mostrò accogliente e comprensiva quando le necessità della guerra rendevano necessario dichiarare indesiderati i cittadini dei paesi nemici. Gli armeni, in quanto cittadini dell'Impero Ottomano erano oggetto di tali provvedimenti, che avrebbero significato per loro tornare in Patria e andare verso morte sicura. Le autorità si prodigarono allora per consentire agli armeni ciò che non sarebbe stato possibile per altre nazionalità e attraverso un decreto Luogotenenziale, i sudditi dell'Impero Ottomano di nazionalità non turca furono autorizzati a rimanere. In questo periodo l'Italia fu effettivamente e concretamente vicina al popolo armeno, anche ai più alti livelli. Papa Benedetto XV[8] parlò a favore di un'Armenia indipendente mentre il mini-

[7] È un gran torto non essere conosciuti – scrive Gramsci. Vuol dire rimanere isolati, chiusi nel proprio dolore, senza possibilità di aiuti, di conforto. Per un popolo, per una razza, significa il lento dissolvimento, l'annientarsi progressivo di ogni vincolo internazionale, l'abbandono a se stessi inermi e miseri di fronte a chi non ha altra ragione che la spada e la coscienza di obbedire a un obbligo religioso distruggendo gli infedeli. (…) Esce da qualche mese una rassegna intitolata, appunto, "Armenia" che con serietà di intenti, con varietà di collaborazione dice cosa sia, cosa voglia e cosa dovrebbe diventare il popolo armeno (…).

[8] In merito all'impegno della Chiesa ed ai rapporti intrattenuti con la Sublime Porta per arrestare le violenze verso i cristiani in Armenia, oltre che per le vicende del genocidio, si rimanda

stro delle Finanze Filippo Meda propose con sano realismo una vera autonomia amministrativa sotto la sovranità di uno stato dominante e «la protezione di altri stati interessati». Per fornire assistenza diretta, specie ai profughi che cominciavano ad arrivare, Luigi Luzzatti – già presidente del Consiglio nel 1910-1911 – fu tra i fondatori, nel 1918, del Comitato Italiano per l'Indipendenza dell'Armenia a cui aderirono una ventina fra deputati, accademici, pubblicisti. In un accorato discorso alla Camera, Luzzatti criticò il silenzio che accompagnava quella tragedia, che definì "un massacro che non ha riscontro nella storia" (Manoukian 2014, 59). Il Governo elargì dei fondi che insieme a quelli forniti dal Vaticano vennero gestiti dall'Ordine dei Cavalieri di Malta per opere di assistenza ai profughi armeni. Vero motore della macchina organizzativa messa in moto a favore dell'Armenia fu però Zanotti Bianco, molto sensibile al problema delle nazionalità oppresse, una condizione questa che segnava la nostra storia di paese di recente unificazione ed indipendenza. Risolvere il problema delle nazionalità significava per lui realizzare l'emancipazione democratica dei paesi soggetti al controllo e al dominio delle grandi potenze e rendere più sicuro il mondo. Sulla base di questi convincimenti, e forte di una sensibilità spiccata sul tema e di una grande determinazione, Zanotti Bianco entrò in contatto con le minoranze albanesi di Calabria, si mobilitò a favore della Polonia, del Belgio, sulla questione adriatica. Insieme all'editore Battiato di Catania elaborò un piano editoriale per affermare il principio di nazionalità, e con questi ripubblicò nel 1916 "Scintille" di Nicolò Tommaseo, allegandovi una sua prefazione. Questo libro lo introdusse e lo appassionò alle questioni adriatica e armena, alle quali si era avvicinato a sua volta Tommaseo fra il 1841 e il 1843, quando aderì alla richiesta dei monaci armeni di Venezia di scrivere le prefazioni a due opere classiche della storiografia armena: La storia di Mosé Coronese (1841) e la Storia di Agatangelo (1843)[9]. Se Tommaseo delineava in questi scritti i caratteri che definiscono l'identità di un popolo e sottolineava il legame fra armeni ed europei, «il comune destino di indipendenza che i vari popoli del vecchio continente devono raggiungere, il riconoscimento dei reciproci diritti per la costruzione di un Mediterraneo pacificato», Zanotti Bianco metteva in relazione le ambizioni degli armeni e le aspirazioni italiane all'unità, il diritto dei popoli all'indipendenza (Grasso, 2016). Sempre nel 1916 Zanotti Bianco scrisse la prefazione al libro del celebre poeta armeno Hrand Nazariantz, esule in Italia, precisamente in Puglia, dal 1913, "L'Armenia e il suo martirio e le sue rivendicazioni", Battiato editore, in cui ripropose l'analogia fra il Piemonte risorgimentale e l'Armenia.

Nel frattempo, dopo i successi russi sul fronte sud, gli armeni rimasti in patria tornarono a sperare in un'Armenia indipendente; molti rientrarono nelle loro terre liberate dai russi dal giogo turco e per un breve periodo vissero l'esperienza di una repubblica democratica indipendente, così come recitava un decreto fir-

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qui a F. Giansoldati, *La marcia senza ritorno. Il genocidio armeno*, Salerno Editore, Roma 2015.

[9] Storiografo del V secolo che raccontò la conversione degli armeni al cristianesimo.

mato da Lenin e Stalin nel gennaio 1918. Tuttavia le sorti della guerra costrinsero il governo bolscevico a siglare il trattato di Brest Litovsk con il quale la Russia subiva significative amputazioni territoriali e restituiva all'Impero Ottomano Kars, Ardhan e Batumi. Da ciò conseguì una migrazione di massa, circa 200 mila armeni che lasciavano i territori tornati alla Turchia, provati dalle malattie e dagli stenti, a cui si sommavano circa 40 mila orfani. Gli aiuti americani furono provvidenziali e decisivi, a fronte di quelli russi di minore entità che manifestavano tuttavia impegno e buona volontà.

La Repubblica democratica di Armenia, abbandonata ora dalla Russia e in guerra con l'Impero ottomano si arrese e siglò con esso il trattato di Batumi con il quale cedeva un territorio (Caucaso sud occidentale) abitato da circa 1,250 milioni di anime, in maggioranza armene. Mentre in Europa la guerra era finita davvero, a oriente la situazione era ancora di grande confusione, con le potenze intente a raccogliere quanti più possibili risultati positivi dal progressivo sgretolamento dell'Impero, minato dall'interno dai nazionalisti di Mustafà Kemal, sempre più forte e popolare, e dall'esterno dall'azione dei paesi dell'Intesa. La Russia nonostante fosse alle prese con gravissimi problemi quali la guerra civile, gli eserciti bianchi coadiuvati dagli alleati, aveva necessità di affrontare e risolvere la questione del Caucaso, regione di fondamentale importanza. E solo due anni dopo, nel 1920 chiuse la partita e la repubblica democratica di Armenia diventò Repubblica socialista sovietica.

Nel frattempo si consumava la tragedia greca, che, questa sì, produsse un nuovo esodo. Il trattato di Sèvres (1920) prevedeva uno stato armeno indipendente e ridusse l'impero ottomano alla pianura anatolica, attribuendo alla Francia ampie zone di influenza, mentre la Grecia otteneva Adrianopoli e Smirne, consentendole di realizzare la "Grande idea", cioè uno stato unitario ellenico popolato da tutti i membri di etnia greca, avente per capitale Costantinopoli e non più Atene. Entrati a Smirne, dopo esser stati autorizzati da Inghilterra e Francia, i greci si abbandonarono a massacri di turchi e ciò accentuò e risvegliò il nazionalismo turco in quell'area, in un modo che i potenti non avevano previsto. I turchi di Mustafà Kemal riconquistarono i territori persi e si distinsero anche in questo caso per la crudeltà di trattamento verso i nemici, in particolare i greci di Smirne, dopo che interi quartieri furono dati alle fiamme. Dopo aver sconfitto la Grecia, la pace fu siglata a Losanna fra Turchia, Inghilterra, Francia, Italia, e Russia sovietica. Il capitolo più delicato, per quanto riguarda il tema qui trattato, riguardava la questione armena, che uscì dalle agende internazionali, facendo del trattato di Sévres carta straccia. A Losanna non si citò nemmeno la "questione armena" e quello che era stato definito "focolare nazionale" diventò "aspirazioni tradizionali degli armeni alla costruzione di un focolare nazionale". Il sapore di questa definizione era così spiccatamente anti armeno che l'Associazione Near East Relief (Usa) fece pressioni per non ratificare il trattato (Salvatorelli, 1976). Durante le fasi finali della guerra e subito dopo, fatta eccezione per i fatti di Smirne, l'attenzione della stampa verso gli armeni era diminuita notevolmente. Ma presto tornò sugli

altari, quando il 5 dicembre del 1921 a Roma fu assassinato Said Halim Pascia, gran Visir ottomano, ad opera di un rivoluzionario armeno della Federazione Rivoluzionaria Armena che lo accusava di aver avuto un ruolo importante nel genocidio (Manoukian 2014).

Con la fine della guerra si inaugura quella che potrei definire la seconda fase della diaspora armena in Italia e della politica dell'attenzione verso questo popolo e le sue problematiche. In diverse località del paese erano sorti comitati a favore dell'Armenia indipendente: a Bologna, a Roma presso l'Istituto coloniale italiano; a Firenze si tenne una manifestazione (29 settembre 1918) e poco dopo a Roma un convegno (31 ottobre).

In occasione della guerra greco-turca (1919-1922) cui abbiamo già fatto cenno, seguì una nuova ondata migratoria, di fronte alla quale Zanotti Bianco progettò l'accoglienza dei profughi la cui organizzazione fu curata dall'ANIMI[10] e in tal senso iniziò un'opera di sensibilizzazione verso la città di Bari. Organizzò un concerto del violoncellista russo Alexandr Barjansky per raccogliere fondi, così come aveva fatto per la Polonia con il concerto del famoso pianista Miecio Horzowosky a Taranto, alla fine del 1921. (Grasso 2016). Il poeta Nazariantz, oramai in Italia da un decennio, favorì l'arrivo a Bari di intere famiglie armene in fuga. In città prese contatto con i due soci del locale lanificio, l'ingegner Lorenzo Valerio e Scipione Scorcia, per avviare una produzione di tappeti orientali utilizzando manodopera armena proveniente dai campi profughi del vicino oriente. Insieme essi formarono la "Società italo-armena di tappeti orientali" e attraverso un poeta rifugiato armeno fecero arrivare un centinaio di armeni. Zanotti Bianco era in contatto con Nazariantz e grazie a Salvemini entrò in contatto con ambienti inglesi, in particolare «con l'Arcivescovo di Gibilterra Harold Jocelyn Buxton. «Il religioso svolgeva in quel momento la funzione di segretario onorario dell'American Fund, nato per tutelare i profughi armeni e favorire il loro insediamento nella Repubblica di Armenia della Russia caucasica» (Grasso 2016, 79-80). Gli armeni giunti in Puglia, abili tessitori ma provati da terribili esperienze di vita e da indicibili disagi, ricevettero una sistemazione precaria, insalubre, all'interno della fabbrica, tanto che ci fu chi progettò di tornare nei campi profughi in Grecia. Zanotti Bianco si mobilitò allora per recuperare i fondi necessari per non far fallire quel progetto che egli vedeva come un'esperienza da diffondere, un simbolo oltre che una risposta pratica alla domanda su quale sistema di integrazione adottare. Così recuperò dei fondi grazie ad una delle associazioni pro Armenia, poi fece pressioni su Luzzatti, da sempre sensibile alla questione e grazie al suo intervento ottennero dal governo italiano sei padiglioni Docker[11] ricevuti dalla Germania in conto riparazioni di guerra, provvisti di acqua corrente ed energia elettrica, sul modello di quelli già utilizzati dall'ANIMI per allestire delle scuole in Calabria. I padiglioni furono disposti su due file parallele all'interno di un'area

[10] Associazione Nazionale per gli Interessi del Mezzogiorno d'Italia.

