

When Immigration Is a Crime

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Over the past few years, European Union law and national laws, particularly in France and Italy, have established repressive and utilitarian immigration policies that have equated European cooperation with legal regression. What is left of the right to migrate once held sacred by theologians and jurists alike?

Migrations are forcing the law to face a paradox. Despite the fact that the *ius migrandi* – the right to migrate – was recognized as the first of all natural and universal rights, and as the foundation of modern international law, we are witnessing, within the European legal area, the implementation of stricter measures to control immigration. These measures are not only likely to impede the exercise of this right itself. They also even appear to question the *acquis* of liberal judicial culture, such as the principle of equality and the inviolability of human dignity¹.

The Right to Migrate and Universal Hospitality

The development of the right to migrate is generally considered to date back to the end of the 16th Century, when Spanish theologian Francisco de Vitoria saw it as stemming from the cosmopolitan idea of universal fraternity between peoples.² To be sure, as the philosopher of law Luigi Ferrajoli recently pointed out, the assertion of this right was

¹ On the implementation of stricter measures to control immigration in France and Europe, see respectively Danièle Lochak and Carine Fouteau, *Immigrés sous contrôle. Les droits des étrangers : un État des lieux*, Le Cavalier Bleu, 2008 and Helene Toner, Elspeth Guide and Anneliese Baldaccini (ed.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Essays in European law), Hart Publishing, Oxford, 2007.

² Francisco de Vitoria, *De Indis et de iure belli relectiones. Relectiones theologicae XII*, in Ernest Nys (ed.), *Classics of International Law*, Carnegie Institution of Washington, Washington, 1917.

clearly taken advantage of by the Europeans as justification for exploiting the lands and peoples of the New World.³ Historically asymmetrical, this *ius migrandi* nevertheless remained a milestone of classical liberal thought. Kant included in his program for a *Perpetual Peace* not only the right to *emigrate* but also the right to *immigrate*, associating the latter with the principle of universal hospitality⁴ – and the *jus migrandi* was included in the main national and international legal texts: first in Article 4 of the 1793 French Constitutional Act (“The following are admitted to exercise the rights of French citizenship: every man born and domiciled in France, fully twenty-one years of age; every foreigner, fully twenty-one years of age, who, domiciled in France for one year and lives there by his labour, or acquires property, or marries a French woman, or adopts a child, or supports an elderly person; finally, every foreigner who is considered by the legislative body to be deserving of being treated humanely”)⁵, to Article 13, paragraph 2 of the Universal Declaration of Human Rights (“Everyone has the right to leave any country, including his own, and to return to his country”), then in several national constitutions.⁶

After five centuries of colonization and exploitation by Europeans, that asymmetry has now been reversed. Today, the peoples who were formerly colonized and exploited are the ones that abandon their homeland for Europe, to seek better living conditions, or to take refuge from political or humanitarian crises. While that reversal should have forced European countries to *take seriously* the universal character of the *ius migrandi*, we are in fact witnessing its gradual denial: as Hannah Arendt highlights in her reflection on imperialism, political or economic refugees – who, deprived of their particular socio-political identity, should embody the ideal bearer of so-called *universal*

³ Luigi Ferrajoli, “La criminalizzazione degli immigrati (Note a margine della legge n° 94/2009)”, *Questione giustizia*, n° 5, 2009, p. 9 sqq.

⁴ *Ibidem.* Emmanuel Kant, *Projet pour la paix perpétuelle*, Gallimard, “Bibliothèque de la Pléiade”, 1986, vol. III, p. 350.

⁵ Translation taken from the website site of the Roy Rosenzweig Center for History and New Media (<http://chnm.gmu.edu/revolution/d/430/>)

⁶ About France, see Patrick Weil, *Qu'est-ce qu'un Français ? Histoire de la nationalité française depuis la Révolution*, Gallimard, 2005.

rights – in reality find themselves stripped of all legal protection, since it is no longer possible to conceive them as citizens of a specific community.⁷

Recent history, however, shows that it is possible to take this even further. Suspended between its universal purpose and the sovereignty of states, the *ius migrandi* has been turned into its exact opposite: a crime. The criminalization of irregular immigrants appears to have become Europe's new totem:⁸ representing and represented as the barbarian, the other, or even the natural criminal, irregular immigrants have become the scapegoat of the delusion and prejudice that are fuelled by our 'risk'⁹ or 'fear'¹⁰ societies. Taking its cue from the U.S. experience of the early 20th century,¹¹ immigration control policy has progressively turned, in Europe, into a *criminal policy*. Countries' borders have been militarized. Once the "criminal immigrant" crosses them, he becomes the target of derogating measures aimed at expelling him or her from the "body of the nation."

