Migration Within the EU Context, Seen through a Multidisciplinary and Plurilinguistic View

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Edited by

Francesca Cappellini,
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We would like to dedicate this book to all the young scientists aspiring to expand the frontiers of knowledge.

PREFACE

Europe has historically been a foundry of different cultures, languages, and religions. Thanks to its diversity, it can rely on being progressive to evolve and overcome geopolitical challenges. However, the combination of democratic inclusivity and rapid societal shifts has rendered national identities and legal systems vulnerable to erosion and fragmentation. Rooted in the continental law tradition, European legislation relies heavily on legal norms to keep pace with the latest developments.

In this context, migration acts as a catalyst, causing legal systems and languages to clash, merge, and transform.

The purpose of this collection is to analyse and deepen, from a multidisciplinary perspective, the way in which, in the 21st century, language and legal issues in the migration framework have become almost indivisible, as one influences the other profoundly.

In line with the principle of the personality of law, migrants may import elements of their legal heritage into host states. Due to language barriers and hostile attitudes towards migration, there is a significant risk of segregation. This can lead to the formation of closed societies governed by legal cultures that may be clashing with Western human rights norms, resulting in a sociological legal pluralism where law becomes heavily fragmented. In addition, this issue led to a rethink of how to effectively combine the safeguards provided by the legislation belonging to different legal orders. Thus, in the European scenario, a significant emphasis should be devoted to the integrated protection of migrants' fundamental rights, as provided by Constitutional, European, and International Law.

From a purely linguistic standpoint, this clash between the laws that form this new plethora of culturally significant principles creates a clear disparity between those who hold power and the factual application of said rules. Although it has been said that power is not just a matter of language, it has many manifestations amongst other modalities or dimensions that may become more forefronting and influential. While we are oriented to the overall foundational construct of power, we are primarily concerned with how power is exercised and enacted through language.

This publication is a compilation of papers presented at the 4EU+ conference *Migration within the EU Context Seen Through a Multi-disciplinary and Plurilinguistic View*, held in September 2023 in Prague.

The conference brought together scholars and practitioners from various fields to explore the intricate relationship between migration, language, and legislation within the European Union. By examining these topics through a multi-disciplinary lens, the conference aimed to explore how migration has influenced recent linguistic and legal dynamics.

Following the structure devised for the conference, the book is divided into 3 main sections:

1. Constitutional and European Law on migrants' rights;
2. Linguistic challenges in migration;
3. Theory and philosophy of law and human rights of migrants.

The contributions in this volume reflect the diverse perspectives and in-depth analyses, offering a comprehensive overview of the current challenges and opportunities in these fields of study. They offer both theoretical and practical focus and feature a multitude of methodologies. Papers focused on linguistic and sociological aspects of migration are based on statistical analysis and Corpus Linguistics. Their counterparts from Legal Theory and Constitutional Law use comparative, historical, doctrinal, and analytical methods.

This publication not only documents the discussions and findings of the conference, but also wants to serve as a basis upon which scholars and institutions alike can build new perspectives and contributions to forward the discourse and attitudes towards migration in a constructive way that promotes the equal and fair treatment of all migrants.

PART I:

CONSTITUTIONAL AND EUROPEAN LAW ON MIGRANTS' RIGHTS

CHAPTER I

THE DROWNED RIGHTS OF MIGRANTS: AN ANALYSIS FROM A EUROPEAN CONSTITUTIONAL LAW PERSPECTIVE

MARIA ELISA D'AMICO*

Introductory Remarks

Tackling the phenomenon of migration and the rights of migrants today means touching on one of the most sensitive aspects of contemporary society. The data speaks for itself: from 2014 until now, more than 28,000 people have died in the Mediterranean Sea and more than 120 million people are refugees all over the world.

The issue of human rights for migrants raises many questions that are not only debated in academic conferences or publications but also have strong relevance in public discourse.

