ARTICLES

JURIDICAL PROTECTION OF FOREIGNERS IN ITALY AND IN EUROPE

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Immigration is an old phenomenon but since the end of the last century, and especially during the last twenty years, it has become a veritable social and political problem for Europe and for the West in general. Jurists, historians and politicians are all witnessing the strong pressure which the latest waves of immigrants are exerting at the doorsteps of united Europe and of the more industrialized countries, like North America and Japan.

In spite of this, however, from the juridical point of view the phenomenon of immigration is a *quaestio nova*, a new problem, especially for Europe. In fact in the past immigration used to be typical of certain situations, like those of England, France and Germany, either as a result of their having been colonial countries or for their rapid rate of industrialization and for the growth of their home labour market.

Following a complex series of historical, economic, social and political factors, immigration began to concern other areas of Europe. Thanks to the changes in Italy and Spain, the end of the dictatorship in Greece and its economic revival, the strong receptive capacity of the home markets in the Netherlands and Belgium and the ample possibilities of accommodating more people in Sweden, waves of

immigrants began finding their way into other countries *as well*. On top of this there came the not negligible phenomenon of returned migrants, which means that people who had migrated from their homeland a long time before were now, for economic and work reasons, coming back. This typically Mediterranean phenomenon has affected mainly Italy, Spain and Portugal.

The attempts by the authorities, at national and European community levels, to control and manage migration (which on the whole had not been underestimated) have not been uniform throughout its development. Such diversity was perhaps inevitable, when one considers the social and economic differences of the individual States, and also the historical and political origins which have influenced the manner, speed and nature with which each state reacted to the problem of migration.

This lack of uniformity, however, together with the growth of the phenomenon, has not hindered the attempts at reaching a common line of conduct to address the question of the presence of foreigners in Europe.

The authorities of the European community and of Europe in general have often shown the way and pointed out the lines to be followed, and the objectives have been reached, for example, by the harmonization of regulations attempted by the Treaty of Schengen, by the recognition of immigration as a primary question within the social and defence policies of the treaty of Maastricht, and in the individual provisions first of the C.S.C.E. and then of the O.S.C.E.

Attempts to reach common policy directions regarding immigration have up to now been rather difficult, since it has been evidently necessary for each State to vary its own political actions and its own regulatory instruments according to the individual internal situations. In spite of this, at least on general principles a fair kind of integration has been reached on the more important procedures and on the final objectives, notwithstanding the diversity in the ways followed to reach these common objectives. The legislators' actions have been particularly influenced by conditions of the labour market, its possibilities of expansion and of reception (or the need for manpower) and its capacities of social and economic accommodation. Finally one also has to consider the role of political will, which in this field is more influential and interactive with regulatory discipline than in other fields of jurisprudence.

Up to now the tendency has undoubtedly been of an evidently restrictive type, brought about by necessities of various kinds, ranging from the socio-economic need to block the influx to the more

recent problems of safeguarding public order. In spite of this situation, and beyond the limits of what has been called "the European Fortress", the pressures of immigration keep increasing because their causes remain and even tend to increase their effects.

From the normative point of view, Europe has not established a common approach to face the problem. This has depended on the concurrence of various causes that are not only political but belong to the social texture itself, which has consequently been expressed at the level of jurisdiction by the regulation in the set-up. First of all the great difference in the evaluation of the phenomenon: just consider, for example, the historic parameter according to which certain States have felt the effects of immigration before others, and in this way have been able to develop a set of rules which, beyond its contents and the restrictive or open policy which created it, made it easier to face the problem and the changed conditions connected with it, both concerning the society and the structure of the influx itself.

Secondly, in the normative perception of the phenomenon a very important role has been played by the geographic and social concentration of immigrants from one country to another. Although at first this has appeared to be unrelated with the issue, it has created great contradictions both in the social and the economic aspects from State to State, and consequently countries with a high level of integration have reacted and react differently to those where integration is still far away or is not managed as it should be.

This explains the deep differences that exist in the norms and local situations among the countries, which have been followed by a process of "imitation", producing difficult and muddled juridical structures, often arising out of emergency situations.

Countries which have only recently started to feel the consequences of immigration have tried to face the new situation by importing foreign experiences and instruments from reference models to adapt or construct their own regulations. But this has created more confusion, in spite of the Community's hope in establishing unified regulations by adopting rules which are substantially similar. A degree of real harmonization of the principal aspects of the issue has been reached by careful supervision and reform, thanks also to the effects of common treaties since Schengen, without limiting the political freedom of individual legislative organs to make laws that deal with local situations. However what strikes the keen observer today is the substantial difference of "normative maturity" between the States concerned: as a consequence Europe

keeps getting more foreigners and it appears ever more divided in political decisions.

In this scenario, which I have sketched very briefly, Italy is an example of a country where the legal and social approach has been one of emergency measures, taken after forty years of deplorable legislative silence on the matter, in spite of what is laid down by the Constitution.

Although Italian legislation has successfully introduced some interesting innovations, today it is in need of substantial integration. One negative aspect, which it shares with other European and non-European legislations, is the lack of regulations to guide it in the second phase of the immigration problem, that is social integration.

It is important to bear in mind that, as has often been emphasised, the problem of immigration is not simply a question of visas and permits: it is mostly concerned with the integration of immigrants in the social context, with all the problems which this creates. By considering it only in terms of numbers or public order we would be missing the real problem and no solutions will be found. If a State, whoever it may be, has decided to allow the entry and integration of foreigners in its own territory, it must have the legal instruments which can guarantee its security in juridical terms, to help peaceful and productive integration, and to respect its socio-cultural relationships.

In this direction newly-conceived studies have looked into this issue with a keen eye, and they have emphasised that in this new relationship between the State and the immigrant new rights are arising and that the juridical basis of the immigrant is becoming wider. The prejudice against the outsider doubtlessly lingers on but it is now limited to ethnic, religious and racial problems. But the immigrant community is receiving encouraging signs from those juridical and constitutional structures which accept integration. It is enough to mention the right to one's cultural identity, religion, the respect of one's customs and way of life, within the limits of the community that follows these rules.

