directed by Salvatore Palidda

Criminalisation and Victimization
of Migrants in Europe

Contributions by

Marcelo F. AEBI, Hans Jorge ALBRECHT, Edo BAZZACO,
Mary BOSWORTH, José Ángel BRANDARIZ GARCÍA,
Alessandro DE GIORGI, Nathalie DELGRANDE,
Cristina FERNÁNDEZ BESSA, Mhairi GUILD, Bernard HARCOURT,
János LADANYI, Yasha MACCANICO, Marcello MANERI,
Laurent MUCCHIELLI, Sophie NEVANEN, Salvatore PALIDDA,
Gabriella PETTI, Federico RAHOLA, Nando SIGONA,
Jérôme VALLUY, Fulvio VASSALLO PALEOLOGO

directed by Salvatore Palidda

Criminalisation and Victimization of Migrants in Europe

With the Contributions of
Hans Jorge Albrecht, Edo Bazzaco, José Ángel Brandariz García, Alessandro De Giorgi, Cristina Fernández Bessa, Bernard Harcourt, János Ladanyi, Yasha Maccanico, Marcello Maneri, Laurent Mucchielli, Sophie Nevanen, Palidda, Gabriella Petti, Federico Rahola, Nando Sigona, Jerome Valluy, Fulvio Vassallo Paleologo

Work Package 3
Criminalisation and Decriminalisation Processes

Criminalisation and Victimisation of Migrants in Europe

directed by Salvatore PALIDDA

Contributions by
Marcelo F. AEBI, Hans Jorge ALBRECHT, Edo BAZZACO,
Mary BOSWORTH, José Ángel BRANDARIZ GARCÍA,
Alessandro DE GIORGI, Nathalie DELGRANDE,
Cristina FERNÁNDEZ BESSA, Mhairi GUILD, Bernard HARCOURT,
János LADANYI, Yasha MACCANICO, Marcello MANERI,
Laurent MUCCHIELLI, Sophie NEVANEN, Salvatore PALIDDA,
Gabriella PETTI, Federico RAHOLA, Nando SIGONA, Jerome VALLUY,
Fulvio VASSALLO PALEOLOGO

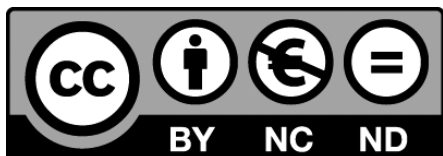**CITIZENS AND GOVERNANCE IN A KNOWLEDGE-BASED SOCIETY**

Assessing Deviance, Crime and Prevention in Europe

Dipartimento di Scienze Antropologiche
Università degli Studi di Genova
c.so A. Podestà, 2; 16128 Genova (It)

Notice

This book collects some contributions proposed to the workshop "Criminalization and victimization of immigrants in Europe", organized the 13th and 15th March 2008 at the Dipartimento di Scienze Antropologiche of Genoa University, in the framework of Workpackage 3, "Processes of criminalization and (de)criminalization", of the Crimprev Programme.

The contributions of Delgrande and Aebi, De Giorgi, Valluy, Mucchielli and Nevanen, Bosworth et Guild, Maccanico, Brandariz García et Fernández Bessa, Bazzaco, Vassallo Paleologo, Harcourt, Sigona, Maneri, Palidda, Petti and Vitale are published in an Italian book.

The contributions of Delgrande and Aebi, Bosworth and Guild are published in French or in English respectively in 4/2009 of "Déviance et Société" and in "British Journal of Criminology" 48:703-719 (2008):
http://bjc.oxfordjournals.org/cgi/content/abstract/48/6/703.

Liste des participants au workshop de Genes

List of participants to the Genoa workshop

- Marcelo F. AEBI (Institut de Criminologie et de Droit Pénal, Suisse)
- Hans Jorge ALBRECHT (director of Max Planck Institute of Freiburg-D)
- Mary BOSWORTH and Mhairi GUILD (University of Oxford)
- José Ángel BRANDARIZ GARCÍA (Un. de La Coruña
- Fabienne BRION (UCL-A. Catholique de Louvain)
- Daniele COLOGNA (Un. Milan)
- Alessandro DAL LAGO (Un. Genoa)
- Nathalie DELGRANDE (Institut de Criminologie et de Droit Pénal, Suisse)
- Cristina FERNÁNDEZ BESSA (Observatori del Sistema Penal i els Drets Human, Spain)
- Emilio FRANZINA (Un. of Verona)
- Bernard HARCOURT (Un. of Chicago)
- János LADANYI (University of Economics Budapest)
- Yasha MACCANICO (Statewatch)
- Marcello MANERI (Un. of Milano)
- Laurent MUCCHIELLI (CESDIP-CNRS France)
- Sophie NEVANEN (CESDIP-CNRS France)
- Salvatore PALIDDA (Un. of Genoa)
- Gabriella PETTI (Un. of Genoa)
- Federico RAHOLA (Un. of Genoa)
- Jerome VALLUY: (Un. Paris 1)
- Fulvio VASSALLO PALEOLOGO (Un. of Palermo)
- Tommaso VITALE (Un. of Milano)

CONTENTS

Considerations on the main european countries (English and French version)

Introduction
(S. Palidda)

The history of different societies has always been marked by periods of persecution and violence, sometimes extreme, targeting the "outsider", that is, the "enemy of the time"[1]. But how can the intensification of the persecution of Roma people and gipsies in general, and of the criminalisation of immigrants in present-day Europe be explained?

As the contributions collected in this volume show, it is a matter of the most elementary mechanism that emerges as being useful if not indispensable for the solidity or re-alignment of political cohesion. The latter is nourished, precisely, by the fear and insecurities attributed to such an enemy to justify practices of power that blend all sorts of prohibitionism, protectionism and an authoritarianism that also strikes at the weakest part of the autochthonous population itself. The war against outsiders, those who are different, may thus be considered one of the "total political facts" that pervades all of society through discourses, rhetoric and practices that consolidate a real or supposed majority. Hence, we can understand that in the current racist approach that characterises the management of societies, there are overlapping aspects that are reminiscent of the discourses and practices applied to colonised peoples and the subordinate classes in the 19th and 20th centuries. In other terms, the persecution of gipsies and the criminalisation of migrants is currently written into a liberalist/neo-conservative political layout that is based on the asymmetry of power and wealth between powerful actors and the weak who have no rights or are reduced to the state of non-people.

The story of the current war against migrations is intertwined with that of the development of criminalisation that began with the neo-conservative revolution in the United States and in England (Thatcher reached power in 1979, Reagan did so in 1981). The success of this revolution continued without interruption even under "democratic" or "left-wing" administrations (Clinton, Blair, Jospin, the centre-left in Italy and even Zapatero in Spain), also because the neo-conservative *discourse* (in the foucauldian acceptation of the term) has ended up phagocytising a sizeable part of the intellectuals and leaders of the left itself. But it is only today that the causes of this process appear somewhat clearer if it is analysed as a passage from the government that was meant to pursue the liberal-democratic myth (described by Foucault[2]) to a liberalist management that only pursues the *hic et nunc* prosperity of the stronger parties. The exacerbation of criminalisation, of "zero tolerance", experiments towards the elimination of the "human

---

[1] On the aspects, see previous works in which I refer, in particular, to Michel Foucault's work (see especially Palidda, 2009, 2008 and 2000)

[2] In particular, see: the following volumes of his courses at the *Collège*, namely, *Il faut défendre la société*, 1997; *Sécurité, territoire, population*, 2004; *Naissance de la biopolitique*, 2004; *Le gouvernement de soi et des autres*, Hautes Etudes-Gallimard-Seuil, 2008

surplus", in short, of what Simon (2008) and others term the *crime deal*, in fact, reflect a management of society that excludes social recovery, re-integration or rehabilitation, because it only seeks to "maximise" the profits of the subjects who are in power. Why take care of marginal people, drug addicts, the poor, deviants, and why promote the stable, peaceful and regular integration of immigrants when, today, the growth of profits can be played out through the erosion of workers' rights, their inferiorisation until they almost reduced to a role as neo-slaves, and getting rid of them at the first sign of them making claims or when they are too worn and can easily be replaced by other rightless or non-people? The government of the people that was meant to have taken care of the inhabitants to construct a stable, peaceful and well-regulated society in accordance with the norms of a universalistic legal order, up to the point of seeking to make everyone happy[3] has never existed. But, since the start of the 1970s (at the end of the "glorious thirty years"), the political organisation of the wealthy societies of the second post-war period had given the impression that it may have been possible to hope for this prospect through the development of welfare, the softening of sentences, even of repression, democratisation, and the pursuit of balance through prevention and social recovery and the widening of political participation[4]. On the contrary, the advent of the globalised neo-conservative revolution[5] progressively routed any illusion, it humiliated and absorbed intellectuals and leaderships. It is hence absolutely natural for government through manipulation of fears and of zero tolerance to be re-discovered, which also becomes a source of consensus and profits, further weakening the capabilities for political action by the weaker parties. The careers and business deals undertaken particularly over these last twenty years by those who have taken advantage of this new management of society (that has nothing to do with pastoral/paternalist or liberal-democratic governmentality) are extraordinary and have unprecedented proportions. The same can be said for its victims, although today there are no longer armies that shoot at crowds: to count the victims, it would be necessary to define new criteria to "measure" the deadly indirect or "collateral" consequences of embargoes, of "humanitarian wars", of prohibitionism against migrations and even of aid in instances of natural catastrophes.

---

[3] As observed by Foucault (2005a) this was what even the thinkers of the modern police theorised, including Turquet de la Mayenne, von Justi, Delamare, and also Guillauté

[4] In all the rich countries, a process of democratisation and effective growth of welfare then developed, although some "paternalistic" or "pastoral" versions deformed it into the worst form of assistentialist nepotism. With the excuse of attacking these practices and excessive public indebitement, liberalism has effectively proceeded to carry out a "non-creative destruction", almost entirely eliminating social prevention as well as social recovery and re-integration, favouring only repression and penal measures (see the chapters by De Giorgi and Palidda).

[5] Which is the interweaving of the financial, technological and military-policing ones –of the political layout- and which imposes itself particularly thanks to the intensification of the asymmetry of power, strength and wealth; see A. Joxe, *Il lavoro dell'Impero e la regolazione democratica della violenza globale*, in "conflitti globali", 1/2005, pp. 70-79

Thus, like in the United States[6], it appears that the *crime deal* has also triumphed in European countries, with effects that are not yet fully understood by the majority of autochthonous people but rather, tragically, only by the victims.

A Europe of countries competing in the persecution of gipsies and immigrants

As shown with copious data and information by the contributions gathered in this volume, since the start of the 1990s, European countries have increasingly become more dogged in the persecution of gipsies and immigrants, but also of that portion of autochthonous people who have no way out of being depicted as "surplus humanity", like the rubbish that one no longer knows how to dispose of (it may prove a new opportunity for recycling mafias after the experience with toxic waste).

It was more or less at the end of the famous "glorious thirty years" (the years of strong development of the second post-war period), and particularly following the so-called oil crisis of 1973-1974, that countries which historically received immigration started to adopt policies to "stop" it. In reality, immigration into rich countries continued ceaselessly and, in some cases, it was still encouraged. The case of the car industry in France is significative, in that by persisting in exploiting the "*OS à vie*", that is, immigrants whose qualifications and wages were blocked, it postponed technological innovations and recruited, in particular, Moroccans through imams who were even provided places of worship in the factories in order to keep these workers well separated from the other unionised ones. It was at the end of the war in Indochina that rich countries accepted tens of thousands of *boat people*, whereas today they criminalise asylum seekers (see Valluy and Vassallo Paleologo). Again in the 1970s and 1980s, hundreds of thousands of Portuguese, not yet members of the European Community, arrived in France –but also elsewhere- as did as many people from Maghreb countries, Turks, Asians in Germany, Belgium, Holland and in other countries. In effect, it was coinciding with the fall of the Berlin Wall that the increasingly overt prohibitionist shift began, which also deformed political and humanitarian asylum as it had been practised until then in Europe. Almost suddenly, the borders with countries "of the South" were closed, while they slowly opened up with countries of the East; recall that until 1990, citizens of Maghreb countries and other countries from the south were not subject to visa requirements. It was from the start of the 1990s that European police forces ended up adopting racial *profiling* as an instrument of customary repression and control and the selection of immigrants, informal but nonetheless effective, was primed to favour people coming from eastern countries, from Latin

---

[6] M.L. Frampton, I.H. Lòpez, J. Simon (directed by), *After the War on Crime*, New York University Press, New York 2008; J. Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear.* New York, Oxford University Press, 2007

America, from the Philippines and some other Asian countries, to the detriment of "Arabs" (already before 9/11/01). In countries of long-standing immigration, criminalisation increasingly took on racist features, striking the children of immigrants first and, almost to a lesser degree, new immigrants. In countries of new immigration, there was an evident, progressive replacement of the autochthonous clients of police forces with foreigners. The cases of Italy, Spain, Portugal and Greece are rather emblematic, but resemble what happens in the United States and, in part, what is also taking place in European countries of long-standing immigration. The combination between an almost complete impossibility of regular immigration and of maintaining regularity, and the repressive clampdown targeting immigrants, unfailingly gives rise to the ideal outcome from the perspective of the neo-liberal/neo-conservative game: on the one hand, the re-production of irregulars, that is, of an enslaveable labour force because it lacks any rights and any possibility of having access to them (almost a sort of "post-modern" cannon fodder), and on the other, the easy designation of the enemy of the moment to whom responsibility for all the fears, insecurities, malaise and economic and social problems caused by neo-liberal development itself can be attributed. It is not a matter of a process that has been carefully planned by a "Big Brother", but rather, of government through fears and through crime that becomes the veritable *crime deal* of wealthy countries. However, as we will see, in some countries the harassment of gipsies and immigrants is worse than in others (see, in particular, the relationship between the rates of detention of foreigners and nationals). In the United States, blacks and Latinos are imprisoned far more than WASPs (as if to confirm Huntington's theory) and there are now more than 13 million irregulars and a sizeable turnover in this category that has guaranteed the growth of the American economy for at least twenty-five years. Apparently, there is less repressive doggedness in Europe, less prison, less irregulars, but underground economies have developed everywhere, even in countries that deemed themselves immune to it, by exploiting both rightless foreigners or non-people and part of those autochthonous people who are discriminated, often because they are children of immigrants. Nonetheless, in the United States and Europe alike, there has been a clear decrease in criminal offences in spite of the frequent inflating of statistics by police forces and the entrepreneurs of zero tolerance. In other terms, if there are more arrests in spite of less crimes being committed, this is only because power has chosen the criminalisation of social malaise and problems rather than seeking to resolve them, something that is certainly not done by shooting into a crowd, massacring marginals and filling up prisons. But the social treatment of society's ills, worsened by liberalist development, does not produce profits and this development can certainly not be curbed[7].

---

[7] Between an educator who takes care of somewhat wayward kids and a video-camera that records them to later enable their mass arrest, the latter is chosen even if just one camera costs as much as the annual

The prohibitionist logic of "fortress Europe" may have caused less deaths among migrants who have sought to reach it than those who have starved or died in wars among those who did not leave. By now, anyone who emigrates knows that they are risking their lives even after setting foot on European soil. By now, accounts of the living and working conditions of so-called clandestines, like the situation in centres for expellees or during deportations, constitute an indelible testimony of what European democracy has been capable of producing[8]. At the same time, the European Union shrouds itself in a humanitarian rhetoric and lavishes generous aid to several NGOs that do not always make a serious effort for the safeguard of the fundamental rights of the weak; in fact, many of them end up becoming involved in prohibitionist practices, if not ones of authentic war against migrations, as happens to *embedded* operators and social scientists in theatres of war[9].

However, there is a considerable difference between countries such as Italy, that have exacerbated a set of norms that is especially apt for re-producing clandestines, and others who, in spite of prohibitionism, nonetheless still guarantee a modicum of certainty of the legal order.

Upstream from this globalised catastrophe of fundamental rights there is, firstly, the asymmetry of power and wealth between strong actors on one side and, on the other, the immigrants and weak, even if they are autochthonous. Unfortunately, it is difficult to imagine the overcoming of this catastrophe precisely because of the asymmetry mentioned above: how can immigrants and autochthonous workers themselves, who are increasingly pushed towards the condition of rightness people, conquer contractual power and capacity for political action? For the time being, one can only observe the successive dynamics, particularly at a micro-sociological level. Perhaps, immigrants and the unstable or rightness workers are starting to experience forms and modes of public action that have little relation with those of the past. The high number of foreigners who have enlisted in trade unions is rather significant, but it is often a sort of tax that is due in order to have protection, demonstrating the extreme weakness of the condition as a foreign worker [10].

In the contribution by Delgrande and Aebi, it is clear to see how this process of escalation of criminalisation is generalised and effectively directed by

wage of the educator; but why avoid causing the youngsters to end up in prison and turn them into serial repeat offenders? Who should pay the social costs of a development that produces "surplus humanity"?

[8] Among the many reports criticising these conditions, we recall those by Amnesty International and other documents in various websites including http://fortresseurope.blogspot.com/2006/02/immigrants-dead-at-frontiers-of-europe_16.html

[9] See M. Pandolfi and D. Fassin, *States of Emergency. Anthropology of Humanitarian Intervention*, New York, Zone Books, 2008; M. M. Pandolfi, *Moral Entrepreneurs, souverainetés mouvantes et barbelés. La bio-politique dans les Balkans postcommunistes*, in "Antropologie et Sociétés", 26, 1, 2002, pp. 40-41

[10] In Italy, they are now over eight hundred thousand members in the different trade unions but, unfortunately, most of these memberships are a sort of mere tax paid to enjoy some safeguard or assistance, whereas the effective promotion of their trade union and political participation is rare and some trade unionists behave as much as racists as small business owners.

countries that, since the second post-war period, claim to be the most democratic in the world, governed both by the right and by the "left". We thus approach the experiment of "large-scale internment" that has been ongoing for thirty years in the United States, which can at least now lay some hope in Obama (see De Giorgi). Through the processing of the most significant data and international comparison[11], it is possible to also see that the countries that imprison foreigners most are especially Italy, Greece, Portugal and the Netherlands, but those that criminalise "irregulars" the most, transforming an administrative offence into a criminal one, effectively or through legislation, are particularly Sarkozy's France and Blair's (now Brown's) Unitd Kingdom.

In Europe, it is even too brazen that the crimes of which immigrants are charged are mainly linked to the impossibility of immigrating there regularly, to which the enormous difficulties and injustices undergone to maintain their regular status must be added, in sum, the consequences of prohibitionism against migrations that grants full discretionarily if not free judgement to police forces, employers, local authorities. This is how the metamorphosis of the right to asylum (political and humanitarian) has asserted itself, transforming applicants into suspected terrorists or delinquents (see Valluy's contribution).

The French case appears particularly emblematic as, in spite of repressive exacerbation against the *racaille* (the young "scum" from the *banlieues*) and immigrants who "dare to seek to take advantage of the social welfare system" –an exacerbation through which the former interior minister Sarkozy has succeeded in the extraordinary endeavour of getting himself elected as *président de la République*- the actual total number of foreign detainees has decreased while, obviously, the internment of "clandestines" has greatly increased (see Mucchielli and Nevanen). The same logic has driven English governments that, moreover, are seeking to test the criminalisation of citizens with foreign origins (see Bosworth and Guild). In fact, the French and English cases show, in a rather brazen way, that the preferred object of persecution is only partly the irregular immigrant, whereas otherwise, the main target is constituted precisely by the citizens with foreign origins and particularly by that posterity that has become inconvenient because it does not accept to, and cannot, be treated like clandestines, that is, as being without rights and easily forced to suffer any kind of imposition (see Yasha Maccanico)[12]. Spain, first under Aznar and now Zapatero, does not seem to belie the prevailing trend in Europe, also because it has not entirely rid itself of francoism and has switched directly to neo-liberal development by feeding off the underground economy, that is, off the the tears and blood of clandestines (see Brandariz Garcia and

---

[11] Following a critical analysis perspective, and hence of de-construction of statistics deemed to be a measurement of what one wants to and is able to measure (see Kitsuse, J.I., Cicourel, V.A. (1963), *A Note of the Uses of Official Statistics,* "Social Problems", 11, 2, pp.131-139; Ph. Robert, *La sociologie du crime*, La Découverte, 2005; Robert, 2007)
[12] On the theories of minors'/juvenile deviance, see Sulle G. Mauger, *La sociologie de la délinquance juvénile*, La Découverte, Paris, 2009

Fernandez Bessa). But in this field, it is Italy that is the teacher and undoubtedly the country that has advanced furthest in neo-conservative development, by re-producing, for twenty years by now, the turning into clandestines of immigrants, both as a formidable resource for the country's economy and for the Italian *crime deal* that is so profitable for the racist right, the mayor-sheriffs of the left and right and the *homini novi* of the so-called Second and Third Republic (see Palidda's chapter). It is not by chance, as shown by Fulvio Vassallo Paleologo, that Lampedusa risks becoming –in accordance with minister Maroni's dream- "Europe's Guantanamo". Finally, Marcello Maneri offers a new analysis of how the construction of the prohibitionist discourse has developed in the direction of trivialised racism, meaning that it is shared because it pervades all segments of society.

What criminalisation is

By criminalisation, what is meant here is the process leading a person or group of people to be the object, first, of repressive action by the police forces, and then to undergo judicial proceedings. In a state deemed democratic and governed by a legal order, such a process only occurs when a given person or group of people are identified as authors of a criminal offence/s, that is, when they have contravened one or more norms of the administrative, civil or criminal code, and in accordance with the rules of procedure based on the principle of the equality of all human beings before the law (and hence on the basis of indisputable evidence).

If we remove the offence of irregular immigration and other offences connected to this condition, resulting from a prohibitionist law that effectively makes regular immigration and the maintenance of regularity impossible, other crimes attributed to foreigners "are almost always the typical crimes of poor people" (Mucchielli and Nevanen), in short, the classic outcome of a merely repressive-penal treatment of a social issue.

It is hence rather likely that part of the people who are reported, arrested, imprisoned and found guilty are effectively the authors of crimes, but it is also likely that a part of the people who are the object of measures by the police or criminal justice system have not committed any criminal offence, and that even some among those who have been responsible of unlawful conduct may have been victims of excessive zealousness if not abuses, harassment or even arbitrary persecutions[13].

---

[13] The texts by Mucchielli and Nevanen and others feature several bibliographic references concerning these aspects that can only be analysed through ethnographic research on police practices and on the practices of administration of justice. In fact, it is evident that upstream from all of this lies the discretional power of police forces, that can easily translate into arbitrary discrimination which, in turn, is transferred into judicial proceedings unless the magistrates involved dispute the acts transmitted by the judicial police (a rather rare event, especially when it is a matter of people charged of minor offences for whom the trial resembles a brief moment on an assembly line (on these various aspects, see Palidda, *Polizia e immigrati: un'analisi etnografica*, "Rassegna Italiana di Sociologia", 1999, XL/1, pp.77-114;

Different authors have clearly shown how a sizeable portion of members of police forces act in accordance to positive and negative stereotypes, that is, prejudices that partly correspond with social representations shared by a majority of the population, are partly dominant in so-called public opinion, or are brandished by opinion leaders and political entrepreneurs and also influence the input handed down by the hierarchy of these forces[14]. It follows that the "production" of the activity of police forces is configured as a sort of self-fulfilling and self-nourishing prophecy[15]. In a supermarket, on public transport vehicles, in the streets, in any public place, the most controlled people are certainly those that have characteristics that are deemed typical of deviant subjects, and are hence suspected of being potential authors of offences.

Such negative stereotypes that, in any case, always tend to concern marginal subjects, youths with an attitude, clothing, behaviour and physical traits that are different from those considered "normal" or "proper", are voiced in every circumstance; these "different" subjects constitute the great majority of people arrested, detained and sentenced, often –obviously- marked by a high rate of repeat offenders. In some cases, the charges attributed to them may even be made worse with a degree of arbitrariness (an attempted theft can easily become an attempted robbery, even in the absence of a weapon or object that may be used as one; possession of a good whose origin is not certified can turn into receipt of stolen goods; drug possession and charges of dealing may be constructed through the doses that some officers hold –unlawfully- to one side in order to "frame" someone who they never manage to "catch"; a subject who has already been identified may be charged again of an offence that is or is not serious, if a worsening of their record as a repeat offender is sought, or if the author of that crime must be found at any cost). It is also historically proven that the last arrival on the social scene (namely, immigrants, particularly if young and not well inserted or who do not place themselves in an absolutely subordinate and "invisible" position, or even refuse to yield or emerge as a different presence in the public space that is supposed to be respectable) is certainly the subject that is most liable to be considered inadequate, if not even undesirable or a suspected delinquent.

And it is also proven that a sizeable portion of the magistrature is not devoid of the negative stereotypes and treats "habitual" cases concerning marginal people, repeat offenders and generally "different" subjects in an extremely summary manner (Quassoli, 1999).

Palidda, *Polizia postmoderna*, Feltrinelli, 2000; F. Quassoli, *Immigrazione uguale criminalità : rappresentazioni di senso comune e pratiche degli operatori del diritto*, "Rassegna Italiana di Sociologia", XL/1/1999, pp.43-76

[14] In particular, I refer to Palidda, ed., 1996; Tonry, ed. 1997; Maneri, 1998; Dal Lago, 1999; Quassoli, 1999; Palidda, 2008

[15] On theoretical and methodological matters pertaining to the critical de-construction of the production of statistics, see, firstly, Kitsuse, J.I., Cicourel, V.A. (1963); Ph. Robert, 2005

Finally, in certain junctures, it is possible for a particular heightening of the criminalisation of "different" subjects to occur, alongside the exacerbation of fears, insecurities and responses. Racism re-produces itself when a new intensification of the asymmetry between power and lack of power takes hold, up to the erosion of the democratic state's legal order. The criminalisation of marginal and different people, or of the last arrivals on the social scene, takes on racist features because it reflects their stigmatisation and hence degradation and denial of rights, their super-exploitation and also pushes them towards self-elimination as "human surplus"[16].

The measuring of victimisation that excludes those most victimised

Since the start of the 1960s in the United States, and later also in England and only for the last 25 years in France, periodic inquiries are carried out into so-called victimisation[17]. Many experts consider these inquiries to be absolutely valid, reliable and hence scientifically unquestionable as new means for approaching the actual reality about crime more closely. However, the doubts concerning these new instruments of criminology appear to be just as reasonable, not just because in some cases they are telephone surveys and not face-to-face interviews, but also because "survey taking", which appears to be all the rage particularly in Italy, merely nourishes alarmism and thus the discourse on which government through fear, terror and zero tolerance is based[18].

The composition of the samples of people heard in this sort of survey is an even more serious matter: a body that almost always excludes the weakest, the people most liable to suffer crimes against their person, impositions, abuses,

---

[16] I do not deem it necessary here to lose time criticising the statistical analyses by neo-positivist authors who appear to adhere perfectly to the "state thought" in wealthy countries, perhaps without realising that they are siding with the *crime deal* by believing that the production of police forces is "objective", as much as Huntington's thesis that deems non-Whites (non-WASPs) as such as a threat to identity and hence to American supremacy, that is supposedly the only guarantee of democracy and progress (cfr. A. Dal Lago, *Esistono davvero i conflitti tra culture?,* in C. Galli, directed by, *Multiculturalismo*, il Mulino, 2006; R. Ciccarelli (2005), *Samuel Huntington e la nuova America*, in "Conflitti globali", 1, 5, pp. 182-187; Palidda (2008)

[17] Among others, see Jock Young, *Risk Of Crime and Fear of Crime: The Politics of Victimisation Studies*, http://www.malcolmread.co.uk/JockYoung/RISK.htm#; in which the author writes: "Criminal victimisation studies are a useful research instrument to deal with the problem of inadequate statistics and to more accurately pinpoint problems within society. Commencing on a large scale in the United States of the 1960's they reached Britain by the late seventies and have resulted in a series of British Crime Surveys (BCS). ... Richard Sparks and his associates, in the introduction to their pioneering British victimisation study, summarised the decade of American research prior to their own with a note of jubilation: "Within a decade .... some of the oldest problems of criminology have come at last within reach of a solution." (1977, p.1). For France, see the contribution by Mucchielli and Nevanen. Then, see Renée Zauberman (ed.), *Victimisation and Insecurity in Europe : A Review of Surveys and their Use*, "Criminologische Studies", VUBPress, , 2009

[18] Among the many surveys that have effectively promoted the "government of fear and zero tolerance", I point out those produced by Demos and commented by I. Diamanti. "In 2008, the number of Italians who believe that crime has risen decreases: it is 81.6%, compared with 88% in 2007"

violence if not even murders. In fact, who are the leading victims of these crimes, particularly in European countries, if not gipsies, "clandestine" immigrants, the homeless, marginal people, that is, all those people who do not dare or do not even have the possibility, do not know how to or do not even imagine that they may have a right to have their physical integrity safeguarded? It is only in exceptional cases that police forces intervene in protection of this type of victims or even only hear news about the crime that they have suffered. Instead, it is entirely taken for granted that these victims be excluded from the samples of victimisation inquiries, and this often also applies to regular immigrants themselves. Moreover, it is possible to note that victimisation inquiries undertaken to date in Italy do not even take the victim's nationality into account.[19] In other terms, by ignoring the victimisation of non-people or the rightless or "inexistent" social subjects, inquiries in this field often end up promoting a rhetoric according to which the victims can only be nationals and the executioners gipsies and clandestines[20]. As regards acts of sexual violence or rapes, we thus come to have police statistics that are distorted by a double concealed number: that resulting from cases involving nationals (often relatives of the victim) that are not reported, and that resulting from cases involving gipsies and clandestines who do not dare or do not even know how to report the crime that they have suffered. However, as soon as an act of violence occurs whose author is a gipsy or immigrant, the majority of the media does not hesitate to mention the nationality or the "ethnicity" or "race" of the author, whereas when the corpse of a foreign woman is found, it is frequent for investigators and the media to talk of *in-group* crimes ("among themselves").

Corruption, abuses and violent acts by police officers and officials

An aspect that is rather neglected in research works about irregularity, crime and the criminalisation of immigrants concerns the close connection between these facts and police practices. It is notorious that individuals and groups that become preferred targets for controls and repression are those that are most

---

[19] See Istat (2004), Settore Famiglia e società, *La sicurezza dei cittadini. Reati, vittime, percezione della sicurezza e sistemi di protezione.* Multi-purpose inquiry on families, "Sicurezza dei cittadini" Year 2002 http://www.istat.it/dati/catalogo/20040915_00/; on p. 164, it is noted that only the people rejecting the interviews there are 0.7 % of foreigners due to lack of understanding of the language… it is a telephone survey on a sample of families chosen among those that appear in directories and interviews in different languages are not envisaged, unlike happens in the face-to-face ones by the Insee in France (see the contribution by Mucchielli and Nevanen).

[20] In the absence of any critical de-construction of statistics, one inevitably reaches "statements of facts" that claim to be "objective" and legitimate the most horrific racist persecutions; thus, as regards sexual violence, some go so far as to state that when the authors are immigrant, 56% of the victims are Italian, and when the rapists are Italian, only 3% of the victims are foreign, as if to say that the latter are only preys for foreigners. But how many foreign women are in a position to report their Italian rapist; and in the rare cases in which this happens are police forces as diligent as they are when dealing with Italian victims and foreign authors? One does not need to have read Cicourel, Kitsuse, Garfinkel and Robert to understand what a modicum of intellectual honesty can allow one to discern without thinking too hard.

infiltrated by informers and informants, at the same time as they are those that are most often subjected to blackmail, bargaining, harassment, impositions and violence by officers-delinquents who have always re-produced themselves within police forces. But, as if by chance, there are no statistics on the cases of corruption, abuses and violent acts perpetrated by police officers against gipsies, immigrants and marginal people in general[21]. It is only in exceptional cases that one manages to discover this kind of events, often because the delinquent officers have exaggerated for too long in using these practices or because they have not respected pacts (as happens in the underworld), or because some competitors have given them up to cover themselves or even because some honest police officer has managed to discover the affair.

As pointed out by Amnesty International and other associations like Statewatch, *Que fait la Police?*, the Observatori del Sistema Penal i els Drets Humans of Barcelona University and others, in these last few years the violent acts and abuses by the police have been more frequent and increasingly marked by racism. The French case appears to be the most serious one (see http://www.amnesty.org/ Police impunity in France). In reality, the same type of racist police violence are customary also in the other countries, including particularly Italy, the United Kingdom, Belgium, Greece, Spain, Germany (this kind of cases in the United States are better known about).

In several cases history has shown that it is precisely at times of police clampdowns towards migrations (that is, in periods of prohibitionism towards both emigration and immigration), cases of corruption and abuses by police officers increase. There are officers or officials who start off to round off their wage and those who discover that it is a veritable business and make use of the power of the public force to misuse it (consider the case of officers who only monitor prostitutes to take money and free services off them, and the same applies to those who have a preference for certain pushers).

There has been a circuit of officers, lawyers, former police officers, and all sorts of mediators who sell (even to those who do not fulfil requirements) regularisation, permit renewal, family reunion, just like visas on departure.

In a period and a context in which activities that exploit the work of irregulars are rather widespread, the complicity of officers from police forces is frequent. It thus happens that small business owners or foremen (who are sometimes immigrants) reach agreements with corrupt officers who turn a blind eye, or intervene precisely on pay-day in order to cause the "clandestines" to flee to divide up their wages with the site manager or employer.

In the field of unlawful activities, partnerships between a gipsy or immigrant delinquent and corrupt officer are not rare, and they often develop

---

[21] See Palidda, *Violences policières et violences des pouvoirs en Italie*, in X. Crettiez, L. Mucchielli, *La violence politique en Europe*, La Découverte, 2009 (CRIMPREV workshop in Nice, 24-25 June 2008)

starting from a co-operation that the officer initially starts off "with the best intentions" (to get himself an informant).

A classic example is that of the relationship between police officers and pick-pockets on public transport vehicles: the well-inserted pick-pocket who has learnt to respect the rules of the game, acts with dexterity and elegance, never arouses alarm and does everything he can to establish a relationship of trust with some police officer or, better still, an official; he provides all the information needed by them to arrest the new arrivals on the scene, that is, inexperienced, "rustic" pick-pockets, perhaps even violent ones; in exchange, the officer turns a blind eye to the "decent" pick-pocket/informant.

In the field of drug dealing, instead, it is frequent for co-operation between an immigrant delinquent and police officer to become a criminal partnership. Among the most recent cases, it can be noticed that a foreign pusher becomes a valuable partner of the delinquent officer: he points out who the pushers who have acquired considerable amounts of drugs and money are, and where they may hide them; they then deal part of the drugs confiscated by the officer, for himself and, in part, for the judicial acts that accompany the arrest of the "unlucky" pusher. The ideal informant-partner of the corrupt officer is precisely the young foreign pusher who often has a criminal record and is willing to co-operate unreservedly on account of the risk to his life itself due to revenge by those betrayed by him or the risk of expulsion. The corrupt officer (and his colleagues who are accomplices in the same gang, as it is impossible for only one of them to practise these illicit trade on his own) may even be granted awards for the numerous arrests and confiscations carried out (the more he does, the more he gains from them), and may even succeed in convincing an investigating magistrate that he is a police officer (or *carabiniere*) who is really good and hence absolutely reliable[22]. This allows the officer-delinquent to eventually ask the magistrate for his informant's release to temporary freedom in case he may have got himself arrested by another officer, or if he had him arrested himself to subsequently show him that he can do whatever he wants and that he must thus be entirely subordinated to him (this is what explains some strange releases without expulsion of serial repeat offenders in some cities; in such cases, there may be a sort of pact between the judge and agent to use the pusher-informant as an infiltrated person who is especially valuable to discover drug dealing rings). The *frame* of "government through crime attributed to immigrants" has noticeably encouraged the proliferation of cases of officers-delinquents in connivance with delinquents-immigrants.

In this regard, the case of the "black Panda" [a Fiat car model that was particularly popular] is emblematic. Criminal association, receipt of stolen

---

[22] Among recent cases, that of three officers from the Genoa drug squad who practised this kind of operative model is enlightening; the same thing has been discovered as regards some *carabinieri* in Turin and Milan and again concerning other police officers in other cities (from the press review filed by the Genoa Italian Team-Challenge project).

goods and embezzlement, apart from episodes of violence against Italians and foreigners; these were the charges faced by seven *carabinieri* and two local police force officers of Cortenuova, a town in the province of Brescia (Lombardy); even the *carabinieri* captain was found guilty. The gang drove around in a black Panda with a stolen number plate every Friday night to carry out their "Negro hunt". Apart from the beatings, during "hard" searches looking for drugs, these special militants of ethnic cleansing, did not spurn the chance to make the money, stuff and mobile phones of those they stopped disappear. They had chosen Fridays to appear in the Sunday papers. The next day, they would tell reporters of arrests and "brilliant operations against drugs". However –the two journalists write- the charged officers are missed by the residents of Calcio: shortly after the arrests of the past July, graffiti of this kind appeared: "We want our *carabinieri* back", "Deidda for mayor" (he was the marshal of the *carabinieri* of Calcio, nick-named "Herr kommandant" by the gang). The victims were chosen from among clandestines who, as such, do not report crimes. As the investigating judge states, they acted while armed, in "a mood of violence, collective exaltation and self-congratulation", in a small town with a Lega Nord mayor. The objective of the "big-game hunt" was also that of increasing statistics on arrests and confiscated drugs. The captain, who in the meantime was promoted major, was obsessed "confiscate at least 25 kilos of drugs, so as to be able to beat his predecessor's record". They were all sentenced to terms of between one and six years[23].

---

[23] Eight people were sentenced, eight were committed for trial, three plea bargained and two were acquitted. All the sentences were for between one and six years' imprisonment. The offences punished were misuse of office, bodily harm, misuse of authority, criminal association, purloining the victims' money and mobile phones, sale of a kilo of hashish. The group's leader, a former commander of the carabinieri station of Calcio (Bergamo), was sentenced to five years and two months, the captain was sentenced to three years and eight months, for the sale of a kilo of hashish and for attempted extortion.

General aspects

Some considerations on the situation in the main European contries
by S. Palidda

The usefulness of the workshop on criminalisation and victimation of immigrant and gipsy stems from the fact that in the course of the last two decades the number of arrests, imprisonments and detention of aliens and citizens of foreign origin, has gone up considerably in all the "old" and recent immigration countries in Europe, but also in North America, Australia, Japan and recently even in countries that continue to function as emigration and transit countries. This phenomenon has aroused the interest, not only of criminologists, but also of scholars from other social sciences. The aim of this workshop was to get together some of the most qualified, hence experienced, scholars in this field, in order to make a summative evaluation of the state of knowledge existing in this area and suggest avenues for its development.

By criminalization of migrants, we mean all discourses[24], facts and practices because of which the police, judicial authorities, but also local governments, the media and a part of the population hold immigrants/aliens responsible for a large number of offences. Thus it is evident that the problem has to be seen in a polysemous context as we are dealing with a *total social phenomenon* (Sayad, 1999; Palidda, 2008), which does not concern only immigrants/aliens or deviants, but also takes into account the many salient characteristics of the political and cultural situation that affects both emigrating and immigrating societies and relations between the two poles. As highlighted in a number of papers presented at the workshop, the criminalization of aliens feeds on several elements and inputs found in the specific local, national and international conditions. Immigration policies as well as the trends followed with regard to repression and punishment find expression in police and judicial practices applicable to both aliens and native persons. In other words, the treatment of immigrants/aliens has a *mirror function* (Sayad, 1999) in the sense that it anticipates or falls in line with how the treatment of natives evolves. Thus, it is obvious that the criminalization of aliens must be analysed at the same time as that of the nationals.