In this perspective, the phenomenon of migration challenges European and Constitutional rights and principles, as we witness daily at our borders. The tragedy of shipwrecks and small boat incidents in the Mediterranean, the masses of refugees fleeing from war make the thinking of the German philosopher of Jewish origin Hannah Arendt, exiled in the United States, still relevant today. According to her, the most evident failure of universalism is represented by the masses of stateless individuals generated after the two World Wars: the "stateless" whom no one wants to take responsibility for and who remain deprived of the very right to have rights.[1] In this paper, I set out to provide some insights into the prospects for protecting what I call the "drowned" rights of migrants, who face extreme difficulties when entering Europe. My analysis will inevitably intertwine both with Constitutional law and European Union law, based on the

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[1] Hannah Arendt, *Le origini del totalitarismo,* (Torino: Einaudi, 2017), first edition 1951.

fundamental assumption that the European integration project today is based on a community of shared rights and values, which embody the true reason that led people to unite: to ensure peace and strengthen solidarity among all individuals in Europe.[2]

To develop my arguments on the topic, I will structure my analysis into three parts:

In the first part, I will depict the broad and diverse framework concerning constitutional and European principles that will help me identify which rights we can define as "drowned" rights.

In the second part, I will focus on the Italian Constitutional case law on migrants' fundamental rights, in order to determine how these rights are protected and what the major challenges are in their protection.

In the final part, I will instead concentrate on ensuring the principle of equality and non-discrimination towards migrant individuals.

Migration and Borders: Framework on Constitutional and European Principles

First of all, the topic of state borders concerning the protection of the rights of migrants leads us to reflect on one of the central challenges of modern constitutionalism: the universalism of human rights.

Since the Universal Declaration of Human Rights in 1948, the protection of rights should no longer be tied to the borders of individual states but, as Bobbio stated, it "consists in the global protection of the individual as such, regardless of their citizenship or lack thereof".[3]

The Italian Constitution embodies the universal vision of rights in Articles 2 and 10, paragraphs 2 and 3.

In particular, Articles 2 and 3 have a general character and establish the inviolability of rights and the principle of non-discrimination as the foundation of the constitutional state, while Article 10, paragraph 3, establishes the right to asylum and reflects the universalist spirit of the Constitution.

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[2] For an in-depth study on the origins of Europe and the principle of solidarity, see the insightful reflections of Paolo Grossi, *L'Europa del diritto*, (Roma-Bari: Laterza, 2007); and Antonio Padoa Schioppa, "Note su ordine giuridico europeo e identità europea in prospettiva storico-costituzionale", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, Vol. 31, (2002), 61 ff.

[3] Norberto Bobbio, *L'Età dei Diritti*, (Torino: Einaudi, 2014), first edition 1990.

This provision should allow individuals who are hindered in the exercise of democratic freedoms as established by the Constitution to cross borders and seek protection within the "territory of the Republic".

The proceedings of the Constituent Assembly reveal a very broad conception of asylum. It seems that the members of the Assembly, many of whom had personally been political asylum seekers, agreed on the profound significance of the right to asylum, considering it one of the "most noble and sacred" rights,[4] a symbol of "a new world of freedom and peace,"[5] and a "most noble affirmation of human solidarity."[6]

However, it is worth noting that even within the Constituent Assembly, there were those who, almost prophetically, believed that "tomorrow thousands of political refugees from other countries might knock on our doors, and we would be compelled to grant them asylum without any limitation, even when restrictions might be advised for economic reasons."[7]

Thus, since 1947 borders have constituted the paradigmatic clash between two sometimes opposing but constitutionally significant needs: on the one hand, security and border control, which are classical expressions of state sovereignty; on the other hand, the protection of the rights of those who wish to cross that border for various reasons, usually related to the pursuit of a better life.

In other words, at the state borders, the problems related to the relationship between state sovereignty and the inviolable protection of individual persons who metaphorically "knock on the doors" of a foreign country emerge to their fullest extent.

As affirmed by the Italian Constitutional Court, it is important not to forget that the protection of inviolable rights belongs to all individuals "not because they belong to a specific political community, but because they are human beings."[8]

Of particular importance are the European principles in this matter. Firstly, Article 18 of the Charter of Fundamental Rights of the European Union, which enshrines the right to asylum, must be guaranteed in accordance

[4] Constituent Assembly of Italy, MCA Vincenzo Cavallari, March 27, 1947 (afternoon session).
[5] Constituent Assembly of Italy, MCA Tommaso Tonello, April 11, 1947 (morning session).
[6] Constituent Assembly of Italy, MCA Ottavio Mastrojanni, March 5, 1947 (afternoon session).
[7] Constituent Assembly of Italy, MCA Umberto Nobile, April 11, 1947 (morning session).
[8] Italian Constitutional Court, judgment No. 105 of 2001.

with the Geneva Convention of 28 July, 1951, and its subsequent 1967 Protocol, as well as the provisions of the European Treaties.

