Asylum seekers and their status as refugees or as beneficiaries of international protection: the Italian approach

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Abstract[1]

This proposal examines the Italian approach to granting asylum seekers refugee status or recognising them as beneficiaries of international protection. The cases analysed in this study lead us to conclude that there is no homogeneous approach in Italy as regards the implementation of international, European and domestic law on asylum, not only for sexual orientation and gender identity claims (SOGICA), but also from a broader point of view. The study also shows evidence of systemic deficiencies in the reception of asylum seekers, as well as in the economic and social integration of beneficiaries of international protection.

Through the analysis of the procedures established for asylum seekers to apply for international protection, the work focuses on the changes introduced by the recent Decree- Law No. 113 of 2018 ("Decreto sicurezza"), implemented by Law No. 132 of 2018 in the Italian asylum system. Two key findings are discussed in this study. Firstly, the law of 2018 abolished "humanitarian protection" - i.e. the automatic granting of residence permits for those not qualifying for refugee status or "subsidiary protection" but nonetheless deemed vulnerable enough to need protection. Secondly, there has been a negative impact on the reception system, with the effect of preventing refugees and migrants' integration.

Keywords: Italy; SOGICA; refugees; securitydecree; humanitarianprotection

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1. Introduction

Nowadays, migration flows have attained the highest level ever recorded by the UN High Commission for Refugees (UNHCR, 2019)[2]. However, emigration is an «asymmetric right»: the possibility of each individual to leave the country of origin does not correspond to a parallel duty of reception by the States of destination (Scovazzi, 2014)[3]. Although politically asylum is currently universally based on the right of asylum provided by Article XIV of the Universal Declaration of Human Rights of 1948, in practice asylum remains a «concession» of each State (Rescigno, 2015)[4].

Article 10 paragraph 3 of the Italian Constitution of December 27th, 1947 confirms this point:

«A foreigner who, in their home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law».

The right to asylum is the right of the foreigner to enter the territory of the Italian State in order to claim asylum. This is a form of asylum commonly accepted in international law but with a wider scope. It is not only a right of asylum guaranteed to refugees, but also includes the right of victims of persecution by governments in which there is no democracy to enter the territory of the Italian State. Nonetheless, the reference to the «conditions established by law» specifies that it must be exercised in accordance with the rules of the Italian legislative system (Benvenuti, 2011)[5].

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[2] UNHCR, *Global Trends Forced Displacement in 2019*, available at https://www.unhcr.org/5ee200e37.pdf (access 14.07.2020).

[3] SCOVAZZI T., *Human Rights and Immigration at Sea*, in RUBIO-MARIN R., *Human Rights and Immigration*, Oxford Press University, Oxford, 2014, pages 212-260.

[4] RESCIGNO F., *Il diritto di asilo*, Carocci Editore, Roma, 2015, page 80.

[5] BENVENUTI M., *La protezione internazionale degli stranieri in Italia. Uno studio integrato sull'applicazione dei decreti di recepimento delle direttive europee sull'accoglienza, sulle qualifiche e sulle procedure*, Jovene, Napoli, 2011.

Since it is a complicated task to establish what the exact motives are behind each migration flow (Kunz, 1973)[6], this paper examines the Italian approach in granting asylum seekers refugee status or recognising them as beneficiaries of international protection.

2. The Italian asylum legislation within the international framework

Article 1 of Law No. 39 of 1990 ("Legge Martelli") has ruled the 1951 Refugee Convention relating to the Status of Refugees ("The 1951 Refugee Convention") and "the 1967 Protocol Relating to the Status of Refugees". The Presidential Decree No. 136 of 1990, converted with amendments into Legge Martelli, established a "Central Commission£ for the recognition of refugee status in Rome, chaired by a Prefect and four other senior officials. The Central Commission replaced the previous Commission for eligibility, set up before the Italian ratification of the 1951 Refugee Convention. On the basis of the new criteria, the President of the Council of Ministers could establish more sections also for geographical areas of origin of the asylum seekers (paragraph 2), while the Presidential Council launch the guidelines and the general criteria for the activities of the sections (paragraph 4). In addition, the Law has ruled for the first time the possibility for the applicant to lodge an appeal against a negative decision taken by the Territorial Commission. Nevertheless, ever since then, the refugee issue has remained a marginal aspect on the Italian political agenda.

