The Securitization of Migration in Europe:
Italy’s Decree Laws on “Security and Immigration” as a case study

LPIS Thesis
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# Table of Content

1. **Introduction** ........................................................................................................... 4

   Research Question and Relevance ............................................................................ 9

2. **The theory of securitization: literature review and conceptual framework** .......... 11

   2.1 The development of the concept of security ...................................................... 11

   2.2 Securitization Theory and the Copenhagen School ............................................. 13

   2.3 Limitations and criticisms of securitization theory ............................................. 18

      2.3.1 The context ........................................................................................................ 18

      2.3.2 The role of practices and the techniques of government ................................. 21

      2.3.3. The exceptional character of security outcomes ............................................. 22

   2.4 The proposal for an interdisciplinary research ..................................................... 24

   2.5 Conclusion on the theory ....................................................................................... 25

3. **Decree Law No. 113/2018** ................................................................................. 26

   3.1 The legal form of Decree Law No. 113/2018 ...................................................... 27

   3.2 The Content of Decree Law No. 113/2018 ......................................................... 29

4. **Decree Law No. 53/2019** .................................................................................... 32

   4.1 The legal form of Decree Law No. 53/2019 ......................................................... 33

   4.2 The legal content of Decree Law No. 53/2019 ..................................................... 34

5. **Conclusion** ............................................................................................................ 38
1 INTRODUCTION

Migration is a highly divisive phenomenon in Europe. In recent years, xenophobic movements and the extreme right are urging government parties to make Europe safer by closing borders and promoting security and restrictive policies against migration, and are gaining broad electoral support, dominating the European elections1. The growing intolerance of the electorate towards immigrants is recorded throughout Europe.

In 2018, according to the public opinion of the Member States, migration flows are confirmed at the first place among the challenges that the European Union must face2. 40% of the citizens interviewed, in fact, placed the migration issue before terrorism (at the second place with 20%); and the state of public finances of the EU countries (19%). The great attention that public opinion reserves to migrations, however, takes place at a turning point: in 2018 irregular migration to the EU returned to 2013 levels3. Whilst in 2015 and 2016, at the height of the crisis, almost 2.3 million irregular migrants had entered the European Union, in 2018 the total number of illegal border-crossing was only 150,0004 (i.e. 90% less, and equivalent to 0.03 % of the EU28 population). So, why does public opinion still fear migration so much5?

Recently, the European Parliament has denounced a worrying situation which does not spare any Member State, and which spreads from "neo-fascist violence"6, from Greece to Italy, from the United Kingdom to France, in particular towards minorities such as migrants, Jews, Muslims, Roma, LGBTI and disabled people. Another reason for concern is also the collusion of political leaders, political parties and law enforcement with neo-fascists and neo-nazis. Therefore, not only is the impunity of neo-fascist and neo-nazi groups in some Member States criticized, but also Member States are called on condemn and sanction “hate crime, hate speech and scapegoating by politicians and public officials at all levels and on all types of media, as they directly normalize and reinforce hatred and violence in society”7.

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1 Extremist parties were widely represented in the European Parliament elected in 2014. Anti-immigrant positions are expressed by the European party group Europe of Nations and Freedom, which brought together 38 parliamentarians (out of a total of 750 MEPs) from parties such as the French Front National, the Italian Lega Nord, the Dutch Partji de Vrijheid and the Belgian Vlaams Belang; by the Europe of Freedom and Direct Democracy Group, which had 45 European parliamentarians from the Italian Five-Star Movement or the UK Independence Party; by the Confederal Group of the European United Left-Nordic Green Left, which united 51 European parliamentarians from Tsipras-L’Altra Europa, Podemos, Sinn Fein, Bloco de Esquesrda, Portugues Communist Party, Die Linke.


3 Ibid.


5 Dempsey, J. (September 13, 2018). Judy Asks: Is Europe Afraid of Migration?, available online at: https://carnegieeurope.eu/strategiceurope/77246


7 Ibid.
Moreover, in several European states xenophobic and racist forces have reached the government and have been responsible for security-migration policies and the denial of subjective rights. For example, Hungary is a country against which the European Commission is carrying out an infringement procedure, started in 2015, concerning its asylum and immigration policy. To be challenged is the criminalization of associations which assist asylum seekers, who, with the entry into force of the new legislation, find themselves in a condition of isolation and do not receive adequate information on their rights. The procedure for the examination of the application for international protection, particularly in border and transit areas, is called into question: the systematic detention of asylum seekers, especially those under the age of 14, who are denied the right to appeal against the deprivation of liberty, is disputed. Furthermore, the immediate rejections to Serbia, preventing people to apply for international protection and to have their situation examined, are also under indictment.

However, since 2017, the support for the "populist right" in Europe has fallen. Against this trend, Italy is an exception. Before of the country’s general elections in March 2018, the apparent decline in support for anti-immigration populism has not been registered in Italy. The polls, first, and the elections’ results, then, showed instead a growing support for the increasingly anti-immigration Lega Nord of the leader Matteo Salvini, whose popularity has grown behind his intransigent and anti-migrant position. Immigration, in fact, from a non-issue in 2013, represents the second most important issue for Italian voters in 2017, demonstrating how it played a crucial role in the electoral results. To date, polls support the Lega Nord at 39%, more than twice its share in last year’s parliamentary elections, making it easily the most popular party.

(Importantly), the Italian migration policy of the last few months has been marked by a defensive and security approach that has determined the compression of fundamental rights guaranteed both by the internal system and by the European and international regulations, as well as by a propagandistic rhetoric that has made the foreign citizen the scapegoat of the country's economic and cultural crisis. Since coming into power in June 2018, the new Italian Government has adopted a restrictive approach to the internal norms, reforming the architecture of the Italian system of international protection, as well as to the international norms, reforming the rules on search and rescue operations and public order, implementing the anti-immigration and exclusionary measures it campaigned upon. Between September 2018 and August 2019, substantial changes


9 Committee for the Prevention of Torture, Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 18.09.2018.


11 Ibid.

12 Ibid.; see Eurobarometer, May 2013 and November 2017

13 See Barone, N. and Nuti, V. (May 27, 2019). Successo Lega e sorpasso del Pd sul M5S: ecco ora le condizioni di Salvini, in “Il sole 24 ore”, available online at: https://www.ilsole24ore.com/art/europee-lega-primo-partito-pd-sorpassa-cinque-stelle-ACpay9; the Lega Nord party of Matteo Salvini had reached 34.33% of votes in the European elections of May 26, 2019, the double of consensus with respect to the 2018 general elections.
were made to the Italian asylum system, as well as to the possibility of undertaking search and rescue operations at sea.

The Decree Law No 113/2018\textsuperscript{14}, converted into Law No 132/2018\textsuperscript{15}, concerns "Urgent provisions on international protection and immigration, public safety, as well as measures for the functionality of the Ministry of the Interior and the organization and functioning of the National Agency for the administration and use of property sized and confiscated from organized crime". The decree-law consists of three titles: the first deals with the reform of the right to asylum and citizenship, the second with public security, prevention and fight against organized crime; and, the third, with the administration and management of seized assets and confiscated from the mafia. Among the main measures introduced by the decree-law on migration, there are: the abolition of humanitarian protection, the extension of the period of detention in permanent centers for repatriation (CPR), the revocation of citizenship in the case of conviction for crimes related to terrorism, the reform and the downsizing of the ordinary reception system for asylum seekers (SPRAR), the extension of the period of detention of asylum seekers inside the hotspots, the revocation of the refugee status to those who are convicted at first instance for certain types of crimes.

The Decree Law No. 53/2019\textsuperscript{16}, concerning “Urgent provisions on public order and security”, also known as "security decree-bis", because of its ideal continuity with the Decree Law No. 113/2018, entered into force on June 15, 2019, and was definitively approved by the Senate on August 5, 2019. At the moment, the Law is expected to be promulgated by the President of the Republic. The decree-law introduces various innovations, divided into three fundamental pillars: the contrast to illegal immigration, public order and security (Chapter I); the strengthening of the effectiveness of administrative action supporting security policies (Chapter II); the contrast to violence at sporting events (Chapter III).

These provisions, strongly wanted and promoted by the Minister of the Interior Matteo Salvini, and for this reason also known in the news as "Salvini decree"\textsuperscript{17}, regulate, among other things, various measures on migration. In the first, the abolition of humanitarian protection, the restriction of the protection system for asylum seekers and refugees (SPRAR), the extension of the period of detention in permanent centers for repatriation (CPR) and that of detention in the hotspots, the revocation of citizenship in the case of conviction for crimes related to terrorism, new limits for the granting of international protection and the decay of the refugee status for those convicted in the first instance for certain crimes, are just some of the aspects that the

\textsuperscript{14} Decreto-legge 4 ottobre 2018 n. 113, recante "Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata".

\textsuperscript{15} Legge 1 dicembre 2018, n. 132, di “Conversione in legge, con modificazioni, del decreto-legge 4 ottobre 2018, n. 113, recante disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell’interno e l’organizzazione e il funzionamento dell’Agenzia nazionale per l’amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata. Delega al Governo in materia di riordino dei ruoli e delle carriere del personale delle Forze di polizia e delle Forze armate”.

\textsuperscript{16} Decreto-legge 14 giugno 2019, n. 53, recante “Disposizioni urgenti in materia di ordine e sicurezza pubblica”.

\textsuperscript{17} See his Tweet at: https://twitter.com/matteosalvinimi/status/1060133413427077120
The second, among the measures concerning the management of public order, provides measures aimed to combating the ‘facilitation of illegal immigration’, by means of the restriction or prohibition of the entry, transit or stay of ships in the territorial waters, therefore, the closing of Italian ports to NGO’s ships that rescue migrants, and establishes sanctions in the event of violation.