In spite of this, integration is often perceived as a violation, an unjustified intrusion into the life of a community. This also happens at the juridical level, when the law must codify and enforce proposals conceived and applied in other fields. One could here refer to the controversies that arise in the cultural, intellectual and political sections of a community when the right to vote in local elections is proposed. This has recently happened in Italy when this possibility was included in a bill on immigration presented by the Government

last February. I will not take sides on this issue, but I think it is important to reiterate that integration is inseparable from immigration: the matter is composed of two phases, immigration and integration, and one cannot consider one without the other.

If one imagines that one can regulate immigration without providing the instruments for integration, this would make any form of *real,* peaceful and multi-ethnic coexistence perhaps not impossible but certainly difficult. In this direction the experiences of countries with a high degree of social chemistry (like Sweden and the Netherlands) have shown that the ability to integrate has reached important goals. In these countries the extension of considerable rights to immigrants is sometimes guaranteed even by the Constitution (including the right to vote in local elections), within the full observance of the prerogatives that citizens, as such, respect foreigners, thanks to delicately-balanced formulas.

Establishing a common line of action on immigration in Europe will mean, first of all the control and management of security and of the numbers of immigrants, and secondly the not less important aspect of the ability to accommodate and integrate them. In this sense the acceptance or the expulsion of foreigners from the State will be particularly meaningful. With all the consequences that are connected to them, including those concerning human rights.

As I have shown before, however, some of the principal European States have had a sudden and traumatic approach to immigration, and among these, for the reasons given above, one finds the Mediterranean countries which are in the forefront facing the immense human reserves of Africa and Asia.

It is not by chance that, among the policies followed by the various groups which are active in regional and international institutions and agreements, those concerned with the Mediterranean deal expressly with immigration.

This is a problem which in the near future, in this area, could grow to alarming proportions, due to the high instability in this region, which does not really form part of the problem but is directly linked to it.

1. The influx into Europe and especially in the Mediterranean

The direct consequence of what has been said above is the choice of political directions intended to stop immigration, both at the Community level and at the individual nations' level. To obtain this goal new instruments have been established, like the intervention

by cooperation on the spot in those countries which are sources of economic migratory movements, as well as the adoption or modification of laws aimed at better control and monitoring of the influxes.

Since the eighties, the Executive Commission of the European Community has proposed solutions for hosting and integrating foreigners, the most innovative being the recommendations on the right to vote in local elections and on the participation of the foreigner in the life of the host country. However these juridical steps were accompanied by increasing agreement on the need to restrict entry, thus creating difficulties in the interpretation of the real directions being followed by the supranational authorities.

On the strictly juridical level one must remember that no State is obliged to welcome foreigners on its territory, apart from cases provided for by international Conventions to safeguard certain protected categories. The first difficulty in the harmonization of migration policies concerns the fact that the choice of policy is necessarily taken by each individual nation. However once the choice in favour of hosting is made, the treatment of foreigners must conform to the principles of the minimum standard of the fundamental human rights. It follows therefore that the freedom to host foreigners entails the obligation for the kind of treatment to which the State must conform. In this field the degree of homogeneity is relatively good, thanks to the common juridical heritage shared by the individual European nations as well as due to the worldwide evolution towards guaranteeing human rights.

Within this general context the Mediterranean has reacquired its old strategic importance. Political developments after the end of the Cold War have shifted political equilibrium from the West-East frontier to the one between North and South, which is still in hand, and have laid the foundations for a renewal of geopolitical considerations of the Mediterranean region. Its strategic position, both from the political and economic viewpoints, its being the natural frontier between the West and Islam has put forward again the importance of the control of the region, especially on account of the Islamic expansion in the heart of Europe, called the diaspora of Islam, which is feared so much by the Western authorities. This presence is quite strong, with important religious centres in Italy, like the mosque of Rome, but also widely spread in Spain, on account of its traditional historical and cultural Islamic presence, and in France, due to its colonial links and the numerous Maghreb colony in its territory.

Consequently immigration in the Mediterranean comprises three kinds of problems which concern all Europe:

a) First of all, regarding the strictly demographic and human dimension, because of the large numbers of people which keep flowing into the nearest and more easily accessible parts from the South of the Mediterranean and the Caucasian East. Some observers have emphasised that the Mediterranean is the weak spot, the easiest entry into the Community's Europe and particularly into the Schengen area.

In order to give an idea of the numbers involved in this kind of demographic pressure and of its possible consequences, the ILO has declared last year that about 20 million potential workers will reach employment age in 20-30 years' time (that is practically by the year 2020). Considering the problem of over-population and the failure of demographic policies of the North African countries, as well as due to the lack of economic development and industrial planning, this would mean that there might be 20 million probable emigrants seeking work and economic improvement.

Such figures are eloquent enough.

In this framework the regulations on immigration in the countries of Southern Europe, who will be the first to be hit by these waves of immigration, are being considered incapable of addressing the problem, mainly because legislation and policies are not clear as to whether there is an effective desire to close the doors. Experts therefore criticize the regularization of the position of whole groups in Italy or the inability to effect expulsions swiftly and with a steady hand, contrary to what happens in other countries, especially in France.

In this sense it is important to note that almost all the (European) nations bordering the Mediterranean boast of legislation on immigration which is fairly recent. A more careful glance will show that the problem will consist of how much the Mediterranean countries will be able to filter immigrants before they reach unified Europe, especially those countries which are more exposed to the influx of foreigners on account of their economic and labour attractions, like Germany, Great Britain, Sweden or the Netherlands. Whatever the real situation in the home market of these countries may be (and it is presently not as rosy as it used to be), it still exerts a strong attraction on immigrants.

b) The problem of employment, which is not very healthy since Europe is beset by contradictions and economic and social disparity. Unemployment, particularly, has become a problem for

the whole Community, to which there does not seem to be a short term solution.

In this sense the Conference of Luxembourg in June 1994 had already stressed the priority to safeguard the home job market from natural competition and from the infiltration of immigrants. In particular three general directives were established to combat illegal immigration, illegal employment and the exploitation of women and minors at work in the violation of general regulations, as in the case of underpayment which is very competitive.

This wound, which is very strong in Portugal, Spain and Italy, has now spread to the whole of Europe.