Then, the general guidelines of public immigration policies were established by Law No. 40 of 1998 ("Legge Turco-Napolitano"), consolidated in the legislative decree No. 286 of 1998 ("Testo Unico sull'Immigrazione") which intervenes with regard to both immigration, reception and integration of asylum seekers, and the rights of refugees in Italy. This extremely complex regulations deal with work permits, integration, territorial control, expulsions of foreigners and international cooperation. In particular, the legislator wished to implement a policy of legal, limited, planned and regulated entry. This law formally introduced a new form of protection for

[6] This framework views human mobility as the result of specific factors that either attract an individual to migration (pull factors) or that repel the individual from continued stay in the place of usual residence (push factors). See KUNZ E.F., *The Refugee in Flight: Kinetic Models and Forms of Displacement*, in *International Migration Review*, 1973, vol.7, No.2, pages 125-146.

"humanitarian reasons", including the residence permit for "social reasons" in order to protect victims of slavery and exploitation.

Further changes to the protection system, introduced by Law No. 189 of 2002 ("Legge Bossi-Fini"), simplified the procedures for the recognition of refugee status (20 days for the administrative procedure), which, in the event of a negative response, provided for a re-examination of the case (10 days) by the administrative authority, with the possibility of jurisdictional appeal even after repatriation through the Italian Embassy to the country of origin. The Legge Bossi-Fini and the Presidential Decree No. 303 of 2004 implemented a decision-making system according to which applications were examined by several "Territorial Commissions" (article 12), coordinated by the "National Commission" (based in Rome). The legislative decree No.25 of 2008 (article 4, paragraph 2) established the Territorial Offices of the government within the Prefectures for the recognition of international protection, replacing the Territorial Commissions for the recognition of the refugee status. The new decree adopted the single procedure of asylum seeking, providing for the evaluation by Territorial Commissions. This practice was also confirmed with the increase of the Territorial Commissions (increased to 20) and the Special Sections (30) in implementation of the decree-law No.119 of 2014, converted with modifications by the Law No.146 of 2014 (as amended by legislative decree No. 25 of 2008).

Moreover, the Legislative Decree No.251 of 2007, designed to implement Directive 2004/83/EC[7], modified by Article 7.2 of Law No.97 of 2013 by Legislative Decree No.18 of 2014 implementation of Directive 2011/95/EU[8] was the most important legislative reform on asylum relating to the application of European asylum regulations based on protection from persecution on SOGI. On the one hand, these laws clarified the asylum seekers' individual position and the personal circumstances which qualified them as being a refugee, including factors such as background, gender and common characteristic of sexual orientation. At the same time, these laws introduced the concept of the person eligible for "subsidiary protection". This means a third

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[7] Council Directive of 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
[8] Directive of the European Parliament and of the Council of 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

country national or a stateless person who does not qualify as a refugee, but in whose respect it can be shown that substantial grounds exist for believing that the person concerned, if returned to their country of origin (or in the case of a stateless person, to their country of former habitual residence), would face a real risk of suffering serious harm. Since many asylum applications based on claims of sexual orientation persecution fail because of lack of evidence, the alternative status of subsidiary protection will be extremely important for SOGI as well as LGBTIQ+ asylum claimants.

More recently, the decree-law No.13 of 2017 ("Minniti-Orlando"), converted with Law No.46 of 2017, and the subsequent legislative decree No. 220 of 2017 introduced provisions aimed to speed up procedures. In this case, asylum seekers could only submit one application for international protection at the designated Territorial Commission, which examines the requirements for the recognition of refugee status. As an alternative, the staff employed in the examining Commissions may verify whether the requirements exist for subsidiary protection and eventually, the requirements for the recognition of humanitarian protection (for cases prior to October 5th, 2018).

The examination of the application must be carried out on an individual basis, through the assessment of all the relevant facts concerning the country of origin at the time of the decision on the application, including the laws and regulations of the country of origin and related methods of application; the relevant declaration and documentation provided by asylum seekers who must also disclose whether they have already suffered the risk of persecution or serious harm; the individual situation and personal circumstances of the applicant (extraction, gender, age); of the possibility that the activities carried out by the applicant, after leaving the country of origin, aimed to create the necessary conditions for submitting an application for international protection; of the possibility that an applicant may have recourse to the protection of another country of which they could declare themselves a citizen. In duly justified circumstances, the Territorial Commission may further exceed 3 months where necessary in order to ensure an adequate and complete examination of the application for international protection. In light of the different possibilities of extension, the asylum procedure may last for a maximum period of 18 months[9]. The Minniti-Orlando decree and the subsequent conversion with the Law No.46 of 2017 has strengthened the

[9] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

judicial structures, by setting up 26 specialized Sections in the Italian courts (with territorial jurisdiction), and speeded up the time of procedures relating to requests for international protection in cases which are refused by the Territorial Commission.