The two decree-laws not only share the fact that they contain provisions on security and migration together, but also the type of procedure for adoption of the law, and the consequences they produced in the internal, as well as international, legal system in terms of respect of fundamental rights.

The justification for the regulatory interventions explains the reasons of extraordinary necessity and urgency that legitimize, pursuant to Art. 77 of the Italian Constitution, the exception to the principle of the parliamentary monopoly of the legislative function. Therefore, reasons relating to migration policies are shown with reference to public order and public safety. The decree of necessity and urgency on migration and asylum takes the form of a law-decree, a provisional measure, which is approved by the Government (and issued by the President of the Republic) in extraordinary cases of necessity and urgency. The law-decree enters into force, with the force of law, once published in the Gazzetta Ufficiale. In both cases at issue, an emergency decree was approved; in both cases, the Parliament placed its vote of confidence at the time of conversion into law, a circumstance which accelerated the procedure for adoption, but which did not allow for parliamentary debate.

Importantly, the new government's approach has raised the serious criticism of the President of the Republic18, of the United Nations19, of important sectors of the Italian institutions20, and of civil society21. Both changes to Italy's migration policy have raised the remarkable criticism of UN’s human rights experts, who have denounced that

“The abolition of humanitarian protection status, the exclusion of asylum seekers from access to reception centres focusing on social inclusion, and the extended duration of detention in return centres and hotspots fundamentally

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18 Letter to the President of the Council, available at: [https://www.quirinale.it/elementi/18099](https://www.quirinale.it/elementi/18099)
20 CSM, Parere ai sensi dell’art. 10 L. 24.3.1958, n. 195, sul decreto legge 113 del 4 ottobre 2018 recante: “Disposizioni urgenti in materia di protezione internazionale e immigrazione, pubblica sicurezza, nonché misure per la funzionalità del Ministero dell’Interno e l’organizzazione e il funzionamento dell’Agenzia nazionale per l’amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata” (Delibera consiliare del 21 novembre 2018), available at: [https://www.csm.it/documents/21768/92150/parere+decreto+sicurezza+%28delibera+21+novembre+2018%29/b80ecee0-0d61-e4b4-183c-9e20b48aac55](https://www.csm.it/documents/21768/92150/parere+decreto+sicurezza+%28delibera+21+novembre+2018%29/b80ecee0-0d61-e4b4-183c-9e20b48aac55)
21 Among these, see [https://www.ilmessaggero.it/politica/manifestazione_anti_razzista_roma-4098396.html](https://www.ilmessaggero.it/politica/manifestazione_anti_razzista_roma-4098396.html); See also the appeal of Padre Zanotelli, [https://www.ilfattoquotidiano.it/2018/12/06/dl-sicurezza-padre-zanotelli-lancia-un-appello-online-e-una-legge-che-trasuda-la-barbarie-leghista-e-incostituzionale/4816194/];
undermine international human rights principles, and will certainly lead to violations of international human rights law.”

Moreover, they claim that

“Removing protection measures from potentially thousands of migrants and limiting their ability to regularise their stay in Italy will increase their vulnerability to attacks and exploitation. They will be at greater risk from traffickers and other criminal groups, and many will have no means to meet their basic needs through lawful means. Exclusion also leads to social tensions and to more insecurity. An inclusive approach would therefore benefit not only the migrants, but also the Italian people.”

Furthermore, the experts denounce the climate of hatred and discrimination, which may also lead to manifestations of violence against migrants and high minorities in the country. In this sense, they refer to the political propaganda of the same government which proposed the law-decrees at issue. The experts said that “During the most recent electoral campaign, some politicians fuelled a public discourse unashamedly embracing racist and xenophobic anti-immigrant and anti-foreigner rhetoric. Such speech incites hatred and discrimination,” highlighting that this climate of intolerance “could not be separated from the escalation in Italy in hate incidents against groups and individuals, including children, based on their actual or perceived ethnicity, skin colour, race and/or immigration status.” Importantly, they refer to the records reported by civil society organisations of the “169 racially motivated incidents, 126 of which involved racist hate speech and propaganda”, during and after he 2018’s national election campaign.

Lastly, UN experts expressed their concern over the detention and criminal proceedings against the German captain of the rescue vessel Sea Watch 3, denouncing the threats to the judge who ruled her release as unlawful. “Rescuing migrants in distress at sea is not a crime” the experts said. “We urge the Italian authorities to immediately stop the criminalisation of search and rescue operations.” The Decree Law No. 53/2019 was described as a “rushed legislative measures” which have “the potential to seriously undermine the human rights of migrants”.

On the basis of what has been said so far, it remains difficult to explain the necessity and urgency of such measures, unless the exercise of subjective rights, such as the right to asylum, or also the respect of international obligations, such as rescue at sea, represent a matter of maintaining public order and the security of a country.

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22 Supra note 20
23 Ibid.
24 Ibid.
26 Ibid.
27 See the study on the Constitutional Court, Nevola, R. (2017). La decretazione d’urgenza nella giurisprudenza costituzionale. Available at: https://www.cortecostituzionale.it/documenti/convegni_seminari/STU_304_Decretazione_ura.png
1.1 RESEARCH QUESTION AND RELEVANCE

It is with the above setting in mind that this dissertation aims to investigate the following research question:

*How do the Italian “security and immigration” law-decrees represent a case of securitization of migration?*

In International Relations, defining what is security - and consequently what determines in-security - constitutes an enormous power. Security is, in fact, closely linked to the possibility of adopting exceptional measures within decision-making processes which are usually also exceptional.28

Traditionally, the concept of security has been associated with the defense against threats of a military nature and the preservation of the sovereign state.29 In this understanding, however, the security nature of migration is not self-evident, representing no military threat.

For this purpose, Buzan, Waever and de Wilde - the so-called Copenhagen School – in their famous Security, a New Framework for Analysis (1998), developed a specific analytical framework to determine which issues could enter the concept of security, with the aim to preserve the discriminatory power and intellectual coherence of the concept. The concept of “securitization” indicates the process by which the understanding of a particular political and social phenomenon is mediated by a security prism. Securitization theory aims to analyze the process of social construction that pushes an ordinary sector of politics into the sphere of security issues, by means of a rhetoric of danger and threat that aims to justify the adoption of special measures that exceed the legal framework. In the Copenhagen School’s words, securitization is

“the staging of existential issues in politics to lift them above politics. In security discourse, an issue is dramatized and presented as an issue of supreme priority; thus, by labelling it as security, an agent claims a need for and a right to treat it by extraordinary means.”30

In other words, securitization is the process by which a question is transformed into a security-related issue, regardless of its objective nature, or the concrete relevance of the supposed threat:

“If by means of an argument about the priority and urgency of an existential threat the securitizing actor has managed to break free of procedures or rules he or she would otherwise be bound by, we are witnessing a case of securitization.”31

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30 Ibid. 26
31 Ibid. 25
“Securitization is not fulfilled by only breaking rules (this can take many forms) nor solely by existential threats (they can lead to nothing) but cases of existential threats that legitimize breaking of rules”\(^\text{32}\).

Therefore, “a successful securitization […] has three components (or steps): existential threats, emergency action, and effects on interunit relations by breaking free of rules”\(^\text{33}\). In conclusion, securitization is a political choice that allows the adoption of exceptional means, including the limitations of rights otherwise considered inviolable, on the basis of the indication that, if the problem is not addressed, “everything else will be irrelevant”\(^\text{34}\).

Consequently, the Italian decree of necessity and urgency - in the cases of Decree Law No. 113/2018 and Decree Law No. 53/2019 – is an interesting case study for the application of securitization theory, for three main reasons:

1. The decree of necessity and urgency on security and immigration;
2. The legal nature of the act adopted – the exception to the principle of the parliamentary monopoly of the legislative function;
3. The alleged negative consequences of the securitizing move on the validity of the legal system.

Drawing upon the literature on securitization theory, this dissertation will critically reflect on the power of security in order to explain the security logic governing immigration and asylum policies in Italy, namely, how are they justified with reference to the political-juridical regime, and which consequences they have on the validity of the legal system.

\(^{32}\) Ibid. 25
\(^{33}\) Ibid. 26
\(^{34}\) Ibid. 24
2 THE THEORY OF SECURITIZATION: LITERATURE REVIEW AND CONCEPTUAL FRAMEWORK

Defining what is security – and, consequently, what determines in-security - constitutes an enormous power in the field of International Relations. Der Derian summarizes this idea very effectively when he states that no other concept in international relations owns the metaphysical power of security and links this force to the acceptance of the idea that only one form of security can exist. Security is, in fact, closely linked to the possibility of adopting exceptional measures within decision-making processes which are usually also exceptional. Therefore, it involves a departure from the normality of political processes.

However, it is tracing the evolution of the concept of security that the uniqueness of security is questioned and, rather, ties between security and the long-term changes in the organization of the international political system and its main actors - states - emerge. Among those who have most contributed to understanding this evolution, scholars belonging to the so-called Copenhagen school have exposed the power of security by analyzing the processes that lead to legitimizing the adoption of exceptional measures in response to existential threats. After briefly tracing the evolution of the concept of security, the proposal of the securitization theory by the Copenhagen school will be presented, and its limits and potential will be highlighted.

2.1 THE DEVELOPMENT OF THE CONCEPT OF SECURITY

International Relation theorists hold two competing perspectives on international security: a traditional perspective and the perspective of the so-called “wideners”. Traditionally, the concept of security has been associated with the defense against threats of a military nature and the preservation of the sovereign state. Its close connection with the diplomacy of the great powers of the system of modern states progressively defined security in terms of national security. In fact, the modern state was born with the main function of neutralizing enemies outside its own territory, making the existence of formal boundaries a key element for the exercise of its authority and leading to understanding security, above all, in terms of territorial defense of the state. The idea behind this conception is that of the Hobbesian contract, in which, in exchange for the recognition of its sovereign authority, the individual guarantees the state not only the right, but also the duty to protect and, therefore, to define its own security. This led to a progressive restriction of the concept, linking national security to the military and state sectors.

