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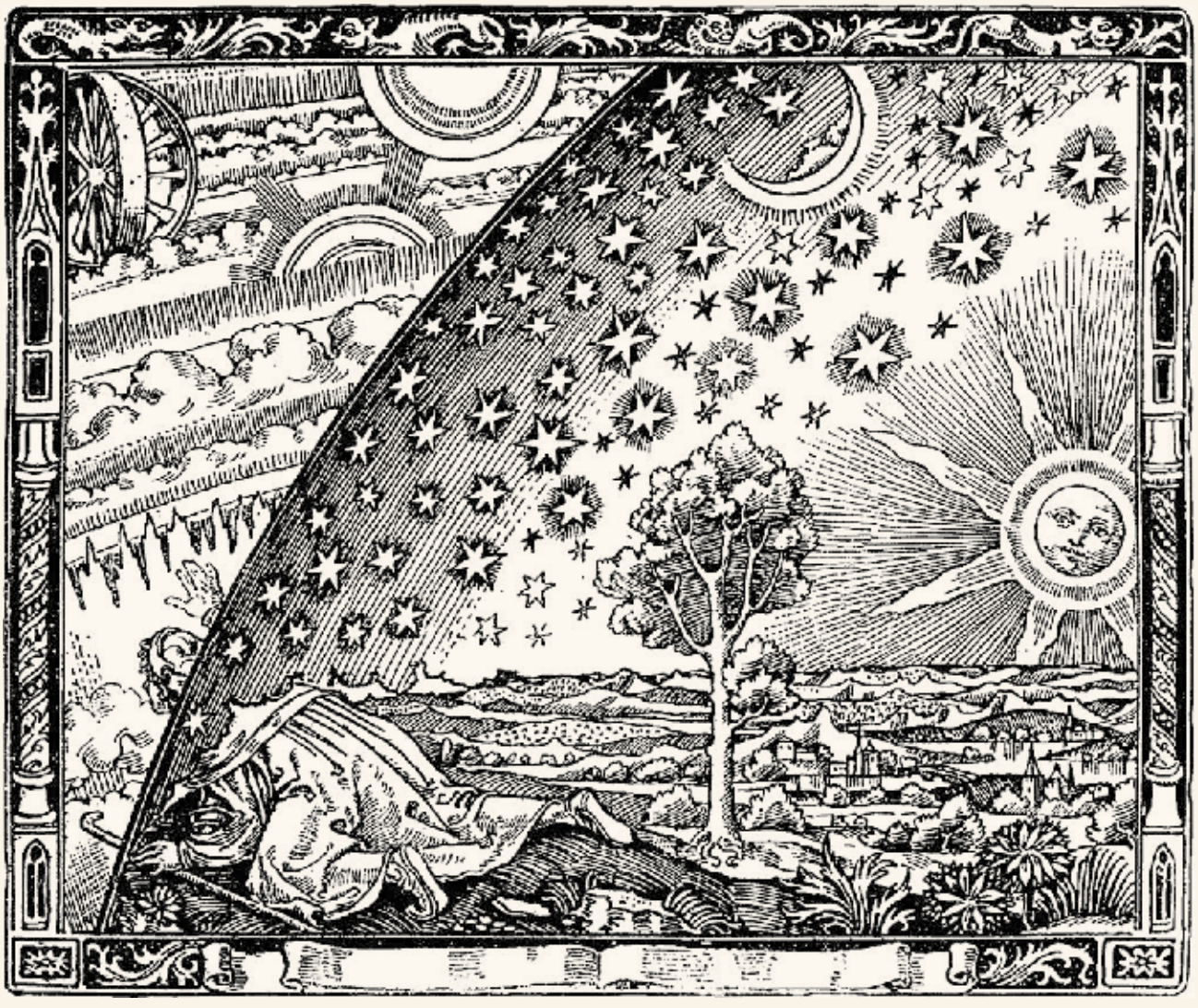
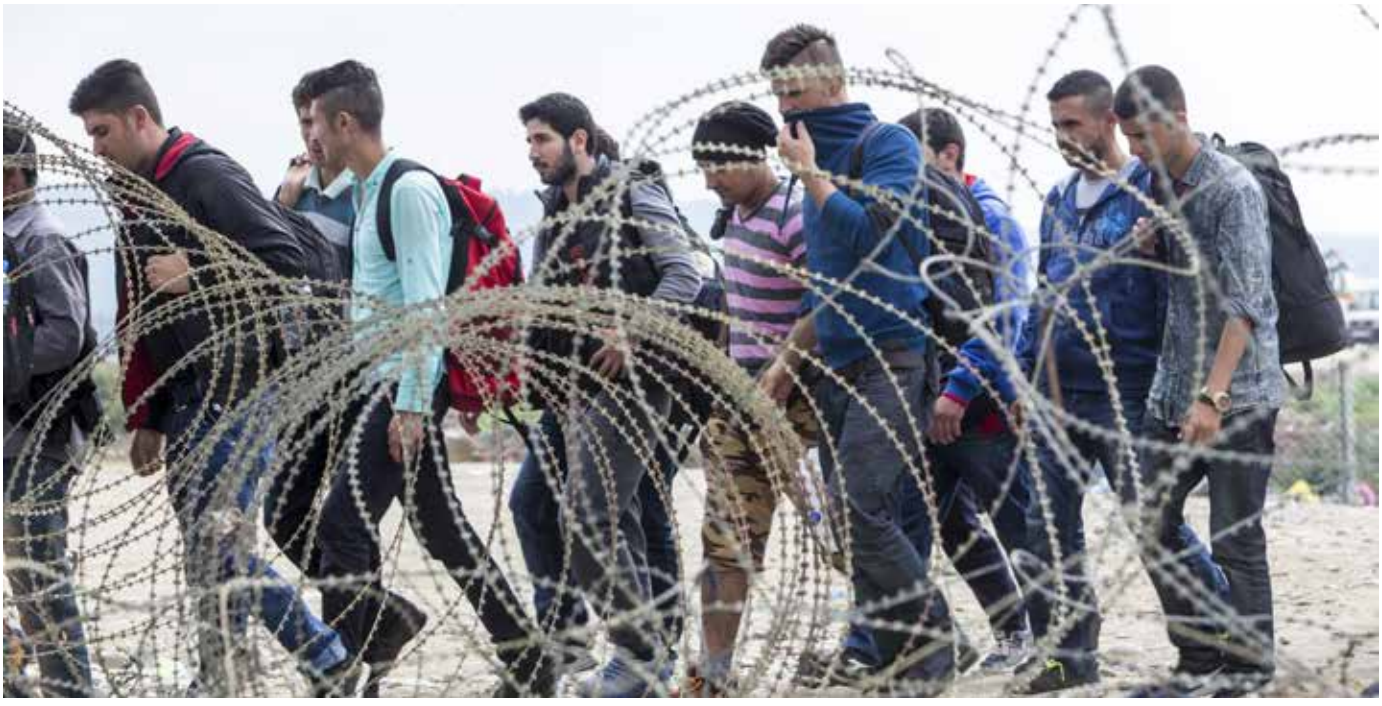


