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**THE RIGHT TO RESIST AND THE HIERARCHISATION OF CITIZENSHIP.
CHALLENGING HOW POLICY PRODUCES VULNERABILITY**

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Abstract

The study explores how realities of migrants' and allies' collective organising, dissenting from the Italian institutional discourse on "migration", produce knowledges that can offer alternative spaces to rethink the evolution of the law. It analyses how (im)mobility is problematised in Italian and European policy, arguing that the migrant person's condition of socio-juridical vulnerability is produced by the law itself. Interrogating the contingency of the existing system and its inegalitarian and hierarchical structures, the research approaches the current order of things through the question: 'what if it was otherwise?'. Informed by the counternarratives of the migrant political subject, it attempts to create a space for criticism and reinterpretation of policy where the dogmatic paradigms of sovereign state, border, security, citizenship and the rights attached to it are approached as assumptions that can be contested and denaturalised. Arguing that migrants' and allies' realities promote a vision of substantial equality while seeking legal reform, the study reflects on the right of resistance in the context of the social conflict, with a view to explore the potential that this has for normative change and for the evolution of constitutional principles guarding the human person in their corporeality, as inhabitant of the earth.

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Introduction

There is an optimism that consists in saying, “In any case, it couldn’t be any better”. My optimism would consist rather in saying, “So many things can be changed, being as fragile as they are, tied more to contingencies than to necessities, more to what is arbitrary than to what is rationally established, more to complex but transitory historical contingencies than to inevitable anthropological constants...” You know, to say that we are more recent than we thought is not a way of bringing the whole weight of our history down on our shoulders. Rather, it is to make available for the work that we can do on ourselves the largest possible share of what is presented to us as inaccessible.¹

This study runs entirely on the idea that *things can be otherwise*. It is a “work in progress” kind of object, a study that is the result of practicing questioning, familiarising with scepticism, with a learning and unlearning process. This introduction will briefly address the overall structure and contours of the thesis, its essential notions and the subject matters it deals with in its chapters, each of which presents the literature relevant to the matter it focuses on. The idea was to produce a text the sections of which were tied by a common thread and yet could be drawn from selectively and be read separately from one another. The reader will be the judge of this. The research was initially meant to be centred on the legal exploration of people on the move’s right to health. While, in the end, the interest at heart might essentially be the same, namely the wellbeing of the human person and its relationship with the law, over time the text came to articulate its content rather differently. The questions that it now explores are: what, or rather how, are the representations of “migration” proposed through state policy? What are the silences of such representations? Are these being challenged by the counternarratives of migrants and allies and how? Do migrants and allies have a *right* to resist said policy when this gives rise to inegalitarian structures? Research endeavours that take a rather distinct direction from their initial proposals might be frequent. Studies that appear neat and transparently linear in their final form probably conceal most of the stumbling and of the reinvent-the-wheel kind of blue epiphanies they went through. In this respect, the author wishes to highlight a few elements that she deems relevant at the outset of this text.

The first element is that, throughout the chapters, the research process is often revealed, as the author opted for dedicating passages of the text to the how and the why her writing developed on a path rather than another. Passages of such kind certainly do not condense the entirety of the research process but felt somewhat indispensable to a more dialogical narrative. A narrative that inevitably builds on the author’s own representations and problematisations of what surrounds her and that is open to the reader’s scrutiny, which is intimidating but looked forward to.

The second element to be addressed is that great part of this work owes much to serendipity. There are serendipity readings, serendipity encounters and serendipity coincidences cherished throughout these pages. They were followed with curiosity and have largely influenced this research. Serendipity readings are those that one inadvertently finds on a shelf, browsing the internet or through the unplanned last-minute attendance of a course. For this study, they are: Shahram Khosravi’s *‘Illegal Traveler’. An auto-ethnography of borders*; Carol Bacchi’s and Susan Goodwin’s *Poststructural Policy Analysis. A guide to practice*; Tamara Caraus’ and Elena Paris’ *Migration, Protest Movements and the Politics of Resistance. A Radical Political Philosophy of Cosmopolitanism*; Luigi Ventura’s *Il diritto di resistenza*; Federico

¹ Michel Foucault, ‘So Is It Important to Think?’ in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 454, 458.

Losurdo's and Antonio Cantaro's *La libertà personale del richiedente protezione internazionale*. Many other readings have obviously guided this research, and they may even be referred to more frequently and more consistently throughout the text. Yet, these were the sources from which the initial ideas of the study emerged. Alongside these, serendipity encounters and coincidences took place. They are not accounted for here but they are acknowledged, as occasions that continue to permeate the author's learning and unlearning efforts. The one coincidence that can be mentioned here is the fact that the author moved to a city in the centre of which an administrative detention facility for migrant persons is located. The facility is *present*, severe, austere, visible among more or less ignoring eyes. The first time the author joined a small demonstration in front of the facility, she was stricken by the fact that such an architecture of repression was not deliberately and strategically relegated to some isolated nowhere somewhere, as many others are. It was – it is – instead right in the middle of a populated district, trams and buses circulating its corners, dogs being walked, bars and offices welcoming their clients, people whose apartment balconies look over cages that do not look anywhere.

In thinking of the origins of my work then, I see no clear plan but an idea and a passion followed by a series of jumps that pull in outside influences and stimuli and try to make them coherent within the general concept of my project. And the grace and luck to make sense of, and pull in, the various contingencies that strike us in our life are as important as any well-planned project.²

These are the serendipities this research moves its steps from. The earlier project on a right to health was set aside and the author attempted to explore from a different perspective that same wellbeing, or lack thereof, that was meant to be analysed. This new exercise builds on premises that the author tries not to comprise with. These guide the agenda of the study and shall not be ignored.

As we said earlier, the underlying direction adopted is that “things” can always be *otherwise*. This ties with the understanding of researching as a political act and of the researcher as a “subject” herself, someone whose identities are located, negotiated, evolving and whose work is inevitably informed by her knowledges. As the way she represents the world around her is grounded in her own deep-seated and unexamined ways of thinking, so do the policy and legal structures that “regulate” the surroundings. Such policy mechanisms operate through categorisation. They are plural, fragmented, at times coherently overlapping, at times incoherently contradicting. Yet they dress in timelessness, objectivity, in science, in evidence-based universality, *naturally* existing. They ignore that they are the expression of the system's historical and “moral” contingency, its “logic” and underlying uncontested paradigms. The law, often aired as something that cannot be altered and that powers never betray and violate, ignores through such a narrative the fact that it is itself the result of a negotiating process of “something” that was debated by “someone(s)” and “one day” was adopted as “lawful”. It is therefore of an evolving character. Its dynamicity must be remembered when exploring the alleged neutrality of the categories it operates with, which are instead regarded by the study as not being value-free. Rather, they are the instruments through which policy *produces* “problems”, rather than *addressing* problems as existing as such.

The operationalisation of categories to maintain order creates inegalitarian and hierarchical structures in society, which forms of power impose and preserve as incontestable. Instead, these can be acted upon and can be denaturalised. This is what the migrant person does, through their non-citizen presence that transgresses the border of the sovereign state and through their demands for equality against discrimination and abuse. Migrants are therefore acknowledged as political subjects, resisting forces in opposition to and within power dynamics. Their presence, actions and expectations have an epistemological function. They speak on behalf of all, as inhabitants of this earth regardless of its

² Zenon Bańkowski, *Living lawfully. Love in Law and Law in Love* (Springer Science+Business Media 2001) 5.

elaborate and fabricated parcelling within the borders of sovereign states. Their narratives are regarded as cosmopolitan expressions of dissent and, through collective organising, migrant persons and their allies pursue policy reform. They resist the hierarchisation of statuses – of citizenship – that the order retains. Their demands propose a vision of equally powerful individuals and appeal to the inviolability of the human person that is cherished by constitutional guarantees. Yet, the migrant person is prohibited and even illicit in their corpoREALITY, in the counterintuitive paradox that denies their bodily presence. In response to the alleged violation of their inviolability, the study explores whether they have a right to resist the order of things and whether they embody the expression of a disorder of things. An outside the order, where the rule of law is anarchic in her being an ally against the oppressor and not a mean through which the monopoly of violence and undistribution of wealth is preserved.

Furthermore, virtually without exception, the states of the developed world have assessed the spectre of uncontrolled migration from the less developed world as a threat to their way of life. What is seen to be at stake is “nothing less than a question of sovereignty” as the power to control borders is one of the few remaining prerogatives of the declining nation state (Joly 1996:17).³

The word “migrant” does not have a legal connotation. It is hereby employed in alignment with that stream of literature that sees it as indicating ‘a broad category of disadvantaged poor mobile persons’, for only the indigent in their precarious conditions is commonly identified as such, in juxtaposition to the “expat”.⁴ The “migrant” is *made* immobile in their very attempt to move, forced into a condition of immobility that contradicts the very term they are named by.

Governments have (...) erected what amounts to a system of “global apartheid” (Richmond 1994). This network of visa restrictions, carrier sanctions and extra-territorial controls serves to shore up the unequal global distribution of risk while ensuring the “extraterritoriality of the new global elite and the forced territoriality of the rest” (Bauman 2000). Migration researchers have pointed to the ‘involuntary immobility’ of aspiring migrants, whose ability to realize their need, or desire, to relocate is increasingly thwarted by these restrictive immigration policies (Carling 2002).⁵

The migrant person is the *non-citizen*, whose juridical condition is highly fragmented.⁶ Such a condition is regarded as distinct from that of the *foreigner* (although the term may at times be used in the text to facilitate the flow of the reading) for in the context of the European Union foreigners may nevertheless be citizens of the Union.⁷ For this research, the migrant is the non-citizen, whose presence, through a multitude of statuses, is subordinate in the hierarchisation of citizenship. The migrant is the person who no longer is, the beyond the border of humanity – irregular, illegal, illicit.

Such a content and its ramifications are articulated in the following structure. Chapter one sets the contours of the study, addressing the evolving character of the law as a living instrument, the notion of “migration” and its connection to citizenship. It further regards administrative detention and the deprivation of the migrant person’s personal freedom as the peak of the hierarchy between citizens and non-citizens. It then sketches the poststructuralist framework and analytical approach endorsed.

³ Leanne Weber, Benjamin Bowling, ‘Policing Migration: A Framework for Investigating the Regulation of Global Mobility’ (2004) 14 3 Policing and Society 195.

⁴ Tamara Caraus and Elena Paris (eds), Migration, Protest Movements and the Politics of Resistance. A Radical Political Philosophy of Cosmopolitanism (Routledge 2019) 11.

⁵ Leanne Weber, Benjamin Bowling, ‘Policing Migration: A Framework for Investigating the Regulation of Global Mobility’ (2004) 14 3 Policing and Society 195.

⁶ Francesca Biondi Dal Monte, Emanuele Rossi, *Diritto e immigrazioni. Percorsi di diritto costituzionale* (il Mulino 2022).

⁷ *ibid.*

Chapter two addresses the situation of socio-juridical vulnerability of the migrant person that is *produced* by policy itself rather than being addressed by it. It begins by exploring the notion of vulnerability in the scholarly debate and its operationalisation, with reference to the jurisprudence of the European Court of Human Rights. Vulnerability is regarded as the result of intersecting *de facto* and *de jure* discriminations. A vulnerability-centred approach can be envisioned, one that flips over the understanding of “the vulnerable” as a burden on society, a tool to flag inegalitarian structures and question them for their betterment, a trigger for change in a vision of collective care. Chapter three interrogates the notion of “places” such as the Italian state and the European region, in an effort propaedeutic to explore their representations as physical locations and as institutions, sources of policy and of order maintaining. Chapter four reflects on resistances by migrants and allies who challenge the condition of vulnerability produced by policy. It touches upon the relationship between these realities and the sovereign state, the police, on the expression of dissent and the blurred lines that this may share with violence. It finally leaps onto whether such realities and the individuals that collectively organise within them do have a *right* of resisting the existing order of things and on whether their demands can reconcile with a vision of progressive realisation of substantial equality, as enshrined in constitutional guarantees. Informed by the narratives of resisting collective organising as political subjects, their competences and knowledges, chapter five concludes the study by interrogating representations of “migration” within specific policies currently in place at the European Union and at the Italian national level.

The author once heard that one cannot claim to be concerned for freedom, if their concern is only for their own – for in such a case, what they really are concerned for is privilege, not freedom.

Giulia Siverio writes that the politics of women is radically other to the politics understood as the governing of the existing: it is not a space where freedom is conditioned but a space of care for the conditions for freedom to exist – for women and, emphasis added, *every subjectivity*.⁸ This study is moved by the practice of asking the *otherwise*, by unlearning and by the desire to be an ally.



Figure 1- Picture of the view over the CPR taken from a construction scaffolding (Turin, October 2024)

⁸ Giulia Siverio, *Fare femminismo* (nottetempo srl 2024) 12.

Chapter one.

Migration in the eyes of the law

Chapter one sets out the framework within which this research unfolds. It begins by reminding the reader of the evolving character of the law and of human rights law, approaching policy, intended comprehensively as order maintaining, as a living instrument that can be questioned and eventually contested (1.1). Such a perspective, contained in the first subchapter, is propaedeutic to accompany the reader on the subsequent brief excursus over migration law at the international, European regional and Italian national level (1.2), with reference to the hierarchisation of citizenship that underpins the policy system in place and the peak of such hierarchisation being the institutionalisation of administrative detention (1.2.1). The institutional multi-layered representations of the migrant person and of migration are observed against the current background of legal pluralism. Highlighting the multifaceted and at times contradictory normative system in place and its heterogeneous practices calls out the political arrangement of the system's moral, rational and historical contingency. Recognising the contingency of a model that is otherwise offered as natural, neutral and timeless brings the reader closer to an exercise of denaturalisation of the current dogmatism on citizenship, its operationalisation and the rights attached to it, which a vision of equality among free and likewise powerful individuals opposes. In the final subchapter, the policy system in place and the way this *produces* rather than *addresses* "problems" is questioned through a poststructuralist lens (1.3). The underlying question that drives the study is: what if it was otherwise? Analysis is aided by the application of Carol Bacchi's approach called 'What's the Problem Represented to be?', WPR. This first section of the thesis introduces the study's analytical framework: interrogating how situations are thought of, represented and problematised allows the exploration of deep-seated assumptions underpinning governing and the creation of a space for scepticism, contestation and eventually reinterpretation of the current order of things and the law keeping it in place, which is not immutable nor value-free.

Keywords: law – living instrument – policy – poststructuralism – WPR

1.1 Bound to the unforeseeable: introduction to human rights and the law as a living instrument

(...) in the use of law, law transforms those who use it, their understanding of the world, of their conflicts and their normative orientations – in other words, their political subjectivities. At the same time (...) law itself is transformed in iterative processes. These transformations are historically contingent on the dialectic between the transformations of social relations and subjectivities the law can affect, on the one hand, and the transformations in the meaning of laws produced by the interpretations of those who mobilise law for their particular social, political or economic struggles, on the other hand. (...) Attention to these dynamics opens our eyes to the creation of new legal understandings (...) that result from the active use of existing law.⁹

And it is in this sense that we must approach our legal battles today as well. (...) [T]he proletarian struggle moves thus into the bourgeois legislation and gradually transforms it. I think that this should be the spirit with which we must conduct this fight of ours for a new law. Each time we

⁹ Julia Eckert, Brian Donahoe, Christian Strümpell, Zerrin Özlem Biner (eds), *Law Against the State. Ethnographic Forays into Law's Transformations* (Cambridge University Press 2012) 1.

succeed in introducing in the juridical system, through new laws, elements that adhere to the logic of socialization, that is, the forces of production, we set in motion a process of dismantling of society from within; each time we succeed in inserting such elements in the social fabric we contribute to the future revolution, perhaps in a small way but more so than with some demonstrations and slogans. We cannot understand the law as the static, closed expression of fixed and immutable relations, because the class struggle is political struggle and every day it alters these relations, therefore impacting on the legal system.¹⁰

This research aligns with a stream of literature that sees migrant protesting and resistance as a direct and radical opportunity to rethink the current given order of things. It was inspired by the principles of radical cosmopolitanism and, for a start, the curiosity of the author was sparked by the reading of the collection of essays edited by Tamara Caraus and Elena Paris in 'Migration, Protest Movements and the Politics of Resistance. A Radical Political Philosophy of Cosmopolitanism'.¹¹ All doctoral studies may have a turning point – several turning points perhaps. This was probably the first one. After more than a year of ideas cluttering and decluttering, Caraus' and Paris' text appeared in all serendipity while browsing titles in a library in search of "something" and it "made sense". Let us start from here then. The objective of this study is to reflect on, question and denaturalise the system's assumptions, committing to the idea and the premise that exploring the very position the law *assigns* to migrants in society, against the constructed hierarchisation between citizens and non-citizens, can reveal the political arrangement of the system's moral, rational and historical contingency.¹² It is argued that migrants, the experiences and aspirations of whom are squeezed into a preconceived autobiographical description that purports to justify the *status* they are allocated within society, do not *find* themselves at the margins but are *placed* at the margins of the current order and [navigate a context of legal pluralism in an effort to secure their rights or assert new ones](#). This initial section of the research attempts to explore such context, asserting that human rights do not remain frozen in time.¹³ They are dynamic, for they emerged from certain historical contexts and as human structures change, human rights do too.¹⁴

The intent of the chapter is not to retrace the emergence of human rights as they are now articulated nor to delve into their progressive codification – a task which would exceed the scope of this research. What is of interest is rather the idea that the protection and promotion of human rights continuously [evolve over time](#) and that such evolution is nothing transcendental to aspire to but rather an element inscribed within the law itself. Reflecting on the evolving character of the law, and of human rights law especially, is propaedeutic to the subsequent analysis. The contestation by migrants and allies of the

¹⁰ Lelio Basso, 'Giustizia e Potere. La Lunga via al Socialismo' (1971) 11–12 Qualegiustizia 644 <<https://www.leliobasso.it/documento.aspx?id=0baf192b613bc0588806171468fd0c25>> accessed 12 May 2023. Own translation. See original: 'Ed è in questo senso che noi dobbiamo vedere anche oggi le nostre battaglie giuridiche. (...) [L]a lotta del proletariato si trasferisce dunque all'interno della legislazione borghese e la trasforma progressivamente. Io penso che debba essere questo lo spirito con cui dobbiamo condurre questa nostra battaglia per un nuovo diritto. Ogni volta che riusciamo ad introdurre nell'ordinamento giuridico, attraverso nuove leggi, degli elementi che si rifanno alla logica socializzatrice, cioè alle forze di produzione, mettiamo in moto un processo di distruzione della società dal suo interno; ogni volta che riusciamo a immettere quegli elementi nuovi nel tessuto sociale, abbiamo contribuito, magari in piccola misura, alla futura rivoluzione, forse però più che con certe manifestazioni e certi slogan. Noi non possiamo intendere il diritto come espressione statica, chiusa, di rapporti fissi e immutabili, perché la lotta di classe è lotta politica e modifica ogni giorno questi rapporti e quindi incide sull'ordinamento giuridico'.

¹¹ Tamara Caraus and Elena Paris (eds), *Migration, Protest Movements and the Politics of Resistance. A Radical Political Philosophy of Cosmopolitanism* (Routledge 2019).

¹² *ibid* 18.

¹³ Gwilym David Blunt, 'The Right to Resistance', *Global Poverty, Injustice, and Resistance* (Cambridge University Press 2019) 47.

¹⁴ *ibid*.

current frameworks and their articulation of alternative interpretations of the law through the language of human rights are approached as [performances of denied citizenship and rejected existence in its corporeity](#). Migrants who cross transnational borders exceed the paradigms of the nation state and test its control and patience. When being refuted, they nevertheless take up space through their [bodily presence](#): a purportedly neutral and natural should-not-be-here and should-be-here-only-if status is manifestly contradicted, and so is its contingency, by the very fact that they are instead present in their flesh and blood on the nation state territory. Their very actions of border crossing and of demonstrating their dissent through the recourse to forms of protesting are to be acknowledged as [exercises of political participation](#), the very essence and existence of which are foreseen within a democratic constitutional system.

The law produces sets of rights that are ultimately contingent to time, space and lawmakers' interests. Their formal establishment implies a delimitation of what one may or may not be entitled to and enjoy – why are the current rights considered such, why not others or why not differently articulated, does their implementation or lack thereof cause any harm, what is being given for granted, what is susceptible to change or is ought to be, is the current system egalitarian as it formally aspires to be, can it be, does it actually aspire to be egalitarian...?

Michiel Agier writes that although the word of the law must be applied, [the law itself](#), insofar as it has stamped its name on what were earlier the subject of political debate, [reminds us that its decrees could always take a different direction](#).¹⁵ Law transforms. It travels. And while traveling, it may propagate through top-down processes of globalisation, which may be defined as politics *of* human rights, that however risk to reproduce 'the silencing of those subjected to the processes in question' and 'assume a unidirectional change' without considering the constitutive effects of the politics *for* rights.¹⁶ The intent of this section is thus to highlight the evolving nature of human rights and their everchanging contexts with the purpose of acknowledging the space that the law itself reserves to dissent and transformation.

The idea that the law and its interpretation continuously evolve is something that, although may be self-evident in ideally democratic society for what becomes law has always previously been debated, is widely recognised by both legislation and jurisprudence. At the international level, laws promoting human rights have been evolving with the display of a variety of different legal norms and institutional mechanisms for the protection of people's rights as well as the issuance of a plethora of international, regional and national human rights bodies.¹⁷ Besides the debatable effectiveness of the system in place, evidence of the conviction of the evolving character of the law safeguarding human rights can be found in the legal sources that have progressively been produced. As an authoritative instance of such evolution, a case from the European human rights law realm is briefly illustrated. In the 1978 *Tyrer v UK* case held before the European Court of Human Rights (hereinafter ECtHR), it was in fact recalled that 'the Convention is a living instrument which (...) must be interpreted in the light of present-day conditions'.¹⁸ The case concerned the corporal punishment received in 1972 by a fifteen-year-old boy living on the Isle of Man, following his guilty plea for unlawful assault causing bodily harm to a schoolmate; in accordance with relevant legislation, he was sentenced to three birch strokes.¹⁹ The

¹⁵ Michel Agier, *Lo straniero che viene. Ripensare l'ospitalità* (Raffaello Cortina Editore 2020) 25. See also the English version: Michel Agier, *The Stranger as My Guest. A Critical Anthropology of Hospitality* (Polity Press 2021) 9.

¹⁶ Julia Eckert, Brian Donahoe, Christian Strümpell, Zerrin Özlem Biner (eds), *Law Against the State. Ethnographic Forays into Law's Transformations* (Cambridge University Press 2012) 3.

¹⁷ Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100(4) *The American Journal of International Law* 783.

¹⁸ *Tyrer v. The United Kingdom*, Application no. 5856/72 (ECtHR, 25 April 1978) para 31.

¹⁹ *ibid* para 9.

following brief passage does not enter the merits of the case: it does not discuss the nature of corporal punishment or its comparison with other forms of punishments, nor it discusses the Court's consideration of addressing the Isle of Man as enjoying 'highly-developed political, social and cultural traditions' and being 'an up-to-date society'.²⁰ What is of interest here is the Court's *indigestion* of a form of institutionalised violence in respect of the time and space in which such violence took place and in respect of the surrounding widespread (re)interpretation of the law regulating the matter. The Isle of Man was at the time a dependency of the United Kingdom; although the latter's Parliament could pass laws applicable to the Isle of Man, it did not ordinarily legislate on the island's domestic affairs.²¹ In England, Wales and Scotland judicial corporal punishment was abolished in 1948, while in Northern Ireland in 1968; the punishment remained in force in the Isle of Man.²² The Court found that the corporal punishment inflicted on the applicant amounted to be a degrading one within the scope of article 3.²³ It is the first case in which the Court explicitly recognised the *living character* of the Convention, admitting it could not remain uninfluenced by the developments and commonly accepted standards in the penal policy of the Council of Europe's member states and *inter alia* dismissing the argument that the punishment in question was not in breach of the Convention since it did not outrage the island's public opinion – that very opinion of a large majority who had chosen to retain corporal punishment on the island once it had begun to be abolished elsewhere.

The living character of the Convention was later endorsed as a doctrine in a multitude of occasions and affirmed itself as the applicable method of judicial interpretation.²⁴ A 2021 Court's report reads that the Convention is interpreted

²⁰ *ibid* para 38.

²¹ *ibid* para 13.

²² *ibid* paras 14-15.

²³ *ibid* paras 31-35.

²⁴ See e.g., the following jurisprudence as instances of the recourse to the doctrine: *Marckx v. Belgium*, Application no. 6833/74 (ECtHR, 13 June 1979) para 41 reading: 'It is true that, at the time when the Convention of 4 November 1950 was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the "illegitimate" and the "legitimate" family. However, the Court recalls that this Convention must be interpreted in the light of present-day conditions (Tyrer judgment of 25 April 1978, Series A no. 26, p. 15, para. 31). In the instant case, the Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim "mater semper certa est"; | *Dudgeon v. United Kingdom*, Application no. 7525/76 (ECtHR, 22 October 1981) para 60 reading: 'As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States (see, mutatis mutandis, the above-mentioned Marckx judgment, p. 19, para. 41, and the Tyrer judgment of 25 April 1978, Series A no. 26, pp. 15-16, para. 31)'; | *Selmouni v. France*, Application no. 25803/94 (ECtHR, 28 July 1999) para 101 reading: 'However, having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions" (see, among other authorities, the following judgments: Tyrer v. the United Kingdom, 25 April 1978, Series A no. 26, pp. 15-16, § 31; Soering cited above, p. 40, § 102; and Loizidou v. Turkey, 23 March 1995, Series A no. 310, pp. 26-27, § 71)'; | *Christine Goodwin v. The United Kingdom*, Application no. 28957/95 (ECtHR, 11 July 2002) para 75 reading: 'The Court proposes therefore to look at the situation within and outside the Contracting State to assess "in the light of present-day conditions" what is now the appropriate interpretation and application of the Convention (see the Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, § 31, and subsequent case-law)'.

dynamically, in the light of present-day condition. By its case-law the Court has extended the rights set out in the Convention, such that its provisions apply today to situations that were **totally unforeseeable and unimaginable** at the time it was first adopted.²⁵

Although one must remain cautiously aware of the opportunities the Court has missed in the operationalisation of such an interpretative method and the pace at which this is being implemented, its formalisation stands. In 2005, the ECtHR further reiterated the evolving character of its founding instrument, highlighting that ‘it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory’²⁶ and ‘in accordance with developments of international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights’.²⁷ This study builds on the acknowledgment of the dynamicity of human rights instruments and their content and on the recognition of protections that were previously ‘totally unforeseeable and unimaginable’.

Today’s migration governing is dictated by a multitude of formal requirements, by the patrolling of nation states borders and the apprehension and detention of persons on the move, by the necessity of holding a labour contract to obtain a residence permit, by applications and procedures and identifications and hotspots – and this begs the question: *what if it was otherwise?* What if what seems totally unforeseeable and unimaginable in respect of current laws were instead being demanded by some, reachable and enforceable already? And what if this unimaginable were instead rather **reconcilable with those constitutional norms and human rights principles** acknowledging equality for all? Much more reconcilable than current migration and citizenship policies laying down how and where and when and for what reasons persons may opt for mobility or may be denied it, with the dire consequences for their lives that this entails.

At the national level, the metaphor that constitutions are living instruments is rather familiar.²⁸ A few paragraphs are spent here on the idea behind a living constitution to further observe the evolving and dynamic relationship between the law and the reality it regulates. A living constitution, so to speak, opposes the conviction that today’s conditions can entirely be governed by a text drafted decades earlier.²⁹ Rather a ‘social conscience’ (*coscienza sociale*) contributes to the realisation of effective laws, distinct from ‘written’ norms, through which subjective rights are safeguarded.³⁰ Constitutional

²⁵ European Court of Human Rights and Council of Europe, *The European Convention on Human Rights. A living instrument* (2021) 7

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjg3_i m8e33AhU3QvEDHVA_DSsQFnoECDwQAQ&url=https%3A%2F%2Fwww.echr.coe.int%2FDocuments%2FConvention_Instrument_ENG.pdf&usg=AOvVaw1p2NwI-fWvMsG8QhBL1mhU> accessed 20 May 2022.

²⁶ *Mamatkulov and Askarov v Turkey*, Applications nos. 46827/99 and 46951/99 (ECtHR, 4 February 2005) para 121.

²⁷ *Demir and Baykara v Turkey*, Application no. 34503/97 (ECtHR, 12 November 2008) para 146 reading ‘(...) it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights (see, *mutatis mutandis*, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 100, ECHR 2003-II, and *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V)’.

²⁸ George Letsas, ‘The ECHR as a Living Instrument: Its Meaning and its Legitimacy’ (2012) 1 <<https://ssrn.com/abstract=2021836>> accessed 20 May 2022. The leap from international and regional human rights instruments to national legislation is not made for equating the former to constitutions but for their human rights law content. The formal connection between international and domestic instruments and the consequent domestication is contingent and eventually restricted to states’ consent.

²⁹ *ibid.*

³⁰ ‘Il diritto vivente’ (12 April 2018) Rivista quadrimestrale di Magistratura Indipendente (Roma, Corte di Cassazione, Convegno). Programme <https://www.judicium.it/wp-content/uploads/2018/03/convegno-il-diritto-vivente.brochure_DEF-4-1.pdf> accessed 26 May 2022.

fundamental rights and principles enshrined stretch over time: they continue to determine the circumstances of our coexistence in so far as they are consulted, interpreted and applied by institutions and citizens alike.³¹ The expression living law, *diritto vivente*,³² generally indicates the common consolidated opinion matured in the doctrine and the jurisprudence in relation to the meaning of a norm.³³ Augusto Barbera argues that doctrines that refer to a living constitution **hold on to the formal text as a starting point**, that it is then reinterpreted in light of its concrete application: the law in action overtakes the law in the books.³⁴

Speaking of a living constitution, Paolo Grossi observes in a 2018 speech that **constitutionalism**, despite the fact that it must not be homogenised nor flattened in its forms throughout time and space, has a unitarian message: the protection of the citizen against the inequities and abuses of power; it is a dam, a bank created for the citizen through movements of thoughts and actions that have developed until now.³⁵ Constitutions articulated in the XX century, he argues, rediscover civil society, in a fervent context of social pluralism that translates into juridical pluralism.³⁶ Italian constitutional law is the expression of society and the Constitution itself mirrors reality; it was birthed in a precise historical moment that Grossi describes with the words of La Pira as a declaration on human rights that must have been admitted especially in opposition to the fascist state that had denied and violated the very root of human rights, with its affirmation of “reflection rights” as the theory that the state is the exclusive rights’ source.³⁷ Grossi describes the centrality of the human person in the constitutional discourse and cites Dossetti: ‘this fundamental concept of the pre-eminence of the human person, of its integral vision and of the integration that this has in a context of social pluralism must always guide’.³⁸ It is this logic and the **historic anteriority of the person, as compared to the state**, that is at the core of the constitutional project: **‘this person, on which the constituent drafters bet, is a relational creature**, nestled in the social, with precise rights and duties’.³⁹ The essence of the law, Grossi argues, is organisation itself (*ordinamento*): the law is the self-organisation of society and therefore something that comes from below.⁴⁰ The Constitution is not a catechism but a juridical handbook (*breviario*) to the benefit of the daily existence of every citizen, irrespective of their status: even the most marginal citizen (*anche l’ultimo dei cittadini*) is the **privileged interlocutor of the constituent** and can find in the constitutional text their own **safe stronghold** (*presidio suo, sicuro*) for the effectiveness of their rights to be ensured.⁴¹ This idea is enclosed ‘in that which is the marvel of article 3, which the Constitutional court sees as one

³¹ Mario Dogliani and Chiara Giorgi, *Costituzione italiana: articolo 3* (Carocci editore 2021) xiv.

³² See the text of Corte Costituzionale, sentenza 274/1976.

³³ Il diritto vivente – Rivista quadrimestrale di *Magistratura Indipendente*, Editoriale: “Il diritto vivente”, la rivista giuridica online di Magistratura Indipendente. Le ragioni della rivista di Lorenzo Delli Priscoli (last updated 15 May 2023) <<https://www.rivistaildirittovivente.it/editoriale.htm>> accessed 23 May 2023. See also Francesco Viganò, ‘Il diritto giurisprudenziale nella prospettiva della Corte costituzionale’ (19 January 2021) *Sistema Penale* <<https://www.sistemapenale.it/it/articolo/vigano-diritto-giurisprudenziale-corte-costituzionale>> accessed 9 June 2023.

³⁴ Augusto Barbera, ‘Ordinamento costituzionale e carte costituzionali’ (2010) XXX 2 Quaderni costituzionali 311, 357-358.

³⁵ Istituto Italiano per gli Studi Filosofici, ‘Paolo Grossi: La Costituzione vivente’ (2018)

<<https://www.iisf.it/index.php/istituto/archivio-storico/vivere-la-costituzione-2-video.html>> accessed 20 May 2023.

³⁶ *ibid.*

³⁷ *ibid.* Own translation, see original: ‘una dichiarazione sui diritti dell’uomo deve essere ammessa soprattutto in opposizione allo stato fascista che con l’affermazione dei diritti riflessi, e cioè della teoria che lo stato è la fonte esclusiva del diritto, negò e violò alla radice i diritti dell’uomo’.

³⁸ *ibid.* Own translation, see original: ‘questo concetto fondamentale della anteriorità della persona, della sua visione integrale e dell’integrazione che essa ha in un pluralismo sociale ci deve guidare sempre’.

³⁹ *ibid.* Own translation, see original: ‘questa persona, su cui puntano i costituenti, è una creatura relazionale, cioè inserita nel sociale, con dei diritti a cui si contrappongono dei precisi doveri’.

⁴⁰ *ibid.*

⁴¹ *ibid.*

of the pillars of its own actions'.⁴² No power, Grossi continues, can violate fundamental rights, not even the legislative power: a de-mythologisation of the law occurs (*si ha una demitizzazione della legge*) and the law must be assessed for its contents and the Constitutional court acts then as guarantor.⁴³

There is not only the Charter (...) there is the entire Constitution in its material form, there is the value-based foundation that is at the root of the Italian civil society, which is a reality that must be understood dynamically, not as something that is immobile, mummified, but as something that lives. So, underneath the Charter, there is a Constitution, that which I call a constitutional dimension that is identified thanks to the work of the Court. And what does it become? New fundamental rights for the Italian citizen. (...) The Constitution is not a static reality (...). [T]here is a slow progression on behalf of our Constitution, the material constitution, and that is what maintains a sort of umbilical cord between the life of civil society and the constitutional dimension. (...) The law is history and history is a continuous becoming.⁴⁴

Grossi concludes:

Living Constitution: indeed, there is the Charter, and in the Charter that which was dear to the new state was set (...). However, there is a value-based reality that is carried by civil society itself and there, the constitution foresees an organ tasked with the interpretation and adaptation of value-related changes. So yes, a living constitution. I believe that the combination between the Charter, the constitutional dimension in a material sense and the Constitutional court as the interpreter of the values therein ensures that we cannot have (...) noble charters that are however floating above reality. It is not only a matter of values but of interests and facts. A social and economic pluralism that also becomes juridical.⁴⁵

The law is thus approached as living, dynamically evolving; its content mirrors the changes in society and the interests of social actors, including the most marginalised, in the progressive realisation of a vision coherent with core constitutional guarantees and protections. The principle of substantial equality enshrined in [article 3 of the Italian Constitution](#) that Grossi mentions is in this study approached as [a vision that verbalises the evolving character of safeguard and protection against all discriminations](#), factual and juridical, promoting the [progressive realisation of people's wellbeing](#) free from socio-economic obstacles. What is the relationship between the law on substantial equality and the social reality it concerns? In his speech, Grossi alternates between speaking of citizens and individuals. Is a person who migrates to or through the Italian territory a beneficiary of human rights protection and constitutional guarantees? Is the current institutional representation of migration foreseeing and facilitating the progressive realisation of the principles enshrined in the Constitution and the

⁴² *ibid.* Own translation, see original: 'nella meraviglia di quell'articolo 3 su cui la Corte costituzionale vede uno dei pilastri della sua azione'.

⁴³ *ibid.*

⁴⁴ *ibid.* Own translation. See original: 'Non c'è solo la Carta (...) c'è tutta la Costituzione in senso materiale, c'è il sostrato valoriale che è alle radici della società civile italiana, la quale è una realtà dinamicamente da intendersi, non è qualcosa di immobile, di mummificato, ma qualcosa che vive. Ecco, al di sotto della Carta c'è una Costituzione, quella che io chiamo una dimensione costituzionale che grazie all'opera della Corte viene identificata. E diventa che cosa? Nuovi diritti fondamentali per il cittadino italiano. (...) La Costituzione non è una realtà statica (...). [I]l lento incedere c'è da parte della nostra Costituzione, della costituzione materiale, ed è quello che mantiene una sorta di cordone ombelicale tra la vita della società civile e la dimensione costituzionale. (...) Il diritto è storia e la storia è un divenire continuo'.

⁴⁵ *ibid.* Own translation. See original: 'Costituzione vivente: ecco, c'è la Carta, e nella Carta hanno fissato ciò che era importante per il nuovo stato (...). Però c'è una realtà valoriale di cui è portatrice la stessa società civile ed ecco, la costituzione che prevede un organo che è chiamato a leggere quelle modificazioni valoriali e ad adeguarle. E allora sì, costituzione vivente. Io credo che la combinazione tra Carta, dimensione costituzionale ossia costituzione in senso materiale e Corte costituzionale come lettrice di quei valori fanno sì che non si possa[no] avere (...) delle nobilissime carte che però galleggiano al di sopra della fattualità. Non sono solo valori ma interessi e fatti. Un pluralismo sociale ed economico che diventa anche giuridico'.

recognition of all individuals being 'born free and equal in dignity and rights'?⁴⁶ And on the other hand, can the demands and claims brought forward by hardly accepted social actors, such as pressure groups of migrants' and allies' resistances, be reconcilable with constitutional guarantees? Can the [knowledge](#) and [competence](#) that such demands carry succeed in intervening in the decision making and policymaking process?

Addressing the relationship between the law and the social reality this regulates, the former is approached as both a dependent and independent variable: dependent, as the effect, the consequence of social dynamics, of the interests at stake, of power relationships, etc.; independent, as capable, albeit with limitations, of influencing social dynamics, interests, relationships, behaviours, etc.⁴⁷ The law is approached as a social phenomenon:

which, as such, is born and incessantly evolves from social relations and from the shared or dominant ways that define and qualify them and, at the same time, applies to social relations, altering them to varying degrees both in terms of their concrete manifestation or unfolding and in terms of the definitions and the prevailing or dominant ways of thinking that characterise them.⁴⁸

The law thus depends on and at the same time contributes to determining the social construction of reality, that is, the manner shared by those belonging to a given society to commonly define situations and interpret them through standardisations (*tipizzazioni*), express assessments and consequently steer actions in one direction or another.⁴⁹ Central to the research are the [representations](#) that the law offers of migrant persons and the situations in which they find themselves, as well as how the law is formed and modified and its connections with social change. The relationship between social dynamics and the evolution of the law is observed, looking at how facts can alter norms and norms can learn from facts.⁵⁰ Legal systems are thus seen as never static and the formation and transformation of norms are seen as a continuous process.⁵¹ This happens both because the meaning of a norm

is never definitely fixed but is subject to subtle modifications due to the changes that always occur in the meaning of words, in the factual conditions to which the laws refer, in the social structure of the country (*paese*), in the dominant opinions on what is just and what is wrong and in the general cultural environment

⁴⁶ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR) art 1.

⁴⁷ Amadeo Cottino (ed), *Lineamenti di sociologia del diritto* (Zanichelli editore 2019) 7, referring to V. Pocar (2002): 'la distinzione, a proposito di rapporto diritto-ambiente sociale, tra il diritto inteso, nella prospettiva propria dei giuristi, essenzialmente come "variabile indipendente", che, cioè, una volta posto, ha effetti sulla società, e il diritto visto come variabile sia "dipendente", e cioè come effetto, conseguenza delle dinamiche sociali, degli interessi in campo, delle relazioni di potere, ecc., che "indipendente", ovvero capace, pur con limiti, di influenzare le dinamiche sociali, gli interessi, le relazioni, i comportamenti, ecc.'.

⁴⁸ *ibid* 7. Own translation. See original: 'che, in quanto tale, nasce e si modifica incessantemente a partire dalle relazioni sociali e dai modi condivisi o dominanti di definirle e qualificarle e, al tempo stesso, alle relazioni sociali si applica, modificandole in misura diversa sia sotto il profilo del loro concreto manifestarsi o svolgersi, sia sotto quello delle definizioni e dei modi di pensare prevalenti o dominanti che le connotano'.

⁴⁹ *ibid* 7-8, referring to P. L. Berger and T. Luckmann (1969): 'In questo senso il diritto dipende da e, al tempo stesso, contribuisce a determinare la "costruzione sociale della realtà", ossia quel modo, proprio del senso comune, di definire le situazioni, interpretarle mediante tipizzazioni, esprimere valutazioni e orientare di conseguenza le azioni, condiviso dagli appartenenti a una certa società.'.

⁵⁰ *ibid* 13, referring to A. Febbrajo (2009): 'Una seconda e rilevante area di interesse ha al centro il tema del come si forma e come si modifica il diritto in conseguenza del mutamento sociale. Più in generale il rapporto tra dinamiche sociali ed evoluzione del diritto, guardando "alla capacità che i fatti hanno di mutare le norme e che, correlativamente, le norme hanno di apprendere dai fatti" (A. Febbrajo, 2009, p. 123)'.

⁵¹ *ibid* 13-14, referring to K. Olivecrona (1972): 'il sistema giuridico non è mai statico, e la formazione e trasformazione delle norme costituiscono un processo continuo'.

and because 'countless agents are at work to propose new norms or to modify the old ones'.⁵² Here is where the questioning of the dominant normative system and the exploration of the suggestions by resistance movements of alternative models of governing find its place.

The process of creation and alteration of norms is not linear, mechanic or granted.⁵³ There exists a 'relative autonomy' (*autonomia relativa*) between the sphere of the law and that of social dynamics, despite the evident interdependence between problems and needs as they occur in societies and the push towards adapting the normative framework to them.⁵⁴ The occurrence of such a relative autonomy is proven by the fact that it is not always the case, but rather only under certain conditions, that the emergence of new exigencies and problems in a given society or the manifestation of "objectively relevant" conflicts result in the production of norms that favour or impose models to face and regulate said conflicts.⁵⁵

Laws are hereby approached as expressions of **conscious choices**, as they embody the choices of decisionmakers; the idea that society or the state are neutral "entities" that take decisions is in fact only a metaphor, for law making is entrusted to given persons.⁵⁶ Law making and enforcement institutions do not act in a vacuum but are made of persons who take their own decisions within a context of material and ideological forces; however, while it is not deniable that large areas of the law bear the interests and the influence of the ruling class, the latter is not the sole responsible for the formation and sanctioning of the law.⁵⁷ Such a perspective finds empiric confirmation by looking at normative moments in contexts of unrest and social change.⁵⁸ Occasions of this kind see different actors playing relevant roles, urging for normative change and employing instruments of representations of problems and exigencies that are functional to reaching a desired outcome; the ability of such actors to represent a given problem or matter as deserving to be regulated is in such cases crucial.⁵⁹

⁵² ibid 14. Own translation. See original: 'non è mai fissato in via definitiva, ma soggiace a sottili modificazioni per i cambiamenti che sempre intervengono nel significato delle parole, nelle condizioni di fatto alle quali le leggi fanno riferimento, nella struttura sociale del paese, nelle opinioni dominanti su ciò che è giusto e sbagliato e nel generale ambiente culturale' and 'agenti innumerevoli sono al lavoro per proporre nuove norme, o modificazioni delle vecchie'.

⁵³ ibid.

⁵⁴ ibid reading 'Il modo in cui ciò avviene non è lineare, meccanico o scontato. Pur essendo evidente l'esistenza di nessi rilevanti e di forte interdipendenza tra i problemi e i bisogni che – nel mutare delle loro condizioni economiche, culturali, sociali – si manifestano nelle diverse società e le spinte ad adeguare il quadro normativo, non può non essere riconosciuta, soprattutto in società caratterizzate da elevata complessità, una "relativa autonomia" dei due ambiti, quello del diritto e quello delle dinamiche sociali.'

⁵⁵ ibid reading 'Questa autonomia relativa è testimoniata dal fatto (...) che non necessariamente, bensì solo a certe condizioni, l'emergere di nuove esigenze o nuovi problemi in una data società o il manifestarsi di conflitti oggettivamente rilevanti, vede prodursi norme che favoriscano o impongano modalità per affrontarli o regolarli.'

⁵⁶ ibid 16 reading 'Tuttavia le leggi, in quanto comprendono "obiettivi, progetti, indirizzi politici, desideri, finalità, scopi, previsioni", sono "l'espressione di una scelta cosciente" (W. Chambliss e R. Seidman, 1987, p. 27): il diritto, in questo senso, incarna le scelte di coloro che prendono decisioni, poiché è solo in senso metaforico che la "società" o lo Stato compiono delle scelte, essendo la creazione vera e propria delle leggi affidata a determinate persone.'

⁵⁷ ibid reading 'Occorre infatti considerare che "le istituzioni legiferanti e quelle sottese a far rispettare il diritto non agiscono in un vuoto; anch'esse sono costituite da persone (i titolari di ruoli) le quali compiono le proprie scelte in un determinato ambito di forze materiale ed ideologiche, comprendenti anche quelle norme giuridiche che definiscono la loro posizione" (W. Chambliss e R. Seidman, 1987, p. 131-132). Ne consegue che "se non si può negare che vaste aree del diritto risentano degli interessi e dell'influenza della classe dominante, è però errato affermare che la classe dominante sia l'unica responsabile della creazione e della sanzione del diritto" (ivi, p. 213).'

⁵⁸ ibid.

⁵⁹ ibid 16-17 reading 'È agevole osservare che nelle vicende che connotano tali mutamenti giocano un ruolo importante attori diversi, protagonisti (in varie forme) del processo di sollecitazione del mutamento normativo, che utilizzano strumenti di rappresentazione di problemi ed esigenze funzionali al raggiungimento del risultato. Determinante è, infatti, la capacità da parte di questi attori di rappresentare un determinato problema o questione come meritevole di regolazione (...).'

Law making is under this perspective a [dialectic process](#) in which people fight and in so doing shape the world in which they live.⁶⁰ In such a fight, not everyone has the same probability of success; economically ruling classes are in a position of considerable advantage in respect of working classes in the fight to obtain a law expressing and defending their interests and opinions.⁶¹ The form and content of the law nevertheless reflect such fight and are not solely the mirror-like image of the interests and the short-term ideologies of the dominant classes or the people.⁶²

The interest of this contribution rests with the question of production of norms and alteration of existing ones in relation to migration and its multifaceted representation. A multitude of actors contribute to processes of production and alteration of norms, from the parliament in its legislative function, the government in its executive function, regional and municipal assemblies that constitute lower administrations and the judiciary.⁶³ The latter does not play a law-making role but, especially at the level of the Constitutional court or of international tribunals, interprets contentious norms through its jurisprudence, correcting or even abolishing existing laws and defining binding orientations.⁶⁴ Against such a process, [policy is proposed as how order is maintained through politics](#), which are heterogeneous strategic relations that shape the world.⁶⁵ [Legal norms are constitutive but not unique elements of policies](#).⁶⁶ They are subsumed therein. A public policy is a set of initiatives and decisions related to the “solution” of a collective “problem” (inverted commas are added to the original text).⁶⁷ It is the “problem” so represented in fact that defines a policy as public; the distinctive feature of public policies is not the pursuance of a public interest but [the possibility to recur to a preestablished “legitimate” use of coercion from the part of the state](#), its substate articulations as well as those of supranational entities such as the European Union.⁶⁸ A fragmented policy and legal framework has come into being, to some extent incoherent, where one can witness the existence of norms that are even contrary to one another.⁶⁹

In the query for normative change a role is played by a [multitude of social actors](#). Furthermore, several factors contribute to the elaboration of new norms or the rearticulation of existing ones in connection with social change, among which the characteristics of the “problem”, such as the number of people impacted by it or its consequences, are only marginal considerations.⁷⁰ Concurring elements to the elaboration of a norm rather are: a) the forms of social construction of the “problem”, including the way this is perceived or represented in the public discussion; b) the questions that result out of the problem representation offered and that orient decision-makers; c) the role played by interest groups; d) predominant interest and “values” that represent the structural and cultural framework against which the process unfolds; and e) the very own interests of the political system and policymakers.⁷¹ The latter aspect is decisive: policymakers’ interest in the maintenance of their role, legitimisation and consensus directs public attention to situations in line with their “agenda” and “possible” “solutions”; it is

⁶⁰ *ibid* 17 reading ‘In questo senso la creazione del diritto riflette un processo dialettico, “un processo nel quale le persone lottano, e nel far ciò, creano il mondo in cui vivono” (W. Chambliss e R. Seidman, 1987, p. 240).’.

⁶¹ *ibid* reading ‘Naturalmente in questa lotta non tutti hanno le stesse probabilità di successo. La storia del diritto dimostra che, nel lungo periodo, i ceti economicamente dominanti si trovano considerevolmente avvantaggiati rispetto alle classi lavoratrici nella lotta per ottenere che il diritto esprima e difenda i loro interessi e le loro opinioni’.

⁶² *ibid* reading ‘Tuttavia “la forma e il contenuto del diritto sono anche il riflesso di tale lotta, non semplicemente l’immagine speculare degli interessi e delle ideologie a breve termine della classe dominante e del popolo (W. Chambliss e R. Seidman, 1987, p. 240).’.

⁶³ *ibid* 243-246.

⁶⁴ *ibid*.

⁶⁵ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 5-6.

⁶⁶ Amadeo Cottino (ed), *Lineamenti di sociologia del diritto* (Zanichelli editore 2019) 247.

⁶⁷ Bruno Dente, *Understanding Policy Decisions* (Springer 2014) 7.

⁶⁸ Amadeo Cottino (ed), *Lineamenti di sociologia del diritto* (Zanichelli editore 2019) 247.

⁶⁹ *ibid* citing Mario Dogliani (ed), *Il libro delle leggi strapazzato e la sua manutenzione* (Paperback 2012).

⁷⁰ *ibid* 249-251.

⁷¹ Amadeo Cottino (ed), *Lineamenti di sociologia del diritto* (Zanichelli editore 2019) 249-251.

furthermore the decisionmakers themselves that can take the initiative and impose themes and solutions, even abstracting from the demands from social sectors and specific collective actors, to realise a political programme, answering to the interests of powerful segments of their electorate or to their own exigencies.⁷²

1.2 On citizenship and its hierarchisation: free and equally powerful individuals? Discourses on migration at the international, regional and national levels

We are here only as private individuals and with no other claim to speak, and to speak together, except a certain difficulty we share in enduring what is taking place. I know very well, and one must defer to this evident truth: we can do little about the reasons which make men and women prefer to leave their country rather than remain and live in it. It is not in our power to change these facts. So who asked as to speak? **No one, and that is exactly our entitlement.** (...) There exists an international citizenship which as such as its rights and duties, and which is obliged to stand up against all forms of abuse of power, no matter who commits them, no matter who are their victims. After all, we are all governed, and, by that fact, joined in solidarity.⁷³

Caraus and Paris write that ‘the marginality, exclusion and illegality of migrants generate new ways of thinking and acting in the world as a whole (...)’.⁷⁴ As anticipated, this research aligns with a stream of studies that acknowledges the epistemological function of migrants’ resisting: a radical cosmopolitan action is performed by the migrant both through cross border mobility and through protesting.⁷⁵

Thus, radical cosmopolitanism is mainly a contestatory practice and action, because it questions the given order and political power and illuminates the contingency of the society’s grounds and hence opens up the possibility of transformation, and a new reaffirmation of freedom, justice, and equality.⁷⁶

The **performance of the border** by the nation state on the life of the migrant person and the obstruction of their mobility is morally intuit as a wrong: beginning from such intuition, the migrant person points at the given-for-granted foundations of the current political order that sees the border as natural and attempts the dismantling and denaturalising of such an arrangement.⁷⁷ While this very proposal may seem transcendental or unattainable, it is itself declined as an evident and given-for-granted everyday reality for all the people for whom borders are already permeable.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.⁷⁸

Every citizen of the Union has the right to move and reside freely within the territory of the Member States.⁷⁹

⁷² *ibid.*

⁷³ Michel Foucault, ‘The rights and duties of international citizenship’ (2015) <https://www.opendemocracy.net/en/can-europe-make-it/rights-and-duties-of-international-citizenship/> accessed 20 May 2023.

⁷⁴ Tamara Caraus and Elena Paris (eds), *Migration, Protest Movements and the Politics of Resistance. A Radical Political Philosophy of Cosmopolitanism* (Routledge 2019) 1-3.

⁷⁵ *ibid* 15.

⁷⁶ *ibid* 11-15.

⁷⁷ *ibid* 13-14.

⁷⁸ Charter of Fundamental Rights of the European Union OJ 2000/C 364/01 preamble.

⁷⁹ *ibid* art 45(1).

The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.⁸⁰

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.⁸¹

Freedom of movement of workers shall be secured within the Union. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.⁸²

Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect (...). The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty. Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence.⁸³

Normative articulations of this kind highlight the manifest partiality and artificiality of the border. Transgressing it can be looked at as a direct opposition to the current arrangement of the nation state and the notion of citizenship related to it.⁸⁴ Nicholas De Genova argues that instead of the social and political relation that subsists between the migrant person and the state, the performance of the border submits the 'thing-like fetish of migrant 'illegality' as a self-evident 'fact', generated by its own supposed act of violation'.⁸⁵

The Border Spectacle, therefore, sets the scene – a scene of ostensible exclusion, in which the purported naturalness and putative necessity of exclusion may be demonstrated and verified, validated and legitimated, redundantly. The scene (where border enforcement performatively activates the reification of migrant 'illegality' in an emphatic and grandiose gesture of exclusion) is nevertheless always accompanied by its shadowy, publicly unacknowledged or disavowed, obscene supplement: the large-scale recruitment of illegalized migrants as legally vulnerable, precarious, and thus tractable labour.⁸⁶

Migrant illegality 'sutures the 'exclusionary' work of the Border Spectacles to a vertiginous spiral of inequalities that are deeply imbricated within the fabric of citizenship itself'.⁸⁷ Through the performance of movement and through their expression of disobedience, migrants reclaim their political subjectivity

⁸⁰ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47 art 3(2).

⁸¹ *ibid* art 26(2).

⁸² *ibid* art 45(1), (2). See also 45(3), 46, 48, 57.

⁸³ 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) preamble. See also current consolidated version of the text.

⁸⁴ Tamara Caraus and Elena Paris (eds), *Migration, Protest Movements and the Politics of Resistance. A Radical Political Philosophy of Cosmopolitanism* (Routledge 2019) 15.

⁸⁵ Nicholas De Genova, 'Spectacles of migrant 'illegality': the scene of exclusion, the obscene of inclusion' (2013) 36(7) *Ethnic and Racial Studies* 1180.

⁸⁶ *ibid*.

⁸⁷ *ibid*.

from the nation state and exercise it across and beyond borders.⁸⁸ Disobeying and protesting, the migrant person enacts rights of and for all, not citizens only, and offers a vision of rejection of the “natural” order of territorial citizenship, immobility and illegality.⁸⁹

What is argued is that a system of **hierarchisation of citizenship** is in place, where citizens stand at the top and non-citizens are categorised in a downward spiral of limitations to their existences. Categorisation is enacted through the unilateral imposition by the state of homogenous and fictional autobiographical accounts the legal requirements of which a migrant person must meet to access protection and not suffer rejection. Rejection at its culmination, and therefore the triumph of the hierarchical model in place, is identified in the **institutionalisation of administrative detention**.

Seyla Benhabib observes that the modern nation state system regulates political membership, which is the ‘principles and practices of incorporating aliens and strangers, immigrants and newcomers, refugees and asylum seekers, into existing polities’, through the one main category of national citizenship.⁹⁰

We are like travelers navigating an unknown terrain with the help of old maps, drawn at a different time and in response to different needs. While the terrain we are traveling on, the world society of states, has changed, our normative map has not (...). The growing normative incongruities between international human rights norms, particularly as they pertain to the “rights of others” – immigrants, refugees, and asylum seekers – and assertions of territorial sovereignty are the novel features of this new landscape.

Citizenship at the Italian domestic level, *cittadinanza*, can be given a glimpse of in legal terms. Law no. 91 of 5 February 1992 disciplines its acquisition, loss and regain. Until 1992, the previous 1912 law had remained into force, subject to progressive intrusions by the Constitutional court and by a 1983 law that prohibited any discrimination based on sex, until an organic reform was offered in the nineties.⁹¹ It is rather striking to observe that the norm was altered only so recently. Law no. 555 of 13 June 1912 maintained for eighty years the centrality of the husband-father character, the citizenship of whom was transmitted to the foreign wife and his children or was revoked altogether to all.⁹² In 1975, the Constitutional court acknowledged the discriminatory nature of the provision according to which an Italian female citizen marrying a foreigner automatically lost her nationality while an Italian male citizen marrying a foreigner maintained it; this was *inter alia* observed contrary to article 3 of the Constitution on the basis of sex.⁹³

[The law] is inspired by the prevailing conception that in 1912 considered women as juridically inferior to men and even as persons without full legal capacity (among other things, at that time women were not recognised active and passive political rights and their rights to access public functions were extremely limited), conception that does not comply with and in fact is contrary to the principles of the Constitution, which instead attributes equal social dignity and equality

⁸⁸ Tamara Caraus and Elena Paris (eds), *Migration, Protest Movements and the Politics of Resistance. A Radical Political Philosophy of Cosmopolitanism* (Routledge 2019) 15.

⁸⁹ *ibid.*

⁹⁰ Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens* (Cambridge University Press 2004) 1.

⁹¹ Paolo Morozzo della Rocca (ed), *Immigrazione, asilo e cittadinanza* (Maggioli Editore 2021) 380.

⁹² *ibid.* See Legge 13 June 1912 no. 555, ‘Sulla cittadinanza italiana (012U0555)’ (entry into force 1 July 1912) GU Serie Generale 153 30 June 1912.

⁹³ Constitutional Court 9 April 1975 no. 87

<http://www.dircost.unito.it/SentNet1.01/srch/sn_showArgs2.jsp?id_senza=19750087> accessed 27 May 2023.

before the law to all citizens with no distinction of sex and regulates marriage based on the moral and legal equality of spouses.⁹⁴

In 1983, the Court moved against the disposition that discriminated the role of the mother in transmitting citizenship to her children.⁹⁵ In the same year, a law was issued prohibiting discriminations in terms of citizenship between wife and husband and from mother and father to their children.⁹⁶ A more organic reform was instituted in 1992, which nevertheless held on to the *jus sanguinis*, recognising the application of the *jus soli* only as a marginal alternative in exceptional circumstances.⁹⁷ Bruno Barel observes that the 1912 law, issued during a phase of emigration of Italian citizens abroad, chose to preserve the bonds between emigrants and their descendants; the nineties, on the other hand, offered a radically changed scenario in terms of social and demographical conditions and witnessed the increase of migratory movements towards Italy.⁹⁸ Difficulties in the convivence between the host society and foreign citizens, and all the more descendants born and residing in Italy throughout their life, were already foreseeable then and indeed persist to these days.⁹⁹ Lawmakers moved at the time into a specific direction and proposals of reform have so far not succeeded. The progressive alteration of the framework on citizenship in place over the last century, with the recognition of formal discriminations opposing the constitutional principle of equality, stands as a demonstration of the juridical adaptation to changed social surroundings and manifests the contingency of norms in spite of their presumed binding timeless and neutral articulation.

Donatella Di Cesare observes that in today's global scenario the old ghosts of blood and territory remerge (*rispuntano allora i vecchi fantasmi del sangue e del suolo*).¹⁰⁰ Nation derives from the Latin *nascor, nasci, natus*, to be born. The territorial state takes root and prospers on the powerful fiction of the ethnic homogeneity; the nation, an entity that is almost “prepolitical”, becomes the insignia of its citizens' political identity, the source of state sovereignty.¹⁰¹ The identification of population and ethnicity however does not fit into a conceptualisation of democracy nor of political citizenship: why would a community be governed by a genetic lineage rather than by citizens' participation through the exercise of their rights?¹⁰² *Jus sanguinis* and *jus soli* become criteria of membership (*appartenenza*) and not of participation, for political citizenship does not need to root into a national identity.¹⁰³

The nations... the regions where there is less welfare see a much more significant demographic decline than others. We cannot give in to the idea of ethnic replacement (*sostituzione etnica*). The idea of ethnic replacement... oh well, Italians are having fewer children, we will replace them with someone else. That is not the way forward. I believe, and I touch on this point, that immigration is a natural and physiological phenomenon. I am the grandchild of an emigrant and I am careful not to think of emigration, and therefore immigration, as a problem. To the contrary,

⁹⁴ *ibid.* Own translation. See original: '[La legge] si ispira (...) alla concezione imperante nel 1912 di considerare la donna come giuridicamente inferiore all'uomo e addirittura come persona non avente la completa capacità giuridica (fra l'altro a quel tempo non erano riconosciuti alla donna diritti politici attivi e passivi ed erano estremamente limitati i diritti di accedere a funzioni pubbliche), concezione che non risponde ed anzi contrasta ai principi della Costituzione che attribuisce pari dignità sociale ed uguaglianza avanti alla legge di tutti i cittadini senza distinzione di sesso e ordina il matrimonio sull'uguaglianza morale e giuridica dei coniugi'.

⁹⁵ Constitutional Court 29 January 1983 no. 30

<<https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1983&numero=30>> accessed 27 May 2023.

⁹⁶ Legge 21 April 1983 no. 123, 'Disposizioni in materia di cittadinanza' GU Serie Generale 112 26 April 1983.

⁹⁷ Legge 5 February 1992 no. 91, 'Nuove norme sulla cittadinanza' (entry into force 16 August 1992, last updated 27 July 2022) GU 38 15 February 1992.

⁹⁸ Paolo Morozzo della Rocca (ed), *Immigrazione, asilo e cittadinanza* (Maggioli Editore 2021) 382.

⁹⁹ *ibid.*

¹⁰⁰ Donatella Di Cesare, *Stranieri residenti. Una filosofia della migrazione* (Bollati Boringhieri editore 2017) 231.

¹⁰¹ *ibid* 233-234.

¹⁰² *ibid.*

¹⁰³ *ibid.*

they are an opportunity for the nation to grow. If there is a demand for labour, when the domestic offer is exhausted, you must recur to a labour force that comes from other nations. But it must be clear that the main enemy of regular immigration, through organised flows, is illegal and clandestine immigration [applause from the audience]. And it is a path that has been followed so far and that we are trying to change. How? By attempting to curb migration flows from the sea, less illegal and clandestine immigration, more organised regular flows on a three-year basis in which people who arrive can be integrate, also thanks to bilateral and multilateral agreements with their nations of origin, which ask for the training of the people who come here to work, to build, perhaps to become Italians...¹⁰⁴

Territoriality becomes the anachronistic delimitation of material functions and cultural identities: territorial monopoly is exercised through the policies of migration and citizenship.¹⁰⁵ Transnational migrations and people on the move across borders pertain to that dimension that acknowledges the rights of individuals as such: *humans* who either come into contact with, wish to entry or to be part of what are institutionally represented 'territorially bounded communities'.¹⁰⁶ *Humans* who as well wish to leave or to not be part of such territorial communities. *Humans*.

Discourses around citizenship and migration at the international, regional and, as we have briefly touched upon, national level revolve around this, often contradictorily. The following instances are a handful of international instruments, not including International Labour Organization's (ILO) or regional instruments, offered as examples of the fragmentation and the relative inconsistency of the codification of human rights before state sovereignty and territoriality.

The 1948 Universal Declaration of Human Rights recognises the inherent dignity and equal and inalienable rights of all members of the human family (preamble). It reads all human beings are born free and equal in dignity and rights; endowed with reason and conscience should act towards one another in a spirit of brotherhood (article 1). Everyone is entitled to the rights and freedoms set forth in the Declaration without distinction of any kind (article 2). Everyone has the right to life, liberty and security of the person (article 3). Everyone has the right to recognition

Yet the Declaration does not foresee a right to entry: there is a right to emigrate but not one to immigrate, so to speak. Asylum is an institute articulated in a way that can be sought in the very restricted circumstance of fleeing persecution. While everyone has a right to a nationality, no indications are provided to ensure that non-citizens or stateless persons may have access to it. Within the logic of a declaration "for all", state sovereignty is rather embedded and reconfirmed.

¹⁰⁴ Francesco Lollobrigida, Ministro dell'agricoltura, della sovranità alimentare e delle foreste, during a speech at the X Congresso Confederale CISAL (18 April 2023). Video available: 'Lollobrigida: 'No alla sostituzione etnica'. Schlein: 'Parole suprematiste' (ANSA 18 April 2023) <https://www.ansa.it/sito/notizie/politica/2023/04/18/lollobrigida-no-alla-sostituzione-etnica-schlein-parole-suprematiste_46992cab-c8f6-40e7-a068-9e51f18e5e00.html> accessed 27 May 2023. Own translation. See original: 'Le nazioni... le regioni dove c'è meno welfare vedono il calo demografico molto più importante rispetto alle altre. Non possiamo arrenderci all'idea della sostituzione etnica. L'idea della sostituzione etnica... vabbè gli italiani fanno meno figli, li sostituiamo con qualcun altro. Non è quella la strada. Io ritengo, e tocco questo tema, che l'immigrazione è un fatto naturale, fisiologico. Sono nipote di un emigrante e mi guardo bene dal pensare che l'emigrazione, e quindi l'immigrazione, siano un problema. Anzi, diventano un'opportunità di crescita per una nazione. Se ci sono richieste di forza lavoro, quando hai esaurito la domanda interna, devi dotarti di forza lavoro che venga da altre nazioni. Però bisogna chiarire che il primo nemico dell'immigrazione regolare, fatta attraverso flussi organizzati, si chiama immigrazione illegale e clandestina [applausi del pubblico]. Ed è una strada che è stata finora percorsa e che noi stiamo provando a cambiare. Come? Cercando di arginare i flussi di mare, meno immigrazione clandestina ed illegale, più flussi regolari organizzati su base triennale in cui le persone che arrivano possano essere integrate anche grazie ad accordi bilaterali e multilaterali con le nazioni di provenienza, che ti chiedono di poter formare le persone che vengono qui per lavorare, per costruire, magari per diventare italiani...'.
¹⁰⁵ Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens* (Cambridge University Press 2004) 4.
¹⁰⁶ *ibid* 10-11.

everywhere as a person before the law (article 6). All are equal before the law and entitled with no discrimination to the equal protection of the law (article 7). No one shall be subjected to arbitrary arrest, detention or exile (article 9). No one shall be subjected to arbitrary interference with his privacy, family and home (article 12). Everyone has the right to freedom of movement and residence within the borders of each state and everyone has the right to leave any country, including their own, and to return to their country (article 13). Everyone has the right to seek and enjoy in other countries asylum from persecution (article 14). Everyone has the right to a nationality (article 15).

The [1951 Convention and its 1967 Protocol relating to the Status of Refugees](#) reads that the term 'refugee' shall apply to anyone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

The Convention is defined as a 'status and rights-based instrument and is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalisation and *non-refoulement* (2010 introductory note by the Office of the United Nations High Commissioner for Refugees). Yet, refugee status is essentially framed in "civil" and "political" terms.¹⁰⁷ This may not come as a surprise, as the landmark legal tool pertaining to international refugee law and the whole system it created was only freed of its temporal and geographical scope in 1967.¹⁰⁸ The grounds to which refugee status is conditioned were never changed, as if what served Europeans in the WWII aftermath could serve the rest of the world population at any time.¹⁰⁹ Since this is not the case, different protections were instituted, generally characterised by a reduced enjoyment of rights and benefits, effectively creating more or less *deserving* asylum-seekers on the basis

¹⁰⁷ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), art 1(A)(2): '(...) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national'.

¹⁰⁸ Protocol Relating to the Status of Refugees (entered into force 4 October 1967).

¹⁰⁹ See also *inter alia* Maurizio Ambrosini, *L'invasione immaginaria. L'immigrazione oltre i luoghi comuni* (Gius. Laterza & Figli 2020) 43.

of their supposedly *non*-political claims.¹¹⁰ On this, Shahram Khosravi makes a brilliant observation, asking whether, after all, there is any boundary between politics and economy and arguing that such boundary is often blurred.¹¹¹ If climate causes drought, famine is caused by the political circumstances whereby a state does not support its population with the necessary resources to live; 'this is pre-eminently a political issue and not just an economic one'.¹¹² States are always responsible for migratory crises: directly, when violating human rights, or indirectly, when they are not able to protect their people.¹¹³ 'Human suffering' he argues 'is always a political issue'.¹¹⁴

On an additional note, the geographical limitation to the 1951 Convention was retained by some states over time, including Turkey.¹¹⁵ This means that the very country which the states of the European Union have made consolidated agreements with¹¹⁶ on migration and externalisation practices in effect, in the diplomatic words of the UNHCR, retains 'resettlement to a third country the most preferred durable solution for refugees arrived due to the events occurred outside of Europe'.¹¹⁷

The 1954 Convention relating to the Status of Stateless Persons defines a stateless person as a person who is not considered as a national by any state under its law. State sovereignty and the unlawfulness of one's presence on state territory are

¹¹⁰ For instance, there is a difference in the length of residence permits granted to beneficiaries of refugee status and subsidiary protection at the European Union level. See European Union's Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [29 April 2004] OJ L 304 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0083&from=EN>>. In addition to international and regional protections, single nation states may grant other forms of protection to asylum applicants.

¹¹¹ Shahram Khosravi, *Illegal Traveller. An Auto-Ethnography of Borders* (Palgarve Macmillan 2010) 113.

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ See 'Chapter V. Refugees and stateless persons. 5. Protocol relating to the Status of Refugees. New York, 31 January 1967' (un.org 5 June 2023) <https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=V-5&chapter=5&lang=en> accessed 5 June 2023. It reads: 'The instrument of accession stipulates that the Government of Turkey maintains the provisions of the declaration made under section B of article 1 of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, according to which it applies the Convention only to persons who have become refugees as a result of events occurring in Europe (...)'.¹¹⁶

¹¹⁶ 'EU-Turkey statement' (18 March 2016) <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>> accessed 3 June 2023. For an overview of related documentation: 'EU-Turkey statement and action plan' (Legislative Train Schedule – European Parliament 20 May 2023) <<https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>> accessed 3 June 2023.

¹¹⁷ 'Refugee and Asylum Seekers in Turkey' (UNHCR 2001-2023) <<https://www.unhcr.org/tr/en/refugees-and-asylum-seekers-in-turkey>> accessed 2 June 2023.

anyone who is not considered as a national by any state under the law (article 1). States shall accord to stateless persons *lawfully* in their territory the right to choose their place of residence and move freely within its territory, subject to regulations applicable to *aliens* (article 26, emphasis added). States shall issue identity papers to stateless persons in their territory who do not have valid travel documents (article 27). States shall issue to stateless persons *lawfully* in their territory travel documents to move outside it; states may issue travel documents to any *other* stateless person in their territory; state shall be *sympathetic* and issue travel documents to stateless persons in their territory who are unable to obtain such documents from the country of their *lawful* residence (article 28, emphasis added). States shall not expel a stateless person *lawfully* in their territory albeit on grounds of national security and public order (article 31, emphasis added). States shall facilitate the *assimilation* and *naturalisation* of stateless persons (article 32, emphasis added).

The [1961 Convention on the Reduction of Statelessness](#) has more recently been introduced by a 2014 note of the Office of the UNHCR that reads that ‘underlying the 1961 Convention is the notion that while States maintain the right to elaborate the content of their nationality laws, they must do so in compliance with international norms relating to nationality, including the principle that statelessness should be avoided’. The Convention is therein said to ‘balance the rights of individuals with the interests of states by setting out general rules for the prevention of stateless, and simultaneously allowing some exceptions to those rules’.

The [1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#) defines a ‘migrant worker’ anyone who is to be engaged, is engaged or has been engaged in remunerated activity in a state of which they are not a national (article 2). The Convention is said to apply to the whole migration process (article 1).

embedded even within the logics behind the recognition of a condition of violation of one’s right to nationality by the very system of states that prescribed for it.

Exceptions to the rules preventing statelessness result, likely, in statelessness. Statelessness is yet represented as a temporary condition, for everyone must have a right to a nationality. What for, if we are members of the human family? The territorialisation of human rights shaped into the system of nation states reduces human rights to citizen rights.¹¹⁸ A stateless person is to be (re)naturalised.¹¹⁹ The very term *naturalisation* reminds us of the “unnaturally” condition of a person devoid of citizenship. This means that a permanent status of being just a human being is incompatible with the logic of the national order of things.¹²⁰

The Convention does not set forth any new right for migrant workers and members of their family that are not already enshrined in other human rights law instruments. The text was adopted by the UN General Assembly in 1990 and entered into force in 2003: it took 13 years due to its slow ratification rate, the longest of any of the core international human

¹¹⁸ Shahram Khosravi, *Illegal Traveller. An Auto-Ethnography of Borders* (Palgarve Macmillan 2010) 122.

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

rights instruments in place.¹²¹ The status of ratification of the Convention as of February 2023 is: 58 state parties, 11 signatories and 129 states having taken no action towards ratification.¹²²

A system is then in place that builds on underlying assumptions of state territory and territoriality where supposedly homogeneous identities ground their roots and sprout into citizenship, which is then a form of ordered sorting rather than active participation. The human being outside the realm of citizenship counterintuitively ends up as being represented and perceived as unnatural and so their rights and prospects are coercively limited. Such a construction permeates the representation of migration and of cross-border existence, situating persons on different steps of a spiralling hierarchy depending on their established “legal status”, paradoxically *made natural* and incoherently finding its place against a background of purported equality for all.

One of the rights allegedly acknowledged to all, citizens and non-citizens, is the *inviolability of one's personal freedom*. Prerogatives on personal freedom do not allow, on the basis of a consolidated constitutional jurisprudence, any discrimination between citizens and foreigners, for inviolable rights pertain to every human being as such and not as a member of a specific political community.¹²³ The performance of the right's infringement by states on the basis of a person's status is a declaration of the model's embedded discriminatory logics of inequality: citizens and non-citizens are then not even equal for what concerns the most inviolable human rights. The current Italian migration governance system strips foreigners' entitlements to personal freedom of constitutional guarantees that are instead foresaw for citizens.¹²⁴ Violations of non-citizens' rights to personal freedom peaks in the *institutionalisation of administrative detention*.¹²⁵ This is the only form of prolonged deprivation of one's personal freedom regardless of one's individual criminal responsibility.¹²⁶

Originally represented as a precautionary tool for entry refusal and for the expulsion of migrants not in a regular situation and who could not claim protection, administrative detention has become, especially with the 2002 Bossi-Fini law, a systemic practice for asylum seekers as well.¹²⁷ The systematisation of the practice can for instance intuitively be inferred by the titles that administrative detention centres have been given over time: from the initial ‘centre of temporary staying and assistance’ (*centri di permanenza temporanea e assistenza, CPTA*) in 1998 to ‘identification and expulsion centres’ (*centri di identificazione e espulsione, CIE*) to ‘centres of staying for repatriation’ (*centri di permanenza per i rimpatri, CPR*).¹²⁸ Indicative of the systematisation of the practice, detention periods have dramatically

¹²¹ ‘As ratifications lag, UN experts renew call for States to sign treaty on migrant worker's rights’ (*UN News* 7 April 2014) <<https://news.un.org/en/story/2014/04/465592>> accessed 5 June 2023.

¹²² To the interactive dashboard on the status of ratification of UN treaties, see the website of the United Nations Office of the High Commissioner for Human Rights: <<https://indicators.ohchr.org/>>. The map, according to the website accessed as of October 2024, was last updated on 21 February 2023.

¹²³ Antonio Cantaro and Federico Losurdo, ‘Personal Freedom of the International Protection Seeker’ (2020) *A Quarterly Review for Criminal Justice* 417. See also Constitutional Court, Sentencing no. 105 (10 April 2001) paras 4-5.

¹²⁴ Antonio Cantaro and Federico Losurdo, ‘Personal Freedom of the International Protection Seeker’ (2020) *A Quarterly Review for Criminal Justice* 417.

¹²⁵ *ibid.*

¹²⁶ Enriga Rigo, ‘Spazi di trattenimento e spazi di giurisdizione. Note a margine di materiali di ricerca sulla detenzione amministrativa dei migranti’ (2017) 2 *Materiali per una storia della cultura giuridica* 475.

¹²⁷ Antonio Cantaro and Federico Losurdo, ‘Personal Freedom of the International Protection Seeker’ (2020) *A Quarterly Review for Criminal Justice* 417.

¹²⁸ Decreto Legislativo 25 July 1998 no. 286, ‘Testo Unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero’, GU 191 18 August 1998 Supplemento Ordinario 139 art 14. See also Enriga Rigo, ‘Spazi di trattenimento e spazi di giurisdizione. Note a margine di materiali di ricerca sulla detenzione amministrativa dei migranti’ (2017) 2 *Materiali per una storia della cultura giuridica* 475.

been increased over time as well: while with the 1998 Turco-Napolitano a foreigner could be detained for a period of 20 days, prolongable to 30, the 2002 Bossi-Fini brought the detention period to 60 days.¹²⁹ In 2008, the EU Directive no. 115 established that, under exceptional circumstances, detention could reach a period of 18 months;¹³⁰ this was domestically receipt with a law in 2009 contained within the so called 'security packet' (*Pacchetto sicurezza*) that introduced the 'crime of clandestinity' (*reato di clandestinità*) and extended the detention period from 60 to 180 days, and later in 2011, when the maximum length was indeed brought up to 18 months.¹³¹

The institutionalisation of administrative detention finds its place within a context, as for the European Union at least, that has progressively governed migration through a *securitarian logic*. This is manifest in provisions such as that establishing the 'safe country' assessment notion, in the distinction between asylum-seekers and so called *economic migrants* who "can" immediately be expelled, in the Dublin criteria of redistribution of asylum-seekers and the process of delocalisation of asylum-seekers in *hotspots*, often outside EU's borders.¹³² Frontex standing corps officers in certain geographical areas have been equipped with service weapons and trained: recruits as EU statutory staff are thus able to carry firearms for patrolling activities.¹³³ The Covid-19 pandemic has even seen the adoption of *quarantine vessels*. In Italy, the context of sanitary emergency impacted activities within the framework of the asylum and reception system as well as search and rescue (SAR) operations and disembarkation procedures. On 7 April 2020, a decree was issued establishing that, for the duration of the state of emergency, Italian ports could not be recognised 'safe' for disembarkation of persons rescued outside the national SAR zone by vessels flying foreign flags. On that very same date, the German NGO Sea-Eye's ship Alan Kurdi was denied the disembarkation of 150 individuals rescued off the Libyan coast. While Italians for whom it had been difficult to return home were collected from all over the world, migrants were left at sea. Those very same ports that were considered safer for nationals were claimed unsafe for others seeking protection and assistance. On 12 April 2020, the Head of the Civil Protection issued a decree concerning emergency activities linked to the assistance and health surveillance (*sorveglianza sanitaria/isolamento fiduciario e quarantena*) of sea rescued migrants and those who had autonomously disembarked (*sbarchi autonomi*) on national territory. The decree foresaw that migrants rescued at sea and for whom no place of safety could be identified were to be transferred on vessels for the duration of their sanitary surveillance. Such exceptional measures excluded disembarkation. For migrants who had disembarked, other areas or facilities were to be designated as accommodation for the period of sanitary surveillance; when these could not be identified, authorities could resort to transferring migrants to said 'quarantine' vessels. Although employing a different wording, both decrees issued on 7 and 12 April addressed the very same target population. Vessels were selected through direct calls for tenders. The two-pager application module available online for the interested company to participate in the selection call explicitly refers to the obligation for the selected vessels to be able to reach the southern coasts of Sicily within the 24 hours following the stipulation of the contract. As of July 2021, at

¹²⁹ See also Alterego – Fabbrica dei Diritti, *Abusi in divisa. Vademecum per la difesa legale* (DeriveApprodi 2019) 151-156.

¹³⁰ 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 (OJ EU L348/98 of 24 December 2008) art 15(5), (6).

¹³¹ Alterego – Fabbrica dei Diritti, *Abusi in divisa. Vademecum per la difesa legale* (DeriveApprodi 2019) 151-156.

¹³² Antonio Cantaro and Federico Losurdo, 'Personal Freedom of the International Protection Seeker' (2020) A Quarterly Review for Criminal Justice 417.

¹³³ 'Frontex and Lithuania agree on service weapons delivered to Frontex standing corps officers' (*FRONTEx*, 9 December 2021) available at <<https://frontex.europa.eu/media-centre/news/news-release/frontex-and-lithuania-agree-on-service-weapons-delivered-to-frontex-standing-corps-officers-y3iVzk>> accessed 7 June 2022. See also: 'Outcome of Industry Dialogue - Procurement of handguns, ammunition and holsters for the European Border and Coast Guard standing corps' (*FRONTEx*, 7 January 2020) available at <<https://frontex.europa.eu/future-of-border-control/research-and-innovation/announcements/outcome-of-industry-dialogue-procurement-of-handguns-ammunition-and-holsters-for-the-european-border-and-coast-guard-standing-corps-2xfPRY>> accessed 7 June 2022.

least three young persons had lost their lives in circumstances involving the recourse to quarantine vessels; hundreds of migrants already on land, holders of international protection or other residence permits or waiting for their procedures to unfold and accommodated in reception facilities, were arbitrarily transferred onto the vessels when allegedly resulting to have had contracted Covid-19. It is like if any person, any citizen, were snatched into the night from their homes and brought onto ships for the state to forcibly monitor their sanitary condition and irremediably deprive them of their freedoms. As of the beginning of November 2020, approximately 10,000 people had been isolated on quarantine boats.¹³⁴

Places like such ships, hotspots or administrative detention centres are architectures of repression. They are sites where the mechanisms of states' control and subjugation unfold and where the state tests new frontiers of illegitimate detention.¹³⁵

Despite concerns, jurisprudential checks have so far legitimised administrative detention rather than obstructing it. The measure has been approached as a non-punitive one only aimed at ensuring the effectiveness of expulsion provisions.¹³⁶ Administrative detention centres have been metaphorically called 'prisons with three walls', for the foreigner allegedly maintains the possibility of leaving the host territory and thus secure their liberty.¹³⁷ At the domestic level, the detention of a foreigner within an expulsion centre has indeed been recognised by the jurisprudence as falling within the scope of article 13 of the Italian Constitution on personal freedom; the judicial overseeing of the practice shall not limit itself to the expulsion provision but consider the reasons that brought to the expulsion order, for these are determining the immediate limitation of the foreigner's personal freedom and their subsequent detention.¹³⁸

¹³⁴ See *inter alia* on the topic: ASGI, *Rights on the skids. The experiment of quarantine ships and the main points of criticism* (March 2021) <<https://en.asgi.it/wp-content/uploads/2021/05/Report-Rights-on-the-skids.pdf>> accessed 1 June 2022; Ministero delle infrastrutture e dei trasporti di concerto con Ministero degli affari esteri e della cooperazione internazionale, Ministero dell'interno e Ministero della salute, 'M INF. UFFGAB. REG DECRETI. R. 0000150. 07-04-2020' <<http://www.immigrazione.biz/upload/decreto-interministeriale-n-150-del-07-04-2020.pdf>> accessed 1 June 2022; '150 migrants rescued in Mediterranean by Alan Kurdi' (*InfoMigrants*, 7 April 2020) <<https://www.infomigrants.net/en/post/23916/150-migrants-rescued-in-mediterranean-by-alan-kurdi>> accessed 1 June 2022; Ministero dell'Interno, Dipartimento per le libertà civili e l'immigrazione 'Soggetto attuatore per le attività emergenziali connesse all'assistenza e alla sorveglianza sanitaria dei migranti soccorsi in mare ovvero giunti sul territorio nazionale a seguito di sbarchi autonomi (OPCM n. 1287/2020)' <<http://www.latrexxentaonline.it/wp-content/uploads/2020/04/attivit%C3%A0-emergenziali-sorveglianza-sanitaria-migranti.pdf>> accessed 1 June 2022; 'Avviso per la presentazione di manifestazioni di interesse per il servizio di noleggio di unità navali battenti bandiera italiana e/o comunitaria funzionale all'assistenza e sorveglianza sanitaria dei migranti soccorsi in mare o giunti sul territorio nazionale a seguito di sbarchi autonomi nell'ambito dell'emergenza relativa al rischio sanitario connesso all'insorgenza di patologie derivanti da agenti virali trasmissibili' (*Ministero delle infrastrutture e della mobilità sostenibili*, 19 April 2020) <http://trasparenza.mit.gov.it/index.php?id_oggetto=11&id_doc=248450> accessed 1 June 2022; see also para 7 of 'Allegato 1 – Domanda di partecipazione' (*Ministero delle infrastrutture e della mobilità sostenibili*, 18 April 2020) <https://trasparenza.mit.gov.it/moduli/downloadFile.php?file=oggetto_allegati/2010821063100_OAllegato+1+-+Domanda+di+partecipazione.docx> accessed 1 June 2022. Essential security, health and technical guidelines were furthermore issued to be applied to the quarantine vessels.

¹³⁵ Alterego – Fabbrica dei Diritti, *Abusi in divisa. Vademecum per la difesa legale* (DeriveApprodi 2019) 7.

¹³⁶ Enriga Rigo, 'Spazi di trattenimento e spazi di giurisdizione. Note a margine di materiali di ricerca sulla detenzione amministrativa dei migranti' (2017) 2 *Materiali per una storia della cultura giuridica* 475.

¹³⁷ See for instance: Daniel Wilsher, *Immigration Detention. Law, History, Politics* (Cambridge University Press 2012).

¹³⁸ Enriga Rigo, 'Spazi di trattenimento e spazi di giurisdizione. Note a margine di materiali di ricerca sulla detenzione amministrativa dei migranti' (2017) 2 *Materiali per una storia della cultura giuridica* 475. See jurisprudence: Constitutional Court, Sentencing no. 105 (10 April 2001) paras 4-5 reading '(...) Il trattenimento dello straniero presso i centri di permanenza temporanea e assistenza è misura incidente sulla libertà personale, che non può essere adottata al di fuori delle garanzie dell'articolo 13 della Costituzione. Si può forse dubitare se

However, such expressions of the jurisprudential control over the practice of administrative detention, albeit before a legislative deficiency, in the end performed the function of legitimising the treatment itself rather than abolishing it.¹³⁹ Similarly, supranational courts such as the European Court of Human Rights and the Court of Justice of the European Union have censored forms of detention affecting the “essential” content of human dignity (such as for instance in cases of “excessive” duration of the detention period, “degrading” conditions, measures being enforced over minors, etc.) but have justified through the recourse to the proportionality principle the functionalist *ratio* of administrative detention, describing it as an instrument to realise the rapid expulsion of (unwelcomed) migrants from the host territories.¹⁴⁰ The Italian National guarantor for the rights of persons detained or deprived of personal

esso sia o meno da includere nelle misure restrittive tipiche espressamente menzionate dall’articolo 13; e tale dubbio può essere in parte alimentato dalla considerazione che il legislatore ha avuto cura di evitare, anche sul piano terminologico, l’identificazione con istituti familiari al diritto penale, assegnando al trattenimento anche finalità di assistenza e prevedendo per esso un regime diverso da quello penitenziario. Tuttavia, se si ha riguardo al suo contenuto, il trattenimento è quantomeno da ricondurre alle “altre restrizioni della libertà personale”, di cui pure si fa menzione nell’articolo 13 della Costituzione. Lo si evince dal comma 7 dell’articolo 14, secondo il quale il questore, avvalendosi della forza pubblica, adotta efficaci misure di vigilanza affinché lo straniero non si allontani indebitamente dal centro e provvede a ripristinare senza ritardo la misura ove questa venga violata. Si determina dunque nel caso del trattenimento, anche quando questo non sia disgiunto da una finalità di assistenza, quella mortificazione della dignità dell’uomo che si verifica in ogni evenienza di assoggettamento fisico all’altrui potere e che è indice sicuro dell’attinenza della misura alla sfera della libertà personale. Né potrebbe dirsi che le garanzie dell’articolo 13 della Costituzione subiscano attenuazioni rispetto agli stranieri, in vista della tutela di altri beni costituzionalmente rilevanti. Per quanto gli interessi pubblici incidenti sulla materia della immigrazione siano molteplici e per quanto possano essere percepiti come gravi i problemi di sicurezza e di ordine pubblico connessi a flussi migratori incontrollati, non può risulterne minimamente scalfito il carattere universale della libertà personale, che, al pari degli altri diritti che la Costituzione proclama inviolabili, spetta ai singoli non in quanto partecipi di una determinata comunità politica, ma in quanto esseri umani. Che un tale ordine di idee abbia ispirato la disciplina dell’istituto emerge del resto dallo stesso articolo 14 censurato, là dove, con evidente riecheggimento della disciplina dell’articolo 13, terzo comma, della Costituzione, e della riserva di giurisdizione in esso contenuta, si prevede che il provvedimento di trattenimento dell’autorità di pubblica sicurezza deve essere comunicato entro quarantotto ore all’autorità giudiziaria e che, se questa non lo convalida nelle successive quarantotto ore, esso cessa di avere ogni effetto. (...) È comunque la forza del precetto costituzionale dell’articolo 13 a imporre una accezione piena del controllo che spetta al giudice della convalida: un controllo che non può fermarsi ai margini del procedimento di espulsione, ma deve investire i motivi che hanno indotto l’amministrazione procedente a disporre quella peculiare modalità esecutiva dell’espulsione – l’accompagnamento alla frontiera – che è causa immediata della limitazione della libertà personale dello straniero e insieme fondamento della successiva misura del trattenimento’.

¹³⁹ Enriga Rigo, ‘Spazi di trattenimento e spazi di giurisdizione. Note a margine di materiali di ricerca sulla detenzione amministrativa dei migranti’ (2017) 2 Materiali per una storia della cultura giuridica 475.

¹⁴⁰ Antonio Cantaro and Federico Losurdo, ‘Personal Freedom of the International Protection Seeker’ (2020) A Quarterly Review for Criminal Justice 417. See *inter alia* the following jurisprudence: *Saadi v. Italy*, Application no. 37201/06 (ECtHR, 28 February 2008) para 124 reading “(...) it is the Court’s settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens (...)”; | *Mikolenko v. Estonia*, Application no. 10664/05 (ECtHR, 8 January 2010) para 65 reading “ (...) while it is true that States enjoy an “undeniable sovereign right to control aliens’ entry into and residence in their territory” (...) the aliens’ detention in this context is nevertheless only permissible under Article 5 § 1 (f) if action is being taken with a view to their deportation”; | *Raza v Bulgaria*, Application no. 31465/08 (ECtHR, 11 May 2010) para 72 reading “(...) However, any deprivation of liberty under Article 5 § 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible (...). In other words, the length of the detention for this purpose should not exceed that reasonably required (...)”; | *Nabil and others v Hungary*, Application no. 62116/12 (ECtHR, 22 December 2015) paras 28-29 reading “as to the second limb of Article 5 § 1 (f), the Convention does not require that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing (...). Once the action is being taken with a view to deportation, it is immaterial, for the purposes of Article 5 § 1 (f), whether the underlying decision to expel can be justified under national or Convention law (...). Nevertheless, any deprivation of liberty will be justified only for as long as

freedom (*Garante nazionale dei diritti delle persone detenute o private della libertà personale*) observed in a 2021 report on the administrative detention centre of Turin, in northern Italy, that enforcing a measure of deprivation of freedom implicates for all those persons responsible for the execution of said measure a series of negative and positive obligations aimed at ensuring the safety of the physical and psychological integrity of the person under custody.¹⁴¹ The visit took place soon after the suicide of Moussa Balde, a young foreigner who had been the victim of an aggression in early May and who had then yet been halted and detained under isolation in Turin in the awaiting of the application of an expulsion order.

1.2.1 The hierarchisation peak: a brief excursus over almost thirty years of administrative detention in Italy

While addressing the institutional representations of the phenomenon of migration through policy, administrative detention being (en)forced on migrant persons is considered a crucial aspect of the bordering machinery. The study sees the practice as the glorification of a legally constructed model of hierarchisation of individuals where non-citizens are caged at the bottom.

At the national level, in 1995 administrative detention was introduced into the normative landscape by the so called Dini decree (*decreto Dini*), which was never converted into law but may have paved the way for the subsequent normalisation of the practice.¹⁴² The proposed text read that the foreigner who was found on state territory irregularly must be expelled (*lo straniero che si trova nel territorio dello Stato in condizione irregolare deve essere espulso*). Expulsion was issued by the prefect and the foreigner was to leave the state within 10 days from the receipt of the notice. The decree foresaw the prohibition to return to the state in the seven years after the expulsion. In cases where identity assessments were to be conducted for the expulsion to take place, documents were needed or there was the risk the foreigner fled, mandatory residence (*obbligo di dimora*) in specific facilities for up to 30 days was prescribed. The provision established that minors above the age of 16 as well as pregnant women in their first trimester could be expelled.

Always in 1995, the so called Puglia law (*legge Puglia*) authorised the prefects of all the regional provinces to avail themselves of military personnel to patrol the maritime frontier and carry out control activities connected to the phenomenon of “clandestine immigration” that interested those areas at the time.¹⁴³ To the military personnel involved were attributed the functions and benefits foresaw by a 1992

deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1 (f) (...)”; | *J. N. v Staatssecretaris van Veiligheid en Justitie*, Case C-601/15 PPU (ECJ Grand Chamber, 15 February 2016) paras 65-70, 77-82.

¹⁴¹ Garante nazionale dei diritti delle persone detenute o private della libertà personale, ‘Rapporto sulla visita effettuata nel centro di permanenza per i rimpatri (CPR) di Torino il 14 giugno 2021’ (Rome, 12 July 2021) available at <https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/e276136e864d9a7d1df4042e39e5e32a.pdf> accessed 6 June 2022, reading: “Tutela della salute. L’applicazione di un provvedimento di privazione della libertà comporta in capo a tutti i soggetti che a vario titolo hanno la responsabilità dell’esecuzione della misura una serie di obblighi passivi e attivi diretti ad assicurare la tutela dell’integrità fisica e psichica della persona posta sotto custodia (...)”.

¹⁴² Decreto-legge 18 November 1995 no. 489 ‘Disposizioni urgenti in materia di politica dell’immigrazione e per la regolamentazione dell’ingresso e soggiorno nel territorio nazionale dei cittadini dei Paesi non appartenenti all’Unione europea’ GU General Series 270 18 November 1995. For a reference and chronological overview of the history of the institution of administrative detention at the domestic level see: Corallina Lopez Curzi, ‘Colpevoli di viaggio. Breve cronistoria di un fallimento lungo vent’anni’ (Antigone 2017) <<https://www.antigone.it/tredicesimo-rapporto-sulle-condizioni-di-detenzione/01-detenzione-amministrativa/>> accessed 27 May 2023.

¹⁴³ Decreto-legge 30 October 1995 no. 451 ‘Ripubblicazione del testo del decreto-legge 30 ottobre 1995, n. 451 (in Gazzetta Ufficiale - serie generale - n. 255 del 31 ottobre 1995), convertito, senza modificazioni, dalla legge 29 dicembre 1995, n. 563 (in questa stessa Gazzetta Ufficiale alla pag. 4), recante: “Disposizioni urgenti per l’ulteriore

decree on urgent measures to contrast organised crime in Sicily, which prescribed that armed forces acted as public security agents.¹⁴⁴ To face the “emergency situations” related to control activities, the Puglia law allocated economic resources for the years 1995, 1996 and 1997 to the establishment of three coastal “centres” for the first assistance of persons arriving with no means of subsistence, who would there await for identification or expulsion. The same could be prescribed for other “emergency situations” throughout the national territory.

In 1998, with the Turco-Napolitano law (*legge Turco-Napolitano*) formal administrative detention centres were instituted.¹⁴⁵ The scope of application of the law targeted foreigners whose countries of origin did not belong to the EU as well as stateless persons. The provision established that the foreigner could be held in the *centro di permanenza temporanea e assistenza* (CPTA) for 20 days prolongable to 30 in specific circumstances. Centres were identified or constituted through a decree of the Ministry of Interior together with the Ministry of Treasury and that of Social Solidarity. Freedom of communication, including telephonic communication with the outside, was to be ensured in the facilities. The law was consolidated in the so called 1998 *Testo unico sull'immigrazione e sulla condizione dello straniero* (TUI).¹⁴⁶

In 1999, guidelines were issued in relation to the operationalisation of the provisions: they prescribed *inter alia* the absolute prohibition for the detained foreigner to leave the facility (article 20(3), 21(1)) and defined the life conditions in the centre.¹⁴⁷ These foresaw the possibility to meet with outsiders (*possibilità di colloquio*), especially the lawyer representing the foreigner’s case, the possibility to be visited by religious ministers, the respect for one’s freedom of correspondence, including by phone, and the respect for one’s fundamental rights, for essential sanitary services, socialisation and religious activities (article 21).

In 2000, a memo (*circolare*) of the Ministry of Interior established that the management of the centres could be delegated to local entities or public or private subjects.¹⁴⁸ A 2002 memo provided further guidelines on the centres’ management and their standardisation, acknowledging them as a fundamental part of the model in place and as indispensable on the whole national territory.¹⁴⁹ Always

impiego del personale delle Forze armate in attività di controllo della frontiera marittima nella regione Puglia” (entry into force 30 December 1995) GU General Series 303 30 December 1995 <www.gazzettaufficiale.it/eli/id/1995/12/30/095A7853/sg> accessed 27 May 2023.

¹⁴⁴ Decreto-legge 25 July 1992 no. 349 ‘Misure urgenti per contrastare la criminalità organizzata in Sicilia’ (entry into force 25 July 1992, converted by L. 23 September 1992 no. 386) GU 174 25 July 1992 <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:1992-07-25:349>> accessed 27 May 2023.

¹⁴⁵ Legge 6 March 1998 no. 40 ‘Disciplina dell’immigrazione e norme sulla condizione dello straniero’ (entry into force 27 March 1998) GU 59 12 March 1998 OS 40 <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1998-03-06:40>> accessed 27 May 2023.

¹⁴⁶ Decreto Legislativo 25 July 1998 no. 286 ‘Testo Unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero’ GU 191 18 August 1998 Supplemento Ordinario 139 <www.gazzettaufficiale.it/eli/id/1998/08/18/098G0348/sg> accessed 5 May 2023.

¹⁴⁷ Decreto del Presidente della Repubblica 31 August 1999 no. 394 ‘Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero, a norma dell’articolo 1, comma 6, del decreto legislativo 25 luglio 1998, n. 286’ (entry into force 18 November 1999) GU 258 3 November 1999 Supplemento Ordinario 190 <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.del.presidente.della.repubblica:1999-08-31:394!vig=2023-05-30>> accessed 20 May 2023.

¹⁴⁸ Ministero dell’Interno - Direzione generale dei servizi civili, Circolare 30 August 2000 no. 3435/50 <<https://www.osservatoriomigranti.org/assets/files/DET-NORM-NAZ/Direttiva%20del%20Ministero%20dell’Interno%20del%2030%20agosto%202000.pdf>> accessed 20 May 2023.

¹⁴⁹ Ministero dell’Interno, Circolare no. 3154/D.C.S.11.6 <<https://www.osservatoriomigranti.org/assets/files/DET-NORM-NAZ/Circolare%20del%20Ministero%20dell’Interno%20n.%2031542002.pdf>> accessed 20 May 2023.

in 2002, the Bossi-Fini law (*legge Bossi-Fini*) was approved and modified the 1998 TUI.¹⁵⁰ The law introduced photo-dactyloscopic checks (*rilevi fotodattiloscopici*) for foreigners applying for a residence permit (article 5(1)(b)). It established the issuance of the residence permit for work after a residence contract for work had been stipulated (*il permesso di soggiorno per motivi di lavoro è rilasciato a seguito della stipula del contratto di soggiorno per lavoro*, article 5(1)(e)). The provision also introduced the immediate execution of an administrative expulsion regardless of any gravamen or appeal by the migrant person (article 12(1)(a), see also (e)). The migrant person could be held (*trattenimento*) at an administrative detention facility for 30 days, extendable to 60 days (article 13(1)(a)). When the migrant could not be detained in the facility or the period of detention had expired without the execution of the expulsion order, the police commissioner (*questore*) ordered the foreigner to leave the state territory within five days (article 13(1)(b)). The foreigner caught on the state territory without a “justified reason” and violating the expulsion order was subject to an arrest lasting from six months to a year and to a new expulsion order foreseeing the person being brought to the frontier by law enforcement; anyone who had been expelled and was nevertheless found on the territory of the state was punished with a period of detention from one to four years; arrest in such cases was mandatory and proceedings accelerated (*rito direttissimo*) (article 13(1)(b)). The law allocated to the construction of administrative detention facilities more than 12 million euros for 2002, around 25 million euros for 2003 and 2004 respectively (article 13(2)). The law further determined migrants could be held (*trattenimento*) in **identification centres** (*centri di identificazione*) in a wide number of cases (article 32).

In the following years, EU directives first on confinement and later on administrative detention were also issued: the Reception Conditions directive in 2003 and the Asylum Procedure directive in 2005. The 2003 directive read that detention ‘shall mean confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement’ (article 2(k)).¹⁵¹ The measure established that asylum seekers could move freely within the territory of the host state or within an ‘assigned area’ that did not affect the unalienable sphere of private life and guaranteed access to the services under the directive; the host state could nevertheless decide ‘on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application’ and confinement of an applicant to a particular place was foreseen (article 7). The 2005 directive on the other hand established a person could not be held in ‘detention’ for the sole reason of having applied for asylum; in cases of detention, the state shall have ensured a possibility of speedy judicial review (article 18, see also articles 16, 21).¹⁵² It was domesticated by a legislative decree in 2008 that introduced the *centro di accoglienza richiedenti asilo (CARA)*.¹⁵³

¹⁵⁰ Legge 30 luglio 2002 no. 189 ‘Modifica alla normativa in materia di immigrazione e di asilo’ GU 199 26 August 2002 <<https://www.parlamento.it/parlam/leggi/02189l.htm>> accessed 19 May 2023.

¹⁵¹ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF>> accessed 2 May 2023.

¹⁵² Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>> accessed 1 May 2023.

¹⁵³ Decreto legislativo 28 January 2008 no. 25 ‘Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicare negli Stati membri ai fini del riconoscimento e della revoca dello *status* di rifugiato’ GU 40 16 February 2008 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwIjp8GWO_KL_AhVBQ_E_DHQ8xBDcQFnoECBUQAQ&url=https%3A%2F%2Fwww.gazzettaufficiale.it%2Feli%2Fgu%2F2008%2F02%2F16%2F40%2Fsg%2Fpdf&usg=AOvVaw0xjBS-hgLGSOH8hHEDuFel> accessed 2 May 2023.

Always in 2008, through a decree on so called urgent measures in relation to public security, administrative detention centres were renamed *centri di identificazione ed espulsione* (CIE).¹⁵⁴

The so called Return directive was further adopted at EU level in 2008.¹⁵⁵ The directive recognised that ‘it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of *non-refoulement*’ (preamble (8)). Voluntary return was said to be preferred over forced return and a period for voluntary departure was to be granted (preamble (10)). Recourse to coercive measure were to be subject to the principles of proportionality and effectiveness (preamble (13)) and the use of detention for removal limited and itself in line with the proportionality principle (preamble (16)).

Article 15. Detention – (1) Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: (a) there is a risk of absconding or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process. Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

Article 16. conditions of detention – (1) Detention shall take place as a rule in specialised detention facilities (...). (2) Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities. (3) Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.

The directive established that detention was to be reviewed at ‘reasonable intervals of time’ and prolonged detention be judicially reviewed (article 15(3)). While detention may not have exceeded six months, an extension of up to 12 months could be applied, bringing a confinement period to a maximum of 18 months (article 15(5), (6)).

In 2009, the so called *pacchetto sicurezza*, a law on measures related to “public security” was issued.¹⁵⁶ The law introduced an “integration agreement” (*accordo di integrazione*) for which integration was a process aimed at promoting convivence among Italian and foreign citizens, in line with the Italian Constitution, with the reciprocal commitment to participating to the economic, social and cultural life of society (article 25, see article 4*bis* TUI). The stipulation of such an agreement was a necessary condition for acquiring a residence permit (article 25). A “repatriation fund” (*Fondo rimpatri*) was instituted (article 22(n)). A foreign person could be held in detention (*trattenimento*) for a maximum of 180 days (article 22(i)). The law further criminalised the foreigner who “illegally” entered and was present on the territory of the state (*ingresso e soggiorno illegale nel territorio dello Stato*); expulsion in such cases did not require judicial intervention (article 16(a), see article 10*bis* TUI).

¹⁵⁴ Legge 24 July 2008 no. 125 ‘Conversione in legge, con modificazioni, del decreto-legge 23 maggio 2008, n. 92, recante misure urgenti in materia di sicurezza pubblica’ GU 173 25 July 2008 <<https://www.parlamento.it/parlam/leggi/08125l.htm>> accessed 2 May 2023 art 9 reading: ‘Le parole: «centro di permanenza temporanea» ovvero: «centro di permanenza temporanea ed assistenza» sono sostituite, in generale, in tutte le disposizioni di legge o di regolamento, dalle seguenti: «centro di identificazione ed espulsione» quale nuova denominazione delle medesime strutture’.

¹⁵⁵ 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 [2008] OJ L 348/98 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:en:PDF>> accessed 1 May 2023.

¹⁵⁶ Legge 15 July 2009 no. 94 ‘Disposizioni in materia di sicurezza pubblica’ GU 170 24 July 2009 Supplemento Ordinario 128 <<https://www.parlamento.it/parlam/leggi/09094l.htm>> accessed 4 May 2023.

In 2011, a subsequent decree extended the maximum period of *trattenimento* to 18 months (article 3(1)(d)(3)).¹⁵⁷

The overall maximum period of detention cannot exceed one hundred and eighty days. In those cases in which proceeding with the removal of the person in question has not been possible, despite every reasonable effort having been made, whether due to the lack of cooperation in the repatriation of the citizen of a third country or due to delays in obtaining the necessary documentation from third countries, the police commissioner (*questore*) may, on a case-by-case basis, request an extension of detention from the justice of the peace (*giudice di pace*) for periods not exceeding sixty days up to a maximum additional term of twelve months.

The provision appears to normalise those circumstances that would bring the period of detention to the maximum already prescribed by EU law. In February 2011, the President of the Council of Ministers declared a state of humanitarian emergency on the whole national territory due to the “exceptional influx” of North African citizens.¹⁵⁸ The state of emergency was declared until the end of the year. At the end of December 2011, its ending was confirmed.¹⁵⁹ In April 2011, the Italian government also issued a memo (*circolare*) restricting access to “immigrants’ centres” (*centri per immigranti*).¹⁶⁰ Allegedly to avoid obstructing the activities regarding access of the “heavy” influx (*massiccio afflusso*) of immigrants from North Africa, the entities that could enter the centres were limited to: UNHCR, IOM, Italian Red Cross, Amnesty International, Doctors Without Borders, Save the Children, Caritas and remaining association with an ongoing agreement with the Ministry of Interior to pursue projects in the reception facilities that were already in a phase of actualisation and were financed by European and national funds. The press was therefore kept out of the facilities such as CARA and CIE: in response to this, the LasciateCIEntrare campaign was launched, appealing to article 21 of the Constitution on freedom of expression and freedom of the press.¹⁶¹

¹⁵⁷ Decreto-legge 23 June 2011 no. 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. (11G0128)’ <<http://www.asgi.it/wp-content/uploads/public/11decreto.legge.89.2011.pdf>> accessed 5 May 2023. Own translation. See original: ‘Il periodo massimo complessivo di trattenimento non può essere superiore a centottanta giorni. Qualora non sia stato possibile procedere all’allontanamento, nonostante sia stato compiuto ogni ragionevole sforzo, a causa della mancata cooperazione al rimpatrio del cittadino del Paese terzo interessato o di ritardi nell’ottenimento della necessaria documentazione dai Paesi terzi, il questore può chiedere al giudice di pace la proroga del trattenimento, di volta in volta, per periodi non superiori a sessanta giorni, fino ad un termine massimo di ulteriori dodici mesi’.

¹⁵⁸ Decreto del Presidente del Consiglio dei Ministri 12 February 2011 ‘Dichiarazione dello stato di emergenza umanitaria nel territorio nazionale in relazione all’eccezionale afflusso di cittadini appartenenti ai paesi del Nord Africa. (11A02242)’ GU Serie Generale 42 21 February 2011 <www.gazzettaufficiale.it/eli/id/2011/02/21/11A02242/sg> accessed 10 May 2022.

¹⁵⁹ Ordinanza del Capo Dipartimento della Protezione Civile (Ocdpc) 28 December 2012 no. 33 ‘Regolamento della chiusura dello stato di emergenza umanitaria e rientro nella gestione ordinaria da parte del Ministero dell’Interno e altre amministrazioni competenti 28 dicembre 2012’ GU 7 January 2013 <https://www.protezionecivilesicilia.it/tinymce/js/tinymce/source/Provvedimenti_normativi/Normativa_nazionale_ed_ordinanze/20121228_ocdpc33.pdf> accessed 10 May 2022. See also ‘Emergenza umanitaria Nord Africa 2011: l’accoglienza dei migranti’ (Dipartimento della Protezione Civile, 5 July 2011) <<https://www.protezionecivile.gov.it/it/approfondimento/emergenza-umanitaria-nord-africa-2011--l-accoglienza-dei-migranti/>> accessed 10 May 2023.

¹⁶⁰ Circolare 1 April 2011 no. 1305 del Ministero dell’Interno ‘Accesso ai centri per immigrati’ <https://www.meltingpot.org/app/uploads/2011/04/circ_1305_del_1_aprile_2011.pdf> accessed 10 May 2023.

¹⁶¹ LasciateCIEntrare – Campagna nazionale contro la detenzione amministrativa dei migranti <<https://www.lasciatecientrare.it/chi-siamo/>> accessed 27 March 2023. Own translation. See original: ‘Noi crediamo, al di là di posizioni politiche e credi religiosi, che trattenere per svariati mesi delle persone che non hanno commesso alcun reato rappresenti un’aberrazione di questo paese che ha dimenticato il suo passato e non ha una visione sostenibile del futuro. Crediamo che un uomo o una donna non possano essere privati di un diritto fondamentale ed inalienabile come quello della libertà personale per un reato amministrativo. La detenzione

Beyond political positions and religious beliefs, we believe that detaining people who have not committed any crime for several months represents an aberration in this country, which has forgotten its own past and does not have a sustainable vision for the future. We believe that neither a man or a woman can be deprived of a fundamental and inalienable right such as that of personal liberty for an administrative misdemeanor. Administrative detention and the system that is created around it – such as arranging dedicated spaces, managing tenders for the services required, security, etc. – represents a useless cost for the public administration to bear. Alternative solutions exist, there are reception policies that can guarantee the safety of both citizens and migrants, there is a citizenry that collaborates with integration.

A December 2011 directive withdrew the memo limiting access to the facilities.¹⁶² The directive reiterated there had been the “need” (*aveva reso necessaria, nel prevalente obiettivo di non intralciare le attività di accoglienza*) to contain access to the centres to avoid the obstructions of operations; the decreasing influx (*il significativo decremento dei flussi*) and the activation of the entire reception system “allowed” (*consentono*) for the provision to be revoked.

In 2014, the European law 2013^{bis} defining Italy’s compliance to the obligations deriving from being an EU member state was approved at the domestic level.¹⁶³ Article 3 of the law approached matters of immigration and repatriation: paragraph (e) limited *inter alia* administrative detention to a maximum of 90 days and no longer 18 months; it moreover added that any foreigner subject to an expulsion order who had already spent a trimester in a detention facility could only be held in a *CIE* for a period of 30 days. In 2015 however, a further decree domesticated the 2013 EU legislation and again modified the provisions in relation to administrative detention.¹⁶⁴ The decree recognised that an asylum seeker could not be held for the only purpose of their application being examined (article 6(1)) yet the maximum period of *trattenimento* was brought up to 12 months (article 6(8)). Detention could take place when there were ‘founded motives’ (*fondati motivi*) to believe that a foreigner held in a *CIE* had applied for asylum ‘for the sole purpose of’ delaying or impeding the execution of the order of removal or expulsion (*quando vi sono fondati motivi per ritenere che la domanda è stata presentata al solo scopo di ritardare o impedire l’esecuzione del respingimento o dell’espulsione*) (article 6(3)).

In 2016, a memo of the chief of police offered a further example of the direction that was being taken by the national governance on migration.¹⁶⁵ The document titled *Attività di rintraccio dei cittadini stranieri irregolari sul territorio nazionale ai fini del rimpatrio* and concerned the ‘tracking down’ of ‘irregular foreign citizens’ specifically for the purpose of repatriating them in the context of ‘illegal immigration’.

amministrativa e il sistema creato intorno ad essa – allestimento spazi, gestione appalti per i servizi, sicurezza, etc. – rappresenta un inutile costo per la pubblica amministrazione. Esistono soluzioni alternative, esistono politiche di accoglienza che possono garantire la sicurezza dei cittadini e dei migranti, esiste una cittadinanza che collabora all’integrazione’.

¹⁶² Direttiva 13 December 2011 no. 11050/110(4) of the Ministry of Interior ‘Accesso ai centri’ <<http://www.immigrazione.biz/circolare.php?id=635>> accessed 27 May 2023.

¹⁶³ Legge 20 October 2014 no. 161 ‘Disposizioni per l’adempimento degli obblighi derivanti dall’appartenenza dell’Italia all’Unione europea – Legge 2013-bis. (14G00174) (entry into force 25 November 2014) GU Serie Generale 261 10 November 2014 Supplemento Ordinario 83 <www.gazzettaufficiale.it/eli/id/2014/11/10/14G00174/sg> accessed 26 May 2023.