2.1 The abrogation of the "humanitarian protection" in Italy

According to the European law, Member States should have the power to introduce or maintain more favourable provisions than the standards laid down in the Directives for third-country nationals or stateless persons who request international protection[10]. In other words, national legislation can include protection against persecution arising from State actors as well as from non-State actors where the country of origin is unable or unwilling to provide such protection.

In Italy, protection for "humanitarian reasons" was provided for even before the European Directive by article 5, paragraph 6 of the Testo Unico, that legitimates domestic protection for «serious humanitarian reasons or resulting from the Constitutional or international obligations of the Italian State». The residence permit for humanitarian reasons was an integral part of the pluralistic system of international protection, which can be ascribed, for instance, to situations of:

- particular vulnerability of the applicant, such as difficult personal stories;
- mothers with under-age children;
- former sex workers;
- the detection of precarious psychological or physical states or serious illnesses not adequately treated in the country of origin;
- in exceptional cases in which the subsidiary protection provided by the qualification decree could not be recognized;
- when the applicant could be exposed to danger in the event of repatriation;

[10] Council Directive 2004/83/EC of 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ruled that Member States should have the power to introduce or maintain more favourable provisions than the standards laid down in the Directive for third-country nationals or stateless persons who request international protection.

- the presence of serious natural disasters or conditions of extreme poverty in the country of origin…

The recent reform applied by the Decree-law No.113 of 2018 ("Decreto sicurezza"), coordinated with the conversion Law No.132 of 2018, has introduced profound and significant changes to the legislation previously in force by abolishing the humanitarian protection clause.

Article 5, paragraph 6 of the Testo Unico and article 13, paragraph 1 of the Regulation containing the implementing rules have been replaced by the cases of a residence permit only for:

- medical treatment;
- calamity;
- acts of particular civil value;
- special protection (such as survivors of domestic violence, human trafficking or exploitation of labour)[11].

On the one hand, the Legislator reduced the high number of residence permits issued for humanitarian reasons; on the other, it reduced the discretion in the granting of humanitarian protection by Territorial Commissions and Courts. The Decree has sparked considerable interest and many scholars have wondered whether this Decreto sicurezza still recognizes those cases of humanitarian needs. Some have argued that the reform gives greater certainty to the domestic law, achieving a balance between international and constitutional asylum obligations. The legislator repealed humanitarian protection as a general category and replaced it with a category aimed to limit the residual hypotheses previously regulated (Padula, 2018)[12].

Other scholars have pointed out that humanitarian protection has traditionally been one of the main forms by which asylum was implemented. The permit was granted to individuals with delicate

[11] Further information available at: https://www.interno.gov.it/sites/default/files/allegati/decreto_immigrazione_e_sicurezza_definitivo.pdf (access 14.07.2020).

[12] According to this author, the effect produced by the reform was not to abolish the humanitarian residence permit but to abolish the "generic" humanitarian permit, and leave the typical hypotheses in existence. PADULA C., *Quale sorte per il permesso di soggiorno umanitario dopo il d.l. 113/2018*, in *Questione giustizia*, 21.11.2018, available at https://www.questionegiustizia.it/articolo/quale-sorte-per-il-permesso-di-soggiorno-umanitario-dopo-il-dl-1132018-_21-11-2018.php (access 14.07.2020).

health problems or with a harrowing personal history, to pregnant women and minors, and to vulnerable people as a «measure for integration» (Favilli, 2018)[13].

As analyzed in this paper, despite the efforts to interpret and implement the status of the various forms of protection in order to preserve the rights of people in need of international protection, UNHCR sent a note to Italy stating that implementation of the new standards introduced to limit the scope of humanitarian protection assessment, may be difficult and create situations of uncertainty and potential inequality of treatment. UNHCR also recommended that persons who do not possess the requirements for recognition of refugee status or subsidiary protection should not be returned to their country of origin or to a transit country if they might be exposed to the risk of inhuman or degrading treatment or punishment, on the basis of the *non-refoulement* (with particular reference to article 33 of the 1951 Refugee Convention, 3 of the United Nations Convention against Torture and to article 3 of the European Convention for Human Rights)[14].