[11] Container di legno.

concessa per tale scopo, in modo da allestire un villaggio. Ad essi si aggiunse un edificio centrale, costruito per farne una scuola, l'infermeria, la biblioteca, quindi una chiesa, costituendo così davvero un villaggio su una estensione di circa settemila mq. in un uliveto a circa mezzo chilometro dalla fabbrica di tappeti. Fra i servizi comuni c'erano lavanderia, forno, cucina e bagni, ripostigli. La gestione fu opera dell'ANIMI, all'insegna dell'accoglienza e dell'integrazione, con particolare attenzione allo studio della lingua armena, delle tradizioni nazionali per non disperdere un patrimonio prezioso, quali sono questi elementi, per ogni popolo. La Puglia confermava così la sua consuetudine con l'accoglienza, l'antico legame con l'Adriatico, le coste e l'entroterra dall'altra parte del mare (Nienhaus, Mugnolo 2013). Con il villaggio battezzato Nor Arax (il nuovo Arax, fiume simbolo dell'Armenia) la Puglia, Bari in particolare, acquistavano il carattere di testa di ponte con l'Oriente (di Crollalanza, 1926)[12]. In Italia intanto si era affermato il fascismo e l'Armenia fu anche uno strumento del Regime per riaffermare la sua idea di Nazione, il valore del senso di appartenenza alla Patria, sebbene in seguito non agì per facilitare questa esperienza. La rivista Oriente Moderno ospitò articoli in cui si metteva in risalto la compassione di Mussolini nei riguardi degli armeni, nei quali rivedeva le vicissitudini vissute dal nostro pase, sotto la tirannia dello straniero[13]. Si pubblicizzava con enfasi l'impegno concreto a favore dei profughi, per i quali il governo elargì la somma di ben dieci milioni di lire, dopo l'occupazione di Corfù, a favore delle folte comunità di profughi greci e armeni lì presenti e degli orfani armeni ospiti a Milano, Torino, Venezia. Inoltre – informava la rivista – con quei fondi erano stati costruiti due villaggi vicino Atene, rispettivamente di 56 e 57 case coloniche più un edificio adibito a scuola, nonché un ospedale da 40 posti nel villaggio di Janitza Vardar[14].

A Bari Zanotti Bianco organizzò poi mostre mercato per la vendita dei tappeti, che registrarono fra gli acquirenti Pirandello, Giovanni Gentile, Giustino Fortunato; quindi pensò di trasferire a Bari l'orfanotrofio armeno Pio XI di Torino, ma a causa dei costi elevati e della ostilità del regime l'operazione non andò in porto. Nonostante questo impegno disinteressato, l'opera di Zanotti Bianco incorse in una spiacevole polemica sulla stampa, alimentata da un giornalista armeno, il quale denunciò lo sfruttamento degli armeni nel villaggio, che, occorre precisare, non riuscì mai a raggiungere l'autonomia economica, l'autosostentamento, ma ebbe bisogno costante degli aiuti, privati e pubblici. Nonostante le difficoltà, l'esperienza di Nor Arax continuò fino agli anni Ottanta, ed oggi potrebbe essere un interessante stimolo di discussione nonché un valido esempio su come affrontare una nuova ondata migratoria che sta alimentando paure e spettri che vicende come quella qui narrata sembravano aver definitivamente sconfitto.

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[12] Araldo di Crollalanza, Bari lenisce il tormento di un popolo disperso, in "La Gazzetta di Puglia", 15 giugno 1926.

[13] Vedi "Oriente Moderno", Caucaso e Armenia, a. 3, n.7, 1923, pp.438-442 in www.jstor.org/org/stable.

[14] Vedi "Oriente Moderno", a. 6, n.9, 1926, pp.465-468 in www.jstor.org/org/stable.

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La fuga dall'Ungheria nel 1956: le cause e i primi interventi internazionali a sostegno dei profughi

CESARE LA MANTIA[*]

1. Lo scenario internazionale

Il panorama internazionale del 1956 era denso di importanti avvenimenti suscettibili di influenzare, in misura differente, la tentata rivoluzione ungherese dell'ottobre-novembre di quell'anno. Le proteste con disordini in Germania orientale, sedate dall'intervento militare sovietico del 1953, e gli scioperi polacchi di Poznań del giugno 1956, stroncati dai carri dell'esercito polacco su pressione di Mosca, dimostravano quanto superficiale potesse essere la definizione di "blocco" intesa come una struttura salda e omogenea riferita alla vasta area d'influenza destinata all'Urss dopo la II g. m. Un "blocco" per la cui coesione furono nel tempo necessari continui interventi, diretti o meno, ai quali Leonid Il'ič Brežnev avrebbe dato una giustificazione ideologica e teorica con la definizione di quella che in Occidente sarà conosciuta come "dottrina Brežnev" o della sovranità limitata. Questa dottrina era costituita da un insieme di principi che riconoscevano la liceità di vie nazionali al socialismo, il ruolo di tutore e il diritto-dovere dell'Urss a intervenire anche militarmente se le vie nazionali avessero deviato da quella del socialismo e avessero recato pericolo agli alleati (Graziosi 2008, 356-357). Il Segretario del PCUS dichiarò che il deviazionismo verso il capitali-

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smo sarebbe stato un problema di tutti i paesi socialisti e non solo di quelli dove il fenomeno si fosse presentato, davanti ai delegati del V congresso del Partito Operaio Unificato Polacco il 13 novembre 1968, dopo il soffocamento mediante intervento armato nell'agosto precedente della "primavera di Praga."

Il generale Dwight (Ike) Eisenhower, appartenente al Partito repubblicano e successo nel 1953 alla presidenza degli Stati Uniti al democratico Harry Truman, continuava una politica estera verso l'Unione Sovietica improntata al "rollback", al contrasto attivo cioè dell'ex alleata, con l'aggiunta di elementi appartenenti alla strategia del "containment" della potenza sovietica tipica della presidenza Truman (Gaddis 2007). Espressione di tale politica fu il rifiuto di Washington alla proposta di Mosca di stipulare un patto di non aggressione e la dichiarazione d'interesse alla tutela dell'integrità e indipendenza di tutti i Paesi del Medio Oriente (Bowie e Immerman 2000; Takeyh 2000).

I Paesi europei vincitori del II conflitto mondiale vivevano un veloce e definitivo crepuscolo del loro rango di grandi stati con interessi planetari testimoniato dalla progressiva perdita dei rispettivi imperi coloniali. Francia e Regno Unito stavano trasformandosi in potenze regionali la cui capacità di imporre la propria volontà in campo internazionale sarebbe dipesa, sempre più, dal sostegno degli Stati Uniti. La perenne crisi mediorientale, il cui culmine fu raggiunto negli stessi giorni della rivolta ungherese, dimostrò il ridimensionamento della forza francese e britannica. L'Egitto di Nasser il 26 luglio 1956 nazionalizzò il canale di Suez e chiese nello scontro createsi con la Francia, il Regno Unito e gli Stati Uniti contrari alla nazionalizzazione, il sostegno dell'Unione Sovietica dalla quale l'anno precedente aveva ricevuto un ingente quantitativo di armi (Kissinger 1996). L'evoluzione della crisi portò ad un attacco israeliano in direzione del canale e all'occupazione anglo-francese dell'area di Porto Said, seguita dall'affondamento egiziano di proprie navi nel canale per bloccarlo. L'Unione Sovietica lanciò un ultimatum a Tel Aviv, Parigi e Londra minacciando il ricorso alle armi atomiche. La risposta del principale alleato delle potenze europee fu tale da indurle a cessare l'avventurosa operazione. La Casa Bianca pose in stato d'allarme le proprie forze armate e consigliò gli alleati europei di rinunciare al confronto con Mosca che, in caso di ulteriori peggioramenti, avrebbero dovuto affrontare da soli. Antony Eden e Guy Mollet, capi dei governi britannico e francese, si trovarono isolati e dovettero accettare la proposta di cessate il fuoco, entrata in vigore l'8 novembre 1956 nelle giornate più calde della crisi ungherese (Cacace 2004, 49), sottolineando l'impossibilità di Parigi e Londra di giocare da soli, senza il sostegno statunitense, un ruolo di attiva opposizione contro i sovietici. Nel mondo tendenzialmente bipolare nato dal conflitto, nelle due alleanze politico-militari contrapposte, la NATO e il Patto di Varsavia, l'alleato principale di ognuna di esse, gli Stati Uniti e l'Unione Sovietica, più il secondo che il primo, era in grado di esercitare sulla conduzione degli affari interni e sulla politica estera degli altri attori del sistema una influenza così forte, esercitata in maniera spesso segreta, da poter azzardare l'esistenza di una sovranità limitata da parte di questi ultimi.

Un potere di condizionamento che nel sistema occidentale avrebbe, ad esempio, portato alla ferma opposizione statunitense all'eventuale partecipazione dei partiti di sinistra al governo italiano e in quello orientale ad un interventismo anche armato nei paesi alleati suscettibili di mettere in pericolo il ruolo dominante del partito e del governo comunista e di alterare il quadro strategico dell'Europa orientale favorevole all'Urss.

All'interno del sistema europeo-orientale i vincoli tra gli attori e la potenza leader erano resi più forti dalla comune matrice ideologica, il marxismo-leninismo nell'interpretazione staliniana, dalla formazione politica a Mosca della maggior parte dei componenti le élite dei vari partiti comunisti al potere e, fatto non secondario, dalla loro sopravvivenza alle purghe staliniane. In misura differente, i segretari e i dirigenti delle neo nate democrazie popolari dell'est Europa avevano creato delle forme di governo ispirate al modello staliniano, replicando anche in versione ridotta, ma non meno efficace, il controllo sulla popolazione con ben organizzati e duri apparati repressivi. Rafforzarono il consenso, in parte già presente nelle rispettive popolazioni, utilizzando anche il culto della personalità senza comunque arrivare alla perfezione sovietica del periodo staliniano (Chlevnjuk 2016). Non responsabile e spogliato degli aspetti peggiori dell'esercizio del suo potere come errori, risultati negativi, crudeli autoritarismi, il leader era rivestito solo delle sembianze del successo. La violenza diventava necessaria, giustificata. I fallimenti erano attribuiti a complotti e servivano anzi a dimostrare come la strada intrapresa fosse quella giusta data la presenza sul suo percorso di tante cospirazioni. All'Unione Sovietica era riconosciuta la legittimità del ruolo di guida all'interno del sistema europeo-orientale ed era, in ogni suo aspetto, il modello politico-economico al quale ispirarsi.

2. L'Ungheria comunista

Tra le democrazie popolari est europee l'unica ad aver vissuto l'esperienza di un governo di stampo bolscevico era stata proprio l'Ungheria. La Repubblica dei Consigli di Béla Kun (Fornaro 2006), aveva avuto vita breve (marzo-agosto 1919) e fallimentare (Romanelli 1964). Pesarono sull'insuccesso gli errori commessi e l'esistenza di sfavorevoli circostanze internazionali, diventate invece, nel secondo dopo guerra, favorevoli all'instaurazione di un governo comunista. Grazie allo stretto rapporto con la Germania nazista e l'Italia fascista, l'Ungheria del reggente ammiraglio Horthy, con i due arbitrati di Vienna (2 novembre 1938 e 30 agosto 1940), aveva risolto a proprio vantaggio l'annosa questione transilvana con la Romania. Il prezzo pagato fu una progressiva subordinazione agli interessi di Berlino a cui concesse nel settembre 1940 il permesso al transito delle truppe in direzione della Romania. L'adesione al Patto Tripartito del novembre successivo condizionò definitivamente in senso sempre meno neutralista la politica estera e interna ungherese in direzione di una completa alleanza anche