It is worth mentioning the significance that the area of Freedom, Security and Justice has gained in the advancement of the European integration project, starting with the Schengen Agreement. It has allowed for the abolition of controls at internal borders and the creation of a common space based on the freedom of movement for people, irrespective of their citizenship, and in compliance with fundamental rights.

Its regulation can now be found in Title V of Part III of the Treaty on the Functioning of the European Union (TFEU), which is dedicated to judicial cooperation, and includes Chapter II concerning policies on border controls, asylum, and immigration (Articles 77-80 TFEU).

Article 78 of the TFEU mandates that the Union develop a unified policy on asylum, subsidiary protection, and temporary protection. This policy aims to provide suitable status to any third-country national in need of international protection while ensuring adherence to the principle of non-refoulement[9] In parallel, Article 79 highlights the Union's responsibility to create cohesive public policies on immigration. These policies are designed to manage migration flows effectively at all stages, ensure fair treatment for third-country nationals legally residing in Member States, and enhance measures to prevent and combat illegal immigration and human trafficking.[10]

Furthermore, the guiding principle mentioned in the introduction, found in Article 80 of the TFEU, asserts that the Union's policies and their implementation should be governed by the principle of solidarity and fair sharing of responsibility among Member States. This includes considering the financial implications. When necessary, the Union must adopt appropriate measures to enforce this principle.[11]

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[9] Article 78 TFEU "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement".

[10] Article 79 states that the Union's task is to ensure common public policies on immigration capable of "ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings".

[11] Article 80 TFEU, "The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle".

Hence, from this first overview, we can affirm that the platform of rights and principles derived from the Italian Constitution and primary sources of European Union law is particularly advanced and recognizes full protection of migrant rights.

However, the full realisation of these principles still struggles to find complete implementation in the public policies approved by European institutions. An example is the recent immigration and asylum pact approved in May 2024,[12] which will present new crucial challenges for the management of borders and asylum applications.

Although not proceeding with the long-awaited revision of the first entry criterion stipulated by the Dublin Regulation 3, the reform introduces important new developments in terms of solidarity among States and entry procedures.

In fact, the new Pact strengthens the so-called border procedures, under which people arriving at the EU's external border will be detained and their personal freedom restricted solely to verify entry requirements. These are regulatory changes that significantly impact individual rights, and which will need to be assessed considering the principles expressed by European and national courts.

The Italian Constitutional Court case law on Migrants' Fundamental Rights

As a constitutional scholar, I find it important to outline the main lines of the Italian Constitutional Court's case law regarding the rights of migrants and border protection.

The first rulings by the Italian Constitutional Court on this matter addressed the extension of inviolable personal rights to foreigners.

From its earliest decisions, the Court has emphasized that the principle of equality, as stated in Article 3 of the Constitution, although explicitly referring to "citizens", must also be extended to foreigners when inviolable rights under Article 2 of the Constitution are at stake.

Specifically, in judgment No. 120 of 1967, the Court has clarified

[12] On May 14, 2024, the Council has definitely approved the "Migration and asylum pact". In depth, see https://www.consilium.europa.eu/en/policies/eu-migration-policy/ eu-migration-asylum-reform-pact/. On the background of this reform see Cecilia Siccardi, "La riforma del sistema comune di asilo: prospettive e criticità", Diritti comparati, (2023).

> This is because, if it is true that Article 3 expressly refers only to citizens, it is also certain that the principle of equality applies to foreigners as well when it comes to respecting fundamental rights.[13]

The Constitutional Court has identified personal liberty[14] and the right to defense[15] among these rights.

Only later, as the migration phenomenon became more pressing in Italy starting from the 1980s, did the Constitutional Court begin addressing issues related to laws aimed at managing migration flows and border control.

In this context, the need for border control emerged in the Court's jurisprudence, recognised as a constitutional "value" and an "inevitable duty of the State."