The risks which threaten the market and the stability of the socio-economic apparatus have been understood by the European authorities and have stimulated a considerable production of laws and institutions to guarantee the protection of the labour market. Within the directions set by the Conference of Barcelona in November 1995, Europe is moving towards a global kind of closure in order to regulate entry, a policy which is being run parallel to, and this is a concrete innovation, interventions *in loco* by the EU in the countries of the Mediterranean region, which is being extended to Subsaharan countries which have considerable demographic and religious importance.

The creation of a Euro-Mediterranean Partnership is the way to involve the authorities of countries which "export" migrants and labour in order to stop the exodus. The motion which was intended to compel States to take back migrants who have been expelled or refused entry (diplomatically transformed into responsibility in the management of international and local migratory movements) which was moved during the Barcelona meeting shows that Europe is clearly pursuing a braking policy, casting a tightly knit net around the continent's borders.

c) Vis-à-vis internal security, the issue has changed aspect in the last three years, becoming increasingly important to three major issues: the high socio-political instability in the region ranging from Islamic fundamentalism to international terrorism; the problem of the exploitation and organized traffic of migrants, drugs or prostitution, sometimes run by foreign criminal rings; problems pertaining to social and economic dropouts who may come into contact with local criminal organizations, which may even be very powerful.

The problem of terrorism is the one which worries national Governments most, since it has been proved that immigration

channels have been used for terrorist actions on the continent (like the Algerian Islamic cells on French territory). This explains the introduction of changes in the legislation of certain countries increasing controls, making antiterrorist laws more strict, reducing the list of countries whose citizens do not need a visa, and vesting the Police authorities with more powers.

But even in this scenario, as I have stressed before, the problem of the integration and the settlement of foreigners on one's territory crops up. Events in France two years ago, with the terrorist attacks in Paris, have demonstrated this: the locking up of foreigners in their urban areas as in a ghetto, with solutions which are sometimes dangerous to the equilibrium of an already uneasy social fabric, have contributed then, and can contribute now, to extremist symptoms which may stop all forms of dialogue.

These three kinds of problems must, finally, be analyzed with reference to the problems of the granting of basic rights to foreigners, because the limitations imposed by the more strict laws on immigration, as well as the parallel laws on anti-terrorism and expulsion, tend to extensively limit the freedom of movement and participation of foreigners – even within the observance of the minimum standard of human rights laid down by international bodies – in some cases they stretch to the limits of compression in the name of the supreme right to defend public order and the legal system.

Substantially, the point on which the question assumes real social and juridical importance, and clashes with political conceptualization, does not concern the respect of rights in itself – on these there seems to be a certain homogeneity, at least on the fundamental ones – but rather on their *identification*. In this sense the term "foreigners' statute" shows peculiar characteristics and different contexts from State to State. It follows that even the legal approach will be different.

As regards immigration, therefore, Europe seems to have decided upon a policy of holding in check the continuous and massive influx of foreigners, by creating instruments intended to block illegal immigration at the frontiers; some States have even embarked on accomplishing the integration of communities who were already established on their territory, mainly by harmonizing their laws further, within the observance of the individual needs and the freedom of each State to choose the political line of action which it considers most appropriate.

It is only natural that the first part of the process to regulate immigration by legal means concerns the problem of hosting, because

of the strong repercussions on the management and programming of entry.

2. The entry and hosting of foreigners: common issues and their connected problems. A comparison of experiences in Europe

Once the criteria which guide the actions of the EU on immigration, and which inspire national legislation, have been established, attention can be turned on the effective contents of the individual legal systems. The degree of homogeneity among these, as I have said before, varies a lot according to the different cases. Regarding entry and hosting, the degree of integration and similarity is quite high, allowing for the differences which mark the individual systems, on the basis of what I have said before.

The first common rule, since it has been chosen as a model by various legal systems on the question of entry, is the Agreement of Schengen, whereby interesting measures have been introduced to start at least a process of convergence of the individual laws regarding visas and entry permits for stays up to 90 days. Gradually other countries have followed this model and adopted its general principles in their laws, even if they were not members of the Agreement.

Within the framework of this Agreement the principle was established giving right of passage from a member country to another, recognizing the validity of the controls made in the first one. Then the SIS was set up (the Schengen Information System), a computerized system of control and monitoring of the movements of persons and goods within the member states, which is very useful in the field of immigration. Lastly, important tasks were given to Europol, like the control of terrorism and illegal immigration.

Beyond the norms of principle laid down by the Agreement of Schengen, the common characteristic of European legal systems on entry and hosting depends on the conditions for entry into the territory of the State. A general degree of similarity can be observed in this sense, although in principle the procedures and the further guarantees required by some legislations to allow regular entry are different. Most of the regulations distinguish between short and long stays, usually less or more than three months, for which different rules and regulations are in force and different procedures are followed in the various States.

On the other hand, the motives for longer stays are more or less

similar in all European States, consisting of work, family reunion and study. The motives for shorter stays are many, and range from family visits to business trips, from religious purposes to medical reasons or bibliographical research. However, the fact that there is no uniformity here does not weaken the validity of the general framework.

Even the requirements that regulate entry are common: the regularity of procedures; the motive for entry must be the same on visas, residence permits and later activities, economic and financial guarantees, and the requirement that the candidate should not be dangerous to society. This last category is considered very important by the authorities, since the problems connected to it keep cropping up in a very worrying way. Some legal systems, among which those of France and Spain, have taken into consideration the risks potentially deriving from the influx of immigrants and have introduced laws *ad hoc,* especially regarding the category of offences which are intimately connected to the status of foreigner, such as the introduction or aiding illegal entry, illegal immigration, attempts against the stability of the labour market (section 499b of the *Codigo Penal Espanol* recently introduced in the text of laws safeguarding the stability of labour against exploitation, incentivization and complicity in creating *lavoro nero* and the black market), as well as the general risks of terrorism.

The principle which has to be stressed, before everything else, is that since the State is not obliged to host a foreigner in its territory, in principle there is likewise no absolute right for a foreigner to be hosted in the territory of a State. A State is therefore free to establish certain requirements that must be satisfied by a foreigner who files an application for entry into the country. Consequently on the basis of this *regula iuris*, regulations governing entry and settlement are important instruments which can control the flow of immigration, and which can be made use of first of all to reach such objectives as the closure of frontiers.

