

Human rights and its attitude to immigrants

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Abstract

The essay deals with scientific approach the thesis of the unconstitutionality of the art. 16 of preliminary dispositions to Italian civil code in matters of “condition of reciprocity”, in the light of the renewed national and supranational normative scenario which gave effect to the principles of equality, non-discrimination and equal treatment, which permeate the entire modern regulatory system. In fact, in contemporary reflection, it has consolidated the tendency to the harmonization of social and juridical fabric, which entails the full integration of immigrants. On this point, it is decisive the argument that each man has his own dignity, by virtue of his membership in the human race.

Keywords: integration, condition of reciprocity, treatment of the immigrant.

1. Introduction – Migrations as a remote phenomenon in the history of humanity. States’ duty to respect ethnic and cultural differences between people

Migrations have strongly marked mankind’s life since ancient times. In some books of the Old Testament (Book of Ruth; Exodus), for example, is told about Abraham’s migration from the Land of Ur of the Chaldeans to the fertile land of the Crescent; as well as this, a migration from Bethlehem to Moab, as archaic episode posed at fundament of the lineage of Jesse; lastly, the migration of a population, stated as descending from Abraham, which moved to the borders of Egypt due to a severe famine. The phenomenon of migration, then, has ancient origins in the history of humanity (Pichierri, 2016, p. 288).

In democratic societies, based on participative principles, the common feeling of communities assigns to the State the duty of respecting ethnic and cultural differences between people who live within the national legal system,

in an attempt to exploit diversities in function of the *common good* (Pope Jean Paul II, 1994, p. 170).

This setting is rooted in the personal dignity, in the universal human rights and in the social duty of solidarity, which make ethically necessary the identity of the stranger and minorities protection (Pope Jean Paul II, 1994).

The transposition of this commitment into binding rules outlines the measure of the State's maturity and its ability to foster peaceful coexistence within its borders (Pope Jean Paul II, 1994, p. 171).

2. Foreigners' legal status: freedom rights and the condition of reciprocity

From an historical point of view, the Italian Civil Code of 1865, ideologically opposed with the Napoleonic Code of 1804, adopted the principle of foreigner's complete assimilation to the citizen, rejecting the proposal to make the condition of foreigners subjected to the constraint of the residence in Italy (Giardina, 1978, p. 25).

Nowadays, in regulating the complex phenomenon, the Italian Constitutional Charter provides that the legal status of foreigners «Is regulated by law in accordance with rules and international treaties» (art. 10, sub. 2, Italian Constitution) (Parente, 2012, p. 73; Mazzoni, 2009, p. 109; Stanzione, 2009, p. 488; La Torre, 2009, p. 339).

Due to the configuration of freedom rights (art. 13 ss. Italian Constitution) as limit to the «sovereign function of legislative power», referring to the citizen and the foreigner, the principles of the Italian Constitution doesn't constitute the expression of a «legality greater than that of ordinary law», but rise to fundamental principles, that cannot be subverted in their essential core «even with the constitutional revision process» (art. 138 Italian Constitution) (Tucci and Di Muro, 2003; Ferrajoli, 2001, p. 298; Gozzi, 1999, p. 197; Rodotà, 1997, p. 97; Baldassarre, 1989, p. 17)¹. Indeed, they belong «to the essence of supreme values from which the Italian Constitution and the entire legal system draw legitimacy» (Tucci and Di Muro, 2003).

In the current Italian law, however, the protection of the stranger is limited by the art. 16 of preliminary dispositions to the Italian Civil Code (Parente, 2012, p. 74; Parente, 2008, p. 1115; Perlingieri, 2005, p. 89), which admits the foreigner to the enjoyment of civil rights allocated to the citizen «on

condition of reciprocity and without prejudice to the provisions contained in special laws» (Stanzione, 2009, p. 488–489; Parente, 2008, p. 1115; Cianci, 2007; Santoro–Passarelli, 2002; Calò, 1994).