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35 Supra note 28, 24-25
36 Supra note 29, 2
37 Supra note 28, 25-27
With the Cold War, the link between national security, the military sector and the state has strengthened, also helped by the spread of realism and neorealism in International Relations and their general acceptance of the Hobbesian political culture of anarchy. Mearsheimer represents this idea incisively:

"states operate both in an international political environment and an international economic environment, and the former dominates the latter in cases where the two come into conflict. The reason is straightforward: the international political system is anarchic, which means that each state must always be concerned to ensure its own survival. A state can have no higher goal of survival, since profits matter little when the enemy is occupying your country and slaughtering your citizens."

This leads not only to an objectification of security in its military dimension, to be inextricably linked to the state, sovereignty, territority, and the maintenance of the existing order, but also to the Waltzian consideration that "in anarchy, security is the highest end."

This perspective dominated the field of Security Studies until an attempt was made to broaden the semantic sphere of the notion of threat, to include threats of a non-strictly military nature, and to consider other reference objects of security than the state. Criticisms of this vision of security have been strongly expressed since the 1980s, when scholars began to reflect more systematically on the fact that a definition of national security in purely military terms leads to ignoring other sources of insecurity and contributes to a militarization of international relations. Even the prevailing state-centrism has been questioned, based on the consideration that national security cannot disregard the internal structure of the state or the international system. For this reason, it is appropriate to consider individual groups, organizations and individuals as reference objects of security. Furthermore, since many security threats derive from the international system, it is at this level that many security policies are addressed.

However, it was only with the end of the Cold War that these first attempts found more space. Accordingly, early literature about Security Studies, based on military conflict, began to be re-examined chiefly after the end of the Cold War, when questions about what now constituted security, and security threats, began to emerge. Since in the early 1990s a “350-year span of history” dominated by military competition was coming to an end, military questions were no longer the main agenda of international politics. The highlighting of the problems caused by the exclusive attention to the military sector (i.e. the arms race) and the exclusion of

war as a realistically possible event in mutual relations have brought, instead, other threats to be considered more ‘close’ (i.e. economic collapse, ethnic rivalry, organized crime, etc.)

Importantly, the end of the Cold War established “the meaning of what ‘international security is about’, and did so with sufficient depth that this still serves as the center of gravity around which the many subsequent widening and deepening debates within ISS revolve. Long standing patterns were declining, giving way to a more complicated global order, where there was a simultaneous development of both local and global identities which overlap each other. The need to overcome the one-dimensional and state-centric view of traditional security enhanced the spread of alternative visions structured around “schools of thought”, homogeneous approaches having in common the opposition to the traditional vision of security and, therefore, a multidimensional approach to the understanding of security and a greater attention to subjects other than States.

2.2 SECURITIZATION THEORY AND THE COPENHAGEN SCHOOL

The securitization theory developed in this context from the contributions of Buzan, Waever and De Wilde, belonging to the so-called "Copenhagen School", who first responded to the call for expanding the meaning of security, arguing that a broader, updated description of security was now needed. Their work represents one of the most advanced attempts to systematize the concept and to define the processes that lead to the identification of its threats.

In 1993, Identity, Migration and the New Security Agenda in Europe brought society to the fore as a focus of insecurity and the problem of identity as the main trigger. Importantly, with this work, authors from the same Copenhagen school explain how processes of this kind also apply to the field of migration. Initially, indeed, immigration became mostly considered in relation to the issue of identity through its association with the concept of “societal security”, that is, as one of the main possible threats to the survival of society. From the very beginning, the idea of societal security, as opposed to traditional state security, offered an effective tool for understanding the new security agenda in Europe.

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46 (at least in the western world)
47 Booth, supra note 45
48 Buzan and Hansen, supra note 39, 68
49 Booth, supra note 46, 314-315
51 Ibid.
52 Ibid.
Yet, it is with *Security: A New Framework for Analysis (1998)*\(^{55}\) that the components of the Copenhagen School articulate in a comprehensive way the expansion of the concept of security, identifying more relevant sectors, rejecting the objectivity of security threats, and highlighting the importance of securitization, namely, the analysis of the process that leads to the construction and identification of security threats as a justification to resort to exceptional measures to deal with the supposed threat.

Accordingly, the Copenhagen School’s theory of securitization is an approach to security that is multi-sectorial, whereas, besides the traditional military sector, this includes also the economic, political, environmental and ‘societal’ ones; and constructivist, whereas it provides a means of understanding the process of social construction of threats that makes something a security issue in international relations\(^{56}\). Indeed, Waever suggests that security is “a practice, a specific way of framing an issue”\(^{57}\). That said, does it follow that everything can be security?

Initially, the central question to the discussion on securitization, specifically “what is security?”, was claimed to remain an “essentially contested concept”\(^{58}\). A first attempt to provide a definition was later made by Buzan, who writes that security is survival, understood as “the pursuit of freedom from threats and the ability of states and societies to maintain their independent identity and their functional integrity against forces of change which they see as hostile”\(^{59}\). By the same token, Waever proposed to frame this type of threats with the notion of “societal security”\(^{60}\), that is the ability of a society to persist in its essential characteristics even in conditions of social change and under the pressure of potential or concrete threats. In this way, the concept of societal security opened up the possibility of a “referent object” other than states.

Accordingly, existential threats can be understood in relation to the different sectors in which security is articulated and, within which subjects to be defended can be identified\(^{61}\). If, in fact, in the military sector the subject to defend is the sovereign state and threats are configured above all in terms of violations of territorial integrity, in the political sector, in addition to the state, to be considered are supra- and sub-state entities able to obtain the loyalty of their adherents, and threats will be directed above all to sovereignty, ideologies and internal order. In the societal sector, where ideas and practices allow an individual to identify himself as a member of a social group, the referent object is “any collectivity that defines its survival as threatened in terms of identity”\(^{62}\): collective identities, nations, ethnic minorities, culture, religion, etc..

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\(^{55}\) Buzan et al., supra note 29

\(^{56}\) Ibid. 21


\(^{58}\) Buzan, supra note 44, 6

\(^{59}\) Buzan, supra note 53, 432

\(^{60}\) Waever, et al. supra note 50

\(^{61}\) Buzan et al., supra note 29

Whilst constituting a substantial innovation to the classic state-centered paradigm of Security Studies, the societal security approach does not change the exclusionary logic of the discourse on security, but further reinforces its ability to reproduce a political imaginary centered on fear and enemies. According to Doty, what threatens the presumed fixity of the inside with respect to the outside of a State or a society are sources of insecurity that trigger the logic of the traditional security discourse. This is based on a principle of exclusion that refers to an understanding of the self and the other closely linked to the territory. From this point of view, even the solutions designed to deal with these security problems will appeal to “an exclusionary logic that seeks to determine the criteria for differentiation between self and other.” Moreover, another contribution resulting from the notion of societal security remains in the important separation between the “referent object”, that which is to be secured, and the “securitizing actor”, who asserts this security. This distinction between referent objects and securitizing actors eventually opens up for the possibility to develop a general theory of circumstances under which an actor successfully ‘securitises’ a specific threat on behalf of a specific referent object.

If, indeed, even for the Copenhagen School security concerns survival, to set up such an open analytical framework for security (where this becomes multi sectorial) required to specify the characteristic quality of security issues. Significantly, in Security: A New Framework for Analysis (1998), Buzan, Waever and de Wild, “recognize too that an uncritical widening of the concept of security would deprive it of its discriminatory power and would undermine its intellectual coherence.” For this purpose, these scholars developed an analytical framework which avoids “an a priori reduction of the traditional approach towards security.” Thus, “securitization” is defined as

“the staging of existential issues in politics to lift them above politics. In security discourse, an issue is dramatized and presented as an issue of supreme priority; thus, by labelling it as security, an agent claims a need for and a right to treat it by extraordinary means.”

This idea is further clarified by emphasizing the distinction between the concept of “politicization” and that of securitization. Specifically, the argument develops as follows:

“‘Security’ is the move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics. Securitization can thus be seen as a more extreme version of politicization.”

In this way, the Copenhagen school starts from the recognition of a spectrum that goes from non-politicized (the problem is not only not addressed, but also not included in the political debate or considered in decision-

64 Ibid.
65 Werner, supra note 54, 3
66 Ibid,
67 Buzan et. al, supra note 29, 24
68 Ibid. 23
making processes) to politicized (the issue has entered the political agenda, it is managed by standard political processes and subject to public policies) to securitized (meaning the politicized issue is “presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure”69). Accordingly, Buzan and Waever later argue that, in International Relations, this framing has a particular logic70: “an instance qualifies as security” when a securitizing actor pose it “as a threat to the survival of some referent object ... which is claimed to have a right to survive”71. In this way, survival provides the issue with a singular urgency and allows some authoritative actor to claim a right to use “extraordinary means” outside of “normal politics”, or break free of normal rules to address it, for reasons of security72.

Accordingly, Buzan and Waever later argue that, in International Relations, this framing has a particular logic: “an instance qualifies as security” when a securitizing actor pose it “as a threat to the survival of some referent object ... which is claimed to have a right to survive”71. In this way, survival provides the issue with a singular urgency and allows some authoritative actor to claim a right to use “extraordinary means” outside of “normal politics”, or break free of normal rules to address it, for reasons of security.

In this understanding, securitization is therefore a political choice that allows the adoption of exceptional means, including the limitations of rights otherwise considered inviolable, on the basis of the indication that, if the problem is not addressed, “everything else will be irrelevant”73. Therefore, for the Copenhagen school, security is "a self-referential practice, because it is in this practice that the issue becomes a security issue"74. Importantly, the distinction of securitization from the normal political processes that leads the Copenhagen school to focus on the security move.