French legislative measures have followed these directions since 1945, the year when the first law on this issue was approved. In fifty years French legislation has passed no less than 13 laws governing immigration and policies of admission or expulsion, a fact which proves that this topic is considered very important to French society, especially when one compares it to the absence of such laws in Italy in spite of the provisions of section 10, para. 2 of the Constitution in a period of time which is only slightly shorter.

The first law on this topic was the *ordonnance* 2685, which was

enacted in conditions which were very different from today's. This was followed by a relevant number of laws which have integrated, modified or updated it but French law continues to base its fundamental principles on the lines set down in the old law.

The French legal system, which is one of the most complex but also one of the most functional and advanced, up to a short time ago used to allow entry into France to all adult foreigners who possessed the common requirements mentioned above and who could, as regards short stays, give ample guarantees of repatriation, show that they possess financial means calculated on a daily basis, and that they could eventually prove their status of tourists by hotel bookings and agreement with tour operators.

The law of 1993 introduced the so-called *repatriation guarantees*: besides the afore-mentioned requirements, the foreigner was required to produce proof that he had the means for returning to his homeland, like a personal and non-transferable return air ticket with a limited validity. This practice had already been adopted much before by the Dutch authorities with good results. Another interesting measure was the one requiring those foreigners who wanted to stay with a French family to produce a signed declaration of hospitality, countersigned by the mayor to prove that the host family's socio-economic situation and their residence were such as to allow a third person to live with them. This condition was waived for foreigners who joined their own family.

In February of this year a strong political debate arose in France when the draft of the *Loi Debré* was presented, a rather harsh law whose aim was to introduce big innovations into the complex legislative structure about the control and prevention of immigration and the issues linked to it. The principles that this law wanted to introduce included the compulsory declaration by the person who had hosted the foreigner, stating that the latter had actually left the country within the period established by the visa.

This point in the bill was strongly challenged by the population, and it was accompanied by a whole series of modifications giving wider powers to the Police, the Prefect (who took charge of the tasks of administrative control concerning residence permits) and the Frontier Guards, except the areas bordering with countries which are members of the Schengen Agreement. It provided for such measures as the possibility of revoking residence permits and the confiscation of personal documents of foreigners who were still being checked, the confiscation of passports, the speeding up of arrest procedures when one had no documents, the introduction of the

annual residence card for those whom the French press has called the "neither-nor" (*"ni-ni"*), that is foreigners who can neither be regularised nor expelled (*"ni régularisables ni expulsables"*).

The strong reaction to the measures proposed in the bill, which was widely discussed in the media, was not the only highly controversial one in France: a similar reaction met the *Loi Pasqua* in 1993 which was considered rather rigid (this was later declared constitutional, by a decision taken on 13 August 1993, in no less than eight articles by the French Constitutional Council). This bill had introduced strong corrective measures limiting admission into France, increased the number of reasons which could lead to deportation, cancelled the compulsory judgement of the Departmental Commission for Expulsion and gave full discretionary powers to the Prefecture which could now take the final decision regarding the expulsion of a foreigner.

The question of the *sans papiers*, which had caused such an outcry in the summer of 1996, has shown that France has lately adopted a firm policy of closure, far from the innovative openings pursued by the *Loi Joxe* in 1989, which was followed by the laws of 1990 and 1991. In that period France increased reasons for admission, eased control procedures, implemented the plan provided for by the Schengen Agreement (particularly the SIS project), and enacted the *Loi Besson* on residence policies which caused a great deal of comment, especially among experts in geography and territorial planning, for its provisions in favour of immigrants.

The current legislation provides for two valid titles of residence, the first one being the *Carte de séjour temporaire* (valid for one year, showing the reason for entry and accompanied by abundant documents which prove the reason for entry). The *Loi Debré* changed these regulations, especially to guarantee public order, allowing the Police to adopt very strict procedures for issuing such titles, also partly modifying the Agreements for free circulation, which exempted from certain controls the citizens of former French colonies like Algeria and Tunisia.

I have no right to express judgements on the legislative engineering of the latest French laws, but apart from the merits of the case, they seem to show that the issue is seriously worrying the French authorities.

The second title is the *Carte de résident*, valid for ten years and destined only to those who have been living in France for at least three years, and it establishes particular conditions. The bearer enjoys wide freedom of movement and work.

The Spanish experience is of particular interest because legislation has strongly developed since 1974, the year of enactment of the first law governing the admission and the stay of foreigners on the Iberian territory. It has established adequate legislation with the *ley bàsica* of 1985, number 7, and with the more recent law number 9 of 1994.

The situation in Spain is very different to that of other nations: stable immigration is relatively recent and has not reached the levels of those of France, Germany, the United Kingdom and even Italy. Up to the Sixties it consisted mainly of transit immigration but now foreign presence has taken firm root in Iberian territory and it originates mainly from Maghreb areas. Since there is not much social pressure against the establishment of foreign communities, the law has for a certain period been more relaxed than others, although within the limits necessarily imposed by the nature of the issue it governs. Already the law of 1985 provided for the possibility of foreigners, possessing the necessary requisites, like a long period of regular residence, to participate in local elections, although on conditions of reciprocity.

Presently the harmonization of Iberian legislation with the general norms of European legislation on immigration has introduced three types of residence title: the *permiso de residencia inicial* corresponds to the old fixed residence permit, and allows a stay of up to one year; *ordinario*, valid for three years and issued only to those who have been already resident for three years; and the one called *permanente*, issued to foreigners who have been residing in Spain for six years and is valid for five years.

Spain, like France, Germany, the Netherlands, Belgium, Luxembourg, Austria, and Sweden has adopted a form of residence permit based on progressive degrees of the status of foreigners, and this is what is most interesting in the legislation we have seen up to now. In practice it is the regularity of a prolonged stay which guarantees the recognition of full rights which are further extended and are linked to privileges which give a right to adoption, as in France, or to voting rights in local elections as in Sweden and the Netherlands. Consequently the participation of a foreigner in the life of the community, as well as his or her stay, depend substantially on the regularity and the continuity of residence which, by increasing the possibilities of integration (from linguistic to social aspects, from the family to the housing situations, and so on), juridically guarantees his or her safeguarding by the concession of further rights and freedoms. In this way the law, in fact, places on

the foreigner the responsibility of his or her own social behaviour, although with evident limits.