Such an inevitable duty is closely connected to ensuring compliance with "rules established for orderly migration flows and adequate reception", which are "intended to protect the national community and, at the same time, to safeguard those who have observed them and who could be harmed by the tolerance of illegal situations."[16]

From that point on, numerous rulings have reaffirmed the multiple values connected to border protection, identifying them as "defense of the national community", "orderly management of migration flows", "security", "public health", "public order", "international constraints", and "national immigration policy", as well as political assessments related to the "socio-economic sustainability of the phenomenon."[17]

Furthermore, supranational and European parameters are increasingly prominent in the protection of migrants' rights, involving both national and European courts.[18]

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[13] Similarly, in judgment No. 104 of 1969, the Constitutional Court has stated "In its ruling No. 120 of 1962, the Court upheld the view that the principle of equality, while specified in Article 3 of the Constitution as referring to citizens, should be considered extended to foreigners when it comes to the protection of inalienable human rights, which are guaranteed to foreigners in accordance with international law. From this statement regarding the equality of foreigners with citizens, the Court has no reason to deviate, as it is evident that, with respect to inalienable personal rights, which represent a subset of the total freedom rights granted to citizens, the entitlement to these rights, shared by both citizens and foreigners within that sphere, necessarily implies a position of equality within that sphere.".

[14] Italian Constitutional Court, judgment No. 105 of 2001.

[15] Italian Constitutional Court, judgment No. 222 of 2004.

[16] Italian Constitutional Court, judgment No. 353 of 1997.

[17] Italian Constitutional Court, judgments Nos. 148/2008, 206/2006, 62/1994, 63/2022.

[18] A recent case of dialogue between the Constitutional Court and the Court of

The European Court of Human Rights is also assuming a central role in protecting the rights of migrants. Noteworthy in this regard are the condemnations of Italy for the conditions at the Lampedusa migrant reception centre, deemed inhumane and degrading and in violation of Article 3 of the ECHR, and for the lack of suitable spaces to accommodate unaccompanied foreign minors.[19]

In a nutshell, the case law of the Italian Constitutional Court has raised highlighted the need for the full and effective protection of migrants' rights: this is in compliance with the principle of solidarity and non-discrimination that guide Italian and European legal systems.

Final Remarks on Principles of Equality and Non-Discrimination

I would like to conclude with some considerations regarding the principles of equality and non-discrimination, upon which the European Union is founded (Article 2 of the Treaty on European Union, Article 8 of the Treaty on the Functioning of the European Union). As is known, these principles are enshrined in all the Constitutions of the member states and are considered general principles of the Union.[20]

Once again, focusing on the Italian legal system, it is important to remember that the Constitution proclaims inviolable rights that must be guaranteed to all, regardless of their residence status. There is a "minimum core" of social rights (e.g., health, education) that must be guaranteed to everyone.

Migrants, asylum seekers, and foreign individuals are often subject to discrimination in the enjoyment of rights because access to social and welfare benefits is often tied to possessing a specific residence permit or the duration of residence. The Italian Constitutional Court has clarified on multiple occasions that such exclusions should not affect primary needs related to human dignity. In this regard, the decision no. 186 of 2020 by the Constitutional Court is emblematic, in which the Court considered the prohibition of age discrimination against asylum seekers as violating the principle of "equal social dignity" recognized by Article 3 of the Constitution

Justice is on so-called baby bonus, see Paolo Gambatesa's chapter in this book.

[19] cf. C. EDU, I Sez., J.A. and others v. Italy, (No. 21329/18), of 03/23/2023; C. EDU, V Sez., A.b. v. Italy (No. 13755/18), C. EDU, V Sez., M.A. v. Italy (No. 13110/18), C. EDU, A.S. v. Italy (No. 20860/20), of 10/19/2023

[20] Court of Justice of EU, judgment November 22, 2005, *Mangold*, C-144/04.

for every person, regardless of their status and the stability of their regular residence in Italian territory.

Furthermore, it should not be forgotten that such policies often risk negatively affecting the rights of the most vulnerable foreigners, such as people with disabilities or women. For example, the Constitutional Court declared unconstitutional, in seven rulings, a provision of a financial law in seven rulings that limited access to certain benefits for people with disabilities (e.g., care allowance) only to foreigners with a long-term residence permit.

In addition, in judgment no. 107 of 2018, it was declared the unconstitutionality was declared from a regional Veneto law that gave priority access to nursery schools to the children of residents in the region for at least fifteen years.

Although I have mentioned examples from domestic law, I believe that we can draw lessons from them at the European level as well. Excluding foreigners from social and welfare benefits based on "rigid" criteria such as duration of residence or residence permits risks negatively impacting the most vulnerable individuals, leading not only to discrimination but also to multiple and intersectional forms of discrimination.

