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SCHENGEN, DUBLIN, LAMPEDUSA. A EUROPEAN IMBROGLIO?

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October 23, 2013, the European Parliament approved a resolution on migration flows in the Mediterranean, requiring effective interventions of the Union and its Member States to avoid tragedies like that of October 3 in Lampedusa (with at least 366 victims). It is a declaration that moreover echoes those, numerous, made by Heads of State and Government of European countries, following the massacre.

Rightly, in fact, what happened in Lampedusa can be defined a European tragedy, also, and above all I would say, because the European Union bears the political responsibility, if not directly legal, because of its unrealistic, confused and wavering Mediterranean policy and its unfriendly migration policy.

Relations with Mediterranean countries were in fact always of great importance for Europe and above all in the last twenty years. In 1995, at a conference held in Barcelona, Europe took the initiative to establish the so-called Euro-Mediterranean Partnership, which was to be merged into the European Neighborhood Policy in 2004. But these strategies did not attain economic integration in the Mediterranean area.

Neither did the Union for the Mediterranean, a pact between EU countries and third countries of the area, strongly endorsed by the then French president Nicolas Sarkozy to relaunch the role of European countries in the area.

Yet migrations from the southern shore to the north of the Mediterranean area may be defined the realization, certainly in a frantic and in some cases irrational way, of that free circulation within the area that the Euro-Mediterranean Partnership promised and never realized.

They show that the political intuition that had driven Europe to seek a partnership with the countries of the southern shore was correct. The migratory flows linked to situations of political instability are not in fact the only component of the phenomenon. The population of non-EU Mediterranean countries is growing at a rate that is certainly higher than in the countries of the Union: it is clear therefore that the demographic pressure of the peoples of the southern shore over the countries of Europe is, and increasingly will be, an unavoidable reality.

A European policy would therefore be necessary to face the expectations generated by the many promises made and never kept. Today, however, the European Union is represented in the Mediterranean almost exclusively by the questionable presence of FRONTEX, a European agency operating without an appreciable political project and indeed with the primary task of coordinating the joint operations carried out by the Member States to protect the external borders of the Union (maritime, land and air).

The promise of an integrated Mediterranean area, where people and goods would move freely and peacefully across the borders, could not have been betrayed more clearly and severely.

Now, to properly understand the reasons for this European attitude, one should go into the tight relationship between the idea of a free movement across national (EU internal) borders through the Schengen Agreements and the Dublin regime concerning people coming from non-European countries and claiming for international protection in Europe.

It was in fact when the free movement across internal borders in the European Union area became real and effective through the Schengen Agreements, that a new problem arose: precisely that of determining which country in the European Union was to decide over an asylum seeker's application, thus ensuring that only one Member State should process each asylum application. This problem arose because a free movement across national borders without controls meant that also asylum seekers could move from one State to another searching for the better response to their application.

A "Convention determining the State responsible for examining applications for asylum lodged in one of the member states of the European Communities" was then agreed 15 June 1990 in Dublin, the so called Dublin Convention. The Treaty entered in force 1997, once ratified by all the Member States of the European Union.

The Dublin Convention sets out a series of criteria (in articles 4 to 8) according to which a State can be identified as the sole State having jurisdiction to examine the claim for international protection.

According to Article 4,

"Where the applicant for asylum has a member of his family who has been recognized as having refugee status within the meaning of the Geneva Convention, as amended by the New York Protocol, in a Member State and is legally resident there, that State shall be responsible for examining the application, provided that the persons concerned so desire".

Article 5 provides that a Member State shall be responsible for examining the application, when that State has issued a valid residence permit or a visa.

Article 6 states that when an applicant has irregularly crossed the border into a Member State coming from a non-member State, the Member State entered shall be responsible for examining the application.

According to Article 8, and that is the general criterion often quoted as typical of the regime,

"Where no Member State responsible for examining the application for asylum can be designated on the basis of the other criteria listed in this Convention, the first Member State with which the application for asylum is lodged shall be responsible for examining it".

Finally, Article 9 allows "Any Member State, even when it is not responsible under the criteria laid out in this Convention …" to examine, at the request of another Member State, an application "… for humanitarian reasons, based, in particular, on family or cultural grounds …"

The Dublin Convention, anyway, proved ineffective, mainly because of different interpretations by Member States, always possible when enforcing a treaty. The European Commission therefore begun to draft a proposal for a Council Regulation on the matter, intended to replace the Convention.

Meanwhile, at the European Council meeting held in Tampere in October 1999, a clear political program for the development of a European policy based on the creation of a common asylum system was approved, foreseeing the establishment of a Common European Asylum System (CEAS). Several acts were adopted in this connection through the years:

- Directive 2001/55 / EC on temporary protection in the event of a mass influx of displaced persons from countries outside the European

Union. The idea of a "burden sharing" was articulated, i.e. a balance of efforts among the States that receive the displaced and suffer the consequences of their reception;

- Directive 2003/09 / EC on the minimum reception conditions of applicants to asylum and refugees, the so-called "reception directive", which defines the reception conditions of asylum seekers who must ensure a decent standard of living in all Member States, further replaced by Directive 2013/33/EU;

- Directive 2004/83 / EC on the attribution of refugee status or subsidiary protection to people otherwise in need of international protection, which sets common criteria for the granting of refugee status and of subsidiary protection, replaced by Directive 2011/95 / EU;

- Directive 2005/85 / EC on the minimum standards and procedures applied in the various Member States to the recognition and revocation of refugee status, replaced by Directive 2013/32 / EU;

- Regulation (EC) No 343/2003 (so called Dublin II Regulation, Dublin I being the convention established as of 1990) containing criteria to identify among the EU members the member state responsible for the examination of an asylum application replaced by Regulation 604/2013, the Dublin III Regulation, intended to replace the Dublin II Regulation starting from January 2014.

