"I Am Eighteen, Why Am I Inside Here?"[1]: A Reflection Upon the Detention and Criminalisation of Migrants under Italian Administrative Law

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I. Introduction

The story of migration is a shared human experience that has occurred across the globe in all shapes and sizes for centuries. In contrast, immigration detention is a relatively recent phenomenon that was introduced in Italy in 1998[2]. This article analyses the evolution in Italian migration law relating to immigration detention while also drawing on practical case studies from Turin, with the purpose of demonstrating the incompatibility of administrative detention with the international and European human rights framework and the fundamental principles of the Italian constitutional and administrative law. The authors make reference to first-hand testimonies from their own prior research as part of the International University College of Turin's 2012 qualitative study *Betwixt and Between. A human rights investigation into Turin's immigration detention centre*[3]; an interview-based study that considered testimonies from detainees, NGO workers, volunteers, lawyers and a journalist with first-hand experience of Turin's immigration detention centre (in Italian, *centro di identificazione ed espulsione* or CIE)[4]. Although this article focuses on Turin's CIE, recent empirical research in Italy shows that most of the controversial issues which are raised in this article apply equally to all national CIEs[5]. For this reason, the authors believe that Turin's case study is symptomatic of systemic issues found throughout the Italian administrative detention system[6].

By reflecting upon the practical application of the law and the underlying administrative law philosophy, we will demonstrate that immigration detention intentionally ignores many of the philosophical underpinnings that the Italian administrative law system was founded upon. The Italian case study also raises broader questions as to whether the administrative detention system might be accurately described as an "illegality regime"; an elusive concept whose potential definition will be explored throughout the article. This paper was first written amidst the backdrop of a joint trans-national and cross-institutional collaboration of academics interested in the concept of illegality regimes[7]. It draws on Juan M. Amaya-Castro's notion of illegality regimes

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[1] Libyan asylum seeker (*Interview 22*), as cited in Ulrich Stege, Maurizio Veglio, Emanuela Roman and Abigael Ogada-Osir (eds.), *Betwixt and Between: Turin's CIE. A Human Rights Investigation into Turin's Immigration Detention Centre*, International University College of Turin, September 2012, 60; see also: Abigael Ogada-Osir, Emanuela Roman, Ulrich Stege and Maurizio Veglio (eds.), *Betwixt and Between: Turin's CIE. A Response from Authorities*, International University College of Turin, December 2012.

[2] Article 12, Law 40/1998 ("Turco-Napolitano Law"); later transposed into Article 14, Legislative Decree 286/1998 ("Unified Text on Immigration").

[3] Stege et al, above n. 1.

[4] Throughout this article, excerpts from the interviews conducted during the authors' previous research will be written in italics and will have an identification number which corresponds to an interviewee.

[5] Caterina Mazza, *La prigione degli stranieri. I Centri di Identificazione ed Espulsione*, Roma: Ediesse, 2013; Medici per i Diritti Umani (MEDU), *Arcipelago CIE. Indagine sui centri di Identificazione ed Espulsione italiani*, Formigine, Modena: Infinito Edizioni, May 2013; Raffaella Cosentino and Alessio Genovese, "Lo scandalo dei centri di identificazione dove gli ospiti diventano detenuti", *La Repubblica* (online), 9 June 2012.

[6] Throughout the article, the cases where the situation in Turin differs from other Italian cities will be clearly pointed out.

[7] A first version of this article was presented at the conference "Illegality Regimes. Mapping the Law of Illegality", VU University of Amsterdam, Amsterdam, 30-31 May 2013.

as "the complex normative and policy framework that is either intended to, or otherwise has the effect of marginalizing or otherwise excluding irregular migrants, and to assist the authorities in the process of localizing and deporting them"[8]. However, this paper also considers the limits to previous definitions of an illegality regime and explores whether it might be apt to differentiate the notion of illegality regime with a new concept of "*un-legality* regime". Thus, although this article focuses on the Italian legal system, the findings and case studies will no doubt be relevant to wider international debates about the aim of administrative law, the relationship between globalisation and borders, identity politics and the concept of criminality in the 21st century.

The structure of the article

Section II offers a contextualisation of the article within the theoretical notions of criminalisation of migration, illegality regimes and a newly proposed concept of "*un-legality* regime". This aims to provide the theoretical backdrop that the authors situate their empirical analysis in, as well as working definitions of the concepts they use throughout the article.

Section III outlines the Italian and European legal framework for returning third country nationals so as to consider how the law declares a person to be "illegal" or "irregular". Contemplating practical scenarios that might constitute an illegality regime sheds light on the tension and overlap between the political and the legal spheres and how this relationship translates through decrees and regulations. In doing so, consideration is given to the evolution of Italian migration law and the specific gaps between European Union migration law and the manner in which migration law is applied in Italy.

Section IV focuses on the controversial relationship between administrative detention and the European human rights framework. While the case study from Turin's CIE illustrates how the application of human rights law can assist those positioned outside the normal protections of a national legal regime, it also reveals the intrinsically ironic nature of the human rights paradigm. Human rights are supposed to be inherent to the human being. Yet, they are applied according to the Arendtian concept of citizenship as "the right to have rights"[9], as well as to a legal categorisation of migrants as "the Others", which serves the purpose of separating "them" from "us" not only via national borders but also via the law within our allegedly equal societies[10].

After considering practical examples of how the administrative detention system relates to an illegality regime, Section V(A) attempts to decipher the disjuncture between legal practice and legal philosophy by reflecting upon the five central principles of Italian administrative law. For, the cause of this disjuncture between theory and practice may well be linked to the problem that brings an illegality regime to life. The authors hypothesise that in the field of administrative detention the Italian legal system is experiencing epidemic confusion about the philosophical underpinnings of administrative law. Administrative law is essentially a mechanism to ensure government accountability and the preservation of the rule of law and the separation of powers[11]. Whilst the Italian administrative law system saw great progress in the last quarter of the 20th century, it has taken a dramatic turn since the 1998 introduction of administrative detention and administrative law mechanisms that were created in order to support immigration control

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[8] Juan M. Amaya-Castro, "Illegality Regimes and the Ongoing Transformation of Contemporary Citizenship", *European Journal of Legal Studies*, vol. 4, issue 2, 2011, 137.

[9] Hannah Arendt, *The Origins of Totalitarianism*, New York: Schocken, 2004.

[10] Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control*, Oxford: Oxford University Press, 2013.

[11] Carol Harlow, "Global Administrative Law: The Quest for Principles and Values", *The European Journal of International Law*, vol. 17, issue 1, 2006, 190-191.

policy. Section V(B) shows that this confusion and the lack of clear jurisprudential underpinnings in the administrative jurisdiction blatantly contrasts with the long-running criminal law premise of innocent until proven guilty and the inherent right to liberty and freedom from arbitrary detention; two fundamental principles of the Italian legal system enshrined under Articles 27 and 13 of the Italian Constitution[12].

II. THE CRIMINALISATION OF MIGRANTS AND THE *UN-LEGALITY* REGIME: PROPOSALS FOR A DEFINITION

The expression "criminalisation of migrants" has been subject to different interpretations and it can refer to a variety of cross-cutting phenomena. Salvatore Palidda defines it as "all the discourses, facts and practices made by the police, judicial authorities, but also local governments, media, and a part of the population that hold immigrants/aliens responsible for a large share of criminal offences"[13]. However, the authors of this article consider that, beyond sociological and anthropological analyses, the criminalisation of migrants is basically a "legal fact" that derives from the very law that sanctions the illegal entry or stay of undocumented third-country nationals.

Italian administrative law and procedure has undergone a phenomenon of criminalisation in relation to how irregular migrants are constructed and dealt with under the national legal system, both in terms of the substantive national law and the manner in which this law is implemented by administrative decision makers at a local level. In relation to substantive law, in the decade following 9/11 Italy joined the trend of Western countries that progressively incorporated criminal law norms and rationales into their administrative migration law systems. A number of scholars view this process as a strategy by the State to govern migration through criminal law, or, through "crime"; a broader concept that includes criminal law provisions as well as criminal law functions, methods and priorities[14]. This process of incorporation is considered to be a selective one, whereby the transplantation of stringent criminal sanctions into the administrative law system is not accompanied by the incorporation of the protective elements which characterise the criminal jurisdiction[15]. Such discrepancy benefits immigration authorities who have the power and flexibility that come with applying criminal justice methodology and

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[12] The right to liberty and freedom from arbitrary detention is affirmed under Article 13, paragraphs 1 and 2 of the Italian Constitution: "Personal liberty is inviolable. No form of detention, inspection or personal search nor any other restriction on personal freedom is admitted, except by a reasoned warrant issued by a judicial authority, and only in the cases and the manner provided for by law" (*La libertà personale è inviolabile. Non è ammessa forma alcuna di detenzione, di ispezione o perquisizione personale, né qualsiasi altra restrizione della libertà personale, se non per atto motivato dell'Autorità giudiziaria e nei soli casi e modi previsti dalla legge*). The principle of innocence until proven guilty is enshrined in Article 27, paragraph 2 of the Italian Constitution: "The defendant shall not be considered guilty until the final judgement is passed" (*L'imputato non è considerato colpevole sino alla condanna definitiva*). Article 533 of Criminal Procedure Code also protects the notion of innocent until proven guilty, stating: "The judge [only] convicts the defendant if their criminal responsibility is assessed beyond any reasonable doubt" (*Il giudice pronuncia sentenza di condanna se l'imputato risulta colpevole del reato contestatogli al di là di ogni ragionevole dubbio*).

[13] Salvatore Palidda, *Racial criminalization of migrants in 21st Century*, Farnham: Ashgate, 2011, 23.

[14] Jennifer M. Chacón, "Managing Migration Through Crime", *Columbia Law Review Sidebar*, vol. 109, 12 December 2009, 135-148; Teresa Miller, "Citizenship and Severity: Recent Immigration Reforms and the New Penology", *Georgetown Immigration Law Journal*, vol. 17, 2003, 611-662; Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime and Sovereign Power", *American University Law Review*, vol. 56, issue 2, 2006, 367-410.

[15] Stephen H. Legomsky, "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms", *Washington and Lee Law Review*, vol. 64, 2007, 469-528.

sanctions while acting within the ambit of an administrative law jurisdiction with less "due process" guarantees.

