Analysis

Decriminalising solidarity by promoting the regularisation of migrants

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October 2018

Translation of a speech given by Fulvio Vassallo Paleologo (*Osservatorio Solidarieta Carta di Milano*) at the session 'Decriminalizing Solidarity: an ever more topical challenge', Sabir Festival, Palermo, 13 October 2018.

1. The criminalisation of people and organisations that lend assistance to immigrants in Europe is an expression of the closure of legal or humanitarian entry routes and the growing difficulty of residing legally. The distinction between "economic migrants" and asylum seekers, the restriction of possibilities to enter to find employment and of the scope of the "European" right to asylum, and finally the agreements with third countries to externalise collective *refoulement* practices, produce a proliferation of cases resulting in illegality.

The European Union has not been able to reform the normative framework for the "Common European Asylum System" (CEAS) and the prospects for the 2019-2024 period, after the next European elections, are likely to result in a further period of deadlock, with an even harsher clash between countries and groups in the European Parliament depending on their outlook based on "sovereignty" (now applying beyond the Visegrad countries) and the countries and groups in the EP which remain loyal to a European vision in the asylum and immigration policy field.

It is likely that the only direction on which the different European states will reach understandings is that of agreements with third countries for the purposes of making return operations more effective and to prevent departures. While at an internal level we are likely to see the substantial emptying of the contents of the "European" right to asylum, increasingly restricting it to elude its individualistic scope as provided by the 1951 Geneva Convention, in the midst of growing conflict over the application of the Dublin Convention and the distribution of the necessary financial costs of funding European agencies like the European Asylum Support Office (EASO) and especially the European Border and Coast Guard (EBCG), as envisaged by the EU Regulations no. 656 of 2014 and no. 1624 of 2016.

2. In this context, the number of migrants who will be forced to enter and reside irregularly will be greater in every European country, particularly those that are more exposed because

they are close to the EU's external borders. The criminalisation of secondary movements within the Union will also increase, as will that targeting people who assist migrants, from the moment of rescues at sea until after their move to different states from those in which they first entered the EU.

The unclear relationship between the 2002 Facilitation Directive and the 2000 Palermo Convention on transnational crime, with its attached Protocol against smuggling, will allow individual states a wide margin of discretion to pursue people who enter and reside illegally, and those who help them. Hence, it appears very likely that there will be a further split between the legislations in European Union member states, also in the field of penal law. The main risk that may surface on this matter is represented by the danger of a break with the principle of legality (or the rule of law) and the criminalisation of solidarity as an effect of political or administrative decisions which retroactively make the conduct of people or NGOs lending assistance to migrants liable to prosecution in penal proceedings.

From this perspective, it is troubling that developments in legislation and case law head towards equating facilitation of entry and assisting irregular residence, tending towards ruling out any differences between cases in which such acts are committed to draw unlawful profit from them and those when assistance is provided exclusively for humanitarian purposes.

Despite both Italy and the European Union being found guilty of crimes against humanity in a sentence by the Peoples' Permanent Tribunal in its session held in Palermo in December 2017, due to their policies of refoulement at sea and undue administrative detention, more recent practices and legislative directions continue to criminalise any sort of irregular entry or residence and, as a consequence, the actions of people lending assistance to migrants. Even worse, there is a worrying decrease in the possibility of attaining legal residence status and a growing pressure to enact forced return procedures. These trends increase the exposure and vulnerability of citizens who continue to act in solidarity by providing assistance to irregular migrants.

3. In Italy, recent legislative amendments introduced by the Decree on security and immigration (which is under parliamentary scrutiny) by eliminating humanitarian protection (as had been announced through an administrative direction act by the interior ministry), demolishing defence rights and the proliferation of cases entailing administrative detention without judicial oversight in violation of the reserve of jurisdiction envisaged by both the Constitution and the ECHR, will produce an exponential growth of so-called "clandestinity" (irregular status). Hence, this also applies to the risks that will be faced by anyone providing assistance to people who, according to the legislation that is currently in force, should comply with the order to leave the Italian territory to return (with what means?) to their countries of origin.

A document signed by 40 jurists gathered in a conference last month at Bergamo University highlighted how "the numerous and serious violations of international law, of existing guarantees under Italian penal law, the Constitution and humanitarian law, justified by the presumed will of the majority of Italians, produce a crisis for the rule of law system and clash with the fundamental Kantian maxim according to which you should act in such a way as to always treat human beings as ends and never simply as a means".

A similar consideration may apply if we examine the so-called Salvini law decree, in the field of "security and migrants", an association which immediately betrays the merely repressive outlook of the measure which, moreover, lack the features of necessity and urgency that

would legitimate resorting to an urgent decree. To argue this, it would suffice to consider the 80% decrease in arrivals through sea crossings and the fall in the overall presence of migrants in Italy, considering that the only relative increase concerns the arrival of European citizens from states like Poland, Bulgaria and Romania, which cannot be faced using the same measures proposed against people rescued along the central Mediterranean route. There is a trend towards criminalising those who rescue and those who are saved at sea who enter Italian territory to request protection, while any prospect of enabling subsequent regularisation and of providing avenues for legal entry are omitted. In practice, this fuels irregularity and hence that "clandestinity" which authorities claim to be "fighting". The premises are being laid to exercise even greater pressure on humanitarian workers and citizens acting in solidarity.