militare con la Germania nazista e le potenze ad essa legate con le quali nel giugno 1941 l'Ungheria intervenne contro l'Urss. Le forze ungheresi condivisero la sorte di quelle italo-tedesche e dopo le vittorie iniziali due terzi della Seconda Armata, forte in origine di 200.000 uomini, rimasero sul campo nella regione di Voronež. Il fallimento del 9 settembre 1943 di un tentativo di armistizio con gli Alleati e le decisioni della conferenza di Teheran (28 novembre-1 dicembre 1943) lasciarono ai sovietici il compito di liberare l'area danubiano-balcanica. Per evitare probabilmente quanto accaduto in Italia, Hitler ordinò l'esecuzione a fine marzo 1944 della "operazione Margherita" il piano di occupazione militare del territorio ungherese. Con i nazisti in casa e l'Armata Rossa in continua e devastante avanzata la popolazione ungherese visse un periodo terribile sotto il governo del filo nazista Ferenc Szálasi, capo e fondatore del Partito delle croci frecciate nato dalle ceneri del Partito della volontà nazionale, nel corso del quale crebbe anche la deportazione di ebrei e rom nei campi di sterminio. L'Ungheria aveva subito ingenti perdite in quattro anni di guerra. Le vie di comunicazione, strade e ponti erano state nella maggior parte danneggiate o distrutte. I trasporti ferroviari avevano patito un doppio deterioramento causato dal sequestro della maggior parte del materiale rotabile e dalla distruzione di circa il 40% dei binari. La perdita per l'intera economia ungherese era stata cinque volte superiore al reddito nazionale del 1938. Al governo provvisorio di larga coalizione del generale Béla Miklós spettava un compito enorme. Tra il 20 gennaio 1945, firma dell'armistizio a Mosca con gli Alleati, e il 20 agosto 1949, avvenne la progressiva trasformazione dell'Ungheria monarchica, ma priva di un re dai tempi di Carlo I d'Asburgo e governata da un reggente fino alla fine della II g. m., in una "democrazia popolare". Si gettarono le basi in questo periodo della futura crisi del 1956 e della conseguente fuga di migliaia di ungheresi verso l'Occidente. Nelle elezioni del 4 novembre 1945, a suffragio universale e senza limitazioni dovute al censo e al grado d'istruzione, il Magyar Kommunista Párt (=MKP), Partito comunista ungherese, ottenne il 16,9 % con 70 seggi giungendo terzo nella competizione elettorale preceduto dal Partito indipendente dei piccoli proprietari Független Kisgazdapárt (=FKGP) con 245 seggi pari al 57 % dei voti e dal Partito socialdemocratico Magyar Szociáldemokrata Párt (=MSDP) con il 17,4 % dei voti e 69 seggi (Fornaro 2006, 143-157). Nella consultazione che si sarebbe svolta il 15 maggio 1949, il MKP che con il Partito socialdemocratico avrebbe dato vita il 12 giugno 1948 al Magyar Dolgozók Pártja (=MDP), Partito dei lavoratori ungheresi, ottenne una schiacciante vittoria conquistando il 70% dei seggi dell'Assemblea nazionale. In meno di quattro anni i comunisti ungheresi erano diventati forza di maggioranza. Il modo in cui ciò avvenne può aiutare a comprendere le premesse, le cause interne della tentata rivoluzione del 1956. Tra i Paesi dell'Europa orientale in procinto di diventare repubbliche popolari furono molti gli elementi in comune nella strategia dei vari partiti comunisti; uno di questi fu il ruolo giocato dallo stazionamento sul proprio territorio dell'Armata Rossa. Gli unici Paesi privi di tale ingombrante presenza erano la Jugoslavia titina e l'Albania. In

Ungheria il rappresentante della Commissione alleata di controllo era il maresciallo sovietico Kliment Efremovič Vorošilov, nel quale le doti politiche e l'essere un fedele staliniano erano superiori alle competenze militari. Il rapporto dei vari partiti comunisti con le forze sovietiche era certamente privilegiato anche se di converso erano da queste controllate. La cautela con la quale inizialmente i comunisti dell'Europa orientale si mossero fu voluta da Mosca in attesa di un rasserenamento della situazione internazionale e di una definizione dei rapporti con gli, ancora per poco, alleati. Tale contesto favorevole valorizzò e rese più efficace la tattica del MKP. Sin dall'inizio dell'attività dell'Assemblea nazionale e del Governo nel dicembre 1944 i comunisti presenti, 90 su 230 seggi e due ministri su undici, approntarono la propria azione alla massima collaborazione con le altre forze governative. L'organizzazione e direzione della polizia segreta incaricata di dare la caccia ai responsabili di crimini di guerra e contro la popolazione fu affidata ad un dirigente comunista, Gábor Péter. Furono catturati e nella maggior parte dei casi condannati a morte molti dei politici compromessi con il nazismo e responsabili delle violenze contro la popolazione, in particolare ebraica e rom, nell'anno di occupazione tedesca. La Államvédelmi Osztály (=ÁVO), Sezione per la sicurezza dello Stato, diventata nel settembre 1948 Államvédelmi Hatóság (=ÁVH), Autorità per la sicurezza dello Stato, sarebbe stata uno degli strumenti utilizzati per perseguitare le forze politiche contrarie al MKP e per rafforzare la corrente maggioritaria del regime dopo la conquista del potere. La violenza degli interventi avrebbe provocato nella popolazione un forte risentimento che avrebbe trovato sfogo durante gli scontri del '56. A complicare il cammino verso la conquista del potere fu la riforma agraria fatta dal governo provvisorio e promulgata il 17 marzo 1945, quando la guerra non era ancora finita sul fronte occidentale. Tra i suoi autori ci fu anche Imre Nagy, protagonista politico della tentata rivoluzione del '56.

La questione agraria costituiva uno dei punti ancora irrisolti della società europea orientale e i governi intervennero nella direzione a suo tempo presa dalla Russia bolscevica. Fu decisa la confisca dei beni degli appartenenti al precedente regime, provvedimento preso anche dagli altri stati dell'est Europa. Furono espropriate le proprietà eccedenti le 570 ha., ai cui possessori fu concesso di mantenere un massimo di 57 ha. Alla Chiesa furono espropriate il 90% delle terre, pari a circa 45.000.000 ha. Dei circa tre milioni di ettari incamerati dallo Stato due terzi furono distribuiti ai nuovi proprietari. Il rimanente servì al governo per creare cooperative statali. Il risultato di ciò fu una profonda trasformazione agraria e la nascita di una grande massa di piccoli e medi proprietari il cui consenso si riversò in minima parte sul MKP e in massima parte sul FKGP. Vorošilov e il MKP mantennero un atteggiamento calmo nei confronti delle conseguenze della riforma poiché le questioni in sospeso, la scelta della forma istituzionale dello stato fatta in senso repubblicano il 1°febbraio '46 e la firma del trattato di pace avvenuta il 10 febbraio '47 consigliavano di muoversi con prudenza all'interno e nel contesto internazionale. Il trattato di pace riconfermava per quanto riguardava i

confini quello di Trianon e dava a Mosca la possibilità di mantenere militari in Ungheria a tutela dei propri interessi strategici. Dopo le elezioni il MKP ebbe il Ministero degli interni e mantenne il controllo sull'ÁVO il cui valore strategico, ai fini della conquista del potere, fu aumentato dalla presenza dei soldati dell'Armata Rossa. Il MKP mise in atto una condotta conosciuta come "szalámitaktika", tattica del salame, all'interno di una strategia di continua erosione e superamento a sinistra delle varie anime costitutive della sinistra politica ungherese. Fu fondamentale creare un blocco minoritario, ma comunque coeso, di forze le quali si riconoscevano pur con delle differenze in un aumento della politica di nazionalizzazione e della collaborazione con l'Urss. Il blocco cominciò a dialogare con le forze minoritarie presenti negli altri partiti con posizioni in forte contrasto con la corrente di maggioranza, provocando scissioni ed una costante erosione dell'opposizione agevolata dall'allontanamento dalle cariche pubbliche e dalla negazione del diritto di voto, spesso seguita dall'arresto, di chi ad esso si opponesse. A quella parte di ricchi latifondisti ungheresi, anche non collusi con il regime filo-nazista, in fuga nei primi mesi del II dopo guerra verso occidente si aggiunsero i nuovi profughi degli anni 1947-50 non quantificabili come numero, ma identificabili in politici, non soltanto di primo piano, non comunisti. Il dato da sottolineare è quello delle elezioni dell'agosto 1947 nel corso delle quali il MKP ottenne il 22,2 %, ma il FKGP raccolse, nonostante il successo della tattica del salame, il 15,4% dei consensi in un panorama politico frantumato nel quale una forza unita come il MKP con il sostegno della potenza occupante, l'Urss, diventava progressivamente il partito più forte. Lo scenario internazionale nel frattempo evolveva verso un rafforzamento dei governi comunisti nell'est Europa e della indiscussa leadership dell'Urss nell'area. La politica estera ungherese aveva ormai come riferimento l'area comunista nonostante la presenza di un dissenso interno ancora forte, ma in via di progressivo spegnimento. Il 18 febbraio 1948 a Mosca la delegazione di Budapest, in cui era presente in qualità di Vice Presidente del consiglio il comunista staliniano Mátyás Rákosi, si uniformò a quanto avevano o avrebbero entro breve tempo fatto gli altri Stati europei comunisti e firmò un trattato di amicizia, collaborazione e mutua assistenza con l'Urss di Stalin. Il posizionamento ungherese si completò con la rinuncia al "piano Marshall", voluta dall'alleato moscovita e l'adesione al COMECON il gennaio successivo. L'occupazione delle istituzioni statali procedeva spedita e senza scrupoli nell'eliminazione degli oppositori. Il MKP assorbì il Partito socialdemocratico e mutò la propria denominazione in Magyar Dolgozók Pártja (=MDP), Partito dei lavoratori ungheresi, ed ebbe come Segretario dal 12 giugno 1948 Rákosi. Il 15 maggio 1949, presentandosi a capo di una coalizione denominata Magyar Függetlenségi Népfront, Fronte popolare d'indipendenza ungherese, il MDP vinse finalmente le elezioni, ottenne la maggioranza dei seggi all'Assemblea nazionale e la delegazione più numerosa, undici su quindici, al governo. Il programma con cui il Fronte e il MDP ottennero il successo in un contesto di mancanza di partiti concorrenti si basava sulla edificazione del socialismo in Ungheria. I sei anni che

sarebbero trascorsi prima dello scoppio della tentata rivoluzione e dell'inizio della fuga dallo stato magiaro furono decisivi per gettare le basi del consolidamento e dello sviluppo dell'Ungheria comunista e per creare quei presupposti interni alla rivolta del '56. Rákosi si mosse lungo più direzioni. Il 20 agosto 1949 fu approvata una nuova Costituzione sul modello di quella sovietica del 1936 e lo Stato assunse la denominazione di Repubblica popolare ungherese, Magyar Népköztársaság. Sotto il profilo personale e della stabilizzazione del potere adoperò metodi staliniani e diede vita ad un periodo di feroci purghe dentro il partito contro chiunque non condividesse il suo pensiero e l'impostazione filo sovietica della sua politica; furono molte le condanne con l'accusa di titoismo e spionaggio a favore dell'Occidente. Esercitò tramite l'ÁVH e le sue migliaia di agenti un rigido controllo sulla popolazione. Nel febbraio 1949 il primate cattolico cardinal József Mindszenty fu arrestato e condannato all'ergastolo. I processi seguivano lo stile sovietico basato su costruzione di false prove, iniziale difesa dell'imputato e successiva piena confessione con ammissione di tutti i capi d'accusa. La durezza del regime instaurato da Rákosi fu seconda a quella staliniana soltanto per il minor numero di vittime provocato, da valutare, però, in proporzione alla popolazione ungherese notevolmente inferiore della sovietica. La violenza organizzata come strumento di controllo politico del periodo rakosiano spiega la durezza dei rivoltosi del '56 contro gli agenti dell'ÁVH, i suoi collaboratori e i sospettati di esserlo. Anche per il Segretario del partito comunista ungherese, fu celebrato un culto della personalità teso a magnificare la figura di un uomo che dal 14 agosto 1952 al 4 luglio 1953 avrebbe unito alla carica di Segretario del MDP quella di Presidente del consiglio dei ministri e di Presidente del comitato di difesa dello Stato, l'organo responsabile dell'ÁVH. In una struttura statale in cui il MDP aveva soppiantato organi e funzioni dello stato, Rákosi era il vertice. Sotto il profilo economico la spinta verso il modello sovietico fu molto forte. Pianificazione quinquennale, massiccia preferenza per l'industria pesante a discapito dell'agricoltura e del settore di produzione di beni e servizi divennero la base delle scelte economiche. L'estensione delle nazionalizzazioni a tutte le imprese con più di dieci operai eliminò la possibilità di iniziativa privata. L'agricoltura fu forzatamente collettivizzata ricreando in Ungheria gli scompensi prodotti in Unione Sovietica. A fronte di una diminuzione del 20% dei salari reali in una fase di prezzi crescenti nel periodo 1950-1955, fu dichiarata raggiunta la piena occupazione. L'Ungheria di Rákosi, identificato come "il miglior discepolo di Stalin", non aveva concluso l'attuazione del primo piano quinquennale quando quest'ultimo morì facendo tirare un lungo sospiro di sollievo a quanti gli erano sopravvissuti, lasciando nel lutto disperato chi l'aveva adorato, chi aveva creduto in lui e ne aveva giustificato l'estrema crudeltà ritenendola un prezzo necessario da pagare per fare dell'Urss una grande potenza, anzi l'altra grande potenza in grado di trattare da pari a pari con gli Stati Uniti d'America non soltanto sotto il profilo ideologico, ma anche sotto quello militare.