Following, the securitization move is structured around three main elements. First, the act of securitization is understood as a “speech-act”, the discursive practice though which an existential threat to a referent object is presented. With this definition, the approach to security has clearly turned constructivist, in the sense that it does not ask whether an issue is in itself a ‘threat’, but rather focus on the questions of “when and under what conditions who securitises what issue”75. Importantly, security does not emerge as a consequence of objective circumstances – ‘real’ threats – but rather because a securitizing actor has done something to identify, label and frame an issue as such. That something is the political process of securitization. The second element, indeed, is constituted by the securitizing actor, i.e. by those who perform the linguistic act, the security move. Political leaders, bureaucracies, governments, lobbyists and pressure groups often play this role, but other actors, who normally enjoy visibility or occupy privileged political positions, could also occupy this role76. Finally, the third element is the audience, “those the securitizing act attempts to convince to accept exceptional procedures because of the specific security nature of some issues”77. Refraining from assessing whether an act of securitization refers to ‘objective’ circumstances, the authors of securitization theory opt for “an external

69 Ibid. 23-24
70 Buzan and Waever, supra note 62, 71
71 Ibid.
73 Buzan, supra note, 29, 24
74 Ibid.
75 Buzan and Waever, supra note 62, 71
76 Buzan et al., supra note 29, 40
77 Ibid. 41
perspective” and analyze “the social practice in which calls for extreme measures in order to cope with the existential threats (so called ‘securitization moves’) are accepted or rejected by a significant audience”78:

“If by means of an argument about the priority and urgency of an existential threat the securitizing actor has managed to break free of procedures or rules he or she would otherwise be bound by, we are witnessing a case of securitization”79.

Importantly, the analytical theory of securitization focuses on the linguistic analysis of securitarian “speech-acts”, according to a perspective that places emphasis on the significant intention of the author of the illocutionary act. Thus, for the Copenhagen School, security threats exist only to the extent that a securitizing actor has successfully carried out a securitizing speech, a discursive practice aimed at persuading a given target audience that some valued referent object faces an existential threat. In the words of Waever, security as a speech act “is not interesting as a sign that refers to something more real; it is the utterance itself that is the act. By saying the words, something is done […]”80. In conclusion, a speech act does more than just describing ‘an existing security situation’81; it labels a situation as a security issue, and “thereby claims a special right to use whatever means are necessary to block it”82.

“Securitization is not fulfilled by only breaking rules (this can take many forms) nor solely by existential threats (they can lead to nothing) but cases of existential threats that legitimize breaking of rules”83.

In conclusion:

“A successful securitization thus has three components (or steps): existential threats, emergency action, and effects on interunit relations by breaking free of rules”84.

78 Werner, supra note 54, 4;
79 Buzan et al., supra note 29, 25
80 Ibid. 26
82 Wæver, supra note, 72, 55
83 Buzan et al., supra note 29, 25
84 Ibid. 26
2.3 LIMITATIONS AND CRITICISMS OF SECURITIZATION THEORY

Although the securitization theory proposed by the Copenhagen school has represented a turning point in Security Studies and has been applied to a wide range of problems until recently ignored, some aspects have been criticized, often with the aim to improve the proposal, but in some cases so radical as to lead to the formulation of alternative proposals for securitization. Only the main ones will be highlighted here.

In the Copenhagen School’s theory, securitization is as an exclusively discursive practice which provides a singular emphasis on the role and interests of the author of the discourse. This means that security threats exist only to the extent that they are experienced subjectively, and that the structuring role of the context, within which these actors move, is overshadowed. Arguably, some scholars studying securitization claim that it is not the language itself, but the symbolic power associated with the word of certain social actors to have a performative efficacy in producing the securitization effect. This power does not lie in the mere performativity of the linguistic act itself, but also in the concrete action of the social actors and in their ability to affect the environmental context in which they operate. Consequently, important questions arise: what determines issue selection? What is the role of the context? What differences in the outcomes of securitizing moves can be derived from different contextual features?

Departing from the speech act literature, the next section of this paper presents some key theoretical arguments around which securitization debates have revolved in recent years: the role of the context, the role of practices and techniques of government, the exceptional character of security outcomes.

2.3.1 THE CONTEXT

The theoretical basis for developing a contextual analysis of securitization processes had been provided by the same Copenhagen School when, inspired by the notion of “felicity condition” theorized by Austin for the existence of illocutionary acts, Buzan and his colleagues traced the profile of the “facilitating conditions” for a successful securitizing speech act. In addition to the internal linguistic-grammatical conditions, for which the speech act must follow the grammar of security (i.e. existential threat), they identify external, non-discursive social conditions that can facilitate or limit the securitization process. Alongside the linguistic act in the strict sense, the securitizing actor must be in a position of authority vis-à-vis the targeted audience.

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87 Buzan et al., supra note 29, 66-67
However, whilst they claim that “the issue is securitized only if and when the audience accepts it as such”\(^{88}\), the concept of audience is left “radically underdeveloped”\(^{89}\) and requires “a better definition and probably differentiation”\(^{90}\). Yet, no comprehensive explanation has been provided about the relationships that link the different contextual elements and Stritzel, indeed, underlines the existence of a significant contradiction in the Copenhagen School’s dealings with the context\(^{91}\). Whilst Waever declares himself skeptical “toward contextual elements”\(^{92}\), on the other hand, he acknowledges that “certain arguments that are powerful in one period or at one place can sound non-sensible or absurd at others”\(^{93}\). Consequently, the theory of securitization of the Copenhagen school has remained trapped in a sort of theoretical-epistemological indecision between a perspective in which the performatative capacity of an illocutionary act changes, by itself, the configuration of a context, and a vision of securitization as an intersubjective process that involves specific actors within a specific social and political context\(^{94}\).

By refining the role of the context in securitization processes, Balzacq contrasts the internalist and externalist views of the context\(^{95}\). The former is that of the Copenhagen School, while the latter is that of some scholars who claim that “[t]he context-dependent character of security is a constitutive feature of its ‘semantic repertoire’”\(^{96}\). Whilst they agree that a speech act “reworks or produces a context by the performative success of the act”\(^{97}\), they also consider the possibility that a context has an independent status and can, in turn, ‘rework’ a discursive assertion. Particularly, Huysmans claims that “a cultural-historical interpretation of the rhetorical structure [of securitization] would reduce a tendency to universalize a specific logic of security”\(^{98}\) because the meaning of security would result from a “specific cultural and historical experience”\(^{99}\). This claim is reinforced by Balzacq, who argues that “the semantic repertoire of security is a combination of textual meaning – knowledge of the concept acquired through language (written or spoken) – and cultural meaning – knowledge

\(^{88}\) Ibid 25
\(^{91}\) Stritzel, supra note 85
\(^{94}\) Stritzel, supra note 85, 364
\(^{96}\) Balzacq, et al., supra note 90, 503
\(^{97}\) Buzan et al., supra note 29, 46
\(^{98}\) Huysmans, supra note 85, 501
\(^{99}\) Ibid.
historically gained through previous interactions and current situations.“ By the same token, Stritzel’s approach to securitization processes also calls for integrating “security articulations [in] their broader discursive contexts”.

The context of the securitization process assumes, as suggested by Stritzel, two different dimensions: a socio-linguistic dimension and a political-institutional dimension. It takes place within a cultural framework that concretely provides the semantic and symbolic repertoire to which the actor of securitization can appeal. The illocutionary act takes root in a context of more or less socially shared meanings that determine, to a greater or lesser extent, the conditions of success of the process of securitization. The latter is the existence of a receptive environment, with respect to the language used and to the meaning that the lexicon of security that is used assumes in that given context. The context is precisely the structure of cultural, legal, institutional and political constraints that determine which strategic actions the actors can take in view of a securitization process. This is not to say that the actors are completely over-determined by the role of the structures that define their space of action - the idea of a discursive strategy remains -, but that the context determines a preliminary reduction of the available options, linking the responses of the various players involved to certain strategic models. Therefore, according to the externalist approach, the meaning of security is contextually shaped and, depending on the context, “certain actors will be exceptionally well positioned to articulate a security discourse.” In other words, the context “empowers or disempowers security actors.”

At present, an important contribution to the consolidation of a contextual view of securitization has been provided by the development of a “sociological” approach to securitization. By posing a new emphasis on the role of practices, rather than discourses, in securitization processes, this approach highlights how different presentations and acceptances of the securitizing moves depend on “the wider social environment.”

Not surprisingly, this phenomenon can be especially witnessed in the European Union, where the introduction of new issues in the security agenda is allegedly related to the abolition of border controls, which led to considering transnational crime as a matter of international (“common internal”) security. The idea was that, due to the integration process, the nation state was now deprived of “crime and immigration filters” and, therefore, this would pose “serious security problems in the fields of terrorism, international crime (especially drug related crime) and illegal immigration” (Werner, 1998: 2). Huysmans concludes that, in this context, migration has increasingly been politicized as a threat to public order, cultural identity, and domestic

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100 Balzacq, supra note 85, 11
101 Stritzel, supra note 85, 359-60
102 Ibid, 369
103 Balzacq et al., supra note 90, 504
105 Ibid.
106 Balzacq et al., supra note 90, 504
and labour market opportunities, increasingly expressing the need for the protection of public order and the preservation of the community identity. Consequently, the securitization of migration in the EU has developed on the basis of three connected themes, internal security, cultural security and the welfare state crisis, the settings in which migration has been first constructed as a threat, and subsequently securitized.

Eventually, the aim is to explore, with greater precision, how the context promotes, fosters or limits a specific outcome.