3. The process towards achieving equality between residing foreigners and citizens. Italian Consolidated Law on Immigration

Actually, the application area of the condition of reciprocity, circumscribed to the enjoyment of civil rights, referring to the stranger, appears to be resized by the republican order's values (Parente, 2012, p. 74; Campeis and De Paoli, 2001, p. 192; Campiglio, 2001, p. 45; Di Raimo, 1990, p. 652)² and seems to lose importance in the Italian Consolidate Law on Immigration (Legislative Decree 25 July 1998, n. 286 and subsequent amendments) (Parente, 2008, p. 1117; Costanzo, Mardegliia and Trucco, 2008; Nascimbene, 2004; Corsi, 2001; D'Auria, 2000, p. 764; Di Maio, Proto and Longarzia, 2000; Martellone, 2000; De Vincentis, 1999; Miele, 1999; Sonetti, 1998, p. 137; Memmo, 1998, p. 941; Nascimbene, 1998, p. 421; Nascimbene, 1998, p. 1), that, as a result of diachronic changes (Italian Republic Presidential Decree 31 August 1999, n. 394), extended the benefit of the exemption from the assessment of the condition of reciprocity, originally reserved for foreign citizens holders of residence card or recipients of residence permit for reasons of work, to foreigners with a residence permit for family, humanitarian and study reasons (Parente, 2012, p. 74)³.

The aim to reach the substantial equality between foreigners residing legally and citizens can easily be noticed by art. 3, sub. 5, Consolidate Law, which assigns to regions, provinces and municipalities the task of adopting, within the scope of their respective powers and budget allocations, measures designed to pursue the objective of removing obstacles which hinder the full realization of the rights of foreigners in the territory of the State, with particular regard to those inherent in the accommodation, the language and the integration. The multiple intervention measures, especially in the context of social–welfare (public and facilitated residential building, cultural activities, support for the right to study, interventions for public services and access to public administrations), must be taken by the public authorities closely to the recipients of the measures, in accordance with the criteria of subsidiarity and adequacy foreseen by the art. 118 of the Italian Constitution (Parente, 2012, p. 81, note 302).

Despite this effort, many rules contained in the Consolidated Law are strongly characterized by parameters that make it difficult to reach the effectiveness of the right to equality of treatment between the citizen and the stranger: for example, the rules on the prevention of racist and xenophobic behaviors in private relationships (art. 43 and 44 Italian Consolidated Law on Immigration), and the provisions of principle provided by art. 42 of the Consolidated Law, in the field of information and cultural actions and of the promotion of cultural mediation and foreigners associations (Parente, 2012, p. 80, note 300; Nascimbene, 2004, p. 142).

4. Regularity of resident status

In fact, holding of rights that are provided by the law to foreigners is subjected to regularity of his position. Residence permit, indeed, on the one hand legitimate the immigrant to stay in the State's territory in a not precarious condition, for specific purposes and predetermined periods; on the other hand, allows a constant police force control, in a preventive function, either at the moment of release, withdrawal or renewal, and subjecting the foreigner to some submissions which oblige him to exhibit the permission at any time while requiring public administration organ's services (art. 6, Italian Consolidated Law on Immigration) (Parente, 2012, p. 81–82, note 304).

Issuing a permit requires a procedure with a very short timescale (art. 5, sub. 9, Italian Consolidated Law on Immigration) and obliges the administration, pending the release, to provide transitional instruments that allow the immigrant to reside in the Italian territory. In this regard, the Italian Interior Ministry, on 20 February 2007, issued a directive concerning foreigner's rights, in response to requests received by the Department for civil liberties and immigration, related to the possibility for non-Community workers to work pending the issue of first residence permit, and to exercise related rights. To access at benefits, foreigners – who have already submitted applications for permit obtainment to the one-stop center for immigration within eight days before the entry into national territory and subscribed the residence contract – must be in possession of a copy of the request template, issued by the one-stop center, and of the receipt certifying the successful submission of the application (Parente, 2012).

If the permission is refused, the foreigner doesn't have the power to intervene for exercise rights usually provided in administrative procedure (Law n. 241 of 1990, emended by Law n. 15 of 2005), nor can be informed of the procedure start or intervene to expose its own reasons. Withdrawal or refusal measure, in fact, takes the form of a police measure and is communicated to the stranger, with a summary of its contents, in a language understandable to him (Parente, 2012).

5. Expulsion and personal freedom limitation measures

Although the immigrant may submit to the Quaestor written pleadings and documents, that the administration has the duty to assess (art. 10, sub. 1, let. *b*, Law n. 241 of 1990), it can hardly know all the acts and documents in the possession of the police headquarters, so that its memories are often inconsistent with the reasons which justify the non-renewal or refusal of permission; and since the law doesn't provide for a specific legal protection against the revocation, annulment or refusal of permission, detrimental effects of refusal in labor relations, family life and social relationships are sometimes irreparable.