Con la morte del Segretario del PCUS ebbe inizio quel complesso processo conosciuto come destalinizzazione (Davis 2006), l'eliminazione cioè degli aspetti più feroci del comunismo sovietico e delle problematiche economiche attribuite alla politica del compagno Stalin. L'accusa principale che gli sarebbe stata mossa qualche tempo dopo la sua morte da Nikita Sergeevič Chruščëv, suo successore alla carica di Primo Segretario del PCUS, sarebbe stata di aver creato un sistema politico-economico basato sul culto della sua persona. Fermo restando la crudeltà del personaggio e gli errori commessi nella politica economica, gli furono attribuite, facendone un capro espiatorio, le responsabilità di tutti i problemi esistenti in Urss. La destalinizzazione va interpretata nel contesto degli stati dell'Europa centro orientale e balcanica appartenenti al c.d. sistema sovietico in cui i forti legami ideologici, economici, militari rendevano ogni avvenimento all'interno di uno degli attori del sistema suscettibile di ripercuotersi sugli altri. Questa situazione rappresenterà un fattore importante per la comprensione degli avvenimenti degli anni successivi, in particolare per gli interventi armati che Mosca sarà, ovviamente dal suo punto di vista, costretta a fare. La destalinizzazione avrà ripercussioni differenti su tutto il sistema a causa delle diverse realtà storiche sulle quali il comunismo si era inserito e delle modalità con cui ciò era avvenuto e mantenuto. Mosca decise che la destalinizzazione avrebbe dovuto essere condotta anche negli altri paesi dell'alleanza ai quali gli inviti a farla giunsero pressanti. Tra le varie richieste crearono più problemi quelle di allentare il controllo sulla società, di rivedere i processi contro avversari, veri o presunti e, lì dove ci fosse, eliminare il culto della personalità. La destalinizzazione fu percepita in tutti i membri del sistema come la possibilità o il timore di un allargamento delle maglie del rigido controllo esercitato sulla società dai partiti e dai governi. La riabilitazione di appartenenti al partito che pur non avendo mai abiurato alla propria fede in esso ritenevano di dover seguire vie differenti rispetto a quelle percorse fino a quel momento, divenne una sorta di legittimazione delle loro idee in riferimento, in particolare, alle cause dei problemi economici da cui erano afflitte le democrazie popolari. Le conseguenze derivate da tale percezione variarono da stato a stato in stretta correlazione con la situazione interna. Il Segretario del MPD non accettò la destalinizzazione e tentò di resisterle. Il successo nelle elezioni e nel III congresso del MPD, entrambi nel maggio 1953, non lo salvarono dalle pressioni del Cremlino e dalle critiche del proprio Comitato Centrale riecheggianti quelle fatte da Mosca e concentrate sui fallimenti economici, sulla durezza del regime e sul culto della sua persona. Fu la sfiducia del suo principale alleato internazionale, senza il cui consenso e la ferma spinta del quale il Comitato Centrale del MPD non si sarebbe pronunciato, a indurre Rákosi alle dimissioni da Capo del governo il 4 luglio 1953. Lo avrebbe sostituito fino al 18 aprile 1955 Imre Nagy (Pietrosanti 2014).

Dal ritiro di Rákosi all'intervento dei carri armati del Patto di Varsavia il tempo a Budapest iniziò a scorrere più velocemente rispetto al resto del sistema sovietico e l'Ungheria divenne il laboratorio di un processo forse sintetizzabile in:

destalinizzazione, rottura del quadro politico interno e internazionale di riferimento, intervento armato e normalizzazione; i profughi saranno una conseguenza di tutto ciò. Nagy e i suoi sostenitori seguirono il percorso della destalinizzazione simile in tutti i Paesi dell'Europa orientale: revisione dei processi politici, amnistia e riabilitazione di importanti personalità comuniste condannate dal governo precedente. Il procedimento fece riemergere i problemi delle democrazie popolari, soprattutto quelli legati ad un progetto di sviluppo economico fortemente ideologizzato i cui risultati non erano quelli sperati. Gli obiettivi mancati aumentarono le tensioni all'interno delle varie società la cui stabilità derivava dalla capacità del Partito di tenere sotto controllo, con qualsiasi mezzo, i fattori destabilizzanti. Nei casi in cui ciò non avvenne le tensioni sfociarono in scioperi e scontri come in Polonia, a Poznań nel giugno 1956. La rottura del quadro politico interno ebbe delle conseguenze internazionali poiché avrebbe potuto alterare il funzionamento e forse la stessa sopravvivenza del blocco sovietico tramite la messa in discussione di alcuni suoi principi fondamentali: il primato del partito comunista e l'appartenenza al Patto di Varsavia, l'alleanza militare costituita in risposta alla NATO e alla decisione statunitense di farvi aderire la Germania occidentale. In Polonia, contrariamente a quanto avveniva in Ungheria, Władysław Gomułka succeduto, grazie alla destalinizzazione, a Bolesław Bierut defunto il 12 marzo 1956, nell'ottobre successivo non mise mai in discussione il ruolo del POUP, (Partito Operaio Unificato Polacco), non creò governi di coalizione con partiti borghesi, non negoziò il ritiro dell'Armata Rossa dal proprio territorio e soprattutto non proclamò l'uscita dello Stato polacco dall'alleanza militare costituita a Varsavia nel 1955. Tutto ciò unito alle assicurazioni fornite da Gomułka a Chruščëv impedì l'intervento sovietico. Le basi da cui il leader polacco e quello ungherese inizialmente si mossero furono abbastanza simili. L'idea della possibile esistenza di vie nazionali al comunismo era costata ad entrambi l'epurazione dai rispettivi partiti e il modo in cui dopo la riabilitazione e il ritorno al potere tentarono di realizzarla portò a conseguenze differenti.

3. La tentata rivoluzione

Il tentativo rivoluzionario ebbe origine da manifestazioni di sostegno agli operai polacchi in sciopero che acquisirono il significato di contestazione e rivolta contro il governo e il partito comunista ungherese grazie alla reazione dura di questi e su premesse nate negli anni precedenti sulle quali la crisi polacca e gli errori del partito e del governo fecero da elemento catalizzatore. La rivolta divenne alla fine un tentativo rivoluzionario poiché quanto fu domandato- elezioni libere, pluripartitismo, ritiro delle truppe sovietiche in Ungheria, richiesta di lasciare il Patto di Varsavia- se ottenuto avrebbe di fatto cambiato il regime al potere e la collocazione internazionale del Paese. La tentata rivoluzione coinvolse molte componenti della società ungherese: studenti, docenti, operai, clero, frequenta-

tori dei circoli culturali, in particolare quello intitolato al poeta e patriota Sándor Petőfi (1823-1849), scrittori, giornalisti. Il dibattito sul superamento del sistema mono partitico e sulla eliminazione della censura era fervido. Il riaffiorare di una comune famiglia di memorie fieramente ungherese e anti russa aumentava in parte della popolazione il risentimento verso l'alleato sovietico e i suoi sostenitori in patria. A Mosca il governo di Budapest chiedeva il ritiro delle sue truppe di stanza in Ungheria. Era forte la speranza in una possibile via ungherese al socialismo raggiungibile anche tramite libere elezioni. Il Cremlino interpretò quanto stava accadendo in terra magiara come un tentativo contro rivoluzionario che andava ben oltre le aperture concesse dalla destalinizzazione e dall'opportunità politica di non accrescere i problemi con gli alleati già presenti con la Polonia. Per spiegare le ragioni dell'intervento si attribuirà la responsabilità di tutto ad appartenenti al vecchio regime, a ex proprietari terrieri, a nostalgici degli Asburgo e alla Chiesa cattolica sostenuti e organizzati dalla CIA. Non è improbabile che appartenenti a quegli ambienti abbiano partecipato alle marce e agli scontri e che agenti del blocco occidentale fossero presenti, la "guerra fredda" era in pieno svolgimento, il pericolo maggiore era però rappresentato dalla partecipazione alle manifestazioni di operai e di contadini delle fattorie collettive, di una parte cioè di chi avrebbe dovuto essere il principale beneficiario del regime al potere.

Le ragioni dell'intervento sovietico sono state spiegate anche con gli eventuali errori politici commessi da Imre Nagy e in particolare con la decisione di neutralizzare l'Ungheria e il conseguente abbandono del Patto di Varsavia. Queste scelte furono fatte quando ormai la situazione era compromessa e lo scenario internazionale non era tale da consentirne la realizzazione. A pesare di più fu, forse, la creazione di un governo di coalizione con esponenti non comunisti e la possibilità che si convocassero elezioni libere dimostrando la pericolosità della destalinizzazione e rendendo possibile eventuali ripercussioni sulla situazione polacca in via di difficile stabilizzazione. Gli scontri con forze dell'ÁVH iniziarono il 23 ottobre. Il 24 ottobre su sollecitazione della folla Imre Nagy tornò per la seconda volta (la prima era stata dal 4.07.53 al 18.04.55) e fino al 4 novembre successivo a presiedere il governo. Sempre il 24, truppe sovietiche attraversarono il confine alle 02.15 provenendo dalle località confinarie della Transcarpazia ucraina di Chop, Berehove e Vylok e quelle di stanza in Ungheria iniziarono un riposizionamento e intervennero nei pressi delle loro caserme. Il 28 ottobre ci fu una tregua negli scontri e le truppe sovietiche accettando la richiesta del governo cominciarono una lenta ritirata verso i confini. La situazione si aggravò in tutta l'Ungheria. Nelle province di Győr-Sopron nell'Ungheria nord-occidentale, nelle città di Miskolc, Debrecen, Esztergom, Nyíegyháza, Székesfehérvár, l'antica capitale dell'Ungheria del Medio Evo, Szombathely, Kecskemét, Szolnok, Szeged, Pápa ci furono scontri con la polizia, le forze dell'ÁVH e forze sovietiche che oltrepassarono le città di Sopron, Mosonmagyaróvár e Szombathely in direzione del confine con l'Austria. Altre forze provenienti da Zalaegerszeg si posizionarono presso la città di Nagykanizsa in prossimità del confine con la Jugoslavia.

Circa la metà delle quasi 4.000 fattorie collettive era in rivolta. Consigli operai si diffondevano nelle industrie. L'ONU dimostrò la propria impotenza e non diede il sostegno richiesto dal governo ungherese (Nagy 2006). Il 3 novembre l'Armata Rossa riprese l'iniziativa facendo affluire reparti che non erano di stanza in Ungheria e con il sostegno oltre dei carri armati anche dell'aviazione. La battaglia si concentrò soprattutto a Budapest, centro della rivolta. Il 4 Nagy si rifugiò nell'ambasciata jugoslava. L'11 novembre i rivoltosi si arresero.