### 2.3.2 THE ROLE OF PRACTICES AND THE TECHNIQUES OF GOVERNMENT

In recent years, the evolution of securitization theory has been significantly influenced by Foucault’s theory of governmentality. Importantly, scholars applying the framework developed by Foucault claim that this provides securitization theory with an “analytics of government”, that is, “an analysis of the specific conditions under which particular entities emerge, exist and change”, and therefore enables scholars to unveil how security practices work.

Accordingly, in a departure from the focus on the linguistic reading of securitization, other scholars - labelled as the “Paris School”- have recently shifted the focus of securitization theory towards the role of practices, or techniques of government, rather than discourses, in securitization processes. According to this perspective, the proponents of this new approach to securitization, pioneered by Bigo, argue that the Copenhagen School’s theory suffers from an important limitation, in that it “reduces the designation of an existential threat to a purely verbal act or a linguistic rhetoric”. The symbolic mediation through which securitization is produced can also be carried out through non-discursive practices and institutional developments, such as the use of particular institutional tools, certain technologies of surveillance and control. In other words, this process also takes place through the attribution of specific skills and the creation of powers in the hands of security professionals called to govern the danger and threats.

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109 Ibid.


112 Wæver, supra note 92, 16


114 Ibid.
As Bigo and Balzacq point out, these operational tools take the form of institutional complexes which, following a Foucaultian perspective, could be understood as particular aggregates of discursive and non-discursive elements. Such institutional devices are, of course, security devices that are activated to govern certain problems, contributing in turn to their security framing. They play a decisive role in crisis management, while at the same time playing a role in defining threats simply because they are activated. According to Bigo, indeed, “[i]t is possible to securitise certain problems without speech or discourse and the military and the police have known that for a long time. The practical work, discipline and expertise are as important as all forms of discourse.” In this understanding, Huysmans claims that “the acts of the bureaucratic structures or networks linked to security practices and the specific technologies that they use” may play an active role in the process of securitization. Consequently, this approach to securitization contributes to overcoming the requirement of audience acceptance of the linguistic approach.

Following form this discussion, the next section aims to show the theoretical debates around the concept of exception in securitization theory.

### 2.3.3. The exceptional character of security outcomes

According to the Copenhagen School’s approach, which develops around concepts derived from Schmitt's political theory through the mediation of the philosophy of Agamben, the securitization process represents an exemplification of the spread of the exception paradigm as a tool of government of contemporary societies. On the other hand, according to the approach to securitization which relies primarily on the work of Foucault on security technologies and the neo-liberal government’s regime, the process of securitization represents the reflection of a strategy used to govern the insecurities multiplied by the neo-liberal political-economic regime.

From this point of view, the political-juridical context, within which the actor of the securitization process is forced to move, thus, assumes a particular structuring force, ending up exerting pressure on the adopted discursive strategy and forcing the main actor to a continuous negotiation in which the images of danger and security, norm and exception are constantly redefined. It is the context, in fact, that places certain actors in a position to affect the securitization process with less or greater success, while establishing the limits around which the process of defining the rule and the exception takes place.

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119 Foucault, supra note 111
According to the two perspectives under discussion, the results of the securitization process are substantially divergent. In the first case, the political rhetoric tends to identify the threat as a potential enemy, capable of endangering the very existence of society; for this reason, there is a tendency to appeal to political strategies and measures of an exceptional nature that generally involve the suspension of the legal framework and faster procedures for political decision-making, the only ones considered capable of effectively combating an existential danger. This, indeed, is the Copenhagen school’s approach.

In the second case, on the contrary, the securitization of threats is linked to the diffusion and development of a series of control tools that are not exceptional, but originate in the daily practice of security experts and in the sphere of police collaboration. As Bigo points out, "securitization takes place through everyday technologies, through continuous rather than exceptional power effects, through political battles, but above all through institutional competition in the field of security experts where interests are at stake more trivial". The threats of which security experts must take responsibility are certainly disturbing, because they are capable of endangering our freedom, but to some extent represent the very extent of this freedom. For this reason, there is no dramatization of the dangers and the technocratic language of ‘risk’ governance prevails over the exceptional language of the emergency.

Consequently, the objective of the instruments put in place by the transnational security elites is not so much the elimination of an existential threat, but that of the management within a certain threshold of tolerance of the inevitable risks of freedom. From the point of view of migration control, for example, it is a selective management technology that allows to govern the security problems posed by the liberal circulation regime imposed by globalization, without the need to place excessive limits on the freedom of risky-free riders.

Finally, and most importantly, those who have focused on the study of practices have emphasized the different dynamics that drive the securitization process depending on whether they considered security practices or security discourses. Whilst the discourses tend, in fact, to have a dramatic character, aimed at emphasizing the threat and invoking the breaking of the ordinary juridical-political framework, the security practices seem to work through an incremental logic, which slowly and daily erodes the juridical-political framework without dramatic invocations of the state of emergency. In this regard, the governance of insecurity in contemporary societies would have essentially favored a pervasive spread of the security logic, ending up by producing a sort of low intensity, permanent emergency based on the wide use of security management devices.

As mentioned above, the power of defining what is security (and in-security) relies on the “possibility of adopting exceptional measures within decision-making processes which are usually also exceptional”. Despite revealing important for understanding the presence of security actors and tools in migration management,

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120 Bigo, supra note 113, 73)
122 See Bigo, generally
especially in the case of the EU\textsuperscript{123}, however, it could be argued that the ‘Foucaultian’ approach on the modalities of securitization appears to have lost the analytical coherence of the concept of security.

\section*{2.4 The proposal for an interdisciplinary research}

In the previous chapter, it was shown how some concepts of the Copenhagen School’s theory remained underdeveloped or unanswered, therefore allowing such a radical criticism that alternative approaches have been formulated and the power of security has somehow been transformed.

Likewise, Werner views securitization theory as a “point of departure for interdisciplinary research into the conditions determining the success or failure of an act of securitization”\textsuperscript{124}. However, by acknowledging that “[t]he most important concepts used by the Copenhagen Group are akin to some key concepts used in legal theory”, Werner's interdisciplinary research not only contributes to clarify the main conceptual elements for an act of securitization to be successful, but also succeeds in giving justice to the idea of securitization as a practice that goes beyond the rules that apply in times of normalcy.

On the basis of the insights advanced by the institutional theory of law, Werner concludes that legal theory can contribute to “determine the consistency of the terminology and the scope of application of the concept of securitization”, namely, the distinction between an act of politicization and of securitization, as well as the difference between the suspension and the violation of rules. Specifically, legal theory contributes to define the conceptual framework of the Copenhagen School in three major ways.

First of all, by reflecting on the concept of rules in analytical legal theory, Werner clarifies the concept of “normal politics” or “established rules of the game”, which underlie the distinction between an act of politicization and an act of securitization. The concept of “normal politics” is broadened by means of the notion of “primary” and “secondary” rules developed by the legal philosopher Herbert Hart\textsuperscript{125}. Besides the primary “mandatory norms of conduct” – which, traditionally, referred to a “system of imperatives” with the function of providing an obligation or permission to do or to refrain from doing something\textsuperscript{126} - the established rules of the political game also comprise “secondary rules”, “in virtue of which accepted norms and principles can be validated, changed and authoritatively interpreted”\textsuperscript{127}.

\textsuperscript{123} See the study of Léonard on the main activities of Frontex, the European external borders agency, in Léonard, S. (2010). \textit{EU border security and migration into the European Union: FRONTEX and securitisation through practices.} European Security, 19(2), 231-254

\textsuperscript{124} Werner, supra note 54, 14


\textsuperscript{127} Werner, supra note 54, 6
Consequently, for an act of securitization to be successful, an issue should be dealt with outside the established primary and – above all- secondary rules. Any rule adopted according to established procedures, fall outside the scope of “securitization”. – “irrespective of the content of the measures adopted”128.

Secondly, legal theory helps to clarify the difference between the breaking and the suspension of rules. Indeed, with reference to the conception of the legal system as an ‘extra-linguistic institution’ which “confers legal validity on a vast array of speech acts”129, “it becomes clear that the successful performance of an act of securitization requires a special position within an extra-linguistic institution (such as the legal system)”130. Importantly, the institutional theory of law allows for so-called “reflexive legal acts”, allowing for “institutionally regulated change in the legal system”131.

Therefore, reflexive legal acts are a type of speech act that can be defined as a “suspending legal act”, whose successful performance yields a legally valid presentation of parts of the legal system as suspended in order to deal with a legally valid representation of a state of affairs (an object being threatened and the impossibility to deal with this threat on the basis of the normal rules of the game)”132. Following, the suspending legal act results successful “if the legal community accepts both the represented threat and the presentation of parts of the legal system as suspended”133. In conclusion, Werner argues that “if an actor successfully performs an act of securitization (a suspending legal act) (s)he cannot break the rules of the game, because the validity or scope of application of these rules is then suspended”134.

Finally, Werner’s interdisciplinary approach reveals “the fundamental role of institutions in the performance of acts of securitization”, whereas he claims that “the suspension of rules, on the other hand, requires the existence of constitutive and regulative rules empowering an actor to perform derogating legal acts”.

2.5 CONCLUSION ON THE THEORY

The changes in security, from mono- to multidimensional, are closely linked to changes in the processes of definition of threats and the most appropriate responses to be given. In turn, these are linked to political processes related to the context. If defining what constitutes a threat has always represented an enormous
power, traditionally in the hands of state actors, the transformations of the modern state have profoundly affected who can exercise this power and how. Even with its limitations, the contribution of the Copenhagen School had the merit of breaking with an objectifying vision of security and of starting to explore the processes of interaction that lead to the identification of security threats and the legitimization of the adoption of exceptional measures in response. This study highlights the intentionality of the process, thus giving prominence to both the political responsibility of those who initiate the securitization process and that of the society in the acceptance or rejection of the security move: thereby, the power of security is exposed.

