THE RIGHT OF ASYLUM AFTER THE "SECURITY DECREE": THE ABOLITION OF HUMANITARIAN PROTECTION

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Abstract:

This essay intends to focus on the effects produced on the right of asylum by the reform approved with Decree-Law no. 113 of 4 October, converted, with amendments, into Law no. 132 of 1 December 2018: in particular, the essay concentrates on the consequences resulting from the abolition of humanitarian protection. After an initial reconstruction of the difficulties tied to the implementation of Article 10, paragraph 3 of the Italian Constitution, and an overview, also in the light of European Union legislation, of the residence permit for humanitarian protection provided for in the law of 1998, broad emphasis is laid on the evolution of case law in this area. Over the years, in fact, a fundamental role has undoubtedly been played by ordinary courts, which have lent concrete substance to this form of protection. Finally, the essay addresses all the critical issues raised by the abolition of humanitarian protection and the possible unconstitutionality of the reform, also taking into account that the "special temporary residence permits on humanitarian grounds" do not by any means fill the gap caused by the so-called Security Decree.

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1. A history of non-implementation

Article 10, paragraph three of the Italian Constitution provides broad protection for the right of asylum, guaranteeing any alien who is denied, in his or her own country, the effective exercise of the democratic liberties guaranteed by the Italian Constitution, the right of asylum in the territory of the Republic, in accordance with the conditions established by law. The constituent assembly, also in the light of Italian history, which had seen many exiles during the Fascist period, adopted a broad definition of a right that "figured as a symbol of the Rights of Man in the sphere of international relationships"[1].

However, the implementation of this protection came late and has never been fully satisfactory. Although Italy ratified the Geneva Convention in 1954[2], it was not until several years later that the geographical and time limitations were set aside. In any case, the transposition of the Convention relating to the Status of Refugees was far from representing an actual implementation of the constitutional provision. To begin with, the Geneva Convention established precise geographical and time limitations, as it referred to events occurring in Europe before 1 January 1951; these limitations were removed with the amendment protocol of 1967 ratified in 1970[3] and Law no. 39 of 1990, respectively (see further below). Furthermore, the definition of refugee is far more restrictive in scope than Article 10 of the Constitution, since "the term 'refugee' shall apply to any person who: owing to a well-founded fear of being persecuted for reasons of race, religion,

[1] H. Arendt, *The Origins of Totalitarianism* (1962), 280. For a reconstruction of the debate in the Constituent Assembly, see M. Benvenuti, *Il diritto di asilo nell'ordinamento costituzionale* (2007). It should be noted that provisions dedicated to the right of asylum were also introduced into other contemporary constitutions, such as the French Constitution of 1946 and the German Constitution of 1949. In the same years, Article 14 of the Universal Declaration of Human Rights proclaimed that "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Although the European Convention for the Protection of Human Rights and Fundamental Freedoms does not lay down any specific provisions on the right of asylum, Arts. 2 and 3, relating respectively to the 'Right to life' and 'Prohibition of torture or to inhuman or degrading treatment or punishment', have played a fundamental role also in respect of the right of asylum. See also F. Rescigno, *Il diritto di asilo* (2011).

[2] Law No. 722 of 24 July 1954.

[3] Law No. 95 of 14 February 1970.

nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".

It should also be considered that for many years there was actually no legislative framework defining procedures for recognising refugee status, which was ascertained through a proceeding that took place before a commission set up on the basis of an agreement between the Italian government and the UNHCR. It was only with the so-called Martelli law of 1990[4] that some first legislative provisions[5] were laid down; these were amended in 2002 by what was dubbed the Bossi-Fini law[6]. And as emerges clearly also from the report illustrating the draft law submitted to the Parliament, through the reform of 2002 the legislator had mainly intended to establish rules for some procedural aspects pending comprehensive legislation regarding the right of asylum[7]. Indeed, neither the Martelli law nor the Bossi-Fini law outlined the situations that could give rise to the right to asylum in our country, in accordance with the constitutional provision, as they made reference to the notion of refugee as defined in the Geneva Convention.

The continued failure to implement Article 10, paragraph 3 of the Constitution was thus evident.

Within this legislative context, starting from the end of the 1990s, the ordinary courts accepted some requests for asylum submitted directly to the judicial authorities: given the lack of an

[4] Decree-law No. 416 of 30 December 1989, converted, with amendments, into Law No. 39 of 28 February 1990. Among other things, the Martelli law generated a certain amount of confusion, because the title referred to "political asylum", whereas the contents regarded exclusively refugees.

[5] The scant legislation was supplemented by some regulatory provisions contained in Presidential Decree No. 136 of 15 May 1990.

[6] Law No. 189 of 30 July 2002.

[7] See the report outlining the draft law, Senate bill No. 795, 14th Legislature. Provisions supplementing the 2002 law were introduced in Presidential Decree No. 303 of 16 September 2004, which perpetuated the confusion between refuge and asylum, defining "asylum applicant" as a foreign national who was asking for refugee status.

implementing law specifying the conditions for exercising and enjoying the right of asylum, it was judged that requests for asylum could be submitted to the courts themselves. In these court rulings, it was stressed that the constitutional provision defined the specific circumstances giving aliens the right of asylum with sufficient clarity and precision, as it identifies the deprival of democratic liberties as grounds justifying the right and recognises the right of aliens to enter and stay in the territory of the Italian Republic[8].

It should be noted, however, that in the following years (starting from 2005), the case law of the Supreme Court of Cassation took some steps backwards from this more courageous stance; it came to affirm, based on reasoning that was not altogether clear, that in the absence of a law implementing Article 10(3) of the Constitution, an alien's right to be received in Italian territory could be recognised only if his or her situation fell within the scope of the refugee protection regime. Moreover, the right to asylum was to be understood as a right to obtain access to the procedure for applying for the recognition of refugee status[9].

Therefore, while a situation of stasis persisted on the national level in those years, the most important new developments were taking place at the Community level. With the Maastricht Treaty, asylum policy had made its entry into European law, albeit merely as an "area of common interest" within the so-called third pillar. Moreover, though it had been necessary to resort to the conclusion of international agreements (Schengen Convention of 1985 and Dublin Convention of 1900) in order to establish provisions governing some particularly delicate aspects, under the Amsterdam Treaty the rules on asylum together with those on immigration and the other policies related to the free movement of persons became part of the first pillar. And as emerges from the first documents published by the European Commission and the conclusions of the European Council adopted in Tampere in 1999, the expectations with regard

[8] See Court of Cassation, joined sections, no. 4674/1997; Cassation, joined sections, no. 907/1999; Cassation, section I, No. 8423/2004. It is worth mentioning the 1999 judgment of the Court of Rome in the Ocalan case (Ocalan was the head of the Kurdish party PKK).