The points in the new law decree on which its proponents are relaunching their election campaign, while governing parties have made commitments they are unable to keep, also constitute an attack on the safeguarding role played by jurisdiction and the denial of key principles enshrined in the Italian Constitution.

Abolishing "humanitarian protection" by redrafting article 5 point 6 of the Single Act on immigration (law no. 286/1998) is not imposed by binding European norms and is in conflict with article 10 of the Constitution, of which this norm is a direct application, as is recognised by the jurisprudence of the Court of Cassation [Italy's highest appeal court]. According to sentence no. 4445 of 2018, "humanitarian protection is one of the forms of application of constitutional asylum (art. 10, third point of the Constitution), in accordance with this Court's constant appreciation (Court of Cassation, no. 10686 of 2012; no. 16362 of 2016)". Beyond the certainty of multiplying cases of irregularity and of interrupting best practices aimed at achieving inclusion, abolishing international protection is linked to the aim of downsizing reception in the SPRAR system (Sistema di protezione per richiedenti asilo e rifugiati) to reserve it exclusively for foreign minors. This contravenes a Constitutional duty to uphold the right to seek asylum that is even wider than that envisaged by international Conventions (art. 10 point 3).

4. Insofar as Mediterranean routes and agreements with third countries are concerned, they have developed into practices to coordinate search and rescue activities at sea, like in the case of the agreements between Italy and Libya (to continue using this term which no longer even refers to a single state authority), which will continue to produce deaths at sea. Following international recognition of a search and rescue (SAR) zone assigned to the Tripoli government and the Maltese government's attitude of closure, the rescue interventions by NGOs that are present in the Mediterranean are squeezed in a bind between the threat of a military attack by the Libyan patrol boats – which even shoot in international waters – and "informal" administrative acts, sometimes issued by means of a "tweet", that impose the "closing of ports", involving possible penal proceedings upon entry into Italy's territorial waters.

5. In the midst of an attack against solidarity that will worsen during the coming months of electoral campaign, there is a need to be conscious that beyond the political proposals that should be supported at the parliamentary level, both internal and European, it has become even more important to strengthen the networks of solidarity on the ground in different territories, even through direct connections between associations, NGOs and institutions at a European level beyond the national plane, and also with bodies to safeguard human rights

within the United Nations framework, to lend initiatives greater effectiveness, not just from a legal viewpoint but also in terms of a movement which it will be necessary to promote.

a) In expectation of the coming violations of international and EU legislation that are in force by state authorities, there will be a need for greater capacity to bring legal cases and to have quick access to jurisdictional bodies or other bodies to enforce legal guarantees (like national and European ombudsmen and oversight authorities) to safeguard migrants and the actors who assist them. At a national level, there will be a need to use every possible means of appeal to verify the compatibility of legislation with the Constitution and with the EU legal framework.

b) It is increasingly urgent at both the European and national levels to verify the lawfulness of bilateral agreements with third countries, especially when they involve countries that do not guarantee respect for human rights and the prohibition of torture and other forms of degrading treatment.

c) In order to guarantee an effective safeguard of human life at sea, there is a need suspend international recognition of those SAR zones, like the “Libyan” SAR zone and the Maltese one, within which the competent states are unable to fulfil their rescue obligations in timely fashion or, as in the Libyan case, they cannot provide a “place of safety”, a safe port in which to disembark, as even the Italian foreign affairs minister, [Enzo] Moavero [Milanesi], now recognises. Hence, we must call upon the IMO (International Maritime Organization) in its London headquarters to check the criteria required for the recognition of a Libyan SAR zone and a strong initiative is needed to strike regional agreements that may commit neighbouring states to guarantee those SAR coordination activities that authorities in the different Libyan territories are currently unable to provide.

d) For the same purpose of preventing the continuing occurrence of shipwrecks, it is necessary to legally recognise and guarantee the supporting role played in rescues to date by NGOs, through legislative measures which should be implemented at a European level and the comprehensive reform of the Common European Asylum System (CEAS), to explicitly state that people undertaking rescue operations in international waters cannot be punished for doing so.

e) Again, to prevent the obstruction of sea rescue activities, redistribution criteria should be set at a European level for people who are rescued by states which make themselves available without awaiting a unanimous decision by all the EU states, which, now and especially after the next electoral round, do not appear liable to reach a unanimous position. There cannot be lengthy negotiations that may last for weeks on every occasion involving a sea rescue which slow down the completion of operations to disembark survivors in a safe harbour.