Member States and the European Union should pay greater attention to this concept because in an increasingly multicultural society, partly due to migration, the risk of intersecting multiple factors of discrimination is high.

At the University of Milan, we are working extensively on the topics of multiple discrimination, social inclusion, and the protection of foreigners' 's rights through initiatives such as the establishment of Human Hall,[21] a research cent promoting interdisciplinary projects on social inclusion.

Additionally, in September 2023 we launched a Joint Degree program with the University of Prague and Warsaw on "Migration Studies and New Societies", promoted within the framework of the 4EU+ alliance. This will be a significant challenge in collaborating on a crucial topic for the future of Europe.

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[21] Information on Human Hall is available at https://humanhall.unimi.it.

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CHAPTER II

ACCESS TO RIGHT TO ASYLUM IN THE EUROPEAN AND CONSTITUTIONAL CONTEXT

CECILIA SICCARDI*

European and constitutional principles

Article 10(3) of the Italian Constitution guarantees the right of asylum to foreigners who find themselves in a situation of impediment to the democratic freedoms enshrined in the Italian Constitution.[1] This rule has never been implemented by the national legislator, and the European Union has progressively assumed competence in this matter.

Today, according to the consolidated jurisprudence of the Court of Cassation, also referred to by the Italian Constitutional Court, art. 10, paragraph 3 "is entirely implemented and regulated through the provision of the final situations foreseen in the three institutions constituted by refugee "status", subsidiary protection and the right to the issuance of a humanitarian permit."[2] Today, Article 10(3) of the Constitution must be read in the light of the Common European Asylum System, its directives and regulations.[3] This system has recently undergone a major reform, approved in May 2024.

In the light of this European and constitutional context, this contribution thus aims to analyse principles (para. 1), modalities (para. 2), obstacles (para. 3) and possible ways of access to international protection in Europe (para. 4).

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[1] On the assumption of the constitutional right of asylum see Carlo Esposito, 'Asylum (right of)—Constitutional Law, *Encyclopaedia of Law—Volume III*, (1958).

[2] See Cass., sec. VI, ord. 10686/2012, also referred to by the Constitutional Court in sentence No. 194 of 2019.

[3] On the content of Article 10(3) Const. see the studies by Claudio Panzera, *Il diritto all'Asilo. Profili costituzionali* (Naples: Editoriale scientifica, 2020).

As far as principles are concerned, at the international and European level—when it comes to the entry of applicants for protection—the principle of non-refoulement enshrined in Article 33 of the Geneva Convention relating to the Status of Refugees, as well as in Art. 3 and Art. 4, prot. 4 ECHR[4] comes to the fore.

This is a cardinal principle of international protection granted to refugees, which prohibits state authorities from returning asylum seekers to their country of origin or to places where they may be subjected to torture or persecution.

In addition to the ban on refoulement, the Italian Constitution provides an additional guarantee for asylum seekers.

The jurisprudence of legitimacy has identified the right of asylum as the right of a foreigner to "enter the territory of the State in order to be admitted to the procedure for examination of the application for recognition."[5]

Even in light of this jurisprudential orientation, the most attentive doctrine has identified entry into state territory as the minimum necessary content of the constitutional right of asylum.[6]

This minimum content consists of two elements: the right to enter the territory of the State in order to apply for protection; the right to reside in the territory of the Republic conditional on the outcome of the procedure to establish entitlement.

In the face of this scenario, however, a paradox must be noted: on the one hand, despite the fact that the right to asylum is recognised by international conventions, EU law and the constitutions of states, there are no routes to legally and safely reach Europe and seek protection.

On the other hand, the only place where it is possible to apply for protection according to the European directives is on the territory of the Member States, as applications abroad are precluded.[7]

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[4] For an in-depth study on the subject Francesco L. Gatta, *Il divieto di espulsione collettiva di stranieri nel diritto internazionale e dell'Unione europea* (Naples: Editoriale scientifica, 2023).

[5] See Court of Cassation, sec. I, Judgement No. 25028/2005.

[6] This thesis is expressed by Marco Benvenuti, *Il diritto d'asilo nell'ordinamento costituzionale italiano. An Introduction* (Padua: Cedam, 2007).