¹⁶⁴ Decreto legislativo 18 August 2015 no. 142 ‘Attuazione della direttiva 2013/33/UE recante norme relative all’accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale. (15G00158)’ (entry into force 30 September 2015) GU Serie Generale 214 15 September 2015 <www.gazzettaufficiale.it/eli/id/2015/09/15/15G00158/sg> accessed 26 May 2023.

¹⁶⁵ Circolare del Capo della Polizia 30 December 2016 ‘Attività di rintraccio dei cittadini stranieri irregolari sul territorio nazionale ai fini del rimpatrio’ <<https://www.asgi.it/allontamento-espulsione/attivita-rintraccio-stranieri-rimpatrio-circolare-2016/>> accessed 26 May 2023.

The memo read that conferring maximum impulse by diverse police forces to such tracking down activity appeared necessary.

In the context of the strategies to combat illegal immigration, in addition to the border control system, the dispositive aimed at controlling and removing irregular foreigners plays an equally important role. It is well known in fact that such a control activity often allows for the interception of phenomena of exploitation and of contamination of the local economy linked to forms of national or transnational organised crime. Nor should the contribution that said dispositive is able to offer in the action of prevention and contrast in the current crisis context be overlooked, given the growing migratory pressure and an international scenario that is characterised by instability and threats that impose the recourse to maximum commitment in the efforts to keep the territory “under control”. (...) It seems necessary to confer maximum impulse to the activity of locating (*rintraccio*) third-country nationals in a situation of irregularity, particularly through a specific control activity by the various police forces.¹⁶⁶

In 2017 the so called Minniti decree (*decreto Minniti*) was introduced.¹⁶⁷ It instituted in tribunals specialised sections on immigration, international protection and free mobility within the EU (article 1). The decree promoted “urgent” dispositions to ensure the effectiveness of expulsions and strengthen what defined *centri di permanenza per i rimpatri (CPR)*, which substituted the previous *CIE* (article 19(1)). Detention periods were extended of an additional 15 days for foreigners who had already spent 90 days in jail and 30 in administrative detention, in cases where identification and repatriation procedures were “particularly complex” (article 19(2)(a)). One of the measures adopted therein was the implementation of initiatives to guarantee the expansion of the administrative detention centres (article 19(3)):

The placement of the newly established centres takes places, after consultation with the president of the region in question, by prioritising sites and areas outside urban zones that are more easily accessible and where there are public properties that can be made suitable for such a purpose, even through interventions of adaptation or renovation. This is to be done considering the need to create limited-capacity facilities able to guarantee detention conditions that fully respect the dignity of the individual. In such centres the Ombudsman for the rights of persons who are detained or deprived of their personal liberty exercises all accessing and monitoring powers.¹⁶⁸

¹⁶⁶ *ibid.* Own translation. See original: ‘Nell’ambito delle strategie di contrasto all’immigrazione illegale, oltre al sistema di controlli alle frontiere, riveste un ruolo altrettanto importante il dispositivo volto al controllo ed all’allontanamento degli stranieri irregolari. È ben noto infatti come tale attività di controllo consenta spesso di intercettare fenomeni di sfruttamento e di inquinamento dell’economia del territorio collegati a forme di criminalità organizzata di livello nazionale o transnazionale. Né va sottovalutato l’apporto che il censito dispositivo è in grado di dispiegare nell’azione di prevenzione e contrasto nell’attuale contesto di crisi a fronte di una crescente pressione migratoria e di uno scenario internazionale connotato da instabilità e da minacce che impongono di approfondire massimo impegno nelle attività volte a mantenere il territorio “sotto controllo”. (...) [A]ppare necessario conferire massimo impulso all’attività di rintraccio dei cittadini dei Paesi terzi in posizione irregolare, in particolare attraverso una specifica attività di controllo delle diverse Forze di polizia (...)’.

¹⁶⁷ Decreto-legge 17 February 2017 no. 13 ‘Disposizioni urgenti per l’accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto dell’immigrazione illegale. (17G00026)’ (entry into force 18 February 2017, converted with modifications into law through L. 13 April 2017 no. 46 in GU 90 18 April 2017) GU Serie Generale 40 17 February 2017 <www.gazzettaufficiale.it/eli/id/2017/02/17/17G00026/sg> accessed 26 May 2023.

¹⁶⁸ *ibid.* Own translation. See original: ‘La dislocazione dei centri di nuova istituzione avviene, sentito il presidente della regione interessata, privilegiando i siti e le aree esterne ai centri urbani che risultino più facilmente raggiungibili e nei quali siano presenti strutture di proprietà pubblica che possano essere, anche mediante interventi di adeguamento o ristrutturazione, resi idonei allo scopo, tenendo conto della necessità di realizzare strutture di capienza limitata idonee a garantire condizioni di trattenimento che assicurino l’assoluto rispetto della

13 million euros were destined to the realisation of new centres, while almost 4 million euros were destined to facilities' management in 2017, almost 12.5 million euros in 2018 and about 18 million euros in 2019 (ibid). About 19 million euros were destined to the Ministry of Interior in 2017 alone to ensure the execution of orders of expulsion, push-back or removal (*esecuzione delle procedure di espulsione, respingimento o allontanamento*) of migrants in irregular situations, with due regard to the "exceptional" influx of foreign citizens from North Africa. Resources were drawn from the FAMI fund, a fund on asylum, migration and integration (*FAMI, Fondo asilo, migrazione e integrazione*) co-financed by the European Union for the period 2014/2020 (article 19(4)).

In 2018, a further decree, so called *decreto sicurezza* or *decreto Salvini*, prescribed "urgent" dispositions in relation to international protection, immigration, public security, terrorism and the management of goods seized from organised crime.¹⁶⁹ The decree extended the duration of the period of administrative detention from 90 days to 180 days (article 2(1)). To ensure the prompt execution of the construction, completion, adaptation and renovation of administrative detention centres, the decree authorised a negotiating procedure without the publication of any tender (article 2(2)). The holding of a foreigner (*trattenimento*) could occur even for the mere sake of verifying their identity or their citizenship (article 3(1)). A foreigner could further be held in "suitable places" (*strutture diverse e idonee; locali idonei*) other than existing administrative detention facilities in cases of no vacant "spot" in the centres or in the vicinity of the pertinent Tribunals (article 4). No additional economic burden was foreseen and the provisions were to be implemented with the resources already allocated to this sector (articles 2(3), 3(3)). To strengthen repatriation measures there was the allocation of funds for 500'000 euros in 2018, 1.5 million in 2019 and 2020 respectively (article 6). The decree moreover intervened on the matter of international and humanitarian protection, drastically limiting their application.

The recent law decree is set to radically impact the landscape of administrative detention in Italy. The norm, known as the security decree, makes administrative detention a cornerstone of the management of migratory phenomena with alarming consequences for the overall system of safeguarding migrants' rights, whether they are seeking international protection or not. It broadens the range of hypothesis and sites for detention and extends the periods during which a person can be administratively detained.¹⁷⁰

In 2019, the so called *decreto sicurezza bis* again intervened on "urgent" dispositions on public order and security.¹⁷¹ The Ministry of Interior acquired the authority to coordinate controls on state maritime and land frontiers and limit or prohibit access, transit or stop of ships in territorial waters, with the

dignità della persona. Nei centri di cui al presente comma il Garante dei diritti delle persone detenute o private della libertà personale esercita tutti i poteri di verifica e di accesso (...)'.

¹⁶⁹ Decreto-legge 4 October 2018 no. 113 'Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata. (18G00140)' (entry into force 5 October 2018, converted with modifications through L. 1 December 2018 no. 132 in GU 281 3 December 2018) GU Serie Generale 231 4 October 2018 <www.gazzettaufficiale.it/eli/id/2018/10/04/18G00140/sg> accessed 27 May 2023.

¹⁷⁰ Garante Nazionale dei diritti delle persone detenute e private della libertà personale, *Norme e Normalità. Standard per la privazione della libertà delle persone migranti. Raccolta delle Raccomandazioni 2016-2018* (Tiburtini Srl 2019) 14. Own translation. See original: 'Ma, come detto precedentemente, il recente decreto legge è destinato a influire radicalmente sul panorama della detenzione amministrativa in Italia. Tale norma, conosciuta come "decreto sicurezza", fa della detenzione amministrativa uno strumento cardine di governo dei fenomeni migratori con preoccupanti ricadute sul sistema generale di tutela dei diritti dei migranti, siano essi richiedenti protezione internazionale o meno. Esso amplia il ventaglio delle ipotesi e dei luoghi del detenere e aumenta i tempi entro i quali sia possibile trattenere amministrativamente un individuo'.

¹⁷¹ Decreto-legge 14 June 2019 no. 53 'Disposizioni urgenti in materia di ordine e sicurezza pubblica. (19G00063)' (entry into force 15 June 2019, converted with modifications through L. 8 August 2019 no. 77 in GU 186 9 August 2019) GU Serie Generale 138 14 June 2019 <www.gazzettaufficiale.it/eli/id/2019/06/14/19G00063/sg> accessed 27 May 2023.

exception of military or governmental vessels for reasons of order and public security; the same could occur to prevent an alleged prejudicial passage (*passaggio pregiudizievole*) or not inoffensive passage (*non inoffensivo*) of a vessel engaged in activities allegedly violating immigration laws with reference to the UNCLOS Montego Bay Convention (article 1). Article 19(2)(g) of the Montego Bay Convention that the decree referred to reads that

passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities: (...) (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.¹⁷²

In cases of violation of the said article 1, article 2 foresaw an administrative sanction for the captain of the vessel going from a minimum of 10'000 euros to a maximum of 50'000 euros, except for alleged criminal cases. When the violation was reiterated, seizing of the assets was foreseen. Funds were allocated to the implementation of undercover operations pertinent to the fight against the crime of "favouring clandestine immigration" (*favoreggiamento dell'immigrazione clandestina*) (article 4). In the same year, a decree identified frontier or transit zones where the accelerated procedure to assess applications for international protections could take place.¹⁷³

In March 2020, a memo from the Ministry of Interior intervened on the matter of prevention of spread of Covid-19 in administrative detention centres.¹⁷⁴ A subsequent memo was issued in April 2020 with further indications.¹⁷⁵ Jurisprudence emerged challenging the detention or its extension during the epidemic period:

In the request for an extension, there is no justification based on the necessity of maintaining the detention order and whether this measure is proportionate to the specific case, nor whether asylum was applied to solely to avoid repatriation. Moreover, the applicant's personal circumstances allow for excluding that their claim is manifestly unfounded, considering their personal situation. He has been present in Italy in fact since 1998, for a period of time with a regular residence permit for autonomous work, a situation that could suggest his non-deportability under article 8 of the ECHR. The ongoing health emergency – given that the deprivation of personal liberty in confined spaces would make it difficult for the measures required to protect individuals' health to be guaranteed – calls for the interpretation of all relevant norms in restrictive terms, with a balance to be struck between the norms and the right to health constitutionally and conventionally guaranteed to everyone present on the territory (see article 2 TUI). Finally, the ongoing health emergency and the restrictions of movement from the national territory would, in any case, prevent the repatriation of the applicant and the execution of the expulsion order. Therefore, the court does not authorise the extension of [name

¹⁷² United Nations Convention of the Law of the Sea (adopted 10 December 1982, entry into force 16 November 1994) art 19(2)(g).

¹⁷³ Decreto 5 August 2019 'Individuazione delle zone di frontiera o di transito ai fini dell'attuazione della procedura accelerata di esame della richiesta di protezione internazionale. (19A05525)' GU Serie Generale 2010 7 September 2019 <www.gazzettaufficiale.it/eli/id/2019/09/07/19A05525/sg> accessed 28 May 2023.

¹⁷⁴ Ministero dell'Interno, 'Interventi di prevenzione della diffusione del virus COVID-19 nell'ambito dei centri di permanenza per il rimpatrio' (26 March 2020) <https://www.interno.gov.it/sites/default/files/allegati/circolare_immigrazione_diffusione_del_virus_covid-19_26.3.2020.pdf.pdf> accessed 20 May 2023.

¹⁷⁵ Ministero dell'Interno, 'Interventi di prevenzione della diffusione del virus COVID-19 nell'ambito del sistema di accoglienza. Ulteriori indicazioni.' (1 April 2020) <https://www.interno.gov.it/sites/default/files/allegati/circolare_covid-19_prot_del_1_4_2020_ulteriori_indicazioni_protocollo_3728_1.pdf> accessed 20 May 2023.

redacted]'s detention in the administrative detention facility of Ponte Galeria and orders his immediate release (...).¹⁷⁶

(...) [G]iven that the suspension of the hearings is estimated to last until 3 April 2020, suspension that could effectively be extended to a later and currently unforeseeable date, the instrumental connection between the detention and the actual proceeding – first and foremost the applicant's hearing – is undermined; this makes compromising the right to personal liberty unjustifiable (...).¹⁷⁷

Always in 2020, a further decree altered the previously emanated provision.¹⁷⁸ It especially introduced the possibility for an asylum seeker to be granted a permit on the basis of the so-called special protection, which safeguarded the private and family life of the individual and reinstated an institute more aligned with the humanitarian protection abrogated in 2018 (article 1). A further permit for natural disasters was also introduced (*ibid*). The decree further reinstated that the *trattenimento* of a migrant person awaiting expulsion towards a state with which Italy had a repatriation agreement could reach a maximum period of 90 days, prolongable of other 30 (article 3(3)). The previously established period of 180 days was abrogated. Any alleged crime against person or things committed while or because of the migrant was held in administrative detention was to be punished with mandatory or discretionary arrest within 48 hours from the commission of the acts; video or photo documentation could lead to the arrest of the alleged perpetrator (article 6). The administrative detention of person considered a threat to order and public security or for persons sentenced for committed crimes, even at a first instance level, was prioritised (article 3(c)(2)). 2021 and 2022 saw *inter alia* the issuance of decrees on the entry of foreign workers on state territory.¹⁷⁹

¹⁷⁶ Tribunale di Roma, Decreto 15892/2020 18 March 2020 <<https://www.questionegiustizia.it/data/doc/2426/n-rg-158922020-decreto-trib-roma.pdf>> accessed 30 May 2023. Own translation. See original: 'Nella richiesta di proroga non vi è alcuna motivazione in ordine alla necessità del mantenimento del provvedimento di trattenimento e che tale misura sia proporzionata nel caso concreto, né che la richiesta di asilo sia stata effettuata al solo scopo di sottrarsi al rimpatrio. Tanto più che la situazione personale del richiedente consente di escludere un giudizio di manifesta pretestuosità della domanda, in considerazione anche della situazione personale del richiedente. Egli infatti è presente sul territorio italiano fin dal 1998, per un periodo con regolare permesso di soggiorno per lavoro autonomo, situazione che potrebbe configurare una inespellibilità dello stesso ai sensi dell'art 8 CEDU. L'emergenza sanitaria in atto - considerato che la privazione della libertà personale in spazi ristretti renderebbe difficoltoso garantire le misure previste a garanzia della salute dei singoli - impone di interpretare tutte le norme in materia in termini restrittivi, dovendosi operare un bilanciamento tra tali norme ed il diritto alla salute costituzionalmente e convenzionalmente garantito ad ogni persona comunque presente sul territorio (v. art 2 TUI). Infine, l'emergenza sanitaria in atto e le disposizioni limitative degli spostamenti dal territorio nazionale, impedirebbero, comunque, il rimpatrio del richiedente e l'esecuzione del provvedimento di espulsione. P.Q.M. non autorizza la proroga del trattenimento di [redacted] nel C.P.R. di Ponte Galeria e ne dispone la immediata liberazione (...)'.
¹⁷⁷ Tribunale di Trieste, Decreto 980/2020 18 March 2020 <<https://www.questionegiustizia.it/data/doc/2426/tribunale-trieste-covid-19-non-convalida.pdf>> accessed 30 May 2023. Own translation. See original: '(...) [S]timato che la sospensione delle audizioni fino al 3 aprile 2020, sospensione che di fatto potrebbe essere prorogata a data successiva e allo stato non preventivabile, fa venire meno il nesso di strumentalità tra il trattenimento ed il concreto svolgimento degli accertamenti – e prima tra tutti l'audizione del richiedente – e rende così non giustificabile la compromissione del diritto di libertà personale (...)'.
¹⁷⁸ Decreto-legge 21 October 2020 no. 130 'Disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare, modifiche agli articoli 131-bis, 391-bis, 391-ter e 588 del codice penale, nonché misure in materia di divieto di accesso agli esercizi pubblici ed ai locali di pubblico trattenimento, di contrasto all'utilizzo distorto del web e di disciplina del Garante nazionale dei diritti delle persone private della libertà personale. (20G00154)' (entry into force 22 October 2020, converted with modifications through L. 18 December 2020 no. 173 in GU 314 19 December 2020) GU 261 21 October 2020 <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2020-10-21:130>> accessed 28 May 2023.
¹⁷⁹ Decreto del Presidente del Consiglio dei Ministri 21 December 2021 'Programmazione transitoria dei flussi d'ingresso dei lavoratori non comunitari nel territorio dello Stato per l'anno 2021. (22A00166)' GU Serie Generale

In 2022 there were in Italy ten active administrative detention centres: Turin (temporarily closed down in 2023 and under restructuring), Gradisca d'Isonzo (Gorizia), Ponte Galeria (Rome), Bari, Restinco (Brindisi), Macomer (Nuoro), Milan (reopened at the end of September 2020), Palazzo San Gervasio (Potenza, reopened at the end of February 2021), Caltanissetta (operational from early May 2021) and Trapani (reopened in August 2021, partially inaccessible in 2024).¹⁸⁰ Conditions of brutality have been denounced within the centres, where life and health are endangered while detainees are under the complete authority of the state. Unworthy housing modules, inadequate or absent medical services, illegal isolation and a dehumanising context, bringing *inter alia* persons to perform daily acts of self-harm, have been reported.¹⁸¹ The outcry that surrounds detention centres is due not only to the mobilisation of civil society and of part of the authorities but largely also to the protests of detainees' themselves, who have over time undertaken acts of resistance such as lip sewing, hunger strikes, etc.¹⁸²

In March 2023 a decree was issued by the Italian government, converted into a law with modifications in May, foreseeing *inter alia* the strengthening and expansion of the administrative detention system.¹⁸³ Overall, the direction that policy is channelling public resources into is rather manifest. How does this scenario represent the "problem" of "migration" and of "irregular migration"? What are the underlying assumptions? How have these proposals been unfolding and come about? What is left unproblematic and what is left silent? Can "migration" be conceptualised differently? How has this institutional representation of migration been produced and spread and is being guarded? Can it be disrupted? Can it be altered?

1.3 How is the "problem" of "migration" represented to be? Poststructuralism and the WPR approach

We had recourse only to ways of thinking about power based on legal models, that is: What legitimates power? Or we had recourse to ways of thinking about power based on institutional models, that is: What is the state? It was therefore necessary to expand the dimensions of a definition of power if one wanted to use this definition in studying the objectivising of the subject.¹⁸⁴

The following paragraphs introduce the reader to the analytical framework of the research and the approach adopted in reviewing the law on migration. The overall study pursues an explicit normative agenda. The intent is to:

12 17 January 2022 <www.gazzettaufficiale.it/eli/id/2022/01/17/22A00166/sg> accessed 3 June 2023; Testo coordinato del decreto-legge 21 June 2022 no. 73 'Testo del decreto-legge 21 giugno 2022, n. 73 (in Gazzetta Ufficiale - Serie generale - n. 143 del 21 giugno 2022), coordinato con la legge di conversione 4 agosto 2022, n. 122 (in questa stessa Gazzetta Ufficiale - alla pag. 1), recante: «Misure urgenti in materia di semplificazioni fiscali e di rilascio del nulla osta al lavoro, Tesoreria dello Stato e ulteriori disposizioni finanziarie e sociali.». (22A04699)' GU Serie Generale 193 19 August 2022 <www.gazzettaufficiale.it/eli/id/2022/08/19/22A04699/sg> accessed 3 June 2022; Decreto del Presidente del Consiglio dei Ministri 29 December 2022 'Programmazione transitoria dei flussi d'ingresso dei lavoratori non comunitari nel territorio dello Stato per l'anno 2022. (23A00232)' GU Serie Generale 21 26 January 2023 <www.gazzettaufficiale.it/eli/id/2023/01/26/23A00232/sg> accessed 3 June 2023.

¹⁸⁰ See 'CPR di Torino: Libro Nero disponibile in inglese e francese' (ASGI, 24 September 2021) available at <<https://www.asgi.it/asilo-e-protezione-internazionale/CPR-torino-libro-nero-inglese-francese/#easy-footnote-2-45631>> accessed 6 June 2022.

¹⁸¹ See recently: ASGI, *The Black book on the Pre-Removal Detention Centre (CPR) of migrants in Turin – Corso Brunelleschi. Fleeing misery, seeking refuge in Italy, being destroyed by the state: when Europe denies the human* (ASGI 2021).

¹⁸² Alterego – Fabbrica dei Diritti, *Abusi in divisa. Vademecum per la difesa legale* (DeriveApprodi 2019) 151-156.

¹⁸³ Decreto-legge 10 March 2023 no. 20 'Disposizioni urgenti in materia di flussi di ingresso legale dei lavoratori stranieri e di prevenzione e contrasto all'immigrazione irregolare. (23G00030)' (entry into force 11 March 2023, converted with modifications through L. 5 May 2023 no. 50 in GU 104 5 May 2023) GU 59 10 March 2023 <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2023-03-10:20>> accessed 3 June 2023.

¹⁸⁴ Michel Foucault, 'The subject and power' in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 326, 327.

- approach the law as a social phenomenon, acknowledging its evolving character and dynamicity;
- adhere to a poststructuralist perspective implying that no category of notions is value-free and unchallenged;
- adopt Carol Bacchi's stance that certain policy representations benefit some groups of persons and damage others.¹⁸⁵

Such a perspective explores the argument that constructions of target groups carrying negative connotations undermine effective democratic governing¹⁸⁶ and ultimately enquires as to the role, or the right, of resistance and disobedience into the law and into decision-making processes. The underlying proposal that the study aligns with is that research is not neutral and descriptive but has a political character: research methodologies, methods and outcomes 'are always political acts with social effects'.¹⁸⁷

The analytical approach that this research is inspired by is Carol Bacchi's 'What's the problem represented to be?' (WPR) a Foucauldian influenced poststructural approach that adopts a form of critical analysis allowing for a degree of [scepticism](#) towards policy (broadly referring to how order is maintained and including law as its constituent part) and what's associated with it to emerge and grow.¹⁸⁸ Scepticism is employed as a tool for policy "betterment": there is in this endeavour no intention to dismiss and dismantle altogether a model of sovereign nation states and their policy frameworks blatantly or apodictically. The idea that is presented here is to be sceptic about such systems, questioning and challenging those elements of violence that are producing situations of vulnerability and discrimination for part of the population. The research attempts to propose that policy on migration and citizenship can be thought of differently: its interest is to [pay attention to the heterogeneous practices that, in the current context of social and legal pluralism, produce hierarchical and inequalitarian forms of ruling and](#), by highlighting such plurality of practices, [to acknowledge the contingency of the realities we live, in turn recognising the potential for challenge and change](#).¹⁸⁹

The throughlines in poststructuralism are that the [limits of knowledge\(s\)](#) play an unavoidable role at its core and that such limits are not defined in opposition to the core but are positive things in their own right.¹⁹⁰ Poststructuralism asks the question: [what if our settled truths were otherwise?, and how can we make things differently?](#)¹⁹¹ James Williams describes poststructuralism

as a through disruption of our secure sense of meaning and reference in language, our understanding of our sense and of the arts, of our understanding of identity, of our sense of history and its role in the present, and of our understanding of language as something free of the work of the unconscious. Disruption should not be seen as a negative word. One aspect of poststructuralism is its power to resist and work against settled truths and opposition. It can help in struggles against discriminations (...), against inclusions and exclusions on the basis of race, background, class or wealth. It guards against the sometimes overt, sometimes hidden, violence of established values such as an established morality, an artistic canon or a fixed legal framework. We shall see that this does not mean that it denies them; rather, it works within them

¹⁸⁵ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016).

¹⁸⁶ Martin Bak Jørgensen, 'Legitimizing policies: How policy approaches to irregular migrants are formulated and legitimized in Scandinavia' (2012) 6(2) *Etikk i praksis. Nordic Journal of Applied Ethics* 46.

¹⁸⁷ Angelique Bletsas and Chris Beasley (eds), *Engaging with Carol Bacchi: strategic interventions and exchanges* (University of Adelaide Press 2012) 2, 48.

¹⁸⁸ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 3-6.

¹⁸⁹ *ibid* 4.

¹⁹⁰ James Williams, *understanding poststructuralism* (Routledge 2005) 1-2.

¹⁹¹ *ibid* 3.

for the better. In each of the great works [of poststructuralists] (...) we find specific struggles and forms of resistance.¹⁹²

Following Foucault, Bacchi as well refers to resistance when speaking of power and its oppositions. Power is seen not as an institution or a structure, nor as the strength one is endowed with, but rather as 'the name that one attributes to a complex strategical situation in a particular society'.¹⁹³ Where there is power, Foucault adds, there is resistance, which is never in a position of exteriority in relation to the former but 'points of resistance are present everywhere in the power network'.¹⁹⁴ Resistances thus operate at the micro-level and are necessarily implicated in methods of governing.¹⁹⁵

Poststructuralism is also regarded as a *practice*: it opposes absolute certainty and can only work through such opposition in repeated critical and creative practices.¹⁹⁶ It does not reject "things" but works with them to undo their purported exclusive claims to truth.¹⁹⁷ It is a radical activity in the sense that it is an active process designed to change situations and move them along while being free of fixed norms, values and truths: it is as such political.¹⁹⁸ Williams observes how

as an heir to 1968, poststructuralism advocates spontaneity, fluidity and openness in political movements of resistance; the revolution of the folding in of limits extends into revolutionary structures and goals. (...) *For poststructuralism, any given democracy and set of rights must be opened on to new possibilities and revitalized, indeed changed radically and riskily*".¹⁹⁹

Poststructuralism thus opens up a variety of situations and structures onto a *virtual* concealed within seeming fixities.²⁰⁰ The future is defined not in terms of imagined possibilities, which albeit new are themselves restrictions based on what is known already, but indeed in terms of a '*virtual*' that is a creative space onto what is unknown rather than a choice between options.²⁰¹ Similarly perhaps, one may consider, to that 'totally unforeseeable and unimaginable' allegedly recognised by the European Court of Human Rights.

Critiqued for its view that there can be resistance from within current capitalism, poststructuralism instead opposes utopian politics: rather than alleging the promise of a state free of present-day evils and of the ills of capitalism, *it advocates for spaces for change within the current state-based system*, somewhat looking at a better world without a fixed image of what that should be like.²⁰²

For example, where a cultural or political claim has failed to be recognized as having any value or legitimacy, the point will be to find ways to express its value and legitimacy. Where new forms of poverty, alienation and exploitation emerge, the struggle will be to force structures to open up to new ways of eliminating them. But this is not to dream of a structure where they cannot exist at all. *Poststructuralism is consistent with activism, but not with utopian states*.²⁰³

Adopting a poststructuralist approach to the study of policy allows for policy premises and proposals to be regarded as '*contingent historical creations, human constructions*, that need to be interrogated rather than enshrined as "truth"'.²⁰⁴ What is hoped throughout the text is to *acknowledge spaces for policy*

¹⁹² *ibid* 3-4.

¹⁹³ Michel Foucault, *The History of Sexuality. Volume I: An Introduction* (Random House Inc. 1978) 93.

¹⁹⁴ *ibid* 95.

¹⁹⁵ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 31.

¹⁹⁶ *ibid* 6.

¹⁹⁷ *ibid* 8.

¹⁹⁸ *ibid* 18-19.

¹⁹⁹ *ibid* 19-21.

²⁰⁰ *ibid*.

²⁰¹ *ibid*.

²⁰² Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 19-21.

²⁰³ *ibid* 21-22.

²⁰⁴ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 5.

contestation and change and to offer some degree of visibility to existing manifestations of dissent and initiatives that question the given order of things and propose alternative options to current hierarchical structures. The intuitive underlying idea is that *things could be otherwise*, meeting proposals of models that are alternative to the institutional ones with openness and curiosity rather than with reluctance and hostility. Hermann Amborn writes that Western societies have already been described as undergoing a fundamental crisis and that such acknowledgment makes the mistrust towards anti-hegemonic movements all the more bizarre.²⁰⁵ This is the spirit with which the research is conducted and its content offered to the scrutiny of the reader.

While things could be otherwise, the solidification of certain social arrangements is considered to involve *politics*, expansively intended as the ‘active shaping and making of the taken for granted’.²⁰⁶ The study thus sees “things” as being “done” or “made” rather than as essences; this allows for what is commonly regarded as “entities”, such as for instance nation states or institutions, to be also “undone” or “unmade”.²⁰⁷ In a similar way, political “subjects” are seen as being emergent or in process rather than as unchanging with a fixed human nature or essence.²⁰⁸

A number of definitions are adopted in the study. To ease the reading, they are hereby addressed.

- *Government*, defined by Foucault in a wide sense, indicating any form of activity aimed at shaping, guiding or affecting people’s conduct.²⁰⁹

Foucault observes that ‘the exercise of power is a “conduct of conducts” and a management of possibilities. Basically, power is less a confrontation between two adversaries or their mutual engagement than a question of “government”’.²¹⁰ The term government is therefore understood in its broad version that does not only refer to political structures or states’ management but indicates the way in which the conduct of groups or people may be directed: to speak of ‘conduct’ is indeed critical to the specificity of power relations, for it can refer to ‘leading’ others with varying degrees of coercion as well as ‘behaving’ in a varying degree of possibilities.²¹¹ Governing is described by Foucault as to structuring the possible field of action of others.²¹²

- *Governmentality*, referring to the way of thinking that allows the exercise of power by social authorities to manage populations in modern polities.²¹³

By governmentality, Foucault means three things: 1) the whole of institutions, procedures, analyses, reflections, calculations and tactics allowing the exercise of this form of power that has population as its target, political economy as its main form of knowledge and security as its essential technical means; 2) the tendency in the West that has led ‘government’, as a type of power, to be preeminent over other models, resulting in the formation of specific governmental apparatuses and in the development of *savoirs*; 3) the result of the process according to which the state becomes ‘governmentalized’.²¹⁴ Michel

²⁰⁵ Hermann Amborn, *Il diritto anarchico dei popoli senza stato* (elèuthera 2021) 26.

²⁰⁶ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 4.

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*

²⁰⁹ *ibid* 5-6 referring to Colin Gordon, ‘Governmental Rationality: An Introduction’ in in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: studies in governmentality: with two lectures by and an interview with Michel Foucault* (University of Chicago Press 1991) 2.

²¹⁰ Michel Foucault, ‘The subject and power’ in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 326, 337-341.

²¹¹ *ibid.*

²¹² *ibid.*

²¹³ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 9.

²¹⁴ Michel Foucault, ‘Governmentality’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: studies in governmentality: with two lectures by and an interview with Michel Foucault* (University of Chicago Press 1991) 87.

Senellart writes that the concept of governmentality gradually shifted from having a precise and historically defined sense to a wider general meaning.²¹⁵ Formulated for the first time in 1978, it designated elements the genesis and articulation of which were specific to Western history at first, coming to be defined as the techniques of government underpinning the formation of the modern state and, from 1979 onwards, serving as an analytical perspective for relations of power in general.²¹⁶ Governmentality then becomes the 'rationality immanent to the micro-powers' at any level of analysis.²¹⁷ An analysis of types of governmentality cannot be separated from an analysis of 'counter-conducts' as in corresponding forms of resistance.²¹⁸

— *Politics*, referring to heterogeneous strategic relations that shape lives.²¹⁹ Politics is, for Foucault, articulated from the perspective of the resistance to power.²²⁰

— *Policy*, referring to how order is maintained through politics²²¹ and including the law.

A core aspect is that 'order maintaining' involves *categorisation of inter alia "subjects"*.²²² Shore and Wright observe that

policy increasingly shape the way individuals construct themselves as subjects. Through policy, the individual is categorized and given such statuses and roles as 'subject', 'citizen', 'professional', 'national', 'criminal', 'deviant'. From the cradle to the grave, people are classified, shaped and ordered according to policies (...).²²³

The study thus rests on the idea that thinking about *categories as the effects of policy*, and not as 'necessary and natural ways of grouping people', generates 'an opening to consider how they are produced and how they translate into lived realities'.²²⁴

Building on such premises, the WPR approach becomes a tool to analyse migration policy in contemporary Italy within the broader European regional and international context, as it is attempted in chapter five of this thesis. It is intended to facilitate critical interrogation of public policies, beginning from the idea that *what one proposes to do about something reveals what is seen as problematic* and thus needs to be changed to them.²²⁵ Policies are called into question by 'probing the unexamined assumptions and deep-seated conceptual logics within implicit problem representations' and thus exploring the 'forms of knowledge that underpin public policies'.²²⁶ The tool allows for 'systematically accessing problem representations in policy'.²²⁷ The WPR approach is operationalised through six

²¹⁵ Michel Senellart in Michel Foucault, *Security, territory, population. Lectures at the Collège de France 1977-1978* (Michel Senellart ed, Graham Burchell trs, Palgrave Macmillan 2009) 502-504.

²¹⁶ *ibid.*

²¹⁷ *ibid.*

²¹⁸ *ibid.*

²¹⁹ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 9.

²²⁰ Michel Senellart in Michel Foucault, *Security, territory, population. Lectures at the Collège de France 1977-1978* (Michel Senellart ed, Graham Burchell trs, Palgrave Macmillan 2009) 502-504.

²²¹ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 5-6.

²²² *ibid.*

²²³ Cris Shore and Susan Wright, 'Policy: A new field of anthropology' in Cris Shore and Susan Wright (eds), *Anthropology of Policy: Critical perspectives on governance and power* (Routledge 2005) 4.

²²⁴ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 6.

²²⁵ Carol Bacchi, 'Introducing the 'What's the Problem Represented to be? approach' in Angelique Bletsas and Chris Beasley (eds), *Engaging with Carol Bacchi: strategic interventions and exchanges* (University of Adelaide Press 2012) 21-22.

²²⁶ *ibid.*

²²⁷ Susan Goodwin, 'Women, Policy and Politics: Recasting policy studies' in Angelique Bletsas and Chris Beasley (eds), *Engaging with Carol Bacchi: strategic interventions and exchanges* (University of Adelaide Press 2012) 25-26.

questions to be applied to the policy representations of interest, followed by a passage where those same questions are applied to the author's own problem representations:²²⁸

Question 1	What's the problem represented to be in a specific policy or policies?
Question 2	What deep-seated presumptions or assumptions underlie this representation of the "problem"?
Question 3	How has this representation of the "problem" come about?
Question 4	What is left unproblematic in this problem representation? Where are the silences? Can the "problem" be conceptualised differently?
Question 5	What effects (discursive, subjectification, lived) are produced by this representation of the "problem"?
Question 6	How and where has this representation of the "problem" been produced, disseminated and defended? How has it been and/or how can it be disrupted and replaced?
Step 7	Apply this list of question to your own problem representations.

Angelique Bletsas writes for instance, in relation to a WPR approach applied to the notion of poverty, that:

[w]hat the post-structuralist ontology highlights then is that how we think about poverty is a product of *how we think* far more than it is a product of something enduring in the nature of poverty. There is nothing inherent to poverty which causes this contemporary debate or the particular structure/agency form it takes.²²⁹

How one thinks about migration, it is argued, is then [a product of how we think](#) far more than it is a product of something enduring "in the nature" of migration: there is nothing inherent to migration which causes this contemporary debate or the specific citizen/migrant, state security/individual mobility form it takes. The proposal is here that the relationship between migration and government is 'neither neutral nor natural', borrowing Bletsas' words.²³⁰ By challenging the notion of migration as *fixed* through the application of the WPR approach, the intent is to create the *space* for scepticism and contestation, observing how the way migration is approached in policy is dependent from how it is thought of and represented by governing logics.

Challenging the view that policies *address problems*, the approach regards them instead as [problematisations](#) that *produce* "problems": exploring how "problems" are represented or come into being in policy allows for the possibility to investigate underlying assumptions that render the promoted representations intelligible and to identify their consequent implications for social realities.²³¹ Rather than being treated as a given, policy is thus considered as 'itself a curious and problematic social and cultural construct that needs to be unpacked and contextualized if its meanings are to be understood'.²³² Shore observes how policy has come to be an increasingly core and dominant organising principle of contemporary society that virtually shapes every aspect of human life: from the moment of birth, people become subjects of policies that classify, order and regulate their behaviour, define their status and frame those norms of conduct expected of them.²³³ Policies are therefore hereby

²²⁸ *ibid* 20; Carol Bacchi, *Analysing Policy: What's the problem represented to be?* (Pearson Australia 2009).

²²⁹ Angelique Bletsas, 'Spaces between: Elaborating the theoretical underpinnings of the 'WPR' approach and its significance for contemporary scholarship' in Angelique Bletsas and Chris Beasley (eds), *Engaging with Carol Bacchi: strategic interventions and exchanges* (University of Adelaide Press 2012) 43.

²³⁰ *ibid* 47.

²³¹ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 6.

²³² Cris Shore, 'Anthropology and Public Policy' in Richard Fardon, Olivia Harris, Trevor H. J. Marchand, Mark Nuttall, Cris Shore, Veronica Strang and Richard A. Wilson (eds) *The SAGE Handbook of Social Anthropology* (Volume 1, SAGE Publications Ltd 2012) 90.

²³³ *ibid*; Cris Shore and Susan Wright (eds), *Anthropology of Policy: Critical perspectives on governance and power* (Routledge 2005) 4.

regarded as technologies that influence human consciousness and conduct in a powerful manner, creating the 'bureaucratic taxonomies' dictating the conditions of people's lives.²³⁴ 'Who does the law want me to be?' reads the title of a subchapter of Giordano's work.²³⁵ Lived realities are looked at as created by, rather than reflected in, social practices.²³⁶ What is challenged is the paradigm of an *authoritative instrumentalism* built on a number of premises such as that there are objective entities called policies, which are intended at solving particular "problems", are the result of a rational authority decision-making process, like a government, and aim to produce outcome that are known and measurable.²³⁷

Policy is approached as *discourse*.²³⁸ This directs attention to appreciating 'the way in which policy ensembles (...) exercise power through *production* of 'truth' and 'knowledge' (...)'.²³⁹ Foucault writes that discourses, when they can be heard or read, are not a mere intersection of things and words:

in analysing discourses themselves, one sees the loosening of the embrace, apparently so tight, of words and things, and the emergence of a group of rules proper to discursive practice (...) [that] define not the dumb existence of a reality, nor the canonical use of a vocabulary, but the *ordering of objects* (emphasis added).²⁴⁰

Discourses are thus treated as 'practices that systematically form the objects of which they speak. Of course, discourses are composed of signs; but what they do is more than use these signs to designate things. It is this *more* that renders them irreducible to language (*langue*) and speech'.²⁴¹ According to Ball, discourses are about what can be said, and thought, but also about who can speak, when, where and with what authority; they therefore embody the *meaning* of propositions and words.²⁴²

We do not speak a discourse, it speaks us. **We are** the subjectivities, the voices, the knowledge, the power relations that a discourse constructs and allows.²⁴³

Specific possibilities for thought are constructed, with words being combined in particular ways and the displacement or exclusion of other combinations: the effect of policy is mainly discursive and 'changes

²³⁴ Cris Shore, 'Anthropology and Public Policy' in Richard Fardon, Olivia Harris, Trevor H. J. Marchand, Mark Nuttall, Cris Shore, Veronica Strang and Richard A. Wilson (eds) *The SAGE Handbook of Social Anthropology* (Volume 1, SAGE Publications Ltd 2012) 90.

²³⁵ Cristiana Giordano, *Migrants in Translation: Caring and the Logics of Difference in Contemporary Italy* (University of California Press 2014) 115.

²³⁶ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 6.

²³⁷ Cris Shore, 'Anthropology and Public Policy' in Richard Fardon, Olivia Harris, Trevor H. J. Marchand, Mark Nuttall, Cris Shore, Veronica Strang and Richard A. Wilson (eds) *The SAGE Handbook of Social Anthropology* (SAGE Publications Ltd 2012) 91. See also Hal Colebatch, Robert Hoppe and Mirko Noordegraaf (eds), *Working for Policy* (Amsterdam University Press 2010) 12 on policy and authoritative instrumentalism: 'The term 'policy' conveys a sense of clarity and stability, but its exact meaning (and its implications for policy work) is not always clear. It is generally situated within a paradigm that we can call 'authoritative instrumentalism', which sees government as a mechanism for official problem solving, centered around decisions made by authorized leaders, with official practice seen as the 'implementation' of the decision (Friedrich 1963; Dye 1972; Hale 1988; Anderson 1997; Althaus, Bridgman and Davis 2008). (...) In the narrative of authoritative instrumentalism, governing happens when 'the government' recognizes problems and decides to do something about them; what it decides to do is called 'policy'. The narrative constitutes an actor called 'the government' and attributes to it instrumental rationality: it acts as it does in order to achieve preferred outcomes'.

²³⁸ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 8.

²³⁹ Stephen J. Ball, 'What is policy? Texts, trajectories and toolboxes' (1993) *Discourse: Studies in the Cultural Politics of Education* 13(2) 10.

²⁴⁰ Michel Foucault, *Archaeology of Knowledge* (Routledge 2022) 53-54.

²⁴¹ *ibid.*

²⁴² Stephen J. Ball, 'What is policy? Texts, trajectories and toolboxes' (1993) *Discourse: Studies in the Cultural Politics of Education* 13(2) 10.

²⁴³ *ibid.*

the possibilities we have for thinking ‘otherwise’.²⁴⁴ Policy as discourse also has the effect of ‘redistributing ‘voices’’, for ‘it does not matter what some people say or think, only certain voices can be heard as meaningful or authoritative’.²⁴⁵ Against such a background, Ball brings forward the need to recognise and analyse the existence of discourses that are ‘dominant’ in social policy.²⁴⁶ Within a governmentality perspective there still is space to acknowledge a *constitutive role for contestation of the dominant discourse* among rulers and ruled ones.²⁴⁷ The WPR approach addresses such space of contestation, allowing for a critical reflection on governing practices, the theorisation of one’s location within such practices and ‘to resist practices deemed to have deleterious consequences for specific people and groups’.²⁴⁸

What’s the proposal then here? Rather than observing how policy, and migration policy especially, *manages* “problems”, a poststructuralist approach is used in this study to inspire the enquiry on how the “problem” is being conceptualised in specific governing instruments, thus creating room to question deep-seated assumptions and silences underpinning their principles. Policies are thus seen as *proposals producing* what they instead assert to *address*.²⁴⁹ Policy can *make (up)* “problems”, “subjects”, “objects”, “places”, which in turn can be *unmade*. Scare quotes are used because “things” are analysed as provisional and in process, not as essences that simply exist and have clear and uncontentious meanings.²⁵⁰

Subjects can therefore be made and unmade. What is relevant is that inhabiting a position of subject can influence how people think and act, for policy can produce ‘lived effects’; the *making* of subjects is defined ‘subjectification’.²⁵¹ This is relevant in terms of policy for the great reliance by institutions on *categories of people* having subjectification effects, thus *making up* the “subject” that policies seem to address and not to produce.²⁵²

What the WPR approach does is to reflect on what policy *makes*, with the desired potential to reduce the harmful effects of such *making* through its *unmaking*. The research aims at addressing the production of “subjects” – often “responsibilised subjects” – that join in the discourses around migration and citizenship governance, as well as the production of “objects” such as “equality” and “vulnerability” and “places” such as the “state” against the background of *making* “borders”, “Europe” and so on. In this context, for “responsibilised subjects” it is intended subjects that are considered responsible for their own health and welfare, as well as their own “voluntary” and exclusively “personal” choices to migrate, deflecting attention from broad-based social factors and downplaying the impact that structural elements have on access to and accessibility of services.²⁵³ The study thus observes the problematisations present in the Italian normative framework on migration and citizenship, analysed within the broader international and regional context, to see how “phenomena” are dealt with and “subjects” are produced rather than addressed. The intent is to enquire as to whether *things could be otherwise*, including into the analysis a phase of contestation, where the representations of migration that are offered as alternatives to institutional ones are acknowledged as competences and as knowledges and become part of the decision-making process.

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*

²⁴⁶ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 61.

²⁴⁷ *ibid* 9.

²⁴⁸ *ibid.*

²⁴⁹ *ibid* 57-61.

²⁵⁰ *ibid* 12, 71.

²⁵¹ *ibid* 70-71. See also on ‘rituals of power’ Hubert L. Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (University of Chicago Press 1983) 110.

²⁵² Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 70-71.

²⁵³ *ibid* 73-76. See also Martin Bak Jørgensen, ‘Legitimizing policies: How policy approaches to irregular migrants are formulated and legitimized in Scandinavia’ (2012) 6(2) *Etikk i praksis. Nordic Journal of Applied Ethics* 46.

For the sake of clarity, an example that inspiration is drawn from is the work of Jørgensen, who offers an insight on the representations of migrants in irregular situations in Scandinavian countries and explores how they are produced as a target group.²⁵⁴ What is argued is that irregular migration is not a policy problem to be solved but rather something that is being constructed as a problem.²⁵⁵ Policies are seen as based on mechanisms of exclusion and inclusion, separating *deserving* and *undeserving* groups for governments' benefit.²⁵⁶ Authorities appease the electorate and through particular representations legitimise actions that place certain groups in vulnerable and exploitative situation or irregular labour market positions, not complying with the protections enshrined in binding international instruments.²⁵⁷ Categories, Jørgensen argues, are not innocent but are embedded in problem understandings: constructing a policy on a *diagnosis* of a perceived problem also includes a *prognosis* of what is to be done to solve it.²⁵⁸ The use of the category of "illegal migrant" for example can be read as the deliberate decision to place a specific target group of migrants 'outside the law, outside the norms (how people should be treated) – the legal citizens'.²⁵⁹

Jørgensen observes how Agamben employs the concept of *homo sacer* for the person who is outside the normal juridical space, who is stripped of all rights: *bare life*, a depoliticized life that stands in contrast with citizenship.²⁶⁰ *Homo sacer* can be related to irregular migration, for the migrant in an irregular situation is stripped of their rights and excluded from 'broader citizenry'.²⁶¹ On a similar note, Khosravi writes that the 'illegal' traveller moves in a space of lawlessness, outside the protection of the law; the territorialisation of human rights within a nation state system reconciles *human* rights to *citizen* rights.²⁶² There is no space for humanity outside the nation state order.²⁶³ This triggers a remand to Arendt's reflections on statelessness and the notion of human rights:

(...) their freedom of movement, if they have it at all, gives them no right to residence which even the jailed criminal enjoys as a matter of course; and their freedom of opinion is a fool's freedom, for nothing they think matters anyhow. These last points are crucial. The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective. Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter of choice, or when one is placed in a situation where, unless he commits a crime, his treatment by others does not depend on what he does or does not do. This extremity, and nothing else, is the situation of people deprived of human rights. They are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion.²⁶⁴

For 'the world found nothing sacred in the abstract nakedness of being human'.²⁶⁵

²⁵⁴ Martin Bak Jørgensen, 'Legitimizing policies: How policy approaches to irregular migrants are formulated and legitimized in Scandinavia' (2012) 6(2) *Etikk i praksis. Nordic Journal of Applied Ethics* 46.

²⁵⁵ *ibid.*

²⁵⁶ *ibid.*

²⁵⁷ *ibid.*

²⁵⁸ *ibid.*

²⁵⁹ *ibid.*

²⁶⁰ *ibid.* See Giorgio Agamben, *Homo Sacer. Il potere sovrano e la nuda vita* (Giulio Einaudi editore s.p.a 1995) and Hannah Arendt, *The Origins of Totalitarianism* (A Harvest Book, Harcourt Brace & Company 1979).

²⁶¹ Martin Bak Jørgensen, 'Legitimizing policies: How policy approaches to irregular migrants are formulated and legitimized in Scandinavia' (2012) 6(2) *Etikk i praksis. Nordic Journal of Applied Ethics* 46.

²⁶² Shahram Khosravi, *'Illegal Traveller. An Auto-Ethnography of Borders* (Palgarve Macmillan 2010) 27, 122.

²⁶³ *ibid.*; Liisa Malkki, 'National Geographic: The Rooting of Peoples and the Territorialization of National Identity among Scholars and Refugees' (1992) 7(1) *Cultural Anthropology* 24.

²⁶⁴ Hannah Arendt, *The Origins of Totalitarianism* (A Harvest Book, Harcourt Brace & Company 1979) 296.

²⁶⁵ *ibid* 299.

As anticipated, the WPR strategy also interrogates the *making* and attempts the *unmaking* of “objects” in addition to “subjects”. There are obviously overlaps among “subjects” and “objects”; as with the former, what is challenged is not the existence of “objects” themselves but the idea that their existence is given and fixed.²⁶⁶ Attention throughout the study is brought to the process of objectivization of categories and concepts that are prominent in the constitution of policy “problems”²⁶⁷ surrounding citizenship and migration. Notions are scrutinised to *defamiliarize* with given-for-granted underlying assumptions and their implications, beginning to think otherwise and imagine alternatives.

The *making* (and *unmaking*) of geographical “entities” and “places” is also taken into account in chapter three, for the cruciality that the designation of “places” play in migration governing.²⁶⁸ This is done synthetically, maintaining the analysis within the scope of a poststructuralist framework. The idea is to consider that “places” are objectivised through policies, thus treating them as *political creations* rather than self-evident, natural and physical sites that simply *exist* out there.²⁶⁹ Aware of the fact that conventional government instruments usually apply in defined territories depending on their sovereign power,²⁷⁰ the study briefly touches upon the production of “the nation state” and “Europe”. What is cared for is the way that the production of such “places” may formally homogenise population(s) and *citizens* under a specific *jurisdiction*.²⁷¹ The contestation of such underlying and given for granted passages is propaedeutic to analysing the policies that are then implemented “within”, “by” and perhaps “for” such otherwise mere “geographical entities”.

(...) since the sixteenth century, a new political form of power has been continuously developing, this new political structure, as everybody knows, is the state. But most of the time, the state is envisioned as a kind of political power that ignores individuals, looking only at the interests of the totality or, I should say, of a class or a group among the citizens. That’s quite true. But I’d like to underline the fact that the state’s power (and that’s one of the reasons of its strength) is both an individualizing and a totalizing form of power. Never, I think, in the history of human societies (...) has there been such a tricky combination in the same political structures of individualization techniques and of totalizing procedures.²⁷²

Pursuing the *virtual of thinking otherwise*, the idea is to make room to ‘reconsider how space is currently organised’,²⁷³ essential in terms of exploring forms of power and resistance. Approaching for instance the “nation state” not as a timeless and self-evident entity but as a process of shifting constitution of the power of “state” institutions, contingent to time and space,²⁷⁴ further supports the idea of exploring resistances as fundamental aspects of the functioning establishment and development of democratic process, (re)defining “state” competences and what exceeds them, interrogating the capacity to include or exclude specific groups and so on.²⁷⁵ Whether speaking of “nation states” or “regional entities”, the perspective hereby adopted observes the development of such “places” *challenging that such development had to happen*,²⁷⁶ as a consequential and logical evolution of the formation of territorial areas of such kind. “Places” are thus rather approached as having been *produced* over time by contingent

²⁶⁶ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis* (Palgrave Macmillan US 2016) 83-84.

²⁶⁷ *ibid* 85.

²⁶⁸ *ibid* 95-96.

²⁶⁹ *ibid*.

²⁷⁰ *ibid* 95-97.

²⁷¹ *ibid*.

²⁷² Michel Foucault, ‘The subject and power’ in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 326, 332.

²⁷³ *ibid*.

²⁷⁴ *ibid* 98.

²⁷⁵ *ibid*.

²⁷⁶ *ibid* 99.

dynamics and awareness is maintained towards such producing practices, technologies, instruments; this pluralisation of producing factors allows for *change* – and therefore resistance – to be possible.²⁷⁷

Consideration is given not only to “existing borders” but to the practices of bordering, referred to as an ongoing and continuous activity of producing ‘places, with *borders* emerging as “technologies of power”’.²⁷⁸ De Genova observes that ‘there is nothing about the Border Spectacle that requires its choreography of images to be so literally affiliated to the geography of border enforcement’: in legal terms, the “border” is a spectrum of spaces, including airports or seaports where migrants are inspected by authorities.²⁷⁹ The spectacle of immigration enforcement “at the border” is thus the enactment and performance of the enforcement practices themselves, regardless of where they take place.²⁸⁰

To the extent that the entirety of the interior of the space of the state becomes a regulatory zone of immigration enforcement, and as borders appear to be increasingly ungrounded – both internalized and externalized – the efficacy of the Border Spectacle in fact is merely intensified. As the border is effectively everywhere, so also is the spectacle of its enforcement and therefore its violation, rendering migrant ‘illegality’ ever more unsettlingly ubiquitous.²⁸¹

The overall idea that is pursued through the study is therefore to question, in the sense of exploring underlying and deep-rooted assumptions, forms of power that influence and define what is represented as the phenomenon of migration. The intent is to challenge the ‘kind of fatalism’, borrowing from Foucault,²⁸² according to which current order maintaining and managing infrastructures are not called into question because “this is how it is”, “this is how it has always been”, “this is the way it works”, etc. Migration, and especially so-called “irregular” migration, is challenged as rather being *irregular-ised* and so are irregular-ised the individuals whose mobility is constrained by the current order of things.

Power is understood in terms of the capacity of exert itself over things with the ability to alter them, use them, exhaust them or destroy them, and it is understood as bringing into play relations between individuals or between groups: ‘if we speak of the power of laws, institutions, and ideologies, if we speak of structures or mechanisms of power, it is only insofar as we suppose that certain persons exercise power over others’.²⁸³ To Foucault, power relations overlap with relationships of communication and objective capacities but they do not coincide with one another: the deployment of all such three domains that adjust to one another comes to form a ‘discipline’.²⁸⁴

What is to be understood by the disciplining of societies in Europe since the eighteenth century is not, of course, that the individuals who are part of them become more and more obedient, nor that all societies become like barracks, schools, or prisons; rather, it is that an increasingly controlled, more rational, and economic process of adjustment has been sought between productive activities, communication networks, and the play of power relations. To approach the theme of power by an analysis of the “how” is therefore to introduce several critical shifts in relation to the supposition of a fundamental power. It is to give oneself as the object of analysis *power relations* and not power itself (...).²⁸⁵

²⁷⁷ *ibid.*

²⁷⁸ *ibid.* 100.

²⁷⁹ Nicholas De Genova, ‘Spectacles of migrant ‘illegality’: the scene of exclusion, the obscene of inclusion’ (2013) 36(7) *Ethnic and Racial Studies* 1180.

²⁸⁰ *ibid.*

²⁸¹ *ibid.*

²⁸² Michel Foucault, ‘The subject and power’ in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 326, 336.

²⁸³ *ibid.* 337.

²⁸⁴ *ibid.* 337-342.

²⁸⁵ *ibid.*

Foucault argues that an essential element of power is *freedom*: when the exercise of power is defined as a mode of action upon others' actions and when such actions are defined as the government of persons by other persons, then power is seen as being exercised only over free subjects and only insofar as they are free. Foucault understands by this the fact that subjects, whether individually or collectively, act within a field of possibilities of conducts, available reactions and behaviours.²⁸⁶ Power and freedom are not mutually exclusive but rather cannot be separated: freedom may be the condition and precondition for the exercise of power, for 'without the possibility of recalcitrance power would be equivalent to a physical determination'.²⁸⁷

At the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom. Rather than speaking of an essential antagonism, it would be better to speak of an "agonism" – of a relationship that is at the same time mutual incitement and struggle; less of a face-to-face confrontation that paralyzes both sides than a permanent provocation.²⁸⁸

Agonism is referred to by Foucault as in the Greek *agonisma*, a combat, a wrestling match.²⁸⁹ One can analyse power relations by focusing on 'carefully defined institutions' as a privileged point of observation.²⁹⁰ This carries considerations to be mindful of: a part of institutions' mechanisms is designed to maintain the institution's own preservation and this exposes the analyser to the risk of interpreting functions that are in the end reproductive; by considering the origin and explanation of power relations in institutions themselves, the analyser exposes themselves to try to explain power by power; for institutions act by regulations, whether explicit or implicit, and an apparatus, the analyser is to avoid giving to one element or the other more privilege in the relations of power, risking to interpret power only as variations of law and coercion.²⁹¹ This advises the study to analyse institutions from the perspective of relations of power rather than vice versa, considering that the fundamental aspect of such relations, which is embodied in an institution, is to be found outside the institution.²⁹² To analyse power relations therefore Foucault highlights a number of aspects to be considered: the system of differentiations that allows one to act upon others' action; the objectives pursued by who acts upon others' actions; the instrumental models through which power is exercised; the forms of institutionalisation and the degree of rationalisation.²⁹³

All such authoritative teaching inspires the current study. In particular, the idea of a continuous struggle between power and recalcitrance to subjugate to it and the suggestion that to analyse the anchor of power relations one might look outside the institution are paid attention to. Seeing power as grounded in the entire network of the social²⁹⁴ allows for the reflection to unfold along the lines of a dissociation, albeit partial, of power to the notion of the state. Power and state do not coincide. All forms of power relations do refer to the state in contemporary society: not because they derive from it but because they have increasingly come under state control.²⁹⁵ They have, using Foucault's restricted understanding of "government", come to be progressively 'governmentalized, that is to say, elaborated, rationalized, and centralized in the form of, or under the auspices of, state institutions'.²⁹⁶ This leaves room for power exceeding the paradigms and the borders of the current idea of state control, to explore the virtual and

²⁸⁶ *ibid.*

²⁸⁷ *ibid.*

²⁸⁸ *ibid.*

²⁸⁹ *ibid* 348.

²⁹⁰ *ibid* 342.

²⁹¹ *ibid* 343.

²⁹² *ibid* 343.

²⁹³ *ibid* 343-345.

²⁹⁴ *ibid.*

²⁹⁵ *ibid.*

²⁹⁶ *ibid.*

acknowledge the continuously inextricable but changing nature of the relations between power and resistance.

1.4 Chapter summary

The first chapter contextualises the background against which this research takes shape. It focuses on elements that are at the heart of the study, namely the evolving character of the law and the idea of policy being contingent and not value-free, and introduces the reader to the way the system regulating migration and citizenship is approached throughout the entirety of the text. The law is thereby seen as a dynamic and living instrument. The multi-layered and overlapping system of legal pluralism in place is composed of heterogeneous practices that can be questioned and can reveal the contingency of the existing policy arrangement. Such a questioning exercise offers the opportunity to sceptically address the overriding model's given-for-granted, "natural", "neutral" and "timeless" assumptions, among which the current notions of mobility and citizenship and their implications in terms of rights entitlement and enjoyment for migrant persons. Setting the agenda of the study and the context in which this unfolds is propaedeutic to the effort that is then undertaken in denaturalising the existing policy framework for a space for challenge and contestation, fertile to a vision of substantial equality for all in line with the living character of the law and constitutional principles. Such a vision is placed in opposition to the system's hierarchisation of individuals that grounds on the current enforced conceptualisation of citizenship, which foresees citizens standing at the top of the hierarchy and non-citizens being *ex lege* categorised in a downward spiral of limitations affecting their existences and their mobility. The peak of such a hierarchisation is identified with the institutionalisation of the practice of administrative detention. Together with the argument that the law is a social phenomenon and can be challenged and modified, the study adopts an understanding of policy as *proposals* that produce "problems" rather than addressing them as they were just existing as such. The chapter introduces the analytical approach that is selected for the development of the overall content of the thesis, that is a poststructuralist one running along the lines of the argument that *things can always be otherwise*. This is further inspired by Carol Bacchi's tool 'What's the Problem Represented to be?', which is introduced as a guide to challenging how specific policies represent and problematise situations involving migrant persons in relation to the territory of the state. The approach is adopted to aid the reflection on alternative spaces of normative (re)interpretation. The following chapter picks up from here and begins by exploring the notions and implications behind situations of socio-juridical vulnerability that migrants may experience in Italy and that, it is argued, are indeed *produced* by the very policy model in place rather than being neutral "problems" to be addressed.

Chapter two.

How vulnerable is enough vulnerable?

Chapter two attempts to explore the meanings of the condition of socio-juridical vulnerability that migrant persons may experience. It is argued that such vulnerability is *produced* through the policy and normative system in place rather than being merely *addressed* by it. The chapter begins by exploring how the “migrant person” is made intelligible to the state by policy through the process of categorisation, reinforcing the system’s dichotomy citizen – non-citizen and leading to a hierarchisation of individuals in terms of rights’ entitlement and enjoyment, access to and accessibility of services (2.1). The text then observes if and how it can be said that the state digestive process of categorisation produces situations of vulnerability affecting the migrant person, focusing on the very notion of vulnerability as developed in the scholarly debate (2.2.1) and on its operationalisation by institutions, with particular reference to the jurisprudence of the European Court of Human Rights (2.2.2). The idea offered is to reconcile a vulnerability-centred approach with a discourse on substantial equality. To do so, the text proposes to acknowledge the production of situations of vulnerability by policy, which are instead ignored by the order of things, and the discrepancies within a system that claims to move towards a constitutional vision of equality and yet undercuts such vision through its very discriminatory structures (2.3). Such acknowledgment is approached as a tool, a ‘heuristic device’ (Fineman) to create a space for contestation, resistance and alternative interpretations of existing and new rights, with the purpose of rejecting the hierarchisation of individuals in place and the ignorance and denial of the space occupied by the migrant person.

Keywords: category – corpoREALITY – equality – hierarchisation of citizenship – vulnerability



Figure 2 - Lega before the election (Pesaro 2022)

This picture was taken during summer 2022 on the road between Pesaro and Urbino, Italy, in proximity of a large industrial area. The size of the board allowed for its message to be read from quite a distance. In the foreground, the board shows a medium close-up of Matteo Salvini, the leader of Lega. Lega is one of the far-right wing parties that, as a coalition with Fratelli d'Italia, Forza Italia and others, won political elections in Italy in September 2022. Salvini smiles, confident and reassuring. The background offers the image of an overcrowded boat at sea, plainly portraying those upon which migrants may embark to perilously reach Italian coasts. A bold writing in capital letters stands over the picture, partially highlighted. It reads *STOP SBARCHI* and *PIÙ SICUREZZA*: 'stop disembarking' and 'more security', inviting the electorate's vote.

This section of the research attempts to explore the notions and implications behind situations of socio-juridical vulnerability that migrants may experience in Italy. The initial idea was for the study to *expose and make vulnerability visible*. Attention was thus to be paid to the notion of vulnerability and the uses and understandings of the term by institutional practices. The proposal was to *put on display* how the framework in place silently, whether consciously or not, produced the situations of great fragility migrants may experience. Now, the content of this segment of the research remains nearly unaltered. It aims at observing whether, how and to what extent the current multi-layered system allegedly relaying on a vision of substantial equality eventually undercuts itself, exploring the meanings of notions and experiences of vulnerability and of migrants' vulnerability. However, the study chooses to no longer speak of *exposing, making visible, putting on display*. Such terms indeed imply the *invisibility* of a condition of suffering and the *silent* production of it. But is it so? The election campaign board described above begs the different. For its function is to publicize and advertise a message, it reveals how counterintuitive and ridiculous it is to enquire as to whether the image of an overcrowded dinghy at sea, shown on a large panel on the side of a trafficked road, is or is not visible. It is an immediate and direct communication, designed to be visible.

That condition of vulnerability and inequality is visible. And so are the countless instances of precarious tents and mattresses in informal settlements and at the corners of metro stations, the walks of young persons along countryside roads, the cheerful smiles of street vendors a moment before their disappearance at the sight of a police car, the look of a caregiver the presence of whom has become indispensable in a family's domestic dynamics and yet is ignored by the receiving state. Situations of vulnerability of such kind are all very visible – in the open fields, in the streets, in the adjacent room. They are *made* and they are explicitly and deliberately instrumentalised in governing and elections to trigger discomfort and fear of a threat to the overarching paradigm of "security" – although the only safety under threat, observing such situations, seems to rather be the one of the persons made so vulnerable.

The question then may rather be: [how vulnerable is enough vulnerable?](#) 'Whereas in monarchical regimes it was the sovereign who had the greatest visibility, under the institutions of bio-power it is those who are to be disciplined, observed, and understood who are made the most visible'.²⁹⁷ This segment of the analysis therefore explores situations of socio-juridical vulnerability beginning by how the state digests the presence of the foreign migrant on its territory and what implications this has in terms of rights entitlement and enjoyment. It follows the subsequent reasoning.

- a. 'Policy digestion of the foreigner through categorisation: exploring power, recognition and acknowledgment': in the first subchapter, the proposal is to explore how institutions relate to the space that the subjectivity of the migrant occupies, if any, within the host society and how such space is processed or denied through categorisation, leading to the reinforcement of the hierarchisation of individuals that was introduced in chapter one.

²⁹⁷ Hubert L. Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (The University of Chicago Press 1982) 191.

- b. 'From categorisation to socio-juridical vulnerability: tackling or producing illegality?': in the second subchapter, the proposal is to explore if and how the said processing produces situations of vulnerability experienced by the migrant person, what is meant by vulnerability, how this is operationalised and how it can reconcile with a discourse on substantial equality.
- c. 'Reflections on substantial equality and hierarchisation of citizenship: from vulnerable to resisting': in the third subchapter, the proposal is to explore how recognising vulnerability production and the deficiencies of an equality-claiming system can have the generative force of reclaiming an effective constitutional vision of equality, open up alternatives for (re)interpreted and new rights, offer space for contestation and reject any nationalist obliterating assimilation of the migrant person's identity into a list of preestablished and fictional criteria.

The argument that is developed is that the biography of a person on the move is squashed into a system of classification of non-citizens, where *foreignness* as *non-citizenship* and lived experiences are translated into a language that the institution can eventually metabolise, coughing the persons up as categorised profiles subject to an inherently discriminatory treatment that is disguised as differentiated. Through such a process, one's characteristics are pondered – enough or not enough vulnerable, deserving of protection, not deserving, how much deserving? – and a person's existence onto a single clamp of this earth is either allowed or denied. Presence legitimisation and de-legitimisation determine the migrant's condition of socio-juridical vulnerability within the host society, defining the scope of one's rights' entitlement and enjoyment and the consequent access and accessibility to services.

To reflect on such matters, this section of the study addresses the notions of power relations, policy and categorisation, vulnerability and its connections to citizenship and substantive equality. It attempts to do so in the hope to learn alongside the reader how distinct disciplines approach the same notions, with the purpose of contesting taken-for-granted meanings and implicit silences to contribute to the discussion on migration and citizenship management, culminating on equality, with prompts from different research fields. Logue writes that disciplinarity is defined by a sort of domain-exclusivity that pulls certain knowledges out of the scope of consideration and in a way produces gaps in the understanding of a subject.²⁹⁸ By engaging in an interdisciplinary analysis, the wish is to avoid as far as possible such situation and infuse socio-legal reflections into the research, which is nevertheless focusing on legal scholarship. The study aligns with the argument that investigating policy language and discourse offers a tool to explore the architecture of modern power relations.²⁹⁹ The intent pursued is to analyse the unequal relationships determined by those political technologies that are at the basis and yet destabilise the theoretical equality presented by the law.³⁰⁰ Against this background, the notion of vulnerability is looked at as a 'heuristic device', in the words of Martha Albertson Fineman, to examine hidden assumptions and biases forming cultural, social and legal meanings: this allows for working on a critical exploration of institutions and therefore on the law as well.³⁰¹

2.1 Policy digestion of the foreigner through categorisation: exploring power, recognition and acknowledgment

The mobility that we cherish for ourselves, the freedom to go wherever we choose, is in the throes of becoming a global tragedy for millions of ordinary people just like you and me, and

²⁹⁸ Jennifer Logue, 'The Politics of Unknowing and the Virtues of Ignorance: Towards a Pedagogy of Epistemic Vulnerability' (2013) *Philosophy of Education* 53.

²⁹⁹ Cris Shore and Susan Wright, 'Policy: A new field of anthropology' in Cris Shore and Susan Wrights (eds), *Anthropology of Policy. Critical perspectives on governance and power* (Routledge 1997) 10.

³⁰⁰ Hubert L. Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (The University of Chicago Press 1982) 185.

³⁰¹ Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60(2) *Emory Law Journal* 251, 266 fn 53 (*note to self: in Oscola, for precise indication of page (although not required): first page of article, comma, pinpoint to page*); Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1, 9.

fatal for tens of thousands of others (...). A global anthropological imbalance renders part of humanity worthless, instantly forgettable and sacrificed at the very moment when mobility is generally perceived as highly desirable or as an indispensable means of escape from crises – simply in order to be able to work, live, and participate in the world in the broadest possible sense. Yet this ‘other’ section of humanity, which risks death by becoming part of the flow of international migration, is not a single and homogeneous entity in time, space, and culture. It does not have a specific identity, it is unstable, changing, a radical (or ‘radicalised’) embodiment of the stranger who can be encountered anywhere on the planet. This is what we need to overcome and to find a solution for, regardless of the ‘cause’ that has led us to this point. Fear itself, and an obsession with security, can just as easily be a motivating force, a reason to rethink hospitality and cosmopolitanism and to be suspicious of the words emanating from the leaders of nation states. For what could be more dangerous than cultivating the reassuring image of a cosseted, protected, and desirable world of luxury, glitter, and justice while at the same time selecting those entitled to enter and keeping at bay a growing mass of the supernumerary?³⁰²

I don’t think that we should consider the “modern state” as an entity that was developed above individuals, ignoring what they are and even their very existence, but, on the contrary, as a very sophisticated structure in which individuals can be integrated, under one condition: that this individuality would be shaped in a new form, and submitted to a set of very specific patterns. In a way, we can see the state as a modern matrix of individualization (...).³⁰³

The following paragraphs accompany the reader towards the notions of [policy](#) and [categorisation](#), for the poststructuralist perspective adopted sees the latter as an important part of the former. [Policy](#) is described by Bacchi as ‘[how order is maintained through politics](#)’, which in turn refers to the ‘heterogeneous strategic relations that shape lives and worlds’.³⁰⁴ Within such a framework, ‘government’ is a term used to indicate ‘the conduct of conduct: that is to say, a form of activity aiming to shape, guide or affect the conduct of (...) persons’.³⁰⁵ As observed by Burchell et al.:

government is not just a power needing to be tamed or an authority needing to be legitimized. It is an activity and an art which concerns all and which touches each. And it is an art which presupposes thought. The sense and object of governmental acts do not fall from the sky or emerge ready formed from social practice. They are things which have had to be – and which have been – invented.³⁰⁶

In such [order maintaining](#), “subjects”, “objects” and “places” are categorised.³⁰⁷ Shore and Wright argue it is through policy that persons are categorised and given statuses and roles such as that of “subject”, “citizen”, “national”, “deviant”, etc.³⁰⁸ Policy is treated as a central notion and tool in organising contemporary societies. It impacts on all areas of a life, with the result that it is virtually impossible to

³⁰² Michel Agier, *The Stranger as My Guest. A Critical Anthropology of Hospitality* (Polity Press 2021) 76-77.

³⁰³ Michel Foucault, ‘The subject and power’ in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 326, 334.

³⁰⁴ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis. A guide to Practice* (Palgrave Macmillan US 2016) 5-6.

³⁰⁵ Colin Gordon, ‘Governmental rationality: an introduction’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: studies in governmentality: with two lectures by and an interview with Michel Foucault* (The University of Chicago Press 1991) 2.

³⁰⁶ Graham Burchell, Colin Gordon and Peter Miller, *The Foucault effect: studies in governmentality: with two lectures by and an interview with Michel Foucault* (The University of Chicago Press 1991) ix-x.

³⁰⁷ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis. A guide to Practice* (Palgrave Macmillan US 2016) 6.

³⁰⁸ Cris Shore and Susan Wright, ‘Policy: A new field of anthropology’ in Cris Shore and Susan Wrights (eds), *Anthropology of Policy. Critical perspectives on governance and power* (Routledge 1997) 3-4.

avoid it and rather more, it increasingly shapes the manner in which individuals construct themselves as subjects.³⁰⁹ However, what policy consists of is rather unclear:

Is it found in the language and concepts of political speeches and party manifestos? Is it the written document produced by government or company officials? Is it embedded in the institutional mechanisms of decision-making and service delivery? Or it is (*pace* Lipsky 1980) whatever people experience in their interactions with street-level bureaucrats?³¹⁰

A great part of said 'work of organising' consists thus of making disaggregated activities appear coherent.³¹¹ Policy can be looked at as a cultural category and a political technology.³¹² What policy and government do is to **objectify** and **universalise** political decision-making: decision makers appear distant from the policy objects, responsibility for decisions taken is collectivised and overall the decision-making process is rendered more generalised, impersonal, bureaucratic and anonymous.³¹³ Policy furthermore has a **legitimising function**: it lends authoritative weight to the choices made and **disqualifies diverging voices** by constructing them as opposing the overarching principles that the measures in question allegedly build on.³¹⁴ The political nature of policies is masked by an **appearance of neutrality and objectivity**, as if policies were mere instruments for effectiveness and efficiency.³¹⁵ Such a characteristic is key to modern **power**: it is through political technologies that power disguises its own functioning.³¹⁶

Foucault speaks of power as *analytics of power*: power is not a theory, context-free, ahistorical and objective.³¹⁷ Relations of power are nonegalitarian and mobile.³¹⁸ Power is the functioning of political technologies through the social body: it determines asymmetrical and nonegalitarian relations and its everyday operation is temporally and spatially contained.³¹⁹ It is imminent but not identical to institutions; yet the disciplinary technology becomes truly effective when the political technology finds its place within the institutional setting.³²⁰ Power relations are as well intentional and non-subjective: it is possible to speak of intentionality without a subject – 'a strategy without a strategist' – for the intelligibility of relations of power rests with practices themselves and their logic.³²¹ Power is in fact exercised and not simply held.³²² Political technologies advance by removing an essentially political "problem" from the sphere of political discourse and rearranging it in neutral scientific language.³²³

Individuals in society are differently positioned from one another, some being either relatively privileged or relatively disadvantaged: privileges and disadvantages accumulate across societal systems and can trigger effects that are either more beneficial or more prejudicial in life to the person than if considered separately from one another.³²⁴ **Compounded inequalities** are therefore **not generated by**

³⁰⁹ *ibid.*

³¹⁰ *ibid* 4-5.

³¹¹ *ibid* 5.

³¹² *ibid* 9.

³¹³ *ibid.*

³¹⁴ *ibid.*

³¹⁵ *ibid* 7.

³¹⁶ *ibid.*

³¹⁷ Hubert L. Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (The University of Chicago Press 1982) 184.

³¹⁸ *ibid* 185.

³¹⁹ *ibid.*

³²⁰ *ibid* 186.

³²¹ *ibid* 187.

³²² *ibid* 192.

³²³ *ibid* 196.

³²⁴ Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale Journal of Law and Feminism 1.

identities but rather by systems of power interacting and producing ‘webs of advantages and disadvantages’.³²⁵

In such a scenario, what a *vulnerability-centred approach* does is questioning the institutional practices producing those very *identities* and the deriving inequalities.³²⁶ This can provide for a tool to address the ambiguities of discrimination-models in place and of the *identity categories* that the models operate through.³²⁷ An analysis of the system based on vulnerability requires the state to *regard individuals as equals*, in a manner that turns away from old identity categories and acknowledges that these only obstruct the institutional role of protection against discrimination.³²⁸

A vulnerability analysis begins by first considering how the state has responded to, shaped, enabled, or curtailed its institutions. Has it acted toward those institutions in ways that are consistent with its obligation to support the implementation and maintenance of a vital and robust equality regime; a regime in which individuals have a true opportunity to develop the range of assets they need to give them resilience in the face of their vulnerabilities?³²⁹

Is having a person fit into the category of, for instance, an *irregular migrant* or *illegal migrant*, functional to the state’s protective role and to a constitutional vision of substantial equality? Is the category’s purpose and its operationalisation that of safeguarding the life and wellbeing of the person on the premise all people are equal? For

(...) [i]t shall be the duty of the Republic to remove those obstacles of an economic and social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.³³⁰

A healthy conceptualisation of equality and its operationalisation build on the core paradigm of the *human person*. The human person in all its declinations and vibrant nuances across a spectrum of identities, the human person in its nakedness, its life and existence, its presence in flesh and blood, its corpoREALITY. Defining the human in terms of a *legal subject* allows what is abstractly outlined in terms of one’s rights to become operationalizable and operationalised, intelligible to the law. Care must be exercised, for rights that are theoretically “recognised” through the legal subject become ‘concrete’ although ‘frequently with (...) profoundly exclusionary results’,³³¹ contradicting a logic of universalism and equality. In her work, Giordano describes how *difference* is ‘translated and recognized in the political context of modern nation states’ for it ‘poses the issue of alternative forms of life, of radically heterogeneous worlds that the state must reduce to recognizable categories, thus depriving them of their otherness’.³³² Migrants, she argues, only exist because there are borders and the current conceptualisation of migration makes sense only within the framed context of the current nation state system.³³³ Borders symbolise the sovereignty of the nation state, for the latter can indeed only be

³²⁵ *ibid.* Note to self: see also Judy Scales-Trent, ‘Black Women and the Constitution: Finding Our Place, Asserting Our Rights’ (1989) 24(1) Harvard Civil Rights-Civil Liberties Law Review 9.

³²⁶ Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20(1) Yale Journal of Law and Feminism 1.

³²⁷ *ibid.*

³²⁸ *ibid.*

³²⁹ *ibid.*

³³⁰ Constitution of the Italian Republic (1947) art 3.

³³¹ Anna Grear, *Redirecting Human Rights. Facing the Challenges of Corporate Legal Humanity* (Palgrave Macmillan 2010) 104.

³³² Cristiana Giordano, *Migrants in translation: caring and the logics of difference in contemporary Italy* (University of California Press 2014) 1, 6.

³³³ *ibid.* 7.

imagined through them.³³⁴ The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families indeed proposes to define the migrant worker, as a legal subject, a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which they are not a national.³³⁵

The following paragraphs build on Giordano's analysis of [how the state digests the foreigner's presence though the use of categories](#). In front of the *migrant subject*, the institution implements an act of *recognition* that encloses both the normative foundation of the political claim and the violence that is therein embedded: recognition comes from the "other", from a space of alienation that is 'in liberal nation states' often predicated 'in the language of tolerance, inclusion, and multiculturalism'.³³⁶ Recognition is performed through techniques that make the social world intelligible to the state.³³⁷

The act of recognition can be a way to *disclose* or *reveal* the other's foreignness, but it can also work to *appropriate* and *reduce* difference, or at least make it identifiable or recognizable to the state. (...) I want to show the broader implications of recognition as a political practice often grounded in power asymmetries and structures of subordination that have an impact on the lives of citizens and, most important, those who will never achieve this status.³³⁸

Charles Taylor writes that 'misrecognition shows not just a lack of due respect [but] can inflict a grievous wound (...). Due recognition (...) is a vital human need' for '[w]hat has come about with the modern age is not the need for recognition but the conditions in which the attempt to be recognized can fail'.³³⁹ Patchen Markell observes on the other hand that while recognition may allow for the social world to be intelligible, it often stratifies it, elevating some people to positions of dominance and privilege and subordinating others.³⁴⁰

The politics of recognition (...) deals with socially and historically situated subjects, with human beings understood as members of communities and as bearers of particular identities, and with distinctive forms of injustice that operate not merely by systematically depriving already-constituted subjects of resources, but by shaping subjects themselves in ways that produce and perpetuate systemic inequality.³⁴¹

Pursuing recognition manifests aspiring to *sovereignty*, which encloses the ideas of state sovereignty as well as of the individual's condition of full ownership and independence.³⁴² Sovereignty is anchored in *knowledge* as *identity*, which is a form of *history*, and this explains why 'understanding of who you are and of the nature of the larger groups and communities to which you belong, and of securing the respectful recognition of these same facts by others' matters.³⁴³ Detouring to reflect on recognition through *inter alia* Arendt's thought, Markell contends the politics' incoherence, suggesting that

³³⁴ Shahram Khosravi, *'Illegal' Traveller. An Auto-Ethnography of Borders* (Palgrave Macmillan 2010) 2. Note to self: see reference to Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1983).

³³⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) (adopted by General Assembly resolution 45/158 of 18 December 1990) art 2.

³³⁶ Cristiana Giordano, *Migrants in translation: caring and the logics of difference in contemporary Italy* (University of California Press 2014) 7-8.

³³⁷ *ibid.*

³³⁸ *ibid.*

³³⁹ See Taylor Charles and others, *Multiculturalism: Examining the Politics of Recognition* (Amy Gutmann ed, Princeton University Press 1994) 26, 35. See Hegel on "the struggle for recognition" and *Phenomenology*, as well as reference to Frantz Fanon, *The Wretched of the Earth* (Grove Press 1963), to Axel Honneth, James Tully, Johann Gottfried Herder, Nancy Fraser, Stanley Cavell, Kelly Oliver.

³⁴⁰ Patchen Markell, *Bound by recognition* (Princeton University Press 2003) 2-7.

³⁴¹ *ibid* 11.

³⁴² *ibid* 10-11.

³⁴³ *ibid* 12-13.

recognition, even at its best-intentioned versions against injustices, is not geared to face the implicit relations of subordination causing ‘systematic, identity-based social and political inequality’ to the extent that may become *complicit* of the very issues it claims to contest.³⁴⁴ What he argues is that subordination relations do not build on the failure to recognise *the other’s* identity but rather on the failure to acknowledge one’s *own* basic ontological circumstances, calling this alternative interpretation ‘*politics of acknowledgment*’ and not of recognition.³⁴⁵ Invoking “identity” as a *fait accompli*, he contends, ‘at once acknowledges and refuses to acknowledge our basic condition of intersubjective vulnerability’ and ultimately diverts attention from the role of the *mis-recognisers* by concentrating on the implications of suffering misrecognition.³⁴⁶

Through acknowledgment, Markell proposes to translate democracy’s egalitarian impulses ‘into a new idiom in which risk, loss, and vulnerability are seen as *constitutive features of political life* rather than as burdens to be overcome once and for all’; this could entail, *inter alia*, approach democratic citizenship not as ‘the self-control of the people, but as a matter of taking part in the activity of politics’.³⁴⁷ Giordano as well enquires as to whether acknowledgment, and not recognition, may leave room for a different ‘politics of life, beyond the logics of understanding and sovereignty’.³⁴⁸ She describes acknowledgment as the political and ethical act of *coming to terms with the appeal to know through preestablished categories*, for *difference* exceeds them and *the other* cannot be forced a fixed identity upon.³⁴⁹ There is here no desire to dismiss the notion of sovereignty itself but to reach out to an understanding of the notion beyond its current logics of bordering and (in)hospitality, beyond a view of state sovereignty desperate to maintain intact its frontiers against the sovereignty of any individual, foreign or not, to their life and projects in full ownership.

The sovereign state *recognises* “subjects” through policy – order maintaining – and to make them intelligible to its institutions clusters them within fixed categories, the content of which proposes a homogenised representation (of the extra-communitarian, the immigrant, the asylum-applicant, the victim of trafficking...) that does not do justice to one’s biography and *difference* as a non-citizen. *Acknowledging* difference suggests its acceptance as exceeding the categories of alleged “inclusion”. *Categories* are means through which the state knows the migrant “subjects”, *translates their foreignness and difference into a digestible narrative of sameness* and, through such act, *manages them*. Management foresees, to some extent, protection, via the establishment of rights’ and services’ entitlement and enjoyment. How, in today’s system, would in fact a migrant persons access rights and services without the state’s conversion of their identities into a predefined legal status? This inability, which is the result of unwillingness, reminds us of how the human person *as such* may not be worthy of protection before the eyes of the state. When the *human* is translated into a preconceived status, the person is *entitled* to their *human* rights. In such a mechanism however, protection’s other side of the coin is rejection: a person’s life is screened through the contingent, legal and “moral” criteria that are prescribed by the fictional identity it must adhere to. That life is then declared unworthy of safeguard if the set criteria are allegedly not met, be that due to their absence or their misinterpretation. But *what is left unproblematic in this representation? What is left silent? Can this “problematic” situation be conceptualised differently?* Giordano writes:

[t]his kind of relation with difference requires struggling with categories of recognition, undoing them in order to realize that there is no identity contained in them. I thus see acknowledgment

³⁴⁴ *ibid* 17.

³⁴⁵ *ibid* 7, 10, 38.

³⁴⁶ *ibid* 14-18.

³⁴⁷ *ibid* 188.

³⁴⁸ Cristiana Giordano, *Migrants in translation: caring and the logics of difference in contemporary Italy* (University of California Press 2014) 9.

³⁴⁹ *ibid*.

as a space for what Jacques Rancière (1999) calls politics, where the other's difference introduces change in established discourses and thus discards preexisting identities.³⁵⁰

In an attempt to answer the previous questions, the text briefly detours on Rancière's work. He writes in fact that 'between the useful and the just lies the incommensurability of the wrong, which alone establishes the body politics as antagonism between parts of the community that are not real parts of the social body'.³⁵¹ So between 'the useful' state's recourse to predefined categories to facilitate the practical implementation of accessing services and 'the just' of substantial equality lies 'the wrong' of *policy* itself designed to be antagonist to the *difference* of those segments of the population that the state does not digest nor hear, irregular-ised, relegated out of the citizens' social fabric.

Whoever is nameless *cannot* speak. (...) Between the language of those who have a name and the lowering of nameless beings, no situation of linguistic exchange can possibly be set up, no rules or code of discussion. This verdict does not simply reflect the obstinacy of the dominant or their ideological blindness; it strictly expresses the sensory order that organizes their dominations, which is that domination itself. (...) [D]omination has no basis other than the sheer contingency of any social order.³⁵²

Giordano matches *recognition* with Rancière's *policing* and *acknowledgment* with Rancière's *politics*.³⁵³ While *politics* is commonly understood as the set of procedures through which collectivities' aggregation and consent are reached, power is organised, roles distributed and such distribution is legitimised, Rancière proposes to call such a system *the police*.³⁵⁴ Policing is therefore the law that establishes a party's share or lack thereof, generally implicitly.³⁵⁵ Politics on the other hand becomes to be understood as an antagonistic activity to policing: it is a break, an expression that undoes the configuration defined by the police order by implementing the heterogenous assumptions of those who had no part in a previous configuration; in doing so, the contingency of the police order becomes manifest and equality of all beings is demonstrated. Rancière writes that

[p]olitical activity is whatever shifts a body from a place assigned to it or changes a place's destination. It makes visible what had no business being seen, and makes heard a discourse where once there was only place for noise; it makes understood as discourse what was once only heard as noise.³⁵⁶

Politics, for Rancière, takes place once there is a way for the process of policing and that of equality to meet.³⁵⁷ Politics acts on policing: '(...) in the places and with the words that are common to both, even if it means reshaping those places and changing the status of those words'.³⁵⁸ Equality itself is not a given to be transformed into service, 'an essence embodied in the law' or goal: it *is an assumption* to be discerned within the practices that implement it.³⁵⁹

The practice that sees the logic of equality taking the form of processing a wrong is politics; politics occurs through *subjects* or through mechanisms of *subjectification*, which are seen as those segments of the reconfiguration of the field of experience that produce and identify a body and a capability of

³⁵⁰ *ibid.*

³⁵¹ Jacques Rancière, *Disagreement. Politics and Philosophy* (University of Minnesota Press 1999) 21.

³⁵² *ibid* 23-25.

³⁵³ Cristiana Giordano, *Migrants in translation: caring and the logics of difference in contemporary Italy* (University of California Press 2014) 9.

³⁵⁴ Jacques Rancière, *Disagreement. Politics and Philosophy* (University of Minnesota Press 1999) 28.

³⁵⁵ *ibid* 29.

³⁵⁶ *ibid* 30.

³⁵⁷ *ibid.*

³⁵⁸ *ibid* 33.

³⁵⁹ *ibid.*

enunciation not previously identifiable.³⁶⁰ In his analysis, Rancière reports an episode to elucidate on political subjectification: inscribing a subject name, of the one who was previously *nameless*, as being *different* from any already-identified part of the community in the police order. From the trial of Auguste Blanqui in 1832:

Le président à l'accusé. Quelle est votre profession?

Blanqui. Prolétaire.

Le président. Ce n'est pas là une profession.

Blanqui. Comment, ce n'est pas là une profession! C'est la profession de trente millions de Français qui vivent de leur travail et qui sont privés de droits politiques.

Le président. Eh bien! Soit. Greffier, écrivez que l'accusé est prolétaire.³⁶¹

Through such an exchange, Rancière exemplifies the conflict between politics and policing. While the magistrate enquires as to the defendant's job, intended as the activity that positions a body into its function and place, Blanqui refers as 'proletarian' not as a trade but, in the context of a revolutionary politics, assigns a different meaning to the term to indicate that 'a profession is a profession of faith, a declaration of membership of a collective'.³⁶² Such a collective is that of a *nameless* one in the pre-existing configuration of the police order. It is 'the class of the uncounted that only exists in the very declaration in which they are counted as those of no account'.³⁶³ The subjectification here produces 'a subject of wrong', where the wrong is the mode of subjectification through which equality takes a political shape.³⁶⁴ In the case of Blanqui, it is not work or a condition of indigency that are subjectified but a gap, 'the simple counting of the uncounted, the difference between an inegalitarian distribution of social bodies and the equality of speaking beings'. What is then, for Rancière, a *subject*? It is not a group the presence of which is imposed onto society but 'an operator' that links and unlinks elements that exist in the nexus between the police order's configuration and the form of equality that is already embedded therein, however flimsy this may be.³⁶⁵

A worker's strike, for example, in its classic form, may bring together two things that have "nothing to do with one another": the equality proclaimed by the Declaration of the Rights of Man and some obscure question concerning hours of work or workshop regulation. The political act of going out on a strike then consists in building a relationship between these things that have none, in causing the relationship and the nonrelationship to be seen together as the object of dispute.³⁶⁶

The worker's strike pokes into the silences of the police order's representation. By connecting and disconnecting elements that are present in the arrangement of a given experience, the subject, through their demonstrating actions, *problematizes a situation differently* than how this is proposed by the pre-existing order. The striking subject highlights *what is left unproblematic* in a representation of a model that organises power through a predefined set of assumptions, distributes roles and legitimates such distribution while having inscribed, in itself, a sense of equality. Political action insinuates where policing and equality may meet. For Giordano, such a situation may then come closer to

³⁶⁰ *ibid* 35 reading 'by *subjectification* I mean the production through a series of actions of a body and a capacity for enunciation not previously identifiable within a given field of experience, whose identification is thus part of the reconfiguration of the field of experience'.

³⁶¹ Défense du citoyen Louis Auguste Blanqui devant la Cour d'Assises (Paris 1832) 4 <<https://gallica.bnf.fr/ark:/12148/bpt6k8537754/f8.item>> accessed 7 April 2023. Mentioned in Jacques Rancière, *Disagreement. Politics and Philosophy* (University of Minnesota Press 1999) 37.

³⁶² Jacques Rancière, *Disagreement. Politics and Philosophy* (University of Minnesota Press 1999) 37-38.

³⁶³ *ibid* 38.

³⁶⁴ *ibid* 39.

³⁶⁵ *ibid* 40.

³⁶⁶ *ibid*.

acknowledgment than recognition. The worker performs their strike through places and words that are common to both policing and politics, albeit reshaping their roles and understandings; so, equality is discerned within its implementation. The worker, for instance, acts within a configuration that claims to promote the principle of “equality” in the Italian Constitution, its recognition of the Republic’s foundation on labour, the right of all citizens to work, the protection of work in all its forms and the right to strike. Such preconfigured equality within a given order however may not answer to the question of parental leave, of an existing gender pay gap, of retirement age, of regulations concerning working hours, etc. The political subject therefore unveils the contingency of policing and resorts to the space produced by politics, discerning and assessing “equality” in its operationalisation. So, a *migrant worker’s* strike may connect all the more elements with no preconfigured links with one another under the police regime, finding space through political action to trigger disagreement (given Rancière) and attempting to change the social order through the redefinition of what (and whom) is (ac)countable, visible, sayable, hearable, understandable. Strike, in this case, is an act of politics. This example is offered to elucidate on, burrowing Giordano’s words on ethno-psychiatry, ‘a practice that models acknowledgment through’ an act ‘that is political and therefore in disagreement with the policing mechanisms of the state, which claims to know foreign others through categories such as victim, migrant, and political refugee’.³⁶⁷ But can a migrant worker strike? Can a “regular” migrant who works without a contract strike? Can an “irregular” migrant who works without a contract strike? Can an “illegal” migrant strike? Can a migrant who is in the process of regularisation strike? What these questions point to is whether the state can digest the difference that the non-citizen’s presence confronts it with. Can the state acknowledge such a difference in its system or, since this cannot be recognised for its unintelligibility, such difference is rejected?

The migrant person, in their *professions* and through their biographical narratives, disagrees with the state preconfigured categories and challenges a social order that in the end does not count them in, at all or in part.

(...) It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and **equality of citizens**, thereby impeding the full development of the **human person** and the effective participation of **all workers** in the political, economic and social **organisation** of the country.³⁶⁸

The Republic recognises the right of all **citizens** to work and promotes those conditions which render this right effective. Every **citizen** has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society.³⁶⁹

The Italian legal system conforms to the generally recognised principles of international law. The **legal status of foreigners** is regulated by law in conformity with international provisions and treaties. **A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms** guaranteed by the Italian constitution shall be entitled to the **right of asylum** under the conditions established by law.³⁷⁰

What is left unproblematic in the representations these dispositions offer? Can these be conceptualised differently? Where are the silences? What effects are produced by these representations? And can these be disrupted or even replaced by the *difference* brought about by the *non-citizen*? Rancière writes that in the ‘social ranks’, someone who is ‘inferior’ understands the ‘superior’s order’ because they belong to the same group of ‘speaking beings’ and so are equal; from this follows that inequality in the

³⁶⁷ Cristiana Giordano, *Migrants in translation: caring and the logics of difference in contemporary Italy* (University of California Press 2014) 9.

³⁶⁸ Constitution of the Italian Republic (1947) art 3.

³⁶⁹ *ibid* art 4.

³⁷⁰ *ibid* art 10.

hierarchisation of persons in societies works because of the very equality of those persons.³⁷¹ Societies, Rancière summarises, with their functions, orders and distributions, build on the idea 'that [inequality exists because of inequality](#)'.³⁷² It is an allegedly unproblematic problem representation.

[All human beings](#) are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another [in a spirit of brotherhood](#).³⁷³

Silences of all sorts sleep in the order maintaining that regulates societies. A simple example of this is drawn by reading the first article of the Universal Declaration of Human Rights. While the expression 'all human beings' exceeds the 'citizens' or the 'men', 'brotherhood' nevertheless remains unproblematically entrenched in the language. All human beings are then equal in rights – but 'brotherhood' may well be indicative of the deep-seated assumptions underlying the representation provided in article 1 as well as the how and where this representation had been produced. May the terms solidarity or compassion have offered an alternative much in line with the alleged equality foresaw, counting in and accounting for the uncounted sisterhood? The same may be said for the countless 'his' that the Declaration holds on to. Policy and legal instruments are contingent to their times, spaces and promoting actors.

The subject disagreeing with the police order performs an act of politics, acknowledgment. Disagreements unfold into social movements asserting their presence into the preconfigured inscription of equality before the law.³⁷⁴ The proposals that are put forward give room to the possibility to reinterpret and reconceptualise difference and the unmalleable categories of recognition. The migrant subject, whom is of interest to this contribution, displays an un-legitimised difference before state hierarchisation of citizenship that exceeds institutions' translation and recognition. This questions the hegemonic model imposed on migrants by the receiving state: through the use of language, discourses, manifestos, actions and the law, the migrant subject employs the means in common with the host state to [assert their compromised space into the constitutional principle of substantial equality, disrupting the order of things](#). Rancière's workers claim:

"[w]e are right to argue for our rights and so to posit the existence of a common world of argument. And we are right to do so precisely because those who ought to recognize it do not, because they act as though they are ignorant of the existence of this common world".³⁷⁵

And so

[t]he workers' manifestos of the day comment on the speech of the bosses, used only to call for repression on the part of the public powers, the speech of judges who condemn, or the speech of journalists who comment, in order to demonstrate that the words of such people go against the *evidence* of a common world of reason and argument.³⁷⁶

So does the foreign other, challenging a social order that does not acknowledge their presence due to their non-citizenship, contesting the state's 'attempt to domesticate it [their difference] within familiar categories'.³⁷⁷ Is the migrant person reducible to the categories' criteria that the state expects them to (or perhaps to not) satisfy? While migrants' accounts are lived experiences of persons in the flesh, categories and their requirements are mere fabrications. Once accepting such a proposal, that of the state's reduction through categorisation of the other's difference as artificial and fictional, one could, at

³⁷¹ Jacques Rancière, *Disagreement. Politics and Philosophy* (University of Minnesota Press 1999) 49.

³⁷² *ibid.*

³⁷³ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR) art 1.

³⁷⁴ Jacques Rancière, *Disagreement. Politics and Philosophy* (University of Minnesota Press 1999) 52.

³⁷⁵ *ibid.* 53.

³⁷⁶ *ibid.*

³⁷⁷ Cristiana Giordano, *Migrants in translation: caring and the logics of difference in contemporary Italy* (University of California Press 2014) 10.

least partially, end their scrutiny and call for the categorisation process' withdrawn from use and for a vision of protection rather than rejection. It is indeed precious to this contribution and her author to ally with a reasoning that sees the earth as one and for all.

Migrants exist because the current asset of borders and nation states exist – for their artificial mechanisms of recognition and for the deadly (un)distribution of access to resources that they define, they have no reason to be sustained and legitimised but from the oppressor. And while this may appear a cheap, essentialist position used to counterargue the very essentialism of the hierarchisation of categories in place, there is on the part of the author the belief in and hope for a progressive realisation of that constitutionally cherished substantial equality. To say the earth is one and for all, it is in fact no more naïve than to claim by law that all human beings are born free and equal in dignity and rights and to point at the counterintuitive and hostile models in place that institutionally deprive people of their choices and their pursuance of alternative, and more substantially equal, conditions. Yet despite the firm conviction in the abolishment of the system of categorisation as it is in place and what this implies in terms of lack of protection, dismissal altogether may be more pointless than anything else. It is in fact as artificial as the disciplining categories in place to deny how the model, once it roots into society, regulates and also “shapes” it, with its potential stereotypes and the actual effects on one's life and identity.³⁷⁸ In the movie ‘Ricomincio da tre’ (1981), the protagonist Gaetano (Massimo Troisi) embarks on a journey in Italy with the intention to move to Florence, unsatisfied with his life in a town in the province of Naples where he works and where his family lives.³⁷⁹ The movie portrays his encounters with a variety of other characters whose reaction once hearing that he is from Naples is: ‘oh, emigrant’ (*emigrante*), to which he often remarks he is only a voyager. His mother herself, at the beginning of the movie, despite knowing of his desire to travel, asks him: “why do you want to emigrate?”. As the story unfolds and the scene keeps repeating, Gaetano in some circumstances prevents, perhaps unnecessarily, the question, interrupting his interlocutor to specify that he is not an emigrant, while in other circumstances answers that he is an emigrant, accepting a presumption that may or may not suit his story without contesting it. No one around him challenges the stereotype of the emigrant, no one thinks of him as a traveller.

Anne Phillips observes that

it is sometimes said that while essentialist constructs are, in a sense, category mistakes – drawing the boundaries between peoples or things in the wrong place – there is not much point rubbishing the constructs as analytically wrong, because once in existence, they become part of our social reality.³⁸⁰

The exercise is then to attempt to delve into a critique of their production and effects rather than limiting this analysis to dismissal. Phillips observes how the features employed to identify groups are formed by history.³⁸¹ This acknowledges their contingency. She understands what she looks at as essentialism as having four meanings:

- a) attributing some characteristics to all people ‘subsumed’ within a category (e.g., ‘(all) women are caring’);
- b) attributing those characteristics to the category in a way that naturalise or reifies what is socially constructed (‘it is because you are a woman that you are more caring than a comparable man,

³⁷⁸ Reference to Gerd Baumann, *inter alia* to the work *Contesting Culture: Discourses of Identity in Multi-Ethnic London* (Cambridge University Press 1996). See also the observation of Anne Phillips exposing Baumann to Bruno Latour's critique. See Bruno Latour, ‘The Promises of Constructivism’ in Don Idhe, Evan Selinger (eds), *Chasing Technoscience: Matrix of Materiality* (Indiana University Press 2003) 27.

³⁷⁹ *Ricomincio da tre* (directed by Massimo Troisi, 1981).

³⁸⁰ Anne Phillips, ‘What's wrong with Essentialism?’ (2010) 20 *Distinktion: Scandinavian Journal of Social Theory* 47, 48.

³⁸¹ *ibid* 49.

not because you live in a society where girls and women are expected to be more caring, or a society where family policy encourages a division of labour between male breadwinners and female carers’);

- c) Invoking a ‘collectivity’ as the subject or the object of political action in a manner that presumes a homogenised group (e.g., ‘women’);
- d) Policing this collective category, treating the alleged shared characteristics as the defining ones that cannot be altered or questioned without discouraging a person’s claim to belonging to that group.³⁸²

Phillips argue how there should be opposition to the notion that social differences are “natural”, for “differences” involve categories and these are produced by people to pursue a **social purpose**: ‘the choice of salient distinction is not simply given to us by nature. It is itself a social act’.³⁸³ So, an immigrant person is not just a person but one whose salient distinction from others is their crossing of states’ borders to enter another state within a model that opposes the paradigms of citizen and immigrant. This is a choice of the receiving state’s policymakers: the category of the ‘immigrant’ and its implications are produced and designed for a social purpose. The goal of citizenship, in terms of belonging to the nation state, is not only to ensure and maintain a social differentiation but to implement, within the scope of state sovereignty, a mechanism of selective belonging (*appartenenza selettiva*) of “subjects” to a specific national political and bureaucratic order.³⁸⁴ The non-recognition (*disconoscimento*) of citizenship to foreign immigrants is not limited to the allocation of a juridical status but sustains a predetermined relation between individuals, groups and the state.³⁸⁵

Although it may seem a paradox, a migrant who contests the state’s disciplining categorisation of people on the move may nevertheless invoke the very category it wishes to subvert. Resisting to a specific model of categorisation, the “subject” may implicitly risk replicating this very structure. This is something that, throughout this contribution, the author herself has been struggling with in her writing and conceptualisations as well. The very line of reasoning that this analysis builds on, such that ‘the migrant is defined as a broad category of disadvantaged poor mobile people’,³⁸⁶ following Caraus and Paris, is not assumed as unproblematic, for thinking in categories runs the risk of reproducing them.

Philipps asks: ‘can we, however, think politics without collectivities? Can we think collectivities without at least some kind of essentialism?’.³⁸⁷ Her answer goes through the recommendation of Iris Marion Young of reserving the expression ‘group’ for historically specific moments when persons come together in a common project and are thus unified, while ‘series’ may describe multifaceted and overlapping sets of practices and structures, such as gender and class.³⁸⁸

Since my theorizing about women depends on Sartre’s distinction between group and series, however, (...) I shall reserve the term *group* for the self-consciously, mutually acknowledging collective with a self-conscious purpose. Much of an individual’s life and action takes place in and is structured by a multitude of groups in this sense. Not all structured social action occurs

³⁸² *ibid* 49, 50, 53.

³⁸³ *ibid* 53-54.

³⁸⁴ Encarnación La Spina, ‘Immigrati nell’Europa Meridionale. Quando “non si nasce ma si diventa” giuridicamente “particolarmente vulnerabili”? poveri’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 315.

³⁸⁵ *ibid*.

³⁸⁶ Tamara Caraus and Elena Paris (eds), *Migration, Protest Movements and the Politics of Resistance. A Radical Political Philosophy of Cosmopolitanism* (Routledge 2019) 11.

³⁸⁷ Anne Philips, ‘What’s wrong with Essentialism?’ (2010) 20 *Distinktion: Scandinavian Journal of Social Theory* 47, 56.

³⁸⁸ *ibid*.

in groups, however. As Sartre explains it, groups arise from and often fall back into a less organized and unself-conscious collective unity, which he calls a series.³⁸⁹

What is drawn from this, is the genuine generation of groups of people – for instance of women, workers, migrants, migrant women, migrant workers, migrant women workers, working migrant women – who may assert their position before the essentialising order they challenge. They attend to, in a specific temporality and spatiality, the unifying and self-conscious purpose of abolishing or altering predefined state essentialism as a threat to one's life and development. Nothing "natural" lies in the chosen salient distinction the state employs to define an immigrant, or a refugee, or a victim of trafficking in persons, or an asylum seeker and the variety of preconfigured "protections" they may apply for and rejections that may fall into. Yet the implications that such categorisation may have in life, and the equality gap these create between citizens and non-citizens, may become the salient characteristics unifying people for a cause and delimiting a common purpose for all those involved, "migrants" (often "citizens" elsewhere) and allies – all governed.

The un-naturality of categories of recognition and their contingency is self-evident especially once they are altered by policymakers themselves, often through reinvigorated acts of violent translation of difference. Un-naturality is obviously manifest whenever subjects contesting the police order are successful and manage to alter or abolish norms that they deemed detrimental to their safety. However, such groups never claimed that those categories were "grounded" in nature. Policy on the other hand is portrayed through assumed for granted, neutral, often technical and scientific models, as if it addressed "problems" readily existing out there rather than representing them as such. Whenever policymakers themselves instead do alter the very model that they had been applying until the deliberation of a fresh new law, the contingency of the police order is very much at display and its un-naturality is eventually confirmed.

In March 2023, the Italian government issued the legislative decree on urgent regulations (*disposizioni urgenti*) on legal migration flows of foreign workers and prevention and fight of irregular migration (decreto legge no. 20/2023).³⁹⁰ Article 7 of the decree modifies the dispositions on 'special protection' (previously 'humanitarian protection'), acting on article 19 of the 1998 legislation no. 286 (TUI) concerning immigration and norms on the foreigner's situation.³⁹¹ People whose application was presented to the competent authorities before the date of entry into force of the decree, can still obtain a residence permit for special protection; those whose special protection has already been recognised will have their permit renewed on such a basis only once, for the duration of a year, and have the possibility to convert the permit into one for work, if conditions suffice.

The so called "**vulnerable category**" of special protection holders therefore, through the emanation of a law, ceases to "exist" as it was earlier articulated, limiting its conceptualisation and application from one day to another. The reform splits a "target population" in two, maintaining some persons under such a cluster and excluding others whose grounds were indeed likely to be the same. Certainly, people in similar circumstances have not disappeared as of March 11. The migrant's *difference* that was previously **recognised and domesticated into vulnerability** is no longer a mean for some form of state protection but becomes the **widening of causes for rejection**. Indeed, the legislative decree no. 20/2023 further prescribes in article 10 disposition for the enhancement (*potenziamento*) of administrative detention

³⁸⁹ Iris Marion Young, 'Gender as Seriality: Thinking about Women as a Social Collective' (1994) 19(3) Signs: Journal of Women in Culture and Society 713, 724.

³⁹⁰ Decreto-legge 10 March 2023 n. 20 'Disposizioni urgenti in materia di flussi di ingresso legale dei lavoratori stranieri e di prevenzione e contrasto all'immigrazione irregolare (entry into force 11 March 2023)' GU 59 10 March 2023 <www.gazzettaufficiale.it/eli/id/2023/03/10/23G00030/sg> accessed 30 April 2023.

³⁹¹ Decreto-legge 25 luglio 1998 n. 286 'Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero (entry into force 2 September 1998, last updated 10 March 2023)' GU 191 Supplemento Ordinario 139 18 August 1998 <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1998-07-25;286>> accessed 30 April 2023.

centres (CPR). The institute of special protection has a contested and short history: it was introduced only in 2018,³⁹² substituting what was earlier defined as “humanitarian protection” (*protezione umanitaria*);³⁹³ its scope of application slightly expanded in 2020,³⁹⁴ it granted a permit of 2 years, renewable and convertible to a residence permit for work. The ‘urgent’ 2023 decree followed the declaration of a state of emergency linked to what was indicated as an exceptional increase of the arrival of migrant persons through the Mediterranean Sea³⁹⁵ and a legislative decree regulating activities of maritime search and rescue.³⁹⁶ This is an example to show the contingency of state categories imposed on migrants, whose *difference* does not fit into the paradigm of the citizen and must therefore be translated to what is more intelligible to the institution. Categories are produced by policy, operationalised, brought into “existence” and abandoned at times once [the social purpose](#) policymakers pursue through them [changes](#).

Khosravi writes that the state performs the border on the travelling body.³⁹⁷ Borders, he contends, establish the extent of people’s movements on a racially discriminating reasoning: globally, most people are caught between borders while a limited cluster of people enjoys approximately unobstructed rights to mobility.³⁹⁸ Mobility is regulated through categorisation, ‘social sorting’ built on class, racial, sexual and gender inequalities that occurs even before one’s arrival to any border.³⁹⁹ While being mechanisms of state violence and control, borders ‘are also spaces of defiance and resistance’.⁴⁰⁰ As it is that migrants exist because there are borders, where there is a border, there is border crossing.⁴⁰¹ The legality of such crossing is only dependent on state recognition or lack thereof; it is policy-produced through policy-produced categories. The performance of the border on one’s body violently translates into the

³⁹² Decreto-legge 4 October 2018 no. 113 ‘Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell’interno e l’organizzazione e il funzionamento dell’Agenzia nazionale per l’amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata. (18G00140)’ (entry into force 5 October 2018, converted with modifications through L. 1 December 2018 no. 132 in GU 281 3 December 2018) GU Serie Generale 231 4 October 2018 <www.gazzettaufficiale.it/eli/id/2018/10/04/18G00140/sg> accessed 27 May 2023.

³⁹³ Decreto-legge 25 July 1998 no. 286 ‘Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero (entry into force 2 September 1998, last updated 10 March 2023)’ GU 191 Supplemento Ordinario 139 18 August 1998 <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1998-07-25;286>> accessed 30 April 2023, see art 5(6) of the original version of the text: ‘Il rifiuto o la revoca del permesso di soggiorno possono essere altresì adottati sulla base di convenzioni o accordi internazionali, resi esecutivi in Italia, quando lo straniero non soddisfi le condizioni di soggiorno applicabili in uno degli Stati contraenti, salvo che ricorrano seri motivi, in particolare di carattere umanitario o risultanti da obblighi costituzionali o internazionali dello Stato italiano’.

³⁹⁴ Decreto-legge 21 October 2020 no. 130 ‘Disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare, modifiche agli articoli 131-bis, 391-bis, 391-ter e 588 del codice penale, nonché misure in materia di divieto di accesso agli esercizi pubblici ed ai locali di pubblico trattenimento, di contrasto all’utilizzo distorto del web e di disciplina del Garante nazionale dei diritti delle persone private della libertà personale. (20G00154)’ (entry into force 22 October 2020, converted with modifications through L. 18 December 2020 no. 173 in GU 314 19 December 2020) GU 261 21 October 2020 <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2020-10-21;130>> accessed 28 May 2023.

³⁹⁵ Ordinanza 16 April 2023 ‘Prime disposizioni urgenti per fronteggiare, sul territorio delle Regioni Piemonte, Liguria, Lombardia, Veneto, Friuli-Venezia Giulia, Umbria, Marche, Lazio, Abruzzo, Molise, Basilicata, Calabria, Sardegna, Sicilia e delle Province autonome di Trento e di Bolzano, lo stato di emergenza in conseguenza dell’eccezionale incremento dei flussi di persone migranti in ingresso sul territorio nazionale attraverso le rotte migratorie del Mediterraneo, Ordinanza n. 984 (23A02349)’ GU Serie Generale 92 19 April 2023.

³⁹⁶ Testo coordinato del decreto-legge 2 gennaio 2023 n. 1 ‘Testo del decreto-legge 2 gennaio 2023, n. 1 (in Gazzetta Ufficiale - Serie generale - n. 1 del 2 gennaio 2023), coordinato con la legge di conversione 24 febbraio 2023, n. 15 (in questa stessa Gazzetta Ufficiale - alla pag. 1), recante: «Disposizioni urgenti per la gestione dei flussi migratori.» (23A01357)’ GU General Series 52 2 March 2023.

³⁹⁷ Shahram Khosravi, *‘Illegal’ Traveller. An Auto-Ethnography of Borders* (Palgrave Macmillan 2010) 4.

³⁹⁸ *ibid.*

³⁹⁹ *ibid.*

⁴⁰⁰ *ibid.*

⁴⁰¹ *ibid.*

production of one's situation of vulnerability, which itself encloses subjugation to oppressive forms of power and resistance to them.

The fragility of the legal *status* of the immigrants represents the most legally relevant vulnerability, given the impossibility and the difficulty – observable and unjustified – suffered by rights holders, especially with regard to accessing social rights. (...) [T]he causes and the consequences of vulnerability have as the starting and ending points the very normative apparatus on foreigners, which allows for the finding and perpetuation, within the different systems, of a series of juridical exclusions and inequalities. Immigration law therefore produces, by omission, vulnerability, (...) also because this often reveals the intention to limit the protection of social rights and the substantive equality of the most vulnerable subjects (...).⁴⁰²

2.2 From categorisation to socio-juridical vulnerability: tackling or producing illegality?

In contrast, I want to claim the term “vulnerable” for its potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility. Vulnerability thus freed from its unlimited and negative associations is a powerful conceptual tool with the potential to define an obligation for the state to ensure a richer and more robust guarantee of equality (...).⁴⁰³

La Spina observes that unlike other “vulnerable groups”, the dimension of migrant vulnerability advances issues that have not find resolution in the laws, in policies nor in the jurisprudence.⁴⁰⁴ To explore situations of socio-juridical vulnerability in which migrant persons may “find” themselves in, the following paragraphs engage with an overview of the literature considered most relevant to the conceptualisation of such condition. Reference is made to legal scholarship in combination with socio-legal observations. Jurisprudence also forms part of the analysed discourse around vulnerability, for it sheds light not only on how the concept has been understood but on how it has been operationalised in terms of human rights before the judicial systems. For the sake of delimiting the scope of this section of the analysis, the caselaw considered in relation to the application of the notion of “vulnerability” and “vulnerable group(s)” is that belonging to the European regional context, i.e., to the Council of Europe (CoE) and the European Union (EU), with special regards to the European Court of Human Rights’ (ECtHR), as the “geographical” and institutional background against which this study unfolds.