f) Although the legislative reforms that may be undertaken in Europe after the 2019 elections appear highly problematic, with outcomes that may be inauspicious for migrants and people who assist them, there is a need to renew the demand for a European humanitarian protection regime and for a transfusion of the Procedures Directive into a new Regulation that may guarantee full access in every member state to the right to defence and to effective protection against the risk of violations of the non-*refoulement* principle, which is affirmed by art. 33 of the Geneva Convention. The European Court of Human Rights (in its Hirsi Jamaa *et al* versus Italy sentence in 2012) confirmed that the prohibition of returns towards

countries in which people may be subjected to inhuman or degrading treatment has an absolute nature.

g) Within the framework of the legislation that is in force, there is a need to promote every possible form of legal entry for work purposes, including through sponsorships and by introducing incentives for people who intend to travel to Europe to study. Family reunifications need to be guaranteed by reducing the delays and margins for administrative discretion. All the channels for the acquisition of citizenship and the legislative reforms that may speed up its acquisition must be supported.

h) There is a need for struggle in individual countries, at least where the political and social conditions for such an initiative exist, for the purpose of obtaining a PERMANENT REGULARISATION procedure, the possibility of regularisation after entry on the basis of a lengthy stay and an employment relationship which already exists, for people who have either lost or have never had a residence permit. Only by reducing “clandestinity” (illegality of status) will it be possible to “decriminalise” the presence of irregular migrants and therefore the activities of people who assist them.

i) It seems very likely that the current national parliaments and the coming European parliamentary assembly may insist on advancing along the route of restrictive policies in the fields of immigration and asylum that has been followed in recent years, leading to a proliferation of instances of clandestinity and of attacks against humanitarian operators and citizens acting in solidarity. For this reason, jurisdictional seats are becoming increasingly important and greater effort is needed by legal teams to support associations that lend assistance to migrants, for two different reasons.

First of all, because there will be a need to guarantee the effectiveness of the right to defence attributed to migrants and to people lending them assistance, and also because it may happen that the attack against solidarity may not be carried out by introducing a new “criminal offence of solidarity” but through an extensive use of all those norms that enable the punishment of anyone who lends assistance, in any way, to an “irregular” foreign citizen. This refers especially to art. 12 of the Single Act on immigration, law no. 286 of 1998, as it was modified by the Bossi-Fini law of 2002 and, then again, by the subsequent security decrees that have been adopted, from [Roberto] Maroni’s time to [Matteo] Salvini.

The second point in this norm needs to be effectively applied. It is the principle that those who provide assistance to irregular foreigners in a situation of need without drawing profit from it, and not just in cases when they are in a state of necessity, cannot be punished (when applying the justification motive envisaged by art. 54 of the Italian penal code). At a judicial level, there is a need to confirm the jurisdictional direction which deems this norm applicable also in the case of rescues enacted in international waters, and hence beyond national territorial limits.

l) Apart from the increase in the length of detention in centres for returns, which have a capacity of just 600 places throughout Italy, that could prove a boomerang for those proposing it by reducing the number of people passing through them for the purpose of enacting forced returns, increasing the length of detention to up to 30 days in the so-called hotpots which still do not have a full legislative regime and detention in border post offices (as envisaged in art. 4 of the law decree) both contravene article 13 of the Italian Constitution and article 5 of the ECHR. This is because they introduce a new form of administrative detention, which was already condemned by the European Court of Human

Rights, removing it from the scope of effective jurisdictional oversight and resulting in a considerable decrease in the right to defence. Special attention will be needed, also in view of possible lawsuits at a European level concerning the so-called hotspots, to prevent them becoming detention centres for indefinite periods that are removed from effective judicial oversight in violation of art. 13 of the Constitution and art. 5 of the ECHR, as is already happening in the ones in Lampedusa, Pozzallo (Ragusa) and Trapani (Milo). Special safeguards must also be introduced for lawyers who challenge orders of deferred refusal of entry, and to those from legal teams which also comprise volunteers, like the law clinics in universities, which may be subjected to undue pressures by the police authorities or the media.

m) Justice cannot be administered, or paralysed, on the basis of opinion polls to drift towards a role involving the mere execution of political outlooks, if we are still in a system governed by the rule of law. As is also true of the law decree on “security and migrants”, the choices of collective refusal of entry for the boats saving human lives in the central Mediterranean and the repeated attempts to criminalise rescuers, the government is renewing its challenge to the judiciary, after past clashes during investigations (partly shelved or soon to be shelved) against NGOs and regarding the case of the *Diciotti* [an Italian coastguard ship whose disembarkation was obstructed by the interior minister]. This attack does not just target judicial independence, but also migrants who need rescuing and all citizens who share the values of solidarity and legality that are sanctioned by the democratic Constitution and the European Charter of Fundamental Rights. They will not remain passive as they watch other institutional conflicts or other attacks against people’s fundamental rights, today those of migrants, and tomorrow those of European citizens as well. Let us hope that international oversight bodies will listen to their complaints with growing attention.

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