The only country besides Italy not using this system is Greece, which for different cultural and sociopolitical reasons has adopted a legislation (law 1971/1991) which follows the other model, the one where entry and residence permits are based on reasons for admission which are regulated individually according to each specific case, and are valid for a certain period of time and are renewable.

Moreover, to safeguard public order, which is a very sensitive issue in Greece both on account of its strategic position in the area and for its being a doorway between the Mediterranean and Eurasia, the law normally avoids the long term validity of entry documents, restricting their validity to the minimum, and regulates admission as strictly as possible, scrutinizing stays longer than three months while special new laws regulate short and very short stays, especially if the reason is tourism.

When a valid international travel document is shown, and proof is given that one has the legal financial means which are sufficient to guarantee the daily expenses necessary for a respectable lifestyle for the whole stay, the foreigner can obtain a residence permit for a longer period. This is not required of those whose aim is to be reunited with their family.

Once the foreigner obtains the residence permit, he can move about freely in the country, so long as he informs the competent authorities, and he can even change jobs from one city to another.

It is precisely the problem of the guarantee of repatriation, and especially of checking the movements of immigrants on the national territory, that is in contrast with the idea that the foreigner too should enjoy full freedom of movement, in virtue of the fact that the freedom of the individual must include freedom of movement as well as freedom of thought. Evidently, supporters of this stand see the restriction of liberty of movement as an objective violation of the minimum standard, or anyhow a position at the limits of fundamental human rights. Although this is quietly accepted in ordinary legal opinion, at least with reference to the Constitutional Law of every State, it is not as easily admitted where the foreigner is concerned.

In the past serious doubts have been raised in this sense regarding the question of security, from which the State cannot derogate, by referring to parallel concepts like obligatory residence and the impediment of departure for bankrupt persons, or to the prohibition of movement to the foreigner and his obligation to inform the

authorities of his whereabouts. Such theories however have not had further developments in spite of the fact that, it is well to keep this in mind, the restriction of freedom of movement has been common to most legislative systems up to the end of the eighties and one of the principle measures to control, manage and monitor the presence of foreigners in a State.

In Italy, France and Spain freedom of movement is guaranteed and respected, except for the limits which the individual laws impose also on the State's own citizens (for example in the event of a national calamity or epidemic) and for change of residence or city for employment or for study.

The same happens in other countries, although there are various juridical establishments with the aim, not so much of restricting freedom of movement in itself, but rather of extending it progressively taking into account the long period one has already been in the country and his everyday behaviour.

An interesting measure has been introduced in Germany, where regulations governing residence permits now include the extension of freedom of movement (as well as the enjoyment of other rights) on the basis of the title possessed, from the annual *Aufenthalterlaubnis* to the much desired *Aufenthaltsberechtigung* which has unlimited validity and gives maximum freedom of movement on the Federal territory.

Italy alone, among the nations of Europe, is conspicuous for having no less than eighteen types of entry permits, differing on the basis of the reasons for their issue, while there is an equally high number of titles for residence. In the new bill, the Government has reviewed the present regulations, in the hope of solving the need of regulating individual issues connected with immigration. Among others, the reform of the procedures of admission and settlement, about which new measures had been already introduced in Law number 477 of 1996, which later fell through, on the subject of regularization and admission for seasonal employment, besides Law number 489 of 1995, which also fell through, which had controversially modified the institution of deportation.

Besides, as has already been shown, Italy boasts of one of the most recent sets of regulations because up to the eighties the need had not been felt to regulate a question which was considered anyway quite limited – and it objectively did not seem to be an urgent issue.

In this way there was a long gestation period by means of minor instruments derived from the regulations actually in the T.U.L.P.S. and from the so-called "discipline by circulars", that is by rules applied

immediately but lacking a wide horizon, issued by the various competent authorities, and which were therefore not always coordinated.

The peculiar character of the Italian regulations, which finds similar institutions in Portugal and Austria, although with due differences, consists of the programming of the influxes, which up to now has not given very encouraging results. Besides, employment control is shared by the provisions of Law number 983/1986 (which includes the principles of the ILO Convention number 143/1976) on subordinate employment and by those of Law number 39/1990 concerning the self-employed.

Control of entry for academic reasons is still governed mainly by circulars, although some are of considerable importance, while the provisions for Centres of Welcome have been disregarded for a long time. Admission to working-class housing is regulated by a limited number of Regional Statutes, and decisions are taken by the Regional Government, contrary to what happens in other countries where regulation is in the hands of the National Government.

3. Deportation and connected issues. The development and the origins of this institute

During this discussion I have often referred to the problem of public order as one of the main issues related to immigration. The State has, among others, the task of safeguarding its security from internal and external dangers, for its own sake and for its citizens, a responsibility from which it cannot shirk – one must keep this in mind – and which must be pursued with adequate instruments which are also compatible with the spirit and the democratic evolution which are typical of the present international juridical system.

It follows that the State itself, in drawing up the laws that govern immigration, produces instruments that can be used when necessary to *safeguard* public order, as we know it.

In its defence the State can make use of the proper instruments which, as regards immigration, are not only of the preventive kind (like the visa, for instance, which makes sure that one satisfies the conditions for entry into a country), but can also be used to intervene later by applying sanctions against a person, strictly in observance of the law and within the limits established by the heritage of rights and liberties.

Deportation is the strongest weapon among these instruments.

The institute under consideration is one of the oldest principles of legislation on the subject of immigration and foreigners, which were introduced out of the need to regulate the status of the foreigner and his juridical safeguarding, even before the need to control the movement of persons and immigration. Substantially this institute consists in empowering the State to send away a foreigner from its territory if he has committed an action which violates a law, particularly of the criminal kind, or has disturbed the rules of peaceful communal coexistence. It is therefore on the opposite side of admission.