- Regulation (EC) no. 2725/2000 (EURODAC) establishing a European database of fingerprints of migrants

This policy was further developed as a central element of the efforts for the establishment of a European Area for Freedom, Security and Justice. The CEAS has since been object of extensive criticism, being identified as a way of restricting access to international protection by third country nationals or stateless persons, all this amounting to the building of what is sometimes called the "Fortress Europe".

This criticism is maybe exaggerated, though it is true that the metaphors of the siege or rather of the invasion have been diffusely recurred to by European political leaders. All in all, the CEAS should be properly seen as a work

in progress, moreover as a work in progress going on in a situation of massive influx of migrants such as the one taking place in the Mediterranean Area since the year 2000.

Visa regulations, border controls by States, border patrolling by FRONTEX, the Dublin regime for asylum seekers are only different moments and articulations of a strategy of migratory fluxes containment under strong political pressure by European peoples fearing loss of their security and ease.

In fact, though written in a normative language aimed at providing a general discipline of these issues, it is easy to detect, behind the formal language of law used in EU treaties and laws, harsh attitudes against what is deemed by many to be an "invasion" to repeal.

Moreover, in several occasions States have unilaterally suspended free movement through their internal borders. For instance, when in 2011 due to extensive mass influxes of Tunisian Migrants Italy gave six months residence permits to thousands of migrants, France blocked trains at the border of Ventimiglia, though not formally suspending Schengen Guarantees.

Later, in 2015, Germany decided to restore temporarily border controls in order to secure a regular inflow of the migrants. Other countries too, have restored border checks due to massive migrant fluxes.

It must be recognized, on the other hand, that the Union has also built obligations for Members States based on the principle of solidarity. Over the years, the solidarity principle has assumed peculiar importance in the field of border controls, asylum and immigration.

With the Treaty of Amsterdam, in art. 73.2, a solidarity mechanism was introduced for the first time in favor of those Member States that were facing an emergency situation characterized by a sudden influx of third-country nationals, through which the Council, acting in qualified majority on a proposal from the Commission, could adopt temporary measures for the benefit of the State concerned lasting no longer than six months.

And again, the Lisbon Treaty introduced article 80 TFEU, according to which the policies relating to border controls, asylum and immigration must be

governed by the principles of solidarity and fair sharing of responsibilities between Member States, including financial matters.

The reformed text of article 78.3 TFEU still provides for the possibility, introduced by the Treaty of Amsterdam, that the Council may adopt measures for the benefit of those Member States confronted by emergency situations characterized by a sudden influx of third-country nationals.

However, these provisions do not clarify which actions should be taken to ensure the application of the principle of solidarity, nor which measures could be adopted by the Council pursuant to article 78.3.

The allocation of reception burdens, however, should not be limited to the financial plan alone, but should extend to the responsibility of Member States for examining asylum applications.

The correct implementation of the principle of equitable distribution, therefore, should result in the transfer of asylum seekers to Member States less affected by this phenomenon, or in a revision of the criteria.

The two decisions adopted by the Council in September 2015 pursuant to article 78.3, TFEU, have introduced a temporary derogation from the system, governing an emergency relocation mechanism to assign to states other than the arrival the examination of applications for asylum seekers in clear need of protection Decisions (EU) 2015/1523 of Council of 14 September 2015 establishing temporary measures in the field of international protection for the benefit of Italy and Greece, (EU) 2015/1601 of the Council of 22 September 2015 establishing temporary measures in the field of international protection for the benefit of Italy and Greece.

One should also add to these the critical attitudes of those States who did not accept the relocation obligations of refugees from other Member States.

In this connection it is to be noted that the Court of Justice on 6 September 2017 has ruled against these States in her judgment in Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council, originating from the refusal of the recurring States to enforce Council Decision (EU) 2015/1601 of 22 September 2015, establishing provisional measures in the area of

international protection for the benefit of Italy and Greece. In her judgment the Court stated inter alia that

«When one or more Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy.

Accordingly, in the present case the Commission and the Council rightly considered, at the time of adoption of the contested decision, that the distribution of the relocated applicants among all the Member States, in keeping with the principle laid down in Article 80 TFEU, was a fundamental element of the contested decision. That is clear from the many references which the contested decision makes to that principle, in particular in recitals 2, 16, 26 and 30». (ECLI: EU: C:2017: 631, paras. 291-292)

The European Commission has since proposed a Regulation amending the relevant provision of the Dublin III Regulation aimed at addressing the pitfalls identified in these judgments. This proposal for a Dublin IV Regulation, put forward in 2016, as a pivotal element of a thorough reform of the Common European Asylum System is anyway still under discussion.

In November 2017 the European Parliament adopted a report in which several amendments on the Commission proposal were put forward. All in all, the main feature of this proposed reform is the modified allocation procedure: the applicant is not bound to find reception in the Member State of arrival but is given the choice between four Member States with the lowest number of asylum seekers.

But a thorough reform of the system still seems too difficult to attain, considering the current political climate … not favourable to burden-sharing. At the time we are closing this comment, States are still negotiating a viable solution to what can be defined, despite their diverging positions, or better due to them, the first all-European issue in the Union history.

Anyway, a bit of a mess, to put it mildly … or better, a true imbroglio, even if a European one.