4. La fuga dall'Ungheria e l'accoglienza in Canada

La prima conseguenza politica della sconfitta dei rivoluzionari fu la sostituzione di Nagy con János Kádár suo sostenitore nella fase iniziale della destalinizzazione e restauratore della "legalità socialista" dal novembre in avanti. La repressione fu durissima, nonostante le assicurazioni del nuovo Segretario del partito e Presidente del consiglio (carica tenuta fino al gennaio 1965) sulla volontà del governo di impedire la persecuzione dei lavoratori che avevano partecipato alla rivolta. Durante le settimane di guerra civile che sconvolsero l'Ungheria ci furono complessivamente 3.000 morti, 15.000 feriti, seguiti nella fase successiva da 50.000 internati e 2.000 esecuzioni capitali. Imre Nagy sarà impiccato assieme ad altri dirigenti del partito del periodo del tentativo rivoluzionario, il 15 giugno il 1958. A condurre le operazioni di repressione furono la Magyar Forradalmi Honvéd Karhatalom (Milizia rivoluzionaria ungherese) e la Munkasorség (Guardia operaia). L'altra conseguenza fu la fuga dall'Ungheria di chi temeva ritorsioni o non desiderava più vivere governato da un regime comunista filo sovietico. Nel periodo 1956-1958 circa 230.000 persone andarono via, di queste più di 17.000 si diressero come prima meta in Jugoslavia il resto attraversò il confine con l'Austria (Csocsán de Várallja 1974).

Rispetto alle migrazioni attuali il numero di ungheresi in fuga era notevolmente inferiore. La loro accoglienza pur avendo un forte valore ideologico in funzione anti sovietica, mitigava solo in parte i problemi economici e politici, ad essa legati. C'erano sensibilità differenti verso la tentata rivoluzione ungherese. Rispetto alle odierne migrazioni quella proveniente dall'Ungheria si poteva prevedere limitata nel tempo, poiché il potere di Kádár si stava consolidando, il controllo interno stava tornando saldamente in mano al partito e al governo e la frontiera con l'Austria stava ritornando ad essere chiusa e ben sorvegliata. La prospettiva era dunque di una "normalizzazione" politica e di una cessazione del movimento migratorio favorita dall'amnistia offerta dal governo di Budapest a chi volesse rimpatriare. L'Austria neutralizzata fu la prima destinazione seguita dalla Jugoslavia che sembrava essere disponibile all'accoglienza pur essendo un paese comunista. La meta successiva era l'Italia. Tutti e tre gli Stati furono luogo di transito e temporanea permanenza in attesa di raggiungere le sedi definitive. I profughi ungheresi del 1956 provenivano da tutte le classi sociali e erano so-

prattutto giovani al di sotto dei 25 anni. Il Canada fu una delle principali mete finali dove nel periodo 1956-57 furono accolti circa 38.000 fuggitivi metà dei quali erano di origine ebraica, con una maggioranza di maschi. Si trattava particolarmente di intellettuali e borghesia delle professioni. I rifugiati furono accolti bene dovunque andassero soprattutto in Canada e Stati Uniti dove erano indicati come "freedom fighters" in fuga dalla parte sovietica del mondo nel pieno della "guerra fredda". L'accoglienza dipese anche dalle condizioni economiche del paese di destinazione definitiva. La maggior parte di loro aveva potuto portare con sé poche cose e aveva bisogno di vestiario, viveri, un'abitazione, di tutto ciò che potesse servire per ricominciare una vita in un paese non proprio dove le necessità dell'individuo non erano tutte a carico dello stato, dalla scuola alla ricerca del lavoro, alla sanità. Un'economia in espansione come la canadese degli Anni cinquanta fu determinante nell'accettazione dei profughi e nel loro inserimento sociale. I profughi del 1956 a differenza di quelli del 1948 non ebbero il tempo di abituarsi all'idea di essere in uno stato e in uno stile di vita molto differente da quello abbandonato. La presenza di vecchi immigrati ungheresi aiutò inizialmente i nuovi. C'erano in Canada tre tipologie differenti di profughi: la prima ante e post I g. m. formata tradizionalmente da contadini, la seconda post II g. m. composta da chi scappava dalla propria storia di collusione con il nazi-fascismo e da quanti fuggivano dal comunismo ed infine la migrazione post '56 costituita da scontenti del regime e membri più o meno attivi del tentativo rivoluzionario, moderati che non avevano accettato la propaganda staliniana; ogni gruppo era vissuto in una realtà temporale e politica differente da quella degli altri. Nel caso canadese i differenti gruppi non andarono molto d'accordo nel tempo e in particolare contro gli ultimi arrivati, terminato il periodo in cui furono considerati degli eroi, si scontrarono gli immigrati di più antica data. Le posizioni dirigenti in associazioni politiche o club sociali create da appartenenti agli emigrati giunti dall'Ungheria dopo il 1948 continuarono ad essere detenute da loro e dagli eredi dei fondatori, rimanendo esclusi dalle cariche di vertice elementi appartenenti ai profughi giunti dopo il 1956; segno questo di una difficile relazione tra i profughi giunti in Canada in tempi differenti. Il periodo di adattamento alla nuova vita dipese anche dalla personalità di ognuno di loro, dalle singole capacità di ambientamento ad una nuova realtà, dal tipo di lavoro che erano in grado di svolgere. Superata la fase di prima parziale integrazione sorsero delle organizzazioni tra gli immigrati del 1956. Furono composte da medici, ingegneri, scrittori, a testimonianza di un inserimento professionale nella vita pubblica canadese avvenuto per gradi, ma comunque realizzatosi grazie anche al livello di preparazione e qualifica posseduto dalla maggior parte dei profughi e dalla loro progressiva accettazione di uno stile di vita che poneva l'accento sulla formazione continua, sul progresso tecnologico e sulla flessibilità personale. Una situazione simile avvenne anche negli Stati Uniti. La lenta, ma costante inclusione nelle società canadese e statunitense ebbe come principale conseguenza la possibilità per gli ex profughi di inviare denaro in Ungheria ai parenti rimasti e oltre al denaro

giungevano informazioni sulla vita in Canada e negli Stati Uniti e più in generale sulla vita al di qua – dal punto di vista occidentale- della Cortina di ferro. Il turismo in entrambi i sensi diverrà successivamente ulteriore fattore di conoscenza reciproca. L'origine della nazione ungherese era fatta risalire a sette mitiche tribù e a queste sarà aggiunta con l'appellativo di "ottava tribù magiara" quella formata dagli appartenenti alla diaspora presente in Canada e Stati Uniti.

5. La prima accoglienza in Austria e Jugoslavia: un problema politico-economico

Lo stato europeo che risentì maggiormente delle conseguenze della tentata rivoluzione ungherese fu l'Austria, a causa della sua particolare e difficile situazione internazionale e del confine in comune con l'Ungheria. Il Trattato di Stato firmato il 15 maggio 1955 aveva fatto dell'Austria una potenza neutralizzata non appartenente a nessuno dei due blocchi, occidentale e sovietico, contrapposti in quella fase della "guerra fredda". Degli ungheresi in fuga la maggior parte, secondo quanto pubblicato dall'United Nations High Commissioner for Refugees (=UNHCR) circa 173.000, entrarono in Austria e circa 18.600 in Jugoslavia. Vienna si trovò nella difficile condizione di dover gestire un affare umanitario e politico nello stesso tempo con delle ricadute certe sui rapporti con l'Unione Sovietica le cui truppe erano state ritirate dal suolo austriaco solo da pochi mesi. Il governo del Cancelliere Julius Raab fu infatti accusato di violare la neutralità appena ottenuta. La necessità di giustificare l'invasione e l'arresto del legittimo governo di Imre Nagy spingeva il governo di Kádár e il Cremlino a legittimare la propria azione cercando sostenitori esterni della causa di Nagy. Questo costringerà la cancelleria austriaca ad un atteggiamento sempre molto prudente volto ad aiutare i profughi, ma senza fare arrabbiare troppo i sovietici. I profughi arrivavano sia valicando il confine austro-ungherese che attraverso la Jugoslavia. Secondo Franz Grubhofer, Segretario di Stato di Vienna, mille fuggitivi entravano ogni giorno in territorio austriaco dalla Jugoslavia[1]. Con la crisi in corso l'Austria nello scenario internazionale recuperava un ruolo da protagonista perso dopo la sconfitta nel primo conflitto mondiale e la fine dell'impero austro-ungarico. La situazione poteva far ricordare quanto accaduto più di cento anni prima: un tentativo di rivoluzione in Ungheria e le forze russe accorse in sostegno dell'ordine rappresentato allora da Francesco Giuseppe e nel 1956 dai comunisti fedeli a Mosca. L'Austria neutralizzata ebbe ristretti margini di manovra, ma fu in grado di sfruttarli nel migliore dei modi. La crisi rafforzò l'interpretazione

[1] Grubhofer lo dichiarò al vice-presidente degli Stati Uniti R. Nixon durante la sua visita in Austria del 20 dicembre 1956; in Austrian State Archive, Vienna (Österreichisches Staatsarchiv=ÖStA), Archiv der Republik (=AdR), Bundeskanzleramt/Auswärtige Angelegenheiten (=BKA/AA), Abteilung 2, Karton 403, "Situationsbericht über das Flüchtlingswesen in Österreich", 8 November 1956; e ÖstA, AdR, BKA/AA, ZI 792.188 Pol 56, Karton 405, "Besuch des Vizepräsident Nixon in Österreich", 20 Dezember 1956.

data dal gabinetto Raab della neutralità austriaca intesa nel suo significato militare, ma non politico. Secondo Julius Raab Vienna avrebbe dovuto mettere all'attenzione internazionale, dandone rilievo, tutte quelle situazioni umanitarie ritenute in contrasto con la storia dell'Austria e nello stesso tempo sarebbe dovuta intervenire con buona volontà e senso della carità, per sradicare la sofferenza del prossimo. Era questa la premessa di un'azione di soccorso dei rifugiati da far durare il tempo necessario e dell'opportunità di dotarsi di una forza di difesa poiché essere neutralizzati non significava essere disarmati e rimanere inermi dinanzi a qualsiasi ingerenza esterna. Le possibilità che il Trattato di Stato lasciava per dotarsi di una forza di difesa avrebbero dovuto essere sfruttate tutte. L'arrivo di profughi in uno stato ha sempre, adesso come allora nel 1956, delle ripercussioni sulla sua situazione politica interna e sulla sua collocazione internazionale e la posizione che Vienna avrebbe assunto si sarebbe riflessa sui suoi rapporti con Budapest e Mosca, migliorati dopo l'avvenuta neutralizzazione. Le operazioni, da parte dei magiari, di rimozione del filo spinato e delle mine poste al confine tra gli stati dell'antica Duplice Monarchia furono interrotte dopo la repressione del tentativo rivoluzionario ungherese. Gli incidenti alla frontiera, sconfinamenti di forze militari ungheresi e esplosioni di mine aumentarono di numero per tutta la durata della crisi per giungere ad una parziale diminuzione nel novembre 1957. Dopo un incontro tra il Ministro degli esteri del governo di Kádár, Imre Horváth, e funzionari del ministero degli Interni austriaco si decise di creare una commissione, simile a quella già esistente con la Cecoslovacchia, per prevenire gli incidenti anche contrassegnando i confini in maniera più netta[2]. La pressione sull'Austria era molto forte e si centrava sulle accuse di violazione della neutralità dovuta alla presunta assistenza data a gruppi intenzionati a penetrare in Ungheria con lo scopo di provocare disordini e supposti sconfinamenti di forze militari austriache in territorio ungherese[3]. Il governo di Raab per poter continuare la propria politica, ideologicamente vicina all'Occidente e improntata al rafforzamento della neutralità si astenne all'Assemblea dell'ONU dal voto di condanna dell'intervento sovietico e tentò di imporre il divieto di reclutamento sul proprio territorio di spie per operazioni nell'Europa orientale. Sovietici e ungheresi accusavano le autorità viennesi di favoritismi verso organizzazioni il cui essere contro l'Urss era conosciuto come ad esempio Radio Europa libera le cui trasmissioni inondavano l'Europa orientale di notizie e propaganda anti comunista e anti sovietica. Le accusavano anche di discriminare le organizzazioni finanziate dai sovietici come il Consiglio Mondiale della Pace e la Federazione Mondiale dei Sindacati del Commercio. La tentata rivoluzione ungherese, la sua successiva repressione e l'inizio del movimento di profughi in direzione dell'Austria introdussero nel rapporto tra Vienna e le capitali comuniste un indubbio fattore di

[2] ÖStA, AdR, BKA/AA, Zl 226-762 Pol 57, Karton 458, "Besuch des ungarischen Aussenministers Horváth", 6 November 1957.