REIMAGINING PUNISHMENT AND JUSTICE

CRIMINALISING MIGRANTS

Belén Olmos Giupponi on the lost dream of a "world without borders" and constraints on the right to migrate



AS far back as the 16th century, revolutionary legal scholars argued for the existence of the *ius migrandi* as a right granted and protected under international law. In this libertarian approach the right of free mobility is a natural right which cannot legitimately be restricted unless there are exceptional circumstances.

This idea is embodied and reflected in articles 13 and 14 of the 1948 Universal Declaration of Human Rights, protecting freedom of movement and guaranteeing asylum respectively. However, the libertarian approach currently faces significant obstacles. Migrants are confronted with increasing restrictions that curtail their freedom of movement. Asylum continues to be a state-based procedure in which, in practice, there is a presumption that the country of origin is safe unless otherwise proven. Whenever a 'migration crisis' arises, borders controls are tightened. This is particularly true in Europe where modifications in the EU member states' asylum policy and the implementation of the EU return policy have led to a growing 'securitisation' of EU migration policy and the criminalisation of undocumented migrants.

Asylum has been included as one of the main areas of cooperation at EU level, with the Dublin system for allocation of responsibility for processing asylum claims. The Treaty of Amsterdam (1999) upgraded cooperation by including asylum policy in the founding treaties as well as so-called 'international protection'. Several other non-binding resolutions on asylum matters have been adopted by the EU. The establishment of a Common European Asylum Policy has been marked by the difficulties in articulating an efficient and meaningful system to deal with asylum claims. Traditionally, the United Kingdom has kept out of the application of EU asylum provisions.

Currently, refugee law is a substitute protection, 'in addition to identifying serious harm potentially at risk in the country of origin, a decision on whether or not an individual faces a risk of being persecuted must also comprehend scrutiny of the state's ability and willingness effectively to respond to that risk' (Hathaway and Foster 2014). The Asylum quarterly report (EU, Eurostat) reveals that the number of first time asylum applicants increased by more than 150 % in the third quarter of 2015 compared with the same quarter of 2014 and almost doubled compared with the second quarter of 2015 (UK Refugee Council, 2013). The 'refugee crisis' has raised concerns on the unsustainability of the current system.