[7] In particular, this principle is provided for by: art. 3 of the so-called Dublin III Regulation No. 604/2013/EU, which specifies that "Member States shall examine any application for international protection lodged by a third-country national or a stateless person on the territory of any Member State, including at the border and in transit zones"; moreover, the so-called Reception Directive No. 33/2013/EU establishes in art. 3 that reception rules apply "to all third-country nationals and stateless persons who express their wish to seek international protection on the territory of a Member State, including at the border and in transit zones".

The only way to reach the European Union, apart from some good practices that will be analysed in the following paragraphs, is to travel irregularly.

The irregular journey of asylum seekers

The absence of legal paths to access international protection forces people who wish to apply for international protection to travel irregularly.[8]

This situation occurs especially in relation to those migrants who come from countries subject to visa requirements and appear on the so-called *black list* (Annex I EU Reg. 2018/1806).

The visa system is governed by Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009, which' is not applicable to the case of asylum seekers.

Firstly, the Visa Code leaves it to states to regulate visas for humanitarian reasons. Left to the discretion of national legislators, as also confirmed by the EU Court of Justice and the European Court of Human Rights,[9] this option has not been pursued by states.

Secondly, short-term visas are in themselves incompatible with the situation of an applicant for protection, who instead aims for a long-term stay, at least until the end of the persecution.

The impossibility of obtaining an entry visa for Europe leads people to travel to the European borders irregularly.

Along the routes, people can become victims of people smugglers, paying large sums of money to be transported to Europe; otherwise, they can become victims of trafficking, being subjected to forced labour or slavery and becoming the objects of exchange themselves. This situation has an even more devastating impact on the rights of the most fragile individuals such as minors and women, who are more easily subjected to blackmail and abuse of power.

Along the routes, migrants "collide" with the consequences of border externalisation agreements drawn up between European countries and migrant transit countries to stop departures.

Among the agreements signed by the Italian government, of particular note is the Italy-Libya Memorandum, signed in 2017[10] and tacitly renewed

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[8] See Cecilia Siccardi, *I diritti costituzionali dei migranti in viaggio. Sulle rotte del Mediterraneo* (Naples: Editoriale Scientifica, 2021).

[9] See CJEU (C-638/16), X. *and X. v. Belgium,* cited above, 7 March 2017; C. EDU, G.C., *M.N. and others v. Belgium* (No. 3599/18), 5 March 2020.

[10] Memorandum of Understanding on cooperation in the field of development, countering illegal immigration, trafficking in human beings, smuggling and

in 2020 and 2023, and the Italy-Albania Protocol signed on 6 November 2023,[11] later ratified by law.[12]

The Italy-Libya *Memorandum* commits the parties to undertake a series of actions to stem the "illegal flow of migrants."

The Italian side pledges to finance and "provide technical and technological support to Libyan bodies in charge of the fight against illegal immigration".

These measures include the adaptation and financing of "reception centres", in which violence and atrocious violations of human rights are perpetrated, as denounced by various associations and international bodies.

In addition, it is also worth pointing out here that under the *Memorandum*, Italy supports and finances the Libyan Coast Guard in order to prevent departures to Italian shores and operate so-called *pull-backs*.

These activities by the Libyan coast guard constitute a circumvention of the ban on refoulement and collective expulsions, as stated by the European Court of Human Rights.[13]

Those who manage to escape from Libya cram into makeshift boats for the Mediterranean crossing where over 30,000 people have died since 2014.[14]

It is not certain that the lucky ones who manage to survive will land on European shores, at least because of the provisions of the recent Protocol signed between the Italian and Albanian governments.[15]

Specifically, the Protocol allows for the construction of centres (hotspots and CPRs) in Albania, subject to Italian jurisdiction and law, in order to ascertain the entry requirements of migrants intercepted by Italian authorities in waters outside the territorial sea. It is estimated that around 36,000 people per year will be detained in these centres.[16]

It differs from outsourcing policies in that it does not merely outsource border control functions to the authorities of a transit state but extends the

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strengthening border security between the State of Libya and the Republic of Italy, signed in Rome on 2 February 2017.

[11] Protocol between the Government of the Republic of Italy and the Council of Ministers of the Republic of Albania on Strengthening Cooperation in Migration Matters', 6 November 2023.

[12] Ratification Act No. 14/2024 was promulgated on 21 February 2024.

[13] C. EDU, G.C, *Hirsi Jamaa v. Italy* (27765/09), 23/02/2012.

[14] IOM, *Missing migrants*, 2024.