From an empirical point of view, the study of this subject firstly concerns police actions and their "output" (i.e. controls, complaints, arrests), judicial actions (arraignment, imprisonment, convictions, etc.), but also those aspects which come under administrative law with regard to asylum seekers and illegals.

Thus the aim of our deliberations is not to establish whether aliens are "more criminal" than nationals, but to understand how statistics, discourses and

---

[24] Here we refer to the meaning of "discourse" proposed by Michel Foucauilt (1966, 1969, 1971).

practices correspond – or do not correspond – to this assertion which is quite common today.

By victimisation we mean the fact that immigrants/aliens are themselves victims of misdemeanours committed by the nationals of the host country, by police agents and by their compatriots. Now, except for France, that has victimization surveys specifically planned with a population sample comprising aliens and face-to-face interviews, we do not have data and comprehensive analyses on the victimization of immigrants/aliens, despite the fact that selective studies and a considerable amount of reliable information attest to the seriousness of the situation. For example, in Italy these surveys are conducted over the telephone; interviewees are selected from the names listed in the telephone directory, thus straight away excluding aliens and tziganes, and even more so illegals.

From a methodological point of view, it should be mentioned that although workshop participants had different approaches, they all made a pluridisciplanry effort and this all the more so as the subject necessitated an interpretative and analytical perspective that was at the same time diachronic and synchronic, micro and macro, as well as comparative.

The difficulties of statistical comparison

Marcelo Aebi and Nathalie Delgrande's presentation showed that the statistical situation regarding the criminalization of immigrants/aliens has complicated the task of international comparisons as the definition of immigrant, alien and hence national, varies from country to country and, in particular, has changed in most of the former USSR countries. Similarly, the status of nationals of countries that joined the European Union has changed. These authors, as also others, thus stress that the problem of definition of this status has affects statistics, for it forms the basis of the definitions of numerous offences and hence of the imprisonment of foreigners (especially in the case of illegal immigration that can vary from an administrative infringement to a penal offence). Similarly, very often foreigners cannot take advantage of alternative sanctions (in relation to imprisonment) and are subjected to several varieties of what we call *double punishment*[25] (Sayad,1999).

From a comparative perspective, despite statistical difficulties, it appears just as important to take into account not only prison data but also data from detention centres that in many countries have acquired considerable weight.

---

[25] By "double punishment" we mean the fact of being subjected to penal measures and administrative measures for the same offence. A typical case is the administrative expulsion of an alien after he has served a sentence.

Having said that, foreign prisoners are still a minority amonst those interned in the penal institutions of the European Union countries, but, from 1989 to 2008, their percentage increased everywhere. In 2006, this percentage represented more than 20% of the total inmate population, with significant differences between Eastern and Western Europe. In the East European countries, the average percentage was less than 5%, whereas in the West European countries it went up to 37% (but there were also other differences amongst the latter).

After a re-examination of the key European and American statistical data (Palidda; De Giorgi), we can make the following observations :

a) European countries with the largest number of foreign inmates are Germany, Spain and Italy, followed by France and England. Amongst the countries listed in the table below (which include the principal "old" and recent immigration countries), these countries have 75% of the total foreign inmates.

b) If we look at the detention rate of aliens (i.e. number of inmates for 100,000 legal immigrants, i.e. foreigners with residence permit), we notice that the highest rates can be found in Portugal, Netherlands, Italy and Greece, followed by Spain, Belgium and Austria.

c) With regard to the ratio between the detention rate of alien males and national males aged between 15-65 years, we note that the highest ratio is to be found in Greece, Netherlands, Italy, Portugal and Switzerland, followed by Belgium and Austria.

d) The detention rate in the United States (where Blacks are taken into custody seven times more and Latin Americans three times more than the Whites) is 11 times higher than that of Norway and Finland, 10 times more than that of Denmark and Ireland, 9 times higher than Sweden and Switzerland, 8 times higher than Belgium, Greece, France and Germany, 7 times more than the Netherlands, Italy and Austria, 6 times higher than Portugal and 5 times higher than Spain and Britain. Romainia, it should be pointed out, has the highest custody rate (1,000 out of 100,000 inmates and mostly all nationals) as compared to the United States, where the rate is 756.

e) France is the only country where a decrease in the number of foreign inmates has been registered. However, this data differs from the sharp increase in the number of internees held in detention centres. In addition, according to some reports, a large number if not a majority of French held in prison are in reality young people of foreign origin.

f) A rise in the criminalization of aliens (as also of nationals) does not seem to correspond to a rise in criminality : on the contrary we note that often there is a decrease in misdemeanours whereas a greater number of aliens (but also nationals) have been arrested or imprisoned.

In the Italian case we have managed to make a more detailed analysis by calculating rates purely for men over 18, for aliens with residence permits and reliable estimates of illegal immigrants and also of individuals born abroad and those born in each Italian province. This enables us to understand, amongst other things, the similarities between the criminalisation of foreigners and that of individuals born in the most negatively stigmatised regions and most affected by the mafia.

Country	Total inmates	Total foreign inmates	% foreigners among total inmates	Foreigners rate x 100 000 foreigners	Ratio of foreigners rate/ national rate
Old immigration countries					
England and Wales	77 982	10 879	14.0	318	2
France	57 876	11 436	19.8	326	3
Germany	79 146	21 263	26.9	292	3
Netherlands	16 331	5 339	32.7	772	8
Belgium	9 971	4 148	41.6	461	5
Switzerland	5 888	4 062	69.0	263	7
Austria	8 780	3 768	42.9	463	5
Scandinavian countries					
Denmark	3 759	710	18.9	263	3
Finland	3 714	300	8.1	263	3
Norway	3 164	576	18.2	259	3
South European countries					
Italy	59 523	19 836	33.3	743	7
Spain	64 120	20 018	31.2	500	3
Portugal	12 636	2 552	20.2	925	7
Greece	10 113	5 902	58.4	668	12

Public policies of migration in Europe

In countries where the prohibitionist policy (very restricted or "zero immigration") vis-à-vis immigration has weakened the judicial security of aliens, increased the powers of the police and therefore its discretionary treatment of aliens, the number of illegals is likely to have increased. On the other hand, even in countries where prohibitionism has become stricter, but the certitude of law exists, the increment in the detention of foreigners has become much less, except perhaps in detention centres (this is particularly true of France, as described by Mucchielli and Nevanen, but also of other "old" migration countries).

The correlation between xenophobic or racist surges and the evolution of criminalization of aliens is true everywhere, not only with regard to the hostility towards tziganes, but also in numerous opinion polls and media analyses proposed by Bazzaco and Maneri and mentioned in several papers.

There is another correlation that would be useful to explore in the future, namely the correlation between the magnitude of the informal economy, the rate of irregularity and the rate of custody of foreigners. It is obvious that in countries where clandestine work is most widespread, the number of illegals and foreign inmates is greater. And this happens even where the ruling government follows a policy of maximum severity against illegal immigration.

As data presented in many of the papers submitted at the workshop shows, the increase in the criminalization of aliens (and especially imprisonment) has become generalised and has intensified in West European countries, independently of the political colour of governments, somewhat like the situation prevailing in the United States (after thirty successful years of what J. Simon (2007) calls the *crime deal*).

If it is true that officially racial profiling has not been institutionalised in Europe (an institutionalisation described in the paper presented by B. Harcourt), we still follow the custom of "facies offences" or "facies checks" or "ethnic profiling" (Sayad, 1999; Palidda, 1999). On top of this the police are under pressure to increase their crime solving rate (Mucchielli, 2008), or achieve their arrest quotas, i.e. tot up the numbers (Slama, 2008), which is what public opinion wants in support of a *government based on fear* (Palidda, 2000; Simon, 2007). In this way we can see how an administrative offence has been converted into a penal offence, asylum seekers transformed into alleged terrorists and deviants, and why administrative custody has been invented (see Valluy's presentation).

In addition, many young people from countries seriously hit by the processes of desintegration, labour under the illusion of making a fast buck, just as young people living in the suburbs of Europe refuse to accept job insecurity or low-wage work. There has thus been a process of change whereby the native deviant or criminal has been replaced by the young foreigner, mostly from countries situated on the periphery of Western Europe. Furthermore, the majority of foreigners arrested and imprisoned (especially in South European countries) are of Maghrebian or Balkan descent.

Despite the differences, there is a certain similarity between the actions of the French and English governments that, as described in the papers presented by Bosworth and Guild and Mucchielli and Nevanen, seem to experiment with the criminalization of (young) urbanites of foreign extraction. Indeed, the English

and French cases seem to suggest that the criminalization of aliens again has a "mirror function", in the sense that it prefigures or exaggerates the tendencies, which also apply to a section of the nationals. We can see this from the tougher measures applied to minors and youth in general (in this regard see the contribution of Yasha Maccanico). As in the United States, where it is the young blacks and Latin Americans who are the specific target of repressive and penal actions, in Europe it is the young aliens who have to bear the brunt, especially if they are illegals, but also lower class native youths, who it appears represent an *inappropriate posterity*[26].

The Spanish case (as well as the Greek) is quite similar to the Italian. In particular, Spain does not seem to have finished with francoism (in the normative sense) and directly moved on to the development that took place between 1980-2006, feeding off the informal economy (Brandariz Garcia and Fernandez Bessa). Having said that, it is in Italy that the judicial security of foreigners has been undermined the most. For more than twenty years, the increase in the irregularity of immigrants/aliens has been a formidable trump card for the country's economy, going hand in hand with their criminalization which ensures an unfailing consensus to the local and national governments, and to the security business.

Change and continuity
The continuity, similarities and changes between the past and the present with regard to the criminalization of immigrants and aliens were also examined in the workshop. Indeed, the phenomenon of the criminalization of aliens was well known in the past. As highlighted by several contributions to the workshop, neo-immigrants always run the risk of occupying the lowest rungs of the social ladder and figuring as the "dangerous classes" alongside the native dropouts from society or in partial substitution of the latter, especially in adverse conditions whereby a pacific and stable integration becomes difficult. In other words, the last arrival on the social scene is very likely to find himself among the dropouts and deviants and potential criminals, an easy target for the police (we just need to think of the fringe elements migrating from the countryside to Paris in 1848, described by Buret[27], the immigrants and the Blacks in the 19th century and after in the United States[28], the domestic

---

[26] The term *inappropriate posterity* is a reference to Sayad (1999) who talks of immigration as a *total social phenomenon* essential for posterity and prosperity during the development of the industrial society; now, one of the most important consequences of neo-liberal development (which is contrary to the liberal democratic development envisaged by Schumpeter, Keynes and others) is that only prosperity *hic et nunc* is favoured and posterity is neglected, i.e. the future and therefore the youth (from the perspective of stable, properly remunerated work, education, social treatment and its problems, etc.). See Muchielli (2002, 2008); Castel (2007); Palidda (2008, 2009).
[27] Chevalier, 1984; Foucault, 1975, 2004.
[28] Franzina, Stella, 2002.

migrants in Northern Italy, especially after the Second World War[29] and numerous other examples found in the works of historians or in diachronic research).

It is also interesting to recall that the discourse that accompanied the criminalization of immigrants/aliens in these different periods and contexts, was often superimposed on the discourse that upheld the criminalization of the "mob", or even the subaltern classes when they veered towards revolt. At other times it was superimposed on the discourse in support of colonisation with racist justifications[30].

As we can see through the history of migrations that took place during the 19th and 20th centuries until the present time, there have been periods of mass migrations (internal and external) which did not sound any alarm with regard to "law and order" or insecurity, and this independently of the short-term increase in criminality. In other periods, on the other hand, migration has been much less but with enhanced levels of the criminalization of migrants – i.e. greater repression – sometimes even without an increase in the number of offences[31]. It is moreover important to remember that present day migrations towards the richer countries are less significant than the domestic and international migrations of the past. In particular, the migrations during the Thirty Glorious Years (from 1945 to 1974 with regard to a majority of developed countries, members of OECD) did not give rise to any feeling of fear or insecurity, even though deviance and criminality among immigrants existed, so much so that their numbers would increase considerably among the new inmates. Thus, we are forced to the conclusion that criminality and criminalization of immigrants was not of great interest to the political and social sciences in the post-Second World War period, but only of interest to some rare criminologists.

It is especially during the 1990s that the criminality attributed to immigrants increasingly caught the attention of scholars from the social scienes in Europe and in the United States, as well as in other immigration countries. And it is after the terrorist attacks in the United States, London and Madrid that the thematisation of the enemy and the rhetoric centred upon the conflict of civilisations or the "impossibility of the integration of immigrants" seems to have contributed to the growing criminalization of immigrants (these were the aspects that Bosworth and Guild, Dal Lago and Petti covered in their papers).

---

[29] Alasia Montaldi, 1961; Fofi, 1964.
[30] Le Cour Grandmaison, 2005; Palidda, 2008.
[31] In other words, the evolution of delinquency was not connected with the evolution of immigration, but with the economic and political conditions and especially with something that since the 19th century corresponds to the criminalization of social "issues" (Baratta, 1982; Franzina, Stella, 2002; Palidda, 2008).

Bibliography

Alasia, Montaldi (1961), *Milano Corea*, Einaudi, Torino;

Baratta, A., (1982), *Criminologia critica e critica del diritto penale. Introduzione alla sociologia giuridico-penale*, Il Mulino, Bologna

Bauman Z. (2004), *Wasted lives. Modernity and its Outcasts*, Polity Press, Cambridge;

Franzina, E., Stella, G.A. (2002), "Brutta gente. Il razzismo anti-italiano", in P. Bevilacqua, A. De Clementi, E. Franzina (a cura di), pp.283-312, in Bevilacqua, P., De Clementi, A., Franzina, E.(eds) (2002) *Storia dell'emigrazione italiana.Arrivi*, Donzelli, Rome;

Burgio, A. (1998), *L'invenzione delle razze: studi su razzismo e revisionismo storico*, Manifestolibri, Rome,

Castel, R. (2007), *La discrimination négative*, Seuil, Paris ;

Chevalier, L., (1984), *Classes laborieuses et classes dangereuses*, Hachette, Paris

Dal Lago, A., (1999), *Non-persone. L'esclusione dei migranti in una società globale*, Feltrinelli, Milan,

Duroselle, J.B., Serra, E., (eds) (1978), *L'immigrazione italiana in Francia prima del 1914*, Angeli, Milan.

Fofi (1964), *L'immigrazione meridionale a Torino*, Feltrinelli, Milan;

Foucault, M. (1966), *Les mots et les choses. Une archéologie des sciences humaines*, Gallimard, Paris

Foucault, M. (1969), *L'Archéologie du savoir*, Gallimard, Paris, 1969

Foucault, M. (1971), *L'ordre du discours*, Gallimard, Paris, 1971,

Foucault, M. (1975), *Surveiller et punir*, Gallimard, Paris,

Foucault, M. (2008), *Le gouvernement de soi et des autres*, Hautes Etudes-Gallimard-Seuil

Foucault, M., (2004) *Naissance de la biopoliticque*, Feltrinelli, Hautes Etudes-Gallimard-Seuil;

Foucault, M. (2005), *Sécurité, territoire, polulation*, Hautes Etudes-Gallimard-Seuil

Le Cour Graindmaison, O. (2005), *Coloniser. Exterminer. Sur la guerre et l'Etat colonial*, Fayard, Paris

Mucchielli, F.(2002), *Violences et insécurité. Fantasmes et réalités dans le débat français*, La Découverte

Mucchielli, F., dir., (2008), *La frénsésie sécuritaire*, La Découverte

Palidda, S.(2008), *Mobilità umane*, Cortina, Milan.

Palidda, S. (2009) *Insertion, integration and rejection of immigration in Italy*, in Elspeth Guild and Mr. Sergio Carrera, eds, *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Ashgate, London (in print, 2009)

Palidda, S., *Délit d'immigration*, COST A2 Migrations, Commission européenne, Bruxelles 1997 (with contributions of Albrecht, Brion, Dal Lago, Maneri, Reyneri, Sayad, Tournier)

Petraccone, C. (2000) *Le due civiltà Settentrionali e meridionali nella storia d'Italia*. Edizioni Laterza.

Rahola, F., (2003), *Zone definitivamente temporanee. I luoghi dell'umanità in eccesso*, Ombrecorte, Verone

Sayad (2002), *Histoire et recherche identitaire*, Bouchène, Paris;

Sayad, A. (1999), *La double absence. Des illusions de l'émigré aux souffrances de l'immigré*, Seuil, Paris;

Simon, J. (1997) "Governing Through Crime", in L. Friedman e L. Fisher, *The Crime Conundrum: Essays on Criminal Justice,* Boulder, CO: Westview Press

Simon, J. (2007) *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. New York, Oxford University Press

Slama, S. (2008), *Politique d'immigration : un laboratoire de la frénésie sécuritaire*, in L. Mucchielli, dir., *La frénésie sécuritaire. Retour à l'ordre et nouveau contrôle social*, Paris, La Découverte, 2008, pp. 64-76

Media and the war on immigration
Marcello Maneri

In this contribution I will seek to expose the role that the media play in the processes of criminalisation of immigrants, using as an example the way in which the issue of immigration is constructed in the public discourse in Italy. Firstly, I will provide a summary of the characteristics of this discourse, showing how it identifies a dangerous class 'by nature'. Secondly, I will briefly discuss the logics that make it possible and the effects that it produces, considering the interaction between the main proponents of the public discourse. Finally, I will focus on the practices of immigration controls, highlighting how Fortress Europe is a generator of meaning, produces objectivisations that speak of immigration and tell us how to speak of it.

A 'racialised'[32] criminalisation
The way in which immigration has been constructed as a meaning-laden object in the Italian news media has been described by several studies over the last 20 years.[33] This body of research pieces together a coherent framework that features similarities to the characteristics of analogous representations in other European countries as well as striking differences in degree. With respect to similarities, immigration has been mainly portrayed through the glance of the country of arrival[34]. It is a monophonic discourse, in which the voice of a sub-population that, by now, constitutes a considerable part of the active population is practically absent. The perspective is always that of an *Us* that defines *Them* as a problem, so much so that in the media from all political leanings, the totality of phenomenologies that may be associated to migratory presence is

---

[32] I use this expression to indicate the way in which the discourse on immigration, that on deviance and the one on security construct an idea of (criminal) threat that is indissolubly linked to immigration as a carrier, so to speak, essentially of a deviant character. In this way, ascribed characteristics inevitably turn into moral categories and appear to govern the behaviour of the people who carry them, similarly to the "racial" membership of the Eighteen century. At the same time, I allude to the policies that deal with immigration on the basis of this deviant status.

[33] See J. Ter Wal, "The reproduction of ethnic prejudice and racism through policy and news discourse. The Italian case (1988-1992)", Florence, PhD thesis, 1997; Id., *Italy*, in European Monitoring Centre on Racism and Xenophobia (ed) *Racism and Cultural Diversity in the Mass Media. An Overview of Research and Examples of Good Practice in the EU Member States, 1995-2000*, Vienna, 2002, pp. 239-272; A. Dal Lago, *Non-persone. L'esclusione dei migranti in una società globale*, Feltrinelli, Milan, 1999a; M. Maneri, "Stampa quotidiana e senso comune nella costruzione sociale dell'immigrato", Trento, PhD thesis, 1995, Id., *Lo straniero consensuale. La devianza degli immigrati come circolarità di pratiche e discorsi*, in A. Dal Lago (ed) *Lo straniero e il nemico. Materiali per l'etnografia contemporanea*, Genoa, Costa & Nolan, 1998; Id., *Il panico morale come dispositivo di trasformazione dell'insicurezza*, in "Rassegna Italiana di Sociologia", no. 1/2001, pp. 5-40; Id., *La construction d'un sens commun sur l'immigration en Italie. Les «gens» dans le discours médiatique et politique*, in «La revue internationale et stratégique», 50/2003, 95-104; M. Binotto and V. Martino (ed) *Fuori luogo. L'immigrazione e i media italiani*, Pellegrini Eri-Rai, Cosenza, 2005

[34] Sayad notes how, even in countries of emigration, the discourse "deals with emigrants only insofar as they are immigrants in other societies, that, is, largely, using the same terms through which others, concerned about immigration, speak of it" (A. Sayad, *La doppia assenza*, Cortina, Milan, 2002:161).

usually encompassed within a single expression, an extended nominal phrase: the "immigration problem". The negativity of the phenomenon is taken for granted to such an extent that it directly lends its name to the very object of the discourse: the malaise of a society undergoing deep de-stucturing is projected onto immigration[35].

The interpretative frame of what is written or said in public about immigrants is substantiated in precise grammatical forms that describe acts that concern them: they are active subjects, agents, of negative or problematic actions (they disembark, commit robberies, run people over, press at our borders etc.), or passive subjects, acted upon, of philantropic acts by our institutions (admitted into a "literacy" course[36], recipients of a multi-lingual handbook, rescued at sea, nourished after disembarking) or even – increasingly often and almost exclusively in the last years – objects of police operations, administrative acts, policies of control (identified, evicted, expelled). This last complex of actions is nonetheless invariably set out within the same *frame*, which interprets its nature and provides a causal explanation: it is the problems that immigration entails that require these acts that are necessary and, if anything, insufficient, through which society defends itself.

In truth, a repertoire of news items representing the immigrant as an active agent engaged in positive actions is not a rarity. It is the news, reports, in-depth analysis boxes that revolve around the themes of second generations, of ethnic entrepreneurship, of initiatives on the territory promoted by immigrants. Appearing mainly in internal pages, or filed within the sections devoted to shows or culture or in the genre of positive stories, these news items do not leave particular traces in the general portrayal and even less so in the public debate. They are not deemed to be important facts, they do not give rise to political statements and debate, they do not guide, as we will see, the behaviour of institutions. Instead, the latter react promptly and exclusively to those episodes of crisis that characterise the tone of voice of information about immigration: that of emergency and alarm.

Thus we have introduced the first characteristic that is exquisitely Italian in this information. It proceeds through cycles of attention that normally start off with events pertaining to crime news that involve (and only if they are the ones implicated) foreign citizens (on the last two cases that have been dealt with most at length, the rapes in Guidonia and in the Caffarella park, on 23 January and 14 February 2009, the daily newspaper "la Repubblica" alone published 82 articles in the week following the violent event and 176 in a month[37]). These

---

[35] Thus simultaneously solidifying the 'community' in relation to the enemy of the moment. See Sayad (2002), Dal Lago, *Esistono davvero i conflitti tra culture? Una riflessione storico-metodologica*, in C. Galli (ed), *Il multiculturalismo in questione*, il Mulino, pp. 45-80; Palidda, *Mobilità umane*, Cortina, 2008
[36] For an enlightening critique of the use of this word, see G. Faso , *Lessico del razzismo democratico. Le parole che escludono*, Rome, DeriveApprodi, 2008
[37] Carrying out a search by keywords on the newspaper's archive that is available online. Articles that do not include the place-name have not been identified.

cycles quickly assume the characteristics of a moral panic[38], leaving behind some extremely relevant consequences for the criminalisation of foreigners on the ground: focussed action by police forces in terms of investigative activity and protection of the territory[39], the activation of administrative production [40] and a special type of legislation[41].

In Italy, it is very often the crime reporter who talks of immigration. In a national press that is located at the junction between the models of serious press and the tabloid ones, with a television that leans strongly towards populist tones, that aims at *infotainment* but often turns out to be a parade for the political class and a voice of the government, the milieux in which immigration is talked about are exclusively those of internal politics and especially of current events, usually crime news. The result is an extremely reduced thematic spectrum, that fits into the frames of invasion (arrivals in boats, overcrowding of detention centres, expulsion orders), of Islamic terrorism (scares, investigations, trials) and, with a typically Italian doggedness, into that of security (a more suggestive way of calling the obsession for the criminal activity of immigrants, that may include anything, regardless of whether it involves criminal offences or not: from violence to dealing, from murder to prostitution, from cowboy drivers to sellers of counterfeit goods).

This thematic focus has condensed into stereotypical categories that sum up the characteristic traits of their representation, leading back to a rigid core of negative traits that are both wide-ranging and often very diversified of subjects (the "vu cumprà" - expression used to refer to street sellers, lit. "wanna buy" -, the "windscreen cleaner", the "Extracomunitario" - non-EU national, the "clandestine" - often translated as "illegal immigrant", but with further connotations, see below-, the "Islamic fundamentalist", the "nomads" [often used to refer to Roma or gipsy people] from the "encampment", the "baby gang").

---

[38] S. Cohen, *Folk Devils and Moral Panics*, MacGibbon and Kee, London, 1972

[39] Palidda, *Polizia postmoderna*, Feltrinelli, Milan, 2000

[40] In the six months that followed approval of law 125/2008 that extends the powers of mayors in the field of urban security, at least 510 ordinances have been approved, with great media publicity, that have segments of the population that have foreign origins as their preferred target (Cittalia-Fondazione Anci ricerche, Cittalia- Fondazione Anci ricerche, "Oltre le ordinanze. I sindaci e la sicurezza urbana", research report, 2009.

[41] It is not just the framework laws on immigration that envisage special types of detention and control mechanisms, but the legislative production of the last two years in the field of security, made possible by the media campaigns mentioned above, is seriously discriminatory towards foreign citizens, beginning from the general aggravating circumstance inserted in art. 61 of the penal code, that increases sentencing by a third in cases in which the offence is committed by a foreigner who is illegally present on the national territory. Many international institutions have criticised the Italian policies on immigration of the last few years. The two latest ones to date are by the UN's International Labour Organisation, http://www.ilo.org/global/What_we_do/Officialmeetings/ilc/ILCSessions/98thSession/Reportssubmittedt otheConference/lang--en/docName--WCMS_103484/index.htm and by the Council of Europe. http://www.cittadinolex.kataweb.it/Note.jsp?id=88197&idCat=26#1 and, finally, the European Hammarberg report in April 2009

In other European countries, this usually happens in the tabloid press with a populist vocation, that identifies *folk devils*, describes them using terms of abuse and rhetorically juxtaposes them with the quintessential prototype of the respectable citizen. Instead, in Italy, albeit with different emphases, these stygmatised stereotypes constitute regular features in television news programmes and in the local news sections of the mainstream press, and they are promoted into the national news pages and in front page, or into the opening titles of television news programmes, on occasion of the recurring episodes of moral panic or when the political dispute autonomously places the issue under the spotlight. The consequence of all this is the almost literal adherence of the policies, measures and ordinances mentioned above – symbolic and immediate answers to the equally symbolic emergencies of the day before – to these protagonists of the public discourse: it is in fact precisely on the basis of the characteristics that are attributed to them that, for years, policies and measures that have contributed to re-produce the stigma and to mould its bearers have been promised or approved.

The process is completed by ethnicizing anything that is problematic, negative and threatening through different strategies of generalisation. The author of a crime is invariably named, almost always in the title as well, through a label referring to nationality or that makes their condition as a foreigner explicit. This is a procedure that, apart from being deemed reprehensible by almost all the deontological codes devoted to information about minorities, is rather more rarely used when foreigners are in the position of victims[42]. At times the generalisation becomes more explicit ("the usual Romanians", "yet another time" etc.). In any case, collective categories that lack any precision and descriptive coherence[43] but on the other hand are laden with connotations and implicit associations are the raw material for the discourse on immigration: "illegals", "nomads", "third-country nationals", "Muslims".

Through the chain of connotations that they activate, these typifications, invariably connected in the public discourse to problematic or deviant phenomena, constitute a perfect example of putative deviance: when the political representative or journalistic account name the category (often while associating it to other similar categories that strengthen its tautological effect), they automatically allude to the universe of deviant behaviour that is connotatively associated to it.[44] For nomads, at this point it appears normal to

---

[42] In a research carried out by the author (Maneri, 1998), already in 1993 migrants involved in crime news incidents were named through an "ethnicised" appellative on 99% of occasions when they were the authors of the crime, and in 72% of cases when their position was that of the victim.

[43] Lacking coherence, because they are collective categories used for individual cases and because they are almost never relevant for understanding the news. Lacking precision because they are too wide and diversified internally to have any kind of descriptive usefulness. For a discussion about some of these words, see the third paragraph.

[44] A very common example of these cross-references is provided by the statement by Rome's mayor Alemanno offered to the microphones of RAI on the day after the violence mentioned above in the

call for them to be controlled and expelled[45]; for "illegal" migrants, one "must" envisage countering and detaining them in CIEs (known earlier as CPT); "the milieu of third-country nationals", similarly to the "criminal underworld", explains the context of a crime or its likely occurrence or attribution; "Muslims" are all "fundamentalists", and hence, probably "terrorists".

Once they are *generalised, essentialized,* (in the moment in which the categories that describe them appear to also 'set' their behaviour), *stigmatised, de-humanised* (immigrants lack a voice in news reports, a vocabulary of feelings and, implicitly, reason – precisely by virtue of their essentialisation – in sum, the status as a "person"[46]), immigrants appear as a new "race without a race"[47], beings that, by virtue of characteristics ascribed to them are 'naturally' different, in a rigid and permanent way. A bit like the "atavists", Lombroso's natural born delinquents. Here, under a different guise (often that of cultural determinism, rarely the biological one), we have the entire baggage of colonial racism and of the classist one of the 19th century.

Explanations and effects. The risk of reductionism

This combination of characteristics of the discourse on immigration has been explained by resorting to different interpretations. One current key for reading it tends to attribute this 'race-based' criminalisation to the media's typical way of operating, which, by virtue of the organisational practices that have taken root in the sector, depend, on a productive basis, on official sources (for example police forces, the centres of political decision-making and action), marginalising voices and viewpoints that are not official and not organised. As a consequence of their mass audience seeking nature, the media supposedly

---

Caffarella park/Rome (that was to appear in reports of 15 February 2009). Two Romanian citizens were blamed for it, who were acquitted after two weeks in detention when they were pilloried in the media. On 16 February an operation to clear all the mini-settlements in Castel Fusano, near to Ostia/Rome, began: "There are so many desperate people wandering around who, unfortunately, could even be a source for crimes, even serious ones […] it is the most important intervention that can be undertaken to improve living conditions and security in the Roman outskirts […] this is the essential passage which, *de facto*, marks the start of the plan against the nomads' emergency that was entrusted to the Prefetto (government representative in charge of security) and that effectively begins today with this operation against clandest (he mumbles)". A violence that is believed to have been committed by two Romanian citizens is connected to an operation to clear out and identify homeless people, the operation is called "anti-nomads-emergency" (Roma emergency at other times) but, to conclude, it is qualified as an operation against clandestines (here, however, the mayor mumbles, submerged by his own over-lexicalization).

[45] In many senses, these removals resemble deportations: they are forced, often in the absence of alternative solutions or towards camps that are usually fenced off and subjected to controls on entries, referred to as "provisional" but which soon reveal themselves to be "definitively temporary" (borrowing the title of F. Rahola, *Zone definitivamente temporanee*, Ombrecorte, Verona, 2003).

[46] Sayad (2002) and Dal Lago (1999a).

[47] Paraphrasing here the "raceless racism" spoken of by E. Balibar, *Esiste un neorazzismo?* in *Razza nazione classe. Le identità ambigue*, Edizioni Associate, Rome, 1990, and, in other terms before him, by M. Barker, *The new racism. Conservatives and the ideology of the tribe*, Junction Books, London, 1981, and P.A. Taguieff, *La force du préjugé. Essai sur le racisme et ses doubles*, Editions La Découverte, Paris, 1987

encourage stereotype, staging a moral comedy in which the roles as victim and executioner may be clearly identifiable. Moreover, and maybe most of all, the newspapers and television are viewed as increasing the saleability of the news by emphasizing deviance and menace, and using the *frame* of emergency.

This sort of explanation clearly picks up on some important aspects of the phenomenon. But it is unable to explain either the phases, which have also had rather different natures, that the discourse has experienced in Italy[48], or what distinguishes the Italian discourse from that in other countries, nor most of all the logics and pervasiveness of this discourse, its ability to become common sense, to constitute a regime of truth[49] connected to the power systems that produce it and upon which it exercises its effects.

A different interpretation, but which is equally reductive, assigns to politics, and especially to the action of political entrepreneurs of racism who have managed to turn the *issue* of immigration into an extremely important weapon in the electoral contest, the responsibility for having been complacent, for having "fanned the flames" of popular feelings and for having suggested – and in any case legitimated – a criminalising discourse that the information media have quickly taken up. It is difficult to deny that all of this has happened in Italy. But even this kind of explanation misses the choral, participant, interactive nature of the discourse, the pervasiveness of the short circuit that produces effects of various types and at various levels that make up, as we will see below, a *diffused* political management of society.

In many ways and with appropriate adjustments, a model that is better suited to understanding what has happened, particularly in the continuous "crime emergencies" that have peppered Italian history over the last 15 years, is that of moral panic (Cohen 1972)[50]. The media have an unescapable role in sounding the warning, but it is other actors – often institutional and almost always political – who, wishing to ride a symbolic threat to propose solutions that are just as symbolic, certify the entity of the threat, confirming and supporting the warning as well as possibly re-directing it towards the most expedient targets. Without political legitimisation, the diagnosis and solutions – that is, the statements and interventions that constitute the imputs that feed the alarm itself – media emergencies would die out rather quickly.

However, this catalysing of emergencies is not the only fruit borne by the privileged relationship between media and politics, a relationship that is particularly tight in Italy, which explains the particular frequency and centrality

---

[48] For a discussion about the first phases of the discourse on immigration, see Maneri (1998).

[49] The reference here is obviously to Foucault's entire oeuvre.

[50] Through this expression, what is meant are those emotive waves in which an episode or group of people is defined, in modern societies by the mass media, in a stereotypical way as a threat to the values of a society, and where commentators, politicians and other authorities erect moral barriers and voice diagnoses and remedies until the episode returns to occupy the position that it previously covered within collective concerns. See, also, E. Goode, N. Ben-Yehuda, *Moral Panics. The Social Construction of Deviance*, Blackwell, Oxford, UK and Cambridge, USA, 1994

of episodes of moral panic in the public discourse[51]. The typical volatility of episodes of moral panic has been accompanied in Italy by an obstinate, constant and planned strategy that has seen the accompaniment and spurring of a social reaction against "urban decay" (illegal markets, irregular settlements, places with a high concentration of immigrant population) as the instrument for re-designing the geography of social conflict, replacing the moribund class-based fronts with more 'modern' fault lines. What the politician who goes to the market to protest against street sellers or drug dealers who have immigrant origins (but also against call centres and small 'ethnic' shops), what the permanent picket against the Roma camp organised by the political entrepreneurs of fear, or the age-old proposal of "citizen patrols" paints – through the media and in response to the portrayal that it outlines – is a new representation that reflects the needs, interests and concerns of the included (the autochtonous population, even and in some senses mostly its lower classes) and views those excluded from citizenship (the new inferior class) as the symbolic and political enemy onto which to project all the ills of society. This strategy has been pursued most explicitly and insistently by the Lega [Nord], but over the years it has been increasingly convincing the entire centre-right alignment, cornering the other parties, which have been unable to elaborate an alternative discourse and have been tempted, without any hesitation since the Reggiani case, to gain credit themselves as reliable champions of security[52].

If we pass from the logics that have led to the media's criminalisation of immigrants to considering the effects that it has produced, there is still a risk of reductionism. Thinking of information outlets, the diffusion of social portrayals of immigration that feed the dissemination of prejudices that may result in the promotion of discriminatory and xenophobic behaviour is often referred to. What seem to be the salient facts of a phenomenon, the assumptions, the expectations, the images and available topics, end up constituting a frame of meaning used to lend sense to the interactions of daily life and to influence the

---

[51] The direct and indirect control of televisions and of an important slice of the daily and periodic press allows the coalition parties that has most made itself a political entrepreneur of security to dictate the agenda, define several editorial lines and the very composition of the sections that make up news programmes (in television channels in particular, crime news ha greatly increased its presence, especially during phases in which, often in the imminence of electoral rounds, veritable security campaigns have been most frequent – see the Osservatorio di Pavia, http://www.osservatorio.it/download/criminalita.pdf, http://www.osservatorio.it/interna.php?section=analysis&m=v&pos=0&idsection=000115).

[52] Since the mid-1990s, statements by representatives of all political parties have appeared in the media using the us-them scheme when talking of "urban decay", petty crime, security. But since the campaign launched on the daily newspaper "la Repubblica" on 7 May 2007 (with the letter by an 'ordinary' citizen entitled "Help, I'm left-wing but I'm becoming racist", followed by an open letter by the secretary of the new-born Democratic Party, Veltroni, who pandered to him), passing through the Cabinet meeting through which, in the wake of the Reggiani murder by an individual of Romanian nationality in the autumn of 2007, a law decree was approved that made the expulsion of Romanian citizens easier (although they were illegal under European legislation), the strategy of the new-born Democratic Party has been: "security is neither right-wing nor left-wing".

mental disposition with which the migratory phenomenon is interpreted. All of this can also influence the passage to action. The very frequent attacks against foreign citizens that occurred in the province of Rome after the Reggiani murder and following other violent episodes that received great media attention provide additional evidence of the fact that the media may produce, more than what is termed the *copycat* effect – mere imitating behaviour fostered by the publicity given to a particularly dramatic act in the media -, a *de facto* legitimation of DIY justice, surreptitiously prompted by the political entrepreneurs of security.

Those that have been mentioned are some very plausible effects, although they are difficult to 'measure' for various reasons.[53] The main problem of this approach, however, is that it tends to only consider the direct effects of receipt of the "message" by the "public"[54]. What the discursive construction of immigration shows better than many other phenomena, is that the effects of the media are very powerful because they are not limited to modifying the definition of the situation of a combination of recipients who occupy analogous role positions, but they also act upon a series of actors that, in turn, have the power to publicly re-define events. What the media provides is a forum for elaborating the dominant consensus. The way in which it is codified in that venue –through the selection of the most important "problems", their definition, the assigning of the narrative roles of *victim* and *executioner*, the mobilisation of moral values that are called into play– constitutes the basic outline within which the other actors equipped with the power of access to public discourse will be called upon to enter it, substantially keeping to the provided pattern, re-issuing it and legitimating it in a circular process. The judge, the *questore* (head of police), the expert, the leader of the local citizens' committee, the political circles at a local or national level are hence the first and most important recipients of the effects of the media, they adopt its language, categories, priorities and, in part, also its knowledge[55]. This does not mean that they do not contribute, in turn, to model its discourse, not at all. In many cases and under many aspects, they are precisely those who act as

---

[53] Among the most important ones, are the impossibility of studying individuals who have not been exposed in any way to the media's influence and the difficulty of isolating the effect of their exposure to the media from other manifold effects to which everyone is subjected. For an evaluation of the results of research works on the issue, see R. Surette, *Media, Crime, and Criminal Justice. Images and Realities*, London, Wadsworth, 1998; R. Reiner, *Media Made Criminality: The Representation of Crime in the Mass Media*, in M. Maguire, R. Morgan and R. Reiner (eds.) *The Oxford Handbook of Criminology*, Oxford University Press, Oxford, 1997, pp. 189:232.

[54] The implicit model views individuals as social atoms who may or may not be influenced by exposure to the stimulus. Another matter is to consider a different type of social actor, who is not limited to consuming, but interacts with the media. Research on mass communication has been doing it for years but, however, almost always within the idea of "public", more active, critical, but nonetheless a recipient and substantially conceived horizontally as an audience.

[55] I have already dealt with this matter in Maneri (1998) and will not focus on it here. See, also, Palidda, 2000.

"primary definers"[56]. In any case, what is most important to them is to *use* the media for what appear to be the strategic aims of anyone aspiring to have an audience in the "democracy of security"[57]: firstly, to learn about the state of that unique cultural product that is called "public opinion"; secondly, to conform to it.