If an individual fails to secure refugee status he or she falls into the category of illegally staying or undocumented migrant, subject to deportation unless the status of internationally protected person is granted under EU law. This has led to controversial cases, such as those where migrants who were denied refugee status were returned to their countries of origin and exposed again to the risk they had fled, in some cases, death. This is the background in which the current legal framework, modelled upon the Return Directive adopted in 2008, sets out the rules and principles to be applied by Member States to third country nationals who do not fulfil, or no longer

fulfil, conditions of entry in accordance with EU legislation. The scenario is fragmented as the United Kingdom and Ireland opted out of this part of EU Law and therefore are not obliged to fulfil the Directive. The consequence of this opt out is that neither the United Kingdom nor Ireland have a time limit on the detention of migrants. This in turn leads to the prolonged detention of vulnerable people despite a presumption that detention should only be considered in exceptional circumstances.

In many cases migrants who fail to obtain this legal status are returned, thus it is crucial to observe how the Return Directive is being implemented in the years after its adoption. As in other cases, EU countries were supposed to implemented the Directive by the most appropriate means. However, many EU member states, for example Italy, did not pass any new modifications and Italian authorities only implemented the Directive after being criticised in 2010 by the Court of Justice of the EU (El Dridi case) on the grounds that some of its legal procedures (especially the long period of imprisonment as punishment for refusing to leave the country after receiving a deportation order) were in conflict with the Return Directive.

A comparative study published in 2014 based on fieldwork carried out in Italy, Spain and Cyprus has revealed that, in practice, the effective enforcement of the Directive has hardened the conditions imposed on undocumented migrants (Di Filippo 2016). At the same time, the EU Fundamental Rights Agency and the Council of Europe have emphasised the need for State authorities to comply with minimum procedural guarantees (such as providing legal assistance to immigrants) and respecting human rights when carrying out removals (they must be safe, dignified and humane). In the El Dridi case, the Court examined the admissibility of criminalising the non-compliance of a repatriation order following a period for voluntary departure. In its judgement, the Court recalled that in principle Member states are allowed to adopt measures - including criminal law measures - to avoid the irregular stay of third-country nationals in their respective countries. However, the Court specified that although criminal law falls into the responsibility of each Member State, this particular branch could be subordinated to European Union law. As a result "States may not apply rules, even criminal law rules, which may jeopardize the achievement of the objectives pursued by the Directive, depriving it of its effectiveness". Therefore, the Court established the need to balance Member States' power in matters regarding undocumented third-country nationals under deportation orders with the need to safeguard "the *effet utile* of the directive".

In a similar case, the Achoughbabian judgement decided in December 2011, the Court reasserted the findings of the El Dridi judgement and confirmed that the Return Directive 2008/115 *does not preclude penal sanctions in line with national criminal legal procedure* with regards to undocumented third-country nationals who are residing in the territory of a member state without any justified grounds for non-return (par. 48). However, penal sanctions could only be applied if the return procedure had already been requested. This safeguard does not apply in the United Kingdom and Ireland where the status of such third-country nationals without justified grounds is already treated as a penal condition and not as a transitional one.

Not surprisingly, after El Dridi v Italy (2011) several other cases on the implementation of the Directive emerged inaugurating a "new era" in CJEU case law. In further cases related to the compatibility of national legislation imposing certain penal sanctions for illegal staying (assignment to stay at home; immediate expulsion) and domestic law provisions criminalising non-compliance with an entry ban, the Court reaffirmed these criteria.

As anticipated by previous NGOs reports, the return of immigrants has also raised concerns around the protection of children's rights. Cases heard before the European Court of Human Rights, concerning the return of third-country nationals including children have resulted in the European Court of Human Rights concluding that there have been violations of Article 8 of the ECHR due to flaws in the decision-making process, in particular, the failure to protect the 'welfare principle', the lack of consideration of the best interests of the child and ineffective coordination between the authorities in determining and protecting such interests.

Taking into consideration the manner in which the return policy is carried out in the different EU Member States and different controversial situations for the respect of human rights arising from asylum cases, one can conclude that serious constraints are imposed on the right to migrate and to obtain asylum. Despite the 'good intentions' as the recent case law appears to suggest, when EU Member States are faced with migration, the outcome is not always favourable to compliance with human rights obligations imposed by regional European law and customary international law.

Despite the protection guaranteed in international human rights law, the implementation of EU law is not only limiting in practice the libertarian approach which supports the idea of international human rights law geared to protect migrants and refugees, but also tolerates the criminalisation of migrants and those who support and aid them. A critical reimagining of *ius migrandi* is perhaps a necessary beginning to a humane and just asylum policy.

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Di Filippo M (2016) '*From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures*', available at http://osservatorio-immigrazione.jus.unipi.it/blog/2016/01/29/oltre-dublino-idee-per-il-cambiamento/

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Cases

Case C-61/11, El Dridi, *supra* n. 25.

Case C-329/11, Achughbabian [2011] I-12695 (France).

Case C-430/11, Sagor [2012] ECR 777 regarding the compatibility of Italian law with the Directive. Case C-297/12, Filev and Osmani [2013] *supra* n. 98 (Germany). Case C-166/13, Case C-166/13, Mukarubega [2014] *supra* n. 98, Request for a preliminary ruling (France).