[15] On this topic, see Cecilia Siccardi, "The law ratifying and executing the Italy-Albania Protocol for the strengthening of cooperation in migration matters: constitutional issues," *Osservatorio AIC,* Nno. 2, (2024).

[16] See Sen. Lombardo's explanation of vote, during the 159th sitting of the Italian Parliament, 15/02/2024, stenographic record, 6.

jurisdiction and applicability of national law to a non-EU state, equating Albanian areas with Italian "border areas".

The Protocol poses several critical issues from the point of view of constitutional law, affecting the personal freedom, the right of defence and the right to asylum of persons detained in the centres.

In the light of the above journey, one has to question the effectiveness of the constitutional right to asylum, which seems to come to a standstill in the face of European border control policies. The trend towards externalisation and strengthening of border procedures is further confirmed by the New Pact on Migration and Asylum, approved on 14 May 2024.

Current trends: border procedures and detention

Among many innovations, the new European Migration Pact[17] includes one that directly affects the entry of asylum seekers.[18]

The Asylum Procedure Regulation in fact makes border procedures hitherto optional, compulsory in some cases, providing for detention pending the decision on the application for protection, with the aim of ascertaining the right to enter the territory of the state.

These are accelerated procedures (halved deadlines) for the recognition of international protection, which are characterised by presumptions of unfoundedness of the application and will apply to applications made at the border or in transit zones. As a result of the reform, Member States will be obliged to activate this procedure if the applicant has provided false information, represents a threat to national security, or belongs to a third state for which the acceptance rate for asylum applications is less than 20% at the European level.

This reform will merely reinforce what has already been provided for in Italy as set down in the Security Decree I[19] and the Cutro Decree.[20]

The latter has provided for a specific border procedure in cases of a border application submitted by a national of a so-called safe country, during which a foreigner who has not surrendered their passport or who

[17] For an effective summary of the reform package, see the Council website https://www.consilium.europa.eu/it/press/press-releases/2024/05/14/the-council-adopts-the-eu-s-pact-on-migration-and-asylum/ .
[18] On this topic, see Cecilia Siccardi, "The reform of the common asylum system: perspectives and critical issues," *Comparative Rights*, (2023).
[19] See Decree-Law No 118 of 2018, Art. 9.
[20] See Decree-Law No. 20 of 2023, Art. 7 bis.

does not provide an appropriate financial guarantee is detained.[21] Regardless of the decisions of some national judges, which can be criticised for reasons that cannot be explored here,[22] it is considered that such procedures, accompanied by forms of detention "on entry" into the territory of the State, are very problematic in the light of constitutional principles, for several reasons.

First of all, it is difficult to understand how the latter can be said to be consistent with Article 10, paragraph 3 of the Constitution, which, as we have seen, guarantees the right of entry "into the territory of the Republic"[23] to those who are prevented from exercising the democratic freedoms enshrined in the Italian Constitution. Moreover, the same rule requires an individual examination of the situations of impediment to the exercise of constitutional freedoms, not counting in any way citizenship, nor even less the likelihood of acceptance of the request, assumptions instead provided by the new European standards.

Moreover, it is questionable to make such an extensive provision of detention "on entry", which, although permitted by supranational sources,[24] is still a measure limiting personal freedom under Article 13 of the Constitution and which entails "that mortification of human dignity that occurs in every case of physical subjection to another person."[25] For this reason, the detention of a foreigner at the border should be ordered as an *extreme ratio* and certainly not as a generalised *modus operandi* for ascertaining the right to enter the territory of the State.

Is there still room for legal pathways to protection?

To date, the European Union has lacked a common legal framework to facilitate the legal and safe entry of applicants for protection into European territory.[26]

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[21] See Art. 6 bis Legislative Decree No. 142 of 2015, Interministerial Decree of 14 September 2023, later updated in May 2024.

[22] See Marilisa D'Amico, 'Administrative detention of migrants is contrary to constitutional norms', *Micromega*, (2023).

[23] *Ex multis* Cass., sec. I, sentence No. 25028/2005. Cass., Sez. Unite, 26 May 1997, No. 4674.

[24] See Art. 5 ECHR (f).

[25] See C. C. Cost. sentence No. 105 of 2001.

[26] On the topic see Cecilia Siccardi, "What are the legal entry routes for protection seekers in Europe? European and Constitutional Context", *Law, Immigration and Citizenship,* No. 2, (2022).