The chapter titles ‘[how vulnerable is enough vulnerable?](#)’ for its objective is to explore how policy classifies migrant individuals and their alleged conditions of vulnerability and which vulnerability “threshold” grants access to which forms of protection. This section, of a more theoretical nature, intends to focus on the [conceptualisation of vulnerability](#). This is considered propaedeutic to the subsequent policy analysis and the reflections on the societal hierarchisation between citizens and non-citizens that underpins the current system and yet undermines the pursue of an envisioned equality. The acknowledgment of the suffering inherent in a condition of vulnerability goes hand in hand, it is

⁴⁰² Encarnación La Spina, ‘Immigrati nell’Europa Meridionale. Quando “non si nasce ma si diventa” giuridicamente “particolarmente vulnerabili?” poveri’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 315. Own translation. See original: ‘La fragilità dello status legale degli immigrati costituisce comunque la vulnerabilità giuridicamente più rilevante, date l’impossibilità e la difficoltà – constatabili e ingiustificate – sofferte dai titolari di tali diritti, soprattutto per quanto attiene all’accesso ai diritti sociali. (...) [L]e cause e le conseguenze della vulnerabilità hanno come punto di inizio e di arrivo la stessa normativa sugli stranieri, che permette di riscontrare e perpetuare, all’interno dei diversi ordinamenti, una serie di esclusioni e di disuguaglianze giuridiche. La legge sull’immigrazione produce dunque, per omissione, la vulnerabilità, (...) anche in quanto spesso in essa si rivela l’intento di limitare la tutela dei diritti sociali e l’uguaglianza sostanziale dei soggetti più vulnerabili (...)’.

⁴⁰³ Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20(1) *Yale Journal of Law and Feminism* 1.

⁴⁰⁴ Encarnación La Spina, ‘Migrant vulnerability or asylum seeker/refugee vulnerability? More than complex categories’ (2021) 11 *Oñati Socio-Legal Series* S82.

hereby argued, with the acknowledgment of the compassionate impulse and the generative and innovating force that such condition may trigger. It is this **propulsive energy** and the **anger** this carries that can challenge the preservation of hierarchical and inegalitarian structures and their oppressive production of situation of vulnerability impacting on migrant persons within the current system.

The angle from which the notion of vulnerability is hereby addressed considers especially the role of “power” and “citizenship”, “security” and “law”. This delimitation of scope aids the contextualisation of the production of migrants’ conditions of socio-juridical vulnerability and emphasises elements that adhere to the debate on the categorisation of individuals, the role of policy and the institutional representation of what is “security”. To begin with, *vulnerability* is hereby approached as a catchword: it works as an umbrella term, indicating situations of vulnerability, the use of which must be considerate of its ambiguities and yet speaks of the exigency to promote an original perspective to rethink current institutions and societal relations.⁴⁰⁵ ‘Vulnerability’ is explored here for its **universality and inevitability** as an enduring feature common to the living condition and yet for being **dynamically situational and dependent** on one’s or a group’s conditions. Its inevitable presence in the life of all risks divesting the concept of the *utility* that elements retain when legal consequences can be derived from them: it is for this reason that the definition of the general notion is often tightened to a specific individual or a collectiveness, resulting in the emergence of blurred ‘vulnerable people’ or ‘groups’.⁴⁰⁶ It is argued that reasoning in terms of policy production of situations of vulnerability allows for the developing of a model aware of its structures, silences and implications. This offers the chance to build an alternative vision to the order imposing and order maintaining, having ‘the opportunity to move closer to a more robust idea of equality’, albeit acknowledging the notion of vulnerability’s actualisation pitfalls and paradoxes.⁴⁰⁷

2.2.1 On the scholarship’s representation of vulnerability

Lucia Re, while tracing back the origins of the modern notion of security, observes that vulnerability within the social contract has been associated with conditions of fragility and weakness typical of dependent subjects, incapable of self-governing and therefore excluded from the public sphere: subjects were conceived as weak and inferior depending on the eras, such as “women”, “minors”, “indigents”, “detainees”, etc.⁴⁰⁸ Over time and following the second world war, attention moved from the ‘egocentric’ subject of the modern European philosophical tradition to one constructed in relation to, exposed to and approached by ‘the other’ (*interpellato dall’altro*).⁴⁰⁹ Moving from a deconstruction of such concepts in said philosophy and modern rights, feminist thought landed on the importance of the relationships of care and the interrelated character of the subject.⁴¹⁰ The discourse developed on the universal feature of vulnerability, contested by the proposal, on the other hand, to see the notion as a condition determined by the lack of adequate protections rather than as an ontological fact.⁴¹¹ In the 2000s, authors explored the role of violence in producing vulnerability and the latter’s differential distribution

⁴⁰⁵ Lucia Re, ‘Introduzione. La vulnerabilità fra etica, politica e diritto’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 7.

⁴⁰⁶ Francesca Ippolito, Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups. The European Human Rights Framework* (Hart Publishing, Oxford and Portland 2015) 1.

⁴⁰⁷ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’ (2013) 11(4) *International Journal of Constitutional Law* 1056.

⁴⁰⁸ Lucia Re, ‘Introduzione. La vulnerabilità fra etica, politica e diritto’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 7.

⁴⁰⁹ *ibid.* See reference to Lévinas, Weil and Arendt: ‘(...) spostato l’attenzione dal soggetto “egocentrico” della tradizione filosofica moderna europea a un soggetto che si costruisce in rapporto con l’“altro”, “esposto all’altro” e, al contempo, “interpellato dall’altro”’.

⁴¹⁰ *ibid.*; cf. Elena Pulcini, *Care of the World. Fear, Responsibility and Justice in the Global Age* (Springer 2009); Elena Pulcini, *L’individuo senza passioni. Individualismo moderno e perdita del legame sociale* (Bollati Boringhieri editore s.r.l. 2001).

⁴¹¹ Lucia Re, ‘Introduzione. La vulnerabilità fra etica, politica e diritto’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 7.

through institutional, economic, social and psychological mechanisms that cause some subjects to be more exposed than others to uncertainty (*precarietà*), violence and exploitation.⁴¹² Always in the 2000s, the philosophical theory of vulnerability was progressively transported to other disciplines, such as to political, legal and social theory, as well as to the policy and normative system.⁴¹³ The term spread into the institutional language and therein adopted a variety of different meanings: it has been employed to frame a wide range of social “problems” and has been at times referred to as a universal condition, at times as a “characteristic” of specific target groups.⁴¹⁴ Ontological vulnerability, whether as universal or specific to individuals’ categories, also seems to blur with vulnerability *that is produced* by social institutions themselves.⁴¹⁵ It has moreover been associated with “resilience”, often in neoliberal governance strategies where the subjects’ freedoms risk to be compressed.⁴¹⁶

The current choice of considering [situations of socio-juridical vulnerability migrants may live through due to the law](#), and the argument that [policy does not tackle but produces such situations](#), nestles into a broader vision of collective care and promotion of substantial equality. It engages with an idea(l) of a system where the self-representation of groups that are today placed at the margins is instead respected, their production of knowledges acknowledged and solutions to harm are considered beyond predefined classifications and “self-evident” truths.

The study takes inspiration from the stream of literature and activism that relate to the epistemological function brought forward by migrants’ groups and allies within society. It challenges the conceptualisation behind a hierarchical societal structure that situates citizens at the top and clusters non-citizens progressively at the bottom, contesting an institutional understanding of vulnerability as “enough or not enough” for a non-citizen to be granted access to rights. This section of the research thus aligns with and promotes an attempt to be aware of the risks of subduing the notion of vulnerability to the interests of the surrounding context: vulnerability may be (mis)used as a “mask” by a tyrannical majority to pursue their own social purpose, from that of running into political and cultural imperialism to assuming a paternalistic or illiberal character.⁴¹⁷ The reader might remember the previously mentioned article of the 1998 TUI that titled ‘vulnerable categories’ and included special protection holders, whom, as a category, recently ceased to be recognised. Before its abolishment, the vulnerable category of special protection once had a different label and scope. It was however nevertheless “second” to the recognition of one’s right to international or subsidiary protection. If any such measures did not exist altogether, people would not be encapsulated into said “vulnerable categories” and hypothetically and ideally could more freely “exist”, walk, work and live. Vulnerability is partially produced, mistreated, strategically operationalised, exploited and exacerbated. The study also tries to distance itself, in its language and content, from what it considers narratives that are eager to obstruct subversive and insubordinate “others” against inegalitarian practices. For this reason, chapter four focuses on *resisting* the production of vulnerability by the law itself.

The recognition of rights is the result of social conflicts, which have at times determined the formal establishment of freedoms in the legislative and constitutional texts thanks to the actions conducted by minorities and marginalised groups.⁴¹⁸ Such a view is offered in contrast – or in conflicting coexistence – to a model that seeks to unroot the most radical expressions of resistances and impede the construction of collective subjects, bearers of a social solidarity from the bottom.⁴¹⁹ The research thus resonates with an understanding of vulnerability as bottom-up, linked to equality as an essential

⁴¹² *ibid.*

⁴¹³ *ibid.*

⁴¹⁴ *ibid.*

⁴¹⁵ *ibid.*

⁴¹⁶ *ibid.*

⁴¹⁷ *ibid.*

⁴¹⁸ *ibid.*

⁴¹⁹ *ibid.*

reference to international and European constitutionalism and in opposition to a paternalistic model that implements a selection of the “most vulnerable”.⁴²⁰ The perspective proposed attempts to argue for turning away from a stereotyping and patronising view of “vulnerable groups” to leave room to a narrative of vulnerability fed of anger and solidarity, coming from the groups themselves, their unrest and their transversal alliances. A renewed and reconceptualised understanding of vulnerability can assist in nurturing substantial equality if rid of stigmatisation, stereotyping and essentialisation.⁴²¹ A vulnerability-centred approach, aware of its paradoxes, may be functional to move past current discrimination-based societal models towards a vision of equality: ‘one that is result-oriented and takes into account past circumstances and future obligations, considering need and disadvantage’.⁴²² Operating with vulnerability at the core of policy thinking would allow for the development of richer and more nuanced “subjects” that the state could nevertheless relate to and which institutions’ political and social commitment could revolve around.⁴²³

Vulnerability has commonly been associated with victimhood, dependency, deprivation, pathology and, in matters competing to public responsibility, the notion has been used to define stigmatised subjects or groups.⁴²⁴ Fineman however argues that vulnerability ought to be conceptualised as resulting from ‘our embodiment’, for the constant possibility of being subjected to harm and suffer.⁴²⁵ While this is a characteristic that is universal to all, one’s vulnerabilities may then vary at the individual level.⁴²⁶ Brunella Casalini writes that the tool that has been indispensable to the production of vulnerability is *dualism*.⁴²⁷ This is not intended as a mere dichotomy but as a radical discontinuity between the “centre” and the separate and hierarchically inferior “other”.⁴²⁸ Once the latter is subordinated in fact, it is no longer essential and can be ignored or instrumentally employed: dualism produces inequality.⁴²⁹ The inferior “other” is then also “vulnerabilised” (*vulnerabilizzato*).⁴³⁰ Bacchi also speaks of binaries in identifying how problems are constructed: what dichotomy, such as for instance that of *citizen/migrant*, does the policy problem representation build on?⁴³¹ She defines the production of provisional “subjects” of policy practices as “subjectification”: the “subject” is seen as the in-process result of policies and

⁴²⁰ *ibid.*

⁴²¹ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’ (2013) 11(4) *International Journal of Constitutional Law* 1056; Martha Albertson Fineman, “‘Elderly’ as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility” (2012) 20 *The Elder Law Journal* 71; Anna Grear, *Redirecting Human Rights. Facing the Challenges of Corporate Legal Humanity* (Palgrave Macmillan 2010) 126-136. See also Bryan S. Turner, *Vulnerability and Human Rights* (The Pennsylvania State University, 2006).

⁴²² Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20(1) *Yale Journal of Law and Feminism* 1.

⁴²³ *ibid.*

⁴²⁴ *ibid.*

⁴²⁵ *ibid.*

⁴²⁶ *ibid.*

⁴²⁷ Brunella Casalini, ‘Le teorie femministe contemporanee, dal paradigma della sovranità al paradigma della vulnerabilità’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 27.

⁴²⁸ Val Plumwood, *Environmental Culture. The ecological crisis of reason* (Routledge 2002) 101.

⁴²⁹ Brunella Casalini, ‘Le teorie femministe contemporanee, dal paradigma della sovranità al paradigma della vulnerabilità’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 27.

⁴³⁰ *ibid.*

⁴³¹ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis. A guide to Practice* (Palgrave Macmillan US 2016) 21.

power-knowledge relations.⁴³² The iper-separation performed by dualism brands the “other” as the target of a differentiated and unequal treatment.⁴³³

Casalini further reflects on the debate on dualism and vulnerabilised subjects by observing that the removal of ontological vulnerability and of the human as belonging to a global ecological community do benefit arbitrary limitations that, to this day, have fuelled fundamental constraints, such as the separation of the citizen fully enjoying rights from the stateless or the person living a condition of halved citizenship.⁴³⁴ Such observations are prompts to contextualise migrants’ conditions of socio-juridical vulnerability against the hope to wreck the formal and informal system of hierarchisation of citizenship and acknowledge alternative visions of global communities where rights – and perhaps rights in a current unconceived matter – are enjoyed by persons in view of their presence on this earth. There is a vibrant energy in challenging, through a vision of a global ecological community, the differential distribution of vulnerability which people are subjected to. A distribution of vulnerability that is the result of a more or less conscious ‘opportunity hoarding’ performed by prevailing groups.⁴³⁵

To keep track of the difference between ontological vulnerability and vulnerability produced through differential distribution, Judith Butler speaks of “[precariousness](#)” and “[precarity](#)”: the existential conception of precariousness is linked to a more specifically political notion of precarity.⁴³⁶ Vulnerability is argued to be universal in terms of precariousness and at the same time parcelled out as precarity.⁴³⁷ In the end, this depends on the way economic and social relations are organised and on the presence of support infrastructures and social and political institutions or lack thereof; as soon as vulnerability is articulated in such specific terms, as it has to, one can admit it has never been merely existential.⁴³⁸ Precarity is the differential distribution of vulnerability through processes of [othering](#).⁴³⁹

For both Butler and Adriana Cavarero, vulnerability does not only encompass a negative dimension but also a positive one.⁴⁴⁰ Cavarero writes in fact that inscribed in the condition of vulnerability one finds both [wounding and caring](#).⁴⁴¹ It unfolds that vulnerability can drive others to annihilate us or can generate a [relation of care and ethical attention](#) towards one’s neighbour (*nei confronti del prossimo*).⁴⁴² The idea is that vulnerability does entail “the wound” but with the other plausible side being “the caress”.⁴⁴³ Being in a situation of vulnerability can therefore trigger care. A vision of such kind, one that acknowledges dependence and support for one another, contests the “[autonomy myth](#)”, according to

⁴³² *ibid* 49. See Ben Golder, ‘Foucault and the Unfinished Human of Rights’ (2010) 6(3) *Law, Culture and the Humanities* 354.

⁴³³ Brunella Casalini, ‘Le teorie femministe contemporanee, dal paradigma della sovranità al paradigma della vulnerabilità’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 27.

⁴³⁴ *ibid*.

⁴³⁵ *ibid*. Note to self: see Charles Tilly, *Durable Inequality* (University of California Press 1999).

⁴³⁶ Judith Butler, *Frames of War. When Is Life Grievable?* (Verso 2009) 3.

⁴³⁷ Brunella Casalini, ‘Le teorie femministe contemporanee, dal paradigma della sovranità al paradigma della vulnerabilità’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 27. Judith Butler, *L'alleanza dei corpi. Note per una teoria performativa dell'azione collettiva* (Nottetempo 2017) 110.

⁴³⁸ *ibid*.

⁴³⁹ Brunella Casalini, ‘Le teorie femministe contemporanee, dal paradigma della sovranità al paradigma della vulnerabilità’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 27. Note to self: consider Young.

⁴⁴⁰ *ibid*; Alberto Pinto, ‘Vulnerabilità: come trasformare il dato ontologico in categoria politica. Un confronto tra Adriana Cavarero e Judith Butler’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 49.

⁴⁴¹ Adriana Cavarero, *Horrorism. Naming contemporary violence* (Columbia University Press 2011) 20.

⁴⁴² Alberto Pinto, ‘Vulnerabilità: come trasformare il dato ontologico in categoria politica. Un confronto tra Adriana Cavarero e Judith Butler’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 49.

⁴⁴³ Adriana Cavarero, *Inclinations. A Critique of Rectitude* (Stanford University Press 2016) 161.

which subjects must be autonomous, individually independent and self-sufficient.⁴⁴⁴ The very term of autonomy as it has just been described, writes Martha Albertson Fineman, is indeed to be rethought: ‘independence from subsidy and support is not attainable, nor is it desirable; we want and need the webs of economic and social relationships that sustain us’.⁴⁴⁵ The possibility to rely on state services is one of the main advantages of a relatively ordered modern state.⁴⁴⁶

Autonomy becomes possible when a person finds themselves in a position to share in society’s advantages and burdens; this can happen only when one has the ‘basic resources that enable them to act in ways that are consistent with the tasks and expectations imposed upon them by the society in which they live’.⁴⁴⁷ So understood, the form of autonomy that is sustained by a societal commitment for the provision of basic social needs shall be *every individual’s birth right*.⁴⁴⁸ There is therefore an inherent dependence from all persons on society and ultimately autonomy must be supported through *collective responsibility*: ‘while some, having benefited by history and circumstances, may have the current means and methods that make it fair to expect them to achieve autonomy, other have been disadvantaged and are deserving of some societal support’.⁴⁴⁹

Alberto Pinto observes that *more than worrying about vulnerability one should alarmingly consider the manner in which this is responded to*, for it is in the attempt to deny such an ontological aspect that walls and fences are built to “protect” borders.⁴⁵⁰ The question that emerges from such a reasoning is: *can ontological vulnerability become a political category?*⁴⁵¹ This opposes the myth of autonomy for instance and rethinks ethics and politics from that condition of precariousness and interdependence common to being human: recognising this allows for imagining new conducts and new forms of political mobilisation against the production of differential distribution of precarity among individuals, the lives of whom become more or less expendable.⁴⁵²

Butler writes that

If certain lives do not qualify as lives or are, from the start, not conceivable as lives within certain epistemological frames, then these lives are never lived nor lost in the full sense. (...) [T]he frames through which we apprehend or, indeed, fail to apprehend the lives of others as lost or injured (lose-able or injurable) are politically saturated. They are themselves operations of power.

[I]f we are to make broader social and political claims about rights of protection and entitlements to persistence and flourishing, we will first have to be supported by a new bodily ontology, one that implies the rethinking of precariousness, vulnerability, injurability,

⁴⁴⁴ Martha Albertson Fineman, *The Autonomy Myth. A theory of Dependency* (The New Press 2004); Alberto Pinto, ‘Vulnerabilità: come trasformare il dato ontologico in categoria politica. Un confronto tra Adriana Cavarero e Judith Butler’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 49.

⁴⁴⁵ Martha Albertson Fineman, *The Autonomy Myth. A theory of Dependency* (The New Press 2004) 28-30. The language of the text is not endorsed.

⁴⁴⁶ Eva Feder Kittay, ‘Dipendenza’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 201.

⁴⁴⁷ Martha Albertson Fineman, *The Autonomy Myth. A theory of Dependency* (The New Press 2004) 28-30. The language of the text is not endorsed.

⁴⁴⁸ *ibid.*

⁴⁴⁹ *ibid.*

⁴⁵⁰ Alberto Pinto, ‘Vulnerabilità: come trasformare il dato ontologico in categoria politica. Un confronto tra Adriana Cavarero e Judith Butler’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 49.

⁴⁵¹ *ibid.*

⁴⁵² Alberto Pinto, ‘Vulnerabilità: come trasformare il dato ontologico in categoria politica. Un confronto tra Adriana Cavarero e Judith Butler’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 49, 51-52.

interdependency, exposure, bodily persistence, desire, work and the claims of language and social belonging.

Subjects are constituted through norms which, in their reiteration, produce and shift the terms through which subjects are recognized. (...) The problem is not merely how to include more people within existing norms, but to consider how existing norms allocate recognition differentially. (...) What might be done to produce a more egalitarian set of conditions for recognizability? What might be done (...) to shift the very terms of recognizability in order to produce more radically democratic results?⁴⁵³

Butler colours vulnerability of a political dimension, addressing it as a [legitimising basis for new fights and demands](#) that can place at the centre of the public sphere the [corporeal dimension of all human beings](#) (*base di legittimazione per nuove lotte e rivendicazioni che sappiano mettere al centro della sfera pubblica la dimensione corporea di tutti gli essere umani, con i loro bisogno e le loro necessità*).⁴⁵⁴ A corpoREAL dimension. In the search for new paradigms, vulnerability can be lived as generating a new ethics and a new modality through which intersubjective relations can take place; the experience of exposure to the possibility of harm can generate a sense of solidarity and community with those subjectivities already threatened by it, including exiles and stateless persons.⁴⁵⁵

Reflecting on Sophocles' Philoctetes, Alessandro Grompi observes that protecting the vulnerable shall not correspond to treating them as victim, incapable; such a cognitive distortion that imposes a binary choice between victimhood and agency leads to nonrecognition and paternalism.⁴⁵⁶ To the contrary, since vulnerability is intrinsic to all members of society, it must be safeguarded through political choices, practices and actions that recognise the potentiality to institute a form of *social ethics*.⁴⁵⁷

Fineman argues that society and its institutions could confront harm through the use of politics and law that see [vulnerability as their organisational principle](#), attempting to alleviate the implications deriving from such harm.⁴⁵⁸ The analysis of vulnerability is an attempt to articulate a more aware and informed egalitarian political culture: aspirations of [substantial equality for the vulnerable subject should be the ultimate model to measure the state](#), social institutions and their actions.⁴⁵⁹ The approach would work backwards in a way, spotting and acknowledging the production of harm and tackling it through its very generative system. Should however the 'aspirations' that Fineman refers to rather be expectations?

Because we are positioned differently within a web of economic and institutional relationships, our vulnerabilities range in magnitude and potential at the individual level. Undeniably universal, human vulnerability is also particular: it is experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of resources we possess or can command. (...) Therefore, because both our personal and our social lives are marked and shaped

⁴⁵³ Judith Butler, *Frames of War. When Is Life Grievable?* (Verso 2009) 1-6.

⁴⁵⁴ Alberto Pinto, 'Vulnerabilità: come trasformare il dato ontologico in categoria politica. Un confronto tra Adriana Cavarero e Judith Butler' in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 49.

⁴⁵⁵ Sandra Rossetti, 'La vulnerabilità tra umanesimo e post-umanesimo antispecista' in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 83.

⁴⁵⁶ Alessandro Grompi, 'Il *Filottete* di Sofocle: una riflessione su vulnerabilità e politica' in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 109.

⁴⁵⁷ Alessandro Grompi, 'Il *Filottete* di Sofocle: una riflessione su vulnerabilità e politica' in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 109.

⁴⁵⁸ Martha Albertson Fineman, 'Il soggetto vulnerabile e lo stato responsabile' in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 141.

⁴⁵⁹ *ibid.*

by vulnerability, a vulnerability analysis must have both individual and institutional components.⁴⁶⁰

The development of Fineman's *ontological vulnerability* has contributed to undo the myth of the autonomous and independent individual as "the Liberal Subject",⁴⁶¹ to be replaced by 'the vulnerable subject'; so the development of *situational vulnerability* rejects a homogeneous application of legal principles in a manner irrespective of social power distribution.⁴⁶² Radical particularity in the experience of vulnerability does not in any case deny its essential ontic commonality.⁴⁶³ Vulnerability as a notion is anchored to equality, assuming state's responsiveness to avert harms; the operationalization of the notion however, in addition to its theorisation, presents pitfalls.⁴⁶⁴ What is remarked, despite deficiencies, is that *caring for the situation of the vulnerable redirects attention to the societal institutions created in response to that vulnerability*: this places the vulnerable individual or group into a *social context* and *in relation with those state institutions responsive to and responsible for the subject's vulnerability*.⁴⁶⁵ Alexander Bagattini and Rebecca Gutwald observe that the mere acknowledgment of a condition of human vulnerability neglects to consider the specific contingencies that depend on the existing social arrangement and the contingencies that effectively render people vulnerable.⁴⁶⁶ Vulnerabilities are then not only "happening" but are directly related to states' actions and omissions. Picking up the previously mentioned abrogation of the so called "special protection" in the process of granting or rejecting asylum to an applicant may perhaps serve as an example. A person whom, before the entry into force of the new 2023 decree, could "meet the requirements" to be granted special protection, today can no longer "benefit" from it; this produces an exacerbation of the person's conditions from being an asylum seeker to being rejected. The institution that is responsive to the person's asylum claim is now responsible for a potentially aggravated situation of vulnerability that further marginalises the person, reduces their chances of a peaceful life on the host state territory and

⁴⁶⁰ Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale Journal of Law and Feminism 1.

⁴⁶¹ *ibid*, 10-11 reading: '[c]urrently, dominant political and legal theories are built around a universal human subject defined in the liberal tradition. These theories presume the liberal subject is a competent social actor capable of playing multiple and concurrent societal roles (...). This liberal subject informs our economic, legal, and political principles. It is indispensable to the prevailing ideologies of autonomy, self-sufficiency, and personal responsibility, through which society is conceived as constituted by self-interested individuals with the capacity to manipulate and manage their independently acquired and overlapping resources. The legal metaphor encapsulating this vision of societal organization is "contract." Liberal subjects have the ability to negotiate contract terms, assessing their options and making rational choices. They consent to such agreements in the course of fulfilling society's mandate that they assume personal responsibility for themselves and for their dependants. (...) In addition, the vulnerability perspective calls attention to another problematic characteristic of the liberal subject: S/he can only be presented as an adult. As such, the liberal subject stands not only outside of the passage of time, but also outside of human experience. (...) We must confront this foundational flaw in the liberal model if we are to develop legal and social policies that reflect the lived realities of human subjects'.

⁴⁶² Paolo De Stefani, 'Conceptualizing "Vulnerability" in the European Legal Space: Mixed Migration Flows and Human Trafficking as a Test' (2022) 4 Frontiers in Human Dynamics 1; Anna Grear, *Redirecting Human Rights. Facing the Challenges of Corporate Legal Humanity* (Palgrave Macmillan 2010) 126-128; Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale Journal of Law and Feminism 1.

⁴⁶³ Anna Grear, *Redirecting Human Rights. Facing the Challenges of Corporate Legal Humanity* (Palgrave Macmillan 2010) 134.

⁴⁶⁴ Paolo De Stefani, 'Conceptualizing "Vulnerability" in the European Legal Space: Mixed Migration Flows and Human Trafficking as a Test' (2022) 4 Frontiers in Human Dynamics 1.

⁴⁶⁵ Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale Journal of Law and Feminism 1.

⁴⁶⁶ Alexander Bagattini and Rebecca Gutwald, 'Renderli forti? Vulnerabilità, capacità e resilienza nei bambini poveri' in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 237.

harshens the precarity it had already distributed on existential precariousness. This does not just “happen”, it is produced.

Vulnerability is hereby considered as a universal condition pertaining to all that can however manifest differently on a case-by-case basis, changing in shape and magnitude.⁴⁶⁷ “Particular” situations of vulnerability can therefore occur within the web of economic and institutional relations that place an individual in a position rather than another within the social fabric: everyone may be vulnerable as an inevitable and everlasting human condition, yet some persons may be in situations of vulnerability when relating to the state and social responsibility.⁴⁶⁸ Such, it is argued, is the condition of migrant persons who find themselves on Italian territory and, more in general, within the territory of the European Union. Migration policies adopted have constructed *ex lege* and produced the conditions of vulnerability that affect migrants.⁴⁶⁹

La Spina observes that the capacity of migrants to anticipate, fight, resist or be resilient in the face of a threat is limited by the loss of the social bond inevitably connected to the paradigm of citizenship as nationality.⁴⁷⁰ Such a paradigm fixes the modes of participation to society on the basis of the impossibility or incapability of the migrant person to have their rights guaranteed due to the very belonging to the “foreigner-immigrant” category.⁴⁷¹ The term vulnerability is therefore used to make explicit that migrants may be subjected to the violation of their fundamental rights as well as to situations of exclusion and discrimination that do not derive from personal intrinsic characteristics nor from any alleged inherent danger in the act of migrating, but from the fact that, to various extent, their life may be dependent on the receiving state.⁴⁷² The persistence of the nexus between “immigrant” and “non-citizen” is a fundamental element of the process of characterisation of the migrant person as “particularly vulnerable”, “vulnerable among the vulnerable”.⁴⁷³ “Vulnerability” must therefore be questioned with a view to resist factual and juridical discriminations and their practical consequences by sceptically challenging the upstream policy system regulating, and limiting, migrant persons’ lives, binding them to the inescapable condition of the non-citizen and making their existences dependent from the arbitrary benevolence of an inhospitable host state. Migrants’ vulnerability is treated as a social construction which the law contributes to, producing a situation where the guarantees of the rule of law towards the migrant person are suspended or waived and juridical restrictions are justified depending on the administrative position the person is made to occupy.⁴⁷⁴ Vulnerability is in such cases triggered and perpetuated in virtue of a political, juridical and social conception that remarks the difference between citizens and non-, determining a juridical status that is only partial.⁴⁷⁵ The system works on the assumption that the binary citizen – immigrant holds together antagonistic notions.⁴⁷⁶ But what if it was otherwise?

⁴⁶⁷ Encarnación La Spina, ‘Immigrati nell’Europa Meridionale. Quando “non si nasce ma si diventa” giuridicamente “particolarmente vulnerabili?” poveri’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 315.

⁴⁶⁸ *ibid.*

⁴⁶⁹ *ibid.*

⁴⁷⁰ *ibid.*

⁴⁷¹ *ibid.*

⁴⁷² *ibid.*

⁴⁷³ *ibid.*

⁴⁷⁴ *ibid.*

⁴⁷⁵ *ibid.*

⁴⁷⁶ *ibid.*

2.2.2 On the operationalisation of vulnerability: the European Court of Human Rights

At the regional level, the terms 'vulnerability' and 'vulnerable groups' have been increasingly employed by both the Council of Europe and the European Union.⁴⁷⁷ Dolores Morondo Taramundi reports the literature's observed rise and following decline of the use of such expressions in relation to human and fundamental rights, with an expansion of the terms in the early 2010s that did not however correspond to an harmonisation of meanings or in-depth reflections, resulting in the subsequent difficult actualisation of the notion.⁴⁷⁸

For the study is interested in observing not only the enunciations of and the understandings behind the concept of vulnerability but its use in the system of order maintaining, the following paragraphs outline how terms have been used and elaborated recently at the Council of Europe and European Union level. This fragment of the analysis intends to be concise but propaedeutic to maintaining the core of the research in line with its approach: vulnerability is problematised and knowledges are being produced by the policy system, handing representations down through categories to determine the lives of people and groups who are their ultimate recipients; yet space may be carved by the plasticity and creativity of the latter, whose epistemological function the system shall not ignore. While the previous section explored the meanings behind the notion of vulnerability in the scholarly debate, the following paragraphs attempt to observe the term's operationalisation and performative functions. The platform selected to do so is that of the European Court of Human Rights (ECtHR), as a mechanism monitoring the societal and normative developments occurring at a territorially regional dimension.

What is stressed is the recognised urgency

to employ vulnerability as a critical concept explicitly founded on incarnate embodied life as a common ontic condition of being human, and to use this embodiment-centred critique to explicitly resist the ideological deployment of vulnerability as the foundation of a set of (predictably) stigmatised subjectivities. Vulnerability, as an ontic matter, unites human beings, not only with each other in a way that invites critique of substantive inequalities and their related structural impediments to adequate protection, but unites us, as a species, with all other carbon-based life-forms and the eco-systems of which we are a part.⁴⁷⁹

The concept of vulnerability, Fineman observes, can act as a 'heuristic device, forcing us to examine hidden assumptions and biases into' social, cultural as well as legal practices.⁴⁸⁰ Employing vulnerability as a critical tool can assist in identifying one of its inherent paradoxes: 'diagnose both the "is" and the "ought"', being it a descriptive and prescriptive mean.⁴⁸¹ Agreement is found in the fact that using vulnerability as a tool allows the exploration of how society and institutions, in the manner they are organised, do strengthen, maintain and originally give rise to vulnerabilities.⁴⁸²

The vulnerability paradigm calls on courts to look beyond the identity of the disadvantaged developed over the past few decades under a discrimination paradigm. While the old identity categories – gender, race, sexuality, and so on – should not be totally removed from

⁴⁷⁷ Dolores Morondo Taramundi, 'Un nuovo paradigma per l'uguaglianza? La vulnerabilità tra condizione umana e mancanza di protezione' in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 179; Francesca Ippolito, Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups. The European Human Rights Framework* (Hart Publishing, Oxford and Portland 2015).

⁴⁷⁸ *ibid.*

⁴⁷⁹ Anna Grear, *Redirecting Human Rights. Facing the Challenges of Corporate Legal Humanity* (Palgrave Macmillan 2010) 128.

⁴⁸⁰ Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60(2) *Emory Law Journal* 251, 266 fn 53; Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1.

⁴⁸¹ Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) *International Journal of Constitutional Law* 1056.

⁴⁸² *ibid.*

consideration, we must reframe our concerns in order to reveal and address things about the organization of society that are otherwise missed.⁴⁸³

At the Council of Europe level, the human rights framework is rooted in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter (ESC, revised 1996). The ECHR and the ESC together give binding force to the rights enshrined in the 1948 Universal Declaration of Human Rights (UDHR), for ‘all human rights’ as stated in the UN 1993 Vienna Declaration “are universal, indivisible and interdependent and interrelated.”⁴⁸⁴ While the ECHR guarantees civil and political rights, the ESC guarantees fundamental social and economic rights.⁴⁸⁵ The recognition of situations of vulnerability requiring specific monitoring saw the establishment over time of a range of bodies such as: the said European Court of Human Rights (ECtHR), the European Committee of Social Rights, the European Commission against Racism and Intolerance, the Group of Experts on Action against Trafficking in Human Beings, the Group of Experts on Action against Violence against Women and Domestic Violence, the Advisory Committee on the Framework Convention for the Protection of National Minorities and the Gender Equality Commission. Not all instruments that recognise persons’ or groups’ possible situations of “vulnerability” do recur to such a wording, supporting the observed rise of the use of the term only in more recent decades. Browsing through the most relevant frameworks in place in their English version, no literal reference to the term “vulnerability” and/or “vulnerable” appears in the 1995 Framework Convention for the Protection of National Minorities, the 1996 revised European Social Charter, the 1996 European Convention on the Exercise of Children’s Rights. The words “vulnerability” and/or “vulnerable” instead appear in the 2005 Convention on Action Against Trafficking in Human Beings, the 2007 Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, the 2011 Convention on preventing and combating violence against women and domestic violence, the 2015 Convention against Trafficking in Human Organs. The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) nor its Protocols show any reference to the terminology of “vulnerability”. At the European Union level, the normative human rights law framework is complemented by, in addition to the core founding treaties, the Charter of Fundamental Rights of the European Union (EU Charter).⁴⁸⁶ Its binding character is recognised by the Treaty on the European Union (TEU), which also establishes the EU shall accede to the ECHR.⁴⁸⁷ The EU Charter reaffirms the rights deriving from: international obligations and constitutional traditions of EU states, the ECHR and the European Social Charter, the Court of Justice of the European Union’s (CJEU) and the ECtHR case law.⁴⁸⁸ The Court of Justice of the European Union (CJEU), which includes the Court of Justice (ECJ) and the General Court,⁴⁸⁹ is ‘the supreme interpreter of

⁴⁸³ Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20(1) Yale Journal of Law and Feminism 1.

⁴⁸⁴ Vienna Declaration and Programme of Action (adopted by the World Conference on Human Rights in Vienna on 25 June 1993) 5 <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>> accessed 2 June 2023.

⁴⁸⁵ For an overview see: ‘European Social Charter and European Convention on Human Rights’ (Council of Europe Portal) <<https://www.coe.int/en/web/european-social-charter/-european-social-charter-and-european-convention-on-human-rights>> accessed 1 June 2023.

⁴⁸⁶ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

⁴⁸⁷ TEU [2008] OJ C115/13, arts 2, 6; TFEU [2012] OJ C326/47 art 218(6)(a)(ii), 2018(8) and Protocol No. 8 relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms. See also Sonia Morano-Foadi and Stelios Andreadakis, *Protection of Fundamental Rights in Europe. The Challenge of Integration* (Springer 2020) 6.

⁴⁸⁸ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, preamble.

⁴⁸⁹ Prior to Lisbon, the courts of the Community were the Court of Justice (ECJ), the Court of First Instance and judicial panels; titles were modified by the Lisbon Treaty. Article 19(1) of the TEU establishes that specialised courts operate within the CJEU; in 2016 the Civil Service Tribunal that had been established in 2004 ceased to operate and its jurisdiction was transferred to the General Court. See Paul Craig and Gráinne de Búrca, *EU Law: text, cases and material* (5th edn, OUP 2011) 58; Anthony Arnall and Damian Chalmers (eds), *The Oxford Handbook of European Law* (OUP 2015), 58; ‘The Institution. General Presentation’ (Court of Justice of the European Union) <https://curia.europa.eu/jcms/jcms/Jo2_6999/en/> accessed 2 May 2021.

EU law'.⁴⁹⁰ In term of migration governance, the so called 2003 Reception Conditions directive generally reads that states shall take into account the specific situations of "vulnerable persons" among migrants, including: minors, unaccompanied minors, disabled persons, elderly persons, pregnant women, single parents with minor children, persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.⁴⁹¹ The same can be said for the 2008 Return directive.⁴⁹² The 2005 Asylum Procedure directive only mentions safeguards should be laid down for unaccompanied minors 'on account of their vulnerability' and that states should ensure that the personnel who conduct a personal interview is 'sufficiently competent' in taking into account also the 'applicant's cultural origin or vulnerability, insofar as it is possible to do so'.⁴⁹³

The following paragraphs explore the use of the word and notion of 'vulnerability' in the jurisprudence of the ECtHR, seen as a platform binding all CoE and EU member states, with specific reference to *vulnerable groups*, drawing *inter alia* from the study of Lourdes Peroni and Alexandra Timmer.⁴⁹⁴ They observe that within legal scholarship a tension exists between group-based and universality-based vulnerability: the notion is either employed in relation to specific peoples or is developed with a universal scope.⁴⁹⁵ They analyse vulnerability not in terms of persons who find themselves in a vulnerable position individually but develop a group-centred analysis of the use of the notion. The authors submit that the ECtHR has developed over time a vulnerable-group reasoning: rather than proposing vulnerability as a tool that has the potentials to capture "the universal", the Court brings forward a notion that builds on "the particular".⁴⁹⁶ What they contend is however that the two approaches can neatly reconcile: every person before the Court is vulnerable but some are more vulnerable than others.⁴⁹⁷ This also acknowledges individuals' different vulnerabilities, recognising their construction by political, economic and social processes of inclusion and exclusion.⁴⁹⁸

Operationalising the concept of 'vulnerable groups', the ECtHR has in this respect originally drafted its emergence in relation to the Roma minority,⁴⁹⁹ while as of 2013 the Court moved on to regard people

⁴⁹⁰ Sonia Morano-Foadi and Stelios Andreadakis, *Protection of Fundamental Rights in Europe. The Challenge of Integration* (Springer 2020) 29-32. See also the so called Lisbon judgment (BVerfG Lissabon (Treaty of Lisbon) BVerfG 123, 267) and the principle of *Kompetenz-Kompetenz*.

⁴⁹¹ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18 art 17(1) <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF>> accessed 2 May 2023.

⁴⁹² 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 [2008] OJ L 348/98 arts 3(9), see also 4(4)(a), 14(1)(d), 16(3) <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:en:PDF>> accessed 1 May 2023.

⁴⁹³ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13 preamble (14), art 13(3)(a) <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>> accessed 1 May 2023.

⁴⁹⁴ Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) International Journal of Constitutional Law 1056.

⁴⁹⁵ *ibid.* See also Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale Journal of Law and Feminism 1.

⁴⁹⁶ Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) International Journal of Constitutional Law 1056.

⁴⁹⁷ *ibid.*

⁴⁹⁸ *ibid.*

⁴⁹⁹ See for instance *D.H. and Others vs The Czech Republic*, Application no. 57325/00 (ECtHR, 13 November 2007) para 182 reading: 'The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority (see also the general observations in the Parliamentary Assembly's Recommendation No. 1203 (1993) on Gypsies in Europe, cited in paragraph 56 above, and point 4 of its Recommendation no. 1557 (2002) on the legal situation of Roma in Europe, cited in paragraph 58 above). As the Court has noted in previous cases, they therefore require special protection (see paragraph 181 above)'; | *Oršuš and Others vs Croatia*, Application no. 15766/03 (ECtHR, 16 March 2010) para 147, reading: 'While

with mental disability as a vulnerable group,⁵⁰⁰ as well as people living with HIV⁵⁰¹ and asylum-seekers.⁵⁰² Indeed, among the many excluded groups from a purportedly universal protection are '(especially) asylum seekers'.⁵⁰³

Peroni and Timmer retrace that the *Chapman vs the United Kingdom* case in 2001 introduced the idea of group vulnerability. The Court there argued that the vulnerable position of who was in the text referred to as 'Gypsies' as a minority suggested that a degree of special consideration was to be given to their needs and lifestyle 'both in the relevant regulatory planning framework and in reaching decisions in particular cases'.⁵⁰⁴ More than the conditions of vulnerabilities that members of the Roma and Sinti community may have experienced as a group, the Court referred in the judgment to the pressure that development policies exercise on the minority's tradition of a travelling lifestyle and on maintaining one's identity, finding however in the end no violation of articles 8 and 14.⁵⁰⁵ Despite not focusing on a strict vulnerable-group approach, the case sets the basis for it. The reader is further invited to pause on the joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall, writing

the case at issue concerns the individual situation of the fourteen applicants, the Court nevertheless cannot ignore that the applicants are members of the Roma minority. Therefore, in its further analysis the Court shall take into account the specific position of the Roma population. As the Court has noted in previous cases that as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority (...).

⁵⁰⁰ See for instance *Alajos Kiss vs Hungary*, Application no. 38832/06 (ECtHR, 20 May 2010) para 42 reading: '(...) In addition, if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question (cf. also the example of those suffering different treatment on the ground of their gender - *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 78, Series A no. 94, race - *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 182, ECHR 2007-..., or sexual orientation - *E.B. v. France* [GC], no. 43546/02, § 94, ECHR 2008-...). The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs (cf. *Shtukaturv v. Russia*, no. 44009/05, § 95, 27 March 2008)'.
⁵⁰¹ *Kiyutin vs Russia*, Application no. 2700/10 (ECtHR, 10 March 2011) paras 63-64 reading: 'If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs (see *Alajos Kiss v. Hungary*, no. 38832/06, § 42, 20 May 2010). In the past, the Court has identified a number of such vulnerable groups that suffered different treatment on account of their sex (see *Abdulaziz, Cabales and Balkandali*, cited above, § 78, and *Burghartz v. Switzerland*, 22 February 1994, § 27, Series A no. 280-B), sexual orientation (see *Schalk and Kopf v. Austria*, no. 30141/04, § 97, ECHR 2010, and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 90, ECHR 1999-VI), race or ethnicity (see *D.H. and Others*, cited above, § 182, and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII), mental faculties (see *Alajos Kiss*, cited above, § 42, and, *mutatis mutandis*, *Shtukaturv v. Russia*, no. 44009/05, § 95, ECHR 2008), or disability (see *Glor*, cited above, § 84) (...)'.

⁵⁰² Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) International Journal of Constitutional Law 1056.
⁵⁰³ *ibid*; Anna Grear, *Redirecting Human Rights. Facing the Challenges of Corporate Legal Humanity* (Palgrave Macmillan 2010) 112, 150-115, 202.
⁵⁰⁴ *Chapman vs the United Kingdom*, Application no. 27238/95 (ECtHR, 18 January 2001) para 96. The paragraph cites the *Buckley vs the United Kingdom*, Application no. 20348/92 (ECtHR, 29 September 1996) although, as pointed out by Peroni and Timmer, the text of the judgment does not mention the concept of vulnerability. Reference to 'a minority as vulnerable as the Gypsies' is contained in the Partly Dissenting Opinion of Judge Repik to the case.
⁵⁰⁵ *ibid* paras 73, 93, 96-98, 115-116, 127-130.

This is one of five cases brought before our Court concerning the problems experienced by Gypsies in the United Kingdom. There are more awaiting our examination. All disclose elements of hardship and pressure on a vulnerable group within the community.⁵⁰⁶

The Convention has always to be interpreted and applied in the light of current circumstances (...). There is an emerging consensus amongst the member States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (...), not only for the purpose of safeguarding the interests of the minorities themselves but also in order to preserve a cultural diversity of value to the whole community. This consensus includes a recognition that the protection of the rights of minorities, such as Gypsies, requires not only that Contracting States refrain from policies or practices which discriminate against them but also that, where necessary, they should take positive steps to improve their situation through, for example, legislation or specific programmes (...). In our view, this [the majority's conclusion] does not reflect the clearly recognised need of Gypsies for protection of the effective enjoyment of their rights and perpetuates *their vulnerability as a minority* whose needs and values differ from those of the general community (emphasis added).⁵⁰⁷

Of interest is also the observation shared by Judge Bonello in a further separate opinion in relation to the findings on article 8, stating that

A public authority has as great an obligation to comply with the law as any individual. Its responsibility is eminently more than that of individuals *belonging to vulnerable classes* (emphasis added) who are virtually forced to disregard the law in order to be able to exercise their fundamental right to a private and family life – individuals who have to contravene the law due to the operation of the prior failings of the public authorities (...). Why a human rights court should look with more sympathy at the far-reaching breach of law committed by the powerful than at that forced on the weak has not yet been properly explained. Here, we are confronted with a situation in which an individual was “entrapped” into breaking the law because a public authority was protected in its own breach. A court's finding in favour of the latter, to the prejudice of the former, is, I believe, a disquieting event. A human rights court, in finding that an authority, manifestly on the wrong side of the rule of law, has acted “in accordance with the law” creates an even graver disturbance to recognised ethical scales of value.⁵⁰⁸

Although not playing a definitive role in the Court's reasoning, the case considered the applicant's belonging to a group and constructed the group's vulnerabilities also assessing the relevant societal circumstances and power differentials.⁵⁰⁹ Over time, other groups were proposed as vulnerable by the ECtHR. Peroni's and Timmer's understanding of the concept as operationalised by the Court is that this is *relational, particular and harm-based*:

- relational: for vulnerability is triggered by the individual's wider social circumstances and is 'shaped by social, historical and institutional forces';
- particular: for the subject is not vulnerable as a human being but as a member of a 'particularly' vulnerable group;
- harm-based: for harm of *misrecognition*, discrimination and *maldistribution*.⁵¹⁰

⁵⁰⁶ *ibid* Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall para 1.

⁵⁰⁷ *ibid* 3-4.

⁵⁰⁸ *ibid* Separate Opinion of Judge Bonello paras 6-8.

⁵⁰⁹ Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) *International Journal of Constitutional Law* 1056.

⁵¹⁰ *ibid*.

Misrecognition, as Peroni and Timmer define it, derives from historical prejudice against and stigmatisation of a group and its members and has been an indicator informing the Court's case assessment.⁵¹¹ Other indicators are social disadvantage and material deprivation, which give rise to cases where the Court addressed the harm of maldistribution.⁵¹²

One of the so-defined maldistribution cases where the Court expressed its view on group-vulnerability is the 2011 *M.S.S. vs Belgium and Greece* case. The proceedings were brought to the court by an [asylum-seeking applicant](#).

The refugee, the asylum seeker, those who stand most juridically naked, these human beings arguably provide the bottom-line test for an adequate conception of international human rights subjectivity, as a foundation of embodied vulnerability suggests.⁵¹³

Given its relevance, the following paragraphs provide the reader with an overview of the facts reported and the merits the ECtHR decided upon.

2011 | *M.S.S. v Belgium and Greece*

The circumstances of the case see the applicant leaving Kabul in 2008 and entering the EU through Greece, where his fingerprints were taken.⁵¹⁴ He was detained for a week and issued an expulsion order upon release.⁵¹⁵ He did not apply for asylum.⁵¹⁶ He travelled to Belgium, where he presented himself to the pertinent office in 2009 without identity documents and there filed for asylum.⁵¹⁷ The examination of the applicant's fingerprints revealed his arrival in Greece and, while being placed into a reception centre, the Belgian authorities submitted a request for the Greek ones to care for his asylum application.⁵¹⁸ Receiving no response after the Dublin Regulation's two-month established period for a decision to be pending, the Belgian authorities considered the absence of confirmation a tacit consent.⁵¹⁹ Meanwhile, due to deficiencies in reception and asylum management, the UNHCR recommended Belgium to suspend transfer to Greece.⁵²⁰ The applicant was refused asylum in Belgium and ordered to leave on the basis that, under the Dublin Regulation, the state responsible for the case was Greece and there was no reason to suspect that the latter would have not taken charge of the matter.⁵²¹ The applicant was guaranteed he would be able to ask for asylum in Greece.⁵²² On the same day of the expulsion order the applicant was placed in detention ("in closed facility 127 *bis* for illegal aliens"). Several were the attempts made by the applicant to halt his expulsion but these were all rejected, including an application to the ECtHR for his transfer to be suspended, which was refused on 'the express understanding that Greece, as a Contracting State, would abide to its obligations'.⁵²³ He was indeed transferred to Greece where he applied for asylum and lived with no means of subsistence.⁵²⁴ Having no residence address to provide for his application to proceed, as he was told, he had not returned to the police station as

⁵¹¹ See for instance: *D.H. and Others vs The Czech Republic*, Application no. 57325/00 (ECtHR, 13 November 2007) para 182; *Oršuš and Others vs Croatia*, Application no. 15766/03 (ECtHR, 16 March 2010) para 147; *Alajos Kiss vs Hungary*, Application no. 38832/06 (ECtHR, 20 May 2010) para 42; *Kiyutin vs Russia*, Application no. 2700/10 (ECtHR, 10 March 2011) paras 63-64; *V.C. vs Slovakia*, Application no. 18968/07 (ECtHR, 8 November 2011) paras 146, 117-179; *Sampanis and Others vs Greece*, Application no. 59608/09 (ECtHR, 11 December 2012) para 76; *Horváth and Kiss vs Hungary*, Application no. 11146/11 (ECtHR, 29 January 2013) paras 102, 104, 110, 115, 119, 122, 128. Ongoing research on the jurisprudence.

⁵¹² See for instance: *Yordanova and Others vs Bulgaria*, Application no. 25446/06 (ECtHR, 24 April 2012) para 129, 132; *M.S.S. vs Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011).

⁵¹³ Anna Grear, *Redirecting Human Rights. Facing the Challenges of Corporate Legal Humanity* (Palgrave Macmillan 2010) 202.

⁵¹⁴ *M.S.S. vs Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011) para 9.

⁵¹⁵ *ibid* 10.

⁵¹⁶ *ibid*.

⁵¹⁷ *ibid* 11.

⁵¹⁸ *ibid* 12-14.

⁵¹⁹ *ibid* 14.

⁵²⁰ *ibid* 16.

⁵²¹ *ibid* 17.

⁵²² *ibid*.

⁵²³ *ibid* 17-32.

⁵²⁴ *ibid* 33-42.

instructed and his application had been stalled.⁵²⁵ As the ECtHR was kept informed of the applicant's condition, it chose to apply Rule 39 against Greece and indicated no deportation was to occur while proceedings were pending.⁵²⁶ Caught while attempting to leave Greece with false identity documents, the applicant was arrested by Greek authorities and sentenced to an administrative expulsion procedure, which was subsequently revoked as he had applied for asylum prior to his arrest.⁵²⁷ As his staying was extended, he informed the police he had nowhere to live and requested for an accommodation, the address of which however was never communicated to him.⁵²⁸ The applicant did not eventually attend his asylum interview, claiming he was not informed of it, and in September 2010 he once again attempted to leave Greece for Italy, having heard that reception conditions there were more decent.⁵²⁹ He was however stopped by Greek police and brought to the Turkish border to be expelled, although at the last moment this did not occur.⁵³⁰ In the description of his several detentions, the applicant alleged brutal conditions and beatings. Circumstances of such kind, as well as the lack of assistance upon arrival and the difficult living conditions for asylum-seekers in Greece, were indeed confirmed by international monitoring.⁵³¹

In the case, the applicant complained of a violation of article 3, claiming that the conditions of detentions he was subjected to at the airport in Athens, where he was kept upon arrival from Belgium and upon a subsequent arrest, amounted to inhuman and degrading treatment.⁵³² In multiple occasions the ECtHR had held that confining an asylum-seeker under certain conditions of deprivation, to be assessed on an *ad hoc* basis, amounted to degrading treatment.⁵³³ More specifically, the cases *S.D. vs Greece*, *Tabesh vs Greece* and *A.A. vs Greece* respectively stated:

Il est difficile pour la Cour d'établir avec certitude quelle était la réalité à laquelle a dû faire face le requérant, d'autant plus qu'outre les rapports de différentes institutions qui dressent un tableau désolant du centre de détention du poste frontière (...). (...) [I]l a séjourné [au centre de détention de Soufli] deux mois, enfermé dans une baraque préfabriquée, sans possibilité de sortir à l'extérieur, sans possibilité de téléphoner et sans pouvoir disposer de couvertures, de draps propres et de produits d'hygiène suffisants. (...) De même, au centre de détention pour étrangers de l'Attique (Petrourali), le requérant a été confiné pendant six jours dans sa cellule, sans possibilité de promenade en plein air (...). Eu égard à ce qui précède, la Cour estime que les conditions de détention du requérant, en tant que réfugié et demandeur d'asile, combinées à la durée excessive de sa détention en de pareilles conditions, s'analysent en un traitement dégradant. Il y a donc eu violation de l'article 3 de la Convention.⁵³⁴

En général, la Cour considère que les insuffisances quant aux activités récréatives et à la restauration appropriée du requérant résultent du fait que les locaux de police de Thessalonique n'étaient pas des lieux appropriés pour la détention que le requérant a dû y subir. De par leur nature même, il s'agit de lieux destinés à accueillir des personnes pour de très courtes durées. Par conséquent, ils n'étaient en rien adaptés aux besoins d'une détention de trois mois et imposée, de plus, à une personne qui ne purgeait pas une peine pénale mais se trouvait en attente de l'application d'une mesure administrative (...). En somme, la Cour estime que le fait de maintenir le requérant en détention pendant trois mois dans les locaux de la sous-direction de

⁵²⁵ *ibid.*

⁵²⁶ *ibid.*

⁵²⁷ *ibid* 43-53.

⁵²⁸ *ibid.*

⁵²⁹ *ibid.*

⁵³⁰ *ibid.*

⁵³¹ *ibid* 159-172.

⁵³² *ibid* 204-206.

⁵³³ *ibid* para 222.

⁵³⁴ *S.D. vs Greece*, Application no. 53541/07 (ECtHR, 11 September 2009) paras 49-54.

la police des étrangers de Thessalonique s'analyse en un traitement dégradant, au sens de l'article 3 de la Convention.⁵³⁵

En l'espèce, la Cour note, tout d'abord, que les allégations du requérant concernant l'état du centre [de Samos] où il a été détenu pendant trois mois sont corroborées par plusieurs rapports concordants d'organisations internationales et d'organisations non gouvernementales grecques. (...) le médecin du centre a confié à l'avocat présent au centre de détention qu'elle avait demandé, le 18 mai au plus tard, le transfert du requérant à l'hôpital afin qu'il y subisse un examen radiologique car il semblait avoir des côtes cassées (...). Le transfert n'a été effectué que le 19 juillet (...). Il y a donc eu violation de cet article [article 3 de la Convention] tant en raison des conditions de vie prévalant dans le centre de détention, ayant entraîné à l'encontre du requérant un traitement dégradant, qu'en raison du manque de diligence des autorités de lui apporter une assistance médicale appropriée.⁵³⁶

The Court had furthermore previously made observations on the very nature of detention in *transit zones* before expulsion:

Cela étant, la Cour estime que le centre de détention du commissariat de Larissa n'était pas un lieu approprié pour une détention aussi longue que celle infligée au requérant. De par sa nature même, il s'agit d'un lieu destiné à accueillir des prévenus pour une courte durée et non pas pour une période de trois mois. Présentant des caractéristiques pouvant faire naître chez le détenu un sentiment de solitude, sans enceinte extérieure pour se promener ou faire de l'exercice physique, ni structure de restauration interne, ni poste de radio ou de télévision pour avoir un contact avec le monde extérieur, le centre de détention, même s'il offre des conditions acceptables pour une courte détention, n'est pas pour autant adapté aux besoins d'une incarcération prolongée (...).⁵³⁷

And almost identically:

The transit zone [of Brussels National Airport] was not an appropriate place in which to detain the applicants. By its very nature it is a place designed to accommodate people for very short periods. With characteristics liable to give those detained there a feeling of solitude, with no access outside to take a walk or have physical exercise, without internal catering arrangements or contact with the outside world, the transit zone is wholly inappropriate to the needs of a stay of more than ten days.⁵³⁸

In the *M.S.S. vs Belgium and Greece* case, the Court recognised that in its previous decisions on administrative detention conditions in Greece amounting to degrading treatment, it had given consideration to 'the fact that the applicants were asylum-seekers'.⁵³⁹ The Greek government's argument that the periods of confinement the applicant was subjected to were brief was irrelevant to the Court, which instead stated: 'the Court must take into account that *the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through* during his migration and the traumatic experiences he was likely to have endured previously (emphasis added)'.⁵⁴⁰

The circumstances of detention of the applicant were found to be 'unacceptable' and indeed violated article 3, for

⁵³⁵ *Tabesh vs Greece*, Application no. 8256/07 (ECtHR, 26 November 2009) paras 38-44.

⁵³⁶ *A.A. vs Greece*, Application no. 12186/08 (ECtHR, 22 July 2010) paras 57-65.

⁵³⁷ *Kaja vs Greece*, Application no. 32927/03 (ECtHR, 27 July 2006) para 49.

⁵³⁸ *Riad and Idiab vs Belgium*, Application no. 29787/03 and 29819/03 (ECtHR, 24 January 2008) para 104.

⁵³⁹ *M.S.S. vs Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011) para 231.

⁵⁴⁰ *ibid* 232.

taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker.⁵⁴¹

Also in relation to the living situation of the applicant in Greece, the Court found a violation of article 3.⁵⁴² Entering the merits of the claim, it was observed that states have a positive law obligation to provide for accommodation and decent material conditions to asylum-seekers who are impoverished.⁵⁴³ Council Directive 2003/9/EC *inter alia* (Reception Directive) lays down minimum standards for the reception of asylum-seekers in member states: domesticated by Greece after the Court of Justice of the European Union (CJEU, back then CJEC) found in 2007 that Greece did not fulfil the Directive obligations, it clearly states that member states shall ensure that material reception conditions are available to asylum applicants.⁵⁴⁴ 'Material reception conditions' include housing, food, clothing and a daily expenses allowance at reception, whether in kind, as financial allowances or in vouchers.⁵⁴⁵ Provisions shall ensure a standard of living adequate for the health and subsistence of the applicants; this shall be met in the situation of persons with special needs and persons who are in detention as well.⁵⁴⁶ Health care shall also be ensured: applicants must receive at least emergency care and essential treatment of illness.⁵⁴⁷

The applicant held before the ECtHR that it was impossible to avail himself of any rights and provide for his essential needs due to the Greek authorities' deliberate actions or omissions.⁵⁴⁸ Against this background, the Court borrowed the wording of the *Oršuš and Others v. Croatia* case on the vulnerability of the Roma population⁵⁴⁹ and stated that it 'attaches considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (emphasis added)'.⁵⁵⁰ It further reiterated the possibility that the situation of an applicant facing official indifference when in a state of serious deprivation that is not compatible with one's dignity could amount to "treatment" under article 3 and give rise to state responsibility.⁵⁵¹ In *M.S.S. vs Belgium and Greece*, the ECtHR observed that the living conditions

⁵⁴¹ *ibid* 233.

⁵⁴² *ibid* 246.

⁵⁴³ *ibid* 250. If interested in the mentioning of 'positive law' by the Court in this case, see also the concurring opinion of Judge Rozakis, *M.S.S. vs Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011) 91.

⁵⁴⁴ *M.S.S. vs Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011) paras 84, 250. See also: *Commission v Greece*, Case C-72/06 (CJEU, 19 April 2007) <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62006CJ0072>> accessed 10 January 2023; Directive 2003/9/EC 'Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers' *OJ L 31/18* art 13 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:En:PDF>> accessed 10 January 2023.

⁵⁴⁵ Directive 2003/9/EC 'Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers' *OJ L 31/18* art 2(j) <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:En:PDF>> accessed 10 January 2023.

⁵⁴⁶ *ibid* 13.

⁵⁴⁷ *ibid* 15.

⁵⁴⁸ *M.S.S. vs Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011) para 250.

⁵⁴⁹ *Oršuš and Others v. Croatia*, Application no. 15766/03 (ECtHR, 16 March 2010) para 147, reading: 'While the case at issue concerns the individual situation of the fourteen applicants, the Court nevertheless cannot ignore that the applicants are members of the Roma minority. Therefore, in its further analysis the Court shall take into account the specific position of the Roma population. As the Court has noted in previous cases that as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority (...)'.
⁵⁵⁰ *M.S.S. vs Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011) para 251.

⁵⁵¹ *ibid* 253; on this point see *inter alia Budina vs Russia*, Application no. 45603/05 (ECtHR, First Section, 18 June 2009) reading 'The Court cannot exclude that State responsibility could arise for "treatment" where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity'.

described by the applicant exist ‘on a large scale’ and are ‘the everyday lot of a large number of asylum-seekers with the same profile’.⁵⁵² Such a situation is found to be linked to the applicant’s ‘status as an asylum-seeker’ and to the fact his application had not yet been assessed.⁵⁵³ The Court thus argued that the Greek authorities did not have due regard ‘to the applicant’s vulnerability as an asylum-seeker’ and are therefore responsible, by inaction, for the fact he lived on the streets with no resources or access or means of providing for his essential needs, subjected to a treatment that aroused in his person fear, anguish and feelings of inferiority that induced desperation.⁵⁵⁴ Combined with prolonged uncertainty and a complete absence of prospects of improvement, such circumstances were regarded as reaching the level of severity incompatible with article 3.⁵⁵⁵

The applicant further argued he had no effective remedy in Greece, alleging a violation by Greece of article 13 in conjunction with article 2 and 3 due to the deficiencies of the asylum application procedure.⁵⁵⁶ The Court reiterated that in cases of expulsion of asylum-seekers, it does not itself assess the asylum application in question or examine whether states do fulfil their obligations, for its interest is to consider whether there are guarantees that can protect the applicant against arbitrary *refoulement*.⁵⁵⁷ A violation of article 13 in conjunction with article 3 was found.⁵⁵⁸

The applicant argued violation of articles 2 and 3 by the Belgian authorities for deporting him to Greece while aware of the system’s deficiencies and not assessing the risks he faced.⁵⁵⁹ A violation of article 3 was found.⁵⁶⁰ Along the same line, a violation of article 3 was also found for Belgium exposed the applicant to the appalling conditions of detention and living conditions in Greece.⁵⁶¹ Belgium was further found in violation of article 13 in conjunction with article 3.⁵⁶²

The development of the vulnerable-group approach as described in this case derives *inter alia* from a recognition of the applicant’s dependency on state support and of the fact that situations like the one he was subjected are not exceptional but exist on a large scale, being them due to institutional deficiencies of the asylum system.⁵⁶³ Peroni and Timmer conclude that ‘[b]y unveiling all these deficiencies in the Greek asylum system, [the Court is ultimately pointing to the institutional production of vulnerability of asylum seekers](#) in Greece’.⁵⁶⁴

They acknowledge that, given the Court’s use of a variety of indicators to determine the vulnerability of a population, other groups could have fallen within this notion by then, resulting in the judges’ perplexing silences and omissions when confronted with other alarming circumstances.⁵⁶⁵ The Court’s reasoning, they argue, ran the risk of underpinning groups’ vulnerability by essentialising, stigmatising, victimising and paternalizing them.⁵⁶⁶

The Court risks essentialising for: it reasons along the lines of a homogenous and unitary vulnerable group, ignoring the different vulnerabilities of subgroups and individuals; and it ‘policies the group’s

⁵⁵² *M.S.S. vs Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011) para 255.

⁵⁵³ *ibid.*

⁵⁵⁴ *ibid* para 263.

⁵⁵⁵ *ibid* para 263-264.

⁵⁵⁶ *ibid* para 265.

⁵⁵⁷ *ibid* para 286.

⁵⁵⁸ *ibid* para 321-322.

⁵⁵⁹ *ibid* para 323.

⁵⁶⁰ *ibid* paras 360-361.

⁵⁶¹ *ibid* paras 362-368.

⁵⁶² *ibid* paras 369, 396.

⁵⁶³ *ibid* paras 253-264.

⁵⁶⁴ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’ (2013) 11(4) *International Journal of Constitutional Law* 1056.

⁵⁶⁵ *ibid.*

⁵⁶⁶ *ibid.*

boundaries, applying a criterion of immutability to the definition of membership to a vulnerable group by birth for instance and not by choice'.⁵⁶⁷ Essentialism in this sense entails treating the group's alleged features as defining ones, which cannot be altered nor doubted for this would undercut the person's claimed belonging to that group.⁵⁶⁸ Moreover, there is a risk to trigger some degree of "competition" among groups the vulnerability of which ought to be recognised.⁵⁶⁹

Asylum-seekers differ to some extent from the above-identified "particularly vulnerable groups". They are not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion. In fact, they are not socially classified, and consequently treated, as a group. For the reasons identified by the Court, it is possible that some or many asylum-seekers are vulnerable (...), but this does not amount to a rebuttable presumption with regard to the members of the "class". Asylum-seekers are far from being homogeneous, if such a group exists at all.⁵⁷⁰

Even if the Court is not tempted to follow the path of the welfare revolution, an odd situation will arise. For example, the mentally disabled, vulnerable as they may be, will not be entitled to the care of the State as their vulnerability is attributable to nature and the conditions causing their suffering and humiliation are not attributable to the passivity of the State. Unlike this undeniably vulnerable group, however, asylum-seekers will be entitled to government-provided services. (...) Even if asylum-seekers were as vulnerable as the traditionally discriminated vulnerable groups, which they are not (...).⁵⁷¹

The preponderance in the law of the reference to "vulnerable groups" reduces the complexity of single vulnerabilities.⁵⁷² Stigmatisation is another element of the application of the concept of group-vulnerability that is reviewed. By labelling a group "vulnerable" the Court risks to deny all other (positive) characteristics of that group and more nuanced identity.⁵⁷³ Moreover, at times the Court resorts to paternalistic tones and disempowering language.⁵⁷⁴

I still have the same impression: the hearing room of the Grand Chamber had become an [ivory tower](#), divorced from the life and problems of the minor applicants and their parents, a place

⁵⁶⁷ *ibid.* See reference to the decision of inadmissibility of *Sharon Horie vs The United Kingdom*, Application no. 31845/10 (ECtHR, 1 February 2011) paras 26-29, 32. See furthermore Anne Philips, 'What's wrong with Essentialism?' (2010) 20 *Distinktion: Scandinavian Journal of Social Theory* 47.

⁵⁶⁸ Anne Philips, 'What's wrong with Essentialism?' (2010) 20 *Distinktion: Scandinavian Journal of Social Theory* 47.

⁵⁶⁹ Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) *International Journal of Constitutional Law* 1056.

⁵⁷⁰ *M.S.S. vs Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011) Partly Concurring and Partly Dissenting Opinion of Judge Sajó 102.

⁵⁷¹ *ibid* 104.

⁵⁷² Encarnación La Spina, 'Immigrati nell'Europa Meridionale. Quando "non si nasce ma si diventa" giuridicamente "particolarmente vulnerabili"? poveri' in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 315.

⁵⁷³ Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) *International Journal of Constitutional Law* 1056. See R. A. Lenhardt, 'Understanding the mark: race, stigma and equality in context' (2004) 79 *New York University Law Review* 803, 819 fn 63 referencing Stephen C. Ainsley, Gaylene Becker and Lerita M. Coleman (eds) *The Dilemma of Difference. A Multidisciplinary View of Stigma* (Plenum Press 1986).

⁵⁷⁴ Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) *International Journal of Constitutional Law* 1056. Reference to paternalistic tones: *D.H. and Others vs The Czech Republic*, Application no. 57325/00 (ECtHR, 13 November 2007) para 203; *Sampanis and Others vs Greece*, Application no. 32526/05 (ECtHR, 5 June 2008) paras 93-94; *Oršuš and Others vs Croatia*, Application no. 15766/03 (ECtHR, 16 March 2010) paras 178-179. Reference to more empowering language that acknowledges the paternalism of other institutions: *V.C. vs Slovakia*, Application no. 18968/07 (ECtHR, 8 November 2011) para 114.

where those in attendance could display their superiority over the absentees. (...) I consider the stance taken by the Grand Chamber with respect to the parents of the minor applicants to be extremely preoccupying and, since it concerned all the Roma parents, one that is quite frankly unacceptable. It represents a major deviation from the norm and reflects a sentiment of superiority that is ought to be inconceivable in a court of human rights and strikes at the human dignity of the Roma parents.⁵⁷⁵

(...) The Grand Chamber begins by calling into question the capacity of Roma parents to perform their parental duty (...). Such assertions are unduly harsh, superfluous and, above all, unwarranted. The Grand Chamber then proceeds to compound its negative appraisal of the Roma parents (...). I find this particularly disquieting. (...) **How cynical**: the parents of the applicant minors are not qualified to bring up their children, even though they are qualified to sign an authority in favour of British and North American representatives whom they do not even know! (...) The deviation from the norm implicit in this judgement is substantial and the fact that all Roma parents are deemed unfit to educate their children is, in my view, insulting. I therefore take my place alongside the victims of that insult and declare: “*Jsem český Rom*” (I am a Czech Rom).⁵⁷⁶

Wrapping up their analysis, Peroni and Timmer find the development of the notion of group vulnerability a positive one, arguing that what is in question is not the attention that the Court pays to vulnerable group but **how this is tested**: they propose that two levels of inquiry should be addressed, namely the collective and the individual dimension.⁵⁷⁷ Vulnerability shall be operationalised not as a label, which can more easily become stigma, but as a **layered notion**: ‘the focus should be on the various circumstances that *render* certain groups vulnerable, not on which groups *are* vulnerable’.⁵⁷⁸ The concept and its application is nevertheless found to address (and redress) inequality more substantively.⁵⁷⁹

Most recently in February 2023, the Court dealt with a case concerning the passing away of F., the applicant’s brother, which occurred during a control operation at the Hungarian-Serbian border while F. was migrating from Syria.⁵⁸⁰ The applicant alleged ill-treatment by the police and Hungary’s failure to effectively investigate the event.⁵⁸¹

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F. had died in 2016 while attempting to cross the Tisza River with others by a smugglers’ boat.⁵⁸² Overall, the migrants’ reconstruction of the events was that they had been disembarked in the water, a few metres from the Hungarian shore which could not be reached because of the reeds.⁵⁸³ Officers shouted to them through loudspeakers to go back and not to enter Hungary.⁵⁸⁴ After hiding in the river for a while and after realising there was barbed wire ashore that could not be crossed, an Iraqi family with three children advanced towards the officers to seek refuge, stating there were kids among them.⁵⁸⁵ In

⁵⁷⁵ *D.H. and Others vs The Czech Republic*, Application no. 57325/00 (ECtHR, 13 November 2007) Dissenting Opinion of Judge Borrego Borrego paras 9-17.

⁵⁷⁶ *ibid.*

⁵⁷⁷ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’ (2013) 11(4) *International Journal of Constitutional Law* 1056.

⁵⁷⁸ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’ (2013) 11(4) *International Journal of Constitutional Law* 1056; note to self cfr. Kathryn Abrams, ‘“Groups” and the Advent of Critical Race Scholarship’ (2003) *Issues in Legal Scholarship* 1; cf. Owen M. Fiss, ‘Groups and the Equal Protection Clause’ (1976) 5(2) *Philosophy & Public Affairs*, 107.

⁵⁷⁹ *ibid.*

⁵⁸⁰ *Alhowais vs Hungary*, Application no. 59435/17 (ECtHR, 2 February 2023, final 2 May 2023) para 1.

⁵⁸¹ *ibid* para 1.

⁵⁸² *ibid* para 5.

⁵⁸³ *ibid* paras 2-49.

⁵⁸⁴ *ibid.*

⁵⁸⁵ *ibid.*

response, tear gas and stones were fired and dogs were let loose.⁵⁸⁶ The applicant, his brother F. and their cousin decided to turn back, all of them being good swimmers.⁵⁸⁷ The Iraqi family was in the end rescued, all children and their mother being at risk of hypothermia and the kids being in very critical conditions to the extent that one even had to be resuscitated.⁵⁸⁸ Once arrived at the Serbian shore, the applicant could not find F. and asked for the help of a fisherman who had witnessed the scene and had also screamed at the officers to intervene.⁵⁸⁹ According to the recollection of those in the water, F. had troubles breathing after inhaling the gas sprayed by the authorities while he tried to assist the Iraqi family to get out of the water; he had also allegedly been hit by a thrown object.⁵⁹⁰ The officers reconstruction was instead that nothing was thrown at the migrants, no force was used and contact had been attempted to direct them towards a rescue boat.⁵⁹¹ An investigation into the officers' conduct was opened, albeit not all officers present at the time were identified; proceedings were later discontinued for the commission of the crimes could not be established and a further appeal from the applicant was also dismissed.⁵⁹²

Collecting sources for the legal framework relevant to the case, the Court makes reference to the 2001 Recommendation Rec(2001)10 on the European Code of Police Ethics that *inter alia* reads that 'police personnel shall act with integrity and respect towards the public and with particular consideration for the situation of individuals belonging to especially vulnerable groups'.⁵⁹³ The Court observed that, from the testimonies gathered, there was no order of priorities or a set course of action for the officers to deal with 'migrants in a vulnerable situation' as in the case in question.⁵⁹⁴ The Court found a violation of article 2 of the Convention.

The following is a list of cases where the Court referred to the vulnerability of asylum seekers. The cases were collected from the jurisprudence available on HUDOC through the use of keywords such as 'migrant', 'asylum seeker', 'vulnerable', 'vulnerability' and no objectives were set in terms of exhaustiveness and representativeness. The intent of the list is rather to cluster instances where the Court mentioned a condition of 'vulnerability' deriving from the applicant's status in receiving states. The overview is presented in chronological order moving from *M.S.S. v. Belgium and Greece* as of September 2024.

2012 | *Hirsi Jamaa et al v Italy*

On 6 May 2009 three vessels aboard of which were approximately two hundred individuals who had left the Libyan shores were intercepted by the Italian Coastguard and Guardia di Finanza in the Maltese Search and Rescue Region of Responsibility.⁵⁹⁵ The migrants were transferred onto the Italian ships and returned to Tripoli.⁵⁹⁶ Their personal effects were confiscated, they were not informed of their destination, nor was any step taken to identify them.⁵⁹⁷ On arrival, when objecting to being handed over to the Libyan authorities, they were forced to leave the ships.⁵⁹⁸ Among those who were intercepted, eleven Somali nationals and thirteen Eritrean nationals filed a complaint before the ECtHR alleging violation on the part of the Italian government of article 3 of the Convention, article 4 Protocol 4, and article 13 of the Convention in conjunction with the abovementioned. The Court had thus to determine whether the events in question had taken place within Italy's jurisdiction in line with the meaning of article 1 ECHR.

⁵⁸⁶ *ibid.*

⁵⁸⁷ *ibid.*

⁵⁸⁸ *ibid.*

⁵⁸⁹ *ibid.*

⁵⁹⁰ *ibid.*

⁵⁹¹ *ibid.*

⁵⁹² *ibid* paras 23-24.

⁵⁹³ *ibid* para 51; see also Council of Europe's Committee of Ministers, Recommendation Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics (adopted on 19 September 2001) para 44 <<https://rm.coe.int/16805e297e>> accessed 26 April 2023.

⁵⁹⁴ *Alhowais vs Hungary*, Application no. 59435/17 (ECtHR, 2 February 2023) para 141.

⁵⁹⁵ *Hirsi et al vs Italy*, Application No. 27765/09 (ECtHR, 23 February 2012) paras 9-10.

⁵⁹⁶ *ibid* para 11.

⁵⁹⁷ *ibid.*

⁵⁹⁸ *ibid* para 12.

It observed that a state's exercise of extraterritorial jurisdiction must be determined with reference to the particular situation, for instance full and exclusive control over a ship.⁵⁹⁹ It concluded that whenever the state through its agents operating outside national territory exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under article 1 1 to secure to that individual the rights and freedoms under the Convention that are relevant to the case.⁶⁰⁰ Moreover, in response to Italy's attempt to circumvent its jurisdiction by describing the events as rescue and not military operations in which the control of the authorities over the applicants was allegedly minimal, the Court considered whether there was at least a *de facto* continued and uninterrupted control.⁶⁰¹ It ruled the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities.⁶⁰² The Court noted that at the time of the occurrence of the events, no rule governing the protection of refugees was complied with by Libya; anyone entering the country irregularly was 'deemed to be a clandestine' and there was no distinction between irregular migrants and asylum seekers, which resulted in people being systematically arrested and detain in inhuman conditions.⁶⁰³ 'Irregular immigrants', such as the applicants, were made to occupy a marginal and isolated position in society, which rendered them 'extremely vulnerable to xenophobic and racist acts'.⁶⁰⁴ The Court shared the applicants' view that the fact that some of them later obtained refugee status constitutes an additional evidence of their vulnerability.⁶⁰⁵ The Court did not make explicit reference to the vulnerable groups approach but nevertheless considered the applicants' heightened vulnerability due to their situation of irregularity. The Concurring Opinion of Judge Pinto de Albuquerque observed that only a misconstruction of norms that bind states to *non-refoulement*, thus securing in particular the protection of 'especially vulnerable persons (victims of trafficking, illegal migrants, persons in danger or in distress on the high seas)' could justify the exposure of the applicants to the risk of ill-treatment by returning them to the countries they had fled.⁶⁰⁶

2012 | *Kurić et al. v Slovenia*

The applicants alleged they had been arbitrarily deprived of their status as permanent residents after Slovenia declared its independence in 1991; they complained that no effective legal remedies were available in that respect, that they had been subjected to discriminatory treatment and that they had been arbitrarily denied their pension rights.⁶⁰⁷ At the time of independence, the Slovenian population was relatively homogeneous, as roughly 90% of the 2 million residents had Slovenian citizenship while approximately the 10% of the population, including the applicants, were citizens of the other former SFRY republics.⁶⁰⁸ The 1991 Constitutional Law provided that those citizens of other republics of the former SFRY who registered as permanent residents of the Republic of Slovenia and actually lived there, held equal rights and duties to citizens of the Republic of Slovenia, with the exception of the acquisition of property, until they acquired citizenship.⁶⁰⁹ In 1992, the municipal administrative authorities removed those who had not applied for or obtained Slovenian citizenship from the Register of Permanent Residents and, according to the Government, transferred them into the Register of Aliens without a Residence Permit.⁶¹⁰ The applicants discovered they had become aliens later in time and no notification was ever issued.⁶¹¹ According to data from 2002, the number of former SFRY citizens who had lost their permanent residence status on in 1992 amounted to 18,305, of whom approximately 2,400 had been refused citizenship; they became known as the "erased" (*izbrisani*), effectively aliens or stateless persons illegally residing in Slovenia.⁶¹² The Court recognised that the applicants, who had no Slovenian identity documents, were left for years in a legal limbo 'and therefore in a situation of vulnerability and legal insecurity'.⁶¹³ The Court found that the case disclosed the existence within the

⁵⁹⁹ *ibid* para 73.

⁶⁰⁰ *ibid* para 74.

⁶⁰¹ *Medvedyev and Others v France*, Application no. 3394/03 (ECtHR, 29 March 2010) para 67.

⁶⁰² *Hirsi et al vs Italy*, Application No. 27765/09 (ECtHR, 23 February 2012) para 81.

⁶⁰³ *ibid* para 125.

⁶⁰⁴ *ibid*.

⁶⁰⁵ *ibid* 155.

⁶⁰⁶ *ibid* Concurring Opinion of Judge Pinto de Albuquerque 78-79.

⁶⁰⁷ *Kurić et al. v Slovenia*, Application no. 26828/06 (ECtHR, 26 June 2012) para 4.

⁶⁰⁸ *ibid* para 23.

⁶⁰⁹ *ibid* para 24.

⁶¹⁰ *ibid* para 29.

⁶¹¹ *ibid* para 31.

⁶¹² *ibid* paras 32-33.

⁶¹³ *ibid* paras 302, 412.

Slovenian legal system of shortcomings as a consequence of which the whole category of the “erased” were still denied compensation for violation of their rights.⁶¹⁴

2012 | *Popov v France*

The applicants, Mr Popov, his wife and their children, alleged that their administrative detention for a period of fifteen days in a detention centre in France, pending their expulsion to Kazakhstan where they feared they would be persecuted, was in breach of articles 3, 5 and 8 of the Convention.⁶¹⁵ Court noted that ‘to be sure, children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The Court would, moreover, observe that the Convention on the Rights of the Child encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents’.⁶¹⁶ The Court found a violation of article 3 and 5 in respect of the children and article 8 in respect of all applicants.

2013 | *Aden Ahmed v Malta*

The applicant left Eritrea in 2008, where she was a refugee, leaving her son in the care of her parents; she travelled through Sudan and Libya and entered Malta irregularly, by boat, in 2009, where she was registered by immigration authorities.⁶¹⁷ She received an order of removal as she was considered a “prohibited immigrant” and was placed in detention.⁶¹⁸ She applied for asylum helped by fellow detainees, for no accompanying information or translation on the procedure was provided to her.⁶¹⁹ Her application was ultimately rejected but instead of appealing it, she escaped from detention and managed to travel irregularly to The Netherlands, where she applied for asylum in the hope of being resettled to Sweden together with part of her family.⁶²⁰ In 2011, she was returned to Malta under the Dublin regulation and again detained.⁶²¹ At the time of her return, she was two months pregnant.⁶²² She was charged for the alleged crimes committed and sentenced to imprisonment for six months.⁶²³ While in jail, she fell unwell and after being moved to a sanitary facility she suffered a miscarriage and subsequently contracted an infection for which she needed to be hospitalised.⁶²⁴ She complained against the conditions of her recovery and the previous failure to assist her.⁶²⁵ She suffered from depression and psychological distress.⁶²⁶ She was released from detention in 2012 as she had spent eighteen months in administrative detention since her arrival.⁶²⁷ The Court found that the applicant was ‘in a vulnerable position, not only because of the fact that she was an irregular immigrant and because of her specific past and her personal emotional circumstances (see also *M.S.S.* para 232), but also because of her fragile health’.⁶²⁸ It declared a violation of article 3, article 5(1), (4).

2014 | *Georgia v Russia (I)*

The Georgian government alleged that Russia had allowed or caused the administrative practice of arresting, detaining and collectively expelling Georgian nationals in autumn 2006.⁶²⁹ The Court assumed that during the period in question more than 4’600 expulsion orders were issued against Georgian nationals, of whom about 2’380 were detained and forcibly expelled.⁶³⁰ The Court found a violation of the prohibition of collective expulsion in breach of article 4 of Protocol 4.⁶³¹ It further found conditions of detention to be regarded as both inhuman and degrading treatment in breach of article 3 of the Convention.⁶³² There was moreover a finding for a violation of article 13 in conjunction with article 3, a

⁶¹⁴ *ibid* paras 283, 412.

⁶¹⁵ *Popov v France*, Application nos. 39471/07 and 39474/07 (ECtHR, 19 January 2012) paras 1-3

⁶¹⁶ *ibid* para 91.

⁶¹⁷ *Aden Ahmed v Malta*, Application no. 55352/12 (ECtHR, 23 July 2013) paras 6-8.

⁶¹⁸ *ibid* para 9.

⁶¹⁹ *ibid*.

⁶²⁰ *ibid* para 13.

⁶²¹ *ibid* para 14.

⁶²² *ibid*.

⁶²³ *ibid* paras 15-16.

⁶²⁴ *ibid* para 17.

⁶²⁵ *ibid*.

⁶²⁶ *ibid* para 19.

⁶²⁷ *ibid* para 30.

⁶²⁸ *ibid* para 97.

⁶²⁹ *Georgia v Russia (I)*, Application no. 13255/07 (ECtHR, 3 July 2014) paras 1-3, 23.

⁶³⁰ *ibid* para 135.

⁶³¹ *ibid* para 178.

⁶³² *ibid* para 205.

violation of article 5(1), (4).⁶³³ The Partly Dissenting Opinion of Judge Tsotsoria observed that during the campaign, the Russian authorities targeted ‘the most vulnerable’ and that ‘regretfully, the present case has not been the only instance when the respondent State has used migration control for political purposes’.⁶³⁴ The judge reiterated that it is recognised that vulnerable groups suffer from aggravated discriminations and are subject to racial and ethnic profiling, targeted inspections and unlawful practices by law enforcement.⁶³⁵ The existence of institutionalised discrimination, especially in the field of migration, has been considered particularly acute and a ‘repressive mechanism’ against foreign citizens was created before the anti-Georgian campaign to be employed for political goals.⁶³⁶ It was furthermore contended that Russian migration legislation and practices made it impossible for most migrants to “legalise” their presence on state territory; the structural problems triggered by corruption, discrimination, xenophobia, mismanagement and arbitrariness increased the vulnerability of migrants.⁶³⁷

2014 | *Tarakhel v Switzerland*

The Court reiterated that ‘as a “particularly underprivileged and vulnerable” population group, asylum seekers require “special protection”’ and in so doing referred to the *M.S.S.* case.⁶³⁸ This requirement of “special protection” of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability.⁶³⁹ Were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention.⁶⁴⁰ In their Joint Partly Dissenting Opinion, Judges Casadevall, Berro-Lefèvre and Jäderblom observed that greater resources are needed in order to provide acceptable conditions for all asylum seekers, especially vulnerable groups such as families with children.⁶⁴¹ They further reiterated that asylum seekers are members of a particularly underprivileged and vulnerable population group in need of special protection, asking whether assurances for those liable to be sent back to Italy would be asked for all or only for families with children.⁶⁴²

2015 | *Khlaifia et al. v Italy*

The applicants, three Tunisian nationals, alleged that their placement in a reception centre for illegal entrants had been in breach of Articles 3 and 5 of the Convention; they argued that they had been subjected to a collective expulsion and that, under Italian law, they had had no effective remedy by which to complain of the violation of their fundamental rights.⁶⁴³ They left Tunisia on a boat to reach the Italian coasts and were intercepted by the Italian Coast Guard, which escorted them to the island of Lampedusa.⁶⁴⁴ They were accommodated in a part of the centre reserved for adult Tunisians, which, in their account, was an overcrowded and dirty area; they were obliged to sleep on the floor because of the shortage of available beds and the poor quality of the mattresses; meals were eaten outside, sitting on the ground.⁶⁴⁵ The centre was kept permanently under police surveillance, making any contact with the outside world impossible.⁶⁴⁶ After a few days a violent revolt broke out among the migrants.⁶⁴⁷ The premises were gutted by fire and the applicants were taken to a sports complex on Lampedusa for the night, managing to escape at dawn and, together with other migrants, evading the police surveillance and walking to the village of Lampedusa.⁶⁴⁸ From there, with about 1’800 other migrants, they started a demonstration through the streets of the island.⁶⁴⁹ After being stopped by the police, the applicants were

⁶³³ *ibid* paras 216, 224.

⁶³⁴ *ibid* Partly Dissenting Opinion of Judge Tsotsoria 66.

⁶³⁵ *ibid* 70.

⁶³⁶ *ibid*.

⁶³⁷ *ibid* 81.

⁶³⁸ *Tarakhel v Switzerland*, Application no. 29217/12 (ECtHR, 4 November 2014) 118.

⁶³⁹ *ibid* 119.

⁶⁴⁰ *ibid* 122.

⁶⁴¹ *ibid* Joint Partly Dissenting Opinion of Judges Casadevall, Berro-Lefèvre and Jäderblom 54.

⁶⁴² *ibid* 57.

⁶⁴³ *Khlaifia et al. v Italy*, Application no. 16483/12 (ECtHR, 1 September 2015) paras 1-4.

⁶⁴⁴ *ibid* para 6.

⁶⁴⁵ *ibid* para 8.

⁶⁴⁶ *ibid*.

⁶⁴⁷ *ibid* para 9.

⁶⁴⁸ *ibid*.

⁶⁴⁹ *ibid*.

taken first back to the reception centre and then to Lampedusa airport.⁶⁵⁰ They were flown to Palermo and after disembarking, they were transferred to ships that were moored in the harbour there.⁶⁵¹ They described the conditions onboard as coercive and violent.⁶⁵² After a few days, they were taken to the airport pending removal.⁶⁵³ The applicants argued they were never presented with any documents, although the Court was provided by the respondent state with refusal-of-entry orders.⁶⁵⁴ Proceedings were initiated at the national level for the treatment for migrants had been subjected to, the description of which is not hereby summarised but its reading is advised.⁶⁵⁵ Two of the applicants challenged the refusal-of-entry orders they were served; the judge annulled them.⁶⁵⁶ The Court found that the applicants' placement by the Italian authorities in the CSPA in Lampedusa and on the ships could be regarded as a deprivation of liberty and thus article 5 was applicable.⁶⁵⁷ It further concluded that the deprivation of liberty in question was devoid of legal basis and there was a violation of article 5(1).⁶⁵⁸ A further violation of article 5(2) was found for the refusal-of-entry orders they were served had incomplete and insufficient information and had not been provided promptly.⁶⁵⁹ A violation of article 5(4) was also confirmed.⁶⁶⁰ A violation of article 4 of Protocol 4 was also found, as well as a violation of article 13 in conjunction with the former.⁶⁶¹ The Joint Partly Dissenting Opinion of Judges Sajó and Vučinić acknowledges that 'asylum-seekers, unaccompanied minors, and other vulnerable individuals were treated differently, as their status so required' but this was not the applicants' case.⁶⁶² They argued that: 'by labelling as "collective expulsion" Italy's attempts to police its borders during an unforeseen emergency, the majority do a grave disservice to an intentionally focused and narrow concept in international law, which is meant to apply only in the most severe of circumstances. To find a violation here misrepresents the reality of the situation faced by the Italian authorities and by the migrants in question. It necessarily dilutes a clear prohibition under international law that has its roots in the national homogenisation and genocidal policies of the twentieth century. Article 4 of Protocol No. 4 has no place in the present case of non-discriminatory and procedurally regular removal'.⁶⁶³

2015 | *Mahamed Jama v Malta*

The applicant entered Malta in an irregular manner by boat on 27 May 2012 and upon arrival was registered by the immigration police, given an identification number (12H-006) and presented with two documents in English, one containing a Return Decision and the other a Removal Order.⁶⁶⁴ She was to her knowledge born in 1996 and at the time was 16 years old but the authorities registered her as being born in 1986.⁶⁶⁵ The applicant alleged that her continued detention for more than eight months was arbitrary and unlawful, and that she had not had a remedy to challenge the lawfulness of that detention. She further complained about the conditions of detention.⁶⁶⁶ The Court found no violation of article 3 of the Convention for 'while it is true that the applicant, being an asylum-seeker, was particularly vulnerable because of everything she had been through during her migration and the traumatic experiences she was likely to have endured previously (see *M.S.S. v Belgium and Greece*, cited above, § 232), a state of vulnerability which exists irrespective of other health concerns or age factors, the Court does not lose sight of the fact that the applicant in the present case was not more vulnerable than any other adult asylum seeker detained at the time (see, *a contrario*, *Aden Ahmed*, cited above, § 97-99)'.⁶⁶⁷ A violation of article 5(4) was confirmed.⁶⁶⁸

2016 | *Moxamed Ismaaciil and Abdirahman Warsame v Malta*

⁶⁵⁰ *ibid.*

⁶⁵¹ *ibid* para 10.

⁶⁵² *ibid* para 11.

⁶⁵³ *ibid* para 12.

⁶⁵⁴ *ibid* para 14.

⁶⁵⁵ *ibid* paras 17-24.

⁶⁵⁶ *ibid* paras 25-26.

⁶⁵⁷ *ibid* paras 46-51.

⁶⁵⁸ *ibid* para 70.

⁶⁵⁹ *ibid* paras 82-85.

⁶⁶⁰ *ibid* paras 95-98.

⁶⁶¹ *ibid* paras 153-158, 168-173.

⁶⁶² *ibid* Joint Partly Dissenting Opinion of Judges Sajó and Vučinić paras 17-18.

⁶⁶³ *ibid.*

⁶⁶⁴ *Mahamed Jama v Malta*, Application no. 10290/13 (ECtHR, 26 November 2015) para 6.

⁶⁶⁵ *ibid* paras 5,11.

⁶⁶⁶ *ibid* paras 1-4.

⁶⁶⁷ *ibid* paras 100-102.

⁶⁶⁸ *ibid* para 122.

The applicants, two Somali nationals, alleged they suffered a breach of article 3 on account of the conditions of their detention and breaches of article 5(1) and 5(4) on account of their detention and lack of judicial review.⁶⁶⁹ No violation was confirmed. In relation to the applicants' state of health the Court observed that, in respect of the first applicant, she only claimed to have been "ill", but failed to give any details as to her condition or how many times she sought a doctor; as to the second applicant, while she did explain her condition, the Court found she failed to give relevant details such as specific dates of when she was unwell and for how long, nor she substantiated any of her illnesses by means of any documentation.⁶⁷⁰ The Court considered that 'while it is true that the applicants, being asylum-seekers, were particularly vulnerable because of everything they had been through during their migration and the traumatic experiences they were likely to have endured previously (see *M.S.S. v Belgium and Greece*, cited above, § 232), a state of vulnerability which exists irrespective of other health concerns or age factors, they cannot be said to have been particularly vulnerable also because of their health. In consequence, they cannot objectively be considered to be more vulnerable than any other adult asylum seeker detained at the time'.⁶⁷¹

2016 | *Abdi Mahamud v Malta*

The applicant, a Somali national, alleged a violation of article 3, 5(1) and (4) on grounds of her detention.⁶⁷² The Court found a violation of article 3 and considered the conditions of the applicant's detention amounted to degrading treatment.⁶⁷³ The Court recalled that in '*Aden Ahmed* the domestic authorities, through the AWAS procedure, had not acknowledged the applicant's vulnerability. Nevertheless, the Court considered that that applicant was in a vulnerable position, not only because of the fact that she was an irregular immigrant and because of her specific past and her personal emotional circumstances (see also *M.S.S. v Belgium and Greece* [GC], no. 30696/09, § 232, ECHR 2011), but also because of her fragile health (§ 97)'.⁶⁷⁴ In the present case, it found domestic authorities had, through the same AWAS procedure, established the applicant was vulnerable and to be released.⁶⁷⁵ A further violation of articles 5(1) and (4) was confirmed. For an extensive digression on the grounds of vulnerability as per the domestic authorities, see the Partly Dissenting Opinion of Judge Sajó.

2016 | *A.B. et al v France*

The applicants, a couple of Armenian nationality and their son, alleged that their administrative detention at the Toulouse-Cornebarrieu centre, pending their removal, had breached Articles 3, 5, 8 and 13 of the Convention.⁶⁷⁶ Violations of articles 3, 5(1) and 5(4) were confirmed. Vulnerability was mentioned in relation to the status of the child. The Court stated that 'it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the child's status as illegal immigrant'.⁶⁷⁷

2016 | *Khlaifia et al v Italy*

The applicants, three Tunisian nationals, alleged they had been confined in a reception centre accommodating irregular migrants in breach of articles 3 and 5 of the Convention, they had been subjected to collective expulsion and had had no effective remedy to address the violation of their rights.⁶⁷⁸ The applicants argued that the vessels on which they were travelling was intercepted by the Italian coastguard, which escorted them to a port in Lampedusa; from there they were accommodated in a centre in overcrowded and poor conditions for a few days, until a revolt broke out among the migrants confined there.⁶⁷⁹ The applicants were then taken to a sports complex and on the same night managed to evade and walked to the village of Lampedusa where, with about 1,800 other migrants, started demonstrating.⁶⁸⁰ They were stopped by the police, taken first back to the reception centre and then to the airport.⁶⁸¹ They were flown to Palermo and after disembarking they were embarked into

⁶⁶⁹ *Moxamed Ismaaciil and Abdirahman Warsame v Malta*, Application nos. 52160/13 and 52165/13 (ECtHR, 12 January 2016) paras 1-4.

⁶⁷⁰ *ibid* para 94.

⁶⁷¹ *ibid*.

⁶⁷² *Abdi Mahamud v Malta*, Application no. 56796/13 (ECtHR, 3 May 2016) paras 1-4.

⁶⁷³ *ibid* paras 88-90.

⁶⁷⁴ *ibid*.

⁶⁷⁵ *ibid*.

⁶⁷⁶ *A.B. et al v France*, Application no. 11593/12 (ECtHR, 12 July 2016) paras 1-5.

⁶⁷⁷ *ibid* para 110.

⁶⁷⁸ *Khlaifia et al v Italy*, Application no. 16483/12 (ECtHR, 15 December 2016) paras 1-3.

⁶⁷⁹ *ibid* para 13.

⁶⁸⁰ *ibid* para 14.

⁶⁸¹ *ibid*.

ships at the harbor.⁶⁸² Onboard of the vessels they were kept in poor conditions and under constant surveillance by the police.⁶⁸³ They were subsequently escorted again to the airport in Palermo and returned to Tunisia, after which they were released.⁶⁸⁴ The Court found a violation of article 5 and article 13 in conjunction with article 3. The Court considered the circumstances that led thousands of people to seek protection in 2011 from North Africa to Italy and concluded that the situation was 'exceptional': 'the State was confronted with many problems as a result of the arrival of exceptionally high numbers of migrants and that during this period the Italian authorities were burdened with a large variety of tasks, as they had to ensure the welfare of both the migrants and the local people and to maintain law and order'.⁶⁸⁵ This did not absolve the state of Italy of its obligations but 'the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time'.⁶⁸⁶

2017 | *Abdullahi Elmi and Aweys Abubakar v. Malta*

The applicants, two Somali nationals, reached Malta irregularly by boat in 2012 as unaccompanied migrant minors, specifying their age.⁶⁸⁷ Mr Burhaan Abdullahi Elmi did not speak English nor Arabic; he was presented with documents in English, including a removal order and a return decision, the latter stating that he was a 'prohibited immigrant' since he had no 'means of subsistence and was liable to become a charge on public funds'.⁶⁸⁸ The same documents were provided to Mr Cabdulaahi Aweys Abubakar.⁶⁸⁹ In both cases, the government of Malta explained that 'in practice the immigration police inform the migrants verbally in English about their right to appeal, and the migrants translate for each other'.⁶⁹⁰ The Court reiterated concerns about the conditions and the place of detention in the Safi Barracks.⁶⁹¹ It further stated that 'while it is true that the applicants were not young children, they still fell within the international definition of minors, in respect of which detention should be a last resort and which should be limited to the shortest time possible. (...) [U]nder the Court's case-law reception conditions for children seeking asylum must be adapted to their age. However no measures were taken to ensure that the applicants as minors received proper counselling and educational assistance from qualified personnel specially mandated for that purpose (...). Nor were any entertainment facilities provided for persons of their age. Furthermore, the Court cannot ignore the applicants' submissions to the effect that there was a tense and violent atmosphere'.⁶⁹² Their detention in such conditions lasted for a period of about eight months, while they awaited the results of the age-assessment procedure which nevertheless confirmed their status as minors.⁶⁹³ The Court further stated that the applicants 'were even more vulnerable than any other adult asylum seeker detained at the time because of their age'.⁶⁹⁴ The Court found *inter alia* a violation of article 3.

2017 | *Chowdury and Others v Greece*

The applicants, forty-two Bangladeshi nationals who lived in Greece without a work permit, alleged that their work in strawberry fields in Greece amounted to forced labour and that such situation amount to a case of human trafficking.⁶⁹⁵ The applicants described the extreme conditions of work they were subject to, which were indeed confirmed during domestic proceedings, and recounted they went on strike several times to demand payment of their unpaid wages.⁶⁹⁶ During an occasion in which they demanded their wages to their employers, the armed guards of the latter opened fire against the workers, seriously injuring thirty of them, including twenty-one of the applicants.⁶⁹⁷ Proceedings showed some workers had even gone to the police station to complain their employers had not been

⁶⁸² *ibid* para 15.

⁶⁸³ *ibid* paras 15-21.

⁶⁸⁴ *ibid*.

⁶⁸⁵ *ibid* paras 178-186.

⁶⁸⁶ *ibid*.

⁶⁸⁷ *Abdullahi Elmi and Aweys Abubakar v Malta*, Application nos. 25794/13 and 28151/13 1-15 (ECtHR, 22 February 2017) paras 1-15.

⁶⁸⁸ *ibid* para 7.

⁶⁸⁹ *ibid* para 12.

⁶⁹⁰ *ibid* paras 8, 13.

⁶⁹¹ *ibid* para 105.

⁶⁹² *ibid* para 111.

⁶⁹³ *ibid* para 113.

⁶⁹⁴ *ibid*.

⁶⁹⁵ *Chowdury et al v Greece*, Application no. 21884/15 (ECtHR, 30 June 2017) paras 1-5.

⁶⁹⁶ *ibid* paras 6-31.

⁶⁹⁷ *ibid*.

paying them.⁶⁹⁸ The Court considered that ‘where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily. The prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour’.⁶⁹⁹ It further noted that the applicants started working at a time when ‘they were in a situation of vulnerability as irregular migrants without resources and at risk of being arrested, detained and deported’.⁷⁰⁰ The Court found a violation of article 4(2) of the Convention, as the applicants’ situation fell within the scope of human trafficking and forced labour.

2018 | *S.F. et al v Bulgaria*

The applicants are members of an Iraqi family of five, two spouses and three children.⁷⁰¹ They were granted asylum in Switzerland in 2017.⁷⁰² The Court reiterated that the administrative detention of minors, whether accompanied or not, raises issues for they are ‘extremely vulnerable and have specific needs’.⁷⁰³ The Court stated that ‘the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant’.⁷⁰⁴ The Court found a violation of article 3 of the Convention in respect of the children.

2019 | *M.A. et al v Lithuania*

The applicants are seven Russian nationals, an adult couple and their children.⁷⁰⁵ They claimed before the Court that the Lithuanian border authorities had refused to accept their asylum applications and to initiate proceedings and they alleged they were not granted effective remedy against such decisions.⁷⁰⁶ They used to live in the Chechen Republic until 2017, when, due to mistreatment and torture suffered by the first applicant, they went to Belarus with the intent to cross into Poland. They alleged that they had attempted to submit asylum applications there several times but were returned to the Belarus border. In April 2017, they arrived at a checkpoint between Lithuania and Belarus but were returned to the latter and no asylum proceedings was initiated; the same occurred at two different checkpoints in May 2017.⁷⁰⁷ The applicants subsequently attempted to submit applications in Poland, without success, and lodged a complaint against Poland before the Court.⁷⁰⁸ Despite the Court’s order for the applicants not to be removed, they were nevertheless returned from Poland to Belarus and, following a series of circumstances during which the first applicant was detained, the second applicant and their children were admitted to a refugee reception centre in Poland in January 2018. In February 2018, the first applicant was released from detention in Russia and later managed to join his family at the reception centre in Poland, while all awaited decision on their asylum applications.⁷⁰⁹ In the assessment of the case, the Court reiterated that an appeal before an administrative court against entry refusal was not an effective domestic remedy within the ECHR’s meaning for it did not have automatic suspensive effect.⁷¹⁰ The Court found a violation of article 3 and article 13. The Court dismissed the applicants’ claim of pecuniary damage for no document confirming the expenses sustained was submitted. In respect of non-pecuniary damage, the Court ‘is convinced that the applicants suffered distress and anxiety as a result of the violations found. However, it considers the amount claimed by them [a total of EUR 175,000] to be excessive. Making it award on an equitable basis, the Court awards the applicants EUR 22,000’.⁷¹¹

2019 | *Ilias and Ahmed v Hungary*

The applicants are two Bangladeshi nationals. They arrived in Hungary from Serbia in September 2015 and entered the Röszke transit zone, situated at the border between the two states; the asylum requests they submitted on their entry day were rejected within several hours as being inadmissible and the applicants’ expulsions were ordered.⁷¹² Following appeal, they spent 23 days in the transit zone while proceedings unfolded and in October they were issued an expulsion order, escorted out the transit zone

⁶⁹⁸ *ibid.*

⁶⁹⁹ *ibid* para 96.

⁷⁰⁰ *ibid* para 97.

⁷⁰¹ *S.F. et al v Bulgaria*, Application no. 8138/16 (ECtHR, 7 March 2018) para 5.

⁷⁰² *ibid.*

⁷⁰³ *ibid* para 79.

⁷⁰⁴ *ibid.*

⁷⁰⁵ *M.A. et al v Lithuania*, Application no. 59793/17 (ECtHR, 11 March 2019).

⁷⁰⁶ *ibid* paras 1-4.

⁷⁰⁷ *ibid* paras 9-21.

⁷⁰⁸ *ibid* paras 22-26.

⁷⁰⁹ *ibid.*

⁷¹⁰ *ibid* para 119.

⁷¹¹ *ibid* para 127.

⁷¹² *Ilias and Ahmed v Hungary*, Application no. 47287/15 (ECtHR, 21 November 2019) para 8.

and they crossed the border back into Serbia.⁷¹³ The first applicant was born in Bangladesh in 1983 and at the age of eight he found himself alone in Pakistan, without his family; as a child, he worked illegally and lived in Pakistan until the age of twenty five, with the exception of a three months period of time at the age of fourteen when he was expelled to Afghanistan, detained there and then returned to Pakistan.⁷¹⁴ He suffered abuse, including at the hands of the police, throughout his whole life; from Pakistan he moved to Bangladesh for a year, to be then expelled to India, from where he crossed into Pakistan, then Iran, Turkey, Greece, Macedonia, Serbia and Hungary.⁷¹⁵ The second applicant was born in 1980 and lived in Bangladesh until 2010.⁷¹⁶ The 2008 floods destroyed his home and he was surviving as a beggar until in 2010 he moved to India ‘in search of better opportunities’.⁷¹⁷ His family, who remained in Bangladesh, were killed in the floods in 2010.⁷¹⁸ He spent a few months in India and then went to Pakistan, where he was held as a captive of traffickers who then flew him to Dubai, where he was forced to work for two years, then transferred him by boat to Iran, then taken to Turkey on foot, then transferred to Greece, where he worked for two years.⁷¹⁹ The applicants met in Greece and from there left together for Macedonia, Serbian and in the end for Hungary.⁷²⁰ The first applicant never went to school; the second applicant finished only the first three years of school.⁷²¹ A psychiatrist visited the applicants with in the Hungarian transit zone and, among other elements, she diagnosed both applicants with PTSD and stated they showed signs of anxiety, fear, despair and depression, adding that the their mental state could deteriorate due to their confinement.⁷²² The applicants were removed to Serbia in October 2015: after meeting the UNHCR staff who visited them at the transit zone and having expressed the intention to appeal an expulsion order and be allowed to remain in Hungary for an additional two months, the applicants were nevertheless forced by the Hungarian police and authorities to “voluntarily depart” for Serbia; the police told them to cross into Serbia via the forest and not the official checkpoint; as they were heading out, the UNHCR staff arrived and arranged for the applicants to be met at the other side of the border, where indeed the Serbian police never intervened and simply told them to wait for the UNHCR.⁷²³ The applicants alleged a violation of article 3 of the ECHR concerning the conditions in the transit zone. The Court found no such violation, noted that their staying in the transit facility was short and stated that ‘while it is true that asylum-seekers may be considered vulnerable because of everything they might have been through during their migration and the traumatic experiences they were likely to have endured previously (see *M.S.S. v. Belgium and Greece*, cited above, § 232), there is no indication that the applicants in the present case were more vulnerable than any other adult asylum-seeker confined to the Röszke transit zone in September 2015’.⁷²⁴ The Court found that there was a violation of article 3 in relation to the applicants’ removal to Serbia, which was conducted without a detailed individual assessment. See as of particular interest the Partly Dissenting Opinion of Judge Bianku Joined by Judge Vučinić in relation to article 5 of the ECHR.

2020 | *G.B. et al v Turkey*

The applicants, a mother and her three children, were held in an administrative detention centre at the time of the submission of the complaint and latest information places them in Azerbaijan.⁷²⁵ The Court reiterated it already ruled ‘rule on the detention of children in custodial facilities in an immigration context in cases such as *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (no. 13178/03, §§ 50-59, ECHR 2006-XI), *Muskhadzhiyeva and Others v. Belgium* (no. 41442/07, §§ 55-63, 19 January 2010), *Rahimi v. Greece* (no. 8687/08, §§ 85-86, 5 April 2011), *Popov v. France* (nos. 39472/07 and 39474/07, §§ 91-103, 19 January 2012), *A.B. and Others v. France* (no. 11593/12, §§ 110-15, 12 July 2016), *Abdullahi Elmi and Aweys Abubakar v. Malta* (nos. 25794/13 and 28151/13, §§ 105-15, 22 November 2016), and *S.F. and Others v. Bulgaria* (no. 8138/16, §§ 78-93, 7 December 2017). The Court considered in each of those cases that the extreme vulnerability of children – whether or not they were accompanied by their parents – was a decisive factor that took precedence over

⁷¹³ *ibid.*

⁷¹⁴ *ibid* para 10.

⁷¹⁵ *ibid.*

⁷¹⁶ *ibid* para 11.

⁷¹⁷ *ibid.*

⁷¹⁸ *ibid.*

⁷¹⁹ *ibid.*

⁷²⁰ *ibid.*

⁷²¹ *ibid* para 14.

⁷²² *ibid* para 30.

⁷²³ *ibid* para 40.

⁷²⁴ *ibid* para 192.

⁷²⁵ *G.B. et al v Turkey*, Application no. 4633/15 (ECtHR, 17 January 2020) para 6.

considerations relating to the child's status as an illegal immigrant. It found that the unsuitable living conditions imposed on the children concerned had caused them great emotional and mental suffering and had thus exceeded the threshold of seriousness for the purposes of Article 3 of the Convention'.⁷²⁶ The Court found a violation of article 3 and article 5.

2020 | *N.D. and N.T. v Spain*

The applicants attempted the crossing between Morocco and Spain at the Melilla border in 2014.⁷²⁷ Having experienced different migratory journeys, they had found themselves staying in the Mount Gurugu migrants' camp, near the triple fence that runs for 13 km separating the two states.⁷²⁸ Mass attempts to breach the barrier are periodically organised.⁷²⁹ The applicants took part in one of such occasions, involving about 60 people, in August 2014.⁷³⁰ They managed to reach the top of the inner fence, where they waited for hours until they climbed down under the supervision of the Spanish authorities.⁷³¹ The latter however, without undergoing any assessment, apprehended the applicants and handed them over to the Moroccan authorities, who eventually brought them to Fez and left them there.⁷³² Months later, both applicants attempted to cross the fences again and succeeded in entering Melilla.⁷³³ Proceedings were issued against them and the applicants received an expulsion order.⁷³⁴ After the rejection of an appeal and the negative intervention of the UNHCR that found the first applicant's circumstances did not justify granting him protection, he was sent back to Mali by plane in March 2015.⁷³⁵ The second applicant was likewise detained for a period of time and received an expulsion order; this was not enforced and since the release from the centre where he was detained, the applicant has irregularly been living in Spain.⁷³⁶ The Court, referring to the *Hirsi Jamaa et al* case, held that the alleged facts took place under Spanish jurisdiction for, from the moment at which the applicants climbed down from the fences, they had been under the continuous and exclusive control, at least *de facto*, of Spanish authorities.⁷³⁷ It further observed that '[u]nder that law, the existence of a fence located some distance from the border does not authorize a State to unilaterally exclude, alter or limit its territorial jurisdiction, which begins at the line forming the border'.⁷³⁸ Moreover, the Court 'has previously stated that the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction'.⁷³⁹ Indeed 'the Convention cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction. To conclude otherwise would amount to rendering the notion of effective human rights protection underpinning the entire Convention meaningless'.⁷⁴⁰ The Court unanimously held that there was no violation of article 4 Protocol no. 4 and no violation of article 13 in conjunction with the former. In particular:

'the Court considers that it was in fact the applicants who placed themselves in jeopardy by participating in the storming of the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force. They did not make use of the existing legal procedures for gaining lawful entry to Spanish territory in accordance with the provisions of the Schengen Borders Code concerning the crossing of the Schengen Area's external borders (...). Consequently, in accordance with its settled case-law, the Court considers that the lack of individual removal decisions can be attributed to the fact that the applicants, if they indeed wished to assert rights under the Convention, did not make use of the official entry procedures existing for that purpose, and was thus a consequence of their own conduct (...). Accordingly, there has been no violation of Article 4 of Protocol No. 4. However, it should be specified that this finding does not call into question the broad consensus within the international community

⁷²⁶ *ibid* para 101.