A crucial aspect of the criminalisation of migration is undoubtedly represented by the way law is implemented at the local level. European "crimmigration" literature emphasises the growing importance of internal immigration control measures, which increasingly supplement external border controls. Measures such as police surveillance, exclusion from public services and the "regular" labour market, (threat of) detention and deportation are carried out at local level and have a considerable effect on the daily life of undocumented migrants, leading to their actual exclusion from (or segregation into) the host society[16]. Discretionary power, professional ethics and respect for the principles of legality and equality before the law are delicate issues at stake when it comes to substantiating an illegality regime. As argued by Michael Lipsky, it is "the decisions of street-level bureaucrats, the routines they establish, and the devices they invent to cope with uncertainties and work pressures [that] effectively become the public policies they carry out"[17].

For the purposes of this article, the criminalisation of migrants will be considered as limited to irregular migration because at present the legal category of undocumented migrants seems to represent the major target of laws, policies, practices and public discourses that aim (or contribute) to constructing their status and identity as illegal, both at European and national level. This article will focus on acts, decisions and omissions by governments and judicial and administrative authorities. However, it will not expand on the role of the media and so-called "discursive criminalisation" [18] or on the issue of police attitudes and behaviour (e.g. discriminatory treatments such as ethnic profiling). The scope and objective of this article is to investigate the blurring boundaries between criminal law, administrative law and migration law with reference to immigration detention[19]. To this purpose, the authors propose a broader definition of criminalisation of migrants, which shall include but not be limited to the fact of "hold[ing] immigrants/aliens responsible for a large share of criminal offences", as suggested by

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[16] Joanne Van der Leun, *Looking for loopholes. Processes of incorporation of illegal immigrants in the Netherlands*, Amsterdam: Amsterdam University Press, 2003; Joanne Van der Leun, "Excluding Illegal Migrants in the Netherlands: Between National Policies and Local Implementation", *West European Politics*, vol. 29, issue 2, 2006, 310–326; Arjen Leerkes, Godfried Engbersen and Joanne Van der Leun, "Crime among irregular immigrants and the influence of internal border control", *Crime Law and Social Change*, vol. 58, 2012, 15-38; Godfried Engbersen, "The Unanticipated Consequences of Panopticon Europe: Residence Strategies of Illegal Immigrants", in Virginie Guiraudon and Christian Joppke (eds.), *Controlling a New Migration World*, London: Routledge, 2001, 222–246; Godfried Engbersen and Dennis Broeders, "The Fight against Illegal Migration. Identification Policies and Immigrants' Counter Strategies", *American Behavioral Scientist*, vol. 50, issue 12, 2007, 1592-1609; Godfried Engbersen and Dennis Broeders, "The State versus the Alien: Immigration Control and Strategies of Irregular Immigrants", in *West European Politics*, vol. 32, issue 5, 2009, 867-885; Godfried Engbersen and Joanne Van der Leun, "The Social Construction of Illegality and Criminality", *European Journal on Criminal Policy and Research*, vol. 9, 2001, 51-70; Nicholas P. De Genova, "Migrant "Illegality" and Deportability in Everyday Life", *Annual Review of Anthropology*, vol. 31, 2002, 419-447.

[17] Michael Lipsky, *Street-Level Bureaucracy. The Dilemmas of the Individual in Public Services*, New York: Russell Sage Foundations, 1980, xii.

[18] For an overview of the academic literature addressing the discursive dimension of criminalisation, see: Joanna Parkin, *The Criminalisation of Migration in Europe. A State-of-the-Art of the Academic Literature and Research*, CEPS Paper in Liberty and Security in Europe, n. 61 / October 2013, 2-7.

[19] For an overview of the academic literature on the relationship between criminal law and immigration management and the use of immigration detention, see: Parkin, above n. 18, 9-12 and 14-17.

Palidda. Throughout this article, the criminalisation of migrants will be defined by using three broad and overlapping categories.

- Firstly, criminalisation occurs when the effect of an administrative action by a migrant results in the migrant being considered a criminal within the criminal law jurisdiction. In practice, it consists in attributing criminal sanctions to violations of administrative law provisions on immigration. In the Italian context, it refers in particular to the 2009 introduction of the so-called "crime of illegal immigration" in the Italian legal system (see below Section III(A)).
- Secondly, the administrative law system and more particularly administrative detention can cause migrants to be treated like criminals. Deprivation of liberty as a measure applied to irregular migrants who violate an administrative law provision produces an implicit analogy with criminal detention and it suggests that detained migrants are like criminals, even when they committed no crime.
- Finally, if we are to see the administrative detention system as an illegality regime then we may need to broaden the concept of illegality regime beyond criminalisation. This third concept of criminalisation may involve a twist in the scope and definition of an illegality regime. For, when the criminal and civil justice systems adopt the concept of illegality they offer more rights protections than the current administrative law system. This discrepancy might be based in the fact that the criminal justice system views the *act* as illegal whilst in practice that part of the administrative law system that deals with foreigners (i.e. migration law, in Italian also referred to as "*diritto degli stranieri*"[20]) positions the *entire person* as illegal. Consequently, the concept of illegality might not be enough to encapsulate all that is occurring to the administrative detention system. The practical examples of injustice from within Turin's immigration detention centre call into question whether the *illegality* regime in administrative detention might actually be better described as an *un-legality* regime. The criminal law jurisdiction entails a binary between the legal and the illegal, however the entire paradigm is governed by law and a strong legality regime based on procedural rights and innocence until proven guilty. In contrast, the Italian administrative detention system is an area where administrative law has discarded its philosophical underpinnings so as to position certain groups of people outside legal philosophy in the realm of the *un-legal*. To a certain extent, this administrative detention paradigm functions outside the binary of legality or illegality and it enters a completely different space; the space of the *un-legal*.

The idea of *un-legality* as a dimension beyond the dichotomy legality vs illegality and as related to the process of re-defining by means of law a person as ontologically illegal draws upon the Agambenian concepts of "*homo sacer*" and "bare life"[21]. However, the authors' definition of an *un-legality* regime does not imply that administrative detention places irregular migrants literally "outside the law" or "outside the scope of law". On the contrary, it moves from the idea that it

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[20] Bruno Nascimbene (ed.), *Diritto degli stranieri*, Padova: CEDAM, 2004.

[21] Giorgio Agamben, *Homo Sacer. Sovereign Power and Bare Life*, Stanford, California: Stanford University Press, 1998. For an interpretation of immigration detention on the basis of Agamben philosophy, see: Giuseppe Campesi, "La detenzione amministrativa degli stranieri in Italia: storia, diritto, politica", *Democrazia e Diritto*, issue 3-4, 2011, 179-180.

is exactly the law, i.e. the legal and procedural framework governing immigration detention that places irregular migrants "outside legal philosophy".

III. THE EVOLUTION OF ITALIAN MIGRATION LAW: THE LEGAL, THE ILLEGAL OR THE *UN-LEGAL*?

A. Administrative Detention and Italian Migration Law

Italian migration law provisions are gathered in the "Unified text on measures concerning immigration and norms on the condition of foreign citizens" ("Unified Text on Immigration"), which was first issued in 1998 as an overarching body of rules on migration by means of *Legislative Decree 286/1998*[22]. The Unified Text on Immigration has seen significant modification and evolution since its introduction[23]. The adoption of a Unified Text on Immigration was established by Article 47(1) of *Law 40/1998*[24] ("Turco-Napolitano Law") which was issued by a centre-left government. The original act included provisions for fighting irregular entry and stay in Italy and it introduced for the very first time in Italy pre-removal detention of irregular migrants who needed to be identified in order for their repatriation to be executed. Consequently, the first immigration detention centres were established in Italy. It should be noted that administrative detention was cautiously introduced into the Italian legal system and initially the detention period could last a maximum of twenty days and could only be extended for another ten days (i.e. thirty days total). In 2002, law reform by a centre-right government altered the Unified Text on Immigration so that it operated in a more restrictive way. *Law 189/2002*[25] (the "Bossi-Fini Law") strengthened the coercive measures for fighting irregular immigration. In particular, it facilitated repatriations by establishing a process for immediate accompaniment to the border, increased the penalty for irregular migrants who failed to comply with a removal order and prolonged the maximum length of pre-removal detention from thirty to sixty days. Moreover, *Law 189/2002* linked the determination of annual in-flows of regular migrant workers to the cooperation of countries of origin in the fight against irregular immigration and in readmission procedures involving their nationals.

The years 2008 to 2009 marked the adoption of a radically security-focused approach to irregular immigration, which was pursued by a newly elected right-wing government that was essentially composed of the very same political parties as those who had been involved with the

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[22] *Decreto Legislativo 25 luglio 1998, n. 286 "Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero" (GU n. 191 del 18-8-1998 - Supplemento Ordinario n. 139) ("Testo Unico Immigrazione").* Legislative Decree 25 July 1998, n. 286 "Unified text on provisions concerning immigration and norms on the condition of foreign citizens" (GU n. 191 of 18-8-1998 – Ordinary Supplement n. 139) ("Unified Text on Immigration").

[23] On the evolution of Italian migration law, in particular as concerns irregular immigration, see: Alberto di Martino, Francesca Biondi Dal Monte, Ilaria Boiano and Rosa Raffaelli, *The criminalization of irregular immigration: law and practice in Italy*, Pisa: Pisa University Press, 2012, 7-20; Raffaele Callia, Marta Giuliani, Zsuzsanna Pasztor, Franco Pittau and Antonio Ricci (eds.), *Practical responses to irregular migration: the Italian case*, European Migration Network - Italy, Rome, 2012, 8-18; Tamara Jonjić and Georgia Mavrodi, *Immigration in the EU: Policies and Politics in Times of Crisis 2007-2012*, EUDO Report 5/2012, November 2012, 101-107.

[24] *Legge 6 marzo 1998, n. 40 "Disciplina dell'immigrazione e norme sulla condizione dello straniero" (GU n. 59 del 12-3-1998 - Supplemento Ordinario n. 40).* Law 6 March 1998, n. 40 "Measures governing immigration and norms on the condition of foreign citizens" (GU n. 59 of 12-3-1998 - Ordinary Supplement n. 40).

[25] *Legge 30 luglio 2002, n. 189 "Modifica alla normativa in materia di immigrazione e di asilo" (GU n. 199 del 26-8-2002 - Supplemento Ordinario n. 173).* Law 30 July 2002, n. 189 "Amendments to the legislation on immigration and asylum" (GU n. 199 of 26-8-2002 – Ordinary Supplement n. 173).

