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ASGI to the senators: these are the good reasons for a quick abrogation of the criminal offence of illegal entry and residence

The discussion that is underway in the chamber of the Senate of the Republic in these days has returned the criminal offence of illegal entry and residence to the public opinion's attention.

In this note, **ASGI briefly outlines the picture** of the situation and highlights the reasons and consequences produced to date **since its introduction in 2009**, in the so-called "security package", that was strongly advocated by the then interior minister, Roberto Maroni (and not by the so-called Bossi-Fini law, which dates back to 2002). It was the security package through which, it is worth recalling, an attempt was made at the time to introduce the obligation for staff to report foreigners who entered health facilities, a plan that was later abandoned due to elements including the strong opposition of doctors' associations.

Hence, it is positive for the debate to be reopened on the unreasonable reasons for the existence of a useless criminal offence that reveals the inability and unwillingness of the legislator to regulate the channels for the legal entry of immigrants in an effective and realistic manner, as it is a structural phenomenon and it is an illusion to believe that it may be governed through penal norms.

To date, it is **a criminal offence** that has proven a source of expenditure for the state that deploys considerable resources to hold trials, with a bureaucratic burden for offices, up to the point that the justice ministry itself called for its abrogation in May 2013.

Contrary to what many people believe, the criminal offence of "clandestinity" (irregular entry and residence) **does not cause overcrowding in prisons**, because those found guilty of it are punished with an administrative sanction that envisages the payment of a fine of between 5,000 and 10,000 euros, that is never collected in view of the fact that those residing illegally do not officially possess any goods that may be subject to attacks by the tax collection agency [*Agenzia delle entrate*]. Furthermore, custodial sentences cannot be envisaged because punishing irregular residence through imprisonment contravenes the Returns Directive, as has been repeatedly stated by the EU Court of Justice.

Hence, it is **a useless and harmful criminal offence** introduced through a so-called "manifesto law" which, like Manzonian shouting*, seeks to affirm in an abstract manner that illegal status is a crime, because this gives the impression that the state is strong (with the weak), even if it does not have any use and affects public spending without any useful return.

The true usefulness of the criminal offence of illegal residence consists in providing the electorate the "calming message" that results from establishing an equivalence between an irregular migrant and a delinquent: hence, there are no reasons to maintain it, and people who state the opposite are either ill-informed or they are interested in keeping it on the statute books for purposes of propaganda.

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* “loud and empty gestures”, a literary reference to “I promessi sposi” by Alessandro Manzoni, first published in 1827. It was set in the province of Lecco (Lombardy), where the author describes Spanish domination as being exercised through a lot of shouting, but a lack of implementation or respect for the laws by the citizenry.

ASGI - Associazione per gli Studi Giuridici sull’Immigrazione

The ASGI note of 11 October 2013 (translated below)

11 October 2013

Why the criminal offence of illegal entry and residence is useless and the good reasons for it to be quickly abrogated

The recent, tragic shipwreck in Lampedusa has returned the public opinion’s interest to the criminal offence of illegal entry and residence, that is, article 10-bis which was inserted in the consolidated act on immigration laws by law no. 94/2009 (the so-called “security package”).

First of all, it is necessary to explain that this criminal offence does not concern the uselessly restrictive and vexatious discipline regarding the condition of foreigners that was provided through the modifications to the same consolidated act on immigration laws introduced by law no. 189/2002 (the so-called Bossi-Fini law), which is a reform dating back to 2002 that preceded the introduction of the criminal offence of illegal entry and residence by seven years.

This criminal offence, *per se*, should not even be applied to the survivors of the latest tragedy in Lampedusa, apart from the surprising fact that - according to press reports that were not denied - the Agrigento prosecutors’ office recorded the shipwrecked survivors in the list of suspects of criminal conduct straight away, while the search for the disappeared and the counting of the deceased was still underway. The bewilderment caused by such zeal brought a criminal offence that was long forgotten by both the media and politicians back to the centre of the stage, an offence that continued its low-key existence in the halls presided over by justices of the peace (these honorary judges are tasked with enacting it).