[9] Court of Cassation Judgments no. 25028/2005; no. 26278/2005; no. 18353/2006; no. 18549/2006, no. 18940/2006; no. 18941/2006.

to the role of the Union and its ability to respond to humanitarian needs with solidarity were very high[10].

By virtue of the "communitarisation" of these policy areas, the first directives relating to asylum were approved. In particular, Directive 2004/83/EC "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" specified the characteristic forms of persecution that entitled a person to refugee status under the Geneva Convention, on the one hand, and on the other hand introduced the regime of subsidiary protection for those who would face a real risk of suffering serious harm if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence. And as the directive itself specifies, serious harm consists of: (a) death penalty or execution; or (b) torture[11] or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

As highlighted in recital 5 of Directive 2004/83/EC[12], this further form of protection was introduced to implement the resolutions adopted at Tampere and was designed to be complementary and additional to the refugee protection enshrined in the Geneva Convention[13]. And as also confirmed recently by the

[10] C. Favilli, *L'Unione che protegge e l'Unione che respinge. Progressi, contraddizioni e paradossi del sistema europeo di asilo*, 2 Questione giustizia (2008), 29; the author highlights that in Council meetings taking place after Tampere and above all after the terrorist attacks of 11 September 2011 and 11 March 2004, the European agenda changed significantly, as a priority was placed on the fight against terrorism and international crime. See also B. Nascimbene, *Asilo e statuto di rifugiato*, in *Lo statuto costituzionale del non cittadino. Associazione italiana dei costituzionalisti. Atti del XXIV Convegno annuale*, (2010); C. Urbano de Sousa, P. de Brycker (eds.), *L'Émergence d'une politique européenne d'asile* (2004); M. Savino, *Le prospettive dell'asilo in Europa*, 5 Giornale di diritto amministrativo, (2018), 553 ff..

[11] Cf. for a definition of torture the art. 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[12] "The Tampere conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection".

[13] See Recital 24 of the Directive.

Court of Justice "it is clear from recitals 5, 6 and 24 to Directive 2004/83 that the minimum requirements for granting subsidiary protection must help to complement and add to the protection of refugees enshrined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, through the identification of persons genuinely in need of international protection and through such persons being offered an appropriate status"[14].

Directive 2004/83/EC was transposed by the legislator with Legislative Decree 251/2007 and 'subsidiary protection status' was thus introduced into the Italian legal system alongside 'refugee status'. Subsequently, in 2008, with Legislative Decree no. 25[15], it was established that in cases in which the application for 'international protection' was rejected, but there were serious concerns of a humanitarian nature, the competent commission would pass on the relevant documentation to the police commissioner, who could grant a residence permit on humanitarian grounds.

This 'humanitarian' residence permit was regulated by Article 5, paragraph 6 of the Consolidation Act on Immigration no. 286/1998[16], which lays downs general provisions concerning the legal status of aliens, without, however, addressing the subject of asylum. Article 5, paragraph 6 of the Consolidation Act gave the police commissioner the option of issuing a residence permit if there were serious grounds, in particular humanitarian concerns or reasons deriving from constitutional or international obligations of the Italian State.

A connection between this provision of the Consolidation Act and the subject of asylum was made by Legislative Decree no. 25/2008[17]. So it was that the Italian legislative framework governing asylum came to include a humanitarian protection

[14] Court of Justice, Fourth Chamber, 30 January 2014, case C-285/12 *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides.*

[15] Legislative Decree No. 25/2008 which transposed Directive 2005/85/EC "on minimum standards on procedures in Member States for granting and withdrawing refugee status".

[16] The prohibition of denial or revocation of a residence permit, if there were serious grounds, humanitarian concerns or reasons deriving from constitutional or international obligations of the Italian State, had been introduced by Law no. 388/1993 which authorised the ratification of the Schengen agreement.

[17] See previously Law 30 July 2002, no. 189.

regime alongside the 'international protection' regime (embracing refugee protection and subsidiary protection). Therefore, although Article 10, paragraph 3 of the Constitution had never been implemented through a specific law, the courts, as reflected in case law (and despite criticism from some legal theorists[18]), maintained that Article 10 had been fully implemented and was governed through the pluralistic system of protection (refugee protection, subsidiary protection and humanitarian protection)[19] and that there was no longer any margin of residual direct application of Article 10, paragraph three. Accordingly, the three protection measures were judged to represent a full implementation of the constitutional right of asylum[20], hence the impossibility of asylum requests other than in the cases provided for in State legislation[21].

This view was shared and backed up by some legal commentators[22], but criticised by others, who doubted that the different levels of the asylum regime – international, European and national – had been successfully harmonised and completed one another, thus contributing to the codification of the asylum system and a full implementation of Article 10, paragraph 3 of the

[18] M. Benvenuti, *La forma dell'acqua. Il diritto di asilo costituzionale tra attuazione, applicazione e attualità*, 2 Questione Giustizia (2018).

[19] A fourth form of protection (temporary protection) must be added: it is provided by Directive 2001/55/EC *on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof* which was transposed by Legislative Decree no. 85/2003. It is an exceptional form of protection which has never been gone into effect.

[20] C. Favilli, *La politica dell'Unione in materia d'immigrazione tra carenze strutturali e antagonismo tra gli Stati membri*, Quaderni costituzionali, 2 (2018). The constitutional right of asylum came to represent a general category embracing all forms of protection, each of which represents only a part of the broader protection guaranteed by Article 10, paragraph 3.

[21] See Court of Cassation 26 June 2012, no. 10686.

[22] P. Bonetti, *Il diritto d'asilo in Italia dopo l'attuazione della direttiva comunitaria sulle qualifiche e sugli status di rifugiato e di protezione sussidiaria*, 1 Diritto, Immigrazione e Cittadinanza (2008) 13 ff.: "60 years after the entry into force of the Constitution, thanks to the implementation of those two Community directives, Italian legislation has undergone such substantial changes as to suggest that a form of complete implementation of the right of asylum guaranteed by Article 10, para. 3 Const. has finally been reached."

Constitution[23]. It was stressed that legislation formulated in supranational contexts and pursuing different aims did not reflect the principles which had inspired the constitutional provision, nor the scope thereof.

Though some legal scholars thus complained of the Parliament's failure to approve a specific implementing law, the idea that the legislative framework deriving from the transposition of European directives and the provision made for humanitarian protection would enable an effective implementation of the constitutional provision increasingly took hold.