Naturally there is no absolute right to admission, but there is the absolute right of the State to adopt instruments which safeguard social peace, to defend itself and its citizens. In reality, however, such a right does not imply the absolute liberty to expel, since there are general limits to the action of the State. First of all, because of a considerable number of international Conventions which deal with the subject, starting with the UN documents, secondly, on account of the existence of a number of wide-ranging juridical principles which are the common heritage of all the national juridical systems, like the *principle of legality* (which is also valid for deportation), according to which the institute, in order to be applied, has to exist within the State's legislation.

Deportation has often been defined, in the field of juridical studies on immigration, as the strongest expression of power of the State on the foreigner, and its nature, precisely due to these particular characteristics, was originally an act of grave sanctions, a kind of *extreme measure* which does not punish the offence in itself, which could be punished according to criminal law, but its author, the foreigner. This last statement, then, considered in itself, is very important in legislation on foreigners since it renders this institute peculiar to the *status* of foreigner, discriminating against the subjective situation of a citizen who, contrary to the first one generally cannot be expelled from his own State.

In its development, however, the general lines of this institute have been modified, and from a serious and particularly extreme act it has become a widely-used instrument, becoming merely an instrument for controlling the quantity and quality of migratory influx. It has often been written that a crackdown on immigration takes the shape of limiting entry permits and of increasing the list of elements that can trigger deportation procedures. In its historical and juridical aspects this has increased in importance in the last twenty years, especially in consideration of the use that has been

made of it, systematically, almost always coinciding with strong reactions to social disturbance.

It is quite evident now that the institute itself has become a clear symptom of the political spirit that permeates legislation on the subject, as well as a thermometer of social unrest, as one can see in the development of legislation in countries with more experience like France, Germany and the United Kingdom, and outside Europe in the United States, Japan and in developing countries which have a high rate of regional immigration.

This helps to explain why in the numerous discussions that arise on the problem of immigration and its management, as well as the questions related to it, few elements arouse as much interest as the institute of deportation.

The recent general tendency of national legislators to make deportation easier is a strong sign of the radical change which this institute has undergone as an instrument of control and repression, although parallel to this process another one has helped the proliferation of procedures in which the foreigner can defend himself, consisting of the existence of rights to appeal, debates and limitations of the discretionary powers of the authorities concerning the application of this measure.

There has therefore been a series of changes of direction which widened or restricted the cases for the application of deportation.

More than the other institutes which are typical of the regulations on immigration, deportation has raised doubts about its position with respect to the question of human rights, which have often been invoked to limit this sanctionary action. I have said above that the action of the State, in this sense, is not free and this limitation derives precisely from the fact that some cases, when censored, make deportation a measure which violates, in its turn, the principle of the safeguarding of human life and dignity, as well as fundamental human rights.

Considering how delicate this subject is, one understands how in this field the harmonization of the various legislations has become even more difficult. There is no doubt that in the Community and other international organizations there are acts for regulating this subject, but such regulations are solely limited to a few essential principles, like the prohibition of collective deportation, the prohibition of mass deportation after dismissal and the prohibition of deportation when the person expelled faces the danger of reprisals after his forced re-entry into his homeland.

Besides these principles, whose validity cannot be placed in doubt,

the national situation can be strongly determined by the difficulties of each geographical and social reality. This accounts for the strong differences between various countries, starting with those who have included deportation into their Constitution and ending with those who have introduced appeal against it before *ad hoc* organs.

A certain homogeneity in laws on this subject can only be seen in the motives that can lead to deportation. These are common to most of the European regulations, especially regarding the battle against illegal immigration, a relatively recent problem and therefore one that is more likely to feel the influence of coordinated action, especially within the (European) Community.

These motives are:

a) The irregular position of the foreigner's stay in the country. In spite of the general agreement which logically exists on this point, the question continues to have rather hazy contours, especially because of the difficulty of distinguishing, in a homogeneous and definitive manner in all the States, between *illegal* and *irregular* immigrants. The former are foreigners who enter the country without documents or without the necessary permit, violating all the regulations on entry and residence in the State. Since the decision whether to admit a foreigner or not belongs only to the State, the foreigner's entry into the national territory in an illegal manner constitutes a violation of the regulations. The attention of the Luxembourg EU summit and of the OSCE's principal acts on immigration has been focused mainly on illegal immigration.

On the other hand, the irregular foreigner is one who, after having entered the country by satisfying all the legal conditions in force, no longer possesses the full requirements imposed by the law, such as in the case of subjects whose residence permit is revoked after entry or whose renewal is refused, or has been revoked because of the commission of offences or for any reason provided for by the law.

The two figures, often confused in terminology as well as in substance, have essentially very different profiles.

b) Danger to society and to national security. It is my intention to dwell on this concept, which is not a hard and fast one, since it embraces various hypotheses which are linked in various ways. This is one of the principal motives for deportation, and it is also the oldest one, directly linked to the hypothesis of the foreigner actually carrying out activities or interests in violation of the regulations which safeguard the security of the State or of the community, and thereby actually disturbing national security.

The difference between the danger to national security and the danger to public order can be said to contain a degree of similarity in that for both it is only necessary to establish the proper procedures which should be followed to carry out the deportation. In countries like France, where they have ordinary and emergency deportations, for instance, the participation in acts of terrorism triggers off the emergency mechanisms which consist of a series of actions and particularly rapid procedures aimed at the immediate expulsion of the dangerous subject. In this last case the peculiar nature lies in the fact that deportation follows a criminal action against the State itself and not against the community or one of its members.

In a different way the threat to public order provides for a potential danger to the community. The concept of a social danger is known in many European legislations and it can be recognized in a number of attitudes which provoke social alarm in the members of the community in which the foreigner lives, as well as the actual commission of acts which are considered offences by the laws of the State. No regulation defines or governs their contents, but these are generally recognizable in proven membership of criminal organizations, doubts about the moral behaviour of the foreigner even in his own land, the commission of criminal acts, and so on.