How to learn about public opinion? It is present in the media in the shape of at least three *simulacra*. The voice of the news organization, which, even through the adoption of the linguistic markers of everyday discourse, presents itself as the voice of civil society[58]. The voice of the "people", in reality of those sectors of the citizenry that manage to gain credit among the media and are constructed by the media as public opinion through the use of universalising categories – the "neighbourhood", the "residents", the "inhabitants", the "city". Finally, the third, the survey, as a scientific certification of the state of opinion. This instrument has gained growing visibility in the media and appears to re-produce its message increasingly, granting it legitimation (not just the legitimation of Science, but also that, strictly connected to it, of numbers, of the sacred truth of opinions through figures). The commissioning of surveys, often arriving from the same world of the media, the search for visibility, that encourages the publishing of results that are in agreement with the public's expectations and in tune with the frame of ermergency, the complex interweaving of relationships between media, politics and pollsters[59], ensure that the opinion polls, more than 'recording' opinions (that are not there waiting to be collected, but that individuals shape, often at the time of the survey, "drawing" them from the positions that are publicly available), re-produce "public narratives", that is, the way in which opinions are represented in the media's discourse.[60]

---

[56] "Primary definers" has been a definition applied to members of those organisations – police forces, courts, governmental agencies, bodies and apparatuses, political parties – which, as the sources that are most employed by the media, often provide a first definition of events (S. Hall, C. Critcher, T. Jefferson, J. Clarke, B. Roberts, *Policing the Crisis: Mugging, the State and Law and Order*, Macmillan, London, 1978). Some believe that their role has been overestimated and that their definitions are frequently questioned or negotiated, often even by marginal groups (P. Schlesinger, *Rethinking the Sociology of Journalism: source strategies and the limits of media centrism*, in M. Ferguson (ed.) *Public Communication: The New Imperatives,* Sage, London, 1990; P. Manning, *News and News Sources. A Critical Introduction,* Sage, London, 2001). The media themselves can often act as primary rather secondary definers. From time to time, it is a matter of considering the relationships of strength and what is meant by "primary definition": the *frame* that selects the salient aspects of an event, the narratives that make it known by the public, the categories within which it is defined etc.

[57] Palidda, personal communication.

[58] As regards the use of a public idiom by the press, see Hall et al. (1978). For an interesting theorisation on the use of an "oral mode", see R. Fowler, *Language in the News. Discourse and Ideology in the Press*, Routledge, London and New York, 1991

[59] The partners that fund many opinion surveys also come from the world of banks and insurance companies. It is difficult not to think that ten years of surveys on the flood of insecurity have no relation to the business of the security sector, which is often directly mentioned in the presentations of data themselves.

[60] For a radical critique of the way in which surveys construct social problems, P. Bourdieu, *L'opinione pubblica non esiste*, in "Problemi dell'Informazione", no.1/1976, pp. 71-87, is still relevant; L.

The second way in which the various social actors mentioned above use the news media is strictly connected to the first. They are not just useful to 'know' what, at a given time or in a given period 'is passed off' as public opinion, but they are used as an instrument to bolster the representation of public opinion, receiving and re-launching the emergency of the moment, using its language, adopting the same perspective and providing interpretations and solutions that are ready for use, in congruent terms with those through which the 'problem' has been defined. All of this is particularly profitable for those who operate in the field of politics. Pursuing an emergency, confirming and alluding continuously to the threat, devoting oneself to the "politics of fear" (as it is called by Amnesty International itself in its report for 2007), does not just supply legitimacy even to the most liberty-denying policies, does not merely distract from other problems that politics does not wish to or does not manage to tackle, but carries out a function of social control: it guarantees agreement for political leaders, marginalises dissent, encourages identification between the ruler and his subjects. When an external threat runs through the 'moral community', power can be seen as a protector, entrusted with identifying and eliminating evil. One thus approaches the Hobbesian absolute sovereign, who guarantees security in exchange for freedom (including that of establishing from where the threats come). But one also quickly arrives at a "government" through fear" (Simon, 2008), at a strategy for *governance* that rests on exasperation, the identification and cancelling of threats as an essential ingredient of the action of government at all levels.

This closed loop construct an image of the "people", it solidifies, assembles, superimposes: it continuously re-creates an Us and, inevitably, a Them. When the Minister of the Interior, after having decided to send soldiers to four Italian cities, declared on the front pages "It is the time for firmness, let us rid ourselves from fear" (corrieredellasera.it, 16 May 2008), he constructed subjects and sovereign as a unit ("let us rid *ourselves*"), he gathered the community, at the same time cutting out for himself the role of protector (he who voices this kind of discourse appears to have studied Mead's claim carefully: "the cry 'thief!' unites us all as owners against the thief", 1918:591[61]).

It is evident how this kind of circuit translates into a generator of processes of criminalisation of "foreigners". It is them (from time to time, and depending on the speaker, all "the third-country nationals", only "the illegals", or, in turn, "the Albanians", "the Romanians", "the Roma") who are, firstly, objectivised

---

Blondiaux, *La Fabrique de l'opinion. Une histoire sociale des sondages aux Etats-Unis et en France*, Belin. Paris, 1999 ; P. Champagne, *Faire l'opinion. Le nouveau jeu politique*, Minuit, Paris, 1990. As observed by Ginsberg (1986), surveys have also contributed to the taming of public opinion (that once had spontaneous expressive forms of a different nature), trasforming it from a potentially destructive force in political terms, into a docile and plebiscitary phenomenon. Cfr. B. Ginsberg, *The captive Public. How mass opinion promotes State power*, Basic Books, New York, 1986. The fact that surveys limit themselves to re-producing public narratives is still, however, largely unexplored.

[61] G. H. Mead, *The Psychology of Punitive Justice*, "American Journal of Sociology", 23/1918, 577-602

as a homogeneous and essentialised category; secondly, them who are constructed in the recurring episodes of "moral panic" as a threat and placed in opposition to Us, the victims; thirdly, them who constitute the privileged target of the security policies proposed, approved and implemented in these years.

The extreme visibility that the politics of fear have attained in the last few years has resulted in their logics and their effects being made the subject of several considerations[62]. An effect of this circularity of the production of the discourse on immigration has, despite its deepness, been far less researched. It is a more indirect effect, mediated, and at the same time so pervasive as to be difficult to capture in its own specificity. It concerns the fact that, at least considering specific aspects of language, the various social actors, rather than voicing a discourse on immigration, are, conversely, "spoken by" it[63]. The categories, arguments, mental images that, to an extent, we are 'forced' to employ in speaking of immigration are constructed elsewhere. Never neutral, they talk to us and tell us how to speak. But where do they come from?

The linguistic objectivisation of practices

Around twenty years of practices and discourses on immigration have produced a legacy that has become objectivised in language. Of all the ways that could be imagined to tell it, only some narratives recur as fixed schemes. Among the various images that accompany, describe and tell it, only a few are remembered and quickly recognised by everyone. Of all the real and potential terms that may be used to name immigration and the phenomena connected to it, only some are used in everyday language, carrying with them the connotations, the conceptual baggage, their own characteristic offcuts. In this way the categories through which we continuously construct and re-construct reality, which are never neutral, tell us how to look at it, legitimate certain practices to the detriment of others, come to form part of reality itself.

The images, narratives, concepts employed in the discourse on immigration have prevailed over their possible alternatives in a competition of discourses that, contrary to what the term suggests, has had, in many senses, a pre-determined outcome. There has not been, just to immediately abandon a fashionable term, a "negotiation" between opposite meanings, whose outcome sanctions the state of the relationship of forces between different components of society. And this is not just because one of these components, the one that is *named*, enjoys, alongside its possible allies, an infinitely lesser power of speech than the others. The main reason for this outcome, and for its deeper nature,

---

[62] In anthropology, the work of Mary Douglas had already brought under focus the political role of the threat of "danger" (M. Douglas, *Rischio e colpa*, Bologna, Il Mulino, 1996). In the last few years the theme has been dealt with from different perspectives. See J. Simon *Il governo della paura. Guerra alla criminalità e democrazia in america*, Cortina, 2008; D. Altheide, *Creating fear. News and the construction of crisis*, Piscataway, Aldine Transaction , NJ, 2002, Dal Lago, *La tautologia della paura*, in "Rassegna Italiana di Sociologia", no. 1/1999b, pp. 5-42; R. Escobar, *Metamorfosi della paura*, Bologna, Il Mulino, 2007
[63] Hall et al. (1978).

lies rather in the fact that ever since its constitution in public discourse immigration has been the object of special policies that have received special attention, and that have built up the vocabulary through which we now think of it in different milieux.

These policies, that in many cases are limited to mere control practices, and the discourse that has accompanied, interpreted, supported and justified them, have led to the stratification of a combination of categories, arguments, images and narratives that reflected the organisational obligations of the institutions in charge of controlling immigration (with their priorities, outlook, definitions, objects). The information outlets have translated this discourse and its priorities into public language[64], in the constructs and typifications that we use in our daily lives.[65]

The first 'special statute' word[66] that appeared in the public discourse in Italy has been "extracomunitario" (lit. third-country, non-EU, national). It was first used in parliamentary debates when, in 1986, the first law on immigration was discussed (later to become law 943/86). The concern, in that arena, was that of establishing some criteria for regulating the presence of those who were *not* citizens of a country of the then European Community. Not belonging, exclusion from rights, was the distinctive trait of the category right from the start. Inserted by the media into the circuit of everyday communication, from a word used to indicate countries not belonging to the European Community and as an adjective classifying "third-country workers", with the debate (1989) and then the so-called Martelli law (39/90), the word "extracomunitario" has become a noun, a category of people that takes on traits of an anthropological type ("extracomunitari" have specified characteristics, they behave in a certain way, etc.). Having become a construct of common sense, the word has undergone a series of adjustments that have invested it with practical relevance by removing from its field anyone (north American, Swiss, Japanese citizens, etc.) who was not a real target of control policies, who did not correspond to the model of the person excluded from enjoying rights – in front of which citizens of countries included in the club of the powerful raised their status, acquired their new European citizenship, denying it to those who were excluded.

The most relevant source of the linguistic forms within which we perceive, interpret and communicate immigration has been, however, supplied by the control policies that have named, described and provided the sites of visibility of immigration. Where immigrants have been institutionally treated, made the

---

[64] Productive apparatuses that require a daily stock of pre-worked information, the bureaucracies of information, due to a principle of "bureaucratic affinity" (M. Fishman, *Manifacturing the News,* University of Texas Press, Austin, 1980) depend on other bureaucracies (institutions and large organisations, so-called "official sources", from which the large majority of news arrives) for inputs on which to work, ending up re-producing their discourse.

[65] A. Schutz, *Sulle realtà multiple*, in Id., *Saggi sociologici*, Utet, Turin, 1979

[66] Speaking of words, for a very rich analysis of the vocabulary of the discourse on immigration understood as a cultural object, see Faso (2008).

object of bureaucratic procedures, rendered visible to observation and mentionable in discourse, in those places, in those milieux, in those themes, a sizeable part of the verbal and iconographic material that constitutes the "archive" available to us has been produced[67]. We then have to consider the institutions, the practices, a language that constructs the objects that they deal with, in their perspective and according to their competencies and priorities.

In Italy, it is possible to identify three cores within which the institutions, practices and languages produce recognisable agglomerates. The fronts for the treatment and control of immigration that has the most public visibility have always been the external one (patrolling borders, the management of CPTs/CIEs – detention centres, first CPTs, centres for temporary detention, now CIEs, centres for identification and expulsion) and the internal one (police operations – evictions, searches, patrols, controls – in urban areas), to which, since 2001, the international one has been added (which does not supply places as much as practices that lend visibility: investigations on international terrorism). The great majority of news items on immigration that have been highlighted the most lead back to one of these three fronts, in which the State re-produces its own sovereignty, confirms its prerogatives, reaffirms and at the same time re-defines its own material and symbolic frontiers, and hence itself[68].

Let us start from the last of these three fronts. If one examines the headlines that have appeared in current affairs news after September 2001[69], it can be seen how they revolve around few recurring elements. The first of these is the mention of a problem. The most recurring terms ("alarm", "risk", **"the shadow of Al Qaeda"**, "terrorist danger", "threat of attacks", "beware …", "suspects") insistently repeat to us that something is threatening us, but also that someone is ready to protect us. In fact, the second ingredient is provided by two opposite entities, "Islamic terrorists" (Them) but also Our institutions (ministry of the interior and police, national and international secret services, the magistrature). The third ingredient concerns the actions in which the two entities that have just been mentioned carry out their efforts: on the one hand a series of processes of undertaking that see "ours" constantly on alert and busy removing the problem (Figure 1). We thus have a dominant narrative with a hero that defends us from a menacing enemy. On the other hand, the enemy: the processes in which he is involved appear as pure action but are in reality the attribution of an intention ("they wanted to", "they organised", "they were preparing"). It is hence a matter of a putative deviance that is then transposed, through continuous associations and substitutions, repetitions and juxtapositions, from the figure of the terrorist to that of the "fundamentalist",
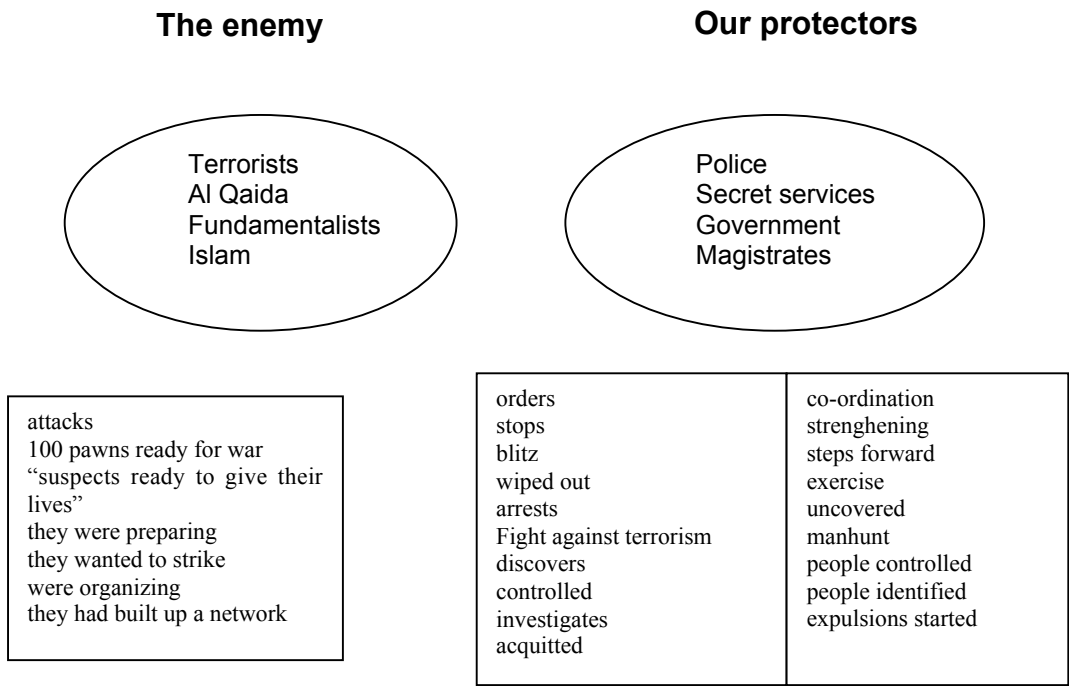
---

[67] M. Foucault, *L'archéologie du savoir*, Gallimard, Paris, 1969
[68] See Sayad (2002).
[69] I have analysed the articles on international terrorism that appeared in the daily newspapers *Il Corriere della sera*, *La Repubblica, La Stampa* between 2002 and 2006.

and then from the latter to Islam in general[70]. That of Islam-fundamentalism-terrorism-al Qaida is a combination of terms-mantras that condense the entire discourse in a tautological manner, that is taken for granted.

Figure 1.

The enemy   **Our protectors**

Terrorists
Al Qaida
Fundamentalists
Islam

Police
Secret services
Government
Magistrates

attacks 100 pawns ready for war "suspects ready to give their lives" they were preparing they wanted to strike were organizing they had built up a network

orders stops blitz wiped out arrests Fight against terrorism discovers controlled investigates acquitted	co-ordination strenghening steps forward exercise uncovered manhunt people controlled people identified expulsions started

•

Investigative operations, those by intelligence services, by the police, hence become news, they are translated into the language of common sense that constructs a pre-interpreted problem. It is characterised by a chain of connotations that portrays the theme of religious differences as a problem that only regards a threatening, fundamentalist Islam[71], that infiltrates when it does not invade, whose nature is by and large criminal. This kind of connotation obviously also characterises an entire series of connected themes, from that of

---

[70] One example among many that would be possible: when four blogs were blacked out that "re-issued Al Qaeda claims", the article in Repubblica, dated 22 February 2008, was entitled "4 filo-Islamic blogs blacked out". The same expression was used by the Corriere and by other newspapers, and it was at the start of the ANSA [Italian press agency] news release.

[71] The theme of fundamentalism/terrorism is, moreover, by far the one dealt with most at length since 2001 when speaking of Islam in the Italian media, see M. Bruno, *L'islam immaginato. Rappresentazioni e stereotipi nei media italiani*, Milan, Guerini and Ass., 2008, and C. Sanna, "L'islamico, l'extracomunitario e il clandestino. La rappresentazione della popolazione migrante nei quotidiani italiani prima e dopo l'11 settembre", Florence, PhD thesis, 2006

integration (Muslims as carriers of customs that violate the accepted norms) to that of freedom of worship (mosques as fundamentalist dens).

The second front for the treatment of immigration, that of patrols and border controls, of arrivals, of Centres for Identification and Expulsion, where the relationship between internal and external is regulated, has produced its first large frame of the discourse on immigration: that of the "invasion"[72]. Its protagonist is the *"clandestino"* –clandestine- (hence an infiltration, apart from an invasion): regardless of whether it is a political refugee, an asylum seeker, a migrant seeking employment, or even just a person who has lost the right to have a residence permit or who awaits its renewal, this is the term that invariably describes their condition. What is the object of assignment is not, as happens instead in other European countries, a status that is internationally recognised (as in "political refugee", that also refers back to the outcome of historical events), and not even an administrative condition (as in "asylum seeker", that also highlights a strategy for escape), but that which, as the De Mauro Dictionary specifies, is "done covertly, in secret, especially what violates the laws that are in force or does not have the approval of an authority"[73]. All the concerns of the agencies seeking to control migratory movements lie in this word: certainly not that of considering a thousand different stories and invidual conditions, but neither that of evaluating, recognising or denying (asylum, entry, protection). Rather, to locate, block, expel those who seek to arrive and cannot move through improbable legal channels. The "clandestine immigrant" is, through an act of labelling, unavoidably illegal, not to say criminal, an act that opens the doors to the political slogan "clandestines out!" and to the competition between those who, among the governing majority and opposition, manages to "carry out the most expulsions"[74]. Having become common sense, the typification of the clandestine leads to its naturalisation. It is no longer an administrative category (in the sense of people defined in a certain way on the basis of administrative procedures that grant them a certain status) but, like and worse than the "extracomunitari", an anthropological category that already 'inhabits' the shores of departure of migration routes or international waters[75], and that is characterised, in common sense as in the political discourse and in a sizeable

---

[72] The remarks that follow are based on a sample (the first week of every month in the years 2000 and 2005) of the daily newspapers *Il Corriere della sera*, *La Repubblica, La Stampa, Il Giornale, L'Avvenire, il Manifesto.* Like elsewhere, I have also drawn on a non-systematic observation.

[73] In July 2008, after many years, a campaign against the use of the word "clandestine" has been launched by a group of journalists, so far adopted by a wire service (Redattore Sociale), by the Order of journalists of Emilia-Romagna and supported by the Presidency of the Region of Tuscany.

[74] The criticism levelled at this and previous governments' immigration policies by the centre-left oppositions are often similar to the declaration by former minister Turco on 16/4/2009, "After a year of right-wing government the number of clandestines has increased", or they refer to the fact that there "have been less expulsions" with the Bossi-Fini law.

[75] "2 million clandestine immigrants ready to set off from Libya" is a statement that has been voiced by almost every Minister of the Interior, through which the status as a clandestine is assigned even to those who have not yet crossed Italy's borders.

part of the scientific one, by "a high disposition towards deviance"[76]. On the other hand, as noted by Sayad (2002: 372-376), national categories, not to say nationalist ones, that characterise "state thought" and our social, economic, cultural, ethical, in short, political understanding, and through which we think of immigration and more generally our social world, see the immigrant as an "intruder" who upsets the national order, muddling up the separation between what is national and what is not and denting the integrity, purity and mythical perfection of such an order. The "double punishment" of migrants lies precisely in their ontological delinquency, in their not being neutral elements, but rather a presence that constitutes a latent crime, disguised, that the prospective criminal offence committed, punished by the magistrature, unearths. Bringing Sayad's reasoning forth, a triple punishment is inflicted on the "clandestine", because apart from an immigrant frequently made visible as a delinquent, apart from being an ontological deviant who disputes the mythical structure of the national order, he is an illegal migrant, or is presented as such (the aggravating circumstance that increases sentencing by a third for "clandestines" who commit criminal offences thus appears to be the legal recognition of the triple sentence, of a guilty verdict that is already de facto expressed by "state thought").

However, one must not think of this way of lending meaning to immigration as a pure reflection of the common mindset. Rather, it is the meeting point between the power's point of view and the typifications of common sense that are most congenial to translate it into practical thought. The "language of arrival" reflects its origin. Whether it is Frontex, the Customs and Excise police or Coastguard, the Police or the Navy, patrolling and rescue operations, while becoming news, make migrants, refugees and asylum seekers visible. Not just with the customary stock images (large boats at sea, long lines of people under the gaze of law enforcement officers, masses kept under control by the walls of a centre in Lampedusa) but also through the telling of the "journeys of desperation". The dominant narrative is less univocal than in the case of terrorism. Who carries out the role as *executioner* and who takes on that as *victim*? Clandestines are the protagonists of an "invasion", once they are detained in CPTs/CIEs they let themselves go to "excesses", but after all, their "odyssey" is moving, in the reportages they are the victims. Certainly, not of non-existent asylum policies, of a military approach to migrations, of unbalanced relationships between the North and South of the world (in other words, of an Us), but, with an operation of externalisation of responsibilities, of another Them: "people smugglers" who "have no scruples", "human

---

[76] Regardless of the extremely different conditions that it describes and of the fact that the majority of "regular" migrants, with a lesser "propensity to deviance", as we are told, were, at some time or other, also "irregular" and hence "clandestines". Thus, on the one hand it is claimed that "clandestines" have a different nature, more deviant, perhaps also due to the precariousness of their own condition; on the other, the loss of that condition, their regularisation, is the last thing that those shouting about the "dangerousness of clandestines" want.

traffickers", at best "the sea tramps"[77]. What places these agents in the foreground, simultaneously excluding the agency of control or exploitative policies, is a narration that is entirely focussed on the present[78]. News reports about arrivals by sea have a starting point that may reach the places where they embark but systematically wipes out what happens before, and they end up with the shipwreck, the disembarkment or sometimes repatriation without ever going so far as to cover what follows (detention in camps, mass deportations, the countless other "odysseys" that follow on from it).

This present is provided by the view of the control agencies: what we see is what they see or say that they see, the camera gets mixed up with their gaze and through the camera, their gaze becomes ours. The objects they deal with is what we can observe. The fact that migration processes are told from the perspective of those who must block them by placing a barrier in the way, and are rendered visible where their representation is more easily dramatised, at sea, on the coast, is one of the probable reasons for the hydraulic metaphors through which the language of common sense, but very often also the scientific one, describes migrations: "flows", "migratory pressure", "waves", "tide", metaphors that accept and prepare the *frame* of invasion.

The third front for the treatment of immigration, in my view by far the most important one due to its capacity for symbolic production, is the internal one. It would be too easy to identify the symbol of the place assigned to immigration when it is portrayed on the territory in the image of the police car's flashing light that accompanies the increasingly numerous episodes of crime news reports placed on the front page by newspapers and television news programmes. On condition that that the culprit is foreign and the victim Italian, an act of sexual violence, a murder,[79] a "robbery in the villa" does not escape the morbid attention of the media, that, through an astounding series of apparent 'crime waves'[80] have spotlighted, as a sort of 'criminal race', in turn, people from Maghreb countries, Albanians, Romanians/Roma people[81]. While these cycles of media attention have deep criminalising effects and, through the construction of a "security emergency", have served to legitimise legislation that is discriminatory and vexatious towards foreigners, the settling of the

---

[77] This last expression quite literally appeared after the sinking of the Kater I Rades, in which 89 people died on 28 March 1997, after it was rammed by a corvette of the Italian Navy. In that instance, there was an evident effort by the Italian media to turn responsibility onto on inanimate object, the "sea tramps", to be precise, which from that moment on became protagonists of the reports on landings.

[78] Following the same line, also M. Bruno, *L'ennesimo sbarco di clandestini. La tematica dell'arrivo nella comunicazione italiana*, in M. Binotto and V. Martino (ed) *Fuori luogo. L'immigrazione e i media italiani*, Pellegrini Eri-Rai, Cosenza, 2004

[79] There have been many cases in which, based on weak leads or false testimonies, a foreigner (or an entire nationality, as in the case of Novi Ligure) has been placed as a "monster" on the front page until a very different reality was discovered.

[80] About how the media are able to produce apparent crime waves through thematisation, see M. Fishman, *Crime waves as ideology*, in "Social Problems", 25/1978, 5:531-543

[81] In the enthusiasm of the manhunt, Romanian citizens and speakers of the Roma language are muddled up with surprising superficiality.

images, narratives and categories governing the discourse on the foreigner is not mainly down to them. Since the start of the 1990s, it has rather been neighbourhood conflicts (against gipsy encampments, centres for immigrants, illegal markets) and the police operations that have accompanied them[82] (evictions, searches, patrolling, indexing) which, through a media portrayal, have structured a large part of the semantic field of immigration. These interventions – and the protests, media and political campaigns that have called for them – have provided the sites of visibility thanks to which immigration could be told.[83]

It is a discourse[84] that firstly tells us of deviance (the "drug blockhouse", the "heroin supermarket", the "red light streets", the "third-country hoodlums", the "Roma's treasure"). The trait that applies to all these expressions is that illegality and threat are lording it, "under everyone's eyes", "in the clear daylight", "in the open". It is a discourse that also thematises violence ("overexcited", "violent", "aggressive", "brutal" people). We are poles apart from the slightly romantic image of the "underworld", a social as well as a criminal phenomenon: here, we seem to understand, the problem is the nature of these people. It is a discourse that tells us of marginality ("desperate", "sewer", "dirty"): lacking empathy, it seeks to tell us that marginalisation is, more than anything else, social dangerousness. Next to it, and to sum it all up, irregularity ("clandestines", "unlicensed", "squatters", "illegals"): hence unlawful. Finally, the portrayal of otherness ("ghetto", "Chinatown", "of every colour", "casbah", "feud"): distant, but not always, from the exotic imagery used in travel agencies, this otherness appears to be a synonym of degeneration and dangerousness and refers back to a "war of races" that is not only hinted at implicitly.

It is here that the topic of "urban decay" emerges: marginality, violence, deviance, irregularity are no longer phenomena equipped with their own contingent or widespread causality, resulting from precise and specific circumstances, and instead they take on a *naturalness* that common sense refers back, through a statement and not an explanation, to the essence of the thing itself, to the general "degeneration" of the place (notice the continuity between decay-degeneration-purity-race). The dominant narrative[85] tells us how decay has descended upon the neighbourhood, is taking hold in a brazen manner, "in front of everyone", constituting an insult to the city's "decorum", apart from a

---

[82] Because they are decided in response to or to pre-empt requests from citizens who have mobilised for this purpose.

[83] It could be thought that the visibility lies in the phenomena as such, rather than in their becoming the object of intervention. But, apart from the few Centres for immigrants, illegal markets and Roma encampments alike have existed for decades and previously did not have an even remotely comparable visibility in the public discourse.

[84] The analyses that follow are based on a sample of articles (the first week of every month from 1/07/1992 to 30/06/1993) of the daily newspapers *Il Corriere della sera, La Repubblica, La Stampa, Il Giornale, l'Indipendente, l'Unità, il Manifesto.*

[85] For a detailed analysis, Maneri, 1995.

menace, also in terms of health, for "residents". The discourse on "urban decay" associates immigration, marginality and crime in a sole universe of cross-references. It is no longer a matter of explaining, but of pointing out. The solution cannot be to recover (social, housing, integration policies), but to remove, cancel out. The demonisation and naturalisation of the agents of decay is functional to the de-responsibilisation of the institutions. Once evil has been portrayed, it may be eliminated without any sense of guilt.

The news items that have constructed the idea of decay are far more complex subjects than the reports on landings or judicial reports on terrorism. Unlike the other two, this genre is characterised by a perfectly established welding between top and bottom, between popular language and the word of power. The chosen perspective is that of the "citizen" who protests: his word is the main ingredient of many accounts of the events, it is through his gaze that we view this reality (think for an instant if an analogous choice were to be applied to the subject of strikes, giving strikers a voice, their viewpoint and their account). The language is wilfully popular, full of metaphors, sometimes even dialectal. Even when it is the institution that speaks – for example in the thousands of statements by Mayors and council officials and in the hundreds of ordinances targeting "windscreen cleaners", hawkers, street prostitutes – everyone avoids using a technical, formal vocabulary, willingly sacrificed on the altar of political legitimation.

In spite of this, thousands of operations on the control of the territory, evictions, searches, indexing and identifications have left behind their linguistic traces. The reports that recount them are generally based on police records, re-producing their contents, functions and categories. Obviously, only 'facts' are drawn from these documents, whose specificity is that of qualifying the 'cases' dealt with, providing some book-keeping details on them and producing a justification for the entry of those cases under the jurisprudence of the institution (generally the police). It will classify them as unauthorised, irregular, clandestine, violent, drug dealers, identifying the characteristics, real or alleged, that the institution has the power to deal with. The news item has the task of re-contextualising these 'facts' into a story, lending it a minimum of narrative framework and translating the expressions that are too specialistic into the typifications of common sense, in those typifications that, to a considerable degree, are shaped or modified precisely during this process. The lexicon of deviance, of irregularity and of violence that fills news reports on "decay" only reflects the charges levelled at a given population pertaining to those characteristics that the police is called upon to deal with. If the latter was devoted to other milieux, as it sometimes has, it would be these that would be publicly invested with its definitions (except for the faculties of negotiation of meanings that powerful social actors are able to field). If other institutions occupied themselves with immigration, other categories would be employed, because the mandates, procedures, objects and priorities would be different.
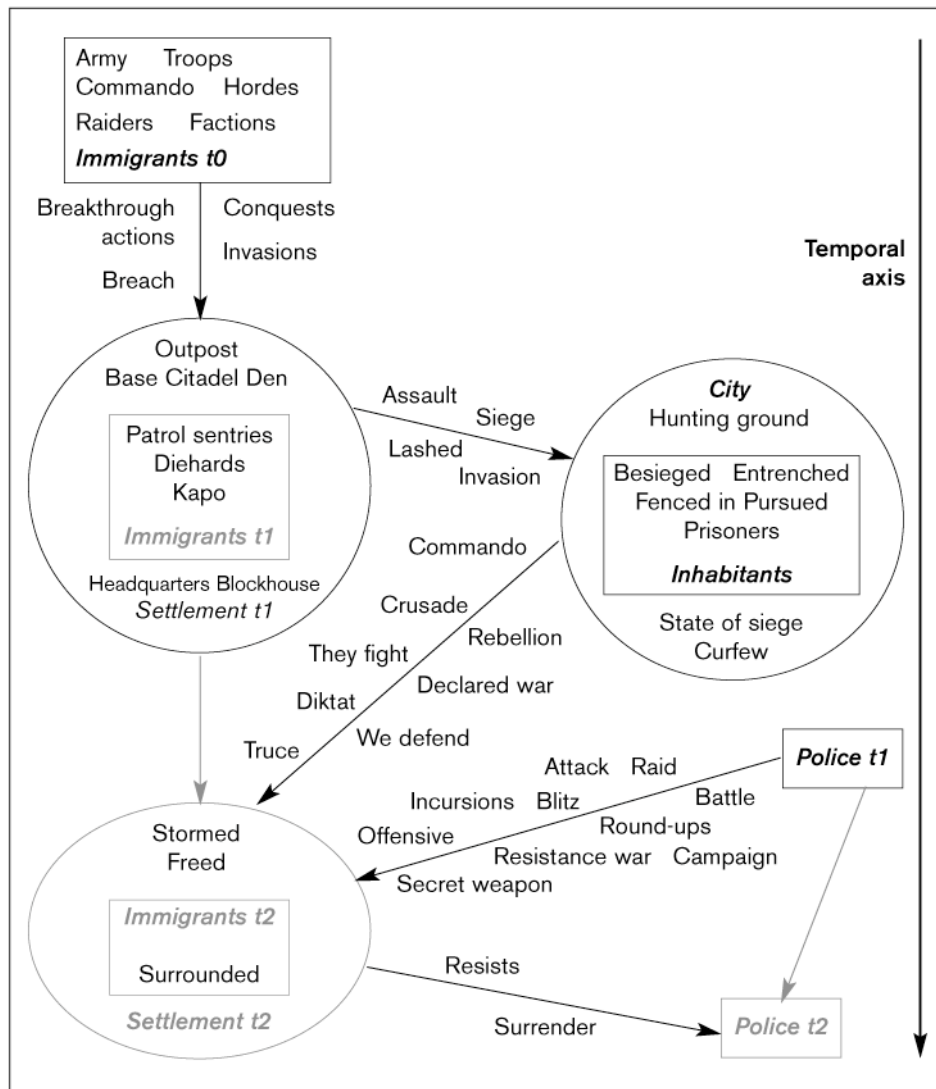
The three fronts of the treatment of immigration considered above thus have the shared characteristic of supplying those events, and the accounts devoted to them, thanks to which, by virtue of the constant dependence of the media on their official sources, immigration control and its requirements are objectivised in the language through which it is spoken of. They are, so to speak, "reunited", by a register whose most evident peculiarity is that of speaking in the language of war or, in any case, of using an agonal lexicon. In investigations into international terrorism, among the most recurring words, we find "blitz", "wipe out", "struggle", "exercise", "manhunt", a language that does not surprise those who know about journalistic writing which, in this way, seeks to make the struggle between good and evil more engaging. On the front of arrivals, expressions such as "invasion", "siege by clandestines", "landing of clandestines after weeks of truce", "patrol operation", "situation that is out of control"[86], have instead represented a novelty. Before and beyond Fortress Europe, the Vietnamese boat people, the Cuban *balseros*, not to speak of the escapees from Eastern Europe, were not portrayed as invaders, but if anything, as heroes fleeing towards freedom.

However, the front that features the most extensive use of the language of war is the internal one. Also here, the evictions of "squatted" settlements, identification and search operations - both instruments of control policies and of 'non-reception' -, but also the protests of citizens' committees against various forms and places with a foreign presence, are told like a war between an invading people and an invaded people that, in the end, with backing from a helper (the police), attains victory (Figure 2: the circles represent places and the boxes people)[87].

---

[86] See also, Bruno (2004).

[87] The words featured in the figure are drawn from the analysed daily newspapers. Naturally, the spatial representation is my own free graphic transposing of the narrative framework that characterises the articles (see Maneri, 1995).

Figure 2.

As illustrated by Simon (2008), governing through criminality, at every level, means speaking of a "war against", at all levels. The identification of an irredeemable threat that represents absolute evil (crime in the USA, "criminal" immigration in Italy) entails the use of the language of annihilation, or at least of military confrontation. What is depicted in Figure 2 is, however, a lexicon that was already fully employed in the early 1990s (and is now very similar), when the logic of the government of fear had not yet established itself in Italy. This is partly due to the way in which first the local news, and then increasingly also national news reports have granted expression to a reaction

'from the bottom' (presented as popular irritability but increasingly spurred on, organised and caused by the *political entrepreneurs* of irritability), animating it with an agonal lexicon and translating it within the co-ordinates of state thought. These co-ordinates that are not unrelated to those through which Italian citizens themselves conceive immigration: on the one hand journalists collect the protests and language of citizens who mobilise ("let's defend…", "invasion"), on the other they textualise their stories by livening them up (the immigrants are "army", hordes", while on the side of citizens we have a "revolt", "crusade", "truce") and filtering it through this thought (the "outpost", "base", "citadel", "blockhouse", are "stormed"). Here, immigrants are an alien body, entrenched, removed from the state's lordship that must re-impose its control. Again, it is the language of invasion: this "army", these "troops", have "conquered" a territory that is the state's competence, that must be "freed". Their presence is an intrusion that dents the integrity of the national order, which is ethnically pure.[88]

However, what keeps the "bellicisation" of three fronts that are so different (the international, external and internal ones) is the police-military prohibitionism that governs migrations. The continuum between these wars and the veritable wars that are fought, alongside the military-policing hybridisation of security activities[89] (Palidda, 2007; 2008) is none other than the outcome of the asymmetry that governs relationships between rich countries (free to de-localise, control resources, govern at a distance, in substance, to exercise neo-colonial power) and poor ones, for whose citizens freedom of movement, a necessary consequence of this layout, is denied by military means. Access to rich countries is only granted at the price of a citizenship that is perpetually at issue, vexed, liable to be withdrawn through the instruments of control by the police and military.

Summing up what this brief review of the three main fronts of the treatment of immigration, practices of exclusion and control (in courtrooms, on the coasts, in roma camps, in neighbourhoods, in abandoned areas) are thus objectivised through their portrayal by the media, into discourse, categories, images and narrations that frame portions of reality that are the competence of these practices into unitary pictures, stereotypical and tautological, that guarantee their legitimation. While the role, not just of mediation, but in many senses of autonomous construction, by the media has been extremely important

---

[88] As I have written little above, the national co-ordinates of state thought are also those of mobilised citizens. For example, in the recurring protests against so-called "nomad encampments" and not only these, it is often said that "they must go to their home", phrases that are continuously repeated even after it has been noted that the camp is only occupied by Roma people who are Italian citizens. Evidently, as they are Roma, they appear to dent the purity of national identity. For an eloquent example, see the show of 22/02/2009 of the RAI programme Presa Diretta http://www.rai.tv/dl/RaiTV/programmi/media/ContentItem-4a7c8533-7b4a-43c1-882e-b430d6cabfe1.html?p=0.
[89] Palidda, *Missions militaires italiennes à l'étranger : la prolifération des hybrides,* «Cultures & Conflits», 67/2007; Palidda (2008)

in the criminalisation of immigration; while the politics of fear on the one hand and the quest for visibility and agreement by the entrepreneurs of common sense on the other have provided an irremissible fuel to the "immigration emergency"; behind the raw material of the discourse on immigration, there lie mainly the practices of Fortress Europe in their Italian version, which is particularly radical. The closing of borders, the withdrawal of reception and assistance policies and the obsession with control leave behind their mark: it is from the acts of expelling, arresting, evicting, searching, identifying, removing that the discourse on immigration springs.

The Detention Machine[90]

by Federico Rahola

(Disa-Unige)

This presentation mainly concerns the detention system which has been adopted as one of (and arguably the) main device (or apparatus, the correct word is *dispositif*) in order to govern migrants movement within and outside the EU territory. The focus is therefore on the particular coherence and "integration" regulating the proliferation of camps, of various kinds of camps which characterises present-time - the humanitarian ones, the identification and detention ones. Hence the title "detention machine". The final aim is to stress and outline such a coherence as a particular "productive" dimension - even in terms of criminalization of migrants movement and of displaced people. So I will start by investigating such a "coherence", that is the relation between different forms of detention that justifies the idea of a "machine". And I make you an example – an example of an extreme (and extremely unlucky) biography. An example whose legal and political insights you probably know better than me.