2002 Bossi-Fini Law. The Northern League (*Lega Nord*) and its Minister of the Interior Roberto Maroni played a crucial role in implementing a security-focused immigration control policy, which was controversially justified via a public discourse that emphasised the exceptional (rather than structural) nature of the immigration phenomenon and dramatically painted immigration as a never-ending emergency for Italy. *Law Decree 92/2008*[26] (the "Security Decree") made the status of undocumented migrants an aggravating circumstance in criminal sentencing, requiring judges to increase any criminal sentence up to one third when directed towards an irregular migrant. These 2008 and 2009 reforms were backed by a powerful media campaign and they revealed a significant change in the national psyche because the decision to make irregular migration an aggravating factor in sentencing meant that if an Italian citizen and an irregular migrant committed the exact same crime in the same circumstances then the irregular migrant would face a significantly harsher penalty. The latter provision was subsequently overturned by the Italian Constitutional Court[27], while the Court of Justice of the European Union ruled against the legality of imprisonment as a sanction for migrants who failed to abide with an administrative return order[28] as discussed more in detail later in this section.

However, *Law 94/2009*[29] (the "Security Package") introduced stricter regulations regarding rejections at the border. It also reframed irregular entry and residence in Italy as a criminal offence, under the label of the "crime of illegal immigration". The crime of illegal immigration gave irregular stay a new degree of illegality, in addition to administrative expulsion measures. Furthermore, the maximum length of administrative detention for unauthorised migrants was tripled from two to six months detention. The Security Package also required third-country nationals to show their permit to stay in order to access any public service, including if a third country national wished to get married. However, this latter provision was overruled by the Italian Constitutional Court in 2011 because it infringed upon the fundamental right to form a family through marriage[30].

A substantial law reform on irregular immigration matters, *Law Decree 89/2011*[31], was issued in June 2011 with the aim of completing the implementation of Directive 2004/38/EC[32]

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[26] *Decreto Legge 23 maggio 2008, n. 92 "Misure urgenti in materia di sicurezza pubblica" (GU n. 122 del 26-5-2008).* Law Decree 23 May 2008, n. 92 "Urgent measures on public safety" (GU n. 122 of 26-5-2008).

[27] *Corte Costituzionale, sentenza dell'8 luglio 2010, n. 249.* Italian Constitutional Court, judgment of 8 July 2010, n. 249.

[28] *El Dridi*, C-61/11 PPU, Court of Justice of the European Union, judgment of 28 April 2011, as explained later in this paragraph.

[29] *Legge 15 luglio 2009, n. 94 "Disposizioni in materia di sicurezza pubblica" (GU n. 170 del 24-7-2009 – Supplemento Ordinario n. 128).* Law 15 July 2009, n. 94 "Provisions on public safety" (GU n. 170 of 24-7-2009 – Ordinary Supplement n. 128).

[30] *Corte Costituzionale, sentenza del 20 luglio 2011, n. 245.* Italian Constitutional Court, judgment of 20 July 2011, n. 245.

[31] *Decreto Legge 23 giugno 2011, n. 89 "Disposizioni urgenti per il completamento dell'attuazione della direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari" (GU n. 144 del 23-6-2011).* Law Decree23 June 2011, n. 89, "Urgent provisions to complete the implementation of Directive 2004/38/EC on free movement of EU citizens and the transposition of Directive 2008/115/EC on the removal of irregular third country nationals" (GU n. 144 of 23-6-2011).

[32] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, L 158/77 *Official Journal of the European Union*, 30.04.2004.

and transposing Directive 2008/115/EC[33] (the "Return Directive"). *Law Decree 89/2011* was issued as a consequence of the April 2011 European Court of Justice judgment in the *El Dridi* case because the Court held that Italy had not yet transposed Directive 2008/115 into the national legal system[34]. Most importantly, the Court found that even though Member States are free to adopt criminal law measures aimed at dissuading unauthorised third-country nationals from staying in their territory, Member States cannot provide a criminal sentence of imprisonment such as the one provided for by the then Article 14(5b) of *Legislative Decree 286/1998*[35] because the punishment itself would have hampered the entire removal procedure[36]. Consequently, Italy was forced to amend the Unified Text on Immigration and to substitute imprisonment with a pecuniary penalty. On the other hand, the transposition of Directive 2008/115 into national law allowed the Italian legislator to further extend the maximum period of pre-removal detention from six to eighteen months. However, the way Italy implemented the Return Directive as a whole (and some of its provisions in particular) into its national migration law is highly controversial and will be analysed in detail in Section III(B) of this article.

The *El Dridi* judgement is not the only occasion where the European Court of Justice was confronted with the issue of compatibility between certain national criminal law provisions and the Return Directive. In *Achughbabian*[37], the Court reaffirmed that Member States are free to classify irregular stay as a criminal offence and lay down criminal sanctions towards the irregular migrant concerned, so long as such sanctions do not contrast with the effective implementation of the objectives of Directive 2008/115. *Achughbabian* considered a French law which imposed a sentence of one year of imprisonment during the return procedure. The Court held that this criminal sanction risked delaying the execution of the irregular migrant's removal, thus contradicting the purpose of the Return Directive[38]. Finally, in *Sagor*[39] the European Court of Justice again considered criminal penalties related to irregular immigration under Italian migration law. The Court held that a fine issued on criminal terms to penalise the unauthorised stay of a third-country national could be replaced by an expulsion order, however it could not be replaced by a home detention order. Again a home detention order was deemed impermissible because it hampers rather than facilitates the implementation of the removal of the person concerned[40].

In these three judgments the European Court of Justice clearly reiterated the centrality of the purpose and aims of Directive 2008/115 and emphasised the risk for certain national criminal law provisions to jeopardise the homogeneous implementation of the Return Directive and thus to deprive it of its effectiveness[41]. However, in doing so the Court also authoritatively limited the extent to which criminal sanctions could be imposed on irregular migrants by

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[33] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, L 348/98 *Official Journal of the European Union*, 24.12.2008 ("Return Directive").

[34] *El Dridi*, above n. 28, para. 45.

[35] Article 14(5b) of Legislative Decree 286/1998, as modified by Law Decree 92/2008, stated that a foreign national who stayed illegally and without valid grounds on the territory of the State, contrary to the order to leave the country within five days issued by the *Questore*, was liable to a term of imprisonment of one to four years.

[36] *El Dridi*, paras. 52, 58 and 59.

[37] *Achughbabian*, C-329/11, Court of Justice of the European Union, judgment of 20 January 2012.

[38] *Achughbabian*, paras. 43, 45 and 46.

[39] *Sagor*, C-430/11, Court of Justice of the European Union, judgment of 6 December 2012.

[40] *Sagor*, paras. 39 and 44.

[41] *El Dridi*, para. 55; *Achughbabian*, para. 39; *Sagor*, para. 32.

Member States and as such the Court limited the extent to which the law can criminalise irregular migrants[42].

In April 2014, the Italian Parliament passed *Law 67/2014* with the purpose to reform the criminal sanctioning system[43]. Article 2(3b) of this recent law commits the Government to abolish the crime of illegal immigration by turning it into an administrative violation, although maintaining the existing criminal penalties associated to administrative violations of migration law[44]. At the time of writing, the Italian Government had eighteen months to actually implement this law reform.

B. Gaps between EU Law and Italian Law on Irregular Immigration

It is interesting to consider the gaps between Italian and EU migration law in light of the overarching concept of an illegality regime. EU migration law is not in and of itself inconsistent with an illegality regime in the sense that EU law treats non-EU citizens as fundamentally different from EU citizens and therefore European jurisprudence does not necessarily oppose the criminalisation of people based on legal categorisation. However, this section will demonstrate that fundamental aspects of EU migration law are not applied in practice. Even where European law offers protection, access to justice requires more than the black letter law. In contrast, immigration detainees in Italy are routinely denied access to legal protections due to the practical barriers they face in accessing their rights.

In practice *Legislative Decree 286/1998* as modified by *Law Decree 89/2011* has not adequately fulfilled Italy's legal obligations under Directive 2008/115. Article 7(1) of the Return Directive establishes the general rule that a third-country national should not be detained in immigration detention but rather they should be given between seven and thirty days to organise their affairs and depart from Italy voluntarily. Article 7(1) adopts mandatory language[45] to indicate that voluntary departure should be more of the rule than the exception. In cases where voluntary departure is not possible then it is up to the Member State to prove that administrative detention is necessary based on one of the grounds in Article 7(4), namely risk of absconding, a

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[42] With regards to this point, it is worth mentioning two further ECJ rulings, where the Court confronted once again with the issue of the relationship between national criminal law provisions and the homogeneous implementation of the Return Directive (*Filev and Osmani*, C-297/12, Court of Justice of the European Union, judgment of 19 September 2013) and with the issue of immigration detention of asylum-seekers as related to the effectiveness of the Return Directive (*Arslan*, C-534/11, Court of Justice of the European Union, judgment of 30 May 2013).

[43] *Legge 28 aprile 2014, n. 67 "Deleghe al Governo in materia di pene detentive non carcerarie e di riforma del sistema sanzionatorio. Disposizioni in materia di sospensione del procedimento con messa alla prova e nei confronti degli irreperibili" (GU n. 100 del 2-5-2014; in vigore dal 17-5-2014).* Law 28 April 2014, n. 67 "Mandate to the Government in the field of non-custodial prison sentences and reform of the sanctioning system. Provisions concerning the suspension of the proceeding with probation and in case of absent defendants" (GU n. 100 of 2-5-2014; entered into force on 17-5-2014).

[44] Article 2(3b) of Law 67/2014 states: "*3. La riforma della disciplina sanzionatoria nelle fattispecie di cui al presente comma è ispirata ai seguenti principi e criteri direttivi: […] b) abrogare, trasformandolo in illecito amministrativo, il reato previsto dall'articolo 10-bis del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, di cui al decreto legislativo 25 luglio 1998, n. 286, conservando rilievo penale alle condotte di violazione dei provvedimenti amministrativi adottati in materia*".

[45] I.e. the word "shall" instead of "may".

manifestly unfounded or fraudulent application, or risk to public policy, public security or national security[46].