2. Humanitarian protection

The humanitarian protection regime thus played a fundamental role in corroborating the view that Article 10 of the Constitution was duly implemented. Given its broad scope, it was interpreted as a last resort instrument enabling protection in situations where there were serious grounds for concern from a humanitarian perspective, though they were not covered by the refugee or subsidiary protection regimes.

The Court of Cassation emphasized 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, which expressly refers to denial of the exercise of democratic liberties" (Court of Cassation Judgment no. 4455/2018). It further underscored that humanitarian protection, though not precisely defined by European legislation and left up to the discretion of the States, is nonetheless referred to in Directive 115/2008/EC "on common standards and procedures in Member States for returning illegally staying third-country nationals", which provides that "Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a

[23] M. Benvenuti, *Andata e ritorno per il diritto di asilo costituzionale*, 2 Diritto, Immigrazione e Cittadinanza (2010), 39.

right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory"[24].

As mentioned earlier, the residence permit for humanitarian protection was regulated by the Consolidation Act of 1998 according to a formulation, necessarily broad in scope, designed to safeguard the legal status of aliens. It was accompanied by other types of permits, which have been preserved and are likewise aimed at protecting persons in a condition of particular vulnerability but regarded specific situations. These permits may be issued to victims of violence or severe exploitation, victims of domestic violence or labour exploitation[25]. Unlike the latter cases, the specific conditions of which have been precisely defined by the legislator, Article 5, paragraph 6 of the Consolidation Act had the nature of an open standard that outlined only a framework within which concrete cases should be interpreted: cases that could not be objectively predetermined, given the impossibility of foreseeing all the circumstances in which serious humanitarian concerns might arise[26]. This character should not be confused with vagueness, as it was aimed rather at allowing the possibility for the interpreter to grant protection in situations where it was warranted[27]. Article 5, paragraph 6 was thus conceived as a safeguard clause against the rigid system delineated by the Consolidation Act in respect of residence permits and the expulsion of aliens. This type of permit was explicitly linked to the subject of asylum with the approval of Legislative Decree no. 25/2008 which, as already noted, established that in cases in which the application for "international

[24] Article 6, paragraph 4 Directive 115/2008/EC. Cf. also recital no. 15 of the "Qualification Directive". In recognising the possibility for States Members to provide further forms of protection, the Court of Justice of European Union clarified, however that they must always be compatible with EU directives and in particular they must be based on different protection needs, so that they would not be confused with those envisaged by EU legislation. See CJEU, 9 November 2010, C-57/09 *B. e D*. § 118-121; 18 December 2014, C-542/13 *M'Body*, § 43-47.

[25] See Articles 18, 18*bis* and 22 of the Consolidation Act.

[26] N. Zorzella, *La protezione umanitaria nel sistema giuridico italiano*, 1 Diritto, Immigrazione e Cittadinanza (2018), 8.

[27] M. Balboni, *Abolizione della protezione umanitaria e tipizzazione dei casi di protezione: limiti e conseguenze*, in F. Curi (ed.), *Il Decreto Salvini. Immigrazione e sicurezza* (2019).

protection" was rejected, but there were serious concerns of a humanitarian nature, the competent commission would pass on the relevant documentation to the police commissioner, who could grant a residence permit on humanitarian grounds.

As a result, this residence permit came to have a sort of double face, as it could be followed up with an application for international protection (in which case a "causal derivation from what was experienced or suffered in the country of origin"[28] had to be determined), or issued directly by the police commissioner independently of a situation that could in some way be considered related to asylum.

In order to get an idea of the specific situations that have fallen under the humanitarian protection regime, it may be useful to go over the case law of recent years, which provides some examples of the types of cases deemed worthy of protection. The courts have, for example, recognised that situations of instability in the country of origin carrying risks of the violation of fundamental rights, even where they do not allow access to international protection[29], give asylum seekers the right to obtain a residence permit on humanitarian grounds[30]. They have judged that discrimination perpetrated in the country of origin against the whole Roma ethnic population entitled a Roma asylum seeker to humanitarian protection[31]. They have also deemed that the conditions for humanitarian protection are met in the event of severe poverty and social exclusion, also where the applicant

[28] M. Acierno, *La protezione umanitaria nel sistema dei diritti umani*, 2 Questione Giustizia (2018), 105. Cf. Cass, 21 December 2016, no. 26641; 3 October 2017, no. 28015; 19 February 2018, no. 3933, 12 December 2018, no. 32213: it must be shown that the condition of vulnerability of the alien is the effect of a severe violation of his or her human rights in the country of origin.

[29] Subsidiary protection presupposes serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

[30] See Court of Appeal of Cagliari, 7 June 2017 no. 476; Court of Florence, 3 March 2017 e 10 April 2017; Court of Milan 17 July 2017, available at: https://bit.ly/2T6JdLS. See also Court of Appeal of Milan, 28 February 2017 no. 873, available at: https://bit.ly/2DeJd78.

[31] Court of Trieste 4 July 2017, (https://bit.ly/2T6JdLS); this ruling is also interesting because it evokes Art. 8 ECHR by emphasising the applicant's family ties in Italy, where her partner and daughter lived.

received no family support in the country of origin[32]. In this regard, it should be pointed out that there has been a great deal of debate, also among legal scholars, on the issue as to whether situations of extreme poverty in the country of origin would give aliens the right to humanitarian protection on the grounds that a severe curtailment of rights in the economic and social spheres should be considered a violation of fundamental individual rights[33]. The Court of Cassation recently affirmed (case no. 4455/2018) that a situation of vulnerability could arise not only from conditions of political and social instability that exposed persons to situations in which their personal safety was threatened, but also from a severe political-economic situation resulting in drastic impoverishment tied to the lack of basic necessities or a geopolitical situation that offers no guarantees of survival within the country of origin (drought, famine, …)[34].

Moreover, situations of vulnerability due to severe health problems undoubtedly entitled persons to humanitarian protection[35]. Finally, it is interesting to consider the decisions in

[32] Court of Bologna, 12 April 2018, (https://bit.ly/2JyHpIS). The Court made a comparison between the living experience in Italy and that in the country of origin and assessed the risk of further severe social exclusion in the event of repatriation. Cf. Court of Perugia, 12 March 2019 (https://bit.ly/2qebln6) which took into account that the applicant, native of Gambia and left motherless, had arrived in Italy still a minor, making the journey alone and that a possible repatriation would have forced him to live in conditions of probable extreme poverty without any family support.