⁷²⁷ *N.D. and N.T. v Spain*, Applications nos. 8675/15 and 8697/15 (ECtHR, 13 February 2020).

⁷²⁸ *ibid* paras 1-31.

⁷²⁹ *ibid*.

⁷³⁰ *ibid*.

⁷³¹ *ibid*.

⁷³² *ibid*.

⁷³³ *ibid*.

⁷³⁴ *ibid*.

⁷³⁵ *ibid*.

⁷³⁶ *ibid*.

⁷³⁷ *ibid* para 90.

⁷³⁸ *ibid* para 109.

⁷³⁹ *ibid* para 110.

⁷⁴⁰ *ibid*.

regarding the obligation and necessity for the Contracting States to protect their borders – either their own borders or the external borders of the Schengen Area, as the case may be – in a manner which complies with the Convention guarantees, and in particular with the obligation of non-refoulement. In this regard the Court notes the efforts undertaken by Spain, in response to recent migratory flows at its borders, to increase the number of official border crossing points and enhance effective respect for the right to access them, and thus to render more effective, for the benefit of those in need of protection against refoulement, the possibility of gaining access to the procedures laid down for that purpose’.⁷⁴¹

See, of interest, the Concurring Opinion of Judge Pejchal who, with reference to article 37 of the Convention, suggests that the applicants’ cases could have been struck out of the list of admissible cases well before the Grand Chamber hearing. See also, of likewise interest, the Partly Dissenting Opinion of Judge Koskelo who did not agree with the majority’s decision that article 4 of Protocol no. 4 was applicable to the circumstances of the case.

2020 | *N.H. and Others v France*

The applicants, five asylum-seekers in France, claimed they were not afforded support by the state as required by national law and as a result of this they were forced to live in inhuman and degrading conditions for several months.⁷⁴² The Court reiterated that neither the Convention nor the Protocols enshrine the right to political asylum and that states are entitled to control the entry, residence and removal of aliens in compliance with international obligations and the Convention itself.⁷⁴³ Factor arising from any increase in migration influx cannot absolve the contracting states of their obligations under the Convention, and especially, given the case at hand, article 3 of an absolute nature.⁷⁴⁴ Yet, the Court held that ‘while the constraints inherent in a migration crisis cannot by themselves justify a breach of Article 3, the Court is of the view that it would be artificial, to say the least, to examine the events of the cases now before it without considering the general context in which they occurred’.⁷⁴⁵ A violation of article 3 was found for some of three of the applicants: the French authorities were in breach of their domestic obligations towards them and must be held responsible for the conditions in which the applicants lived for months.⁷⁴⁶

2020 | *M.K. and Others v Poland*

The applicants, which filed three different applications, are thirteen Russian nationals, eight of whom are children.⁷⁴⁷ M.K. presented himself to the the Polish-Belarusian border in 2016 and 2017 approximately thirty times: adducing fears for his safety and PTSD, he attempted to apply for asylum but was consistently turned away; he was also in contact with his lawyer and had been granted prevention of removal under Rule 39 of the ECtHR’s Rule of Court.⁷⁴⁸ Regardless of the circumstances of his case, he was always denied access at the border.⁷⁴⁹ He later left Belarus, fearing deportation to Chechnya and moved to Siberia.⁷⁵⁰ M.A., his wife and their five children travelled to the Polish-Belarusian border on several occasions in 2017.⁷⁵¹ They were from Chechnya and feared for their safety.⁷⁵² They expressed the wish to lodge an application for international protection but were turned away. They also tried to enter Lithuania and lodge an application there (see *M.A. and Others v. Lithuania*, 2018, final 2019).⁷⁵³ The applicants’ representative had also lodged requests under Rule 39 to prevent the applicants being removed from the Polish-Belarusian border to Belarus.⁷⁵⁴ They were nevertheless expelled on numerous occasions.⁷⁵⁵ Between October and December 2017, M.A. was apprehended and detained by the police and transferred to the Chechen Republic; his wife decided to return with her children to Belarus and lodged a further application for protection: after one unsuccessful attempt, in

⁷⁴¹ *ibid* paras 231-232.

⁷⁴² *N.H. and Others v France*, Applications nos. 28820/13, 75547/13 and 13114/15 (ECtHR, 2 October 2020) para 1.

⁷⁴³ *ibid* para 155.

⁷⁴⁴ *ibid* para 157.

⁷⁴⁵ *ibid*.

⁷⁴⁶ *ibid* paras 184-187.

⁷⁴⁷ *M.K. and Others v Poland*, Applications nos. 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020) 1.

⁷⁴⁸ *ibid* paras 9-25.

⁷⁴⁹ *ibid*.

⁷⁵⁰ *ibid*.

⁷⁵¹ *ibid* paras 26-51.

⁷⁵² *ibid*.

⁷⁵³ *ibid*.

⁷⁵⁴ *ibid*.

⁷⁵⁵ *ibid*.

2018 the border guards at Terespol finally received her application and forwarded it to the Aliens Office while the family was placed in a refugee reception centre.⁷⁵⁶ M.A. was released from detention and was later admitted into Poland, where he joined his family in the reception centre.⁷⁵⁷ The family later left for Germany, which however requested their application being transferred back to Poland.⁷⁵⁸ The other five applicants, a married couple and their three children, also travelled to the Terespol border crossing on numerous occasions between 2016 and 2017.⁷⁵⁹ The always expressed the wish to lodge and application for international protection and their legal representation was on one occasion also present at the border.⁷⁶⁰ Both adults had been detained and tortured on different occasions and had developed PTSD.⁷⁶¹ They were summarily turned away.⁷⁶² An application was lodged by their representative under Rule 39.⁷⁶³ They were always turned away.⁷⁶⁴ They in the end left Belarus to avoid deportation and submitted they remained in hiding for fear of being tracked down by the Chechen authorities.⁷⁶⁵ The Court found a violation of article 3 of the Convention on account of the applicants were denied access to asylum procedure and exposed to the risk of torture and inhuman and degrading treatment in Chechnya, a violation of article 4 Protocol no. 4, a violation of article 13 in conjunction with the previous articles.

2021 | *R.R. et al v Hungary*

The applicants, an Iranian-Afghan family with three minor children, were confined in a transit zone at the Hungarian and Serbian border in the period between April and August 2017.⁷⁶⁶ The Court reiterated that 'the confinement of minors raises particular issues in that regard, since children, whether accompanied or not, are considered extremely vulnerable and have specific needs related in particular to their age and lack of independence, but also to their asylum-seeker status (...) encourages States to take appropriate measures to ensure that children seeking refugee status, whether or not accompanied by their parents or others, receive appropriate protection and humanitarian assistance'.⁷⁶⁷

2021 | *Savran v Denmark*

The applicant, born in 1985 in Turkey, entered Denmark with his family when he was six years old.⁷⁶⁸ In 2006 he was arrested and charged for the assault of a man.⁷⁶⁹ The applicant had previously been convicted for robbery.⁷⁷⁰ An expulsion order was recommended.⁷⁷¹ The applicant suffered from schizophrenia.⁷⁷² The Court observed that 'on account of his mental condition, the applicant was more vulnerable than an average "settled migrant" facing expulsion'.⁷⁷³ The Court found a violation of article 8 of the Convention.

2021 | *V.C.L. AND A.N. v The United Kingdom*

The case concerned the prosecution of the applicants, two Vietnamese nationals that at the time of the domestic proceedings were under the age of eighteen.⁷⁷⁴ They were recognised as victims of trafficking by the competent authority at some stage during the domestic proceedings but were nevertheless prosecuted for criminal charges linked to their forced work as gardeners in cannabis factories.⁷⁷⁵ This was the first case before the Court concerning the prosecution of a victim or a potential victim of trafficking and thus the first occasion to consider if such prosecution gave rise to any issues under article

⁷⁵⁶ *ibid.*

⁷⁵⁷ *ibid.*

⁷⁵⁸ *ibid.*

⁷⁵⁹ *ibid* paras 52-66.

⁷⁶⁰ *ibid.*

⁷⁶¹ *ibid.*

⁷⁶² *ibid.*

⁷⁶³ *ibid.*

⁷⁶⁴ *ibid.*

⁷⁶⁵ *ibid.*

⁷⁶⁶ *R.R. et al v Hungary*, Application no. 36037/17 (ECtHR, 5 July 2021) paras 1-4.

⁷⁶⁷ *ibid* para 49.

⁷⁶⁸ *Savran v Denmark*, Application no. 57467/15 (ECtHR, 7 December 2021) paras 10-11.

⁷⁶⁹ *ibid* paras 12-15.

⁷⁷⁰ *ibid.*

⁷⁷¹ *ibid.*

⁷⁷² *ibid* para 3.

⁷⁷³ *ibid* para 191.

⁷⁷⁴ *V.C.L. AND A.N. v The United Kingdom*, Application nos. 77587/12 and 74603/12 (ECtHR, 5 July 2021) paras 1-29.

⁷⁷⁵ *ibid* paras 109-110.

4 of the Convention.⁷⁷⁶ The applicants' main complaint was that by prosecuting them for criminal offences related to the illegal work they carried out while being trafficked, the State failed in its duty to protect them as victims.⁷⁷⁷ Throughout the case, the Court reiterated that 'where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily. In this regard, the prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour (see *Chowdury and Others v. Greece* (...))'.⁷⁷⁸ The Court considered that decisions on the prosecution of a potential victim of trafficking should only be taken once a trafficking assessment has been made by a qualified person to do so, especially in the case of children given their particular vulnerability.⁷⁷⁹ At the time of the events, Vietnamese minors had been identified as 'a specific vulnerable group'.⁷⁸⁰ The Court further noted that domestic authorities' guidance itself stated that child victims of trafficking are a particularly vulnerable group and children in such conditions cannot be required to self-identify as victims nor can they be penalised if they fail to do so.⁷⁸¹ The Court found a violation of article 4 and 6(1) of the Convention.

2022 | *Darboe and Camara v Italy*

The applicants arrived in Italy as unaccompanied minors seeking asylum in 2016 and later ended up being accommodated in an adult reception centre.⁷⁸² In respect of the concept of "private life", the Court writes that states' obligations at protecting said right are 'even more important where (...) personal relationships of an unaccompanied minor are at stake, in a migration context that makes him or her particularly vulnerable'.⁷⁸³

2023 | *S.H. v Malta*

The applicant, from Bangladesh, arrived in Malta by boat in 2019 and was placed in detention.⁷⁸⁴ He claimed to be a journalist and had to flee the country for he had become a target after covering news against the ruling party. The applicant applied for international protection.⁷⁸⁵ The Court found a violation of article 13 in conjunction with article 3 and held that returning him to Bangladesh without 'a fresh assessment of his claim' that as a journalist he risked being subjected to treatment contrary to article 3, would itself breach article 3 of the Convention. The Court reiterated that 'in cases concerning the expulsion of asylum-seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Refugee Convention. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled. By virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights'.⁷⁸⁶ The court stated it must 'be satisfied, however, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources'.⁷⁸⁷ No where in the judgment the Court directly refers to the applicant as vulnerable or in a condition of vulnerability.

2023 | *M.A. v. Italy*

The applicant, a Ghanaian national, arrived in Reggio Calabria as an unaccompanied minor by boat in October 2016.⁷⁸⁸ Upon arrival she underwent a medical examination and was finally transferred into a facility to accommodate minors, which she fled in February 2017 and reached the north of Italy, where she was accommodated in an adult reception centre.⁷⁸⁹ Meanwhile the Juvenile Court had opened proceedings to assess eligibility for adoption. She expressed the wish to apply for international protection and also provided information for her asylum request while being interviewed by a mediator

⁷⁷⁶ *ibid* para 157.

⁷⁷⁷ *ibid* para 112.

⁷⁷⁸ *ibid* para 149.

⁷⁷⁹ *ibid* para 161.

⁷⁸⁰ *ibid* para 171.

⁷⁸¹ *ibid* para 199.

⁷⁸² *Darboe and Camara v Italy*, Application no. 5797/17 (ECtHR, 21 October 2022) paras 1-14.

⁷⁸³ *ibid* para 123.

⁷⁸⁴ *S.H. v Malta*, Application no. 37241/21 (ECtHR, 22 May 2023) paras 5-6.

⁷⁸⁵ *ibid* para 7.

⁷⁸⁶ *ibid* para 100.

⁷⁸⁷ *ibid*.

⁷⁸⁸ *M.A. v Italy*, Application no. 70583/17 (ECtHR, 30 November 2023) paras 1-4.

⁷⁸⁹ *ibid* paras 4-12.

in the adult centre.⁷⁹⁰ Through such an interview she recounted the reasons of her journey and reported she had been subjected to abuse, sexual abuse, violence and harassment.⁷⁹¹ In May 2017 a psychological examination confirmed she had been exposed to multiple traumatic experiences in her life and attested that her psychological condition, already fragile, was exacerbated by living in the centre.⁷⁹² Guardians were appointed to her but were unresponsive.⁷⁹³ While the asylum application proceeded and following a number of events and other health assessments, in December 2017 the applicant was granted international protection.⁷⁹⁴ The Court recalled that authorities ‘must display particular vigilance when dealing with vulnerable people and must afford them increased protection as their capacity or will to pursue a complaint will often be impaired’.⁷⁹⁵ The Court referred to the applicant as being ‘particularly vulnerable’.⁷⁹⁶ The Court found a violation of article 3.

2024 | *A.D. v. Malta*

The case concerned the confinement of the applicant, ‘a vulnerable individual due to his alleged minority and health situation, in different detention centres’ for different ‘purposes’ over a period of months.⁷⁹⁷ The applicant was born in 2004 and at the time of application was detained in Safi.⁷⁹⁸ In 2021, he arrived in Malta irregularly by boat with a group of other persons after having been stranded at sea for ten days, time during which while a number of people died before the remaining persons were rescued.⁷⁹⁹ Upon arrival, the applicant was detained with several other newly arrived asylum seekers, including male adults, under COVID-19 quarantine for the government of Malta ‘explained that, on arrival, the applicant did not present the authorities with a COVID-19 vaccination certificate, nor a negative Polymerase Chain Reaction (PCR) or rapid antigen negative test result, nor proof of recovery from COVID-19’.⁸⁰⁰ The applicant provides for an horrific description of the poor conditions in which he was detained. The applicant was later found to be suffering from TB.⁸⁰¹ He was treated for TB in a hospital and then moved from facility to facility and kept in detention.⁸⁰² In January 2022 his psycho-social age assessment was conducted, according to which he resulted to be an adult.⁸⁰³ He was then moved to a container and was held in horrific conditions there until around June 2022, when he was further moved elsewhere in similar conditions to the ones he previously described.⁸⁰⁴ Meanwhile he applied for asylum in an unspecified date.⁸⁰⁵ In July 2022 he was released from the Safi Detention Centre and was accommodated at the Hal Far Open Centre.⁸⁰⁶ The Court found *inter alia* a violation of article 5 and article 13 in conjunction with article 3.⁸⁰⁷ The Court further held that ‘the problems detected in the applicant’s particular case may subsequently give rise to numerous other well-founded applications which are a threat to the future effectiveness of the system put in place by the Convention’ and reiterated its concern was to ‘facilitate the rapid and effective suppression of a defective national system hindering human-rights protection’.⁸⁰⁸ It therefore recommended ‘that the respondent State envisage taking the necessary general measures to ensure that the relevant law is effectively applied in practice and that vulnerable individuals are not detained, as well as to limit any necessary detention periods so that they remain connected to the ground of detention applicable in an immigration context, and that they are undertaken in places and conditions which are appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens in an immigration context’.⁸⁰⁹

⁷⁹⁰ *ibid* paras 9-13.

⁷⁹¹ *ibid*.

⁷⁹² *ibid* para 14.

⁷⁹³ *ibid* para 46.

⁷⁹⁴ *ibid* para 24.

⁷⁹⁵ *ibid* para 38.

⁷⁹⁶ *ibid* para 41.

⁷⁹⁷ *A.D. v Malta*, Application no. 12427/22 (ECtHR, 17 January 2024) para 1.

⁷⁹⁸ *ibid* para 2.

⁷⁹⁹ *ibid* para 5.

⁸⁰⁰ *ibid* paras 6-11.

⁸⁰¹ *ibid* para 14.

⁸⁰² *ibid* paras 14-19.

⁸⁰³ *ibid* para 19.

⁸⁰⁴ *ibid* paras 19-24.

⁸⁰⁵ *ibid* para 22.

⁸⁰⁶ *ibid* para 24.

⁸⁰⁷ *ibid* paras 191, 203.

⁸⁰⁸ *ibid* para 209.

⁸⁰⁹ *ibid* para 211.

There is a case that terminated in 2022 that was not included in the abovementioned list. It is the case of *M.H. and Others v. Croatia*.⁸¹⁰ It is a case regrettably concerning circumstances heard in other recounts but has remained vividly in the author's mind and is granted a little more space than others in these paragraphs.

The case concerns the death of a six-year-old child, MAD.H. The applicants were a family of fourteen members of Afghan origin. According to them, in November 2017 the mother of MAD.H., along with MAD.H. and other five children, entered Croatia from Serbia with a man N., while the rest of the family remained in Serbia. While in Croatia, the group was approached by the police who ignored their expressed asylum request and took them back to the border, where they were told to follow the train tracks to reach Serbia again. While the group walked along the tracks, a train passed and hit MAD.H. The child was brought by the very same police officers who had previously been encountered to a doctor but nevertheless died. The family then returned to Serbia. The government of Croatia contended instead that the Croatian border police officers had identified a group of migrant persons walking along the train tracks a few hundred meters from the Croatian-Serbian border. They were, in the government's account, using the tracks to reach Croatia. After the passing of a train, the police officers were alerted by a man and a woman transporting an injured child. While the mother and her child were brought to the doctor, the remaining of the group stayed at the border without crossing into Croatia. The medical team could not resuscitate the child. The mother voluntarily returned to the border to the remaining of her family. According to the government, no one of them sought asylum from the Croatian authorities. Statements of the police officers collected by domestic authorities differed in so far as while in 2017 the officers submitted to have merely seen the family inside the territory of Serbia and then heard the passing of the train, in 2018 the officers said that they had gone to the border to signal to the applicants not to cross it.⁸¹¹ Discrepancies also concerned whether the family remained by the railway tracks while the medical team attended MAD.H. or whether they were all brought into Croatia at the occurrence of the accident, as the doctors called to intervene had seen a group of migrant persons, with a child, into a police van.⁸¹² The recordings of the thermographic camera used by the police officers during the events were not submitted to any proceedings, as the police reported that the system had been broken at the time.⁸¹³ No attempt was reported to try to verify the location of the applicants and the officers by using their GPS signals through their mobiles at the time of the event.⁸¹⁴

In 2018 the applicants were intercepted by the Croatian police while crossing the Serbian-Croatian border and were took to a police station where they expressed their 'wish' to seek international protection.⁸¹⁵ They were placed in prison-like conditions of detention for months and a psychologist who visited them had noted that they were mourning the death of MAD.H.⁸¹⁶ The procedures to ascertain the identities of the family revealed the applicants had applied for asylum in Bulgaria in 2017 and their claims had been rejected.⁸¹⁷ The Serbian authorities also informed Croatian authorities that the applicants had expressed the intent to seek international protection in Serbia but had then left the state.⁸¹⁸ They had been traveling for at least two years through different countries.⁸¹⁹

⁸¹⁰ *M.H. and others v Croatia*, Applications nos. 15670/18 and 43115/18 (ECtHR, 4 April 2022).

⁸¹¹ *ibid* para 154.

⁸¹² *ibid* para 155.

⁸¹³ *ibid* para 11.

⁸¹⁴ *ibid* para 25.

⁸¹⁵ *ibid* paras 28, 48.

⁸¹⁶ *ibid* paras 29-32.

⁸¹⁷ *ibid* para 34.

⁸¹⁸ *ibid*.

⁸¹⁹ *ibid* para 45.

The applicants submitted that they had left Afghanistan in 2016 owing to their fear of the Taliban. Prior to coming to Croatia, they had spent about nine months in Bulgaria and then a year in Serbia in different migrant camps. They had not sought asylum in those countries. Even though they considered Serbia a safe country, they had not wished to stay there because, in their view, Serbia was in Asia and there were no job opportunities there. *They wanted to live in Europe so that the children could go to school and have a good life* (emphasis added).⁸²⁰

The family's applications for international protection in Croatia was deemed inadmissible on the basis that Serbia, to which the applicants were to be returned to, was considered a safe third country.⁸²¹ In 2021 only, the Croatian Constitutional Court found that the authorities had failed to properly consider whether Serbia could be regarded as a safe third country.⁸²² Earlier in April 2018, a request under Rule 39 of the Rules of Court had been submitted, requesting *inter alia* the family's release from the centre where they were held and the prevention of their removal from Serbia.⁸²³ The Court temporarily granted interim measures, complying with the request.⁸²⁴ Following the recognition of the family's attorney, in 2019 the Court lifted the interim measures it had granted over time because the family had left Croatia for Slovenia, after having been transferred to an 'open-type centre in Kutina' and having tried to leave on several occasions.⁸²⁵

The Court reasoned that it was not its competence to assess the liability of the police officers for the death of MAD.H. but noted that the officers' actions allegedly immediately preceding the child's death

might have involved a deliberate disregard of the relevant rules on access to asylum procedures (...), or at the very least a disregard of the readmission agreement between Croatia and Serbia on the safe return of migrants unlawfully entering the country (...), despite the obvious risks involved in view that it was night-time in the winter and that there were several children present in the group aged one, two, six, nine and fourteen at the time.⁸²⁶

Third-party interveners submitted that since 2016, Croatian authorities had been performing collective expulsions of migrants and violent pushbacks and most reported cases saw migrants being exposed to dangerous situations, including following railway tracks.⁸²⁷ Reports concerned the unlawful expulsions of children as well and there had been no effective investigation into such alleged illegal practices carried out by the police.⁸²⁸

The Court considered it was not in a position to reach any finding under the Convention concerning the alleged responsibility of Croatia for the death of MAD.H.⁸²⁹ It found however that the investigation conducted domestically did not comply with the requirements of article 2 of the Convention.⁸³⁰

In regard to the detention of the family, the Court reiterated that 'the confinement of minors raises particular issues (...), since children, whether accompanied or not, are considered extremely vulnerable and have specific needs related in particular to their age and lack of independence, but also to their asylum-seeker status'.⁸³¹ The Court further reconfirmed what had held in previous jurisprudence, namely 'that the extreme vulnerability of children – whether or not accompanied by their parents – was

⁸²⁰ *ibid* para 49.

⁸²¹ *ibid* para 50.

⁸²² *ibid* para 55.

⁸²³ *ibid* paras 67-68.

⁸²⁴ *ibid*.

⁸²⁵ *ibid* paras 47, 76.

⁸²⁶ *ibid* para 136.

⁸²⁷ *ibid* paras 144-147.

⁸²⁸ *ibid*.

⁸²⁹ *ibid* para 165.

⁸³⁰ *ibid* paras 164, 272.

⁸³¹ *ibid* para 184.

a decisive factor that took precedence over considerations relating to the child's status as an illegal immigrant'.⁸³² The Court observed that in assessing whether facts met the threshold of a violation of article 3 of the Convention, it considered elements such as: the age of the child involved, the length of their period of detention, the material conditions of the confinement facilities and their 'appropriateness' for accommodating kids, the 'particular vulnerability of children caused by previous stressful events and the effects of detention on the children's psychological condition'.⁸³³

Detention itself is therefore never contested, not only when this involves children. Only its brutal enforcement is once it reaches a threshold that is arbitrarily deliberated on from afar. In regard to such threshold, the Court in this case stated that

the detention of children in an institution with prison-type elements – where the material conditions were satisfactory, but where the level of police surveillance was high and there were no activities structuring the children's time – would perhaps not be sufficient to attain the threshold of severity required to engage Article 3 where the confinement was for a short duration, depending on the circumstances of the case. However, in the case of a protracted period, such an environment would necessarily have harmful consequences for children, exceeding the above-mentioned threshold. The Court reiterates that the passage of time is of primary significance in this connection for the application of Article 3 of the Convention.⁸³⁴

The Court *inter alia* found in this case that all elements compounded gave rise to a violation of article 3 in respect of the children of the applicant family.

In respect of the complaint against collective expulsion under article 4 of Protocol No. 4 of the Convention, according to which collective expulsion of aliens is prohibited, the Court reiterated that the distribution of the burden of proof and the degree of persuasion needed for it to reach a conclusion on a case are linked to the facts, the allegations and the rights that are at stake under the Convention.⁸³⁵

In the context of the expulsion of migrants, the Court has previously stated that where the absence of identification and personalised treatment by the authorities of the respondent State was at the very core of the applicant's complaint, it was essential to ascertain whether the applicant has furnished prima facie evidence in support of his or her version of events. If that is the case, the burden of proof should shift to the Government.⁸³⁶

The Court was of the view that *prima facie* evidence had been provided by the applicants on their expulsion and was in favour of their version recollecting the circumstances of their removal from Croatian territory on the night in which MAD.H. was killed.⁸³⁷ While the family alleged to have been summarily expelled from Croatia two subsequent times, the Court found such claims had not been substantiated.⁸³⁸ It found in the end that the removal to Serbia on the night of the train accident was of a collective nature and amounted to a breach of article 4 Protocol No. 4.⁸³⁹

This case condenses and encapsulate a degree of suffering that should never be lived and the cruelty and violence of the order maintain infrastructures of the nation state that are in place, patrolling and bordering and through their patrolling and bordering, killing. Killing anyone, regardless of their status

⁸³² *ibid.*

⁸³³ *ibid* para 186.

⁸³⁴ *ibid* para 199.

⁸³⁵ *ibid* para 268.

⁸³⁶ *ibid.*

⁸³⁷ *ibid* para 273-275.

⁸³⁸ *ibid.*

⁸³⁹ *ibid* para 304.

or their “recognised” vulnerability, as if that hypocritically meant anything to the persons whose lives are so arbitrarily brutalised.

This section of the chapter has included an uncomprehensive list of cases. These could be revised and commented on at great length. The application by the ECtHR of an approach that recognises the situations of vulnerability in which migrants and asylum seekers are dragged by the very laws that regulate their (im)mobility is to the author vague, distant, inconsistent, timid. The interference with domestic affairs in assessing the national system’s procedures in relation to asylum and protection determination is almost none. The Court does not seem to step outside its subsidiarity to the domestic architecture safeguarding human rights, even when such domestic architecture is placed under proceedings for allegedly having violated said rights. This is not to say that a role other than a subsidiary one would be *a priori* to be upheld of course. But the reading of most of the judgments is sour, leaving to think that so much could be accomplished by a machinery the services of which can be directly appealed to from single laypersons, be them citizens or not, against states. The jurisprudence reports significant and sharp statements that recognise that persons ‘were in a situation of vulnerability as irregular migrants without resources and at risk of being arrested, detained and deported’⁸⁴⁰, plainly acknowledging the exposure to harm that the very “status” of irregularity – of irregularisation – produces. The caselaw does however seem to miss so many opportunities in which a different outcome could have been reached. Sentences like ‘while it is true that the applicants were not young children, they still fell within the international definition of minors’⁸⁴¹ are for instance rather sadly perplexing to spot. Is the age of a minor still to be debated? The amount of evidence and third-party interveners’ reports pointing at massively widespread illegal practices carried out by domestic authorities, the enumeration of paradoxical instances where the burden of proof of a bureaucratic administrative procedures is placed on the migrant themselves, the tragic unfolding of detentions in violent, inhumane and degrading conditions while awaiting for identities to be verified, ages ascertained through medical examinations, family relationships determined in a patronising and often unsensitive manner while they were being plainly described by the migrant persons themselves...

A dramatic sur-reality emerges out of the words of each case, where persons in their flesh and blood are labelled ‘illegal’, ‘prohibited’ and the Court does not, for the most part, seem to ever step outside a courteous line of argument that does acknowledge the occurrence of violations and, somewhat mildly, intimates to states that all such recurring and extensive situations are unacceptable. This is obviously said not to discredit the authoritative role that such mechanism has and its potential, nor the reflections shared on its jurisprudence are offered to the reader as empty critics that do not recognise the worth and preciousness of a directly applicable system such as that of the Court. Yet, the Court has a *potential* that, to the author, seems today to have remained just that, a *virtual* that had promised to evolve to *the unforeseeable and unimaginable* and yet does not seem to be fulfilling such a promise at the pace that a system of protection of human rights might instead require.

In her Partly Dissenting Opinion to the 2020 *N.D. and N.T. v Spain* case (a brief summary of which can be found in the table of jurisprudence in the previous pages) Judge Koskelo contests the applicability of article 4 Protocol 4 on the prohibition of collective expulsion to the specific circumstances that took place at the border separating Melilla from Morocco, writing:

Although the mass influx of migrants and asylum-seekers wishing to claim international protection has in recent years become, and is likely to remain, a dominant point of focus around Europe, these developments should not detract from the fact that other issues and other interests are also relevant in the context of the powers which the States Parties must be able to exercise at their borders. Important issues of national security, the protection of territorial

⁸⁴⁰ *Chowdury et al v Greece*, Application no. 21884/15 (ECtHR, 30 June 2017) para 97.

⁸⁴¹ *Abdullahi Elmi and Aweys Abubakar v Malta*, Application nos. 25794/13 and 28151/13 1-15 (ECtHR, 22 February 2017) para 111.

integrity and public order are at stake as well. I see no justification for disregarding those matters in the legal analysis solely on the grounds that, at a given time, many of the aliens turning up at the border may be persons wishing to claim international protection. In my view, it amounts to a distortion of perspective to view the latter scenario as the only one deserving attention and consideration, and to overlook the legitimate need for States Parties to prevent and refuse, in particular, the entry into their jurisdiction of aliens aiming to cross their external borders with known hostile intentions or posing known threats to national security.⁸⁴²

The protection of territorial integrity and public order becomes in her words priorities that might override persons' chances for safety. Why? How? Protecting order from whom? What does 'territorial integrity' mean and how is the migrant person a threat to it?

The case begins its sentencing with a linear description of the Melilla frontier. It reads that Melilla 'lies on the migration route from North and sub-Saharan Africa which is also used by Syrian migrants. The border between Melilla and Morocco is an external border of the Schengen Area and thus provides access to the European Union. As a result, it is subject to particularly intense migratory pressure'.⁸⁴³ But is it so? Is it subject to particularly intense migratory pressure as 'a result' of the fact that it simply 'lies' on the 'route' to the European Union or is it subject to pressure because the system does not foresee other viable means to access the latter for the people who do attempt crossing?

The sentencing reads that

The Spanish authorities have built a barrier along the 13 km border separating Melilla from Morocco, which since 2014 has comprised three parallel fences. The aim is to prevent irregular migrants from accessing Spanish territory. The barrier consists of a six-metre-high, slightly concave, fence ("the outer fence"); a three-dimensional network of cables followed by a second, three-metre-high fence; and, on the opposite side of a patrol road, another six-metre-high fence ("the inner fence"). Gates have been built into the fences at regular intervals to provide access between them. A sophisticated CCTV system (including infrared cameras), combined with movement sensors, has been installed and most of the fences are also equipped with anti-climbing grids. There are four land border crossing points between Morocco and Spain, located along the triple fence. Between these crossings, on the Spanish side, the Guardia Civil has the task of patrolling the land border and the coast to prevent illegal entry. Mass attempts to breach the border fences are organised on a regular basis. Groups generally comprising several hundred aliens, many of them from sub-Saharan Africa, attempt to enter Spanish territory by storming the fences described above. They frequently operate at night in order to produce a surprise effect and increase their chances of success.⁸⁴⁴

How has this been normalised to the extent that it is indeed "normal"?

In her Opinion, Judge Koskelo recalls that 'the confines of the Convention system are therefore imposed by the State Parties and are not for the Court to set aside'.⁸⁴⁵ In relation to the matter of (extra-)territorial application of the Convention, she writes 'the Court has also acknowledged that the "living instrument" doctrine cannot serve to widen the scope of Article 1, which is "determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection" (see *Banković and Others* (...))'.⁸⁴⁶ And continues reiterating that

⁸⁴² *N.D. and N.T. v Spain*, Application nos. 8675/15 and 8697/15 (ECtHR, 13 February 2020) Partly Dissenting Opinion of Judge Koskelo para 25.

⁸⁴³ *N.D. and N.T. v Spain*, Application nos. 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 15.

⁸⁴⁴ *ibid* paras 16-17.

⁸⁴⁵ *N.D. and N.T. v Spain*, Application nos. 8675/15 and 8697/15 (ECtHR, 13 February 2020) Partly Dissenting Opinion of Judge Koskelo para 16.

⁸⁴⁶ *ibid* para 13.

the Convention does not include provisions on the right to asylum or international protection, therefore arguing that ‘ensuring access to asylum procedures for aliens wishing to enter the jurisdiction of a State Party is (...) not a matter for the Court’s supervision’.⁸⁴⁷ Matters related to asylum are limited to the obligation of *non-refoulement* and the Convention ‘is not intended as an instrument for the supervision of the State Parties’ obligations arising under other international treaties’.⁸⁴⁸ Therefore she contends that, while the underlying idea of the majority’s position in the *N.D. and N.T. v Spain* case appears to her to be to ‘preclude the State Parties from closing their borders to aliens’, in her view the Court has not been tasked by states with dealing with such a matter.⁸⁴⁹ Moreover, she finds ‘rather bizarre’ and ‘neither necessary nor justified’ an interpretation according to which the Convention requires, in the interest of an effective compliance with the obligation of *non-refoulement*, that ‘nobody, regardless of the circumstances, can be turned away or removed from a State Party’s external borders without being granted access to an individualised procedure’.⁸⁵⁰ She furthermore argues that the principles that the judgment sets ‘will create the risk of false incentives, namely by encouraging people smugglers to direct the flows of migrants to places that may best lend themselves to arguing a lack of access to points of legal entry, thereby giving rise to excuses for the storming of borders by aliens (...)’ and that this may in turn have ‘negative repercussions on attitudes among the public even towards those who actually do need protection’.⁸⁵¹ It rather seems that such an argument ignores the reasons why sites ‘may best lend themselves to arguing a lack of access to points of legal entry’: likely because of the *actual* lack of access to points of legal entry, one of the essential elements influencing the channelling of irregularised flows towards one place or another and not an ‘excuse’ to storm a fence. Judge Koskelo’s referencing to migrant smuggling also seems to be flattening a complex phenomenon under the umbrella of a criminal activity. Khosravi writes that indeed the

criminalization of migration has become central to the policy of governing through crime (...). It creates criminals to be able to punish them. Redefining a social issue as a crime, and categorizing an affected group as criminals, is a political strategy to legitimate further intervention into matters not previously regarded as criminal (...). Human smuggling is multifaceted and is a complex market of highly differentiated services (...). Human smugglers are not a homogenous group.⁸⁵²

The concerns expressed by the Judge on the applicability of the scope of the prohibition of collective expulsion in the circumstances of the *N.D. and N.T. v Spain* case, where no violation of said prohibition was eventually found, and the concerns on the balancing of the interests at stake, especially in regard to public order and territorial integrity, are rather negatively striking and so is the argument that, in assessing the merits of the case, the Court stepped outside its remit. What other mechanism could an applicant recur to? Judge Koskelo however makes a further observation: while in her opinion exceeding the scope of its tasks, the Court stated that it must ascertain whether states ‘make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border’⁸⁵³. This, she argues, is of particularly relevant concern for situations that are fact- and time-

⁸⁴⁷ *ibid* para 14.

⁸⁴⁸ *ibid* para 15.

⁸⁴⁹ *ibid* para 17.

⁸⁵⁰ *ibid* para 26. Indeed, she argues: ‘I find it difficult to see why the States Parties should be expected to accept that, as a matter of principle, any persons about to penetrate their external borders must be treated as potential asylum seekers, and that nobody can be stopped and prevented from entry without individualised procedural safeguards, including persons whose hostile intentions are obvious or are known in advance on the basis of intelligence activities’.

⁸⁵¹ *ibid* para 41.

⁸⁵² Shahram Khosravi, *‘Illegal Traveller’. An auto-ethnography of borders* (Palgrave Macmillan 2010) 21-22.

⁸⁵³ *N.D. and N.T. v Spain*, Application nos. 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 209 and Partly Dissenting Opinion of Judge Koskelo para 42.

sensitive: indeed, the supervision of the Court will only occur retrospectively and with delays and, as such, the Court is not well placed to fulfil such an arbitering position.⁸⁵⁴

Indeed, the Court may certainly not be a timely and practical mechanism of intervention when it comes to the means of accessing border checkpoints or crossing frontiers. However, to argue that the Court should not step into the realm of asylum management for this does not equal that of *non-refoulement* would run the risk of bringing about the consequence that state parties could unequivocally close their borders to non-citizens and could not be under the scrutiny of the Court for doing so. The *N.D. and N.T. v Spain* case sets a peculiar series of positive and negative developments that are of interest to the analysis of the understandings of situations of socio-juridical vulnerability affecting migrant persons. The Court noted it interpreted the term “expulsion” in its generic meaning in current use, namely that of driving away from a place, therefore indicating any forcible removal of an alien from a state’s territory, regardless of the lawfulness of that person’s staying, the time they spent in the territory, the location of apprehension, their status as a migrant or an asylum-seeker and their conduct during the border crossing.⁸⁵⁵ Despite the jurisprudence had until then often dealt with situations of collective expulsion following an attempt to enter domestic territory by sea, it concluded that there was no reason to adopt a different interpretation of the term “expulsion” when it came to the forcible removal from a state’s territory in the context of an attempt to cross a state border by land.⁸⁵⁶ Indeed, the principle of *non-refoulement* cannot be arbitrarily dependent on the legal distinction between expulsion and non-admission. The Court, as stated earlier, further established for states to make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border.⁸⁵⁷ It finally reiterated that the Convention cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction for ‘to conclude otherwise would amount to rendering the notion of effective human rights protection underpinning the entire Convention meaningless’.⁸⁵⁸ It however ruled that the expedited expulsions to Morocco at the border fences in Melilla did not amount to a violation of the prohibition of collective expulsion under article 4 of Protocol no. 4. Such a decision was, *inter alia*, reached through focusing on the *conduct* of the individuals who crossed the border instead of focusing on the Spanish authorities’ compliance with the system of protection enshrined in the Convention.⁸⁵⁹ The judgment in fact reads that it was the applicants who placed themselves in jeopardy by participating in the storming of the Melilla border fences, trying to take advantage of the large number of the people who participated in the occasion, using force and not recurring to the existing legal procedures for gaining lawful entry in the territory of Spain: the lack of individual removal decisions could therefore be attributed to the fact that the applicants did not use the official entry procedure existing for the purpose of wishing to assert one’s rights and appeal to the principle of *non-refoulement*.⁸⁶⁰ Their removal without an individual assessment ‘was thus the consequence of their own conduct’.⁸⁶¹ How is it sound that a human right, such as that of being able to appeal to the prohibition of *refoulement* for one’s own safety, be subordinate to an assessment of behaviour? And even if we were to accept such a disquieting premise, is it factually accurate that other means to seek protection were effectively available and accessible to the applicants? What practical implications do these findings risk to have?

The story that each case before the ECtHR tells is the story of a person whose life is dictated by an administrative apparatus that did not, at the very origin of the events, recognise that person’s right to

⁸⁵⁴ *ibid.*

⁸⁵⁵ *N.D. and N.T. v Spain*, Application nos. 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 185.

⁸⁵⁶ *ibid* para 187.

⁸⁵⁷ *ibid* para 209.

⁸⁵⁸ *ibid* para 110.

⁸⁵⁹ Sergio Carrera, ‘The Strasbourg Court Judgment *N.D. and N.T. v Spain* A *Carte Blanche* to Push Backs at EU External Borders?’ (2020) EUI Working Paper RSCAS 2020/21 1.

⁸⁶⁰ *N.D. and N.T. v Spain*, Application nos. 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 231-232.

⁸⁶¹ *ibid.*

be *there* where they instead were and *there* where, so regrettably often, they suffered incommensurably to arrive. Often time, that *there* is not even their desired destination. An apparatus that then spends years and resources to prove it is not at fault for the impediments it set on that person's path. An apparatus that when it is proven at fault is scolded with the order to pay a few thousand euros for the damage caused, as if that rebalanced a lifetime of denied mobility and, after all, a denied life altogether. An apparatus that channels its efforts into detention and expulsion rather than acknowledging the bodily presence of a person and their life projects and welcoming them. To recognise the 'particular vulnerability' of persons and groups placed under the coercive, and often segregating and confining, absolute authority of the nation state in situations of the commission of misdemeanours is paralysing, for this nothing does but legitimising the very use of that coercive, and often segregating and confining, authority.

Yet, the characteristic of exceptionality of administrative detention of the migrant persons seems to be fading away these days and the deprivation of liberty seems to becoming the main path to be followed, the primary mean to achieve the forced removal of foreigners; no longer an extraordinary measure but the norm, to the point of extending the periods, the number and the types of places where such a measure is applied: places where people are deprived of their freedom. Certainly, we refer to numbers that might seem small when we consider that in 2018, 4,092 people transited through administrative detention centres. However, these numbers are not insignificant when we know that only 1,768 persons were effectively repatriated, just over 43%. This is an extremely low figure if it is confronted with the economic but above all the human costs of the detained individuals.⁸⁶²

What do all these tragic situations and the massive structure they mobilise materially boil down to in the end? What are they practically triggered by? A physical lack of papers. But are we humans or are we papers? The silences of such a logic are so loud: what interests do the economic and human costs of the irregularisation of individuals serve?

The concurring opinion of Judge Pinto de Albuquerque in the case *M.A. et al v Lithuania* is of a striking transparency:

In the wake of a new and dangerous "post-international law" world, this opinion is a plea for building bridges, not walls, for the bridges required by those in need of international protection, not walls arising from the fear that has been percolating in recent years through global sewers of hatred. Although justified as an attempt to curb illegal immigration, human trafficking or smuggling, these physical barriers reflect an ill-minded isolationist policy and represent, as a matter of fact, the prevailing malign political *Weltanschauung* in some corners of the world, which perceives migrants as a cultural and social threat that must be countered by whatever means necessary and views all asylum claims as baseless fantasies on the part of people conniving to bring chaos to the Western world. The culture of fear, with its delirious ruminations

⁸⁶² Garante Nazionale dei diritti delle persone detenute e private della libertà personale, *Norme e Normalità. Standard per la privazione della libertà delle persone migranti. Raccolta delle Raccomandazioni 2016-2018* (Tiburtini Srl 2019) 3. Own translation. See original: 'Eppure, la caratteristica di eccezionalità della detenzione amministrativa delle persone migranti sembra di questi tempi perdersi e la privazione della libertà sempre più sembra divenire la via maestra, il principale mezzo per giungere all'allontanamento forzato delle persone straniere; non più dunque uno strumento straordinario, ma la regola, tanto da ampliarne i tempi di applicazione della misura, il numero e la tipologia dei luoghi in cui essa è eseguita: luoghi dove privare le persone della loro libertà. Certamente, ci riferiamo a numeri che potrebbero sembrare piccoli, se si considera che nel 2018 sono passate nei Centri di permanenza per il rimpatrio (CPR) 4.092 le persone. Ma, che non sono tali se si considera che di essi a essere stati effettivamente rimpatriati sono stati in 1.768, poco più del 43%. Una cifra davvero bassa se si pensa ai costi in termini economici, ma soprattutto umani delle persone ristrette'.

against “cosmopolitan elites” and “foreign” multiculturalism, and its most noxious rhetoric in favour of “our way of life” and “identity politics”, has burst into the mainstream.⁸⁶³

The Judge further advocates that ‘in order to remain the “conscience of Europe”, the Court must ensure the effective protection of migrants and especially of asylum-seekers, which requires scrutiny of States’ actions’ and exhorts the Court to

resist two temptations, regardless of how insistently it has been and will continue to be lured towards them. Denying jurisdiction when migrants are *de facto* and *de iure* in the hands and at the mercy of border-control authorities (...) would be a blatant circumvention of the legal force of the Convention and its Additional Protocols, by means of the fraudulent creation of an intolerable legal vacuum at the border of the Contracting Parties. Accepting jurisdiction at the border, but rejecting the principle that migrants who come under the Contracting Parties’ jurisdiction have the right not to be returned or removed without an individual evaluation of each migrant’s claim, would be a hypocritical, self-defeating interpretation of the Convention and its Additional Protocols. To allow people to be rejected at land borders and returned without assessing their individual claims amounts to treating them like animals. Migrants are not cattle that can be driven away like this.⁸⁶⁴

Such an appeal has the potential to be operationalised in a multitude of possibilities and in a virtual that is yet unforeseen. What if a what-if-it-was-otherwise-logic indeed persistently contaminated our reasoning and thinking? What if ‘the Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens’⁸⁶⁵ was instead otherwise? What if that right to control was currently being enforced to an extent that had deformed it to be mere, self-feeding control with no other interest balanced but that of an armed disciplining machinery fending for itself? What if that right to control was instead implemented differently? What if it was drastically altered? What if it was no longer a right altogether on the part of the state? What if the exercising subject of that right became the people, surprisingly competent in their determination of where to live, with whom, when to leave, for where and why?

2.3 Reflections on substantial equality and hierarchisation of citizenship: from vulnerable to resisting

What should be the political and legal implications of the fact that we are born, live, and die within a fragile materiality that renders all of us constantly susceptible to destructive external forces and internal disintegration? Bodily needs and the messy dependency they carry cannot be ignored in life, nor should they be absent on our theories about society, politics and law.⁸⁶⁶

First of all, one must take into consideration the ideological function of the law. What do I mean by this? In my opinion, the dominant class assigns to the legal system, in addition to its normative function to regulate social relations, also an ideological function, which veils and mystifies the true nature of those very relations. (...) Now, contemporary society cannot confess its hidden, sometimes not even hidden, substratum, that is, it cannot admit that it is a society of plunder, of exploitation, of oppression and of inequality. To make this acceptable, it must conceal such a reality as much as possible and present itself as a society of the just, the free, the equal. The other day, a magistrate recalled a sentence that reads above the heads of judges in courtrooms: “the

⁸⁶³ *M.A. et al v Lithuania*, Application no. 59793/17 (ECtHR, 11 March 2019) Concurring Opinion of Judge Pinto de Albuquerque para 26.

⁸⁶⁴ *ibid* paras 27-30.

⁸⁶⁵ For instance in *M.A. et al v Lithuania*, Application no. 59793/17 (ECtHR, 11 March 2019) para 102.

⁸⁶⁶ Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20(1) *Yale Journal of Law and Feminism* 1; Martha Albertson Fineman, ‘Il soggetto vulnerabile e lo stato responsabile’ in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 141.

law is equal for all". Well, this is a mystifying principle, expression of the ideological function of the legal system, that is, having citizens believe that they are all equal before the law while in reality, in the substratum that is being concealed, citizens are deeply unequal. (...) [The legal system] insists so much on the principles of freedom and equality, that many eventually no longer see the real inequalities, or at least do not attribute them to the system, to the division into classes, and they settle for the legal and formal aspects to then offer their consent to this society (...).⁸⁶⁷

In *The Autonomy Myth*, Fineman speaks of *political myths* as not merely entertaining but promoting practical purposes, describing the present and introducing a vision of the future.⁸⁶⁸ A myth's primary function is to voice all relevant human activities.⁸⁶⁹ It is an instrument adopted to come to grips with reality; a given account is a myth not in virtue of the truth it holds but by the fact that it is *believed* to be true and it is casted in dramatic terms.⁸⁷⁰ The vision of the future a myth depicts is in fact 'not as a possible social order, but as a *catastrophe*': the objective is evoking the strongest inclinations of a people, a party or a class; *belief in the catastrophic event envisioned is not based on any analysis of the present* but on the ability to explain the experiences of those to whom the myth is addressed.⁸⁷¹ What renders a myth a political myth is simply its subject matter; political myths deal with politics.⁸⁷² They tell 'the story of how a political society was founded' and 'the values and aspirations of those who benefited from the continued existence of that society'.⁸⁷³

One of the European Commission's priorities for the period 2019-2024 titles '*Promoting our European way of life. Protecting our citizens and our values*'.⁸⁷⁴ The strategy is introduced on the website by a paragraph that reads of standing up 'for justice and for the EU's core values', stating how 'threats to the rule of law challenge the legal, political and economic basis of our Union'; it speaks of a 'vision for a Union of equality, tolerance and social fairness' built 'upon the rule of law'. The last statement reads: '*strong borders, modernisation of the EU's asylum system and cooperation with partner countries* are important to achieve a fresh start on migration'. The proposals of endorsing *externalisation practices, patrolling strong borders and fuelling bordering technologies* have thus worked their way up to and appear rather nonchalantly among the "*values*" that must be protected for citizens' well-being and for the said *promotion of "our" European way of life*. Fineman argues that foundation myths especially,

⁸⁶⁷ Lelio Basso, 'Giustizia e Potere. La Lunga via al Socialismo' (1971) 11-12 *Qualegiustizia* 644 <<https://www.leliobasso.it/documento.aspx?id=0baf192b613bc0588806171468fd0c25>> accessed 12 May 2023. Own translation. See original: 'C'è da tenere in considerazione in primo luogo quella che è la funzione ideologica del diritto. In che senso uso questa parola? A mio giudizio la classe dominante attribuisce all'ordinamento giuridico, oltre che la funzione normativa per regolare i rapporti sociali, anche una funzione ideologica, velando, mistificando la vera natura dei rapporti stessi. (...) Orbene la società attuale non può confessare il suo substrato nascosto, qualche volta neppure tanto nascosto, di essere cioè una società di rapina, di sfruttamento, di oppressione o di disuguaglianza. Per farlo accettare deve velare quanto più le è possibile questa realtà e presentarsi come una società di giusti, di liberi, di eguali. L'altro giorno un magistrato ricordava una frase che leggiamo sopra il capo dei giudici nelle aule giudiziarie "La legge è uguale per tutti". Ebbene, questo è un principio mistificatore, è espressione della funzione ideologica che ha l'ordinamento giuridico, cioè quella di far credere ai cittadini che essi sono tutti uguali di fronte alla legge, mentre nella realtà, nel substrato che si cerca di nascondere, i cittadini sono profondamente disuguali. (...) [L'ordinamento] insiste talmente sui principi della libertà e della uguaglianza, che molti alla fine non vedono più le disuguaglianze reali, o perlomeno non le attribuiscono al sistema, alla divisione in classi, e si accontentano degli aspetti giuridico-formali per dare il proprio consenso a questa società (...)'.
⁸⁶⁸ Martha Albertson Fineman, *The Autonomy Myth. A theory of Dependency* (The New Press 2004) 12.
⁸⁶⁹ Mircea Eliade, *Myth and Reality* (Harper & Row 1963) 8. The reference is deemed useful to the current research; the language of the text however is not endorsed.
⁸⁷⁰ Henry Tudor, *Political Myth* (The Macmillan Press Ltd 1972) 17. The reference is deemed useful to the current research; the language of the text however is in no way endorsed.
⁸⁷¹ *ibid* 15 referencing *inter alia* to Georges Sorel, Jeremy Jennings (ed), *Sorel: Reflections on Violence* (Cambridge University Press 2004).
⁸⁷² Henry Tudor, *Political Myth* (The Macmillan Press Ltd 1972) 17.
⁸⁷³ *ibid* 97; Martha Albertson Fineman, *The Autonomy Myth. A theory of Dependency* (The New Press 2004) 12.
⁸⁷⁴ 'Promoting our European way of life' (European Commission) <https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-of-life_en#highlight> accessed 5 June 2022.

which are the most common ones, are conservative and tend to preserve justifications for the *status quo*.⁸⁷⁵ Systemic aspects of the current societal arrangement are mostly not challenged when addressing the perpetration of discriminations:

It is as though existing material, cultural and social imbalances are the product of natural forces and beyond the ability of the law to rectify. While it may be beyond the *will* of the law to alter, existing inequalities certainly are not natural. Inequalities are produced and reproduced by society and its institutions. Because neither inequalities nor the systems that produce them are inevitable, they can also be objects of reform.⁸⁷⁶

Intent, Fineman objects, is irrelevant, for what is relevant is rather whether the institutions in place are structured to respond in an unequal manner to our common condition of vulnerability.⁸⁷⁷ The state needs reconceptualising its role.⁸⁷⁸

Norberto Bobbio writes that the pathway to the recognition of the rights of citizens of a single state is evolving towards the acknowledgment of the rights of citizens of the world.⁸⁷⁹ Rights, he argues, emerge when they must or can: they are historical, they arise from specific circumstances characterised by the fights for new freedoms against old powers; they appear gradually, not all at once and not once and for all.⁸⁸⁰ They emerge in response to the increase of one's power over another; this either produces new threats to individual freedoms or enables new remedies to indigency.⁸⁸¹ Threats can be contravened with requests for limitations of power; remedies can be met with demands towards power itself to protectively intervene and are thus related to social rights or states' positive obligations.⁸⁸² Although demands for rights can be chronologically clustered into generations, they relate to the constitutive power either by restricting its harms or encourage its goods.⁸⁸³ Some demands, Bobbio observes, emerge only when certain needs appear, which in turn are dependent on social changes and technical development: third generations rights were not even imaginable when the second generation ones were proposed, just as the latter were not conceivable at the time of the eighteenth-century declarations.⁸⁸⁴

The purpose of the study is to reflect on a vision of an alternative model to the current given-for-granted one: a more substantially equal policy system, where challenge to hierarchical and harmful structures is not only possible but welcomed as a performance of citizenship, dislodged from its silent ties to nationality, and as a fundamental element of a democratic process devoted to the benefit of societies. Alternative scenarios are possible and are being proposed and knowledges are being produced by those affected by the harm resulting from existing policy and those in solidarity with them.

Speaking of epistemology of ignorance in relation to the vulnerability paradigm in contemporary feminist theories, Casalini argues that the privilege enjoyed by those holding more power derives not as much from their knowledge but from the possibility they have to ignore part of experience; that is, from the traced [boundaries between what one ought to know and what can be excluded from the objects of](#)

⁸⁷⁵ Henry Tudor, *Political Myth* (The Macmillan Press Ltd 1972) 91; Martha Albertson Fineman, *The Autonomy Myth. A theory of Dependency* (The New Press 2004) 16.

⁸⁷⁶ Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale Journal of Law and Feminism 1.

⁸⁷⁷ *ibid.*

⁸⁷⁸ *ibid.*

⁸⁷⁹ Norberto Bobbio, *L'età dei diritti* (Einaudi 1997). Note to the reader: the version of the text used does not have page numbers. This will be corrected.

⁸⁸⁰ *ibid.*

⁸⁸¹ *ibid.*

⁸⁸² *ibid.*

⁸⁸³ *ibid.*

⁸⁸⁴ *ibid.*

knowledge.⁸⁸⁵ Power in fact manifests itself not only through a production of knowledge but also through the definition of what is and is not knowledge.⁸⁸⁶

The acknowledgment of *other* subjects in their bodily and political presence and the acknowledgement of their expression of competence and production of knowledge change the narratives and the understandings through which the oppressor prospers at the detriment of the oppressed. Giordano, in her work on caring and the logics of difference in Italy, addresses the occurrence of uprisings between 2008 and 2010 at the hands of migrant workers in the areas of Castel Volturno and Rosarno, in southern Italy. She compares such episodes to possible *heterotopias*: 'spaces of radical otherness that disturb shared discourses, where categories no longer hold and institutional languages are shattered and unable to name experiences'.⁸⁸⁷ As heterotopias do not fit into common categories, they often remain unrecognised.⁸⁸⁸ Those who joined the uprising, she says in fact, were depicted by media as rioters and criminals despite the brutal episodes of violence that had triggered migrants' reaction and the well-known exploitative living conditions they were protesting against.⁸⁸⁹

«Here it is a disaster, a disaster», the cops recount from a burning Rosarno while in Reggio Calabria, 70 kms south, a parade goes on stage with the State that does the State with an additional hundred and twenty agents and six magistrates against the 'ndrangheta. An Italian city burns, Calabrians fire against the immigrants and injure some of them, extra-communitarians devastate the town, assault cars with women and children, injure Italians. And when darkness comes raids, destructions, car fires and the tearing down of doors and windows continue, with nine Italians and six foreigners wounded, terrified and fleeing people inciting agents against the foreigners: «shoot them!», women in tears, «something we have never seen, even if we often witness immigrants' revolts».⁸⁹⁰

On 18 September 2008, six Africans are killed at Castel Volturno. The day after, a revolt exploded during which tens of foreigners devastated the state road calling for justice. For these homicides, Giuseppe Setola (belonging to the clan of the *casalesi*) and the other killers have been sentenced to life imprisonment.⁸⁹¹

⁸⁸⁵ Brunella Casalini, 'Le teorie femministe contemporanee, dal paradigma della sovranità al paradigma della vulnerabilità' in M. G. Bernardini, B. Casalini, O. Giolo and L. Re (eds), *Vulnerabilità: etica, politica, diritto* (IF Press srl 2018) 27.

⁸⁸⁶ *ibid.*

⁸⁸⁷ Cristiana Giordano, *Migrants in translation: caring and the logics of difference in contemporary Italy* (University of California Press 2014) 241-245.

⁸⁸⁸ *ibid.*

⁸⁸⁹ *ibid.*

⁸⁹⁰ 'La rivolta nera di Rosarno' (*La Stampa*, 8 January 2010) <<https://www.lastampa.it/cronaca/2010/01/08/news/la-rivolta-nera-di-rosarno-1.37028179/>> accessed 20 December 2022. Own translation. See original: '«Qui è un macello, un macello», dicono i poliziotti da Rosarno che va a fuoco mentre a Reggio Calabria, 70 chilometri più a Sud, va in scena la parata dello Stato che fa lo Stato con centoventi agenti e sei magistrati in più contro la 'ndrangheta. Una città italiana brucia, i calabresi sparano agli immigrati e ne feriscono alcuni, gli extracomunitari mettono a ferro e fuoco il paese, danno l'assalto alle auto con donne e bambini, feriscono gli italiani. E quando fa buio ancora proseguono saccheggi, devastazioni, incendi di auto, infissi sventrati, con nove italiani e sei stranieri feriti, la gente terrorizzata e in fuga che incita gli agenti contro gli stranieri: «Sparategli addosso!», le donne in lacrime, «una cosa mai vista anche se qui di rivolte di immigrati ne vediamo spesso»'.

⁸⁹¹ 'Castel Volturno, la storia della strage' (*RaiNews*, 14 July 2014) <https://www.rainews.it/archivio-rainews/articoli/Castel-Volturno-la-storia-della-strage-dee255f9-e338-4106-af89-febb980c2a03.html?refresh_ce> accessed 20 December 2022. Own translation. See original: 'Il 18 settembre del 2008 sei africani vennero uccisi a Castel Volturno. Il giorno dopo scoppiò una rivolta in cui decine di stranieri misero a ferro e fuoco la Statale Domiziana per chiedere giustizia. Per gli omicidi, Giuseppe Setola (del clan dei casalesi) e gli altri killer sono stati condannati all'ergastolo'.

Their demands, for migrants and citizens all, were directed against the violence of organised crime and the inertia of the institutions. Were they recognised as knowledge-makers by the holding power? Were they heard or could they be heard? Shannon Sullivan and Nancy Tuana argue that [ignorance](#) is often thought of as a gap in knowledge: while it can indeed be an accidental by-product of epistemological oversight, it can nonetheless also exist as a lack of knowledge or an act of unlearning that is actively generated for purposes of exploitation or domination, especially in cases of discrimination and racial oppression.⁸⁹² Ignorance of such kind can be shaped by the holding power as impediment to the marginalised to acquire knowledge, such as by obstructing literacy, or [can take the form of the holding power's own ignorance of harm and injustice](#), such as obliviousness to racism, etc.⁸⁹³ Focusing on racism, Charles Mills writes that

in effect, on matters related to race, the Racial Contract prescribes for its signatories an [inverted epistemology](#), an epistemology of ignorance, a particular pattern of localized and global cognitive disfunctions (which are psychologically and socially functional), [producing the ironic outcome that whites will in general be unable to understand the world they themselves have made](#).⁸⁹⁴

"Unknowledges" can be consciously or unconsciously produced.⁸⁹⁵ Ignorance is not only a tool for domination but can also be a strategy for the oppressed against the oppressor.⁸⁹⁶ Marilyn Frye reflects on the fact that

one can, and should, educate oneself and overcome the terrible limitations imposed by the abysmal ignorance inherent in racism. (...) While one is educating oneself about the experiences and perspectives of the peoples one is ignorant about, and in part as a corrective to the errors of one's ways, one should also be studying one's own ignorance. Ignorance is not something simple: it is not a simple lack, absence of emptiness, and it is not a passive state. Ignorance of this sort (...) is a complex result of many acts and many negligences. [To begin to appreciate this one need only to hear the active verb 'to ignore' in the word 'ignorance'](#). Our ignorance is perpetuated for us in many ways and we have many ways to perpetuating it for ourselves.⁸⁹⁷

Expanding the debate from racism onto a dimension of intersected discriminations, knowledges as well as ignorances are socially constructed: 'how do we attend to relationships that create and sustain patterns of ignorance?', asks Jennifer Logue while reviving Plato's allegory of the cave, 'why don't we know what we don't know? What keeps ignorance alive, or allows it to be used as a political instrument?'.⁸⁹⁸ Ignorance is 'actively sought after, consciously produced, strategically deployed, ferociously consumed, and carefully maintained'.⁸⁹⁹ Logue looks at how knowledge about sex and sexuality has been constructed through ignorance; she observes that forms of strategic ignorance depend on what she defines as a form of closure, which is 'the denial and disavowal of difference'.⁹⁰⁰

⁸⁹² Shannon Sullivan and Nancy Tuana, 'Introduction' in Shannon Sullivan and Nancy Tuana (eds), *Race and Epistemologies of Ignorance* (State University of New York Press 2007) 1-2.

⁸⁹³ *ibid.*

⁸⁹⁴ Charles W. Mills, *The Racial Contract* (Cornell University Press, 2022) 18.

⁸⁹⁵ Shannon Sullivan and Nancy Tuana, 'Introduction' in Shannon Sullivan and Nancy Tuana (eds), *Race and Epistemologies of Ignorance* (State University of New York Press 2007) 1-2.

⁸⁹⁶ *ibid.*

⁸⁹⁷ Marilyn Frye, *The politics of reality: essays in feminist theory* (The Crossing Press 1983) 118-119.

⁸⁹⁸ Jennifer Logue, 'The Politics of Unknowing and the Virtues of Ignorance: Towards a Pedagogy of Epistemic Vulnerability' (2013) *Philosophy of Education* 53.

⁸⁹⁹ Jennifer Logue, 'The Politics of Unknowing and the Virtues of Ignorance: Towards a Pedagogy of Epistemic Vulnerability' (2013) *Philosophy of Education* 53.

⁹⁰⁰ Jennifer Logue, 'The Politics of Unknowing and the Virtues of Ignorance: Towards a Pedagogy of Epistemic Vulnerability' (2013) *Philosophy of Education* 53.

The poststructuralist framework in which this study develops asks: ‘what is left unproblematic in the problem representation of interest? Where are the silences? Can the “problem” be conceptualized differently?’.⁹⁰¹ Erinn Gilson writes that for a conventional and implicitly assumed understanding, to be vulnerable is to be exposed and in danger: such a description tends to serve the function of an ‘uninterrogated background assumption’.⁹⁰² Challenging such assumption(s) also includes factoring ‘strategic unknowns’, whether these are deployed consciously or not, as well as engaging in the effort to alter the understandings behind expressions that can constantly be (re)determined by the environment in which they are deployed. The following paragraphs engage in the effort to sketch the preliminary context for the subsequent analysis of the relationship between the current policy production of vulnerability at the expenses of migrant persons and the notion of substantial equality. The idea is to explore the latter in its constitutional vision, with links to broader human rights norms and a constant reminder of the evolving character of the law.

Pietro Costa and Mariuccia Salvati write that the Italian Constitution was born from the will to leave behind the defeated totalitarianism and to build a new political and social order free of fear and necessity (*libero dalla paura e dal bisogno*), capable of respecting the promises that, during the war, had nurtured resistance to fascism and national socialism.⁹⁰³ The first twelve articles of the Constitution enclose fundamental principles, presented as the framework for a coherent and unitarian normative system: the drafters deliberately did not enclose such principles into a preamble, for fear this could have given rise to a value ranking between the norms listed therein and those included in the body of the text.⁹⁰⁴ Fundamental principles were deemed of a too general character to be appropriate for the titles composing the constitutional body and yet, for such very nature, they were deemed the ones defining the face of the state and its Republic.⁹⁰⁵ They are the result of a *preventive* obligation that the Constitution is expression of, a project of a new and fairer political and social model to be progressively realised.⁹⁰⁶ The actualisation of the Constitution first and foremost foresees the realisation of fundamental principles and rights as the very condition for a constitutional democracy.⁹⁰⁷ Such principles and rights ‘live in time’ (*vivono nel tempo*): they stretch out over time and necessitate of the very same ‘long period’ democracy needs to actualise its promises; they cannot be reformed but must be realised (*non possono essere “riformati”, ma devono essere “attuati”*).⁹⁰⁸

Let us begin by clarify the distinct character between *substantial and formal equality*. The latter in fact, albeit affirming that everyone is equally subjected to the law of the state, does not engage with the very content of such a law. Mario Dogliani and Chiara Giorgi offer to the reader an example to elucidate such a difference, proposing the text of article 24 of the Statuto Albertino as an instance of formal equality, of a different nature from the principle enshrined in article 3(1) of the current Constitution: all subjects of the monarchy, regardless of their title or rank, are equal before the law, they equally enjoy civil and political rights and are admissible to civil and military office as determined by law (*tutti i regnicoli, qualunque sia il loro titolo o grado, sono eguali dinanzi alla legge. Tutti godono egualmente i diritti civili e politici, e sono ammissibili alle cariche civili, e militari, salve le eccezioni determinate dalle Leggi*).⁹⁰⁹ The statutory article established the identical authority of the state law on all people, regardless of class and social status, abolishing therefore the regime based on classes (*ceti*) that saw every class subjected to

⁹⁰¹ Carol Bacchi and Susan Goodwin, *Poststructuralpolicy analysis. A guide to practice* (Palgrave Macmillan 2016) 20.

⁹⁰² Erinn Gilson, ‘Vulnerability, Ignorance and Oppression’ (2011) 26 *Hypatia* 308.

⁹⁰³ Mario Dogliani and Chiara Giorgi, *Costituzione italiana: articolo 3* (Carocci editore 2021) vii.

⁹⁰⁴ *ibid* viii-ix, citing *La Costituzione della Repubblica Italiana. Illustrata con i lavori preparatori da Vittorio Falzone, Filippo Palermo, Francesco Cosentino* (Camera dei Deputati 18 April 1949) 12.

⁹⁰⁵ *ibid*.

⁹⁰⁶ *ibid* xiii.

⁹⁰⁷ *ibid* xiv.

⁹⁰⁸ *ibid*.

⁹⁰⁹ *ibid* 1-2.

its own laws.⁹¹⁰ This however did not entail the equal treatment of all by the law; the principle that the law is one and for all in fact coexisted with brutal *de facto* as well as *de jure* inequalities.⁹¹¹ The principle in article 3(1) according to which ‘all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions’ manifests instead an equality ‘in’ the law (*eguaglianza “nella” legge*) for the equality in *treatment* that the *content* of the law determines for its beneficiaries.⁹¹²

Equal social dignity and equality without discrimination do necessitate the acknowledgment of ‘objective differences’ to be ‘humanely protected’ through the actualisation of different treatments (*la <<pari dignità sociale>> può infatti essere calpestata anche dalla violenza di una legge che non riconosce la rilevanza di oggettive differenze che richiedono un trattamento diverso per essere “umanamente protette”*).⁹¹³ Such a prescription is complemented by article 3(2) affirming the obligation to pursue policies targeting the reduction of inequalities as the foundation of democratic constitutionalism, connected to the enjoyment of rights’ effective constitutional safeguards:

It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.

The article evidently foresees the pursue of a material transformation of the underlying reality, not limited to a juridical reform.⁹¹⁴ Basso argues that the principle represents an attempt to move beyond the formal and [anchor the law on social reality](#): article 3(2) acknowledges that the equality spoken about in article 3(1) does not exist in society, despite formal statements, and that indeed there is no ‘real’ equality.⁹¹⁵ The second paragraph also emphasises the deep contradictory nature of the system: the affirmation that it is the republic’s duty to remove economic and social inequalities, which impede workers’ participation in society, implicitly acknowledges the falsity of other norms, Basso says; Italy cannot be a democratic republic, as for article 1, if workers cannot participate in its governing due to material conditions and will not be one until article 3(2) will be realised.⁹¹⁶ It is by employing such a contradiction within the constitutional text, Basso argues, that the system can be newly interpreted.⁹¹⁷

The Constitution acknowledges factual inequalities and offers a political project the articulation of which is enclosed in article 3.⁹¹⁸ At the end of the second world war, the equality principle was the founding one of the new juridical systems, for its negation had been at the basis of the horrors that had been perpetrated.⁹¹⁹ The same principle is enshrined in the Universal Declaration of Human Rights, the European Convention on Human Rights as well as the Charter of Fundamental Rights of the European Union that dedicates the whole chapter III to the principle of equality, as noted by Dogliani and Giorgi.⁹²⁰

⁹¹⁰ *ibid.*

⁹¹¹ *ibid.*

⁹¹² *ibid.*

⁹¹³ *ibid* 2-3.

⁹¹⁴ *ibid* 6.

⁹¹⁵ Lelio Basso, ‘Giustizia e Potere. La Lunga via al Socialismo’ (1971) 11–12 *Qualegiustizia* 644 <<https://www.leliobasso.it/documento.aspx?id=0baf192b613bc0588806171468fd0c25>> accessed 12 May 2023.

⁹¹⁶ *ibid.*

⁹¹⁷ *ibid.*

⁹¹⁸ Mario Dogliani and Chiara Giorgi, *Costituzione italiana: articolo 3* (Carocci editore 2021) 11.

⁹¹⁹ *ibid.*

⁹²⁰ *ibid.*

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (...).⁹²¹

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.⁹²²

Everyone is equal before the law.⁹²³

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.⁹²⁴

The “subject” of these provision is “everyone” without discrimination on any ground. The same is shown in the earliest elaborations of article 3, where the “subjects” were: ‘men’ – the infamous “neutral” – regardless of any distinction in attitude, sex, race, nationality, class, political and religious opinion; the ‘human person’:

Men, regardless of diversity in attitudes, sex, race, nationality, class, political opinion and religion, are equal before the law and have the right to equal social treatment. It is therefore the duty of society and the State to eliminate the economic and social obstacles that, effectively limiting the freedom and the equality of people, impede the achievement of the full dignity of the human person and their complete physical, economic, cultural and spiritual development.⁹²⁵

The final integral version of the text reads:

3.1 – All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.

3.2 – It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.

⁹²¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR) art 2.

⁹²² Convention for the Protection of Human Rights and Fundamental Freedoms (entry into force 1953) (European Convention on Human Rights, as amended) (ECHR) art 14.

⁹²³ Charter of Fundamental Rights of the European Union (2000/C 364/01, Official Journal of the European Communities) art 20.

⁹²⁴ Charter of Fundamental Rights of the European Union (2000/C 364/01, Official Journal of the European Communities) art 21.

⁹²⁵ Mario Dogliani and Chiara Giorgi, *Costituzione italiana: articolo 3* (Carocci editore 2021) 45, mentioning the text was approved on 11 September 1946 by the First Subcommission. See ‘Art. 3. 11 settembre 1946’ (*La nascita della Costituzione. Le discussioni in Assemblea Costituente a commento degli articoli della Costituzione*) <<https://www.nascitacostituzione.it/index.htm>> accessed 3 June 2023. Own translation. See original: ‘Gli uomini, a prescindere dalla diversità di attitudini, di sesso, di razza, di nazionalità, di classe, di opinione politica e di religione, sono uguali di fronte alla legge e hanno diritto a uguale trattamento sociale. È compito perciò della società e dello Stato eliminare gli ostacoli di ordine economico-sociale che, limitando di fatto la libertà e l’uguaglianza degli individui, impediscono il raggiungimento della piena dignità della persona umana e il completo sviluppo fisico, economico, culturale e spirituale di essa’.

Looking at the preparatory works of the Constituent Assembly for further reference, the evolution of article 3 is connected to that of article 1, which reads that ‘Italy is a democratic Republic founded on labour. Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution’. The commentary of article 1 recalls that the expression ‘founded on labour’ did not only have a juridical character, in the sense that it excluded the possibility to be founded on privilege, aristocracy or on the fatigue of others (*si esclude che essa possa fondarsi sul privilegio, sulla nobiltà ereditaria, sulla fatica altrui*) but referred to a characterisation from a socio-economic, political and historical perspective.⁹²⁶ The project in fact included in the text reference not only to the foundation on labour but to the effective participation of all workers in the political, economic and social organisation of the country.⁹²⁷ The formulation was only shortened for its preferred brevity.⁹²⁸ Yet it was made explicit that such an expression was not of a classist nature, indicated a sense of social justice as foundational of the political arrangement and held a vision of a realisation of democracy that was not only political but social end economical.⁹²⁹

The reference to the effective participation of all workers to society that had been left out in article 1 for reasons of conciseness, later appeared in article 3. The term ‘workers’, here as well, was specifically said to be void of any classist meaning.⁹³⁰ While article 2 speaks of the inviolable rights of the individuals (*i diritti inviolabili dell’uomo*), article 3(1) moves from such a universalistic concept to that of the ‘citizen’ related to national positive law.⁹³¹ The expression that had been proposed by the First Subcommission, as said earlier, placed among the conditions that could not limit equality that of *inter alia* nationality; while formally revisiting the text, the Editorial Committee left out ‘nationality’ as a consequence of the replacement of the subject ‘men’ in ‘citizens’.⁹³² Article 3(2) commits the newly born political arrangement and the ‘future legislator’ to do everything possible for the concrete actualisation of the principle of equality, which was the reason the expression ‘it is the duty of the Republic to remove those obstacles of an economic or social nature’ was maintained.⁹³³

The combination of terms such as ‘citizens’, ‘workers’ and the further reference to the realisation of the ‘human person’ might offer a picture of the perpetual and progressive movement of exchange between the social reality and its normative framework. Such movement finds in the guidance of the constitutional text a starting point for a continuous expansion of rights rather than an arrival point. Basso affirms that a way tomorrow’s society can access today’s system is the silent path of modifying the meanings of words and expressions; there is no need, he contends, to alter the literal text of a norm for it to change meaning, when the norm encloses expressions that are strictly connected to the socio-cultural context.⁹³⁴ Expressions over time mean what the surrounding cultural context determines them to mean and therefore norms can be interpreted differently even without being altered; Basso elucidates, as an example of such an inevitable contingency, that the moral and social value of the same act is valued differently under a fascist regime or a democratic one.⁹³⁵ As the socio-cultural environment

⁹²⁶ *La Costituzione della Repubblica Italiana. Illustrata con i lavori preparatori da Vittorio Falzone, Filippo Palermo, Francesco Cosentino* (Camera dei Deputati 18 April 1949) 21-22.

⁹²⁷ *ibid.*

⁹²⁸ *ibid.*

⁹²⁹ *ibid.*

⁹³⁰ *ibid* 24-25.

⁹³¹ *ibid.*

⁹³² *ibid.* Si vedano i passaggi della discussione al riguardo dell’11 settembre 1946, così come i successivi, per un approfondimento: ‘Art. 3. 11 settembre 1946’ (*La nascita della Costituzione. Le discussioni in Assemblea Costituente a commento degli articoli della Costituzione*) <<https://www.nascitacostituzione.it/index.htm>>. In particolare, la proposta di sostituzione delle parole “gli uomini” con “i cittadini” dell’onorevole Lucifero non viene approvata; la proposta di emendamento per aggiungere le parole “di nazionalità” a “razza” dell’onorevole Dossetti è approvata.

⁹³³ *ibid.*

⁹³⁴ Lelio Basso, ‘Giustizia e Potere. La Lunga via al Socialismo’ (1971) 11-12 *Qualegiustizia* 644 <<https://www.leliobasso.it/documento.aspx?id=0baf192b613bc0588806171468fd0c25>> accessed 12 May 2023.

⁹³⁵ *ibid.*

changes and develops, so the meanings of norms do.⁹³⁶ Basso contends that the contradictions inherent to a normative framework, including the very constitutional one that he sees as the result of a clash of forces on the manner in which the Italian post-fascist society was to be built, are leveraging instruments that can be used to modify the system.⁹³⁷

An inquiry of interpretation or reinterpretation of the normative model revolves around the identity of the “subjects” as the beneficiaries of substantial equality. The ‘effective participation’ enshrined in article 3(2) is closely connected to a new political structure.⁹³⁸ The meaning behind participation may be interpreted as amplified, extended to an understanding of it closely related to the question of distribution, redistribution and appropriation.⁹³⁹ The notion of participation is moreover not formalizable in a pre-conceivable manner and is growingly characterised by continuous enrichment.⁹⁴⁰ The term ‘workers’ on the other hand assumes in the constitutional context a clearly historical connotation, at the time supplementing the notion of ‘citizens’ with new contents.⁹⁴¹ Following such a line of reasoning, the vision of equality and freedom that the article offers identifies as recipients ‘the person’ and ‘the worker’, both of which are terms that cannot only be attributable to the formal scope of citizenship.⁹⁴²

‘Citizens’ is to be extensively interpreted in regard to the existence, or lack thereof, of an equivalence between equality of citizens and equality of individuals, pointing at all those whose exercise of freedoms and participation is impeded by social and economic obstacles.⁹⁴³ Finally reflecting on the very expression ‘remove those obstacles of an economic or social nature’ for fear of abuses of power by a government majority, an additional extract from the preparatory works discussion is hereby reported:

Since, over time, the interpretation becomes extensive and these articles that might now make a jurist or a constitutionalist smile for they seem void of content, at some point do find their content; and since they have no inherent content, they assume that which at a particular moment is given to them by those who are more forceful. The Constitution is made for minorities and not for majorities, to protect the few and not the many. The many do not need the Constitution; they have the recourse to force.⁹⁴⁴

The fights of ‘subaltern groups’, as referred to by Dogliani and Giorgi, were to fulfil the space of “rewriting” into the surrounding reality the principles established on paper, rendering them effective and ensuring the realisation of democracy.⁹⁴⁵ And to this day

it cannot, in fact, be said that the idea of a Constitution as a horizon for possible change has been abandoned. A conception that for its realisation requires a political, cultural and juridical struggle carried out by organised historical subjects who are aware of having to implement a very concrete utopia. A complex and articulated path, which is not predetermined, of

⁹³⁶ *ibid.*

⁹³⁷ *ibid.*

⁹³⁸ Mario Dogliani and Chiara Giorgi, *Costituzione italiana: articolo 3* (Carocci editore 2021) 117-120.

⁹³⁹ *ibid.*

⁹⁴⁰ *ibid.*

⁹⁴¹ *ibid.*

⁹⁴² *ibid.*

⁹⁴³ *ibid.*

⁹⁴⁴ Art. 3. 4 marzo 1947’ (*La nascita della Costituzione. Le discussioni in Assemblea Costituente a commento degli articoli della Costituzione*) <<https://www.nascitacostituzione.it/index.htm>> accessed 8 June 2023. Own translation. See original: ‘Giacché con il tempo l’interpretazione diventa estensiva e questi articoli che possono far sorridere un giurista o un costituzionalista perché privi di contenuto, ad un certo momento il loro contenuto lo trovano; e visto che non ne hanno uno proprio, assumono quel contenuto che in quel determinato momento gli vuole dare chi è più forte. La Costituzione è fatta per le minoranze e non per le maggioranze, per tutelare i pochi e non i molti. I molti non hanno bisogno di Costituzione; hanno la forza’.

⁹⁴⁵ Mario Dogliani and Chiara Giorgi, *Costituzione italiana: articolo 3* (Carocci editore 2021) 91.

emancipation in rights and limitation in powers (...). The Constitution has been abandoned by the majority of the organised political forces but is yet sustained by scattered and divided multitudes who engage in <<resistance>>.⁹⁴⁶

2.4 Chapter summary

This chapter touches upon the notion of vulnerability and its operationalisation. It argues that the socio-juridical vulnerability of the migrant person is produced through policy, intended as order maintaining and including law. The analysis begins by exploring how the migrant person is digested by the state through a process of categorisation that renders their presence familiar and thus intelligible to the system, reinforcing the binary structure that sees the notions of citizen and non-citizen as opposing ones. Categorisation is addressed with reference to the gap between state's recognition and acknowledgment, policing and politics, where the otherness of the migrant person, the non-citizen, disrupts the existing order of things and eventually cannot be translated. It is argued that such a process of sorting people upon preestablished legal statuses determines a hierarchisation of individuals and their rights, producing situations of vulnerability impacting on migrants' lives in socio-juridical terms. The study familiarises with the notion of vulnerability as developed in the scholarly debate and as operationalised by the ECtHR, selected as a platform of jurisprudence binding states at the regional level. While the analysis does not claim comprehensiveness, it hopes to pave the way for a discourse that merges the policy production of vulnerability with the idea of the realisation of a project of substantial equality. The latter notion is further touched upon, arguing that accepting that vulnerability is produced by the system itself can be used as an instrument to inform and guide collective care, with solidarity and anger. The idea that is aligned with is to flip over the perception of vulnerability from being a burden on society to seeing it as a core element of political life, and of life altogether. A vulnerability-centred approach calls on collective responsibility to pursue protection rather than to coercively enforce rejection. It can offer a device to identify and assess the gaps and missed opportunities of a system that claims to move towards a constitutional vision of equality and yet undercuts such a vision through the very issuance of subsequent discriminatory policies, allegedly timeless and unmodifiable. This proposal leaves room for contestation, for recalcitrance to a subjugating power and for alternative interpretations of existing norms and new rights, with the purpose of rejecting the hierarchisation of citizenship currently in place and the institutional denial and ignorance of the space occupied by the migrant person, their allies and the scattered multitudes of resistance.

⁹⁴⁶ Gaetano Azzariti, *Diritto e barbarie. Il costituzionalismo moderno al bivio* (Editori Laterza 2021) 108-109. Own translation. See original: 'non può, infatti, dirsi sia stata abbandonata l'idea di una Costituzione come orizzonte di cambiamento possibile. Una concezione che richiede per la sua realizzazione una lotta politica, culturale e giuridica compiuta da soggetti storici organizzati e consapevoli del compito di dover attuare una concretissima utopia. Un percorso articolato e complesso, non predeterminato, di emancipazione nei diritti e limitazione dei poteri (...). La Costituzione è stata abbandonata dalla maggior parte delle forze politiche organizzate, ma è ancora sostenuta da moltitudini disperse e divise, le quali fanno <<resistenza>>'.

Chapter three.

Problematizing migration through “places”: questioning the “Italian state” and the “European region”

Chapter three attempts to question the ways of thinking behind “entities” such as that of the “state” and the “region”. The representation of “places” by the current policy and governing systems are offered as timeless, natural, neutral, entirely physical, building on an uncontested and incontestable notion of the “border” and of “sovereignty”. Challenging such a narrative is propaedeutic to highlight the contingency of these “entities” and the policy instruments they issue. Introducing the idea that “geographical” and institutional entities can be approached as proposals themselves and denaturalised (3.1), the chapter addresses the understandings and silences behind the representation of the “Italian state” (3.2) and of “Europe”, with particular reference to the “European Union” (3.3), and concludes its analysis reflecting on the current order of things of state sovereignty and how such order is disrupted by the migrant person, competent and knowledgeable agent of an outside-the-order, an anarchic disorder of things (3.4).

Keywords: Europe – Italy – “place” – sovereignty – “state”

3.1 Foregrounding the background: questioning of nation state Italy and regional Europe

Reason was never short of reasons why the poor, female or colonized were not fully rational, could not exercise rights or did not deserve them. Each challenge to the limits of the reasonable raised the possibility that the previous concept of reason had been not merely limited but flawed: that the way in which reason was specified and exercised depended on the exclusion of alternative perspectives.⁹⁴⁷

This segment of the study takes into consideration the role played by Italy and the European region in migration policy. It does so by considering such “entities” not as mere “places” where migration takes place nor plain backgrounds against which migration unfolds but as policy *productions* themselves made of power relations that govern people’s movements. These political constructions, it is argued, are oftentimes taken for granted in policymaking as well as policy analysis as simply being “out there” and “existing” as geographical and regulatory settings. In these cases, analyses may question policies as they are adopted and implemented by such “entities” but not the paradigms behind these very “entities” and their “existence”. It is argued that this maintains unaltered and presumably immutable *self-evident* “states” and “regions” rather than recognising them as political and spatial relations that can be questioned and eventually rethought. While the chapter does not rethink “Italy” and “Europe” altogether, as engaging in the study of the genealogy and phenomenology of these “places” would be too ambitious of an effort at this time and exceed the purpose of this section, it proposes to question and reflect on them as a set of premises that can be explored to propaedeutically move onto contesting the current order of things. To be clear, contesting does not entail a histrionic tearing down of the Italian state and of European region. The attempt is rather to observe the contingency of such structures and that of those elements that give rise to and benefit uneven power relations between people rather than a more equal and homogeneous sharing of wellbeing among all governed individuals.

⁹⁴⁷ Alan Finlayson and James Martin, ‘Poststructuralism’ in Colin Hay, Michael Lister and David Marsh (eds) *The State. Theories and Issues* (Palgrave Macmillan 2006) 155, 157.

Therefore, while the initial idea was to only introduce the European regional policy system in place as well as the Italian national one before delving into the analysis of the laws they issue, the author realised the need to move slightly backwards and follow a reasoning that challenged such actors at an earlier stage. Beginning to question the Italian state and regional Europe aims at setting the tones of the discussion and at challenging a symbolic and normative framework. The text follows Bacchi's cues on the making and unmaking of "places", focusing on their meanings, assumptions and presumptions and addressing them as proposals themselves, within the limits of this analysis on migration. As Bacchi observes, the idea is to encourage the reader to look at "places" or otherwise geographical "entities" as political creations; they are instead most often addressed in policymaking as *physical locations*, taken for granted as simply being "there", while playing major governing functions.⁹⁴⁸ "Places" are indeed usually looked at as self-evident and incontestable: they are treated as backgrounds against or context within other phenomena of interest occur.⁹⁴⁹ And admittedly this was indeed this study's initial approach: treating Italy and Europe as *settings* rather than elements of analysis themselves. In this understanding, "places" such as "nation states" and "regional entities" are also treated as self-evident "jurisdictions": their representation is that of 'territories with fixed borders and legitimate rulers, and are made singular and homogenized by designating populations as *citizens* of that *jurisdiction*'.⁹⁵⁰ Such a view implies the uncontested legitimacy of the rulers' governing and the policy that eventually derives from it. It disregards the way "territories" and "populations" are shaped and channelled into specific directions so that governing '*can take place*', narrowly conceiving the "state" and neglecting alternative governing forms, depoliticising those elements such as the "where" and "how" of policy.⁹⁵¹ To avoid this, the following line of reasoning is therefore adopted: how do political spatial relations come to be described through terms such as "state", "Italy", "region", "Europe", "European Union" and so on?; what effects does this labelling have?⁹⁵²

Bacchi writes that the focus of the analysis shifts from 'conventional political institutions to the networks of relations among various agencies and experts involved with "the state" in making "territories" and populations governable': this is described, she continues, as the *governmentalisation* of the "state" by Foucault.⁹⁵³ The latter speaks of *governmentalisation* of the "state" as a 'singularly paradoxical phenomenon':

the governmentalization of the state is at the same time what has permitted the state to survive, and it is possible to suppose that if the state is what it is today, this is so precisely thanks to this governmentality, which is at once internal and external to the state, since it is the tactics of government which make possible the continual definition and redefinition of what is within the competence of the state and what is not, the public versus the private, and so on; thus the state can only be understood in its survival and its limits of the basis of the general tactics of governmentality.⁹⁵⁴

Subjects and objects are the effects of practices: placing the practises first can 'denaturalize and historicize whole sets of things that are simply assumed to be stable entities: citizens, individuals, states, corporations, parties, and classes (...)'.⁹⁵⁵ This allows for the state to be seen as an effect of practices

⁹⁴⁸ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis. A guide to Practice* (Palgrave Macmillan US 2016) 95-97.

⁹⁴⁹ *ibid.*

⁹⁵⁰ *ibid.*

⁹⁵¹ *ibid.*

⁹⁵² *ibid.*

⁹⁵³ *ibid.*

⁹⁵⁴ Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: Studies in governmentality* (University of Chicago Press 1991) 87, 103-104.

⁹⁵⁵ Antti Tietäväinen, Miikka Pyykkönen and Jani Kaisto, 'Globalization and Power – Governmentalization of Europe? An Interview with William Walters.' (2008) 5 *Foucault Studies* 63.

rather than 'a given, self-evident entity'.⁹⁵⁶ Burchell writes that 'our relation to political power has been shaped by what Foucault calls 'governmentalization' of the state':

it is in the name of forms of existence which have been shaped by political technologies of *government* that we, as individuals and groups, make claims on or against the *state*. It is in the name of our governed existence as individual living beings, in the name of our health, of the development of our capabilities, of our membership of particular communities, of our ethnicity, of our gender, of our forms of insertion into social and economic life, of our age, of our environment, of particular risks we may face and so on, that we both revile and invoke the power of the state.⁹⁵⁷

The entities that are commonly referred to as international organisations, such as "Europe" in general terms, harmonise and regulate states' relations and transactions 'so that perhaps extended economic and social spaces become more viable'.⁹⁵⁸ Speaking of the governmentalisation of Europe then entails thinking about 'the way in which it becomes possible to identify or to name something as Europe, which is a very political act (...)': it is to consider the practices that allow an organisation to govern key aspects of economic and social life at a certain time in the name of "Europe".⁹⁵⁹

So Europe – which has long been an idea, a geographical idea, cultural idea, civilization idea – at a certain point begins to acquire a much more positive existence (...). It is a positivity because it becomes a domain of statistics, calculations and projections – the object and the subject of a whole range of policies. The governmentalization of the Europe is the process of making Europe practical.⁹⁶⁰

The following paragraphs approach the questioning of what the "Italian state" and the "European region" are. The idea is to observe such "entities" not as self-evident and natural but as productions contingent to time and space and as the coming together of sets of practices. The study does not propose to replace "states" and their networks with entirely different entities or with the lack thereof. It rather aims at suggesting to the reader that alternatives to the models that Italy and Europe currently hold on to may exist. It therefore attempts to draw attention to the overall "reasons" and "logics" behind the entities involved and introduce the idea that these may be subject to change. This allows for the contestation of those paradigms such as that of the "border", of "security", of "citizenship", of "movement", of an "area of freedom, security and justice", of "administrative detention", "asylum" and so on, central to the policy production of socio-juridical vulnerability of the migrant person.

What if the "Italian state" was thought of differently in relation to the migratory movements it "witnesses"? What if a whole "European region" was thought of differently? Such enquiries open the discussion to reflections on the nature of spaces (and their *establishment*) that are both empirical and symbolic, geographical and normative.

3.2 What if the "Italian state" was otherwise?

The necessary premise to understand where our institutions come from and how they could evolve is to never forget that the type of political system currently in place, far from being the

⁹⁵⁶ *ibid.*

⁹⁵⁷ Graham Burchell, 'Peculiar interests: civil society and governing 'the system of natural liberty' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: Studies in governmentality* (University of Chicago Press 1991) 119, 145.

⁹⁵⁸ Antti Tietäväinen, Miikka Pyykkönen and Jani Kaisto, 'Globalization and Power – Governmentalization of Europe? An Interview with William Walters.' (2008) 5 *Foucault Studies* 63.

⁹⁵⁹ *ibid.*

⁹⁶⁰ *ibid.*

only and inevitable product of universal reason, is merely the result, ultimately quite contingent, of a series of historical conjunctions.⁹⁶¹

The following paragraphs address the “state” in an effort to challenge its current paradigms. Terms such as “state” and “statehood” are used interchangeably, unless otherwise specified. “Sovereignty” may as well be employed as a synonym in the text, although with care, for the notion is hereby considered to be the conflation of both politics and the “state”: sovereignty historically has been referred to the rule of law, which manifests itself in the authority of someone to set and exercise laws over a population and a geographical location.⁹⁶² So intended, a “state” is the actor currently widely thought of as exhibiting sovereignty.⁹⁶³ The term “nation state” is often employed as well to indicate the “state” when the text wishes to refer to an articulation of the latter that converges onto a purported level of collective recognition of people allegedly sharing common identitarian characteristics, often founding on “natural” presumptions and often also strongly tied to the “geographical” element of “territory”.

Poststructuralism argues that to approach the “state” one shall understand the reasonings behind its constitution, defining the parameters ‘within (and without) which legitimacy can be established’.⁹⁶⁴ A critique is therefore made to the state and the idea of sovereign statehood when taken as a given and thought of as a formal unity, without enquiring and revealing its limits.⁹⁶⁵ The state is seen as coexisting with other transnational entities that may exceed and disrupt its boundaries, meanwhile ‘the migration of populations or refugees problematizes state responsibility for citizens’.⁹⁶⁶ Such elements transcend the margins of unitary sovereignty and challenge the very notion of bounded statehood.⁹⁶⁷

“State” semantically evolves from the Latin *status*, from *stare*, the roots of which express the meanings of “staying” and “establish” (*stare e porre*): the former indicating that which objectively stays, lasts, remains, does not change and if anything repeats itself with no alterations; the latter indicating the action, more or less voluntary, aimed at doing in such a manner as to something would not move nor change, remaining or becoming stable.⁹⁶⁸ The term thus originally referred to the idea of the objective persistence of something, the active maintenance of a situation or the creation of something durable.⁹⁶⁹ The logical and semantic proximity of both meanings suggests the exploration of the mechanism that sees that some norms (especially prohibitions), although having been issued remotely in time, are absorbed as natural and unavoidable laws, as something cogent (*cogente*).⁹⁷⁰ *Status* in Latin did not refer to a political system, which was instead indicated by the term *res publica*; *res publica*, together with *regnum* and *civitas*, remained as predominant terms until early Medieval ages, with no instances of *status* within the meaning of a model that could encompass the different forms of exercising powers.⁹⁷¹ The term *status* however, to Miglio, did come to become the pillar, and thus the interpretation key, of the structure of the ‘modern’ political system: *status* has indicated over time the entirety of the obligations, rights, prerogatives and means that determine the ‘place’ and ‘function’ of a person within

⁹⁶¹ Gianfranco Miglio, *La regolarità della politica* (Giuffrè Editore 1988) 803. Own translation. See original: ‘Non dimenticare mai che il tipo di ordinamento politico oggi vigente, lungi dall’essere l’unico e inevitabile prodotto della ragione universale, è soltanto il risultato, in fondo abbastanza occasionale, di una serie di congiunture storiche, costituisce il presupposto necessario per capire appunto da dove vengano le nostre istituzioni e come potrebbero evolversi’.

⁹⁶² Thom Kuehls, *Beyond Sovereign Territory* (University of Minnesota Press 1996) 25.

⁹⁶³ *ibid.*

⁹⁶⁴ Alan Finlayson and James Martin, ‘Poststructuralism’ in Colin Hay, Michael Lister and David Marsh (eds) *The State. Theories and Issues* (Palgrave Macmillan 2006) 155, 158.

⁹⁶⁵ *ibid.*, 163.

⁹⁶⁶ *ibid.*, 164.

⁹⁶⁷ *ibid.*

⁹⁶⁸ Gianfranco Miglio, *La regolarità della politica* (Giuffrè Editore 1988) 804.

⁹⁶⁹ Giuseppe Campesi, Luigi Pannarale, Ivan Pupolizio, *Sociologia del diritto* (Mondadori Education 2017) 1.

⁹⁷⁰ Gianfranco Miglio, *La regolarità della politica* (Giuffrè Editore 1988) 804-805.

⁹⁷¹ *ibid.* 805-810.

society and that have been customarily negotiated.⁹⁷² Referring to the work of Hans De Vries, Miglio writes that the term “state” employed by Machiavelli indicated a dominant equipe, so to speak, that segment of the political class that is the core of the ruling system and holds the authority: it is the personification of the political arrangement, intended as the delimited and corporate dominant group, but not the abstract notion indicating the idea of the arrangement itself yet.⁹⁷³ Such a view, he argues, confirms the continuity existing between the original idea behind the word *status* as someone’s “place” within society and the “new” meaning as the modern “state”.⁹⁷⁴ Machiavelli, he continues, consolidated the use of a term that was at the time widely present in the political language of contemporary Italian society.⁹⁷⁵

Following the line of argument expressed by Campesi *et al.*, reflecting on the uses of the word “state” allows one to distance themselves from the representation of it as a universal model of organisation of power and rather shifts attention towards *a, and not the, way of thinking of political institutions* in modern age.⁹⁷⁶ *The notion of “state” is a proposal* and so are its paradigms.

But the important fact that must be considered as a real, specific, irreducible historical phenomenon is the moment when the state enters into men’s reflective practice. The problem is to know when, in what conditions and form the state began to be designed, planned and developed within a practice of reflection; at what point it became an object of knowledge and analysis and how it became part of a thought and concerted strategy, beginning to be invoked, desired, invited, feared, repudiated, loved, hated. In short, what one must attempt to understand is the entry of the state into the realm of the practice and the thought of men (...). And what if the state were instead nothing but a way of governing? What if it were nothing but a form of governmentality?⁹⁷⁷

Miglio moves through the process of abstraction and personification of the state as an entity distinct from its representatives until the current conception of it that *makes up* (‘inventa’) the myth of the “nation”.⁹⁷⁸ This finds, he argues, the peak of its ‘delirious greatness’ in the words describing the *Italian nation state* under the fascist regime:

It is not an exaggeration to consider the abstract and ‘personalised’ idea of the ‘State’ as the masterpiece of western political thought and, at the same time, the most sophisticated of the ‘fictions’ behind which, throughout history, the men who compose the political class conceal themselves. Perhaps nowhere has the ‘fiction’ of the ‘State’ reached a level of delirious grandeur like in the Title I of the Book II of the current Italian Penal Code (<<On the crimes against the

⁹⁷² *ibid* 810-812.

⁹⁷³ *ibid* 815-816.

⁹⁷⁴ *ibid* 817.

⁹⁷⁵ *ibid* 818; Norberto Bobbio, *Stato, governo, società. Per una teoria generale della politica* (Einaudi 1985) 55-56.

⁹⁷⁶ Giuseppe Campesi, Luigi Pannarale, Ivan Pupolizio, *Sociologia del diritto* (Mondadori Education 2017) 3.

⁹⁷⁷ Michel Foucault, *Sicurezza, territorio, popolazione. Corso al Collège de France (1977-1978)* (Feltrinelli 2005) 182-183. Own translation. See original: ‘Ma il fatto importante che bisogna considerare, in quanto fenomeno storico reale, specifico, irriducibile è il momento in cui lo stato entra effettivamente nella pratica riflessiva degli uomini. Il problema è sapere quando, in che condizioni e in che forma lo stato ha iniziato a essere progettato, programmato e sviluppato all’interno di una pratica di riflessione; da che momento è diventato oggetto di conoscenza e di analisi e in che modo è entrato a far parte di una strategia riflettuta e concertata, cominciando a essere invocato, desiderato, invitato, temuto, ripudiato, amato, odiato. Insomma, ciò che bisogna tentare di comprendere è l’ingresso dello stato nel campo della pratica e del pensiero degli uomini (...). E se invece lo stato non fosse altro che una maniera di governare? Se non fosse altro che un tipo di governamentalità?’.

⁹⁷⁸ Gianfranco Miglio, *La regolarità della politica* (Giuffrè Editore 1988) 821-826.

personality of the State>>) and above all in the words with which the then Ministry of Justice Alfredo Rocco at the time illustrated this part of the code.⁹⁷⁹

The text picks up the cue from here. Retracing the way the “state” was thought of at the time is of interest because, although being only one example of a single policy scenario contingent to its time and space, it provides to the reader a hint of [the possible plethora of alternative conceptualisations that go by the very same term “state”](#) and at a given moment in time are passed off as obvious, granted, ageless, natural, self-evident...

Extracts of the report accompanying the 1930 penal code reform are hereby included to offer to the reader a sense of what policy representation of the “Italian state” was displayed and promoted at the time: sovereignty and punishment are presented as interconnected, recalled as the essential manifestation of an empire and as the power to command the armed forces of the state. It is a noteworthy and startling reminiscence of what *reasonings* the current “Italian state” was *made of* at the time and what has gone through.

The power to punish is indeed one of the highest attributes of Sovereignty, so much so that our ancestors saw it as one of the most essential expressions of the *imperium*, and they assimilated it, in its most complete capacity of exercise, to the power to have at one’s disposal the armed force of the State (...). This success is due to a long and tenacious effort, carried out with unwavering faith and secured in its fruitful continuity by the new and more favourable political conditions of our Fatherland (*Patria nostra*), largely brought about by the intimate renewing virtue of Fascism and by the far-seeing animating impulse of its Leader.⁹⁸⁰

In such a description, one’s attention might be caught by the use of the term ‘*Patria*’, which is ‘ours’ and which is identified with the ‘State’, both with capital initials. The description aligns with the notion of state as a stable entity comprising of an economic, social, political and military structure separate from the ruler:⁹⁸¹

This transformation draws its historical justification from an entirely new system of social, political and legal philosophy, which can rightly be called the philosophy of Fascism. For it, the State is conceived as an organism that is at one economic, social, political, juridical, ethical and religious.⁹⁸²

⁹⁷⁹ *ibid.* Own translation. See original: ‘Non è esagerato considerare l’idea astratta e ‘personalizzata’ dello ‘Stato’ come il capolavoro del pensiero politico occidentale, e, ad un tempo, la più sofisticata delle ‘finzioni’ dietro cui, da sempre, gli uomini che compongono la classe politica, sono costretti a celarsi. Forse da nessuna parte la ‘finzione’ ‘Stato’ ha raggiunto un livello di delirante grandezza come nel Titolo I del Libro II del Codice penale vigente oggi in Italia (<<Dei delitti contro la personalità dello Stato>>) e sopra tutto nelle parole con le quali il Guardasigilli Alfredo Rocco illustrò a suo tempo questa parte del codice stesso’.

⁹⁸⁰ Alfredo Rocco, *Codice Penale – Relazione e R. Decreto 19 ottobre 1930 – Anno VIII, n. 1398. Relazione a S. M. il RE del Ministro Guardasigilli (ROCCO). Presentata nell’udienza del 19 ottobre 1930 – VIII per l’approvazione del testo definitivo del Codice Penale* in Gazzetta Ufficiale del Regno d’Italia (26 ottobre 1930 – anno VIII, numero 251 (straordinario) available at <<https://www.gazzettaufficiale.it/eli/gu/1930/10/26/251/sg/pdf>> 4444. Hereinafter Rocco 1930. Own translation. See original: ‘La potestà di punire è infatti uno dei massimi attributi della Sovranità, tanto che i nostri antichi ravvisavano in essa una delle più essenziali manifestazioni dell’*imperium*, e la assimilavano, nella sua più completa capacità d’esercizio, al potere di disporre della forza armata dello Stato (...). Questo successo è dovuto ad un lungo e tenace lavoro, condotto con incrollabile fede e assicurato nella sua feconda continuità dalle nuove e più felici condizioni politiche della Patria nostra dovute, in sì gran parte, dall’intima virtù rinnovatrice del Fascismo e all’antiveggente impulso animatore del suo Capo’.

⁹⁸¹ Giuseppe Campesi, Luigi Pannarale, Ivan Pupolizio, *Sociologia del diritto* (Mondadori Education 2017) 3.

⁹⁸² Rocco 1930 4446-4447. Own translation. See original: ‘Tale trasformazione attinge la sua giustificazione storica a tutto un nuovo sistema di filosofia sociale, politica e giuridica che può ben dirsi la filosofia propria del Fascismo. Per esso lo Stato è concepito come un organismo, ad un tempo, economico e sociale, politico e giuridico, etico e religioso’.

As an economic and social organism, the state is depicted as the synthesis of those persons, categories and classes that constitute it. It has its own life, ends, needs and interests that exceed the life of those persons, categories and classes and that extend to *all generations*, being thus unaltered across time and timeless. All other interests, whether individual or collective, must be subordinated to the interests of the state, for these have an immanent character.

As an economic and social organism, the State is no longer represented as the arithmetic sum of the individuals composing it, but rather as the result, the synthesis or the composition of the individuals, the categories and the classes that constitute it, having its own life, goals, needs and interests that transcend, both in extension and in duration, the very life of the individuals, categories and classes and that extend to all past, present and future generations. To these preeminent goals and interests, which are the goals and interests of the state, all other individual and collective interests – of the individuals, categories and classes – must therefore be subordinated in case of any conflict, for they have, unlike that of the State, a transient and not an immanent character, as concerns the life of the State.⁹⁸³

As a political and juridical organism, the state is conceptualised as the population of a specific territory ordered under a highest power to the extent that this acquires the capacity to *want* and to *act* to pursue its collective objectives.

As a political and legal organism, the State is conceived as the population of a given territory, politically and juridically organised under a supreme power in such a way as to acquire the capacity to want and act, as a whole, for the achievement of its collective goals and thereby acquire a distinct and autonomous personality, at once social, political and juridical.⁹⁸⁴

As an ethical and religious organism, the state is said to emerge as a unit, as the very nation that it is within.

Finally, as an ethical and religious organism, the State appears to us as the Nation itself, organised within it, that is, as a unit that is not only social but also ethnic, bound by ties of race, language, custom, historical traditions, morality, religion and living, therefore, not by mere material or economic needs but also and above all by psychological and spiritual needs, be such needs intellectual, moral or religious.⁹⁸⁵

In 1930, this was *the* vision portraying the “Italian state” and it is now only *a* vision of it. It was proposed as a unitary sovereign entity, identifying in the “nation” as well, of an ageless nature, with its own personality and interests to which all other needs were subordinated. Would the representation of the

⁹⁸³ *ibid.* Own translation. See original: ‘Quale organismo economico-sociale, lo Stato non più si rappresenta come la somma aritmetica degli individui che lo compongono, bensì come la risultante, la sintesi o composizione degli individui, delle categorie e delle classi che lo costituiscono, avente propria vita, propri fini, propri bisogni e interessi che trascendono per estensione e per durata la vita stessa degli individui, delle categorie e delle classi e si estendono a tutte le generazioni passate, presenti e future. A tali preminenti fini e interessi che sono i fini e interessi statuali debbono, dunque, venire subordinati, nel caso di eventuali conflitti, tutti gli altri interessi individuali e collettivi, propri dei singoli, delle categorie e delle classi che hanno, a differenza di quelli, carattere transuente e non già immanente, come gli interessi concernenti la vita dello Stato’.

⁹⁸⁴ *ibid.* Own translation. See original: ‘Quale organismo politico e giuridico, lo Stato viene concepito come la popolazione di un determinato territorio organizzata politicamente e giuridicamente sotto un potere supremo in modo tale da acquistare la capacità di volere e di agire, come un tutt’uno, pel conseguimento dei suoi scopi collettivi e acquistare così una distinta e autonoma personalità, ad un tempo, sociale, politica a giuridica’.

⁹⁸⁵ *ibid.* Own translation. See original: ‘Infine, quale organismo etico-religioso, lo Stato ci appare come la Nazione medesima, in esso organizzata, cioè come un’unità non solo sociale, ma altresì etnica, legata da vincoli di razza, di lingua, di costume, di tradizioni storiche, di moralità, di religione, e vivente, quindi, non di puri bisogni materiali o economici, ma anche, e soprattutto, di bisogni psicologici e spirituali, siano essi intellettuali o morali o religiosi’.

“Italian state” now be along the same lines? Statal representations may indeed vary while going by the same name.

Bobbio observes that once jurists got a hold of ‘the problem of the State’, the latter has been defined through three constitutive elements, namely population, territory and sovereignty.⁹⁸⁶ The state, Mortati writes, in light of the absolute supremacy in relation to all the physical and juridical subjects on its territory that characterises it, is essentially stable, authoritarian, coactive, necessary and total.⁹⁸⁷ The territory delimits the spatial validity of the right of the state (with the exception of the matter of extraterritorial jurisdiction that is hereby not addressed) while, besides exceptional cases, the population delimits the personal validity of the right of the state.⁹⁸⁸ Under the 1933 Montevideo Convention and as accepted under customary international law, ‘the state as a person’ is indeed defined when it possesses the following criteria: a permanent population, a defined territory, a government and the capacity to enter into relations with other states.⁹⁸⁹ Parameters of such kind are hereby only addressed as constituents of a proposal that has over time maintained its authoritative status among (compliant) states themselves. Such a codification is not flawless, nor it is its implementation before geopolitical interests: instances of lives under occupation and repression, under a condition of unrecognition of customs unconforming to a ruthless hegemonic framework, as well as instances of the disregard of self-determination, apartheid and besiege, are manifest before everyone’s eyes. Moreover, questions as basic as to the permanence of the population rather than its movements and nomadism, as to what elements *make* such “population”, the implications of a unilateral, arbitrary or imposed definition of a territory as well as its denial, the capacity of non-governmental actors to enter into relations with others, and so on, are all examples of situations that suggest to the reader to leave this customarily agreed definition of the “state” open to reflections.

A customary definition of state indeed completely prescind from the purpose or purposes of said state: Bobbio cites Montesquieu’s argument that all states in general have the same objective, that of preserving themselves, while each state also has a particular aim such as that of expanding its borders, or being belligerent, cherishing religion, trading, etc.⁹⁹⁰ That is, from the angle of ‘a formal definition and instrumental necessary condition for existence’, the state is determined by its agreed upon constitutive elements regardless of what its decisions and actions may be.⁹⁹¹ There is no designated space, in such a definition, for a state thought of as serving and benefiting the people.

A passage from Crawford’s Brownlie’s Principles of Public International Law reads that:

[t]he Treaties of Westphalia of 1648-9 (...) are often regarded as at the origin of what we now call international law, hence the standard reference to the public order system founded on state sovereignty as ‘Westphalian’. But this is anachronistic: while the Treaties may have consolidated the idea of the nation state they neither created nor constituted the law of nations, nor did they establish (...) any new political or legal institutions. In term of intellectual history, international law was European in origin, although the Europe in question was large, extending to the whole Mediterranean, to Russia and the Near East; thence international law travelled with the

⁹⁸⁶ Norberto Bobbio, *Stato, governo, società. Per una teoria generale della politica* (Einaudi 1985) 84.

⁹⁸⁷ Costantino Mortati, *La Costituzione in senso materiale* (Giuffrè Editore 1998) 54-55.

⁹⁸⁸ Norberto Bobbio, *Stato, governo, società. Per una teoria generale della politica* (Einaudi 1985) 85.

⁹⁸⁹ Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (26 December 1933) art 1. See also International Court of Justice (ICJ), *Western Sahara* (Advisory Opinion) 16 October 1975 I.C.J. Reports p. 12; see also Jamie Levin (ed), *Nomad-State Relationships in International Relations. Before and After Borders* (Palgrave Macmillan, 2020).

⁹⁹⁰ Norberto Bobbio, *Stato, governo, società. Per una teoria generale della politica* (Einaudi 1985) 85-86.

⁹⁹¹ *ibid.*

colonizers to the Americas, to Asia, to Africa, eventually to Oceania. At this time, Europe was not chauvinistic in defining membership of the international system.⁹⁹²

The excerpt highlights the consolidation of an idea, that of the “nation state”, that rests within the contours of precise historical moments, underlining the contingency that permeates it. It simultaneously emphasises the mutable nature of a “geographical entity” such as the then “Europe”, its definition(s), membership parameters and evolution over time, its organisation and hierarchical structures. “States” and “regions” are the outcome of historical processes and not timeless and self-evident “entities”. A state-centric view shapes the narratives and the representations of society as if “states” were the natural structures around which life and people organised, as if they always existed and always displayed the very same powers, mechanisms and practices – and not the other way around, where people did always exist and “states” developed and organised around that. Among all the “phenomena” that “states” define and regulate, [a state-centric view is also predominant in the narrative of migration.](#)

In the Italian Constitution, migration is mentioned twice, both in terms of emigration and immigration.⁹⁹³ Article 35 recognises the freedom to emigrate. It does so in the section on economic rights and duties, establishing the protection of work in all its forms and practices and that of ‘Italian workers abroad’. Emigration is thus depicted in close connection with labour. Immigration on the other hand is mentioned in article 117 as a matter in which the state, and no lower administrations, has exclusive legislative powers. Immigration matters are treated in the ‘Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero’ (TUI).⁹⁹⁴ This entered into force in 1998 and has been revisited since. In compliance with article 10 of the Constitution, recognising how the national system conforms to international law and regulates the legal status of foreigners, the TUI applies to citizens not belonging to the EU and to stateless persons.⁹⁹⁵ The parameters adopted to represent the “state” come to define those around migration. How does the “state” appear in the TUI? By looking at this policy text on immigration, the analysis rolls back onto the reasonings behind the problem representation of the “state” and in so doing observes how this determines how movements are reasoned and “managed”.

*To the foreigner nevertheless present at the frontier or within the territory of the State, the fundamental rights of the human person are recognised, as foreseen by domestic law, by international conventions and general principles of international law (emphasis added).*⁹⁹⁶

The article “recognises” the fundamental rights of the human person to foreigners at the frontier or within national territory. There thus appears to be an underlying reliance on *territoriality* behind the recognition of rights to a foreigner. The “state” as a physical, “real” place is therefore an essential element in the definition of national competences and jurisdiction as well as the definition of the person as a rights holder. What shall be considered a frontier? What shall be considered a territory? Is a public official operating extraterritorially and exercising authority over a foreigner nonetheless *performing the frontier or performing the territory* over them? Do frontiers and borders (hereby used as synonyms)⁹⁹⁷

⁹⁹² James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press 2019) 180-181.