Consider the case of a person who is persecuted (for reasons of religious, political or ethnic belonging) in his/her own country – a country wherein international organizations (either UNHCR or different Ngos) directly operate in terms of minority protection. The person should be therefore lodged/hosted within a temporary shelter centre (whose official definition could be "Temporary emergency location"). And consider the case that such a person should succeed in leaving his/her own country, crossing the border: at his/her arrival in the destination country (suppose the case of Italy, and suppose Lampedusa island), he/she will be detained for a while within the local "detention center" (whose official definition is *Centro di permanenza temporanea assistita* – CPTA), while seeking for asylum. After a while (from one to nine weeks), he/she will be therefore transferred into another structure (arguably in Sicily, in Agrigento or Trapani), an identification centre (Centro di identificazione), while his/her application will be evaluated. Consider then both the options, of a denial of any asylum release/recognition (because of the humanitarian/protection plan already operating in his/her own country), and/or of the release of a generic and temporary humanitarian status (which sensibly differs from asylum to the extent that it does not imply any permanent social and political right and form of recognition). Once the temporary humanitarian permit expires (or, in the case of a former denial, immediately), his/her presence in the country of arrival will therefore become illegal. And the (very unlucky) person will be once again detained in a CPTA before being deported

---

[90] For a ample version of this text, see the n.4 of the journal "Conflittiglobali"

in the third country he/she passed through before arriving in Italy. Make the case that the country is Libya: once the repatriation is organised, according to specific international bilateral agreements between the two countries, he/she will be detained in a specific transit centre (financed with European funds – and managed by IOM) therein staying for nobody knows how long and in what conditions.

It is a virtual and "extreme" example, which nonetheless explains how far, for each step (and, of course, it is not necessary to pass through all of them – any of whom, by the way, corresponds to a different formal definition: from internally displaced persons, IDP, to asylum seekers, to temporary protected, *prima facie* refugees, to illegal migrants), how far for each step, I was saying, there is always a centre, a camp that at least potentially (rather than actually) hangs/looms over.

It is from this constancy/consistency, as well as from the ubiquitous presence of camps, in all their possible manifestations and phenomenologies (protection/shelter, detention, identification – think for instance the impressive map produced by the collective group of Migreurop), as transit zones which represent the only "legitimated" territories for the "humanity in transit" (as Hannah Arendt already suggested, in a problematic and dense chapter of *The Origins of Totalitarianism*, as she defines the internment camps proliferating in the pre-WW2 Europe "the only possible territory for those who had lost any country and any possible territory"), the only space "recognized" for those who exceed any univocal form of belonging - it is form this constancy, I was saying, that we can talk about a particular and overall system, a "detention system", relying upon what I suggest to call the different "definitely temporary zones" of present time.

The detention system, however, appears to be a rather consistent and coherent one. Broadly speaking, such a system reflects and reproduces the current overall redefinition involving the notion of border, and particularly the crucial role played by borders in the government of migrations movement: a redefinition which encompasses both the displacement and the externalisation (the outsourcing) of borders, in a preventive function, and their reflection/refraction inward, as immaterial lines which differentially define those who have crossed them (thus ratifying radical differences of status within the population of a given territory). Camps, from this point of view, are in a way the ri-territorialized form of deterritorialized borders, the material places upon which the weight of the delocalized borders of present time end up with precipitating, thus finding a localized and material declination. For this reason, I guess, in materializing the effects of more and more deterritorialized borders, camps assume a key role in the *government* of human mobility.

There is a conspicuous theoretical literature about detention and internment camps, interpreted as spaces of exception, places where (as

suggested by the Italian scholar Giorgio Agamben, for instance) sovereign power and "bare life" confront themselves without any kind of mediation, without any notion of right. Here, rather than "exceptionalist" interpretations, I would like to suggest to consider camps as particular tools of government, that is, in a Foucauldian perspective, as governmental apparatuses/dispositifs. According to this perspective, camps are basically devices of a specific technique of government which, instead of reflecting forms of sovereign power from above, directly produces relations of power *from below*. A power which is productive, therefore, insofar as it produces/ratifies differences of status among a population insisting upon the same territory. But what kind of differences do camps produce, and according to which logics?

In order to answer, I think we have to recover/redraw another line, in addition to the horizontal and synchronic one gathering together all present-day camps in all their different manifestations (protection, detention, identification): a vertical, diachronic line.

A genealogy of detention camps, of the first facilities for civilians internment, and of a kind of internment which does not rely on any juridical/penal action, just a simple *administrative* action, amounts to the colonial realm: to Cuba, in 1894 (as a response to an insurrection of the colonized people against the Spanish/Spaniard colonial power), and then to South Africa, in 1900, during the Boer war (when English colonial power relocated, deported and detained thousands and thousands of Boer civilians), and then to Namibia (for the overall Herero population, concentrated and exterminated by German colonial power in 1910), to Kenya (during the Mao-Mao insurrection), to Libya (together with the first experiments with chemical weapons made by the Italian general A. Graziani), to Algeria and so on. The colonial history has been literally disseminated by internment (relocation/concentration) camps.

The colonial matrix of camps thus requires us to be confronted with/to face with a specific dimension of border, as well as with a similarly specific and defined political subject, that is the colonial subject. A subject whose political and legal existence has been function(al) of that same peremptory, geographical as well political, Border (or "meta-border") which used to separate/divide metropolitan citizens and colonial subjects into two radically different and separate spheres. And it is worth remembering how, upon the colonial realm, upon the overseas territories, rather than a suspension of the law (of a rule of law which, in the colonies, was never cogent), it used to be in force a particular separation of law - that is the coexistence of a national law for the metropolitan territory and metropolitan citizens or settlers, and of a colonial law for colonial subjects, the colonized people (I'm mainly referring here to the work of the Italian jurist Santi Romano, who theorized a double jurisdiction, a double standard for metropolitan territory and citizens, and for

colonial territories and subjects). However, the point here is that, in the colonies, the existence of internment camps and the practice of administrative detention, rather than referring to a particular state of exception, directly reflected a legal system a judicature (*ordinamento*) which actually was not necessary to suspend, and on the contrary was differentially applied along the border of the Colonial Divide. More important, the point is that the recourse to administrative detention and camps materially defined colonial subjects *as "internable"* and *deportable subjects*.

According to some critical perspectives suggested, among the others, by postcolonial studies (I think, for instance, at the work of the Indian historian Partha Chatterjee which suggests to read colonial world as a specific governmental laboratory of globalization), and whose prefix "post" alludes to a transition stretched over time, rather than to a clear overcoming of colonial order), one of the most complex theoretical problem consists in detecting, within the current unified/globalized space (which in turn is the result of the global economic integration, as well as of the past decolonization struggles) the symptoms of that (meta)Border (the Colonial Divide), once the geography it used to organize has been "technically" overcome, and once the two political figures (the citizen and the colonial subject), after being for so long divided/separated along that Border and that geography, nowadays live, in a way, side by side. For this reason, the current delocalised and deterritorialized borders seem to act as operators of differences: as lines which bear the weight of that broken/overcome Border, yet, differently from that figure, which nowadays operate on a situation marked by proximity, upon a unified geography.

My point is that the detention system intervenes here, on this specific predicament: that camps are separators, material signals/manifestations of a Border, within a unified dimension of space; and that they represent governmental apparatuses/*dispositifs*, for this reason being specifically productive (Anyway, according to Michel Foucault, the apparatuses of power are always productive, insofar as they produce a field of "positivity": it is through the prison that a notion of deviance and normality is socially produced; through the hospital that a notion of the healthy and the sick/ill, of madness and normality, is produced).

But, what do present-day camps produce and ratify? By virtue of their simple, material presence, camps always signal/ratify the existence of an "internable" and deportable humanity. The main effect of the overall detention system is therefore to introduce a radical difference of status within the population of a given territory: to decompose/resolve in radically differential terms the forms of recognition and the very notion of citizenship, ratifying the presence of internable and deportable subjects.

At this regard, Etienne Balibar has recently denounced European migration policies/politics as a revisited form of the "apartheid" regime, particularly emphasising the decisive, material role played by camps and detention system within the framework of the constitutional process of European citizenship. Balibar's point is correct and shareable as a denunciation, but it needs to be clarified in political and theoretical terms. As a matter of fact, an apartheid regime (as the one in South Africa up to 1991) is basically a static, fixed and univocal regime, whereas the "government" of migrations (or al least European migration policies) and the recourse to detention camps as the main apparatuses of this government, are instead dynamics and more "virtual" than real.

Rather than sanctioning/ratifying a definitive condition, camps define and mortgage/subsume the biographies of those who do not belong as potentially internable and deportable. It is not the act of internment and deportation *in sè* (insofar as the vast majority of "economic" and "political" migrants do not fall into/directly experience a detention centre, and insofar the majority of those arrested and "detained" actually is not expulsed and deported, but released): it is its possibility, its virtual possibility as a potential act that matters.

It is specifically in this potential act (to define someone as liable to be detained and deported), which hangs over migrants and displaced persons thus ratifying a dimidiated status, that we can draw the particular "productivity" (as well as the specific "integration") the overall European detention and deportation system provides. And it is a kind of productivity, which primarily responds to criteria and logics of flexibility, rather than of closure: *a temporary tool/device which produces a definitely flexible status*. To say it with a more precise word, borrowed from Pierre Bourdieu, it is a device that ratifies a *precarisation* of the conditions of existence and permanence within a given political territory; a device that, rather than excluding those presences, defines them in terms of an absolute, almost ontological, precariousness, both political and economic. For this very reason, rather than a simple exclusion, the detention system, in the way it works at least at the European borders, seems rather to provides/produces a form of differential inclusion. And this in turn says something crucial about the role and the meaning of present time borders, that I suggest to conceive as tools/devices providing differential forms of inclusion rather than radical forms of exclusion.

I think a precariousness as such ends up with being perfectly compatible with and, for that reason. included within the material logics of production and reproduction of a labour market that globally competes with others, arguably characterised by conditions of the living labour as much if not more precarious. But I was also wondering whether all this really matches/fits

or not with the title of the Workshop (criminalisation and victimisation)- and my answer is an affirmative one.

Is it possible to conceive a detention camp for illegal migrants as a specific tool of criminalization? In a way, the overall detention system disseminated within the internal EU borders (or the Australian and US ones) as on the external borders and within the transit and original countries as well, is a way to punish migrants while producing/ratyfing at the same time the specific "crime" they have committed.

Detention centres are, from this point of view, prisons for those who commit or have committed (who are responsible of) the crime of not-belonging, or, better, of *exceeding* the forms of belonging. For an humanity in excess as such, the particular productivity of a *dispositif* like the camp is therefore that one of ratifying and hypostatising the crime of not belonging, namely the "crime" of having crossed a border, the "crime" of "being a clandestine". It is worth to remember here that the act of (illegally) crossing a border is not, from a juridical point of view, a crime: it is just an illegal action, an infraction which has to be punished with an administrative sanction (at least with an injunction to leave, a decree of expulsion). This administrative sanction is therefore "magically" transformed into an administrative detention, thus ratifying the fact that the detention punishment produces the crime.

Even the category of "victimisation" seems to be a rather inherent one. Although , as you know, the (mainly) moral category of victim is a very ambiguous one, encompassing more a reified definition than an active recognition in terms of subjects endowed with a form of agency. And this is true in both the dimensions of victim which pertain migrants, as object of violence (we should say, in a marxian perspective, a victimisation in itself, *in sé*), as well as the dimension of victimhood/victim elaborated by migrants themselves (victimisation *per sé*) that is in terms of subjectivation or, with Foucault of *assujetissement*. .

For, we can talk of victimisation for the un-legitimised detentions imposed upon migrants, as well as for the conditions suffered by migrants, most of them forced within facilities which have been described as new lager. Migrants are thus victims of an administrative detention which is totally un-justified unless for the fact of sanctioning -and thus creating- the crime of illegally crossing a border. Yet, the even legitimised and necessary victimisation of migrants as unfairly, un-legally, or a-legally detained seems to be a rather week category in order to stress what kind of social reactions surrounds detention camps. More profitable, from this point of view, should be the perspective focused on the specific and active reactions of migrants themselves against the practice and the devices of detention. It is a relevant and decisive topic, that should be extended to the perception migrants themselves develop and produce concerning the experience of detention and the very

existence of camps in all their possible phenomenologies. Specific ethnographies are attempting to investigate and address this subject. It is the case for instance of the work of Pablo Vila (*Border Crossing, Border Reinforcing*) focusing on the different and oppositive narratives involving border and border devices on the Us/Mexican frontier. Migreurop is developing a similar kind of co-research in Europe, as well as the Frassanito network. What I can say here, suggesting and encouraging this kind of research, is far more general, and unfortunately, far more less specific.

If it is true that the prison produces the crime (fixing in a way the social notion of crime and criminal), detention camps produce the specific crime of clandestinity and that specific criminal subject which is the clandestine migrant: once more, they are "factories of cladestinity". For this reason we have to conceive the detention system as a rather coherent one, an integrated one, and first of all, as a laboratory, as a productive system. And the fact of being socially perceived and defined as temporary subjects, criminalised as clandestine presences, disciplined as "internable" and deportable bodies, is probably the ultimate productive effect of the detention apparatuses/devices, that is the productivity of the present-days detention machine.

NB: See the n. 1 and the n. 4 of the journal "conflitti globali"

The U.S. Penal Experiment[91]

Alessandro De Giorgi
(Department of Justice Studies, San José State University)

The statistical data reported below offer a disturbing picture of the process of mass-criminalization that has been taking place for more than three decades in the greatest of Western democracies. At the outset of the XXI century, the U.S. prison population has reached the historically unprecedented number of 2.3 million individuals confined within a carceral archipelago of almost five thousand penal institutions, with an incarceration rate of 756/100.000 – unmatched by any other country (democratic or not) in the world.[92] On the other hand, the total number of individuals under some form of correctional supervision – including non-custodial or semi-custodial measures such as probation, parole, electronic monitoring, house arrests, etc. – amounts to 7.2 million: this means that today, in the "land of the free" 2.3% of the population lives in conditions of limited freedom.

United States: Correctional Population in Federal Prisons, State Prisons and Jails[93]

Year	2000	2006	2007
Inmates	1.937.482	2.258.983	2.293.157
Rate x 100.000	684	751	756
% in state prisons	60,7	57,6	57,4
% in jails	32,1	33,9	34,0

Inmates in Federal and State Prisons

---

[91] The present contribution elaborates on some arguments developed in my introduction to the Italian edition of Jonathan Simon's book *Governing Through Crime* (it. trans. *Il governo della paura. Guerra alla criminalità e democrazia in America*, Raffaello Cortina Editore, Milano 2008). I would like to thank Stefania De Petris for making this and many other things possible.

[92] The U.S. incarceration rate of 756/100.000 can be compared to 413/100.000 in post- *apartheid* South Africa, and 523/100.000 in post-Soviet Russia. Overall, between 1972 and 2004 the American prison population has increased by 600%, M. Mauer, *Race to Incarcerate*, The New Press, New York 2006, p. 20.

[93] State prisons and local jails house the vast majority of U.S. inmates. At the same time, penal repression tends to assume a more markedly racialized connotation particularly in some geographic contexts – for example, states characterized by a high concentration of African Americans (i.e., Southern regions), and highly urbanized areas affected by significant flows of immigration (particularly from Latin America). Among the convicted population (as well as among prisoners in general), African Americans are dramatically overrepresented, and their conviction rates are on average six to eight times higher than those of whites, whereas the overrepresentation of Hispanics (compared again to whites) narrows down to a factor of three to one. Overall, 66% of the convicted population belongs to the vast group of "non-whites". African American women are in absolute terms less numerous in prisons than white women, but they are convicted three times more often (although their rate of overrepresentation has declined by two points since 2000). While white men represent only 33% of males sentenced to prison, white women constitute 48% of females sentenced to prison. Finally, rates of prison conviction among white women two times lower than those found among Hispanic women.

Year	2000	2006	2007	
Total	1.391.261	1.570.691	1.598.316	
Federal prisons	145.416	193.046	199.618	
State prisons	1.245.845	1.377.645	1.398.698	
Males	1.298.027	1.457.486	1.483.896	
Females	93.234	112.459	114.420	
Sentenced to >1 year	1.331.278	1.504.660	1.532.817	
Rate x 100.000	478	501	506	
CONVICTED	1.331.300	1.504.700	1.532.800	100%
Males				
White	435.500	528.000	521.900	
% of total	33 %	35 %	34 %	
Black	564.600	563.700	586.200	
% of total	42 %	37 %	38 %	
Hispanic	255.700	308.500	318.800	
% of total	19 %	21 %	21 %	
Females	84.300	103.300	105.500	100%
White	33600	49200	50500	
% of total	40 %	48 %	48 %	
Black	32200	28600	29300	
% of total	38 %	28 %	28 %	
Hispanic	13100	17500	17600	
% of total	16 %	17 %	17 %	
CONVICTION RATES AND	**RATIOS**			
White males	410	487	481	
Black males	3.188	3.042	3.138	
Black/White *ratio*	8	6	7	
Hispanic males	1419	1261	1.259	
Hispanic/White *ratio*	3	3	3	
White females	33	48	50	
Black females	175	148	150	
Black/White *ratio*	5	3	3	
Hispanic females	78	81	79	
Hispanic/White *ratio*	2	2	2	

[SOURCES: elaboration by Salvatore Palidda and Alessandro De Giorgi on M. Mauer, R.S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, July 2007 (www.sentencingproject.org); L.E. Glaze, T. P. Bonczar, *Probation and Parole in the United States*, 2007, Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs, December 2008, NCJ 224707; H.C. West, W.J. Sabol, *Prisoners in 2007*, Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs, December 2008, NCJ 224280].

The construction of what fifteen years ago abolitionist criminologist Nils Christie denounced as an emerging "*gulag* Western-style"[94] represents one of the fundamental corollaries of the neo-conservative revolution initiated in the last quarter of the XX century by the Reagan administration, and later continued by the following administrations along the coordinates of a bipartisan commitment to the war on crime and drugs. As a consequence, the carceral crisis of the United States represents today one of the greatest emergencies the Obama administration receives as legacy of three decades of neoliberal economic policies[95] developed in a symbiotic relation with a punitive paradigm of social governance based on the mass-criminalization of the "collateral effects" neoliberalism.

The foundations of the punitive overturn of the welfarist model of social regulation which had emerged in advanced capitalist democracies (including, though to a lesser degree, the United States) in the aftermath of World War II, were laid down in the second half of the 1970s.[96] Consolidating its governmental rationality in an era dominated in much of the Western world by a capitalist restructuring of the economy in the direction of a post-Fordist model based on deregulation, labor flexibility, and the "abolition of welfare as we know it", the American severity revolution exhibited its exclusionary logic in the form of vertically increasing incarceration rates and growing resort to non-custodial forms of penal control.

As the XXI century unfolds, the result of this ongoing trajectory of punitive governance is that the United States is the world leader in punishment and it spends more on prisons than on higher education. But despite the sort of cultural amnesia surrounding the penal question in public debates, this has not always been the case. In fact, while between the end of the 1960s and the early 1970s (at the height of the reformist era defined by David Garland as "penal modernism"[97]), U.S. incarceration rates were comparable to (and often lower than) those of other advanced Western democracies, those rates are now between five and eleven times higher than those found in European countries. In this sense, it is possible to argue that the United States has become the greatest "punitive democracy" in the world, and this appears to be the consequence of calculated politico-economic choices.

---

[94] N. Christie, *Crime Control as Industry. Towards Gulags Western Style*, Routledge, New York 1993.

[95] Though, of course, not the only one. As shown by the current recession, other social emergencies generated or at least aggravated by neoliberal policies of deregulation and individualization of risk are emerging in areas like housing, health care, education, and labor relations.

[96] For sociologically informed reconstructions of the punitive turn, see for example: K. Beckett, *Making Crime Pay. Law and Order in Contemporary American Politics*, Oxford University Press, New York 1997; C. Parenti, *Lockdown America. Police and Prisons in the Age of Crisis*, Verso, New York 2000; M. Tonry, *Thinking About Crime. Sense and Sensibility in American Penal Culture*, Oxford University Press, New York 2004; J. Simon, *Governing Through Crime. How the War on Crime Transformed American Democracy and Created a Culture of Fear*, Oxford University Press, New York 2007.

[97] D. Garland, *The Culture of Control. Crime and Social Order in Contemporary Society*, The University of Chicago Press, Chicago 2001.

However, it is not only from the statistical dimension of this new "great confinement", to borrow Michel Foucault's words, that we can get an exhaustive image of the American punitive obsession. In fact, besides the advent of what sociologists of punishment have come to define as "mass-imprisonment",[98] it is important to note that the decades-long wars against crime and drugs – which since the late 1970s, both in the political agenda and in public debate, have replaced the "war on poverty" launched by Lyndon B. Johnson in 1964 – have also been fought with "non-conventional" penal weapons such as the death penalty, the return of chain gangs, the diffusion solitary confinement, the introduction of "supermax" prisons, and other draconian types of punishment. Therefore, we have witnessed the rebirth of some pre-modern penal practices, which the progressive ethos of earlier decades (to which the Supreme Court had significantly contributed with path-breaking decisions not limited to the field of punishment) seemed to have once and for all consigned to the arsenal of history. Thus, between 1977 and 2007, 1.099 individuals have been executed in the United States, at an average of three each month.[99]

Meanwhile, at different latitudes of the U.S. penal archipelago, there has been a proliferation of the so called "invisible punishments", whose clearest example is perhaps offered by the punitive welfare reforms promoted by president Clinton in 1996, which permanently excluded convicted drug felons from access to food stamps, public housing, educational grants, and unemployment benefits.[100]

The draconian *One Strike and You're Out* measures adopted in several urban areas in the late 1990s allow public housing authorities to evict entire families from subsidized homes even if just *one* member of the household is convicted of a drug-related felony, and in some cases also if the crime took place *outside* the building. It has been mainly as a consequence of these authoritarian and revanchist policies – targeting a population largely composed of poor African Americans and Latinos confined in the most derelict areas of the American inner cities – that race, welfare, and crime have come to be systematically associated in public discourse, almost to the point of becoming synonymous.

As Glenn Loury has recently argued:

> Before 1965, public attitudes on the welfare state and on race, as measured by the annually administered General Social Survey, varied from year to year independent of one another: you could not predict much about a person's attitudes on welfare politics by knowing his or her attitudes about race. After

---

[98] See D. Garland (ed.), *Mass Imprisonment. Social Causes and Consequences*, Sage Publications, New York 2001.

[99] See Bureau of Justice Statistics, *Capital Punishment, 2006* (http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/cp06st.htm).

[100] See "Personal Responsibility and Work Opportunity Reconciliation Act" (Pub. L. 104-193, 1996). On the concept of "invisible punishment", see M. Mauer, M. Chesney-Lynd (eds.), *Invisible Punishment. The Collateral Consequences of Mass Imprisonment*, The New Press, New York 2002.

1965, the attitudes moved in tandem, as welfare came to be seen as a race issue […]. The association in the American mind of race with welfare, and of race with crime, was achieved at a common historical moment.[101]

But the process of social excommunication of the "truly disadvantaged" fractions of the American population determined by the punitive turn has not been limited to civil and social rights: in fact, it has extended to the realm of political rights as well.[102] Today, fourteen states impose a temporary ban from electoral participation on individuals convicted of a felony, even after the sentence has been fully served, while eight states impose a *lifetime* ban on voting rights.[103]

At the same time, particularly between the end of the 1980s and the early 1990s, in the wake of cyclical moral panics occasioned by some celebrated criminal cases (e.g., Polly Klaas and Megan Kanka), authoritarian-populist penal strategies gained a renewed legitimacy: among these, the death penalty also for the mentally ill,[104] life imprisonment also for juveniles tried as adults in cases of serious crime,[105] the Three Strikes and You're Out legislations mandating life in prison for any third felony, in some cases even if the two previous offenses were only *attempted* crimes,[106] the reintroduction of forced labor in some Southern states, and Megan's laws mandating the publication of data concerning sex offenders released from prisons.

An analysis of these practices of socio-political neutralization collateral to mass-imprisonment reveals an even clearer image of the racialized connotation of the American great confinement. On the one hand, penal statistics show that African Americans constitute the majority of the U.S. prison population, although they represent only 12% of the general population. In other words, one every three African American males aged 20 to 29 is today

---

[101] G. Loury, *Race, Incarceration, and American Values*, The MIT Press, Cambridge, MA 2008, pp. 14-15).

[102] W. J. Wilson, *The Truly Disadvantaged. The Inner City, the Underclass, and Public Policy*, The University of Chicago Press, Chicago 1987.

[103] For a historically grounded analysis of felon disenfranchisement laws, see L. Wacquant, *Race as Civic Felony*, in "International Social Science Journal, 183, 2005, pp. 127-142.

[104] It is worth remembering here that in 1992 presidential candidate Bill Clinton interrupted his campaign to preside over the execution of Ricky Ray Rector, who suffered from self-inflicted cerebral damages as a consequence of an attempted suicide. Rector was so mentally impaired that at the time of having his last meal before execution he asked the prison personnel to keep the dessert for him, so that he could eat it after the execution.

[105] Forty-four states have enacted legislation permitting juveniles to be tried as adults in cases of violent crime. Two states (Vermont and Kansas) extend this provision to children aged 10.

[106] In November 1995, U.S. Army veteran Leandro Andrade was arrested in a K-Mart while attempting to steal nine videotapes he needed as Christmas gifts for his nieces, for a total value of $153. In Mach 2000, Gary Albert Ewing was caught in a golf shop near Los Angeles while trying to hide some golf clubs for a total value of $1197. Both have been convicted under the Three Strikes laws, since both were considered "third strikers" as a consequence of previous convictions for minor crimes. Andrade will be able to apply for parole in 2045, while Ewing will be eligible in 2025. In March 2003, the U.S. Supreme Court upheld California's Three Strikes laws, establishing (in *Lockyer* v *Andrade* and *Ewing* v *California*) that none of the two sentences was grossly disproportionate, and that California's Three Strikes laws did not violate the Eighth Amendment's prohibition of "cruel and unusual punishments".

under some form of correctional supervision; at current rates, an African American male born in 2001 has 32% of chances of ending up in prison during his lifetime – a probability which for Hispanics of the same age group is 17%, whereas for whites of the same age is as low as 6%.[107]

On the other hand, electoral data indicate that just forty years after the civil rights revolution (and less than sixty years after the start of de-segregation), almost 13% of African American males are politically disenfranchised as a consequence of the voting bans mentioned above.[108] During the 2000 presidential elections, which saw George W. Bush famously defeat former vice-president Al Gore by a handful of (controversial) votes, almost 4.7 millions U.S. citizens did not vote as a consequence of earlier convictions. Reliable estimates suggest that – given the current voting trends within the African American electorate – even if just the black voters who were banned from the 2000 and 2004 elections having served their sentences *in full* had been allowed to vote, George W. Bush would never have been elected to the White House.[109]

In an attempt to explain the U.S. penal hypertrophy of the last few decades, and particularly the condition of "internal exile" which the rise of the penal state has imposed on the most economically and racially disadvantaged fractions of the American population, critical criminologists have forcefully argued that this process of prisonization disconfirms the commonsense perspective on crime and punishment – popularized by mainstream criminologists and eagerly embraced by politicians and mainstream mass-media – according to which the obvious catalyst of any punitive "reaction" must be, in the last analysis, a criminal "action".[110]

Indeed, after a significant rise during the 1960s and early 1970s, rates of (street) crime exhibited fairly stable trends in the next two decades,[111] before starting their sharp (and still ongoing) decline in the early 1990s: a decline

---

[107] M. Mauer, *Race to Incarcerate*, cit. See also B. Western, *Punishment and Inequality in America*, Russell Sage Foundation, New York 2006.

[108] M. Mauer, *Mass Imprisonment and the Disappearing Voters*, in M. Mauer, M. Chesney-Lynd (eds.), *Invisible Punishment*, cit., pp. 50-58.

[109] See A. Davis, *Are Prisons Obsolete?* Seven Stories Press, New York 2003.

[110] See S. Scheingold, *The Politics of Street Crime: Criminal Process and Cultural Obsession*, Temple University Press, Philadelphia 1991; S. Donziger (ed.), *The Real War on Crime*, Harper, New York 1996; L. Wacquant, *Punishing the Poor. The Neoliberal Government of Social Insecurity*, Duke University Press, Durham, NC 2009; L. Wacquant, *Prisons of Poverty*, University of Minnesota Press, Minneapolis, MN, 2009; Harcourt, B. *Illusions of Order. The False Promise of Broken Windows Policing*, Harvard University Press, Cambridge, MA, 2001.

[111] With the exception of gun-related violence, which increased sharply in the second half of the 1980s, mainly as a consequence of the rapid spread of crack in the streets of American inner cities (and of a militaristic approach to the problem by law enforcement, which escalated drug-related violence). However, this trend was statistically circumscribed in its impact on the prison population. Almost 1/3 of U.S. inmates is convicted of violent crimes, while the remaining 2/3 are in prison for drug-related and predatory crimes. See J. Irwin, V. Schiraldi, J. Ziedenberg, *America's One Million Nonviolent Prisoners*, Justice Policy Institute, Washington D.C. 1999.

involving all types of crime – violent, predatory, and drug-related.[112] In other words – as has been observed also with regard to Europe, and with particular reference to the criminalization of migrants – since the early 1990s reported crimes have decreased, while the number of people arrested, convicted, and imprisoned has increased significantly (see the other contributions in this volume).[113] Moreover, it must be observed that in Europe as well as in the U.S., the steady decline in street crime has not prevented a rhetoric of *zero tolerance* – prompted by political entrepreneurs and amplified by mainstream mass-media – from pervading public debates and inspiring public policies.[114]

Thus, it is not difficult to understand why the increasing divergence between the seriousness of the criminal problem and the intensity of punitive practices – a divarication whoe social un-sustainability is further aggravated in the U.S. by the huge economic costs of mass incarceration, which have implied a radical disinvestment from other fields of public intervention such as health care and education – has not reversed the trend toward mass-imprisonment.[115]

The sharp contrast between the decline in crime and the escalation of penal repression has undermined any criminological approach based on what several years ago Dario Melossi defined as "legal syllogism": that is to say, "the commonsensical idea […] that punishment is simply the consequence of crime".[116] In this sense, the American penal experiment of the late XX century illustrates once again the relative autonomy of punishment from crime, and the genuinely politico-economic dimension of penal policy.

---

[112] The magnitude of this decline (as well as its diffusion throughout the United States) has been so significant that criminologists and statisticians – also writing from opposed theoretical standpoints – have been struggling for several years to find a plausible explanation. See for example, F. Zimring, *The Great American Crime Decline*, Oxford University Press, New York 2008.

[113] Among the early analyses of these trends in Europe, see S. Palidda (ed.), *Délit d'immigration*, *La construction sociale de la déviance et de la criminalité parmi les immigrés en Europe*, COST-Communauté Européenne, Bruxelles 1996; M. Tonry, *Ethnicity, Crime, and Immigration. Comparative and Cross-National Perspectives*, in "Crime and Justice. A Review of Research", 21, 1997, pp. 523-551.

[114] Criminologists have also contributed to this, by corroborating public fears with questionable uses of statistics and an increasing recourse to commonsense notions about criminal dangerousness, particularly in the field of immigration and crime. For a paradigmatic case from Italy, see M. Barbagli, *Immigrazione e sicurezza in Italia*, il Mulino, Bologna 2008.

[115] As Loic Wacquant has observed: "In 1975 the country locked up twenty-one inmates for every 1.000 serious crimes (homicide, rape, assault, robbery, theft, and car theft counted together); by 1999 this ratio had reached 106", L. Wacquant, *The Place of the Prison in the New Government of Poverty*, in M.L. Frampton, I.H. Lòpez, J. Simon (eds.), *After the War on Crime. Race, Democracy, and A New Reconstruction*, New York University Press, New York 2008, p. 23.

[116] D. Melossi, *An Introduction: Fifty Years Later. Punishment and Social Structure in Comparative Analysis*, in "Crime, Law & Social Change", 13, 4, 1989, p. 311. In the same direction, a few years earlier Stuart Scheingold had warned that the diffusion of what he called the "myth of crime and punishment" would legitimate among the U.S. public opinion the war on crime and drugs in which the country was embarking itself: "The core of the myth of crime and punishment is a simple morality play that dramatizes the conflict between good and evil: because of bad people, this is a dangerous and violent world […]. This frightening image triggers off a second and more reassuring feature of the myth of crime and punishment: the idea that the appropriate response to crime is punishment. Punishment is both morally justified and practically effective", S. Scheingold, *The Politics of Law and Order. Street Crime and Public Policy*, Longman, New York, p. 60.

In a sort of paradox, on the one hand the rhetoric of the criminal question (and of penal severity as its inevitable corollary) has been deployed in the U.S. without much connection to the actual size of the criminal problem; on the other hand, both in public discourse and in political debates, social issues traditionally framed according to vocabularies other than the punitive ones – such as the language of access to civil and social rights, or of a more equitable distribution of resources in a chronically unequal society – have been subsumed under the orbit of punishment and its exclusionary logic.[117]

In this sense, as Jonathan Simon has recently argued, the diffusion of discourses and practices of securization at all levels of American society – but particularly among a middle class whose upward social mobility has been decisively jeopardized in the last few decades by the cyclical crises of the new economy, which have "corroded" its character[118] as well as its faith in an inclusive version of the American dream – and the development of policies of mass-criminalization against the most vulnerable fractions of American society (minorities, poor, homeless, unemployed, drug addicts, illegalized immigrants) have converged to define a new paradigm of "governing through (fear of) crime".[119]

By fomenting and then "governing" ubiquitous but manageable fears – from street crime to illegal immigration, to Islamic terrorism – this paradigm of government, whose strategies of risk-privatization and individualization of security are entirely consistent with the neoliberal ideology of "possessive individualism" and social deregulation,[120] is able to find new sources of political legitimacy, against the background of global economic processes increasingly immune to state governance.

Thus, as Jonathan Simon has argued elsewhere:

> If the experience of mass economic insecurity associated with the Great Depression formed a major impetus for the New Deal model, it must be

---

[117] In this respect, several authors have illustrated the political dimension of punitive discourses which have now become global (such as the ideology of *zero tolerance* or "order maintenance" policing), as well as of the increased "productivity" of law enforcement and police forces across the Western world. On Europe, see for example D. Bigo, *La mondialisation de l'(in)sécurité*, in *Suspicion et exception*, "Cultures et Conflits", 58, 2005, pp. 53-101; Id, *Identifier, catégoriser et contrôler. Police et logiques proactives*, in L. Bonelli, G. Sainati (eds.), *Pratiques et discours sécuritaires: la machine à punir*, L'Esprit Frappeur, Paris 2004, pp. 56-88; Id., *Frontiers, Identity and Security in Europe, an Agenda of Research*, "Journal of Boundaries Studies", 2, 1999, Id., *Sécurité et immigration, vers une gouvernementalité par l'inquiétude?*, in "Cultures & Conflits", 31-32, 1998, pp. 13-38; *Circuler, refouler, enfermer, éloigner*, in "Cultures & Conflits", 23, 1996, pp. 3-7; A. Dal Lago, *Nonpersone. L'esclusione dei migranti nella società globale*, Feltrinelli, Milano 1999; S. Palidda (ed.), *Délit d'immigration*, cit.; Id, *Polizia postmoderna*, Feltrinelli, Milano 2000. On the United States: L. Wacquant, *Punishing the Poor. The Neoliberal Government of Social Insecurity*, Duke University Press, Durham, NC 2009; L. Wacquant, *Prisons of Poverty*, University of Minnesota Press, Minneapolis, MN, 2009; A. Davis, *Are Prisons Obsolete?* cit.

[118] R. Sennett, *The Corrosion of Character. The Personal Consequences of Work in the New Capitalism*, Northon, New York 1998.

[119] J. Simon, *Governing Through Crime*, cit.

[120] See C.B. Macpherson, *The Political Economy of Possessive Individualism: Hobbes to Locke*, Oxford University Press, Oxford 1962.

agreed that the experience (whether real or imagined, on television or embodied, well-founded or specious) of mass insecurity about violent crime since the late 1960s has provided the impetus for the Crime Deal. Liberty, security, and community have been renegotiated by governing actors and agents of all kinds on the basis of this crime priority. In place of spreading risk across broad social and economic groups, the Crime Deal has promoted disaggregation of risk that reaches its most potent form in the assignment of a historically unprecedented portion of our population to incarceration, as well as in patterns of consumption, such as the ubiquity of the gated community form of residential subdivision, the high security office park form of business development, and the militarized SUV with names like Expedition, Armada, and Suburban, which advertise their militant commitment to security and liberty without community.[121]

While Simon's analysis refers specifically to the United States, and is perhaps reflective of the "exceptionalism" of the American experience, it would be difficult to deny that some elements of this diagnosis point to emerging tendencies in the European context as well. Indeed, here too – and with particular reference to a rhetoric of securization systematically translated into the language of an ongoing war against illegal immigration – we witness the consolidation of a governmental logic which on the one hand nourishes public fears and insecurities associated with public enemies against whom wars must be waged, and on the other hand relinquishes its welfarist model of socio-economic intervention in favor of punitive approaches to social issues. Therefore, through an opportunistic exasperation of the process defined by Italian sociologist Alessandro Dal Lago as "tautology of fear",[122] in the United States as well as in Europe this paradigm of governance has been able to consolidate the hegemony of an authoritarian-populist framework, which has contributed to neutralize (although only temporarily, as the current global crisis has made clear), the socially catastrophic consequences of the neoliberal political economy.

However, beyond its propensity to accumulate political capital around the vocabularies of ontological insecurity, ubiquitous criminal dangerousness, zero tolerance, and the war on crime, this paradigm of punitive governance has also revealed a strong capacity to generate capital *tout court*, acting as a catalyst for the increasing profits of insurance companies, private security, and the so called prison-industrial complex. Not surprisingly, the development of this "penal capitalism" has been particularly visible in a purely neoliberal economic system like the United States, as Glenn Loury argues:

We have a corrections sector that employs more Americans than the combined work forces of General Motors, Ford, and Wal-Mart, the three largest

---

[121] J. Simon, *From the New Deal to the Crime Deal*, in J. Simon, I. Haney-Lòpez, M.L. Frampton, (ed.), *After the War on Crime. Race, Democracy and a New Reconstruction*, New York University Press, New York 2008, p. 54.
[122] A. Dal Lago, *La tautologia della paura*, in "Rassegna italiana di sociologia", 40, 1, 1999, pp. 5-41.

> corporate employers in the country, and we are spending some $200 billion annually on law enforcement and corrections at all levels of government, a fourfold increase (in constant dollars) over the past quarter century.[123]

Finally, at a broader level it is possible to trace the development of an intense circularity of interactions between national and global actors involved in the construction of punitive discourses, as well as in their economic and political productivity: a punitive whirl which from the United States has made its way throughout the Western world, reaching a status of cultural hegemony. Particularly between the late 1980s and the early 2000s, in many neoliberal societies the result of this process has been the consolidation of vocabularies and practices of war – against drugs, crime, terrorism, illegal immigration – as the main tools to frame social issues and shape public policies.