[33] E. Castronuovo, *Il permesso di soggiorno per motivi umanitari dopo la sentenza della Corte di Cassazione n. 4455/2018*, 3 Diritto, Immigrazione e Cittadinanza (2018), 8: some courts have ordered the issuance of a residence permit on humanitarian grounds to nationals of countries currently affected by a major natural disaster or famine or severe food emergency certified by international bodies which explained their flight from their country or would have in any case placed their life and food safety in jeopardy should they be returned, thus constituting a violation of the right to life or inhuman treatment prohibited by Arts. 2 and 3 ECHR.

[34] Of a different opinion Court of Cassation no. 23757 of 24 September 2019 which, without further arguments, states that situations of difficulty, even extreme, of an economic and social nature, are not sufficient in themselves, in the absence of specific vulnerable conditions, to justify the issuance of the residence permit for humanitarian reasons.

[35] A fundamental point of reference with regard to the right to health of foreigners, even if their presence in Italian territory is unauthorised, is judgment no. 252 of the Constitutional Court, 17 July 2001.

which the court, in addition to evaluating the context in the country of origin and the person's vulnerability, also took into account the applicant's integration into the workforce and social integration in Italy: in these judgments it was underscored, for example, that the refusal to issue a permit on humanitarian grounds would have resulted in an abrupt interruption of a process of social integration and a working activity that was already ongoing[36], with severe repercussions on the person's life, or else emphasis was laid on the risk of breaking emotional or social ties that had come to be created[37]. In this regard, in its well-known judgment no. 4455/2018, the Court of Cassation clarified that though the social integration of the asylum seeker was an element warranting evaluation, it could not become an exclusive factor, as it was in any case necessary to take into account the

Cf. by way of example the Court of Bologna, 17 August 2017, (available at: https://bit.ly/2T1uVfG) which recognised the right to humanitarian protection pursuant to Art. 5, para. 6 because of the applicant's health conditions, extremely precarious and duly certified, which could have been prejudiced in the event of an immediate return to the country of origin, due to the serious deficiencies of the health care system in the Ivory Coast. See also Court of Venice 29 April 2018, (https://bit.ly/2RuWSQc) which recognised the right of an applicant from Burkina Faso to humanitarian protection on the grounds of his serious health conditions (affected by TBC), which required health treatments to manage the tuberculosis affecting the lungs and bones, along with a radiological clinical follow-up for 24 months after the end of therapy in order to rule out relapses and prevent recurrence of the disease. Cf. Court of Bologna, 28 March 2019 (https://bit.ly/2qebln6).

[36] *Ex multis* cf. Court of Trieste, 22 December 2017 (https://bit.ly/2Jy1UWf). As highlighted by N. Zorzella *Rassegna asilo e protezione internazionale*, 1 Diritto, Immigrazione e Cittadinanza (2018); this decision is particularly interesting because, by referring expressly to Article 2 of the Constitution, it affirmed that a person's right to work warranted protection because of the relationship existing between working activity and the state of health, considered not only in terms of the influence of work on the ability to procure the material resources needed to safeguard the state of health, but also from a psychological standpoint, as working activity was inextricably linked to personality development in the social context. In acknowledging the constitutional significance of the concept of integration (which has similarly been acknowledged in various other decisions), the Court also indicated the constitutional framework in which the right to work undoubtedly fits, work being an essential condition for personal dignity.

[37] C. Favilli, *La protezione umanitaria per motivi di integrazione sociale. Prime riflessioni a margine della sentenza della Corte di Cassazione n. 4455/2018*, 2 Questione giustizia (2018).

social, political or environment context in the country of origin in order determine whether a significant, actual compromise of fundamental rights was involved. And this orientation was recently confirmed by the joint sections of the Cassation (13 November 2019, no. 29460).

Although the residence permit on humanitarian grounds was, in a large majority of cases, issued by the police commissioner on receipt of documents sent by the commissions responsible for assessing the requests for international protection (see above), it could also be issued, as mentioned earlier, on the basis of a request submitted directly to the police commissioner, where there were "serious grounds" irrespective of whether a request for asylum had been made previously and irrespective of the conditions connected to the asylum. In this regard, it may be interesting to look at a recent judgment of the Court of Appeal of Florence[38]: despite affirming that social integration alone was not a sufficient reason for recognising a subjective right to a residence permit on humanitarian grounds – as it needed to be assessed in relation to the violation of fundamental personal rights, which the State was required to respect under its constitutional or international obligations – it qualified both the right to work and the right to education, as well as the right to maintain family unity, as fundamental rights of the applicants, and also emphasised their lengthy presence in Italian territory. The Court pointed out that in the specific case concerned, it was not a matter of "a mere environmental integration, but rather of a true, effective integration into the country, so that for all practical purposes there were grounds for arguing that the uprooting from the latter by denying the requested residence permit for humanitarian protection purposes represented a condition of objective vulnerability for the appellants, and thus compromised their fundamental rights, rather than a simple suffering due to the

[38] Court of Appeal of Florence, 17 September 2018, no. 2088 (https://bit.ly/2JCMxf8); the case regarded two Albanese citizens (mother and son), who had lived in Italy for more than 10 years, always legally, by virtue of a residence permit issued on serious grounds connected to the psychophysical development of a minor (Art. 31 of the Consolidation Act).

change in living conditions resulting from their return to the country of origin[39].

3. The abolition of humanitarian protection

Though this may have been the situation up to a year ago, Decree-Law no. 113 of 4 October 2018, converted with amendments into Law no. 132 of 1 December 2018, abolished the regime whereby resident permits could be granted on humanitarian grounds, since, as stated in the report accompanying the draft law converting the decree, the government deemed it necessary and urgent to intervene in order to combat the anomalous disproportion between the number of cases in which forms of international forms of protection were granted and the number residence permits issued on humanitarian grounds[40]. This disproportion was allegedly due to the legislative definition of humanitarian protection, characterised by uncertainty, which left ample margins for an extensive interpretation that was in contrast with the aim of providing

[39] As was pointed out by N. Zorzella, *Rassegna asilo e protezione internazionale*, 3 Diritto, Immigrazione e Cittadinanza (2018), the ruling took on a particular significance, because the Court made an assessment of the consequences of repatriation in reference to the infringement of the fundamental rights acquired in Italy, namely, work, education and family unity.

[40] This unusual generosity of the Italian system, which supposedly reached a height with the granting of residence permits as a form of humanitarian protection, is in reality contradicted by the data published in the dossier on the "*Decree-law on Immigration and Public Security*" drawn up by the Senate Research Service, because though it may be true that our country has a high percentage of cases in which permits are granted on the grounds of humanitarian protection compared to more complete forms of protection, the data also reveal that the percentage of recognition 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.
It should also be noted that a certain pressure on the applications for residence permits on humanitarian grounds may also derive from the fact that in recent years the decrees on immigration flows have precluded entry to non-EU workers (except for seasonal work), thus cutting off every legal channel for gaining entry to Italy and making requests for humanitarian protection the only possible means of obtaining a residence permit.

temporary protection[41]. And though many provisions of the Decree-Law reflect a policy aimed at strongly restricting the number of persons taken in and granted asylum in Italian territory, the abolition of the residence permit on humanitarian grounds represents its heart[42].