3. The Italian reception and integration system of asylum seekers and refugees

Every single asylum application lodged within EU territory has to be examined. A European country must be able to determine if and when it is responsible for handling an asylum claim. Indeed, the objective of the European law is to ensure quick access to asylum procedures, as well as to an adequate reception of asylum claimers in a single, clearly determined Member State[15].

The Italian Law provides for access to "Centri di prima accoglienza" (First reception centers) for claiming asylum in order to supply initial identification and define the asylum seeker's legal status, whereas the rescue and assistance centers (hotspots) are located in the main arrival areas.

[13] FAVILLI C., *La protezione umanitaria per motivi di integrazione sociale. Prime riflessioni a margine della sentenza della Corte di cassazione n. 4455/2018*, in *Questione Giustizia*, 14.03.2018, available at https://www.questionegiustizia.it/articolo/la-protezione-umanitaria-per-motivi-di-integrazion_14-03-2018.php (access 14.07.20 2 0).
[14] The text is available at https://www.unhcr.it/wp-content/uploads/2018/10/Nota-tecnica-su-Decreto-legge-FINAL_REV_DRAFT1_V2.pdf (access 14.07.2020).
[15] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

The use of “Centri di accoglienza straordinaria” (CAS, Extraordinary reception centers) is only in presence of arrivals in large numbers. In a second phase, asylum seekers, refugees and beneficiaries of international protection could access structures within the Centers of the “Sistema di protezione per richiedenti asilo e rifugiati” (SPRAR, Protection system for asylum seekers and refugees), regulated by Law No.189 of 2002.

The Decreto sicurezza also modified this reception system, meaning that there are presently numerous systemic shortcomings in the Italian reception system for asylum seekers and beneficiaries of international protection. The reception system is based on short-term emergency measures and is highly fragmented. Vulnerable asylum seekers and beneficiaries of international protection run the risk of seeing their rights as guaranteed under international and European law infringed (OSAR, 2020)[16].

In accordance with the Decreto sicurezza, SPRAR has been renamed “Sistema di protezione per titolari di protezione internazionale e per i minori stranieri non accompagnati” (SIPROIMI, “Protection System for Beneficiaries of International Protection and for Unaccompanied Foreign Minors).

The new legislation sets out that access to SIPROIMI’s integrated reception services cannot be provided to asylum seekers and holders of what was previously described as humanitarian protection.

According to the data collected, the daily cost for each migrant in the first reception period was around 30-35 euros. The 2018 decree reduced the daily funding available for the CAS to 21.35 euros. These cuts made it very difficult to keep running the CAS in small structures, such as apartments, shelters or hotels. There has also been a reduction in those integration services previously guaranteed to foreign arrivals, such as psychological and legal support, and activities aimed at fostering integration, such as learning Italian, or doing professional training, sports or similar things (Amnesty International, 2019)[17].

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[16] Swiss Refugee Council (OSAR), *Reception conditions in Italy Updated report on the situation of asylum seekers and beneficiaries of protection, in particular Dublin returnees, in Italy*, January 2020, available at https: //www.refworld.org/pdfid/5315872c4.pdf (access 14.07.2020).

[17] Amnesty International, *Italy: Refugees and Migrants'Rights under Attack, Submission for The Un Universal Periodic Review 34Th Session of the Upr Working Group*, November 2019, available at https://www. amnesty.org/download/Documents/EUR3002372019ENGLISH.pdf (access 14.07.2020).

4. Conclusions

As we have seen above, over the last three decades, the Italian legal system has progressively toughened its provisions as regards the protection of foreigners. Humanitarian protection needs to be separated from the two hypotheses of refugee status and subsidiary protection. Indeed, it was a residual, atypical nature and with non-standard assumptions, it has been provided for a generic and broad protection in case of «serious reasons, in particular of a humanitarian nature or resulting from constitutional or international obligations of the Italian State», when the conditions for recognising refugee status or subsidiary protection to the seekers do not exist. It was a residence permit for those not qualifying for international protection but nonetheless deemed vulnerable enough to need protection.

From a careful analysis of the progress of the registrations at the Courts of Appeal from the Territorial Commissions for the recognition of international protection of Trieste, Rome, Milan and Naples, two findings have emerged.

