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POLICY BRIEF

Evaluating the 'Salvini Decree': Doubts of constitutional legitimacy

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Decree-law no. 113 of 4 October, converted, with amendments, into Law no. 132 of 1 December 2018 (the so-called 'Salvini Decree' or 'Security Decree') weighs very heavily upon legal provisions and protections for migrants in Italy, particularly for migrants seeking asylum. The principal changes are both substantive (the abolition of humanitarian protection) and procedural (the introduction of accelerated procedures and new grounds for detention of individuals seeking asylum), as well as the modalities of reception.

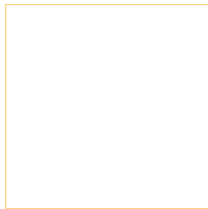
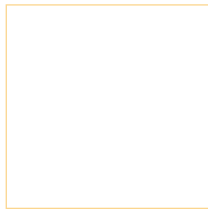
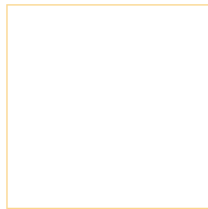
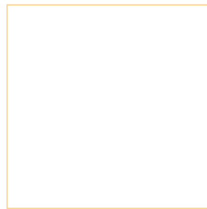
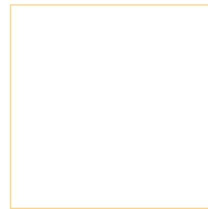
There is a wide debate concerning the dubious constitutionality of this legislative measure, not only in relation to its contents, but also to the methods with which it was approved.[1]

The Lack of the Requisites of Necessity and Urgency

The abuse of decrees having the force of ordinary law is certainly not new in the Italian system, although this is no reason for not questioning the Italian Government's recourse to a legal instrument that the Constitution reserves for 'extraordinary cases of necessity and of urgency.'

Examining the Decree's contents, it emerges first of all that Title I, which is the fundamental part of the measure, mainly concerns the treatment of foreigners who arrive on Italian territory requesting 'protection'; consequently, the introduction of a Decree could lead one to imagine an emergency situation with a need for recourse to a suitable legal instrument. Yet, as data published on Ministry of the Interior's own website reveals, in 2017 there was a significant drop in the number of migrants disembarked in Italy in comparison with the previous two years, a trend that continued into 2018 when there was a

1. Cf. A. Algostino, *Il decreto "sicurezza e immigrazione"*. In *Costituzionalismo.it*, 2, 2018, 168 ff.; S. Curreri, *Prime considerazioni sui profili d'incostituzionalità del decreto legge n. 113/2018 (c.d. "decreto sicurezza")*. In *Federalismi*, 22, 2018; M. Ruotolo, *Sui vizi formali del decreto-legge e della legge di conversione*. In *Osservatorio sulle fonti*, 3, 2018; F. Curi (ed.), *Il decreto Salvini. Immigrazione e sicurezza*, Pacini Giuridica, 2019.

reduction of more than 80% compared with 2017 and of over 90% compared with 2016.[2]

The question, then, is: What are the extraordinary cases of necessity and urgency which the Italian Government sought to deal with?

In the report accompanying the conversion bill, reference is made to the necessity and urgency of intervening to oppose the anomalous difference between the granting of forms of international protection and the number of permits to stay in Italy that are issued on humanitarian grounds. This is attributed to a legislative definition of humanitarian protection that is seen as being marked by "uncertain contours, which leave ample margins for an extensive interpretation at odds with the purpose of temporary protection."[3] This apparently unusual generosity of the Italian system, which supposedly reaches a height with the granting of humanitarian protection, is, in reality, contradicted by the data published in the dossier on the "*Decreto-legge immigrazione e sicurezza pubblica*" drawn up by the Senate Research Service. Even though it may be true that Italy had a high percentage of cases in which permits were granted on the grounds of humanitarian protection compared to international protection, data reveals that the percentage of recognitions of refugee status and the right to subsidiary protection, which offer much more solid guarantees and safeguards to the applicant, is on average much lower than in other European countries. [4]

The question remains: What extraordinary situation of necessity and urgency did the Italian Government see itself confronting?

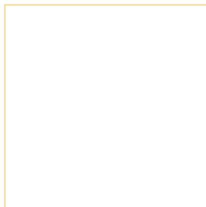
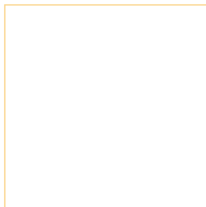
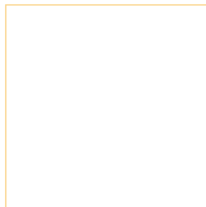
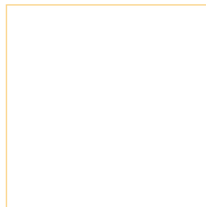
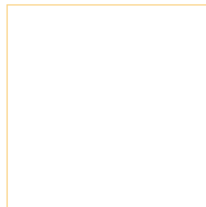
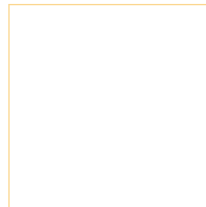
What necessity and urgency (beyond judgements of merit, discussed below) can, for example, be found in the normative provisions that exclude applicants from protection by SPRAR (the central service for protection for asylum applicants and refugees) when, as became clear during the hearing before the I Committee of the Senate, the Director of SPRAR herself stated that the system is not experiencing an emergency, as evidenced by a steady decrease in the number of arrivals?[5]