3 Decree Law No. 113/2018
The Decree Law No 113/2018\textsuperscript{135}, converted into Law No 132/2018\textsuperscript{136}, concerns "Urgent provisions on international protection and immigration, public order, as well as measures for the functionality of the Ministry of the Interior and the organization and functioning of the National Agency for the administration and destination of property seized and confiscated from organized crime".

The decree consists of three titles: the first deals with the reform of the right to asylum and citizenship, the second of public security, prevention and fight against organized crime; and, the third, of administration and management of property sized confiscated from the organized crime.

Among the main measures introduced by the decree-law on migration, there are: the abolition of humanitarian protection; the extension of the period of detention in permanent centers for repatriation (CPR) and the extension of the period of detention of asylum seekers inside the hotspots; the revocation of citizenship in the case of conviction for crimes related to terrorism; the reform and the downsizing of the ordinary reception system for asylum seekers (SPRAR); the revocation of the refugee status to those who are convicted at first instance for certain types of crimes. For reasons of space and purpose, the content analysis will focus on the first two of these provisions.

3.1 The legal form of Decree Law No. 113/2018

The first doubts, with regard to compliance with the Constitution, concern the type of act: the motivation for "extraordinary cases of necessity and urgency", the only ones which can legitimize the adoption of a decree-law, pursuant to Art. 77 of the Italian Constitution, seems to be groundless.

This choice is justified by necessity and urgency

"to provide for measures to identify the cases in which special temporary residence permits are issued for humanitarian reasons, as well as to guarantee the effectiveness of the execution of expulsion orders"\textsuperscript{137}

and

"to adopt rules on the revocation of the status of international protection as a consequence of ascertaining the commission of serious crimes and of suitable rules to prevent the recourse to the application for international protection, to rationalize the use of the protection system for holders of

\textsuperscript{135} Decreto-legge 4 ottobre 2018 n. 113, recante "Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata"

\textsuperscript{136} Law 1 dicembre 2018, n. 132, di “Conversione in legge, con modificazioni, del decreto-legge 4 ottobre 2018, n. 113, recante disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell’interno e l’organizzazione e il funzionamento dell’Agenzia nazionale per l’amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata. Delega al Governo in materia di riordino dei ruoli e delle carriere del personale delle Forze di polizia e delle Forze armate”

\textsuperscript{137} Decree Law n. 113/2018
protection international and for unaccompanied foreign minors, as well as provisions aimed at ensuring the proper conduct of citizenship granting and recognition procedures\textsuperscript{138}.

However, there is no emergency situation in relation to the numbers of temporary humanitarian protection\textsuperscript{139}, or as regards the presence of refugees\textsuperscript{140}. The urgent necessity to intervene in matters of expulsion, reception of refugees and procedures on citizenship remains also unclear. These are all subject that, undoubtedly, can be modified, but remains questionable whether such change, or "rationalization", as stated in the decree-law, effectively constitutes an "extraordinary case" that legitimates the urgent regulatory intervention of the executive.

Furthermore, the presence of a heterogeneous content does not correspond to the rationale of the decree-law. As the Constitutional Court affirms\textsuperscript{141}: "the inclusion of heterogeneous norms with the object or purpose of the decree breaks the logical-juridical link between the evaluation made by the Government of the urgency of the provision and ‘the provisional measures with the force of law’ "; "the presupposition of the extraordinary ‘case’ of necessity and urgency always and only pertains to the provision understood as a unitary whole, a normative act provided with intrinsic coherence, even if articulated and differentiated within it". It follows that "the atomistic decomposition of the condition of validity prescribed by the Constitution is in contrast with the necessary link between the urgent legislative provision and the ‘case’ that made it necessary, transforming the decree-law into a set of rules assembled only from mere temporal randomness"\textsuperscript{142}.

The "structure of legislative sources", as the constitutional judge points out, influences the form of government and "is related to the protection of fundamental values and rights"\textsuperscript{143}. In line with the principle of separation of powers and the recognition of popular sovereignty, Art. 70 of the Italian Constitution attributes the legislative function to the two Chambers and Art. 77, provided that "the Government cannot, without delegation from the Chambers, issue decrees having the value of ordinary law", relegates to the space of exceptionality the exercise of primary legislative power of the Government. A decree-law - as stated by the constitutional judge with constant jurisprudence since 1995\textsuperscript{144} - that does not comply with the requirements of Art. 77 can therefore be judged to be unconstitutional. Despite the Court's self-restraint on the matter, given the space of the political evaluations and the structural elasticity linked to the rationale of the provision, there

\textsuperscript{138} Decree Law n. 113/2018
\textsuperscript{140} Centro Studi e Ricerche IDOS, in partenariato con il Centro Studi Confronti, con il sostegno e la collaborazione di varie organizzazioni nazionali e dell’Organizzazione Internazionale per le Migrazioni, Dossier Statistico Immigrazione 2018, Scheda di sintesi, 2018, pp. 2-3
\textsuperscript{141} Constitutional Court, sent. n. 22 del 2012
\textsuperscript{142} Ibid.
\textsuperscript{143} Constitutional Court, sent. n. 171 del 2007.
\textsuperscript{144} Sentence No. 29
were plenty of decisions in this sense\textsuperscript{145}. Moreover, the choice of the urgent decree, outside the strict confines of the Art. 77 of the Italian Constitution, violates the principle of popular sovereignty, both by abolishing Parliament as a forum for confrontation between political forces and by hindering the development of discussion in society.

The defect of constitutional illegitimacy of the decree-law cannot be remedied by the Conversion into law: it inevitably, as the Constitutional Court has also specified\textsuperscript{146}, has an impact on the law of conversion, which cannot assume as an object of conversion an illegitimate act. The use of the question of confidence in the Senate approval procedure, and also in the Chamber, restricts further space for debate and narrows parliamentary freedoms.

Another matter of concerns is that the urgency is motivated by obscuring assumptions of incorrect behavior or, at least, excessively "permissive" in the view of the Government, as emerges where there is reason for the need to introduce "suitable rules to avoid the use of the instrumental application of international protection"\textsuperscript{147}, or "provisions intended to ensure the proper conduct of the procedures for granting and recognizing citizenship"\textsuperscript{148}. The political will to limit the entrance or the stay of foreigners in the territory appears fueled by a culture of suspicion and results in adversity and discredit towards the work of public administrations, which are accused of an incorrect use of the law in force, in order to justify the need to intervene. Eventually, this attitude does not seem to respect the principle of separation, and mutual respect, between the powers.

\subsection*{3.2 The Content of Decree Law No. 113/2018}

\textsuperscript{145} For a detailed reconstruction of the constitutional jurisprudence on the evident lack of the assumptions, see Nevola, supra note 27, 46-

\textsuperscript{146} Constitutional Court, sent. n. 29 del 1995

\textsuperscript{147} Decree Law n. 113/2018

\textsuperscript{148} Decree Law n. 113/2018
The abolition of humanitarian protection

Article 5, paragraph 6, of Legislative Decree No.286/1998, stated that: "the refusal or revocation of the residence permit can also be adopted on the basis of international conventions or agreements, rendered enforceable in Italy, when the foreigner does not meet the residence conditions applicable in one of the Contracting States, except that there are serious reasons, particularly of a humanitarian nature or resulting from constitutional or international obligations of the Italian State. The residence permit for humanitarian reasons is issued by the Questore according to the procedures set forth in the implementing regulation"; pursuant to Art. 1, paragraph 1, lett. b), No. 2, of the Decree Law No. 113/2018, it is replaced as follows: “the refusal or revocation of the residence permit can also be adopted on the basis of international conventions or agreements, rendered enforceable in Italy, when the foreigner does not meet the conditions of residence applicable in one of the Contracting States”. There is no longer a residence permit for humanitarian reasons.

Some specific hypotheses remain, such as the permit, now classified as “for special cases”, for victims of domestic violence, or “situations of violence or serious exploitation”, in the presence of concrete dangers for safety, for the declarations made in a criminal proceeding or for the attempt to escape "the violence and the conditioning of the criminal organization". Some cases are typified: 1) residence permit "for medical treatment", when the foreigner is in "particularly serious health conditions", "such as to cause significant health damage"; 2) residence permit "for calamity", in the event that the foreigner cannot return to the country in which he should return due to "a situation of contingent and exceptional calamity"; 3) residence permit "for acts of particular civil value", authorized by the Minister of the Interior; 4) residence permit for "special protection", adopted in the context of the procedure for the recognition of international protection, in the presence of a risk of persecution and risk of torture.

The types of permits contemplated avoid the occurrence of some obvious collisions with constitutional and international obligations, as well as conforming to specific provisions of European Law; in this sense, for example, the permit for medical care ensures that there is not a total absence of protection in relation to the right to health pursuant to Art. 32 of the Italian Constitution, or, the permit for special protection follows the principle of non-refoulement, in compliance with international norms, agreements and customary laws. However, it remains questionable whether the exclusion of the "humanitarian reasons", violates the Constitution.

Importantly, the reference to "humanitarian reasons" used to allow to offer protection, however limited and partial, to the inviolable rights of man in a broad sense, pursuant to Art. 2 of the Italian Constitution, as

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149 Decree Law No. 286/1998, art. 18-bis
150 Ibid.
151 Decree Law n. 113/2018, art. 1, c.1, lett. g)
152 Ibid. art. 1, c.1, lett. h)
153 Ibid. art. 1, c.1, lett. q)
154 Ibid., art. 1, c. 2, lett. a)
well as in relation to international treaties and customary norms that protect the rights of the human person and his dignity (based on compliance with international obligations pursuant to Art. 117, paragraph 1, and the automatic adaptation to customary law pursuant to Art. 10, c. 1 of the Constitution). In this respect, the indeterminacy of humanitarian protection also allowed, if not to resolve, not to incur in violations of the Art. 10, paragraph 2 of the Italian Constitution, where it provides that the legal status of the foreigner is "regulated by law in accordance with international rules and treaties".