⁹⁹³ The topic of migration and the Constitution is approached in chapter IV.

⁹⁹⁴ Decreto-legge 25 July 1998 no. 286 ‘Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero (entry into force 2 September 1998, last updated 10 March 2023)’ GU 191 Supplemento Ordinario 139 18 August 1998 <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1998-07-25:286>>. Hereinafter TUI.

⁹⁹⁵ TUI art 1.

⁹⁹⁶ *ibid* art 2(1). Own translation. See original: ‘Allo straniero comunque presente alla frontiera o nel territorio dello Stato sono riconosciuti i diritti fondamentali della persona umana previsti dalle norme di diritto interno, dalle convenzioni internazionali in vigore e dai principi di diritto internazionale generalmente riconosciuti’.

⁹⁹⁷ The term ‘frontier’ and ‘border’ are hereby in the text regarded as synonym, unless otherwise specified. For an alternative reading of such terminology, see for instance the conceptualisation provided by Ferrarese on frontiers

indeed physically “exist”? What determines their materiality, if any? Is a line on a map concrete enough? Do a river or a mountain *naturally* perform a bordering function? Are those indeed “borders” of a delimiting nature or could on the other hand they rather be *passages*? After all, doors’ thresholds can be either closed or open to the newcomer. The territoriality of the “state” seems rather ephemeral when observed against a framework that questions it.

*The foreigner who is regularly staying in the territory of the State enjoys the civil rights that are attributed to the Italian citizen (...).*⁹⁹⁸

Here, the foreigner is yet the citizen of another “state” or is a stateless person whose protection nonetheless depends on the “state” they come from or their receiving one. The foreigner to whom rights are recognised is regularly present on Italian territory; if that was not the case, civil rights would not be equalled. This places foreigners onto a recognition scale, a hierarchical structure where people occupy a space preordered to them by their papers: permits vary and shape the lives of their “beneficiaries”, locating them onto a spectrum that maintains the spot of the “citizen” at the top of the hierarchy.

*To the foreigner is recognised equal treatment with the citizen in terms of the jurisdictional protection of the rights and legitimate interests, relations with the public administration and access to public services, in the limits and forms foreseen by law.*⁹⁹⁹

*The foreigner who is present on Italian territory is nevertheless bound to comply with the obligations established by the current legislation.*¹⁰⁰⁰

Foreigners are recognised equal treatment to citizens in terms of jurisdictional protection deriving from one’s rights and interests as well as in connection with the public administration and access to public services, so far as foreseen by law. The foreigner who finds themselves on Italian territory must observe the obligations foreseen by law. Presence and, beforehand, entrance into domestic territory are amply regulated by the TUI as well as by the so called Schengen Borders Code¹⁰⁰¹ governing the movements of third-country nationals in the Schengen area.¹⁰⁰²

Ours is a time of the triumph of borders, an epoch of border fetishism. Borders determine how the world looks (...). Borders are constructed to designate difference (...). Borders appear unbreakable as if they have always been there. Natural barriers, such as rivers, mountains and deserts, are used to designate borders, and thereby to naturalize them. In this way, borders are presented as primordial, timeless, as part of nature. Borders symbolize the sovereignty of states. A nation state can be imagined (Anderson 1983) only through its borders.¹⁰⁰³

in the premodern era: crossing points (*aree di passaggio*) between two or more territories corresponding to vast and articulated areas rather than lines, in which coexisting and conflicting dynamics concentrated among various ethnic, linguistic and religious groups. Maria Rosaria Ferrarese, ‘Tra rafforzamenti e indebolimenti. Il contraddittorio statuto dei confini in epoca post-globale’ (2020) 10 *Teoria politica. Nuova serie Annali* [Online] 191-205.

⁹⁹⁸ TUI art 2(2). Own translation. See original: ‘Lo straniero regolarmente soggiornante nel territorio dello Stato gode dei diritti in materia civile attribuiti al cittadino italiano (...)’.

⁹⁹⁹ TUI art 2(5). Own translation. See original: ‘Allo straniero è riconosciuta parità di trattamento con il cittadino relativamente alla tutela giurisdizionale dei diritti e degli interessi legittimi, nei rapporti con la pubblica amministrazione e nell’accesso ai pubblici servizi, nei limiti e nei modi previsti dalla legge’.

¹⁰⁰⁰ *ibid* art 2(9). Own translation. See original: ‘Lo straniero presente nel territorio italiano è comunque tenuto all’osservanza degli obblighi previsti dalla normativa vigente’.

¹⁰⁰¹ ‘Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification)’ <<http://data.europa.eu/eli/reg/2016/399/oj>>. Hereinafter Schengen Borders Code.

¹⁰⁰² For a broader analysis of administrative law on entry and staying see for instance Paolo Morozzo della Rocca (ed), *Immigrazione, asilo e cittadinanza* (Maggioli Editore 2021) 15-50.

¹⁰⁰³ Shahram Khosravi, *‘Illegal Traveller’. An auto-ethnography of borders* (Palgrave Macmillan 2010) 1-2.

Besides exceptional circumstances regulated by law, entry is foreseen when the foreigner holds valid permits and shall take place in designated border crossing points (*valichi di frontiera appositamente istituiti*).¹⁰⁰⁴ A border crossing point is any crossing-point authorised by the competent authorities for the crossing of external frontiers; there can also be shared border crossing points situated either on the territory of a member state or on the territory of a third country, at which member state border guards and third-country border guards carry out exit and entry checks one after another, in accordance with their national law and pursuant to a bilateral agreement.¹⁰⁰⁵ Scope of application of such provisions is without prejudice to the free movements of persons under EU law as well as ‘the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*’.¹⁰⁰⁶ Any entry that does not comply with the conditions foreseen by law, which include circumstances satisfying the prohibition of expulsion and push-back and disposition relating to “vulnerable categories” listed in article 19 TUI, is to be considered *illegal*. Provisions of the TUI and their connected EU regulatory framework present the “state” as a marked territorial entity. The word *territorio* appears in the TUI 244 times; *frontiera* and its plural versions appear 95 times. While the “state” is obviously not reduced to its land, the latter and its (non)porous borders nonetheless appear essential and somehow immutable in the problem representation the system proposes.

The question that this text holds on to then is: what if it was otherwise?

Bacchi observes: ‘[i]nstead of treating “the state” as some sort of closed and timeless “entity” therefore, the task becomes seeking out and exploring the shifting constitution of “state” power in particular times and places’.¹⁰⁰⁷ After all, anywhere we can see how ‘nature abhors fixed boundary and sudden transitions; all her forces combine against them. Everywhere she keeps her borders melting, wavering, advancing, retreating’.¹⁰⁰⁸ Why then considering something as the immutable borders, both abstract and physical, of a “state” *natural*?

People have always moved, whether driven by desire or forced by violence.¹⁰⁰⁹ However, Deleuze and Guattari observe, “*history is always written from the sedentary point of view and in the name of a unitary State apparatus*, at least a possible one (...). What is lacking is a Nomadology, the opposite of history”.¹⁰¹⁰

Sedentarism and territorialization are also expressed in ordinary language: the term “nation” is often referred to in many languages as “country”, “land”, “soil”; the link between people and places, nations and territories are metaphysical too: terms like *motherland* and *fatherland* see every nation as ‘a grand genealogical tree, rooted in the soil that nourishes it. By implication, it is impossible to be part of more than one tree’.¹⁰¹¹ The way we *naturalise* the connection between people and places depicts territorial

¹⁰⁰⁴ TUI art 4(1), (1bis).

¹⁰⁰⁵ Schengen Borders Code art 2(8), (9).

¹⁰⁰⁶ *ibid* art 3.

¹⁰⁰⁷ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis. A guide to Practice* (Palgrave Macmillan US 2016) 98.

¹⁰⁰⁸ See Ellen Churchill Semple, ‘Geographical Boundaries. I’ (1907) 39 7 *Bulletin of the American Geographical Society* 385. Borrowing the statement, extrapolating this sentence from her work.

¹⁰⁰⁹ Liisa Malkki, ‘National Geographic: The Rooting of Peoples and the Territorialization of National Identity Among Scholars and Refugees’ (1992) 7 1 *Cultural Anthropology* 24.

¹⁰¹⁰ Gilles Deleuze and Félix Guattari, *A thousand plateaus. Capitalism and schizophrenia* (University of Minnesota Press, 1987) 23.

¹⁰¹¹ Liisa Malkki, ‘National Geographic: The Rooting of Peoples and the Territorialization of National Identity Among Scholars and Refugees’ (1992) 7 1 *Cultural Anthropology* 24. See also Gilles Deleuze and Félix Guattari, *A thousand plateaus. Capitalism and schizophrenia* (University of Minnesota Press, 1987) 18-19: ‘It is odd how the tree has dominated Western reality and all of Western thought, from botany to biology and anatomy, but also gnoseology, theology, ontology, all of philosophy...: the root-foundation, *Grun*, *racine*, *fondement*. The West has a special relation to the forest, and deforestation (...)’.

displacement as *pathological*.¹⁰¹² Culture has also been conceived as something existing in soil – culture and cultivation, *cultura* and *coltura*.¹⁰¹³ Words such as ‘autochthonous’, ‘indigenous’, ‘native’ root cultures in soil.¹⁰¹⁴ There is ‘a powerful sedentarism in our thinking (...). This is also a sedentarism that is taken for granted to such an extent that is nearly invisible’.¹⁰¹⁵

According to the natural-national order of things,¹⁰¹⁶ people must belong to a nation: there is no space for humanity outside the “nation state”.¹⁰¹⁷ This is perhaps why, Khosravi observes, loss of citizenship is termed *denaturalisation*, becoming unnatural.¹⁰¹⁸ Statelessness may be even a greater example of this. It is a condition interpreted as temporary:¹⁰¹⁹ the 2014 introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR) to the 1954 Convention relating to the Status of Stateless Persons reads that the Convention provides for solutions for States to guarantee stateless persons’ ‘security and dignity until their situation can be resolved’.¹⁰²⁰ *Being*, as humans and not as belonging to a “state”, is a situation that the system sees as one that must be resolved, for it is designed in such a way that it exposes populations to a condition of *vulnerability* that does not ensure fundamental human rights once outside the “permanent” statal order.¹⁰²¹

Bookchin writes that

Far from being a static scene – a vision that allows reactionary elements to identify the existing society with society *as such*, in the same way that the oppressed and the oppressors are unified into a single species called Homo sapiens and considered equally responsible for the current ecological crisis – society is instead the history of its evolution and its many forms and possibilities. On a cultural level, we are the product of our social history, just as on a physical level, we are the product of natural evolution.¹⁰²²

For Bookchin, the “state” represents ‘the institutional peak of the male civilisation’ (*l’apice istituzionale della civiltà maschile*), building on one of the premises according to which ‘the dominance of the human on the human preceded the idea of dominating nature (...). Men never thought of dominating nature if not after having dominated the women, the youth and other men.’¹⁰²³

¹⁰¹² Liisa Malkki, ‘National Geographic: The Rooting of Peoples and the Territorialization of National Identity Among Scholars and Refugees’ (1992) 71 Cultural Anthropology 24.

¹⁰¹³ *ibid.*

¹⁰¹⁴ *ibid.*

¹⁰¹⁵ *ibid.*

¹⁰¹⁶ *ibid.*; Liisa Malkki, ‘Refugees and Exile: From “Refugee Studies” to the National Order of Things’ (1995) 24 Annual Review of Anthropology 495.

¹⁰¹⁷ Shahram Khosravi, *‘Illegal Traveller’. An auto-ethnography of borders* (Palgrave Macmillan, 2010) 122.

¹⁰¹⁸ *ibid.*

¹⁰¹⁹ *ibid.*

¹⁰²⁰ Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR) to the Text of the 1954 Convention relating to the Status of Stateless Persons (Geneva, May 2014).

¹⁰²¹ The statement ‘The 1954 Convention is designed to ensure that stateless people enjoy a minimum set of human rights’ can be read on ‘UN Conventions on Statelessness’ (UNHCR) <<https://www.unhcr.org/un-conventions-on-statelessness.html>> accessed 19 December 2023. See also 1961 Convention on the Reduction of Statelessness (GA Res 896 (IX), 4 December 1954). See Hannah Arendt, *The Origins of Totalitarianism* (A Harvest Book, Harcourt Brace & Company, 1979) *inter alia* 292.

¹⁰²² Murray Bookchin, *Per una società ecologica* (elèuthera 2021) 40-41. Own translation. See original: ‘Ben lungi dall’essere una scena immobile – visione che permette agli elementi reazionari di identificare la società esistente con la società in quanto tale, allo stesso modo in cui oppressi e oppressori vengono unificati in una singola specie detta Homo sapiens e considerati equamente responsabili dell’attuale crisi ecologica – la società è invece la storia della sua evoluzione e delle sue molteplici forme e possibilità. Sul piano culturale siamo il prodotto della nostra storia sociale, così come sul piano fisico siamo il prodotto dell’evoluzione naturale’.

¹⁰²³ *ibid.* 41, 68. Own translation. See original: ‘(...) dominio dell’uomo sull’uomo è venuto prima dell’idea di dominare la natura (...). Gli uomini non hanno mai pensato di dominare la natura se non dopo aver cominciato a dominare le donne, i giovani e gli altri uomini’.

At its minimum level, the State can be considered a system of social coercion managed in a professional manner, and not a mere administrative body (...). Here, the term <<professional>> holds the same relevance as the term <<coercion>>. Coercion exists in nature, in interpersonal relations and in non-hierarchical communities without a State. If the State were defined solely through the concept of coercion, we could then only trace it back to a purely natural phenomenon, which is false. It is only when coercion is *institutionalised* and becomes a form of social control that is professional, systematic and organised, that is, when people are dispossessed of their daily lives within a community and such a life is <<administered>> by an institution that holds the monopoly of violence, that we can properly speak of the State.¹⁰²⁴

Bookchin points out how various “state” levels do exist, from incipient ones to quasi-“states” to partial “states”.¹⁰²⁵ Ignoring such gradations of coercion, professionalisation and institutionalisation leads to forgetting that statehood as it is known today is the product of a long and complex evolution.¹⁰²⁶ It is a simplistic concept that which sees “states” being birthed, coming into existence as newborns: this denies the crucial gestational process of statehood.¹⁰²⁷

At the same time, Bookchin observes, “states” are not necessarily institutionalised systems of violence operating in the interest of a precise ruling class.¹⁰²⁸ Being reminded of this is fundamental: the purpose of this analysis is not to disparage the role of the “state” as such and its multiple functions. The interest rests with challenging its purported immutable and timeless nature, questioning assumptions and presumptions in an effort towards evening out current hierarchical structures to the benefit of persons otherwise left at the margins.

Bookchin places at a historical turn the coming to power of “nation states” and of industrial capitalism, phenomena that are not necessarily connected to one another but that, in light of their parallel rise, can be considered conjunct.¹⁰²⁹ Through a chronological outline of events over the centuries, he argues that the future of “nation states” was at one stage precarious within the European context and that the continent could have leaned towards municipal confederations instead.¹⁰³⁰ Janet Biehl exemplifies that as recently as the nineteenth century in fact, federative structures were still present in central and southern Europe: the delayed ‘creation’ of the Italian “state” for instance, she observes, was also due to obstructions by cities and confederacies therein, by parochialism and by a tradition of autonomy of municipalities and resistance to centralisation attempts.¹⁰³¹ The evolution towards today’s industrial capitalism was also not historically preordered: capitalism and the “nation state” were not inevitable necessities.¹⁰³² Anthony Giddens argues that the ‘modern world’ has been moulded by the juncture of capitalism, industrialism and the system of “nation states”, which cannot however be reduced to the

¹⁰²⁴ *ibid* 68-69. Own translation. See original: ‘Al suo livello minimo, lo Stato può essere considerato un sistema di coercizione sociale gestito in modo professionale, e non un semplice organo amministrativo (...). Qui il termine <<professionale>> riveste la stessa importanza del termine <<coercizione>>. La coercizione esiste in natura, nelle relazioni interpersonali e anche nelle comunità non gerarchiche senza Stato. Se lo Stato venisse definito soltanto attraverso il concetto di coercizione, allora non potremmo che ricondurlo a un fenomeno prettamente naturale, il che è falso. Solo quando la coercizione si istituzionalizza e diventa una forma di controllo sociale professionale, sistematico e organizzato, cioè quando le persone vengono espropriate della propria vita quotidiana in seno a una comunità e tale vita viene <<amministrata>> da un’istituzione che ha il monopolio della violenza, solo allora possiamo propriamente parlare di Stato’.

¹⁰²⁵ *ibid*.

¹⁰²⁶ *ibid*.

¹⁰²⁷ *ibid*.

¹⁰²⁸ *ibid*.

¹⁰²⁹ *ibid* 90.

¹⁰³⁰ *ibid* 90-102.

¹⁰³¹ Janet Biehl, *The politics of social ecology. Libertarian municipalism* (Black Rose Books 2017) 46.

¹⁰³² Murray Bookchin, *Per una società ecologica* (elèuthera 2021) 90-102.

existence of the former phenomena.¹⁰³³ A key process that accompanied the rise of the “nation state” was as well the industrialisation of war.¹⁰³⁴

Articulating Bookchin’s thoughts, Biehl summarises the “state” as an overarching structure of domination where a few persons rule over the majority; the “state” is structurally and professionally separated from the population, exercising power over ‘ordinary’ people.¹⁰³⁵

(...) [B]uilders of republican States appropriated it [democracy] as a gloss for their “representative” institutions (...) and at the same time as a mantle to cloak their elitist, paternalistic, and coercive nature. So it is that Western Nation states today are routinely referred to as “democracies” without a murmur of objection. With the creation of the welfare or Social state, the State’s powers – as well as its acceptability to the unwary – were even further expanded, assuming many of the social tasks for which communities had once been responsible on their own account.¹⁰³⁶

Thom Holterman writes that in the western scenario, the structure of the nation state constitutes the classic model of organisation based on coercion, intended as the state monopoly of violence.¹⁰³⁷ Referring to the ‘illusion of the statism’ (*l’illusione dello statalismo*), Holterman considers that the “western thought” gave life to a coercive organisation that has snapped society’s backbone, i.e., the autonomy of the law (*[c]ome scrive Stefan Blankertz (...) la spina dorsale della società è <<l’autonomia del suo diritto>>*); the law is customs, contracts and statutes endorsed by social groups and their members: there is no need to have the state for this.¹⁰³⁸

Hermann Amborn argues that to a western perspective what seemed advantageous was a society arranged into a hierarchy, characterised by a social division of labour, the evolution of which landed on despotism and eventually on the conception of the modern state.¹⁰³⁹ Thinkers of such stream imagined the times preceding the modern state as some sort of chaos: Amborn refers to the work of Hobbes as the one founding the historic idea of the monopoly of power in state hands.¹⁰⁴⁰ To Peter Kropotkin, the state is ‘only one of the forms assumed by society in the course of history. Why then make no distinction between what is permanent and what is accidental?’.¹⁰⁴¹ The idea that ‘since we have been told as much at school, that our present governments have so far remained in their noble role as the salt of the earth, the pacifiers and civilizers of the human race (...)’ dominated the eighteenth century.¹⁰⁴² Pierre Clastres speaks of the ‘traditionalism’ (*tradizionalismo*) of the undoubted certainty that political power manifests itself in a coercive relationship.¹⁰⁴³ There, the presumption is one: the truth and the essence of power consist in violence and power is unthinkable without its predicate, namely violence.¹⁰⁴⁴

Donatella Di Cesare observes that

[t]he current world is divided into a multiplicity of neighbouring Nation-states that are both confronting and accompanying each other. This state-centric order is assumed as the norm. Everything that happens is considered and judged within the confines of a state perspective.

¹⁰³³ Anthony Giddens, *The Nation state and Violence* (Polity Press 1985) 4-5.

¹⁰³⁴ *ibid.*

¹⁰³⁵ Janet Biehl, *The politics of social ecology. Libertarian municipalism* (Black Rose Books 2017) 1.

¹⁰³⁶ *ibid* 8-9.

¹⁰³⁷ Thom Holterman, ‘Il diritto come baluardo dell’anarchia?’ in Hermann Amborn, *Il diritto anarchico dei popoli senza stato* (elèuthera 2021) 7.

¹⁰³⁸ *ibid.*

¹⁰³⁹ Hermann Amborn, *Il diritto anarchico dei popoli senza stato* (elèuthera 2021) 28.

¹⁰⁴⁰ *ibid* 29.

¹⁰⁴¹ Peter Kropotkin, *The State: Its Historic Role* (1896) (marxists.org 2009, theanarchistlibrary.org) 6.

¹⁰⁴² *ibid* 8.

¹⁰⁴³ Pierre Clastres, *La società contro lo Stato. Ricerche di antropologia giuridica* (Feltrinelli 1977) 12.

¹⁰⁴⁴ *ibid.*

Migration is also approached as from within the State, and its territorial sedentarism (*stanzialità territoriale*), and it is therefore regarded as a contingent and marginal phenomenon. If the State is the essential core of the political structure, migration is the accident.¹⁰⁴⁵

Sovereignty and a default hostility towards the foreigner, in contraposition with any sense of hospitality, merge together when they are exercised on state territory, *il nostro paese* as remarked by Di Cesare, of which citizens consider themselves as landlords and feel thus authorised to deny access to it to others; a right to property over the territory ties with the privilege of belonging to a community and the entitlement of guarding its borders.¹⁰⁴⁶ This brings back the seemingly universal and timeless (self-)definition of a state as having a territory, a population and the capacity of interaction.

The *assumption of the “state” as the norm* is what can be placed into question when addressing migration and what policy *produces* to “manage” movements. Those speaking of a “migratory crisis” tacitly always assume the perspective of whom belongs to a “state” and looks at the outside from an ‘internal’ position, trenched behind barriers and borders.¹⁰⁴⁷ Such a state-centric view is always a *normative one* too: citizens, belonging to the “state”, are *a priori* recognised the freedom to decide and the prerogative to welcome or reject the stranger-foreigner (*lo straniero*) at their threshold.¹⁰⁴⁸ Such a sovereign power to dismiss the other *appears irrefutable and undisputed*: the right to exclude becomes symbol and proof of state sovereignty and “states” demand to manage their political and territorial borders also through the recourse to force, with the validation of international law.¹⁰⁴⁹

International law indeed manifests the centrality of the “state” as the “entity” customarily agreed upon, validating its absolute existence and undressing it of its ages, mutating character and functions. It is true that individuals do not disappear in the international law framework: rights are conferred to persons (and increasingly corporations, international organisations and others) and the category of the personality of the individual is recognised, particularly in the realm of human rights law.¹⁰⁵⁰ However, sovereignty is maintained at the core of the system. The Italian Constitution reads that the national legal framework conforms to the generally recognised principles of international law.¹⁰⁵¹ It does moreover establish that

[t]he legal status of foreigners is regulated by law in conformity with international provisions and treaties. A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law. A foreigner may not be extradited for a political offence.¹⁰⁵²

This shows the centrality of the “state” as a subject of international law and the degree of domestication and reciprocity present in the system of relations between international and national law. The constitutional text further considers the category of the “foreign individual” who may seek asylum, placing them within a context where “states” and the international legal realm appear as gatekeepers of the asylum seeker’s wellbeing. If the asylum seeker was believed to be able to exercise their rights in their “state” of origin, they would not be granted protection: who decides whether this is or is not the

¹⁰⁴⁵ Donatella Di Cesare, *Stranieri residenti. Una filosofia della migrazione* (Bollati Boringhieri editore 2017) 22. Own translation. See original: ‘[i]l mondo attuale è suddiviso in una molteplicità di Stati-nazione limitrofi che al contempo si fronteggiano e si fiancheggiano. Questo ordine statocentrico è assunto come norma. Tutto quello che accade viene considerato e giudicato entro i confini di una prospettiva statale. Dall’interno dello Stato, e della sua stanzialità territoriale, viene vista anche la migrazione, ritenuta perciò un fenomeno contingente e marginale. Se lo Stato è il fulcro essenziale dell’assetto politico, la migrazione è l’accidente’.

¹⁰⁴⁶ *ibid* 22-28.

¹⁰⁴⁷ *ibid*.

¹⁰⁴⁸ *ibid*.

¹⁰⁴⁹ *ibid*.

¹⁰⁵⁰ James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press 2019) 180-189.

¹⁰⁵¹ Constitution of the Italian Republic (1947) art 10(1).

¹⁰⁵² *ibid* art 10(2), (3), (4).

case? How are one's 'democratic freedoms' assessed? A bouncing game between "states" arbitrarily measures the degree of *professional* coercion and oppression a person may have experienced and may experience in one place rather than another and determine a person's present and future conditions irrespective of their will and desire to move. In terms of relations among "states" and the centrality of sovereign power over individuals, the category of the "citizen" appears in the constitutional text on the matter of extradition, for this can be granted only if in compliance with international agreements.¹⁰⁵³ Article 117 moreover makes reference to legislative powers being vested in the "state" and its "regions" in compliance 'with the constraints deriving from EU legislation and international obligations', offering an additional ground for the binding connection between the domestic and the international plain, where the "state" is the central actor.¹⁰⁵⁴ So the "state" concentrates power and is entitled to act for lower administrations if these 'fail to comply with international rules and treaties of EU legislation'.¹⁰⁵⁵ One of the definitions provided for international law is indeed that of a 'body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other (...)'.¹⁰⁵⁶ Besides the impact individuals' actions may have on "states" conduct, the latter do self-portray and are themselves both the engineers and beneficiaries of the law that decision-making produces; the individual is secondary and subordinated to such a system. "States" arrogate to themselves a power of discrimination and 'selection' of persons as if that was just the permanent and absolute *norm*, a natural and inevitable aspect of peoples' lives that can 'happen', rather than a decision adopted at a place and time by persons with an ideology poured into a "sovereign" entity and by the structures they work within.

Is such a right to exclude the other legal, and if so, is it legitimate?¹⁰⁵⁷ Ultimately, Di Cesare argues, what this question leads down to is whether "states" can impede or limit immigration.¹⁰⁵⁸

Yet, if we thought of the "state" differently, would not its paradigms change too? Subordinating the "state" to the person would be a radical overturn. Challenging the "state" as the absolute entity it is portrayed to be, with its unmovable paradigms, opens a plethora of possibilities and of *unforeseen* that may benefit the human being, especially the one who is irregular-ised and relegated at the margins of such a state centric view. The more at the margins now, the more at the centre in the overturn. This is nothing transcendental to affirm – to the contrary, its banality is overwhelming. What contesting the current representation of the "state" does is reminding that the system is indeed alterable and therefore improvable, if interests shifted. "Borders" could be permeable rather than not, as they are on many occasions, including for all European Union citizens. "Sovereignty" and "territoriality" could be subordinated to human rights – if they were indeed inalienable to all. Force and violence could be thought of as subordinated to *care* in a more egalitarian and forward-looking view of *migration as the multifaceted timeless phenomenon that indeed is*, and so on. After all, it is likely people always moved and sought a living elsewhere: what if *this was the parameter around which life was organised and protected, rather than limited and oppressed*? Migration has always been present and always will, it is a historical and structural fact, a "phenomenon" that must be met and regulated rather than opposed; it is not a threat nor something that emerges to attack "our" society.¹⁰⁵⁹ "Our" way of life.

The "state" could therefore "exist" but "choose" and "produce" differently. The Ecuadorian constitution for instance reads that 'the right to migrate of persons is recognized. No human beings shall be identified

¹⁰⁵³ *ibid* art 26.

¹⁰⁵⁴ *ibid* art 117(1).

¹⁰⁵⁵ *ibid* art 120(2).

¹⁰⁵⁶ Alina Kaczorowska, *Public International Law* (Routledge 2010) 2.

¹⁰⁵⁷ Donatella Di Cesare, *Stranieri residenti. Una filosofia della migrazione* (Bollati Boringhieri editore 2017) 22-28.

¹⁰⁵⁸ *ibid*.

¹⁰⁵⁹ Pietro Bartolo, 'Prefazione' in Caterina di Fazio, *Acqua come frontiera. Politiche per una nuova cultura della mobilità umana* (Feltrinelli Editore Milano 2022) 11-12.

or considered as illegal because of his/her migratory status'.¹⁰⁶⁰ This was *chosen* and *policy produced*. It represents the “problem” of “migration” as a right and not a threat; so is the problem of the “state” and its “borders” represented as subordinated to the life and decisions of people moving, indulgent towards their crossings and aware of the ominous fictionality of one’s *illegality*.

Since that person is alive, moves and breathes and eats and drinks and walks onto this earth, their *illegality* is a counterintuitive narration that stains a human being of an unfounded danger and criminality. In his ‘Born a crime’, Trevor Noah writes ‘I was born a crime’ for he was ‘a half-white, half-black child who violated any number of laws, statutes, and regulations’ under South Africa’s apartheid regime.¹⁰⁶¹ And despite the distance between that context and the current migratory one under analysis, an obvious likeness emerges: as Noah’s *illegality* was produced by the law itself and is manifestly abhorrent today – he was just a baby – the *illegal immigrant*, the *clandestine*, is an abhorrent *production* of today’s policy. Such a narrative and the pretended absolute paradigms it builds on can change – and be replaced by more collectively caring solutions where the “state” and its alternatives and evolutions are allies rather than enemies to the person on the move.

Ultimately, the issue of migration challenges our conception of what we define as European political space. It raises normative and ethical questions regarding the determination of an integrated political space and of integrated strategies for the management of borders. The promotion of counter-narratives has the objective of rearticulating juridical categories in relation to borders and migration, in order to embrace human mobility as a fundamental and indispensable part of our societies.¹⁰⁶²

3.3 What if “Europe” was otherwise?

I think it is more useful to attempt (...) to be empirical and say what are the different ways in which political space or economic space are being imagined and classified and acted on. One needs to ask what is a “region” (...). So one should ask what is a “zone” or what is a “network” or what is an “area”, for example, this area of freedom, security and justice? How is an area different from a territory? What is a sector? In all of these things it seems to me to be more useful to analyse those things than to try to keep squeezing reality with all its complexity and manifold aspects into this kind of pre-given trichotomy, which is a product of a particular historical moment.¹⁰⁶³

The paradox is that now it is almost *bon ton* to predict the collapse of Europe – financial, political and cultural. Visigoths are certainly coming, one way or another: African, Asian and East European migrants and refugees strip Europe of its historically formed identity, while Muslims pose a direct threat to the legacy of Christianity and our fundamental rights and liberties. Funeral music for Europe has become commonplace (...).¹⁰⁶⁴

This section attempts to question “Europe” as a “regional entity” in an effort to test and reveal its contingency in relation to migration “management”, eventually focusing on “Europe” as in the “European Union”. One of the proposals that can be considered is to regard “Europe” as, although not

¹⁰⁶⁰ Constitution of Ecuador (2008, rev. 2021) art 40.

¹⁰⁶¹ Trevor Noah, *Born a crime* (John Murray (Publishers) 2016) 26.

¹⁰⁶² Caterina Di Fazio, *Acqua come frontiera. Politiche per una nuova cultura della mobilità umana* (Feltrinelli Editore Milano 2022) 22. Own translation. See original: ‘In definitiva, la questione della migrazione mette in discussione la nostra concezione di ciò che definiamo spazio politico europeo. Essa pone interrogativi normativi ed etici alla determinazione di uno spazio politico integrato e di strategie integrate di gestione dei confini. La promozione di contro-narrazioni ha l’obiettivo di riarticolare le categorie giuridiche in relazione ai confini e alla migrazione, così da accogliere la mobilità umana come parte fondamentale e irrinunciabile delle nostre società’.

¹⁰⁶³ Antti Tietäväinen, Miikka Pyykkönen and Jani Kaisto, ‘Globalization and Power – Governmentalization of Europe? An Interview with William Walters.’ (2008) 5 *Foucault Studies* 63.

¹⁰⁶⁴ Zygmunt Bauman, Leonidas Donskis, *Moral Blindness. The Loss of Sensitivity in Liquid Modernity* (Polity Press 2013) 94-95.

being limited to, a geographical and political network of “states”. Such a loose conceptualisation might be adapted to both the European Union and the Council of Europe, for in either case “European” law is domesticated (or not) by state parties, the sovereign power of the latter and their competences are negotiated with the supranational cluster they may be a part of, the exercise of jurisdiction is as well partially bargained across territories and, eventually, all of this converges into the determination of the mobility or immobility of a migrant person’s life. After all, today’s “multicultural Europe” has come to be modelled through the large-scale labour migration flows that took place during the 1960s and early 1970s, while the following decades were characterised by an increasing selectivity and restrictive policies.¹⁰⁶⁵ In the 1980s, Germany was the first state in Europe to apply visa requirements to be met by citizens coming from states from which asylum seekers used to arrive; other states followed suit.¹⁰⁶⁶ An articulation of “Europe” as a network of “states” can also be inferred from those policies that focus on notions such as that of the (Dublin) state of first entry for asylum seeker’s protection, the EU “solidarity” mechanism of relocation among states, the enforcement (or lack therefore) by states of sentences from human rights supranational institutions, etc. This section of the study opts for approaching “Europe” not as a uniform and abstract “entity” regulating states’ conducts and working in the background to emanate policies from afar. This is not to deny the disconnection that may exist between “Europe” and “its” people. Indeed, within a union of states the variety of interests is wider than that within a single state and a sense of belonging to a collective identity legitimising public initiative of redistribution is feeble.¹⁰⁶⁷

What the analysis attempts is to address “Europe” by considering it an emanation of “states”, which remain [the current \(and contested\) unit of measurement](#) for all people’s movements. Acknowledging that the regional continental frame of “Europe” does not transcend a state-centric view of migration may seem rather obvious. However, it is a premise that allows for the current “European” order of things to be questioned and for alternative narratives, moving beyond a state centric perspective and this time revolving around the *person* beyond “state” border and not revolving around said border, to be promoted.

Frontiers could be said to be today’s main factor of inequality in the world.¹⁰⁶⁸ Branko Milanovic argues that ‘there is a *fundamental contradiction* at the heart of globalization as it exists today (emphasis added)’ as ‘in its broadest terms, globalization implies the seamless movement of the factors of production, goods, technology and ideas across the world’ but not, for instance, labour, and therefore people.¹⁰⁶⁹ The places in the world where countries with large income differences are in close physical proximity are those ‘with the greatest barriers to migration’, as ‘the rich world is fencing itself in, or fencing others out’.¹⁰⁷⁰ Other authors speak about such an imbalance, with reference to migration from Africa to Europe, as ‘on the one hand there is a need for labour, on the other hand European governments refuse to allow migrants from the South to enter their countries and take up paid work, a *contradiction* that has to be addressed on a political level and which has significant implications for the daily lives of African migrants (emphasis added)’.¹⁰⁷¹ However, is this a *contradiction*? ‘Today’, Bookchin writes, ‘there are oppressive human beings who literally own society and others who are owned by it’.¹⁰⁷²

¹⁰⁶⁵ Jørgen Carling, ‘Migration in the Age of Involuntary Immobility: Theoretical Reflections and Cape Verdean Experiences’ (2002) 28 1 *Journal of Ethnic and Migration Studies* 5.

¹⁰⁶⁶ Frances Webber, ‘The War on Migration’ in Paddy Hillyard, Christina Pantazis, Steve Tombs, Dave Gordon (eds), *Beyond Criminology. Taking Harm Seriously* (Pluto Press 2004) 133.

¹⁰⁶⁷ Federico Losurdo, ‘L’Unione europea e il declino dell’ordine liberale’ (2018) 6 *Federalismi.it* 2.

¹⁰⁶⁸ Maurizio Ambrosini, *L’invasione immaginaria* (Gius. Laterza & Figli, 2020) 30.

¹⁰⁶⁹ Branko Milanovic, *Global Inequality: a new approach for the age of globalization* (The Belknap Press of Harvard University Press, 2018) 143.

¹⁰⁷⁰ *ibid* 143-147; Branko Milanovic, ‘Global Income Inequality by the Numbers: in History and Now’ (2012) Policy Research Working Paper 6259 1, 25-27.

¹⁰⁷¹ Reinhilde Sotiria König and Marina de Regt, ‘Family dynamics in transnational African migration to Europe: an introduction’ (2010) 3 1 *African and Black Diaspora: An International Journal* 1.

¹⁰⁷² Murray Bookchin, *Remaking society. Pathways to a Green Future* (theanarchistlibrary.org, 1990) 25.

As the territory of “Europe” became scenery of both world wars in the XX century, accounts of European integration describe the desire for states’ cooperation that had already been expressed before then and gained support following the years of the war.¹⁰⁷³ The European “area”, both in terms of territory and in terms of articulation of fundamental rights, revolves around two supranational institutions, as seen in chapter two: the Council of Europe and the European Union. Craig and de Búrca observe how after the 1948 Congress of Europe, development towards political unity were stalled by the UK.¹⁰⁷⁴ Outcome of this was the founding in 1949 of the Council of Europe, defined today as the continent’s human rights organisation; it consists of 46 Member States, 27 of which belong to the EU as well. In light of the UK’s decision not to participate in more concrete actions for European integration, France proposed a plan to restore its relations with Germany and adopt a framework of cooperation, which other European states could take part to, focusing on coal and steel resources.¹⁰⁷⁵ France, Germany, Italy, Belgium, Luxemburg and The Netherlands came together and signed the treaty that in 1951 led to the establishment of the European Coal and Steel Community (ECSC). The EU is the current political and economic union that developed from the institutions that followed the ECSC.¹⁰⁷⁶ It replaced and succeeded to the European Community with the Lisbon Treaty (2007, 2009).¹⁰⁷⁷ The Lisbon framework revised the two treaties at the constitutional basis of the Union, thus promulgating the Treaty on the Functioning of the European Union (TFEU) and the Treaty on the European Union (TEU).¹⁰⁷⁸ Areas of competences are determined between the EU and its member states: the “area” of freedom, security and justice is subject to shared competence.¹⁰⁷⁹ In addition, the Schengen Area is a border-free zone to EU citizens and non-EU citizens who live or visit the EU for tourism, business or studies for limited periods of time and as established by law. As of today, the Schengen Area encompasses all EU member states with the exception of Cyprus and Ireland and non-EU states such as Iceland, Norway, Switzerland and Liechtenstein. All such “entities” – the Council of Europe, the European Union, the Schengen Area, the eurozone as well and all states involved in any of such endeavours – coexist and at times overlap. So do their jurisdictions and their areas of competence. What the following paragraphs primarily focus on is “Europe” in terms of European Union, as a crucial actor in the representation and the “management” of “migration”.

Borders (whether permeable or not) and the resulting freedom of movement give to the modern “nation state” its spatial and political identity.¹⁰⁸⁰ The political existence of a “space” (‘spazio’) can in fact only dwell in a specific spatiality, which coincides with the very place that the political existence instituted precisely through the existence of movement.¹⁰⁸¹

¹⁰⁷³ Paul Craig and Gráinne de Búrca, *EU Law: text, cases and material* (5th edn, OUP 2011) 4.

¹⁰⁷⁴ The UK is described as insisting on an intergovernmental organisation with no compromise on state sovereignty, see Paul Craig and Gráinne de Búrca, *EU Law: text, cases and material* (5th edn, OUP 2011) 4.

¹⁰⁷⁵ Paul Craig and Gráinne de Búrca, *EU Law: text, cases and material* (5th edn, OUP 2011) 5. See also Schuman Declaration (9 May 1950); Treaty establishing the European Coal and Steel Community (ECSC Treaty).

¹⁰⁷⁶ See also Sonia Morano-Foadi and Stelios Andreiadakis, *Protection of Fundamental Rights in Europe. The Challenge of Integration* (Springer 2020) 27.

¹⁰⁷⁷ The Lisbon Treaty came after the failure of the acceptance of the constitutional treaty. See Consolidated Version of the Treaty on European Union (TEU) [2008] OJ C115/13 art 1.

¹⁰⁷⁸ TEU [2008] OJ C115/13; Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47.

¹⁰⁷⁹ TFEU [2012] OJ C326/47 arts 2-6, in particular 4(2)(j), 81.

¹⁰⁸⁰ Caterina Di Fazio, *Acqua come frontiera. Politiche per una nuova cultura della mobilità umana* (Feltrinelli Editore Milano 2022) 25-26.

¹⁰⁸¹ *ibid*: ‘Quello che ci interessa è l’istituzione dello spazio politico proprio in quanto spazio: l’esistenza politica, infatti, può risiedere solo nel dispiegamento di una spazialità specifica, come coincidenza con lo spazio stesso che ha istituito proprio attraverso il movimento’.

To defend Europe, more Europe is needed. If Europe fails to establish a unified policy on immigration, citizenship and asylum, it is predictable that the issue of immigration will increasingly coincide with a problem of pushback and closed frontiers.¹⁰⁸²

The “problem” of “migration” could indeed be increasingly represented as pushbacks and expulsions and repatriations, given that today extraterritorial patrolling and extraterritorial entry refusals, detentions and removals are already in place. The frontier is kept more and more impermeable to the “outside”. While the Union’s “inside” has been built on the ambitious achievement of the free movement of persons and the visionary opening of frontiers, the “outside” is not even afforded entry. To be more precise, that fragment of the “outside” that may be seeking protection the most and may be in most vulnerable conditions is hardly afforded entry. The “outside” that does not seek safety and economically affords to travel for tourism, business and pre-enrolled studies does have a “legitimate(d)” access instead. States’ nationalist approach to migration, timidly critiqued¹⁰⁸³ at times by the EU as a whole and to the contrary more and more winked at, will foreseeably ‘result in a problem of rejection, criminalization, and closed borders’.¹⁰⁸⁴ ‘Until now’ Di Fazio and Urbinati argue, ‘the European Union has not been scandalized when Italy has closed the ports to NGO vessels. Initially critical, it has however ultimately absolved itself of responsibility: and this risks making the nationalist model a model for Europe’.¹⁰⁸⁵ A paradoxical process is set in motion: to keep freedom of movement within EU’s borders, the EU has initiated their externalisation.¹⁰⁸⁶ Doing so, [it reshapes its imaginary geography](#).¹⁰⁸⁷

In some cases there has even been a criminalization of migrants or a pre-emptive suspicion that they were “fake” refugees who came to take advantage of the “generosity” of our protection systems, which has come in very handy to those who thus achieved a double objective: to blame the weakening of the welfare state on a supposed explosion in the demand for protection (instead of an express will to diminish it) and to install the mental framework that links the welfare state with excessive generosity, unbearable in times of crisis.¹⁰⁸⁸

The narrative therefore feeds on fear and presents migration as a “problem” of limited states’ resources and welcoming capacity. This shapes the European space empirically and normatively. The “European region” is represented as a problem of territory and frontiers and as the deriving (un)distribution of rights therein and out. Di Fazio and Urbinati observe that ‘Europe is today an issue of borders: how they are understood and interpreted, how porous they should be, how much freedom of movement can be allowed’ and sadly and ironically ‘Europe was born with an almost perfect freedom of movement and risks running aground on freedom of movement’.¹⁰⁸⁹

Étienne Balibar observes that the notion of “borders” in relation to “Europe” is changing meanings: they are no longer wholly located at the confines of territories but are spread everywhere, while so called peripheral areas are ‘the melting pot for the formation of a people (*demos*) without which there is no

¹⁰⁸² *ibid* 55. Own translation. See original: ‘Per difendere l’Europa occorre più Europa. Se l’Europa non riesce a darsi una politica unitaria sull’immigrazione, sulla cittadinanza e sull’asilo, è prevedibile che la questione della migrazione coinciderà sempre più con un problema di respingimento e di frontiere chiuse’.

¹⁰⁸³ *ibid*.

¹⁰⁸⁴ Caterina Di Fazio and Nadia Urbinati, ‘For a political Europe’ (2019) openDemocracy <<https://www.opendemocracy.net/en/can-europe-make-it/political-europe/>> accessed 20 December 2023.

¹⁰⁸⁵ *ibid*.

¹⁰⁸⁶ Caterina Di Fazio, *Acqua come frontiera. Politiche per una nuova cultura della mobilità umana* (Feltrinelli Editore Milano 2022) 59.

¹⁰⁸⁷ Caterina Di Fazio and Nadia Urbinati, ‘For a political Europe’ (2019) openDemocracy <<https://www.opendemocracy.net/en/can-europe-make-it/political-europe/>> accessed 20 December 2023.

¹⁰⁸⁸ *ibid*.

¹⁰⁸⁹ *ibid*.

citizenship (*politeia*).¹⁰⁹⁰ This makes “border areas” not marginal to the creation of a public space but central.¹⁰⁹¹ “Europe” then can be seen as an ‘*unresolved political problem*’ once “border areas”, where “complexities” are more concentrated, are considered its centres.¹⁰⁹² While EU discourses and institutions are formally egalitarian, the “region” shows a hierarchical structure where decision-making powers are concentrated within a few states and disparities deepen.¹⁰⁹³

Some have argued that the national state is the sole framework within which processes of de-politicization and de-democratisation that are spread by globalisation and supranational integration can be contained: the return to full national sovereignty would be indispensable to offer protection to needs and interests of working classes at the core of social-democratic constitutions and to further a project of democratic economy.¹⁰⁹⁴ Yet, Federico Losurdo argues, such a perspective seems to underestimate that the loss of normativity of the social-democratic constitutionalism is not merely an effect of having committed to the European Union but, even before this, is the collapse of a global economic constitution that has introjected and codified the market’s *will to power*.¹⁰⁹⁵ The solution that is proposed by identitarian sovranism is an illusory and ahistorical one.¹⁰⁹⁶ The sole forward-looking *political rationality*, although currently utopic, Losurdo argues, would be that of imagining a renewed mediation between the European and states’ internal commitment (*‘una rinnovata mediazione tra vincolo europeo e vincolo interno’*).¹⁰⁹⁷ This could, on the one hand, limit the dangerously chauvinist declinations of popular sovereignty with possible anti-democratic outcomes and, on the other hand, have the persistent reasons of the social-democratic constitutionalism impeding the reduction of the European space to mere competition among member states, arbitered by supranational institutions, on the ruins of the welfare state.¹⁰⁹⁸

The original project of a federalist Europe was of such a different nature. Giuseppe Civati observes that it is typical of the political literature to imagine utopic islands – in the case of Ventotene, it really was a utopic island while the real dystopia was all around it.¹⁰⁹⁹ Eugenio Colorni writes in the preface of the 1944 edition of the Ventotene Manifesto that

[i]t was in this way that, in the minds of some, the central idea emerged that the essential contradiction responsible for crises, wars, miseries and exploitations that plague our society, is the existence of sovereign states, geographically, economically, militarily defined, considering the other states as competitors and potential enemies (...).¹¹⁰⁰

¹⁰⁹⁰ Étienne Balibar, *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton University Press 2004) 1-2.

¹⁰⁹¹ *ibid.*

¹⁰⁹² *ibid.*

¹⁰⁹³ Étienne Balibar, *Crisi e fine dell’Europa?* (Bollati Boringhieri editore 2016).

¹⁰⁹⁴ Federico Losurdo, *‘Italexit. Trasformazione del vincolo europeo e sovranità condizionata’* (2020) 42(1) DPCE Online 355.

¹⁰⁹⁵ *ibid.*

¹⁰⁹⁶ Federico Losurdo, *‘L’Unione europea e il declino dell’ordine liberale’* (2018) 6 *Federalismi.it* 2.

¹⁰⁹⁷ Federico Losurdo, *‘Italexit. Trasformazione del vincolo europeo e sovranità condizionata’* (2020) 42(1) DPCE Online 355.

¹⁰⁹⁸ *ibid.*

¹⁰⁹⁹ Giuseppe Civati, *‘Ritorno a Ventotene’* in Altieri Spinelli, Ernesto Rossi, *Il manifesto di Ventotene* (People s.r.l. 2023) 14-15.

¹¹⁰⁰ Eugenio Colorni, *‘Prefazione all’edizione del 1944’* in Altieri Spinelli, Ernesto Rossi, *Il manifesto di Ventotene* (People s.r.l. 2023) 56. Own translation. See original: *‘[f]ù così che si fece strada, nella mente di alcuni, l’idea centrale che la contraddizione essenziale, responsabile delle crisi, delle guerre, delle miserie e degli sfruttamenti che travagliano la nostra società, è l’esistenza di stati sovrani, geograficamente, economicamente, militarmente individuati, consideranti gli altri stati come concorrenti e potenziali nemici (...)’*.

It is certain, Colorni writes, that the occasion for lasting peace and prosperity for the continent would be forever lost if the old nationalistic models resolidified.¹¹⁰¹

3.4 Dichotomies on citizens and migrants, sovereignty and anarchy. The disorder of things

Even where it offers some signs of tolerance, the sovereign community could not avoid being hostile as a priority. Citizens are called to be undisputed arbiters, supreme judges, entitled to exclude or admit newcomers on the basis of the evidence they offer: persecutions and abuses for asylum seekers, utility for economic immigrants, the will to integrate for everyone else. The human rights of foreigners are suspended by administrative accounting, while all the privileges, the advantages and the immunities of citizens are upheld with force.¹¹⁰²

Di Cesare argues that the *migrant* is without a place and out of place (*senza luogo, fuori-luogo*) more than the *foreigner* is. While the latter is relegated to the margins of society, she writes, the migrant situates themselves at the border, in the effort to cross it.¹¹⁰³ They are not citizen nor foreigner and everywhere they are unwanted (*di troppo*). This is where the difficulty to *think* the migrant rests: the migrant is an undefined and undefinable figure for they are trespassing (*sconfinante*) and therefore questioning the limits agreed upon, revising the foundations of citizenship and amending the pillars of “spaces” such as the sovereign nation state.¹¹⁰⁴

The dichotomy of the migrant–citizen builds across the empirical and symbolic frontiers of the “state”: the migrant destabilises the natural-national order of things for their presence discloses the evanescent nature of the assumption of the permanence and absoluteness of the “state”. If the migrant does cross the frontier and immigrates into national territory, then the ephemeral but solidly unequal nature of the hierarchisation of citizenship within that space is revealed. In the state-centric perspective, there is an “inside” to be protected – *secured* and *securitised* – and an “outside” to protect the citizens from. The migrant is dressed in danger and heads towards questioning and compromising what is claimed to be the *status quo*. The “state” “identity” and “morality” are threatened. Counterintuitively, the movement of people, which constantly changes with time and space and yet transcends them, for it is something that has always *happened*, is not contemplated within the current order of things nor facilitated. Persons always move – states impact the way they do so and determine the degree of hardship the journeys entail, *producing* the current “migratory flows” and contributing to the misery they are often characterised by. Still, persons move.

Allowing the migrant to be the starting point means withdrawing from the *arché*, from the principle that founds the sovereignty, around which the political body is immunized. This implies not only welcoming the migrant who is unexpected, with their existential nakedness, their baggage of suffering, despair and discomfort, but also doing so in such a manner as to having the migrant as the protagonist of a new anarchic scenery.¹¹⁰⁵

¹¹⁰¹ *ibid* 61.

¹¹⁰² Donatella Di Cesare, *Stranieri residenti. Una filosofia della migrazione* (Bollati Boringhieri editore 2017) 25. Own translation. See original: ‘Anche là dove offrisse qualche segno di tolleranza, la comunità sovrana non potrebbe fare a meno di essere prioritariamente ostile. Così i cittadini sono chiamati ad essere arbitri indiscussi, giudici supremi, ai quali spetta di escludere o ammettere i nuovi venuti sulla base delle prove offerte: le persecuzioni e i soprusi per i candidati all’asilo, l’utilità per gli immigrati economici, la volontà di integrarsi per tutti gli altri. I diritti umani degli stranieri vengono sospesi dalla contabilità amministrativa, mentre sono sostenuti con forza tutti i privilegi, i vantaggi, le immunità dei cittadini’.

¹¹⁰³ *ibid* 28.

¹¹⁰⁴ *ibid*.

¹¹⁰⁵ Donatella Di Cesare, *Stranieri residenti. Una filosofia della migrazione* (Bollati Boringhieri editore 2017) 34-35. Own translation. See original: ‘Lasciare che il migrante sia punto d’avvio significa sottrarsi all’arché, al principio che fonda la sovranità, intorno a cui si immunizza il corpo politico. Il che implica non solo accogliere il migrante che giunge inatteso, con la sua nudità esistenziale, il suo bagaglio di sofferenza, disperazione, disagio, ma anche il far sì che sia protagonista di un nuovo scenario anarchico’.

Akbar Rasulov, in their reflection on Derrida's philosophical legacy, observes that 'the whole modern Western culture is essentially grounded in a binaristic sensibility': 'whichever way you look at the world, if you look at it through Western eyes, it always comes out as an endless chain of binary opposition (...). The same, of course, holds true for Western law'.¹¹⁰⁶ Regardless of the stability that binary oppositions may show at first, Rasulov argues, they are fundamentally unstable.¹¹⁰⁷ This happens because 'no entity can ever keep at bay that analytical antithesis on whose ontological isolation its identity depends'.¹¹⁰⁸

Di Cesare argues that the dichotomy of inside and outside, of sovereignty and "anarchy", is a constitutive one: it justifies obedience to the sovereign power for the condition of order it proposes is the only alternative to the absence of government and the consequent *disorder*.¹¹⁰⁹ It is, to Di Cesare, an anachronistic dichotomy which one shall move away from: migration encourages such a distancing for it drags sovereignty into that open *space* surrendered to anarchy.¹¹¹⁰ Anarchy is the *outside the order*. It is the transgression that forms the heterotopia.¹¹¹¹

How, amidst all the ambiguities and contingencies of a diverse global history, are actions coordinated, energies concerted, resistances tamed, and boundaries of conduct imposed such that it becomes possible and sensible simply to represent a multiplicity of domestic societies, each understood as a coherent identity subordinate to the gaze of a single interpretative centre, a sovereign state?¹¹¹²

Richard K. Ashley speaks of the hierarchical opposition that the dichotomy of sovereignty and anarchy build on: sovereignty is privileged as 'a higher reality, a regulative ideal' while anarchy is interpreted in a negative way, as a failure of and a threat to this ideal.¹¹¹³ The "state" is '*the* indispensable ideological principle'.¹¹¹⁴

Despite the fact that the state is an intrinsically contested, always ambiguous, never completed construct – a construct that is itself always in the process of being imposed in the face of never-quieted resistances – theoretical discourse of the anarchy problematique must 'find' the state to be a pure presence already in place, an unproblematic rational presence already there, a sovereign identity that is the self-sufficient source of international history's meaning.¹¹¹⁵

Contextualising this "space" against a background of an assumed antagonistic lack of order, the "inside" versus the "outside", opens the discourse to other foreseeable visions and unforeseeable scenarios beyond the apparatus of the "nation state" – and therefore beyond its promulgation of *legality*. Enquiring the "spaces" where migration takes place to reveal their reasonings and implicit propositions is done in an effort to identify what has been *excluded* from the articulation of the current order of things and to observe where the *silences* are. This provides ground for a rethinking of the production of alternative "spaces" of action.

¹¹⁰⁶ Akbar Rasulov, 'International Law and the Poststructuralist Challenge' (2006) 19 *Leiden Journal of International Law* 799, 800.

¹¹⁰⁷ *ibid* 801.

¹¹⁰⁸ *ibid*.

¹¹⁰⁹ Donatella Di Cesare, *Stranieri residenti. Una filosofia della migrazione* (Bollati Boringhieri editore 2017) 22-28.

¹¹¹⁰ *ibid*.

¹¹¹¹ *ibid* 155-156.

¹¹¹² Richard K. Ashley, 'Untying the Sovereign State: A Double Reading of the Anarchy Problematique' (1988) 17 *Millenium – Journal of International Studies* 227, 229.

¹¹¹³ *ibid* 230.

¹¹¹⁴ *ibid* 231.

¹¹¹⁵ *ibid* 231.

Seeing the “state” as both a site and an outcome of political practices¹¹¹⁶ highlights the plurality and multifaceted nature of a claimed uniform, self-evident and absolute system and therefore allows for the questioning of its paradigms and logics. This, it is argued, is to go to the benefit of the people and especially those people who are left “outside”, excluded by the very paradigms that are in the end contestable and may be said to contradict the factual evidence that *life* timelessly, permanently and naturally still unfolds beyond the statal “inside”. The feared anarchic disorder that “exists” beyond the boundaries of the “state” is nothing but a proposal built on the order of the inside, a problem representation and a production of the very policy issued by the “state” itself. This assumed outer realm of *illegality* is only given by the assumed inner realm of *legality*. Is this legitimate and can it be legitimated? The dichotomy between sovereignty and anarchy is what produces the very environment it purports to address.¹¹¹⁷

The *migrant*, left outside the orderly “space” of the “nation state”, challenges it with its portrayed and *naturalised* anarchic illegality. Such *(il-)legal status* (ultimately of human being) is regarded as inherent or, worse, Elena Paris observes, deserved.¹¹¹⁸ Their *being* intimately challenges the absolute nature of “states” and networks thereof. All is questioned, from the “state” geographical to its regulatory dimension, from its empirical to its symbolic “existence” – for indeed there is an “outside” inhabited by “outsiders” whose *illegal* lives are nevertheless unfolding and, by presenting themselves at the “borders” and transiting through, radically demand their own “space”, a space that does not comply with and therefore shatters the coercive fundamental paradigms of the “inside”.

Do all such reflections call for a dismantling of the nation state system? Do they disaggregate and refuse the meanings of state sovereignty? Not necessarily, the hesitant answer might be. They do not, for at this very moment in time such call seems unrealistic and counterproductive. They do, however, imagine scenarios where the *current* definition of “state” and “state sovereignty” are modelled along alternative reasonings. Moreover, there is the conviction that one must be mindful that the experience of the brutality of several ‘-ism’ often works from within the system and roots its morbidity in the infrastructures of powers and subjects that are already in place.

(...) it is not a theoretical question but a part of our experience. I’d like to mention only two “pathological forms” – those two “diseases of power” – fascism and Stalinism. One of the numerous reasons why they are so puzzling for us is that, in spite of their historical uniqueness, they are not quite original. They used and extended mechanisms already present in most other societies. More than that: in spite of their own internal madness, they used, to a large extent, the ideas and the devices of our political rationality.¹¹¹⁹

Foucault writes that ‘the relationship between rationalization and excesses of political power is evident. And we should not need to wait for bureaucracy or concentration camps to recognize the existence of such relations’.¹¹²⁰ The images of hotspots, formal and informal settlements, detention facilities, shipwrecks, families walking along barbed wires, the uncontested securitarian logic that managed to reach such an extent as to lead to the establishment of so called COVID-19 quarantine vessels (*navi quarantena*) beg for their acknowledgment. An acknowledgment that can begin with and find nourishment in those positions that resist the otherwise uncontested order of things. The struggles of those who oppose power are the grounds for the sprouting of reflections on domination itself and its

¹¹¹⁶ Alain Finlayson and James Martin, ‘Poststructuralism’ in Colin Hay, Michael Lister and David Marsh (eds), *The State. Theories and Issues* (Palgrave Macmillan 2006) 163.

¹¹¹⁷ *ibid* 164.

¹¹¹⁸ Elena Paris, ‘No One is Illegal. Law and the Possibilities for Radical Cosmopolitics’ in Tamara Caraus and Elena Paris, *Migration, Protest Movements and the Politics of Resistance. A Radical Political Philosophy of Cosmopolitanism* (Routledge 2019) 231.

¹¹¹⁹ Michel Foucault, ‘The subject and power’ in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 326, 328.

¹¹²⁰ *ibid*.

underlying meanings. So, the “state”, “statehood”, “sovereignty” and the mechanisms through which they take place can be looked at, not only from the inside but also from the outside, observing contestations and treating informal actors’ demands and competences as producing knowledges, the cues of which can be picked up and reflected on. Resistances are acknowledged in their epistemological function and become the eyes and mouths through which the system is revisited. Let us analyse “migration” from the perspectives of those who live it and claim it for themselves beyond citizenship and nation states.

I would like to suggest another way to go further toward a new economy of power relations (...). It consists in taking the forms of resistance against different forms of power as a starting point. To use another metaphor, it consists in using this resistance as a chemical catalyst so as to bring to light power relations, locate their position, find out their point of application and the methods used. Rather than analyzing power from the point of its internal rationality, it consists of analyzing power relations through the antagonism of strategies. For example, to find out what our society means by “sanity”, perhaps we should investigate what is happening in the field of insanity. And what we mean by “legality” in the field of illegality. And, in order to understand what power relations are about, perhaps we should investigate the forms of resistance and attempts made to dissociate these relations.¹¹²¹

Adhering to such an approach, chapter four of this thesis deals with resistances and chapter five deals with the “problem” of “migration”. Looking at resistances before looking at relations of power is hoped to inform the analysis of the latter and this is why the research contents are presented in such an order, for the form to mirror the approach endorsed. Guidance from the ideas around migrants’ and allies’ collective organising seeking reform and the notion of a right to resist are taken as a starting point in addressing the meanings and the implicit beneath the institutional representation of power relations dictating “migration”.

Observing opposing actors within society and actors opposing the dominant institutional character of the “state” *modelling* society is an effort moved by the desire and the curiosity to reflect on the system’s alternatives for a (more) equal order of things. Perhaps one that could be called a *disorder of things*. A disorder of things does not necessarily escape the boundaries of the nation state altogether. It however does exceed its borders, physical and non, at the margins of which some (categories of) people are held.

A critique of the order of things does not ignore those aspects of the statal entity, such as welfare, that can be accessed from and accessible to people for their wellbeing. To argue the incompetence of the state for not doing enough in terms of services, for not delivering enough, for not offering enough and to enough people by attacking the state’s very existence may be counterintuitive. To attack its existence, one must refrain from claiming its support and its protections and must do so with a language and a logic that does not mirror the logic of the system it opposes. Anti-state proposals of such kind are in no way criticised – this thesis adopts a softer outlook. The author’s struggle for coherence, to avoid falling into the illogicity of calling for more state services while denying the worth of the existence of the statal entity, is not hidden from this text. It is a struggle that is part of that self-problematisation journey that she does not wish to shy away from throughout the study, while hopefully keeping it at bay.

There are aspects of the statal entity that one might desire to improve rather than uproot the “state” altogether. Since the statal entity does exist, people might as well take advantage of the positive sides of it. Beneficial mechanisms can be enhanced and expanded with a vision towards equality among people (and hopefully and eventually, species) on that which is one, and one only, earth. This vision may go well beyond the limits of the articulation of the state, encouraged by societies and collective arrangements where statehood is not contemplated and where nations are communities. Instances and projects of such kind are inspiring. Communities could reorganise themselves in endless models; municipalities

¹¹²¹ *ibid* 329.

and groups could cluster to support one another; citizenship could be participation and not a geographical or blood related screening of sort; decision-making could belong to the people, to the open assemblies, and no longer be relegated to distant and secluded places of power; the law could be a refuge against dominance and not the mean through which dominance is exercised, a shield for the oppressed against the oppressor rather than a mean through which violence is monopolised in the hands of a few and through which oligarchies maintain themselves behind an alleged democratic veil.

This contribution is not mature enough to ambitiously step into that disordered vision. It offers much more modest proposals, starting from partially transcending the current notion of nation state and its paradigmatic fanatic and fetishist bordering mechanisms, acknowledging these are not natural nor neutral nor timeless. It attempts to do so in an effort to reflect on what can be improved to the benefit of those whom the nation state itself marginalises, for this to no longer happen. What aspects of the current system can thus one nevertheless hold on to, to the betterment of current relations among governing, governed and ungovernable?

In this analysis, the most salient element to be considered of the current nation states' system is regarded as the [welfare state](#). Its existence is the praise of an apparatus that has the potential to revolve around the *human person* and its wellbeing. The welfare state must however be contextualised within the regional and national "spaces" of Europe and Italy. It obviously cannot be regarded as an abstract and ideal apparatus detached from the relations of power in place and the very system of policy that, in its unfolding, proposes specific problematisations of "phenomena" and adheres to an institutional version of "wellbeing", channelling of strategies and solutions in precise directions. These directions can be contested. Visions of nonstate welfare can inform and inspire state practices (to the very extent of proposing their dismantling) and can be found across the world. Yet, let us contemplate the welfare system within the current and formal "spaces" under analysis.

In the aftermath of the second world war, the early European economic communitarian constitution was negotiated in the common conviction of those national ruling classes that regarded freedom to trade as the prerequisite for economic development to take off again, nevertheless considering that forming robust and inclusive welfare systems within states opening to international exchanges was likewise fundamental.¹¹²² Such a mission contributed to the political re-legitimation of the then ruling classes, after the tragedies that had taken place during the war.¹¹²³ Meanwhile, the neoliberalist rationality that the European commercial state had ideally married was asserting that the only obstacle to the globalisation of the capitalistic economic is constituted by state national institutions sovereignly claiming to determine the set of rights citizens are entitled to.¹¹²⁴ Adhering to such a logic, the European Union bet on the acceleration of an expansion towards east to the detriment of a vertical integration among states (which would have entailed instead 'the delving into the social') with a view to increase social dumping between states of the 'old' and 'new' Europe.¹¹²⁵ The vertiginous enlargement of the Union towards east fed a '*fratricide*' competition between 'eastern Europe' and 'western Europe' that was primarily centred around wage and social depreciation.¹¹²⁶ Speaking of an "old Europe" and a "new Europe", of a "western Europe" and an "eastern Europe" is in itself so revealing of the contingencies of these institutional and geographical "spaces".

¹¹²² Federico Losurdo, '*Italexit. Trasformazione del vincolo europeo e sovranità condizionata*' (2020) 42(1) DPCE Online 355.

¹¹²³ *ibid.*

¹¹²⁴ *ibid.*

¹¹²⁵ *ibid.*; Federico Losurdo, '*L'Unione europea e il declino dell'ordine liberale*' (2018) 6 *Federalismi.it* 2.

¹¹²⁶ Federico Losurdo, '*L'Unione europea e il declino dell'ordine liberale*' (2018) 6 *Federalismi.it* 2.

Depreciation has at times been encouraged by the very jurisprudence of the Court of Justice of the European Union (CJEU) that, in the stream of the *Laval-Viking* cases, set off the constitutional primacy of economic freedoms of movement on individual and collective social rights.¹¹²⁷

2007 | *Laval-Viking* cases

The cases do not only show how priorities were ordered in the exercise of a judgment within the European legal space but are of particular interest for they originate from actions put in place by collective organising to defend workers' rights. The *Viking* case (C-438/05) concerned an action of boycotting against the Finnish vessel company Viking Line at the hands of the International Transport Workers' Federation, an international association of transportation workers' unions. Viking Line had opted to reflag one of its vessels, the *Rosella*, for it to be registered as an Eston ship. This would allow the conclusion of a collective agreement with Eston unions, the application of cheaper hourly tariffs and labour conditions than those foreseen under Finnish law. The *Laval* case (C-341/05) concerned the collective action, consisting in the interruption of working in a construction site, undertaken by the Swedish construction workers' union against the Latvian construction company Laval. The action was undertaken to push Laval to provide the workers from Latvia being employed elsewhere with the contractual condition of labour applicable in their actual place of work and not the state of origin.

Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include (...) *inter alia*, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.¹¹²⁸

The *Viking* case sees the right of collective action being reasoned by the CJEU as falling within the scope of application of article 43 of the Treaty establishing the European Community on the prohibition of restrictions on freedom of establishment: this, as noted by Erik Longo, allowed for the possibility to reconcile the events with the conceptual and regulative sphere of the provision of services.¹¹²⁹ Moreover, the recognition of the right to take collective action, including the right to strike, as a fundamental right forming an integral part of the law of the Community was parallel to the fact that 'the exercise of that right may none the less be subject to certain restrictions'.¹¹³⁰ The inclusion of the right to collective action within European law brings as a consequence that of "balancing" the fundamental social right with economic freedom and freedom of establishment, no less fundamental within the European framework.¹¹³¹ The result is that

a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interests. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it.¹¹³²

In this regard, the right to collective action for protecting workers is recognised as a legitimate interest, in principle justifying a restriction of one of the Treaty's fundamental freedoms, and the protection of workers is one of the public interest reasons recognised by the CJEU.¹¹³³ Yet, collective action does not meet its legitimate objective if there is no threat to the worsening of the labour conditions: 'even if that [collective] action (...) could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat'.¹¹³⁴ To understand if collective action is performed out of *necessity* to achieve the objective pursued, the national court dealing with a case is to examine whether the union 'did not have other means at its disposal which were less restrictive of freedom of establishment' and whether the union 'exhausted

¹¹²⁷ *ibid.*

¹¹²⁸ Case C-438/05 (CJEU Grand Chamber, 11 December 2007) para 79; Case C-341/05 (CJEU Grand Chamber, 18 December 2007) para 105.

¹¹²⁹ Erik Longo, '*Viking, Laval e la costruzione dell' <<economia sociale di mercato>> in Europa*' in Marta Cartabia (ed), *Dieci casi sui diritti in Europa. Uno strumento didattico* (Mulino 2011) 209.

¹¹³⁰ Case C-438/05 (CJEU Grand Chamber, 11 December 2007) para 44.

¹¹³¹ Erik Longo, '*Viking, Laval e la costruzione dell' <<economia sociale di mercato>> in Europa*' in Marta Cartabia (ed), *Dieci casi sui diritti in Europa. Uno strumento didattico* (Mulino 2011) 209.

¹¹³² Case C-438/05 (CJEU Grand Chamber, 11 December 2007) para 75.

¹¹³³ *ibid* para 77.

¹¹³⁴ *ibid* para 81.

those means before initiating such action'.¹¹³⁵ In the balancing exercise between social rights and freedoms of services, the performance of a right to collective action must therefore be the last remedy at disposal.¹¹³⁶

Albeit treating a distinct legal scope, the *Laval* case as well reiterated the right to collective action must be recognised as a fundamental right forming an integral part of the general principles of the regional framework that may nevertheless be subject to restrictions.¹¹³⁷ The CJEU further finds that 'the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another Member States which posts workers in the framework of the transnational provision of services'.¹¹³⁸ Indeed the CJEU held that

'since the freedom to provide services is one of the fundamental principle of the Community (...), a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary to attain it (...).'¹¹³⁹

Structural reforms within the EU that are stimulated through the jurisprudence of the CJEU also aim at remodelling those sectors of the welfare state that are most directly connected to the reduction of the public expenditure, namely the retirement and the sanitary system, social services foreseeing the provision of assistance to the population, public education, redistribution regimes, collective negotiations of wages, the regulation of the market and the relationship with labour.¹¹⁴⁰ Economic-social asymmetries are then converted into likewise radical political-constitutional asymmetries in light of the mechanisms of a coercive and conditional governance: it is a sophisticated normative instrument of multilateral surveillance, aimed at guaranteeing member states do respect the "values" of macroeconomic stability and competitive growth and, if need be, at imposing penalties to the states that distance themselves from such a tendency.¹¹⁴¹ Such a political-constitutional organisation is the immediate expression of the power relationships between northern European states, as 'creditors', and southern European states, as 'debtors': the former, while having introduced measures to contain public expenditure, have not corroded the core of their welfare institutions; the latter instead seem to powerlessly witness a progressive erosion of past social conquests, a creeping deindustrialisation, a widespread impoverishment.¹¹⁴²

So far therefore, formally sovereign statal systems have become '*products*' offered in reciprocal competition to remove those that less adequately meet investors' expectations.¹¹⁴³ Such a neoliberal Europe is feeding somewhat everywhere neo-populist and neo-sovranist movements that advocate for the re-nationalisation of decision making in virtue of the defence of each state's cultural and identitarian conditions and of each state's revindication to set new limits to the market.¹¹⁴⁴ The welfare state, the provision and maintenance of which is that aspect which this study looks at to be *enhanced* within a proposal to reinterpret the state beyond its current paradigms, is constricted and illtreated within such a context.

In Italy, the success of the far-right coalition of parties elected to govern the state in 2022 has been dramatically continuing the corrosion of access to and accessibility of welfare services, especially in

¹¹³⁵ *ibid* para 87.

¹¹³⁶ Erik Longo, '*Viking, Laval e la costruzione dell' <<economia sociale di mercato>> in Europa*' in Marta Cartabia (ed), *Dieci casi sui diritti in Europa. Uno strumento didattico* (Mulino 2011) 209.

¹¹³⁷ Case C-341/05 (CJEU Grand Chamber, 18 December 2007) para 91.

¹¹³⁸ *ibid* para 95.

¹¹³⁹ *ibid* para 101.

¹¹⁴⁰ Federico Losurdo, '*L'Unione europea e il declino dell'ordine liberale*' (2018) 6 *Federalismi.it* 2.

¹¹⁴¹ *ibid*.

¹¹⁴² *ibid*.

¹¹⁴³ *ibid*.

¹¹⁴⁴ *ibid*.

terms of sexual and reproductive health **rights**. In March 2023, a law degree entered into force titling 'further urgent dispositions for the actualisation of the national plan of recovery and resilience'.¹¹⁴⁵ Article 44-quinquies on norms on matters of clinic services (*'servizi consultoriali'*) reads that

[t]he regions organise consultorial services in the context of the PNRR and *can avail themselves*, without new or additional costs for public finances, *also of the involvement of third sector subjects that have a qualified experience in supporting maternity* (emphasis added).¹¹⁴⁶

This is essentially prescribing the possibility for public hospital and clinic services to avail themselves of anti-abortion and anti-choice associations and to reserve to them dedicated spaces within their facilities, within the framework of public financing through the National Recovery and Resilience Plan (NRRP). When questioned on the critical matter of allowing anti-abortionists to enter family planning centres through the Recovery and Resilience Facility (RRF), the European Parliament stated that the issue fell outside the scope of the NRRP and therefore such actions could not be financed by the RRF.¹¹⁴⁷ On 28 September 2024, Non Una Di Meno and the national network of clinics Rete nazionale Consultorie e Consultorie, together with other groups, took the squares to express their revendications for free, safe and public access to abortion rights and, in Turin, protested against the creation of the so called '*stanza dell'ascolto*' within the public hospital Sant'Anna, specialised in gynaecology and obstetrics. Public financing to private clinics managed by anti-abortion associations has for long been a reality in a wide number of Italian regions while public clinics are being closed down and emptied.¹¹⁴⁸ In 2022, the law foresaw one public clinic (*consultorio*) every 20'000 inhabitants, with the possibility of one public clinic every 10'000 inhabitants in inner and rural areas.¹¹⁴⁹ Across regions, abortion rights have been increasingly limited to the extent that, while a voluntary interruption of pregnancy is not prohibited by law, in some areas it is virtually impossible to have access to such procedure. The Marche region has been described as a laboratory for the policies emanated by Fratelli d'Italia, the party leading the far-right coalition at the national government as of 2022 and locally administering the region since 2020.¹¹⁵⁰ Clinics across Marche for instance, in some cases managed by associations with the endorsement of the administration, have displayed in their programmes, even before 2020, free services such as 'ethical and moral counselling' (*consulenza etico-morale*) and counselling on 'responsible procreation and abortion prevention' (*procreazione responsabile e prevenzione dell'aborto*).¹¹⁵¹

¹¹⁴⁵ Decreto-legge 2 March 2024 no. 19 'Ulteriori disposizioni urgenti per l'attuazione del Piano nazionale di ripresa e resilienza (PNRR). (24G00035)' GU 52 2 March 2024 <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2024-03-02;19!vig>> accessed 4 October 2024.

¹¹⁴⁶ *ibid.* Own translation. See original: 'Le regioni organizzano i servizi consultoriali nell'ambito (...) del PNRR e possono avvalersi, senza nuovi o maggiori oneri a carico della finanza pubblica, anche del coinvolgimento di soggetti del Terzo settore che abbiano una qualificata esperienza nel sostegno alla maternità'.

¹¹⁴⁷ Parliamentary question P-001213/2024 on 'Italian Government's proposal to allow anti-abortion activists to enter family planning centres through the Recovery and Resilience Facility' (European Parliament, 23 April 2024) <https://www.europarl.europa.eu/doceo/document/P-9-2024-001213_EN.html> accessed 1 October 2024; answer to the parliamentary question P-001213/2024(ASW) 'Answer given by Mr Dalli on behalf of the European Commission' <https://www.europarl.europa.eu/doceo/document/P-9-2024-001213-ASW_EN.html> accessed 1 October 2024.

¹¹⁴⁸ Non Una Di Meno, 'I consultori sono nostri!' (*NUDM*, 14 May 2024) <<https://nonunadimeno.wordpress.com/2024/05/14/i-consultori-sono-nostri/>> accessed 1 October 2024.

¹¹⁴⁹ Allegato 1 to the Decreto 23 May 2022 no. 77 'Regolamento recante la definizione di modelli e standard per lo sviluppo dell'assistenza territoriale nel Servizio sanitario nazionale. (22G00085)' GU Serie Generale no. 144 22 June 2022 <www.gazzettaufficiale.it/eli/id/2022/06/22/22G00085/sg> accessed 1 October 2024.

¹¹⁵⁰ See for instance the attention this received at the international level as well: Angela Giuffrida, 'Abortion rights at risk in region led by party of Italy's possible next PM' (*The Guardian*, 22 August 2022) <<https://www.theguardian.com/world/2022/aug/22/abortion-rights-at-risk-in-region-led-by-party-of-italys-possible-next-pm>> accessed 6 October 2024.

¹¹⁵¹ See for instance the *consultorio familiare di Macerata* <<https://www.comune.macerata.it/aree-tematiche/servizi/politiche-di-genere/informadonna/consultoriositonotizia.pdf>> accessed 6 October 2024.

For fascism to thrive, women must be subjected to reproductive control in order to fulfil their natural role, they must submit to a mythical past of patriarchal authority and must reproduce that ideal subject called to fight for the realisation of the theory of the pure Nation-state.¹¹⁵²

Besieging and disciplining the bodies through the welfare state system, it is argued, takes place parallelly to the performance of what Fabio Perocco and Francesco Della Puppa define **welfare racism**. The authors argue that the spread of anti-asylum seeker racism is occurring against the background of the “harshening” of migration policies, the mechanisms of which include the re-functioning and re-directing of welfare racism against the profiles of the asylum seeker and the refugee.¹¹⁵³ A fundamental component of welfare racism is the racialised welfare discourse, the most common arguments of which can be grouped in leitmotifs such as *worklessness*, *abusing the welfare system*, *taking advantage of Western policy*, *protection of citizens* and *the maintenance of law and order* and ultimately the *protection against terrorism*.¹¹⁵⁴ Racialised welfare discourse and securitarian discourse often reinforce each other’s strands by demanding and eventually enforcing (more) punitive migration policies and restricting the social sphere.¹¹⁵⁵ Racialised welfare discourse shows strong connections to the neoliberal ideology, itself characterised by an anti-welfare stance.¹¹⁵⁶ In such a context, fear becomes paradigmatic. At a time of structural precariousness and increase of indigency and inequality, the citizen fears the insufficiency of public resources and the collapse of the welfare system, further alleging that the public expenditure for the management of migrants is higher than the economic contribution of the latter to the host society.¹¹⁵⁷ In Italy, while the immigration reception system is being gradually taken down, access to social benefits is increasingly limited by the introduction of policy framed barriers: first, the “communitarian” vs “extra-communitarian” dichotomy; second, the requirement of registered formal residency for the category of the extra-communitarian; third, the requisite of long-term residency among the formally residing extra-communitarian.¹¹⁵⁸ Such a layered restriction regime manifestly shows the nuanced and framed complexity of the dichotomy citizens vs non-citizen/(im)migrant. The landscape is further fogged by a fragmented and often disaggregated policy system developed and implemented at the national, at the regional and at the municipal level. The Constitution in fact foresees that legislative powers are vested in both the state and the regions, with concurring legislation applying but not being limited to the sphere of job protection and safety, education, professions, health protection, nutrition, disaster relief, social security, the promotion and organisation of cultural activities (article 117). Meanwhile, administrative functions are attributed to municipalities, unless they are assigned to provinces, metropolitan cities, regions or back to the state level pursuant to the principles of subsidiarity, differentiation and proportionality (article 118). While this may to an extent have the potential to favour the design and enforcement of policies that are conscious of the territorial and population specificities of each area, the deriving applicable legislative and regulatory framework may be rather intricate and hostile to navigate, especially for foreigners. Institutionalised fragmentation and decentralisation of competences further allow for a significant degree of discretion in bureaucracy and in the management of resources of the local level, where administrations may arbitrarily demand formal discriminatory requirements to access social benefits and informal obstacles of all sorts may hamper accessibility of social services.

¹¹⁵² Sian Norris, *Corpi sotto assedio. L’attacco globale della destra alle donne* (People s.r.l. 2024) 35. Own translation. See original: ‘Affinché il fascismo possa prosperare, le donne devono quindi essere soggette al controllo riproduttivo per adempiere al loro ruolo naturale, sottomettersi a un passato mitico di autorità patriarcale e riprodurre quel soggetto ideale chiamato a combattere per la realizzazione della teoria di uno Stato-nazione puro’.

¹¹⁵³ Fabio Perocco, Francesco Della Puppa, ‘The Racialized Welfare Discourse on Refugees and Asylum Seekers: The Example of “Scroungers” in Italy’ (2023) 12(59) Social Sciences 1.

¹¹⁵⁴ *ibid.*

¹¹⁵⁵ *ibid.*

¹¹⁵⁶ *ibid.*

¹¹⁵⁷ *ibid.*

¹¹⁵⁸ *ibid.*

One sentence in Verónica Gago's work in relation to the ubiquity of feminism as a global phenomenon reads that in Italy *compañeras* from Non Una Di Meno denounce 'the use of welfare to manage poverty instead of enabling self-determination'.¹¹⁵⁹ This is so transparently explicative.

Yet what if it was otherwise? What if the welfare system emanated from the sovereign state was instead permeated by the disordered, the unthinkable and the ungovernable *subjects*, acknowledged as no longer objects? Exceeding the paradigms of the current nation state and of the *version* of welfare this offers, with the embedded discriminatory paradigms and physical and abstract borders that lie beneath it, can be inspired by 'the capacity of people to be creative, reflexive human beings, that is, to be active agents in shaping their lives, experiencing, acting upon and reconstructing the outcomes of welfare policies in variable ways'.¹¹⁶⁰

Federico Losordo observes that one must be mindful of the fact that where 'the *Sovereignty*' of states is at stake, understood as the fundamental political decision of a 'Community', there is always the possibility to alter the existing juridical order, furthering normative solutions that were earlier regarded as unthinkable.¹¹⁶¹

What if we indulged on this and acknowledged sovereignty is at stake when this does not have a long-term and forward-looking [vision of the people and for the people](#) who eventually generate its own very existence? The very manifest logic of alteration of a current juridical order for the preservation of sovereignty could be guided by the acknowledgment that [the human person is the ultimate paradigm, the unit of measurement](#) for the development of an alternative order of things, a sustainable and forward-thinking one – a welcoming and compassionate disorder of things, not naively but realistically adapting to the unfolding scenarios before us today. Is not after all the disorder of the outside such because of the very order of the inside? What if that anarchic reality of the multitude of those people who are *made* prohibited and *made* illegal, who move around and across borders, was instead welcomed into the current operationalisation of state sovereignty, rather than being represented as its enemy?

What if, in a manifest fashion, the existing juridical order of the "European Union" and its "states" were altered to produce normative solutions that could accommodate a long-term and conscious vision of sovereignty that was unfenced, that was unpatrolled, that was demilitarised, that was rather chameleonic and ductile to the evolving societies it regulates. A vision that promoted and expanded protection to *equal* people rather than narrowing it down to the bones in terms of entitlement to and enjoyment of rights, in terms of access to and accessibility of services. A vision of freedom of goods and services and capital – and people. Is it sustainable, to fence citizens in and keep non-citizens out, to limit the distribution of wealth, to pour that undistributed wealth into the military industry, to finance technologies and resources and personnel to guard borders – and for what?

¹¹⁵⁹ Verónica Gago, *Feminist International. How to Change Everything* (Verso 2020).

¹¹⁶⁰ Fiona Williams, Jennie Popay, Ann Oakley, 'Changing Paradigms of Welfare' in Fiona Williams, Jennie Popay, Ann Oakley (eds), *Welfare Research: A Critical Review* (UCL Press 1999) 2.

¹¹⁶¹ Federico Losurdo, 'Italexit. Trasformazione del vincolo europeo e sovranità condizionata' (2020) 42(1) DPCE Online 355.



Figure 3 - European Commission website on “managing migration responsibly” (September 2024)

What is *responsible* about apprehending and detaining the indigent, the resourceful, the traveller, the dreamer, the hopeless and the hopeful, the family and the child, rather than plentifully pouring energies and resources to shelter them?

Those subjects that struggle for acknowledgment are ultimately already altering the system, the failure of which is being extensively announced, while paradoxically those who are proposing an intuitive change to counter its collapse are being ignored and silenced. The unacknowledged subjects are those who move alongside with the evolving societies they live in, for they are the societies they live in. There is not a crumble of foresight or of responsibility for the collectiveness in state sovereignty and sovereign-ers clinging onto their wired fences and implementing normative changes to maintain their own status quo, despite thousands of people at their thresholds driven by the desire for a different life, despite the climate thundering its catastrophic irreversibility, despite bodies being disciplined and denied their rights and identities across a spectrum of spirits, despite the images of people and their longing for freedom being wiped out of this earth by the very weaponry and industry that is being so resourcefully founded.

In the more general scenario of re-militarisation of ‘democracies’, even the EU sets the objective of converting a part of its economic and productive apparatus to the ‘exigencies’ of war, to the extent that it promises to conjugate its ‘war functionalism’ (*funzionalismo bellico*) with the ecological transition.¹¹⁶²

The essential act of war is destruction, not necessarily of human lives, but of the products of human labour. War is a way of shattering to pieces, or pouring into the stratosphere, or sinking in the depths of the sea, materials which might otherwise be used to make the masses too comfortable (...). Even when weapons of war are not actually destroyed, their manufacture is still a convenient way of expending labour power without producing anything that can be consumed (...). In principle the war effort is always so planned as to eat up any surplus that might exist after meeting the bare needs of the population. In practice the needs of the population are always underestimated, with the result that there is a chronic shortage of half the necessities of life; but this is looked on as an advantage. It is deliberate policy to keep even the favoured groups somewhere near the brink of hardship, because a general state of scarcity increases the importance of small privileges and thus magnifies the distinction between one group and another.¹¹⁶³

¹¹⁶² Federico Losurdo, ‘L’Unione europea tra welfare e warfare’ (fuoricollana.it, 31 August 2024) <<https://fuoricollana.it/lunione-europea-tra-welfare-e-warfare/>> accessed 1 October 2024.

¹¹⁶³ George Orwell, 1984 (Planet eBook.com) 241-242.

There is a creeping sense of dystopic solitude and fear in observing the way sovereignty and its supranational negotiations are currently being “operationalised”, from the global to the local level, in states’ and regions’ territories, their extraterritorialities and areas of influences. The alternative what-if-vision that is argued in this text contesting such a system, in the end proposes to acknowledge that the earth is one and for all, beyond borders as they are professionally coercively conceptualised and deadly guarded and performed, beyond citizenship and territorial rootedness as instruments of discrimination. A vision where the disorderly revolutionises, revitalises and reorders paradigms and units of measurements, bringing them down from the nation state to the human person, their wellbeing and aspirations, in an effort to progressively realise a project of substantial and not alleged equality.

Geminello Preterossi writes that sovereignty as a conceptual reagent is an antidote to the globalist ideology, which hides the imposing effects of supremacy (*dominio*) under a layer of hypocritical (*tartufesco*) moralism.¹¹⁶⁴ Negating sovereignty, he argues, does not quash the question of power.¹¹⁶⁵

Rather than describing the world as it is, it is certainly more comfortable to stop at the illusion of post-sovereignty (...). Therefore, simplifications about sovereignty are common both among the so-called “sovereignists” (...), and “globalists”, who believe they can relieve themselves with a pure act of abstract willingness, or with the moralization of the law, of the mortgages of the current “political”: from the necessity to limit the chaos produced by globalisation to that of confronting the new challenges of hostility and with the recalcitrance of a plural world that does not accept to be homogenised. In the end, both show they do not know how to face the crisis of globalisation: (...) the latter (...) perhaps telling themselves they are waiting for an unlikely global revolution of a unified humanity, but impolitically and – as if by miracle – with no longer borders, internal fracture lines, differences.¹¹⁶⁶

The hope of the author is that her reflections are not second guessed by the reader as superficially naïve and as falling into shallowness. To the contrary, the ideas that are offered aim at exploring the ‘chaos produced by globalisation’ and to acknowledge the contingencies and the pluralities in a world that does not concede to its homologation. Yet imagining alternatives to confined humanity and gardening a soil of contestation from which unimagined or unimaginable virtual could take root is not, it is argued, a senseless or pointless endeavour to be belittled. There is a cherished cosmopolitan intent that attempts to respond to both the sovranist and the globalist and that takes inspiration from the representations and actions of realities that are competent and that produce knowledge to inform and suggest how to address the “crisis”.

Sovereignty can be declined and has been declined in a multitude of meanings, functions and, in the words of Dieter Grimm, of ‘historical constellations’.¹¹⁶⁷ The concept of sovereignty, he writes, can be adaptable to changing conditions and there is no obligation to remain tied to it, for instance, to avoid anarchy.¹¹⁶⁸ For in the pre-sovereign word there was no anarchy, so a post-sovereign world does not

¹¹⁶⁴ Geminello Preterossi, ‘Sovranità, non sovranismo’ in Dieter Grimm, *Sovranità. Origine e futuro di un concetto chiave* (Gius. Laterza & Figli 2009) IX-X.

¹¹⁶⁵ *ibid.*

¹¹⁶⁶ *ibid.* Own translation. See original: ‘Piuttosto che descrivere il mondo com’è, è certamente più comodo baloccarsi con l’illusione della post-sovranià (...). Perciò, le semplificazioni sulla sovranità sono tanto dei cosiddetti “sovranisti” (...), quanto dei “globalisti”, che credono di potersi sgravare con un puro atto di buona volontà astratta, o con la moralizzazione del diritto, delle ipoteche del “politico” attuale: dalla necessità di porre argine al caos prodotto dalla globalizzazione a quella di confrontarsi con le nuove sfide dell’ostilità e con le refrattarietà di un mondo plurimo che non accetta di essere omologato. In fondo, entrambi mostrano di non sapere come affrontare la crisi della globalizzazione: (...) i secondi (...) magari raccontandosi di essere in attesa di un’improbabile rivoluzione globale di un’umanità unificata, ma impoliticamente e – come per miracolo – senza più confini, linee di fratture interne, differenze’.

¹¹⁶⁷ Dieter Grimm, *Sovranità. Origine e futuro di un concetto chiave* (Gius. Laterza & Figli 2009) 101.

¹¹⁶⁸ *ibid.* 119.

necessarily have to fall into it.¹¹⁶⁹ This may be, in the end, the equivalent of opening sovereignty up to the *space* of anarchy and vice versa – contaminating order with disorder (the *outside the order*) so that they no longer occurred in opposition. So that the condition of *order* that the b-*order*-ed sovereign state produces and imposes is regarded as not being the sole, natural, neutral and timeless alternative to disorder. So that, while the current given order of things has its unit of measurement into the nation state, the disorder of things has its unit of measurement into the human person transgressing the threshold between the inside and the outside, crossing into the statal territory, governed and policed but unrecognised, unacknowledged, undisciplinable and therefore radically political in their bodily presence.

3.5 Chapter summary

This chapter argues that “geographical” and institutional “entities” such as the “Italian state” and “Europe” can be questioned and denaturalised to challenge a symbolic and normative framework issuing policy that is often otherwise assumed as self-evident and timeless. The analysis aligns with the idea that “places” can be made and unmade and can as such be regarded as proposals, as political creations the meanings, assumptions and presumptions of which can be reflected upon within the context of migration. This is propaedeutic to pursue the rethinking of the current order of things and to develop a reasoning that moves beyond the present notion of state sovereignty as it is actualised today, through its bordering function and its monopoly of force, acknowledging that such a representation neglects alternative forms of governing and depoliticise policy. The notion of “state” is then approached with reference to the “Italian state” and its diverse representations over time, highlighting its *making up* and the contingency of its underpinning reasonings. Challenging statal representation(s) is of interest for, today, a state-centric view is predominant in the narrative of migration. Likewise, observing how policy instruments regulating migration represent the state can reveal the way in which the latter is conceptualised. In this regard, the text observes the underlying reliance on territoriality, on the border as impermeable for the many and permeable for a few, on sedentarism – as if it has always been this way. Yet, assuming the “state” as the norm can indeed be challenged, leading to questioning whether “states”, as Di Cesare writes, *can* in the end impede or limit immigration. If “states” were thought of differently, their paradigms would change too. Can the “state” be subordinated to the human person? This would be a radical overturn in the regulation of people’s mobility and the virtual of the unforeseen and unimaginable, acknowledging one’s own freedoms and rights as having primacy over state sovereignty and its exercise of force: the more irregularised and marginalised in today’s state-centric view, the more at the heart of the system of protection and care in the overturn. This, in the end, would quite linearly comply with the idea that human rights are *human*, inalienable to all, and people are equal. Rethinking the “state” offers a space for it to act and *policy produce* differently, revealing the contingency of the current order and exposing how counterintuitive the denial and illegalisation of a *person* are. The chapter then proceeds to analyse the notion of “Europe”, focusing on the “European Union” especially, and its silences. In a similar manner to the effort that questioned the “state” in its relationship with migration, the text addresses the contingency of a European space and how the “problem” of “migration” is increasingly represented in terms of crime, a threat to public order and security, a norm of pushbacks and expulsions – extraterritorially as well. This can indeed be reshaping Europe’s (imaginary) geography. The “problem” of “migration” is instrumentalised to feed suspicion, fear and the idea of limited resources and limited migration-carrying capacity. The chapter eventually concludes on the idea that the migrant, situated at the border in an effort to cross it, tests the limits of the “space” of the sovereign state and questions the paradigm of citizenship. The dichotomy of the citizen and the non-citizen and that of sovereignty and anarchy are disorderly disrupted by the migrant person and the way they challenge the “state” as *the* indispensable ideological principle, in the words of R. K. Ashley. By presenting themselves at the frontier and transiting through, migrants radically demand their own space: a corporeal space and a political space altogether. Through their presence and their demands,

¹¹⁶⁹ *ibid.*

they bring about alternative models of actions and new meanings and paradigms, challenging the order of things that does not acknowledge them. Their resistances then, and the competences and knowledges they offer, can be the starting point to address (and redress) forms of power. This does not necessarily entail the dismissal of the state system altogether, in particular considering the beneficial role of the welfare state in the protection of individuals and in ensuring access to services, but calls for the “betterment” of the current, discriminatory, arrangements.

Chapter four.

The right to resist. Collective organising, dissent and legal reform

Chapter four speaks of realities of resistance and of the right to resist. The idea that is developed is that migrants' and allies' collective organising dissent from the institutional narrative on "migration" and seek reform. Through their corporeal presence, that which has transgressed the paradigmatic state border in the first place, and through the acts of protesting and challenging the constituted powers, they demand acknowledgment as the competent, knowledgeable and acting political "subjects" they are. In the context of the social struggle, groups of such kind are the bearers of constitutional principles and the "new" advocates for the revitalisation and realisation of a constitutional vision of substantial equality, one that evolves and adapts to current circumstances and exceeds the imposed and maintained order of things. They resist the state's attempts to violate such a vision of equally powerful individuals onto this earth, a vision that is threatened by the policed and securitarian policy against the inviolability of the human person. They resist and have a right to do so. The chapter preliminarily addresses the notions of policing and security (4.1), proposing a vision of an ethic of intransigency towards powers. Such a vision is pursued and promoted by migrants and allies: nonviolent collective organising seeking legal reform is explored in the context of the relation between the law and the social conflict, its expressions and its relationship with violence (4.2). As an instance of a reality of resistance, the text then touches upon the case of the temporary closing of the detention centre for migrants in Turin, the facilities of which were burned down from the inside by the people held therein (4.3). Eventually, can the resisting migrants' and allies' collective organising appeal to a right to do so? A right(-duty) of resistance is finally explored, with particular reference to the words and rationales expressed by the Constituent Assembly during the Italian Constitution's preparatory works (4.4). Reflecting on the right to resist allows for the exploration of the relationship between the governing and *all* the governed, irrespectively of their "legal" status, and opens up a space for dissent as the heart of the democratic process and for challenging the sovereign state order of things.

Keywords: collective organising – dissent – police – resistance – right to resist

One does not dictate to those who risk their lives facing a power. Is one right to revolt, or not? Let us leave the question open. People do revolt; that is a fact. And that is how subjectivity (not that of great men, but that of anyone) is brought into history, breathing life into it. A convict risks his life to protest unjust punishments; a madman can no longer bear being confined and humiliated; a people refuses the regime that oppresses it. That doesn't make the first innocent, doesn't cure the second, and doesn't ensure for the third the tomorrow it was promised. Moreover, no one is obliged to support them. No one is obliged to find that these confused voices sing better than the others and speak the truth itself. It is enough that they exist and that they have against them everything that is dead set on shutting them up for there to be a sense in listening to them and in seeing what they mean to say. A question of ethics? Perhaps. A question of reality, without a doubt. All the disenchantments of history won't alter the fact of the matter:

it is because there are such voices that the time of human beings does not have the form of evolution but that of “history”, precisely.¹¹⁷⁰

Acts and practices of resistance permeates lives in all their nuances. Protesting and participating in demonstrations, fasting, walking marches together with people sharing a common cause, speaking one’s own mind when witnessing a wrong being perpetrated by someone abusing their position, practices of boycotting goods and services, petitions, open letters, picketing, collective legal actions and so on, are all strategies enacted in and experiences of everyday life. Engaging forms of power with perplexity and scepticism, and anger before oppressing practices, is at the heart of democratic and participatory processes.

To resist is to exert force in opposition, either individually or collectively. The term resistance is hereby used in reference to [opposition to oppression](#), that is, within the current context of analysis, [acts of the constituted public powers that seemingly exceed their scope and infringe upon inviolable rights and constitutional law in its progressive realisation](#). It is therefore detached from a context of war, armed conflict and any situation involving populations rising up against the aggression of a state. It is detached from the realm of application of international humanitarian law and its intersection with international human rights law. Resistance is hereby considered as the [expression of dissent](#) from the institutional narrative and the production of socio-juridical vulnerability through policy. It is, to some extent, a synonym of protesting or demonstrating, but it is not limited to it, for [a multitude of dimensions](#) can overlap in the exercise of acts of resistance. In this study, resisting is understood [in virtue of the pursuance of legal reform and denaturalisation of the paradigms of the current state sovereignty](#), such as that of citizenship, bordering and security, whenever policies enforcing such paradigms exceed the boundaries of constitutional guarantees.

The choice of speaking of resisting [from the perspective of a right to do so](#) comes from the desire to acknowledge and ground the reflections contained in this study into a [constitutional framework](#) and a [constitutional vision of substantial equality](#) to be progressively realised.

This is done because, as observed by Alessandro Morelli, reflecting on the right to resist does not only mean [retracing the genesis and the historical evolution of constitutional law](#), understood as the whole of norms and establishments adopted by contemporary systems to define the [relationship between those governing and those governed to limit power and safeguard rights](#).¹¹⁷¹ It also triggers the exploration of [perspectives on the survival and development of constitutional law itself in the current multicultural and globalised social context](#).¹¹⁷² What this thesis investigates is indeed whether a right to resist can be spoken of altogether and whether movements of migrants and allies opposing the current power structures can claim such a right for their actions. Speaking of resistance helps bringing the constitutional discourse to the forefront and opens the analysis up to a perspective that reflects on powers and oppositions beyond social conflicts, [questioning the normative system at a foundational level](#), reviving its paradigms and ultimately reminding of how the constitutional vision must be cherished as *actual* and seen as in a process of *progressive realisation*. Are the demands of realities unconforming to the institutional narrative on migration eventually aligned with the fundamental principles enshrined in the constitutional system and with the *promise-project* of a condition of substantial equality? Can these be approached as resistances and their knowledge-production role

¹¹⁷⁰ Michel Foucault, ‘Useless to Revolt?’ in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 449, 452. For more context, see Michel Senellart in Michel Foucault, *Security, territory, population. Lectures at the Collège de France 1977-1978* (Michel Senellart ed, Graham Burchell trs, Palgrave Macmillan 2009) 477-488; for the Italian version, see Michel Senellart, ‘Nota del curatore’ in Michel Foucault, *Sicurezza, territorio e popolazione. Corso al Collège de France (1977-1978)* (Paolo Napoli trs, Feltrinelli 2004) 273.

¹¹⁷¹ Alessandro Morelli, ‘Introduzione. Il diritto-dovere costituzionale di resistenza e la resistenza del diritto costituzionale’ in Luigi Ventura, *Il diritto di resistenza* (Rubbettino 2014) 5.

¹¹⁷² *ibid.*

acknowledged? The established relationships between the governing and the governed, which are offered to the public as timeless and natural, are rather modelled and contingent to time and space. As such, they must change and evolve, thriving to even out inegalitarian and hierarchical forms of ruling and aspiring to see coming into existence that which may have been unforeseen at the time of the constitutional drafting but is nevertheless in line with such a project. The presence of the migrant person is undigestible to the state for exceeding the category of the citizen. The migrant person emerges with that singular biographical complexity of one's life that fractures the limited scope of the labelling *statuses* subordinated to citizenship. Such a presence calls for a renewed interpretation of the foundations of the current normative system and denaturalises the deep-seated assumptions and presumption with its revendications of equality for all, offering a chance to imagine a less hierarchical and imbalanced society for everyone, citizens and non.

During this study, often there came the question: why bringing the constitutional text into the analysis? Why addressing migrants' and allies' claims against a constitutional background? Great thought was given to such perplexities. The observation was often answered with another question: what else instead? What other dimension can one take as a foundational reference and as the backdrop against which an analysis of reinterpretation, evolution and application of the law can unfold? In the end, it was the conviction that a fragmented system of laws and policies such as that regulating migration in Italy could be more thoroughly and comprehensively analysed and questioned when approached from its underlying and overarching principles. Principles that are not carved in stone as they are written in the formal text but have been agreed upon as being at society's core and as no longer negotiable, by their very nature a projected vision to be realised over time, interpreted and applied to satisfy the realities of present-day conditions. The meanings contained in the constitution are adopted as the [interpretative key](#) to review the fragmented and multilayered policy system concerning migration. Narratives that do not conform to the institutional discourse are credited as competent and ultimately analysed before the normative foundational framework to see if their demands meet and merge with agreed upon principles that are enshrined therein and thought of as adapting to a changing society. The phenomenon of people moving across states is [a reality](#) and so is approaching it as [a political necessity](#). The ultimate objective of this study is to contribute to the study of the law as an instrument that can mirror and support a society equal for all, in the books and in action. A society where the condition of suffering of one and their opposition to such condition become [the struggle of all](#), the struggle for the universal to be protected by the designated institution in all forms, exceeding the sameness of categories and acknowledging equality in the other-ness, to a level that may have previously been unforeseen.

It is a matter of making conflicts more visible, of making them more essential than mere clashes of interest or mere institutional blockages. From these conflicts and clashes a new relation of forces must emerge whose temporary profile will be a reform. Whatever the project of reform, if its basis has not been thought working in itself, and if ways of thinking – which is to say, ways of acting – have not actually been modified, we know that it will be phagocyted and digested by behavioral and institutional models that will always be the same.¹¹⁷³

A second question on the study often followed that on the constitutional reference, enquiring as to the nature of the realities considered. Why seeing only migrants' and allies' groups as resistances? Is not this a biased assumption in itself? Why not considering an anti-establishment, sovranist or anti-immigration group's demands as resistance, when such group protests the institutional narrative on state's migration-related strategies, reception administration or social policies? Receiving such a critique for the very first time was intriguingly puzzling. It had never occurred to the author that such a perplexity could arise. Simply answered, a choice of scope was made throughout the study, and a line of argument adopted, to reflect on migrants' and allies' collective realities. However, if the question was

¹¹⁷³ Michel Foucault, 'So Is It Important to Think?' in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 454, 457.

asked once, nothing prevents the reader from wondering the same. The reason why anti-immigration realities protesting the institutional approach to migration are not considered is grounded in the very reference to the constitutional vision. There is not the slightest interest in entertaining the idea that groups who position themselves against the principle of equality among people and desecrate the prohibition of non-discrimination are to be neutrally addressed as a part of the democratic process. They are, to the contrary, the antithesis of this, for their vision is to annihilate and reject the other. Their narratives are permeated by racism and xenophobia. They often discriminatorily propose a governing model that considers alleged “natural” characteristics as common identitarian features of a homogenised collectivity. Fascist is what denies one’s will, choice, marvellous specialty of loving freely with no correlation to any genetic destiny.¹¹⁷⁴ Any narrative that builds on discrimination and hatred, whether unfortunately affiliated to the institutional discourse or whether criticising it for the adoption of not “harsh” enough policies, poisons a democratic process. Groups that align to such stance, even when they dissociate from the established order of things, are therefore not contemplated as instances of resistance in this research. The idea is not to consider movements that oppose the institutional narrative on migration per se. It is to consider migrants’ and allies’ ones, whose claims root in a vision of equality of all and fight the system’s implicit partialities causing conditions of socio-juridical vulnerability for those falling “beneath” the category of citizen.

This is not perceived by the author as the expression of a lack of neutrality that may impair the study. The issue is irrelevant. Neutrality itself in fact does not fall within the scope of this exploration, for the normative agenda this pursues has been made clear since the very outset of this text. This is a modest research effort, the aim of which is to contribute with reflections to the [observation of the law and its evolution](#). There is nevertheless a firm belief that researching is a political action and as such shall not shy away from a responsibility of duly, not neutrally, challenging what is interpreted as intoxicating a system of protections that can indeed be improved, and the checks and balances of which must constantly be secured, upheld, revised to ensure their actuality. Migrants’ and allies’ movements seeking normative reform are a chance to lift oppressive practices and balance hierarchical and inegalitarian structures [for all](#). Groups spreading hatred and denying to people on the move a respectful welcome as brothers and sisters only speak for themselves and call for the maintenance or the establishment of racist and xenophobic structures of privilege and domination. No such informal group, regardless of their expression of unsatisfaction with migration governance and their opposition to the institutional narrative on migration, is at all considered in this research. Any such group should be made the object of severe intervention on the part of the normative system in place, for a democratic process does not need showing tolerance to those eventually wishing to obliterate it and its precious, choral multiplicity of voices.

During discussions on the subject matter of this study, a third and a fourth question also emerged, involving the means and methods resistances and power may recur to. Where can the line between resistance and alleged criminal conduct be drawn? Is there a separation between the legitimate and the legal and can the legal be illegitimate, can the illegal be legitimate? The attempts to explore such queries are spread throughout this entire work. Particular attention in this regard may be paid to the idea of [violence and abuse of power](#) on the part of the authority.

(...) [M]y theoretical ethic is (...) to be respectful when a singularity revolts, intransigent as soon as power violates the universal.¹¹⁷⁵

¹¹⁷⁴ Michela Murgia, *Dare la vita* (Rizzoli 2024) 57.

¹¹⁷⁵ Michel Foucault, ‘Useless to Revolt?’ in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 449, 453.

4.1 Notes on policing and security

Discussing the legality and legitimation of the dominant system of the monopoly of force is inevitably correlated with the [ethic of intransigency towards powers](#) and, ultimately, it may flow into the question of “security” and that of a securitarian logic being proposed to the public as *the* avenue for safety.

While the decision-making process of all powers, as in the form of policy and thus order maintaining mechanisms, is the object of analysis throughout the text so far as it relates to the discourse on “migration” in Italy, a few words can be spent on the exercise of authority by, generally speaking, [the police](#). This term has previously been employed in chapter two when referring to Rancière’s conflict between politics and policing, following the reflections of Giordano on recognition and acknowledgement.¹¹⁷⁶ While it is now employed with reference to a more general usage, the reader is invited to keep the reflections shared on politics and policing in mind: the law determining social actors’ roles in society or lack thereof, the disciplining of bodies within a preordered configuration, the maintenance of such imposed order. The term policing is now more generally referred to as an umbrella term, being aware that each state comprises underneath different public law enforcement agencies – another common expression, that of “law enforcement” agencies, which is indicative of the underlying and uncontested assumptions behind the notion of such institutions. Whereas in fact, as Waddington remarks, much of police work may be characterised by the exercise of discretion in favour of non-enforcement rather than enforcement.¹¹⁷⁷

In this section of the text, the term policing is understood – and contested – as borrowing from Campesi’s mention of the so called “democratic police”, abstractly indicating the task assigned to police forces in “modern democracies” to guarantee a safe environment within which citizens may exercise their fundamental freedoms.¹¹⁷⁸ Such an idea sees the legitimacy of police powers as being ideally exercised at the service of citizens and impartially.¹¹⁷⁹ The very use of wordings such as “democratic police” in “modern democracies” for “citizenry” do imply a whole realm of underlying assumptions that cannot be ignored. Speaking of “democratic” police is an oxymoron to the author and leaves room for great discomfort. It may be deceptive in fact to speak of *ideal democratic* police. Current policing evolves within a capitalist system in which, over time, political actors have facilitated the expropriation of resources and the expulsion of people and groups from rights and statuses: through the structural regulation of paths of legal and material inclusion that are partial, subordinate or selective, economic actors therefore reached their objectives of asymmetric and inegalitarian accumulation.¹¹⁸⁰ Policing therefore can be approached only within a framework that refers to the political, administrative and ultimately dominant (un)ethical mechanisms of accumulation and distribution of wealth and resources. For the sake of discussion however, and since the purpose of these notes is only to sketch the contours of the element of policing that is inevitably intertwined with the question of the expression of dissent and manifestation of citizenship, let us begin by referring to the articulation of police borrowed by Campesi as a ground for further observations, keeping at heart Rancière’s teaching.

Policing has historically developed with reference to the nation state, being granted powers in virtue of state’s monopoly of coercive force in a given territory.¹¹⁸¹ At first, Waddington observes that policing is what police officers do.¹¹⁸² He touches upon a number of functions that policing may entail and questions

¹¹⁷⁶ See Jacques Rancière, *Disagreement. Politics and Philosophy* (University of Minnesota Press 1999); Cristiana Giordano, *Migrants in translation: caring and the logics of difference in contemporary Italy* (University of California Press 2014).

¹¹⁷⁷ P. A. J. Waddington, *Policing Citizens: Authority and Rights* (UCL Press 1999) 5.

¹¹⁷⁸ Giuseppe Campesi, *Che cos’è la polizia? Una introduzione critica* (DeriveApprodi 2024) 57.

¹¹⁷⁹ *ibid.*

¹¹⁸⁰ Giulia Fabini, Enrico Gargiulo, Simone Tuzza, *Polizia. Un vocabolario dell’ordine* (Mondadori Education 2023) 3.

¹¹⁸¹ Leanne Weber, Benjamin Bowling, ‘Policing Migration: A Framework for Investigating the Regulation of Global Mobility’ (2004) 14 *3 Policing and Society* 195.

¹¹⁸² P. A. J. Waddington, *Policing Citizens: Authority and Rights* (UCL Press 1999) 1.

them, from crime-fighting to investigating, peacekeeping, order maintaining (not in the sense of maintaining order *per se* but in the sense of imposing a particular order) and control, delivering help and assistance; however, he then argues that the essence of policing in the end may not lie in what police actually do but in *their potential*, particularly their potential to use force as in the general capacity to recur to the exercise of legally sanctioned forceful means against properties or persons.¹¹⁸³ Police forces' coercive authority is granted by the state and so policing is nestled within the paradox that sees the state as both the guarantor of freedom and its greatest threat at the same time.¹¹⁸⁴ One is to be mindful of the fact that state authority had been granted to the military, before it was granted to the police – a distinction came to be drawn over time between such forces potentially exercising coercion over state's domestic population, the police, and 'others whose claim to citizenship was non-existent or rejected', the military acting in colonies abroad.¹¹⁸⁵

Those upon whom military violence may be inflicted are not “us”, but “them”, and therefore “we” need have no fear of military might. Indeed, the military, unlike the police, are valorized precisely because of their association with violence, which is used to protect or promote the interests of the state and its citizens. This leaves the police in a curiously ambivalent position: (...) as the military parallel illustrates, it is not association with violence *per se* that taints policing, but the fact that police may use violence against “us” and therefore they present a threat.¹¹⁸⁶

Waddington indeed writes that ‘the irony is that the “police idea” takes hold and develops during the same period and in the same place that the notion of “citizenship” is also taking root’.¹¹⁸⁷ Those whom, by their actions, find themselves outside the ‘moral community of citizens’, like criminals, represent a threat to other citizens and therefore the exercise of force over them by police finds justification in the necessity to protect the citizenry ‘from the depredations of the lawless and disorderly’.¹¹⁸⁸

Don't the *illegal immigrant*, the *clandestine*, the whole of the homogenised fictional biographical narratives that surround the suspiciously treated idea of *the immigrant*, *l'immigrato*, ground into this very distinction between the citizenry to protect and those whose presence is itself illegal and at the outskirts of citizenship? With a brief digression onto colonial police, Waddington observes

that *how* a society is policed depends upon *who* is policed. When it is citizens with civil and political rights, then policing is approached with caution; but when the recipients of police authority are not citizens, then police are free to exercise naked coercive force.¹¹⁸⁹

Stone and Ward ask ‘how can the citizens of a democracy control their police?’.¹¹⁹⁰ In general terms, they say, effective democratic control over policing as well as over any government function requires a civic culture valuing democratic governance, social structures supporting democratic practice among citizens and political will of leaders to hold officials accountable: such conditions can promote democratic policing.¹¹⁹¹ Indeed the paradox of the idea of a democratic police rests with the fact that the main threat to civil and democratic freedoms comes exactly from the institution tasked with safeguarding them: provided with coercive powers and the possibility to intrude in one's private sphere, aspects not attributed to any other public institution, the police is not only the primary source of guarantee of rights

¹¹⁸³ *ibid* 16; 42.

¹¹⁸⁴ *ibid* 21-23.

¹¹⁸⁵ *ibid*.