In the government's report accompanying the conversion bill it is underlined that "the normative intervention provides necessary and urgent measures for ensuring the effectiveness of repatriation of those not entitled to stay in the national territory, with new provisions in the matter of detention".[6] Indeed it is difficult, for example, to understand the urgency of the provision that reinstated the 180-day time limit for administrative detention, when it was reduced to 90 days already in 2012, *inter alia* on the grounds that if it has proved impossible to identify a foreigner in the first three months, an additional period of detention is unlikely to be useful.

Still, in the government's report accompanying the Decree it is stated that, given the high number of claims, the Decree contains necessary and urgent provisions for ensuring the careful processing of applications for the recognition and granting of Italian citizenship, and the extension of the deadline for termination of the pertinent administrative process from two to four years. In the face of the sluggishness of the bureaucracy, for the Italian Government it becomes necessary and urgent to burden the applicants themselves with the inefficiencies of the administration through a provision that violates the principles of proper administrative action and of reasonable length of process.[7] Moreover, the Decree introduces the institution of revocation of citizenship following conviction for certain offences.[8] What aspects of necessity and urgency (beyond judgements of merit) can be found in these rules?

Therefore, even before going into the merits of the provisions contained in the Decree, it is evident how serious doubts about constitutional legitimacy emerge, owing to a change of the constitutional division of competencies between Parliament and Government.

2. See "*Cruscotto statistico*" at: http://www libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/cruscotto_statistico_giornaliero_31-12-2018_0.pdf.
3. The report accompanying the conversion bill is downloadable at: http://www.senato.it/service/PDF/PDFServer/BGT/01076594.pdf
4. Downloadable at: http://www.senato.it/service/PDF/PDFServer/BGT/01076617.pdf
5. Cf. the hearing before the I Committee of the Senate of the Director of the SPRAR.
6. http://www.senato.it/service/PDF/PDFServer/BGT/01076594.pdf.
7. Cf. *European Court of Human Rights*, *Salesi v. Italy,* 26 February 1993.
8. Most of these offences concern crimes for the purpose of terrorism.

The Vote of Confidence

The question of converting the Decree into law was put to a vote of confidence in both the Senate and the Chamber of Deputies on 7 and 28 November. This cutting-off of parliamentary debate on a legal measure that bears on the rights of individuals is not reassuring with regard to the manner of proceeding on the part of the executive. This is particularly pertinent when it is noted that the maxi-amendment put to a vote of confidence in the Senate introduced numerous changes, to the point of nearly doubling the number of articles. We are, therefore, faced with a law that contains many provisions enacted on the basis of a questionable appeal to necessity and urgency and converted into law (moreover with changes often pejorative from the standpoint of guarantees of fundamental rights) through the "blocked vote" of a vote of confidence.

The Reading of the Migratory Phenomenon in a Security Key

Moving on to examine the Decree's contents, the mere reading of the first part of the title[9] "Urgent Provisions in the Matter of International Protection and Immigration, Public Safety…" cannot but make us reflect on the juxtaposition of the theme of the legal status of the foreigner with questions relating to public safety. A reading of the migratory phenomenon in terms of security is deeply rooted in the Italian system, but in addition to providing a distorted key for both interpretation of the phenomenon and singling out possible solutions for governing it, this misleading narration conveys to public opinion the idea that immigration first and foremost constitutes a hazard for public safety and for orderly civil living. This frequent juxtaposition in legislative policies, in administrative action and in political communication is jointly responsible for the false perception of the migratory phenomenon on the part of Italians that some studies point out[10]. These analyses reveal how in Italy the number of resident immigrants and irregulars present in the territory is overestimated; but all this contributes to create a circle between strategies of political communication and the perception of public opinion that leads to the legitimation of security policies for the treatment of foreigners, with the effect of governing a phenomenon not for what it is, but for how it can serve instrumentally for other and further ends of a political nature. The risk is the dramatic consequence of infringing fundamental rights of individuals, may arise.

9. "*Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata*".

10. Cf. the data published by *Eurobarometer on integration of immigrants in the European Union.*

The Main Doubts of Constitutional Legitimacy

If we then move on from the Decree's title to a reading of the text of the articles, there are many provisions that raise potential conflicts with the Italian Constitution and with supranational standards.