To the above can be added doubts about the practice of rituals or attitudes which are considered contrary to public order, and the violation of rules on human rights, but these actions can be liable to legal prosecution (as in the case which has recently been denounced in Europe, of the practice of female infibulation, which is as important in the culture of certain peoples as it is denounced, even conceptually, in Western culture and subsequently by the law).

c) Conviction. There is no disagreement on the fact that, once an offence has been committed in violation of a country's criminal code, when a sentence is passed in virtue of the principle of territoriality the State can intervene with a special sanction against the foreigner, like deportation. In this case the institute's nature changes fundamentally, becoming a juridical act (up till then it was of an administrative nature), because it is included in a judgement, and sometimes it can be ordered by a judge by a special act or automatically, but always as a consequence of a judicial process.

In this case it is an ancillary penalty, following a general judgement for a serious offence, for an accumulation of minor offences or for relapsing.

The offences for which the legal framework of a country provides

deportation are often linked to such criminal acts by the foreigner as drug trafficking, the exploitation of prostitutes, the organization of and trading in illegal immigration. In recent years, in the wake of a strong social reaction to a wave of ordinary crimes, deportation measures have been introduced to punish crimes which are considered revolting by the community, such as rape and the abuse of, trading or violence on minors.

d) The lack of financial means, as one of the principal elements in the procedure for the granting of visas and admission on the national territory. The inspection of the prospective immigrant's financial means is virtually a preventive measure to guarantee public order which has two aims: on the one hand it permits selection and gives guarantees on the entry of foreigners, on the other it exerts control on the same, since it demands proof that the sums involved are licit.

This measure, which is also included in Italian legislation, in its global *ratio* is also intended to safeguard the foreigner from the risk of slipping into criminal circles (like the Mafia organization) for his financial survival, because it forces him to find licit ways to satisfy his everyday needs and dignity.

I have previously mentioned how deportation is not applicable in an absolute or discretionary manner. There are in fact three main categories which limit the defensive action of the State (besides the political and juridical choice of its contents): the observance of human rights in its widest meaning, the observance of the general principles of the legal framework, starting with the principle of legality, and the existence of generically identified situations for which the measure of deportation must be avoided because of the grave consequences that it might create.

As to the first principle, the respect of human rights places a limit on the State when it decides to effect a deportation to safeguard the dignity of a man, his life and his honour, ruling out expulsions based on racial and religious discrimination and their carrying out in a violent or arbitrary manner. This last concept, which has been debated recently following charges of violations committed by a number of European States, is necessarily linked to the second limitation, the observance of the general elements of the regulations.

In line with this obligation the deportation must be provided for by the laws in the said regulations, it must be free of the risks of discretionality and administrative abuse, must follow the juridical

principles contained in the Constitution and must conform to the general laws which are typical of a juridical system, and it must also avoid creating differentiated treatment with the rights that belong to other persons, particularly to the State's citizens. All this notwithstanding, as I have already pointed out, that deportation is in itself already a kind of differentiated treatment, since a citizen cannot normally be expelled from his homeland.

Of particular interest is the part which is linked to the third point, since there is a kind of parallel between extradition and deportation which has brought about the assimilation of certain rules which are typical of the Criminal Code into the institute under consideration. Many European legal systems follow the criterion that a foreigner cannot be deported if:

1) his expulsion can lead to repressive measures which endanger his life, dignity, honour and physical and moral well-being, especially regarding forced repatriation or blocking at the frontier. The topicality of this measure has been highlighted by events in these last years because in many regions of the world there have been strong inter-ethnical and religious clashes which were followed by fierce political, social and racial persecutions.

In certain cases there have been attempts at introducing mechanisms for the expulsion of a foreigner to countries which border on or are near to his native land. However such a procedure has its limits, especially regarding the difficulties of having such a burden accepted in a third State.

2) the person being deported is a foreigner with a particular family situation like a mother with a young child or the breadwinner whose children are not self-sufficient and do not have any other income. This formula originated from the respect of the family ties which would be seriously impaired if such an important member were to be sent away. In cases where the deportation cannot be postponed – as in France where deportation with an urgent process has been introduced – the child and the whole family can be "deported" as well as the original object of this process. Besides criticism of its abuse, formulated by some observers in the application of this measure and with reference to the procedure itself, the authorities have always pointed out that this measure strikes the right balance between family needs, which are inviolable, and the safeguarding of regulations, which is also insurmountable.

3) the person being deported is of an age which does not allow

the measure to be carried out without exposing the subject in question to great harm, as in the case of young people under 18 (in Italy under 16) or old people over 80.

This principle has not been adopted by all European legislations, but it has been introduced in France and Greece, and can be considered an interesting innovation which deserves deep attention, at least for humane reasons.

In France legislation on deportation is rather complex because the regulations on immigration have been modified many times since the first integrations to the ordinance 2658/1945. Ordinary procedure lays down that sentences of imprisonment up to one year without probation, or for particularly serious offences like rape, exploitation and trading of prostitutes, illegal immigration, besides the violation of regulations on immigration and residence, the foreigner can be deported by a procedure which may include the possibility of appeal before an *ad hoc* organ.

There is also an urgent procedure, which has already been mentioned here, whose range has been extended in a restrictive sense by the latest amendments in the law, and concerns terrorism and subversion of the constitutional order. In these cases deportation follows a speedy process and causes the immediate expulsion from the territory of the State. In the case under consideration even the aforementioned protected categories can be deported, although an exception is made for persons under 18 years of age.

Spain has drawn up a very similar discipline, that follows the same kind of conduct and with a certain degree of homogeneity. Deportation follows a judgement of one year in jail on the Iberian territory or in another country if the criminal act for which he has been punished is recognized as such also in Spain, provided that it carries a similar punishment.

Greece provides for deportation for the violation of the rules of entry, employment for the commission of offences and for terrorism.

The Italian situation is more complex because for a certain period the two main systems of regulations have overlapped, as contained in the laws 39/1990 and 489/1995. The latter divided the institute into five elements: deportation as a measure of security, deportation as a measure of prevention, on application by a party, for reasons of security and by an administrative measure of expulsion. With these subdivisions, Italy came closer to the lines being followed by most of the European legislations which consider deportation as a preventive act and not only as a punitive measure.

In some cases there has also been a certain fusion with the similar

institute of escorting a foreigner to the frontier and with turning someone back at the frontier.

In some cases, as in Italy and Spain, regulations have included the substitution of imprisonment by deportation from the State.