[3] ÖStA, AdR, BKA/AA, Zl. 52069, "Behauptete Neutralitätsverletzung durch Österreich; Information des Bundesministers", 16 November 1956.

crisi del quale non bisogna, però, sopravvalutare il peso. L'elemento più importante dell'intera questione fu il mancato intervento degli Stati Uniti o degli altri stati del c.d. blocco occidentale a sostegno di Imre Nagy e dei rivoltosi ungheresi. Fu chiaro sin dall'inizio che la situazione ungherese sarebbe rimasta nell'ambito degli affari "interni" sovietici e qualsiasi cosa avesse fatto la piccola Austria quella realtà difficilmente si sarebbe alterata. Un eventuale e non desiderato, né previsto, intervento militare contro Vienna da parte sovietica l'avrebbe invece profondamente alterata. La crisi stessa a meno di follie del gabinetto Raab non avrebbe superato i limiti di una pressione diplomatica costante da parte di Mosca e di continue lamentele da parte dei paesi suoi alleati e avrebbe, alla fine, rafforzato lo stesso governo austriaco. Il territorio austriaco divenne, comunque, oggetto di accurato e costante spionaggio da parte degli agenti delle democrazie popolari. Ad essere spiati erano i campi profughi e i loro residenti. Agenti s'infiltrarono sotto la copertura di essere dissidenti in fuga. Oggetto di ricerca erano gli eventuali contatti con chi era rimasto in Ungheria e gli eventuali finanziatori della tentata rivoluzione del '56. I rifugiati in Austria furono sistemati in 257 campi in attesa di essere trasferiti nei paesi in cui desideravano emigrare. L'allestimento dei campi e il mantenimento dei loro occupanti furono il secondo problema in ordine d'importanza che il governo austriaco dovette affrontare; il primo fu quello delle conseguenze internazionali della presenza dei profughi. L'aspetto finanziario era quello che poteva provocare all'interno maggiori e negative ripercussioni rispetto a quelle causate dalle ripetute accuse sovietiche di violazione del Trattato di Stato che aveva fatto dell'Austria un paese neutralizzato. Le Nazioni Unite con le loro varie istituzioni ebbero un ruolo importante nel finanziare le differenti fasi dell'assistenza ai profughi: sistemazione nel paese d'arrivo, trasporto in quello di nuova e definitiva residenza e progressiva integrazione in esso. Quest'ultima fase potrebbe essere considerata, soprattutto nella società canadese e in quella statunitense, come un'azione condotta con successo. Il costo totale dell'intera operazione fu al di sopra dei cento milioni di dollari del periodo, corrispondente a più di un miliardo di dollari odierni. Un costo superiore alla somma erogata nel 1954 dal Fondo delle Nazioni Unite per i rifugiati della II guerra mondiale (Loescher 2001). Allo stanziamento delle risorse necessarie si giunse dopo una richiesta urgente d'aiuto finanziario da parte austriaca all'Ufficio dell'Alto Commissario per i Rifugiati che domandava anche che gli stati membri ricevessero rifugiati temporaneamente e in attesa della loro partenza per le destinazioni scelte. Secondo i dati dell'ONU il 70% dei rifugiati- e di questi il 90% proveniva dall'Austria- alla data del I aprile 1957 lasciarono lo stato di primo arrivo per andare in quelli, 29 in tutto, di definitiva residenza. Nei 15 Paesi europei prescelti andarono 78.574 (40,5%) profughi. La maggioranza scelse il Regno Unito (20.590 profughi), seguito dalla Germania federale (14.270), dalla Svizzera (11.962) e dalla Francia (10.232). Il rimante dei profughi scelse stati extra europei preferendo soprattutto gli Stati Uniti (35.026), seguiti da Canada (24.525) e

Australia (9.423)[4]. L'Assemblea generale condannò con una risoluzione l'intervento sovietico (1004(ES-II)) e il 4 novembre 1956 incaricò il Segretario generale dell'ONU di occuparsi assieme alle agenzie specializzate dell'organizzazione di quanto fosse necessario per affrontare le conseguenze umanitarie della crisi, di informarsi dei bisogni soprattutto di medicinali e cibo dei rifugiati, di coordinare gli interventi e raccogliere le eventuali donazioni e di riferire all'Assemblea appena possibile[5]. Il primo report sull'attività in favore dei profughi fu presentato il 12 novembre 1956. L'attività del Segretario generale Hammarskjöld nella gestione negativa del complesso della crisi ungherese fu molto chiacchierata e tra le colpe che gli furono attribuite la meno gravosa fu quella di essersi disinteressato del tentativo di rivoluzione ungherese e del conseguente intervento sovietico a vantaggio della soluzione della crisi di Suez ritenuta, forse a ragione in quel momento storico, più importante (Nagy 2006). Il peso dell'Unione Sovietica era così forte da annullare i possibili margini di manovra e condizionò l'operato di Hammarskjöld facendogli assumere una posizione più defilata limitando anche gli interventi in pubblico e le dichiarazioni ufficiali.

La crisi dei profughi contribuì a completare un percorso di riavvicinamento di Washington all'UNHCR sanando una crisi strisciante nata dalle difficoltà di sistemazione degli sfollati a causa del secondo conflitto mondiale. La maggior presenza tra gli sfollati di individui di età avanzata e di malati aveva reso difficile la loro collocazione nel mercato del lavoro. Per il Dipartimento di Stato statunitense i rifugiati dai paesi comunisti avevano un importante ruolo propagandistico nello scontro in corso con l'Unione Sovietica e i suoi alleati (Loescher 2001). La valenza politica dell'aiuto ai profughi ungheresi contribuì a velocizzare l'intervento a loro favore. I governi degli Stati occidentali che non erano intervenuti in soccorso dei rivoltosi seguirono molto l'onda emotiva delle proprie popolazioni. Superata l'emozione del momento, l'opinione pubblica europeo-occidentale cominciò ad interessarsi meno della questione ungherese in ciò aiutata dall'esiguità del numero dei profughi rispetto a quanto avviene nel periodo a noi contemporaneo. E, inoltre, il peggioramento della "guerra fredda" e il timore per lo scoppio di un conflitto nucleare dove non ci sarebbero stati vincitori, ma solo sconfitti fece considerare la repressione sovietica a Budapest come un prezzo accettabile da pagare visto, soprattutto, che a pagarlo erano gli ungheresi. Con la diminuzione della commozione provocata dalla presenza dei carri armati dell'Armata Rossa in Ungheria, calò la propensione dei governi a donare denaro e ad accogliere profughi[6]. Due mesi dopo l'inizio dell'arrivo dei primi fuggitivi venne

[4] Nations Unies, Comité de l'UNREF, A/AC. 79/73 (8 May 1957); Report of the Intergovernmental Committee for European Migration on the Hungarian Refugee Situation (Austria, 31 December 1957). USA Senate Report, nr. 1815, 1958, quoted by Puskás (1985).

[5] The 564th plenary meeting of the UN General Assembly, 4 November 1956 (resolution 1004 (ES-II)).

[6] Office of the United Nations High Commissioner for Refugees (= UNOGA), Archives, Geneva Coordination Committee for Assistance to Refugees from Hungary, Summary record

sollevato al Comitato Esecutivo del Fondo per i Rifugiati delle Nazioni Unite il problema delle quote statali da versare e si chiese una valutazione delle offerte delle organizzazioni di volontariato prima della pubblicazione del nuovo bando per le donazioni, in modo da avere un quadro il più esatto possibile delle necessità finanziare[7] che il governo austriaco continuava a gestire con difficoltà. Nel novembre 1956 Vienna chiese in un promemoria inviato a Philippe de Seynes, responsabile per gli aiuti umanitari all'Ungheria, la spedizione di sostegni in denaro e materiale agli ungheresi senza distinzione tra profughi e residenti e sollecitò l'invio di treni, da parte dei paesi europei, direttamente al confine austro-ungarico per garantire il trasporto immediato dei rifugiati all'estero nei centri e campi di cui si chiedeva la sollecita realizzazione in altri paesi europei[8]. Le richieste del governo austriaco trovarono appoggio in un'indagine dell'UNCHR del gennaio 1957 secondo la quale, nonostante un sostanzioso contributo internazionale, la maggior parte delle spese per la prima accoglienza e la sistemazione dei profughi pesavano sulle finanze austriache. Vienna aveva istituito dei conti correnti in cui convogliava i versamenti dei cittadini. Mediante tale sistema erano stati raccolti circa 4.209.050 dollari statunitensi ai quali andava aggiunta la quota di 384.610 dollari messi direttamente dal governo di Raab. Le varie agenzie delle Nazioni Unite contribuirono con 3.100.540 dollari[9]. La raccolta dei fondi si basava sul principio della condivisione degli oneri per dare una risposta alle richieste d'aiuto provenienti dai paesi coinvolti nell'accoglienza dei profughi basandosi su stime dell'Ufficio per l'Alto Commissariato per i Rifugiati.

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of the ninth meeting held at the Palais des Nations, Geneva, 6 May 1957, HCR/SVA/SR. 9, restricted (10 May 1957). G. I. 30/2 (Situation in Hungary, Relief measures, Refugees), Jacket, nr. 2 (11 January – 11 November 1957).

[7] United Nations Refugee Fund (UNREF), Executive Committee, Standing Programme Sub-Committee, Fourth Session, Provisional summary record of the seventy-second meeting held at the Palais des Nations, Geneva, 25 January 1957, restricted. UN-S-445-0199-11.

[8] United Nations Archives and Records Management Section(UNARMS): Letter from Franz Matsch, Permanent Representative of Austria to the United Nations to Philippe de Seynes, Under-Secretary for Economic and Social Affairs, Under-Secretary for Relief to the Hungarian People, UN, New York and aide-mémoire (15 November 1956), UN-S-445-0199-3; UNARMS: Letter from Franz Matsch, Permanent Representative of Austria to the United Nations to the UN Secretary-General, to the attention of Philippe de Saynes, and note entitled Situation of Hungarian Refugees in Austria as of 26 November 1956 (26 November 1956), UN-S-445-0199-3.

[9] UNARMS: Report submitted by the High Commissioner, The problem of Hungarian refugees in Austria, An assessment of the needs and recommendations for future action. UNREF Executive Committee, Fourth Session, A/AC. 79/49, (17 January 1957), UN-S- 445-0199-11. UNOGA: Office of the United Nations High Commissioner for Refugees, Coordination Committee for Assistance to Refugees from Hungary, Summary record of the third meeting held at the Palais des Nations, Geneva, 10 January 1957, restricted (15 January 1957). G. I. 30/2 (Situation in Hungary, Relief measures, Refugees), Jacket Nr. 2 (11 January – 11 November 1957). NATO Archives: Avant-projet de rapport du Comité politique sur les réfugiés hongrois. AC/119-WP/22 (2 March 1957). UNARMS: United Nations Refugee Fund, Executive Committee, Standing Programme Sub-Committee, Fourth Session, Provisional summary record of the eighteenth meeting held at the Palais des Nations, Geneva, 25 January 1957, restricted (25 January 1957), UN-S-445-0199-11.