In accordance with art. 10, 13, 14, 15 e 16, Italian Consolidated Law on Immigration, towards the stranger present on the territory of the State removal measures can be taken (refoulement, administrative expulsion, expulsion as security measure, expulsion as replacement or alternative of detention) and special measures restricting personal freedom, preparatory to the actual implementation of the first (detainment in temporary centers). In addition, pursuant to art. 6 sub. 5, Italian Consolidated Law on Immigration, the public security authority, «when there are well-founded reasons », has the faculty to ask foreigners precise information and the submission of documents proving the availability of an income from work or from other legitimate sources, sufficient to sustain their own and the members of their family residing in the territory of the State (Parente, 2012, p. 83, note 306; Nascimbene, 2004, p. 96–97; Caputo, 1998, p. 998).

From the point of view of the comparison with the position of the citizen, therefore, the *status* of foreigner suffers from an objective condition of inferiority, which justifies the attempts of repeal of the art. 16 of preliminary dispositions to the Italian Civil Code.

6. The express repeal of reciprocity condition lack and the silent repeal theory

In the absence of express repeal, the prospect of a tacit repeal seems precluded from an *a contrario* interpretation of art. 39, Italian Consolidated Law on Immigration, which envisages the provision of scholarships, grants and awards for foreign students, without obligation of reciprocity (Parente, 2012, p. 84, note 310).

Likewise, the tacit repeal may be denied in the light of the art. 37, Italian Consolidated Law on Immigration, which doesn't allow residing legally foreigners to access to professional activities, on equal terms with Italian citizens, restricting access to professional activities to quotas defined by an annual decree of fluxes determination for the input streams for job, which sets maximum employment percentages, in accordance with the criteria laid down in the implementation rule.

A further not-repealing induction can be set aside art. 35, Italian Consolidated Law on Immigration, which is without prejudice to provisions concerning sanitary assistance to foreigners on the basis of treaties and bilateral or multilateral agreements of reciprocity, signed by Italy (Pastore, 1998, p. 1090).

The same national legislation implementing the Directive 2000/43/CE, on equal treatment (Legislative Decree 9 July 2003, n.215), which also dispose «measures necessary to ensure that difference of race or ethnic origins should not be cause of discrimination» (art. 1), presupposes the lack of a tacit repeal, where specifies that is «without prejudice to provisions of Article 43, sub. 1 and 2, of consolidated law of dispositions concerning the discipline of immigration and rules on the condition of foreigners, approved by the legislative decree 25 July 1998, n.286» (art. 2, sub. 2) and that «the present legislative decree doesn't cover differences of treatment based on nationality and is without prejudice to national provisions and conditions relating to the entry, stay, access to employment, to the assistance and social security of citizens of third countries and stateless persons in the territory of the State, and to any treatment, adopted on the basis of the law, which arises from the legal status of such entities» (art. 3, sub. 2) (Parente, 2012, p. 85, note 310).

7. The reduction of reciprocity parameter's scale in supranational sources evolution. State' duty to ensure effective participation of migrants in the life of the Nation

On the systematic plan, the evolution of supranational law has helped considerably to reduce the flow rate of the reciprocity parameter (Parente, 2008, p. 1118). In fact, the international human rights conventions, welcoming the prospect of the recognition of person's fundamental freedoms, have defined the discretion sphere of the States (Tucci and Di Muro, 2003, p. 180–181).

Also the equivalence of treatment for all citizens of Member States of European Union⁴ and the impact of principles of non-discrimination and equal treatment reduced the scope for action on the condition of reciprocity (Parente, 2008, p. 1120).

Under these assumptions, appears well-founded suspicion of constitutional illegitimacy of the art. 16 of preliminary dispositions to the Italian Civil Code in relation to art. 2 and 3 of Italian Constitution (Parente, 2012, p.87).

In conclusion, the world of migrations requires individual commitment to hospitality and solidarity in order to promote the integration of foreigners, but demands also the State to guarantee the effectiveness of the participation of migrants in the life of the nation. This participation is not only a fundamental human right, but also the tangible sign of a society culturally mature and morally right (Pope Jean Paul II, 1994, p. 171).