Moreover, the practice shows a widespread use of humanitarian protection: in the first half of 2017 (until 7 July), with 41,379 applications for international protection, there was a 51.7% denial, in 9% a recognition of refugee status, in 9.8% the attribution of subsidiary protection and in 24.5% the issuing of a permit for humanitarian reasons\textsuperscript{155}. Accordingly, humanitarian protection responds to the need to guarantee rights that cannot be answered in the instruments provided: a normal practice, supported by the fact that forms of humanitarian protection are contemplated in 20 of the 28 Member States of the European Union\textsuperscript{156}.

\textit{The extension of administrative detention}

The law-decree provides for an extension of the currently established detention period in repatriation detention centers (CPR), from a maximum stay of 90 days to 180 days\textsuperscript{157}.

However, the increase in the months of detention does not correspond to an increase in the percentage of repatriations. According to the data reported in the opinion on the decree under examination, adopted by the National Guarantor of the rights of detained or deprived persons, the percentage of repatriations with respect to detained persons is around 50%, regardless of the terms of detention\textsuperscript{158}. According to the Guarantor, therefore, "the widening of the scope of application of the measure with obvious repercussions on the fundamental right to the freedom of the citizens, therefore, does not seem to find an adequate balance in effective system requirements"\textsuperscript{159}. Indeed, the extension of time limits affects the guarantee of personal freedom (Article 13 of the Italian Constitution), therefore making questionable the disproportion in the sacrifice of personal freedom in the interest of border control.

The Constitutional Court has no doubts that "the detention of the foreigner in the centers of temporary permanence and assistance is an incident measure on personal freedom", finding "that mortification of the dignity of man that occurs in every eventuality of physical subjugation to the others' power and that is a sure indication of the relevance of the measure to the sphere of personal freedom "\textsuperscript{160}. Likewise, the full equivalence

\textsuperscript{156} Ibid. 189.
\textsuperscript{157} Art. 2, paragraph c), Law Decree No. 113/2018
\textsuperscript{159} Ibid.
\textsuperscript{160} Constitutional Court., sent. n. 105 del 2001.}
between citizens and foreigners in the application of the guarantees of Article 13 of the Italian Constitution should be respected. Between protecting the fundamental rights of the human person and the need for immigration control, the Court recognizes the supremacy of the first: "for how much", in fact, "the public interests incident on the matter of immigration are multiple and for how much they can be perceived as the problems of security and public order connected to uncontrolled migratory flows, the universal character of personal freedom cannot be affected in any way"¹⁶¹.

Secondly, the law-decree introduces the detention of the asylum seeker "for the determination or verification of identity and citizenship"¹⁶². This detention can be carried out in hotspots or in the first-reception centers, "for the time strictly necessary, and in any case not more than thirty days"¹⁶³; furthermore, for identification purposes, detention can be carried out for up to 180 days in the repatriation detention centers (CPR).

The anxiety to distinguish the economic migrant, object of immediate repatriation, and the asylum seeker, to be admitted, at least temporarily, in the territory, has produced the creation of places, the hotspots, where the rights are regulated by soft communitarian law¹⁶⁴. With the Decree Law No. 113/2018, in those places, the same anxiety legitimizes the detention of every asylum seeker as a potential "threat".

Again, a prevalence of immigration control instances on a fundamental right can be observed, such as personal freedom. An alleged right to security, which is based on the instrumental and discriminatory assumption of the configuration of the migrant as a public security problem, cancels the security of rights.

4 DECREE LAW NO. 53/2019

¹⁶¹ Constitutional Court. sent. n. 105 del 2001
¹⁶² Law Decree No. 113/2018, Art. 3
¹⁶³ Law Decree No. 113/2018, art. 3, c. 1, lett. a).
¹⁶⁴ The source of the hotspots, conceived at the same time as a place and a procedure, is the European Agenda on Migration, adopted by the European Commission on 13 May 2015 through a Communication (European Commission 13.5.2015 COM(2015) 240 final, Bruxelles).
The Decree Law No. 53/2019165, concerning “Urgent provisions on public order and security”, entered into force on June 15, 2019, and has been definitively approved by the Senate on August 5, 2019. At the moment, the Law is expected to be promulgated by the President of the Republic.

The decree-law introduces various innovations, divided into three fundamental pillars: the contrast to illegal immigration, public order and security (Chapter I); the strengthening of the effectiveness of administrative action supporting security policies (Chapter II); the contrast to violence at sporting events (Chapter III). Before proceeding to critically illustrate the specific contents concerning security and immigration, the next paragraph will focus on the justifying assumptions identified by the Government to resort to the reform intervention under consideration.

4.1 THE LEGAL FORM OF DECREE LAW NO. 53/2019

In line with the provisions of Art. 15 of the Law No. 400/1988, the preamble of the law-decree illustrates the justifying assumptions of the normative intervention, that is, explaining the reasons of “extraordinary necessity and urgency” that legitimize, pursuant to Art. 77 of the Italian Constitution, the exception to the principle of the parliamentary monopoly of the legislative function. First of all, reasons relating to migration policies are indicated with reference to the necessity of "oppose the evasive practices of international law and the provisions regarding public order and security, assigned by the current legislation to the Minister of the Interior"; "strengthen the investigative coordination of crimes related to illegal immigration"; "enhance the effectiveness of the provisions on returns". Secondly, it highlights the necessity of "actions to eliminate the backlog relating to the execution of criminal conviction measures that have become final". Moreover, reasons are given for the strengthening of the measures aimed at guaranteeing the "regular and peaceful conduct of events in a public place or open to the public"; to ensure the "necessary levels of security for the 2019 Naples’ Universiade"; to counter "phenomena of violence at sporting events".

Even without going into the substance of the political choices made by the Government, some critical aspects do not go unnoticed. Similarly to what has been observed regarding Decree Law No. 113/2018, also this new intervention is inspired by heterogeneous purposes, held together only by generic references to public order and public safety. Precisely because of their intrinsic vagueness, they do not satisfy the requirements of specificity and homogeneity established for the emergency decree by the Art. 15, paragraph 3 of the Law No. 400 of 1998. Although this provision, having the same rank as the law-decree, cannot constitute a parameter of legitimacy in the strict sense, nevertheless, the Constitutional Court has highlighted its relevance in the context of the union on the factual circumstances of extraordinary necessity and urgency pursuant to Art. 77 of the Italian Constitution. The existence of the latter, in fact, must be verified with respect to the unitary ratio of the law-decree, that is, in the light of its final purpose to face situations whose only recurrence justifies the

165 D.L. 53/2019: “Disposizioni urgenti in materia di ordine e sicurezza”
exceptional governmental power to exercise the legislative function without a prior delegation by the Parliament.\footnote{166}{See the judgment of the Constitutional Court No. 22/2012.}

Consequently, with respect to the aforementioned generic purposes of protecting security and public order, it appears objectively difficult to maintain that the Government found itself in need of adopting measures so urgent as to be incompatible with the normal course of the parliamentary legislative process. Paradoxically, this is confirmed by the same words pronounced by the proposing Minister of the Interior during the press conference immediately following the Council of Ministers which approved the decree-law.\footnote{167}{The video is available at: \url{http://www.governo.it/it/articolo/consiglio-dei-ministri-n-61/12104}} In this occasion, based on the data held by the Interior Ministry, he highlighted that, currently, there is an important decrease in the number of landings of irregular foreigners, of asylum applications, and of migrants in immigration centers on the territory. Furthermore, this is also confirmed by the data of the Ministry of the Interior on the reduction of crimes that normally cause social alarm (such as thefts, robberies and murders). These data conform Italy with the statistics of European countries commonly considered safe.\footnote{168}{See the data’s processing of the Ministry of the Interior in the 1st Report on the Safety Chain in Italy, 2018, edited by Censis, pp. 7-13, available at: \url{http://www.astrid-online.it/static/upload/protected/18be/18be96c9-6fd0-411f-b5af-202de970114b.pdf}}

Therefore, the decree-law at issue appears to have been adopted in a context in which it is really difficult to recognize the factual evidence of that "security" and "public order" deficit that the preamble identifies as the ratio justifying the intervention. These only could justify the postponement of the parliamentary intervention to the stage of the conversion into law. Again – as in the case of the Decree Law No. 113/2018 - the role of the Parliament has been reduced to a mere vote of confidence, with the final result of completely eliminating the political debate around regulatory interventions that will have a profound impact on fundamental rights.

In conclusion, in light of what has been observed, a question of the constitutional legitimacy of the decree-law at issue appears to be questionable for violation of the requirements of legitimacy of decree of urgency established by Art. 77 of the Italian Constitution. Importantly, with the conversion into Law, the illegitimacy of the decree-law is transferred to the latter, sub species of defect in procedendo.\footnote{169}{See the judgement of the Constitutional Court No. 171/2007, considered in Law No. 5}

\section*{4.2 The legal content of Decree Law No. 53/2019}

\addcontentsline{toc}{section}{4.2 The legal content of Decree Law No. 53/2019}

\footnote{166}{See the judgment of the Constitutional Court No. 22/2012.}
\footnote{167}{The video is available at: \url{http://www.governo.it/it/articolo/consiglio-dei-ministri-n-61/12104}}
\footnote{168}{See the data’s processing of the Ministry of the Interior in the 1st Report on the Safety Chain in Italy, 2018, edited by Censis, pp. 7-13, available at: \url{http://www.astrid-online.it/static/upload/protected/18be/18be96c9-6fd0-411f-b5af-202de970114b.pdf}}
\footnote{169}{See the judgement of the Constitutional Court No. 171/2007, considered in Law No. 5}
Moving on to the illustration of the contents of the decree-law, Chapter I contains, first of all, a series of provisions aimed at contrasting irregular immigration. To this end, Art. 1 modifies Art. 11 of the national law on immigration\textsuperscript{170}, providing for border control measures, introducing the following new paragraph 1-ter:

"The Minister of the Interior, National Public Security Authority pursuant to Article 1 of the Law of 1 April 1981, No. 121, in the exercise of the coordination functions referred to in paragraph 1-bis and in compliance with Italy's international obligations, may limit or prohibit the entry, transit or stop of ships in the territorial sea, unless it concerns military ships or ships in non-commercial government service, for reasons of order and public safety or when the conditions referred to in article 19, paragraph 2, letter g) are realized, limited to the violations of the immigration laws in force, of the Convention of the United Nations on the law of the sea, with annexes and final act, made in Montego Bay on 10 December 1982, ratified by the Law of 2 December 1994, No. 689. The provision is adopted in agreement with the Minister of Defense and with the Minister of Infrastructure and Transport, according to their respective competences, informing the President of the Council of Ministers."