L'aspetto politico legato alla questione dei profughi ungheresi fu per l'intera durata di essa quello delle relazioni tra l'Occidente europeo e statunitense e l'Unione Sovietica con i propri alleati dell'Europa orientale. Se i rifugiati non fossero stati adeguatamente aiutati con una prima accoglienza seguita dal trasferimento nei paesi disposti ad ospitarli definitivamente e se a causa di ciò fossero rientrati in Ungheria il danno d'immagine, politico ed ideologico per l'Occidente sarebbe stato rilevante. Questa valutazione era fatta dalla NATO e coincideva con il parere dell'Alto Commissario per i rifugiati Lindt secondo il quale il problema dei profughi ungheresi andava chiuso entro la fine del 1957. Lindt cercava di far andare d'accordo e cooperare le potenze tra di loro e soprattutto con gli USA che tramite il proprio United States Escapee Programm sostenevano anche l'attività dell'UNHCR[10]. Il punto conclusivo della vicenda era l'integrazione dei rifugiati in tempi brevi poiché il suo costo sarebbe aumentato con il trascorrere del tempo e del soggiorno prolungato in centri di raccolta e ciò avrebbe agito negativamente sulla morale dei profughi e sulla loro volontà di inserirsi nei paesi di ultima accoglienza[11]. L'aiuto fornito all'Austria fu costante e seguì una doppia via: il versamento diretto di quote a Vienna e l'intervento tramite l'Ufficio dell'Alto Commissario per i Rifugiati. Al primo marzo 1957 grazie e soprattutto ai continui appelli lanciati dalle Nazioni Unite e dall'Alto Commissariato per i Rifugiati furono raccolti e versati al secondo quasi 7 milioni di dollari, un'altra somma di poco più di 400.000 dollari fu trasferita direttamente nei conti aperti dal governo austriaco per le spese più immediate di vitto, alloggio e prima assistenza sanitaria. Grazie alla collaborazione e ai buoni rapporti tra Lindt e il Dipartimento di Stato di Washington, gli Stati Uniti contribuirono al totale con 5 milioni di dollari. Si era comunque lontani dal raggiungimento dei 26.347.000 dollari stimati necessari per tutto il 1957 dall'UNHCR.[12]

Il modo in cui Belgrado affrontò la questione dei profughi venne reso più complesso dalla sua appartenenza agli Stati comunisti e dalle aperture in corso di Mosca a Tito dopo la rottura di qualche anno prima. Il tentativo di rivoluzione ungherese era rivolto non solo contro l'invadenza sovietica, ma contrastava anche il ruolo di preminenza politico-sociale del partito comunista e spingeva per una liberalizzazione del regime, elementi questi che andavano ad intaccare l'impostazione politica interna della Jugoslavia, nonostante la presenza in essa di elementi di originalità propri del regime titino. Pur essendo il territorio jugoslavo luogo di transito, ciò metteva in imbarazzo Belgrado inducendola a rafforzare

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[10] La questione dei profughi ungheresi mise in crisi lo stesso meccanismo decisionale dell'ONU, creando dei contrasti tra le cariche interessate alla sua soluzione.

[11] UNARMS: Letter from Myer Cohen, Executive Director for Relief to the Hungarian People, UN, New York to Philippe de Seynes, Under-Secretary for Economic and Social Affairs. Under-Secretary for Relief to the Hungarian People, UN, New York (7 December 1956). UN-S-445-0195-7

[12] UNARMS: Report submitted by the High Commissioner, The problem of Hungarian refugees in Austria. An assessment of the needs and recommendations for future arction, UNREF Executive Committe, Fourth Session, A/AC. 79/49 (17 January 1957), UN-S- 445-0199-11.

i controlli alla frontiera con l'Ungheria utilizzando anche militari della riserva. Al governo jugoslavo fu chiesto di accogliere i profughi e all'Alto Commissario per i Rifugiati lo svizzero August R. Lindt, eletto nel dicembre 1956, il Segretario della Lega dei comunisti della Jugoslavia e Presidente della Repubblica Josip Broz, meglio conosciuto con il suo nome di battaglia Tito, subordinò l'accoglienza a due precise condizioni, l'abbandono in tempi brevi, meno di sei mesi, del suo paese da parte dei profughi e il rimborso delle spese sostenute per il loro mantenimento. I temi economici e del rapido trasferimento continuavano a procedere di pari passo[13]. Belgrado aveva deciso di chiedere l'intervento dell'Ufficio dell'Alto Commissariato per i Rifugiati a causa dell'aumento del numero di arrivi; nel dicembre 1956 il totale dei rifugiati in Jugoslavia era di circa 1.250. Un numero non impressionante e, soprattutto, non paragonabile a quelli odierni, ma che vista la particolare situazione politica jugoslava avrebbe potuto creare dei problemi. Il governo jugoslavo si dichiarò sin dall'inizio disponibile ad accogliere chi fosse stato soltanto in transito[14]. Le richieste di finanziamento apparivano ingenti e basate su una previsione di un totale di 22.000 rifugiati nel primo semestre del 1957. Un'eventuale concordanza d'azione tra Austria e Jugoslavia sul tema dei profughi ungheresi sarà in futuro un interessante campo d'indagine. Entrambi gli Stati chiesero in più sedi una compensazione finanziaria per le spese sostenute. E il principio delle quote di spesa e relativi rimborsi basati sul numero di profughi accolti fu più volte citato. Durante la quarta sessione del Comitato esecutivo del Fondo per i rifugiati delle Nazioni Unite (29.01.'57-04.02.'57), il governo di Vienna chiese una ripartizione dei profughi tra tutti i paesi amanti della libertà e un rimborso da prelevare da un fondo comune costituito all'uopo, per le spese di assistenza[15]. Il rappresentante permanente jugoslavo all'ONU ribadì nella sostanza gli stessi concetti, dando maggior enfasi ai problemi finanziari causati al suo governo dall'accoglienza e dal mantenimento dei profughi[16]. La quarta sessione del Comitato esecutivo del UNREF stabilì il I febbraio 1957, all'unanimità, il principio della condivisione mondiale, secondo le rispettive risorse, della cura dei rifugiati e dichiarò il proprio sostegno all'azione dell'Alto Commissario per i

13 UNHCRA: Transcript of the interview of August R. Lindt by Bryan Deschamp, 4. February 1998. Sound Recording, UNHCR Oral History Project, Fonds 36, Record of the Archives. 10, 12.

14 UNARMS: Interoffice memorandum from Aline Cohn, Representative of the UNHCR to Philippe de Saynes, Under-Secretary for Economic and Social Affairs, Under- Secretary for Relief to the Hungarian People, UN, New York, Hungarian refugees in Yugoslavia, and Pro Memoria On the Question of Hungarian Refugees in Yugoslavia (31 December 1956), UN-S-445-0199-4.

15 UNOGA: United Nations General Assembly, UNREF Executive Committee, Fourth Session, Standing Programme Sub-Committee, Fourth Session, Report on the Fourth Session of the Standing Programme Sub-Committe, Geneva, 23-28 January 1957, A/AC. 79/53, A/AC.79/PSC/5, general (28 January 1957). G. I. 30/2. (Situation in Hungary, Relief measures, Refugees), Jacket, nr. 2 (11 January – 11 November 1957).

16 UNARMS: Letter from Joza Brilej, Permanent Representative of the Federal People's Republic of Yugoslavia to the United Nations to Dag Hammarskjöld, Secretary-General, UN, New York and aide-mémoire (14 March 1957), UN-S-445-0199-4.

Rifugiati[17]. Secondo lo stesso ufficio nei primi sei mesi del 1957 in Austria c'erano circa 70.000 profughi ai quali si prevedeva se ne sarebbero aggiunti altri 35.000 nella seconda parte dell'anno[18]. Va sottolineato il ruolo avuto nella distribuzione delle risorse dall'Alto Commissario per i Rifugiati, con sede a Ginevra. In base ad un accordo con il Segretariato generale dell'ONU le somme da questo raccolte, donazioni di stati o privati, sarebbero state trasferite all'Alto Commissario che le avrebbe utilizzate direttamente o le avrebbe trasferite agli stati interessati[19]. L'Alto Commissario aveva propri rappresentanti a Vienna e a Belgrado.

Non c'erano solo i profughi da sostenere, ma anche la popolazione rimasta in patria e anche ciò avrebbe comportato delle conseguenze di carattere politico; temevano, soprattutto gli Stati Uniti e il Regno Unito, di rafforzare il governo ungherese e non di aiutare la popolazione. Fermo restando l'aiuto ai rifugiati quello a chi era rimasto a casa era, comunque, subordinato alla conoscenza delle loro esigenze[20]. Il dibattito in seno alle istituzioni ONU sull'opportunità di indicare la destinazione delle donazioni durò per molto tempo. L'UNHCR ebbe un atteggiamento più propenso all'intervento in favore dei rifugiati, mentre il segretariato dell'ONU riteneva fosse necessario aiutare anche chi era rimasto in Ungheria. I costi austriaci e jugoslavi per la crisi furono coperti dal sostegno tramite le agenzie ONU di stati esteri e da donazioni private di importo inferiore a quelle statali.

6. Le ripercussioni in Italia e la posizione della Santa Sede

L'intervento sovietico in Ungheria provocò una frattura all'interno del Partito comunista italiano che, non dimentichiamolo, era il maggior partito comunista presente in una democrazia parlamentare. La maggioranza della dirigenza del

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17 UNARMS: UNREF, Executive Committee, Fourth Session, Resolution nr. 4 on the problem of Hungarian refugees adopted at the 33rd meeting on 1 February 1957, general (7 February 1957), UN-S-445-0199-11.

18 UNOGA: United Nations General Assembly, UNREF Executive Committte, Fourth Session, Standing Programme Sub-Committee, Fourth Session, Report on the Fourth Session of the Standing Programme Sub-Committee, Geneva, 23-28 January 1957, A/AC. 79/53, A/AC.79/PSC/5, general (28 January 1957). G. I. 30/2 (Situation in Hungary, Relief measures, Refugees), Jacket, nr. 2 (11 January – 11 November 1957).

19 UNARMS: UN Press Release SG/567. Secretary-General and High Commissioner for refugees make further appeal to assistance to Hungarian refugees (12 March 1957), UN- S-445-0195-8. And, NLS: United Nations, Department of Public Information, Press and Publication Division, UN, New York (for use of information media – not an official record), Press Release REF/102, UN, High Commissioner arrives in Vienna. Informs government of $ 2, 000, 000 Contribution for Hungarian Refugee Relief (The following was received here from the Office of the United Nations High Commissioner for Refugees, Geneva) (20 December 1956), Dag Hammarskjöld samling, Hungary, 1956-1957 (chronologic.) 1 November 1956 – 31 January 1957.

20 UNARMS: Letter from Myer Cohen, Executive Director for Relief to the Hungarian People, UN, New York to Philippe de Seynes, Under-Secretary for Economic and Social Affairs, Under-Secretary for Relief to the Hungarian People, UN, New York (7 December 1956), UN-S-445-0195-7.

partito si schierò con l'interpretazione di Mosca. Il Segretario del PCI Palmiro Togliatti ritenne essere quanto stava accadendo in Ungheria un tentativo controrivoluzionario di stampo fascista e giustificò l'azione sovietica poiché era stata fatta a difesa delle conquiste del proletariato ungherese. Pietro Ingrao sull'Unità, quotidiano organo del PCI, pubblicò un editoriale chiaramente favorevole alle posizioni del Cremlino. Non tutto il partito si schierò a favore della repressione: un appello sottoscritto da 101 intellettuali iscritti al PCI condannò l'intervento e chiese un cambiamento della linea politica. La partecipazione all'appello fu per la maggior parte dei firmatari l'inizio di un percorso di uscita dal partito. Nelle maggiori piazze italiane le dimostrazioni a favore dei rivoltosi erano frequenti. Il governo italiano ebbe una posizione chiara sin dall'inizio. Quando scoppiò la crisi ungherese Antonio Segni era il quinto Presidente del consiglio su sei della II Legislatura (25.10.'53-14.03.'58), di un governo di coalizione composto dalla Democrazia cristiana, dal Partito socialista democratico italiano e dal Partito liberale italiano; sarebbe rimasto in carica dal 6 luglio 1955 al 15 maggio 1957, per tutta la durata della fase più acuta della crisi. Il Ministro degli affari esteri era il liberale Gaetano Martino. Il gabinetto italiano tenne una linea di ferma condanna dell'invasione sovietica. Martino si mosse lungo due direttrici di sostegno ai rivoluzionari ungheresi: la denuncia della violazione dei principi di non ingerenza, di autodeterminazione, di rispetto dell'indipendenza dei popoli e della sovranità degli stati sanciti dalla conferenza di Bandung di cui l'Urss era stata firmataria nell'aprile del 1955 e la manifestazione del proprio assenso alla discussione di quanto avvenuto in sede Assemblea Generale dell'ONU. La politica del Ministro italiano era rivolta ad uno scenario interno di contrasto al Partito comunista e ad uno internazionale di opposizione all'Urss, ma era comunque la politica di una piccola potenza a sovranità limitata sconfitta nella seconda guerra mondiale che, molto lentamente e con grande difficoltà, stava recuperando un ruolo in campo internazionale. Lo scarso potere contrattuale doveva essere bilanciato dalla capacità di inserire i pronunciamenti e la tutela degli interessi italiani in quelli più generali degli alleati occidentali e di crearsi spazi di manovra in Europa[21]. Gli alleati avevano nel 1956 obiettivi divergenti da quelli italiani essendo invischiati in problemi coloniali e nella questione di Suez[22]. La politica estera italiana del periodo della crisi ungherese non è materia specifica di questo lavoro, ma è necessario sottolineare la fermezza sulla posizione di condanna dell'intervento sovietico mantenuta da Roma, nonostante la scarsa possibilità di un risultato positivo. Per un'approfondita analisi del ruolo avuto nella crisi ungherese e più in generale nella politica estera italiana da Martino si rimanda ai lavori di Angela Villani (2007 e 2008). L'intransigenza italiana non era condivisa dagli alleati occidentali e gli Stati Uniti non desideravano alzare ulteriormente

[21] Archivio Storico del Senato della Repubblica (=ASSR), *Fondo Gaetano Martino*, sez. I, b.1, f.7, tel. 12817 in partenza, Ministero affari esteri a Amb. italiana a New Delhi, 1 novembre 1956.