In contrast, the Unified Text on Immigration as modified by *Law Decree 89/2011* does not clearly state that the removal of irregular migrants should normally be enforced without any coercive measures[47]. The *Prefetto*[48] may only grant a time-limit for voluntary departure to those who apply for it and therefore in Italy the voluntary departure procedure is neither automatic, nor a "default rule". However, Article 7(1) of the Return Directive goes on to explain that:

> Member States may provide in their national legislation that such a period [for voluntary departure] shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.

In Italy the process for submitting an application for voluntary departure is in practice very difficult because national law requires the possession of valid passport and the availability of a stable domicile, the absence of which is extremely broadly interpreted as "risk of absconding". These requirements hamper (if not fully prevent) an irregular migrant's right to apply for voluntary departure. Lack of access to legal information and complex Court processes further impede upon the extent to which undocumented migrants can actually apply for voluntary departure and attain an effective remedy[49].

Moreover, the manner in which administrative decision makers and judges in Turin actually interpret "risk of absconding" and "risk to public policy, public security or national security" is worrisome when it is considered in the context of how the law is applied to vulnerable immigrants. Allegedly, it is quite common for immigration authorities (*Prefettura* and *Questura*[50]) and the *Giudice di Pace*[51] to overlook the fact that a migrant might have stable housing

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[46] Article 7(4) of the Return Directive states: "If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days."

[47] See Article 13 and Article 14, Legislative Decree 286/1998.

[48] The *Prefetto* is the head of the Italian *Prefettura*. The *Prefettura* is the local police branch that is part of the Ministry of the Interior. The *Prefettura* represents the central government at a local level and there is a *Prefettura* in each of the 110 Italian provinces. *Prefettura* offices manage issues such as order and public security, civil rights and immigration, local autonomies and voting matters. Below the *Prefettura* level, there are local *Questure*. The *Questura* is an office of the *Polizia di Stato* that is under the authority of the Ministry of the Interior. *Questura*'s main function consists in maintaining order and ensuring public security within the territory of the province where it is located. Within each *Questura* there is an immigration office (*Ufficio Immigrazione*) which deals with immigration administrative procedures.

[49] The situation may differ throughout the Italian territory as decisions on voluntary departure applications are taken by the *Prefetto* who is competent on a given territory. To the authors' knowledge, differently from few other *Prefetture*, Turin's authorities deny on a routine-basis the right to voluntary departure to irregular migrants.

[50] See above n. 48.

[51] A *Giudice di Pace* is a non-specialist small-claims judge who is in charge of resolving minor cases or disputes under civil, administrative or criminal law. In Italy, they are the judge in charge of irregular immigration proceedings, in particular of validating an immigrant pre-removal detention and extending the period of such detention. In Italian, a *Giudice di Pace* is commonly called an "honorary judge" (*giudice onorario*) who is appointed by the Minister of Justice. *Giudici di Pace* are paid proportionally based on the number of matters that they decide, rather than the amount of time that they spend hearing and deliberating over matters. Selection is based on qualifications and generally the selected *Giudici di Pace* are

and strong community and family ties when determining whether or not there is a sufficient "risk of absconding" to justify detention as opposed to voluntary departure. Under EU law, national administrative decision makers and judges are the first people responsible for the proper execution of European law, even in cases where the latter is in contrast with provisions of national law. This rule derives from two fundamental principles of EU law that are established by the European Court of Justice's jurisprudence; the principle of direct effect of EU law[52] and the principle of supremacy of EU law[53]. Therefore, Italian immigration authorities and judges are legally obliged to directly apply the principles and norms enshrined in the Treaties of the European Union and the Charter of Fundamental Rights of the European Union, such as the right to family life. This includes applying legal provisions contained in EU regulations and directives, such as Article 7 of the Return Directive on voluntary departure.

Furthermore, hearings in front of the *Giudice di Pace* operate quickly and a significant portion of detainees and lawyers who were interviewed during the authors' 2012 research study noted that there is a lack of individual attention given to detainees and their stories at these hearings: *"I only saw my staff attorney [avvocato d'ufficio[54]] at the hearing together with the judge, that's it. They didn't tell me anything. That lawyer has never called me back again and I do not have his phone number so I cannot contact him" (Interview 22, immigration detainee).* This quotation highlights a double-edged problem relating both to immigration lawyers and the system they operate in. On the one hand, lawyers have a duty towards their clients; on the other hand, the financial and time constraints of how legal aid operates in the immigration detention regime call into question whether lawyers are granted the minimum procedural standards necessary to carry out their duties appropriately. For instance, attorneys are only informed about hearings a short time before hearings take place (i.e. usually few hours, sometimes half an hour before). Consequently, there is no time for case preparation and sometimes there is not even the chance to talk with the client before the hearing. Allegations were made that at validation hearings there is a common attitude amongst the *Giudici di Pace* whereby there is an implicit presumption that detention will be validated: *"[T]he implied understanding, although not expressed, is that you feel "so, here we are to validate [the detention]" rather than "we are here to decide the final result"" (Interview 5, lawyer).* Such allegations seem to be confirmed by official figures produced by *Prefettura* in October 2012 concerning judicial proceedings which took place inside Turin's immigration detention centre in 2011: 96% of validation hearings resulted in a validation of the migrant's detention and 97.2% of extension hearings ended up in an extension of the migrant's detention[55].

Article 15(3) of the Return Directive adopts mandatory language to specify that judicial

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law graduates who have obtained the qualification to practice law or who have exercised judicial functions. Unlike in some jurisdictions, in Italy it is not necessary to have years of experience as a lawyer or barrister before undertaking the *Giudice di Pace* role. The only further requirement is that a *Giudice di Pace* must be between thirty and sixty-five years of age. In criminal matters the *Giudice di Pace* does not have the power to imprison a person.

[52] *Van Gend en Loos v Nederlandse Administratie der Belastingen*, C-26/62, Court of Justice of the European Union, judgment of 5 February 1963.

[53] *Costa v ENEL*, C-6/64, Court of Justice of the European Union, judgment of 15 July 1964.

[54] An *avvocato d'ufficio* is a lawyer appointed by the judge or the prosecution in cases where legal assistance is required by law but a person did not nominate their own lawyer.

[55] A total of 1,144 validation hearings took place in Turin in 2011 and only 46 of these validation hearings actually resulted in a non-validation. The total amount of extension hearings during the same period was 961 and only 27 of these extension hearings resulted in the *Giudice di Pace* denying the extension of detention (figures provided by Turin's *Prefettura* to the authors on 15 October 2012).

or administrative review must occur either at the detainee's request or on an *ex officio* basis[56]. The Return Directive clarifies the rule that where a detainee faces prolonged detention, reviews must be subject to the supervision of a judicial authority. However, there is no provision under Italian law that permits detainees to request a review for their detention. Therefore, detainees must wait for either thirty or sixty days for the periodic review of their detention in an extension hearing. In Turin, detainees are not present at extension hearings, despite the fact that the Italian *Corte di Cassazione*[57] has ruled that detainees must be present both at validation hearings and all extension hearings[58]. Consequently, detainees do not have an opportunity to have their voices heard when a decision is made about whether or not their detention should be extended. Such clear disregard for a higher Court's interpretation of the law would be hard to imagine in the criminal justice system, which is generally more open to media and public scrutiny. In disregarding the *Corte di Cassazione*'s rulings, the local *Giudici di Pace* are demonstrating that their regime operates to its own paradigm and to their discretionary power. While the authors only conducted research about this concerning phenomenon in Turin, informal inquiries suggest that the same practice is occurring in many Italian cities. Nonetheless, in some cases (e.g. in Rome) detainees are allowed to appear in front of the *Giudice di Pace* at extension hearings. This fragmented situation results in an unequal regime that operates inconsistently throughout the country.

Article 15(4) of the Return Directive states that if there are no longer any "reasonable prospects of removal", either due to a lack of legal grounds or other considerations, then detention is no longer justified and it should immediately cease. However, this provision is yet to be incorporated into Italian legislation and there are systemic problems with its application in Turin:

> *"For example, I have a client who is currently detained in CIE [immigration detention] and this is her third time inside CIE. But if you couldn't repatriate her on either the first time or the second one, how can you put her inside CIE for a third time? Why do you detain her? It is only to increase the number of detainees because they know that they will never be able to repatriate her. Serbia didn't recognise her as a Serbian citizen, she has no birth certificate, she has no documents at all. They continue asking the Serbian consulate for identification, even though I've already provided them with a declaration by the Serbian consulate where it is stated that she does not appear in their records. But they keep insisting." (Interview 8, lawyer)*

Article 16(4) of the Return Directive states that "relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities". According to European law, whilst immigration detention centres can exist, human rights organisations should also be allowed to enter them in order to give legal and medical assistance and monitor the conditions in which migrants are temporarily detained. Although Italian law provides for NGOs and other associations to enter inside CIEs[59], there is clearly a

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[56] If a review occurs on an *ex officio* basis it means that it is an automatic/periodic review established by law.
[57] The *Corte di Cassazione* is the Italian Supreme Court located in Rome. It is a *giudice di legittimità*, which means that it cannot undertake merits review, as it only deals with interpretation of law and procedural correctness. Moreover, it solves conflicts about jurisdiction.
[58] *Corte di Cassazione, Sezioni Unite Civili, ordinanza del 13 giugno 2012, n. 9596.* Supreme Court, Unified Civil Section, order of 13 June 2012, n. 9596. On the same matter, see also: Supreme Court, cases n. 4544/2010, 10290/2010, 13117/2011, 13767/2011 and 10055/2012.
[59] See Article 22(1), Presidential Decree 394/1999.

lack of transparency about the conditions by which permission to enter CIE is determined[60]. There is also ambiguity as to the role that NGOs and social cooperatives can play inside immigration detention centres. It seems that their function is limited to providing goods, services and activities inside detention while they face serious barriers to meeting their second and equally important prescribed function of monitoring detention conditions[61].