¹¹⁸⁶ *ibid*.

¹¹⁸⁷ *ibid*.

¹¹⁸⁸ *ibid*.

¹¹⁸⁹ *ibid* 26.

¹¹⁹⁰ Christopher E. Stone, Heather H. Ward, ‘Democratic policing: a framework for action’ (2000) 10 *Policing and Society* 11.

¹¹⁹¹ *ibid*.

but it also is the primary source of insecurity to them.¹¹⁹² While a “democratic” police is an “impartial” police, in reality the relationship between police and politics is problematic: the “political police” is no anomaly and, although its idea is often associated with authoritarian regimes, modern liberal “democracies” are typically equipped with systems against actions destabilising state existence.¹¹⁹³

The character of the government and police action are virtually indistinguishable. A government is recognized as being authoritarian if its police are repressive, democratic if its police are restrained. It is not an accident that dictatorial regimes are referred to as “police states”. Police activity is crucial for defining the practical extent of human freedom. Furthermore, the maintenance of social control is fundamentally a political question. Not only does it powerfully shape what a society may become, but it is a matter in which governments feel a vital stake, for they know that their own existence depends upon it. For all these reasons, the police are in politics, whether they recognize it or not.¹¹⁹⁴

A distinction is referred to by Campesi between ‘high’ policing (*alta polizia*), which is tasked with neutralising internal threats to the existence of the state, and ‘low’ policing (*bassa polizia*), which is called to control the remaining crimes and disorders.¹¹⁹⁵ The activities of the high police risk to be at the advantage of the elites, preserving an established political order; it is in such cases that the face of the police as armed branch of the state becomes disturbingly transparent.¹¹⁹⁶ To remain within the limits of legitimate actions, the political police should be able to distinguish between potentially violent antagonists and dissidents recurring to opposition strategies well within the boundaries of the democratic dialogue.¹¹⁹⁷ However, the political police is structurally brought to favour confusion among the two groups.¹¹⁹⁸

Political police’s ambiguity is all the more manifest in mass demonstrations, where protesters (*rivoltosi*) may hold an unclear position: their behaviour states a demand for inclusion into the political process and their complaints, even when violently expressed, acquire some sort of ‘moral dignity’ for the ends pursued.¹¹⁹⁹ The distinction between “legitimate” and “illegitimate” protests is often blurred and moral boundaries during demonstrations may be more contentious.¹²⁰⁰ The pacification of the management of public order in so called western democracies is much the result of the inclusion of the working class in the political process: the more working movements earned political and social consensus, the more violent escalation and conflict with demonstrators was less of an option; the fringes of the movements operating beyond unions’ and parties’ systems have in fact traditionally been exposed to more violent repressions, and the same has occurred to those segments of the population whose access to citizenship is contested.¹²⁰¹ This is decisive. Uprisings of young protesters belonging to minorities have in fact often been seen as dangerous for their explicit racial character: they highlight the presence of a deep-rooted fracture within the social body that can potentially weaken the state’s legitimacy and, by reason of this, the political meaning of such uprisings is ignored and they are more often deemed violent criminal events to be repressed with force.¹²⁰² This is an important reminder for those demonstrations of dissent that have occurred over time in Italy especially at the hands of migrant workers. Chapter two mentioned

¹¹⁹² Giuseppe Campesi, *Che cos’è la polizia? Una introduzione critica* (DeriveApprodi 2024) 58.

¹¹⁹³ *ibid.*

¹¹⁹⁴ David H. Bayley, *Patterns of policing. A comparative International Analysis* (Rutgers University Press 1985) 189.

¹¹⁹⁵ Giuseppe Campesi, *Che cos’è la polizia? Una introduzione critica* (DeriveApprodi 2024) 58. On high and low policing see also Jean-Paul Brodeur, *The policing web* (Oxford University Press 2010).

¹¹⁹⁶ Giuseppe Campesi, *Che cos’è la polizia? Una introduzione critica* (DeriveApprodi 2024) 61.

¹¹⁹⁷ *ibid.*

¹¹⁹⁸ *ibid.*

¹¹⁹⁹ *ibid.* 62.

¹²⁰⁰ *ibid.* See also P. A. J. Waddington, *Policing Citizens: Authority and Rights* (UCL Press 1999) 64-69.

¹²⁰¹ Giuseppe Campesi, *Che cos’è la polizia? Una introduzione critica* (DeriveApprodi 2024) 62-63.

¹²⁰² *ibid.*

those which took place in Rosarno and Castel Volturno between 2008 and 2010 and recalled how Giordano compared them to episodes of heterotopias.¹²⁰³

Waddington writes that the police “‘keep people in their place’” when exercising their potential power and discretion ‘under the guise of neutrally enforcing the law’: ‘patrolling the boundaries of respectability – and thus reproducing patterns of domination and subordination, inclusion and exclusion – is the exercise of largely invisible state power’.¹²⁰⁴ That same act of maintaining an imposed order of things becomes more visible when the police acts against dissent, especially mass dissent, opposing predominant socioeconomic and political conditions: ‘[h]ere the notion of the police as neutral and impartial enforcers of the law is exposed for the myth that it is; since their first duty becomes transparent – to protect the state, whose coercive arm they are’.¹²⁰⁵

Discriminatory and oppressive tendencies can be identified in societies that do not build on explicit apartheid regimes: in such contexts, the very existence of the state does not depend on the dominance of one part of the population over the other but there nevertheless are deep-seated stratifications on grounds of class and “race”.¹²⁰⁶ In such societies, the impact of police actions inevitably reinforces inequalities.¹²⁰⁷ The political character of police is then evident. This is so to the extent that even the so called ‘low’ police, if a distinction of such kind is to be maintained, can function as an instrument to oppress minorities or marginal(ised) social segments of the population, often stigmatised.¹²⁰⁸ This highlights how the police can be seen as the institution tasked with the protection of citizens from an *internal* danger represented by those who are located at the *moral and social borders of citizenship*.¹²⁰⁹

Hence policing is characterized by a majoritarian ethos with police regarding their task as the protection of “ordinary decent people”. How is the disreputable minority defined? (...) The wider discretionary authority possessed by the police is used to protect prevailing values from those sections of society that pose a threat to those values – *the marginal and dispossessed. What they are marginal to and dispossessed of is citizenship itself.*

Thus, exclusion and subordination are legitimated through the process of *criminalizing* groups whose lifestyles offend prevailing respectable values.¹²¹⁰

Campesi also observes how the “legal status” of minorities plays a role in the exercise of power by the police: police engaging in migration-related checks and patrols for instance have reinforced the implementation of discriminatory practices, for it offers an apparent legitimation to the selective control of minorities.¹²¹¹ Speaking of police’s abuse of power, Campesi distinguishes between excessive use of force, police violence and brutality: the first occurs when it is unnecessary or disproportionate to the “legitimate” objective pursued by the agent; the second occurs when the agent consciously uses force for an “illegitimate” objective; the third occurs when violence drifts into the infliction of suffering for no apparent reason whatsoever.¹²¹² Di Cesare questions that the so called excessive use of force and any alleged discrimination perpetrated at the hands of the police is an inevitable anomaly, a disfunction within an otherwise correct system, asking whether this rather is a *systematic disfunction* that in the

¹²⁰³ Cristiana Giordano, *Migrants in translation: caring and the logics of difference in contemporary Italy* (University of California Press 2014) 241-245.

¹²⁰⁴ P. A. J. Waddington, *Policing Citizens: Authority and Rights* (UCL Press 1999) 64.

¹²⁰⁵ *ibid.*

¹²⁰⁶ Giuseppe Campesi, *Che cos’è la polizia? Una introduzione critica* (DeriveApprodi 2024) 63-64.

¹²⁰⁷ *ibid.*

¹²⁰⁸ *ibid.*

¹²⁰⁹ *ibid.*

¹²¹⁰ P. A. J. Waddington, *Policing Citizens: Authority and Rights* (UCL Press 1999) 41.

¹²¹¹ Giuseppe Campesi, *Che cos’è la polizia? Una introduzione critica* (DeriveApprodi 2024) 65-67.

¹²¹² *ibid.*

end reveals the functioning of a system of violence that builds on discrimination.¹²¹³ The question of police, she argues, is inscribed into the [economy of the public space](#)

because it is there that the right to belonging and that of appearing are decided: who is authorised to access, to circulate freely, to feel at home, and who is instead identified, intimidated, pushed back into invisibility, if not even confined in prison. The segregative use of power by the police is undeniable, a way to more or less brutally reinforce the supremacy of some – but is not this already racism, xenophobia of the State? – and to sharpen differences making them perspicuous. This does not mean that the police are illegal. Rather, they are legally authorised to carry out extra-legal functions. They do not limit themselves to administer the law, but each time they establish its boundaries.¹²¹⁴

Power expresses its character in a multitude of forms, from the decision-making process of the legislative to the very enforcement of the law and its sanctions. While dissent is the lymph of a participatory political process, its extent and its actors may be perceived as a threat to the state and those uncontested paradigms that its current infrastructures build on. Instead of being heard and welcomed, it may then be repressed with coercion and force, especially once protesters find themselves at the very margin of recognition and are either denied or stripped of their participatory role in the political community. Speaking of policing allows for the discussion to be mindful of the diverse actors that within society hold the statal monopoly of “legitimate” force. Policing evolves in a political and economic context, that of capitalism, which is characterised not only by a specific model of production of goods and by the action of the forces of the market but by, and perhaps primarily, the type of institutions that operate from within and that are directly responsible for the creation of the juridical and political ‘rules of the game’ favouring economic accumulation and the nearly absolute respect of private property.¹²¹⁵ Policing is increasingly being militarised, pluralised and outsourced to private security agencies and transnational forces and is progressively orienting its actions towards the tendency to “anticipate potential dangers”, with the alarming similarity that can be traced between this and a qualifying feature of the “security police”.¹²¹⁶ Those actions at the hands of the police that disconcert and appear so ignominious are all clues of an authoritarian power, the proof of the undeniable [existence of a state of police within the rule of law](#).¹²¹⁷

Article 2 and 3 of the Italian Constitution establish the recognition and guarantee of the inviolability of human rights and the equal social dignity and the substantial equality of fundamental freedoms for all people. The relationship between the civil person and the state is further qualified by article 13 of the Constitution, for which personal freedom is inviolable. This specifies that the law “punishes” any violence committed against a person whose personal freedom has been restricted. The relationship between the civil person and the state is also defined in terms of penal law in article 27, for which punishments must not consist in inhuman treatments, article 28, for which state officials and public officers are directly responsible for acts committed in violation of rights, article 32, for which the law may never violate the limits imposed by the respect of the human person. The *human* and not the *citizen* is said to be safeguarded and protected. To this, one could add that article 10 recalls that a foreigner

¹²¹³ Donatella Di Cesare, *Il tempo della rivolta* (Bollati Boringheri editore 2020).

¹²¹⁴ *ibid.* Own translation. See original: ‘perché lì si decide il diritto di appartenenza e quello di apparizione: chi è autorizzato ad accedere, a circolare liberamente, a sentirsi a casa propria, e chi viene invece identificato, intimidito, ricacciato nell’invisibilità, se non addirittura rinchiuso in prigione. È innegabile l’uso segregativo che la polizia fa del potere, un modo per rinsaldare più o meno brutalmente la supremazia di alcuni – ma non è questo già razzismo, xenofobia di Stato? – e per acuire le differenze rendendole perspicue. Questo non vuole dire che la polizia sia illegale. Piuttosto è legalmente autorizzata a svolgere funzioni extralegali. Non si limita ad amministrare il diritto, ma ne stabilisce ogni volta i confini’.

¹²¹⁵ Giulia Fabini, Enrico Gargiulo, Simone Tuzza, *Polizia. Un vocabolario dell’ordine* (Mondadori Education 2023) 3.

¹²¹⁶ Giuseppe Campesi, *Che cos’è la polizia? Una introduzione critica* (DeriveApprodi 2024) 81-83.

¹²¹⁷ Donatella Di Cesare, *Il tempo della rivolta* (Bollati Boringheri editore 2020).

who is denied in their state the enjoyment of the democratic freedoms established by the Constitution shall be entitled to the right of asylum. It is a reminder of the principle of equality according to which all liberties guaranteed to citizens are to be guaranteed to all individuals arriving at state borders, regardless of their origin.¹²¹⁸

The production of <<human wastes>> or, more precisely, of discarded human beings (those who are <<surplus>>, <<excess>>, that is the population made up of those to whom recognition or permission to stay could not, or would not, be granted), is an inevitable result of the modernization and an inseparable companion to modernity. It is an unavoidable collateral effect of the construction of order (every form of order discards some parts of the existing population as <<out of place>>, <<unfit>> or <<undesired>>), and of the economic progress (which cannot advance without degrading or devaluing the ways of <<earning a living>> that were once effective, and therefore inevitably depriving those who practiced them of their livelihood).¹²¹⁹

This order-maintaining, which is in the end order-establishing, inevitably *produces* those who exceed the boundaries of the structure that is being put and kept in place. Those who exceed such boundaries are rejected not only because their presence would otherwise create *disorder*, which can always be reordered, but also because of *the puzzlement that their mere presence can trigger in those who otherwise orderly live*: if one is here although it should not be, perhaps this may raise a doubt as to whether they ought to instead. At the same time, those who disorderly live may be *comforted and encouraged by their very multitude, if any presence was tolerated at all. The other-ness is then approached as the threat that it is to the security of the state borders and boundaries*. The paradigm that is idolized is the one that sees state security as the absolute priority, masked and sold to the public, the citizenry, as the ultimate safety. The nation state reaffirms itself as 'the producer of selective security through coercion'.¹²²⁰

What can be asserted is that border dynamics have depended on the perceived capacity of existing institutions to produce order, either through immobilizing techniques of welfare-coercion, or mobilizing strategies of incorporation into new economic roles and social identities; on levels of demand for either sedentary or mobile labour; and on the legal and practical possibilities for physical expulsion of surplus populations.¹²²¹

Security ultimately derives from the Latin *sine cura*. It is a polysemic concept that can refer to a variety of situations characterised by the absence of dangers or risks.¹²²² However, in today's era of 'secitarian drunkenness' (*sbronze securitarie*) security only reminds us of preserving the public order, obeying to "decency" ("*decoro*") through the necessary contrast to "decay" ("*degrado*") and of the criminalisation of entire social categories.¹²²³ As of the late eighties there has been in Italy a progressive drift in the

¹²¹⁸ Stefano Catone, 'Aiutiamoli a casa loro' in Stefano Catone (ed), *Dizionario #Antifa* (People s.r.l. 2023) 12.

¹²¹⁹ Zygmunt Bauman, *Vite di scarto* (Gius. Laterza & Figli 2005). Own translation. See original: 'La produzione di <<rifiuti umani>> o, più precisamente, di essere umani scartati (quelli in <<esubero>>, <<eccedenti>>, cioè la popolazione composta da coloro cui non si poteva, o non si voleva, dare il riconoscimento o il permesso di restare), è un risultato inevitabile della modernizzazione e una compagna inseparabile della modernità. È un ineludibile effetto collaterale della costruzione di ordine (ogni forma di ordine scarta alcune parti della popolazione esistente come <<fuori posto>>, <<inidonee>> o <<indesiderate>>), e del progresso economico (che non può andare avanti senza degradare e svalutare i modi di <<procurarsi da vivere>> che in passato erano efficaci, e che quindi non può che privare del sostentamento chi quei modi praticava)'.¹²²⁰

¹²²⁰ Leanne Weber, Benjamin Bowling, 'Valiant beggars and global vagabonds: Select, eject, immobilize' (2008) 12 *Theoretical Criminology* 355.

¹²²¹ Leanne Weber, Benjamin Bowling, 'Valiant beggars and global vagabonds: Select, eject, immobilize' (2008) 12 *Theoretical Criminology* 355.

¹²²² Alterego – Fabbrica dei Diritti, *Abusi in divisa. Vademecum per la difesa legale* (DeriveApprodi 2019) 10.

¹²²³ *ibid.*

meaning of the term 'sicurezza', becoming the instrument of political propaganda to justify normative involutions pulling towards 'penal populism'.¹²²⁴ Penal populism is defined by Luigi Ferrajoli as

any strategy in the sphere of "security" aimed at demagogically obtaining political consensus by answering to the (objective) fear generated by criminality, through the stressing of such fear together with the recourse to criminal law; a criminal law that is as harshly repressive as it is substantially inefficient in terms of prevention. This is the strategy that has been experimented in Italy (...) and that has expressed itself through (...) the progressive criminalisation of regular immigrants, the favouring of expulsion laws, the use of the military with a policing function (...).¹²²⁵

The progressive dismantling of the welfare state has been accompanied by a consequent enhancing of securitarian policy targeting the outcasts, 'waste' (*scarti*) whom the neoliberalist system first ostracised and later criminalised: it is a policy choice built on a classist degeneration of penal justice, which brought the poor and the marginalised to be defined as 'dangerous classes' to be quashed.¹²²⁶ Entire social groups are treated as the enemy and are as such more exposed to the violence and the abuses of the police, whose actions are legitimated by the fact that such subjectivities are perceived as no longer citizens and rights holders but mere *persons* with no rights.¹²²⁷ Moreover, let no one be fooled: the category of the "enemy" is always expanding and as securitarian policies are enhanced, welfare policies are tightened.¹²²⁸ The canonisation of the 'right to security' is directly correlated with the dismissal of the right to work, inscribed in the constitution but defeated by mass unemployment and growing condition of precariousness, which is to say the denial of any life security to an ever increasing number of people.¹²²⁹ Within a neoliberal order, policing is then called to contain 'insecurities' the nature of which is increasingly intertwined with that of phenomena that should rather be under the care of other state agencies, especially social, health and education services.¹²³⁰

In the present neoliberalist landscape, borders are multiplied: these do not find their sole expression through the production of material and juridical barriers that obstruct access to territories but also through the introduction of legal and administrative impediments to the acquisition and maintenance of one's status.¹²³¹ The diversification of formal positions that bind individuals to institutions is today a strategic governing instrument.¹²³² In the effort of classification and stratification of people, what is produced is an ordered society, respectful of the 'moral values' shared by the majority and the

¹²²⁴ *ibid.*

¹²²⁵ Luigi Ferrajoli, 'L'illusione della sicurezza – 1ª Edizione del Festival del Diritto' (*Radio radicale* 26 September 2008) <<https://www.radioradicale.it/scheda/262837/1a-edizione-del-festival-del-diritto-lillusione-della-sicurezza-luigi-ferrajoli>> accessed 30 September 2024. Own translation, original version available at the minute 09:55 of the recording: 'Io credo che questa politica può essere etichettata come "populismo penale". Cosa intendiamo per populismo penale? Intendiamo qualunque tipo di strategia in tema di sicurezza che è diretta ad ottenere demagogicamente consenso politico rispondendo alla paura generata dalla criminalità, che è una paura oggettiva, attraverso l'enfaticizzazione della paura e un uso congiunturale del diritto penale tanto duramente repressivo quanto sostanzialmente inefficace rispetto alle finalità di prevenzione. È la strategia sperimentata con successo in Italia, non soltanto dall'attuale maggioranza di governo ma certamente soprattutto dall'attuale maggioranza di governo, e che si è espressa in questi mesi in interventi demagogici, interventi che tutti conosciamo: la tendenziale criminalizzazione degli immigrati regolari, le norme che ne favoriscono l'espulsione, l'impiego dell'esercito in funzione di polizia, l'idea di penalizzare la prostituzione di strada in quanto tale...'.
¹²²⁶ Alterego – Fabbrica dei Diritti, *Abusi in divisa. Vademecum per la difesa legale* (DeriveApprodi 2019) 11.

¹²²⁷ *ibid.* 12.
¹²²⁸ *ibid.* 13.

¹²²⁹ Loïc Wacquant, 'La paranoia securitaria. Guerra di classe non dichiarata. La genesi di un modello repressivo' (2002) *Le Monde diplomatique*. The Italian version: <<http://www.ecn.org/filiarmonici/wacquant8.html>> accessed 28 September 2024.

¹²³⁰ Giulia Fabini, Enrico Gargiulo, Simone Tuzza, *Polizia. Un vocabolario dell'ordine* (Mondadori Education 2023) 6.

¹²³¹ *ibid.* 5.

¹²³² *ibid.* 6.

hierarchies: a society where policing contributes to maintaining and reproducing the status quo and where 'positions' are well defined and cannot be easily changed.¹²³³ Policing does not act as an ideal independent element within society – the ideal democratic police. It acts as a serpentine belt between political requests and requests coming from sectors of society that demand a specific model of intervention and that regard matters as "problems"; in translating such requests in concrete actions, policing appeals to its own knowledge and culture, producing and reproducing an established order.¹²³⁴

It is, in the end, the prosperous hierarchisation of citizenship, itself the ambivalent tactical tool and purpose of the order of things in a circle of relations of power that produce and reproduce their knowledges, where policing selectively and coercively exercises a securitarian security towards those who are denied, unwanted and undeserving. The tragic and vicious nature of this situation is that these very persons – denied, unwanted and undeserving – constitute 'the massive number of desperate people currently circling the globe in search of security' themselves.¹²³⁵ Security and safety paradoxically become adversaries. Not only borders and frontiers are being policed in the name of security but the very boundaries of citizenship. This implies that citizenship becomes an instrument of selection of those welcomed, wanted and deserving. It becomes a privileged status 'while non-citizens are categorised according to hierarchies of desert and entitlement'.¹²³⁶ Do the denied, the unwanted and the undeserving resist such imposed order? *Can* they do so?

Only a politics that takes the reverse path, that moves from the margins, that breaks down the barriers, freeing itself from the policing function, can redeem its name. Such a politics, which is there where conflicts explode, where struggles arise, brings the wrong into the open, expresses dissent, shines a light onto the invisible and the unwanted, sides with those who are not allowed a part thereof, disproves the distribution, shows the contingency of the order, shatters the police hierarchy of the *arché*, which claims the monopoly from the beginning and demands to have established control.¹²³⁷

4.2 Realities of resistance and the blurred lines of nonviolence

Revolts belong to history. But, in a certain way, they escape from it. The impulse by which a single individual, a group, a minority, or an entire people says, "I will no longer obey," and throws the risk of their life in the face of an authority they consider unjust seems to me to be something irreducible. Because no authority is capable of making it utterly impossible (...). And because the man who rebels is finally inexplicable; it takes a wrenching-away that interrupts the flow of history, and its long chains of reasons, for a man to be able, "really", to prefer the risk of death to the certainty of having to obey (...). If societies persist and live, that is, if the powers that be are not "utterly absolute", it is because, behind all the submissions and coercions, beyond the threats, the violence, and the intimidations, there is the possibility of that moment when life can no longer be bought, when the authorities can no longer do anything, and when, facing the gallows and the machine guns, people revolt.¹²³⁸

¹²³³ *ibid* 4.

¹²³⁴ *ibid* 5.

¹²³⁵ Leanne Weber, Benjamin Bowling, 'Policing Migration: A Framework for Investigating the Regulation of Global Mobility' (2004) 14 3 *Policing and Society* 195.

¹²³⁶ Leanne Weber, *Policing Non-Citizens* (Routledge 2013) 2.

¹²³⁷ Donatella Di Cesare, *Il tempo della rivolta* (Bollati Boringheri editore 2020). Own translation. See original: 'Solo una politica che compia il percorso inverso, che muova dai bordi, che infranga le barriere, sottraendosi alla funzione poliziesca, può riscattare il proprio nome. Una tale politica, che è lì dove esplodono i conflitti, dove sorgono le lotte, mette in comune il torto, manifesta il dissenso, accende le luci sugli invisibili e gli invisi, prende la parte dei senza-parte, smentisce la ripartizione, mostra la contingenza dell'ordine, spezza la gerarchia poliziesca dell'arché, che vuole il monopolio dell'inizio, che pretende di aver stabilito il comando'.

¹²³⁸ Michel Foucault, 'Useless to Revolt?' in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 449, 449-450.

Addressing the economy of power relations, Foucault speaks of resistances and defines them as a series of oppositions that have developed over the years such as, for instance, the opposition to the power of administration over the ways people live.¹²³⁹ Struggles of opposition to powers do not attack the institution of power as such but rather a form of power.¹²⁴⁰ They do not limit themselves to being ‘anti-authority’ but have a number of qualifying features in common:

- they are not confined to one country;
- they target power effects as such;
- they are “immediate”, ‘anarchistic struggles’, for the instance of power that is contested is the closest one that exercises action over the persons concerned, and for the solution to the identified problem is not to be found at a future date;
- they question the status of the individual, meaning that they are ‘struggles against the “government of individualization”’: ‘one the one hand, they assert the right to be different and underline everything that makes individuals truly individual. On the other hand, they attack everything that separates the individual, breaks his links with others, splits up community life, forces the individual back on himself, and ties him to his own identity in a constraining way’;
- they question the ‘regime of knowledge (*savoir*)’ meaning ‘the way in which knowledge circulates and functions, its relation to power’ and therefore oppose ‘the effect of power linked with knowledge, competence, and qualification’ as well as ‘secrecy, deformation, and mystifying representations imposed on people’;
- they are centred on the question ‘who are we?’ for ‘they are a refusal of these abstractions, of economic and ideological state violence, which ignore who we are individually, and also a refusal of a scientific or administrative inquisition that determines who one is.’¹²⁴¹

The form of power that the struggle opposes applies itself to the immediate everyday life; it categorises the individual and ‘marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him that he must recognize and others have to recognize in him’.¹²⁴² The power that is opposed makes these individuals “subjects”: ‘subject to someone else by control and dependence, and ties to his own identity by a conscience or self-knowledge’.¹²⁴³

This is the description of Foucault’s forms of resistance to forms of power. The punctuality of the qualifying characteristics that are listed to differentiate such realities from any other anti-authority struggle inspire the following reflections. The study indeed takes inspiration from Foucault’s suggestion to consider forms of resistance against forms of power [as a starting point](#) to analyse the latter. It merges this with a juridical exploration of an alleged right to resist and the possibility of reconciling resisting subjects’ demands with constitutional norms in the collective pursuit of legal reform. This is why the content of chapter four precedes the analysis of the law on migration that is contained in chapter five. Relevant is the idea of *domination*, understood as a general structure of power the implications of which

¹²³⁹ Michel Foucault, ‘The subject and power’ in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 326, 329.

¹²⁴⁰ Michel Foucault, ‘The subject and power’ in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 326, 331.

¹²⁴¹ Michel Foucault, ‘The subject and power’ in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 326, 330-331.

¹²⁴² *ibid.*

¹²⁴³ *ibid.*

can at times ground into the fabric of society and as a 'strategic situation' in a long-term adversarial confrontation that has to some extent been taken for granted.¹²⁴⁴

By *realities of resistance* the study refers to the ways through which forms of resistance to the institutional narratives on "migration" have come together and are being enacted in a number of occasions. Such cases are situational and specific to each resisting entity and their demands and their revindications cannot be generalised. They could be seen as strategies in broad terms, that is, plans of actions with a purpose. Foucault argues that all power relations potentially imply a strategy of struggle.¹²⁴⁵ Yet the study does not lock the understanding of resistances within the meanings of Foucault's strategies of confrontation. The author's idea here is that speaking of "realities" intuitively suggests an understanding of voices alternative to the institutional discourse that are in no way less "true", less "factual", less "competent", less "appropriate", less "legitimate", less "natural"... in no way less "real" than the institutional account on "migration". To the contrary, their competency and production of knowledge is acknowledged.

The initial idea of this section was to broadly map instances of resistance of migrants against state's representation of "migration" throughout Italy and, when possible, to acknowledge the transnational character of the struggles. The criteria sought for in the screening were: non-violent, collective and led by migrant persons themselves. The endeavour was later set aside however for three main reasons. The first is that it was feared that such an alleged comprehensive mapping could instead result into a limited and partial coverage of realities acting on the Italian territory. What if, in fact, a series of protesting groups were ignored or did not come to the author's attention in her research? The second reason that drove the mapping effort to be abandoned was closely linked to the first: proposing such a mapping to the reader, even with the pertinent disclaimers on its limitations, further felt as an arrogation on the part of the author of the choice of what "qualifies" as forms of resistance and what does not. This would be patronising, unprofessional and uncalled for. The third reason that led to setting aside the mapping effort concerned the nature of the realities considered in terms of their (in)formality and membership. The study in fact struggled with defining the extent of i) the varying degree of the realities' informality, whether comprising of collaborations with registered organisations, labour unions, formal or semi-formal entities, and ii) the varying degree of their membership, whether or not as being constituted of migrant persons only or allies as well. The character of the movements' observed was in fact often of a rather mobile and changing nature and, while groups may at times be tight, the struggles they engage with are often multidimensional and transversal, so that collaborations and temporary coincidence among different actors may take place. Di Cesare speaks of revolts in terms of a constellation: one may insist over dissimilarities and discordant methods and purposes among revolts, some being sporadic, others being frequent, some timidly surfacing, other being openly subversive.¹²⁴⁶ What is crucial however is that a particularisation of revolts – and all resistances, it is added – that refuses to consider them as articulations of a global movement, does nothing but a priori endorsing the defence of the status quo, claiming that everything is settled and that a few marginal glitches emerge here and there.¹²⁴⁷

The following passages therefore expand, although briefly, on realities of resistances. Attention is paid to *nonviolent forms of collective organising*, with the acknowledgment that *lines between nonviolence and violence may blur*, especially in those contexts in which resistance is expressed through protesting and publicly demonstrating. Forms of individual resistances are not the object of analysis within the text. They are, however, particularly frequent, moving and compelling and are often given recourse to by migrant persons who find themselves in situations of segregation, in situations of forthcoming expulsion and deportation, or whose conditions of vulnerability are cruelly exacerbated by discrimination, abuse, detention, isolation. An impressive multitude of such acts are being reported,

¹²⁴⁴ *ibid* 326, 348; for a definition of 'relations of strategy' see 346-348.

¹²⁴⁵ *ibid* 326, 346-348.

¹²⁴⁶ Donatella Di Cesare, *Il tempo della rivolta* (Bollati Boringheri editore 2020).

¹²⁴⁷ *ibid*.

alarmingly, from hunger strikes to lip sewing, swallowing razor blades, batteries and hazardous materials, etc. Not even one of such resisting actions should go unnoticed and the courage and despair of the persons engaging in such conduct must speak to all and to the cherished freedoms. Forms of individual resistance build on the very first manifestation of dissent and contestation that the migrant person embraces: the rebellious act of the border crossing against the personhood of the state, against the current imposed order of things and its machinery.

Overall, the idea of a collective organising seeking legal reform is explored in [the context of the relation between the law and the social conflict](#), to ultimately culminate into the question of [whether a right to resist can be called for](#).

Alessandro Somma writes that the system in place can react to the social conflict following three distinct paradigms: considering the social conflict a pathology, considering it a threat to social peace or considering it a catalyst for positive evolutions.¹²⁴⁸ The first paradigm approaches the social conflict as a pathological risk to society's core, that of persons living with one another as some sort of stable and pacified organism. The second paradigm sees the social conflict as physiological instead, as a dynamic that does exist within human communities but must nevertheless be defused by political power as a threat to social peace. The first and second paradigms fight contaminations from the third, that which sees in the social conflict an inalienable and beneficial element of society, as long as it is not pushed forward by merely egoistic agendas. Reflecting on the conceptualisations of the system's reactions to the social conflict must consider the current global and globalised context. Touching upon the relationship between the law and the social conflict while not touching upon "capitalism" would likely ignore the elephant in the room. There is no doubt the reader may well be more equipped than the author to evaluate such a matter. What is relevant to the author however is to propose an interpretation of "capitalism" for the discussion on law, rights, conflict and resistance not to take place in a vacuum. Capitalism, Geminello Preterossi writes, is a religion with not god and no dogma: it is pure cult.¹²⁴⁹ A strange religion of despair that does not consent to any change of course, demanding the monopoly and the exhaustion of the question of meaning of the human (*pretendendo di monopolizzare ed esaurire la domanda di senso dell'umano*).¹²⁵⁰ Capitalism is hereby approached as a *social order*. The sole reference to an economic system is too reductive and rather than revealing the nature of the system, it conceals it.¹²⁵¹ Fraser writes that capitalism is a social order that allows an economy oriented towards profit to loot those extra-economic substances that it needs to function.¹²⁵² Bookchin writes that

[m]odern capitalism, the most unique, as well as the most pernicious, social order to emerge in the course of human history, identifies human progress with bitter competition and rivalry; social status with the rapacious and limitless accumulation of wealth; the most personal values with greed and selfishness; the production of commodities, of goods explicitly made for sale and profit, as the motive force of nearly every economic and artistic endeavour; and profit and enrichment as the reason for the existence of social life. No society known to history has made these factors so central to its existence or, worse, identified them with "human nature" as such.¹²⁵³

Fraser indeed speaks of cannibal capitalism to emphasise how this is a type of society that authorises an economy officially designated to accumulate monetised value for investors and proprietaries, while

¹²⁴⁸ Alessandro Somma, 'Introduzione. Diritti fondamentali e conflitto sociale: le ragioni di un binomio, le cause della sua crisi e i tentativi di superarla' in Alessandro Somma (ed), *Diritti fondamentali e conflitto sociale. Un dialogo tra le discipline* (Sapienza Università Editrice 2024) 17.

¹²⁴⁹ Geminello Preterossi, *Teologia politica e diritto* (Gius. Laterza & Figli 2022).

¹²⁵⁰ *ibid.*

¹²⁵¹ Nancy Fraser, *Capitalismo cannibale. Come il sistema sta divorando la democrazia, il nostro senso di comunità e il pianeta* (Gius. Laterza & Figli 2022).

¹²⁵² *ibid.*

¹²⁵³ Murray Bookchin, *Remaking society. Pathways to a Green Future* (theanarchistlibrary.org 1990) 29.

devouring everyone else's non-economised (*non-economicizzata*) wealth; an autophagic society that is ready to devour itself and that becomes the frame for structural injustice that is class exploitation, gender dominance and racial and imperialist oppression, non-accidental subproducts of a social model that subordinates social reproduction to the production of goods and that demands an expropriation on grounds of race to finance lucrative forms of exploitation.¹²⁵⁴ Cannibal capitalism triggers a wide and complex range of social struggles, including those at the constitutive junctures of the system.¹²⁵⁵ Alessandra Algostino writes that reality itself, which the law is a part of insofar as a social phenomenon, is constituted of and run by contradictions that are emblematically represented by the social conflict and by the struggle between oppressed and oppressors.¹²⁵⁶ The conflict becomes the founding element of rights for, on the one hand, the latter emerge through the former and, on the other hand, for rights "live" situated within an historical context and exposed to constant tensions.¹²⁵⁷ Legal recognition indeed does not end the conflict over one's rights.¹²⁵⁸

The inclusion of rights into a (rigid) Constitution and their subtraction from constitutional revision by being inserted among the fundamental principles shield them from ordinary turbulence but not from extraordinary storms or from an erosion that, slow over time but constant, undermines their social foundations (a passive revolution). The tension that accompanies rights, even once they are juridically recognised, manifests itself in their effectiveness, in the gap between the real and the normative data (a gap that is paradigmatically recognised in article 3(2) of the Constitution).¹²⁵⁹

There is a multidimensional relationship intercurrent between conflict, rights and law.¹²⁶⁰ This is placed within the framework of a current state of things that offers the image of a world dominated by the neoliberalist hegemony, which has colonised economic, social and political spaces; that has sketched an anthropological model to its likeness, the *homo oeconomicus*; that has trapped time into an eternal present, blocking the horizon of alternatives if not of human survival altogether, given the violence and the voracity of capitalism.¹²⁶¹ In such a scenario, the neutralisation of the conflict of those oppressed is indeed pursued.¹²⁶² The *non-political making* (*spoliticizzazione*) shapes a model of social order: its purpose is the deactivation of politics as ground for alternative projects and for the conflict to be regarded as indeed productive; in the social order based on the economy, there is no space for political projects that are tasked with affecting the organisations of the economic power.¹²⁶³ Belonging to a (social) "class" rather than another means belonging, willingly or not, to a community that shares the same destiny (*una comunità di destino*) and endures the consequences of such belonging.¹²⁶⁴ The class

¹²⁵⁴ Nancy Fraser, *Capitalismo cannibale. Come il sistema sta divorando la democrazia, il nostro senso di comunità e il pianeta* (Gius. Laterza & Figli 2022).

¹²⁵⁵ *ibid.*

¹²⁵⁶ Alessandra Algostino, 'Diritti e conflitto sociale: l'insorgenza dei movimenti' in Alessandro Somma (ed), *Diritti fondamentali e conflitto sociale. Un dialogo tra le discipline* (Sapienza Università Editrice 2024) 43.

¹²⁵⁷ *ibid.*

¹²⁵⁸ *ibid.*

¹²⁵⁹ *ibid.* Own translation. See original: 'L'inserimento dei diritti in una Costituzione (rigida) e la sottrazione a revisione costituzionale attraverso l'assunzione fra i principi fondamentali li mettono al riparo da turbolenze ordinarie ma non da tempeste straordinarie o da un'erosione che, lenta nel tempo ma costante, ne mina le fondamenta sociali (una rivoluzione passiva). La tensione che accompagna i diritti, anche una volta che siano giuridicamente riconosciuti, si esprime nell'effettività, nello scostamento tra il dato reale e il dato normativo (scostamento paradigmaticamente riconosciuto nell'art. 3 c. 2 Cost.)'.

¹²⁶⁰ *ibid.*

¹²⁶¹ *ibid.*

¹²⁶² *ibid.*

¹²⁶³ Geminello Preterossi, *Teologia politica e diritto* (Gius. Laterza & Figli 2022).

¹²⁶⁴ Luciano Gallino, *La lotta di classe dopo la lotta di classe* (Gius. Laterza & Figli 2012).

struggle has been remodelled to the extent that from the 1980s onwards it is no longer a bottom up one but is won top down:¹²⁶⁵

(...) the struggle that had been fought from below to improve one's own destiny has given way to a struggle that is fought from the top to reclaim the privileges, the profits and above all the power that has been somewhat eroded in the previous thirty years. The salient characteristic of class struggle in our time is this: the class of those whom, from various perspectives, are to be considered the winners – a term highly appreciated by those who find humanity must inevitably divide into winners and losers – is fighting a determined class struggle against the class of the losers. This is what I mean by class struggle after the class struggle.¹²⁶⁶

Social movements are in this context those who [oppose the hegemony of neoliberalism](#): they situate themselves in the space of change and with their sole existence express and concretize the idea of collectiveness, community and desire for a future, that is simultaneously a transformation of the present and imagination of alternatives.¹²⁶⁷ One element that is crucial to the social conflict together with [transversality](#) and [convergence](#) is, to Algostino, [territory](#).¹²⁶⁸ Territory, Algostino writes, is key to many protesting realities, from the struggles against large-scale constructions to migrations: there is here a new and alternative way to understand “territory”, not in terms of an exclusively local concern nor in terms of nimby, but rather a conceptualisation of “territory” that unhinges shapes, decisions and horizons of the dominant political and economic power.¹²⁶⁹ The territory becomes an opportunity to rebuild social ties and to recover the living space of the community.¹²⁷⁰ Relevant in this sense is the role of the *presidio*, picketing, as concrete manifestation of the mobilisation: the *presidio* is the *place* that functions as a protest catalyst, the symbol of a communitarian re-appropriation and a re-attribution of meaning to the territory in question.¹²⁷¹ Analogously one can speak of “freed zones” (“*zone liberate*”), as experimentations of popular and transversal bottom-up democratic participation, or even of the spaces that are occupied by raves as political experimentations, as well as by urban movements linked to squatting and housing that propose an understanding of the city that contraposes the neoliberalist hegemony and gentrification processes.¹²⁷² The ways in which a territory is lived and interpreted become expression of a vision of the world alternative to that which is contested, recalling the idea of a political ecology that is tied to a different understanding of social relationships and new mobilisation experiences.¹²⁷³ A vision of reinterpretation of the territory and one of direct democracy often go hand in hand, characterised by open discussions and popular assemblies, adhering to a more horizontal conceptualisation of political relations that escapes formalisation and bureaucratisation, mindful that expropriation is part of a global process of neoliberalist plundering.¹²⁷⁴ The territory becomes the [space](#)

¹²⁶⁵ Alessandra Algostino, ‘Diritti e conflitto sociale: l’insorgenza dei movimenti’ in Alessandro Somma (ed), *Diritti fondamentali e conflitto sociale. Un dialogo tra le discipline* (Sapienza Università Editrice 2024) 43. See Luciano Gallino, *La lotta di classe dopo la lotta di classe* (Gius. Laterza & Figli 2012).

¹²⁶⁶ Luciano Gallino, *La lotta di classe dopo la lotta di classe* (Gius. Laterza & Figli 2012). Own translation. See original: ‘(...) la lotta che era stata condotta dal basso per migliorare il proprio destino ha ceduto il posto a una lotta condotta dall’alto per recuperare i privilegi, i profitti e soprattutto il potere che erano stati in qualche misura erosi nel trentennio precedente. La caratteristica saliente della lotta di classe alla nostra epoca è questa: la classe di quelli che da diversi punti di vista sono da considerare i vincitori – termine molto apprezzato da chi ritiene che l’umanità debba inevitabilmente dividersi in vincitori e perdenti – sta conducendo una tenace lotta di classe contro la classe dei perdenti. È ciò che intendo per lotta di classe dopo la lotta di classe’.

¹²⁶⁷ Alessandra Algostino, ‘Diritti e conflitto sociale: l’insorgenza dei movimenti’ in Alessandro Somma (ed), *Diritti fondamentali e conflitto sociale. Un dialogo tra le discipline* (Sapienza Università Editrice 2024) 43.

¹²⁶⁸ *ibid.*

¹²⁶⁹ *ibid.*

¹²⁷⁰ *ibid.*

¹²⁷¹ *ibid.*

¹²⁷² *ibid.*

¹²⁷³ *ibid.*

¹²⁷⁴ *ibid.*

for and of the social conflict. It counters the evanescence of a top-down governance and the process of neutralisation of the struggle that is pursued by hegemonic forces.¹²⁷⁵ Territory is physical and theoretical. Algostino observes that

the territory becomes fortress of privilege and once again emblem of a social conflict that is played out on a global scale. The migrant person embodies the contradictions of capitalism, from colonialism to extractivism; they are doubly victimised for their original conditions and for they are forced to migrate and are rejected. And the act of migrating, the will to cross – and break – borders is a subversive act: a denunciation of the effects of neoliberalism and a revindication for equality. Migration presents itself as an existential and political act of rebellion. The frontiers are those of States but also those of living conditions. It is the social conflict, once again.¹²⁷⁶

All that comes from “the outside” is spectral, an illusory shadow and an imminent threat: as migration is *made* clandestine (*clandestinizzata*), in the same way the revolt is sold as an obscure and apolitical disorder.¹²⁷⁷ Giulia Locati observes that the social conflict itself has been criminalised in Italy over recent years.¹²⁷⁸ This has *inter alia* occurred through the articulation of charges that rather than retracing and focusing on alleged criminal conduct enacted by individuals in specific instances has opted for tackling the struggle itself and the associative movement promoting it, alleging the criminal nature of the latter. The crime contested is that of *associazione a delinquere* of article 416 of the Italian Criminal Code. Among other social movements, the No TAV movement has for instance responded to such accusations by turning the label over in *associazione a resistere*, promoting its own representation against the institutional narrative.

The *criminalisation* of the social conflict marries the rhetoric of the delinquent protester and the tale of rotten apples among peaceful demonstrators as the sole cause and trigger of violent responses by police forces. Altogether, this is to be considered against a broader context of progressive criminalisation of the indigent, of the dispossessed, of the unconforming identities, of women and more generally people who express ownership of their own bodies. At the international meeting of extremist right parties held at Pontida in October 2024, among the disturbing speeches that filled the Italian crowd with fervour, André Ventura, the president of the Portuguese Chega!, spoke of a hotchpotch of elements with no apparent correlation to one another, among which the defence of national borders and of women from the invasion of the clandestine.¹²⁷⁹ In 2020, a member of his party had gone so far in the depiction of the punishable immorality of anyone exercising ownership on their own body, that he had submitted a motion to the party to establish women who chose to abort had to *remove their ovaries*; the proponent of the motion was expelled from Chega! only months after this episode. The criminalisation of all enemies to the status quo inevitably meets the criminalisation of the immigrant and eventually of the immigrant’s rescuer – physically, not metaphorically, from shipwreck or mistreatment or injuries that need medical attention and so on. Such a practice is vicious, not only because this tendency targets those who find themselves most in need and their allies, but also because, in the end, *the system criminalises*

¹²⁷⁵ *ibid.*

¹²⁷⁶ *ibid.* Own translation. See original: ‘il territorio diviene fortezza del privilegio e, di nuovo emblema, di un conflitto sociale agito su scala mondiale. La persona migrante incarna le contraddizioni del capitalismo, dal colonialismo all’estrattivismo; ne è doppiamente vittima per le sue condizioni originarie e in quanto costretta a migrare e respinta. E l’atto di migrare, la volontà di attraversare – e rompere – confini è un atto sovversivo: una denuncia degli effetti del neoliberalismo e una rivendicazione di uguaglianza. La migrazione si pone come atto esistenziale e politico di ribellione. Le frontiere sono quelle degli Stati ma anche delle condizioni di vita. È il conflitto sociale, di nuovo’.

¹²⁷⁷ Donatella Di Cesare, *Il tempo della rivolta* (Bollati Boringheri editore 2020).

¹²⁷⁸ Giulia Locati, ‘Sempre dalla parte del torto? Rimozione e criminalizzazione del conflitto’ in Alessandro Somma (ed), *Diritti fondamentali e conflitto sociale. Un dialogo tra le discipline* (Sapienza Università Editrice 2024) 215.

¹²⁷⁹ ‘Pontida 2024 – Raduno della Lega per Salvini’ (*Radio Radicale* 6 October 2024) <<https://www.radioradicale.it/scheda/740219/pontida-2024-raduno-della-lega-per-salvini-premier>> accessed 13 October 2024.

the vulnerability that it produces. This unscrupulous and corrupt hunt targeting *the human* soaks into racism and xenophobia, prospers into a context of identitarian populism – *prima gli italiani* –, acts under the disguise of a merciless pitiful narrative on alleged merits and deservingness, on the myth of the ‘true refugee’ and that of the fraudulent ‘economic migrant’, under the flag of an *aiutiamoli a casa loro* foreign policy with supposedly miraculous immediate effects and oblivious of its colonial legacy.

Thousands upon thousands of men, women and children have died, and are dying annually as a result of exclusionary immigration and asylum policies. They are dying because migration itself has been redefined as a crime against the new economic order. And as politicians harness and exploit popular racism and xenophobia in order to legitimise this wholesale criminalisation and exclusion of the victims of globalisation, they provide aid and comfort to the far right and encourage the spread of racist violence.¹²⁸⁰

This is the manifest and brutal mass violence at the hands of states that deviously disappears from the institutional discourse that criminalises migration and dissent. There is instead a background of ruthless and unscrupulous violence being systemically and systematically perpetrated by states against which one must assess any expression of dissatisfaction with and opposition to the institutional apparatus in place. Be the reader mindful of the deaths, the segregations, the mutilations and the afflictions, the inhumane treatments, the separations inflicted upon families, the disappearances and enforced disappearances that are perpetrated, whether directly or indirectly, by states and state subsidised forces that allegedly “legally” control persons’ movements.

In particular, my Office continues to collect and analyse information relating to serious and widespread crimes allegedly committed against migrants attempting to transit through Libya (...). I am deeply alarmed by reports that thousands of vulnerable migrants, including women and children, are being held in detention centres across Libya in often inhumane conditions. Crimes, including killings, rapes and torture, are alleged to be commonplace. I am similarly dismayed by credible accounts that Libya has become a marketplace for the trafficking of human beings (...). The situation is both dire and unacceptable, demanding a concerted response by the relevant actors to address these serious trends of criminality. I take this opportunity before the Council to declare that my Office is carefully examining the feasibility of opening an investigation into migrant-related crimes in Libya (...).¹²⁸¹

The present communication provides the Prosecutor with evidence implicating European Union and Member States’ officials and agents in Crimes Against Humanity, committed as part of a premeditated policy to stem migration flows from Africa via the Central Mediterranean route, from 2014 to date. The evidence establishes criminal liability within the jurisdiction of the Court, for policies resulting in i) the deaths by drowning of thousands of migrants, ii) the refoulement of tens of thousands of migrants attempting to flee Libya, and iii) complicity in the subsequent crimes of deportation, murder, imprisonment, enslavement, torture, rape, persecution and other inhuman acts, taking place in Libyan detention camps and torture houses (...).¹²⁸²

¹²⁸⁰ Frances Webber, ‘The War on Migration’ in Paddy Hillyard, Christina Pantazis, Steve Tombs, Dave Gordon (eds), *Beyond Criminology. Taking Harm Seriously* (Pluto Press 2004) 133.

¹²⁸¹ ‘Statement of ICC Prosecutor to the UNSC on the Situation in Libya’ (9 May 2017, ICC) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-unscc-situation-libya>>.

¹²⁸² ‘Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute. EU Migration Policies in the Central Mediterranean and Libya (2014-2019)’ by Omer Shatz, Dr. Juan Branco and students of the Capstone on Counter-Terrorism and International Crimes PSIA – Sciences Po (Paris) 2017/2018, 2018/2019: Paula Stuurman, Joanna Pickering, Elise Lauriot Dit Prevost, Maxine Both, Matthew Abbey, Jeanette Trang, Milena Reig-Amette And Francesco Pinotti (2019) <<https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf>> paras 1-2.

Criminalising the dangerous migrant and the amoral dissident, the violence of the system is blatantly ignored and finds no place nor visibility in the institutional discourse and in the policy that is being implemented. In May 2023, a legislative decree further tightened immigration dispositions in Italy: it was called 'decreto Cutro' after the shipwreck of a vessel carrying migrant persons that sunk right in front of the coast of Calabria, near Crotona, earlier in February. More than eighty people lost their lives, among whom thirty-three children. Many disappeared in the sea, how many will never be known, their names will never be known. The authorities had been alerted throughout the course of the event and yet no rescue operation had been implemented. The memory of a preventable strategy during which people *died killed* by the (in)action of the system takes the form of a legislative decree further harshening migration policy – the nauseating audacity to name such a law after the place where the vessel sunk.

This is the violence of the border-necropolitics, as Khosravi calls it with reference to Mbembe.¹²⁸³ The ultimate expression of sovereignty, converging in the border regime, rests in the capacity and power of determining who lives and who dies – the power to kill, to let live or to expose to death.¹²⁸⁴ The "state" orders who can live and who must die. It is an ordering in the sense of commanding whose life and death may unfold. And in the sense of, it is argued, arranging and maintaining an imposed social structure, a state of policing the rule of law. Let us keep this violence in mind when addressing the forms of resistance that oppose the present order of things.

While nonviolent resistance seeking legal reform is the focus of this study, the analysis acknowledges instances in which groups may recur to some forms of violence. Moreover, the reader may stumble upon recounts in this research where the line between violent and nonviolent is blurred: actions and manifestos, proposed under the lens of resistances, that merge with uprisings involving violence against objects and buildings. That is, for instance, the case of migrant prisoners of administrative detention facilities protesting their conditions by destroying their surroundings, whereas allies pick up their demands beyond prison walls. In such cases, violence is perpetrated against objects that symbolise the exercise of the monopoly of violence that statehood clutches onto – and the coercion with which it obliterates unwelcomed persons.

Within the context of collective organising, the recourse to forms of violence during episodes of demonstrations and public manifestations of dissent are therefore briefly discussed. These paragraphs do not claim to provide for a comprehensive picture of demonstrating practices, brushing instead through the most common forms. Speaking of violence in resisting is significant not only because its contours may often be indefinite but also because exercising violence against objects or especially against persons brings the discussion of resisting *as an alleged right* onto a level of analysis that must comprise an overlapping interference between the realm of human rights law and that of criminal law in its attribution of individual criminal responsibility. This is to say that the questions 'what if a protester harmed a state officer?' is fundamentally different from the question 'what if, *by exercising their right to resist*, a protester harmed a state officer?'. Where does a right end and another begin? This matter moves the study into the realm of criminal law and is therefore not delved into here. Resistances and collective organising are approached from a, somehow delimited albeit indeterminate, nonviolent perspective, with consideration given to violence being perpetrated by resisting persons against objects and not against persons. This is also partially addressed in the reference to the difference between resistance and revolution that is discussed in the final section of this chapter.

Realities of resistance expressing their demands through violent acts in occasions of public protesting are hereby termed *riots* or *revolts*. Let us linger on how 'revolting' may refer to uprisings, revolutions, to rise up in protest and more generally to flip over, turn upside down – as well as to being upset, disgusted, nauseated. This is, essentially, our starting point. *Revolt* cannot be reduced to a single cause, for each struggle is triggered by a combination of different grounds, economic, political and existential:

¹²⁸³ Shahram Khosravi, *Illegal Traveller. An Auto-Ethnography of Borders* (Palgrave Macmillan 2010) 28.

¹²⁸⁴ *ibid*; Achille Mbembe, *Necropolitics* (Duke University press 2019) 66.

it is the expression of an unbearable discomfort and of disappointed expectations.¹²⁸⁵ Indeed, Algostino writes that the explosive nature of a social movement may recall the image of the riot, *rivolta*, and implicitly diminishing the political qualification of such struggle.¹²⁸⁶ Riots may be episodic and fragmented, but they are not for this reason void of a political character: interpreting them as a mere inconsistent and unexpected burst of unreasonableness degrades their counterhegemonic and subversive value.¹²⁸⁷

Riots are coming, they are already here, more are on the way, no one doubts it. They deserve an adequate theory. A theory of riot is a theory of crisis (...). However, riot can only be grasped as having an internal and structural significance, to paraphrase Frantz Fanon, insofar as we can discover the historical motion that provides its form and substance. We must then move to further levels, where the gathering instances of riot are inextricable from ongoing and systemic capitalist crisis. Moreover, the riot as a particular form of struggle illuminates the character of crisis, makes it newly thinkable, and provides a prospect from which one views its unfolding.¹²⁸⁸

Riots express a conflict that refuses the political space itself, institutions, the state and its organisation.¹²⁸⁹ This, Algostino writes, could be seen for instance in 2023 in France during the demonstrations that followed the homicide by the police of Nahel Merzouk at Nanterre, during which buildings were assaulted and damaged, including police stations and schools, cars set on fires, etc.¹²⁹⁰

¹²⁸⁵ Donatella Di Cesare, *Il tempo della rivolta* (Bollati Boringheri editore 2020).

¹²⁸⁶ Alessandra Algostino, 'Diritti e conflitto sociale: l'insorgenza dei movimenti' in Alessandro Somma (ed), *Diritti fondamentali e conflitto sociale. Un dialogo tra le discipline* (Sapienza Università Editrice 2024) 43.

¹²⁸⁷ *ibid.*

¹²⁸⁸ Joshua Clover, *Riot. Strike. Riot* (Verso 2016).

¹²⁸⁹ Alessandra Algostino, 'Diritti e conflitto sociale: l'insorgenza dei movimenti' in Alessandro Somma (ed), *Diritti fondamentali e conflitto sociale. Un dialogo tra le discipline* (Sapienza Università Editrice 2024) 43.

¹²⁹⁰ *ibid.*



Figure 4 - Banner: the police kills revenge for Nahel during a demonstration (Turin July 2023)

Protests and riots spread beyond French borders, acquiring a transnational character. On 1 July 2023, in Turin, Italy, during a demonstration against migrants' administrative detention protesters called on the brutality of police and remembered the recent death of Nahel Merzouk. This is a further reminder of that transnationality, transcendence and that convergence among struggles that, in the end, bring people beyond the single cause they take the streets for, expressing dissent from a system the violence of which is not episodic but structural and intertwined. During the noisy walk that occupied part of the city centre in the afternoon, a banner was hung across Corso Regina that read 'THE POLICE KILL REVENGE FOR NAHEL' and chants from the crowd repeatedly sang '*tout le monde déteste la police*'. Revolts can be defined as an expression of the social conflict that may lack organisation and awareness but accounts for the physical and cultural violence of a top-down class struggle: the revolt voices a [radical refusal](#) of the existing system.¹²⁹¹ There is furthermore a nexus between revolt and the [public space](#).¹²⁹² Confirmation of such nexus is the targeting and damaging of statutes, often honouring military actors, propagandists of fascist colonialism, etc., as an expression of the exigency to [reoccupy](#) the urban landscape and [rearticulate](#) collective memory: if it is inappropriate to cancel the past, it is no less inappropriate to reify it.¹²⁹³

¹²⁹¹ Alessandra Algostino, 'Diritti e conflitto sociale: l'insorgenza dei movimenti' in Alessandro Somma (ed), *Diritti fondamentali e conflitto sociale. Un dialogo tra le discipline* (Sapienza Università Editrice 2024) 43.

¹²⁹² Donatella Di Cesare, *Il tempo della rivolta* (Bollati Boringheri editore 2020).

¹²⁹³ *ibid.*

Revolts are often relegated to the margins of the news and the official accounts of events proposed to the public; if they overcome [censorship](#), they are often [spectacularised](#) and exhibited in their transgressive obscurity.¹²⁹⁴

A news article by Rainews.it on a demonstration in Turin in February 2023 catches the attention of the reader by titling ‘anarchists, fireworks against the administrative detention centre’.¹²⁹⁵ The text then recounts that fireworks were shot in the air in front of the centre, not against it. It then adds that ‘only in the dark’ and once the demonstration against article 41-bis and Italy’s prison regime had ended, a few tens of ‘activists’ found themselves before the detention centre and, after chanting in Arabic towards the inside of the facility, shot fireworks ‘that however did not damage the few constructions that are still accessible’ after the protests at the hands of those detained that had taken place in an earlier period. While the title speaks of ‘anarchists’ and ‘fireworks shot at’, sensationally dragging the curious reader into a state of alarm, the text then softens its tones, albeit maintaining a gloomy outlook over those described then as ‘activists’ reuniting in the dark and speaking a foreign language. If the news reader was not curious enough and stopped at the title, what would they extract? An aggressive act carried out with ordinary means from antagonist actors? The author was not present in this specific occasion and cannot therefore comment on it. However, may the reader allow her to offer a couple of general remarks. The first observation is that being it February 2023 in Turin, the sun set before 6 pm. Darkness falls soon rather than being the staged scenography of a deviant act. The second is that, having participated to a number of *presidi* and demonstrations in front of the walls of the administrative detention centre in Corso Brunelleschi, what the news article may have missed from the event is the reason why there may have been chants and fireworks: so that the prisoners left inside the facilities could hear and see the presence of allies outside the walls. It is often the case that a moment of solidarity between detainees and people protesting for their freedom from the outside, incorporates in its strategy noisy and flashy practices: chants are often sang in multiple languages, to attempt to reach people of different cultural backgrounds, especially crucial when segregated in an administrative detention centre, and the same applies to the reading of brief speeches; pots, lids, whistles, loudhailers, drums and music are often used to make noise in the hope to be heard from inside the walls, and the same goes for firecrackers and loud noises. Similar practices and *battiture solidali* may for instance take place before the walls of prison facilities. This is not done to damage buildings. It is an attempt to send a message to the inside: we know you are there, we hear you, we are here today. Again, the author was not present during the specific occasion reported. However, Rainews.it’s account grabbed her attention: a text divested of the reasons and principles of the struggle, ignoring the grounds on which people inside and outside protested and bypassing the well-known ignoble state of the facilities in Corso Brunelleschi. RAI stands for ‘Radiotelevisione Italiana’, the exclusive concessionaire of the radio-television and multimedia public service. The website of the current Ministry of Enterprises and Made in Italy reads that RAI must guarantee objectives of public utility, among which the provision of complete and impartial information and a proper unfolding of the democratic life through offering diverse political, social, cultural and religious opinions.¹²⁹⁶

Overexposed and hyper visible, the riot is then nonetheless to remain relegated to its [unreasonableness](#).¹²⁹⁷ The irrationality with which the riot is portrayed, vividly coloured by the masked faces of protesters, by the flames, the broken windows of shining multistore and the smell of spray paint, is fed to a compliant public as frantic and alarming, and yet again somehow confines the dissent

¹²⁹⁴ *ibid.*

¹²⁹⁵ Jacopo Ricca, ‘Anarchici, fuochi d’artificio contro il CPR di corso Brunelleschi a Torino’ (Rainews.it 13 February 2023) <<https://www.rainews.it/tgr/piemonte/video/2023/02/watchfolder-tgr-piemonte-web-ricca-anarchici-sr-tgp1mxf-a1f02f72-ff74-4467-b66a-e76b294ef8d4.html>>.

¹²⁹⁶ ‘RAI – Radiotelevisione Italiana’ (Ministero delle Imprese e del Made in Italy) <<https://www.mimit.gov.it/it/comunicazioni/televisione/rai#:~:text=La%20RAI%20%2D%20Radiotelevisione%20Italiana%2C%20C3%A8.un%27informazione%20completa%20e%20imparziale>>.

¹²⁹⁷ Donatella Di Cesare, *Il tempo della rivolta* (Bollati Boringheri editore 2020).

expressed to its [neutralisation](#), to the nullity of occasional burst of delinquent anger and isolated cases. Images that portray the riots mostly convey the disorder and offer a vision of the revolt that is blurred and sinister, indulging on the public reprimand and favouring an interpretative amnesia: that is for the revolt exceeds the rationale of institutional politics.¹²⁹⁸ [It exceeds](#), it is further argued, [the rationale of policing and is therefore policed](#).

While violence may occur during protests and demonstrations, revolts and riots are but one of the forms in which the struggle can take place. The nexus between such other forms and the public space does remain. [Occupying space](#) is indeed one non-violent tactic that the social struggle may adopt. Factories, schools, universities, streets, squares, buildings, etc., can be occupied by social actors in an effort to oppose forms of power and institutions' narratives and proposals. Occupation is hereby intended in terms of taking space, being present and visible, being cumbersome, whether loudly or silently, living the surroundings and otherwise-designated places in a manner that is alternative, unusual and possibly inconvenient to the manner imposed by the order of things. It is understood as the performance of demands through the fleshiness of people being in the streets, in the abandoned houses, in the schools and the workplaces. Realities of resistance [occupy spaces to take up space](#). Places are taken over for a limited period of time, causing the suspension and momentarily cessation of the daily and ordinary activities, to put forward a particular demand and express discontent. Spaces are also taken over with a vision that is not confined in time and that does not aim at achieving a short-term or single goal, that is for instance in the case of squatting of buildings and housing occupation. In such cases, occupation denounces the tragedy lived by so many persons without a roof over their head and being in conditions of indigency. Here again, public space is disputed and repurposed and private or semi-private spaces are turned to public. The struggle acts in the name of the fundamental necessity of having a house and in the name of the [responsibility of the collectiveness](#) to ensure that no one is deprived of a safe shelter.

A curious aspect when it comes to occupying public spaces such as streets and squares is the formal notice that this requires. Regardless of the reasons behind the demonstration, protesters are formally to subject their peaceful gathering to state's monitoring and are to articulate their disagreeing presence in a way the state agrees with, for such presence shall not pose any threat or risk to "security" or "public safety". A notice is therefore "required". Giving prior notice softens the articulation of the relationship between order and disorder. The dissent of the protest is bridled into the contours of what is accepted as safe and secure by and within the imposed order of things. Through the receipt of an approval of such communication, a twofold passage is set in motion. On the one hand, protesting realities and their struggle are recognised a space in the democratic and participatory process, their demands find state's legitimisation – which may be a unilateral concern on the part of the state, for legitimisation by the system may not be of any interest to the protesting group – and, although limitedly to that single occasion, that reality of resistance inscribes itself into the institutionally accepted realm of politics. On the other hand, however, through "approval" the struggle is policed. It is policed physically and figuratively and to an extent counterintuitively, for the very nature of the notice at the hands of demonstrators is given to the authority to respect the alleged order, inform of the disorder the dissent will manifest, and therefore the policing of such occasion appears in some way superfluous in their deployment of force.

Notice again brings about the relationship between protesting and the public space. Public space is disciplined and controlled through the perception of the notice, with its approval, rejection and the arrangement of police in the places that are about to become the platform of contestation. The right to demonstrate is then, to Di Cesare, no longer obvious, for parades, walks, marches, sit-ins, pickets, etc., all require what she calls an "authorisation".¹²⁹⁹ Notice is turned by the order maintaining mechanisms into permission. The obviousness of protesting is no longer banal, no longer a given, no longer taken for granted but, to the contrary, the pre-requirement of an official authorisation and its bureaucracy worm

¹²⁹⁸ *ibid.*

¹²⁹⁹ *ibid.*

its way into the impulsivity and the rightfulness of people's gatherings in dissent. Resistance may at such point find new ways of expressing their demands while rooting its spirit in constitutional norms, awakening, recalling, representing the vision that is enshrined therein and that evolves over time to adapt to society. Let us recall that Article 21 acknowledges that everyone has a right to freely express their thoughts in speech, writing or any other form of communication. Article 17 of the Constitution safeguards citizens' right to assemble peaceably and unarmed and that no previous notice is required to meet, including in places open to the public. The article adds the limitation that when meetings are held in public places notice shall be given to the authority, which can prohibit the meeting only for proven reasons of security or public safety. Notice is therefore a *responsibility* on the part of the demonstrations' organiser: it is not a condition of legitimacy, which would instead be the authorisation.¹³⁰⁰ Indeed the jurisprudence of the Constitutional Court recognised that the forewarning to public security authority, as foreseen in article 17, for gatherings in public space cannot be equalled to an authorisation and therefore meetings held without notice cannot be considered illicit.¹³⁰¹ Once notice becomes a precondition to manifest, sneaking its way into thinking, into language, into the design and articulation of the demonstration that takes up the streets and the squares, once it dictates the reasoning behind march's itinerary, it then becomes an instrument for disciplining the struggle and exercising control over the public space. The question that one can often hear during demonstrations is 'has the march been authorised?', rather than 'has the march been communicated?'. The statement that was often heard by the author during public assemblies and discussions over the route and schedule of a march was 'they [the police] will not allow us to go there'. Notice risks to be, at that point, no longer such. Even in the exercise of the constitutional right to peaceful gathering and manifesting one's thought, the collectivity and the conflict are policed through the public space, which becomes an instrument to curtail participation and dissent in the name of alleged security and safety. Could the community do without such a forewarning? Or could such a forewarning be just that? The softening of the relationship between order and disorder to ensure that necessities are maintained and situations can be adequately addressed. That, for instance, of hospitals' accesses not being obstructed, traffic circulation being partially maintained, no one being indirectly hurt by the demonstrations. Is the inevitable risk of authority's exercise of discretion worth, if giving notice is the way through which safety is ensured? Is safety ensured at all? Safety for whom?

The task of the Police forces, in the complex scenarios in which they are called to operate, must be supported with trust and without prejudices, guaranteeing that they, especially during public order services, have the possibility to operate with the necessary serenity, essential condition to manage the risks connected to particularly challenging contexts. In this regard, notifying demonstrations in advance, respecting the prescriptions and the agreements with the public security authorities, avoiding provocative or violent behaviours – more generally, abiding by the law – certainly helps everyone to contribute to the goal of finding a balance between the free expression of thought, the right to peaceful assembly and the likewise necessary protection of public security. Essentially, the risk of incidents or clashes is zero if demonstrators do not engage in dangerous or violent conducts, respecting the rules (...). On the other hand, it is also useful to prevent possible attempts of infiltration from subjects who come from the antagonistic or extremist side who, as it is demonstrated by the experience historically grown in the field, may strongly influence the ways in which the protest takes place, often using violence and seeking visibility during such occasions (...).¹³⁰²

¹³⁰⁰ Giulia Locati, 'Sempre dalla parte del torto? Rimozione e criminalizzazione del conflitto' in Alessandro Somma (ed), *Diritti fondamentali e conflitto sociale. Un dialogo tra le discipline* (Sapienza Università Editrice 2024) 215.

¹³⁰¹ Corte Costituzionale, Sentenza 90/170 (3 June 1970).

¹³⁰² 'Informativa urgente del Ministro dell'Interno Matteo Piantedosi al Senato' (29 February 2024) <https://www.interno.gov.it/sites/default/files/2024-02/informativa_urgente_ministro_piantedosi_al_senato_29.2.2024.pdf>. Own translation. See original: 'Il compito

The narrative on security during demonstrations is soaked in the rhetoric of the rotten apples and of that zero chance of violence occurring when protesters abide by the law. Is not this part of that very policing and disciplining the public thing? One shall ask whether politics is then possible beyond the surveillance of the public space: let us reinterpret the dispositive of the public space by casting a glaze in that anarchic beyond-politics that is glimmering through new revolts.¹³⁰³

I thus believe it is essential to avoid that isolated incidents that may occur be used for distorted reconstructions of reality, feeding, especially from those who are far from antagonistic logics, the risk of portraying police forces as being in opposition to the demonstrators. Their presence, as I have already stated, is on the contrary the expression of a fundamental exigency of democracy, namely that dissent, even the harshest, can always be expressed in full security.¹³⁰⁴

Occupying the public space itself becomes an act of resisting the given order of things through living the open, the street, the city and the surroundings in a way that allows for the community to express its multitude of colours and voices, promoting the representations of identities that are more genuinely identifiable with, to reinterpret places and their meanings against contested institutions and their narratives. Di Cesare writes that peaceable occupations have left behind factories and workplaces and, to some extent, universities and other facilities with a social function, which could otherwise be strategic hubs for the struggle to unfold.¹³⁰⁵ Such an abandonment, she argues, has a clear political meaning: working no longer builds up community and therefore the latter must be yearned and looked for elsewhere, in the open, where assemblies become shelters for the unrepresented segment of the population, the others.¹³⁰⁶ Assemblies find their space in the square, which is a place left empty by institutional politics and at the same time a symbolic recall to the *agora*.¹³⁰⁷ Through the assembly, a newly formed and forming community comes together and devolves a space to confrontation, seeking to reach the outside and inviting discussion within the inside. Bookchin writes that no substantive democracy can there be and no self-administration is meaningful unless people converge in open and face-to-face assemblies to articulate policies.¹³⁰⁸

delle Forze di polizia, nei complessi scenari in cui sono chiamate ad operare, va sostenuto con fiducia e senza pregiudizi, garantendo loro, specie nei servizi di ordine pubblico, la possibilità di operare con la necessaria serenità, condizione imprescindibile per gestire i rischi legati a contesti particolarmente impegnativi. In tal senso, preavvisare le manifestazioni, rispettare le prescrizioni e gli accordi intercorsi con le autorità di pubblica sicurezza, evitare comportamenti provocatori o violenti - più in generale, rispettare la legge - sicuramente aiuta tutti a concorrere all'obiettivo di quella complessa ricerca del punto di equilibrio tra libera manifestazione del pensiero, diritto alla pacifica riunione ed altrettanto doverosa salvaguardia della sicurezza pubblica. In sostanza, il rischio di incidenti e di scontri è pari a zero se i manifestanti non pongono in essere comportamenti pericolosi o violenti, rispettando le regole (...). D'altro canto, è anche utile a prevenire possibili tentativi di infiltrazione da parte di soggetti di area antagonista o estremista che, come dimostra l'esperienza storicamente maturata sul campo, possono arrivare a condizionare fortemente le modalità della protesta, facendo, non di rado, uso della violenza e cercando, in tali occasioni, spazi di visibilità (...)'.

¹³⁰³ Donatella Di Cesare, *Il tempo della rivolta* (Bollati Boringheri editore 2020).

¹³⁰⁴ 'Informativa urgente del Ministro dell'Interno Matteo Piantedosi al Senato' (29 February 2024) <https://www.interno.gov.it/sites/default/files/2024-02/informativa_urgente_ministro_piantedosi_al_senato_29.2.2024.pdf>. Own translation. See original: 'Ritengo, dunque, indispensabile evitare che singoli incidenti che possono verificarsi, vengano utilizzati per ricostruzioni distorte della realtà, alimentando, soprattutto da parte di chi è lontano da logiche antagoniste, il rischio che le Forze di polizia siano rappresentate in contrapposizione ai manifestanti. La loro presenza, come ho già avuto modo di dire, è al contrario espressione di un'esigenza fondamentale della democrazia ovvero che il dissenso, anche quello più aspro, possa essere sempre manifestato in piena sicurezza'.

¹³⁰⁵ Donatella Di Cesare, *Il tempo della rivolta* (Bollati Boringheri editore 2020).

¹³⁰⁶ *ibid.*

¹³⁰⁷ *ibid.*

¹³⁰⁸ Murray Bookchin, *Remaking society. Pathways to a Green Future* (theanarchistlibrary.org, 1990) 108.

Throughout the year 2023, the Italian Ministry of Interior said to have registered 11'219 demonstrations of 'marked interest for the public order', which saw 969'770 police operators being deployed.¹³⁰⁹ In the period of two months from January 2024 to the end of February 2024, the Ministry said to have registered 2'538 demonstrations with 150'388 police operators being deployed and that in the 1,5% of such cases criticalities or disruption to the public order were accounted for.¹³¹⁰ Since October 2023 to February 2024, in light of the increasing media coverage of the military occupation, apartheid regime and ongoing genocide of the Palestinian people at the hands of Israel – referred to by the Italian Ministry of Interior as the 'Israeli-Palestinian conflict' – 1'076 related initiatives were registered on Italian territory and in 'only' 33 of these occasions there had been some criticalities.¹³¹¹

Without in any way underestimating the modest extent of the data regarding the criticalities that occurred, I believe that the vast majority of demonstrations, carried out in complete security and with the utmost freedom of expression of thought, serve to certify not only the commitment of the Police forces but their efficiency and professionalism. I also want to recall that, in many other European countries, not all demonstrations are permitted, while in Italy, the Government, from the beginning of the Israeli-Palestinian conflict, has guaranteed the full freedom to demonstrate to all parties, never imposing bans and making a significant effort in terms of resources and men [personnel] employed in ensuring security (...). Therefore, any suggestion that there is a government plot to suppress political dissent and that such a plot is being carried out by the Police forces during public order services must be firmly rejected.¹³¹²

Di Cesare argues that the mobilisation that occupies the squares, although trying to react to the capitalist dispersion, in the end is however not capable of reconfiguring the public space.¹³¹³ While a reconfiguration of the public space may not occur, for the fight against the hegemonic structures must comprehend and merge all diverse forms of resistance and cannot be limited to occasionally or periodically taking up space, several are the experiences of assembly and occupation that do manage to redesign their surroundings, offering their contribution to the struggle of wealth and space distribution and developing creative and inventive ways of being together. Whereas squares and streets are partially vividly inhabited by a variety of social actors and become a platform for the social conflict to unfold, other facilities that may function as catalyst for the struggle are nevertheless being occupied, despite some authors highlight how they no longer are core places to a community: factories, workplaces, education facilities, etc. Universities have indeed recently seen their occupation all over Italy and globally, with students-led associations denouncing academic partnerships with Israeli entities and demanding their cessation. In such places, participation is promoted and the social conflict is intersectional, transversal and transnational, with the convergence of the condemnation of the ongoing genocide of the Palestinian people with the struggles against the systemic and structural discrimination of the oppressed in more proximate territories. Experiences of occupation of factories as catalysts for practices of change are also not absent from the current landscape, one being for instance that brought

¹³⁰⁹ 'Informativa urgente del Ministro dell'Interno Matteo Piantedosi al Senato' (29 February 2024) <https://www.interno.gov.it/sites/default/files/2024-02/informativa_urgente_ministro_piantedosi_al_senato_29.2.2024.pdf>.

¹³¹⁰ *ibid*

¹³¹¹ *ibid*.

¹³¹² *ibid*. Own translation. See original: 'Senza voler sottovalutare in alcun modo la modesta entità del dato sulle criticità verificatesi, credo che la stragrande maggioranza delle manifestazioni, svolte in piena sicurezza e con la massima libertà di espressione del pensiero, valga a certificare non solo l'impegno delle Forze di Polizia, ma anche la loro efficienza e professionalità. Voglio anche ricordare che, in molti Paesi europei, non tutte le manifestazioni vengono permesse, mentre in Italia, il Governo, fin dall'inizio del conflitto israelo-palestinese, ha garantito la piena libertà di manifestare a tutte le parti, non opponendo mai divieti e sostenendo un relevantissimo sforzo in termini di mezzi e uomini impiegati per garantire la sicurezza (...). Va, pertanto, fermamente respinta ogni suggestione che vi sia un disegno del Governo per reprimere il dissenso politico e che questo disegno sia eseguito dalle Forze di polizia nel corso dei servizi di ordine pubblico'.

¹³¹³ Donatella Di Cesare, *Il tempo della rivolta* (Bollati Boringheri editore 2020).

forward for months by the Collettivo di fabbrica Gkn. In their words, their experience aspires to a mobilisation outside the continuous emergency stage, where the agenda of the struggle is imposed onto them, a mobilisation outlined by the urgent need of changing the relations of power in society, of conquering rights and salary, of reconquering education, health and public transport services, of obtaining climate and social justice; where the working class, their demands and their vision (*immaginario*) are resituated at the centre of the political discourse.¹³¹⁴ Let us rise up, they say, *insorgiamo*, is an empowering (*responsabilizzante*) and collective message.¹³¹⁵

Territory and space are then no longer a dispositive for surveillance but, with their occupation, become an instrument at the service of the struggle. They are given a recoloured appearance and renewed identity that attempt to root deep beneath the surface, reclaimed by the very persons who inhabit and live such surroundings regardless of their status but regarding their *existence and corporeity*. Crowds in the streets all over Italy, migrant workers clinging onto a crane in Brescia or a family squatting a building with the support of the *muri solidali* (solidarity walls) in Turin are the scattered but widespread reminders that bodies and their demands (of rights) do exist in their flesh. They sit in, fill up space, hold ground, breathe, live and ultimately through their lives, dissent. The fact that they are policed, they are not acknowledged as the heart of the democratic process that they instead realise through their very actions, the fact that they should not be there *but are*, is the ultimate confirmation of the irrationality and the contingency of an infrastructure that denies their *irrefutable bodily presence*.

While realities of resistances may take the street in the expression of their dissent, those who collectively organise nevertheless often operate beyond the context of square demonstrations and seek policy reform in a peaceful and nonviolent manner. Occupying spaces, boycotting state services, stopping traffic circulation are in fact but one side of the coin, occasions where outbursts or actions of a violent character may at times take place but that do not define nor condense the continuous resistance that every reality pursues. Their morphology is endless, so are their fights and the means through which they are pursued, as endless are the opportunities and the virtual their demands and their knowledges promote. The following are but a handful of examples.

The political manifesto of Refugees in Libya reads

We are fleeing from civil wars, persecutions, climate changes and poverty back in our countries of origin. We were all pushed by circumstances beyond human endurance. We wanted to reach Europe seeking a second chance for our lives and therefore arrived in Libya. Here we became the hidden workforce of the Libyan economy (...). [W]e suffered every possible and unimaginable human right violation (...). We tried to raise our voice and spread our stories (...). We were deliberately silenced. But not anymore. Since the 1st of October 2021, the day the Libyan police and military forces came to our homes in Gargaresh neighborhood and took ruthless, grave and merciless crackdowns and mass raids against us. Thousands were arbitrarily arrested and detained in inhumane concentration camps. The day after, we came as individuals and gathered at the UNHCR headquarters. Here we understood we had no other choice than start organizing ourselves (...).¹³¹⁶

All over Italy, groups of migrants and allies, under the most diversified forms and each with their own demands, propose counternarratives dissenting from the existing institutional representation of migration and through their representations and models of action offer spaces to rethink and reinterpret the evolution of the law. The website of the Coordinamento Migranti Bologna, active since 2024, defines itself as

¹³¹⁴ Collettivo di fabbrica Gkn, *Insorgiamo. Diario collettivo di una lotta operaia (e non solo)* (Alegre 2022) 8.

¹³¹⁵ *ibid.*

¹³¹⁶ Refugees in Libya, 'Our Political Manifesto' <<https://www.refugeesinlibya.org>> accessed 23 April 2022

a collective of migrants and Italians, women and men that opposes the Italian immigration law and European regulations which, thanks to the link between residence permit and employment contract, make migrants a specific workforce destined to be exploited or expelled according to market needs. We oppose any kind of racism. We affirm the political role of migrants in their fight against the policies of job insecurity to which they have always been exposed (...). [W]e recognize the violation of borders by migrants as the first and most relevant form of globalization.¹³¹⁷

The group ties with the activism of the *Assemblea Donne* and with the Transnational Migrants' Coordination and promotes a migrants' politics of peace. Transnational connections are fostered through the Transnational Social Strike Platform as well as the political infrastructure of the Permanent Assembly Against the War, directed towards a transnational politics of peace.

We come from different places and contexts, but as subjects mainly living across the European space, we acknowledge the need to make Europe a field of struggle. We believe this is the time to be brave enough to think and practice a transnational politics for a better life, free from oppression, free from poverty, racism and patriarchy.¹³¹⁸

Kesha Niya, the slogan of which reads 'no borders no problem', is a grassroots volunteer-run project and collective operating around the Ventimiglia area in Italy, particularly providing support to people 'who have been illegally denied entry into France':

Be aware: the situation around the border is violent – mentally, emotionally and also physically. Mostly for people on the move, but also for everyone choosing to be on this territory. Strategies of prevention and of aftercare are essential tools to face this violence, but to a degree there is no way of avoiding it.¹³¹⁹

In 2022, the political collective Progetto 20k, 'fighting the border since 2016 in Ventimiglia and all around the globe' remembered that since 2015 tens of people lost their lives at the hands of the 'frontier regime', victims of racism and indifference: 'just a few kilometers from our house, often one dies (*si muore*) with no one even worrying that a name be given to the bodies. In Ventimiglia, the European, French and Italian institutions show their face of death and exclusion. Let's not forget anyone, let's tear down any border!'.¹³²⁰

The 2019 Mai più lager No ai *CPR*'s manifesto reads that:

"(...) the announcement of the current Italian government to accelerate the reopening of administrative detention centres for foreigners (...) reveals once again the continuity of vision that has characterized over the years the evolution of the various laws concerned: the *CPR* by Minniti-Orlando (2017) find their antecedent in the CPT by the Turco-Napolitano (1998) and in CIE by Bossi-Fini (2002). (...) *CPR* are (only) the tip of an iceberg, the emblem (...): opposing the reconstruction of these places means rejecting the security logic that underlies their implementation. Under the symbol MAI PIU' 'LAGER! - NO AI *CPR* (...) all those people can recognize who believe in constitutional values (...). Because not just the rights of migrant people are concerned (...).¹³²¹

¹³¹⁷ Coordinamento Migranti <<https://www.coordinamentomigranti.org/informazioni-e-contatti/>> accessed 1 October 2024.

¹³¹⁸ TSS Platform, 'Manifesto for a Transnational Politics of Peace' (12 July 2022) <<https://www.transnational-strike.info/2022/07/12/manifesto-for-a-transnational-politics-of-peace/>> accessed 1 October 2024.

¹³¹⁹ Kesha Niya <<https://keshaniya.org/about/>> accessed 1 October 2024.

¹³²⁰ Progetto 20k <https://www.instagram.com/p/CZovHEHoK8s/?hl=it&img_index=1> accessed 1 October 2024.

¹³²¹ Mai più lager No ai *CPR* <<https://linktr.ee/noaiCPR>> accessed 1 October 2024.

The then *Lega Braccianti* remembered that

On April 25 last year [2021], three of our fellow fighters were shot in what will be remembered in the history of these foggy campaigns, as a real “BLACK” fighter hunt. Next April 25, we will celebrate the day of RESISTANCE in this place where we RESIST every day against the slavery of food giants, against the exploitation of caporals, against political indifference and against the risk of absorbing our drama and our struggles. Let’s not forget the labor wars, and the ever-growing labor deaths, which are being worn out silently and daily *in our Country* [emphasis added]. In a Republic founded on labor, we need JOB PARTNERS”.¹³²²

Aboubakar Soumahoro observes that the exploitative model ongoing in certain areas seems to be characterised by a principle that has affirmed itself on a normative level: migrants are only ‘arms to work’ (*braccia per lavorare*) and their every right is subordinated to the capacity to work and the market demand, a condition that does not allow a worker to have any life planning.¹³²³

Bracciante is such a densely meaningful word. On 19 June 2024 in Rome, the agricultural worker Satnam Singh was killed by the criminal actions of the farm owner who exploited him. After being injured while working on the site, he was not assisted but abandoned nearby his house, gravely wounded, his amputated arm left beside him. Titles all over the news called him *bracciante*. *Bracciante*. Until he no longer was.

His ‘horrible and inhumane death’ was commemorated at the Chamber on 26 June 2024.¹³²⁴ The president of the Council of Ministers Giorgia Meloni remembered him as the thirty-one years old *bracciante* from India. As all politicians were applauding in his memory while standing up, she said to the members of the executive who remained still and seated: *sì ragà, alzatevi pure voi*. The Minister of Foreign Affairs and International Cooperation Antonio Tajani then said he had asked for visas for his family – *bravo*, Meloni replies. She continues: ‘This is the worst Italy. That which profits from migrants’ despair, from the plague of immigration without rules’.

On 8 October 2024, Baobab Experience posts on social media that Yonas, two years old, was on that night the youngest guest of their humanitarian hub: his mother, Hamna, had overcome ‘the violences of the Eritrean dictatorship and of the Libyan lagers, the insecurity of the sea patrolled by criminals and emptied of NGOs to offer him a future of freedom and peace’.¹³²⁵ The post reads:

Europe tried with every mean to impede their arrival. [Hamna’s fight] is just one fight: the war against migrants does not end at their disembarking but continues in juridical, administrative and bureaucratic traps that Italy and the European Union have disseminated everywhere. The war continues within the internal frontiers: in the offices of the *questura* and of the border police, in the absence of any welcome that forces people in the streets. The war on migrants is a war with internal and external borders. And perhaps we are, here, today, resisting.¹³²⁶

Algotino writes that often, social movements are those who assume onto themselves the values and the project of the constitution, in opposition to governors’ political choices within the framework of the

¹³²² Lega Braccianti <<https://www.facebook.com/legabraccianti/>> accessed 25 April 2022.

¹³²³ Aboubakar Soumahoro, *Umanità in rivolta. La nostra lotta per il lavoro e il diritto alla felicità* (Giangiacomo Feltrinelli Editore Milano 2019) 21.

¹³²⁴ Redazione ANSA, ‘L’Aula omaggia Satnam Singh, Meloni ai ministri: “Ragà alzatevi”’ (ANSA 26 June 2024) <https://www.ansa.it/sito/videogallery/italia/2024/06/26/meloni-dietro-la-morte-di-satnam-uno-schifo-e-italia-peggiore_d9cbe0a4-b299-4c2c-9e92-18c67a3b4803.html> accessed 1 October 2024.

¹³²⁵ Baobab Experience <https://www.instagram.com/p/DA38NL90824/?img_index=1> accessed 14 October 2024.

¹³²⁶ *ibid.*

neoliberal governmentality: movements exercise a *constitutional resistance*.¹³²⁷ It is not a resistance solely understood as defence but as a revitalisation of the idea of the constitution as foundation and instrument of social transformation.¹³²⁸ The synergies of movements, in the plurality of their objectives, of their actions and of the persons through which the movements live, propose and practice *alternative*, tie together social and environmental justice, show how these are distinct articulations of the very same conflict, a social conflict, coherent with an emancipating constitutionalism that holds together political, economic and social democracy.¹³²⁹

4.3 Resisting detention in Turin. Burn the lager down

This section of the analysis speaks of resistance to so called administrative detention. Administrative detention is approached as a performance of the border, as the disciplining of the body and the identity of the other-ness, as the apprehension, segregation and confinement of the exceeding categories under the disguise of a prison with three walls. Administrative detention is approached as the violent rearticulation of the notion of a physical border within the territory of the state. Its institutionalisation is the apex of the violation of the fundamental prerogatives of non-citizens' personal freedom, against the background of a general and systematic hierarchisation of citizenship.¹³³⁰ All the while border "protection" has been symbolically strengthened as a core political "value" and as an expression of state sovereignty.¹³³¹

In a world characterized more than ever by an unequal redistribution of capacities for mobility, and in which the only change of survival, for many, is to move and to keep on moving, the brutality of borders is now a fundamental given of our time. Borders are no longer sites to be crossed but lines that separate. Within these more or less miniaturized and militarized spaces, everything is supposed to remain still. Many are those who, encountering them, now meet their ends or, when not simple victims of shipwrecks or electrocution, are deported.¹³³²

There is such a vast literature on border crossing, the border and bordering that the text does not have the capacity to consider. An apology is offered to the reader for this, for again, the author is aware of the limited scope of her exploration. The small case study that is hereby discussed is offered as a reality of resistance against state discourse on migrants' administrative detention. The results of the observation of such reality are not generalised, for each resistance proposes its own demands, but are relevant to the articulation of reflections on forms of power and forms of dissent. Through the following paragraphs, the text also attempts to offer a change of perspective, adopting that of those who oppose the institution of administrative detention, and to facilitate this implements a change of register, assuming the terminology used by the resisting realities observed. Let language then be an instrument to support the effort to think about otherwise-policy and let us begin to stop speaking of administrative detention and its facilities. Let us instead speak of *lagers* and *state lagers*.

¹³²⁷ Alessandra Algostino, 'Diritti e conflitto sociale: l'insorgenza dei movimenti' in Alessandro Somma (ed), *Diritti fondamentali e conflitto sociale. Un dialogo tra le discipline* (Sapienza Università Editrice 2024) 43.

¹³²⁸ *ibid.*

¹³²⁹ *ibid.*

¹³³⁰ Antonio Cantaro and Federico Losurdo, 'Personal Freedom of the International Protection Seeker' (2020) *A Quarterly Review for Criminal Justice* 417.

¹³³¹ Leanne Weber, Benjamin Bowling, 'Policing Migration: A Framework for Investigating the Regulation of Global Mobility' (2004) 14 *3 Policing and Society* 195.

¹³³² Achille Mbembe, *Necropolitics* (Duke University press 2019) 3.



Figure 5 - Graffiti: CIE, CPR Lager di Stato (Turin September 2024)

The instances taken into consideration take place in the city of Turin, in the region of Piedmont, in northern Italy. To streamline reading, the city and its urban distribution are not touched upon but when relevant to the description and analysis of the matter in question. The city has for years seen the presence of a lager, the *CPR* of Corso Brunelleschi, in the neighbourhood of Pozzo Strada. This is not a peripheral area. The facility stands within the inner city, in its fenced structure among apartment buildings, its walls facing the streets and partially surrounded by a green area along the main road, where people mind their own business and walk their dogs. There, demonstrators against the institutionalisation of migrants' detention gather to express their dissent and their solidarity to the prisoners. The following paragraphs trace the contours of a reality of resistance that has articulated in a variety of forms especially as of February 2023: an uprising from the inside of the lager; intensification of demonstrations on the outside in solidarity with the uprisers; organisation of an assembly, open to civil society and publicly held, to discuss the matter of the closing of the *CPR* and its likely reopening; organisation of initiatives around the nature of the facility. These contours are sketched as corollary to the main source of data and information, namely the documental study and analysis on administrative detention. They offer an example of the self-organisation of the people for a common cause, in solidarity with those confined. With their contestation, they [seek legal reform that does not compromise on personal freedom](#), proposing alternative representations to that produced by and embedded in the institutional policy, demanding the abolishment of such an established reclusive practice and acknowledging imprisoned immigrants as political actors.

A few considerations are offered in relation of the activities undertaken by the reality of resistance against the *CPR* of Turin that were joined by the author, for the records and the impressions of some of such events are included throughout the text. Movements against the *CPR* have always been present in Turin. Protesting initiatives organised by a variety of collectives were joined by the author only as of 2022. An attempt by activists and militants to gather energies and groups together was then undertaken in 2023 with the creation of an assembly, in solidarity with the prisoners of the *CPR* that had demonstrated from inside the detention facility against their living conditions. All assemblies and

initiatives that were attended were public ones, open to civil society. Gathering occasions and meeting up points were ordinarily shared on social media and via telegram channels. They were attended by tens of people.

The author's participation in the occasions prior, during and after the closing of the *CPR* was driven by two main reasons: sharing the cause of the struggle and being curious about the narratives and meanings that were being articulated and promoted by the social reality concerned. In practice, the latter reason greatly affected the former: for there was a professional interest in observing the articulation of the reality of resistance and the representations this offered of migration and administrative detention, the author did not feel comfortable in engaging in active participation. The interest rested in the meanings, the silences, the production of narratives of the movement itself. Therefore, the option pursued was that of being a supporter of the cause and a non-participating observer, with ordinary interactions occurring with the people joining the assemblies, for specific occasions and for specific residual activities. Core initiatives were attended as a non-participating spectator: the floor was not taken during the assemblies and no active role was fulfilled nor personal opinion was shared during the planning and preparation of any activity. This felt the most appropriate way of dealing with the overlapping between personal and professional involvement in a context of public activism. Such a position was adopted to avoid as far as possible any direct "contamination" of the representations, the narratives and the actions promoted by the movement with the author's thoughts and stances. As simple example, visual artefacts and graphics were often shared with the group before being disseminated to spread the word on upcoming initiatives. Once, the graphic of a flyer announcing a march was being discussed before printing: a participant argued that what had been proposed might have been too 'militant' and this might have been a limit rather than an advantage. If the goal was to reach the largest number of people and to involve civil society in fact, they argued, the graphic that had been worked on could misfire, for the tones it aligned with could have been a deterrent to people curious and unfamiliar with the issue. One more person then offered to work on a new graphic, which was adopted. Contributing one's opinions in the space of discussion thus may have had an impact on the assembly's initiatives and representations, which was, in the author's opinion, to be avoided.



Figure 6 – Part of the graphics of a demonstration flyer (Turin July 2024)

Moreover, the author did not always share the choice of means and forms through which some activities, related to the cause, were being carried out. While on some occasions she could have compromised, on a personal level, on a series of elements, she did not feel comfortable doing so on a professional level. For these reasons, she opted for being a non-participant observer with interactions.¹³³³ Any impression that she shares in these pages on the reality of resistance that came together in the struggle against the *CPR* of Turin is the result of such approach and of the notes taken during and after joined events. Again, this is a corollary to the documental analysis.

Since the reality of resistance observed is of a collective nature in fact, the negotiated outcomes of meanings and narratives are those contained in the movement's manifestos, flyers, pamphlets, writings, internet posts, events' speeches, open letters, petitions, etc., documental material that stands for a *collectively* agreed upon representation. Specifying this is important: not all members of a reality may share the same strategies, thoughts and activism. The diversification of opinions within the group and the internal negotiation processes are not the object of this study. To clarify this, an example is offered. On 19 February 2022, during a demonstration in Bologna in Piazza Roosevelt organised by the Coordinamento Migranti Bologna, several speakers took the floor to denounce the discriminations they were subject to at the hands of the local institutions. One person took the microphone and pleaded for mercy to the *prefettura*. They asked all bystanders to take white paper tissues and to lift them up. They kneeled in front of the closed door of the *prefettura* and repeated their appeal for mercy. From the back, someone protested. They took the floor, seemingly infuriated, declaring that they would never ask for mercy. They shouted at those very closed doors that the *prefettura* and the institutions were all fascists. Now, both persons were there for the same reason and fought the same cause. Yet such an episode shows how their individual strategies and individual stances differed – once within a collectivity however, their instances must have been brought together and their messages negotiated. Therefore, while single voices are not hereby considered, any documental material that was issued and openly distributed by the movements represents the collective narrative on “migration” that is of interest to the discussion.

¹³³³ Alan Bryman, *Social Research Methods* (Oxford University Press 2016) 437. See also: Paul Lichterman, 'What do Movements Mean? The Value of Participant-Observation' (1998) 21(4) *Qualitative Sociology* 401; Luigi Berzano, Renzo Gallini, 'Centri Sociali Autogestiti a Torino' (2000) 22 *Quaderni di Sociologia* 50; Romano Alquati, *Per fare conricerca* (DeriveApprodi 2022).



Figure 7 - Banner: *sfruttati all'interporto derubati in prefettura no multe no espulsioni!* (Bologna February 2022)

Now, after a brief description of the choices made by the author in her observation of a reality of resistance, the text is brought back to Turin and the mobilisation opposing administrative detention. One element of the landscape of the city that can be spent a few words on is its judicial machinery.

Claudio Novaro describes Turin as an extraordinary laboratory of experiments and repressive practices.¹³³⁴ He observes that one crucial aspect of such laboratory has been the constitution of a specific pool of investigative magistrates for the commencement, inquiry and management of trials related to the social conflict. In 2010, the prosecutor's office (*procura*) constituted a working group targeting proceedings related to the high speed train (TAV) construction project in Val di Susa: the group was to consider proceedings related to any alleged crime linked to the construction of the TAV infrastructure, both during public demonstrations, in terms of tenders, etc.¹³³⁵ The organisation of such a specialised section was not in response to the need to deal with a multitude of legal proceedings but took place before the articulation of allegations of interest to the unit, which has been interpreted by some as indicative of the direction of the dedicated section to target the No TAV movement specifically, very active and rooted in the territory.¹³³⁶ This implied that significant resources were invested in the arrangement of a swift processual circuit that has permitted the rapid articulation of a specific kind of

¹³³⁴ Claudio Novaro, 'Repressione giudiziaria e movimenti. Il caso Torino' (volerelaluna 2 July 2019) <<https://volerelaluna.it/societa/2019/07/02/repressione-giudiziaria-e-movimenti-il-caso-torino/>>.

¹³³⁵ Procura della Repubblica presso il Tribunale di Torino, 'Criteri di organizzazione dell'Ufficio per il periodo 25 giugno 2015/2016 (Prot. n. 3403/15)' (Turin 23 June 2015) 73 <<https://ordineavvocatitorino.it/sites/default/files/documents/News/NUOVO%20PROG.%20%20ORGANIZZ.%20%20Procura%20Torino%2023.6.2015.pdf>> reading: 'Alla Sezione "Gruppo TAV", istituita sin dal 2010 ed oggetto di specifica delibera del 3.10.2012 del Procuratore *pro tempore* sono assegnati i procedimenti per qualsiasi tipo di reato connesso alla costruzione del cd. impianto TAV, sia in occasione di manifestazioni pubbliche, che in materia di appalti etc.'

¹³³⁶ Claudio Novaro, 'Repressione giudiziaria e movimenti. Il caso Torino' (volerelaluna 2 July 2019) <<https://volerelaluna.it/societa/2019/07/02/repressione-giudiziaria-e-movimenti-il-caso-torino/>>; reference to 'No Tav e repressione: una storia antica. Da Caselli a Spataro.' (NOTAV.INFO 23 September 2016) <<https://www.notav.info/documenti/no-tav-e-repressione-una-storia-antica-da-caselli-a-spataro/>>.

proceedings involving social movements.¹³³⁷ In 2015-2016, the specialised section for TAV-related proceedings was indeed merged with the specialised section on terrorism and subversion of the democratic order, with the arrangement of a team dedicated to terrorism, subversion of the democratic order, crimes in occasions of public demonstrations (*Costituzione del “Gruppo 9 - Terrorismo ed eversione dell’ordine democratico, reati in occasione di manifestazioni pubbliche”, con contestuale unificazione delle sezioni “Reati di terrorismo ed eversione dell’ordine democratico” e “Gruppo TAV”*).¹³³⁸ In this regard, the observations shared by the No TAV movement are particularly biting: the text of the 2015 official document of the *procura* that rearranges sections refers in several passages to the initial 2010 judicial “gruppo TAV” as the “gruppo No Tav” instead, indicative, as the movement argues, of the very targeted character of the unit.¹³³⁹ The neo-constituted section was assigned a variety of judicial competences related to terrorism, subversion and the perpetration of offences during demonstrations, among which that of: dealing with crimes moved by ethnic and religious discrimination that, the 2015 text reads, often risk to give rise to acts of violence during public demonstrations; dealing with crimes related to the phenomenon of so called foreign fighters; dealing with the ‘politically motivated’ occupation of buildings and public places (*occupazione di stabili e luoghi pubblici “politicalmente motivati”*); dealing with offences pertaining to terrorism-related cyber-criminality; the possibility of employing preventive telephonic wiretapping in specific occasions as established by law; dealing with preventive personal measures; etc.¹³⁴⁰ A 2022 document by the *procura* on the reorganisation of the magistrature in Turin recalls how the unit specialised on terrorism, subversion and offences committed during public demonstrations was constituted in 2015 through the merging of the section on terrorism and subversion and that on TAV-related proceedings, given the ‘political matrix and the violent nature’ of the offences which the latter targeted.¹³⁴¹ Referring then to a group 7 rather than 9, the *procura* lists additional offences that the unit is tasked with, including: crimes that are related to terrorism, subversion of the democratic order and crimes against statehood; again, ‘politically motivated’ crimes (*reati politicamente motivati*) committed during public demonstrations; aiding and abetting (*favoreggiamento*) ‘clandestine immigration’ when ‘politically motivated’; again, ‘politically motivated’ occupations of buildings and public places; offences related to the exportation, importation and transit of weaponry material (in consideration of alleged connection with proceedings on international terrorism); a number of preventive measures and preventive wiretapping.¹³⁴² Coordinator of the group is the *Procuratore della Repubblica Aggiunto*

¹³³⁷ Giulia Locati, ‘Sempre dalla parte del torto? Rimozione e criminalizzazione del conflitto’ in Alessandro Somma (ed), *Diritti fondamentali e conflitto sociale. Un dialogo tra le discipline* (Sapienza Università Editrice 2024) 215; Claudio Novaro, ‘Repressione giudiziaria e movimenti. Il caso Torino’ (volerelaluna 2 July 2019) <<https://volerelaluna.it/societa/2019/07/02/repressione-giudiziaria-e-movimenti-il-caso-torino/>>; reference to ‘No Tav e repressione: una storia antica. Da Caselli a Spataro.’ (NOTAV.INFO 23 September 2016) <<https://www.notav.info/documenti/no-tav-e-repressione-una-storia-antica-da-caselli-a-spataro/>>.

¹³³⁸ Procura della Repubblica presso il Tribunale di Torino, ‘Criteri di organizzazione dell’Ufficio per il periodo 25 giugno 2015/2016 (Prot. n. 3403/15)’ (Turin 23 June 2015) 3, 73-76 <<https://ordineavvocatitorino.it/sites/default/files/documents/News/NUOVO%20PROG.%20%20ORGANIZZ.%20%20Procura%20Torino%2023.6.2015.pdf>>.

¹³³⁹ ‘No Tav e repressione: una storia antica. Da Caselli a Spataro.’ (NOTAV.INFO 23 September 2016) <<https://www.notav.info/documenti/no-tav-e-repressione-una-storia-antica-da-caselli-a-spataro/>>. See: Procura della Repubblica presso il Tribunale di Torino, ‘Criteri di organizzazione dell’Ufficio per il periodo 25 giugno 2015/2016 (Prot. n. 3403/15)’ (Turin 23 June 2015) 36, 41, 76, 96 <<https://ordineavvocatitorino.it/sites/default/files/documents/News/NUOVO%20PROG.%20%20ORGANIZZ.%20%20Procura%20Torino%2023.6.2015.pdf>>.

¹³⁴⁰ Procura della Repubblica presso il Tribunale di Torino, ‘Criteri di organizzazione dell’Ufficio per il periodo 25 giugno 2015/2016 (Prot. n. 3403/15)’ (Turin 23 June 2015) 3, 73-76 <<https://ordineavvocatitorino.it/sites/default/files/documents/News/NUOVO%20PROG.%20%20ORGANIZZ.%20%20Procura%20Torino%2023.6.2015.pdf>>.

¹³⁴¹ Procura della Repubblica presso il Tribunale di Torino, ‘Progetto organizzativo’ (Turin 22 February 2022) 32-34 <https://procura-torino.giustizia.it/cmsresources/cms/documents/Progetto_organizzativo_2022.pdf>.

¹³⁴² Procura della Repubblica presso il Tribunale di Torino, ‘Progetto organizzativo’ (Turin 22 February 2022) 32-34 <https://procura-torino.giustizia.it/cmsresources/cms/documents/Progetto_organizzativo_2022.pdf>.

Emilio Gatti, whose ten-year time within the group ends in 2028 (*scadenza termine decennale di permanenza nel gruppo*).¹³⁴³ The same person is also the *Procuratore Aggiunto Coordinatore* of the immigration affairs office (*Ufficio Affari dell'Immigrazione*).¹³⁴⁴ Currently, the website of the Ministry of Justice shows that the coordinator of both the magistrature group 7 and the office on immigration affairs has not changed.¹³⁴⁵

An additional note on the landscape of Turin is that its urban area is characterised by the presence of self-management social centres, *centri sociali occupati autogestiti* (Csoa). Generally speaking, these root their collective actions on the rejection to neoliberalism and neocapitalism.¹³⁴⁶ The city moreover seems to be undergoing a significant phase of gentrification under the eyes of an increasingly present surveillance of the military and the police.¹³⁴⁷

Out of the administrative detention facilities in Italy, the *CPR* in Turin is, as of the beginning of November 2024, inactive, although being about to reopen. Its inactivity was the result of the actions of prisoners who, protesting their conditions of detention, burned it down from the inside in February 2023. The writing that for years stood on the external walls of the lager reading **FUOCO AI CIE** – burn the centres down – appears with its anger as an auspice and a threat that eventually found its realisation.

¹³⁴³ Procura della Repubblica presso il Tribunale di Torino, 'Progetto organizzativo' (Turin 22 February 2022) 32-34 <https://procura-torino.giustizia.it/cmsresources/cms/documents/Progetto_organizzativo_2022.pdf>.

¹³⁴⁴ Procura della Repubblica presso il Tribunale di Torino, 'Progetto organizzativo' (Turin 22 February 2022) 60-62 <https://procura-torino.giustizia.it/cmsresources/cms/documents/Progetto_organizzativo_2022.pdf>.

¹³⁴⁵ 'Gruppo 7 – Terrorismo ed eversione dell'ordine democratico' (Procura della Repubblica presso il Tribunale di Torino) <https://procura-torino.giustizia.it/it/gruppo_9.page> accessed 4 September 2024; 'Ufficio specializzato – Affari dell'Immigrazione' (Procura della Repubblica presso il Tribunale di Torino) <https://procura-torino.giustizia.it/it/gruppo_7.page> accessed 4 September 2024.

¹³⁴⁶ Luigi Berzano, Renzo Gallini, 'Centri Sociali Autogestiti a Torino' (2000) 22 Quaderni di Sociologia 50.

¹³⁴⁷ On this, the reader is invited to refer to, *inter alia*: Francesco Migliaccio, *La Venere degli stracci. Miseria, rivolta e potere nella città post-industriale* (Monitor edizioni 2021); dora griot, 'Comportamenti delle guardie a Torino #1. Il profumo proibito' (napoli MONITOR 7 May 2023) <<https://napolimonitor.it/comportamenti-delle-guardie-a-torino-1-il-profumo-proibito/>> accessed 21 October 2024; dora griot, 'Comportamenti delle guardie a Torino #2. Visioni di volanti che sgommano' (napoli MONITOR 19 May 2023) <<https://napolimonitor.it/comportamenti-delle-guardie-a-torino-2-visioni-di-volanti-che-sgommano/>> accessed 21 October 2024;

dora griot, 'Comportamenti delle guardie a Torino #3. Sono ordini dall'alto!' (napoli MONITOR 25 May 2023) <<https://napolimonitor.it/comportamenti-delle-guardie-a-torino-3-sono-ordini-dallalto/>> accessed 21 October 2024; dora griot, 'Comportamenti delle guardie a Torino #4. Controlli di documenti lungo la Dora' (napoli MONITOR 7 July 2023) <<https://napolimonitor.it/comportamenti-delle-guardie-a-torino-4-controlli-di-documenti-lungo-la-dora/>> accessed 21 October 2024; 'Argo, progetto di videosorveglianza a Torino. Un'intervista su Radio Blackout' (napoli MONITOR 30 August 2023) <<https://napolimonitor.it/argo-progetto-di-videosorveglianza-a-torino-unintervista-su-radio-blackout/>> accessed 21 October 2024; redazione monitor torino, 'The Student Hotel. Come si svende suolo pubblico a Torino' (napoli MONITOR 7 November 2022) <<https://napolimonitor.it/the-student-hotel-come-si-svende-suolo-pubblico-a-torino/>> accessed 21 October 2024; Stefania Spinelli, 'Sgomberi "umanitari". L'ipocrita gestione del problema casa a Torino' (napoli MONITOR 27 April 2023) <<https://napolimonitor.it/sgomberi-umanitari-lipocrita-gestione-del-problema-casa-a-torino/>> accessed 21 October 2024.



Figure 8 - A police officer stands in front of the walls of the CPR during a demonstration. The wall reads: *fuoco ai CIE* (Turin 2022)

The centre has been temporarily closed. Protesters set the facilities on fire repetitively over a few days to the extent that the structure is no longer accessible and “habitable”, if it ever was. They did so at the risk of their life, safety and at the risk of their liberty.

The developments that brought to the suspension of the activity of confinement and expulsion of the lager are hereby offered to the reader as an instance of resistance and uprising against an otherwise institutionally led bleak surrounding context. While the centre closed in fact, a March 2023 decree was issued foreseeing the strengthening and extension of the machinery of administrative detention on the whole state territory. After the uprising in Turin, collective mobilisation from the outside attempted to gather energies and advocate for the dismantling of the facilities and its permanent inactivity.

The recourse to violence by the migrant persons who were held therein is not to be ignored. As mentioned earlier, lines between violence and nonviolence are at times blurred. In such a case, protesting prisoners destroyed their cages. Their violence must be placed in juxtaposition with that perpetrated on their bodies and their personal freedom by the state and the private entity financed by the state to provide the “service” of their confinement and expulsion. What is of interest to this research is the process that the prisoners’ uprising set in motion: if and to what extent the resistances and demonstrations of the detainees may have prompted [a course of alteration of the administrative and judicial system](#) in place regulating the *CPR* of Turin and what consequences this may have.

The *CPR* is in the urban area of the city of Turin between Corso Filippo Brunelleschi, Via Monginevro and Via Santa Maria Mazzarello.

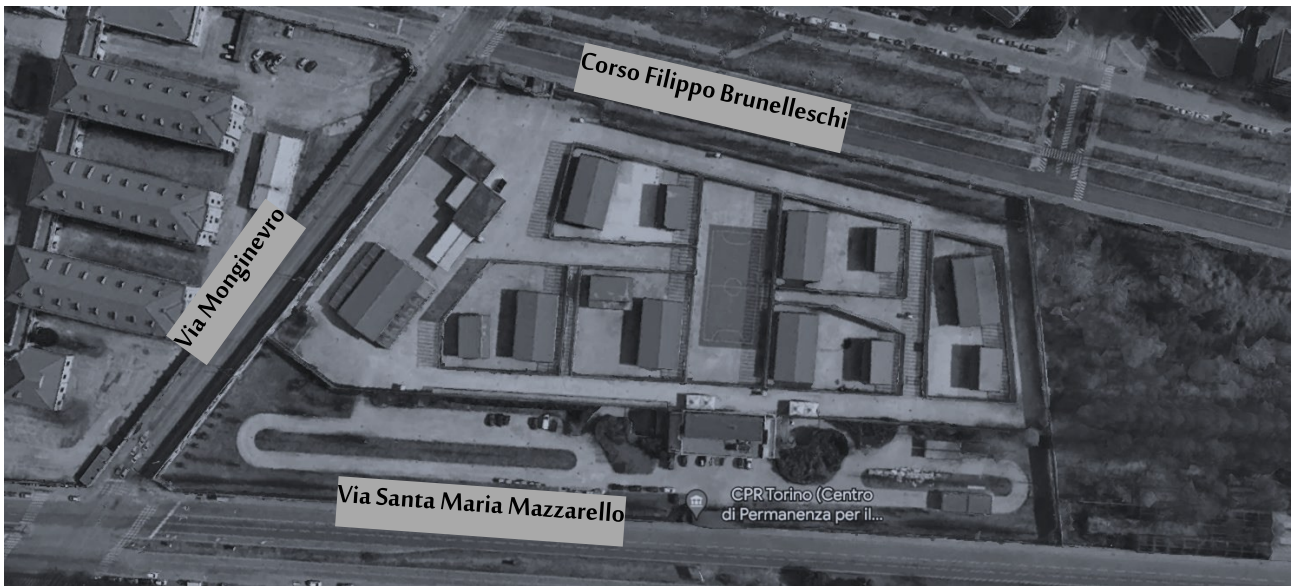


Figure 9 - View of the CPR in Turin. Picture from Google earth in June 2023 (1)



Figure 70 - View of the CPR in Turin. Picture from Google earth in June 2023 (2)



Figure 11- View of the CPR in Turin. Picture from Google earth in June 2023 (3)

It was active since 1999, when the Italian Red Cross was entirely managing the detention facility:

It should be noted that the *CIE* on Corso Brunelleschi, managed by the Red Cross since 1999, is literally “sealed off”. None of the interviewed protection agencies has access to or knowledge of the reality inside the Centre. Only lawyers, if they are appointed, obviously have the possibility to enter to meet the people they assist. The Centre has no connection with the local territory (except for a couple of agreements with the hospital for dental care and with the drug addiction services for urine analysis to detect substance abuse). Everything is provided by the Red Cross in a “regime” of “multi-service”.¹³⁴⁸

It covers an area of about 3'000m² and in 2018 it could host about 180 people.¹³⁴⁹ As of 2022, the facility could host 144 people.¹³⁵⁰ Detention was foreseen only for men. The facility was made up of six detention areas with the perimeter delimited by a 5 metres high fence, each equipped with 5 sleeping rooms with seven beds respectively, two or one toilets and one shower; each area, to which a colour label was given, comprised a refectory too.¹³⁵¹ Separated from the rest of the detention areas there was a building called *Ospedaletto*, literally translated to “little hospital”, with 12 double rooms.