In the midst of a global recession which in the U.S. brings back to public consciousness the images of the great depression, the 2008 presidential election seems to have at least reopened the possibility of a public debate about the exclusionary effects produced by three decades of uninterrupted symbiosis between economic deregulation and penal severity. In the 1930s, Americans built their way out of the great depression and its devastating consequences through a New Deal whose inclusionary ethos paved the way to several decades of prosperity and expansive social citizenship. Time will tell whether the new-new deal envisioned by Barack Obama will be enough to reawake American society from the prolonged punitive torpor in which it fell almost thirty years ago, and above all whether this awakening will extend itself beyond the boundaries of the United States.

---

[123] G. Loury, *Race, Incarceration, and American Values* , p. 5. More generally, on the hypothesis that the punitive turn has been prompted, at least in part, by an emerging "prison industrial complex", see R.Gilmore, *Golden Gulag. Prisons, Surplus, and Crisis in Globalizing California*, University of California Press, Berkeley 2007.

La métamorphose de l'asile en Europe: des origines historiques du «faux réfugié» à l'évidence de son enfermement
by Jérôme VALLUY

Dans l'histoire moderne de l'idée de droit d'asile, la proclamation la plus marquante en est faite le 10 décembre 1948 dans les articles 13 et 14 de la Déclarations Universelle des Droits de l'Homme de l'Organisation des Nations Unies :

> Article 13 : 1. Toute personne a le droit de circuler librement et de choisir sa résidence à l'intérieur d'un Etat. 2. Toute personne a le droit de quitter tout pays, y compris le sien, et de revenir dans son pays.

> Article 14 : 1. Devant la persécution, toute personne a le droit de chercher asile et de bénéficier de l'asile en d'autres pays. 2. Ce droit ne peut être invoqué dans le cas de poursuites réellement fondées sur un crime de droit commun ou sur des agissements contraires aux buts et aux principes des Nations Unies.

Au lendemain de cette proclamation, dès 1949, année de création du poste de Haut Commissaire aux Réfugiés auprès du Secrétaire Général de l'ONU, s'amorcent les négociations qui aboutiront en 1951 à la Convention de Genève sur les Réfugiés. Deux logiques s'affrontent sur le contenu idéologique de ce droit : celle de la plus large protection des exilés et celle de la primauté des souverainetés nationales. Dans cette négociation entre diplomates, qui représentent essentiellement les intérêts des Etats nationaux, la seconde logique l'emporte aisément.

Dans la première perspective, le droit d'asile est indissociable de la liberté de circulation. C'est ce que l'on pourrait un *droit d'asile axiologique* : il découle d'un système de valeurs qui conduit à une politique d'ouverture des frontières offrant par elle-même l'essentiel de la protection recherchée par les réfugiés et qui amène à apporter un soutien symbolique et matériel à ceux ou celles qui sont ainsi reconnus réfugiés ainsi qu'à la cause pour laquelle ils ou elles se battent ou sont persécutés.

A l'inverse, dans l'autre logique, le principe philosophique devant régir l'état juridique et matériel des frontières étant celui de la souveraineté des Etats, le droit d'asile est conçu comme un exception : une petite porte ouverte en marge de la vaste étendue fermée des frontières nationales. Ainsi associée à la fermeture des frontières, ce *droit d'asile dérogatoire* offre essentiellement et exceptionnellement une autorisation d'entrée et de séjourner dans le pays refuge pour échapper à des persécutions.

La proclamation de 1948 ne fermait aucune des deux options, ni la grande porte largement ouverte, de l'asile axiologique, ni la petite porte entrouverte, de l'asile dérogatoire. Mais la Convention de Genève de 1951, en revanche, procède d'une choix politique tranche cette question qui paraît, rétrospectivement, plus philosophique que diplomatique :

Article 1.A.2 :« *Aux fins de la présente Convention, le terme "réfugié" s'appliquera à toute personne (...) qui (...) craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques, se trouve hors du pays dont elle a la nationalité et qui ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays* »

En réduisant le droit d'asile à une définition du réfugié, la convention énonce essentiellement des critères de sélection des individus et remet aux Etats le pouvoir de sélection en leur laissant le soin d'en définir les modalités. Elle fonde ainsi l'idéologie de l'asile dérogatoire qui est développée et diffusée, depuis un demi-siècle, par le Haut Commissariat aux Réfugiés (HCR) créé pour l'élaboration de cette convention et chargé de sa mise en œuvre ainsi que par l'ensemble des acteurs gouvernementaux (administrations, juridictions…) et non gouvernementaux (associations, travailleurs sociaux…) participant à cette mise en œuvre.

Dès cet embranchement de l'histoire, le droit d'asile devient une affaire de spécialistes, notamment fonctionnaires internationaux puis nationaux, qui décident aussi discrétionnairement que le leur permet un régime juridique qui brille par sa vacuité et sa faible portée contraignante. L'observation directe de l'activité de jugement de la demande d'asile[124] montre que loin d'être l'ultime arbitrage d'une instruction approfondie et d'un raisonnement juridique, tous deux étroitement dépendant du droit, l'intime conviction se substitue purement et simplement à l'une et à l'autre dans le processus de jugement. Une simple somme d'opinions subjectives et intuitives remplace la recherche d'informations et le syllogisme juridique supposés guider le juge vers sa conclusion. Sont ainsi masqués l'absence de moyens et la rareté d'un fondement raisonné dans la prise de décision mais aussi le caractère relativement discrétionnaire d'un pouvoir technocratique sous influence politique et idéologique.

La genèse du «faux réfugiés» (1960's, 1970's)

Le pouvoir technocratique relatif aux réfugiés se construit initialement avec la création du HCR (1949) et d'organisations nationales, tels l'OFPRA (1952) et la CRR en France. Mais ce n'est que plus récemment, dans les décennies 1970 et 1980 que s'opère, en France comme dans les autres pays riches de la planète, un mouvement de *professionnalisation* référée à cette catégorie d'action publique qu'est devenu le droit d'asile institutionnalisé, mouvement tiré par la croissance budgétaire et humaine de ces institutions publiques ainsi que par celle de leurs partenaires associatifs et universitaires. Ce monde de spécialistes du droit de l'asile entre en croissance rapide au moment même où le droit d'asile se retourne en son contraire. Les référentiels

---

[124] Jérôme Valluy, "Vrai ou faux réfugiés ?", dans la revue *Espaces Temps (Réfléchir les sciences sociales) - Les Cahiers*, n°89/90, 3ème trim. 2005, p.96-103.

professionnels de ce monde se construisent en relation directe avec le grand retournement de la politique du droit d'asile contre les exilés.

Durant la première période du droit d'asile moderne, de 1948 à 1968 environ, cette politique internationale dépendait essentiellement de la volonté des Etats de préserver leur souveraineté en cas d'afflux massifs d'exilés et de l'intérêt du camps capitaliste d'accueillir des dissidents illustrant, par leur fuite, l'échec moral et politique du camps adverse. La définition individuelle, restrictive et sélective du réfugié, selon l'article 1A2 de la Convention de Genève, remplissait parfaitement cette double fonction politique. En France, quelques milliers de personnes demandaient l'asile chaque année et la grande majorité d'entre eux – entre 80% et 100% – l'obtenaient. Durant cette époque cependant, les frontières occidentales étaient « ouvertes » ce qui permettait à toute personne y cherchant refuge d'obtenir un asile sociétal sans passer par la procédure régit par la Convention de Genève.

C'est au tournant des décennies 1960 et 1970 que l'histoire de la politique du droit d'asile, jusque là dépendant de la guerre froide entre les blocs communiste et capitaliste, se trouve rattrapée par une autre histoire avec laquelle elle s'entremêle : celle de la décolonisation. La *Convention de Genève sur les Réfugiés* de 1951, en effet, n'était pas internationale mais européenne. Elle ne se rapportait qu'aux Etats européens, pour régler les suites de la seconde guerre mondiale. Or plusieurs d'entre eux étaient des empires coloniaux dont les ressortissants colonisés ne pouvaient rien demander des métropoles au titre du droit d'asile sauf à changer d'empire colonial tout en venant sur le continent européen, double condition rendant le phénomène improbable et démographiquement marginal.

Cependant, après la vague des décolonisations des années 1960, les décolonisés deviennent des sujets de droit international dans leurs relations avec leur ancienne métropole. Aussi faudra-t-il plusieurs années de négociations intérieures pour que la France accepte de ratifier le Protocole de New-York de 1967 qui étend la portée de la Convention de Genève à l'ensemble du monde. Après un long rapport de forces technocratiques entre le Ministère de l'Intérieur, craignant que cette extension ouvre une voie d'entrée de décolonisés immigrés, et le Ministère des Affaires Etrangères plus soucieux de préserver l'influence de la France tant sur le continent africain qu'au sein de l'Assemblée Générale des Nations Unies, où les nouveaux Etats décolonisés pèsent. Les diplomates emportent la décision en 1971... mais l'administration interne peut exprimer son rejet autrement : dès 1972, les demandes d'asile non européennes sont massivement rejetées avec des taux de rejet proches des 100% alors que les taux demeurent aux alentours de 15% pour les européens.

Dès 1972 et 1973 le nombre de demandes d'asile augmente rapidement en provenance d'Indochine et d'Amérique du sud. Dès ce moment là aussi, le taux de rejet des demandes d'asile par l'OFPRA commence sa longue croissance historique. Cependant cette croissance, en tendance globale, est ralentie par le bon accueil fait aux indochinois (et aux chiliens). L'effet « boat

people » qui leur bénéficie dans l'opinion publique et l'intéressement politique de la France à cet accueil leur fait bénéficier d'un taux de rejet très bas, en 0% et 10% jusque dans le milieu des années 1980. Durant les vingt ans qui suivent, la population des exilés indochinois est la première parmi les nationalités accueillies et constitue la plus grosse part des demandes d'asile acceptées. Cet accueil privilégié des indochinois permet à la France d'attester de la faillite morale et politique de ses vainqueurs dans la guerre de décolonisation, dans un conteste d'affrontement entre camp communiste et capitaliste où elle ne conserve que peu d'influence politique sur ses anciennes colonies asiatiques.

Cependant cet accueil privilégié masque le phénomène le plus important : les proportions de rejets s'envolent pour toutes les autres nationalités qui ne sont pas politiquement privilégiées. Les demandes d'asile africaines sont les plus rejetées : 95% de rejet en 1973 comme les autres demandes extra-européennes. Mais ce taux s'élève encore immédiatement après : 30% en 1973, 35% en 1974, 45% en 1975, 80% en 1976. Après trois années de taux plus modérés entre 1977 et 1979, la tendance au rejet se réaffirme à partir de 1981 (70%) jusqu'aux taux plafonds actuels, entre 70% et 100%, qui sont atteints dès le milieu des années 1980 (85% en 1985 puis 90% dans les trois années suivantes)[125].

On le voit, la politique du droit d'asile en ce qui concerne les non européens est étroitement liée à la décolonisation, tant en ce qui concerne l'accueil des indochinois que le rejet des autres nationalités notamment africaines. L'OFPRA est sous tutelle du Ministère des affaires étrangères mais dépend aussi de ce qui passe au Ministère de l'Intérieur (politique des naturalisations, statistiques d'entrées, enregistrement initial des demandes d'asile en Préfecture...) et au Ministère des Affaires Sociales (accueil et prise en charge des demandeurs d'asile en centres spécialisés, des réfugiés reconnus...). Or ces trois ministères et leurs administrations respectives, sont fortement concernés par le processus de décolonisation durant la décennie 1960.

Le Ministère de l'Intérieur, assume en métropole sa part de la guerre contre les algériens durant la guerre de libération et les mentalités formées dans les services durant les huit années de guerre ne s'estompent pas comme par miracle après la signature des accords d'Evian en 1962. Si la guerre d'Algérie a certainement constitué un laboratoire de l'encadrement policier des étrangers non européens, cette orientation se diffuse à l'ensemble des nationalités africaines comme le montre la répartition par nationalité des personnes expulsées de France de 1963 à 1973 : 73,1% d'algérien en début de période contre 45,4% à la fin[126], pour un nombre annuel d'expulsions à peu près

---

[125] L. Legoux, *La crise de l'asile politique*, op. cit., Figure 33, p.148. Toutes les statistiques de cette section proviennent de cet ouvrage.
[126] Cf. tableau d'A. Spire, *Etrangers à la carte*, op. cit., p. 218.

constant, la différence se faisant principalement au détriment des autres nationalités du Maghreb et d'Afrique Noire.

Sur le versant social également, comme le montrent les travaux de Marc Bernardot[127], la volonté de mieux contrôler les décolonisés immigrés est manifeste avec le développement de la SONACOTRAL (Société nationale de construction de logements pour les travailleurs algériens 1956) renommée SONACOTRA lorsqu'elle perd, en 1962, sa spécialisation algérienne pour étendre son domaine d'intervention à l'ensemble des populations africaines : à la fin de la décennie 90% des directeurs de foyers sont d'anciens militaires ayant été engagés dans les guerres coloniales. La genèse et l'évolution de la Direction de la Population et des Migrations au sein du Ministère des Affaires sociales, créée en 1966, illustrent également cette orientation d'encadrement des populations étrangères comme le montre Sylvain Laurens[128] : la plupart des hauts fonctionnaires de cette nouvelles direction et surtout les plus hauts gradés dans chaque catégorie ou service, sont issue de l'ancienne administration coloniales et réimportent dans ce service des référents professionnels formés antérieurement.

Il y a donc, dans la décennie 1960, plus qu'un simple contexte : un processus de configuration qui aboutit aux décisions du début des années 1970 et leur donne un sens qui n'a guère de rapport avec la crise économique de la décennie suivante même si celle-ci offrira de nouvelles justifications à des politiques de rejet à la fois antérieures et issues d'une autre dynamique historique : fermeture des frontières (1974), restrictions au regroupement familial (1976), pénalisation du séjour irrégulier (1980), contrôles d'identités au faciès (1981).

A partir des années 1980, s'imposera une réinterprétation de l'histoire basée sur une connaissance alors acquise de la crise dont personne ne disposait encore dix ans plus tôt : les chocs pétroliers seront présentés comme les principales variables explicatives de l'histoire du retournement de la politique du droit d'asile. Celle-ci apparaît pourtant essentiellement tributaire d'une xénophobie, essentiellement technocratique qui ne connaîtra de politisation partisane qu'au milieu des années 1980 avec l'émergence électorale de l'extrême droite. Cependant au moment où émerge cette nouvelle force politique, l'essentiel du grand retournement du droit d'asile contre les exilés est déjà réalisé et achevé notamment pour les nationalités non européennes et en dehors de l'exception indochinoise. On peut donc raisonnablement considérer l'émergence de l'extrême droite comme une conséquence de l'histoire qui précède puisque l'hypothèse d'une relation inverse serait absurde. Une fois cette composante nouvelle entrée en scène, la vie politique du pays accélère son mouvement historique par référence au Front National – ce que certains ont

---

[127] Marc Bernardot, *Une politique de logement : la SONACOTRA, (1956-1992)*, thèse de doctorat, Université Paris I, 1997.
[128] Sylvain Laurens, *Hauts fonctionnaires et immigration en France (1962-1981) – Socio-histoire d'une domination à distance*, EHESS, Doctorat en sociologie, Dir. Gérard Noriel, 8 décembre 2006, 773 p.

appelé la « lepénisation des esprits »[129] - souvent considéré comme le facteur explicatif des évolutions historiques...alors qu'il en est, en fait, un symptôme parmi d'autres, d'un phénomène plus profond et plus ancien d'institutionnalisation de la xénophobie.

Après plusieurs décennies d'élaboration technocratique, par les fonctionnaires rapatriés des colonies, les hauts fonctionnaires des ministères des affaires étrangères, de l'intérieur et des affaires sociales, mais aussi les experts et intellectuels proches de ces milieux... les questions de l'asile et de l'immigration s'entremêlent et s'inscrivent sur l'agenda électoral. D'autres facteurs cependant interviennent qui favorisent cette mise sur agenda : l'arrivée de la gauche au pouvoir la met en contact avec les technocraties ministérielles et l'oblige à composer avec eux dans la conduite de l'action publique. L'alternance de 1981 n'ouvre qu'une brève parenthèse associant des mesures spectaculaires en faveur des sans-papiers, et les prémices, dès 1982, de la conversion socialiste à la lutte anti-migratoire : durcissement contre les irréguliers, mise en opposition des anciens et nouveaux migrants. La victoire électorale du FN en mars 1983 marque les esprits mais il ne s'agit encore que de scores réduits et rien n'indique alors qu'ils seront durables. C'est pourtant l'année suivante le Premier Ministre socialiste L.Fabius prononce sa phrase célèbre - « *l'extrême droite, ce sont de fausses réponses à de vraies questions.* » - qui reflète cette imbrication nouvelle des élites socialistes et des technocraties ministérielles.

Le tournant national-sécuritaire (1980's, 1990's)

On s'en rend compte rétrospectivement : l'évolution de la politique du droit d'asile a été entraînée par des évolutions plus larges et plus fondamentales qui la dépassent et l'emportent. Les distinctions « asile / immigration » ou « gauche / droite » sont peu utiles pour décrire cette transformation de rapports de forces idéologiques entre trois systèmes de valeurs et de croyances qui traversent les administrations et les niveaux territoriaux de gouvernement (local, national, européen...)[130] : l'idéologie utilitariste, l'idéologie national-sécuritaire et l'idéologie humaniste-asilaire.

Ces trois coalitions sont transnationales mais plus ou moins fortes selon les pays. Chacune réunit un ensemble de spécialistes des migrations (fonctionnaires, experts, journalistes, associatifs, universitaires et chercheurs, avocats, etc.) qui partagent un même modèle d'analyse des phénomènes migratoires, des problèmes qu'ils posent et des solutions à leur apporter. Le

---

[129] Pierre Tévanian, Sylvie Tessot, *Dictionnaire de la lepénisation des esprits*, Paris : L'Esprit Frappeur, 2002.

[130] Pour une description détaillée : J. Valluy, « Les politiques européennes de l'immigration et de l'asile sous tension : entre logique des quotas et logique anti-migratoire », in : Cahiers du CEMMM, n°8, mai 2006, (Actes du colloque "Migration Maghrébine : Enjeux actuels et Contentieux", 24-25 nov. 2005, Univ. Mohammed I, Oujda / Maroc), pp.33-41.

mode d'action ordinaire des acteurs de chaque coalition consiste à diffuser leurs idées dans tous les segments de l'action publique (à divers niveaux de gouvernement, divers pays, en diverses catégories d'acteurs...).

Pour la résumer brièvement, l'histoire européenne des politiques migratoires depuis un demi-siècle, qui est aussi une histoire politique européenne des rapports culturels à l'altérité et à l'identité collective, se caractérise par un déclin continu du courant humaniste-asilaire et un renforcement tout aussi continu des forces idéologiques national-sécuritaires tandit que les voix économiques de l'utilitarisme progressivement marginalisée au milieu de la période, réapparaissent, notamment au niveau européen, depuis quelques années mais semblent bien loin de contrebalancer les forces politiques qui déterminent la fermeture et le rejet. La politique du droit d'asile est un élément de cette concurrence idéologique et, comme toute politique publique dans ce domaine, n'est pas l'expression d'une seule de ces coalitions mais de leur rapport de forces, de la tectonique d'ensemble qu'elles déterminent ensemble.

Un tel mouvement de balancier, dépend d'abord d'une croissance endogène des forces nationales-sécuritaires (conversion précoce de la haute fonction publique à l'idée d'un « problème » migratoire, dès les années 1960 ; fermeture administrative des frontières, l'intensification des politiques antimigratoires dont le retournement de la procédure d'asile vers des rejets massifs dès les années 1970 ; émergence de l'extrême droite nationaliste dans le champ politique au cours des années 1980). Cependant, le mouvement de balancier est du aussi à des facteurs moins visibles, masqués par les précédents, tendant à l'affaiblissement des forces humaniste-asilaires, dont l'origine est à rechercher dans la transformation de forces associatives, académiques et partisanes explicitement référées à des valeurs d'action humanitaire et sociale.

Lorsqu'au cours des années 1980, les partis d'extrême droite émergent dans le champ politique européenne et s'emparent du thème de l'afflux d'étrangers comme motif de contestation des politiques gouvernementales... celles-ci ont depuis dix ans déjà généré le discrédit des exilés en élevant continuellement les taux de rejet des demandes d'asiles et en produisant dans l'espace public les justification de cette élévation : la stigmatisation de l'exilé comme « réfugié économique » attiré par nos richesses et abusant de la Convention de Genève sur les Réfugiés. Les usages politiques, dans le champ de la politique électorale, tant ceux des forces contestataires que ceux des acteurs de gouvernement, ne feront qu'amplifier cette stigmatisation dans l'espace public et augmenter la portée politique des taux de rejet.

Dans cette perspective, l'enfermement des migrants, devient un élément crucial des politiques anti-migratoires avec deux effets latéraux importants : il renforce la dangerosité socialement perçue des migrants tout en affichant la mobilisation des autorités contre cette menace. De nombreuses études de sciences sociales disponibles sur cette forte fréquence d'emprisonnement des

étrangers en Europe aboutissent, observe Anastassia Tsoukala[131], à des conclusions convergentes : ces effectifs d'étrangers en prison sont tirés à partir des années 1980 par les infractions aux législations sur l'immigration (séjour irrégulier, refus d'expulsion…)[132], par les infractions liées directement à la vie en clandestinité (faux et usages de faux, infraction à la législation sur l'emploi…) et par les incarcérations préventives d'autant plus nombreuses que les étrangers ne présentent pas les garanties requises (stabilité et légalité du séjour, du domicile, de la situation familiale, de l'emploi, de la scolarité, etc.) pour bénéficier des mesures alternatives à la détention préventive. Reste, au-delà de ces facteurs, une sur-représentation des étrangers liée non à leurs origines nationales mais à leurs distributions statistiques suivant d'autres variables : l'âge, le sexe et les conditions socio-économiques. Si l'on efface, au moyen de calculs statistiques, l'influence de ces variables pour mettre en évidence l'effet propre à la variable « nationale », comme cela été fait pour l'Allemagne[133], on s'aperçoit alors que la population étrangère n'est pas plus criminogène que la population nationale. L'essentiel réside donc dans cette corrélation entre les taux d'incarcération d'étrangers et les facteurs liés au séjour irrégulier, comme le montre l'étude réalisée par James Linch et Rita Simon en 1998[134] sur sept pays (USA, Canada, Australie, Royaume-Uni, France, Allemagne, Japon). A cette corrélation fondamentale s'ajoute des facteurs incidents notamment les discriminations policières et judiciaires. L'ensemble de ces analyses permet donc de considérer les taux d'incarcération des étrangers comme une mesure sociologiquement pertinente du degré de criminalisation de l'exilé dans une société (voir les données générales dans les synthèse au début du volume).

Les événements du 11 septembre 2001 vont entraîner une accélération considérable du phénomène de criminalisation des exilés. A cet égard, toutes les études sont convergentes. Mais cette actualité éblouissante risque aujourd'hui de nous empêcher de percevoir la profondeur historique du phénomène et donc d'en mesurer correctement l'ampleur. Toutes les tendances précédemment décrites sont antérieures à 2001.

---

[131] Anastassi Tsoukala, « La criminalisation des immigrés en Europe », in : G. Sainati, L. Bonelli, (dir.), *La machine à punir*, Paris : L'esprit Frappeur, 2000, p.251.

[132] Le phénomène est particulièrement net pour les quatre pays de l'Europe du sud : Kitty Calavitta, « Immigration, law and marginalization in a global economy : notes from Spain », *Law and Society Review*, 1998, vol.32, n°3, pp.529-566.

[133] H.-J. Albrecht, « Ethnic minorities and crime – the construction of foreigners'crime in the Federal Republic of Germany », in : S. Palidda, *Délit d'immigration*, COST A2 Migrations, Commission européenne, Bruxelles 1997, p.99.

[134] James P. Lynch, Rita J. Simon, « A comparative assessment of criminal involvement among immigrants and natives across seven nations », *International Criminal Justice Review*, 1999, n°9, pp.1-17.

Européanisation et externalisation de l'asile (2000's)

Une autre tendance à partir de la fin des années 1990 accentue cette remontée de la coalition utilitaire, c'est celle de l'européanisation des politiques de l'immigration et de l'asile. Ce mouvement d'harmonisation européenne des politiques s'amorce véritablement à partir de 1999, lors du Sommet de Tempere. Le premier plan quinquennal, achevé en mai 2004, permet de faire plusieurs observations.

Premièrement les capacités de mobilisation des milieux associatifs, déjà faibles au plan national, deviennent à peu près inexistantes au niveau européen. Hormis les associations qui peuvent salarier des spécialistes multilingues de la « veille juridique européenne », les petites associations militantes du droit d'asile et du droit des étrangers ne parviennent plus à suivre les processus de décision politique et à les influencer : la marginalisation de la coalition asilaire se trouve ainsi achevée.

Deuxièmement le HCR joue un rôle politique crucial à ce niveau de gouvernance parce que – très européen par son histoire et son financement – il jouait déjà depuis longtemps un rôle essentiel dans la coordination des politiques européennes avant que la Commission Européenne ne parvienne à s'imposer. Or la dérive politique du HCR, sa conversion aux thématiques utilitaires puis ses concessions aux projets sécuritaires de « camps d'exilés » pèse sur l'évolution de la politique européenne en formation.

Troisièmement, l'européanisation de ces politiques s'est d'abord faite, dans le champ bureaucratique européen, au bénéfice de la Direction Générale « JLS » (Justice, Liberté et Sécurité), c'est à dire policière et sécuritaire, de la Commission Européenne focalisée aujourd'hui sur l'enjeu migratoire. Cependant les sécuritaires de la « JLS » sont plus sensibles que leurs homologues nationaux aux logiques économiques qui prédominent dans toute la bureaucratie d'une Commission Européenne vouée historiquement à la gestion économique.

Enfin, la politique « d'externalisation de l'asile » du Programme de la Haye, certes Programme de la « JLS » ne peut être mise en œuvre sur les territoires voisins de l'Union Européenne sans faire appel à la diplomatie européenne c'est à dire à la Direction « Rel Ex » (Relations Extérieures) de la Commission Européenne. Or la « Rel Ex » est une diplomatie essentiellement économique et les représentations consulaires de l'Union Européenne ressemblent plus souvent à des Chambres de Commerce qu'à de véritables Ambassades. Les fonctionnaires de la « Rel Ex » appelés à prendre en charge une telle politique de voisinage vont naturellement et spontanément l'aborder et la traiter avec des catégories mentales plus économiques que policières.

L'externalisation de l'asile, est une expression d'usage courant dans les réseaux de spécialistes de l'asile et des migrations pour désigner une idée politique relativement simple ainsi que les politiques publiques qui la mettent oeuvre : *d'accord pour accorder l'asile aux exilés, mais pas chez nous, de*

préférence loin de chez nous et dans des endroits, camps d'internement ou des zones géographiques de concentration, qu'ils ne pourront pas quitter aisément pour tenter de rejoindre l'Europe. L'idée n'est pas nouvelle mais devient plus explicite dans un projet du gouvernement autrichien en 1999 puis est théorisée en 2002 par le Haut Commissaire aux Réfugiés de l'ONU, Ruud Lübbers, ancien premier ministre des Pays Bas et par le Premier Ministre britannique Tony Blair. Elle s'institutionnalise ensuite en politique centrale de l'Union Européenne avec l'appui des gouvernements européens les plus xénophobes, hollandais, danois, autrichien, italien notamment et le soutien explicite ou implicite d'à peu près tous les autres.

L'externalisation de l'asile n'est pas une innovation radicale mais plutôt la radicalisation d'une tendance antérieure. Elle constitue une figure paroxystique du grand retournement de l'asile contre les exilés : la politique du droit d'asile sert alors, sans renier le droit d'asile dans son principe, non seulement à bloquer des frontières et à interdire aux exilés l'accès aux territoires refuges de leur choix mais plus encore à les enfermer dans des camps dits « centres de traitement » ou des zones dites de « protection spéciale ». Elle introduit aussi une dimension nouvelle dans le retournement de l'asile contre les exilés : sa diffusion au-delà des frontières européennes et, plus précisément, dans les pays limitrophes, qui semblent à la fois attirés par l'entrée dans la communauté d'Etat mais aussi voués à rester en dehors… ce que l'on appelle les *Marches* d'un Empire. Zones sensibles pour tout Empire où se manifestent ses tensions à la fois intérieures et extérieures, avec une sensibilité aggravée lorsque la délimitation de cette zone est incertaine, encore sujette à des fluctuations.

Le processus dit *d'européanisation des politiques publiques* c'est à dire à la fois de convergence européenne des politiques nationales et de montée en puissance d'acteurs et de cadres d'action spécifiquement européens n'est donc pas neutre du point de vue des choix politiques effectués dans ce domaine comme dans bien d'autres. L'européanisation modifie les rapports de forces entre les coalitions idéologiques de l'immigration et de l'asile : elle lamine définitivement la coalition asilaire en assurant la promotion des idées sécuritaires et leur balancement avec les logiques utilitaires ; elle renforce progressivement la coalition utilitaire au détriment des approches strictement policières. Ce phénomène affecte les possibilités d'action stratégiques des différents protagonistes : les défenseurs des droits humains, par exemple, ont aujourd'hui à lutter non seulement contre les coalitions adversaires, l'une peut-être plus que l'autre, mais aussi à lutter contre le processus d'européanisation lui-même en tant qu'il renforce ces coalitions adverses.

Conclusion

Le retournement du droit d'asile contre les exilés paraît finalement refléter un phénomène de xénophobie de gouvernement entendu comme ensemble des discours et des actes d'autorités publiques tendant à désigner

l'étranger comme un problème, un risque ou une menace. La xénophobie n'est pas seulement un phénomène psychologique, d'hostilité à l'égard des étrangers, mais également un phénomène social de stigmatisation de l'étranger. Dans la configuration étudiée, celle de la politique du droit d'asile en France et en Europe, ce phénomène social apparaît comme le produit d'une lutte et d'un rapport de forces idéologiques évoluant dans le sens d'un ascendant progressif d'idées nationales sécuritaires qui se trouvent de moins en moins contrebalancées par des idées et des forces adverses pouvant créer un équilibre. La xénophobie de gouvernement est donc essentiellement un déséquilibre idéologique produit par des mouvements inverses de renforcement et d'affaiblissement de systèmes de croyances antagoniste. C'est également un processus historique d'institutionnalisation des perceptions de l'étranger comme problème, risque ou menace dans les référentiels ordinaires de divers types d'autorités (ministérielles, administratives, judiciaires, médiatiques, scientifiques, intellectuelles, scolaires, économiques, partisanes, associatives...). Le développement de ce phénomène historique est tiré par l'action d'acteurs technocratiques, à la fois administratifs, experts et politiques que l'on retrouve au cœur des transformations de l'action publique dans ce domaine depuis cinquante ans.

Sans la geste haineuse et la vulgarité et bien avant la résurgence de la *xénophobie contestataire* des groupuscules d'extrême droite, la xénophobie de gouvernement s'est exprimée avec le froid détachement qui sied aux élites dirigeantes dans la désignation d'une menace et la réflexion technocratique sur les moyens d'y faire face. L'origine du grand retour des nationalismes xénophobes dans le champ politique européen, à un niveau sans précédent depuis les années 1930, est à chercher dans l'intérêt objectif des élites à focaliser les regards et les énergies sur la lutte des « ethnies » plutôt que sur celle des « classes », sur l'immigration plutôt que sur la récession. Ce mécanisme de pouvoir très universel qu'est l'union sacrée contre l'étranger, les européens savent l'identifier lorsqu'il s'agit d'analyser des situations en Afrique ou en Asie, mais peinent à le reconnaître dans leurs propres pays.

The Roma in neoliberal Europe
Anti-Gypsyism, poverty and the limits of ethnopolitics
Nando Sigona

Introduction

Twenty years on from the break-up of the Soviet Union and after millions of euros spent in EU-sponsored projects to promote the social inclusion of Roma, the Roma are possibly now even more marginalised than they were twenty years ago, even in the countries of western Europe. The record of guilty verdicts passed against Great Britain by the European Court of Human Rights for the ill-treatment of English Gypsies and Travellers, the nomad camps built by Italian authorities that, according to the UN and numerous international organisations (for example, Ecri 2002, 2006; Errc 2000)[135], are the product of discriminatory administrative practices, racist attacks against Roma refugees and migrants in Germany and Italy, unemployment and under-employment rates that are way above the average in their respective countries: all of this confirms that the persecution of the Roma has a European dimension.

This chapter is divided into four parts. In the first part, I discuss the impact of neoliberal policies on the socio-economic situation of Romani communities in Europe and the rise and spread of anti-Gypsyism in the context of the collapse of the Soviet Union (and its satellite states) and the crisis of European socialism. Part 2 and 3 outline the institutional responses to these phenomena, their rationale – in particular the fear of Romani westward migration - and the emergence and salience of minority and human rights frameworks, as well as their limitations. In the final section, I look at the spaces of political participation for Romani communities and the issue of leadership in the context of the critique of the neoliberal racialization of political spaces occurring in Europe.

Poverty and anti-Gypsyism

The new geopolitical order that has re-drawn the map of Europe after the fall of the Berlin Wall have been accompanied by the assertion and consolidation throughout the continent, but more clearly in the European Union and its new satellites, of the neoliberal economic doctrine. In countries that have followed this inspiration, an increasing number of people that, for various reasons, have not found any adequate and socially acceptable position in the new order have been pushed to the margins and impoverished: among these, there are millions of Roma people, for whom chronic unemployment and social exclusion have become the norm.

---

[135] Ecri (2002) 2nd Report on Italy adopted on the 22 June 2001. Strasbourg: Ecri; Ecri (2006) 3rd Report on Italy adopted on the 16 December 2005. Strasburg: Ecri; Errc (2000) Campland: Racial segregation of Roma in Italy. Budapest: Errc.

The process of pauperisation of the Roma started in the 1990s, during the climax of the neoliberal triumph. Precisely then, while some benefited from the new prosperity, the income of Roma families crashed alongside the closure of state-run factories and the drastic reduction of employment by public administrations. The former president of the World Bank, James Wolfensohn, one of the main backers, alongside the financier and philanthropist George Soros,[136] of the "Decade of Roma Inclusion", stated:

Roma have been among the biggest losers in the transition from communism since 1989. They were often the first to lose their jobs in the early 1990s, and have been persistently blocked from re-entering the labour force due to their often inadequate skills and pervasive discrimination.

The case of Hungary, one of the most economically advanced countries from the former Socialist bloc, is emblematic: in 1985, the employment rate of men belonging to the Roma minority was almost equal to that of the rest of the male population; today, instead, it is estimated that at least 70% of the men are unemployed.[137]

The poverty rate of Roma people in the countries of central-eastern Europe is often as many as ten times higher than that of other citizens. In 2000, almost 80% of Roma people in Bulgaria and Romania lived on less than 4 euro per day, compared with 37% of the rest of the population in Bulgaria and 30% in Romania. In Hungary, instead, "only" 40% of the Roma lived below the 4 euro threshold, a figure that, however, must be compared with the 7% of the rest of the population. These figures, combined with a high birth rate, make it possible to foresee a further growth of poverty.[138]

Apart from the structural tensions resulting from the quick economic transformation, the transition towards capitalism in formerly Socialist countries has also been characterised by a search for foundational myths to re-define the relationship between state and nation after the fall of Communist ideology.[139]

---

[136] J.D. Wolfensohn, G. Soros, "Why The Roma Matter in Europe", report presented at the conference *Roma in an Expanding Europe: Challenges for the Future*, Budapest, 30 June-1 July 2003. For a critical reading of George Soros' philantropic activities, see N. Clark, *George Soros, a profile*, "New Statesman", 2 June 2003.

[137] G. Kertesi, *The Employment of the Roma in the End of the 20th Century*, "Budapest Working Papers on the Labour Market", 4/2005. For an analysis of the impact of neoliberal inspired policies on the Roma in Hungary, see E. Forrai "The political economy of exclusion: unemployment, poverty and excess deaths amongst Roma men in Hungary", report presented at the seminar "Welfare State(s). Equality or Recognition?", Roskilde University, 21-22 August 2006.

[138] D. Ringhold, M.A. Orenstein, E. Wilkens, *Roma in an Expanding Europe: Breaking the Poverty Cycle*, The World Bank, Washington, D.C. 2003; Undp, *Roma in Central and Eastern Europe: Avoiding the Dependency Trap*, Undp/Ilo Regional Human Development Report, Undp, Bratislava 2002.

[139] R. Brubaker, *Nationalism reframed: Nationhood and the National Question in the New Europe*, Cambridge University Press, Cambridge 1996. This research mainly, but not exclusively, concerned countries in central-eastern Europe. Countries such as Italy, for example, have undergone two decades of

In such a context, nationalist movements have acquired strength and, alongside them, so have numerous far-right racist and xenophobic groups that have managed to etch themselves out some increasingly large spaces in the political life of most European countries. This overall slide to the right, also resulting from the existing confusion in the social-democratic camp, has turned the Roma, a minority without significant political representation, into one of the preferred targets for racist campaigns that have sometimes culminated in overt displays of violence.

Hence, racism against the Roma does not only concern some extremist fringe elements.[140] The Eurobarometer surveys (2007, 2008) show how widespread prejudices and stereotypes about this minority are.[141] 77% of European citizens deem it a disadvantage to belong to the Roma minority and 24% would consider it inconvenient to have a Roma as a neighbour. This figure rises to 47% in Italy and the Czech Republic, where only one person in ten states that they would have no problem living close to a Roma person.[142]

Data on Italy from the Institute for the Study of Public Opinion (ISPO) research (2008) offers a picture that is even more worrying,[143] confirming the scepticism expressed by some Roma experts and activists about the reliability of the Eurobarometer data. According to the ISPO findings, Italians have an extremely negative view of the Roma: 47% of the interviewed people sees them primarily as thieves, delinquents and layabouts, 35% links their image to that of nomad camps, to degradation and dirtiness. According to Michael Guet (2008, p. 5), the head of the Council of Europe division that deals with Roma communities in Europe:

The scandal of this extremely high negative attitude against Roma in all European societies becomes clear when being compared to other minority groups. While the social and political debate on all forms of anti-Semitism and xenophobia relays on a variety of instruments, beginning with education up to

---

transformations, births and re-foundations that have deeply re-drawn the country's political-ideological map.

[140] For the Italian case see N. Sigona (dir. by), *Political participation and media representation of Roma and Sinti in Italy*, research report commissioned by Osce/Odihr, Warsaw 2006, (www.osservazione.org/documenti/osce_italy.pdf); A. Simoni, *I decreti "emergenza nomadi": il nuovo volto di un vecchio problema*, "Diritto, Immigrazione e Cittadinanza", 10/2008, 3-4, pp. 44-56; P. Colacicchi, *Ethnic Profiling and Discrimination against Roma in Italy: New Developments in a Deep-Rooted Tradition*, "Roma Rights", 2/2008, pp. 35-44 (www.errc.org/db/03/B8/m000003B8.pdf).

[141] Eurobarometer, Discrimination in the European Union, Special no. 263/2007, Eurobarometer, Brussels; Eurobarometer, Discrimination in the European Union, Special no. 296/2008, Eurobarometer, Brussels.

[142] It is interesting to note that similar results are also obtained in countries like Denmark and Malta, where there is a minimal presence of Roma people.