For example, the *Betwixt and Between* report was the first comprehensive legal analysis of Turin's immigration detention centre. It was the first research project to include a large proportion of anonymous and confidential detainee interviews and as such the research was unique in its ability to give more voice to immigration detainees. However, it was not easy to obtain official authorisation for this research project from the *Questura* and *Pefettura* police branches or the Italian Red Cross who manage Turin's CIE. The researchers initially contacted the Red Cross managing entity and relevant local police bodies to ask them to participate in interviews and authorise entry into Turin's CIE in order to conduct the research. The authorities were the only group of potential interviewees who were contacted and yet failed to provide a formal response within four months. Given that the researchers had not received any formal response from authorities by the publication date, their perspective could not be included in the September 2012 *Betwixt and Between* report. Due to the fact that researchers could not physically visit the immigration detention centre to conduct detainee and staff interviews, the September 2012 *Betwixt and Between* research relied on recording extended telephone interviews with detainees. Initially, the detainee telephone numbers were obtained with permission via volunteers who entered immigration detention and afterwards it was the detainees themselves who spread the word around their cell blocks about the research project. Ironically, shortly after the publication of the September 2012 *Betwixt and Between* report and two subsequent newspaper articles, the authorities contacted the researchers and agreed to an interview in November 2012[62]. At this later stage, the authorities were extremely cooperative in their interview and took the time to answer questions and allow the researchers to enter the staff section of Turin's CIE. However, the same problem resurfaced the following year, when a new group of researchers tried to follow up on the findings of the 2012 *Betwixt and Between* study. Again, the researchers failed to receive a formal response from the authorities within the timeframe of the research project. Nonetheless, they finally received a late authorisation nine months after their request. These obstacles to obtaining the authorisation to enter Turin's CIE for research purposes demonstrate that there is inadequate transparency about the criteria by which permission to enter Italian immigration detention centres is determined by the governing authorities.

IV. HUMAN RIGHTS AND ILLEGALITY REGIMES: THE GAP BETWEEN THE EUROPEAN HUMAN RIGHTS FRAMEWORK AND ADMINISTRATIVE DETENTION IN ITALY

[60] As an example, since the now revoked *Circolare Prot. n. 1305* signed the 1 April 2011 by the former Minister of the Interior Roberto Maroni, it has remained very difficult for researchers and journalists to enter Italian CIEs. Such Ministerial Order prevented journalists from entering CIE for eight months in 2011. It was revoked by the following Minister of the Interior, Anna Maria Cancellieri in December 2011. However, on a practical level the previous ministerial policy still affects deeply the chance to get information from inside of CIE. For further information, see the Italian *LaciateCIEntrare* campaign for journalists, researchers and civil society to have greater access to Italian CIEs (<http://www.lasciatecientrare.it/> and <http://www.openaccessnow.eu/it/>).

[61] See also Article 21(7), Presidential Decree 394/1999.

[62] Information received during this interview was published in a December 2012 supplement paper (Ogada-Osir et al, above n. 1).

Amaya-Castro argues that "illegality regimes carry the general seal of human rights approval"[63] because of the paradoxically weak response of human rights institutions to the claims of migrants and the fact that not all human rights are universal and for non-citizens there are more exceptions as to where the State can legally (or illegally) infringe upon rights. If illegality regimes "increase the distance between the centre and the periphery within a community, and, as such, change the economy between cohesion and division, not necessarily in desirable ways"[64], then the solution to an illegality regime might be to reduce the distance between the centre and the periphery through both formal legal protections as well as the more general ability of the law to influence and normalise progressive social change. Given the theoretically universal nature of human rights, the human rights paradigm should offer a response to situations where irregular migrants are positioned within what could be classified as an illegality regime. However, there are two practical limitations that inhibit the human rights framework from providing a complete response to illegality regimes in the context of administrative detention in Italy. Firstly, there is a gap between the theory of the European human rights framework and its actual application to administrative detainees in Italy. Secondly, the rights protections for third-country nationals in the administrative law system are very different from the rights protections that are guaranteed via the criminal justice system. The former issue will be analysed in this section, while the latter will be examined under Section V(B).

Article 6 of the Treaty on the European Union (TEU)[65] explicitly provides that EU law must not only be consistent with international human rights law and the Council of Europe's *European Convention on Human Rights* (ECHR)[66], but the Charter of Fundamental Rights of the European Union[67] should also constitute part of EU law and have the same legal value as the Treaty on the European Union and the Treaty on the Functioning of the European Union (TFEU)[68]. The *Betwixt and Between* study revealed a clear discrepancy between the word of the law and the manner in which the law operates in practice for immigration detainees in Turin. It calls into question the extent to which the Return Directive is being implemented in Italy with regards to the right to family life, children's rights, the right to an effective remedy, rights relating to conditions of detention and the EU premise that in return procedures voluntary departure should be the default position. The fact that there are EU and Italian laws that fail to be applied at every level of the detention process indicates that although immigration detainees are legally supposed to fall within a democratic political regime that is ruled by law, in reality their status as irregular migrants can actually place them in a second regime. Whilst this second regime is theoretically within the rule of law, there are frequent allegations that the law is not applied as it was intended. In that sense, the second regime that is described in this section could be seen as a regime of *un-legality*.

A. Children's Rights

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[63] Amaya-Castro, above n. 8, 159.

[64] *Ibid.*, 155.

[65] Consolidated Version of the Treaty on the European Union, C 83/1 *Official Journal of the European Union*, 30.3.2010.

[66] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953 and ratified by Italy 26 October 1955).

[67] Charter of Fundamental Rights of the European Union, C 303/1 *Official Journal of the European Union*, 14.12.2007.

[68] Consolidated Version of the Treaty on the Functioning of the European Union, C 83/1 *Official Journal of the European Union*, 30.3.2010.

Whilst Article 5(a) of the Return Directive protects the best interests of the child, there is strong evidence to suggest that some administrative decision makers and judicial authorities in Turin are not adhering to the legal obligation to consider the best interests of the child as a primary consideration. Amongst administrative decision makers there is a systemic failure to acknowledge children's ties to Italy, schooling and familiarity with their parent's country of origin:

> *"Children stay outside. For example, there was a woman […] who was detained in CIE here in Turin for six months and she had four children living in Reggio Calabria*[69] *and she wrote a letter saying that it is inhumane to separate a mother from her children. I still have the letter. So, basically parents are separated from their children and nowadays this happens very often because inside CIE you find people who have been living in Italy for a long time, with a family here and children who were born here" (Interview 2, volunteer).*

In a subsequent interview with representatives from the Italian immigration police and the Italian Red Cross who manage Turin's CIE, the authorities clarified that detainees are usually allocated to the closest CIE and this decision is determined by the number of available beds in each immigration detention centre on the day of the transfer. The authorities noted that consideration is given to where a detainee's embassy or consulate is located in order to make it easier to complete the identification procedure[70]. The authorities further explained that detainees can be transferred between immigration detention centres in circumstances where it would be easier for the embassy or consulate in question to identify all of their alleged nationals if those nationals were detained in the same centre. The authorities claimed that detainees are usually informed about such transfers, although sometimes the authorities prefer not to tell certain detainees in advance if they fear that advising a detainee could jeopardise security or threaten public order.

The same criterion is applied when a detainee is transferred for repatriation. Generally, when detainees are moved from one immigration detention centre to another they are not transferred back to the original centre, even where the reason for their transfer, namely a planned meeting with the consulate representatives, identification or repatriation, does not take place. However, the separation of children and parents, and more generally of detainees and family members, was a recurring theme in the *Betwixt and Between* interviews: *"The problem is that I am stressed because I cannot see my daughter […] I want to die, because I miss my family too much" (Interview 11, immigration detainee).* The study called into question whether the processes used to determine if an immigration detainee was to be transferred ensured that the best interests of the child remained a primary consideration, as mandated by Article 3(1) of the *Convention on the Rights of the Child* (CRC)[71].

B. The Right to Family Life

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[69] Reggio Calabria is approximately 1,360 km away from Turin.

[70] Ogada-Osir et al, above n. 1, 8.

[71] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990 and ratified by Italy 5 September 1991). Article 3(1) states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 8 ECHR enshrines the right to family life and it incorporates both a positive and a negative obligation on the State to respect and protect this right[72]. In general, detainees with stable family situations and strong long-term family ties to Italy should either receive a permission to stay or at least not be detained as the risk of absconding is likely to be quite limited due to their strong family ties. However, it appears that this right to family life is not fully respected. *Betwixt and Between* discovered some cases where it was surprising that a deportation order had been issued given the detainee's long-term private and family life ties to Italy. One interviewee had been in Italy for almost twenty years and after his detention his family faced such severe financial woes without his income that they had lost their rental apartment and although they lived in Turin they were no longer able to pay for the bus fares to visit him inside the local CIE: *"Also, she [my wife] cannot come to visit me anymore. Previously, I could see my daughter and now I cannot see her anymore. They came to visit me three or four times [in the past]. My ex and my son also came to visit. I have a good relationship with them" (Interview 20, immigration detainee).*

Moreover, there are reports of families being broken up across the EU. The NGO *Medici per I Diritti Umani* (Doctors for Human Rights) reported that in 2011 a total of 304 Romanians were detained in Rome's *Ponte Galeria* CIE, a figure that made Romanians the third most represented nationality in that immigration detention centre[73]. We should reconsider where the boundaries of the illegality regime lie in light of the fact that both EU citizens and third-country nationals can have their families broken up due to immigration detention. Romanians are EU citizens and yet they probably face a higher chance of being categorised along with third-country nationals than that which is faced by a Frenchman or Englishman in Italy. The reasons why Romanians are so disproportionately represented in comparison to other EU citizens inside the Italian immigration detention system are worthy of more detailed consideration. This overrepresentation of Romanians might reveal how the process of dividing people via illegality regimes does not merely entail classification along EU borders, but also categorisation that is influenced by socio-economic and ethnic differences.

C. The Right to an Effective Remedy

Article 15(2) of the Return Directive protects the right to either speedy judicial review of an administrative decision to detain, or the right for the third-country national to "take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings". Despite this clear legal obligation, the Italian system does not have an effective mechanism for fast judicial review after the *Giudice di Pace* has approved the decision to detain a migrant via their generally quick and impersonal validation hearing. There are long waiting lists for appeals to the *Corte di Cassazione* and an appeal often takes more than a year. An application for an appeal to the *Corte di Cassazione* is not a ground for an immigration detainee to be released from detention. Moreover, a lawyer must have practiced for over twelve

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[72] See *Kroon and Others v. The Netherlands*, 18535/91, Council of Europe: European Court of Human Rights, 27 October 1994, para. 31. On the right to respect for family life, see also: Article 16, *Universal Declaration of Human Rights*; Article 23, *International Covenant on Civil and Political Rights*; Article 7, *Charter of Fundamental Rights of the European Union*. On the right to family life as applied to migrants and irregular migrants, see: Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, L 251/12 *Official Journal of the European Union*, 3.10.2003; and Article 5, Directive 2008/115/EC.

