

Race as a category of legal analysis: scrutinizing Italian case law

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In the post-Second World War period, with some delay compared with the new world, the old Europe witnesses what has been called “institutional racism”. In other words, the centrality and complicity of law in upholding white supremacy can now also be witnessed inside European borders. Needless to say that the racial issue in Europe is intimately related to migration flows. EU Law presents fundamental weaknesses with regard to Third Country Nationals in the intersections between race, religion and nationality discrimination. In particular for non-EU nationals, these three grounds of discrimination can be closely related, and difficult to distinguish. Moreover, the recent Race Directive (Council Directive 2000/43/EC) does not have as its objective to redress collective racial or ethnic disadvantage as it does not provide for the enforcement of positive (*affirmative*) action. The emphasis on migration as a cultural problem or an ethnic-cultural problem hides the fundamental role of race in the formation of the new European legislation on migrants. This new “democratic” racism looks like a racism without races, a “cultural” racism, which risks rendering to no effect the traditional strategies against racism. As a result, it is time to examine the relationship between the racial power and professed ideals such as the “rule of law” and “equal protection” in the old world; in other words, how can this power be exercised legally inside the European territory. For the European societies, characterized by remarkable phenomena of migration, it is now impossible to underestimate the political and legal institutions’ power in embedding the basis for discriminatory realities.

In the United States, Critical Race Theory (CRT) has since the 1980s examined the role of the law in the construction and maintenance of racial domination and subordination and worked on the ways in which race and racial power are constructed and represented in American legal culture. The ‘Old World’, too, should now address the disclosure of what is hidden under the “impartial”, “general and abstract” law. Lawyers’ legal education, trial procedures, court decision, and legislative drafting all risk being imbued with racial prejudice. Racism is becoming the premise of the drafting and application of laws on migration. Far from being impartial, law reproduces

the structures and practices of racial domination, and reflects and produces racial power. It has been argued that it is time to investigate whether there is a growing divergence between the pretended European democratic identity and a *de facto* discriminatory practice towards migrants and their descendants in Fortress Europe, and whether there exists a “European dilemma” similar to the American one, centered on a new racial contradiction (1). Critical Race theorists have shown that “although race is socially constructed it is nonetheless “real” in the sense that there is a material dimension and weight to the experience of being “raced” in American society, a materiality that in significant ways has been produced and sustained by law” (2). This race-conscious and anti-essentialist approach to law has not yet crossed the Atlantic; the critical migration scholarship in Europe (excluding E. Balibar) rarely uses the socially constructed category of race as a category of legal analysis. The European analysis of the processes by which law participates in discriminating migrants is often based on a critical approach to the concept of citizenship. This is easily explained: at least first generation migrants are often deprived of a European citizenship and its associated rights; in contrast, when Critical Race Theory started its analysis in the eighties, “black people were not migrants”, they were African-Americans (3). CRT therefore failed to explore the relationship between race and migration law. This omission was the result of the assumption that the race issue in the US exclusively concerns African Americans and whites. It has only recently been shown, (the second half of the 1990s), thanks to new movements closely related to CRT like LatCrit (Latina & Latino critical legal theory) and Asian Critical Race Theory (*AsianCrit*), that immigration law is central to the subordination of Asians and Latinos. In the opinion of these new movements a complete outline of racism requires a study on how the immigration laws have affected all racial minorities. A careful examination of immigration law and policy has now become essential to understanding racial subordination in the United States. On the other side of the Atlantic the attention to the discriminatory attitude towards migrants through law has showed the ambivalence of the concept of citizenship. However, in this field of study, the racial implications of immigration law and policy have not been fully understood by legal theorists and migrants discrimination laws have not yet been related to racial subordination.