The rule confers the Minister of the Interior - in agreement with the Ministers of Defense and Transport, and informed (but not "heard"), the President of the Council - the power to issue measures aimed at prohibiting or limiting entry, the transit or stay in the territorial waters of ships (excluding military or non-commercial government services), where there are two alternative conditions: i) "reasons of order and public safety"; ii) the realization of the conditions referred to in Art. 19, paragraph 2, lett. g) of the Montego Bay Convention, a law which, in turn, identifies, as a hypothesis of non-harmless (or "prejudicial") passage of a foreign ship in territorial waters, the case in which this ship carries out "the loading or unloading of [...] persons in violation of the immigration laws in force in the coastal State"\textsuperscript{171}.

The wording of the new paragraph 1-ter textually refers, at least partially, to the contents of the directives recently issued by the Minister of the Interior in the context of the so-called "closed ports" policy\textsuperscript{172}. These are the disputed measures which, by invoking the need for orderly management of migratory flows, as well as the correlated need to prevent the passage of ships that are prejudicial under the law of the sea, had instructed the authorities in charge of maritime border surveillance in the sense of denying the entry to anyone who had carried out a "rescue activity [...] in an improper manner, in violation of the international law on the law of the sea and, therefore, prejudicial to the good order and safety of the coastal State as it was aimed at the entry of persons in violation of immigration laws "\textsuperscript{173}. This first "general" directive was followed by further directives

\textsuperscript{170} T.U. Immigrazione
\textsuperscript{171} The text of the Convention attached to the ratification Law No. 689/1994 is available at: https://www.gazzettaufficiale.it/eli/id/1994/12/19/094G0717/sg
\textsuperscript{172} See, for example, https://www.bbc.com/news/world-europe-44668062
concerning the work of individual NGOs, held responsible for the conduct described in terms of "possible exploitation of international obligations regarding search and rescue\(^{175}\); or, again, of "mediated" cooperation which, in fact, encourages crossings by sea of foreign citizens who do not comply with the residence permit, and objectively favors their irregular entry into the national territory\(^{176}\).

However, the so-called “closed ports” policy has been subject to severe criticism by the United Nations High Commissioner for Human Rights. In particular, a letter dated May 15, 2019\(^{177}\) signed by five Special Rapporteurs highlighted its radical incompatibility with the obligations deriving from the UNCLOS, SOLAS and SAR Conventions on the international law of the sea, as well as with the principle of *non-refoulement*. The progressive inhibition of the rescue activities provided by NGOs and other private ships in the central Mediterranean, in fact, involves very serious risks for the fundamental rights of migrants, destined in statistically ever greater measure to lose their lives in a shipwreck or to be recovered by the Libyan Coast Guard and brought back to a country where arbitrary detentions, torture and sexual violence represent a tragic daily life\(^{178}\).

That said, it is clear that the same profiles of illegitimacy that can be observed in the aforementioned directives can, today, vitiate the ministerial prohibitions that will be adopted pursuant to the new Art. 11-ter of the national law on immigration. The existence of a juridical frame of primary rank does not, apparently, change the system of supranational sources (ratified by Italy) within which these measures are inserted. Indeed, paradoxically, the presence of an express reference to the necessary "compliance with international obligations" will make easier the examination for violation of the law, with possible annulment or non-application in the jurisdictional session.

At the moment, the question is at the center of the news. Immediately after the decree-law came into force, on Saturday 15 June, 2019, the first entry ban was signed, then notified to the “Sea Watch 3” ship\(^{179}\), belonging to the German NGO Sea Watch and flying the Dutch flag. The ship remained for 14 days stationary off Lampedusa, with more than 40 people on board in international waters.

In support of the ministerial powers described above, Art. 2 of the “security decree-bis” introduces specific sanctions against offenders of entry, transit and stay. The provision intervenes on Art. 12 of the national law on immigration, that is to say, the incriminating case of the so-called “facilitation of irregular immigration”, introducing a new paragraph 6-bis, which quotes:


\(^{177}\) Available at: [https://www.avvenire.it/c/attualita/Documents/ONUdirittiViolati.pdf](https://www.avvenire.it/c/attualita/Documents/ONUdirittiViolati.pdf)

"6-bis. Except in the case of military ships or ships in non-commercial government service, the ship's captain is required to observe international regulations and any prohibitions and limitations which may be established pursuant to Article 11, paragraph 1-ter. In case of violation of the prohibition of entry, transit or stay in Italian territorial waters, notified to the captain and, where possible, to the shipowner and owner of the ship, it is applied to each of them, except for criminal penalties when the fact constitutes an offense, the administrative sanction of the payment of a sum from € 10,000 to € 50,000. In case of reiteration committed with the use of the same ship, the accessory sanction of the confiscation of the ship is also applied, proceeding immediately to a precautionary seizure. The territorial competent prefect provides for the imposition of the sanctions, ascertained by the control bodies. The provisions of Law of 24 November 1981, n. 689, with the exception of the fourth, fifth and sixth paragraphs of Article 8-bis, apply".

With regard to the commander, the shipowner and the owner of the ship, a pecuniary administrative sanction of 10 thousand to 50 thousand euros is required. In the absence of a different provision, the amount must be commensurated with the general criteria which prescribe having regard to “the seriousness of the violation, the work performed by the agent for elimination or mitigation of the consequences of the violation, as well as the personality of the same and its economic conditions”\(^{180}\). The accessory sanction of the confiscation of the ship is also provided, although only in case of "reiteration with the use of the same ship", with immediate administrative seizure. In the absence of further specifications, the general rules on the precautionary seizure and the administrative confiscation set forth in articles 13, 19 and 20 the Law No. 689/1981 apply.

The application of the Art. 8-bis paragraphs 4, 5 and 6 of the same Law No. 689/1981 is excluded. The result is a more severe sanction treatment than the general one, in three ways: i) it is excluded that transgressions committed in a short time can be considered as a unit (paragraph 4); ii) it is excluded that the effects of reiteration do not apply in cases of reduced payment (paragraph 5); iii) it is excluded that the effects of the reiteration can be suspended until the provision that ascertains the previous violation has become final (paragraph 6).

Again, with reference to the general legislation on administrative sanctions, the causes of the exclusion of liability pursuant to Art. 4 Law 689/1988 are highlighted. The rule reaffirms what can already be acknowledged from the general principles, namely that it is not liable for the violation "who committed the act in the performance of a duty or in the exercise of a legitimate faculty or in a state of necessity or self-defense". This is a series of conditions which, as shown by the judicial practice relating to Art. 12 of the national law on immigration, are likely to occur with very high frequency in the subject at issue. Beginning with the fulfillment of a duty, the norms of international law come to the fore (first and foremost Article 98 of the Montego Bay Convention and Article 10 of the Hamburg Convention on research and maritime rescue\(^{181}\)) which oblige the commander of the ship to save people in danger and conduct them, without exposing them to further risks, to

\(^{180}\) Art. 11, Law 689/1988

\(^{181}\)
a place of safety, i.e. a place where respect for fundamental rights is guaranteed. The case study also highlighted the state of necessity, which led the judges to exclude the responsibility of the rescuers and, at the same time, to affirm the responsibility of the actual smugglers, who had deliberately placed migrants on a boat unable to perform the last part of the crossing, thus exploiting the rescue activity and, therefore, having to answer for irregular entry according to the mediated authority scheme. Finally, even legitimate defense was recognized in the hands of some migrants who had rebelled against the commander's decision, taken on the basis of the indications of the Italian maritime coordination center, to bring them back to Libya, thus exposing them to the current danger of unjust offenses for life and physical integrity.

5 Conclusion

This research delved into the interdisciplinarity of the International Law and Politics of International Security, by applying the securitization theory to the case study. The analytical framework developed by the Copenhagen School made possible to research how there can be exceptions to the normal process of the formation of new laws ("normal politics"), with the caveat being a case of necessity and urgency for the

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security of a sovereign state. Moreover, the contribution of Werner proved to be fundamental for the empirical application of the theory to concrete legal cases of urgency decree.

Particularly, the case study examined how a sovereign state, such as Italy, has the Constitutional power derived from Art. 77 to decree the necessity and urgency to pass legislation on immigration and asylum, in exception to the principle of the parliamentary monopoly of the legislative function, if justified by an alleged threat to security. In this way, the Italian Decree Laws at issue revealed coherent with Werner’s definition of the act of securitization as a ‘suspending legal act’ allowing for “institutionally regulated change in the legal system”\(^\text{184}\).

However, this research revealed that the choice to intervene on such heterogeneous subjects constitutes a question of unconstitutionality. Moreover, the reasons of necessity and urgency revealed vague and roughly motivated, unless the exercise of subjective rights, such as the right to asylum, the right of freedom, or even international obligations, such as the rescue at sea, represent a matter connected with maintaining public order and the security of a State. This, indeed, is where the power of security lies. Motivating with the word security a case of necessity and urgency, it is possible to make an exception.

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