However, before the irregular immigrant is repatriated, criminal law guarantees his or her exclusion from society. This would seem to be the real purpose of "criminal immigration law": transforming the irregular immigrant into a modern-day *homo sacer*, an individual who, well before expulsion is physically accomplished, is already made a sort of "juridical exile."¹²

Immigration: a "Common Policy"

⁷ Hannah Arendt, *Les origines du Totalitarisme. L'impérialisme*, Seuil, 2006, p. 292.

⁸ For an overview of criminal legislations passed in the area of immigration in Europe, and its implications on human rights protection, see the Issue Paper "Criminalisation of Migration in Europe: Human Rights Implications", prepared by Elspeth Guild and published by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, February 2010. Our necessarily short analysis will be limited to European law, but this phenomenon also affects North America, Australia and Japan, as well as countries of emigration and transit (and above all the treatment of migrants passing through Libyan territory).

⁹ Ulrich Beck, *La société du risque. Sur la voie d'une autre modernité*, Flammarion, 2003.

¹⁰ Mireille Delmas-Marty, *Libertés et sûreté dans un monde dangereux*, Seuil, 2010.

¹¹ For an interesting comparison, see Michele Pifferi, "La doppia negazione dello *ius migrandi* tra otto e novecento", in Orsetta Giolo and Michele Pifferi (ed.), *Diritto contro. Meccanismi giuridici di esclusione dello straniero*, Giappichelli, 2009.

¹² On the concept of "homo sacer", see Giorgio Agamben, *Homo sacer. Le pouvoir souverain et la vie nue*. Volume 1, Seuil, 1997.

This phenomenon is not only found on a national scale: through a game of ascending (from national governments to supranational institutions) and descending (from supranational to national legislation) interactions, a pernicious link between immigration control and criminal law now characterises the immigration policy implemented at EU level. Before the Treaty of Lisbon made immigration a “common policy” (aiming to create an integrated system for managing external borders and to establish a common asylum system and a common policy on illegal immigration), it was the European Pact on Immigration and Asylum adopted in 2008 under the French presidency that, at EU level, accelerated the implementation of a utilitarian and repressive approach to immigration control.

The first measures adopted within this framework seem to confirm these two aspects of European immigration policy. On the one hand, the “EU Blue Card Directive” promotes the entry and residence of non-EU citizens for the purposes of highly qualified employment. On the other hand, the “Return Directive” makes provision for the option of detaining migrants awaiting removal for up to 18 months, and a re-entry ban of up to five years for the whole Schengen area (which includes no fewer than 25 countries of which 22 are members of the European Union) – thereby building, in the face of foreign “undesirables, the new walls of “Fortress Europe.”¹³

Furthermore, once again on the pretext of complying with EU legal obligations, the French government has recently put forward a bill on immigration. Adopted by the National Assembly in early October 2010, this bill is the fifth reform in seven years.¹⁴ It aims to strengthen the administrative regime applied to irregular immigrants. We use the term *pretext* intentionally: while seeming to endorse the spirit of the supranational measures, the national legislation is not adopting the safeguards provided by EU law in order to guarantee the migrants’ rights.

¹³ The re-entry ban can nevertheless be extended beyond five years if the third country national constitutes a serious threat to public order, public safety or national security.

¹⁴ See the 2003 law on immigration control and the residence and nationality of aliens in France, and the law on the right to asylum; the 2006 law on immigration and integration; and the 2007 law on immigration control, integration and asylum.