¹³⁴⁸ ASGI et al., *Il diritto alla protezione. Studio sullo stato del sistema di asilo in Italia e proposte per una sua evoluzione* (Progetto co-finanziato dall'Unione Europea e dal Ministero dell'Interno 2009) 78 <<https://www.asgi.it/wp-content/uploads/2016/12/il.diritto.alla.protezione.pdf>> accessed 3 June 2023. Own translation. See original: ‘Va segnalato che il C.I.E. di Corso Brunelleschi - gestito dalla Croce Rossa sin dal 1999 è letteralmente “blindato”. Nessuno degli Enti di tutela intervistati ha accesso e/o conosce la realtà interna al Centro. Solo gli avvocati, se nominati, hanno ovviamente possibilità di entrare per incontrare gli assistiti. Il Centro non ha nessun legame con il territorio (se non un paio di convenzioni con l'ospedale per le cure odontoiatriche e con il SERT finalizzata all'analisi delle urine per l'individuazione delle tossico-dipendenze). Tutto è fornito dalla Croce Rossa in “regime” di “multi-service”’.

¹³⁴⁹ ‘CPR, Centro di Permanenza per il Rimpatrio di Torino (già C.I.E)’ (*Garante dei diritti delle persone private della libertà personale della Città di Torino*, 2019) <<http://www.comune.torino.it/garantedetenuti/dentro/il-CPR-centro-di-permanenza-per-il-rimpatrio-di-torino-gia-c-i-e/>> accessed 3 June 2023; Gepso and Ordine dei medici chirurghi e degli odontoiatri della Provincia di Torino, ‘Protocollo d'intesa’ (Torino 14 February 2021) <[https://omceo-to.it/wp-content/uploads/2021/02/PROTOCOLLO DI INTESA FIRMATO 24.02.2021 wtmk.pdf](https://omceo-to.it/wp-content/uploads/2021/02/PROTOCOLLO%20DI%20INTESA%20FIRMATO%2024.02.2021%20wtmk.pdf)> accessed 3 June 2023.

¹³⁵⁰ Prefetto della Provincia di Torino, ‘Prot. n. 24952’ (Torino 10 February 2022) <[http://www.prefettura.it/torino/contenuti/Procedura aperta affidamento gestione centro di permanenza per i rimpatri c.p.r. di torino cig 8886364b8c-12954983.htm](http://www.prefettura.it/torino/contenuti/Procedura%20aperta%20affidamento%20gestione%20centro%20di%20permanenza%20per%20i%20rimpatri%20c.p.r.%20di%20torino%20cig%208886364b8c-12954983.htm)> available under ‘decreto di aggiudicazione’ accessed 3 June 2023.

¹³⁵¹ ibid; NO CPR TORINO, *Che cos'è un CPR* (2021) 9 <<https://noCPRtorino.noblogs.org/post/2021/11/26/opuscolo-che-cos-e-un-CPR/>> accessed 3 June 2023.

The facility consists of a factory-like structure that is divided into 12 separate sleeping areas, with high iron bars surrounding the outdoor areas as well. Each area can be accessed through a small walking courtyard that is topped by a dense metal mesh. Such a perimeter around the entrance of the sleeping rooms has the effect of transforming the courtyard into a cage, in disregard of the human dignity of whom is staying there. The outdoor areas of two sections, which were not used on the day of the visit, were found to be completely covered in guano.¹³⁵²



Figure 12 - View of the CPR in Turin. Picture from Google earth in June 2023 (the Ospedaletto)

The immediate closure of the *Ospedaletto* was ordered back in 2021 when the National guarantor for the rights of people deprived of their personal liberty recommended it: the facility was officially used for “sanitary” confinement, more in general for isolation; it was described as being completely void of any features that could allow the monitoring and assistance of people held therein or even any communication with the rest of the area.¹³⁵³ Two people died in the *Ospedaletto* as of 2019: Hossain Faisal, 32 years old, died on 8 July 2019; Moussa Balde, 23 years old, died on 22 May 2021.

The practices of isolation implemented in the “Ospedaletto” [Little Hospital], for reasons unrelated to health needs, are carried out in a condition of complete informality, with no guarantees to safeguarding the detained person and for prolonged and indefinite periods of time. These practices also appear contrary to the right to private communication recognised to the persons detained in

¹³⁵² Garante Nazionale dei diritti delle persone private della libertà personale, *Rapporto sulla visita effettuata nel centro di permanenza per i rimpatri (CPR) di Torino il 14 giugno 2021* (12 July 2021) 12 <<https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/e276136e864d9a7d1df4042e39e5e32a.pdf>> accessed 3 June 2023. Own translation. See original: ‘Il settore è costituito da un corpo fabbrica suddiviso in 12 locali di pernottamento separati anche nell’area esterna da alte inferriate. Si accede ai singoli locali attraversando un piccolo cortile di passeggio sovrastato da una fitta rete metallica. Una simile perimetrazione dell’area antistante l’ingresso della camera ha l’effetto di trasformare il cortile in una gabbia non rispettosa della dignità umana di chi vi è alloggiato. Le aree esterne di due settori, non utilizzate nel giorno della visita, risultavano completamente imbrattate di guano’.

¹³⁵³ ibid 11-15.

the Centre, as outlined in the Charter of rights and duties of the foreigner that is attached to the *CIE* Regulations.¹³⁵⁴

In addition to being inadequate as a healthcare monitoring environment, the practice of using it to house individuals with psychic disorders qualifies it as a place of segregation according to an unacceptable logic recalling that of psychiatric hospitals (*inaccettabile logica manicomiale*) that only meets management needs in a harmful way to the dignity of the individual. The recent tragic event concerning the suicide of the Guinean citizen [Moussa Balde], the serious issues raised in previous reports, the failure to consider the recommendations made in this regard and the continued systematic use in a context of complete informality and without the necessary guarantees concerning isolation, compel the Guaranteeing authority to adopt a very clear position regarding the sector called “Ospedaletto” of the *CPR* of Turin: the National Ombudsman believes that housing individuals therein amounts to inhuman and degrading treatment and that this assessment can be shared by the ECtHR, if brought before it, thus exposing the country to the related consequences.¹³⁵⁵

Medical checks and visits were declared to be almost inexistent and the local sanitary service (*ASL*) did not conduct any check-up upon entry; subsequent assessments were to be carried out by the sanitary personnel hired by the private managing entity:¹³⁵⁶ GEPSA from 2018 until 2022 and ORS Italia Srl as of then.¹³⁵⁷ In 2021 Gepsa had agreed with the medical order of Turin to receive the *voluntary* services of sanitary personnel within the facility.¹³⁵⁸

The 2022 adjudication decree (*decreto aggiudicazione*) agreed with the Prefect saw Ors Italia Srl adjudicating the tender at the following prices net of the offered reduction of the 11% (*ai seguenti prezzi di aggiudicazione al netto del ribasso offerto dell'11%*): service pro die pro capite of 37.976 euros; clothing kit of 133.50 euros.¹³⁵⁹

Food, the catering of which was assigned to Sodexo at least in the years 2018-2019, was reportedly distributed cold and spoiled; psychiatric drugs were largely used and even said to be hidden into food

¹³⁵⁴ *ibid* 14. Own translation. See original: ‘Le prassi di isolamento messe in atto nell’“Ospedaletto”, per ragioni estranee ad esigenze di carattere sanitario, si svolgono quindi in una condizione di completa informalità, senza garanzie a tutela della persona trattenuta e per periodi di tempo prolungati e indefiniti. Queste appaiono peraltro in contrasto con la libertà di colloquio riconosciuta alle persone trattenute all’interno del Centro nella Carta dei diritti e dei doveri dello straniero allegata al già citato Regolamento unico Cie’.

¹³⁵⁵ *ibid* 15. Own translation. See original: ‘Oltre a essere inadeguato quale ambiente di osservazione sanitaria, la prassi di utilizzo per l'alloggiamento di persone affette da disturbo psichico lo connota come luogo di segregazione secondo un'inaccettabile logica manicomiale rispondente unicamente a esigenze di gestione lesive della dignità della persona. Il recente evento tragico relativo al suicidio del cittadino guineano [Moussa Balde], le gravi criticità sollevate sull'area in tutti i precedenti Rapporti, la mancata considerazione delle raccomandazioni espresse in merito e il suo perdurante sistematico utilizzo in un quadro di completa informalità e senza le necessarie garanzie in tema di isolamento impongono all'Autorità di garanzia l'adozione di una posizione molto netta riguardo al settore “Ospedaletto”: il Garante nazionale ritiene che l'alloggiamento all'interno dell'area “Ospedaletto” del CPR di Torino configuri un trattamento inumano e degradante e che tale valutazione possa essere condivisa dalla Corte Edu, qualora adita, esponendo così il Paese alle relative conseguenze’.

¹³⁵⁶ NO CPR TORINO, *Che cos'è un CPR* (2021) 10 <<https://noCPRtorino.noblogs.org/post/2021/11/26/opuscolo-che-cos-e-un-cpr/>> accessed 3 June 2023.

¹³⁵⁷ Prefetto della Provincia di Torino, ‘Prot. n. 24952’ (Torino 10 February 2022) <http://www.prefettura.it/torino/contenuti/Procedura_aperta_affidamento_gestione_centro_di_permanenza_per_i_rimpatri_c.p.r._di_torino_cig_8886364b8c-12954983.htm> available under ‘decreto di aggiudicazione’ accessed 3 June 2023; ‘ORS Italia Srl è il nuovo gestore del CPR di Torino’ (NO CPR TORINO, 18 February 2022) <<https://noCPRtorino.noblogs.org/post/2022/02/18/ors-italia-srl-e-il-nuovo-gestore-del-cpr-di-torino/>> accessed 3 June 2023.

¹³⁵⁸ Gepsa and Ordine dei medici chirurghi e degli odontoiatri della Provincia di Torino, ‘Protocollo d'intesa’ (Torino 14 February 2021) <https://omceo-to.it/wp-content/uploads/2021/02/PROTOCOLLO_DI_INTESA_FIRMATO_24.02.2021_wtmk.pdf> accessed 3 June 2023.

¹³⁵⁹ *ibid*.

itself.¹³⁶⁰ A 2023 report by *Altraeconomia* on the use of psychiatric drugs in administrative detention facilities all over the state in 2021 reported that the cost sustained by the managing corporation in Turin for psychiatric drugs reached the 44% of the total sanitary expenses.¹³⁶¹ Communication with the outside was null: mobiles, although then legally allowed in detention facilities, were seized upon arrival as of 2020 and the only means to make a phone call were call boxes installed in the areas, their use restricted; consultation of one's mobile's address book was furthermore not ensured.¹³⁶² The banality of such cruelty is shocking and so is the violence that occurred daily, in a space inherently coercive that has been described as nothing but cages.

Protests in administrative detention facilities have been ongoing over the years. The *CPR* in Turin has been no exception: demonstrations took place even before its very opening, as of 21 January 1999, and continued in the same year, in 2005, 2006, 2008, 2014, 2015, 2020.¹³⁶³ Most recently, the *CPR* in Turin saw revolts that have rendered the facilities unusable. In early February 2023, the *CPR* had five areas accessible, for the red area had been closed due to earlier protests.¹³⁶⁴

(...) [A] detained person reports: «The other day, they set fire to the area, not out of love, passion, or for fun. They set fire to the area because there was a boy who was feeling ill, and they didn't want to take him to the hospital. They had to do what they did to send him to the hospital. Then, in the end, they took him to the hospital, and after that, they entered back and beat everyone up».¹³⁶⁵

Between 4 and 5 February 2023 a first uprising took place and areas were partially set on fire, to the extent that on 6 February two thirds of the centre were unemployable.¹³⁶⁶ People held therein were at

¹³⁶⁰ NO CPR TORINO, *Che cos'è un CPR* (2021) 10-11 <<https://noCPRtorino.noblogs.org/post/2021/11/26/opuscolo-che-cose-un-CPR/>> accessed 3 June 2023.

¹³⁶¹ Luca Rondi and Lorenzo Figoni, 'Rinchiusi e sedati: l'abuso quotidiano di psicofarmaci nei CPR italiani' (*Altraeconomia* 1 April 2023) <<https://altreconomia.it/rinchiusi-e-sedati-labuso-quotidiano-di-psicofarmaci-nei-CPR-italiani/>> accessed 3 June 2023.

¹³⁶² NO CPR TORINO, *Che cos'è un CPR* (2021) 10-11 <<https://noCPRtorino.noblogs.org/post/2021/11/26/opuscolo-che-cose-un-CPR/>> accessed 3 June 2023.

¹³⁶³ 'Il CPR di Torino e il corteo nazionale del primo luglio' (napoli MONITOR 26 June 2023) <<https://napolimonitor.it/il-CPR-di-torino-e-il-corteo-nazionale-del-primo-luglio/>> accessed 10 October 2024.

¹³⁶⁴ NO CPR TORINO, *I CPR si chiudono con il fuoco* (2 June 2023) 20-27 <<https://noCPRtorino.noblogs.org/files/2023/06/I-CPR-SI-CHIUDONO-COL-FUOCO-pdf.pdf>> accessed 3 June 2023. See also 'Migranti: tensioni al CPR di Torino, fiamme nell'area rossa. Forze ordine sedano tentativo rivolta. Ospiti in infermeria' (ANSA 10 September 2021) <<https://www.ansa.it/piemonte/notizie/2021/09/10/migranti-tensioni-al-CPR-di-torino-fiamme-nellarea-rossa-6f5a8097-c22a-4052-91cb-c1c9e744f806.html>> accessed 3 June 2023.

¹³⁶⁵ M.C., "'Come in un campo di concentramento': le testimonianze dei reclusi nel CPR di Torino' (*L'Indipendente* 20 May 2023) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjGrcKLqKn_AhX4RvEDHey7CL8QFnoECB8QAQ&url=https%3A%2F%2Fwww.lindipendente.online%2F2023%2F05%2F20%2Fcome-in-un-campo-di-concentramento-le-testimonianze-dei-reclusi-nel-CPR-di-torino%2F%3Fpdf%3D78286&usg=AOvVaw10EVseEBg0A6TQMkUdS6gG> accessed 3 June 2023. Own translation. See original: 'In un'altra, risalente al medesimo periodo, un'ospite riferisce: «L'altro giorno hanno bruciato l'area non per amore, per passione o per divertimento. Hanno bruciato l'area perché c'era una ragazzo che stava male e non lo volevano portare in ospedale. Loro hanno dovuto fare quello che hanno fatto per mandarlo in ospedale. Poi alla fine lo hanno portato in ospedale e dopo sono entrati e hanno massacrato di botte tutti quanti»'.

¹³⁶⁶ For a more detailed overview of the protests consult: NO CPR TORINO, *I CPR si chiudono con il fuoco* (2 June 2023) 20-27 <<https://noCPRtorino.noblogs.org/files/2023/06/I-CPR-SI-CHIUDONO-COL-FUOCO-pdf.pdf>> accessed 3 June 2023. See also: 'Proteste al CPR di Torino: <<Condizioni ignobili e abusi della polizia sulle persone trattenute>>. Abusi giornalieri dietro le mura dei centri di detenzione' (*Melting Pot Europa* 1 February 2023) <<https://www.meltingpot.org/2023/02/proteste-al-CPR-di-torino-condizioni-ignobili-e-abusi-della-polizia-sulle-persone-trattenute/>> accessed 3 June 2023; Gioele Urso, 'Torino, il CPR cade a pezzi: dopo le rivolte trasferite

first detained in secluded areas and subsequently moved towards other lagers all over the state, released upon receipt of expulsion orders or directly repatriated.¹³⁶⁷

On the evening of Saturday 4 February, a revolt broke out inside the CPR in Corso Brunelleschi, which was harshly suppressed by riot police and tear gas. Three areas were involved and a fire broke out in the canteens. The protest started due to the horrific conditions of detention and the forms of torture that the managing entity, ORS Italia, with the support of the *questura*, implement daily (...). The allies (*i solidali*) who went to the walls of the CPR on the evening of Saturday 4 February could hear the screams of protesting people, the smell of tear gas from the riot police and the smokes from the fire (...). Someone from inside indeed told us that three people were brought to the hospital and that violent beatings were carried out to repress the revolt. Some people were left on the ground, injured, without receiving any assistance. With the intent to not leave those inside alone, in the late afternoon of Sunday 5 February, a group of allies gathered in the green area in Corso Brunelleschi and set up a mobile protest in solidarity with the detainees and the rioters. During this time, some people climbed onto the roof of the White area while shouting for freedom. The *battiture* alternated with the cries of the protest. Numerous fires were set, forcing the firefighters to enter the facility.¹³⁶⁸

On 20 February, after the remaining persons had gone on a hunger strike and further protests were triggered by the beating of a detainee, the last accessible part of the facility was also set on fire.¹³⁶⁹ The day after, from a capacity of 144 detainees, the centre counted only 7 spots remaining in one room of the blue area.¹³⁷⁰

79 persone. Grimaldi: "Situazione inumana" (*Torino Today* 9 February 2023) <<https://www.torinotoday.it/politica/CPR-corso-brunelleschi-danni-dopo-incendi-grimaldi.html>> accessed 3 June 2023.

¹³⁶⁷ NO CPR TORINO, *I CPR si chiudono con il fuoco* (2 June 2023) 20-27 <<https://noCPRTorino.noblogs.org/files/2023/06/I-CPR-SI-CHIUDONO-COL-FUOCO-pdf.pdf>> accessed 3 June 2023.

¹³⁶⁸ *solidarieta.prigionieri.torino* (*Instagram* 6 February 2023) <<https://www.instagram.com/p/CoUivQtJrV/>> accessed 10 October 2024. Own translation. See original: 'Nella serata di sabato 4 Febbraio è scoppiata una rivolta all'interno del CPR di corso Brunelleschi duramente sedata con celere e gas lacrimogeni. Sono state 3 le aree coinvolte e nelle mense è partito un incendio. La protesta è partita per via delle orrende condizioni di detenzione e delle forme di tortura che l'ente gestore ORS Italia, con il sostegno della questura, attuano giornalmente (...). I solidali che nella serata di sabato 4 sono andati sotto le mura del CPR, hanno potuto sentire le urla delle persone in protesta, l'odore dei gas lacrimogeni della celere e dei fumi dell'incendio (...). Qualcuno da dentro infatti ci ha raccontato di 3 persone trasferite in ospedale e di violenti pestaggi atti a reprimere la rivolta. Alcune persone sono rimaste a terra ferite senza soccorso. Per non lasciare solo chi è dentro, nel tardo pomeriggio di domenica 5 Febbraio un gruppo di solidali si è trovato nel prato di Corso Brunelleschi dando vita a un presidio mobile in solidarietà con i reclusi e con i rivoltosi. Durante questo momento alcune persone sono salite sul tetto dell'area Bianca al grido di libertà. Le battiture si sono alternate alle urla di protesta. Numerosi fuochi sono stati accesi costringendo i vigili del fuoco ad entrare nella struttura'.

¹³⁶⁹ *ibid.*

¹³⁷⁰ *ibid.*

In early March, the Prefecture chose to close the facility to allow possible renovation for a foreseen reopening after the summer of 2023.¹³⁷¹ Meanwhile, on 13 March 2023 the municipality of Turin approved a proposal for the definitive stop of the use of the facilities of the CPR.¹³⁷²

The closing of the CPR of Turin however does not mark its definitive dismantling nor stops the perpetuation of securitisation and structural violence it embodied. A new perspective of struggle begins from here: the detainees set on fire their cage and as a result the CPR was emptied but this will not prevent this detention facility from resuming its function sooner or later. The prefecture, with the approval of the ministry of interior, suspended Ors as the managing entity. Ors is a giant specialised in the immigration business, specifically created by those who intended to profit on public money from the plight of migrant people, a business that politicians and institutions have skilfully fed. Nevertheless, today is an important day, it is to be celebrated alongside the rebels who, fuelled by anger at the inhumane conditions they were subjected to, forced the closing of the centre in Turin. The struggle does not stop. Always alongside those who fight and resist! Never again CPR, never again Lager!¹³⁷³

The movement that developed around such events attempted to aggregate the realities that had been for years already active on the territory as well as new ones. The closing of the CPR brought together groups of a wide variety, the characters of which greatly differed from one another. From formal and semi-formal associations operating in the field of migrants' protection to activist groups and collectives, self-manged social centres such as *Csoa* or parts thereof and their offshoots, civil society organisation more generally, single individuals and clusters of militants. Some of these realities already opposed the immigration regime, others focused their struggle against incarceration and state torture, and so on. During the same period, strong was civil society resistance to the prison regime and article 41bis. While the groups' structures, demands, premises and strategies differed, they seemed to attempt to bond over the common cause of opposing the CPR. Fragmentation however could be perceived during each meeting. Communications with the inside of the lager prior and during the uprisings, as well as communications with prisoners afterwards, occurred through what was referred to by a cluster of persons as 'the phone'.

¹³⁷¹ Federico Dagostino, 'CPR, tra ristrutturazione e chiusura' (*CittAgorà Periodico del Consiglio comunale di Torino* 2 March 2023) <<http://www.comune.torino.it/cittagora/altre-notizie/CPR-tra-ristrutturazione-e-chiusura.html#>> accessed 3 June 2023; Federica Cravero, 'Rivolte e incendi, ma il CPR di Torino riaprirà: dopo l'estate al via i lavori per ampliarlo' (*la Repubblica* 14 April 2023) <https://torino.repubblica.it/cronaca/2023/04/14/news/CPR_torino_chiusura_lavori_ampliamento-396116573/> accessed 3 June 2023.

¹³⁷² Federico Dagostino, "'Non riapra il CPR, le risorse per le politiche migratorie'" (*CittAgorà Periodico del Consiglio comunale di Torino* 13 March 2023) <<http://www.comune.torino.it/cittagora/altre-notizie/sala-rossa-non-riapra-il-CPR-le-risorse-per-le-politiche-migratorie.html>> accessed 3 June 2023; 'Dati statistici delle attività consiliari' (*Città di Torino* 3 June 2023) <<https://servizi.comune.torino.it/consiglio/prg/txt/Statistica.html>> accessed 3 June 2023; 'Quadro riepilogativo delle votazioni – Lunedì 13 Marzo 2023 ore 13,00' (*Città di Torino* 13 March 2023) <https://servizi.comune.torino.it/consiglio/prg/web/verbali/votazioni_riepilogo.php?c_riunione=17091> accessed 3 June 2023.

¹³⁷³ sportello_illegale (*Instagram* 3 March 2023) <<https://www.instagram.com/p/CpU8vrXNNkn/>> accessed 10 October 2024. Own translation. See original: 'La chiusura del CPR di Torino non sancisce tuttavia il suo definitivo smantellamento né arresta il perpetuarsi della securitizzazione e della violenza strutturale da questo incarnato. Da qui comincia una nuova prospettiva di lotta: i detenuti hanno dato fuoco alla loro gabbia e il CPR è stato perciò svuotato, ma ciò non impedirà che questa struttura detentiva prima o poi riprenda la sua funzione. La prefettura con l'approvazione del ministero dell'interno ha sospeso l'incarico da ente gestore ad Ors. Ors è un gigante specializzato nel business dell'immigrazione, nato appositamente da chi aveva intenzione di speculare sulla pelle delle persone migranti attraverso soldi pubblici, e che politici ed istituzioni hanno sapientemente alimentato. Ciononostante oggi è un giorno importante, da celebrare al fianco dei rivoltosi che, trasportati dalla rabbia per le condizioni disumane in cui erano costretti, hanno obbligato la chiusura del centro torinese. La lotta non si ferma. Sempre a fianco di chi lotta e resiste! Mai più CPR, mai più Lager!'.

Through the “deportation phone”, the number of which has been shouted at every protest outside the walls of Corso Brunelleschi, the voice of the detainees and their determination were able to break through the silence that permeates detention facilities and were able to keep solidarity active for what was and continued to be necessary.¹³⁷⁴

Prisoner’s recounts were shared during assemblies, on the internet and on the radio. Reflections that merged the perspective of the prisoners and that of their allies were also shared through independent pamphlets promoted by groups or single individuals.¹³⁷⁵ During meetings, the transnational element of the resistance to the immigration regime also emerged: accounts of protests of prisoners confined in lagers in other states, especially France, were also shared.

The call that strongly comes from the inside is that of breaking the wall of silence surrounding administrative detention and of making known to the outside the violence to which detainees are subjected to on a daily basis. The determination of the prisoners, who kept calling their allies outside despite the manifest attempts by the management of the CPR to isolate all communications, creates breaches in such a wall. We continue to show solidarity with the detainees and the rebels. FIRE TO THE CPRs! FREE ALL!¹³⁷⁶

Solidarity was brought to the prisoners in front of the lager on several occasions and, after meetings on how the struggle on the outside could have been modelled, periodical open assemblies self-organised. These discussed the possible strategies that could be adopted to spread the word about administrative detention and to pursue the struggle against the reopening of the CPR facilities in Turin. Strategies included the rather spontaneous organisation of working groups, sessions on specific elements of the immigration regime, the setting up of events to raise funds, nonviolent actions of contrast to entities collaborating to reopen the CPR such as phone-bombing and mailbombing,¹³⁷⁷ the organisation of a national march that took place on 1 July 2024, followed by an assembly on 2 July 2024 that expressed

¹³⁷⁴ solidarietà.prigionieri.torino (Instagram 30 May 2023) <https://www.instagram.com/p/Cs3i6U7t5_2/?img_index=1> accessed 10 October 2024. Own translation. See original: ‘Attraverso il “telefono espulsioni”, il cui numero è stato urlato ad ogni presidio sotto le mura di corso Brunelleschi, la voce dei reclusi e la loro determinazione hanno avuto modo di rompere il silenzio che avvolge le strutture detentive e di mantenere attiva la solidarietà quando e per ciò che era e continua ad essere necessario’.

¹³⁷⁵ Pamphlets (*opuscoli*) on the CPR of Turin have been shared throughout the years. See for instance: NO CPR TORINO, *Che cos’è un CPR* (2021) <<https://noCPRtorino.noblogs.org/post/2021/11/26/opuscolo-che-cose-un-cpr/>>; NO CPR TORINO, *I CPR si chiudono con il fuoco* (2 June 2023) <<https://noCPRtorino.noblogs.org/files/2023/06/I-CPR-SI-CHIUDONO-COL-FUOCO-pdf.pdf>>; 3Zeta, *Le Rivolte nel CPR di Torino* <https://gabrio.noblogs.org/files/2024/02/Rivolte_CPR_Torino_3zeta.pdf>. Previous booklets were also the object of criminal investigations. During one of the assemblies organised by the newly aggregated movement in Turin to oppose the immigration regime, the events related to the sharing of earlier pamphlets were partially recounted. This research does not delve into the matter and does not consider the unfolding of the so called ‘operazione Scintilla’. See however the pamphlet: *I cieli bruciano. Dei centri di identificazione ed espulsione e di coloro che ne permettono il funzionamento* <<https://hurriya.noblogs.org/files/2016/04/i-CIEli-Bruciano2.pdf>>. See also ‘Operazione scintilla – un testo’ (*Rivoluzione Anarchica* 18 August 2021) <<https://www.rivoluzioneanarchica.it/operazione-scintilla-un-testo/>> accessed 10 October 2024; ‘Call for Solidarity with the Imprisoned of Operazione Scintilla, Italy’ (*Squat!net* 14 February 2019) <<https://en.squat.net/2019/02/14/call-for-solidarity-with-the-imprisoned-of-operazione-scintilla-italy/>> accessed 10 October 2024.

¹³⁷⁶ solidarietà.prigionieri.torino (Instagram 6 February 2023) <https://www.instagram.com/p/CoUivQ_tjRV/> accessed 10 October 2024. Own translation. See original: ‘La richiesta che forte arriva da dentro è quella di rompere il muro di silenzio che circonda la detenzione amministrativa e fare sapere fuori da quella prigione le violenze a cui sono sottoposti quotidianamente. La determinazione dei reclusi, che hanno continuato a chiamare i solidali fuori, nonostante l’evidente tentativo da parte della gestione del CPR di isolare le comunicazioni, apre delle brecce in questo muro. Continuiamo a portare solidarietà ai reclusi e ai rivoltosi. FUOCO AI CPR! TUTTə LIBERə’.

¹³⁷⁷ See for instance: assembleanoCPRtorino, ‘L’Operosa Spa sta collaborando per riaprire il CPR di Torino’ (noCPRtorino.noblogs 23 June 2023) <<https://noCPRtorino.noblogs.org/post/2023/06/23/loperosa-spa-sta-collaborando-per-riaprire-il-cpr-di-torino/>> accessed 10 October 2024.

the desire and the intent to pursue the struggle in the following months. A recurring element discussed during the assemblies was their predominant ‘whiteness’: considerations were shared on how more people could be reached by the message that was being spread and over the fact that allies, rather than migrant persons themselves, primarily participated in these occasions. Such concerns moved the assemblies and the flyering in specific areas of the town that were regarded as somewhat intermediate and frequented by both citizens and non-citizens. However, the author noted that, especially during the assemblies that were attended by the least number of persons, the atmosphere was not always friendly towards unfamiliar faces nor individuals’ habits that could be perceived as unwelcoming in respect of a variety of religious practices seemed to be questioned.

A year after the prisoners’ uprising, a march was organised against all *CPR* on 16 March 2024.¹³⁷⁸

It has been just over a year since the riots led to the closure of the detention centre on Corso Brunelleschi but meanwhile the machinery of administrative detention has gone on, causing deaths and violence on behalf of the state, to which detained individuals have responded with protests and uprisings in many of the centres across Italy. We call this march because the fight against administrative detention and solidarity towards those who are incarcerated, or is at risk of being incarcerated, has no city, region or state borders. In Turin, as elsewhere, we cannot accept the existence of such places and of the underpinning migration management policies.¹³⁷⁹

Meanwhile however, the reality of resistance that was aggregating groups and that was performing through the self-organising assemblies, faded. A march is foreseen for 1 November 2024 against the reopening of the *CPR*, which has been undergoing renovations as of February 2024¹³⁸⁰ and is indeed likely to be reactivated in the upcoming days. The red and blue area of the facilities have been restored for a maximum capacity of 70 spots.¹³⁸¹ On 28 September 2024, the *prefettura* issued the results of the tender for the management of the *CPR*.¹³⁸² It nominated a commission to determine the entity to which

¹³⁷⁸ This also called for the freedom of Jamal, a person who had been apprehended and deported and who was described by the narrative of part of the group who organised the march as having been caught by the ‘mechanisms of state racism’ and the ‘machinery of deportations and administrative detention’. See for instance: assembleanoCPRtorino, ‘Resistere alla macchina delle espulsioni: sui fatti alla questura di Torino’ (noCPRtorino.noblogs 29 February 2024) <<https://noCPRtorino.noblogs.org/post/2024/02/29/resistere-alla-macchina-delle-espulsioni-sui-fatti-alla-questura-di-torino/>> accessed 10 October 2024; assembleanoCPRtorino, ‘Inceppare la macchina delle espulsioni: sui fatti all’aeroporto di Malpensa, Terminal 1, pista di decollo del 20 Marzo 2024’ (noCPRtorino.noblogs 21 March 2024) <<https://noCPRtorino.noblogs.org/post/2024/03/21/inceppare-la-macchina-delle-espulsioni-sui-fatti-allaeroporto-di-malpensa-terminal-1-pista-di-decollo-del-20-marzo-2024/>> accessed 10 October 2024; assembleanoCPRtorino, ‘RESISTERE ALLA MACCHINA DELLE ESPULSIONI. PARTE 2: misure cautelari per i fatti del 28 Febbraio ’24’ (noCPRtorino.noblogs 10 September 2024) <<https://noCPRtorino.noblogs.org/post/2024/09/10/36869/>> accessed 10 October 2024.

¹³⁷⁹ sportello_illegale (Instagram 1 March 2024) <<https://www.instagram.com/p/C3-BzmNNhk3/>> accessed 10 October 2024. Own translation. See original: ‘È passato poco più di un anno dalle rivolte che hanno fatto chiudere il centro di detenzione di corso Brunelleschi, ma nel frattempo la macchina della detenzione amministrativa è andata avanti, causando morti e violenze di stato, a cui le persone detenute hanno risposto con proteste e rivolte in molti centri d’Italia. Chiamiamo questo corteo perché la lotta contro la detenzione amministrativa e la solidarietà verso chi si trova reclus*, o rischia di esserlo, non ha confini di città, né di regione né di stato. A Torino come altrove non possiamo accettare l’esistenza di questi luoghi e delle politiche di gestione migratoria che li sottendono’.

¹³⁸⁰ Prefetto di Torino, ‘Prot. n. 0131523’ (9 July 2024) <https://prefettura.interno.gov.it/sites/default/files/90/2024-09/decisione_a_contrarre_CPR.pdf> accessed 21 October 2024.

¹³⁸¹ *ibid.*

¹³⁸² ‘Esito gara con procedura aperta affidamento gestione Centro di Permanenza per i Rimpatri (C.P.R.) di Torino’ (Ministero dell’Interno 28 Settembre 2024) <<https://prefettura.interno.gov.it/it/prefetture/torino/amministrazione-trasparente/bandi-gara-e-contratti/esito-gara-procedura-aperta-affidamento-gestione-centro-permanenza-i-rimpatri-CPR-torino>>

the management of the facility would be assigned among those who participated to the public bid. Three entities had presented their candidacy: EKENE Cooperativa Sociale Onlus, admitted to the bid; AZZURRA s.r.l.s., not admitted; Cooperativa Sociale SANITALIA SERVICE admitted.¹³⁸³ The tender is adjudicated on the basis of ‘the most advantageous economic offer on the basis of the relation quality/price’.¹³⁸⁴ It foresees the allocation of 8'517'432,00 euros to the winning candidate.¹³⁸⁵ Facility management is foreseen for a period of two years, from 1 November 2024 to 31 October 2026, with the possibility of an extension of two additional years from 1 November 2026 to 31 October 2027.¹³⁸⁶

At the end of October 2024, the website of the *prefettura* of Turin published a series of contracts of ordinary maintenance for the recently renovated facilities of the CPR: electrical system, heating and air conditioning, video surveillance, .¹³⁸⁷ In some of these documents, redacted by the prefecture, dated and issued by the prefect and vice prefect, the acronym CPR is declined as ‘Centro di Permanenza Rifugiati’, which could translate to refugees’ accommodation centre rather than ‘Centro di Permanenza per il Rimpatrio’, as in accommodation centre for repatriation. Given no such centre was earlier heard of and assuming the documents do refer to the only CPR present in town and about to reopen, the lately articulated acronym explicates a disturbing new meaning. Although likely to be a mistake in redaction, it is nevertheless a “mistake” issued by a public entity professionally *competent* for the management of such a mechanism. An oversight that transforms the CPR in a *Centro di Permanenza Rifugiati* symbolises the inexorable dismantling of the asylum mechanism and of international protection: a system that no longer limits itself to the institutionalisation of administrative detention as the peak of the hierarchisation of citizenship, in disregard of the inviolable personal freedom of all, but an further step in the abandonment of the already limited guarantees of refuge and protection and of the principle of *non-refoulement*. Replacing the word ‘repatriation’ with ‘refugee’ is disquieting.

The temporary closing of the lager in Turin was somewhat parallel to the issuance of the infamously called Decreto Cutro, the 2023 decree on migration that harshened policies and strengthened confining practices. This was followed by the latest measure on the transfer of unwelcomed immigrants from Italy to an extraterritorially built and managed lager in Albania. Such differing narratives, that which are promoted by resistances and that promoted by institutions, are the opposite sides of the same situation. Their actors have different resources, competences and knowledges, they recur to different means and

accessed 21 October 2024. See the tender: ‘Gara con procedura aperta affidamento gestione Centro di Permanenza per i Rimpatri (C.P.R.) di Torino’ (*Ministero dell’Interno* 2 September 2024) <<https://prefettura.interno.gov.it/it/prefetture/torino/amministrazione-trasparente/bandi-gara-e-contratti/gara-procedura-aperta-affidamento-gestione-centro-permanenza-i-rimpatri-CPR-torino>> accessed 21 October 2024.

¹³⁸³ ‘Gara europea a procedura aperta per l’affidamento dell’appalto dei servizi di gestione e funzionamento del centro di permanenza per i rimpatri (CPR) - di cui all’art. 14 del D.lgs. 25 luglio 1998, n. 286 presso la struttura di via S. Maria Mazzarello, n. 31 in Torino. CIG. B26AC829F6’ (26 September 2024) <<https://prefettura.interno.gov.it/sites/default/files/90/2024-09/avvisoammessiedesclusi.pdf>> accessed 21 October 2024.

¹³⁸⁴ Prefetto della provincial di Torino, ‘Prot. n. 174233’ <<https://prefettura.interno.gov.it/sites/default/files/90/2024-09/decreto-nomina-commissione-di-gara.pdf>> accessed 21 October 2024.

¹³⁸⁵ Prefetto di Torino, ‘Prot. n. 0131523’ (9 July 2024) <<https://prefettura.interno.gov.it/sites/default/files/90/2024-09/decisione-a-contrarre-CPR.pdf>> accessed 21 October 2024.

¹³⁸⁶ *ibid.*

¹³⁸⁷ See: Prefettura di Torino, ‘Prot. 196584/2024’ (9 October 2024) <https://prefettura.interno.gov.it/sites/default/files/90/2024-10/determina-a-contrarre_1_0.pdf> accessed 12 November 2024; Prefettura di Torino, ‘Prot. 196962/2024’ (9 October 2024) <https://prefettura.interno.gov.it/sites/default/files/90/2024-10/determina-a-contrarre_2.pdf> accessed 12 November 2024; Prefettura di Torino, ‘Prot. 196912/2024’ (14 October 2024) <https://prefettura.interno.gov.it/sites/default/files/90/2024-10/determina-a-contrarre_3.pdf> accessed 12 November 2024.

methods. Yet they both offer their version of the very same story, the very same moment in time and space from a different perspective, being poles apart, proposing models that are alternative to one another and mutually exclusive. Burn the lagers on the one hand, expand and strengthen them on the other hand. Can the closure of the *CPR* in Turin, and any other moment of such kind, set in motion a reality of resistance, [disrupting the social as well as the normative fabric](#)? Ultimately, can it [offer an alternative model to a system of hierarchisation of citizenship and its culmination into the machinery of administrative incarceration](#)? Personal freedom is an inviolable human right. At the international level, it is safeguarded by *habeas corpus* laws, by article 3 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights and article 5 of the European Convention on Human Rights. It is safeguarded by article 13 of the Italian constitution, which reads 'personal liberty is inviolable'. Yet, the machinery of segregation and deportation relentlessly devours the bodies and identities of people, accused of the administrative misdemeanour of being *sans papiers* and for this spoiled of their very humanity. Can this be resisted? And is there a right to resist this?

I will attempt here to defend three ideas: the first is that the globalization of the economy has not dissolved our capacity for political action. The second is that the actions of the most underprivileged categories are not restricted to rebellion against domination, that they can also demand rights, and cultural rights in particular, and can therefore put forward an innovative (and not merely critical) conception of society. The third is that, if it is not based upon demands for equality and solidarity, the institutional realm is ineffective or even repressive. We have to replace a logic of order and disorder with a logic of social and political action to demonstrate that, rather than having to choose between a purely defensive institutional realm and purely anti-establishment rebellions, we have to recognize and revitalize a public space that can encompass both social conflicts and the will to integrate.¹³⁸⁸

4.4 Is there a right to resist?

The current political space is confined by the state. Everything that happens is observed and judged within such borders (...). The reigning order is state-centred. The undisputed sovereignty of the State is still the criterion that draws the limits and shapes the map of the current geopolitical landscape. This has produced a separation between the internal sphere, subject to the sovereign power, and the external one, surrendered to anarchy. This fortunate dichotomy has introduced a value judgment between inside and outside, civilization and uncivilization, the ruly and the unruly, order and chaos. State sovereignty has imposed itself as the only condition for order, sole alternative to anarchy, discredited as the absence of government, as confusion that rages in the unlimited outside (...). New phenomena, like migrations, open a crack, revealing what happens outside, pushing one to move beyond that dichotomy, adopting an external perspective. Similarly, revolt situates itself beyond sovereignty, in the open that has always been left to anarchy.¹³⁸⁹

¹³⁸⁸ Alain Touraine, *Beyond Neoliberalism* (Polity Press 2001) 2-3.

¹³⁸⁹ Donatella Di Cesare, *Il tempo della rivolta* (Bollati Boringheri editore 2020). Own translation. See original: 'L'attuale spazio politico è circoscritto dai confini dello Stato. Tutto quel che accade viene osservato e giudicato entro tali confini. La modernità degli ultimi due secoli ha fatto dello Stato il mezzo indispensabile e il fine supremo di ogni politica. L'ordine che regna è statocentrico. L'indiscussa sovranità dello Stato è sempre ancora il criterio che traccia i limiti e disegna la mappa dell'attuale paesaggio geopolitico. Ciò ha prodotto una separazione tra la sfera interna, sottoposta al potere sovrano, e quella esterna, consegnata all'anarchia. Questa fortunata dicotomia ha introdotto un giudizio di valore fra dentro e fuori, civiltà e inciviltà, regola e sregolatezza, ordine e caos. La sovranità statale si è imposta come sola condizione dell'ordine, unica alternativa all'anarchia, screditata come mancanza di governo, confusione che imperversa nel fuori illimitato (...). Nuovi fenomeni, come le migrazioni, dischiudono uno squarcio, lasciano intravedere ciò che accade fuori, spingono a prendere congedo da quella dicotomia, assumendo una prospettiva esterna. In modo analogo la rivolta si situa oltre la sovranità, nell'aperto da sempre consegnato all'anarchia'.

The reflections that follow on the right of resistance are framed within the context of the social struggle. This section of the study was initially placed at the very beginning of the chapter: the enunciation of a right of resistance was in fact thought of as paving the way for discussing its operationalisation in practice, the elements and the strategies that people could hold on to in order to manifest their disagreement and their anger against the order of things and in defence of their rights. This version of the text instead flips this thought over: people do resist and groups do express their dissent from the order of things, whether or not a right to do so is recognised or codified. This is why the discussion onto a right to resist closes this chapter rather than opening it.

This subchapter titles: is there a right to resist? This may at first sound as a rhetorical question. As it was anticipated, after all people may or may not resist state oppression or the erosion of their rights regardless of whether they have a juridically conceived *right* to do so. Therefore, is it relevant? And why? The section touches upon a series of elements of the relationship between the resistance *in action*, concretely taking place through bodies and identities, through different knowledges and means in *real* life, the resistance in theory, as the conceptualisation of a right one might appeal to, and the links that both may have with positive law. The text runs along queries the author was puzzled by:

- Is a right of resistance present in the Italian constitutional text, its organisation and vision?
- Does the absence of an explicit codification in the text deny its legality?
- If legality is alleged, how is legitimacy weighted?
- Is it a right via which other rights can be safeguarded and appealed to or is it rather a condition subsumed by other rights?
- Is it a right via which *any* right can be safeguarded?
- Is it a right that programmatic dispositions and rights “in potential” can appeal to?
- Is it exercised for the purpose of preserving the system or for the purpose of dismantling it?
- Where does resistance end and revolution begin, if an end and a begin can be assumed in the first place?
- If it is a right, is it also a duty?
- Whether it is a right or whether it is a duty or both, what forms can it take?

Moreover:

- Is the right of resistance an expression of sovereignty?

And lastly:

- If it is a right, is it a citizen’s right or is it a right that can be exercised by the *human person*, all the governed, regardless of their status?
- Does the *citizen* have a right to resist *their* state or does *everyone* have a right to resist *the* state?

These questions are not addressed in any specific order. They summarise the main curiosities of the author and can hopefully intrigue the reader. To answer them, the primary reference that the study builds on is the work of the Constituent Assembly, accompanied by the reading of ‘Il diritto di resistenza’ by Luigi Ventura, introduced by Alessandro Morelli.

Reflecting on the right to resist allows for reflecting on power dynamics, a vital element of which is dissent. At a present time and place that sees the draft law no. 1236, previously no. 1660, on “public security” dispositions being discussed by the Italian Senate, it is all the more precious to remember that the idea of resisting can be proposed as anchored onto a right and to recall how this has been recognised to various degrees in the language of diverse legal systems over time. It is, moreover, no accident that this text is spontaneously using expressions like ‘remember’ and ‘recall’. While this was done instinctively, the implicit is rather evident: memory can be a mighty ally in the discussion on power and order. Angela De Benedicts writes that if, under a totalitarian power, memory (*il ricordo*) is annihilated,

so its revival becomes a weapon against oppression.¹³⁹⁰ In a world of totalising levelling, she argues, memory allows for the experience of the other and for the distancing of the absolutism of the present and of the matters of fact.¹³⁹¹

Retracing the history of said right, Ventura writes that the doctrine has been developed since the XVI century as a collective right.¹³⁹² While for a more detailed excursus the reader is invited to consult such text, a few passages are hereby touched upon as particularly propaedeutic to this discussion. In the writing of Johannes Althusius, a right to resist is elaborated. Carl J. Friedrich observes that building on Jean Calvin's work, Althusius deals to some extent with the concept of a constitutional legislation providing for the political community's basic order: this has sovereignty hinting at a democratic structure.¹³⁹³ Althusius speaks of a resistance that is 'the process by which the ephors impede the tyranny of the supreme magistrate by word and deed. And when he is incurable, or the rights (*jura*) of the associated body cannot otherwise be kept sound, well-protected, and in good condition, or the commonwealth free from evil, they depose him (...)'.¹³⁹⁴ The theory of the right to resist is then developed in the XVII century by John Locke: once those to whom the government has been handed over attack natural rights or do not protect them sufficiently, political power founded on consensus returns back to the people.¹³⁹⁵ Resistance is conceptualised as the ultimate sanction, the popular reaction that can be appealed to once the apparatus of positive law goes off because governors violate the very rights that the apparatus was made to protect.¹³⁹⁶ Indeed, when the legislative or the executive, or both, act contrary to their mandate, governments dissolve: first and foremost when the legislative acts against the trust that was accorded to it, attempting to become owner of the life, of the freedom and of the wealth of the people or attempting to be able to dispose of the property of the people with no restraints.¹³⁹⁷ Locke's development of the right consolidated the doctrine in Anglo-Saxon policy, with great influence in the north American rights declarations.¹³⁹⁸ The 1776 Declaration of Independence of the United States recites that

(...) whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. (...) But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.¹³⁹⁹

The New Hampshire's state Constitution includes a right of revolution, according to which:

Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary

¹³⁹⁰ Angela De Benedictis, Valerio Marchetti (eds), *Resistenza e diritto di resistenza* (CLUEB 2000) 15-16.

¹³⁹¹ *ibid.*

¹³⁹² Luigi Ventura, *Il diritto di resistenza* (Rubbettino 2014) 19-35.

¹³⁹³ Carl J. Friedrich, 'Preface' in Johannes Althusius, *The Politics of Johannes Althusius* (Frederick S. Carney tr, S. J. Reginald Saunders and Co. 1964) xi.

¹³⁹⁴ Johannes Althusius, *The Politics of Johannes Althusius* (Frederick S. Carney tr, S. J. Reginald Saunders and Co. 1964) 187.

¹³⁹⁵ Luigi Ventura, *Il diritto di resistenza* (Rubbettino 2014) 24-26.

¹³⁹⁶ *ibid.*

¹³⁹⁷ John Locke, 'II Trattato' in Brunella Casalini (ed), *Due trattati sul governo* (Edizioni PLUS 2007) paras 221-222.

¹³⁹⁸ Luigi Ventura, *Il diritto di resistenza* (Rubbettino 2014) 24-26.

¹³⁹⁹ United States of America, Declaration of Independence (1776).

power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.¹⁴⁰⁰

The Pennsylvania's state Constitution recognises that power is inherent in the people, who have an inalienable and indefeasible right to alter, reform or abolish their government as they may think proper.¹⁴⁰¹ The Delaware's state Constitution similarly recognises that power is inherent in the people for the due exercise of those rights essential to their welfare and, as circumstances require, to advance their happiness they may alter their Constitution of government.¹⁴⁰²

Such a stream of instances of the consolidation of the doctrine in the modern state, Ventura argues, are indicative of the fact that the alleged irreconcilability between the former and the right to resist is at least questionable, contrarily to what the influence of Kant's doctrine might have asserted over time.¹⁴⁰³ Later in the XIX century, the question of the right of resistance is no longer of great concern: on the one hand, in virtue of the increasing affirmation of the contraposition of society to the state, and on the other hand, in virtue of the process of constitutionalising of remedies against the abuse of power, the separation of powers and their subordination to the law.¹⁴⁰⁴ The illusion that had come to form that the rule of law could no longer be violated was dismantled throughout the XX century by the rise of fascist regimes and the unfolding of the first and the second world war, with the consequent revitalisation, both in theory and obviously in practice, of the resistance.¹⁴⁰⁵ In the aftermath of the second world war, the issue of the inclusion of the right to resist in each newly forming constitution in Germany, France and Italy emerged. In Germany, the right to resist can be found in the Basic Law for the Federal Republic of Germany, which established all state authority is derived from the people and all *Germans* (emphasis added) shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available (article 20). In 1949, the right to resist was also introduced in the Constitution of the German Democratic Republic, which reads that *everyone* (emphasis added) has the right and the duty to resist measures contradicting enactments of the popular representative body and every *citizen* (emphasis added) has a duty to act in accordance with the Constitution and to defend it against its enemies (article 4). In France, the right to resist was proposed in the constitutional project but rejected during the 1946 referendum.¹⁴⁰⁶

In the realm of international law, an emblematic norm one might have regard to is the preamble of the 1948 Universal Declaration of Human Rights, reading that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human right should be protected by the rule of law (...)'.¹⁴⁰⁷ On the interpretation of such a disposition, Tony Honoré asks

Would it make sense to deny someone the right to do what he is compelled to do in the sense not of being coerced but of having no other means of vindicating his fundamental interests? Does not almost everyone, if the dilemma is presented, recognize such a right? To deny it would be to assert that people may be bound indefinitely to submit to conditions of life which we and they

¹⁴⁰⁰ New Hampshire, State Constitution (1784) art 10.

¹⁴⁰¹ Pennsylvania, State Constitution (1968) art 1(2).

¹⁴⁰² Delaware, State Constitution (2021) preamble.

¹⁴⁰³ Luigi Ventura, *Il diritto di resistenza* (Rubbettino 2014) 28.

¹⁴⁰⁴ *ibid* 28-32.

¹⁴⁰⁵ *ibid* 33.

¹⁴⁰⁶ Luigi Ventura, *Il diritto di resistenza* (Rubbettino 2014) 35. On article 21 of the French constitutional project, one can also find interesting passages in the discussion of the Italian Constituent Assembly on the right to resist. See Prima Sottocommissione dell'Assemblea Costituente, 'Resoconto sommario della seduta di martedì 3 dicembre 1946' <https://legislature.camera.it/dati/Costituente/Lavori/I_Sottocommissione/sed044/sed044nc.pdf> accessed 1 October 2024.

¹⁴⁰⁷ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR) preamble.

recognize as intolerable (...). It seems to me, therefore, that in a proper case there must be a right to rebel.¹⁴⁰⁸

Differences between the right to resist and the right to rebel are not always manifest and conceptual confusion may weigh on the distinct notions of resistance and revolution. In regards to the recourse to violence, Honoré argues that, unless there exists a right to rebel under certain conditions, great part of the discussion on human rights can be dismissed as empty rhetoric; if such a right existed however, it is observed, people would at times be entitled to use violence against others, confirming the dilemma on the relation between human rights and criminal responsibility.¹⁴⁰⁹ Honoré understands the right to rebel to be the right of an individual or group to resort to violence, if necessary on a large scale to: a) secure on behalf of persons or groups regarded as exploited or oppressed a change in society's government, structure or policies; or b) resist a change in society's government, structure or policies on behalf of persons or groups who are attached to their way of life; or c) secure the right to independence on behalf of a group regarded as distinct from the society to which at present it belongs.¹⁴¹⁰

What is of particular interest is that Honoré attributes such a right to both [citizens and non-citizens](#) 'such as aliens and slaves'.¹⁴¹¹ He considers violence an inherent part of the right to rebel and recognises that such a right covered a range of acts of political violence; revolution is regarded as a type of rebellion, for besides the possibility of a peaceful revolution, the term usually indicates rebellion resulting in drastic social or political change.¹⁴¹² It pertains to a single individual as such, to an individual as a member of a group as well as to a group as such:

it may be the sum of individual rights, for example those of a number of oppressed people, such as foreign workers, who possess similar interests. In that case an individual foreign worker may have a right to rebel even though it would be unwise, perhaps even wrong, for him to exercise that right unless many others were ready to join him and there were some prospect of success. Alternatively the collective right can (...) be a right which inheres exclusively in a large number of people.¹⁴¹³

Non-citizens and foreign workers are therefore considered part of a population entitled to rebel against abuse as much as and alongside citizens. Honoré concludes that a right to rebel does exist: it is a right with no remedy, as rebellion is the final sanction for the violation of other rights: '[it] is both the last resort and the ultimate gamble'.¹⁴¹⁴

Gwilym David Blunt as well argues, while observing that human rights have become the lingua franca for cosmopolitan political thought and are tied to transnational socio-economic justice, that the right to resistance is 'a necessary part of the political conception of human rights', for 'if this were not the case, human rights would not be rights' but 'urgent interests that are held as privileges in the best circumstances' and 'a convenient discourse to express these interests and a language of protest'.¹⁴¹⁵ The right, it is thus contended by Blunt, delivers coherence to human rights 'by providing people with an ultimate remedy to human rights violations. It allows to seek justice or escape injustice'.¹⁴¹⁶

[Revolution](#) is hereby understood as a [historical reality](#) and is not delved into in this research. On the other hand, as it may be clear by now to the reader, [resistance is approached as a tool to reinstate](#)

¹⁴⁰⁸ Tony Honoré, 'The Right to Rebel' (1988) 8(1) Oxford Journal of Legal Studies 34.

¹⁴⁰⁹ *ibid.*

¹⁴¹⁰ *ibid.*

¹⁴¹¹ *ibid.*

¹⁴¹² *ibid.*

¹⁴¹³ *ibid.*

¹⁴¹⁴ *ibid.*

¹⁴¹⁵ Gwilym David Blunt, *Global Poverty, Injustice, and Resistance* (1st edn, Cambridge University Press 2019) 43, 70.

¹⁴¹⁶ *ibid.*

constitutional principles that may have been violated by the government itself, whether directly or indirectly. Resistance, regardless of its codifications, is understood as immanent to the existing apparatus.¹⁴¹⁷ It *lives* in the system, in those institutional mechanisms or popular initiatives compatible with and rather foreseen by the constitutional project.¹⁴¹⁸ Let us explore this.

In Italy, the right to resist was discussed by the Constituent Assembly in the aftermath of the second world war. Starting from Ventura's retraced negotiations, the subsequent paragraphs offer a brief overview over the way the matter was articulated at the time. Not all representatives' instances are reported. Reading the drafters' intentions however and observing the unfolding of the reflections around the right to resist within the framework of the constitutional project is propaedeutic to discussing whether such a right is embedded in today's system and in the constitutional vision, what its exercise might entail, by whom it might be exercised and what its evolution might be.

On 3 December 1946, the then article 3 of the constitutional project was approached by the First Sub-Commission as presented by Dossetti, reading: 'individual and collective resistance to the actions of public powers, violating the fundamental freedoms and the rights guaranteed in the Constitution, is a right and a duty of every citizen'.¹⁴¹⁹ The statement was linked to that on the sovereignty of the state and negotiations concerned both notions.

Moro argued that the juridical and political restraints of state sovereignty were to be specified within the text of the constitution. After twenty years of the arbitrary exercise of power of the executive in fact, that had led to the creation of a doctrine for which state sovereignty coincided with absolute power and abuse (*assoluta potenza, o prepotenza*), the constitution had to assert that state power is a juridical one and that the state rules within the constitutional boundaries and its conforming laws. Such a specification was, he continued, all the more necessary to the formulation of article 3 by Dossetti, which read that resisting the state was up to the individual and to the collectivity if the state, taking advantage of its sovereignty, attempted to maim the rights endorsed in the legal framework. Solely once the sovereignty of the state is framed within the juridical system, there is the possibility to establish in the constitution the right of resisting the arbitrariness of the state.

After a historical experience like the one lived, [Moro] does not believe it possible to avoid to clearly define the following concepts: the sovereignty of the State within the framework of the law; the organs of the people or delegated by the people for the exercise of sovereignty; the right and duty of resistance, by the individual and the collectivity, to the arbitrary actions of the State.¹⁴²⁰

Togliatti aligned with such reflections and observed that in a constitution emerging after fascism, the assertion of the right to resist shall not be rejected as long as the text affirmed that sovereignty is held by the people. Caristia on the other hand did not regard the insertion of the right to resist as appropriate, for in the constitution there are several means to legally resist abuses. He further argued that, as an individual right, the nature of the right to resist was difficult to define while, as a collective right, what was being discussed coincided with a 'movement called revolution' that, if taking over, did not need to

¹⁴¹⁷ Alessandro Morelli, 'Introduzione. Il diritto-dovere costituzionale di resistenza e la resistenza del diritto costituzionale' in Luigi Ventura, *Il diritto di resistenza* (Rubbettino 2014) 7.

¹⁴¹⁸ *ibid.*

¹⁴¹⁹ Prima Sottocommissione dell'Assemblea Costituente, 'Resoconto sommario della seduta di martedì 3 dicembre 1946' <https://legislature.camera.it/_dati/Costituente/Lavori/I_Sottocommissione/sed044/sed044nc.pdf> accessed 1 October 2024. Own translation, see original: 'La resistenza individuale e collettiva agli atti dei pubblici poteri, che violino le libertà fondamentali e i diritti garantiti dalla presente Costituzione, è diritto e dovere di ogni cittadino'.

¹⁴²⁰ *ibid.* Own translation. See original: 'Dopo una esperienza storica come quella vissuta, [Moro] non crede si possa fare a meno di fissare con la massima chiarezza i seguenti concetti: la sovranità dello Stato nell'ambito della legge; organi del popolo o delegati dal popolo all'esercizio della sovranità; diritto e dovere di resistenza del singolo e della collettività agli atti arbitrari dello Stato'.

appeal to the constitution. Marchesi asked which state organ would be tasked with guaranteeing the right to resist, which should have had a juridical and not a revolutionary foundation: any insurrection against the powers of the state in fact would have no need to appeal to an article of the constitution. Cevelotto replied that being that a negotiation within the framework of the constitution, the assertion on the right to resist was to be regarded as a directive (*direttiva*) and the concrete regulation of the principle competed then to criminal law. Togliatti further observed that voting against an articulation of the right of resistance could appear as wilfully precluding the possibility to resist tyranny. The discussion elaborated onto whether resistance was to be framed solely as a right or also as a duty: in the latter case, Moro argued, it could be understood not only as a sanctionable duty but as a moral one. He believed that the norm had a precise and clear legal meaning, providing the legislator with the indication of not regarding as crimes acts that may in appearance seem unlawful but had instead the 'noble objective of guaranteeing human freedom'. The article was approved with ten votes in favour, two absentees and one contrary.

The article moved on to the discussion before the Assembly as article 50, later article 54 of the constitutional text void of the reference to resistance. Article 50 read: 'every citizen has the duty to be faithful to the Republic, to respect the Constitution and the laws, to fulfil the functions entrusted to them with discipline and honour. When public powers violate fundamental freedoms and rights guaranteed by the Constitution, resistance to oppression is the right and the duty of the citizen'. The resulting article 54 no longer has any reference to resistance.

On 19 May 1947, the Assembly generally began the discussion on title IV of the constitution on political relations, where article 50 had been inserted. Rodi argued that the right to resist could not be established within the framework of the constitution.¹⁴²¹ He recognised that a right-duty did exist but moving from theory to practice could entail risks, especially considering that a rebellion must always be organised, likely by a political entity. Establishing the right of resistance in the constitution would be like offering a weapon to any such entity, at any moment in political history, to allow a fraction of the people to rebel against the government. Resistance to oppression, in his view, is a historical fact that spontaneously emerges from the unfolding of the events.

Caristia agreed on the possibility to recognise a right to resist but doubted that this could effectively be regulated. He argued that the constitution expressed itself in vague terms, as it could not be otherwise, and it was therefore difficult to understand how a right to resist, whether individual or collective, could be rigorously established.

The day after, the Assembly continued.¹⁴²² Preziosi took the floor on the right of resistance, contesting what had been said earlier. He argued that no right to a revolution was being proposed and rather that article 50 was to the defence of citizens' freedom and of freedom itself. He added that the right of the citizen to defend their freedom becomes a duty towards the collectivity once it is under the aggression of a power that was democratically created and yet became a weapon of dictatorship. The norm is not a recognition of a revolutionary right: it is rather merely the right to defend of once' person, house, family, one's way of thinking and speaking, and the duty to defend the freedoms of their peers and the freedom of the country (*proprio paese*).

This said, how can it be affirmed that article 50 is the recognition of a revolutionary right? Rather, isn't this the greatest statement (*la più bella affermazione*) of our Constitution that offers to the citizen the possibility to defend their freedom, the freedom of their country, the freedom

¹⁴²¹ Assemblea Costituente, 'Seduta di lunedì 19 maggio 1947' 4054 <<https://legislature.camera.it/dati/costituente/lavori/Assemblea/sed126/sed126nc.pdf>> accessed 14 October 2024.

¹⁴²² Assemblea Costituente, 'Seduta di martedì 20 maggio 1947' <<https://legislature.camera.it/dati/costituente/lavori/Assemblea/sed127/sed127nc.pdf>> accessed 14 October 2024.

of their democracy? It is a defence the importance of which shall not be underestimated and it must remain in our Constitution. This configuration of rights and duties on the part of the citizen is a model for the Constitutions of other states; it is, in any case, a model of how we, in a condition of freedom, want to defend our new democracy.¹⁴²³

Di Giovanni¹⁴²⁴ argued that popular sovereignty could be exercised through, *inter alia*, the right-duty of citizens to rise up against the attempts of the constituted powers to violate constitutional fundamental principles. Recognising the right-duty in question upholds the principle of legitimate collective defence and confirms the individual right to legitimate defence, established by law and even earlier by the right of nature. The constitution, he argued, posed the conditions and the limit to the exercise of such a right-duty and there would therefore be no abuse of such a norm.

Azzi¹⁴²⁵ argued that the right and the duty to rebellion, to resistance and to revolution cannot be regulated by law. It is, in his view, an expression of the collectivity, incoercible and spontaneous, that no law can regulate.

Sullo¹⁴²⁶ argued for the cancellation of the paragraph of article 50 on the right to resist. He understood the moral necessity to 'repeat to the Italians' that one must rebel against tyranny. He found however that there was no space for the pedagogic value of such a norm in the constitutional text. Moreover, he wondered who would be capable of assessing when a violation or oppression fell within the scope of the article. If the Assembly found it necessary to speak of a right to resist, this should have been done in relation to the constitutional court. He argued that it was only natural that the people had to defend what was constitutionally established and authorised, for this is implied in the obedience to the authority of the Republic.

Giolitti¹⁴²⁷ argued that the appeal to the conscience of the citizen that permeated the spirit of the whole section of the fourth title of the constitution and that formed the solid foundation, the root of the ultimate and extreme guarantee of democracy, was the right of resistance in article 50. Such an appeal was necessary to preserve the deeply democratic meaning of the constitution, especially considering this was being drafted after such recent historical experiences. Articulating the citizen's right to resist oppression within the constitution was necessary. This had, he continued, an educational character and a juridical character.

I believe that establishing such a right in the Constitution means consecrating the legality of an act that could otherwise appear as a fracture in the validity of the Constitution, which instead somehow ensures, through such a norm, its own life when faced with a violation triggering the legitimate resistance. And can we forget, dear colleagues, that the free democratic institutions that we are establishing in this new Constitution emerge from such a very act of resistance against oppression? This Constitution, this democratic republic that we are erecting are founded on the marvellous resistance through which the Italian people opposed the aggressor. We owe it to the fight of the people, to the sacrifice of its greatest children, today's possibility of democratically discussing, defining, refining our free institutions. By asserting in the Constitution the right to resist oppression, we consecrate the birth, deeply national and popular, of the Italian democratic Republic.¹⁴²⁸

¹⁴²³ *ibid* 4071. Own translation, see original.

¹⁴²⁴ *ibid* 4071.

¹⁴²⁵ *ibid* 4075.

¹⁴²⁶ *ibid* 4079.

¹⁴²⁷ *ibid* 4098.

¹⁴²⁸ *ibid* 4102-4102. Own translation, see original.

Taking the floor, Terranova¹⁴²⁹ argued the responsibility to approve a codification of the right to resist was extremely serious. He asked what type of resistance the norm referred to. Referring to the work of Vittorio Emanuele Orlando, he listed three types of resistance from a political and juridical dimension: individual resistance, legal collective resistance and revolutionary collective resistance.¹⁴³⁰ He wondered whether the articulation of the norm as in article 50 referred to the legal or the insurrectional model. A legal resistance was, in his view, already established within the guarantee of the constitutional court and article 50 entailed the constant possibility of a revolution: 'it is in fact evident that with the approval of such article, any uprising (*sommossa*) could not only be licit but legitimate (*non solo "lecita" ma anche "legittima"*). The project of speaking within the constitutional text of a right to resist could not be guaranteed a practical realisation on the part of the Republic.

Days ago, article 31 on the right to work was adopted. It is a brave statement of great social reach. But if and when such a right will not be realising (...), if and when masses of unemployed will knock at state's doors to have a job, to enjoy of the actual exercise of a clearly recognised right, then one could speak of a right that, although enshrined in the Constitution, could be regarded as violated; then, one could say that there is the oppression at the hands of a class or of an oligarchy, the resistance would be legitimate and therefore the revolution. Because, dear colleagues, resistance in the codification and the spirit of the text of article 50 means precisely revolution, a revolution that can have, in the best of intentions, the purpose of removing obstacles that hinder the realisation of the violated rights and liberties; but when it explodes, there is no longer a precise end, because one can perhaps know how and why revolutions begin but can never know how they end.¹⁴³¹

He further contended that an order based on the catholic morality and on the social Christian principles could not recognise to individuals the freedom of violent opposition to public powers. Revolt, he argued, can never be codified and cannot be a matter of the constitution: 'revolts belong to the accident of the social life, in the twists, although logic and at times marvellous, of history. Let us cancel from the text of this project any spark of hatred, any ground for the political and social fight'.¹⁴³²

On 21 May 1947, the Assembly continued the discussion on the general disposition of that section of the constitutional text. Condorelli spoke of the right to resist as a technical error compromising the constitution, an error that was politically dangerous.¹⁴³³ He noted that by referring to public powers, the article understood the right of resistance as one that could be exercised against any violation from the executive, the legislative and the judiciary, and therefore against the law itself. Condorelli mentioned the infinite hypothesis in which resistances can take place, individually or collectively, actively or passively, at the hands of 'the person or the citizen' (*che può fare l'individuo o il cittadino*). The law, he argued, has a mandatory character:

[i]t is extremely contradictory and even anarchic to think that individuals, singularly or associated among themselves beyond the established organ of the constituted juridical order to unitarily express the will of the people... that these individuals amorphously reunited could destroy the compulsory character of the law (...). We must recognise that this right to resist, which is expressed through insurrections, coups d'etat, revolutions, is not a right but the very historical reality (...). These are facts that are logically antecedent to the law (...). This is history

¹⁴²⁹ *ibid* 4102.

¹⁴³⁰ See Vittorio Emanuele Orlando, *Della resistenza politica individuale e collettiva* (Ermann Loescher 1885).

¹⁴³¹ Assemblea Costituente, 'Seduta di martedì 20 maggio 1947' 4103 <<https://legislature.camera.it/dati/costituente/lavori/Assemblea/sed127/sed127nc.pdf>> accessed 14 October 2024. Own translation, see original.

¹⁴³² *ibid* 4104. Own translation, see original.

¹⁴³³ Assemblea Costituente, 'Seduta di mercoledì 21 maggio 1947' 4119 <<https://legislature.camera.it/dati/costituente/lavori/Assemblea/sed128/sed128nc.pdf>> accessed 14 October 2024.

that unfolds, witnessed by the powerless legislator. The legislator, if they want to regulate it, can only commit ingenuities or mistakes.¹⁴³⁴

Merlin Umberto criticised the argument brought forward by Terranova that placed in contraposition the right to resist and the catholic doctrine and attempted to persuade Condorelli and those who had spoken against this section of article 50. He argued:

is there anyone, among catholic moralists, who had something to say about the partisan movement? Did anyone not recognise instead the legitimacy of such a movement against a tyrannic regime, which attempted to impose itself through foreign weapons and violence, which wanted to govern not in the interest of the country (*non per la salvezza del Paese*) but for the interest of a man? No one ever doubted how licit such movement was. And therefore, dear Condorelli, please let us not indulge on all that record of cases listed against article 50! Such cases do not regard article 50 (...). With this article we asserted instead the legitimate right of defence against public authority's acts that violate the fundamental freedoms of the citizen, proposing a hypothesis that is analogous to that of the 1943, when the tyrant exceeded all boundaries and manifested, through facts, the intention to spoil every citizen of their every liberty and right.¹⁴³⁵

He concluded saying that if any revolution was to explode, the trigger would not be article 50. The article would instead be a warning to the public powers.

On 23 May 1947, the Assembly opened the discussion on article 50 with an amendment by Mastino.¹⁴³⁶ He spoke of the 'audacity' to assert a right to resist under constitutional law and proposed an articulation of the text that no longer had an explicit reference to resistance but that, in his understanding, affirmed the right to *political* resistance in a more precise and statutory conceptualisation: every citizen has the duty to defend fundamental freedoms, constitutional rights and the apparatus of the state from any violation. Resistance was, he argued, not a right but a duty imposed in the interest of the collectivity. The rearticulation of the idea aimed at escaping the possibility that the Republic was subverted, under the pretext of the violation of rights and freedoms.

Mortati proposed a different amendment: it is the right and the duty of citizens, individually and collectively, to exercise the resistance that is necessary to curb the violation of individual rights and democratic freedoms at the hands of the public authorities. Such an articulation, he argued, distinguished between the individual and collective character of resistance and highlighted the element of necessity that the right must meet to be considered legitimate.

Colitto proposed the abolishment of the paragraph on resistance. He was however open to maintaining the norm if his perplexities were answered. He wondered, first of all, what article 50 meant by 'public powers'. While he convened that executive power was certainly included therein, he questioned what a right to resist entailed if exercised against the judiciary or the legislative. What does it mean, he asked, that the citizen has not only the right but also the duty to resist violations of constitutional guarantees, when it comes to such other powers? Faced with sentencing, there is the burden (*gravami*) established by law; faced with the law, he argues, there is only obedience. A *lex iniusta*, he argued, is not law and therefore no one can be bound by an unjust disposition. A citizen who disobeys the legitimately issued law shall instead be considered a rebel and be treated as such. What does it mean, he questioned, that the citizen has a right to resist the law? Can the citizen judge the legislator and act accordingly? And

¹⁴³⁴ *ibid* 4121. Own translation, see original.

¹⁴³⁵ *ibid* 4130. Own translation, see original.

¹⁴³⁶ Assemblea Costituente, 'Seduta di venerdì 23 maggio 1947' <<https://legislature.camera.it/dati/costituente/lavori/Assemblea/sed130/sed130nc.pdf>> accessed 14 October 2024.

moreover, how is such a right to be interpreted in relation to those rights that are codified as being in potential (*diritti potenziali*)?

Let us think about the right to work recognised by the Republic to all citizens; about the pledge of the Republic to ensure to the family the necessary economic conditions for its formation and development; about the right recognised to those who are unable to work, in conditions of indigency, to be guaranteed with alimony and social assistance. In case the Republic did not have the possibility to hold on to such commitments (...) the citizen will have the right and the duty, as the norm foresees, to rise up against the public powers?¹⁴³⁷

Colitto argued that, in virtue of such perplexities, the norm that was being discussed legitimised the right to rebel (*consacri il diritto alla ribellione*) and asked therefore for it to be eliminated. He furthermore questioned whether at all one could speak of a right to resist from a purely legal perspective: the right to resist in fact, he argued, was nothing but the expression of another freedom under attack. He contended that recognising that there was no right to resist would be a success for the Italian juridical landscape (*pensiero giuridico italiano*). The report of the Assembly noted that applauses came from the right.

Caroleo took the floor and proposed another amendment, to substitute or to be subordinated to the paragraph of article 50 on the right to resist: resistance to the public powers is not punishable in cases of violation of the fundamental freedoms guaranteed by the constitution. In his argument, a case of resistance to public powers would, so codified, remain an abnormality outside the realm of the law (*il fatto resta nella sua anormalità, perchè fuori dal diritto*). Such a case is nevertheless subject to the rule of law and, if the citizen did act in defence of their right and for the freedom guaranteed by the constitution to be respected, they will not be subject to any punishment. However, he argued, this would not entail the abnormality of a citizen who appointed themselves as the judge of the laws of the state.

Della Seta as well proposed the abrogation of the paragraph on the right to resistance. He added that it was not their task, that of *historical* republicans (*non siamo noi repubblicani storici – e questa volta sull'aggettivo "storico" bisogna proprio porre l'accento*), to disown or not the right and the duty to resist constituted powers whenever these tamper with public freedoms.

History has never recorded the instance of a man, of a party or a people that, before resisting, concerned themselves with whether such resistance complied or not with the constitutional text. Victor Hugo wrote that at times to reenter the realm of the law one must exit it (*per rientrare nel diritto bisogna uscire dalla legge*). With such a disposition you want to legalise the illegality. "Appeal to heaven", this is what the people's right of resistance was called in the medieval treaties' drafters (...).¹⁴³⁸

Benvenuti, aligning with Sullo and other representatives, proposed to move the examination of article 50 to the section related to constitutional guarantees. This, he argued, would allow for the right of resistance to be discussed in relation to the alleged possibility of resisting not just the executive power but also the legislative power. The paragraph of article 50 on the right to resist was indeed deferred and, at that point, the text of the article read: every citizen has the duty to be faithful to the Republic, to respect the Constitution and the laws.

¹⁴³⁷ Own translation. See original Assemblea Costituente, 'Seduta di venerdì 23 maggio 1947' 4197 <<https://legislature.camera.it/dati/constituente/lavori/Assemblea/sed130/sed130nc.pdf>> accessed 14 October 2024.

¹⁴³⁸ *ibid* 4200. For the reference to the appeal to heaven, see also John Locke.

On 4 December 1947, the Assembly picked up the suspended negotiation on the right of resistance.¹⁴³⁹ After a round in which some amendments were withdrawn and others upheld, Benvenuti offered the further proposal to replace the paragraph with: the resistance of the citizen, to acts that are carried out by the public powers because of unconstitutional legislations, is not punishable.¹⁴⁴⁰ Sharing the idea of including in the constitution a right of resistance, he argued:

The institute seems to me necessary from the perspective of the gap that can occur between an unconstitutional law and the declaration of its unconstitutionality from the Constitutional court. In such a period of time, namely between the promulgation of the law and the declaration of unconstitutionality, the sole constitutional guarantee left to the citizen is the right to resist. This is why such a right must be codified in the Constitution. But I think the norm shall be framed within our legislative system.

He contended that a broad innovation could be formulated, as for the case for instance of the right of citizens to not be prosecuted for acts of resistance against the arbitrariness of the executive power: this would provide the citizen, charged with the act of breaking the law for resistance (*incriminato del delitto di resistenza*), the possibility to oppose the exception of the unconstitutionality of the laws that were exercised against them. On the unconstitutionality of the law therefore, the defensive exception safeguarding the right to resist would build. Laconi intervened in the discussion stating that resisting is a duty. Benvenuti replied that it is a duty and an authority (*facoltà*).

Nobile took then the floor to express a doubt over the practical aspects of the right to resist and asked whether an approval of the norm would modify the criminal code.

Mastino repropoed an amendment to article 50 that read that the citizen had the duty to defend fundamental freedoms, constitutional rights and the apparatus of the state. He argued that in such a way, the right was recognised but, speaking of a duty rather than a right, the codification escaped the issue of acknowledging a right to insurrection under constitutional law. Moreover, he observed, the right of resistance was to be transposed from the individual to the collectivity.

The session was postponed to the day after.¹⁴⁴¹ Mastino retraced the basis for the proposal of his amendment and added that there was not only a juridical but a moral reason to adopt it: the duty of the citizen to defend fundamental rights was to be established not as an exercise of their personal interest but in the interest of the state and the collectivity as a whole.

Similarly, Musolino proposed to amend ‘citizen’ with ‘citizens’: this would highlight the fact that the norm referred to a collective assessment onto an alleged violation of the constitution and not the assessment of the single individual.

Nobile proposed a further amendment, for the codification of article 50 was unacceptable to him. He argued in fact that speaking of resistance entailed speaking of a *material* resistance, therefore armed resistance: ‘there is no defence against tanks and bombs. Asserting in the Constitution the citizen’s right and duty to resist public powers, implying the armed character of the resistance, is absurd’. He submitted to the Assembly an alternative version of the paragraph: ‘the citizen has the right to demand that fundamental freedoms guaranteed by the Constitution be respected by public powers’. It was

¹⁴³⁹ Assemblea Costituente, ‘Seduta pomeridiana di giovedì 4 dicembre 1947’ 2841 <https://legislature.camera.it/_dati/costituente/lavori/Assemblea/sed319/sed319nc.pdf> accessed 14 October 2024.

¹⁴⁴⁰ *ibid.* Own translation. See original: ‘Non è punibile la resistenza opposta dal cittadino ad atti compiuti dai pubblici poteri in forza di atti legislativi incostituzionali’.

¹⁴⁴¹ Assemblea Costituente, ‘Seduta antimeridiana di venerdì 5 dicembre 1947’ <https://legislature.camera.it/_dati/costituente/lavori/Assemblea/sed320/sed320nc.pdf> accessed 14 October 2024.

preferable, in his view, to leave undefined how such demand could be exercised. The article was therefore purely rhetoric and platonic and, all in all, it could be abolished altogether.

Paolo Rossi took then the floor. He argued against the amendment proposed by Mastino. He recognised the equation between the state and positive law and found the claim of juridically disciplining insurrection to be childish and to be the opening of a meta-juridical phase:

Insurrection against public powers is judged, justified or condemned case by case depending on its success or lack thereof (...). When the right and the duty to rise up against unconstitutional acts is codified, the principle of proportionality is applied: (...) against an act violating the right of existence of citizens, one might and must protest armed and even butchering the heads of a liberticidal government. Shall we think about this concretely? (...) history cannot be restrained within the boundaries of an amendment.¹⁴⁴²

He further argued the paradoxical situation that the codification of the right-duty to resist could bring about: the fact that a person has the *duty* to uprise (*insorgere*) when their rights are violated consequently means that they could be arbitrarily arrested; this also means however that one could be then tried for not having resisted the violation of their rights. The prosecutor, he argued, could say: 'I was testing your constitutional understanding: you did not resist, let's imprison you again'. Rossi was interrupted by Gullo Fausto, who found the situation described 'sympathetically absurd'. Paolo continued that such a paradoxical articulation was not absurd at all and further opposed as well the amendment proposed by Musolino on codifying the pluralization of citizens: 'does one really think that two or three citizens are competent and stable (*buoni e sicuri*) judges of constitutional law (...)? Let us not insert naïve dispositions, let us preserve the seriousness of our statutory text (...) or the Constitution, from one side and the other, will be teared to pieces with violence'.¹⁴⁴³

Tito Oro Nobili proposed a further amendment. In disagreement with Rossi, he offered an excursus on the doctrine of the right to resist over time in different geographical contexts. Aligning with other representatives, he made reference as well to the Italian legislation on dispositions regulating the fact that one shall not be punished when acting in response to the public official who arbitrarily exceeded the limits of their authority. He argued:

[i]sn't it evident that all freedoms and rights would remain "empty and without subjects" if they did not rely on a protective action, that action which accompanies every right and without which no right can be realised? The paragraph that is oddly feared is nothing but the corollary, logical even before juridical, of all rights of freedoms and all political rights granted by the Constitution. What guarantee would there be, if citizens, individually and collectively, regarded themselves as obliged to passive obedience even when facing acts and orders of the public administration sabotaging constitutional principles and rights? Resistance is not an aggression and let alone a revolution. It is a defence. Why shall we abstain from teaching the people that such a defence, in exceptional circumstances, is not only legitimate but due? I am convinced that this matter, if rooted earlier, if understood and internalised, could have impeded, without giving rise to a revolution, the first successes of fascism.¹⁴⁴⁴

Resistance, he argued, is an episodic occurrence and cannot be confused with revolution nor with insurrection. It is locally circumscribed with broader implications over public powers, for it warns that no violation of the law is tolerated by the people. The codification of the right of resistance would constitute a teaching and a cautionary alert from the people to the governors, would have an educational

¹⁴⁴² *ibid* 2850-2851. Own translation, see original text.

¹⁴⁴³ *ibid*.

¹⁴⁴⁴ *ibid* 2852.

function, would contribute to the formation of a conscience of rights and duties in both the citizens and the public powers and would exercise a preventive function against excesses and abuses from all sides.

The freedoms that are systematically governed by the police constitute a permanent offence to the dignity of the people; let us entrust them to the people's common sense, to their responsibility, and the people will become their vigilant guardian without falling into either excesses or abuses: let us not humiliate ourselves before fascism (...).¹⁴⁴⁵

What was essential to him was that the constitution established 'at least the most elementary of sanctions' if public powers were to sabotage and lay waste to the principles of freedoms and to political rights.

Bettiol took the floor to assert that a norm on the right to resist was useless for it attempted to establish a relationship between positive law and the revolution, a relationship which can never be tied to positive law.

Fausto Gullo on the other hand argued for the codification of the right as proposed by article 50. He contended that Rossi jumped from one extreme scenario to the other: a population that either submits to tyranny or directly engages in a revolution. This could never be the case, for there are intermediate phases: there is a way to resist the arbitrariness of power without culminating into the revolution. In Rossi's equation state – positive law, there was an embedded odd equation: state – executive power, which do not instead coincide.

I think that the Constitution must affirm the right of the citizen to rebel against arbitrariness and tyranny. We are not legalizing the revolution: (...) if we move from this premise in fact, we must then expand our reflections. What Constitution has ever stopped a population from conquering their rights or a tyrant from infringing upon them? None. Therefore if we reasoned forward, we should assert that not just this article, but all articles establishing the rights of the citizen and the human person are themselves useless, for it is rather easy to imagine the pursuance of tyranny despite all the constitutions of this world, and it is as well easy to imagine a people that, despite liberticidal norms, recognise their own rights.¹⁴⁴⁶

Faced with a power that exceeds the limits of its authority, he argued, the citizen must have the right to resist.

Their resisting act might not assume the extreme form of the revolution. There are other ways to resist. Asserting such a principle means ensuring the actual realization of those other rights enshrined in the general section of the Constitution, the rights of citizens, the rights of the human person (*i diritti del Cittadino, i diritti dell'uomo*). If such rights are violated or offended by the constituted authorities, the offended citizens, individually and collectively, have a right to rebel.¹⁴⁴⁷

Mortati then took the floor and argued that articulating the right to resist was extraneous to the legal scope, for the principle had a meta-juridical character and entered the factual realm. He agreed on the fact that the principle had an educational value: it was however then to be established whether the constitution was a text of positive law or a pedagogic treaty. He therefore proposed the abolishment of the section of article 50 on resistance.

¹⁴⁴⁵ *ibid.* Own translation. See original: 'Le libertà sistematicamente governate dalla polizia costituiscono un'offesa permanente alla dignità del popolo; affidiamole al buon senso del popolo, alla sua responsabilità, ed esso se ne costituirà geloso custode senza incorrere né in eccessi né in abusi: non umiliamoci di fronte al fascismo (...)'.
¹⁴⁴⁶ *ibid* 2854.
¹⁴⁴⁷ *ibid.*

The Assembly moved towards the voting of, first, the elimination of the paragraph on resistance, and eventually to voting the different versions of its codification. The omission of the right to resist from article 50 was approved and the matter concluded there.

A handful of considerations are offered on the process of political negotiation that led to the right of resistance being omitted by the final text of the constitution. These are offered humbly, for reading the works of the Assembly is a great privilege. The first impression that may permeate the reader is that while the right-duty to resist was in principle not rejected by most of the speaker, who did recognise its existence, its historical factuality or the moral necessity that pushed its proponents, it was its [translation into positive law](#) to be rather opposed. Mortati refers to the right to resist as a ‘non-jurisdictional guarantee’. He argues that this can indeed take different forms, mindful of the distinction between individual and collective resistance.¹⁴⁴⁸ The constitutional project, he writes, had attempted to regulate collective resistance, both passively and actively exercised.¹⁴⁴⁹ The codification that had been articulated however was not included in the final text for ‘it is impossible to juridically regulate a hypothesis that by its very nature escapes the realm of the law’.¹⁴⁵⁰ The principle however, and the popular reaction this enshrines, can be regarded as a [constitutional guarantee](#) for it refers to the exigencies of conservation of the institutional principles that inform the constitution.¹⁴⁵¹ That very constitution which in itself has a resisting primacy over all other sources of law.

A Constitution was born (...), to be understood therefore not only as a “political” act (the constitutional pact), but also as a “normative” act, endowed with a particular power of resistance against all other sources, including the law.¹⁴⁵²

The negotiations that unfolded in the Assembly also showed a degree of confusion about the notions of resistance and revolution. This, Ventura writes, was likely instrumental to some and never entirely unravelled.¹⁴⁵³ Especially the proponents of the suppression of the norm often had the former coinciding with the latter. However, resistance is rather a guarantee and a sanction in the hands of rights holders to pursue the [preservation of the constitutional principles](#) against powers violating them in the first place. It is therefore distinct from revolution. Indeed, while the resistance aims at the defence of the constitutional apparatus, the revolution aims at its overturning.¹⁴⁵⁴ The [legality of the right to resist](#) is confirmed by the fact, Ventura argues, that this pursues the conservation of the validity of those programmatic fundamental norms and guarantees enshrined in the constitutional project: it builds on the [necessary correspondence between a norm and the collective conviction that substantiates its validity](#).¹⁴⁵⁵ Indeed, the purpose of the right to resist is to [restore the constitutional order](#) that was violated by the state-government.¹⁴⁵⁶ To add to this, the right is regarded as well as a [duty to respect the constitution](#). This alone cancels the idea of subverting the constitutional framework out of the scope of the resistance.

The question of the right to resist being tied to [sovereignty](#) can also be addressed. Ventura observes that only one intervention explicitly regarded the right of resistance as a way to realise the principle of

¹⁴⁴⁸ Costantino Mortati, *Istituzioni di diritto pubblico* (CEDAM 1962) 935-937.

¹⁴⁴⁹ *ibid.*

¹⁴⁵⁰ *ibid.*

¹⁴⁵¹ *ibid.*

¹⁴⁵² Paolo Caretti, ‘La Costituzione come norma giuridica: una “lezione” ancora attuale in Stefano Merlini (ed) *Il potere e la libertà. Il percorso di un costituzionalista. Atti del Convegno per il centenario della nascita di Paolo Barile* (Firenze University Press 2019) 41, 42. Own translation. See original: ‘Nasceva così (...) una Costituzione, da intendersi dunque non solo come atto “politico” (il patto costituzionale), ma anche come atto “normativo”, dotato di una particolare forza di resistenza rispetto a tutte le altre fonti, ivi compresa la legge’.

¹⁴⁵³ Luigi Ventura, *Il diritto di resistenza* (Rubbettino 2014) 55.

¹⁴⁵⁴ Luigi Ventura, *Il diritto di resistenza* (Rubbettino 2014) 58. Cfr. Paolo Barile, *Il Soggetto privato nella Costituzione italiana* (CEDAM 1953).

¹⁴⁵⁵ *ibid.*

¹⁴⁵⁶ *ibid.* 62.

popular sovereignty.¹⁴⁵⁷ Di Giovanni in fact argued that popular sovereignty can be exercised in three ways: the right to vote, the right to associate in parties to participate in the political life of the 'Nation' and the right-duty of citizens to rise up (*insorgere*) whenever the constituted powers attacked the constitutional principles.¹⁴⁵⁸ From this perspective, the right of resistance would therefore be an exceptional instrument in the hands of the people to fully and directly exercise sovereignty at a given moment in history, once other measures physiologically failed.¹⁴⁵⁹ Considering the right to resist an instrument through which sovereignty can exceptionally be exercised in fact complies with the system: it is the legitimate conduct of the sovereign people that of ending a constitutionally abnormal situation in the case of a gap (*difformità*) between the governing action and the interests of the popular collectivity.¹⁴⁶⁰ A tie between sovereignty and resistance rests on the idea that the latter is the highest expression of control that the people can recur to against the state-government.¹⁴⁶¹ Article 1 of the Italian constitution reads that 'sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution'. The notion of sovereignty, to Morrone, indicates the making of a juridical system, the form and the substance of a political community: this process, which thus constitutes and realises the juridical governing system of a political community, renders the constitution 'superior', in the sense that this contains the highest principles of the juridical system on which the governing apparatus builds.¹⁴⁶² Governing powers must be not only legal but also legitimate, that is, they must be founded in the people, must come from the people and comply with the interests of the sovereign people.¹⁴⁶³ The people is not an abstraction but a community constituting itself in a *polis* and that lives and realises itself continuously and dynamically through the *polis*.¹⁴⁶⁴ Morrone recalls how Locke argued that the political community holds, in addition to its own fundamental rights, the ultimate power of resistance: such a right-power would be senseless if the people did not concretely exist and if the people were not sovereign, ground for legitimacy and end of powers.¹⁴⁶⁵ A thesis denying relevance to popular sovereignty rests on a number of identifications, among which that of the former coinciding with the sovereignty of the governing organs and therefore with the sovereignty of the state; yet, Morrone observes, the representatives of the Constituent Assembly did valorise the sovereignty of the people.¹⁴⁶⁶ The constitution indeed recognises to the people both ownership and exercise of sovereignty. Mario Sirimarco, referring to the thought of Vezio Crisafulli, observes how a coherent reading of popular sovereignty as within the constitution recognises that the people must always be able to speak and to have their will prevailing in case this was in contrast with the will of the subject state.¹⁴⁶⁷ This ties the right of resistance, exercised collectively, to the constituent power.¹⁴⁶⁸

This contribution aligns with the argument that a right to resist does permeate the whole constitutional apparatus, regardless of the absence of an explicit codification into positive law. The right-duty to resist does act as a guarantee to preserve and eventually restore constitutional principles and their vision of progressive realisation. A vision of progressive realisation that is intimately connected with the principle of substantial equality formally enshrined in article 3. The right of resistance therefore shall be approached within a landscape of convergence of, on the one hand, the process of [adaptation to](#)

¹⁴⁵⁷ Luigi Ventura, *Il diritto di resistenza* (Rubbettino 2014) 55.

¹⁴⁵⁸ Assemblea Costituente, 'Seduta di martedì 20 maggio 1947' 4071 <<https://legislature.camera.it/dati/costituente/lavori/Assemblea/sed127/sed127nc.pdf>> accessed 14 October 2024.

¹⁴⁵⁹ Luigi Ventura, *Il diritto di resistenza* (Rubbettino 2014) 54.

¹⁴⁶⁰ *ibid* 64.

¹⁴⁶¹ *ibid* 65.

¹⁴⁶² Andrea Morrone, 'Sovranità' (2017) 3 *Rivista AIC* 76-77.

¹⁴⁶³ *ibid*.

¹⁴⁶⁴ *ibid* 79.

¹⁴⁶⁵ *ibid*.

¹⁴⁶⁶ *ibid*.

¹⁴⁶⁷ Mario Sirimarco, 'La riflessione sullo stato e la sua crisi nel pensiero di Vezio Crisafulli' (2017) 1 *Nomos* 1.

¹⁴⁶⁸ *ibid*.

society of the constitutional project formally anchored to its text and, on the other hand, that which is the globalised and plural society in which the constitution must be actualised. Such an outlook cannot shy away from the responsibility of acknowledging the actors that constellate our surroundings, actors that are knowledgeable, competent, political, active and acting. Ultimately, also *resisting*. Actors that are, through their demands and initiatives and narratives, building on and pursuing the very principles embedded in the constitutional vision, first and foremost that of a society of substantially equals. The constitution, it is argued, revolves around the centrality of the human person, for the inviolable rights of the person are recognised and guaranteed, both as an individual and in the social groups where human personality is expressed. The question as to whether a right to resist can or cannot be exercised by anyone therefore is regarded as redundant. To negate the exercise of the right of resistance to non-citizens would paradoxically negate the very right itself and the very guarantee of equality that this right might attempt to defend. The pursuance of the principle of substantial equality, in today's society and in virtue of the plurality of its actors, cannot be restrained from the boundaries of a formal conceptualisation of citizenship understood as mere nationality or blood tie.

Speaking of a right to rebel, Honoré argues that this can be exercised against the rulers by *subjects*: 'both citizens and non-citizens such as aliens and slaves'.¹⁴⁶⁹ What if indeed, for the sake of discussion, slavery was to be brought back into place by legislation. Absurd, one might think. Yet if such a scenario took place, would those spoiled by law of their very humanity, be impeded from resisting such law by the very enslaved *status* this imposed onto them? No, we could unanimously agree, for this would be outrageous and paradoxical and, for their *humanity* is cherished and guarded, the foundational legal system must ensure their protection. If a law on slavery was ever to be issued, everyone could – and must – resist it, for the safety of the newly labelled *slaves* and in truth for the safety of all. Now, always for the sake of discussion, what if, by a democratic majority decision of its ruling class, a part of society opted for disposing of another part of society? Labelling the undesired segment of the population, present on state territory and among the governed population, as *illegal* and by virtue of a fabricated category legalising the denial of their human person. What if the *illegal* were not only labelled as such, obstructed in their access to the life of the state and its services, but were often arrested on arbitrary conditions and even spoiled of, first instance, their very personal freedom, on the ground of the status the state attributed to them and with no connection whatsoever with their conduct under criminal law? This would deny their most basic human rights and the inviolability of their personal liberty. And if a few tens of *illegal* people were apprehended and, not only temporarily segregated, but for that purpose flown to a neighbouring state to be confined there, for the state that opted for their detention built a prison-like architecture outside its territory. Surreal?

For it is quite conceivable, and even within the realm of practical political possibilities, that one fine day a highly organized and mechanized humanity will concluded quite democratically – namely by majority decision – that for humanity as a whole it would be better to liquidate certain parts thereof.¹⁴⁷⁰

It is, after all, only surreal until it happens.

Now, does the idea of a right of resistance potentially exercisable by all, citizens and non-citizens, frustrate any tie to popular sovereignty? To this, the author attempts to offer two considerations. The first, regards the people as *all the governed*. The second, does not consider the alleged connection to sovereignty and rather ties the right to resist to the inviolability of the human person. The author does not have a definite answer.

The *governed* are all within the ordered system of hierarchisation of citizenship. They are, therefore, the citizens at the top of the hierarchy and the marginalised at the bottom of the hierarchy. To exclude from

¹⁴⁶⁹ Tony Honoré, 'The Right to Rebel' (1988) 8(1) Oxford Journal of Legal Studies 34.

¹⁴⁷⁰ Hannah Arendt, *The Origins of Totalitarianism* (A Harvest Book, Harcourt Brace & Company 1979) 299.

the people the marginalised, the other-ness, would effectively deny to them the ultimate glimmer of political subjectivity and personality. It would deny the present and the virtual of any principle of substantial equality and prohibition of discrimination based on the dispositions contained in laws that are subsequent and subordinate to the constitution. To exclude from the people the marginalised, would effectively ignore how these are likely the ones to suffer from the unconstitutionality of successive norms, from the bias of a system in potential, from its silences and implicit assumptions and therefore likely the ones whose right to resist could be needed the most. To consider popular sovereignty in reach only for some and out of reach for all governed is to silence those *made* most vulnerable, kept at the margins, both metaphorically and physically. This is, after all, what may be happening right now within the current order of things. However, is this acceptable? The boundaries of citizenship and participation have always changed over time and have expanded in governing structures that defined themselves democracies. To Eschilo is attributed the statement that recognised that in the *polis* of five thousand free individuals, ten thousand were slaves. The very constitution is not only a 'political fact' that concerns citizens but rather one that concerns *all* who recognise it and live it as a fundamental norm, as the basis of the social pact: *all* that participate in society.¹⁴⁷¹ The constitution belongs to and concerns the citizens in so far as these are understood as the people belonging to the society that the constitution is the foundation of: what would be the reason to restrict such belonging only to those holding a formal title of "citizen"?¹⁴⁷² What would be the constitutional criterion limiting belonging to mere ties of blood?¹⁴⁷³ Belonging and aspirations to belong. No other reason than the will of formal citizens to preserve their privileges – and while this may certainly be a strong motive, it is not a right.¹⁴⁷⁴ Social struggle and the demands of unacknowledged and unrecognised social actors in every age and place are proponents of change, regarded as unconscionable often by the most powerful – not necessary the majority in number, but the majority in power – until that change succeeds. The future then recognises the demand of the present for the past to be left behind. Does this have the potential to trigger the pursuance of a vision of substantial equality to the extent of subverting the current arranged order of things? Does this imply in the end that the differential treatment in the enjoyment of rights, which both citizens and non-citizens are entitled to, become regarded as discriminatory treatment? The answer to these questions could be a further question: is not this desirable? Is it, in the end, so disruptive? The result would be a society of acknowledged equally powerful individuals: as said earlier in this text, this is, after all, not so far from the seemingly unattainable and yet transparently linear 'all human beings are born free and equal in dignity and rights'. Is not the system foreseen to tend to the unforeseen, in respect of the *inviolability of the human person* as such?

This brings the discussion towards the second consideration on the enjoyment of the right of resistance by all, citizens and non-citizens. If this right is in fact not regarded as tied to sovereignty, it can be considered bound to the human person as such, for this is the core of a constitutional vision and the virtual that the order beyond its current boundaries can aspire to. Teresa Serra writes that, to a note written by Mortati, the source of the right of resistance is not popular sovereignty but rather the inviolable rights.¹⁴⁷⁵ Could we regard these two options, that of tying the resistance to popular sovereignty and that of tying it to the inviolability of the human person, as not being mutually exclusive? If we considered the people as the governed, cherishing their human inviolability. In the end however, the inviolability of the human person is that which transcends any border and any boundary. The same goes for the principles enshrined in the constitution which are no longer negotiable and no majority can

¹⁴⁷¹ Alessandra Algostino, 'Il ritorno dei meteci: migranti e diritto di voto' (13 April 2010) 1 *Costituzionalismo.it* <https://www.costituzionalismo.it/wp-content/uploads/Costituzionalismo_339_r.pdf>.

¹⁴⁷² *ibid.*

¹⁴⁷³ *ibid.*

¹⁴⁷⁴ *ibid.*

¹⁴⁷⁵ Teresa Serra, 'Il 'diritto' di resistenza in Mortati' (2016) 1 *Nomos* 1.

bypass or ignore.¹⁴⁷⁶ They are such because they are *of all* and therefore are not susceptible to compromise nor to the decision, albeit majoritarian, of a people or their representatives.¹⁴⁷⁷ The very idea of representativeness does not cover the exceptional situation of the right of a beneficiary to contrast and resist the *mala gestio* of the trustee.¹⁴⁷⁸ This may consolidate the idea that resistance roots in *humanity* rather than *popular sovereignty* and that the latter, when resisting against unconstitutional acts of public powers, does so on behalf of the human person. It is therefore an expression of it but not its end.

Alleged constraints to equality in the enjoyment of rights by both citizens and non-citizens are often adduced on the grounds of *public security* and *public order*, concerns of the ordered state sovereignty as it is currently conceptualised and operationalised. In the reality we live in, these alleged concerns are dragged and stretched and applied to the extent that a current minister, then minister of interior, faced with allegations of the abduction (*sequestro di persona*) of 147 people – migrants – rescued by the NGO Open Arms whose disembarkation he had impeded, responded that: ‘I am charged and I risk incarceration because the left in Parliament has decided that defending the Italian borders is a crime’.¹⁴⁷⁹ He recounted that the Spanish NGO on board of a Spanish flagged vessel ‘suddenly cancels its destination [Lampedusa] from the logbook and heads towards the Libyan coast’ where ‘it manages to intercept a boat with clandestines on board’ and ‘from that moment begins to navigate the Mediterranean, picking up more clandestines and heading towards Italy’.¹⁴⁸⁰ It is a merciless episode of the present unfolding in the complete disregard of the human person. The seriousness of the accusation directed at Parliament is not to be underestimated, for it implies the hijacking of the judiciary by another power. It also alleges that the organ representative of the whole of the Italian people was being monopolised in seemingly persecutory-like actions by a segment thereof in disregard of the expression and trust of the electorate.

Grimm observes that a characteristic of the constitutional state is that it does not recognise in the state a highest power.¹⁴⁸¹ There are only different state powers, each with specific functions assigned to them by the constitution: in a constitutional state, even the legislative power is subordinate to constitutional law.¹⁴⁸² The call for constitutional regulation is fulfilled for neither extra-constitutional holders of governing powers nor extra-constitutional means and methods for exercising power are permitted.¹⁴⁸³ The sovereignty of the constitutional state is distinct from that of its predecessors: conciliation between constitution and sovereignty could only succeed once the latter’s holder was situated beyond constituted powers.¹⁴⁸⁴ In the constitutions that had been established through the revolution, only the people could fulfil such a role.¹⁴⁸⁵ The sovereignty of the constitutional state fully formed was popular sovereignty.¹⁴⁸⁶ The democratic state of the XX century is constitutionally sovereign – that dormant, latent sovereignty that Grimm speaks about: it is such because, Preterossi writes, it builds on fundamental rights and principles, the first and foremost of which is the founding assertion that sovereignty belongs to the people, which presupposes the existence and the autonomy of a pluralised

¹⁴⁷⁶ Michele Marchesiello, *Diritto di resistenza. Come fare la rivoluzione attraverso il diritto* (Edizioni Gruppo Abele 2020) 54.

¹⁴⁷⁷ *ibid.*

¹⁴⁷⁸ *ibid.* 55.

¹⁴⁷⁹ ‘Open Arms, per Salvini chiesti 6 anni per sequestro di persona. Meloni: precedente gravissimo. Anm: dichiarazioni gravi’ (*Sole 24 Ore* 14 September 2024) <<https://www.ilsole24ore.com/art/open-arms-pm-diritti-umani-prevalgono-sovranita-salvini-ho-difeso-confini-AFqNMPuD>> accessed 14 October 2024.

¹⁴⁸⁰ *ibid.*: ‘improvvisamente cancella la sua destinazione [Lampedusa] dal diario di bordo e si dirige verso le coste libiche’, ‘riesce ad intercettare un barcone con dei clandestini a bordo’, ‘da quel momento comincia a navigare per il Mediterraneo, raccogliendo altri clandestini e puntando verso l’Italia’.

¹⁴⁸¹ Dieter Grimm, *Sovranità. Origine e futuro di un concetto chiave* (Gius. Laterza & Figli 2009) 71.

¹⁴⁸² *ibid.*

¹⁴⁸³ *ibid.*

¹⁴⁸⁴ *ibid.*

¹⁴⁸⁵ *ibid.*

¹⁴⁸⁶ *ibid.* 72.

political unity.¹⁴⁸⁷ Preterossi argues that ‘we live in an “interregnum”’: a transitional phase, at a global level, during which a given power organisation is in crisis but a new order struggles to emerge.¹⁴⁸⁸ Such a “crisis” is one of regulatory capacity as much as one of legitimation (*tale crisi è tanto di capacità ordinativa quanto di legittimazione*).¹⁴⁸⁹ In such a landscape, neoliberalism is a philosophy of the making nonpolitical of the human action (*della spolticizzazione dell’agire umano*). There no longer is opening and creative un-foreseeability of the human: in such a perspective, all individual rights and the very notion of freedom are destined to be regarded as expendable on the altar of the techno- (*sacrificabili sull’altare della tecnica*) in the name of some “objective” emergency and of the deference to the economistic (*economicistico*) paradigm of the governance of lives.¹⁴⁹⁰ He observes that to approach neoliberalism, Foucault adopted an interpretative strategy that contraposes the paradigm of the “government”, as capillary management of lives and of the population, to the paradigm of “sovereignty”, which is vertically legitimated as the representative decision of the people.¹⁴⁹¹ In such a way, the molecular conducts of power is approached by centring the exploration on its terminals, that is, the bottom and the margins of society.¹⁴⁹² Today, Preterossi argues, we have become used to the exception, the suspension of rights and freedoms theoretically unavailable as if it were the matter of banal temporary parenthesis and not dangerous failures, episodes not to be feared for derivative of a power that pretends to be “neutral” and that “can be trusted”.¹⁴⁹³ The banality of allegedly neutral and ordinary measures escapes the boundaries of temporariness and the exception worms its way into the ordinary, as if that is how it has always been, as it is, as it will always be.

This corroborates the idea that the marginalised cannot be left out of the right to resist state powers, if these sabotage the constitutional project in its progressive realization and evolving character – whether such right rests on popular sovereignty or on the inviolability of the human person. It would certainly be naïve to propose, through the exercise of the right to resist, the sudden disregard of the fictional categories of the hierarchisation of citizenship that so dangerously and steadily, and regrettably often deadly, rage about the already desecrated nakedness of the human person. While such categories, discriminating non-citizens from citizens, violently dismember the linearity of ‘all human beings being born free and equal’, exposing their artificiality can become a strategic tool in the pursuance of a collective wellbeing. Indeed, emphasising the fictional character of identities shows how their production resonates with the plastic, energetic feature of the human, opening it to a semantic and political pluriverse.¹⁴⁹⁴ This highlights the contingency and the plurality of elements that, at each time and place, attempt to determine the definition and the preservation of a fabricated order of things, exposing the artificiality of its claimed timelessness, neutrality and naturalness, defended through objective language, purported under the disguise of technocracy, expertise, science and evidence-based policy. Acknowledging the creativity of such an apparatus hints at one logical consequence: if categories are made, they can be unmade. If such a complexity of labels and identities, differential treatment and disciplining, was once afforded, reducing it to the simplicity of ‘all are equals’ seems almost disarming. Obviously, since such constructions are defined through history and constitute long-term cultural stratifications, they are evolving and alterable but they cannot be dismissed or produced *ex novo* with a pure act of voluntarism.¹⁴⁹⁵ The intertwining of alternative imaginations and of meanings that have already settled is complex and must consider the issue of a junction between shared feeling and vanguards: it would be naïve to ignore that every political order has realistic boundaries, spatial, and

¹⁴⁸⁷ Geminello Preterossi, *Teologia politica e diritto* (Gius. Laterza & Figli 2022).

¹⁴⁸⁸ *ibid.*

¹⁴⁸⁹ *ibid.*

¹⁴⁹⁰ *ibid.*

¹⁴⁹¹ *ibid.*

¹⁴⁹² *ibid.*

¹⁴⁹³ *ibid.*

¹⁴⁹⁴ Geminello Preterossi, *Teologia politica e diritto* (Gius. Laterza & Figli 2022).

¹⁴⁹⁵ *ibid.*

political prerequisites that, despite their artificiality, represent a conditioning substrate.¹⁴⁹⁶ This is where recalling and calling onto a right of resistance for a constitutional vision to be progressively realised comes in. With the determination and the anger to resist unconstitutional acts emanated by that order of things that is in truth subordinate to the people, to the inviolability of the human person and to the primacy of constitutional law. One cannot contest the “existence” of the right to resist within the constitutional vision on the ground that its codification was lastly omitted from the text. Serra argues that the positivist jurist may struggle with the thought of resistance as a right within a liberal-democratic constitutional system but not within a democratic system coherently understood.¹⁴⁹⁷

4.5 Chapter summary

This chapter builds on the idea that the phenomenon that sees people migrating and moving across states is a reality and so is approaching it as a political necessity. The text argues for the right of migrants’ and allies’ collective organising to appeal to a right to resist state oppression, understood as the acts of the constituted public powers that seemingly exceed their scope, abusing their role and undermining human rights’ protection, and infringe upon inviolable freedoms and constitutional law in its progressive realisation. As Morelli observes, reflecting on the right to resist indeed helps retracing the evolution of constitutional law, in terms of the agreed upon fundamental relationship between governing and governed for power to be limited and rights safeguarded, and promotes the exploration of perspectives on its evolution within an everchanging and globalised social context. The text begins by addressing the notion of policing, its relationship with citizenship and citizenry and therefore with the marginalised and the migrant person, whose existence and presence are first ostracised and then criminalised for they, in the words of Waddington, ‘offend prevailing respectable values’. Policing, as Di Cesare observes, is inscribed in the economy of the public space and there is a state of police within the rule of law. Within such a context, the other-ness is approached as the threat that it is to the securitarian security of the state, its borders and the boundaries of citizenship it policies. The chapter argues however that a politics of resistance, free from policing, can affirm itself in the current context of the social struggle and assert itself against oppressing powers, strong of the constitutional principles it cherishes. Nonviolent collective organising of migrants and allies who seek legal reform is then explored in the context of the relationship between the law and the social conflict, increasingly silenced, ignored and criminalised, with the idea to ultimately culminate in reflecting on whether there is a right to resist that such organising may appeal to. The criminalisation of the social struggle and its agents goes hand in hand with that of the indigent, the dispossessed, the women, the unconforming identity, the migrant person and eventually their rescuer. Although the research focuses on nonviolent realities of resistance, it acknowledges that violence and nonviolence do blur, especially in the contexts of uprising, revolts, riots or demonstrations – all public manifestations of dissent. Demonstrations and occupations of spaces are but one side of the coin of a politics of resistance. Social movements act in a variety of forms and expressions in the pursuance of the constitutional project they assume onto themselves. The analysis then touches upon on an instance of collective organising against the state practice of administrative detention of migrants: the case of the temporary shutting down of the migrants’ detention facility – the *lager* – in Turin and the mobilisation this triggered among allies. The questions that such an example bring about are whether struggles of such kind can disrupt the social and normative fabric of society and succeed in their effort to seek legal reform, and whether they can be acknowledged as proposing an alternative model to the institutionally produced hierarchisation of citizenship and its peak in administrative detention. The final subchapter explores the idea of a right to resist. With reference to the work of the Constituent Assembly, the notion of the inviolability of the human person and that of the sovereignty of the people, the text concludes that the absence of a codification of the right to resist in the articles of the constitution does not negate its existence and the possibility for all, citizens and non-citizens, to appeal to it.

¹⁴⁹⁶ *ibid.*

¹⁴⁹⁷ Teresa Serra, ‘Il ‘diritto’ di resistenza in Mortati’ (2016) 1 *Nomos* 1.

Chapter five concludes the analysis on the representation of the “problem” of “migration” and “irregular migration”. It runs along the underlying question: what if it was otherwise? After reinforcing the idea that current migration policy can be contested and its paradigms denaturalised (5.1), it pays attention to specific policy instruments at the European Union and Italian level and, under the guide of the WPR, practices the approach as an exercise to interrogate unexamined ways of thinking. The idea is not to elicit alleged “truths” but to disrupt otherwise taken-for-granted policy proposals and create space for questioning and scepticism. The policy instruments considered are the New Pact on Migration and Asylum at the European Union level (5.2) and the so-called Cutro decree at the Italian domestic level (5.3).

Keywords: Cutro decree – “irregular migration” – “migration” – New Pact on Migration and Asylum – WPR

5.1 How is migration a “problem”?

A critique does not consist in saying that things aren’t good the way they are. It consists in seeing on what type of assumptions, of familiar notions, of established, unexamined ways of thinking the accepted practices are based. We need to free ourselves of the sacralization of the social as the only instance of the real and stop regarding that essential element in human life and human relations – I mean thought – as so much wind. Thought does exist, both beyond and before systems and edifices of discourse. It is something that is often hidden but always drives everyday behaviors. There is always a little thought occurring even in the most stupid institutions; there is always thought even in silent habits. Criticism consists in uncovering that thought and trying to change it: showing that things are not as obvious as people believe, making it so that what is taken for granted is no longer taken for granted. To do criticism is to make harder those acts which are now too easy. Understood in these terms, criticism (and radical criticism) is utterly indispensable for any transformation. For a transformation that would remain within the same model of thought, a transformation that would only be a certain way of better adjusting the same thought to the reality of things, would only be a superficial transformation. On the other hand, as soon as people begin to have trouble thinking things the way they have been thought, transformation becomes at the same time very urgent, very difficult, and entirely possible.¹⁴⁹⁸

This chapter builds on the idea that current migration policy can and must be contested with a view to overturn the alleged self-explanatory, timeless and natural paradigms of the border, citizenship and security. These are selectively and discriminatorily realised, they are performed against the inviolability of the human person and sabotage the vision of equally powerful individuals onto this earth. Contestation stems from the desire and the necessity of acknowledging that “things could be otherwise”. Things could be otherwise not because state sovereignty must be demonised and dismantled as a whole – but because the current order of things, dictated by statehood as it is operationalised, builds on and produces inegalitarian and hierarchical structures that impair the life of people on the move, causing suffering and death. Things can be otherwise: if passports did not exist, a person without a passport would be a person; if the *status* of the “undocumented migrant” did not exist, an undocumented migrant would be a person; if that person was in need of medical attention, they would be receiving care on the

¹⁴⁹⁸ Michel Foucault, ‘So Is It Important to Think?’ in James D. Faubion (ed), *Power: essential works of Foucault 1954-1984. Volume 3* (Robert Hurley and others trs, London: Penguin 1981) 454, 456-457.

grounds of their condition and not on the grounds of having been assigned an identification code that “granted” a doctor’s visit; if borders and frontiers did not exist altogether or existed as permeable, one would not be an “immigrant” nor an “emigrant” or a “migrant” engaging in transnational crossing but again, a person, simply moving from one place to another.