[143] Ispo, *Italiani, rom e sinti a confronto. Una ricerca quali-quantitativa*, report presented on occasion of the European Conference on Population, Rome, 22-23 January 2008, interior ministy. See also P. Arrigoni and T. Vitale, *Quale legalità? Rom e gagi a confronto*, "Aggiornamenti Sociali", 3/2008, pp. 183-194.

advocacy with political and social representatives as well as legal restrictions, anti-Gypsyism remains almost a normal thing to which no attention needs to be drawn. The lack of an adequate term describing the resentments against Roma for many decades is one indicator.[144]

This lack of interest in forms of persecution and discrimination against the Roma has a long history, which is also reflected, for example, in the absence until very recently of research on the extermination of the Roma within the historiography of the Holocaust.[145]

The terms anti-Gypsyism and Romaphobia have only recently entered Europe's political language. The first official document in which the matter of forms of discrimination against the Roma is dealt with in depth, is the European Parliament's resolution adopted on 28 April 2005 (P6_TA(2005)0151), in which the European Commission is invited to intervene to combat Anti-Gypsyism/Romaphobia across Europe,

underlining the importance of urgently eliminating continuing and violent trends of racism and racial discrimination against Roma, and conscious that any form of impunity for racist attacks, hate speech, physical attacks by extremist groups, unlawful evictions and police harassment motivated by Anti-Gypsyism and Romaphobia plays a role in weakening the rule of law and democracy, tends to encourage the recurrence of such crimes and requires resolute action for its eradication.[146]

We are faced by a specific form of racism (Nicolae 2008:1),

An ideology of racial superiority, a form of dehumanisation and of institutional racism […] fuelled by historical discrimination.

A complex social phenomenon that expresses itself publicly through episodes of violence, expressions of hatred, exploitation and discrimination, but also through the discourses and portrayals produced by politicians and academics, spatial and housing segregation, widespread stigmatisation and socio-economic exclusion.[147]

---

[144] M. Guet, *What is anti-Gypsyism/anti-Tsiganism/Romaphobia?*, report presented at the seminar on anti-discrimination organised by the Hungarian Presidency of the "Decade for Roma Inclusion", Budapest, 16 April 2008, p. 5.

[145] See G. Boursier, *Lo sterminio degli zingari durante la seconda guerra mondiale*, "Studi Storici", 36/1995, 2, pp. 363-395; L. Bravi, *Altre tracce sul sentiero per Auschwitz*, Roma 2002; C. Bernadac, *Sterminateli! Adolf Hitler contro i nomadi d'Europa*, Libritalia, 1996; H. Van Baar, *The way out of amnesia? Europeisation and the recognition of the Roma's past and present*, "Third Text", 22/2008, 3, pp. 373-385.

[146] European Commission, *Community Instruments and Policies for Roma Inclusion*, COM_2008_420 CSWD 27[1].6.08, Brussels, European Commission; European Parliament, *Resolution on a European Strategy on the Roma*, adopted on 31 January 2008, P6_TA(2008) 0035, Strasbourg.

[147] V. Nicolae, *Anti-Gypsyism – a definition* ..., cit., p. 1. The failure to recognise the Roma as holders of rights (their *imperfect citizenship*) has also repeatedly surfaced in research works on the discrimination of

It is a form of racism that includes a biological component and which produces the de-humanisation of the Roma. "The Roma", Nicolae continues, "are viewed as 'less than human', they are perceived as not being morally worthy of enjoying human rights in the same way as the rest of the population."

In sum, the worsening of the living conditions of Roma people in central-eastern Europe over the last twenty years and the episodes of anti-Roma racism are two separate phenomena at the same time as they are related. The first cause of the impoverishment of Roma after the end of the USSR was not racism, which has played its part and still has a central role in defining experiences and life opportunities for people belonging to the Roma minority, but rather, the structural transformations that have radically re-defined the economy and social contract on which the former Socialist countries were founded.

From migrants to minority

Even more so than in previous years, after the expansion of the European Union and the suppression of visa requirements, abandoned by all governments and at the mercy of the sudden transformations imposed by the neoliberal turn, the Roma of central-eastern Europe have sought a chance to save themselves through emigration, giving rise to alarm in Western governments.

Until the 1990s, the main countries from which the Roma emigrated had been Macedonia, Bosnia-Herzegovina, Yugoslavia (Serbia, Montenegro and Kosovo) and Romania,[148] while subsequently they were Romania, Bulgaria and Slovakia. Among the countries of arrival, Germany, France and Italy were historically the main destinations of the Roma's migration, but over the years, a significant flow has also affected Great Britain, Austria and Spain.[149]

The perceived threat represented by the mass arrival (*tidal wave*) of Roma people was, from the 1990s, the main reason for the European Union and the other leading European organisations, i.e. the Council of Europe and OSCE, becoming interested in this population.[150]

---

the Roma in Italy (Errc 2000; N. Sigona, L. Monasta, *Cittadinanze Imperfette. Rapporto sulla discriminazione razziale di rom e sinti in Italia*, Spartaco, Santa Maria Capua Vetere 2006.

[148] During certain phases, particularly at the start of the 1990s, substantial groups of Roma people also emigrated from
Croatia and Bulgaria and, as of 1995, from Poland, the Czech Republic and Slovakia (Y. Matras, *Romani migrations in the post-conflict era: their historical and political significance*, "Cambridge Review of International Affairs", 13/2000, 2, pp. 32-50).

[149] The introduction of new measures to manage flows like, for example, bilateral repatriation agreements and lists of safe third countries during the 1990s, have given rise to secondary migrations and changes in mobility patterns; see E. Sobotka, *Romani migrations in the 1990s: perspectives on dynamic, interpretation and policy*, "Romani Studies", 13/2003, 2, pp. 79-121.

[150] See W. Guy, *Between past and future. The Roma of Central and Eastern Europe*, University of Hertfordshire Press, Hatfield 2001; R. Guglielmo, T.W. Waters, *Migrating towards minority status: shifting European policy towards Roma*, "Journal of Common Market Studies", 43/2005, 4, pp. 763-786.

As is well known, the so-called "invasion" of the West never happened[151] and, quantitatively, the migration of Roma people corresponds with that of the rest of the population in their respective countries of origin. In spite of this, the fear of such an "invasion", manipulated through a distorted use of data, stories and images, has influenced the choices of several governments and has pushed them to adopt draconian measures to stop "the gypsies".[152]

The process of EU expansion has led to a gradual transformation of this approach for two types of reasons, one demographic, and the other more strictly political. With the expansions of 2004 and of 2007, in fact, around two million Roma people became European citizens and members of the largest European ethnic minority, rendering "the social, rights, and security issues surrounding Roma became *internal* issues.[153] Moreover, with accession, it has become more or less impossible to stop the mobility of Roma people in the EU countries' territory –in spite of recent efforts undertaken by countries like France, Italy, Great Britain and Belgium–, safeguarded by one of the key EU pillars: freedom of movement. Conversely, third-country Roma are increasingly encountering greater obstacles in entering the EU through legal channels, both as a result of the selectiveness of EU migration policies towards TCNs and due to the general restriction of the right to political asylum, which is even more evident for citizens of countries that aspire to join the EU, like Macedonia, Kosovo, Croatia, Serbia, Turkey, Albania and Montenegro.

Measures of a purely repressive, restrictive and deterrent nature that have mainly characterised the pre-enlargement phase, such as bilateral agreements for the immediate repatriation of migrants, intelligence exchanges and training of police forces of neighbour countries, the discriminatory application of norms on visas and the increasing reduction of the effectiveness of the right to asylum, have produced a segmentation of the concept of citizenship and of the rights associated to it.[154] As time passed, such measures were accompanied by others of a different nature, aimed at encouraging the Roma to stay in their countries of origin, the enforcement of human and minority rights framework

---

[151] The literature on Roma migrations is rather limited and often within the bounds of the restricted *milieu* of experts in *Romani studies* (Guy 2001; Matras 2000; J.P. Liegeois, N. Gheorghe, *Roma/Gypsies: A European Minority*, Minority Rights Group International, London 1995; A. Reyniers, *Evaluation of Gypsy populations and of their movements in Central and Eastern Europe and in some OECD countries, focusing on the issues of migration, application for asylum, demography and employment*, OECD, Paris 1999, with some rare attempts to frame the issue within a wider debate on migrations; Sobotka 2003; N. Sigona, *How can a 'nomad' be a refugee? Kosovo Roma and labelling policy in Italy*, "Sociology", 37/2003, 1, pp. 69-80; L. Piasere, *I rom d'Europa. Una storia moderna*, Laterza, Bari-Rome 2006.

[152] See Cdmg 1998; C. Clark, E. Campbell, *"Gypsy invasion": A critical analysis of newspaper reaction to Czech and Slovak asylum-seekers in Britain*, "Journal of the Gypsy Lore Society", 10/2000, 1, pp. 23-48; Guy 2009; N. Sigona, N. Trehan , *Romani Politics in Contemporary Europe: Poverty, Ethnic Mobilization and the Neoliberal Order*, Palgrave-Macmillan, London 2009.

[153] R. Guglielmo, T.W. Waters, op. cit., 2005, pp. 776-777.

[154] E. Rigo, *Europa di confine* , Meltemi, Rome 2007; E. Balibar, I. Wallerstein, *Race, Nation, Class: Ambiguous Identities*, Verso, London-New York 1991.

and development-like initiatives are part of this strategy. The political reason for this change in approach is summarised by Guglielmo and Waters (2005, p. 764), who state:

Although the EU and other European institutions were initially concerned with externally oriented migration control, the fact that the case for enlargement was articulated in terms of 'common values' compelled EU Member States to elaborate a more internally oriented, rights-based approach to minority protection and towards Roma.

Hence, as enlargement approached, it would have become necessary for the EU to tackle issues concerning Roma people within a different framework, whose hinge was no longer "if" the Roma should be integrated into the EU, but "how".

It has certainly not been a process whose outcome was a foregone conclusion, and the issue of the migration of Roma people has threatened to derail the enlargement process of countries such as Hungary and Slovakia, which were accused of being unable to protect the Roma's fundamental rights and of not being ready for freedom of movement.

In spite of these obstacles and with a series of restrictions that were more or less temporary to freedom of movement, in 2004 and 2007 the enlargement of the European Union occurred, changing the situation considerably. Thus, while in certain countries the tensions were appeased, in others, like Italy, the issue of freedom of movement for Roma people acquired a growing urgency, as did the exasperation of the public debate and the spreading of Romaphobic sentiment in public opinion.[155]

The Europeanization of the Roma issue

In spite of the announcements and declarations of principle, the priority concern for European Union policies towards Roma people since the 1990s has been to control and limit their westward migration.

While it must be acknowledged that the protection of minorities, one of the requirements set for aspiring EU member States in the 1993 Copenhagen Council, represents an important advance towards the recognition of the protection of minorities among the foundational norms of democracy, it must also be stressed that the relationship between "democracy" and "respect and protection for minorities" has been wilfully left vague and ambiguous in the Copenhagen document. About this matter, Sasse points out that the linguistic formula employed by the EU carefully avoids the notion of "minority rights".

---

[155] See N. Sigona (ed), *The latest public enemy: Romanian Roma in Italy*, Florence: OsservAzione. To make the situation even more complex, a number of European countries –including countries like the Czech Republic, Poland, Slovenia and Hungary– after being countries of emigration of Roma people, have become countries of destination.

Moreover, it does not refer to "national minority" and does not specify what types of minority are covered.[156]

Furthermore, even without an explicit reference to rights, the criterion raises legitimate conceptual and empirical objections about the type of democracy that the EU sought to promote in the candidate countries. In fact, there is an evident risk of ending up fostering the fragmentation of society along ethnic lines and heightening social and political conflict, like the recent displays of intolerance and racism that have burst out in Hungary and Czech Republic have, to an extent, confirmed.

The reception of the principle of the protection of minorities by the candidate countries has been effectively described by Tesser, who has underlined the instrumental and top-down character of this process, as the "geopolitics of tolerance"[157]. Moreover, Guglielmo and Waters (2005) have noted that the protection of minorities as formulated in the Copenhagen criteria are only valid for countries aspiring to enter the EU and not for current member states. The referral to OSCE as to the definition of the reference framework for the protection of minorities provides further evidence of the fact that at the start of the 1990s, the European Union did not wish to commit to defining its own normative framework on minorities.

This attitude gradually changed when, following enlargement, the concrete reality was altered and it was no longer possible to envisage managing the Roma issue only in terms of the control of mobility. In fact, even if the Roma do not move, the conditions of marginality in which many of them live are, on their own, insofar as they are EU country nationals, a sufficient reason to justify interest from the EU: rather than being the Roma who migrate, rights have migrated towards them, at least in theory.

The "nomad emergency" decrees issued by Prodi and then Berlusconi governments, the pogrom in Ponticelli (Naples) in May 2008 and the mass collection of biometric data in nomad camps, caused the outrage of progressive European public opinion and diplomatic tension between two EU member States (Romania and Italy). As a response to the crisis, the process of Europeanization of the Roma issue speeded up (the governments of Romania and Italy themselves called upon the European Commission to intervene in November 2007). According to Guy:

> The consequences of both EU enlargement and Roma exclusion combined to threaten not only the relationship between two Member States but also the fundamental right to freedom of movement within the EU.[158]

---

[156] G. Sasse, "Minority rights in Central and Eastern Europe before and after EU enlargement", report presented at the "Ethnic mobilization in the New Europe" workshop, Brussels, 21-22 April 2006, p. 4.
[157] L. Tesser, *The geopolitics of tolerance: minority rights under EU expansion in East-Central Europe*, "East European Politics and Societies", 17/2003, 3, pp. 483-532.
[158] W. Guy, *EU Initiatives on Roma: Limitations and Ways Forward*, in Sigona, Trehan, 2009.

The episodes that occurred in Italy also revealed that systemic and institutional discrimination against the Roma and violent expressions of racism do not only take place in countries of the former Soviet bloc, but also in western Europe (something that was wilfully underestimated by the European Commission in previous years). Moreover, the events that happened in Italy served to remind the Commission that, in spite of a decade of EU involvement in the "matter" and the numerous assistance projects that were funded through the Phare programme, the problems of a large majority of Roma people in the new member States remain unresolved, pushing many Roma to migrate westwards looking for a better life.

In December 2007, for the first time, the European Council, the EU's highest political body, tackled the issue "of the very specific situation in which many Roma find themselves in the Union" and invited member States to "adopt any means to improve their inclusion".[159]

In January 2008, an urgent invitation came from the European Parliament to draw up a European framework strategy for the 'inclusion of the Roma' (European Parliament, 2008, par. 6); a similar invitation also arrived in the following months from the countries involved in the "Decade of Roma inclusion" (Hungary, the Czech Republic, Slovenia, Romania, Albania and Macedonia) and from the European Roma Policy Coalition, a network formed by the main international NGOs that struggle for Roma rights in Europe (Erpc 2008).

For the time being, the pressure on the European Commission to draw up a new approach to the Roma issue has not had the awaited results. In a report published in July 2008, the Commission acknowledged that:

> Although the European institutions, Member States and candidate countries as well as civil society have addressed these problems since the beginning of the 1990s, there is a widely shared assumption that the living and working conditions of Roma have not much improved over the last two decades (European Commission 2008a: 4).

The Commission's view is misleading and self-exculpating: the material and working conditions of the Roma in central-eastern Europe have never been at the top of the priorities of the interventions backed and funded by the EU, especially in the 1990s. Moreover, to state that the situation "has not improved much" is insulting to the Roma, considering that numerous indicators show how the situation, rather, has deteriorated after the fall of the Socialist regimes.

In September 2008, the European Commission organised the Roma Summit, with the participation of hundreds of Roma activists, politicians and administrators from all over Europe. The presence of the president and several commissioners from the European Commission sent out a clear sign of how the matter of the social inclusion of the Roma has become an important theme in

---

[159] European Council, *Presidency Conclusions on inclusion of the Roma* , 8 December 2008, Brussels: EU, par. 50.

the EU's political agenda, even though Barroso continues to issue signs of continuity with the policies enacted in past years, rather than a willingness to acknowledge the failure of this approach and to think up new forms of intervention.

Roma politics in Europe: potential and limits

Starting from the second half of the 1990s, in response to the dramatic living conditions of a majority of Roma people and to increasing anti-Gypsyism, two discourses have acquired growing relevance in the EU context: the human rights and anti-discrimination discourse, and the minority rights one.[160]

Within these discourses and their related apparatuses and practices, the presence of a "Roma civil society" that seeks to dialogue with European and national institutions at various levels, has progressively taken shape.

Two recent initiatives are emblematic of the process that is underway and of the change in scale with regards to the direct involvement of Roma people in decision-making processes at a European level. They also underline the two main directions that are forming: on the one hand, the European Roma and Travellers Forum (Ertf), born in 2004; on the other, the European Roma Policy Coalition (Erpc), established in 2008. The first organisation, born within the Council of Europe under the patronage of the president of Finland, Tarja Halonen, has been structured on a representative basis. It involves the presence, on a basis that is more or less proportional to the number of Roma in each country, of representatives from over twenty different groups belonging to the Roma family, NGOs, Roma political parties and representatives of faith organisations. The stated goal of the Ertf is that of facilitating the integration of the Roma population in European societies and their participation in public life and decision-making processes (Ertf statute, article 2). Instead, Erpc was born in response to increasing episodes of violence and racism that have taken place in various EU countries, and has as its main objective that of exerting pressure on the European Commission for it to draw up a framework strategy for the Roma. Among the coalition members and the founders –who define it as an "informal group"[161] – there are not just European and national Roma associations, like the European Roma Grassroots Organisation (Ergo), the European Roma Information Office (Erio) or the Fundacion Secretariado Gitano (Fsg), but also NGOs that have specialised in promoting respect for human rights, minorities and the fight against racism, the Open Society Institute (Osi), the Spolu International Foundation (Sf), the European Roma

---

[160] P. Vermeersch, *The Romani Movement: Minority Politics and Ethnic Mobilization in Contemporary Central Europe*, Berghahn Books, Oxford-New York 2006.
[161] Erpc, *Discrimination against Roma in Europe*, Factsheet/Background press, European Roma Policy Coalition, Brussels 2008.

Rights Centre (Errc), Amnesty International (Ai), the European Network Against Racism (Enar) and Minority Rights Group International (Mrgi).

The identification in the ethnonym "Roma" has become the main channel for political action and access to EU resources for people belonging to the varied and diverse Romani communities of Europe, priming important transformations within the latter and promoting the consolidation of the idea of a pan-European Roma minority ("the most numerous European minority") and the birth of a trans-European mainly English-speaking Roma élite.[162] If identifying all the Roma as a single community may appear to be a rational and effective choice to enhance their visibility in the political sphere, at the same time it is a choice that avoid taking into account the historical, linguistic and cultural differences that exist between the communities, but, more importantly, it also overlooks the concrete opposition, which is also political and legitimate, that some of the communities express as regards their assimilation into the ethnonym "Roma".[163]

Brubaker *et al.* have compellingly argued that "ethnicity is not a thing, an attribute, or a distinct sphere of life, it is a way of understanding and interpreting experience, a way of talking and acting, a way of formulating interests and identities".[164]

Romani politics is almost universally perceived as a positive development lacking any ambiguity, that represents the long-awaited entrance into the political arena of a people and a community that have been excluded from decision-making processes and from participation in public life for a long time. Instead, as Kovats highlights,[165] one must not look at Roma politics in isolation, nor at the Roma issue in general as being outside of the political, social and economic context in which it arose, and without taking into account the growing inequality and phenomena of widespread racism that are becoming consolidated in Europe.

The construction of an ethicised political agenda and of the bodies to support it, not only conceals the interests that the Roma have in common with their fellow citizens, but it also places them in competition with one another. Kovats writes:

---

[162] The training of the Roma élite has been brought forth through workshops, specialisation courses, scholarships, stages, particularly by the Soros Foundation (especially through the Open Society Institute and the European Roma Rights Center) and by the Project on Ethnic Relations (Per). Among the initiatives, there has also been a superior education course in diplomacy for the Roma.

[163] E. Marushiakova, V. Popov, *New ethnic identities in the Balkans: the case of the Egyptians*, "Facta Universitatis,

Philosophy and Sociology", vol. 2/2001, 8, pp. 465-477; Sigona 2004; Kovats 2003.

[164] R. Brubaker, M. Feischmidt, J. Fox, L. Grancea, *Nationalist politics and everyday ethnicity in a Transylvanian Town*, Princeton University Press, Princeton 2006, p. 358.

[165] M. Kovats, *The politics of Roma identity: between nationalism and destitution*, "Open Democracy", 2003 (www.opendemocracy.org).

> Money spent on Roma is quite simply, money not spent on 'non-Roma'. This occurs within the context not only of intensive competition for scarce public resources, but also the historic political culture of Central and Eastern Europe, characterised [...] by the often problematic relationship between ethnic/national identity and political power..[166]

The research that I am conducting on the forms and modes of political participation of the Roma who currently reside in Kosovo has confirmed the concerns expressed by Kovats, highlighting how the policies for ethnic minorities wanted and imposed by international and European institutions end up exacerbating tensions between communities that live in Kosovo by placing them in competition with one another on an ethnic basis, rather than transversely responding to the real needs and concrete situations that exist on the ground. Moreover, some Kosovo Roma activists have noted how the allocation of resources and the imposition of the human rights and minority rights vocabularies sometimes places them in conflict with members of their own communities and forces them to continuously carry out a role as translators (not merely linguistic) between the humanitarian language and that of the people with whom they interact.[167]

On the matter of talking or not talking the same language, Brubaker (2004, p. 167) recalls that "the beliefs, desires, hopes and interests of ordinary people cannot be uncritically inferred from the ethnopolitical entrepreneurs who claim to speak in their name".[168]

Conclusions

Poverty, social exclusion and racism are three phenomena that dominate the daily life of European Roma and determine their expectations and opportunities for the future. Poverty and anti-Gypsyism are different phenomena, but they are strictly interrelated. In fact, the roots of the process of pauperisation of the Roma minority in central-eastern Europe cannot be reduced as being the product of racist policies, but rather, they must be traced back to systemic factors such as the transformation in a neo-liberal direction of the economies of countries from the former Socialist bloc and of the welfare state. Kovats caustically argues:

> The fashion for attributing objective disadvantages — unemployment, low life expectancy, slum housing — to racism, ensures not only that conditions continue to deteriorate, but enables elites to deny political responsibility by blaming the popular prejudices for their failure to act..[169]

---

[166] Ibid., p. 3.

[167] An interview with two Kosova Roma activists carried out in June 2008 will appear in the volume on Roma politics in contemporary Europe that I edited with Nidhi Trehan; see N. Sigona, N. Trehan 2009.

[168] Brubaker, *Ethnicity without groups*, Harvard University Press, Cambridge, MA 2004, p. 167.

[169] M. Kovats, *The Politics of Roma Identity*, cit., p. 5.

It was only as EU enlargement approached that there was an evolution in the policies of European institutions, with a gradual shift from a rhetoric that centred on concern over the de-stabilising power of migration by Roma people to placing a greater emphasis on the concept of discrimination and the protection of minority rights. This transformation may be attributed to the objective fact, with the entry of new EU member States, that at least two million Roma people became EU citizens from one day to the next. Nonetheless (unfortunately), the Roma élite has been unable to etch out an adequate political role for itself; in fact, political participation has been structured and is strongly conditioned by the priorities imposed by the neo-liberal and racialising discourses, whereas communities on the ground experience the effects of poverty and social exclusion on their bodies.

Within some fringes of the Roma élite, it seems possible to glimpse a growing awareness of the limits of ethnopolitics and of the need to move beyond the paradigm of anti-discrimination towards a full political subjectivity for EU Romani citizens. Dissonant voices can be heard nowadays not only at the fringes of the neoliberal power structure, but also at its very core. MEP Livia Jaróka, a Romani Hungarian politician for the centre-right party FIDESZ, has made it clear in recent public statements that there is a need to move beyond the anti-discrimination paradigm which has failed to provide answers to the socio-economic marginalization of a large section of the European Romani population. She argues:

> The Roma in Europe are at a similar level as people of sub-Saharan Africa. But in this they don't differ from other underprivileged social groups. Therefore, I do not want a special Commissioner for Roma affairs in Brussels. This is a cross-cutting issue, which should be located with the commissioners who are concerned about health, education, working conditions and social welfare issues. [...] Instead of wasting its time on mini projects for small charities, the state should itself become more involved. [...] Why can't the state operate factories in regions with high unemployment? (Jaróka 2009).[170]

---

[170] L. Jaroka, "Die Tageszeitung", 28 March 2009. However, Jaroka's statement runs contrary to her candidature in the ranks of the Hungarian right-wing party Fidesz, which pursues an economic policy that has a neo-liberal approach.

National case studies

Delinquency, victimisation, criminalisation and penal treatment of foreigners in France

Laurent Mucchielli, Sophie Nevanen[*]

Introduction: the strength of suspicion

In France, like in other European countries, for around the last thirty years the issue of immigration and that of security have become impossible to separate in the political-media debate. As has been shown for some time by certain authors[171], the history of foreigners or immigrants in France is structurally linked to the construction of the nation-state and industrialisation. In the French case, however, one must also add the impact of de-colonisation and, in particular, that of an Algerian War that was traumatic in various senses and not acknowledged as such for a long time, even when, in the 1960s and 1970s, Algerian workers and then their families became the most numerous group among immigrants[172]. The consequence has been a powerful anti-Arabic racism[173]. Finally, over the last few years, the new research approaches point to a third dimension of the analysis of the history of immigration, that of a «post-colonial» society that preserves, *nolens volens* [whether it wants to or not], a devaluing, suspicious and often discriminatory attitude towards populations

---

[*] Respectively sociologist, director of research for the CNRS, lecturer at Versailles Saint-Quentin University, director of the Centre de recherches sociologiques sur le droit et les institutions pénales (CESDIP) (mucchielli@cesdip.com); statistics, CESDIP research engineer (snevanen@cesdip.com)

[171] See, for example, G. Noiriel, 1988, *Le creuset français. Histoire de l'immigration, XIXè-XXè siècle*, Seuil, Paris, 1988; V. Viet, *Histoire des Français venus d'ailleurs, de 1850 à nos jours*, Perrin, Paris, 2004.

[172] See B. Stora, *La gangrène et l'oubli. La mémoire de la Guerre d'Algérie*, La Découverte, Paris, 1991; ID., *Ils venaient d'Algérie. L'immigration algérienne en France (1912-1992)*, Fayard, Paris, 1992. Since then, Algerian immigration (and later Moroccan immigration) became more important than Italian or Portuguese immigration. In the last census (2004-2005), there were around 700,000 Algerian immigrants and almost 620,000 Moroccans; for the first time they were more numerous than the Portuguese (see C. Borrel, *Enquêtes annuelles de recensement 2004 et 2005. Près de 5 millions d'immigrés à la mi-2004*, «Insee Première», no. 1098/2006) [Note: In France, a very large majority of immigrants has acquired French nationality ("immigration for demographic reasons", to "manufacture French people", and not just for labour needs); the children of immigrants who are born in France automatically become French when they turn 18 years old. In France, jus solis and jus sanguinis are –still- in force, that is, one becomes French due to birth in the national territory or to being the child of at least one French parent; concession of nationality to a foreigner remains at the discretion, not of the judicial authority, but of the police authority. Both people who turn French and those born on French soil are –obviously- no longer recorded as foreigners. After Nazism and by virtue of an assimilationist tradition, there are no statistics on the foreign origins of French people, but estimates show that at least a third of the people with French nationality has foreign origins and perhaps they are even more if one traces them back to five or six generations ago; their origins are mainly Italian, from Maghreb countries, Polish, Spanish and Portuguese. There is information on the "French by acquisition" only in certain statistics, that obviously exclude those who are "French by birth" –even if they are children of foreign parents].

[173] Y. Gastaut, *L'immigration et l'opinion en France sous la V⁰ République*, Seuil, Paris, 2000

whose origins lie in its former colonies[174]. All of this makes it possible to understand the persistence, over the last thirty years, if not of a more or less explicit xenophobia, at least of an attitude towards populations with immigrant origins that is marked by *suspicion*. A suspicion of "regressive" violence (as is testimonied by the frequent use of the term «barbarism» in commenting certain criminal events), suspicion of cynicism («they take advantage of the system», of social benefits, etc.), suspicion of «poor integration», suspicion of rebellion or subversion.

In the 1974-1985 years, the French situation took on an extremely conflictual characterisation due to the economic crisis and the political decision to "stop" immigration and, conversely, of combating illegal immigration that was previously encouraged[175]. After the left came to power (1981) and then the failure of its economic recovery (1982-1983), there was the emergence of the *Front National*, the far-right party that has progressively become the backer of the resentment of working-class sectors «of French origins» that were struck by the crisis[176] and imposed an «immigration issue» into the public debate that, since then, has never ceased to be a concern (Gastaut, 2000). At the political level, this has translated into the taking hold of a concern about illegal immigration and into the legitimation of the «struggle» against it, amid suspicion that it is intrinsically dangerous[177]. A «governmentality through concern» has hence re-established itself through the figure of the foreigner/immigrant[178].

At the same time, the «immigrant workers» and their families have been struck even harder by unemployment than working-class families «of French origins». They have hence found themselves «in imposed residence» in the large council housing agglomerates found in the outskirts of cities, where all sorts of instability were concentrated. After the failure of an attempt to set up a social movement (the «Beur movement»), immigrants found themselves without any sort of social and political recognition. From then until the turnaround of the 1980s and 1990s, two phenomena took shape: on the one hand, the resurgence of urban revolts, and on the other, "identitary" assertion

---

[174] Fassin D., Fassin E., dir., 2006, *De la question sociale à la question raciale? Représenter la société française*, La Découverte, Paris, 2006.

[175] P. Weil P., *La France et ses étrangers. L'aventure d'une politique de l'immigration, 1938-1991*, Calmann-Lévy, Paris, 1991.

[176] N. Mayer, *Ces Français qui votent Le Pen*, Flammarion, Paris, 1999.

[177] See, for example, the analysis of political speeches from the period of the vote on the «Debré Law» in 1996 (Lessana C., 1998, Loi Debré: la fabrique de l'immigré, *Cultures & conflits*, 29-30, 125-141 and 31-32, 141-158) and that on those in 2007 following the election of Sarkozy as President of the Republic and the creation of a «ministy of immigration and national identity» (S. Slama, 2008, *Politique d'immigration : un laboratoire de la frénésie sécuritaire*, in L. Mucchielli, dir., *La frénésie sécuritaire. Retour à l'ordre et nouveau contrôle social*, Paris, La Découverte, 2008, pp. 64-76 ; C.Rodier, E. Terray, dir., 2008, *Immigration : fantasmes et réalités*, Paris, La Découverte.

[178] D. Bigo, *Sécurité et immigration : vers une gouvernementalité par l'inquiétude?*, « Cultures & Conflits», 31-32/1998, 13-38; D. Lochak, *L'intégration comme injonction. Enjeux idéologiques et politiques liés à l'immigration*, «Cultures & conflits», 64/2006, 129-147 ; ID., *Face aux migrants : Etat de droit ou état de siège ?*, Paris, Textuel, 2007.

through the Muslim religion by a part of the French children of these «immigrant workers». Throughout the 1990s to date, these two issues –the revolts and Muslim religion, particularly through the issue of the «Islamic scarf» at school– have not ceased to stir up the political-media debate[179]. Finally, the 2001-2005 years led to a dramatised shift in these two matters due to two important events. Firstly, the attacks of 11/9/2001, which sparked fears and legitimated ideas of a «clash of civilisations» -first supported only by xenophobic intellectual currents[180]- up to the point where they trivialised genuine «Islamophobia»[181]. Once the link between the «rise of Muslim integralism» in the world and delinquency by youths in the French *banlieues* had gained credit, one then came to a veritable *moral panic*, as in the «turnstiles» *affaire* in 2001-2002[182]. A veritable figure of the «internal enemy» then progressively emerged[183]. In relation to all of this, the theme of the «excessive delinquency of youths with immigrant origins» was very present in the 2001-2002 elections, picking up a relative consensus beyond the traditional right-left division[184]. Subsequently, the three weeks of revolts in October and November 2005 had an international resonance. In the French public debate, they fostered publicity for opinions that were sometimes overtly xenophobic, which were previously concealed due to the fear of being accused of racism[185].

---

[179] H. Rey, *La peur des banlieues*, Paris, Presses de Sciences-Po, 1996; A. Tsoukala, *Le traitement médiatique de la criminalité étrangère en Europe*, «Déviance et société», 1/2002, 61-82; J. Bowen, 2007, *Why the French don't like Headscarves. Islam, the Stats and Public Space*, Princeton, Princeton University Press, 1998b.

[180] J. Cesari, 1997, *Faut-il avoir peur de l'Islam ?*, Paris, Presses de Sciences Po, 1997.

[181] V. Geisser, *La nouvelle islamophobie*, Paris, La Découverte, 2003; T. Deltombe, *L'Islam imaginaire. La construction médiatique de l'islamophobie en France*, Paris, La Découverte, 2005.

[182] See L. Mucchielli, *Le scandale des « tournantes ». Dérives médiatiques et contre-enquête sociologique*, Paris, La Découverte, 2005. The expression «turnstiles», picked up from the popular dialect (*argot*) by journalists, concerns collective rapes. In 2001 and 2002, the media suddenly took over this issue, speaking of it almost always as if it were a new phenomenon, greatly increasing and specifically involving «youths of immigrant origins», inhabitants of the «banlieues» (suburbs). The cited research tested and empirically belied these three "assumptions".

[183] D. Bigo, *L'immigration à la croisée des chemins sécuritaires*, «Revue européenne des migrations internationales», 1/1998, 25-46.

[184] L. Mucchielli, *Délinquance et immigration en France : un regard sociologique*, «Criminologie », 2/2003, 27-55 ; ID., *Immigration et délinquance : fantasmes et réalités*, in N. Guénif-Souilamas, dir., *La république mise à nu par son immigration*, Paris, La Fabrique, 39-61.

[185] See F. Gèze, *Les « intégristes de la République » et les émeutes de novembre*, «Mouvements», 44/2006, 88-100; G. Mauger, *L'émeute de novembre 2005. Une révolte protopolitique*, Editions du Croquant, 2006, pp. 85-96. Let us recall that Sarkozy, who was then the interior minister, spoke of the presence of numerous «foreign delinquents» among the rebels, as he did of that (totally imaginary) of «Muslim extremists». In doing so, he was followed by many politicians as well as journalists (for instance those of the weekly magazine *Marianne*, who described the revolts as acts of «barbarism», but also the editorialists of *Point* and *Nouvel Observateur*); militant associations (like the *Union des Familles Laïques*, spoke of «leaders of political Islam»); intellectuals (like R. Redeker, criticised the «nihilism» of the rebels, seeing them as «the expression of an essentially cultural problem»; as for A. Finkielkraut, he saw them as «a revolt of an ethnic-religious character» by «youths who identify with Islam»). Some among them (B. Accoyer, president of the UMP group in the chamber of deputies [lower house of parliament], G. Larcher, then the employment minister, Philippe de Villiers, a French far-right leader, as well as H. Carrère d'Encausses, the perpetual secretary of the Académie Française) linked the revolts to

Thus, after the presidential elections of 2002, while the theme of security had lost ground among the concerns of the French (the economic themes of unemployment and purchasing power prevailed), that of immigration returned to the centre ground in the 2007 election[186]. In fact, opinion surveys indicate that a rather large consensus emerged that interpreted the revolts in terms of an «integration problem» encompassing a degree of revival of xenophobia[187]. Vincent Tiberj (*ibid.*) has shown how this development gave rise to a demand for security (or order) and for «ethno-centric reassurance» that Sarkozy managed to capture for his benefit, that is, as one of the keys for his victory.

Hence, the related themes of security and foreigners (or immigration) have practically never ceased to return to the centre of the political debate in France since the 1970s. And this is why, almost twenty years after the first study of statistics on foreigners in delinquency and in the penal system[188], it is important to return to this data, update it and discuss its interpretations again. At first, however, we will offer a glimpse of recent victimisation surveys to ascertain whether this instrument of analysis, rather different from statistics produced by the police and justice system, throws up some differences between French people and foreigners (I). We will then analyse police statistics since the start of the 1970s (II). Subsequently, we will compare police data with judicial data (III). Finally, we will look at the situation of foreigners in prison (IV) and in administrative detention structures (waiting zones and detention centres) (V).

I. *Victimisation: are foreigners victims more or less often than nationals?*

Victimisation surveys, apart from providing information on cases that are ignored, makes it possible to describe victims on the basis of their demographic and social characteristics. In France, the first one was carried out on a national scale by CESDIP researchers in the mid-1980s. This research centre then perfected the survey technique that was employed later at a regional and municipal level[189]. After 1996, l'INSEE [translator's note: the French national institute for statistics] inserted a form on victimisation in its annual survey on the living standards of families (EPCV), with a representative sample of around 11,000 people[190]. In spite of some untimely changes

---

the polygamy of «these people [who] come directly from their African village». L. Mucchielli, *Violences et insécurité. Fantasmes et réalités danni le débat français*, Paris, La Découverte, 2002, 2nd ed.

[186] See V. Tiberj, *La crispation hexagonale. France fermée contre France plurielle, 2001-2007*, Paris, Plon, 2008. The candidate Sarkozy announced his intention to create a «ministry of immigration and national identity».

[187] Thus, the positive answers to the question: «There are too many immigrants in France: do you agree or not?», were clearly more than 50%.

[188] P. Tournier, Ph. Robert, *Etrangers et délinquance. Les chiffres du débat*, L'Harmattan, Paris, 1991.

[189] Ph. Robert, M.L. Pottier, R. Zauberman, *Les enquêtes de victimation et la connaissance de la délinquance*, «Bulletin de méthodologie statistique», 80/2003, 5-24.

[190] The PCV surveys by INSEE (the French institute for statistics) do not select interviewees and do not interview them by telephone, but on the basis of the INSEE's housing database and through face-to-face interviews. The questionnaire is translated into several languages. However, it is difficult to know enough

in the questionnaire (in 1999, 2006 and 2007), today, a substantial series of such annual surveys are available[191].

To start with, we calculated the incidence according to the nationality of the people interviewed. The only forms of victimisation concerning individuals that are dealt with by the EPCV survey are attacks and personal theft[192]. Those interviewed who are of foreign nationality are a small part of the total (around 6%). Because as large a sample as possible is required in order for the results to make any sense, we have chosen to use the sum of the EPCV surveys from 1996 to 2004 (whose questionnaires are sufficiently similar to justify their being grouped together).

Reading table 1, one will note a greater incidence than average among people whose nationality is from «Africa excluding the Maghreb» and a lower one among people whose nationality is from the «Maghreb», «15-country Europe» and the «Rest of Europe». The incidence of personal theft is highest among people whose nationality is from «Africa excluding the Maghreb», the «Rest of Europe» and the «Rest of the World».

Table 1: Bi-annual indices of attacks and personal theft by nationality[193]

	French-born	Turned French*	Euro 15	Rest of Europe	Maghreb Africa	Africa exc. Maghreb	Rest of the World	total
Size of the sample (n)	*80 723*	*2 543*	*1 921*	*450*	*1 456*	*361*	*921*	*88 553*
victims of attacks in %	6.51	5.51	3.25	4.33	4.80	9.17	7.01	6.38
victims of personal theft in %	4.95	5.48	4.91	6.39	4.04	8.74	6.26	4.99

* Foreigners who obtained French nationality

Calculating the incidence according to interviewees' countries of birth, as indicated by table 2, we find the same differences. People born in Africa (excluding the Maghreb) run a higher risk of being attacked, whereas people born in Europe or in Maghreb countries run a lower risk of being attacked. Moreover, people born in Europe (excluding the 15 EU countries), in Africa (excluding the Maghreb) and in the rest of the world, run a higher risk of suffering personal theft that the average of interviewees.

