

FUNDAMENTAL HUMAN RIGHT

NON REFOULEMENT

EFFECTIVENESS

RECEPTION

INTEGRATION

CITIZENSHIP

STATE OF EXCEPTION

Those people fleeing from conflicts, refugees, asylum seekers, have the right to ***non-refoulement***.

The right to *non-refoulement* is the right to enjoy the protection from refoulement – the non-refoulement principle is one of the fundamental and universal human rights. This fundamental human right consists on the right not to be sent back to a place where a person can be deprived of life, subjected to torture, inhuman and degrading treatment. This principle embodies customary rights that do not exist only for their development in signed instruments having force of law but because it is a principle of *Recht*: the inviolable justice that transcends the positive rules¹.

Nowadays citizenship and capacity to act are the only differences in status that still surround the equality of human beings. Citizenship and capacity to act are the two parameters on which we can establish two great divisions among rights: that between universal fundamental rights and citizenship rights due respectively to all human beings or only to citizens, and that between primary rights (or substantial) and secondary rights (or instrumental or autonomy), respectively, due to all or only to people who are able to act².

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in

¹ R. ALEXY, *Theorie der Grundrechte* (1986), trad. spagnola di E. Garzón Valdés. *Teoria de los derechos fundamentales* Centro de Estudios Constitucionales. Madrid 1997, pp. 25 e 29; R. Alexy *Theorie der Grundrechte* (suhrkamp taschenbuch wissenschaft) Taschenbuch – 26. Januar 1986

² L. FERRAJOLI in *Principia Iuris* proposes a theoretical definition of "fundamental rights: " are "fundamental rights" all those rights which belong universally to "all" human beings since they have the status of people , or citizens or people capable of acting; intended for "personal right" any positive expectation (in performance) or negative (not injury) ascribed to a subject by a rule of law, and "status" the condition of a subject which is also expected to be a positive rule of law as a prerequisite of its capacity to be the holder of legal situations.

certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

The effectiveness of human right is the main gap between the declaration and the concrete protection of the fundamental right to that person

The right of *non refoulement* is a customary right as prescribes by article 31 of the Wien convention on treaties of 1969, article 31 of the Vienna Convention on Treaties of 1969 explicitly provides that any term of a treaty must be interpreted in light of the meaning and purpose of the Treaty itself, because the Treaty is an expression of the will of the contracting parties. The International Court of Justice itself (ICJ) has shown, in the case *Gabcikovo-Nagymaros Project (Hungary / Slovakia)* on 25 September 1997, that the interpretation of fundamental human rights has to guarantee the effective implementation of human rights themselves, without confining theme to a mere declamation. The International Court of Justice added that no Court can support actions that are in place against the protection of human rights themselves, as well as protected by a Treaty or an international convention, just because put in place before the signing of the Treaties they consider violations of the above actions³

The *non refoulement* principle does not exclude the sovereignty of States to regulate access to their territory for migrants without a visa, but every legal system has to respect the hierarchy of its sources, and therefore, the Conventions and International agreements have to prevail over the ordinary national legislation.

Non refoulement: effectiveness could be possible only in case of access to a safe territory, the access to legal guarantees a procedure to analyze the effective risk of *refoulment* in the single case of that person, the rights during the procedure (information, legal support, translation, etc), and then the right to an effective remedy in case of a negative decision, that means the right to appeal.

The right to effective remedy in safe condition is the *habeas corpus* of the effectiveness of each fundamental human right, that means that any authority has to recognizes the right of a person to exercise his/ her right to appeal against a decision that can sent back the person into a violation of the fundamental right to be safe in case of persecution, fundamental human rights violation

The right to seek asylum and the principle of *non-refoulment* could be possible only in case of access to a safe territory and only in case of adequate reception

The reception is a right prescribes by European laws, not just a free decision by states, this right is a pre-condition to have access to a safe place where legal and sanitary support could take place.

The access to a territory and the principle of *non refoulement* in case of persecution for a refugee are a fundamental human rights without any necessity to be citizens, but as a matter of fact, the

³ ICJ, *Gabcikovo-Nagymaros Project, Ungheria/Slovacchia* , 25 September 1997, in ICJ Reports 1997, 114.

violation and the exception in access to , for example a safe place, the right to interpreter, sanitary support for refugee people, the distinction between persons and citizens could open the door to the necessity of a new concept of citizenship able to face apartheid, discrimination, apartheid *banlieues* phenomenon.

The limitation of fundamental rights are possible in case of emergency situation, when from the legal point of could be possible a state of exception in a democratic society⁴. The state of exception starts when there are specific limitation to the access to fundamental rights for that society in the name of security, so, for example there could be the exceptional national law based on security that could prescribes, for a certain period of time, a limitation on privacy, right to movement. the Italian emergency migration laws are an example, but also the state of emergency laws in case of terrorism in France or in Benelux , to face an emergency , the national law prescribes a limitation of rights.

State of exception

Reception

Citizenship

Integration: to be part, cultural rights...

It could be possible to rethink to be a citizen because you are a person with the right to take part and have access. The economic resources could be the main reason to forbid the access to all the civil rights to a person who has the right to stay, to a person who has the right to non-to be in refoulement.

⁴ G. AGAMBEN, STATO DI ECCEZIONE, Bollati Boringhieri eds, 2003