In the report accompanying the draft version of the law converting the decree, it is also stated that in view of the abolition of the previous regime, the new provisions have introduced specific cases in which residence permits may be granted on humanitarian grounds, thus more strictly defining this form of protection, which until now had only been generically outlined by the legislator.

In actual fact, the Decree-Law confirms, on the one hand, the permits for victims of violence or severe exploitation, victims of domestic violence and labour exploitation (so-called "special cases"), and confirms the permit (now referred to as granted on "special protection" grounds) in cases in which *refoulement* is prohibited;[43] on the other hand it introduces new permits for persons fleeing disasters, those with serious health issues and those who have engaged in "acts of civic valour".

In order to put the novelties introduced properly into focus and understand the reasoning behind them, we need to remember that the humanitarian protection regime referred to "serious grounds", which could be connected to the situation of asylum seekers but could also regard conditions of vulnerability of individuals more in general. The affirmation made in the aforementioned report (accompanying the draft version of the law converting decree no. 113) that the residence permit on humanitarian grounds has been replaced by specific types of permits is mystifying in more than one respect. First of all, most of the "special temporary residence permits" already existed in our legal system, and the newly introduced permit on health grounds

[41] Moreover, the portrayal of the residence permit on humanitarian grounds as serving merely purposes of temporary protection is undoubtedly open to criticism.

[42] Cf. the circular issued by the Ministry of the Interior on 4 July 2018 (adopted shortly after the government took office), from which the intention of greatly reducing humanitarian protection emerged clearly.

[43] Cf. Articles 18, 18-*bis*, 22, par. 12-*quater* and 19 par.1 and 1.1 of the Consolidation Act.

does not add much, as the obligation to receive and prohibition against expelling foreign nationals in serious health conditions has long been established[44]. The two only "new" permits, therefore, are the ones granted to persons fleeing disasters[45] and to reward outstanding acts of civic valour[46].

Secondly, although all these permits are designed to protect persons in situations of vulnerability, most of them do not necessarily or directly have anything to with the constitutional right of asylum (though there may obviously be overlaps), because the specific cases envisaged are largely disconnected from the reasons for fleeing the countries of origin and the violations of fundamental human rights in those countries[47].

This means that the legislative intervention, in relation above all to the right of asylum, has had the effect of abolishing a provision that precisely by virtue of its general and residual character had been deemed capable of ensuring (together with international protection) the implementation of Article 10, paragraph 3 of the Constitution[48]. This observation holds despite the reference now made by the amended Article 32, paragraph 3 of Legislative Decree no. 25/2008 to Article 19, paragraphs 1 and 1.1 of the Consolidation Act, which establishes that in cases in

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[44] C. Corsi, *Il diritto alla salute alla prova delle migrazioni*, 1 Le Istituzioni del Federalismo (2019).

[45] When the country the foreigner is supposed to return to is affected by contingent and exceptional circumstances due to a disaster which precludes his or her return or stay there in conditions of safety, the police commissioner will issue a residence permit on the grounds of natural disaster.
However, a possible form of protection in the event of disasters was also provided for under the Consolidation Act. Article 20 establishes that, by decree of the President of the Council of Ministers, extraordinary reception measures may be adopted following exceptional events (conflicts, natural disasters or other events of particular severity). Involved in the latter case is a general measure taken by the government, whereas the decision of whether to issue the new permit is left up to the police commissioner.

[46] This permit is based on a different logic, as a form of reward: if a foreign national has performed exceptional acts of civic valour, the Ministry of the Interior, on a proposal from the competent provincial authority, will authorise the issue of a special residence permit.

[47] Cf. Court of Florence 24 October 2018 (https://bit.ly/2ASA8zp).

[48] A different point of view has been expressed by M. Benvenuti, *Il dito e la luna. La protezione delle esigenze di carattere umanitario degli stranieri prima e dopo il decreto Salvini*, 1 Diritto, Immigrazione e Cittadinanza (2019).

which the competent commission does not accept the application for international protection, but the conditions laid down in Article 19, paragraphs 1 and 1.1 are met[49], it will send the relevant documents to the police commissioner, who will issue a yearly residence permit with the heading "special protection" (unless it is possible to arrange for the individual to be removed to another country where analogous protection will be accorded). Article 19 merely reaffirms the *non-refoulement* principle[50] with reference to situations that would give rise to a right to refugee status or subsidiary protection, but cannot be granted due to the presence, for example, of legitimate grounds for exclusion[51], in any event, such a provision already existed in the Consolidation Act.

It seems clear that the aim of this legislative measure was to knock down one of the pillars on which the implementation of the constitutional provision was founded: it was not a matter of replacing one set of rules with another, but of abolishing a fundamental part of an overall regime[52]. So much so that we

[49] Article 19, Consolidation Act: 1. In no case whatsoever may an alien be expelled or rejected towards a State in which he might be subjected to persecution due to race, gender, language, citizenship, religion, political opinions, or personal or social conditions, or may risk being sent to another State in which he is not protected against persecution. 1.1. Rejection, expulsion or extradition of a person to a State is not allowed when there are reasonable grounds to believe that that person is at risk of being subjected to torture. The assessment of reasonable grounds shall also take into account the existence, in that State, of serious and systematic human rights violations.
Paragraph 1.1. was introduced with Law no. 110/2017, "*Introduction of the crime of torture in the Italian legal system*", which was intended to define an extreme situation.

[50] Cf. Art. 33 of the Geneva Convention and Art. 3 of the European Convention on Human Rights.

[51] See Articles 10 and 16, Legislative Decree no. 251 of 19 November 2007. Cf. P. Papa, *L'esclusione per non meritevolezza, i motivi di sicurezza e di pericolo, il principio di non refoulement e il permesso di soggiorno per motivi umanitari*, in Diritto, Immigrazione e Cittadinanza, 2 (2018).