While this may sound redundant and naïve, it is like asserting that all persons are equal in dignity and rights. It is disheartening to acknowledge how the linearity, transparency, immediacy, punctuality of such a proposition is lost in its realisation. However, models other than the version and understanding of nation state as the one that is currently implemented in Italy and models other than the current understanding of immigration into said state *can* be imagined. Rather, they *shall* be imagined and explored and proposed and rethought, for the present and future lives of all depend on the ability and the competence to spot and unlearn the paradigms that are causing sorrow and inequality, with a view to implement sustainable, welcoming and wealth-redistributing strategies instead. Nothing is scarier than the awareness that wrong and abuse keep being perpetrated before everyone’s eyes over and over again. Nothing is scarier than the awareness of the possibility that any day, the wrong and the abuse that has been perpetrated to others in the name of a deliberate choice and interests of some, may be done to you and to your family. The frustration and fear that such thought causes can be channelled into an attempt for a renewed vision of the socio-legal structure in place. The outrage and the compassion that are generated by witnessing others being mistreated by the constituted powers rather than being protected by them, and the anger that is triggered while witnessing the state’s proud display of its monopoly of force and violence, can be the ground for a common proposal outside and beyond the current order of things. The earth is one – this is not naïve nor globalist to say. Its fragmentation in the name of sovereignty, territoriality and a (un)distribution of wealth must be contested to propose and pursue an alternative vision of order, a disorder.

Questioning the institutional production and propagation of knowledges concerning the phenomenon and the notion of “migration” is central to this exercise. An exercise that needs to happen and that is already being pursued, both in the books and in action, by so many in all forms, the struggles of whom must be acknowledged as creating competences and *savoirs* that could nourish a new – restored – system. This chapter engages with the analysis and the questioning of specific policy instruments to address their socio-legal consequences, treating them as the outcome of decision-making processes the “nature” of which can be challenged and denaturalised. This disassembling and unlearning effort is steered by the underlying question that permeates the whole study: what if it was otherwise? The chapter further proposes the application of Carol Bacchi’s understanding of problematisations: what is the problem represented to be? Can we reveal current silences and implied paradigms? Can we ask new policy questions, informed by the competence of those actors challenging the institutional narrative on migration? A narrative on a limited migration-carrying capacity, of criminalisation of the unwelcomed, of widespread fear and alarm, of the “defence of the national borders” – what defence? From whom?

This analysis is inevitably influenced by the author’s knowledges, bias, stances and positionality. Pointing this out at the outset of the chapter is dear to her, for an exercise of self-problematisation is immanent to problematising. Referring to the work of Bacchi and Goodwin, to *problematise* may have different meanings:

- analysing an issue at the level of deep-seated assumptions and presumptions;
- articulating an issue as a “problem”, the conceptualisation of which is referred to as *problematization*.¹⁴⁹⁹

¹⁴⁹⁹ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis. A guide to Practice* (Palgrave Macmillan US 2016) 38-41.

Adhering to a poststructuralist approach to policy analysis, this chapter therefore engages in an attempt to investigate how issues are constituted as “problems” within and by policies.¹⁵⁰⁰ It argues that policy does not *address* the problem of migration, as if that just “existed” out there, but rather *produces* the “problem” of “migration”. The reason why the analysis focuses on the way an issue is represented as a “problem” within and by policies themselves is that *governing* takes place through the way in which things are being problematised.¹⁵⁰¹ Policies therefore are, as said earlier, not “problem-solving” but problem-making. Their claimed “evidence-based” character is put into question, not because the phenomenon the policy deals with does not exist of course but because the allegedly self-evident nature of such phenomenon as “that problem” can be contested and conceptualised differently. Building on such an understanding, the text aims at analysing the problematisations articulated in selected policies and thus what the “problem” is represented to be therein, to explore the silences and the uncontested paradigms behind its articulation. The effort is to problematise policy problematisations, so to speak. To *self-problematise* is then to apply the same questioning logic pursued throughout the analysis to one’s own thinking and research process. The WPR approach aids this process by foreseeing for the researcher to seek out forms of domination in one’s own arguments and problematisations.¹⁵⁰²

The articulation of “migration” within selected policies is the focus of this chapter. This was briefly anticipated in chapter three in relation to the conceptualisation of the “state” and how this inevitably influences the notion, rather, the problematisation of “migration”. Selected policy instruments and the articulation of “migration” that they offer are investigated within the Italian and European Union framework with a specific focus on the recourse to administrative detention.

The WPR approach foresees to begin from policies as proposals or proposed solutions, which the researcher analyses to extrapolate the explicit and implicit problem representations contained therein and the deep-seated *ways of thinking*.¹⁵⁰³ Discourse refers to background knowledge and discourses are knowledges rather than forms of using the language.¹⁵⁰⁴ On this is based the distinction between the WPR approach and critical discourse analysis: the former understands discourse as *savoirs*, as Foucault’s ‘unexamined ways of thinking’ and not as language or language use, as the latter does.¹⁵⁰⁵ “Knowledge” is, for Bacchi, a contested political creation and forms of knowledge are connected to power and to politics.¹⁵⁰⁶ The WPR approach proposes an analysis of discourses rather than a discourse analysis, with a view to understand how governing takes places through knowledges and as a strategy to critically reflect on the implicit *within* “problem representations”, that is to say how a “problem” is characterised and conceptualised within a policy proposal or other texts.¹⁵⁰⁷ The analysis starts by spotting what the proposals for change and what the proposed “solutions” to the represented “problem” are within the text of the policy of interest: these indicate what the “problem” is represented to be. A series of questions are foreseen in the application of the WPR approach. These are *questions* and not directives: the approach is a *guide* to practice.¹⁵⁰⁸ Questions are not asked to reveal any “truth”, which would contradict the rationale of this poststructuralist exercise, but are there to engage in an alternative kind of interrogation, creating space to explore and challenge otherwise uncontested knowledges.¹⁵⁰⁹ Questions can be manifestly addressed throughout the analysis or not, they can be drawn from

¹⁵⁰⁰ *ibid.*

¹⁵⁰¹ *ibid.*

¹⁵⁰² *ibid.*

¹⁵⁰³ *ibid.* 111.

¹⁵⁰⁴ *ibid.*

¹⁵⁰⁵ Carol Bacchi, ‘Comparing WPR and critical discourse analysis’ (14 May 2018) <<https://carolbacchi.com/2018/05/14/comparing-wpr-and-critical-discourse-analysis/>> accessed 20 October 2024.

¹⁵⁰⁶ *ibid.*

¹⁵⁰⁷ *ibid.*

¹⁵⁰⁸ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis. A guide to Practice* (Palgrave Macmillan US 2016) 112.

¹⁵⁰⁹ *ibid.* 16.

selectively and, since they are interconnected, they may elicit multiple times the same concepts and unexamined ways of thinking and they may also be applied multiple times to explore multifaceted problematisations and problematisations within problematisation.¹⁵¹⁰ The WPR is a guide, an exercise to *practice* interrogation and questioning and the cues of which are disseminated throughout the analysis. Overall, it is like reading a doctor's referral: from the proposed medications one can infer what the health problem is believed to be. The approach teases out the silences and the implicit representations behind the "problem" of "migration" and further observes the "problems" to which "detention" of migrants is proposed as a solution. Chapter one offered a brief excursus over thirty years of administrative detention. This is the culmination of an ordering and ordered system that attributes to hierarchised subjects a more or less wide range of rights, limiting entitlement regardless of their human person, undermining enjoyment by implementing discriminatory practices under the guise of a so-called differential treatment. While specific policy instruments on migration and on detention are taken into consideration, let us remember that these do not act in a vacuum. They are part of the broader governing landscape and their contingency must be acknowledged. Governing extends beyond the state itself to those "entities" engaged in the "administration" of society.¹⁵¹¹

Back in 2000, De Giorgi writes that it is not a simple task that of isolating the norms that are explicitly inspired to pursue social control out of the overall framework of immigration policies.¹⁵¹² The objective to control the immigrant population manifestly emerges from all legislative dispositions regulating the juridical condition of the foreigner: norms of a repressive character are in fact those that are actually being implemented rather than norms of a social character, which are instead kept vague and programmatic.¹⁵¹³

In fact, all policies on extra-EU immigration appear to be inspired by a political-legislative philosophy that regards the migrant population as a potentially deviant social group, the conducts of whom are to be foreseen and prevented, the movements of whom are to be contained and restrained, and the juridical condition of whom is almost always determined in an emergency-like context.¹⁵¹⁴

More than twenty years have passed since these reflections were shared. The direction that was being followed is now confirmed, consolidated, structured. Luca Queirolo Palmas and Federico Rahola write in their preface: '[w]e finished writing this book [*Underground Europe*] in January 2020. Since then, it has felt like we live in another world'.¹⁵¹⁵ The authors recount that while Europe was beginning to battle with the spreading of COVID-19 as if it was entering a new world, 'the Greek police shot at people trying to cross the Evros river, attempting to push them back into Turkey. The President of the European Commission, Ursula von der Layen, praised Greece as a fundamental European shield (...)'.¹⁵¹⁶

In 2023, the president of the European Commission delivered a keynote speech at the International Conference on a Global Alliance to Counter Migrant Smuggling. She argued that a global alliance for migration governance should focus on prevention, on response and on legal alternatives to the deadly

¹⁵¹⁰ *ibid* 24.

¹⁵¹¹ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis. A guide to Practice* (Palgrave Macmillan US 2016) 111.

¹⁵¹² Alessandro De Giorgi, *Zero tolleranza. Strategie e pratiche della società di controllo* (DeriveApprodi 2000) 49-50.

¹⁵¹³ *ibid*.

¹⁵¹⁴ *ibid*. Own translation, see original: 'In realtà, tutte le politiche sull'immigrazione extracomunitaria sembrano ispirarsi a una filosofia politico-legislativa che considera la popolazione migrante come un gruppo sociale potenzialmente deviante, i cui comportamenti si tratta di prevedere e prevenire, i cui flussi si tratta di contenere e limitare, e la cui condizione giuridica viene determinata quasi sempre in un contesto emergenziale'.

¹⁵¹⁵ Luca Queirolo Palmas, Federico Rahola, *Underground Europe. Along Migrant Routes* (Palgrave Macmillan 2022) vii.

¹⁵¹⁶ *ibid*.

smuggling routes. The first task of such alliance would indeed be that of 'preventing and dissuading people from entrusting their life to smugglers. The best way to avoid violence and death along the route is to avoid that the dangerous trip takes place'.¹⁵¹⁷ Without disputing the ruthlessness of people who exploit despair and place people's lives at risk, why do such dangerous trips indeed take place? Because of the presence of smugglers or because people are afforded no other alternative for their lives? Is not smuggling a response to the denial of mobility? To speak of deadly routes without addressing why such deadly routes are there in the first place is paradoxical, it is to lose the plot. Von der Leyen says that with states' unity, legislation to prevent and to respond to migrant smuggling must be updated and cooperation with international partners must be stepped up. Finally, she says, Europe must offer more legal alternatives to the people who want to seek fortune abroad:

labour and skills shortages have reached record levels, while in other continents there are millions of people who seek to work and learn. We must manage this in a way that it is safe, humane and mutually beneficial (...). But this mobility must be managed by the law, not by the smugglers (...). This goes in parallel to strengthen cooperation on return of irregular migrants. These two need to go hand in hand. The better we are in legal migration, the more convincing we can be in preventing irregular migration.¹⁵¹⁸

She concludes: 'in human history, people have always moved. But never before has the smuggling business been so profitable, so deadly. Human mobility is a fact of life, migrants' smuggling should not be one. It is a matter of political will, it can be defeated and we only can succeed together'.¹⁵¹⁹ It is all the more perplexing – has there ever been in human history a period when mobility was so fast and available, interconnection among people was this widespread and immediate across continents and yet borders were so patrolled, so defended, so militarised, so policed, so guarded, so screened, so controlled? People have always moved, von der Leyen asserts, yet from her account the plot twist is the rise of the smuggling industry, not the "legal" deadly limitations on mobility that are being enforced and that drag despair through increasingly perilous routes.

As more and more people resort to clandestine travel, physical security measures proliferate – fences, searchlights, armies, helicopters, sniffer dogs, x-ray, thermal imaging and night vision devices; a huge security industry has been created to detect and prevent illegal entry, in a mirror image of the smuggling industry.¹⁵²⁰

There is a narrative of defence and *invasion* that is irresponsibly and murderously dominant: it is omnipresent in the political discourse on migration and it merges with an imaginary duty to defend the nation state's borders – *difendiamo i confini* – that deceptively recalls the right to self-defence against aggression, whereas this time the aggression is not perpetrated by a state, there is indeed no aggression and said defence is a delusional fantasy. Defending state borders against whom or what? What invasion? Whose invasion?

Chapter two mentioned how the European Commission's priorities for the period 2019-2024 title 'Promoting our European way of life. Protecting our citizens and our values'.¹⁵²¹ "Values" in this dominant logic of annihilating powers, of performance of the border, of externalisation and extra-territorialisation as escamotages to jurisdictions and responsibility, of necropolitics – racism, xenophobia, sexism, the shadow of an ever-present colonialism, fascism that no longer creeps in solitude

¹⁵¹⁷ 'Ursula von der Leyen delivers major speech on migrant smuggling' (28 November 2023) <https://www.youtube.com/watch?v=1_vI0NKG3dQ> accessed 24 October 2024.

¹⁵¹⁸ *ibid.*

¹⁵¹⁹ *ibid.*

¹⁵²⁰ Frances Webber, 'The War on Migration' in Paddy Hillyard, Christina Pantazis, Steve Tombs, Dave Gordon (eds), *Beyond Criminology. Taking Harm Seriously* (Pluto Press 2004) 133.

¹⁵²¹ 'Promoting our European way of life' (European Commission) <https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-of-life_en#highlight> accessed 5 June 2022.

but rests assured in the patriarchal brotherhood of neo-authoritarian, empty, “democracies”. In her autobiography, Giorgia Meloni writes that the idea that the existence of a limit (border) represents violence against the other is pure insanity.¹⁵²² She cites Marcello Veneziani and his ‘wall of idiocy’ (*il muro dell’idiozia*): the password of the “global idiot” (*cretino planetario*) is to have bridges, not walls.¹⁵²³ The global parrot (*il pappagallo globale*) marches against walls, he writes, or rather takes advantage of them – *marcia contro i muri, più spesso ci marcia* – but this password bricks the enemy up to separate the ‘progressive and welcoming humanity’ from the movements and the persons who are inspired by the love for their homeland (*l’amore patrio*), for national sovereignty, for civilisation (*civiltà*), for tradition.¹⁵²⁴ Veneziani writes that the call to tear down walls and build bridges has become obsessive and does not only concern people and territorial borders but also sexes and ‘natural boundaries’, cultures and conducts, religions and belongings and even the separation between the human and the animal kingdom.¹⁵²⁵ Today’s ‘uprooted society’ has lost the sense of the limit (*il senso del confine*) and in fact populations, sexes, persons trespass and the boundary between the licit and the illicit is lost.¹⁵²⁶ The border, he says, is protection, security, humility, safeguard of the most vulnerable and it is not hostility nor racism.¹⁵²⁷

Without walls there is no house, there is no temple, there is no security. Without walls there is no decency (*pudore*), there is no intimacy, protection from the cold, from the darkness and the unknown. Without walls there is no sense of measures, recognition of the limit and of one’s own limits. Without walls there is no beauty, there is no fortress, there is no foundation of the cities, there is no building of civilisation (...). The walls are the strongholds of civilisation, the hospitals of charity, the libraries of culture, the sides (*pareti*) of art, the meditation (*raccoglimento*) of the prayer.

Do not, he argues, turn the love for family into homophobia, do not turn the love for one’s fatherland (*patria*) into xenophobia, do not turn the love for one’s own civilisation into racism, do not turn the love for one’s own tradition into islamophobia and the love for the border in walls of hatred.¹⁵²⁸

Yet, the latest European Commission against Racism and Intolerance’s (ECRI) report on Italy summarises that

[t]he public discourse has become increasingly xenophobic and political speech has taken on highly divisive and antagonistic overtones particularly targeting refugees, asylum seekers and migrants, as well as Italian citizens with migration backgrounds, Roma and LGBTI persons. Hate speech, including by high-level politicians, often remains unchallenged (...). Negative mainstream political narratives created serious obstacles to effective integration and inclusion of migrants, as well as endangered the activities of non-governmental organisations providing support to migrants. Undue criticism targeting individual judges dealing with migration cases also puts their independence at risk (...). There are numerous accounts of racial profiling by law enforcement officials, targeting especially Roma and people of African descent.¹⁵²⁹

¹⁵²² Giorgia Meloni, *Io sono Giorgia. Le mie radici, le mie idee* (Rizzoli 2021).

¹⁵²³ Marcello Veneziani, ‘Il muro dell’idiozia’ (10 January 2019) <<https://www.marcelloveneziani.com/articoli/il-muro-dellidiozia/>> accessed 20 October 2024.

¹⁵²⁴ *ibid.*

¹⁵²⁵ *ibid.*

¹⁵²⁶ *ibid.*

¹⁵²⁷ *ibid.*

¹⁵²⁸ *ibid.*

¹⁵²⁹ European Commission against Racism and Intolerance, *ECRI report on Italy* (22 October 2024) 5 <<https://rm.coe.int/sixth-ecri-report-on-italy/1680b205f5>> accessed 24 October 2024.

5.2 EU: the “problem” through the New Pact on Migration and Asylum

The Italian case fits into the broader space, both geographical and institutional, of European Union policy. In 2020, Ursula von der Leyen addressed the State of the Union at the European Parliament Plenary. In relation to migration, she anticipated the issuance of the New Pact on Migration and Asylum and declared that

we will take a human and humane approach. Saving lives at sea is not optional. And those countries who fulfil their legal and moral duties or are more exposed than others, must be able to rely on the solidarity of our whole European Union. We will ensure a closer link between asylum and return. We have to make a clear distinction between those who have the right to stay and those who do not. We will take action to fight smugglers, strengthen external borders, deepen external partnerships and create legal pathways. And we will make sure that people who have the right to stay are integrated and made to feel welcome.¹⁵³⁰

The first sentence that is offered on the webpage of the Pact is that this is ‘a set of new rules managing migration and establishing a common asylum system at EU level, that deliver results while remaining grounded in *our European values* (emphasis added)’.¹⁵³¹ Again, European values are the settings within which and through which “migration” is “addressed”: ‘protecting our citizens and our values’, ‘the rule of law’, ‘a Union of equality, tolerance and social fairness’ and, casually dropped there as “values”, ‘strong borders, modernization of the EU’s asylum system and cooperation with partner countries’.¹⁵³² This is, the European Commission declares, ‘a fresh start on migration’.¹⁵³³ The Pact contains a series of legislative files that are clustered as follows:

- Asylum and Migration Management Regulation (AMMR);
- Asylum Procedure Regulation (including the Return Border Procedure Regulation);
- Crisis and Force Majeure Regulation;
- Eurodac Regulation;
- Screening Regulation;
- Qualification Regulation;
- Reception Conditions Directive;
- Union Resettlement and Humanitarian Admission Framework Regulation.¹⁵³⁴

Let us remember that a regulation is a binding legislative act to be applied in its entirety across the member states of the European Union. A directive on the other hand is a legislative act that indicates a goal that member states are to achieve on their own terms, therefore devising their own policy and legal frameworks to reach the established objective.

The 2020 Communication from the Commission on the New Pact on Migration and Asylum introduces the envisaged framework by affirming that ‘migration has been a constat feature of human history with a profound impact on European society, its economy and its culture. With a well-managed system,

¹⁵³⁰ Ursula von der Leyen, ‘State of the Union Address by President von der Leyen at the European Parliament Plenary’ <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655> accessed 28 October 2024.

¹⁵³¹ ‘Pact on Migration and Asylum’ (European Commission 21 May 2024) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en> accessed 20 October 2024.

¹⁵³² ‘Promoting our European way of life’ (European Commission) <https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-of-life_en#highlight> accessed 5 June 2022.

¹⁵³³ *ibid.*

¹⁵³⁴ ‘Legislative files in a nutshell. Pact on Migration and Asylum’ (European Commission 4 June 2024) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum/legislative-files-nutshell_en> accessed 20 October 2024.

migration can contribute to growth, innovation and social dynamism'.¹⁵³⁵ An 'effective migration policy' is called on by policy 'imperatives' such as free movement of the Schengen area, safeguarding of fundamental rights, ensuring security and filling skills gap:

[t]he task facing the EU and its Member States, while continuing to address urgent needs, is to build a system that manages and normalises migration for the long term and which is fully grounded in European values and international law. The New Pact on Migration and Asylum offers a fresh start to address this task.¹⁵³⁶

In the text of the Communication, one can spot a multifaceted representation of the "problem" of "migration". The overall solution that is being proposed is an alleged 'fresh start' on 'effective' policy to manage and normalise migration; this includes a 'new, durable European framework' that 'is needed to manage the interdependence between Member States' policies and decisions and to offer a proper response to the opportunities and challenges in normal times, situations of pressure and in crisis situations'.¹⁵³⁷

No state, the Communication reads, should be subjected to a 'disproportionate responsibility' and all should 'contribute to solidarity on a constant basis'. The text directly addresses the so called 'challenges' – "problems" – that member states 'continue to face' in different measures: '*external border management*', '*large-scale arrivals* by land and sea', '*overpopulated* reception centres', 'high numbers of *unauthorised movements* of migrants' (emphasis added). The solutions proposed foresee to:

- creating faster and seamless migration process, thus representing the "problem" of slow and fallacious existing process;
- strengthening migration governance and border policies with the aid of IT systems and 'more effective' agencies, thus representing the "problem" of a weaker migration governance and border policies, the IT systems of which must be strengthened, and implying the "problem" of current agencies not being effective enough;
- reducing unsafe and irregular routes, thus indicating migration undertaken in circumstances of irregularity as the "problem";
- promoting legal pathways 'for those in need of protection', therefore a priori highlighting the "problem" of the existence of people regarded as undeserving of protection;
- better matching arrivals through legal means and the 'EU labour market needs', thus representing the "problem" of migration as a marketable resource that could be more profitably controlled to attract 'talent';
- fostering trust in policies by 'closing the existing implementation gap', thus representing the "problem" of migration as having the character of a domestication and enforcement issue;
- including in the common response relationships with third countries and working closely with partners, thus representing the "problem" of migration as one that others can be outsourced to be responsible for, upon financial arrangements.¹⁵³⁸

Indeed, tailor-made partnerships are regarded as means for 'addressing the root causes of irregular migration, combatting migrant smuggling, helping refugees residing in third countries and supporting well-managed legal migration'.¹⁵³⁹ "Problems" are therefore:

¹⁵³⁵ 'Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum (COM/2020/609 final)' (23 September 2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609>> accessed 20 October 2024.

¹⁵³⁶ *ibid.*

¹⁵³⁷ *ibid.*

¹⁵³⁸ *ibid.*

¹⁵³⁹ *ibid.*

- so called unexplored ‘root causes’ of the already designated problematic irregular migration;
- migrant smuggling, therefore representing migration as a criminal law issue, ignoring the reasons for which the smuggling industry is there in the first place;
- the presence of refugees, who should then be residing elsewhere other than the EU and should remain in third countries;
- the perseverance of people moving outside the realm of ‘legal migration’ and engaging in what is then ‘illegal’ migration.

The Communication foresees the recasting of the Reception Conditions Directive to disincentivise ‘unauthorised movements’ and the clarification of ‘rules on detention’.¹⁵⁴⁰ Detention for children is not prohibited. Unaccompanied minors and children under the age of twelve together with their families ‘*should*’ (emphasis added) be exempt from border procedures ‘unless there are security concerns’.¹⁵⁴¹ The system ‘needs to be geared to reflect the particular needs of children at every stage, providing effective alternatives to detention’.¹⁵⁴² The plan foresees the recasting of the Return Directive to ‘help prevent and reduce *absconding* and *unauthorised* movements, with common criteria to assess each case and the possibility to use *detention* for *public order* and *security concerns*’ (emphasis added).¹⁵⁴³

Four years after the issuance of the Communication, the Plan is adopted.

The [Asylum and Migration Management Regulation \(AMMR\)](#) replaces the so called Dublin III Regulation.¹⁵⁴⁴ Article 1 lays down the Regulation subject matter: it establishes a common framework for asylum and migration management within the European Union and for the functioning of the Common European Asylum System; it establishes a so called solidarity mechanism; it establishes the criteria and mechanisms to assess the member state that is responsible for the evaluation of an application for international protection. Within the instrument, detention is foreseen ‘for the purposes of transfer’ (articles 44 and 45) and a person should not be held in detention ‘for the sole reason that he or she is seeking international protection’ (preamble paragraph 65). Detention ‘should’ be subject to the principles of necessity and proportionality, allowed only as a measure of last resort and in accordance with article 31 of the Geneva Convention (preamble paragraph 65). Persons shall not be held in detention on the sole ground that they are subject to the procedure set out by the Regulation but they may be detained to ensure procedures for transfer (article 2(21)) ‘where there is a risk of absconding or where the protection of national security or public order so requires’ (article 44(1), (2)). Detention shall be as short as possible and for no longer than the time ‘reasonably necessary’ for the administrative procedures required to be completed with due diligence until the transfer (article 44(3)). Detention conditions are guaranteed in the newly issued Reception Conditions Directive (article 44(4)) and shall be ordered in writing by competent authorities, shall state the grounds in law and in fact on which confinement is based and administrative cases shall be subject to a speedy judicial review of their lawfulness (article 44(5)). Detention is offered therein as a measure to ‘absconding’ (article 2(17)) and ‘risk of absconding’ (article 2(18)) and for ‘the protection of national security or public order’.

The [Asylum Procedure Regulation](#) establishes a common procedure for the granting and the withdrawal of international protection (article 1), concerning all applications in the territory of member states,

¹⁵⁴⁰ *ibid.*

¹⁵⁴¹ *ibid.*

¹⁵⁴² *ibid.*

¹⁵⁴³ *ibid.*

¹⁵⁴⁴ ‘Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013’ (22 May 2024) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1351>> accessed 20 October 2024.

including at the external border, on territorial sea or in transit zones (article 2).¹⁵⁴⁵ Applicants may be searched or their items be searched if it is ‘necessary and duly justified for the examination of an application’ (article 9(5)). Applicants have a right to remain on the member state’s territory until a decision has been reached on their application: this is not an entitlement to a residence permit and it does not entail the applicant’s right to travel to the territory of another state without a specific travel documentation (article 10). In examining applications, ‘relevant, precise and up-to-date information’ on the prevailing situation in the country of origin shall be considered (article 34). This applies to the cases considering the concepts of first country of asylum or safe third country as well (ibidem). Admissibility of an application shall be concluded no later than two months from the date of lodging it (article 35). Such time limit can be extended when ‘a *disproportionate* number of third-country nationals or stateless persons’ (emphasis added) apply for international protection within the same period and this makes it unfeasible for the authorities to conclude admissibility procedures within the set limits; when there are complex issues of fact or law; when the delay can be attributed to the applicant’s failure to comply with their obligations (ibidem). Conclusion of the examination procedure may also be postponed when the competent authorities cannot ‘*reasonably be expected* to decide within the time limits (emphasis added)’ in light of the ‘uncertain situation in the country of origin’ that is ‘expected to be temporary’ (ibidem). In cases of rejection of an application found to be inadmissible, unfounded or manifestly unfounded with regards to refugee status and subsidiary protection status, as well as in cases of withdrawal, a return decision shall be issued, in accordance with the principle of *non-refoulement* (article 37). Third-country nationals or stateless persons held in detention facilities or at border crossing points, including transit zones and at external borders shall be informed of the possibility to submit an application for international protection (article 30). Interpretation services shall be arranged and organisations and persons, as permitted under national law, to provide advice and counselling shall have effective access to applicants (ibidem). Limits to such access may be imposed by the national authority ‘where they are objectively necessary for the security, public order or administrative management of a border crossing point, including transit zones, or detention facility’ as long as access is ‘not severely restricted or rendered impossible’ (ibidem).

Accelerated examination procedures are foreseen in wide range of circumstances, including (article 42):

- the applicant raises issues that are not relevant to the determination of their status as a beneficiary of international protection;
- the applicant makes ‘clearly inconsistent or contradictory or clearly false or obviously improbable representations or representations which contradict relevant and available country of origin information, thus making his or her claim clearly unconvincing’;
- the applicant, ‘after having been provided with the full opportunity to show good cause’, is ‘considered’ to have intentionally misled the authorities, particularly with respect to their identity or nationality, or ‘there are clear grounds’ to consider that the applicant has in ‘bad faith’ destroyed or disposed of documents to prevent the establishment of their identity or nationality;
- the applicant makes an application to delay, frustrate or prevent enforcement of their removal;
- ‘a third country may be considered to be a safe country of origin’;
- there are ‘reasonable grounds’ to regard the applicant as a danger to national security and public order;
- the applicant entered the territory of a member state ‘unlawfully or prolonged [their] stay unlawfully’ and ‘without good reason’ has not presented themselves to the authorities or not made an application for international protection as soon as possible;

¹⁵⁴⁵ ‘Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU’ (22 May 2024) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202401348> accessed 20 October 2024.

- the applicant is a national or a former habitual resident, in case of statelessness, ‘of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower, unless the determining authority assesses that a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data or that the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered to be representative for their protection needs’.

Numbers enter the equation citizens unequal non-citizens and begin to tear down the human person, adding discriminatory treatment to discriminatory treatment in the name of a deliberate policy choice dressed in undetailed and unelaborated objective language.

Accelerated examination procedures may apply to unaccompanied minors as well (article 42). Border procedures may take place *inter alia* once an application has been made at an external border crossing point or in a transit zone, following ‘apprehension in connection with an unauthorised crossing of the external border’, following ‘disembarkation in the territory of a Member State after a search and rescue operation’ (article 43). The Regulation sets out an elaborated framework to determine decisions of the asylum border procedure (article 43, 44, 45). These reach the extent of determining *what* a ‘family unity’ is (!) for the purposes of maintaining it ‘as far as possible’ during the border procedure and with comparison to the ‘equivalent’ relationships by the law or practice of the concerned member state (article 45).

The Regulation sets ‘the adequate capacity at Union level’ to be 30’000 (article 46). No other detail is offered after 30’000, not even the words applicants, individuals, persons, not even applications, cases...

The “adequate capacity” of each member state is calculated by using a *formula* (article 47). The formula in article 47(4) calculates the capacity of the state:

by multiplying the number set out in Article 46 [30’000] by the sum of irregular crossings of the external border, arrivals following search and rescue operations and refusals of entry at the external border in the Member State concerned during the previous three years and dividing the result thereby obtained by the sum of irregular crossings of the external border, arrivals following search and rescue operations and refusals of entry at the external border in the Union as a whole during the same period according to the latest available Frontex and Eurostat data.

Once the ‘adequate capacity of a Member State is reached’, this may notify the Commission and is *inter alia* excepted from examining border procedure applications in cases falling within the previously mentioned 20% or lower proportion of decisions granting international protection to applicants from a given third country (article 48, cfr article 42(1)(j), article 49). Situations of such kind ‘shall be applied on an inflow-outflow basis’ (article 48). A member state may as well notify the Commission ‘where the annual maximum number of applications is reached’: upon verification by the Commission of the number of applications provided by the state within a calendar year, the former ‘shall authorise’ the state ‘to not examine in the border procedure applications’ in cases referring to the said 20% or lower proportion or referring to the applicant’s alleged misleading of the authorities, withholding information, destruction or disposal of documents to frustrate proceedings (article 50, cfr article 42(1)(c), (j)). It is therefore numbers, with no names, no faces, no families, no biographies, no tales to tell or smiles or tears. It is numbers calculated on arbitrary formulas. And while a recount of dispositions of such kind is rather tedious, let us have this sinking in: formulas.

Border procedures shall be as short as possible ‘while at the same time enabling a complete and fair examination of the claims’ (article 51). During asylum border procedures the state shall require applicants ‘to reside at or in proximity to the external border or transit zones as a general rule or in other designated locations within its territory, fully taking into account the specific geographical circumstances of that Member State’ (article 54). Families with minors shall reside in ‘appropriate’

reception facilities (ibidem). Subsequent applications are regarded as further representations and not new applications (article 55) and in some of such occasions the right to remain may be derogated from (article 56). International protection can be withdrawn (articles 65, 66, 67, 68).

“Problems” are the maintenance of the border before the migrant and the presence of the migrant in the territory of the Union once the border did not perform its scanning function. All such dispositions, which are but a pebble of the mosaic-like framework that has been put in place, should suffice to contradict those whose accusation is that this is an era of obsession for the dismantling of the border – it should suffice to admit that this is rather an era of border fetishism, in the words of Khosravi. An epoch in which ‘borders determine how the world looks’.¹⁵⁴⁶ An epoch of obsession for the illegality and the irregularity, *illegalisation* and *irregularisation*, of the person, prohibited in their inviolable humanity – represented as apprehended, unauthorised, at risk of absconding, absconding, a danger and a threat to national security and public order, misleading, in bad faith, sabotaging a procedure determining their life for which they never had a choice, at fault by being that plus one person who, waiting in lines while under surveillance and policed, reached a desk a moment too late and fell over the arbitrary threshold of a calculation that was dictated by the top of a fortress, clinging with its claws at undistributed wealth.

The Regulation also sets out the ‘safe country concepts’. A third country that has ratified and respects the Geneva Convention, within the limitations and derogations made therein, shall be considered to ensure effective protection (article 57(1)). Let us remember that Turkey is for instance a party to the 1951 Refugee Convention and its 1967 Protocol but maintains the geographical limitation to its scope of application. Criteria to determine whether a third country can offer effective protection when this is not a party to the said Convention are then listed (article 57(2)). The concept of first country of asylum, which is an “obligation” that is absent from the Refugee Convention, and the concept of safe third country are also set out (articles 58, 59, 60, 63, 64), as well as that of safe country of origin (article 61, 62, 63, 64).

The Asylum Procedure Regulation is accompanied by the [Return Border Procedure Regulation](#), which applies to third-country nationals or stateless persons whose application has been rejected during the asylum border procedure and therefore shall not be authorised to enter the territory of the concerned state.¹⁵⁴⁷ In its preamble, the Regulation exemplifies the procedure to which an applicant for international protection is subjected to: as many applications are made at the external borders or in transit areas of a state, a ‘screening’ is “necessary” for people to be ‘channelled to the appropriate asylum or return procedure, or refused entry’. Procedures foresee ‘identification, security and health screening’. Let us observe the order that the policy spells: identification first, security second, health third. The Regulation clarifies that the screening and border procedures for asylum consist of a ‘pre-entry phase’.

Prior Regulation 2021/1148 is amended to ensure a full contribution by the Union budget to the total eligible expenditure of solidarity actions and to introduce reporting requirements in relation to those actions; this is also amended to permit states to provide financial contribution to the Border Management and Visa Instrument (BMVI).

People to whom this Regulation applies shall not reside at or nearby the external border or transit zones or be accommodated in other locations designated by the state, for a period exceeding 12 weeks (article 4). Upon request, a period of ‘voluntary departure’ can be granted: it shall not exceed 15 days nor confer a right to enter state’s territory (ibidem). Detention is foreseen as a measure of last resort, to be decided on an individual assessment and if there is no less coercive alternative (article 5). When an applicant, third-country national or stateless person, who was detained at the stage of the asylum border

¹⁵⁴⁶ Shahram Khosravi, *Illegal Traveller. An Auto-Ethnography of Borders* (Palgarve Macmillan 2010) 1.

¹⁵⁴⁷ ‘Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148’ (22 May 2024) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202401349> accessed 20 October 2024.

procedure, has not been allowed to remain or no longer has such a right, the state may continue their detention to prevent them from entering the territory and to conduct a return procedure and their removal. The same applies when the person concerned is at risk of absconding, if they hamper return or if they pose ‘a risk to public policy, public security or national security’.

While the contestable idea of a danger to public or national security is recurrent, what does it mean to pose a risk to public policy? Is an ‘unauthorised’ migrant posing a risk to order maintaining?

In ‘a situation of crisis’ as defined in the Crisis and Force Majeure Regulation, the return border procedure should facilitate the return of people ‘illegally’ staying. By way of derogation, people might be kept at designated locations for an additional period of a maximum of six weeks (article 6). The same applies to detention (*ibidem*). Organisations and persons allowed under national law to provide advice and counselling shall have access to applicants in detention or at border crossing points (*ibidem*). The member state can apply for derogations when it considers itself in a situation of crisis (article 7).

The [Crisis and Force Majeure Regulation](#) ‘addresses’ (“addresses”), by means of temporary measures that shall meet the requirements of “necessity” and “proportionality”, exceptional situations of crisis, including instrumentation, and *force majeure*.¹⁵⁴⁸ A situation of crisis is: i) an exceptional situation of mass arrivals of third-country nationals or stateless persons in a member state by land or sea, ‘of such a scale and nature, taking into account, inter alia, the population, the GDP and geographical specificities of the Member State’, that it renders non-functional the otherwise well-prepared asylum, reception or return system; ii) a situation of ‘instrumentalisation’ where ‘where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State’ and when such actions can put at risk the state’s essential functions (article 1(4)). Situations of such kind do not include situations of smuggling of migrants, where non-state actors are involved in organised crime, nor humanitarian assistance on the other hand (preamble paragraphs 15-17). A situation of *force majeure* is one of abnormal or unforeseeable circumstances outside the state’s control and the consequences of which could not be avoided regardless of due care (article 1(5)). States that consider themselves in situations of crisis or *force majeure* can request to benefit from “solidarity” measures and from possible derogations applicable to the asylum procedures (articles 2-13). When ‘objective circumstances’ indicate that applications for international protection from specific groups could be well-founded, expedited procedure may be applied (article 14). Crisis preparedness is foreseen to be a part of national strategies (article 16).

The [Eurodac Regulation](#) concerns the development of the existing Eurodac database.¹⁵⁴⁹ This is done to control irregular immigration into member states and secondary movements within the European Union, for it is ‘necessary’ to establish the identity of applicants for protection and of ‘apprehended’ persons during irregular crossings. Accessing Eurodac by law enforcement is also considered in

¹⁵⁴⁸ Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 (22 May 2024) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202401359> accessed 20 October 2024.

¹⁵⁴⁹ ‘Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of ‘Eurodac’ for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council’ (22 May 2024) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202401358> accessed 20 October 2024.

connection with cross-border crimes and terrorism. For the purposes of the Regulation, states have an obligation to take biometric data, which includes fingerprint and facial image data.

The [Screening Regulation](#) establishes: i) the screening of third-country nationals, before being referred to the ‘appropriate procedure’, at a member state’s external borders when they have crossed said border in an unauthorised manner, have applied for international protection during border checks or have been disembarked after a SAR operation; ii) the screening of third-country nationals illegally staying within the state’s territory when there is no indication they were subject to border controls, before being referred to the ‘appropriate procedure’ (article 1).¹⁵⁵⁰ The screening’s objective is: to strengthen the control over external border crossing, identify persons and check in the relevant databases whether they may pose a threat to internal security (*ibidem*). Screening ‘shall also entail’ preliminary health and vulnerability checks (*ibidem*). During the screening of persons apprehended in connection with an unauthorised crossing of external borders, disembarked following a SAR operation and in connection with an application for international protection made at external border crossing points or in transit zones, the concerned persons shall not be authorised to enter the state’s territory (article 6). Screenings are also to be carried once third-country nationals are ‘illegally staying’ within state’s territory and have entered in an unauthorised manner or have not been subjected to any screening yet in a member state (article 7).

The [Qualification Regulation](#) sets standards for the qualifications of third-country nationals or stateless persons as beneficiaries of international protection, standards for the content of the latter and standards for a uniform status for refugees or people eligible for subsidiary protection (articles 1, 2).¹⁵⁵¹ The text does not apply to national humanitarian statuses (article 2). The Regulation disposes *inter alia* for the so called ‘internal protection alternative’, applicable when the applicant’s state of provenience or agents of such state are not the actors of persecution or serious harm: in such cases, the member state competent for their application shall examine whether the person concerned ‘can safely and legally travel to and gain admittance to a part of the country of origin and can reasonably be expected to be settled there’ when in that part of the country the applicant has no well-founded fear of persecution, does not risk suffering serious harm or has access to protection against persecution and harm (article 8). The Regulation further foresees the withdrawal of refugee status in a number of occasions, including when there are ‘reasonable grounds’ to regard the person in question ‘a danger to the security’ of the state (article 14).

The [Reception Conditions Directive](#) sets out the standards for reception of international protection applicants across member states.¹⁵⁵² Differences of treatment in member states are regarded as ‘important drivers of secondary movement’ (preamble paragraph 3). To restrict the possibility of ‘abuse of the reception system’, states should be able to provide material conditions of reception only to applicant with not sufficient means to provide for themselves; otherwise, states should be able to require applicants to cover, contribute to or refund the cost of the reception or of health care (preamble

¹⁵⁵⁰ ‘Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817’ (22 May 2024) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202401356> accessed 20 October 2024.

¹⁵⁵¹ ‘Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council’ (22 May 2024) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202401347> accessed 20 October 2024.

¹⁵⁵² ‘Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection’ (22 May 2024) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202401346> accessed 20 October 2024.

paragraph 61). Abuse should be prevented by considering circumstances in which material conditions can be reduced or withdrawn (preamble paragraph 61). The Directive applies to all those who make an application for international protection, provided they are allowed to remain on the territory of the state as applicants (article 3). Within the Regulation, ‘detention’ is understood as the confinement of the applicant by a member state within a particular space, where the applicant is deprived of their freedom of movement (article 2(9)). The text indicates that member states may freely organise their reception system, in line with the Directive, and that applicants ‘may move freely within the territory’ of the state concerned (articles 7, 8). This provided, states may allocate or re-allocate applicants to accommodations (ibidem). Despite the disposition on free movement on the territory of the state, persons may, upon request, be granted ‘permission to temporarily leave the geographical area’ they were allocated to for ‘duly justified urgent and serious’ family reasons or ‘necessary’ medical treatment unavailable in their area of allocation (article 8(5)). Further restrictions on freedom of movement can be applied by the state: the latter may decide that an applicant is only permitted to reside in a specific place adapted for housing migrants, for reasons of public order or to prevent absconding (article 9). Restrictions ‘shall be proportionate’ and consider the ‘relevant’ aspects of the individual situation of the applicant and their special reception needs (article 9(4)). No person shall be held in detention on the sole ground they are an applicant or on ground of nationality and detention shall not be ‘punitive in nature’ (article 10). Applicants may be detained ‘when necessary and on the basis of an individual assessment’ if no other less coercive alternatives can be applied (article 10(2)). Special reception needs shall be taken into account (article 10(3)). Applicants may be detained: i) to determine or verify their identity and nationality; ii) to determine the elements pertaining to the claim for international protection, if these cannot be obtained in the absence of detention or if there is the risk of absconding; iii) in case of risk of absconding and to ensure compliance with legal obligations; iv) when the applicant is subject to a return procedure; v) when detention is required by ‘protection of national security or public order’; vi) in accordance with the disposition on detention in Regulation 2024/1351 (article 10(4)).

Finally, the New Pact on Migration and Asylum includes the [Union Resettlement and Humanitarian Admission Framework \(Union Framework\) Regulation](#).¹⁵⁵³ This is to be established to ‘complement other legal pathways’ and offer ‘the most vulnerable’ international protection applicants access to a durable solution in line with EU and national law (preamble paragraph 3). It applies to persons admitted on the territory of member states to be granted international protection or humanitarian status under domestic law and lays down the rules on admission through: i) resettlement, which implies a referral from the UNHCR, or ii) humanitarian admission, which implies a referral from the European Union Agency for Asylum, from the UNHCR or from another relevant international body (articles 1, 2).

Such an excursus of the newly established framework of the European Union space is propaedeutic to observe that the overall “problems” configured by the system are related to so called “irregular migration”, rather irregular-ised, comprising of “unauthorised movements” and “illegal staying”. The objective to harmonise procedures and conditions of reception across member states is also indicative of the consideration of “secondary movements” as a “problem”. This is somehow paradoxical, within a system that has been structured entirely around its internal free mobility and circulation and is now turning that ideal into a caged privileged condition to be maintained through the fortification of external borders.

There is furthermore a particular emphasis on the idea that the reception and asylum system may be *abused* by applicants *undeserving* of protection and of material conditions of subsistence. Indeed, the statement ‘for those in need of protection’ is complementary to most of the dispositions on migration

¹⁵⁵³ ‘Regulation (EU) 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147’ (22 May 2024) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1350>> accessed 20 October 2024.

management, implying the foundational idea that any ground to migrate other than those meeting the strict requirements of international protection, which are to be proven with obsessive accuracy and detail, is not worthy of reception. This is combined with the pursuance of the “legal” side of migration through pathways designed to “attract talent” and to match the needs of the Union’s market with the “human resources” that could fill in the gaps. It is an arbitrarily preconfigured system geared on a categorisation of humanity in respect of the interests of a fortressing power and the labour market, where the talent is granted access to the space of the Union, the vulnerable fleeing persecution may be granted protection under ever stricter conditions and the likewise vulnerable falling outside such strict scope may never even be acknowledged. The latter in particular falls outside the realm of the law and their unlawfulness is displayed: they are ‘apprehended’ and ‘detained’, they are a ‘risk’ and a ‘threat’, they are removed. If they are not removed or while they are under the incumbent shadow of being removed, they are a nameless multitude replenishing the ranks of undeclared and grey labour, for their clandestinity negates their recognition in the mechanisms of the state’s economy but does not negate their very existence, which is dragged then into the market through exploitation and abuse.

Meanwhile, a whole militarised and policed and technological industry is being mobilised to thin accountability of Union’s states towards people seeking a life therein, instituting pre-entry screening, enhancing patrolling and border controls, establishing accommodations in frontier and transit zones at the discretion of authorities, disguising detention as the norm under a veil of arbitrary necessity and proportionality, collapsing territorial jurisdictional ties, outsourcing responsibilities and services. The European institutional space does not “open” “its” geographical, territorial space to the human person, as if the lands it comprises of where indeed “theirs” of sovereign member states; it does not “open” “its” citizenry to a vision of citizenship as participation, claiming the threat to be protected from came from the outside and not from the “disvalues” of an “our” European way of life.

The ‘humanitarian rationale’, borrowing from Losurdo and Cantaro, that characterises the framework of asylum is *made* to be selective in its screening of ‘deservingness’ in the first place. Reasoning on refugees through the lens of the Geneva Convention in fact, an instrument of the aftermath of the second world war that limits status definition to “political” grounds and to the applicant’s capability to document the persecutions suffered, no longer reflects the current aspects of the migration phenomenon.¹⁵⁵⁴ While this discrepancy has been acknowledged long ago, there is all the more resistance to translate such considerations into a more extensive operational vision of protection.¹⁵⁵⁵ Worse, the humanitarian rationale is declining, leaving room to the increasingly prominent ‘security rationale’, as Losurdo and Cantaro observe.¹⁵⁵⁶

In the New Pact on Migration and Asylum, ‘the Commission (no doubt inadvertently) reveals its dominant political use of the term migration (and migrant) as a problem which needs to be addressed by controlling, governing and diminishing it’, Guild argues.¹⁵⁵⁷ Migrants are indeed categorised as

a challenge to border control, a factor of profound impact on the EU economy and Member States’ culture, the agents of large-scale arrivals and overcrowding of reception centres, and subjects who demand that Europeans (perhaps reluctantly) treat them humanely and live up to their EU values; in other words, irritants in every way.¹⁵⁵⁸

¹⁵⁵⁴ Maurizio Ambrosini, *L’invasione immaginaria. L’immigrazione oltre i luoghi comuni* (Gius. Laterza & Figli 2020) 43.

¹⁵⁵⁵ *ibid.*

¹⁵⁵⁶ Antonio Cantaro, Federico Losurdo, ‘Personal Freedom of the International Protection Seeker’ (2020) *A Quarterly Review for Criminal Justice* 417.

¹⁵⁵⁷ Elspeth Guild, ‘Promoting the European way of life: Migration and asylum in the EU’ (2021) 26(5-6) *European Law Journal* 355.

¹⁵⁵⁸ *ibid.*

The Pact is rather explicit in its problematisation of “migration”: “regular” migration is rather unproblematically brushed through, whereas “irregular” – “illegal” – migration is “addressed” and thus produced. Unauthorised arrivals must be prevented and curbed, applicants must be stopped as far as possible at external EU borders and the functionalism of accelerated procedures and of pre-entry screening is prioritised over fundamental asylum and human rights guarantees; formulas and percentages are proposed as solutions to allegedly massive flows in a narrative of numbers and not persons, ever-emergency and ever-crisis, *force majeure* and even instrumentalisation by the fraudulent refugee, reinforcing the representation of member states’ limited migration carrying capacity in need of a ‘fresh start’.

If such a policy vision foresees the ‘enhancement’ of safe and legal pathways for those ‘in need of protection’, it arbitrarily sets the strictest surveillance over such pathways and implies that the remaining ‘unauthorised’ arrivals concern those who are *not* in need of protection. Almost illogically within such a scenario, the mobility of people is nevertheless proposed as a fact in human history. ‘Root causes’ of irregular migration are mentioned as if they were natural, timeless, inextricable, visceral, primordial causes of a phenomenon, merely and agelessly “present”: the great absent from this narrative is the policy construction of such irregularity, the elaborated framework relegating *wanted* people to acceptance and *unwanted* people to illegality, fabricating the unlawfulness of the human person in their flesh and blood. Forgetting that the prohibited is yet corpoREAL. “Irregular” migration is there because of movement restrictions: for human mobility has always occurred, it was merely a decision of some to deliberately opt that part of such mobility should not occur. Or rather, for it continues to occur, it was merely a decision of some to deliberately choose that part of such mobility should occur *in this way*. Its illegality is a production, an artificial escamotage that reinforces unequal wealth allocation, a hierarchisation of likewise artificial statuses, dragging people in hope or despair to exploitation, death or both. The massive display of the monopoly of force – violence – against the unwelcomed, the military-like industry that is financed, the resources that are mobilised: what for, if people have always moved? The paternalistic rhetoric against migrant smuggling is accompanied by its frequent (instrumental) confusion with trafficking in human beings and is shadowed by the elephant in the room: the reason why migrant smuggling is there in the first place. And the reason why wealth is poured into restricting movement that does not end, that is no longer or not always (or has ever been?) an emergency to be addressed by urgent dispositions and by crisis measures. Why the threshold of European doors, rather than being open and opened, continues to be armoured and pushed closed, stone by stone and brick by brick, metaphorically and physically, hotspots, detention facilities, (non)transit zones, (non)crossing points, barbed wires, containers, fences, cameras, thermal images, infrared, gps, helicopters, vessels and even mathematical formulas...

Baobab Experience observes in relation to the 2024 deportation and confinement agreement between Italy and Albania:

while Italy is breaking apart over 16 asylum seekers forced to roam the Mediterranean spending 300’000€ only on fuel, our hub welcomes every night three times that number: transiting women, men and children. People on the move: what a weird invasion that no one notices. How many warm meals could have we offered with the 300’000€ spent for the failed deportations of a few?¹⁵⁵⁹

5.3 Italy: the “problem” through the Cutro decree

The migrant is a mirror in which all the contradictions of contemporary society are reflected. The migrant speaks to us of the present, is able to transit through free from the stickiness of the habit, exempt from the disenchantment of the already-seen. Through the condition of the migrant we observe our own condition; the migrant forces us to rethink our certainties about what is just

¹⁵⁵⁹ Baobab Experience <https://www.instagram.com/p/DBRwo2qOHHI/?img_index=1> accessed 26 October 2024.

and unjust, about what is acceptable and what is not. (...) [T]he migrant who is controlled, in a waiting area, more incarcerated than the citizen, the migrant who is made invisible by the laws that seek to push them out of the walls of fortress Europe, the migrant who is a *non-person* (...). The non-person speaks to us of the crisis of the wage society and of a right to citizenship that we are not able to conceive and practice outside of labour. They speak to us of the rhetorical construction of a European political space and of the violent delineation of its external borders. They speak to us of the crisis of the Nation-state and of its reemergence as a Police state.¹⁵⁶⁰

Chapter one of this study proposed a brief excursus over administrative detention, concluding with the mentioning of a 2023 legislative decree foreseeing the expansion of the detention system for migrants. The decree was picked up in chapter two in relation to the alteration of the “vulnerable category” of asylum seekers “entitled” to “special protection” status. It was further touched upon in chapter four, which *inter alia* recalled that said 2023 legislative decree was informally titled after a deadly shipwreck in front of the coasts of Cutro, in Calabria. The following paragraphs analyse the problematisation of “migration” contained in this specific policy instrument, the so called *decreto Cutro*, issued in March 2023 and converted into law with modifications later in May.¹⁵⁶¹ Attention is specifically paid to dispositions concerning administrative detention. The decree formally titles ‘urgent dispositions in relation to legal entry flows of foreign workers and in relation to preventing and contrasting irregular immigration’. It primarily builds on the earlier 1998 TUI, a landmark instrument in migration management policy. Its preamble indeed reads that the decree was issued given the ‘extraordinary necessity and the urgency to adopt dispositions’ of the matters of concern.

Article 1 deals with measures for the organisation of legal entry flows of foreign workers. It establishes the maximum ‘shares’ (*quote massime*) of foreigners to be admitted into state territory for dependant work (*lavoro subordinato*), including seasonal work, and independent work (*lavoro autonomo*). Such organisation must take into consideration the ‘analysis of the needs of the labour market’ together with the outlook provided by the national most representative labour unions and employers’ organisations. With a view to prevent irregular migration, a share of the available spots is preferentially reserved to workers from states that, in cooperation with the Italian state, promote for their own citizens media campaigns on the risks for personal safety deriving from joining irregular migratory ‘traffics’ (*traffici migratori irregolari*). Spots can also be assigned to stateless persons or refugees ‘recognised’ by the UNHCR or by first asylum and transit countries. Other arrivals can be authorised for dependent work, including seasonal work, concerning foreign citizens of states with which Italy has ratified repatriation agreements.

Article 2 concerns measures for the simplification and acceleration of procedures for the issuance of a ‘clearance’ to work (*rilascio del nulla osta al lavoro*).

Article 3 sets out dispositions for entry and residence outside the established shares. It refers to the entry of dependant workers who have attended and completed educational and training activities of a

¹⁵⁶⁰ Alessandro De Giorgi, *Zero tolleranza. Strategie e pratiche della società di controllo* (DeriveApprodi 2000) 19. Own translation. See original: ‘Il migrante è uno specchio nel quale tutte le contraddizioni della società contemporanea hanno modo di riflettersi. Il migrante ci parla del presente, è capace di attraversarlo libero dalla vischiosità dell’abitudine, esente dal disincanto del già visto. Attraverso la condizione del migrante osserviamo la nostra condizione; ci costringe a rivedere le nostre certezze sul giusto e l’ingiusto, su ciò che è accettabile e ciò che non lo è. (...) [I]l migrante controllato, in zona d’attesa, più incarcerato del cittadino, il migrante reso invisibile da leggi che vogliono respingerlo fuori dalle mura della fortezza Europa, il migrante non-persona (...). La non-persona ci parla della crisi della società salariale e di un diritto alla cittadinanza che non riusciamo a pensare e praticare fuori dal lavoro. Della costruzione retorica di uno spazio politico europeo e della perimetrazione violenta dei suoi confini esterni. Della crisi dello Stato-nazione e del suo riapparire come Stato di polizia’.

¹⁵⁶¹ Decreto-legge 10 March 2023 no. 20 ‘Disposizioni urgenti in materia di flussi di ingresso legale dei lavoratori stranieri e di prevenzione e contrasto all’immigrazione irregolare. (23G00030)’ (entry into force 11 March 2023, converted with modifications through L. 5 May 2023 no. 50 in GU 104 5 May 2023) GU 59 10 March 2023 <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2023-03-10;20>> accessed 3 June 2023.

professional and civic-linguistic character in their states of origin. Such activities are said to be organised 'on the basis of the needs detected by trade associations and communicated to the Ministry of work and social policies. The selection of workers takes place directly in their state of origin.

Article 4 sets out dispositions on the duration of the residence permit granted for permanent work, autonomous work and for family reunification. Temporal limitations are added to the renewal of residence permit for work.

Article 4*bis* sets out dispositions on the conversion of residence permits for unaccompanied foreign minors.

Article 5 regulates the entry of workers in the agricultural sector and for the purpose of contrasting organised crime in said sector (*agromafie*).

Article 5*bis* sets out measures for the technical-logistic strengthening of the first reception system and of border controls (*potenziamento tecnico-logistico del Sistema di prima accoglienza e dei controlli alla frontiera*). The article regulates the realisation of so called 'crisis hubs' and similar facilities through the possibility to appeal to waivers and derogations as established in a 2017 legislative decree on 'urgent dispositions to accelerate procedures for international protection and to contrast illegal immigration' (article 5*bis*(1)).¹⁵⁶² Reference is also made to the disposition foreseeing the extension of the network of 'expulsion centres', known as *CPR*, with a view to ensure the most effective execution of expulsion orders.¹⁵⁶³ According to this, distribution of the *CPR* facilities is to be ensured throughout the whole national territory; new centres will preferably be located in extra-urban areas that can be easily accessed and where there are public facilities that, upon renovations, can be adapted to the objective of detention and removal. The disposition recalls the necessity to have facilities of a "limited" capacity so that confinement (*trattenimento*) is carried out in the 'absolute respect of the individual's dignity'. Article 5*bis*(2) further establishes that until the end of 2025, the Ministry of Interior can, through derogations, call on the Italian Red Cross for the management of the crisis hub in Lampedusa in cases of over-crowdedness, with a view to ensure 'adequate reception levels'. 5*bis*(3) adds to article 10*ter* of the 1998 TUI. The latter establishes that the foreigner who is tracked down during the irregular crossing of internal or external frontiers or who has reached the national territory following a rescue operation at sea is conducted to said hotspots (*punti di crisi*) or reception facilities (*centri governativi di accoglienza*) defined by the 1995 legge Puglia and article 9 of the law 142/2015 respectively. In such locations, photo-dactyloscopic and identification checks are conducted, the foreigner is informed of the procedure for international protection, the programme of relocation to other EU member states and the possibility to be assisted in voluntary repatriation. Article 5*bis*(3) of the new decree adds that, to facilitate compliance with such provisions, foreigners hosted in crisis hubs (*punti di crisi*) can be transferred to similar facilities (*strutture analoghe*) on the state territory; moreover, to ensure the coordinated implementation of all competences, the identification of facilities destined to carry out frontier procedures with detention (*strutture destinate alle procedure di frontiera con trattenimento*) and the assessment of their capacity is conducted together with the Ministry of Justice. Article 5*bis*(4) reads that in specific circumstance, reception can be agreed upon by the prefecture in temporary reception facilities, where services concerning food, accommodation, clothing, medical assistance and linguistic-cultural mediation are ensured. Article 5*bis*(5) reads that to ensure adequate levels of reception in *punti di crisi* (article 10*ter* of the 1998 TUI), the Ministry of Interior is authorised to stipulate one or more contracts to assign the maritime transport of migrants hosted therein (*uno o piu' contratti per*

¹⁵⁶² See Decreto-legge 17 February 2017 no 13 'Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto dell'immigrazione illegale. (17G00026)' (entry into force 18 February 2017) <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2017-02-17:13~art19-com3bis>> accessed 20 October 2024.

¹⁵⁶³ *ibid*.

l'affidamento del servizio di trasporto marittimo dei migranti ivi presenti), within the maximum cost of 8'820'000€ in 2023.

Article 5*ter* and article 5*quater* deal with modifications to the reception system and with the reduction or withdrawal of reception conditions respectively. Article 5*ter* excludes international protection applicants from reception services, i.e., SAI, Sistema di Accoglienza ed Integrazione, besides those who fall within the scope of listed “vulnerable categories” or who have entered national territory through humanitarian corridors or legal pathways such as evacuation measures or resettlement programmes. The norm does not apply to applicants already present within the system at the date of entry into force of the law nor it applies to Afghan and Ukrainian applicants who entered the Italian state following the crises unfolding in both state of origins. Article 5*quater* foresees that the prefect can reduce or withdraw reception conditions when the asylum applicant breaks the rules of the facilities where they are accommodated, damages properties, engages in violent conduct. The asylum applicant can likewise be moved to another facility. Any such dispositions applied to the person concerned are to be communicated to the Territorial Commission competent for their international protection procedure.

Article 6 sets out extraordinary measures in relation to the management of migrants' centres (*centri per i migranti*). It foresees that in cases of a serious incompliance with the tender obligations and when the immediate cessation of the contract could compromise the continuity of services for the protection of fundamental rights as well as occupational levels, the prefect can nominate commissioners (*uno o più commissari*) for the exceptional and temporary management of the facilities in question. These include: reception centres as for article 9 of the law 142/2015, temporary reception centres as for article 11 of the law 142/2015, hotspots, similar facilities and facilities for frontier procedures with detention as for article 10*ter* of the 1998 TUI and *CPR* as for article 14 of the 1998 TUI. Simultaneously, the prefect begins the procedures for the direct assignment of a new tender for the provision of goods and services (*avvia le procedure per l'affidamento diretto di un nuovo appalto per la fornitura di beni e servizi*).

Article 6*bis* sets out the activation of an emergency medicalised hub (*postazione medicalizzata del 118*) in Lampedusa.

Article 6*ter* eliminates psychological assistance, Italian language courses, legal counselling and orientation into the local territory from the services offered in reception centres. Services left are limited to medical assistance, social assistance and linguistic-cultural assistance.

As seen in chapter two, article 7 of the decree deals *inter alia* with the alteration of the institute of the category of ‘special protection’. Moreover, special protection residence permit can no longer be converted into a residence permit for work.

Article 7*bis* deals with urgent dispositions in relation to accelerated frontier procedures. Article 7*bis*(1)(a) establishes that civil administration personnel belonging to the Ministry of Interior can join the Territorial Commissions. Upon acceptance of the role, the personnel is specifically trained on the matter of international protection by the Ministry. Territorial Commissions are defined in article 4 of the 1998 TUI.¹⁵⁶⁴ Before such a recent addition, the latter article foresaw that Commissions were composed of at least four highly qualified administrative officials (*funzionari amministrativi con compiti istruttori*) as for article 12 of the legislative decree 13/2017. Article 7*bis*(1)(b)(1.2) expands the recourse to accelerated procedures. These foresee the speedy transmission by the questor of the necessary documentation to the Territorial Commission, bound to communicate a response over an

¹⁵⁶⁴ The matter of the arbitrariness and widely denounced discretion (*discrezionalità*) of Territorial Commissions in their assessment of individual circumstances of each applicant is not discussed in this study. However, the degree of discretion of such organs has been regarded as ‘one of the most negative consequences of the [current] regulatory framework on the juridical status of the foreigner’. See Maria Antonella Gliatta, ‘Governance dell’immigrazione in Italia, crisi della legge e (non) ruolo dei regolamenti dell’esecutivo (27 November 2017) 2 federalismi.it (numero speciale) 2.

asylum application in five days, as for article 28*bis* of the legislative decree 25/2008. The new decree adds that accelerated procedures apply to cases where the request for international protection is presented directly at the border or in transit zones by an asylum seeker coming from a 'safe' country of origin as for article 2*bis* of the 1998 TUI. Article 7*bis*(1)(b)(2) foresees that a set of such procedures can directly take place at the border or in transit zones. Article 7*bis*(1)(c) expands cases of inadmissibility of an asylum application as for article 29 of the legislative decree 25/2008. The new decree establishes as inadmissible circumstances in which an identical request is reiterated unless the applicant proves they could not offer relevant elements in their previous application and that this did not depend on them (*il richiedente allegghi fondatamente di essere stato, non per sua colpa, impossibilitato a presentare tali elementi o prove in occasione della sua precedente domanda o del successivo ricorso giurisdizionale*). In such cases the application is preliminarily examined to assess whether new relevant elements were adduced and whether their previous delay or omission was not attributable to the applicant, with whom the burden of "specific attachment" rests (*non è imputabile a colpa del ricorrente, su cui grava l'onere di allegazione specifica*). Article 7*bis*(1)(2) establishes that the executive validity of an inadmissibility verdict is not suspended by an appeal or an application for precautionary injunction (*la proposizione del ricorso o dell'istanza cautelare*), with reference to article 35*bis* of the legislative decree 25/2008. When the applicant is held at the frontier, a specific disposition applies which foresees that the Territorial Commission's decision can be appealed within 14 days. The Territorial Commission is immediately notified and within two days is required to submit material and a decision defence. At the end of such period, the judge submits within five days a reasoned verdict that is no longer appealable. For such a period, the foreigner cannot be expelled nor distanced from the place where they are held.

The remaining of article 7*bis* contains the features of the administrative detention to which a foreigner can be subjected. It makes reference to article 6 of the legislative decree 142/2015 and the addition of articles 6*bis* and 6*ter* of the same decree, respectively defining the *trattenimento* of the foreigner at the frontier and that of the foreigner to whom the Dublin regulation is applicable. Article 6 foresees that an asylum seeker is to be held in *CPR* (as for article 14 of the 1998 TUI) on a case-by-case assessment. The new normative addition explicitly mentions that holding in such facilities occurs upon the limits of the available spots. Detention can furthermore take place if it is necessary to determine the elements on which the application for international protection is based and if the foreigner may flee. Article 6*bis* establishes that the foreigner can be detained during a border procedure for the sole purpose of assessing their right to entry on state territory. Such a situation can occur when the applicant has not handed over their passport or any valid identification document or when the foreigner does not submit adequate financial guarantees (*non presti idonea garanzia finanziaria*). Applicants can be detained in specific areas (*appositi locali*) in facilities for frontier procedures with detention as for article 10*ter* of the 1998 TUI and, in cases of consistent and close-range arrivals (*arrivi consistenti e ravvicinati*), in *CPR* as for article 14 of the 1998 TUI, located in border or transit zones. Detention lasts for the period strictly necessary to assess the applicant's right to entry on state territory. Article 6*ter* establishes that applicants subject to the Dublin regulation can be detained in facilities as for article 14 of the 1998 TUI while awaiting relocation, when there may exist a considerable (*notevole*) risk of the foreigner fleeing. Such a considerable risk is assessed upon a set list of criteria. Detention in "Dublin cases" may last up to six weeks, prolongable to other six weeks.

Article 7*ter* sets out disposition on decisions related to international protection recognition. The Territorial Commission, when no protection is granted, proceeds with the issuance of an expulsion order as long as the *questore* shares no reasons preventing the expulsion. The order is operational as of the moment of the expiration of the period granted for an appeal: the applicant must therefore leave the territory of the state.

Article 7*quater* introduces that the foreigner participates remotely in the confirmation of the measures to escort them at the border or to detain them through an audio-visual link between the hearing and the holding facilities where they are.

Article 7^{quinquies} sets out accelerated procedures for appeals that were submitted within 2021.

Article 8 concerns criminal dispositions. It exacerbates and expands sentencing for individual criminal responsibility in cases of “clandestine immigration” and in cases in which other crimes are committed while engaging in said activities. It does so by altering article 12 of the 1998 TUI and by adding article 12^{bis}.

Article 9 addresses dispositions on expulsion and appeal of the recognition of international protection, while article 9^{bis} addresses dispositions on crimes committed while in centres or facilities for asylum seekers, including detention facilities, expanding those considered to include: hotspots, similar facilities and facilities for frontier procedures with detention as for article 10^{ter} of the 1998 TUI, reception centres as for article 9 of the law 142/2015, temporary reception centres as for article 11 of the law 142/2015, facilities belonging to the reception and integration system (*SAI, sistema di accoglienza e integrazione*) as for article 1-sexies of the legislative decree 416/1989. Article 9^{ter} sets out new dispositions on the cessation of international protection: assessment on cessation will consider any return in the state of origin, regardless of their brevity, that is not justified by serious and proved motives and that exceeds the duration of the period strictly necessary.

Article 10 addresses the strengthening of the *CPR* system by adding a paragraph to article 19 of the legislative decree 13/2017 on effective expulsions and consolidation of the detention centres. To ensure the realisation of administrative detention centres until 31 December 2025, it allows to derogate from any provision other than those contained in the criminal code, anti-mafia and prevention provision, as well as binding provisions deriving from being a EU member state. *ANAC*, the national anti-corruption authority, ensures monitoring (*vigilanza collaborativa*).

Article 10^{bis} modifies article 14(5) of the 1998 TUI. It foresees the extension of derogations to detention for a period of up to 45 days.

Article 11 establishes that no new or additional public expense shall derive from the adopted decree.

In September 2023 moreover, the Council on Ministers, with a view to ‘contrast illegal migration’ through a further decree, extended the period of administrative detention to a total of 18 months.¹⁵⁶⁵ This aligns with EU norms (article 20). The Council also sets out the ‘extraordinary plan’ to develop an ‘appropriate’ number of facilities across national territory such as crisis hubs and hotspots (*punti di crisi*), similar facilities and *CPR*. The design and development of the facilities are assigned to the Ministry of Defence, through the military (*Genio militare*), the armed forces and the agency *Difesa Servizi S.p.A.* The project is declared by law as destined to ‘national defence and security’. A specific fund is established with 20 million euros being allocated for 2023. As of 2024, the expense of 1 million euros per year is authorised to contribute to the functioning of the facilities and 400’000 euros for 2023 for expenses related to preliminary phases of setting up of the areas, working sites, security and surveillance.

What is then the problem of “migration” represented to be in the Cutro decree? In a similar fashion to what takes places at European Union level, “regular” migration is represented as a marketable platform of offers to the demands and necessities of the national labour market. The state and other governing actors, such as in this case representative trade unions and employers’ associations, come together to shape people’s conducts in an elaborate scheme of quantitatively and qualitatively controlled entry flows, put in place to benefit from and mobilise those *skills*, rather than people, which are formally

¹⁵⁶⁵ Presidenza del Consiglio dei Ministri, ‘Comunicato stampa del Consiglio dei Ministri n. 50’ (18 September 2023) <<https://www.governo.it/it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n-50/23603>> accessed 20 October 2024; Decreto-legge 19 September 2023 no. 124 ‘Disposizioni urgenti in materia di politiche di coesione, per il rilancio dell’economia nelle aree del Mezzogiorno del Paese, nonché in materia di immigrazione. (23G00137)’ <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2023-09-19:124>> accessed 20 October 2024.

wanted or needed – therefore legitimate and legitimated to move, contrary to any other reason, need, choice, human right protection. Skills are requested and therefore converted into access granted by law, overriding any other ground. Talents, the Union would call it. Labour is transformed into “regular” migration and vice versa. The ‘legal entry flows’ of foreign workers is juxtaposed to “irregular” migration, to be *prevented* and *contrasted*. Not just juxtaposed – legal entries become tradable, expendable commodities in exchange of assistance in said prevention and contrast: shares of available entries and further pathways can in fact preferentially be reserved and organised for foreign *skills* the governments of which have agreed on disseminating information on the risks of embarking in irregular routes and have agreed on repatriation arrangements. Prevent and contrast. This reinforces the manifest problematisation of “irregular” migration as something to be quashed: curbing protection rights, reducing reception services, increasing the criminalisation of asylum seekers, introducing additional limitations to the enjoyment of one’s rights, promoting accelerated removal procedures, strengthening detention and confining accommodations. The “existence” of “irregular migration” is *the* problem, to be prevented and contrasted through ‘urgent’ measures: that is, the physical presence of the immigrant on the national territory is to be limited, controlled and refused. The human person who pursued their own choices and arrived in Italy is undeserving of protection, which rests subordinated to the labour market. The human person is officially unwanted, for exceeding the threshold of shares unilaterally calculated – again numbers, not persons – and is thus detained and removed. The human person is unofficially wanted and is thus recruited by the renegade, publicly despised yet visible and known organisation of exploitation. For the solutions proposed are accelerated proceedings, reduction of access to the reception system, reduction of the services of the reception system itself, expansion of the detention system, extension of detention periods, enhancing of expulsions: in the end, “irregular migration” is represented as a problem because [the physical presence of the migrant person on state territory is a problem](#). They must be controlled, policed, removed. They disorder the order of things.

The deep-seated ways of thinking underlying such a problem representation are that people arriving outside legal entry flows are i) undeserving of protection and are ii) unwanted, not responding to the officially identified needs of the market. The protection rationale, even at its down to the bone version, is subordinate to the rationale of profit. There is an underlying logic tying the immigrant to the employer, an inescapable image that ignores the human person and rather conveniently sees (or does not see) the potential worker in their exploitable precarity, a vision that does not articulate migration outside the perimeter of labour under surveillance, that does not acknowledge migration as participation nor participation as performative citizenship to be promoted.

The state brings forward its alleged yet unchallenged limited migration carrying capacity. Capacity is so limited that there no longer is a space for the respect of the inviolability of the human person. The state does not have the resources to protect the human (non)person. It has the resources to detain them for up to eighteen months. It has the resources to reserve, fuel, staff and fly a charter flight back and forth to remove them. The state is sovereign. It is sovereign in its selective recognition and in its rejection of acknowledgment, in its perseverant unacceptance to care for the other and yet its unacceptance to let them be, live, exist. During a demonstration in Bologna in February 2023, a migrant person asked why, if the state did not have the resources or the intention to house migrants, support them or protect them, why they could not just go about their life. Confined in a reception centre, migrants had been notified by the *prefettura* they had to leave the facility and had to reimburse the state of exorbitant amounts of money because their precarious work conditions had brought them beyond the threshold of the bare minimal assistance they were entitled to.

This study in its entirety has attempted to answer questions of how problem representations of such kind have come about and how they are being produced, disseminated and defended. It will not therefore indulge on them further. However, let us bear in mind that the “emergency” and the “crisis” requiring urgent dispositions, exceptional derogations and extraordinary plans of intervention have been around for decades now. The state of alarm is persistently asserted and broadcasted, the rationale

of security has permeated the most basic aspects of life and of policy. This occurs to the extent that persons rescued at sea and in need – no, in right – in need and in right of assistance are not allowed to be disembarked on the enigmatic ground of defending the national borders. Fear is the element that is being instrumentalised to impose and maintain the order, an order that the ordinary citizen is dissatisfied with and yet must be preserved from the outsider. It is an order tainted by the responsabilized and individualised subject, alone in their struggle for an acclaimed desirable independence, tainted by the collapse of salary, by the exhaustion of family and personal resources, by the lack of job opportunities, by the unpaid work to acquire experience to work harder at an unsatisfactory wage, by the woman and the family as pieces of welfare in the place of a shredded public assistance; an order tainted by the rise of costs, the dismantling of the welfare system, the disaggregation of a community, the repression of dissent, the repression of freedom over the ownership of one's bodies and identities. Yet it is an order that claims to be deteriorated by the presence of the other-ness – even more, it is an order that claims to no longer have the strengths to improve and heal *because of* the other-ness. Refuted at entry, migrants nevertheless are with certainty the reason of the ills of society.

There is an inherent and deep-seated contradiction that is left unproblematic in the representation of “irregular migration” that does not consider the very fabrication by law of its irregularity. Illegality is made by the law itself. If there was no policy imposing and maintaining such an outlaw condition to part of human mobility, this would only be and happen. More safely and more humanely – more humanly. Which does not mean it would not require some sort of regulation to ensure protection and safety of all persons. It would however mean abandoning irregularisation and irregularisation.

Mobility is not contingent. Policy is. A long-term and prospective vision of a phenomenon that is not destined to reduce over the near future is being ignored and is not being put forward. An unsustainable and short-term emergency-tuned plan is being implemented for decades now: fragmented, nonperforming, out of breath, costly, follow-the-leader kind of approach, inherently violent. The adoption of measures expanding and strengthening migrants' detention, with the most articulated escamotages to compress state responsibility for its coercive and professional exercise of violent authority, are the salient manifestation of the contingency of a vision with no vision, unless the vision is indeed the lager.

Social control is aggressively being performed at the expenses of life and personal freedom. Migrants represent the humanity that is negated, the marginalised segment of a hierarchised population. They speak to the system by virtue of their human personality and, while their abandonment unfolds, they represent all. De Giorgi writes that at a time of welfare state, social control is no longer exercised within the perimeter of jails and factories but spreads over the territory, over the society-factory as a whole, characterised by the new directive criteria which are capillarity, extension and pervasiveness of control.¹⁵⁶⁶ People are no longer locked up, he continues: they are followed where they are *normally* locked up, that is, outside factories, in the territory, with the structure of propaganda and mass media and a new and more efficient police network and social assistance as heralds of the neo-capitalistic social control.¹⁵⁶⁷ Twenty years later, the inviolability of personal freedom is sacrificed on the altar of security and order: people are, also, physically locked up. The post-Fordist age is characterised by the control of territorial mobility and the temporal flexibility of a conformed workforce (*massificata forza-lavoro*).¹⁵⁶⁸ “Irregular migration” and its relationship with “regular migration” fit right into this. The narrative on irregular migration masks the state's despise and disrespect for the *presence* of the migrant person on its territory with concerns over order and security. Presence is uncomfortable and undigestible. The

¹⁵⁶⁶ Alessandro De Giorgi, *Zero tolleranza. Strategie e pratiche della società di controllo* (DeriveApprodi 2000) 17-18.

¹⁵⁶⁷ *ibid.*

¹⁵⁶⁸ Toni Negri, ‘Prefazione’ in Alessandro De Giorgi, *Zero tolleranza. Strategie e pratiche della società di controllo* (DeriveApprodi 2000) 8.

state alleges limited capacity and effectively denies assistance to people in need while declining its unwillingness to assist them. The state neglects to admit that the migrant person is uncomfortable not because of capacity but because it enters a structured system that repudiates indigency, regarding poverty as a condition one is responsible for; a mechanism for which the maintenance of “decorum” and “decency”, understood again in contraposition to the display of poverty, has paramount primacy over human life; an ordered organisation where racism, xenophobia and sexism are systemic and people are hierarchised on fabricated categories, their bodily presence in its corpoREALITY, although *being here*, is made illegal and violated.

State borders can indeed be open and opened. They do not physically exist; if they coincide with natural elements like rivers or mountains, they can be crossed and their crossing facilitated if the resources and energies poured into patrolling were poured into enforcing protection instead. If such crossing even occurred at all, once viable and effective and accessible means of moving and entry were offered. State borders do not imply a closing of sort. This is *made*. They do not *are* nor *have to be* closed, nor police, nor patrolled.

The Cutro decree, and the representation of the problem it promotes, further harshens already restrictive and coercive measures on migration management. An abundant list of practical effects generated by the norm in the bureaucratic, administrative, legal and social areas could be rattled off. In the end however, people’s lives and choices continue to be persistently disregarded and marginalised.

One of the elements that are disregarded by the order of things that most strike the author is *time*. The order of things is timeless and runs through the capacity of monopolising and annihilating the time of persons, so that there is no room for questioning what is *naturally* imposed. Time is ignored in the myth of the independence of the individual who needs no one and no community, in the myth of the do-it-yourself, in the disregard of domestic work as work for it is unpaid, in the perverse maintenance of such unpaid condition as the *natural* tendency of a subordinate part of the population who does it for *love* and for *instinct*, in the sexiness of hyper productivity. Time is negated to the community so that there is no longer a community and solitude is paramount, energies are all consumed to get by on one’s own and therefore cannot be employed alternatively to produce people’s wealth, ideas, beauty. The order of things ignores time also in relation to migration. As a collectivity: time to move out of an alleged emergency state, time to move out of an alleged endless crisis, time to enforce rescuing laws that are already in place and can rather be enhanced, time to acknowledge the political subjects next to us in the bus, at the grocery store, in the parent met at the nursery school, time to move over and forward. Time is ignored as a responsibility towards the migrant person whose flesh and blood is denied: their time is priceless and is being wasted and negated. Through long and perilous journeys made deadly by policy-made irregularity and through confinement and through removal.

(...) the shared goal of restoring meaning to the time of detention, freeing it from the connotation of a time that is stolen from life or a time spent waiting, to make it an occasion for acquiring, albeit limitedly, some positive elements for one’s own subjectivity and for the start of a process of social reintegration. This last statement cannot be applied to the imprisoned time of migrants, who are awaiting for the completion of their failure. Because the time of deprivation of their freedom in the centres for repatriation is unequivocally empty and flows in spaces that are likewise empty. A dual absence that merges with that feeling of having reached the negative end of one’s own project – whatever that was – and of having to confront the third void: the inner one.¹⁵⁶⁹

¹⁵⁶⁹ Garante Nazionale dei diritti delle persone private della libertà personale, ‘Relazione al Parlamento 2023’ (EUROLIT s.r.l. 2023) 45 <https://www.sistemapenale.it/pdf_contenuti/1687157959_relazione-al-parlamento-2023.pdf> accessed 20 October 2024. Own translation. See original: ‘(...) l’obiettivo comune di ridare significato al

Can this “problem” be conceptualised differently? How has this been or how can this representation of the “problem” be disrupted and replaced? This is where the virtual of the ‘what if it was otherwise?’ happens. It is where resistance and a right to do so happen. It is where people in their flesh and blood are acknowledged by a policy framework that must adapt to them, cherish their presence and not the other way around, as “new” subjects, competent, knowledgeable, acting, disordering.

5.4 Chapter summary

This chapter adheres to a poststructuralist approach to policy analysis and runs along the lines of the question: what if it was otherwise? Policy instruments on migration are considered because governing takes place through the way things are problematised. Indeed, policy does not address problems but makes up “problems”: the “problem” of “migration” and “irregular migration” is observed from such an underpinning perspective. Guidance is sought through the use of Carol Bacchi’s ‘What’s the problem represented to be?’ approach, applied throughout the text to the New Pact on Migration and Asylum at the European Union level and to the Decreto Cutro at the national Italian level. The analysis attempts to show the contingency and much needed reversibility of a system that can indeed be altered, the representation of which disrupted. The text addresses the ideas of a limited-migration carrying capacity of states, bordering, detention, the rationale of protection being subjugated to that of profit, the irregularisation and illegalisation of the human being as such.

tempo della detenzione, liberandolo dalla connotazione di tempo sottratto alla vita o di tempo di attesa, per farne occasione per l’acquisizione, quantunque limitata, di qualche elemento positivo per la propria soggettività e per l’avvio di un percorso di reinserimento sociale. Proprio quest’ultima affermazione non può applicarsi al tempo recluso dei migranti, in attesa del compimento del proprio fallimento. Perché il tempo della loro privazione della libertà nei Centri per il rimpatrio (Cpr) è inequivocabilmente vuoto e trascorre in spazi anch’essi vuoti. Una duplicità di assenza che si unisce a quella sensazione di essere giunti al termine negativo del proprio progetto – qualunque esso fosse – e di doversi misurare così con il terzo vuoto: quello interiore’.

(un)Concluding remarks

Every era has its own fascism: the warning signs are manifest wherever the concentration of power denies citizens the possibility and the ability to express and act upon their will. This can happen in many ways, not necessarily through the terror spread by police intimidation but also by denying and distorting information, contaminating justice, paralyzing education, subtly propagating a longing for a world where order reigned sovereign and where the security of a handful of privileged individuals rested on the forced labour and the forced silence of many.¹⁵⁷⁰

The last passage of the WPR approach is to apply the guiding list of questions to the researcher's own problem representations. Commitment to self-problematisation derives from the fact that one's own thinking must be subjected to critical scrutiny, given 'one's location within historically and culturally entrenched forms of knowledge'.¹⁵⁷¹ It is a precise act of reflexivity. The analytical framework of the WPR can selectively be drawn from as long as the self-problematising ethic is respected.¹⁵⁷² This passage is not laid down as part of the previous exercise for the very reason that the author wishes to extend questioning of her own representations beyond the perimeters of the application of the WPR in the previous chapter, which was just a pebble into the study's attempt to promote an otherwise-vision of migration policy. This, therefore, is an exchange between the author and the reader. It is called for by the necessity to reflect on the former's own views on this policy area and to complement the more dialogical discussions on her research choices.

Researching is understood to be a political act. The very nature of policy is political – not neutral, objective, scientific, statistical, evidence-based but political. It follows that the act of engaging with policy is not exempted from being political itself. The author is a “subject” like any other she has spoken with and about for this study. She is a “subject” in scare quotes for hers is a provisional status, as any other. Any “individual” is works in progress.¹⁵⁷³ She learns and even more difficulty unlearns, at times growing out of her previous convictions, other times solidifying them and becoming more intransigent. This research of hers is still immature and unripe, *acerba*, an object that is a “works in progress” itself. It attempts to question the paradigms in political stances and the dogmatic facticity of “entities”, such as the “nation state”, and “subjects” and “objects” belonging to the realm of the hierarchisation of citizenship. It offers an otherwise-policy vision. It does not propose precise recommendations on how to move forward. There is here the explicit intent to distance the study from any particular scheme of reforming that declares that *this is what needs to be done*.¹⁵⁷⁴ Rather, the analysis invites a view of researching as a political practice and the observation of forms of authorities and the effects these have.¹⁵⁷⁵ Bacchi asks: ‘is it possible to claim to support an egalitarian politics while refusing to advocate specific reforms?’.¹⁵⁷⁶ The two options are not, she argues, mutually exclusive but rather necessary to each other.¹⁵⁷⁷ Reforms in fact often buy into problematic premises and unexposed silences that need to

¹⁵⁷⁰ Primo Levi, ‘Un passato che credevamo non dovesse tornare più’ (*Corriere della Sera* 8 May 1974). Own translation, see original: ‘Ogni tempo ha il suo fascismo: se ne notano i segni premonitori dovunque la concentrazione di potere nega al cittadino la possibilità e la capacità di esprimere ed attuare la sua volontà. A questo si arriva in molti modi, non necessariamente col terrore dell'intimidazione poliziesca, ma anche negando o distorcendo l'informazione, inquinando la giustizia, paralizzando la scuola, diffondendo in molti modi sottili la nostalgia per un mondo in cui regnava sovrano l'ordine, ed in cui la sicurezza dei pochi privilegiati riposava sul lavoro forzato e sul silenzio forzato dei molti’.

¹⁵⁷¹ Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis. A guide to Practice* (Palgrave Macmillan US 2016) 24.

¹⁵⁷² *ibid.*

¹⁵⁷³ *ibid* 121.

¹⁵⁷⁴ *ibid* 25.

¹⁵⁷⁵ *ibid.*

¹⁵⁷⁶ *ibid.*

¹⁵⁷⁷ *ibid.*

be revealed and questioned.¹⁵⁷⁸ As an example, the New Pact on Migration and Asylum claims for itself a novelty that might instead be disputed. It is a reform that represents itself as a ‘fresh start’, which however does not fall outside the direction into which previous policy has channelled resources and produced migration “management” and “control”. Likewise, the Cutro decree offers reforms and solutions to a “problem” that sets within a consistent and uncontested broader representation of “migration”. The goal of a post-structuralist analysis is to create space for critique and reflection. The questioning effort includes all proposals and all representations, including one’s own.

The author’s own views on this policy area are expressed throughout the study. Her vision is of an otherwise-policy of disorder, unpoliced and beyond the current order of things, exceeding the boundaries of state sovereignty as it is currently operationalised, transgressing the border as it is currently performed on the bodies and the identities of the human person. Within such a context, “subjects” are acknowledged as political, competent and knowledgeable. Persons have a right to resist the order when this betrays the promise of the inviolability of humanity. The latter is the heart of the disorder of things. The disorder is a project of living law to be progressively realised. A law that does not produce situations of socio-juridical vulnerability but moves from vulnerability and cherishes substantial equality. A law that is not the coercive arm of the domination of a group over another nor the sanctuary of the state’s monopoly of violence but one that is the anarchic rule of law, in her pursuance of the social struggle and in her dissenting expression against accumulation of power. The disorder is constitutional.

What is the “problem” represented to be in such a proposal? What assumed paradigms and unquestioned knowledges is this operating with? What are the silences therein? The underlying premise of such a vision is the problematisation of policy, which is not approached as “addressing” problems that just exist out there but is approached as producing “problems”. Policy can always be otherwise and there is a space to be created for questioning and resisting. The proposed vision challenges the paradigms of state sovereignty; the functionalism of the border; a securitarian logic underpinning security; territory and citizenship as instruments of discrimination; police as the disciplining of the marginalised, marginalised who are -ised and who are not marginal themselves.

“State sovereignty” is conceptualised as distinct from the sovereignty of the people – understood as the governed, all. It is represented as a “problem” for it is unable to welcome other-ness nor escape the categories it runs inegalitarian structures on, fortressing within its borders, a state that is neglecting its welfare ambitions and is involving into a police state. “Borders” are represented as functional to “state sovereignty” and its imposition and maintenance of order: they are both physical and metaphorical, the first militarised and patrolled for the *amor patrio* and the securitarian defence of national territory and its integrity, the second limiting entitlement to and enjoyment of rights, determining a system of discrimination under the disguise of legal and legitimated differential treatment. “Citizenship” is represented as a “problem” that is as well functional to “state sovereignty”, for it is articulated as selective screening, often running on blood ties, as a sieve for membership to a predetermined political order that is bureaucratically organised. So represented, “citizenship” is operationalised as the top of a hierarchised system of statuses, the realisation of which undercuts the vision of equally powerful individuals onto this earth – all are equal in dignity and rights, yet once exceeding the boundaries of the state that equality evaporates and is no longer inviolable. The proposed vision therefore implies that “citizenship” is not currently articulated as a performative act but as an ordering dogmatism, which does not coincide with participation in a collectivity nor with a sense of commitment to the common good and responsibility towards one another. To the contrary, the author’s proposal implies “citizenship” as an instrument of the state through which participation is restricted, if not made impossible, allegedly timeless and innate, *natural*, to the extent that its loss is termed denaturalisation, its acquisition is termed naturalisation. “Citizenship” is therefore identified in her representations as a “problem”, for it

¹⁵⁷⁸ *ibid.*

articulates the non-citizen as unnatural and non-human, becoming human once they are naturalised into citizen. Within such an underlying conceptualisation, in the author's proposal the "police" is also represented as a "problem". Not for its discredit but for its inherent part in the definition of inequalitarian and hierarchical structures within society. It is not represented as an ensemble of agencies that impartially enforce the respect of the rule of law but rather as a power that is *inter alia* legitimated to enforce social control and in so doing perpetuates uncontested and deep-rooted biases, patriarchal knowledges of racism, xenophobia and sexism.

Lastly, the author's vision offers to flip "vulnerability" over and represents it as a 'heuristic device', borrowing from Fineman, to identify inequalitarian forms of rulings and act on them, with a view to even out their detrimental impact on people's lives. Such a proposal builds on the premise that "vulnerability" is currently perceived as a "problem" by the system itself, ignoring the fact that policy causes its production in the first place and treating it as a burden on society. Rather, the proposal is to represent it as both ontological, therefore universal, for everyone is vulnerable to life, and at the same time as specific to everyone's circumstances, being *socio-legal*, acknowledging that it is "produced" by the law and its enforcement. Universal and *made* vulnerabilities therefore add to one another while *de facto* and *de jure* discriminations overlap, combine and intersect. The author's proposal runs on the assumption that the system first categorises individuals, *making* them vulnerable or *more* vulnerable, then marginalises them, ostracises them, represses them, criminalises them – marginalising, ostracising, repressing and criminalising the very same conditions it produced in the first place.

The author's vision also builds on the idea that the earth is one and for all. Such a representation is evidently disrupted and contested by our surroundings, running contrary to the current global organisation of territories. In a scene of *On the bride's side*, Tasneem Fared observes that there is only one sun for the whole humanity, only one moon, that the sea is everyone's and so is life; everyone's and for everyone.¹⁵⁷⁹ This is an underlying and uncontested assumption at the foundation of the author's own representation of the world and *humanity*, itself as a whole, not in sameness but equalness. The author sees this and rearticulates this as a powerful proposal that nurtures the beauty of an uncompromising belief in substantial equality. It is a proposal that aspires to be far from the alarming securitarian narrative that instrumentally and deliberately blends together migration, crime, defence; far from the insatiable monster that is the constantly emergency-tuned discourse that feeds on an alleged limited migration-carrying capacity of host states. It is represented as a long-term and prospective vision in opposition to what are deemed as short-term and deadly scenarios that we bear witness to. It aligns with a vision of cosmopolitanism, opposing the hatred of identitarian populism, the reification of state nationalism and the flattening of globalism.

This is an exercise of sharing the author's acquired knowledges, her 'unexamined ways of thinking'. What she knows and she shares is also inevitably informed by where she is located in relation to her identities. The "I" that is missing from these lines is one that has lived for a few years in different states and different places that housed her but were not home or were home at times, an "I" that moved with the regular papers she was "born with" that were probably never checked, an "I" abroad that worked with no contract and had no private health insurance but was never even scolded by the European Union, an "I" that could access medical care with her "blue card", an "I" that had to have a health insurance once outside the Union, an "I" that was called an "expat" and not an "immigrant".

The underlying question that permeates this endeavour is: what if it was otherwise? The reader might have noticed that the question is articulated as a 'what if it was' rather than a 'what if it were'. The author's first spoken language is not English and therefore she apologises if this is a mere grammatical error. However, the sense that 'what if it was otherwise' conveys to her understanding is, through the indicative mood, that of a question of facts, a question about reality. It enquires and attempts to pave

¹⁵⁷⁹ Paraphrasing and translating a monologue from the film 'Io sto con la sposa', in English 'On the bride's side', written and directed by Antonio Augugliaro, Gabriele Del Grande e Khaled Soliman Al Nassiry.

the way to real, possible, plausible scenarios, it brings about hypothesis that are not transcendental nor out of reach but, although they are open to embrace the unforeseeable and unimaginable, are indeed already here, happening, present through presence. A ‘what if it *were*’ question instead seemed to call for unreality, for an imaginary landscape that could not be. Through the what-if-it-was-otherwise-policy, the idea is to make space for scepticism and learn from the proposals of other “subjects” and their counternarratives. If the current order of things was *the* order of things, there would be no states’ hypocrisy or lack of foresight to be discussed, brutality would not be regarded as such but would be the norm, the hierarchisation of citizenship could and would not be resisted and the marginalised would merely be the marginal. Yet the collapse of the current capitalist system is after all being proclaimed far and wide. The study’s desire is to create room for challenging paradigms towards a virtual of policy reform. All around, persons continue to move despite the adversities they are *made* to encounter, migrants and allies take up space in solidarity with one another, identities and bodies in their corpoREALITY are manifesting their dissent while being made illegal and irregular, criminalised, prohibited, unauthorised, illegitimated, refuted in that presence that transgresses state’s boundaries and yet is fleshy, physical, bodily, *natural* because it is *human*. It is an uncomfortable presence that is denied and yet is here and from which policy can learn, unlearning itself. After all, it is counterintuitive highlighting the downfalls of the current system but meanwhile ignoring the existences and the voices that have been resisting it all along: should not they be the first knowledgeable and competent actors to seek guidance from and to inspire reform? The ones that said it all the while, proposed alternatives, created space, critiqued, struggled, disobeyed.

I have seen men and women throwing molotovs against other men and women (and above all children) guilty of being born elsewhere, being untidy and ragged. I have seen *clochards* killed by the abandonment and by the beatings. I have seen police forces in war-like gear clearing out camps, tunnels and gardens, sending away (no one knows where) men, women, elderly and kids guilty of being poor. I have seen sanitation trucks following the police, loading and moving towards the destruction of dirty mattresses, broken furnishings, old electrical appliances (that is, the houses of the poor). I have seen laws criminalising populations, communities, groups (...). I have seen people applauding and newspapers cheering for this *new* political course and ask for its further harshening. I have seen the spreading of hatred and contempt towards the others for *race*, culture, ideas. All in the silence or with the circumstantial distinction of great part of politics and many intellectuals. While those who denounced the culture underlying such practices and opposed them was regarded as old-fashioned, do-gooder, abstract, subversive.¹⁵⁸⁰

This study is contingent to its time and space. Paolo Berizzi writes that three contemporary Italian political leaders, namely the late Berlusconi, Salvini and Meloni, have never had the intention to dissatisfy that part of the electorate belonging to a ‘fascist matrix’ or resembling fascism (*fascistoide*) on matters such as immigration, racism, homophobia and women’s autonomy.¹⁵⁸¹ Year after year, the essential prejudice (*pregiudiziale*) towards fascism has been losing ground and an intolerance towards anti-fascism has been establishing itself.¹⁵⁸² This is *an* interpretation that can aid in the contextualisation of the policies that are being adopted and can inform the reading of the direction in which public resources are being channelled. Most recently, Italy has passed a law broadening the criminalisation of gestational surrogacy,¹⁵⁸³ within a broader environment that continues to crumble women’s and people’s autonomy and sexual and reproductive health rights. In this same period, the government of Italy and its affiliated governing apparatus have contracted an agreement with the government of

¹⁵⁸⁰ Livio Pepino, *Prove di paura. Barbari, marginali, ribelli* (Edizioni Gruppo Abele 2015) 7-8.

¹⁵⁸¹ Paolo Berizzi, *Il ritorno della Bestia. Come questo governo ha risvegliato il peggio dell’Italia* (Rizzoli 2024) 58.

¹⁵⁸² *ibid.*

¹⁵⁸³ Laura Biarella, ‘La maternità surrogata diventa reato universale’ (*Altalex* 21 October 2024) <<https://www.altalex.com/documents/news/2024/10/21/la-maternita-surrogata-diventa-reato-universale>> accessed 28 October 2024.

Albania to ‘intensify collaboration in the realm of the management of migratory flows’ for both states are ‘aware of the problems that derive from illicit immigration’.¹⁵⁸⁴ Immigration therefore is no longer “only” “irregular” or “illegal” but becomes “illicit”, not just “unlawful” but “forbidden”, exceeding in its disobedience before the state to an extent that it threatens its moral rationale. The agreement specifies the definition of “migrants” in article 1. As it is known, “migrant” does not have a legal definition. The term that is used in the agreement is noted down in its plural form, where the singularity of personhood is lost in the mass of faceless arrivals. “Migrants” are therein: third-country citizens or stateless persons for whom subsistence of entry, staying or residence requirements in the Italian territory shall be assessed or for whom the lack of subsistence of said requirements on the Italian territory has been assessed. Indigency is embedded therein and refused. The text of the agreement foresees that the use of ‘areas’ in Albania by Italy is granted by the former free of charge. Italy can construct facilities in such areas that can host a maximum of 3’000 “migrants” at once. Facilities are managed by Italian authorities and any controversy that can emerge between such authorities and migrants therein are exclusively subject to Italian jurisdiction. Albania consents to the entry and staying on its territory of migrants with the purpose of conducting frontier or repatriation procedures. Expenses are entirely on Italy. Facilities are built with no need to acquire construction permits or similar formalities. At the end of the agreed upon period, Albania keeps the areas as they have been constructed and renovated. Albanian personnel are tasked with the perimetral security of the facilities. Migrants are impeded by Italian authorities to move outside the facilities without authorisation. The persons who so far had been transferred therein were moved back to Italian territory following a judicial review of their situation.¹⁵⁸⁵ All the while, on Italian territory itself, dissent is being heavily curbed and controlled. Attacks against the lymph of the democratic process continue to take place, with the recent addition of the draft law no. 1236.¹⁵⁸⁶ Among alarmingly repressive dispositions proposed therein that are being discussed, article 26 and 27 problematise situations of “disobedience” arising during detention. Article 26 in fact, modifying criminal code dispositions, introduces measures on “security” within prison facilities, among which: the aggravating circumstances of ‘disobeying’ to public laws while within the penitentiary facilities or through communications with detainees; the crime of ‘revolt’ (*delitto di rivolta*) within the penitentiary facilities, the criminal conducts of which include the promotion, organisation or leading of the revolt through violent acts, threats, resisting orders and passively resisting orders and attempts to evade. Article 27 introduces a new crime aimed at repressing episodes of violent protests enacted by ‘groups of irregular foreigners held in detention and reception centres’ (*centri di trattenimento e accoglienza*). It is moreover foreseen the extension of the special regime on the development of *CPR* to the procedures of locationing, upgrade and restoration of existing facilities.

In *If this is a Man*, Primo Levi warns us: ‘meditate that this came about’.¹⁵⁸⁷

¹⁵⁸⁴ ‘Protocollo tra il Governo della Repubblica Italiana e il Consiglio dei Ministri della Repubblica di Albania per il rafforzamento della collaborazione in materia migratoria’ <<https://www.esteri.it/wp-content/uploads/2023/12/PROTOCOLLO-ITALIA-ALBANIA-in-materia-migratoria.pdf>> accessed 28 October 2024.

¹⁵⁸⁵ For the documents published by the Tribunal that took charge of the cases, see annexes in Andrea Natale, Fabrizio Filice, ‘Nota ai provvedimenti di rigetto delle richieste di convalida dei trattenimenti disposti dalla Questura di Roma ai sensi del Protocollo Italia-Albania, emessi dal Tribunale di Roma, sezione specializzata nella protezione internazionale, il 18 ottobre 2024’ (*Questione Giustizia* 22 October 2024) <<https://www.questionegiustizia.it/articolo/albania-centri>> accessed 28 October 2024.

¹⁵⁸⁶ ‘Atto Senato n. 1236’ <https://www.senato.it/leg/19/BGT/Schede/Ddliter/comm/58519_comm.htm> accessed 28 October 2024. See also: ‘Legislatura 19^a - 1^a e 2^a riunite - Resoconto sommario n. 21 del 01/10/2024. In sede referente. (1236) Disposizioni in materia di sicurezza pubblica, di tutela del personale in servizio, nonché di vittime dell’usura e di ordinamento penitenziario, approvato dalla Camera dei deputati’ <https://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=19&id=1429206&part=doc_d_c-sedetit_isr> accessed 28 October 2024.

¹⁵⁸⁷ Primo Levi, *If this is a man. The truce* (Abacus 2019) 11.

There is a passage in the works of the Constituent Assembly where Togliatti says:

We find ourselves before a catastrophe [the defeat and the disaster of the war] that we cannot untie from a determined politics and from being the consequence thereof; and this politics was sought by a ruling class that did not see and did not foresee, because even when it witnessed the destruction of the goods, material and moral, to which the life of this nation rested upon, or when it could predict that we were fatally collapsing towards such destruction, let the process crawl and was therefore its accomplice: for before the interests of all, put their own egoistic interests, the interests of the cast, of the preservation of determined political, economic and social structures. The old Italian ruling class, in the moment in which performed such a fatal error, revealed itself as the class that was no longer national, for national is only that class that, by defending its positions, asserts itself, safeguards and asserts the interests of all and, I wish to add, of the whole of humanity.¹⁵⁸⁸

Referring to those present at the Assembly who had been silent or complicit to the regime, he adds:

You thought that it was a matter of secondary importance, of tolerable “exuberances” or of methods that you deemed legitimate to bring the “subversives” back to reason. But who are the subversives? The subversives are the new ruling class, the one which is conquering their positions, asserting their ideals, which demands its deserved seat in the leading authority of the public life and of the state, which wants to offer a new life to the whole nation. It was to stop the progressing of this new ruling class, emerged out of the working classes, that you let fascism execute its criminal endeavour of destruction of what was most cherished in our nation.¹⁵⁸⁹

He argues

We wish for this never to happen again (...). To this end, we demand constitutional guarantees. This is why (...) we want a Constitution that is not afascist but that is anti-fascist. When we characterise the Constitution that we are drafting in such a way, we precisely intend to assert that the Constitution must ensure, for its general content and for its concrete norms, that what happened once will never happen again, that the ideal of freedom can never be thrashed again, that the juridical and constitutional order that we are laying the foundations for can never be destroyed again. But the sole real and serious guarantee for this is that new forces establish themselves and lead the state, forces that are democratic and revitalising by their very nature.¹⁵⁹⁰

Almost eighty years have gone by and Roberto Vannacci is elected to be a representative of the Italian state at the European Parliament. Vannacci writes that there is currently the complete flip over of what he defines as the “values” and the “certainties” of an earlier time, of what the “multitude” understands as “normality”.¹⁵⁹¹ Such subversion is all the more difficult to accept because it is performed by scant “minorities” that abuse “common sense” and the opinion of the majority on the very “debateable” rules of “inclusion” and “tolerance” imposed by “other minorities”.¹⁵⁹² Scare quotes could not be enough. This “subversion” is evident in the fact that

one must unlock a five-point security lock to their door, a lock that a minority of criminals have imposed on our threshold, to adventure into a city where another minority of mannerless graffiti vandals (*graffitari*) stains walls and monuments, hoping not to accidentally encounter a protest

¹⁵⁸⁸ Assemblea Costituente, ‘Seduta pomeridiana di martedì 11 marzo 1947’ 1993 <<https://legislature.camera.it/dati/costituente/lavori/Assemblea/sed058/sed058nc.pdf>> accessed 14 October 2024.

¹⁵⁸⁹ *ibid.*

¹⁵⁹⁰ *ibid.*

¹⁵⁹¹ Roberto Vannacci, *Il mondo al contrario* (R. Vannacci 2023) v-vi. Own translation, see original.

¹⁵⁹² *ibid.*

by yet another minority that, allegedly fighting a prophesised climate apocalypse and opposing the measures already adopted by the majority, blocks traffic circulation and disrupts the whole community. Debates only speak of rights, especially of minorities: those who denounce the lack of job and must be supported by the hard-working multitude; those who cannot biologically have children but demand them; those who have no home and therefore illegally occupy one; those who steal in the subway but claim for themselves a right to privacy.¹⁵⁹³

There was great perplexity in whether or not this extract should be included here. It is here, in the end, for the concern caused by the narratives it promotes and the “problems” it “addresses”. What Vannacci forgets or rather ignores is the minorities he ridicules, bothering the peaceful existence of the oblivious citizen while *he* goes about his daily life, might instead be the multitude. And vice versa, the multitude he fears for might instead be a cast or a nostalgic cluster. And that rights of the minorities are being debated in the public sphere because minorities, let us remind ourselves of this, do have rights. After all, this is what minorities resist and resist for.

An element is absent from the pages of this study on realities of resistance: it is civil disobedience, which is never or hardly ever mentioned. This is not because civil disobedience was not considered but for three main reasons. The first is that the choice of the author was to articulate an alternative narrative on resistance that intuitively, spontaneously recalled in the reader the constitutional framework, its reminiscence and vision of progressive realisation and the vital, intimate connection that dissent and resistance have with and *within* the democratic process. The second reason is that a *right* of resistance is posed at the heart of this discussion. The third reason for not speaking of civil disobedience is that the author thought that one cannot do so without referring to the work of Arendt on this, inextricably tied to her work on violence, revolution and citizenship. In the words of Niklas Plaetzer, her ‘cosmopolitan thought entails an activist conception of ‘world-building’ to be considered together with her vision of a right to have rights and her performative understanding of citizenship.¹⁵⁹⁴ However, Plaetzer argues, Arendt’s work ultimately falls back into ‘the linear narrative centred around a certain (European) heritage that she tried to avoid’, for her idea of action in the end ‘departs from its cosmopolitan intent and espouses an untenable European parochialism in so far as the principles at stake become identified with the particularity of a certain heritage’.¹⁵⁹⁵ Plaetzer argues that Arendt excludes from her narrative ‘alternative historiographies, such as those centred on anti-colonial struggle or slave revolt’ to the extent that they are ‘relegated to a non-political zone at distance to the venerable tradition of revolutionary citizenship’.¹⁵⁹⁶ Jennifer Gaffney as well observes how Arendt turns to a new conception of citizenship in order to face the ‘worldlessness of modern life’ together with forms of exclusion and alienation.¹⁵⁹⁷ However, she argues, Arendt’s analysis is limited regarding slavery and colonisation and, along these lines, her work on revolution speaks of the French and the American cases but omits the Haitian one.¹⁵⁹⁸ Moreover, Arendt speaks of ‘Negro students’ in the context of collective organising whose ‘interest was to lower academic standards’ and argues that

it seems that the academic establishment, in its curious tendency to yield more to Negro demands, even if they are clearly silly and outrageous, than to the disinterested and usually highly moral claims of the white rebels, also thinks in these terms and feels more comfortable

¹⁵⁹³ *ibid.*

¹⁵⁹⁴ Niklas Plaetzer, ‘Fugitive world-building. Rethinking the Cosmopolitics of Anti-Slavery Struggle with Arendt and Glissant’ in Tamara Caraus and Elena Paris (eds), *Migration, Protest Movements and the Politics of Resistance. A Radical Political Philosophy of Cosmopolitanism* (Routledge 2019) 186.

¹⁵⁹⁵ *ibid.*

¹⁵⁹⁶ *ibid.*

¹⁵⁹⁷ Jennifer Gaffney, ‘Memories of exclusion: Hannah Arendt and the Haitian Revolution’ (2017) XX(X) *Philosophy and Social Criticism* 1.

¹⁵⁹⁸ *ibid.*

when confronted with interests plus violence than when it is a matter of nonviolent “participatory democracy”.¹⁵⁹⁹

Recalling the claims brought forward by students’ collective organising in such a context, she defines education in Swahili in scare quotes, “education”, referring to it as a kind of no-language, and does not spare ‘African literature, and other nonexistent subjects’.¹⁶⁰⁰ She further argues that ‘it has become rather fashionable among white liberals to react to Negro grievances with the cry, “We are all guilty,” and Black Power has proved only too happy to take advantage of this “confession” to instigate irrational “black rage.”’.¹⁶⁰¹ Arendt’s notions of performative citizenship and cosmopolitanism therefore, together with her representations on violence, revolution and disobedience, seem to be intrinsically tied to a particular history and heritage. Reconciling a reading of her work with the analysis of resisting migrant movements is therefore urgently problematic.¹⁶⁰² While the text draws inspiration from her narrative on naked humanity and her representations related to totalitarianism, it attempts to do so cautiously and opts for not indulging on her cosmopolitan visions nor borrowing from her vision on civil disobedience, as their translations in the context of migrants’ struggles did not feel appropriate.

The cosmopolitanism that was aligned with was that which saw migrants’ and allies’ protesting as directly contesting the current global state-based order: migrants speak in the name of all, suggesting new ways to be in the world and grounding on the idea(l) that all people are inhabitants of the earth.¹⁶⁰³ Transgressing the border, the migrant challenges the order of things. Expressing their dissenting narratives counters the dominant institutional representation of “migration”. The migrant demands their space into the mechanisms of the nation state that is not capable of acknowledging their uncomfortable presence. Presence is therefore irregular, illegal, illicit. The law is the determinant of their unlawfulness: policy, which is order maintaining, produces the conditions of social and juridical vulnerability that affect the migrant person, the non-citizens. While being denied, the migrant pursues a social struggle for substantial equality. Their being *here* creates new spaces to denaturalise otherwise uncontested notions of state sovereignty, citizenship and security and demands legal reform towards the progressive realisation of a vision of the earth where individuals are free and equally powerful. Their political subjectivity is expressed in their bodily presence across and beyond borders. Within such an understanding, the right to resist is a fundamentally precious instrument in the hands of the governed, citizens and non-citizens alike, to pursue the struggle against unconstitutional acts committed by the constituted powers, *themselves* disobeying and betraying the rule of law.

The resistance of migrants denounces the vulnerability that is produced by policy itself and that dictates their mobility and lives. It challenges the conditions of social and juridical vulnerability that are caused by the inegalitarian and hierarchical structures of the existing system. Migrants and allies resist the hierarchisation of citizenship of the order of things, creating space for a vision of a disorderly earth where the law is their ally and not their oppressor. Vulnerability is no longer burden on society but starting point and trigger for social struggle. It tells us what is wrong, where to start untangling and dismantling, what is made and can be unmade. It is a spark for the anger that burns the lagers down, defaces the monuments and occupies the streets. It is a call for reform, collective care and responsibility towards all and towards the earth.

Bookchin recounts an exposition at the New York Museum of Natural History in the seventies on ecological disruption: the closing exhibit showcased a sign ‘the most dangerous animal on earth’ over a

¹⁵⁹⁹ Hannah Arendt, *On violence* (A Harvest/HBJ Book 1970) 19.

¹⁶⁰⁰ *ibid* 95-96.

¹⁶⁰¹ *ibid* 64-65.

¹⁶⁰² Niklas Plaetzer, ‘Fugitive world-building. Rethinking the Cosmopolitics of Anti-Slavery Struggle with Arendt and Glissant’ in Tamara Caraus and Elena Paris (eds), *Migration, Protest Movements and the Politics of Resistance. A Radical Political Philosophy of Cosmopolitanism* (Routledge 2019) 186.

¹⁶⁰³ Tamara Caraus and Elena Paris (eds), *Migration, Protest Movements and the Politics of Resistance. A Radical Political Philosophy of Cosmopolitanism* (Routledge 2019) 1.

mirror which reflected the public standing before it.¹⁶⁰⁴ A child faced the mirror and watched their most dangerously, beastly reflection.¹⁶⁰⁵ The message was the misanthropic idea that *humanity* as such is plundering the planet and not a part thereof, rapaciously responsible for destroying the earth and brutally oppressing other humans: a mythical human species had replaced classes, hierarchies and the 'violent paraphernalia of the State'.¹⁶⁰⁶ It is a representation that is so gloriously and successfully comfortable to the oppressor.

There is a virtual of *otherwise* that can move beyond the paradigm of the border, from a state-centred approach towards a vision of care, a humanity-centred and vulnerability-centred approach. The constitutional normative system offers an anchoring platform for this collective effort, its guarantees remind us of what cannot be compromised. The text and its drafts are the foundation from which converging and enraged subjectivities can begin to realise the spirit of equality in the struggle against the abuse of powers. The constitutional vision is revitalised through the acknowledgment of the anachronism and the hypocrisy of the dichotomy citizen versus migrant, non-citizen. The denial of the (non)person, unintelligible to the state regardless of their inviolability, is challenged by the physical, bodily, uncomfortable and unconforming, dissenting presence of the corporeal human, seeking reform and, even before that, moving, just *being*. The human person is right here, prohibited yet here, regardless of the recognition by the state of her choice or *right* to be. In the ethics of intransigency against power, let us be her ally, challenging the violence of an ordered and sovereign police state, pursuing an anarchic rule of law through the right to resist the hierarchisation of citizenship.

¹⁶⁰⁴ Murray Bookchin, *Remaking society. Pathways to a Green Future* (theanarchistlibrary.org, 1990) 15-16.

¹⁶⁰⁵ *ibid.*

¹⁶⁰⁶ *ibid.*

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