---

about the actual representativeness and reliability of answers. [Note: These are the annual *surveys* that are now also carried out by Istat in Italy. The corresponding Istat survey is conducted using 60,000 families every five years, but it is only a telephone survey and does not record any information on the interviewee's nationality.]

[191] See Ph. Robert, R. Zauberman, S. Nevanen, E. Didier, *L'évolution de la délinquance d'après les enquetes de victimation France 1984-2005,* "Déviance et Société", 4/2008, 435-471. This survey technique is tending to become generalised. Epidemiologists from the National Health Institute and the National Institute for Health and Medical Research (INSERM) and from the National Institute for Prevention and Education for Health (INPES) use it. It has also been used in the framework of research on violence in a school setting.

[192] As opposed to victimisation concerning families, such as car theft and thefts involving break-ins.

[193] The interviewed people are asked the following questions: «Over the last two years, have you been a victim of an attack or of acts of violence, including by people who you do not know?» and «Over the last two years, have you been a victim of a different kind of theft than theft with a break-in or car theft?».

Tab. 2: Bi-annual indices of attacks and personal theft according to countries of birth

	French-born	Euro 15	Rest of Europe	Maghreb	Rest of Africa	Rest of the World	Total
Size of sample (n)	*78 656*	*3 143*	*859*	*3 654*	*812*	*1 429*	*88 553*
victims of attacks in %	6.51	3.79	4.91	5.31	9.42	7.34	6.38
victims of personal theft in %	4.94	4.71	6.19	4.37	8.95	7.00	4.99

Victimisation rates may vary depending on socio-demographic characteristics or the places of residence of the people interviewed. The variations noted depending on the nationality of those interviewed or their countries of birth may hence be a consequence of other characteristics of these populations. An analysis of the "logistical regression" for the purpose of explaining having or not having been a victim during the previous two years could distinguish the criteria that are at play in the variation of rates, enabling a study «in equality of all other circumstances»[194].

As can be inferred from the measure of the influence of the different variables[195] on the fact of having or not having been a victim attacks (analysis of the logistical regression)[196], in equality of all other circumstances, women have a lower probability of being victims of attacks than that for men. The person's age has an effect, but decreases as age advances: people who are 75 years old or over, risk being attacked up to five times less than 15 to 25-year olds. This risk also varies depending on individuals' employment, with the unemployed more often victims on average than people who work; farmers, factory workers, pensioners and other people who are not active are victims less often than office workers. Individuals belonging to families composed by couples with children are victims less often than those belonging to other types of families; inhabitants of the Paris region and cities are victims more often than rural people. Finally, and this is what we wish to know, *the most important rate of attacks among people whose nationality is «African excluding the Maghreb» that was highlighted through the analysis of indices disappears when one takes into account the other variables*; hence, it seems to be an artifact of the combination of other characteristics of the population.

Always in a condition of equality of all other circumstances, the measure of the influence of the different variables[197] as to whether or not someone has been a victim of personal theft (logistical regression analysis)[198] makes it possible to note that women have a lower probability of being victims of personal theft than men. As in the case of attacks, the person's age also has a considerable impact on their risk of being

---

[194] Translator's note: the customary expression in French sociology is: *toutes choses égales par ailleurs* which, in Latin, corresponds to: *ceteris paribus sic stantibus* (formulae that are characteristic of a Durkheimian tradition, "all other circumstances being equal").

[195] We only include significant results; we have sought to introduce other variables: type of habitat, income, countries of birth, but these have not appeared to be significant.

[196] Such a model has a percentage of «good predictions» of just 66%, obviously there are several variables missing that would contribute to explain the risk of being attacked.

[197] Again, we have only reviewed the more significant results here; we have also sought to introduce other variables: type of housing, income, position in relation to activity (active/not active), nationality, residence in ZUS (sensitive urban areas), but these have not appeared to be significant.

[198] Again, this model has a percentage of «good predictions» of only 66%, numerous variable are obviously missing here that would contribute to explain the risk of suffering personal theft.

victims of theft, with over-25s running the risk of being victims at least two times less than 15 to 25-year-olds, but the progressive decrease as age advances can no longer be observed in this case. The risk of theft also varies according to the social-professional category to which people belong: craftsmen, shopkeepers, members of the liberal professions, cadres, people from the higher intellectual professions, farmers and members of intermediary professions are victims more often than office workers; pensioners are victims less often, while other non-active people are victims more often; individuals belonging to families composed by couples with children are victims less often than members of single-parent families; inhabitants of the Paris region are victims more often, and those in rural towns are less often the victims of theft than city dwellers. Finally, inversely to what we noted in the case of attacks against persons, *the highest rate of personal thefts among people born in «Africa excluding Maghreb countries» and in the «rest of the world» persists in equality of all other circumstances*.

In short, the victimisation study for the French and for foreigners shows that French nationals are more protected than some categories of foreigners or of people who have turned French but were born abroad, particularly in the case of people from black Africa and Asia. In effect, the latter are most often victims of personal theft (of which only a small part –from 10 to 15% depending on the years and wording of the questions- are committed using violence).

II. *The impact of foreigners on delinquency according to police statistics*
1. Elementary methodological precautions

Those that are currently and mistakenly termed «statistics on delinquency» in the public debate are in reality the statistics recording delinquency that is known about and investigated by the police and *gendarmerie* services[199], however, excluding traffic offences, certain offences recorded by other administrative bodies (such as tax fraud) and fines[200]. Such statistics have been published in a homogeneous and reliable way since 1974. The counting of those who are referred to as «accused people» (for whom this source presents a break-down between men/women, French/foreign and minors/adults) depends on verification upstream; for a majority of crimes, the authors are not discovered; moreover, clearance rates vary considerably depending on the type

---

[199] [translator's note: These are statistics that, in agreement with Kitsuse and Cicourel (1963), must be considered a measurement of police productivity, namely, accusations and arrests that police carry out by generally pursuing «easy preys» in accordance with directives from the hierarchy, political authorities and so-called public opinion. The *gendarmerie* corresponds to the *carabinieri corps* –the Italian police force with a military status-; in France there are only two State police forces and there has only been a proliferation of municipal police forces, as well as private ones, over the last few years].

[200] Ph. Robert, B. Aubusson de Cavarlay, M.-L. Pottier, P. Tournier, *Les comptes du crime. Les délinquance en France et leur mesure*, l'Harmattan, Paris, 1994; B. Aubusson de Cavarlay, *Les statistiques de police : méthodes de production et conditions d'interprétation*, «Mathématiques, informatique et sciences humaines», 136/1996, pp. 39-61; ID., *La détention provisoire. Mise en perspective et lacunes des sources statistiques*, «Questions pénales», 3/2006, 1-4.

of offence: from 7 to 8% for theft in a car or motorbike theft, to over 100% for offences against drug legislation and… offences against the policing of foreigners[201]. The clearance also depends on the reported offences [translator's note: by citizens] as well as on pro-active work [translator's note: or of prevention] by the police, particularly controls in the street. It is rather well proven that such controls target foreigners, primarily on the basis of their physical traits[202]. It is what is currently known as «feature-based control» (*faciès*) or, more recently, «ethnic *profiling*» (Lévy, 2008 –note: also see Harcourt, in this volume). This practice has become even more frequent during these last few years due to two reasons. The first is that, since 2002, the arrest of irregular foreigners has been one of the means that police officers and *gendarmes* have found to satisfy the political injunction to increase arrest rates[203]. The second is that since 2007, with the creation of the ministry of immigration, the French government decided to organise a real "hunt" against irregular foreigners, with targets that included figures imposed upon police officers and *gendarmes* for the purpose of «attaining numbers» in this field as well[204].

For all these reasons, it cannot in any case be considered that the people accused by the police constitute a representative sample of verified delinquency, *a fortiori* of real delinquency. Furthermore, in evaluating the weight of foreigners among the people accused, one must recall that certain offences only apply to foreigners. It is a matter of so-called «administrative delinquency» (Mucchielli, 2003), namely, offences against the "policing of foreigners", but also crimes involving false identity documents and the crime of illegal employment. To calculate the rate of foreigners among police proceedings, such crimes must hence be excluded. Finally, it must be recalled that the foreigners accused are not necessarily people who reside in the national territory. France is also a country with a large amount of movement of people and goods, and one of the leading tourist destinations in the world[205]. Moreover, certain forms of delinquency (particularly any kind of trafficking) are by definition cross-border and some foreigners may hence be arrested in France for crimes committed elsewhere even when they do not live there.

---

[201] See J.H. Matelly, C. Mouhanna, *Police : des chiffres et des doutes. Regard critique sur les statistiques de la délinquance*, Michalon, Paris, 2007. [translator's note: these clearance rates –that is, of crimes whose author was discovered- are similar to those in Italy. The ratio between crimes and people charged in the case of drug offences is similar in all countries and can be explained because the pusher is often a drug addict as well, and arrests for drugs often take place in group, notoriously in the case of police raids in public gardens or sinuous sites in urban areas]

[202] Lévy, Zauberman, *Police, minorities and the French republican ideal*, "Criminology", 41/2003, 4, 1065-1100; Lévy, 2008

[203] Mucchielli, *Le «nouveau management de la sécurité» à l'épreuve : délinquance et activité policière sous le ministère Sarkozy (2002-2007)*, «Champ pénal / Penal Field» http://champpenal.revues.org/document3663.html

[204] See Lévy R., Zauberman R., 1998, *La police et les minorités visibles : les contradictions de l'idéal républicain*, in Cartuyvels Y., Digneffe F., Pirès A., Robert Ph., eds., *Politique, police et justice au bord du futur*, Paris, L'Harmattan, 287-300; Slama, 2008. [translator's note: some have called this input the introduction of the *sarkomètre* - sarkometer]

[205] In 2007, 82 million tourists stayed in France (1.3 times the French population), of whom 45 million for stays that lasted at least four nights (*Les chiffres-clefs du tourisme*, Paris, Ministère du Tourisme, 2008).

2. Evolution of the impact of foreigners on recorded delinquency

Figure 1: Evolution in the number of foreigners among the people investigated 1974-2007

Source: Data from the Ministère de l'Intérieur, re-worked by the authors

Tab. 5: Evolution of the percentage of foreigners (in %) among people charged (1977-07)

Offences	1977	1987	1997	2007	evolution 77-07
Theft	*16.2*	*14.4*	*14.2*	*14.1*	*- 13 %*
of which car and motorbike theft	13.7	11	8.6	6.1	- 55 %
of which theft in a car	18.3	14.3	10.6	9.7	- 47 %
of which theft in a shop	17.3	19	23.9	21.8	+ 26 %
of which break-ins or in a flat	14.9	11.6	10.4	11.6	- 22 %
of which using violence without a firearm*	23.9	18.8	16.6	13.6	- 43 %
Physical violence	*17.1*	*13*	*12.7*	*13.1*	*- 23 %*
of which different murder	18.4	15.6	15.1	16	- 13 %
of which CBV (intentional blows and injury)	24	17.4	15.8	13.9	- 42 %
of which sexual violence	29.8	18.5	12.4	13.4	- 55 %
of which other sexual crimes	15.7	13.3	8.6	21.4 **	-
Public order crimes					
of which destruction, degradation of private goods	13.5	12.2	11	7.6	- 44 %
of which destruction, degradation of public goods	9.4	9.6	8.9	4.8	- 49 %
of which drug trafficking/dealing	62.5	39	21	22.7	- 64 %
of which drug use	10.5	15.6	8.8	6.9	- 34 %
of which IPDAP (off. vs. public authorities)	13.2	12.8	14	10.5	- 20 %
Administrative delinquency					
"Policing of foreigners"	96.3	96.8	97.5	97.2	=
False identity documents	79.2	68.7	71.2	77.1	=
Illegal employment	-	-	23.5	31.5	
Overall	23.5	16.8	17.2	20.9	- 11 %
Number of foreigners charged	136 749	130 070	142 053	235 767	x 6,4
Total, calculated again***	13.8	12.7	12.7	10.7	- 22 %
Number of foreigners, calculated again	78 619	93 437	93 261	119 149	x 1,5
Total number of people charged	582 770	775 756	797 362	1 128 871	x 2

Source: Ministère de l'Intérieur, calculations by the authors

* = except for the year 1987, when the published figure corresponds to «theft using violence with any sort of weapon»

** = a figure that has surprisingly been rising quickly since 2002;   *** = total excluding «administrative offences»

Figure 1 clearly shows that the course of the curve of the total of foreigners charged is identical to that of foreigners subjected to proceedings solely for

offences against the policing of foreigners. In other terms, the delinquency of foreigners and its evolution are primarily and most of all the result of repression against "illegal" immigration.

As for the rest, crimes against property (theft and theft with a break-in), those against people (acts of physical and sexual violence) and economic and financial offences only vary slightly (fraudulent activity, counterfeit goods, stolen cheques, fraud and other offences against legislation on prices and competition, on transport, etc.). Crimes against property are stable in the overall period, as are economic and financial offences. The only ones that increase, particularly after the mid-1990s, are acts of physical violence. But it is not something that applies to foreigners, it is a general trend that can be explained through the deep processes of "penalisation" and transformation of the norms on violent acts[206].

Table 5 shows the proportion of foreigners in comparison with the totality of people charged with offences, according to the main categories of offences, comparing it for every decade starting from 1977. Hence, we can suggest the three following observations.

a) During the last thirty years, the portion of foreigners within the overall delinquency has decreased, but the trend has nonetheless reversed in the middle part of the period. In reality, this is due, again, to the repression of "illegal" immigration. Excluding «administrative delinquency» (offences that almost exclusively concern foreigners or in which they are, almost by definition, over-represented: offences against the policing of foreigners, illegal employment, false identity documents) from the calculation, a constant decrease in the proportion of foreigners among people who are charged can be appreciated, until it falls to 10.7% in 2007[207].

b) Apart from some rare exceptions such as theft in shops (quintessential poor people's delinquency), the portion of foreigners among the people who have been charged has decreased over thirty years in every category of crime. The most substantial decreases concern inter-personal violence, offences against drug legislation (especially trafficking) and destruction-degradation.

c) While it had increased slightly between 1987 and 1997, the number of foreigners reported increased greatly between 1997 and 2007. Hence,

---

[206] Mucchielli, *Une société plus violente ? Analyse sociohistorique de l'évolution des violences interpersonnelles en France depuis les années 1970*, «Déviance et société », 2/2008b, 115-146.

[207] [translator's note: The French situation thus appears different from the Italian, Spanish or even Greek ones, that is, different from that of southern countries, primarily because France is a country of "old" immigration in which, despite the approach adopted by governments in the last decade and particularly by Sarkozy, certain guarantees remain strong, at least for regular migrants (less precariousness as regards the keeping of one's residence permit). However, if it were possible to "delve" further into official statistics, it would be easy to discover that a majority of the French who are reported, arrested and imprisoned is composed by French youths, born in France, but from parents with foreign origins, often from Maghreb countries and particularly Algerians. This is what arises from testimonies given by prison workers; unfortunately, ethnographic research on police practices and those in prisons are rather rare in this country]

something has happened in the most recent years. We will see that it is what we may call the «Sarkozy effect».

3. The role of foreigners in the «new management of security» (after 2002)

As a previous research work shows (Mucchielli, 2008a), on his arrival at the interior ministry, Sarkozy sought to impose a «new management of security» to the 237,000 French police officers and *gendarmes*. The goal was two-fold: on the one hand, to lower the official figure for recorded delinquency, on the other, to cause the indicators for «police performance» to increase (clearance rate as to the authors of crimes, number of people arrested and number of people accused, that is, reported to the judicial authority). To reach this goal set in advance and under the control of the entire hierarchical chain of command (with sanctions affecting professional advancement for officials and encouragement, even through awards for merits earned), police officers and *gendarmes* were induced to deal less with matters that had a "low clearance rate" (i.e. the many types of theft) and to concentrate on crime that brought «higher yields» in terms of the identification of the author. In this context, multiplying controls in the street and in places frequented by foreigners (sometimes including police headquarters where foreigners seek to obtain permits and are called to turn up for "trap call-ups"), as well as in the offices of associations and even hospitals that are now considered «public places»[208], the forces of law and order have strongly intensified their hunt against migrants in an irregular situation[209]. They have also heightened the persecution of drug users as well as that concerning inter-personal disputes of slight seriousness (insults, threats, minor violence) whose authors are easy to pursue because they are explicitly reported by the victims.

---

[208] This unprecedented hunt has only partly been stopped at the gates of schools, thanks to the mobilisation of the «Network for education without borders» (www.educationsansfrontieres.org).

[209] This is the purpose of Circular JUSD0630020C of 21 February 2006, jointly issued by the interior and justice ministries, concerning: «Conditions for controlling the identity of a foreigner in an irregular situation, for holding a foreigner in an irregular situation, penal responses» (17 pages), that aims to «invite prosecuting magistrates to fully invest this shared field of action and to define certain directions in the penal response» as well as «reminding police chiefs of the need to issue orders for accompaniment to the border while specifying certain rules of procedure, notably as regards the specific circumstances of identification in one's residence or in police headquarters». The practice of «trick call-ups» to police headquarters has twice been disapproved by the Court of Cassation, whose latest decision (25 June 2008) lays out that: «the administration cannot use a call-up [of a foreigner] to police headquarters to examine their administrative situation requiring their presence, to proceed to identify them with a view to holding them without breaching French law as well as the European Convention on Human Rights.

Table 6: The evolution in foreigners reported between 2001and 2007

	2001	2007	evolution in %	% in the evolution*
Offences vs. policing of foreigners	52,130	108,675	+ 108	70.5
Theft in a shop	13,791	12,447	- 9.7	- 1.7
Intentional bodily harm	12,212	19,701	+ 61.3	9.3
False identity documents	6,389	4,454	- 30.3	- 2.4
Receiving stolen goods	5,586	6,638	+ 18.8	1.3
Drug use	4,508	8,015	+ 77.8	4.4
«Other crimes»	4,115	6,377	+ 55	2.8
IPDAP (see above)	3,992	4,435	+ 11.1	0.6
Fraud and confidence tricks	3,834	6,172	+ 61	2.9
Threats or blackmail	3,416	5,198	+ 52.2	2.2
Illegal employment	1,859	3,489	+ 87.7	2
«Other sexual attacks»	564	3,341	+ 492	3.5
Others (various)	43,148	46,825	- 7.9	
Total of foreigners reported	*155,544*	*235,767*	*+ 51.6*	

Source: Ministère de l'Intérieur, produced by the authors. * the calculation is: (nb 2007 – nb 2001 of the offence) x 100 / (nb 2007 – nb 2001 of the total)*

Table 6 allows to measure the impact of this policy on the repression of "illegal" immigration and, consequently, its contribution to this «new management». Then, one can see that a 70.5% portion of the growth in the number of foreigners reported between 2001 and 2007 is accounted for by "illegal" immigration. Furthermore, it can be calculated that just the increase in the number of foreigners reported since 2002 represents 21% of the entire increase in people reported. In other terms, the hunt against "illegals" has considerably contributed to the general improvement of the «police performance» during that period. Some equivalent calculations could be made with regards to clearance rates and the number of people held and arrested. That is, foreigners appear to be a category of people who are particularly profitable for police statistics, just as, moreover, is the case for that of drug users (Mucchielli, 2008a).

III. *The role played by foreigners in delinquency according to judicial statistics*

Judicial statistics provide a review of the guilty verdicts passed by the totality of the French courts, on the basis of (partially) checking through the register. These statistics have been published on a yearly basis since 1984, and they provide a detailed breakdown of the offences, gender, age and nationality

of people who have been found guilty[210]. In table 7, on one side we compare the composition of delinquency by French nationals that has been tried with that of foreigners, and on the other side, the incidence of foreigners for each kind of offence (the last column to the left).

Comparison of the two structures throws up an almost perfect likeness, from a judicial perspective, in the distribution between crimes, offences and fines. Foreigners merely appears to be sentenced slightly less for crimes and offences and somewhat more as regards fines. In the breakdown of offences (that represent 94% of overall guilty verdicts), one immediately finds the over-representation of foreigners among the «administrative offences» categories (offences against the policing of foreigners, false claims in documents and illegal employment). Otherwise, in comparison with nationals, foreigners are more often charged for theft, in equal measure for physical and sexual violence[211], and less often for the majority of other offences, including those against the traffic code. In a political context (especially in 2006, that is, the year when most of the participants in the revolts of 2005 were tried) in which foreigners were often accused of lacking respect for the State and of contributing to social disorders[212], it must be noted, on the contrary, that their delinquency is less marked than that of nationals as regards offences against public officials (meaning especially police officers), as is also the case for destruction-degradation. In sum, there is an almost perfect likeness between the composition of foreigners' delinquency and that of nationals.

---

[210] Unlike police statistics, they include traffic delinquency and 5th class fines (the more serious ones, the others are tried by police courts).

[211] However, with clearly less sexual attacks on minors compared to nationals.

[212] See *supra* note 3, notoriously, the declarations by Sarkozy concerning the November 2005 revolts.

Table 7: *Comparison of the composition of delinquency by foreigners and French nationals in judicial statistics (2006)*

	foreigners charged	% of tot foreigners	French charged	% of tot French	% offences by foreigners
Crimes (serious)	372	0.5	2,870	0.6	11.5
Offences	72,670	94.1	471,441	95.2	13.4
Fines (5th class)	4,165	5.4	20,619	4.2	16.8
Total	77,207	100	494,930	100	13.5
Total exc. «administrative offences»	*69,486*		*488,586*		*12.4*
Breakdown of offences	*72,670*	*100*	*471,441*	*100*	*13.4*
Road traffic	25,372	34.9	194,506	41.3	10.6
Theft and receipt of stolen goods	14,157	19.5	89,230	18.9	13.7
Intentional bodily harm and violence	6,722	9.3	45,062	9.6	13
Policing of foreigners	4,651	6.4	427	0.1	91.6
Drugs	3,792	5.2	29,821	6.3	11.3
Fraud	2,036	2.8	12,064	2.6	14.4
IPDAP (see above)	1,800	2.5	15,871	3.4	10.2
False claims in docs.	1,612	2.2	2,779	0.6	36.7
Irregular employment	1,458	2	3,138	0.7	31.7
Destruction, degradation	1,341	1.8	18,081	3.8	6.9
Attacks vs. morality *(incl. against minors)*	1,329 *(278)*	1.8 *(20.9)*	8,750 *(4,483)*	1.8 *(51.2)*	13.2
Involuntary violence	961	1.3	10,886	2.3	8.1
Others	7,439	10.3	40,826	8.6	15.4
Weight of «administrative offences»	*7,721*	*10.6*	*6,344*	*1.4*	*54.9*

Source: Ministère de la Justice, «Sentences» series.

Table 8: comparison of the composition of delinquency by French nationals and foreigners in police and judicial statistics in 2006

	% foreigners guilty verdicts judicial	% foreigners involved in proceedings police
Theft and receipt stolen goods	13.7 %	15 %
Fraud, confidence tricks	13.4 %	14.7 %
Destruction, degradation	6.9 %	7.5 %
Intentional bodily harm and violence	13 %	14.7 %
Attacks against morality	13.2 %	20.5 %
Verbal threats	11.2 %	13.7 %
Drugs	11.3 %	8 %
Policing of foreigners	91.6 %	97.7 %
IPDAP (see above)	10.2 %	11.5 %
Total	13.5 %	20.7 %
Total excluding administrative offences	12.4 %	12.6 %

Sources: Ministère de l'Intérieur and Ministère de la Justice

Through table 8, we attempt to compare data from police statistics (people charged) and those from judicial statistics (people found guilty), observing the proportion of foreigners in the different categories of offences according to the two sources and for the same year (2006, the last one for which the administration of justice services have published data). It can be noted that the police overestimates the weight of foreigners in delinquency because it prosecutes many offences against the policing of foreigners (they will later be dealt with through an administrative rather than judicial course). Once such offences have been excluded, the part played by foreigners in recorded delinquency is nonetheless globally similar (around 12.5% for both populations). In the breakdown, one can likewise observe an overestimation by the police in the majority of types of offences[213]; the most important gap concerns violence in general and sexual violence in particular. Here, one may conjecture that police investigate several events of slight seriousness that courts shelve or treat in alternative ways other than committals to trial.

---

[213] An exception is represented by offences against drug legislation, and more precisely only drug trafficking (in which foreigners represent 23.5% of people accused by the police and 33.7% of the people found guilty (the difference can be explained through the fact that judicial statistics draw a distinction between «trafficking (import/export)» that, here, we have instead added to the other two sub-categories: «trade-transport» and «offer-sale».

Now, let us see the types of sentences passed by courts against foreigners and how they are executed[214].

IV. *The sentences inflicted on foreigners and the evolution of their imprisonment*

Furthermore, judicial statistics on guilty verdicts make it possible to observe the (main) sentences passed against foreigners and to compare them with those inflicted on nationals. Thus, on the one hand table 9 summarises the available information on the number of foreigners on the basis of the types of sentences and the proportion of foreigners for each kind of sentence, and on the other hand, in particular, it enables a comparison of the structure of the sentences inflicted to members of both populations.

About foreigners who are always punished more heavily for the same offence

As the following table shows, even when the composition of their delinquency is similar to that of nationals, overall, foreigners are more heavily punished than nationals. In effect, they are more often sentenced to serve prison terms. To be precise, they are sentenced more often to imprisonment or to a partial sentence suspension, and less often to complete sentence suspension, while longer sentences are also passed against them.

Table 9: Number and proportion of foreigners, based on the main sentence in 2006

Nature of the main sentence	foreigners found guilty	% foreigners of the total found guilty	composition of sentences for foreigners	composition of sentences for total found guilty
Imprisonment	43 134	13.5	55.9	51.9
Of which imprisonment	*169*	*13.4*	*0.2*	*0.2*
of which confirmed	*20 394*	*17.2*	*26.4*	*19.3*
- for less than 1 month	*406*	*12.2*	*0.5*	*0.5*
- 1 to 6 months	*11 619*	*16.3*	*15*	*11.6*
- 6 months to 1 year	*3 899*	*16.5*	*5*	*3.9*
- 1 to 5 years	*3 952*	*21.8*	*5.1*	*3*
- more than 5 years	*518*	*23.1*	*0.7*	*0.4*
With complete susp. sent.	*22 571*	*11.4*	*29.2*	*32.3*
Fine	25 889	13.2	33.5	32
Alternative sentence	5 835	9.5	7.6	10
Educational measure	1 513	5.2	2	4.8
Educational punishment	42	5	0	0
Sentence exemption	794	10.3	1	1.3
Total of sentences	77 207	12.6	100	100

Source: Ministère de la Justice, «Sentences» series

---

[214] Unfortunately, data that crosses nationality with judicial procedures and decisions prior to final rulings are not yet available.

Finally, they are sentenced to pay fines slightly more often than nationals. On the contrary, they are sentenced to serve alternative sentences or educational measures less often. Hence, in 2006, we again find a situation that has been noted various times over the last few years[215].

How is one to understand –with the same offences- this greater strictness with regards to foreigners and, in particular, the more frequent use of detention?[216] The customary explanation claims that it is not a form of discrimination based on reasons of an ideological kind, but rather, a sort of vicious circle based on a situation of instability that is simultaneously judicial and social for many foreigners. Regardless of whether they have a regular residence permit, foreigners investigated for offences committed on French territory, *by definition*, offer «guarantees of representation» at trials less often: home address, family situation, employment (Tournier, Robert, 1991, 87; Mary, Tournier, 1998, 17). In simpler terms, in many situations, when they are subjected to the police or *gendarmerie*'s services, the PMs (investigating magistrates of the *court* who decide the approach adopted in proceedings) may fear that the foreigners may not turn up at later summons by the court[217]. Hence, they resort more often to the procedure of immediate appearance, during which magistrates opt more often for provisional detention, something that the final sentences generally take into account for the purpose of «covering» (justifying) the time of this detention[218].

---

[215] *Cf.* P. Tournier, *Nationality, Crime and Criminal Justice in France*, in Tonry M., ed., *Ethnicity, Crime, and Immigration. Comparative and Cross-National Perspectives*, "Crime and Justice. A Review of Research", vol. 21/1997, University Press of Chicago, 523-551 [A version of this text is available in *Délit d'immigration*, Palidda (ed.), Cost A2Migrations, EC, 1996]; F.L. Mary, P. Tournier, *La répression pénale de la délinquance des étrangers en France*, «Information - Prison – Justice», no. 84/1998, these use judicial statistics from 1991. Also, see the «civic observation» undertaken by militants from the Cimade (*Les prétoires de la misère. Observation citoyenne du Tribunal correctionnel de Montpellier*, «Causes Communes» collection, not part of a series, January, 2004), insofar as it is resembles a real research work (based on the observation of 50 days of hearings in the TGI -*tribunal de grande instance*- of Montpellier and the judicial treatment of 480 people stopped, of whom 25% were foreigners). This research also stresses that foreigners are more often subjected to trial using a procedure of immediate appearance and that, with the same offences and criminal records, they are punished more heavily than French nationals. [translator's note: the same kind of result was obtained through the research carried out by Palidda and Quassoli for the Migrinf project (fp5) in 1995-98, results that were partly published in Quassoli, 1999 and 2002]

[216] [translator's note: This type of results is also obtained by analysing similar cases in Italy –see, in particular, Quassoli, 1999 and 2002]

[217] Call-ups addressed to them in writing to an address that is not necessarily theirs, or which magistrates may deem temporary or false. [exactly the same thing happens in Italy; see Quassoli, 1999, 2002; as well as Petti, 2004]

[218] See M. Guillonneau, A. Kensey, C. Portas, *Détenus étrangers*, «Cahiers de démographie pénitentiaire», 6/1999, 1-4; Aubusson de Cavarlay, 2006. We have seen that foreigners represent more than 90% of the people found guilty for offences against legislation for the "policing of foreigners"; now, such offences have given rise to a measure of provisional detention in 27.5% of cases in 2005 (Commission de suivi de la détention provisoire, *Rapport 2007*, Paris, Ministère de la Justice, 2007, p. 35). The *Commission Nationale Consultative des Droits de l'Homme* (National Commission for Consultation on Human Rights) has also reported that foreigners have been those most often subjected to provisional detention: 41.7% among imprisoned foreigners compared with 31.3% among nationals in

Other research works have highlighted that, regardless of whether they are foreign or have turned French, «youths with Maghreb country origins» seem to be victims of a distinctive punitivity. This is what at least three original studies suggest. In a dated work on procedures for people caught *in flagrante delicto* (in the act) in Paris, R. Lévy (1987) had shown that, in equality of offences and judicial records, but also of «guarantees of representation » [references provided to have access to alternative sentencing or to probation], magistrates commit men of a «Maghreb type» for trial more often[219]. More recently, using local judicial data in an innovative way, Pager (2008) has shown that, with an equal volume of offences and unemployment rates, there is a correlation between courts that issue more prison measures and sentences and the departments (provinces) in which young men of Maghreb country origins are more numerous[220]. However, this is not to say that the discriminatory mechanisms are to be found at the judicial stage. The research by Jobard and Nevanen (2007) devoted to the judicial treatment of offences by public officials, also confirms the judicial inequality, but traces back a sort of vengefulness with clarity to the police proceedings phase that specifically targets men «of Maghreb country origins»[221]. We will return to this point in the conclusions.

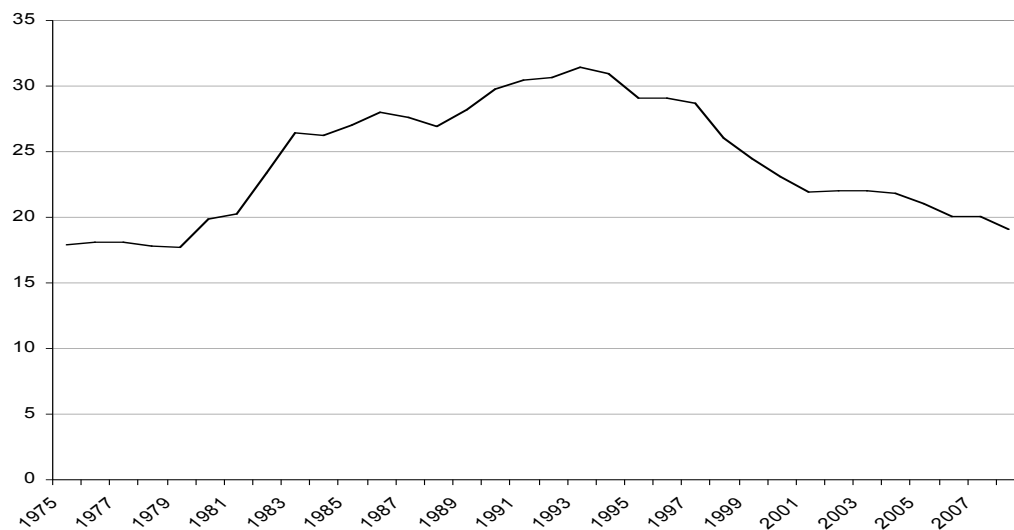*Nonetheless, there is a decrease in the foreigners' part of the prison population*

2004 (CNCDH, 2004, 4). [translator's note: the same sort of result was obtained in a research work for the EU* and later Emilia-Romagna region project in the years 1994-99 (Palidda, 1999). We recall the public protests by Milan prosecuting magistrates against the misuse of arrests that caused a high percentage of them not being validated and a waste of resources for the court –see the results that were partly published in Palidda, 1998; 1999, 2000; 2001]

[219] R. Lévy, *Du suspect au coupable. Le travail de police judiciaire* , Paris-Geneva, Méridiens Klincsieck-Médecine et Hygiène, 1987

[220] D. Pager *The Republican ideal ? National minorities and the criminal justice system in contemporary France*, "Punishment and Society", 4/2008, 375-400.

[221] F. Jobard and S. Nevanen, *La couleur du jugement. Les discriminations dans les décisions judiciaires en matière d'infractions à agents de la force publique (1965-2005)*, «Revue française de sociologie», 48/2007 (2), 243-272.

Figure 2: evolution of the weight of foreigners on the prison population 1975-2008

Source : Direction dell'Administration pénitentiaire

In spite of everything that has been said so far, the evolution of the imprisonment of foreigners has moved downwards since the mid-1990s (after an inverse movement during the previous period). On 1 January 2008, foreigners were 19.1% of the prison population, whereas in 1993 they had reached 31%[222]. This decrease can mainly be explained through the lessening of guilty verdicts for offences against the policing of foreigners and, to a lesser extent, those concerning offences against drug laws and simple theft. This trend is also accompanied by a progressive change in the origins of imprisoned foreigners. While in 1993 people from Maghreb countries represented around 57% of detained foreigners, that proportion fell to 36% in 2006 (Hazard, 2008). Conversely, there are increasingly more cases of foreigners from Asian and eastern European countries (particularly Romanians)[223].

In an age in which the criminalisation of foreigners is experiencing a strong revival, while the overall prison population has been unceasingly growing

---

[222] *L'administration pénitentiaire en chiffres*, Paris, Ministère de la Justice, 2008. [This figure is even more surprising if compared to that recorded in Italy and generally in southern European countries, as well as in countries that, unlike France, have not had an "assimilationist" past. In effect, the holding in custody of foreigners takes place mostly under the "new" forms of detention, but there is also a figure that official statistics do not show, and that the authors cannot comment upon here due to a lack of specific data: as shown by some testimonies, a majority of French inmates have foreign origins, particularly from Maghreb countries.]

[223] It is not surprising that the dominant social characteristic of this population remains its deficit of economic and social integration (half of the detained foreigners were not active before imprisonment, added to around 30% who were unemployed, that is, in total, 80%. Obviously, the part played by illegal employment is not known. [translator's note: as shown by some research works in Italy and in other countries, the mechanism of "replacement" is confirmed here: the last arrivals are always worse off in every field, from housing, to illegal employment, to illegal activities and in turning into the "easy preys" for police productivity and racism alike –see Palidda, 2008]

since 2001 and police proceedings for offences against the norms on foreigners (ILE) have also risen sharply since 2002, one may find the fall in the number of foreigners surprising. Analysing the reasons for entry into prison, it can nonetheless be verified that this decrease can be mainly explained through a fall in the number of entries resulting from ILEs[224]. To understand this apparent paradox, one must look at the punishment of irregular immigration.

V. *Evolution of the different forms of administrative detention*

For some time, imprisonment after a judicial decision has no longer constituted the only, nor the main means for the repression of "illegal" immigration. Hence, we will look at the two other kinds of detention: «holding in waiting zones» and that «in administrative detention», that is, the most common treatment used for "illegal" immigration since 1990.

Holding people in waiting zones

Waiting zones were established through the law dated 6 July 1992 that legalised (and made more transparent) a previous administrative practice. Such zones were set up to hold foreigners who arrived at the borders (by land, air, sea or rail routes) and were not authorised to enter French territory; a part of them apply for political asylum. The waiting zone is hence used to receive them for the necessary time or to make them leave again, or even to examine their asylum application. Control is firstly exercised by the border police (PAF), that can hold someone for up to 72 hours, after which a judge can order an extension. In total, foreigners (individuals or families with children) can be held for up to 20 hours in waiting zones, on the basis of a judicial decision. Once this term has passed, if the police has not expelled them, it must let them into French territory but can immediately control them again, put them back into detention and bring them before the court for «avoiding the execution of a refusal of entry measure», a crime that is liable to incur several months' imprisonment (and is generally accompanied by a ban from French territory). Even though the main waiting zones (the most important one is in Roissy-Charles De Gaulle airport, with around 170 places) are well known, ANAFE[225] estimates that there are more than a hundred that are sometimes not active and impossible to control (those for detention in police stations, or also in hotel rooms that are seized *ad hoc*). All of this takes place in living conditions that

---

[224] A. Hazard, *Les étrangers dans les statistiques pénitentiaires*, «Cahiers de démographie pénitentiaire», 25/2008, 1-4.

[225] National association for assisting foreigners at borders. ANAFE is a "1901 law association" established in 1989 for the purpose of ensuring an effective presence among foreigners who are not allowed entry at borders or await a decision on admission in order to apply for asylum, and hence to be able to exert pressure on public authorities so as to ensure that the fate reserved to such foreigners respects French law and the international conventions ratified by France. Plenty of information is available on its website*.: www.anafe.org

are often degrading and which associations as well as occasional observers have never stopped criticising[226].

The number of foreigners detained in waiting zones has grown from 1992 to 2001, a year in which it reached around 23,000 detentions. After 2002, the figures (around 16,500 people detained in 2006) have decreased thanks to bilateral agreements and police and administrative practices that seek to dissuade migrants "upstream".

Administrative detention

Foreigners accused by the police and punished by the public administration or courts for the sole offence of contravening norms on the policing of foreigners[227], can be interned in *administrative detention centres and places* awaiting expulsion from the French territory. Until 1981, foreigners undergoing expulsion proceedings were detained in prisons. When the left came to power in 1981, it sought to mark a break with the previous administration, creating a form of administrative detention that was independent from prison administration. The law of 29 October 1981 hence created administrative detention for a maximum duration of seven days, but it did not organise its implementation at all and, in particular, in did not define specific places for it. In practice, these places are generally run-down, often under the control of the prison administration service or the state police, and some of them are none other than the old internment camps from the Second World War[228]. In 1984, Administrative Detention Centres (CRA) were created in large cities and assistance for the detained people was entrusted to a national association, Cimade[229]. Finally, the decree of 19/3/2001 regulates living

---

[226] A. Loisy, *Bienvenue en France ! Six mois d'enquête clandestine dans la zone d'attente de Roissy*, Paris, Le Cherche Midi, 2005; L. Mermaz, *Les geôles de la République*, Paris, Stock, 2001.