Many scholars have recently stressed how the use of citizenship as an inclusive instrument throughout the 20th century has come to a standstill. Qualifying citizenship as the ultimate privileged status, the Italian scholar Ferrajoli has stated that, in time of migration flows, citizenship is the main instrument for exclusion and discrimination (4). Many of the rights once conceived in the western tradition as universal and associated to the possession of the *status personae* are now exclusive to the holders of the

status civitatis, i.e. to lawfully members of the State. Rather than being the foundation for equality, the *status civitatis* is the privileged source of discrimination. The legal construction of the non-citizen as the holder of the *status migrantis*, who is not granted the same rights as citizens, is one of the main reasons why migrants are left vulnerable when confronted with the citizens' ("racial") prejudice. Their being legally inferior opens the door to their being perceived as anthropologically inferior, precisely because (s)he is legally inferior: "as well as equality of rights is the source of equality based on the respect of the other as equal, inequality of rights gives birth to the representation of the other as unequal" (5).

The modern legal order as constructed on the sovereign State system is characterized by the legitimacy of disparity of treatment of the foreigner, resulting in a lawful discrimination: the traditional citizen-foreigner dichotomy. Also the new European citizenship maintains a form of inclusion-exclusion by keeping intact the dichotomy between Union citizens and non-EU foreigners. The State has the power to legitimately discriminate when controlling the access and remove the residence of non-nationals on its territory and as well as in regulating access to its nationality (6). In this sense the most characteristic feature of citizen status in terms of fundamental rights is today the "*right to stay*" (7). In other words the crucial right related to citizenship is the right not to suffer expulsion from the State's territory. The relation of the migrant with the country of arrival is regulated by a "contract to stay" that allows the migrant to stay in the national territory only for the time needed to accomplish the work expected from him or her: the immigration laws see the migrant as labor force and not as an individual entitled to rights, definitely linking its right to stay to employment. In the European framework it is possible to speak of a proliferation of different legal positions according to rights-based membership reflecting a sort of post-colonial development of the EU model that gives rise to a subjective fragmentation of the law of foreigners (8). The multiplying range of subjective statuses depends upon the supposed degree of inclusion of migrants within the national community. European integration has produced the multiplication of subjective figures marking different degrees of inclusion within the European "community of law"; national citizen, European worker, non-EU worker, legally resident migrant, family member, illegal immigrant. In this ocean of distinctions, it becomes very hard to determine where the "normal" (*sic*) discrimination ends, the one that is *legitimately* inner to State power to discriminate between citizen and foreigner, and where the legally "unfounded" discrimination begins. Even though, when thinking of second generation migrants-citizens or the "immigrants' child-citizens", we may not witness discrimination on the basis of nationality, often their subordination is clearly based on ethno-racial diversity (9).

It is therefore time in Europe to uncover the legal construction of the other when acting through laws and policies in an exclusive or discriminatory manner, to disclose the exclusionary rules, normative codes and policies. The first step for a critical theory is to pay attention to immigration laws and their application which, through neutrality, can have racial impacts. The issue of racialization through migration law still needs a place in the European critical legal doctrine. The second step is to uncover the role played by racial ideology in the composition and culture of the main legal institutions. If these institutions can behave in an overtly or inherently racist manner, adopting behaviors that intentionally or unintentionally have racist outcomes, then legal scholars should account the processes by which law participates in “race-ing” European society.

To begin with the critical inquiry it is worth starting from a very recent “discriminatory” decision handed down by the Italian Supreme Court of Appeal (Corte di Cassazione – sezione civile I n. 5856 10th march 2010). Italy can be considered an example of this new form of institutional racism, the democratic racism that may oblige us to talk of a “European dilemma”. This decision perfectly falls within the new Italian trend that was opened by the “Security package” (July 2008). This Act, which has its political origins in the first Italian migrations laws (Turco-Napolitano 1998; Bossi-Fini, 2002), has been seriously criticized as for criminalizing migration at large. Excluding irregular migrants from schools, medical (including emergency) care and protection by security forces against crime, the Act also obliges doctors, teachers and civil servants to report immigrants, who they discover being illegal, to the authorities. In this sense the Italian State impedes migrants the access to fundamental rights recognized by the legal order to anyone irrespective of their being Italian citizen. Moreover these legislative acts allow, *inter alia*, for facilitated expulsions, the transformation of irregular immigration into a crime, and an extension of the period of detention of illegal migrants. In this new climate, it is not surprising that the Italian Supreme Court of Appeal has radically changed its previous consolidated case law in migration issues, overturning the application of a hierarchy of rules previously applied. The new Court’s case law is the product of a deeply politicized choice, even if it would have us believe that this decision is the product of an ineluctable legal logic. It is worth uncovering the politics hidden behind this new case law in order to start mapping the doctrinal mystifications which the current court has begun to develop to camouflage its discriminatory attitude.