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Endnotes

- ¹ On fundamental rights intangibility, cf. Cost. Court, 29 December 1988, n. 1146, in *Foro it.*, 1989, I, c. 609.
- ² Some authors (Barile, 1984, p. 32–34; Cassese, 1975, p. 512–515; La Pergola, 1961, p. 32–34) offers the thesis of tacit repeal of the art. 16, preliminary dispositions to the Italian Civil Code, operated by art. 10 of the Italian Constitution, expected that international standards, general and conventional, which must be complied by the law on the legal status of foreigners, doesn't contemplate the reciprocity clause, nor the preparatory work of the Italian Constitution leave infer the intention of Constituents to remove the condition of reciprocity. In particular, Cassese (1975, p. 514) argues that the condition of reciprocity was eliminated, but the art. 10 of Italian Constitution don't prevent the ordinary legislator to include it in the laws which authorize ratification of specific international treaties, where this is deemed reasonable; and also Giardina (1978, p. 38) notes that in the field of person's fundamental rights, the art. 2 of Italian Constitution exclude some distinction of treatment between citizens and foreigners, even if based on the criterion of reciprocity. A different orientation (Pace, 1990, p. 145) considers that the reciprocity clause is in accordance with the art. 10, sub. 2, Italian Constitution, which confines itself to shape the discipline of the treatment of the stranger to ordinary law, in compliance with the provisions of international law. In accordance, cf. Focarelli (1989, p. 825). The jurisprudence of the Italian Supreme Court (Cass., 10 February 1993, n. 1681, in Di Francia, 2006, p. 7). On the point, the Court of

Monza, 8 May 1998, in *Danno e resp.*, 1998, p. 927, stated: «the fundamental rights recognized by the Constitution to every human being without distinction are not subject to the condition of reciprocity referred to in art. 16 of general provision on law. This condition is, however, satisfied all the times in which the examination of the legislation of the Member State of affiliation of the stranger that invokes justice in Italy shows that this agreements to an Italian citizen, without discrimination, adequate safeguard and protection of the right which is actuated, by the recognition also in his favor of the operation of legal institutions of a substantial nature, similar to those existing in our sorting, without it being necessary to experience an absolute superimposition of the legal forms placed in concrete as a garrison of position so recognized».

- ³ On stages which have gradually led the legislator to widen the scope of the stranger's rights, cf. Nascimbene, 2004, p. XXXI–LIV.
- ⁴ The recognition of European citizenship added more rights to *status personae* and strengthened the rights of European citizens, thanks to «a citizenship Europeanization process», that suggest a hypothetical transition from national citizenship to a «post-national citizenship» (Zanfrini, 2007, p. 67; Alpa, 2006, p. 36–37). Before the Treaty of Lisbon on 13 December 2007, immigration, visas, asylum and policies related to the free movement of persons was regulated in the Treaty of Amsterdam of 2 October 1997, in force since 1 May 1999. The provisions contained in the Treaty realized a genuine area of freedom, security and justice in which Member States are obliged to comply with the principles and the aims proposed by the Community policy (cf. AA.VV., 1999, p. 257). To the creation of an area of persons free movement within the Community area was dedicated the Tampere European Council (15 and 16 October 1999), in which they were identified some priority objectives, among which the fair treatment of nationals of third countries legally resident in the territory of the Member States of the Community (cf. Presidency conclusions, accompanied by the presentation of Balboni, 1999, p. 205). In the sphere of the communitarian legislative production aimed at the uniformity of treatment, there are numerous regulations and directives that protect the rights of the stranger: Dir. 2 September 2003, n. 2003/86, in *G.U.U.E.*, L 251 of 3 October 2003, in the field of family reunification; Reg. 13 June 2002, n. 1030/2002, in *G.U.C.E.*, L 157 of 15 June 2002, which has established a uniform format for residence permit; Dir. 29 June 2000, n. 2000/43, in *G.U.C.E.*, L 180 of 19 July 2000, which implemented the principle of equal treatment between persons irrespective of racial or ethnic origin, as well as the free movement; Com. L. 1° February 2002, n. 39, in *G.U.* 18 August 2003, n. 186, Gen. Ser., transposing Dir. n. 2000/43. On European citizenship, cf. Santoro, 2007, p. 35; Daniele, 2000, p. 13; Mattera, 1998, p. 431; Adam, 1992, p. 622; Parente, 2007, p. 1118–1120.