It must be stated at the outset that Article 10 of the Italian Constitution, which provides for the right of asylum in the territory of the Italian Republic in favour of the foreigner who is prevented in his/her country from effectively exercising the democratic freedoms guaranteed by the Italian Constitution, has been implemented very belatedly in legislation since, for many years, Italy had limited itself to applying the Geneva Convention concerning the *status* of refugee that regards circumstances far more circumscribed with respect to the normative reach of Article 10, to the point that jurisprudence had come to affirm the direct applicability of the constitutional provision by means of a verification proceeding before the judge. Then, with the transposition of the EU directives that have juxtaposed **refugee status** and **subsidiary protection**, and with a provision in the Consolidation Act on immigration mandating **humanitarian protection** (in case of *serious reasons, in particular humanitarian concerns or reasons deriving from constitutional or international obligations of the Italian State*), the courts, as reflected in case law, maintained that Article 10 had been fully implemented through these three forms of protection and that humanitarian protection constituted "one of the forms of implementation of constitutional asylum, precisely by virtue of its open nature and the fact that the conditions for its recognition are not wholly precisely definable, consistently with the broad scope of the right of asylum contained in the constitutional provision".[11]

11. See Court of Cassation sentence no. 4455/2018.

As now an important part of the framework for the implementation of Article 10 has been dismantled, the full protection of the right of asylum could be in danger. It should also be borne in mind that most of the permits allowed for the specific cases enumerated in Decree no. 113 do not serve to implement the right of asylum as per Article 10 of the Constitution. The permits that may be issued to victims of violence or severe exploitation, victims of domestic violence or labour exploitation (already provided for under the Consolidation Act), as well as the new permits for outstanding acts of civic valour and health reasons, do not specifically regard situations tied to the right of asylum. Only the permit for victims of disasters and the special-protection permit implementing the non-refoulement principle can be considered also to regard asylum.

Furthermore, the Consolidation Act provided for a residence permit to be granted on humanitarian grounds in fulfilment of constitutional or international obligations. As underscored in the letter sent by the President of the Republic to the Prime Minister at the time the Decree was enacted, "[t]he constitutional and international obligations of the State continue to apply, even if not expressly mentioned in the legislative text, including, in particular, what is directly provided for in Article 10 of the Constitution and the obligations ensuing from the international commitments undertaken by Italy." It is clear that an ordinary law cannot do away with such obligations or the duty to respect inviolable human rights. It should be concluded, therefore, that either the new provisions revoking humanitarian protection are unconstitutional, or forms of protection (that go well beyond the special cases provided for) still remain in any case in view of constitutional obligations (including that of providing asylum) and international obligations.

In any case, what clearly emerges is the will on the part of the legislator to scale down sharply the recognition of the right of asylum: it suffices to consider the new provisions that introduce speeded-up procedures for the examination of applications for protection.

Further looking through the provisions of the Decree, what stands out is the useless and therefore illegitimate extension of the time limit placed on administrative detention and, above all, the new regime regarding the treatment of the applicant for asylum for purposes of identification, which may entail detention up to 210 days. It raises no few concerns with respect to observance of the guarantees sanctioned by Article 13 of the Constitution regarding the protection of personal freedom, and poses problems concerning the observance of Directive 2013/33/EU[12] providing that Member States shall not detain a person for the mere fact of being an applicant.

The decision to reserve access to the System of Protection managed by local authorities[13] just for those who are already entitled to international protection or holders of the new permits introduced as a replacement for humanitarian protection and protection of unaccompanied minors also may have serious consequences. In addition to an imminent violation of Directive 2013/33/EU, and in particular of Article 17 which lays down "General rules on material reception conditions and health care"[14], this provision comes to be at loggerheads with a process that, while difficult, is certainly meritorious, which had been undertaken in recent years with the involvement of local authorities. Such decision may produce perverse effects on the integration process toward which migrants must be directed because being eligible for reception in the System of Protection only after recognition of protection means remaining in government first-reception centres or in special reception centres for a period of time that may be long, and in one way or another creating the premises for situations of marginality and alienation.

Finally, what to say about the introduction of the revocation of Italian nationality, for those who are not citizens by birth, following conviction for certain offences? This is certainly one of the most blatantly unconstitutional normative provisions: the violation of the principle of equality, the creation of a different *status civitatis* for those who have acquired Italian citizenship as opposed to those who are citizens by birth, and the risks of statelessness are obvious.

12. Directive laying down standards for the reception of applicants for international protection (recast).
13. Subsequent to Decree no. 113 the *Sistema di protezione per richiedenti asilo, rifugiati e minori* changed to *Sistema di protezione per titolari di protezione internazionale e per minori stranieri non accompagnati.*
14. Article 17, Directive 2013/33/UE: 1. Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection. 2. Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.

So what was the real urgency for the Government to adopt such a Decree? Not attention to the reasons of social cohesion and therefore also public safety, because these provisions will create greater precariousness and therefore more irregularity, marginality and, finally, insecurity. Unfortunately, by now for many years, we must cope with an instrumentalization of the phenomenon of immigration for the purpose of creating political consensus.

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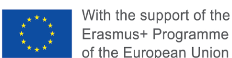

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