The Court decision of march 2010 is related to the interpretation of art. 31 paragraph 3 of the Legislative Decree 25 July 1998, No. 286 *Combined text of measures governing immigration and norms on the condition of foreign citizens* (Testo unico dell’immigrazione). This paragraph reads as follows:

“The Juvenile Court, for serious reasons related to psychological and physical development of the child and in view of the age and health of the child who is in Italian territory, may authorize relatives to enter or reside for a specific period of time, in derogation of other provisions of this Act.”. From 2006 until March 2010 the Supreme Court of Appeal has interpreted this article to allow the “illegal” parent to have the right to establish (entry or stay longer) in the Italian territory for the exact period of time of the psychological and physical development of the child. This statement was clarified by the Court that gave the exact scope of Art. 31 par. 3: the paragraph was to be understood as an exception to the immigration Acts, as an exceptional way of acquiring a residence permit: this special authorization granted by the Juvenile Court was to be interpreted as an exceptional event because it derogates from the normal rules for the entry and residence of migrants. For the healthy psychological and physical development of the child the Court understood also the protection of the internationally recognized child’s right to education. In the Court’s opinion, the need to protect the superior interest of the child had to prevail over the general principle of borders defense. The Court stated that the legislator’s aim in 1998 certainly was that the child had a right to education within a familiar context. Since the right to education is linked to the psychological and physical development of the child, it cannot be affected or diminished by the administrative requirements of the parent’s residence permit. The parents expulsion would indeed impede or could interfere with this development, causing a psychological shock for the child. Moreover, in the Court’s opinion this exception could not be transformed in a regular residence permit, as the special authorization for parents with school-age child cannot be converted in a permanent work permit (art. 29 par. 6 TU). The fear of this being an alternative way to regularization for undocumented migrants was in the opinion of the Court totally unjustified.

Surprisingly enough, last March the Court has completely overturned its case law, in the name of Italian territory borders’ protection and of the principle of “securing” the border. The Court’s new discourse clearly plays on the “syndrome of the invasion” and the necessity to defend ourselves. The decision stated that when granting an exceptional residence permit, the term “exceptional” means the condition of the child from a psychological or physical point of view, and doesn’t mean the way of granting the residence permit for the child’s “illegal” parent. The Court has argued that the child’s right to grow and study within his family is nonetheless fully guaranteed by the principle of family unity and the right to family reunification (artt. 29 and 30 d.lgs n. 286 25 luglio 1998). Furthermore, in the “new” opinion of the Court this right is also guaranteed by art. 19 par. 2 of the same Act which stated that the child has the *right* (sic!!) to follow his parent to the destination where he/she is expelled. The opposite opinion, consolidated in

the previous case law, could allow the family - through the use of “legal trickery” - to put down roots in the Italian territory and therefore legitimize the inclusion of foreigners’ families by the exploitation of childhood. With this legal reasoning, the Court explains its decision to protect borders against unregulated immigration, thereby avoiding the abuse of law by illegal or irregular migrants. However, the real explanation of this choice seems to be its compliance with the Italian general suspicion against migrants. Moreover, even if the interpretation of the term ‘exceptional’ was not to be generally accepted, it is nonetheless a “good” excuse for legal operators (police force, administrative institution, law enforcers) to apply the law restrictively. It is clear that this is a judicial practice by which State representatives are discriminating on the basis of ethnic and racial criteria, notwithstanding the international and constitutional principle under which the interests of children prevail absolutely irrespective of nationality. Moreover, this principle should be the ground for any judicial or administrative decision concerning children as it is compliant with the 1989 New York Convention (*Convention on the Rights of the Child*), which has been endorsed by ratification in the Italian legal order in 1991 (Act n. 176, 27 may 1991). There is no legal argument for this new decision; on the contrary, it is possible to claim that in the Court’s new interpretation of the Act, there is a serious violation of a fundamental constitutional, and international, principle, unjustified from a strictly legal point of view.