In the context of these facts, the message addressed to the Senate and the Chamber of Deputies by President Napolitano returned the attention of public opinion and the political debate to the dramatic and unlawful situation in prisons. This mistakenly led people to believe that the norms introduced by the Bossi-Fini law and/or the criminal offence of illegal residence were among the causes of overcrowding in prisons.

In the presence of such a degree of misinformation on such delicate matters, there is a need for clarity:

1. nobody who was charged or convicted for the crime of illegal entry and residence can end up in prison (unless they are also accused of other criminal offences) for the simple reason that this offence is punished with a fine of between 5,000 and 10,000 euros, not with custodial sentences;

2. not even the criminal offence of failing to comply with an order to leave the territory of the state issued by the *questore* [the police chief in a given city] to foreigners who are expelled or refused entry exists anymore (in this a case, a crime that **was** introduced in its first version since 2002, that is, by the Bossi-Fini law and mistakenly confused in the general media with the criminal offence of illegal entry and residence). It envisaged the obligatory arrest of culprits and a custodial sentence, which did fill up the prisons: it is no longer applied since 28.4.2011 - the date when the European Union's Court of Justice declared that it contravenes the 2008 EU Directive on the return of migrants in an irregular situation and, since May 2011, it has been replaced by a similar criminal offence for which punishment consists in a fine.

Therefore, today, there aren't any foreigners in prison for offences that only relate to irregular entry and residence (except for the criminal offence of illegal re-entry of a foreigner who has been expelled) and, thus, these typologies are not factors that have led to an increase in the prison population.

Nonetheless, the criminal offence of illegal entry and residence is a typology that is odious, useless and racist, even if it does not produce prisoners and has nothing to do with the tragedy in Lampedusa.

One must not forget that the criminal offence of illegal entry and residence was strongly advocated by the then [interior] minister [Roberto] Maroni for the declared purpose of eluding the application of the part of Directive EC/115/2008 - the so-called returns Directive - which obliges EU member states to adopt certain guarantees regarding expulsion procedures and, in particular, envisages that repatriation measures should be carried out primarily through the concession of a period for their voluntary return, rather than by accompanying them forcefully to the border (if necessary after a brief stay in a CIE – detention centre) in every case. However, the Directive allows member states not to apply the guarantees that it envisages in cases in which the foreigner's expulsion is the effect of a punishment under the penal law and this is why, after it was proposed by the Berlusconi government of 2009, the law that introduced the criminal offence of illegal entry and residence was adopted, and set out as follows:

- foreigners who enter or reside illegally in the state's territory are punished with a fine of between 5,000 and 10,000 euros

- the judge may substitute the financial penalty with an expulsion

- the expulsion thus becomes a "sentence" and the Returns Directive may be circumvented

In short, it is the classic "labelling scam".

Moreover, that attempt to elude the Directive already failed two years later, when the EU Court of Justice, in the El-Dridi sentence, confirmed that the Italian legal system had to conform to the new Directive, which happened through a law decree of June 2011 which, in turn, largely sought to elude the effects of the same Directive.

Now that we have clarified the historical reasons for the introduction of this criminal offence, let's turn to its usefulness.

First of all, no foreigners convicted of this crime have ever paid a cent: those who reside illegally cannot be the holders of a bank account, they cannot work legally (so they don't have a wage slip), they cannot buy a property ... in essence, they do not have any goods that are officially recorded and may be attacked by the tax collection agency.

Yet, the state deploys resources to hold these trials: they are expenses that will never be recovered. Hence, not only does the public administration not gain anything from them, but it also spends a substantial amount of economic and human resources.

Furthermore, it is evident that the offence's effectiveness as a deterrent does not exist and it certainly does not lead any foreign person to respect the law.