[73] Medici per i Diritti Umani (MEDU), *Le Sbarre Più Alte: Rapporto sul centro di identificazione ed espulsione di Ponte Galeria a Roma*, May 2012, 21.

years before they are allowed to appear in the *Corte di Cassazione* in Rome and this presents a practical difficulty for detainees because the lawyer who represented them at their validation hearing is unlikely to be able to appear in front of the *Corte di Cassazione*. Detainees with language barriers and difficulty understanding the legal system can find it overwhelming to organise an experienced lawyer in Rome whilst living in the emotional and physical constraints of a detention centre that is hundreds of kilometres away.

The right to an effective remedy is protected by Article 13 ECHR and Articles 13 and 15(2) of the Return Directive. In Turin, there are serious doubts as to whether an effective remedy is actually accessible by detainees because, as mentioned above, detainees are not even allowed to participate in the periodic extension hearings where the term of their detention is increased (despite the *Corte di Cassazione*'s conflicting jurisprudence[74]). The *Betwixt and Between* interviews revealed inadequate access to lawyers for legal advice and case preparation. The majority of detainees explained that they had only met their lawyer on the day of the validation hearing and a significant portion of detainees felt that they had not had enough time to speak to their lawyer comprehensively. Interpreters are only guaranteed during the actual hearing in front of the *Giudice di Pace* and this means that many detainees are denied prior access to an interpreter in order to obtain private legal advice from a lawyer before their hearing. Consequently, many detainees are unable to explain their personal circumstances so that their lawyer could prepare legal submissions.

D. Rights Protection for Vulnerable People

Article 16(3) of the Return Directive provides that "[p]articular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided". For the purposes of the Return Directive, "vulnerable persons means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape and other serious forms of psychological, physical or sexual violence"[75]. However, it is questionable whether the *Giudice di Pace*, the Red Cross, the immigration authorities and the police who work inside CIE pay sufficient attention to the situation of vulnerable people. Healthcare in Italian immigration detention has been heavily criticised by numerous studies by *Medici per i Diritti Umani*[76] and the *Betwixt and Between* interviews revealed alarming rates of self-harm[77] and hunger strikes, endemic waits for healthcare and questionable use of psychotropic medication.

Immigration detainees in Turin include extremely vulnerable people such as asylum seekers with no known criminal history. For example, an eighteen-year-old asylum seeker spoke to us via an interpreter and he was extremely confused as to why he had been detained: *"I don't know why I am inside here. I don't want to stay here and in Libya there are so many troubles. I don't want to go*

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74 See above Section III(B) of this article.

75 Article 3, Directive 2008/115/EC.

76 Medici per i Diritti Umani (MEDU), *Arcipelago CIE. Indagine sui Centri di identificazione ed espulsione italiani*, Formigine, Modena: Infinito Edizioni, May 2013; *Le Sbarre Più Alte*, May 2012; *L'iniquo ingranaggio dei CIE. Breve analisi dei dati nazionali completi del 2011 sui centri di identificazione ed espulsione*, July 2012; *Rapporto Centro di Permanenza Temporanea ed Assistenza Brunelleschi di Torino*, June 2006.

77 Figures related to self-harm inside Turin's immigration detention centre in 2011, as reported by the Red Cross Director of the centre, are the following: 156 registered episodes of self-harming, 100 of them consisting of swallowing pharmaceuticals and other materials, 56 of them consisting of cutting oneself. See also: Raffaella Cosentino and Alessio Genovese, "Lo scandalo dei centri di identificazione dove gli ospiti diventano detenuti", *La Repubblica* (online), 9 June 2012.

back there" (Interview 22, asylum seeker). He further explained his confusion because: *"I've never had problems with justice. I've never been to prison. I want freedom, here there is no freedom. I want to go out. I am eighteen, why am I inside here?".* This interviewee saw taking psychotropic medication as the only way to endure detention, on the brink of adulthood: *"Of course I have to take psychotropic drugs because here if you don't take the therapy you go crazy. You need psychotropic drugs both to sleep and to keep quiet. Almost everybody here takes psychotropic medication".*

V. ITALIAN ADMINISTRATIVE LAW AND THE EXCLUDED

A. The Disjuncture between Administrative Law Theory and Practice

Perhaps an illegality regime lies in the divide between theory and practice. For, it is in this chasm that we can see how misguided intentions, inherent prejudice and fear of the unknown stranger might cause the systemic discrimination that propels us from the realm of legality governed by the rule of law to that of illegality (or *un-legality*) watered by prejudice. In theory, Italian administrative law espouses two fundamental democratic principles that are shared by most modern Western legal traditions: the rule of law and the separation of powers[78]. Italian administrative law can perhaps be summarised in terms of five key principles; the principle of legality, the principle of impartiality, the principle of good execution, the principle of responsibility and the principle of openness and transparency[79].

1. The Principle of Legality (*Legalità*)

The principle of legality derives from Article 97 of the Italian Constitution[80], which states: "Public administration activity is organised according to provisions of law, so that good execution and impartiality of public administration are guaranteed."[81] This principle entails three different concepts[82]:

- there must be "non-contradiction" in the sense that an administrative act cannot be in contradiction with any provision of law and the law only represents a negative limit to public administration activity;
- there must also be formal compliance with the law, an administrative action must be grounded on a specific provision of law and it must be executed within the limits set by that law, which represent its external limit;
- there must not merely be formal compliance but substantial compliance with the law, which sets the internal limit of administrative action, that is its contents and modalities.

The manner in which asylum seekers have been treated in Italy contradicts the principle of legality when interpreted in either its weaker or stronger form. The *Betwixt and Between* study found that there can be a gap of up to twelve days in Turin between the moment when an immigration detainee applies for asylum and the time when that asylum application is put on the

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[78] Harlow, above n. 11, 189-195.

[79] On the principles of Italian admnistrative law, see: Elio Casetta, *Manuale di diritto amministrativo*, 12th ed., Milano: Giuffrè, 2010, 31-68; Sabino Cassese, "Il diritto amministrativo e i suoi principi", in Sabino Cassese (ed.), *Istituzioni di Diritto Amministrativo*, 4th ed., Milano: Giuffrè, 2012, 1-22; Paolo Piva, "An Introduction to Italian Public Law", *European Public Law*, vol. 1, issue 3, 1995, 299-307; Guido Corso, *Manuale di Diritto Amministrativo*, 5th ed., Torino: Giappichelli, 2010; Augusto Barbera and Carlo Fusaro, *Corso di Diritto Pubblico*, 7th ed., Bologna: Il Mulino, 2012.

[80] Constitution of the Italian Republic of 22 December 1947 (in force since 1 January 1948).

[81] *I pubblici uffici sono organizzati secondo disposizioni di legge, in modo che siano assicurati il buon andamento e l'imparzialità dell'amministrazione.*

[82] Casetta, above n. 79, 42; Cassese, above n. 79, 9-12.

centralised system, in order to ensure that no deportation occurs before asylum proceedings have been determined:

> *"Also, for example, if I am inside the CIE and I ask the Red Cross to make a request for political asylum, from the moment I make this request to the moment they bring me to the Immigration Office inside the camp to formalise the request, one week, ten days, two weeks can pass. During this week I have no guarantee and I can be deported. You are not protected until you formalise your request. If there is a lawyer who comes and says, well, there is my client who wants to ask for it [asylum], okay, they will write [it] in the Immigration Office but if there is no lawyer then there is no guarantee" (Interview 7, lawyer).*

This contradicts the law because Italy has an obligation under Article 3 ECHR to ensure that third-country nationals are not actually deported back to countries where they would face a real risk of being subject to torture or inhumane and degrading treatment[83].

There is also a failure on the part of administrative decision makers to substantially comply with the purposes of asylum law set by the UN High Commissioner for Refugees (UNHCR). The *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*[84] and relevant *Conclusions*[85] note the vulnerability of asylum seekers and weigh against detention. The State is required to justify each individual decision to detain an asylum seeker, and such decisions should be necessary to serve a specific purpose and as brief as possible[86]. Yet, in *Betwixt and Between* a journalist who had been in Lampedusa at the time of the Arab Spring claimed that the decision about whether to put migrants in Reception Centres for Asylum Seekers (CARA) or immigration detention centres (CIE) was in practice an arbitrary decision based on skin colour rather than individual circumstances. This journalist alleged that he had witnessed administrative decision makers automatically putting people of Arab complexion who came on boats into immigration detention and separating Sub-Saharan Africans to process asylum applications[87].

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[83] *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, para. 74.

[84] United Nations High Commissioner for Refugees, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, UNHCR, 26 February 1999, Guidelines 2 and 3.

[85] United Nations High Commissioner for Refugees, *Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers*, ExCom, UNHCR, 37th Session, 1986, para. B.

[86] Detention is to be permitted only where it is necessary and lawful in order to verify identity, to determine the truth of the basis for an asylum claim, to deal with cases of destroyed or fraudulent identity documents or for national security or public order. See: United Nations High Commissioner for Refugees, *Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers*, above n. 85; United Nations High Commissioner for Refugees, *Conclusion No. 85 (XLIX) International Protection*, ExCom, UNHCR, 49th Session, 1998, para. (w); United Nations High Commissioner for Refugees, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, UNHCR, 26 February 1999, Guideline 3.

