

Editorial

The recent, tragic events that have occurred on some of the European borders should have led us to open a serious debate on migration from the point of view of the human and social values in which the EU is based, values upon which the very existence of the EU was founded and ones which should continue to constitute its *raison d'être*.

Europe has become a “fortress” for migrants. The idea that migration “is linked to organized crime, in particular to organized drug trafficking, trafficking in human beings, smuggling of illegal migrants and to the emerging of shadow economies”¹ seems to be at the basis of a European policy often aimed at building a strict control system in order to achieve a sense of safety by excluding any risk. These policies are probably an answer to the widespread idea of immigration and crime being an interdependent phenomena and, consequently, to the conviction that control of immigration means control of crime.

This kind of point of view seems to have been encouraging the trend lately followed by most national legislators: the criminalization of the illegal entry and stay of non-European Union nationals in EU territory. Furthermore, it is all too obvious that European (and non-European) legislators have decided, more often than not, to use criminal law against illegal immigration with the specific purpose of raising consent among the voters that look at foreigners with suspicion. Immigration is perceived as an “evil to eradicate”². The real reason for some of the legal provisions made lies in the concept of the migrant being perceived as a stranger, as an ‘outcast’ of sorts, the bearer of differences and therefore, for many, people with cultures and behaviours which are considered to be frightening. People are afraid of what they don’t know, and therefore migrants are seen as a threat. This approach feeds the so-called “criminal law of the enemy” which underlines the prevalence of ideological and personal profiles above legal profiles duly based on an offence in terms of legal interests.

In direct relation to this, it should not be forgotten that the Directive 2008/115/EC calls only for the use of administrative law for the national regulations on illegal immigration. Nevertheless, most of the EU Member States have chosen to regulate it through criminal law. As such, the real question is: why do national legislators choose to use criminal law where this subject is concerned? The only reason for providing criminal sanctions against illegal immigration is a symbolic one: it is functional to security-related policies called upon by criminal populism. These criminal law provisions are directly aimed at gaining a cheap electoral consensus by using a “cheap” resource – criminal law – but they clearly contradict the role of last resort that criminal law has to play³.

¹ Albrecht H. J., “Fortress Europe? – Controlling Illegal Immigration”, in *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 10, nr. 1, 2002, p. 2.

² In the words addressed by Pope Francis to a delegation of the five great international associations of criminal Law and criminology last October the 23rd, 2014, He gave his point of view on the matter, and said that “In mythology as in primitive societies, the crowd discovers the evil powers of its sacrificial victims, who are accused of the misfortunes that befall the community. This dynamic is not lacking in modern societies either. Reality shows that the existence of the legal and political instruments necessary to address and resolve conflicts is not a sufficient guarantee to prevent some individuals from being blamed for everyone’s problems. Scapegoats are not only sought to pay, with their freedom and with their life, for all social ills such as was typical in primitive societies, but over and beyond this, there is at times a tendency to deliberately fabricate enemies: stereotyped figures who represent all the characteristics that society perceives or interprets as threatening”. These are the strong words of Pope Francis, words that are well worth listening to and deeply meditated upon.

³ In this sense, e. g., Gatta G. L., “La criminalizzazione della ‘clandestinità’ fra scelte nazionali e contesto europeo”, in *Rivista italiana di diritto e procedura penale*, 2015, p. 188-198.

Fortunately, after years of unrestrained use of criminal law in the EU Member States (for example the so-called “security packages” in Italy), something has started to change after three important judgments delivered by the EU Court of Justice⁴. Luckily, they are leading to a gradual abandonment of the typical instruments of criminal law that is to be seen in many countries, which is fortunate when one considers, among other reasons, their ineffectiveness.

Up until the end of July of this year, around 2,000 people have lost their lives in the Mediterranean while trying to reach the EU, and more than 188.000 have crossed it risking their lives very seriously, being saved in the end by authorities, NGOs and other ships⁵. Another very large number has reached it through other European borders, such as Hungary. Can anyone think that a real solution may be reached through criminal law by turning more than 250,000 desperate human beings into criminals, people who are simply in search of a normal life, far away from being murdered in wars or by fanatical terrorists, or just through hunger, who in the last 7 months have illegally entered the EU? It is not just an unfair or an immoral solution that fails to meet the Human Rights upon which the very basis of the EU rests? It is also an illusion. No criminal law can help deal with such a situation. Instead, the main consideration for criminal law practitioners and scholars should be another one with a long, meditated and consolidated European tradition of criminal law: being an illegal migrant carries no offence against the generally recognized legal interests. Over the decades, European criminal law based on the criminalisation of personal features has been refused, and there is a general agreement that criminal law should only be based on facts carrying an offence to a previously recognized legal interest. Our provisions also recognize some situations of necessity that have to be considered not just in the moment of application of the law, but also at the moment of creating it. The reasons for this choice are known by all of us and have been discussed for over two centuries, and therefore we should work for its survival.

However, and above all, we must not forget that the tools that criminal law can offer are absolutely useless to provide a real solution.

It seems clear that criminalizing illegal immigration should not be the answer to the situation of people running away from war conflicts and unbearable situations of survival. In the words of Pope Francis “a widespread conviction has taken root in recent decades that public punishment can resolve the most disparate social problems, as if completely different diseases could be treated with the same medicine. This is not so much about trust in some social function traditionally attributed to public punishment, as about the belief that it is possible that such punishment can obtain those benefits that would demand the application of a different type of social and economic policy as well as social inclusion”⁶.

It is clear that the problems which have arisen from immigration need a different approach. A new immigration policy inside every EU State and inside the European Union is urgently needed. We need to change the idea of a “fortress” Union. It is our belief that criminal sanctions must not be seen as the answer.

The Editors

⁴ ECJ 28.4.2011, *Hassen El Dridi* (case nr.C-61/11); ECJ 6.12.2011, *Achughbaban* (case C-329/11); ECJ 6.12.2012, *Sagor* (case C-430/11).

⁵ Figures from the intergovernmental International Organization for Migration (IOM) published in column of 4.8.2015 in its www.iom.int, 16.8.2015.

⁶ See above nr. 2.