Moreover, at present, it could not even be conceived that irregular residence should be punished through imprisonment because:

1. the current occupation rate of places in penitentiary facilities is 20,000 inmates higher than their maximum capacity and, therefore, it would not allow a further significant increase in detainees

2. the European Union Court of Justice's jurisprudence has repeated that member states cannot punish illegal residence through imprisonment because this contravenes the useful effects of the Returns Directive, which imposes that irregular foreigners must be removed from the Union's territory.

These elementary reflections would suffice to understand – beyond matters of ideology – that this criminal offence is entirely useless.

Nor is the envisaged possibility of replacing the economic punishment with an expulsion of any use, because:

1. the law envisages that this substitution may only be undertaken if there are not any obstacles to the immediate execution of the removal but, as the offence is punished through a fine and hence does not allow the use of coercive measures, the trial is usually held while the accused is free, so this situation can never actually occur;

2. a foreigner who irregularly enters or resides in the state's territory, apart from being accused of the criminal offence of irregular entry and residence, is issued an administrative expulsion measure by the *prefetto* [government representative in charge of security] and this measure can almost always be enacted by the *questore* with an immediate accompaniment to the border: therefore, either the police chief's office manages to expel the accused before the trial for the offence of irregular entry and residence (in which case the trial ends with a ruling that proceedings be curtailed without a case to answer), or the foreigner will collect expulsion orders, the one issued by the prefect and that from the judge, both of which are destined not to be enacted in practice.

Hence, it is a criminal offence that is has no use, envisaged by a so-called "manifesto law" which, like a Manzonian rallying cry*, seeks to state in an abstract manner that irregular residence is a crime because, in this way, one gives the impression that the state is strong (with the weak), and

then it does not matter if it has no practical use, what is important is for the electorate to receive the “calming message” attached to the “illegals” stigma, to the normative construction of the “enemy” and of deviance. The identification of “illegal” as equivalent to delinquent is thus achieved in the collective imagination. What is important, is the message that is transmitted. But this message is a racist message. This is the actual usefulness of the criminal offence of illegal entry and residence.

Thus, there are no reasons for it to continue existing, and those who state the opposite are either ill-informed or interested in maintaining this stigma.

Hence, it is positive that - even if it is in a way that is irrelevant in relation to the tragedy of Lampedusa and the inhumane conditions in prisons - the debate has restarted about the unreasonable reasons for the existence of a criminal offence that is useless and conceals the inability and unwillingness to regulate the channels for the legal entry of immigrants in an effective and realistic manner. Immigration is a structural phenomenon that is destined to increase and, hence, it will never be possible to impede it irrationally through penal norms.

* “loud and empty gestures”, a literary reference to “I promessi sposi” by Alessandro Manzoni, first published in 1827. It was set in the province of Lecco (Lombardy), where the author describes Spanish domination as being exercised through a lot of shouting, but a lack of implementation or respect for the laws by the citizenry.

Associazione per gli Studi Giuridici sull'Immigrazione

The original, “L’inutilità del reato di ingresso e soggiorno illegale e le buone ragioni per la sua rapida abrogazione”, is available at:

http://www.asgi.it/public/parser_download/save/1_0013_reato10bis_asgi.pdf

Both translations by Statewatch

Previous coverage by Statewatch:

On the ECJ sentences referred to in the text: Italy: Series of defeats in court for the “security package”, July 2011, <http://www.statewatch.org/analyses/no-137-italy-security-package.pdf> (pp.3-5)

On the security package and other issues of that period: Italy: The internal and external fronts: security package and returns, Statewatch journal vol. 19 no. 3, July-Sept. 2009, <http://www.statewatch.org/analyses/no-100-italy-internal-external-fronts.pdf> (pp. 1-4)

On prison overcrowding: Italy/ECtHR: “Pilot” judgement condemns Italy for inhuman and degrading treatment in overcrowded jails, February 2013, <http://www.statewatch.org/analyses/no-211-italy-prisons.pdf>