[87] Stege et al, above n. 1, 80. On the issue of procedural irregularities and alleged human rights violations in the Reception Centre (CDA) of Lampedusa, see *inter alia*: Parliamentary Assembly of the Council of Europe, *Report on the Visit to Lampedusa (Italy) (23-24 May 2011)*, AS/Mig/AhLarg (2011) 03 Rev 2, September 2011; Commissioner for Human Rights of the Council of Europe, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Italy from 26 to 27 May 2011*, CommDH(2011)26, Strasbourg, 7 September 2011; Amnesty International, *Italy: Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo*, Briefing Paper, EUR 30/007/2011, 21 April 2011; Rutvica Andrijasevic, *How to Balance Rights and*

2. The Principle of Impartiality (*Imparzialità*)

The principle of impartiality is articulated in the abovementioned Article 97 of the Italian Constitution and it contains both a negative and a positive obligation[88]. The negative obligation forbids the public administration from discriminating against subjects who are involved in its action. The positive obligation compels the public administration to consider and evaluate all the existing interests related to a certain administrative action, so as to ensure that the public interest prevails over other interests in the least harmful way to the latter. This does not mean that administrative actions cannot follow a certain orientation. On the contrary, the public administration is supposed to make discretionary decisions when pursuing the public interest, as long as this occurs with respect to law and the principle of anti-discrimination[89]. The principle of impartiality does not only apply to the public service, but also to its apparatus, which includes administrative tribunals, statutory authorities and entities carrying out functions of a public nature, such as the Italian Red Cross when managing Turin's immigration detention centre.

3. The Principle of Good Execution (*Buon Andamento*)

The administrative branch of government has a duty to carry out its activities in the most appropriate and adequate way in order to make the administrative action compliant with the criteria of effectiveness, efficiency, cost-effectiveness, promptness and simplicity. Moreover, administrative actions should cause the least damage possible to the private subjects involved. This implies a duty to carry out a considered investigation to evaluate the effects of administrative action[90]. *Law 241/1990*[91] bestowed a new and more complete meaning upon the constitutional principle of good execution, as spelled out in Article 97 of the Constitution. Article 1 of *Law 241/1990*[92] extends the private company principles of cost-effectiveness, efficiency and effectiveness into public service activity. Consequently, the focus of administrative law is no longer restricted to the narrow question of the legality of an administrative action because it also includes administrative procedure and the substantive merits of administrative decision making.

Immigration detention in Italy is not a cost-effective method of approaching migration issues, as recently proved by a ground-breaking study carried out by the NGO *Lunaria*[93]. Immigration detention centres are not only places of immense suffering but they run at a huge cost to the public purse, with official estimates placing Italian immigration detention centres at

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Responsibilities on Asylum at the EU's Southern Border of Italy and Libya, Centre on Migration Policy and Society, Working Paper n. 27, University of Oxford, 2006.

88 Casetta, above n. 79, 46; Cassese, above n. 79, 13-14.

89 Casetta, above n. 79, 47; Cassese, above n. 79, 13-14.

90 Cassese, above n. 79, 14-16.

91 *Legge 7 agosto 1990, n. 241 "Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi" (GU n. 192 del 18-8-1990).* Law 7 August 1990, n. 241 "New norms concerning the administrative procedure and the right to access administrative documents" (GU n. 192 of 18-8-1990).

92 "The administrative activity pursues the aims established by law and is grounded on criteria of cost-effectiveness, efficiency, impartiality, openness and transparency, according to the rules included in this law and the rules governing each administrative procedure, as well as the principles of European law" (*L'attività amministrativa persegue i fini determinati dalla legge ed è retta da criteri di economicità, di efficacia, di imparzialità, di pubblicità e di trasparenza secondo le modalità previste dalla presente legge e dalle altre disposizioni che disciplinano singoli procedimenti, nonché dai princìpi dell'ordinamento comunitario*).

93 Lunaria (ed.), *Costi disumani. La spesa pubblica per il "contrasto dell'immigrazione irregolare"*, May 2013.

about 200 million euros per year[94]. Expenditure on the construction of Italian CIEs was 140 million euros, running costs accounted for 30 million euros and another 34 million euros were spent on repatriation procedures. Moreover, there is a loss of potential income that could have been earned through taxes that might otherwise have been collected if those migrants were outside of detention and working with valid documents. Immigration detention can have terrible consequences for the mental health of detainees and their families and quantifying the cost of this suffering on a long-term scale is difficult because it would require considering how future income (and tax) is affected due to mental health issues or social disintegration[95]. Immigration detention centres also require periodic infrastructure maintenance. For example, in 2008 Turin's immigration detention centre underwent a major maintenance program to increase its capacity and this cost 14 million euros, equating to 78,000 euros per bed inside the detention centre[96]. Available sources claim that the organisations who manage Italian CIEs are paid a daily average of 40 to 45 euros per detainee[97], meaning that each detainee costs the State between 1,200 and 1,300 euros per month[98].

A large number of detainees in Turin's immigration detention centre comes directly from jail. Despite the massive social, psychological and economic costs of detaining migrants for a *de facto* second term of imprisonment, there is still no efficient system in place to identify people during criminal imprisonment. It would be more logical and efficient to decide whether immigration proceedings were justified and necessary after a criminal sentence. This would also potentially allow migrants better access to justice since they could seek legal assistance during their prison term in the case that they wished to appeal an immigration decision.

The serious economic costs associated with immigration detention raise questions in terms of whether the principle of good execution is consistent with the administrative authorities' tendency to detain irregular migrants rather than offering them voluntary departure or better access to work visas. Moreover, less than half of the migrants who are detained in Italian immigration detention are actually deported. In 2013, 45,7% of detained migrants were

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94 On a national level, the *Corte dei Conti* (the most important judicial body on public budget control) estimates that in 2010 the final budget for Italian CIEs was 200 million euros. See: Fulvio Vassallo Paleologo, "Cie – Dopo il decreto sui rimpatri ancora diritti violati", *Progetto Melting Pot Europa* (online), 9 August 2011; figures presented by Andrea Stuppini at the conference "*Quali alternative ai CIE? Prospettive e Proposte*" [Which alternatives to CIEs? Perspectives and proposals], Transeuropa Festival, European Alternatives, Bologna, 10 May 2012. The same Court maintains that in 2004 surveillance activity – implemented by 800 law enforcement officers – cost 26.3 million euros, a figure that has probably been raised throughout recent years. See: Luigi Manconi and Stefano Anastasia (eds.), *Lampedusa non è un'isola. Profughi e migranti alle porte dell'Italia*, Associazione A Buon Diritto Onlus, June 2012, 66.

95 Axel Klein and Lucy Williams, "Immigration Detention in the Community: Research on the Experiences of Migrants Released from Detention Centres in the UK", *Population, Space and Place*, vol. 18, issue 6, November/December 2012, 741-753.

96 Figures provided by members of Turin's *Prefettura*; Maurizio Bongioanni, "Quanto ci costano i Cie (e chi li gestisce)", *Radio Radicale* (online), 7 July 2012; figures presented by Andrea Stuppini, above n. 94.

97 Figures presented by Andrea Stuppini, above n. 94; Raffaella Cosentino, "Cinque biglietti per un rimpatrio. Quanto costa un'espulsione?", *Progetto Melting Pot Europa* (online), 2 May 2012; Grazia Naletto, "Immigrati, il costo della cattiveria", *Sbilanciamoci* (online), 23 November 2010; Maurizio Bongioanni, "CIE: grandi gruppi e concorrenza al ribasso", *Radio Radicale* (online), 9 July 2012; Antonello Mangano, "Gli intrappolati. La spending review dimenticata", *Radio Radicale* (online), 6 July 2012.

98 Under the agreement signed between the Italian Red Cross who manages Turin's CIE and the local *Prefettura*, the managing entity would receive 11 million euros of public funding for a three-year period (2011-2014).

repatriated, which is 5% less than in 2012[99]. When compared to the limited budget that the State spends per annum on migrant integration in Italy, the huge costs associated with the immigration detention system are perplexing and wasteful.

4. The Principle of Responsibility (*Responsabilità*)

The principle of responsibility derives from Article 28 of the Italian Constitution[100], which establishes the notion of accountable government because it implies that public servants should act responsibly as they exercise their duties. Public servants are personally liable for any illegal action they commit in exercising their duties and they may be subjected to a sanction. The findings of the *Betwixt and Between* report were disturbing because there was not always a clear relationship between administrative power and a sense of responsibility to maintain the law. The latter entails granting fair procedures as prescribed by law and taking responsibility to ensure due process and protect vulnerable people such as asylum seekers whose treatment is subject to international law:

> *"They led me to Milan. I spent seven hours there inside the airport's immigration office. They brought me some papers and they made me sign those. But I could not read in Italian, so I just signed some papers without knowing what was written on them. There wasn't anyone able to translate them into Arabic. No interpreters, no lawyers. Nothing. I realised that the documents were for my expulsion just now, during my detention in Turin's CIE." (Interview 22, asylum seeker).*

5. The Principle of Openness and Transparency (*Pubblicità e Trasparenza*)

The right to freedom of information in Italy stems from Article 1 of *Law 241/1990*. The principle of openness and transparency has two components[101]. Firstly, there is a right of private subjects who hold an interest in a case to be involved in the administrative procedure concerning that case. Secondly, there is a right of immediate and easy access to the documents related to that administrative procedure. This principle was not included in the Constitution and it was only introduced among the general principles of administrative law with *Law 241/1990*. This represented a key evolutionary moment in Italian administrative law and procedure because it is meant to substitute the (opposite) principle of secrecy, which characterised Italian administrative law until the 1990s.

Unfortunately, secrecy remains entrenched in the governance of immigration detention centres. Detainees suffer from a serious lack of information about how the administrative proceedings concerning their case are progressing (this is particularly pertinent where a detainee

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[99] Medici per i Diritti Umani (MEDU), *Riepilogo situazione persone transitate nei Centri di Identificazione ed Espulsione (tabella comparativa dei dati nazionali per gli anni 2012 e 2013)*, <http://www.mediciperidirittiumani.org/pdf/Tabella_comparativa_2012-2013.pdf>; *Grafico Rendimento CIE dal 2008 al 2013*, <http://www.mediciperidirittiumani.org/pdf/Rendimento_CIE.pdf>; "Centri di identificazione ed espulsione: i dati nazionali del 2013. Strutture sempre più inutili e afflittive", 12 February 2014, <http://www.mediciperidirittiumani.org/centri-di-identificazione-ed-espulsione-dati-nazionali/>.

[100] **"**Public servants and State employees are directly responsible for their own acts which represent a breach of rights, according to criminal, civil and administrative law. In those cases, civil responsibility is also extended to the State and public administration bodies." (*I funzionari e i dipendenti dello Stato e degli enti pubblici sono direttamente responsabili, secondo le leggi penali, civili e amministrative, degli atti compiuti in violazione di diritti. In tali casi la responsabilità civile si estende allo Stato e agli enti pubblici*).

