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Rule of Law and Migration in the European Context: A Focus on the European Convention on Human Rights and the Jurisprudence of the European Court of Human Rights

Caterina Drigo[19]

[19]Assoc. Prof. Dr., in Constitutional law Department of Legal Studies "A. Cicu" Alma Mater Studiorum Università di Bologna, Bologna, Italy, caterina.drigo@unibo.it.

Abstract

As is well known, both the European Union and the Council of Europe highlight the close connection and relationship between the rule of law and the protection of fundamental human rights. One of the areas in which this relationship is often put in crisis is that relating to migrants. Historically human beings have always expressed the need for refuge and have always experienced exile. The history of the asylum, in fact, is a history that is intertwined with that of human beings, since the first organized societies. And there is a trace of this both in the sacred texts of many religions, and in historical documents where asylum became an expression of welcome hospitality of the kings of many eras. Over the centuries, asylum has come to acquire an institutional and legal connotation, finding expressed codification in international law during the twentieth century. So, according to art. 14 of the Universal Declaration of Human Rights, everyone has the right to seek and enjoy in other countries asylum from persecution. This provision shall be read in connection to art 13.2 UDHR, according to which everyone has the right to leave any country, including his own. A few years later, the Geneva Convention of 28 July 1951, as integrated by the Protocol of 31 January 1967, codified a vast and articulated protection in favour of those who are forced to leave their country by introducing – among others - also the principle of non-refoulment. Nowadays, the above-mentioned principle has risen under the norm of customary international law and is codified in art. 33 of the Convention. This principle prohibits returning or expelling a refugee «to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion».

However, it cannot be claimed by a migrant «whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country».

As is well known, in the European regional context, as well as in general international law, there is no obligation for States to welcome foreign citizens into their territory, without prejudice to the guarantee of free movement and residence recognized to citizens of Member States of the EU.

This means that, in principle, States are free to limit and control the entry and stay of foreigners in their territory (see articles. Art. 1, par 1, letter f), 2.3 of Protocol no. 4 to the ECHR and

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articles 78 and 79 TFEU in addition to arts. 18 and 19, par. 1, of the CFREU), and may also order their expulsion, - without prejudice to the prohibition of collective expulsions (Article 4 prot. No. 4 of the ECHR, Article 19 of the Charter) - if are met the conditions, the guarantees, and limits, set out in Articles 6, 13, 1 of protocol n. 7 to the ECHR and 19, par. 2 CFREU.

The right of asylum is recognized only by CFREU which, moreover, limits itself by recalling the rules established by the Geneva Convention of 28 July 1951 and the protocol of 31 January 1967.

The ECHR, on the other hand, does not mention it, limiting itself to art. 1, requiring the States that adhere to the Convention to recognize «everyone within their jurisdiction», and therefore also foreigners not legally residing in their territory, «the rights and freedoms defined in Section I».

Furthermore, migration issues have been the object of numerous decisions of the Strasbourg Court, as well as significant decisions of the Luxembourg Court. Indeed, in Europe, both the ECtHR and the CJEU, have played a decisive role in expanding the protection of migrants, especially in relation to expulsions.

This paper intends to retrace the main stages of this jurisprudence highlighting which dystonic practices adopted by States (not respecting the rule of law principle) have been censured.

The Strasbourg Court has consistently affirmed the fundamentality of the rule of law, intended as a concept inherent in all articles of the ECHR. Hence, in the field of migration, the ECtHR protects and enforces the fundamental and substantive human rights of migrants (in particular, but not only, refugees and asylum seekers) by relying on procedural rule of law safeguards, such as proportionality, non-discrimination, and equal application of the law, the principles of legality and legal certainty, the availability of effective remedies in the country, the right to a fair trial and repatriation procedures, and the principle that any exercise of power should be subject to review by the courts.

All the above-mentioned elements apply to the different aspects and stages of the migration process. Accordingly, the ECtHR has contributed to an increasing judicialization of protection duties at the supra-national level, which has also had a significant impact on the EU asylum and migration policy.

The ECtHR, in fact, has interpreted the conventional provisions in order to identify the limits to the expulsion of migrants, asylum seekers, and non-asylum seekers, to give details of their rights, and to verify that the national implementation of European Union law was respectful of the conventional provisions. Migration issues have determined a huge case law from the Strasbourg Court. Such case law provides a basis for the interpretation of the meaning and scope of the (corresponding) rights set out in the CFREU.

While each of the courts has read and applied the rights of refugees, asylum seekers, and economic migrants from the perspective of the respective system and instruments, a progressive "dialogue" between the courts has also taken place and has resulted, at least to a certain extent in the alignment of the protection granted.

Due to the limited time available here, I will focus on a single profile, which is the one relating to the "detention" of migrants waiting to be expelled to a third country or to receive the examination of their request for international protection, deepening some cases that have recently been an opportunity for discussion between the ECHR and the CJEU: ECHR *Ilias and*

Ahmed v. Hungary [GC], 21.11.2019; CJEU C-924/19 *PPU* and C-925/19 PPU, *FMS and others* [GC] of 14.05.2020.

***Keywords*:** asylum, migration, detention of aliens, ECHR