This means that, if the reform is adopted (as will most likely be the case), the administrative authorities will be able to create transit zones “à la carte;” in other words, transit zones will not be limited to the specified border points provided by law, but will be created anywhere “a group of foreigners is discovered to have just entered national territory.” At the same time, the maximal duration of detention for the purpose of removal of foreigners will increase from 32 to 45 days. Furthermore, the transit zone and the detention facilities are likely to become “no-go areas:” the bill significantly reduces the judicial review of the lawfulness of detaining foreigners. Only after five days can judges decide whether or not a foreigner should be freed or kept in detention (the period was previously 48 hours), and they will only be able to do so in the event that there are found to be procedural irregularities of a “substantial nature” which “infringe on the alien’s rights.”

Criminalizing Immigration Law

While, on the one hand, the return proceeding is progressively limiting the guarantees for individual freedom imposed by criminal law, French law resorts to criminal law to implement a “scorched earth policy” for foreigners illegally residing on its territory. It is true that in France, unlike other European legal systems, the criminalization of irregular immigrants has never been taboo: French legislation punishes not only irregular entry, stay or residence but also “any person who has, directly or indirectly, assisted or tried to assist the irregular entry, stay or residence of a foreigner in France.” This crime (known as “crime of solidarity”) was introduced by decree in 1938¹⁵ and included, since 2005, in the Code on Entry and Stay of Foreigners and Right to Asylum (CESEDA). It makes provision for draconian penalties (detention up to five years and a fine of 30 000 euros) and is today used mostly to intimidate people and members of associations trying to help or assist irregular migrants.

These provisions represent only part of the “criminal arsenal” deployed in order to isolate migrants irregularly entering or staying on the French territory: the crimes of contempt, insult, defamation, or the offence of obstructing an aircraft’s movement, are

¹⁵ Article 4 of the government decree of 2 May 1938 on the policing of foreigners.

used on the one hand to deprive foreigners who illegally enter or stay in France of any form of support and, on the other hand, to send a signal to the entire population that citizens cannot object to the discriminatory and authoritarian policy implemented by a shameless government.¹⁶

It is in the same spirit of exclusion that Italy recently decided to “reinforce” its immigration control policy by turning to criminal law. With the adoption in 2008 of a “securitarian” packet of measures that surfed the wave of emotion brought on by particular events in the news, a status of “clandestinity” was introduced as an aggravating circumstance of common crimes. First applied to all foreigners irregularly entering, staying or residing on the national territory, then subsequently limited to non-EU nationals in order to avoid violating EU law, this aggravating circumstance finds – according to the lawmaker – its justification in a presumption of dangerousness stemming from the violation of administrative law by irregular migrants.

Lacking any empirical basis, and with the evident purpose of discriminating against foreigners on geopolitical and even ethnic grounds,¹⁷ the “aggravating circumstance of clandestinity” was annulled by the Italian Constitutional Court in 2010. Using precedents that prevented seeing the absence of a document authorizing the entry or the stay of the foreigner on the national territory as “a[n unequivocally] symptomatic element of the social dangerousness of the foreigner,” the Constitutional Court held that the absolute presumption of dangerousness (presupposed by the aggravating circumstance regardless of the assessment of the conditions in which the offence was committed) was “contrary to the principle of legality of crimes and penalties, which is non-derogable in providing that a person must only be punished for his actions and *not for his individual status*.”¹⁸

¹⁶ See the report “Les délits de la solidarité”, available on the website of GISTI ([www.gisti.org/delits-de-solidarité](http://www.gisti.org/delits-de-solidarite)).

¹⁷ We have Massimo Donini to thank for this useful expression. See “Il cittadino extracomunitario da oggetto materiale a tipo d’autore nel controllo penale dell’immigrazione”, *Questione giustizia*, n° 1, 2009, p. 101 sqq (especially pp. 118-119).

¹⁸ Italian Constitutional Court, judgment n° 249, 8 July 2010.

In Italy, as in France, this penal system aiming to exclude irregular migrants is nevertheless showing a worrying resistance to the fundamental principles of law. The introduction of the crime of “illegal entry and stay of foreigners” into the Italian legal order in 2009 provides further proof of that. Vehemently criticized by eminent scholars, this provision has nonetheless been validated by the Constitutional Court in a judgement issued the same day as the one annulling the “aggravating circumstance of clandestinity.”¹⁹