The present juridical evolution has given the foreigner an increasing possibility of opposing the deportation order in the terms established by law and with the means placed at his disposal by the regulations.

The first important achievement in this sense has been the introduction of the right to appeal against deportations which are of an administrative nature, that is all those which have not been decided following a criminal sentence or conviction. In Italy, France, Spain, Greece, Sweden, Portugal, etc., the foreigner, within the limits that such a process places on the person concerned, both in terms of his knowledge of juridical matters as well as the economic side of such a defence, is allowed to appeal to the competent authorities (the T.A.R. in Italy) against the measure issued.

In France in particular, the competent body is the Departmental Commission for Deportation, whose decision however is no longer binding after the introduction of the discipline contained in the Loi Pasqua of 1993, which actually gives wide discretionary powers to the Prefect of Police. But the latter must always keep in mind the opinion of the said Commission. The summons is compulsory except in cases of procedural urgency and takes place 15 days before the meeting and the discussion, to allow the foreigner to contact a lawyer and draw up eventual notes for his defence.

In Spain, on the contrary, notification of the measure is given, for the same reason, at least 72 hours before, to allow the person concerned to start the proceedings for the appeal, when necessary.

4. Between admission and deportation: the new rights of foreign communities

The natural conclusion of what has been said up to now is that the present political tendencies, at the national and international levels, are directed towards the prevention and avoidance of further forms of mass immigration on the territory of Europe. To this end limitations and instruments have been set up to intervene on the influx before it touches the national territory and to block illegal immigration which brings so much harm, first of all to the victims, secondly to the local socio-economic structure.

But this policy does not, and cannot, take into account foreign

communities already present on the national territories. For these, especially where figures of spontaneous integration are relatively high, there must be instruments as incentives for and to safeguard the process of osmosis with the local community. In countries where such a situation is being created, the foreign community has been allowed to participate further in local life, by the concession of even more rights.

This extension of rights is linked with the safeguard of the human person, particularly concerning the needs which may arise once it has been regularly inserted in a context.

In this way new rights for foreigners are introduced, others are consolidated, others are now becoming part of the acquired juridical heritage. The debate which has been launched in the juridical sphere, has remained up to now confined to the level of enunciation, and in practice it has been transformed into permissive conduct and into the actual recognition of a few general principles. Few legal systems have given concrete form to these discussions by producing laws in this sense. This can be interpreted in the light of various factors which limit its development, none of which, it must be here pointed out, seems to be deliberately limitative in scope. The problems of foreigners are often tackled by Governments on the lines of those which concern their citizens, according to a logic which is not open to criticism, and even for these latter often considerably bigger difficulties arise in the application and identification of rights. Just consider the strong diformity which, in parallel topics, the various regulations have addressed issues pertaining to ethnic and linguistic minorities, the right to vote for citizens residing abroad, the measures for cheap housing, and so on.

The fact remains, however, that in many States the foreign community has been given the freedom of exercising and unconditionally enjoy other kinds of rights, mainly connected with the cultural and religious spheres, occasionally limited only by the rules of entry and residence, which in this case are more concerned with the observance of the laws than with the prohibition of the exercise of one's rights.

More recently devised, but more widely applied, are the rights of cultural identity, of the freedom to openly practice one's religious rituals, to respect one's cultural needs in the place of work (as the Muslim's Fridays, which has been recognized in certain collective agreements in some European countries, or the break for prayer on the job).

Although there are limits which differ from State to State,

nowadays the foreigner's statute includes reunion with the family, the right to study, freedom of movement, the general recognition of civil rights (or a part of them), the progressive abolition of the conditions of reciprocity, in this sector, placed as limits in the former legislation.

A separate case, with very strong repercussions which interact in the fabric of society, is the right to participate in policy-making in government and local administration, as in the case of the vote for administration. This principle has been accepted in Sweden and the Netherlands, has been applied in Switzerland and in other European countries, but it does not seem to spread easily, given the strong opposition that the interpretation of the "right to vote" undergoes from State to State.

Even more varied is the scenario, which has developed in some States but is forbidden in others, concerning the concept of membership, foundation and militancy in political groups, while the situation is more fluid concerning trade unions.

In conclusion it is evident how local and international legislation on the problems of immigration varies, depending on the direct action it has on the community and on the policy of the individual realities. The legislator's general intention seems to be the updating of the *status* of the established immigrants, not least because of the strong pressure that regularization and integration place in terms of social peace, of the foreigners' rights and above all about the problems of the so-called third generation, that of immigrants born abroad, who were consequently brought up and lived in a reality which is more similar to that of the local community.

The problem of the third generation continues to be of considerable importance, both on account of the social effects that it can trigger and for the rights and safeguards which, in most cases, concern minors, who usually make up the larger part of this generation.

In the near future these will form the adult part of the community of foreigners living in Europe, that which has been born and has lived together with our present generation. A number of national authorities place a lot of trust in it for the development of integration, and try to help it with proper and targeted interventions, aimed above all to eliminate the risks or involvement with criminal components.

In particular there have been attempts to act on the right to study, granting free access to state and private schools, on compulsory school attendance, on the health measures as provided for the citizens' children, on the extension of the rights of protection of minors, which

these days are sadly in the limelight because of the well-known events linked to violence to and sexual abuse of minors. The latter problem is increasingly linked with the issue of immigration, since the migratory channels constitute an easy bridge to extend such activities in the West.

The Europe of the above-mentioned future generations, seems to be increasingly becoming a Europe of foreigners, a Europe in which, if cards are played carefully, many States will create really multi-ethnic societies, the burden and the delight of intellectual circles who now prophesy their creation.

Therefore we can conclude that the regulations of each State or the concerted action of international bodies must take into account how, in little more than half a century, immigration has changed structurally from a peculiar phenomenon to a role of a "container" of the original central problem and channel of a well branched-out series of other issues, among which, as we have briefly analyzed, we find integration, cultural and religious diffusion, terrorism, demographic pressure and the market of child prostitution. All these are problems which have to be considered in the light of a migratory phenomenon which, it is worth remembering, concerns a large part of the world.

At the doorstep of the new millennium, whatever the road to future development will be, "Fortress Europe" continues its battle against the siege.

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