This last effective application of the 1998 Immigration law by the Supreme Court of appeal reveals the emergence of an institutional discrimination policy in Italy. The fear for the abuse of law has brought the judicial institution to the denial of a fundamental human right. It is not the first time that concerning school matters the current Italian institutions have adopted a discriminatory approach towards Third Country national children. In the school framework, the encoded signifier in this discourse is always cultural compatibility. The nature of discrimination in school context is often produced through exclusionary activities, accompanied by a banal discourse of cultural difference (a coded racialised discourse). The discussions on the compatibility or incompatibility of cultures, on the distance between the migrants’ cultures and the majority national culture look, as it is well known, *per se* racist. Talking about migrants as “culture bearers” is a way of putting out of sight their being rights holders.

From a strictly legal point of view, this decision is complete nonsense because it affects the weaker subject internationally protected in its right to education, the child. This decision is justified on the basis that his parents could take advantage of his right to be protected. This unreasonable justification shows the irreducibly political character of the current Court’s general hostility towards migrants. It is even more absurd, because it allows

to shows that in Italy discrimination is still linked to the non-possession of citizenship. The figure of the migrant is a vital component in the process of inclusion and exclusion. The migrant permits the need to continuously reproduce the figure of the citizen, as the citizen is not a self-evident presence (10). The discrimination of the irregular/illegal migrant is constructed through an easy shortcut for legitimacy, the citizenship. The logic of ethicized, nationalized, racialised identities is grounded on the naturalization of the binary relationship of inclusion/exclusion. The given identity of the non-citizen is legally produced, and discursively he becomes a criminalized social enemy thanks to security rhetoric. The State has the “legitimate” power to discriminate between citizens and foreigners, regulating the access to the territory of non-national, but it is obliged to allow the access to the rights internationally recognized for the exceptional character of these rights and not for the exceptional charter of the specific case. Because this brings the public opinion to believe that the denial of citizenship authorizes and justifies the denial of any right to the holders of the *status personae*. Moreover, the State cannot prohibit the free access to what are to be considered social commons, i.e. those rights that we can rely on as members of the ‘human family’. The social commons must lie outside the realm of the institutional State: the public access to health care and education cannot be legally and legitimately prohibited. The need for a legal framework to protect this social commons, irrespective of the binary relationship of inclusion/exclusion, irrespective of race, nationality and culture, has to be taken into serious consideration.

1) Federico Olivieri, “La critica dei pregiudizi sui migranti come strategia contro le discriminazioni razziali”, in *Lessico delle discriminazioni tra società, diritto e istituzioni*, ed. T. Casadei (Reggio Emilia: Diabasis, 2008), 73-94.

2) *Introduction* to Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas ed., *Critical Race Theory. The Key Writings That Formed the Movement*, (New York: The New Press, 1995), XXVI.

3) Jennifer Gordon and R.A. Lenhardt, *Citizenship Talk: Bridging the Gap between Race and Immigration Perspectives*, *Fordham Law Review*, 75 (2007): 2943-2519, 2494: “In CRT, while “race” has been thoroughly deconstructed and interrogated, the notion of “citizenship” has rarely been examined with a critical eye. Meanwhile, in mainstream immigration legal scholarship, “citizenship” is subject to rigorous interrogation, but the concept of “race” is rarely raised and its social construction is infrequently challenged”.

4) Luigi Ferratoli, *Diritti fondamentali. Un dibattito teorico* (Roma-Bari: Laterza, 2002).

- 5) Ferrajoli, 26
- 6) Olivieri, 80.
- 7) Alessandra Sciarba in this issue.
- 8) Enrica Rigo and Sandro Mezzadra, “Diritti d’Europa. Una prospettiva postcoloniale sul diritto coloniale”, in ed. A. Mazzacane, *Oltremare. Diritto e istituzioni dal colonialismo all’età postcoloniale* (Napoli: Editoriale Scientifica, 2006).
- 9) Salvatore Palidda has spoken of an “Ill-timed posterity” (*Mobilità umane. Introduzione alla sociologia delle migrazioni*, Milano: Raffaello Cortina, 2008).
- 10) H.K. Bhabha, *Nation and Narration* (London: Routledge, 1990).