Even though the European Commission had recently highlighted[27] the need to promote legal and safe entry routes to seek protection, nothing is provided for in the new Pact.[28]

In the absence of a common European framework, the introduction of legal routes of access was mainly made through autonomous and non-homogeneous initiatives of individual states, outside the European legal migration programmes.

Legal entry routes are distinguished on the basis of several elements, such as the source regulating them, the beneficiaries, the initiators and the reasons for the measure.

With regards to the source regulating protected entry measures, it should be noted that in some jurisdictions such measures have only become established as an administrative practice, such as the *visa au titre de l'asile* in France.

Other measures, replicating the Italian "model" of humanitarian corridors that is well regarded by the European Commission, have been introduced by ministerial protocols, as in France and Belgium.

In other jurisdictions, these have been regulated by law, such as the application for protection submitted in Spanish embassies, ex art. 38, *Ley de Asilo*,[29] and the different types of humanitarian admission provided for in the *Gesetz über den Aufenthalt.*[30]

A further distinguishing feature of protected entry measures concerns the beneficiaries, who may be either individuals, as in the case of humanitarian visas, or groups of people selected on the basis of predetermined criteria (e.g. nationality, or vulnerability), as in the case of humanitarian admission programmes in Germany.

Furthermore, it is possible to distinguish protected admission initiatives by the sponsoring bodies, which may be public, private,[31] or combine both elements, as in the case of the land admission programmes in Germany.

The reasons for the recognition of the instrument of protected entry may also be different: on the one hand, they may be measures motivated by emergency situations relating to the situation of a country or a territory (e.g. temporary protection); on the other hand, they may be measures motivated

[27] See 2020 Pact on Migration and Asylum.
[28] New European Pact on Migration, 14 May 2024.
[29] Ley No. 12/2009.
[30] *Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet*.
[31] For a mapping of such initiatives see ERN, *Private sponsorship in Europe. Expanding complementary pathways for refugee resettlement*, 27 September 2017.

by the risk the individual runs, such as the reference by Article 38 of the *Ley de Asilo* to the threat to physical integrity.

In Italy, the entry of protection seekers located in other states has been ensured through Italy's adherence to European resettlement programmes for a minimum commitment, as well as within the framework of the humanitarian corridors, which constitute a best practice in Europe.

The so-called humanitarian corridors constitute private sponsorship programmes aimed at transferring applicants and holders of protection from countries of origin or transit/first asylum to Italy where they are welcomed and included in integration paths thanks to the support of associations. The first project of this kind, called O*pening Humanitarian Corridors,* was promoted in 2015 thanks to the signing of a memorandum of understanding between the Ministry of Foreign Affairs and International Cooperation, the Ministry of the Interior, the Community of Sant'Egidio, the Federation of Evangelical Churches, and the Tavola Valdese.[32]

This first experience, which led to the safe arrival in Italy of around one thousand applicants for protection, was then repeated in subsequent years, thanks to the signing of new protocols with similar characteristics.

The protocols signed over the years differ according to the countries from which the humanitarian corridors originate, the nationality of the beneficiaries, and the maximum number of beneficiaries involved. Thus, for example, the protocol signed on 12 January 2017 aims to receive 500 Eritreans, Somalis and South Sudanese from Ethiopia, by 19 May 2019 aims to receive 600 from Ethiopia, Niger and Jordan, and by 22 April 2021 aims to ensure the safe journey of 500 people from Libya[33] .

The humanitarian corridors are certainly a best practice, as are the other measures taken by other states to secure the arrival of protection seekers in Europe.

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[32] The Memorandum of Understanding for the implementation of the Opening of Humanitarian Corridors project between the Ministry of Foreign Affairs and International Cooperation, the Ministry of the Interior, the Italian Bishops' Conference and the Community of Sant'Egidio, 12 April 2015;

[33] See the Memorandum of Understanding for the realisation of the project Opening of Humanitarian Corridors between the Ministry of Foreign Affairs and International Cooperation, the Ministry of the Interior, the Italian Bishops' Conference and the Community of Sant'Egidio, dated 12 January 2017; The Memorandum of Understanding, Opening of Humanitarian Corridors, signed on 9 May 2019 signed by the Ministry of Foreign Affairs, the Ministry of the Interior, the Italian Bishops' Conference, the Community of Sant'Egidio; The Memorandum of Understanding for the realisation of the project Humanitarian Corridors Evacuations from Libya, signed on 22 April 2021.