First, the Territorial Commissions do not always consider certain circumstances, although in some cases these were later clarified on appeal. In particular, it is evident that all SOGICA were then accepted and considered as refugees during the appeal (there are many stories of women and girls who fled because of female genital mutilation or other cases of LGBTIQ+ applicants). Furthermore, from the monitoring of the jurisprudence under examination, it emerges that the international origin of asylum is not always referred to or considered, with specific reference to the 1951 Refugee Convention and the 1967 Protocol or to the International Conventions on human rights but there is a lot of reading based on domestic law which sometimes leads to a more restrictive interpretation, one which fails to take into account, for example, the UNHCR interpretation guidelines neither the Yogyakarta Principles on the application of International Human Rights Law in relation to SOGICA. Unfortunately, in Italy there is still a lack of jurisprudence on asylum, which could instead represent a laboratory of reflection capable of enriching the legal culture in broader terms (Behr for UNHCR, 2018)[18].

[18] BEHR H., *Giurisdizione e protezione internazionale. Il diritto per i rifugiati: Costituzione, politica, giustizia*, in *Quaderni del Consiglio Superiore della magistratura*, July 2018, pages 102-106, available at https://www.csm.it/documents/21768/81517/giurisdizione+e+protezione+internazionale+2018/adcc2b59-1c6f-daf4-b82e-a429bf8ef548 (access 14. 07.2020).

At a more general level, the second finding that emerged was an evident difference between one court and another in the approach to granting asylum seekers refugee status or recognising immigrants as beneficiaries of international protection: cases of acceptances differed widely and some courts were much more restrictive (even refusing to recognise minimal protection). The criteria adopted for cases of acceptances seem to be very widely between courts.

In conclusion, these reductions in the funding made available for the reception and integration of applicants have made it impossible to pay for reception also in the first reception structures and have resulted in the reduction of services previously guaranteed to the refugees, especially those activities designed to foster integration, such as learning Italian, assistance in preparing for the hearing in the Territorial Commission for the request for asylum, professional training or sports or other activities, also due to the evident lack of funds especially for staff.

The data consulted on the material reception conditions of migrants, whether they are asylum seekers or beneficiaries of protection, point to the difficult situation present in the Italian system (InMigrazione, 2019)[19]. The systemic shortcomings described have already been highlighted by several national courts and those of EU Member States, which suspended some Dublin transfers to Italy for violations of fundamental human rights (for the lack of accommodation and the risk of living in conditions below the minimum subsistence level). The difficulties faced by applicants in obtaining reception conditions which could guarantee their basic rights, both during the relative asylum application procedure and during the integration phase in the territory have raised many concerns which have been voiced by numerous volunteer organisations engaged in the field. It is the most vulnerable migrants who are most affected by the reform; moreover, although the financial cuts do not concern all the reception phases, they do prevent any intervention in support of economic and social inclusion (OSAR, 2020).

In the course of this study it has emerged clearly that migrants in Italy often feel a sense of despair because of the difficult prospect of future integration since they have already been away from their home country for years. In many cases, they feel like “prisoners” stuck in Italy and say they would prefer to take part in the Assisted Voluntary Return and Reintegration programmes put in place by

[19] InMigrazione, *La nuova (mala)accoglienza, Radiografia del nuovo schema per gli appalti dei Centri di Accoglienza Straordinaria per i richiedenti asilo*, 2019 available at https://www.inmigrazione.it/it/dossier/la-nuova-malaaccoglienza (access 14.07.2020).

the International Organisation of Migration, rather than live as outsiders in Italy, where this poorly functioning system for immigration and asylum is increasingly being used to try to make the emergency situation appear worse, and has the effect of criminalizing migrants instead of encouraging an inclusive approach to immigration and integration.

Notwithstanding these conclusions, the Italian Court of Cassation (United Chambers), in its judgment No. 29460/2019, ruled that Law 132 of 2018 should not be applied to requests for asylum submitted before the Decree Law entered into force (namely, on 5th October 2018). Asylum seekers who had been granted humanitarian protection before that date should therefore be entitled to stay in migrant reception centres, i.e. the previously named SPRAR and now SIPROIMI. Moreover, a recent judgment by the Italian Constitutional Court of July 9th, 2020 rejected that part of the Decreto sicurezza which makes it impossible for asylum seekers to register as residence with local autorithies, providing further evidence of the violation of article 3 of the Italian Constitution[20] because of increasing obstacles to asylum seekers' in their effective participation in the economic and social rights.

[20] «All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country».

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