[52] See also A. Algostino, *Il decreto sicurezza e immigrazione (decreto legge n. 113 del 2018): estinzione del diritto di asilo, repressione del dissenso e diseguaglianza*, 2 Costituzionalismo.it (2018), 176 ff. A different position has been expressed by S. Curreri, *Prime considerazioni sui profili d'incostituzionalità del decreto legge n. 113/2018 (c.d. "decreto sicurezza")*, 22 Federalismi (2018), 7; by S. Pizzorno, *Considerazioni, anche di costituzionalità, su alcune delle principali novità introdotte dal decreto legge n. 113/2018 (c.d. decreto sicurezza) in tema di diritto d'asilo*, 4 Forum

might even venture to suggest that a constitutionally mandatory law has been abrogated. As the Constitutional Court has affirmed, such a law, once it has come into existence, may be amended by the legislator but not abrogated "with the aim of eliminating a protection previously granted, as this would be a direct violation of the very constitutional precept it was designed to implement"[53].

Moreover, Article 5, paragraph 6 provided for residence permits to be granted on humanitarian grounds in fulfilment, among other things, of constitutional or international obligations, and as underscored in the letter sent by the President of the Republic to the Prime Minister at the time the Decree-Law was enacted, "the 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". In the previously cited report accompanying the draft version of the law converting Decree no. 113 it is stated that "compliance with constitutional and international obligations shall continue", which in certain respects appears contradictory, because on the one hand the provision that expressly made reference to such obligations has been eliminated and on the other hand an attempt is made to "reassure" by affirming that these obligations remain. In any case 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 compliance with constitutional obligations (including that of providing asylum) and international obligations[54].

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di Quaderni costituzionali (2018) and by A. Masaracchia, *La protezione speciale sostituisce il permesso per motivi umanitari*, 45 Guida al diritto (2018), 21 ff.

[53] Constitutional Court, judgment no. 49/2000.

[54] Cf. Constitutional Court, judgment no. 194/2019, § 7.8 which affirms that the legislative provisions must be applied in compliance with constitutional obligations and international obligations.

4. If constitutional and international obligations remain…

As is well known, the European Convention on Human Rights does not contain a provision that explicitly deals with the right of asylum. However, interpretation given by the Strasbourg Court to several articles of the Convention has resulted in foreigners being granted protection in asylum-related situations. More specifically, it has recognised a right to *protection par ricochet* in the case of foreign nationals who have had a removal order issued against them or been denied a residence permit, if the measure taken prejudices the enjoyment of their rights under the Convention, in particular the rights enshrined in Articles 2, 3 and 8[55]. Moreover, as previously mentioned, the reference to international obligations contained in Article 5, paragraph 6 of the Consolidation Act allowed the option of a residence permit being issued for humanitarian reasons also in cases where no explicit protection was provided for in Italian legislation, but where protection was warranted based on the European Convention and ECtHR case law[56].

Following the changes introduced by Decree-Law no. 113, it is worth asking whether the rights protected under Articles 2 and 3 of the European Convention are actually guaranteed by the regime of subsidiary protection as defined by Directive 2011/95/EU[57] and Article 14 of Legislative Decree no. 251/2007 or in any case Article 19 of the Consolidation Act.

There are cases (where serious offences have been committed by the asylum seeker) for which EU and Italian legislation rule out international protection[58]; Article 19 of the Consolidation Act[59] also does not seem to be applicable in such

[55] A. Del Guercio, *La protezione dei richiedenti asilo nel diritto internazionale e europeo* (2016), 141. See the systematisation of the Court's case law by the author.

[56] E. Hamdan, *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment* (2016).

[57] Directive 2011/95/EU replaced the previous "Qualification Directive" 2004/83/EC.

[58] See also the cases of revocation or termination of refugee status and subsidiary protection.

[59] See G. Conti, *Il criterio dell'integrazione sociale quale parametro rilevante per il riconoscimento della protezione umanitaria. (Nota a sentenza n. 4455 del 2018 della Corte di Cassazione),* 4 Federalismi (2018): Article 19, para. 1 of the Consolidation

cases, as it makes reference to risks of persecution or torture, but not to the risk of inhuman and degrading treatment. As is well known, the Strasbourg Court has reaffirmed the absolute and essential character of the guarantees offered by Article 3 ECHR in a number of its judgments. Accordingly, whenever there is a risk of inhuman and degrading treatment, "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration"[60]. In such cases we might be talking about an international obligation that is not taken into account in any specific national legislative provisions[61]; nor can it any longer be considered to fall within the scope of a general provision such as Article 5, paragraph 6 of the Consolidation Act, as it has been abolished.

A further question might arise in the case of persons who have suffered persecution or risk suffering serious harm in the event that they are returned to the country of habitual residence, where the latter is not the country of citizenship (stateless persons obviously being an exception)[62], as such persons will be ineligible for the status of international protection. Though in the case of the risk of persecution or torture, Article 19 of the Consolidation Act may come to their aid, in the second case there is no longer the anchor that humanitarian protection could offer.

In this regard, it should be pointed out that EU legislation is also rather lacking in transparency. This is true in particular for the "Qualification Directive", which in cases where a person is excluded from international protection but cannot be removed in

Act does not thoroughly cover all the international obligations which Article 5, para. 6 refers to.

[60] *Chacal v. United Kingdom,* no. 22414/93, §80, ECtHR 1996. See also *Saadi v. Italy,* no. 37201/06, §127, ECtHR 2008: "as the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct…., the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3." Cf. E. Guild, *Article 19*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights* (2014); M.T. Gil Bazo, *Refugee Protection under International Human Rights Law: From Non-refoulement to Residence and Citizenship*, 34 Refugee Survey Quarterly (2015), 16-24.

[61] Article 20, Legislative Decree 251/2007, as amended in 2014, could help, as it refers to international obligations with regard to protection from expulsion.

[62] P. Morozzo della Rocca, *Protezione umanitaria una e trina*, 2 Questione giustizia (2018), 113.

the light of international obligations (first and foremost respect for the principle of *non-refoulement*) leaves it up to the Member States to decide whether to issue a permit on purely compassionate or humanitarian grounds. As has been underscored, the Directive "is seriously misleading about the scope of the Member States' international legal obligations, as it seems to suggest that all those outside the scope of application of the Directive are allowed to remain by Member States on purely compassionate or humanitarian grounds …, rather than on the basis of their international obligation"[63].

Moreover, as was also clarified in Circular no. 3716 issued on 30 July 2015 by the National Commission for the Right of Asylum – which gave examples of some cases in which the right to humanitarian protection would be recognised – the authorities competent to assess requests for protection had to take into account the family situation of the asylum seeker. The assessment would be based on the provisions of Article 8 ECHR concerning the respect for private and family life and would determine whether a residence permit should be issued on humanitarian grounds[64]. In these cases as well, an international obligation might come into play, which might not be fulfilled under the legislation now in force.