[22] Archivio Storico Ministero degli Affari Esteri (=ASMAE), *Telegrammi segreti*, 1956, Francia-Amb. Parigi, tel. 25211 in arrivo Parigi-Roma.

il livello dello scontro politico-diplomatico in corso con l'Urss. Roma non tenne conto dei consigli alla moderazione ricevuti dagli alleati, suggerì a questi la rottura delle relazioni diplomatiche con Mosca, durante la sessione speciale d'emergenza dedicata dall'Assemblea Generale all'Ungheria chiese l'invio di una Commissione e di un Corpo di polizia internazionale in terra magiara e denunciò a più riprese con toni durissimi l'intervento sovietico e lo stesso Kádár fu accusato di complicità con Mosca. Appellandosi alla tutela dei diritti umani si utilizzò il termine genocidio con riferimento alla dura repressione contro la rivolta e alla deportazione di ungheresi in territorio sovietico. L'approvazione, il 4 novembre 1956, in sede di Assemblea Generale di una risoluzione, la 1004, di condanna dell'invasione sovietica non cambiò lo stato delle cose. Imre Nagy chiese più volte un intervento dell'ONU e il veto posto da Mosca oltre a bloccare le decisioni del Consiglio di sicurezza dimostrò, ancora una volta, l'inadeguatezza dell'ONU a risolvere crisi politiche internazionali. L'Assemblea Generale tentò, nonostante le difficoltà, di fare qualcosa e con la risoluzione 1132 del 10.01.1957, istituì un Comitato Speciale d'indagine sull'Ungheria del quale fecero parte i rappresentanti di Australia, Ceylon, Danimarca, Tunisia e Uruguay; l'Italia non ne fece parte, ma tentò lo stesso d'imporre, senza successo, i propri punti di vista provando ad influenzarne l'attività in direzione[23], approvandone le conclusioni e cercando, ancora una volta vanamente, di aumentarne l'effetto[24]. Il governo Segni e il successivo presieduto dal democratico cristiano Adone Zoli (19.05.1957-01.07.1958), con agli Affari esteri e alla Vice presidenza del consiglio il compagno di partito Giuseppe Pella sostennero tutte le iniziative che andassero in direzione di una condanna severa di Kádár e dell'Urss. Roma richiamò anche il proprio rappresentante diplomatico a Budapest. A più riprese la crisi ungherese fu proposta in sede di Assemblea Generale con l'Italia sempre su una posizione di ferma condanna. L'ultima discussione portò ad una risoluzione la 1857 (XVII sessione assembleare) del 20 dicembre 1962 con la quale si registrava il fallimento dell'ONU nella questione ungherese.

In contemporanea all'azione diplomatica e alle manifestazioni di sostegno ai rivoltosi magiari in molte città italiane, il governo prese delle decisioni a favore dei profughi stanziando 50.000 dollari da utilizzare tramite il Comitato intergovernativo per le migrazioni europee. La franchigia doganale fu estesa allo scopo di rendere più semplice l'invio di aiuti da parte dei privati, fu mobilitata anche la Croce Rossa italiana (=CRI)[25]. Roma diede la propria disponibilità ad accoglie-

[23] ASMAE, *Telegrammi ordinari*, 1957, vol.42, ONU-New York, tel.1822 del 22.01.1957, Rappresentanza permanente italiana (=Rpi) ONU a Ministero Affari Esteri (=MAE)" Comitato Speciale per questione Ungheria".

[24] Ibidem, tel. 14661 del 19.06.1957, Rpi ONU a MAE" Comitato Speciale per questione Ungheria".

[25] Archivio Centrale dello Stato (=ACS), *Presidenza del consiglio dei ministri (=Pcm), 1955-1958*, b.15.2(327), f. 54607, sf. 2. ASMAE, *Telegrammi ordinari*,1956, vol.28, ONU-New York, tel.14363 del 1.12.1956, MAE a Rpi ONU, "Problema rifugiati ungheresi". L'attività della Croce Rossa

re inizialmente 2.000 profughi, per un periodo provvisorio di sei mesi, numero successivamente elevato a 4.000. Alla fine di giugno 1957 quando il flusso si avviò alla conclusione, in Italia furono accolti 3.832 profughi ai quali fu garantita la possibilità di emigrare nei paesi che per loro avevano previsto delle quote d'ingressi. I profughi furono inviati in campi di raccolta organizzati e gestiti dalla Croce Rossa a Jesolo, a Follonica presso l'ex colonia fascista "Luigi Pierazzi", a Massa Carrara, a Ravenna dove 300 trovarono accoglienza nei locali della colonia di Marina di Ravenna, a Tirrenia e a Latina al centro "Rossi Longhi". I rifugiati furono sistemati anche nelle ex colonie fasciste del Calambrone, località marina toscana nel comune di Pisa, dove il 28 novembre 1956 giunsero 700 profughi per le necessità dei quali la Croce Rossa di Pisa allestì un centro di raccolta indumenti, medicinali e offerte di denaro. Il 23 gennaio successivo la colonia ricevette la visita di Carla Gronchi, moglie del Presidente della Repubblica. Il 30 maggio 1957 dalla colonia di Calabrone in aggiunta ai 459 già andati via, 241 profughi furono trasferiti a Genova dove s'imbarcarono per il Canada. Sempre con il sostegno della CRI, alcune decine di profughi furono accolti sulle colline bolognesi nella località Cà di Landino. L'incarico alla CRI fu dato su proposta del socialdemocratico Ezio Vigorelli, Ministro del lavoro e della salute pubblica. Negli interventi a favore dei rifugiati ci fu una continuità nei meccanismi assistenziali e nelle strutture post II conflitto mondiale. Il centro di Jesolo ospitò profughi provenienti dai campi di raccolta austriaci di Eisenstadt, Oberpullendorf e Handau in maggioranza in fuga da Budapest giunti al confine di Coccau (Tarvisio) privi di tutto (Kiss 1996). Il Friuli Venezia-Giulia e la città di Udine dalla cui provincia i rifugiati facevano ingresso in Italia dimostrarono grande solidarietà materiale e morale con un'accoglienza generosa e manifestazioni inneggianti all'Ungheria libera.

Alla fermezza di Roma contribuì il sostegno ai rifugiati dato dalla Chiesa cattolica e dalle sue organizzazioni e la dura e chiara presa di posizione della Santa Sede contro l'intervento sovietico che risentiva della pessima condizione in cui viveva la Chiesa ungherese in quel caso particolare e in generale tutta la Chiesa cattolica nell'Europa orientale comunista. La Chiesa italiana manifestò a più riprese e a più livelli il proprio sostegno ai profughi e agli insorti in Ungheria. Il 4 novembre 1956 il cardinale Montini, arcivescovo di Milano e futuro papa con il nome di Paolo VI, fu fotografato durante la benedizione degli aiuti da inviare in Ungheria raccolti dalla diocesi milanese. Il patriarca di Venezia Roncalli, futuro papa Giovanni XXIII, visitando il 1° dicembre di quell'anno il campo dei profughi a Jesolo, pronunciò un'accorata preghiera con la quale chiedeva l'intervento divino per la salvezza, la libertà, la pace e la prosperità del popolo ungherese per i cui gloriosi morti invocava la concessione del riposo eterno. Alla misericordia divina affidava il soccorso degli esuli e la protezione dei cittadini rimasti nella cara patria in lutto (Sansonetti 2010). L'invasione sovietica indusse la "Chiesa del silenzio" a urlare il proprio disagio. In Italia i sacerdoti ungheresi organizzarono

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Italiana è documentata dalle carte conservate all'ACS, *Croce Rossa Italiana*, *Archivio generale* (1908-78), *Servizio Affari Internazionali*, *b. 23*.

nei centri di accoglienza le settimane missionarie. Si trattava di incontri spirituali per incoraggiare i profughi e rafforzarli nella fede. In queste occasioni i sacerdoti portavano la croce di San Giovanni da Capestrano il frate francescano inviato nel 1451 da papa Nicolò V nell'Europa centro-orientale a predicare con grande successo la crociata contro i Turchi e anche a combattere il movimento hussita. I nuovi Turchi erano i Sovietici invasori che così come i primi nel 1456, negli auspici dei preti ungheresi, sarebbero stati sconfitti 500 anni dopo. Quando il 4 novembre 1956 verso le 04.30 i carri armati sovietici iniziarono a sparare, il primate di Ungheria, nazione con il 97% di cristiani su più di 10 milioni di abitanti di cui il 70% si dichiarava cattolico, il cardinale Mindszenty arcivescovo della diocesi di Esztergom era da qualche giorno libero dal suo domicilio coatto e aveva espresso prima del 4 novembre, per radio la speranza degli ungheresi a vivere liberi e in pace anche con gli oppressori. Un discorso comunque moderato rispecchiante la consapevolezza della difficoltà di realizzazione del desiderio dei rivoluzionari. Le violente persecuzioni patite avevano ridotto al silenzio anche la Chiesa cattolica ungherese. Papa Pio XII diresse al mondo cristiano e no tre brevi encicliche che non influirono sulla situazione ungherese, non bloccarono i carri armati e non fermarono i profughi, ma dissero in maniera chiara che la Santa Sede stava dalla parte dei rivoltosi. La prima enciclica la "Luctuosissimi eventus"[26], resa pubblica il 28 ottobre 1956 festa di Cristo Re, indiceva pubbliche preghiere per far ottenere alla popolazione ungherese una pace fondata sulla giustizia. La seconda la "Laetamur admodum"[27], emanata il I novembre 1956, deprecava quanto accadeva in Ungheria e quanto era iniziato a accadere in Medio oriente, la terza la "Datis nuperrime"[28], la più dura delle tre, fu diramata il 5 novembre 1956 il giorno dopo l'inizio della battaglia di Budapest e tra le tante violenze condannate inseriva il rovesciamento delle patrie istituzioni, i diritti umani violati e conculcati da armi straniere; tutti delitti gridanti vendetta davanti a Dio il quale avrebbe punito anche i governanti e le nazioni che se ne macchiavano. Il 10 novembre papa Pacelli rivolse al mondo un radio-messaggio per la libertà e la pace[29], in cui parlò della iniquità consumata a rovina del diletto popolo magiaro, reo di aver voluto il rispetto dei fondamentali diritti umani. Gli interventi continui e chiari nella loro interpretazione da parte del pontefice romano non ebbero effetto e quella parte dell'Ungheria in lotta contro le truppe sovietiche continuò ad essere sola e alla fine a ricevere soccorso furono soltanto i profughi.

Il fallimento dell'intervento del Papa aggiunge un ulteriore elemento di riflessione sull'efficacia dei pronunciamenti della Santa Sede nelle crisi internazionali.

[26] Acta Apostolis Sedis 48 (1956), pp. 741-744

[27] Ibidem, pp. 745-748.

[28] Ibidem, pp. 748-749

[29] Ibidem, pp. 787-789

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