This polarization of criminal law has been achieved by introducing legal standards that are inconsistent with the principles recognized at constitutional and conventional level. With respect to the criminal offence, subjective conditions considered dangerous to society are punished (from culpability to dangerousness). With respect to the penalty, the aim of reinsertion or resocialization is abandoned in favour of the segregation of the accused and the neutralisation of her alleged dangerousness (from criminal sanctions to security measures). As for the procedural aspects, this system circumvents judicial control, abuses afflictive measures of prevention and control, administrative detention, and police operations, thus distorting criminal law and criminalizing administrative law. “Immigration criminal law” therefore seems to have the features of the so-called “criminal law of the enemy” coined by German Professor Günther Jakobs. This legal concept linking citizen and enemy status with criminal law owes a great deal to post-9/11 anti-terrorist practices and to the link that has gradually been (re-)established between individuals and the concept of dangerousness.²⁰

However, governments’ activism, driven by purely political motives, quickly makes any attempt at reflection or doctrinal categorization null and void. The legal concept of citizenship no longer seems able to guarantee the application of a “criminal

¹⁹ Italian Constitutional Court, judgment n° 250, 8 July 2010.

²⁰ Günther Jakobs, “Derecho penal del ciudadano y derecho penal del enemigo”, in Günther Jakobs and Manuel Cancio-Meliá, *Derecho penal del enemigo*, Cuadernos Civitas, 2003, p. 19-56, also published in German (“Bürgerstrafrecht und Feindstrafrecht”, in *Höchstsrichterliche Rechtsprechung Strafrecht*, March, 2004, p. 88 sqq.) and in Italian (“Diritto penale del nemico”, in Massimo Donini and Michele Papa (ed.), *Diritto penale del nemico. Un dibattito internazionale*, Giuffrè, 2007, p. 5 sqq.). In France, see “Droit pénal de l’ennemi – Droit pénal de l’inhumain”, *Revue de science criminelle et de droit pénal comparé*, n° 1, 2009, p. 1 ss.

law of the friend.” The recent proposal to remove the nationality of those French citizens of foreign origin who have endangered the lives of the trustees of public authority; the mass expulsion of Roma people and the circumvention of the right of free movement and settlement granted to them as European citizens; finally, in France, the entry into force – in the name of the protection of public order – of the absolute and general ban of the *niqab* or *burka* in public areas: all these examples show how the link between criminal law and immigration control policy can worryingly shift the latter towards a “criminal protection of cultural identity.”²¹

Although the discourse on identity is no longer constructed around the concept of race, the history of both France and Italy, each of which has experienced state racism on a different scale, forces us to recall that the “rationalization of inequalities” at the time passed through a system of administrative measures that was strengthened by criminal law.²² Carried forward by the binding mechanisms of European legal integration, the spread of these instruments for exclusion runs the risk of weakening the construction of a true “European community.” When faced with migrants, Europe, supposed to open up a new era of exchange and prosperity, seems to be breaking its promise by building walls which, like the *limes* of the Roman Empire, attest rather to its inability to envisage “other horizons and another future.”²³

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²¹ For this expression, see Marco Pellissero, “Il vagabondo oltre confine. Lo statuto penale dell’immigrato irregolare nello Stato di prevenzione”, typescript.

²² On the criminal policy under the authoritarian regimes in Italy and France, see respectively Guido Neppi-Modona and Marco Pelissero, “La politica criminale durante il fascismo”, in Luciano Violante (ed.), *Storia d’Italia, Annali 12, La criminalità*, Einaudi, 1997 and Danièle Lochak, *Le droit et les juifs en France depuis la Révolution*, Dalloz, 2009. On the pernicious consequences stemming from the link between national identity and immigration, see Séverine Dessajan, Nicolas Hossard and Elsa Ramos, *Immigration et identité nationale : Une altérité revisitée*, L’Harmattan, 2009; Agnès Maillot, *Identité nationale et immigration : La liaison dangereuse*, Éditions Les Carnets de l’Info, 2008.

²³ Aldo Schiavone, *L’Histoire brisée. La Rome antique et l’Occident moderne*, Belin, 1996, p. 233. Also see Mireille Delmas-Marty, *Vers une communauté des valeurs ?*, Seuil, 2011, p. 387-390. On walls as a symbol of the decline of the nation-state, see Wendy Brown, *Murs. Les murs de séparation et le déclin de la souveraineté étatique*, Les Prairies Ordinaires, 2009.