In addition, a residence permit on humanitarian grounds was formerly issued to foreign nationals whose extradition had been rejected by the Court of Appeal (political crimes and in the cases specified in Article 698, paragraph 1, and Article 705, paragraph 2 of the Code of Criminal Procedure concerning serious human rights violations). Now it is not clear what type of

[63] M.T. Gil-Bazo, *Refugee status, subsidiary protection, and the right to be granted asylum under EC law*, 136 UNHCR Research Paper (2006) 11-12. One might also pose the question as to whether the "Qualification Directive" is compatible with Article 19 of the Charter of Fundamental Rights of the European Union. Cf., however, the questionable judgment of the CJEU, H.T. v. Land Baden-Württemberg C 373/13, 24 June 2015, which confirmed the possibility of removing a refugee for security reasons, even if he risks being subjected to serious violations of his rights.

[64] If the control of the entry and residence of foreigners falls within the powers of the States, however, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.

residence permit can be granted, as only some of these cases are covered by the "special protection" regime pursuant to Article 19 of the Consolidation Act.

In this regard, it is worth mentioning a 2012 judgment[65] of the European Court of Human Rights, which found a violation of Article 6 of the Convention (right to a fair trial), since the UK government had manifested its intention to extradite a Jordanian national who had been convicted *in absentia* of terrorism-related offences by a court in his own country, but on the basis of statements obtained through the torture of two co-defendants. The Court ruled that there had been a "flagrant denial of justice" in this case and for the first time confirmed the responsibility of a Contracting State for a violation of Article 6 in relation to the repatriation of an alien.

In situations such as the one described, the abolition of a general provision such as the former Article 5, paragraph 6 of the Consolidation Act could make it difficult to obtain the issuance of a residence permit.

The problematic aspects highlighted here are meant to provide only an example – which obviously does not claim to be exhaustive – of the international obligations that might no longer be duly fulfilled under national legislation.

Also with regard to the serious grounds resulting from "constitutional obligations", the picture is anything but clear; the reference has formally been eliminated, but an ordinary law clearly cannot do away with such obligations. And the first constitutional obligation that emerges is precisely the right of asylum under paragraph 3 of Article 10.

We should note first of all a point on which legal scholars are in full agreement and which is by now well-established in case law: what is involved here is a subjective right[66], whose justification lies in the denial of the effective exercise of the democratic liberties guaranteed by the Italian Constitution. This is

[65] *Othman (Abu Qatada) v. United Kingdom,* no. 8139/09, ECtHR 2012.

[66] The first orientation expressed in administrative case law, whereby Article 10 paragraph 3 was included among so-called "programmatic" provisions, is by now obsolete and the jurisdiction of ordinary courts is undisputed. See the important ruling no. 4674 of the Court of Cassation, joined sections, issued on 26 May 1997, which for the first time recognised that Article 10 directly attributes to aliens a subjective right to obtain asylum.

not the right place to go back over theoretic debate concerning the specific democratic liberties whose infringement gives a right of asylum, and in particular the diatribe concerning social rights. What is generally recognised, however, is the directly binding nature of the provision where constitutional freedoms are concerned, and the merely declarative and non-constitutive character of the measures adopted by the competent bodies.

By now, in fact, the orientation of the Council of State[67], which claimed jurisdiction based on the existence of a broad discretionary power of the administrative authorities in assessing the facts and their relevance for the recognition of refugee status[68], has clearly been abandoned, as has the first orientation of the Court of Cassation, which, given the broad scope of political-administrative discretion implied in Article 5 paragraph 6, had considered the administrative courts to have jurisdiction in disputes related to the issuance of a residence permit on humanitarian grounds (despite having previously affirmed the jurisdiction of ordinary courts in disputes related to international protection)[69]. Indeed, following the transposition of the first Community Directives and the connection established by Legislative Decree no. 25/2008 between requests for international protection and the possibility of issuing a residence permit on humanitarian grounds (see above), the Court of Cassation changed its stance. It went on to clarify that such residence permits were intended to guarantee respect for inviolable human rights and underscored the connection with all the different forms of protection under Article 2 of the Constitution; this precluded

[67] Council of State, Section IV, no. 4336/2002 and Council of State, Section IV, no. 6710/2000.

[68] See Court of Cassation, no. 907 of 17 December 1999, which establishes that following the abrogation of the provision in the Martelli law, whereby appeals against denials of refugee status were brought before the administrative courts, jurisdiction must be determined based on the general principles of the legal system. The qualification as refugee constitutes a subjective right and all measures adopted by the competent authorities in this area have a declarative and not a constitutive nature. This interpretation is corroborated by the fact that the Consolidation Act of 1998 had attributed appeals against expulsion orders to the jurisdiction of the ordinary courts.

[69] Court of Cassation, joined sections, no. 7933/2008, and no. 8270/2008, according to which the administrative courts had jurisdiction in cases of denial by the police commissioner of residence permits as per Art. 5.

their being downgraded to legitimate interests based on the discretionary assessments entrusted to the administrative authorities, whose power was limited to ascertaining the facts that justified the humanitarian protection, i.e. a mere technical discretion, as the balancing of interests was to be left up to the legislator alone[70].

It is worth pointing out that an analysis of the evolution of the case law of the Supreme Court of Cassation clearly reveals the intent of the latter to combine the constitutional and international frameworks with the changes in domestic law in order to guarantee a solid basis for situations relating to asylum.

5. A "lame" legislation

If this is the overall picture that can be derived from the constitutional aspects, what now appears clear is that the provisions that remain after the recent legislative intervention do not seem to cover the possible cases falling within the scope of Article 10, paragraph 3; if we look at the situations protected by the regime of international protection (in both its forms), it is evident that Article 10 of Constitution is only partly implemented by Directive 2011/95/EU, Legislative Decree no. 251/2007 and Article 19 of the Consolidation Act[71]. Moreover, the "special temporary residence permits" do not appear to fill the gap; the majority of these permits regard situations of vulnerability, for example, cases of violence or severe exploitation committed in the context of certain crimes, but the rules governing these permits do not represent a definition of possible cases that may fall under Article 10, paragraph 3. Besides the difficulty of predetermining the different ways in which "the effective exercise of the democratic liberties" may be denied, it was not even the legislator's intention to implement the constitutional right of asylum through these provisions.

[70] Court of Cassation, Joined Sections, 9 September 2009, no. 19393; the conclusions reached by the Court with reference to the right of asylum and recognition of refugee status were also extended to humanitarian protection, since the situations involved all regarded fundamental human rights. Cf. recently Court of Cassation, First Section, 19 February 2019, no 4890.

[71] Cf. Court of Florence, 17 February 2018 (https://bit.ly/2RuWSQc).