[101] Cassese, above n. 79, 20-21.

is not assisted by an *avvocato di fiducia*[102]). Detainees usually struggle to receive information through oral conversations with the immigration police and Red Cross staff who manage the centre. For instance, in Turin detainees are not present at their own extension hearings and neither the time nor the outcome of such hearings are formally communicated to them in writing. A further example of administrative secrecy is found in the manner in which decisions are made about detainee repatriations and transfers between immigration detention centres. The detained person often does not know the time, mode or reason for their transfer or repatriation and their lawyer and family are not always informed in advance. Finally, the fact that journalists and researchers often face difficulties in entering detention centres as well as accessing information, data and figures about the Italian immigration detention system is another affront to the principle of openness and transparency[103].

B. Comparing Criminal Procedure and Administrative Procedure

When compared with criminal detention, administrative detention seems like a peculiar space that is outside the law despite the fact that it is governed by a legal system and overarching human rights framework. This element of being *outside* stems from the fact that the procedures and dominant legal philosophy related to administrative detention are inconsistent with those applying to the criminal justice system, and more generally to the rest of the legal system. Innocent until proven guilty is replaced with a presumption of risk of absconding or threat to public security even when a migrant has lived in Italy for years.

However, worshipping "the border" is not necessarily the same as effectively protecting public security. We interviewed an eighteen year-old asylum seeker who arrived in Italy as an undocumented unaccompanied minor and then run away because he did not like the care facility where he was placed. A short time later, when he had just come of age, his identity was checked in Switzerland and he was immediately transported to immigration detention in Italy. This teenager lost his right to liberty because his personal freedom was not seen to be as important as the risk that he might abscond. Here, the realm of administrative law offered far less protection than that of criminal law: this teenager, who could not speak Italian, was deported back to Italy and detained in a quick and almost automatic manner and was not given adequate access to an interpreter, information or legal advice. Unlike in criminal law, the threshold for detaining him in administrative detention was not beyond reasonable doubt. Similarly, we interviewed a mother with a nine-year old child born in Italy and an extended family with jobs and permits to stay who was caught in the hyperbole of threat to public security. This woman had committed criminal offences and served six months in jail. Though she and her family had spent over a decade in Italy, the fact that she was a foreigner meant that she faced a second sentence of immigration detention and then deportation. As such her nine-year-old daughter and the other innocent family members would also suffer due to trans-continental family break-up.

For, those who need rights the most remain *outside*, judged and categorised by the legal system based on their birthplace and ethnicity rather than their actions. Article 6(1) ECHR[104]

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102 An *avvocato di fiducia* is a lawyer whom a person has individually chosen to represent them for a case. In contrast, an *avvocato d'ufficio* is a lawyer appointed by the judge or the prosecution in cases where legal assistance is required by law but a person did not nominate their own lawyer.

103 See above Section III(B) of this article.

104 Article 6(1) ECHR states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or

establishes that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" and yet this fundamental right only applies to "civil rights and obligations" and to "any criminal charge". For this reason, the Article 6 ECHR right to a fair trial does not apply to expulsion and extradition proceedings, which are administrative proceedings, as confirmed by the European Court of Human Rights in *Maaouia v. France*[105]. Although aliens are included as much as nationals of contracting Parties in the ECHR definition of "everyone", in practice there are only very limited circumstances when Article 6(1) may apply to immigration matters, namely in cases where an applicant is being returned to a third country where they may be subjected to treatment contrary to Article 6(1) and in asylum and expulsion proceedings[106]. Therefore, the ECHR framework contains a strong difference between the rights protection that is offered in criminal matters and the rights protection that is given in administrative matters. Thus, even the most influential international treaty protecting human rights at the European regional level seems to legitimate the existence of a big discrepancy between the procedural safeguards that are afforded to migrants in immigration matters and those safeguards guaranteed to accused people in the criminal justice system. Yet, in both cases an individual risks losing their liberty. Here, to be part of the criminal law illegality regime would offer more protection than that of being *outside* the system due to one's status as a foreigner. This discrepancy between rights and safeguards in criminal and administrative proceedings is particularly striking in light of the fact that Turin's immigration detainees who had been transferred from jail to CIE overwhelmingly viewed the conditions in jail as better than the dire conditions of Turin's CIE[107].

The moment when administrative law turned to detention as a measure to cope with undocumented migrants, it borrowed the harshest means of punishment from criminal law. However, the same procedural safeguards and rights protection which are guaranteed under the criminal judicial system were not simultaneously extended to administrative detention of irregular migrants. In the US context, this process has been defined by Stephen Legomsky as the "asymmetric incorporation of criminal justice norms" into immigration law[108]. Legomsky argues that the process of incorporation of elements of criminal law into civil migration law has been selective and asymmetric, because "immigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal enforcement model"[109] while rejecting its procedural safeguards.

As a matter of fact, within the ECHR legal framework, Article 1 of Protocol 7 ECHR[110] (as amended by Protocol 11 ECHR[111]) sets out "procedural safeguards relating to expulsion of aliens":

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national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

105 *Maaouia v. France*, 39652/98, Council of Europe: European Court of Human Rights, 22 March 2000.

106 Hélène Lambert, *The position of aliens in relation to the European Convention on Human Rights*, Strasbourg: Council of Europe Publishing, 2006, 80-81.

107 Stege et al, above n. 1, 32.

108 Legomsky, above n. 15.

109 *Ibid.*, 472.

110 *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 22 November 1984, ETS No. 117 (entered into force 1 November 1988).

111 *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 1994, ETS No. 155 (entered into force on 1 November 1998).

> 1(1) An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
> a) to submit reasons against his expulsion,
> b) to have his case reviewed,
> c) and to be represented for these purposes before the competent authority or a person or persons designated by that authority.

Article 6(1) ECHR is rarely applied to immigration matters exactly because the Court refers to Article 1 of Protocol 7 ECHR as the legal provision protecting the right to a fair trial of aliens facing return procedures to exclude any such guarantee from Article 6(1)[112]. However, Article 1 of Protocol 7 only applies to non-citizens who are "lawfully residents" in the territory of a contracting State and apparently leaves unauthorised migrants outside the scope of the rights and safeguards listed under paragraphs 1(1)(a), (b) and (c).

The question of whether the European Court of Human Rights should adopt a more liberal definition of "civil rights and obligations" under Article 6(1) has received mixed opinions from the bench. In their dissenting opinion in *Maaouia v. France,* Judge Loucaides and Judge Traja argued for the adoption of a broad interpretation of "civil rights". In the absence of a definition of the word "civil" in the ECHR, in order to interpret Article 6(1) in *good faith*, Judge Loucaides and Judge Traja referred to Article 31(a) of the *Vienna Convention on the Law of Treaties* and interpreted the word "civil" in Article 6(1) as simply meaning non-criminal. Here, Judge Loucaises was influenced by what he interpreted to be the purpose of Article 6(1) and of the ECHR as a whole:

> "It is, I believe, evident that the object and purpose of Article 6 was to ensure, through judicial guarantees, a fair administration of justice to any person in the assertion or determination of his legal rights or obligations. It would be absurd to accept that the judicial safeguards were intended only for certain rights, particularly those between individuals, and not for all legal rights and obligations, including those *vis à vis* the administration, where an independent judicial control is especially required for the protection of individuals against the powerful authorities of the State. In other words, it is inconceivable for a Convention which, according to its Preamble, was intended to safeguard "those fundamental freedoms which are the foundation of justice ... in the world" and implement the principle of "the rule of law" to provide for a fair administration of justice only in respect of certain legal rights and obligations, but not in respect of rights concerning relations between the individual and the State."[113]

In this respect, we may question whether the right to draw a border around one's land could justify a presumption of guilt that undermines the very basis of Western legal tradition. The criminal law system has come to terms with the fact that sometimes guilty people will go free in order to prevent the innocent from being jailed. Not holding a residence permit and being an actual threat to public security are two very different things and they should not be confounded. Public security is an elusive concept and needs to be understood in the context of how it is dealt with under rights-based criminal law systems. The law is a balancing act and the correct solution

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112 See *Maaouia v. France*, paras. 37-38. On the ECtHR restrictive judgement in *Maaouia v. France*, see also: Lambert, above n. 106, 81-82.

113 *Dissenting Opinion of Judge Loucaides joined by Judge Traja*, in *Maaouia v. France*, 20.

is rarely simple or perfect. Yet, the correct solution is one based on reason rather than race, and philosophy rather than fear.

VI. CONCLUSION: ADMINISTRATIVE LAW - FROM A GOVERNMENTAL ACCOUNTABILITY MECHANISM TO AN ILLEGALITY REGIME

The issues revealed in this article are not unique to Italy and while a detention centre in Turin was the case study chosen for this particular analysis, the underlying revelations are thought-provoking for illegality regimes elsewhere. The experience inside Turin's CIE no doubt shares parallels to that of immigration detention centres around the world. Within immigration detention, there is a pervasive feeling of being stuck in limbo and left to suffer in a forgotten space. There is an intrinsic sense of confusion that is exacerbated by inadequate access to interpreters, barriers to legal advice and the stress of being detained in a foreign country where one's entire sense of self is criminalised. This criminalisation of identity stems from the random roulette of life that determines what side of the sea we are born on. The desire to escape persecution and the aspiration to search for a better life are two fundamentally human attributes and yet strangely they can divide humanity rather than bring us together by relating to each other's intrinsically shared goals and experiences. It is the reason that Italy was once a country of emigration, and why so many Italians suffered terribly unfair discrimination and racism when they crossed seas in the 19th and the 20th centuries in search of a better life.

The world is divided into Nation States, each with its own legal regime that is supposed to serve its citizens. Yet, many immigration detainees find themselves outside of the two national legal regimes that could help them because they are ignored by their home countries, and their individuality and humanity is forgotten by the State where they arrive. Even the supposedly universal human rights framework does not function to fully include them. So, immigration detainees remain in a curious space somewhere in the middle. This space could be described as an illegality regime, or perhaps more appropriately an *un-legality* regime, since the philosophical underpinnings and fundamental principles upon which a legal system is grounded are deliberately ignored or circumvented. As the European Union faces a fundamental moment in the formation of its identity and values, it is timely to reflect upon the purpose of legislation and consider the philosophies that lie behind administrative and criminal law regimes. Criminal law and administrative law theory add perspective to debate about the ideals and legal philosophies that the continent decides to embrace for the future.

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