There is no doubt that the regime of humanitarian protection has filled a gap (the non-implementation of Article 10, paragraph 3 through a specific law) over the years by offering the possibility of recognising situations in which fundamental rights were placed in jeopardy. Some recent judgments recognising the right to a residence permit on humanitarian grounds are explicative on this point: it has been affirmed, for example, that the obligation to safeguard the human rights enshrined in Article 2 of the Constitution means that an applicant cannot be repatriated in a context of danger[72], and that situations precluding the possibility of exercising fundamental human rights in the country of origin plus the fact of having been exposed to torture in the period of residency in Libya gave the right to obtain a humanitarian permit[73], and, moreover, that situations of extreme poverty may be seen as causing severe prejudice to essential rights[74] (the Court of L'Aquila has spoken of freedom from hunger as an inviolable human right)[75]. In accordance with Article 8 of the ECHR, the courts have accorded due recognition to certain family or personal ties[76]; and, as synthesized by the Court of Florence[77], health, psychophysical integrity and personal dignity are aspects of the human dimension which, for the purpose of implementing Article 10, paragraph 3 of the Constitution, must be guaranteed coverage in the form of humanitarian protection even where they are threatened by phenomena other than those taken into consideration under the refugee protection and subsidiary protection regimes.

Many of the "serious grounds" that have until now enabled foreign nationals to obtain residence permits on humanitarian grounds were related to situations in which fundamental rights had been breached – thus situations giving rise to the constitutional right of asylum. And if the humanitarian residence

[72] See Court of Bologna, 28 March 2017 (https://bit.ly/2DeJd78). Cf. Court of Appeal of Trento, 16 March 2018, no. 67 (https://bit.ly/2qedPBW): having regard to the social situation of the applicant's country of origin, he could run the risk of seeing the fundamental rights of the person harmed, being in spite of himself involved in the disorders that frequently afflict the area.

[73] Court of Bologna, 28 July 2018 (https://bit.ly/34oTubx).

[74] Court of Florence, 21 December 2017 (https://bit.ly/2CpPwTZ).

[75] Court of L'Aquila 16 February 2018 (https://bit.ly/2RuWSQc).

[76] Court of Trieste, 4 July 2017 (https://bit.ly/2T6JdLS).

[77] Court of Florence, 17 February 2018 (https://bit.ly/2RuWSQc).

permit served to fulfil these constitutional and international obligations, what roads can and must be taken now that it has been abolished?

The Constitutional Court will no doubt be called upon to pronounce itself and, as has already been highlighted, there are many problematic aspects. Furthermore, the ordinary courts may play a fundamental role[78], both by offering an extensive and constitutionally oriented interpretation of some instruments (for example the "special protection" permit or the permit granted to those fleeing disasters) and going back to the case law of the late 1990s, which, in the absence of legislation implementing Article 10, paragraph 3, had come to directly recognise the right of asylum where the constitutional conditions were met[79]. An interpretation of the current legislation that ensures maximum consistency with the Constitution and international obligations should be adopted not only by the courts, but also by administrative authorities[80]. We need only consider the need for an extensive interpretation of Article 19 of the Consolidation Act[81] in order to fully align it, for example, with Article 3 of the ECHR[82].

Finally, it would be desirable, more in general, that the practice of the territorial commissions be subjected to scrutiny: if we observe the data published in the dossier drawn up by the Senate Research Service, we note that the percentage of recognition of refugee status and the grant of subsidiary protection is on average much lower than in other European

[78] Cf. Court of Cassation, joined sections, no. 29460/2019 which confirmed the non-retroactivity of the provisions of Decree-Law no. 113 that repealed the humanitarian protection.

[79] E. Cavasino, *Diritti, sicurezza, solidarietà e responsabilità nella protezione della persona migrante*, 21 Federalismi (2018), 21.

[80] See Constitutional Court, judgment no. 194/2019, § 7.8 that enhances the administrative and jurisprudential practice precisely with regard to a normative interpretation that respects the Constitution and international obligations.

[81] See Court of Cassation judgment no. 38041 of 26 May 2017, where the Court judged that a strict interpretation of the cases precluding expulsion, as laid down by the legislator in Art. 19, paragraphs 1 and 2 of the Consolidation Act, was incorrect, since the legislation should be read in a constitutionally oriented perspective, in the light of the principles affirmed by the ECtHR and the Constitutional Court.

[82] Cf. M. Benvenuti, hearing before the Office of the Presidency of the 1st Commission (Constitutional Affairs) of the Italian Senate on 16 October 2018, 3 Osservatorio AIC (2018).

countries; it is true that this may depend on the countries of origin of the migrants received by different European States, but it could likewise be due to a more restrictive interpretation of European directives on the part of the Italian administrative authorities.

It is clear that the Constitutional Court may play a key role in restoring an acceptable level of implementation of Article 10, paragraph 3 of the Constitution, because the abolition, by Decree no. 113, of a general "humanitarian" provision has made it complicated to offer protection in situations that are difficult to categorise a priori[83], also taking into account that constitutional and international human rights law is by its very nature a living instrument, to be interpreted in the light of the present conditions[84]. This does not mean to say that it is not possible for the legislator to guide the discretionary choices of the administrative authorities in relation to recognition of the right of asylum, or that only absolutely generic legislative formulas are compatible with Article 10, paragraph 3. It would have in fact been desirable to see a parliamentary initiative that was finally aimed at implementing Article 10, paragraph 3. What is worthy of censure is the continuing failure to implement the constitutional provision through a law specifically designed for this purpose. With the amendments introduced by Decree no. 113, this risks being a violation of the Constitution.

Once again, the courts will be called on to act as substitute, given the persistence of the conflict between politics (or a certain type of politics) and law which has also pervaded other areas of immigration law[85].

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[83] A possible categorisation by the legislator of the cases in which humanitarian protection must be provided would not be censurable a priori (indeed, this solution has been adopted in other European countries); it all depends on how these cases are defined, taking into account that it is necessary to leave margins of flexibility. See European Commission *EMN Ad-Hoc Query on ES Ad hoc Query on Humanitarian Protection*, June 2017; ECRE, *Complementary protection in Europe*, July 2009.

[84] M. Balboni, *Abolizione della protezione umanitaria e tipizzazione dei casi di protezione: limiti e conseguenze*, in F. Curi (ed.), *Il Decreto Salvini. Immigrazione e sicurezza* (2019) 19 ff.; M. Savino, *Il diritto dell'immigrazione: quattro sfide*, 2 Riv. trim. dir. pubbl. (2019) 381 ff.

[85] A. Guariso, *Introduzione*, in A. Guariso (ed.), *Senza distinzioni. Quattro anni di contrasto alle discriminazioni istituzionali nel Nord Italia* (2012), 13.