[227] Over 80% of the removal measures that are the reason for these detentions in CRAs are orders issued by the police chief to be accompanied back to the border due to irregular stays in France (and do not follow a guilty verdict for any offence). If arrests with a view to re-admission into third countries are added, such crimes (against the policing of foreigners) represent around 90% of detentions in CRAs. Finally, one must also add the part of banning orders from French territory that Cimade is unable to provide figures for; this means that internments in CRAs due to mere offences against the "policing of foreigners" make up 90-95% of the total (Cimade, *Centres et locaux de rétention administrative. Rapport 2006*, Paris, Cimade, 2007).

[228] [translator's note: In such camps, even ordinary Italians who were immigrants in France and had not yet disowned their nationality were detained – on camps, see no. 4 of "conflittiglobali" magazine, 2007]

[229] CIMADE, the «ecumenical service for mutual aid», is a Christian anti-racist association established in the 1930s. For around the last twenty years, it has been the only association authorised to enter detention centres for the purpose of providing a mission of «legal and social assistance» to detainees. Thus, it constitutes the only guarantee of a minimum of transparency on detention conditions. However, a decree dated 22 August 2008 envisages to break its monopoly by creating regional "allotments" and specifying that operators will be bound to maintain «neutrality» and «confidentiality», which will effectively impede the publication of this association's annual and national reports, which the government certainly deems to be excessively critical. The real threat is that this apparent «opening to competition» may in fact lead to securing total acquiescence about detention (www.cimade.org).
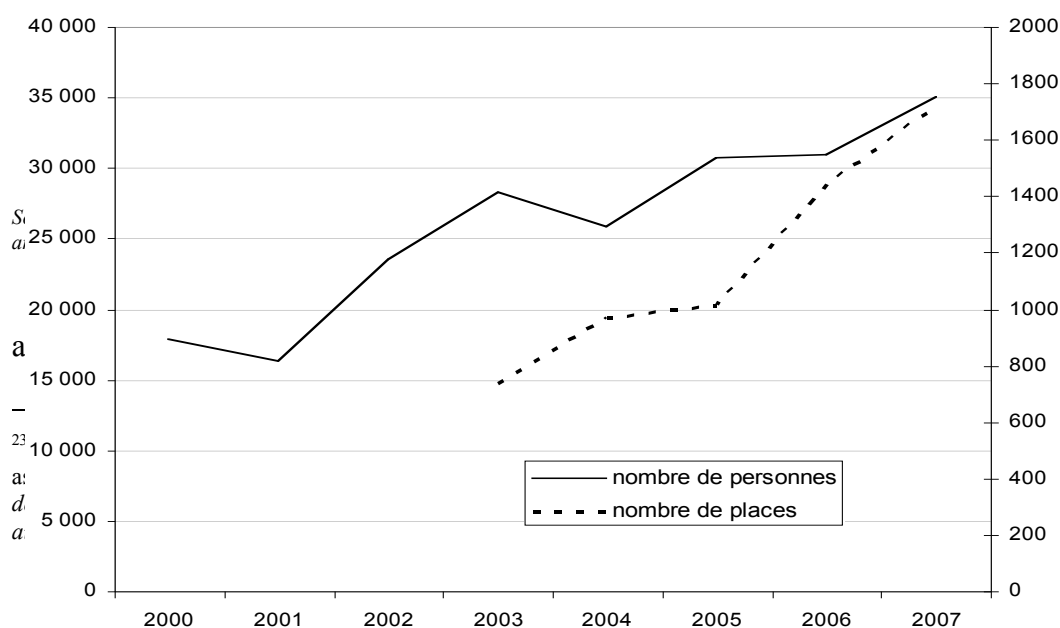
conditions in the CRAs, setting the most elementary judicial and material norms.

For fifteen years, in several instances, governments have extended the maximum duration of detention. In 1993, it was raised to 10 days, then to 12 in 1998, with its official goal always remaining that of enabling conditions to carry out expulsions. However, the law of 26 November 2003, the so-called Sarkozy law, caused a real watershed, suddenly bringing the maximum length of detention from 12 to 32 days. This considerable extension was also accompanied by an increase in the number of available places that the decree of 12 July 2007 envisaged to raise to around 2,000 by the end of 2008, in the 26 CRAs (of which ten are certified as suitable to receive families with children).

Figure 3 illustrates this evolution. From 2003 to 2007, the number of available places grew from 739 to 1,724 (a 133% increase) and the number of people detained in a year passed from 22,220 to 35,923 (a 62% increase).

Moreover, the judicial and practical situation of Places for Administrative Detention (LRA) remains more than problematic. LRAs are generally big isolated halls in police stations (or also of the air border police, that is, in airports) or even simple cells. In this case, we are dealing with provisional detention for a maximum of 48 hours, but it is not regulated by law as is the case for CRAs[230]. Taking into account the brevity of detentions and the fact that their visit is not required by law, Cimade workers do not intervene systematically there, and are only able to provide an estimate of the annual flow of interned people: between 10,000 and 15,000. Overall, administrative detention could hence concern an annual flow of around 50,000 internment measures.

Fig.3: Number of available places and flow of people in adminstrative detention from 2003 to 2007

form of imprisonment». So much so, that the people themselves, who are sometimes impossible to expel for legal reasons, are often placed in administrative detention in several instances during the same year[231]. In conclusion, the policy that has been practised since 2003, combined with the expulsion quotas that have been set for every city police chief's office, moves towards a transformation of the nature of administrative detention:

«the latter, having reached an industrial stage by now, is no longer an exceptional measure and limited to the time required for organising a foreigner's expulsion, but it slowly turns into a means of repression and banishment of foreigners deemed undesirable»[232].

Furthermore, administrative detention is carried out in conditions that have been criticised as degrading on many occasions, not just by associations, but also by the State Auditors' Court (2004, p. 417 and following[233]), and that have not ceased to worsen over these last few years due to overcrowding, as is also the case in prisons.

Thus, in reality, the decrease in the number of foreigners who are imprisoned every year (from 26,948 to 17,232 from 1993 to 2007, that is, a 36% decrease) conceals a continuous increase in the administrative forms of detention. With around 50,000 people placed in administrative detention and

---

[231] Cimade writes: «in the Marseille CRA, out of 3,132 detainees in 2007, at least 260 had already been interned in the same CRA (at least 80 during the 3rd quarter and 98 in the last one). One foreigner was interned as many as five times during that year after his last 32-day detention. Three others returned four times, 13 for as many as three times and 160 twice, always in the same year. The others, 83 people detained just once in 2007, had already been interned repeatedly in the previous years. In principle, the Constitutional Council's "reserve of interpretation" on 22 April 1997 authorises just one repetition of placement in detention on the basis of the same expulsion measure. In practice, we find that it is not rare for police chief's offices to detain a foreigner several times on the basis of the same decision. On the other hand, it also happens that a foreigner who is heard more than once in the same year has a new expulsion decision issued against him and is hence subjected to a new denial of freedom. This distortion of procedure turns detention into a repressive measure [translator's note: not a penale one]. Hence, internment is practised to organise the removal of a foreigner in an irregular situation but constitutes a «punishment» applied to a person that the Administration is unable to expel. The same logic operates at the end of the first 32-day period of detention, when the police chief's offices, deeming that the foreigner has lied or not provided them the elements that would enable their identification and the issuing of an LPC (consular travel permit) by their country of origin, choose to refer him to a penal jurisdiction for "obstructing a removal measure". In such cases, the foreigner is more often condemned to serve a prison sentence accompanied by a ban from French territory (ITF). At the end of his imprisonment, he is put back into a detention centre. He may even be subjected to an ITF as his main punishment. In this case, at the end of the hearing, he is immediately taken to the CRA. In the majority of cases, being led back there is no more effective after this second term, and the foreigner is hence either released or referred again. Thus, numerous foreigners experience a denial of freedom that goes well beyond the 32 days that are theoretically envisaged by law. Enclosed within a cycle composed by many detentions or of leaving-and-returning from detention to detention, there is no way out for them. (Cimade, 2008, 10). [translator's note: All these tragic vicissitudes that have sometimes led to total desperation, self-harm or revolts in such centres have been taking place for over a decade and continuously occur]

[232] Cimade, *Centres et locaux de rétention administrative. Rapport 2007*, Paris, Cimade, 2008; see, also, the analyses by A. Tsoukala, *The administrative detention of foreigners in France. An expanding network of exclusionary spaces*, in A. Mehra A., R. Lévy, eds. *Civil Society, State and the Police in India and France*, New Jersey, Pearson Education (in print), 2009

[233] Cour des Comptes, 2004, L'accueil des immigrants et l'intégration des populations issues de l'immigration, Paris, Cour des Comptes, 2004

over 16,500 in waiting zones, the flow managed through these forms of detention is, by now, at least four times greater than that in the prison system.

Conclusions

The portrayal of the dangerousness of foreigners is undoubtedly one of the oldest social fears and one of the oldest resorts of political demagogy[234]. From the mid-1980s, with the emergence of the *Front National* (Le Pen) on the political scene, the persistence of its electoral weight and of the importance of its xenophobic opinions[235], this representation has acquired new vigour and has had such an impact in the political field that it has made debates on immigration and nationality something recurring. This criminalisation of migrants has been further strengthened at a European level since the start of the 2000s, in the context of the «war against terrorism» after the attacks of 11 September 2001[236]. It is in this context that we have sought to update the analysis of available data on delinquency, victimisation, criminalisation and the penal treatment of foreigners. We have thus ascertained that: 1) foreigners and nationals have overall types and levels of victimisation that are similar (with a slight over-victimisation for certain foreigners), 2) the evolution of delinquency by foreigners investigated by the police forces is composed, first of all and mostly, by offences against the policing of foreigners, that is, "crimes" of "illegal" immigration; 3) if this «administrative delinquency» is excluded, the part played by foreigners in overall delinquency has been decreasing for thirty years; 4) the composition of foreigners' delinquency is not dissimilar from that of French nationals; 5) however, foreigners are more severely punished than French people, for reasons that primarily concern the precariousness of their living conditions; 6) in spite of this, the proportion of foreigners in prisons is decreasing, something that can be explained through the development of forms of administrative internment and the speeding up of expulsions («accompaniment to the border»).

Hence, if foreigners occupy a relatively important part in the administrative and penal systems and particularly cause considerable work for the penal institutions, this is primarily because the public authorities repress "illegal" immigration. As for the rest, the «penal» delinquency of foreigners, like their victimisation, cannot be distinguished from that of nationals. In reality, their

---

[234] G. Noiriel, *Immigration, antisémitisme et racisme en France (XIXè-XXè siècle). Discours publics, humiliations privées*, Paris, Fayard, 2007

[235] Which, every year, measure the surveys published in the reports by the Commission Nationale Consultative des Droits de l'Homme (CNCDH, 2004, *Etude sur les étrangers détenus*, Paris, Commission Nationale Consultative des Droits de l'Homme, 28 pages; CNCDH, 2008, *La lutte contre le racisme et la xénophobie : rapport d'activité 2007*, Paris, La Documentation française).

[236] D. Melossi, ed., *Symposium on Migration, punishment and social control in Europe* , «Punishment and Society», 4/2003, 371-462 ; Palidda S., 2008, *Mobilità umane. Introduzione alla sociologia delle migrazioni*, Milan, Raffaelo Cortina; E. Guild, *Les étrangers en Europe, victimes collatérales de la guerre contre le terrorisme*, in D. Bigo, L. Bonelli, T. Deltombe, dir., *Au nom du 11 septembre. Les démocraties à l'épreuve du terrorisme*, Paris, La Découverte; 2008, pp. 139-150

over-representation in the delinquency investigated by the police and *gendarmerie* plausibly concerns two main factors, that are rather strictly interconnected.

The first of these factors is their frequent precariousness, from every point of view (legal, economic, social, relational), which constitutes a risk factor in certain types of delinquency. Regardless of how limited they may be, the available indicators speak clearly. To highlight only a few of the socio-economic ones provided by the INSEE here, the unemployment rate for foreigners is more than two times higher than that for nationals (16.3% compared with 7.5 % in 2007), and that of third-country (non-EU) foreigners is three times higher (22.2% in 2007). This is notoriously a consequence of legislation that prevents their access to several million jobs due to discriminatory employment practices that are now recognised and measurable[237]. And this difference is not something that time reduces. This precariousness of living conditions is one of the aggravating factors for certain forms of delinquency that are forcefully repressed by penal institutions[238]. Thus, although the part they play in recorded delinquency decreases overall, foreigners are very heavily over-represented in police statistics on «shoplifting» (22% of the people charged in 2007) and «pickpocketing» (41% of the people charged in 2007), quintessential poor people's crimes. Finally, if we add up the number of foreigners accused for the five police categories of «shoplifting», «pickpocketing», «simple theft against private individuals in a public space», «bag-snatching in the street» and «theft in a parked car and of accessories of vehicles with number plates», we obtain a total of 21,049 foreigners, equivalent to 18% of the total number of foreigners accused without taking "administrative delinquency" into account. The weight of this petty predatory delinquency in the street is therefore important. If, to finish off, we add the foreigners accused for the use and sale of drugs[239] and those prosecuted for «insult, rebellion and violence against public officials», we reach a total of 34,623 people prosecuted as a result of controls in the street, that is, around 30% of the total number of foreigners accused outside of the field of "administrative delinquency".

This introduces the discussion of the second factor of over-representation of foreigners in prosecuted delinquency: over-exposure to police controls in the

---

[237] The poverty rate is far higher among foreign families as well: while 8% of the totality of children lived below the poverty threshold in the late 1990s, this rate for children of parents who are not EU nationals was above 30%, that is, a ratio of almost 1 to 4 (F. Dell, N. Legendre, S. Ponthieux, *La pauvreté chez les enfants*, «Insee Première», no. 896/2003.

[238] Aubusson de Cavarlay, 1985; P. I. Jackson, *Minorities, crime and criminal justice in France*, in I.H. Marshall, ed., *Minorities, Migrants and Crime. Diversity and Similarity across Europe and the United States*, London, Sage, 1997, pp. 130-150; Collective, *L'histoire familiale des détenus*, Paris, Insee, Insee Synthèses collection, 2002.

[239] To distinguish these from trafficking, which, on the one hand, involves foreigners that often do not live in France, and on the other, a majority of whom are undoubtably accused at the end of judicial police inquiries rather than controls in the street.

street. As has already been written by Robert and Tournier (1991, 85-86), non-European foreigners constitute

«a population that has high visibility: heavily struck by unemployment, overladen with low-skilled [people], often precariously housed, migrants have living conditions that expose them to being observed. For many of them, their physical appearance and sometimes their clothing enhances their visibility. […] is a policing of appearance that leads to detention. Moreover, the suspected authors can certainly not oppose the police investigation».

Such a claim is confirmed by research works on the practices and mentality of the police, summed up by two other researchers:

«All the researchers who have closely observed police practices, both in France and abroad, come to the conclusion that it is a matter of a generalised racist discourse that constitutes a veritable norm for police officers to which it is difficult, as a low-level police officer, to escape from and even more to oppose. The character of this police racism as being the norm, firstly turns it into an element of policing culture, separate from customary racism or that of the social layers from which the police officers are drawn, and does not have the character of an ideological or doctrinal construct. […] one does not enter the police due to being racist, one becomes so through the process of professional socialisation. In other terms, the habit of judging individuals on the basis of their supposed ethnic characteristics is acquired in practice, during the course of professional socialisation. […] racist representations have an operative character, insofar as they allow to differentiate among individuals. In practice, by directing police surveillance, they contribute to the mechanism of creative prediction. In some ways, they constitute work tools and form part of an overall body of practical knowledge that shape the backdrop, the reference for policing work. Resorting to ethnic features has a functional character for police officers, as do age and gender, insofar as the policing of the streets primarily refers back to a conception of normality that is conceived as the conformity of a type of population, of a space and of a given moment, to the norm. Any deviation between these three parameters primes police suspicion and may lead to an intervention» (Lévy, Zauberman, 1998, 293-294[240]).

It is always this sort of «ethnic profiling» that drives a part of the interventions by the police in the street, in France like in other countries, *a fortiori* in the «post-11 September 2001» context[241], towards an era of «new» predictions on the dangerousness of «actuarial justice» (Harcourt, 2007) and under the rule of the «new immigration policy», French-style. And it is to be feared that all of this may merely make discriminatory police practices that specifically target migrants coming from the former colonies regain relevance, starting –now as always- from young men of Maghreb-country origins with whom France appears to have a sort of unwitting account to settle ever since the Algerian War.

---

[240] A more developed and updated version can be found in Lévy, Zauberman (2003).
[241] J. Goodey J., ed., *Ethnic Profiling, Criminal (In) Justice and Minority Populations*, "Critical Criminology", special issue, 14 (3), 2006; B. Harcourt, *Against Prediction. Profiling, Policing, and Punishing in an Actuarial Age*, Chicago, Chicago University Press, 2007

Criminalization and Victimization of Immigrants in Germany

Hans-Joerg Albrecht

Introduction: Immigration and the Problem of Social Cohesion

Immigration and its links to crime and victimization continue to receive widespread and ambiguous attention in Germany. When two immigrant youth in December 2007 assaulted and seriously injured an aged person in a Munich subway station a nationwide debate ensued on how to deal with juvenile immigrant chronic offenders. The Munich subway case figured also prominently in the January 2008 election campaigns in the state of Hesse [242] (although the outcome of elections demonstrated clearly that the conservative Christian-Democratic Union party could not profit from emphasizing immigration and violence [243]). Beside demands for toughening youth criminal law requests for stricter enforcement of deportation orders were voiced; the debate then centered around questions of integration of immigrants, in particular also the question of what efforts with respect to integration should be exacted from immigrants and immigrant communities. Some weeks later a fire destroyed an apartment building in Ludwigshafen, a middle-sized city in the southwest of Germany, leaving nine people of Turkish descent dead and several others seriously injured. In the wake of the deadly fire it was quickly assumed that right wing extremists could be responsible for setting fire to the apartment building. Parallels were drawn to the deadly fire bombings of Turkish owned houses in the first half of the 1990ies (Moelln and Solingen) which fell into a period of dramatic increase in hate violence shortly after re-unification and of political conflicts on asylum and restrictions on asylum [244]. While responsibility for the deadly incident remains unclear today, the case has resulted in heavy coverage in Turkish media, in Turkish investigators being sent to Germany for working with German police as well as in being placed high on the agenda of a rather uneasy meeting between the German chancellor and her Turkish counterpart in February 2008 [245]. The Turkish Premier appealed at the occasion of his visit to his countrymen and advised them not to forget their being Turkish. These appeals sparked in turn furious public

---

[242]   www.focus.de/politik/deutschland/jugendgewalt/unions-wahlkampf_aid_232321.html; www.ad-hoc-news.de/Politik-News/de/14789577/(Zusammenfassung+Neu+Reaktionen)+Parteien+streiten+um

[243]   www.forschungsgruppe.de/Studien/Wahlanalysen/Kurzanalysen/Newsl_Hess_Nied08.pdf

[244] Esser, F.: Medienwirkung und fremdenfeindliche Straftaten. Eine Langzeitanalyse von 1991 bis 1996. In: Bundesprüfstelle für jugendgefährdende Schriften (ed.): Von „Antisemitismus" bis „Xenophobie". Rechtsextreme Medien in Deutschland. Bonn 1999, pp. 48-55.

[245]   see www.bundesregierung.de/nn_1516/Content/DE/Mitschrift/Pressekonferenzen/2008/02/2008-02-08-merkel-erdogan-pk.html.

comments alleging the purposeful creation of obstacles to integration of immigrants of Turkish descent.

These cases provide for ample evidence that the social problem of immigration has diversified along various perspectives among which the question of social integration of immigrant minorities certainly stands out. The process of immigration so far has led in Germany (and elsewhere in Europe) to the re-emergence of questions of cultural, ethnic and religious divides in society and ultimately to the question of how social and political integration can be achieved under conditions of ethnic and religious diversity (and modernity). The ongoing discussion on the rise of a "parallel society" [246] points in particular to Muslim immigrants who are perceived to detach themselves from mainstream society.

Evidently, the particular German approach to political integration, that is a federal state with a careful balance between the federal and the state level, is not well-suited to respond to problems of social cohesion and integration in face of substantial groups of immigrants bringing with them ethnic, cultural and religious differences. Federalism was, as was the French tradition of secular Republicanism or the British approach of community oriented pluralism, a fairly efficient approach to identity building and social cohesion in the 19th and 20th centuries but does not provide for solutions in the new millennium.

It is also clear that the traditional concept of immigration obviously does not fit to immigration in Germany. Rather than conventional assimilation or integration immigration generates networks of migration and a pluralism of „transnational communities" [247]. This is facilitated by efficient systems of transportation and by the fact that immigration to Germany sets off in European countries (including Turkey) or in neighboring regions (as eg. the Maghreb countries and the Near East).

Immigration, Immigration Policies in Germany

Post-second world war Germany has experienced a rather short history of immigration with immigration starting around 1960 and significant changes in immigration patterns occurring in the subsequent decades. While the debate in the 1960ies and 1970ies has emphasized the concept of "guest-workers" (migrant workers assumed to return to their home countries after a more or less

---

[246] Halm, D., Sauer, M.: Parallelgesellschaft und ethnische Schichtung. Aus Politik und Zeitgeschichte 2006, 1-2, pp. 18-24.
[247] Nell, L.M.: Conceptualising the Emergence of Immigrants' Transnational Communities. Migration Letters 1(2004), pp. 50-56.

extended period of work), the 1990ies saw a growing recognition that in fact immigration had taken place [248].

The ethnic composition of immigrants and triggers for migration have changed significantly over the last 50 years. Sending countries from which the migrant work force originated have changed with South-Eastern European countries (former Yugoslavia and Turkey) replacing South-West European countries (Italy, Spain, Portugal). At the beginning of the 1960ies approximately two thirds of the foreign population came from now countries of the European Community. In the 1990ies, their share has dropped to less than 30%. Turkish immigrants and immigrants from the former Yugoslavia today account for almost half of the resident immigrant population in Germany. Furthermore, immigrants from developing countries in Africa and Asia make up substantial proportions of the immigrant population since the second half of the 1980ies.

The status of foreign nationals in Germany differs as different legal standards apply to citizens of European Community countries, Turkish citizens (who are in-between European Community status and Non-European Community status and citizens of Non-European Community states). German immigration law makes distinctions between tourists (or short-term visitors), foreign nationals joining the labour force (or enrolling at schools or universities), asylum seekers and refugees (to whom the Geneva Convention applies). Complete abolition of schemes set up for hiring workers abroad and severe restrictions on granting permissions for non-EC foreigners to work in Germany then obviously led in the 1990ies to larger numbers of foreigners applying for asylum (which until amendments of the German constitution and the immigration law had the effect of a preliminary permission to stay on German territory awaiting the final decision on asylum). A rather unique immigration phenomenon concerns ethnic Germans whose ancestors emigrated to Poland, Russia, Romania and who are entitled to be re-naturalized (under the condition that evidence on German origins is provided). 4,5 million ethnic Germans have been re-naturalized between the early 1950s and 2007 [249], the majority of whom immigrated to Germany since the second half of the 1980ies [250] making them the most important (immigrant and ethnic) minority in quantitative terms. After 1990, ethnic Germans migrating to Germany come mostly from countries of the former Soviet-Union and face increasingly problematic conditions for integration. The number of migrants from the

---

[248] Bade, K.: Integration und Politik – aus der Geschichte lernen? Aus Politik und Zeitgeschichte 2006, 40-41, pp. 3-6.
[249] Sachverständigenrat für Zuwanderung und Integration: Migration und Integration – Erfahrungen nutzen, Neues Wagen. Jahresgutachten 2004. Berlin 2004, p. 62.
[250] Bayerisches Staatsministerium für Arbeit und Sozialordnung, Familie und Frauen: Statistik Spätaussiedler und deren Angehörige 2007. München 2008.

former Soviet-Union is decreasing significantly, though, due also to more restrictive admission rules [251].

A look at the spatial distribution reveals regional differences in the density of immigrants. The majority of immigrants is drawn to the western part of Germany. In 2007 the share of immigrants at the population of the "New Bundesländer" (the former German Democratic Republic, 16% of the total population in Germany) amounts to 2,4% [252].

Legal and institutional changes as regards immigration have come slowly in Germany with the traditional concept of policing oriented immigration laws (Ausländergesetz) and its focus on risk control and prevention replaced only recently by a new immigration law. The amended immigration law went into force 2005 (Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern) and places more weight on naturalization and integration. The title of the new law combines restriction and regulation of immigration on the one hand and integration of European Union citizens and foreign nationals on the other hand. The focus switched (though not completely) from a rather restrictive approach to naturalization to an approach that seeks to facilitate integration through reducing the length of stay before naturalization can be applied for, accepting to a certain extent dual citizenship and providing for more protection against deportation. Part of the overhauling of the normative framework of immigration was the introduction of new institutions, like for example an ombudsman for immigration (Ausländerbeauftragte), the Council of Experts on Immigration (Sachverständigenrat für Zuwanderung und Integration) and a new concern for basic information on the economic, social etc. situation of immigrants [253]. In 2006, The Federal Ministry of Interior has founded the "German Islamic Conference" seeking to initiate a dialogue between Islamic associations and state institutions as well as civil society [254]. These changes have been encouraged by the obvious social problems visible in ghettoization in metropolitan areas and concerns about the emergence of "parallel societies" but also through human rights perspectives that were particularly expressed in reports of Council of Europe and United Nations based institutions as well as efforts of NGOs which emphasize the particular problems experienced by immigrants [255].

---

[251] Currle, E.: Migration in Europa. Daten und Hintergründe. Stuttgart 2004, pp. 55-58.

[252] Statistisches Bundesamt: Bevölkerung und Erwerbstätigkeit 2007. Wiesbaden 2008, table 3.3.

[253] Sachverständigenrat für Zuwanderung und Integration: Migration und Integration – Erfahrungen nutzen, Neues Wagen. Jahresgutachten 2004. Berlin 2004, pp. 396.

[254] www.deutsche-islam-konferenz.de.

[255] European Commission against Racism and Intolerance: Third Report on Germany. Adopted on 5 December 2003. Strasbourg 2004; Report of the Committee on the Elimination of Racial Discrimination:

The history of ethnic and racial minorities in 20th century Germany as well as research on minorities are overshadowed by the murderous terror regime German fascism exerted in Europe during the 1930ies and 1940ies [256]. One of the lessons drawn from this period concerns the elimination of information on race and ethnicity from official data systems (and, furthermore, from most questionnaires and interview forms used in criminological research). So, official statistics, be it crime or judicial statistics, be it general population statistics cannot account for the racial or ethnic composition of the German population. Only estimates are available e.g. on the size of the group of black or Afro-Germans ranging between 40.000 and 50.000 [257]. Panel research on the size of foreign born residents reveals that some 10% of the population belong to immigrant groups while official statistics give a 7% share of foreign nationals at the population at large [258]. However, the foreign born group does not include second or third generations of immigrants among whom a substantial share has been naturalized. Due to a law amendment of 1998 under certain conditions children born to immigrant foreign nationals adopt automatically German citizenship and until the beginning of the 21st century ethnic Germans immigrating from countries of the former Soviet block received automatically German citizenship after arriving in Germany. The variable "nationality" or "citizenship" therefore may be used only as a rather crude proxy in analyzing immigrant groups.
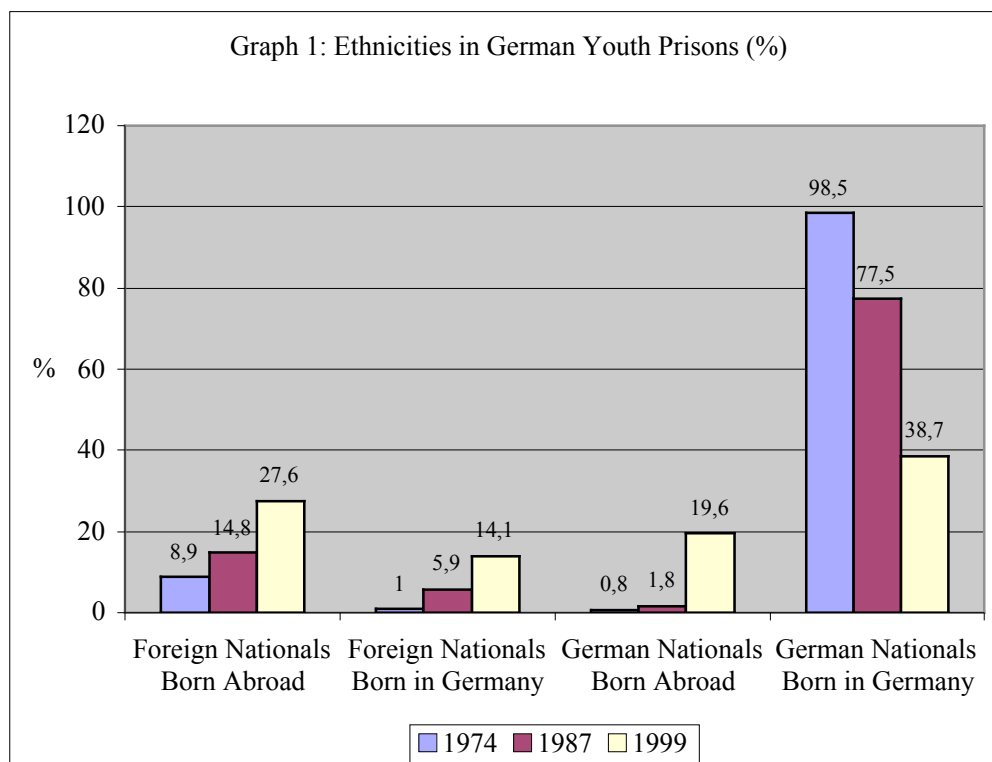
The problems that arise from the lack of valid data when interpreting official, in particular crime related statistics become apparent when looking at changes of inmate structures in German youth prisons. Data from the state of Baden-Wuerttemberg demonstrate that over a period of some 25 years the structure of youth prison inmates changed completely. While in the mid 1970ies virtually all inmates were German citizens, in 1999 young German nationals accounted only for less than 40% of prison inmates. If relying only on the variable nationality it would go unnoticed that immigrant youth in fact represent the majority of prison inmates today.

Seventy-second session (18 February-7 March 2008), Seventy-third session (28 July-15 August 2008), General Assembly, Official Records, Sixty-third session, Supplement No. 18 (A/63/18), pp. 38.

[256] Bade, K.: Integration und Politik – aus der Geschichte lernen? Aus Politik und Zeitgeschichte 2006, 40-41, pp. 3-6, p. 3.

[257] Forbes, I., Mead, G.: Measure for measure.   A Comparative Analysis of Measures to Combat Racial Discrimination in the Member States of the European Community. University of Southampton 1992, p. 39.

[258] Sachverständigenrat für Zuwanderung und Integration 2004, p. 68.

Graph 1: Ethnicities in German Youth Prisons (%)

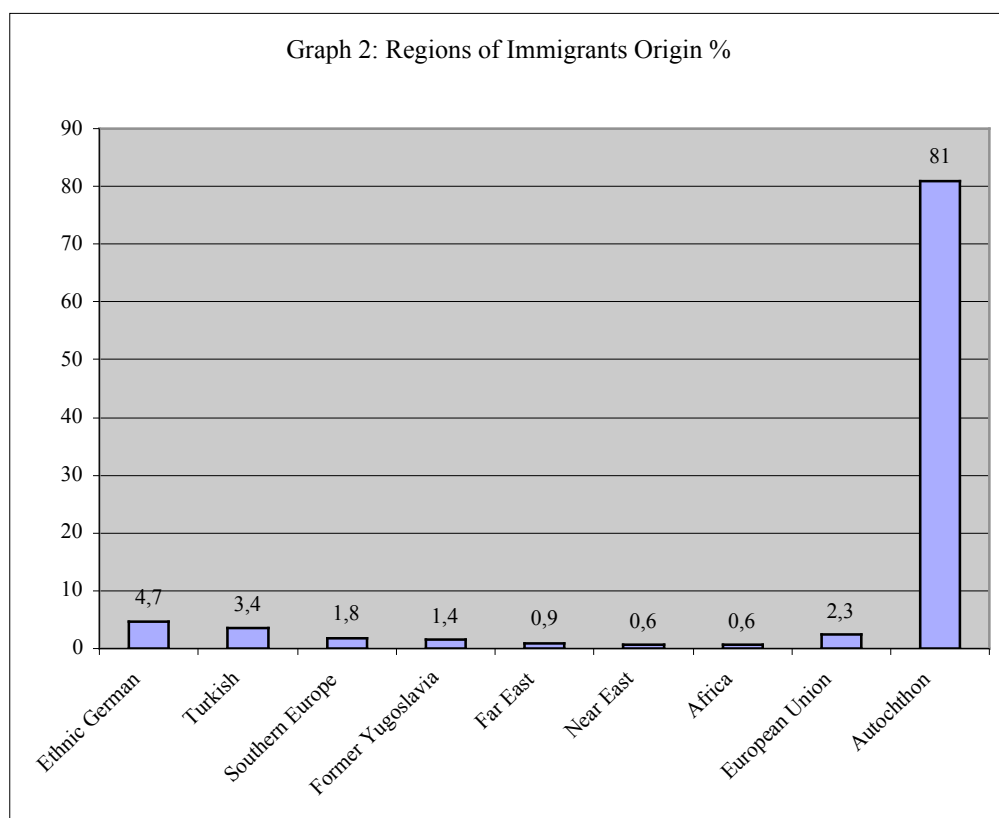|	Foreign Nationals Born Abroad	Foreign Nationals Born in Germany	German Nationals Born Abroad	German Nationals Born in Germany
1974	8,9	1	0,8	98,5
1987	14,8	5,9	1,8	77,5
1999	27,6	14,1	19,6	38,7

Source: Jugendstrafvollzugsanstalt Adelsheim

Related to these concerns are new approaches in national census studies to account for the size of the immigrant population and the social conditions in which immigrants find themselves. With that, the question is put forward on how and through what criteria an immigrant is defined and how social groups are construed. In particular, the question comes up who is an immigrant and how long does one remain an immigrant? The first micro census study that looked at the share of immigrants in Germany revealed in 2005 quite interesting data. In the micro census immigrants were defined as all those persons who immigrated to Germany after 1949 as well as those borne in Germany as foreign nationals and those borne as German citizens with at least one immigrant parent or one parent borne as a foreign national in Germany [259]. While on the basis of nationality or citizenship the proportion of immigrants was approximately 9 % of the (resident) population in the new millennium [260], the share of immigrants (defined according to the criteria mentioned above) amounts to 18,6 % in 2005 [261] and 18,7 in 2007 [262]. The distribution of immigrants along regions of origin is on display in graph 2.

---

[259] Statistisches Bundesamt: Bevölkerung und Erwerbstätigkeit. Bevölkerung mit Migrationshintergrund – Ergebnisse des Mikrozensus 2007 -. Wiesbaden 2008, p. 6.
[260] Statistisches Bundesamt : Bevölkerung und Erwerbstätigkeit 2007. Wiesbaden 2008, table 1.2.
[261] Statistisches Bundesamt: Bevölkerung und Erwerbstätigkeit. Bevölkerung mit Migrationshintergrund – Ergebnisse des Mikrozensus 2005 –. Wiesbaden 2007, p. 7.

Graph 2: Regions of Immigrants Origin %

Ethnic German	4,7
Turkish	3,4
Southern Europe	1,8
Former Yugoslavia	1,4
Far East	0,9
Near East	0,6
Africa	0,6
European Union	2,3
Autochthon	81

Source: Institut für Bevölkerung und Entwicklung: Ungenutzte Potenziale. Zur Lage der Integration in Deutschland. Berlin 2009.

However, most information on social and other characteristics of immigrants is derived from data collection on foreign nationals. Statistical information on the ethnic or racial composition of the population is not available. The complete neglect of ethnic or racial information in official statistics and censuses is a deliberate response to German fascism and the holocaust which was facilitated by availability of information on religion and ethnicity but has been criticized recently by the Committee on the Elimination of Racial Discrimination [263].

According to available data from the National Office for Statistics foreign nationals are disproportionally affected by unemployment with unemployment rates of approximately 20% among foreign nationals and 10%

---

[262] Statistisches Bundesamt: Bevölkerung und Erwerbstätigkeit. Bevölkerung mit Migrationshintergrund – Ergebnisse des Mikrozensus 2007 -. Wiesbaden 2008, p. 32.
[263] Report of the Committee on the Elimination of Racial Discrimination: Seventy-second session (18 February-7 March 2008), Seventy-third session (28 July-15 August 2008), General Assembly, Official Records, Sixty-third session, Supplement No. 18 (A/63/18), p. 40.

among the German born labour force [264]. In many aspects they display characteristics of the lower working class, seen for instance from housing, social security dependency (which is the threefold among foreign nationals), education and income levels [265]. A particularly precarious situation is found among young immigrants. For them, research on educational achievements and integration in the labor market displays significant differences compared to German young people [266]. The emergence of profound social inequality is driven also by a system of education and formation which evidently does not cater to the special needs of young immigrants [267]. Spatial segregation of immigrants is followed by cultural segregation. Such cultural segregation was noticed for example with an increase in religiousness in the group of Turkish immigrants [268].

The current situation of immigrants partially may be explained by social and economic changes in the last decades that in general have worked to the disadvantage of immigrants. The success stories of immigration which are known from 19th and still 20th century Europe and North-America concern immigrant groups which managed to work their way up and to integrate (economically and culturally) into mainstream society. So, e.g., several waves of Polish labor immigrants settled at the end of the 19th and the beginning of the 20th century in the West of Germany (in particular in coal mining areas); they melted rather rapidly into main stream society and became invisible as a distinct group within half of a century. The disappearance of low skilled work and the transformation of industrial societies into service and information societies dependent on high skilled workers have contributed to change labor markets drastically and with that the basic framework of traditional mechanisms of social integration (which always was based upon labour and

---

[264] Statistisches Bundesamt: Stand und Entwicklung der Erwerbstätigkeit 2004. Wiesbaden 2005; see also micro census data on unemployment among immigrants Statistisches Bundesamt: Bevölkerung und Erwerbstätigkeit. Bevölkerung mit Migrationshintergrund – Ergebnisse des Mikrozensus 2007 -. Wiesbaden 2008, p. 236.

[265] Anhut, R., Heitmeyer, W.: Desintegration, Konflikt und Ethnisierung. In: Heitmeyer, W., Anhut, R. (eds.): Bedrohte Stadtgesellschaft. Soziale Desintegrationsprozesse und ethnisch-kulturelle Konfliktkonstellationen. Weinheim, München 2000, pp. 17-75, pp. 22; Tiemann, S.: Die Integration islamischer Migranten in Deutschland und Frankreich – ein Situationsvergleich ausgewählter Bevölkerungsgruppen. Berlin 2004, pp. 37.

[266] Anhut, R., Heitmeyer, W.: Desintegration, Konflikt und Ethnisierung. In: Heitmeyer, W., Anhut, R. (eds.): Bedrohte Stadtgesellschaft. Soziale Desintegrationsprozesse und ethnisch-kulturelle Konfliktkonstellationen. Weinheim, München 2000, pp. 17-75; Tiemann, S.: Die Integration islamischer Migranten in Deutschland und Frankreich – ein Situationsvergleich ausgewählter Bevölkerungsgruppen. Berlin 2004, pp. 37; Statistisches Bundesamt: Strukturdaten und Integrationsindikatoren über die ausländische Bevölkerung in Deutschland 2002. Wiesbaden 2004..

[267] Gomolla, M., Radtke, F.-O.: Institutionelle Diskriminierung. Die Herstellung ethnischer Differenz in der Schule. Opladen 2002.

[268] Goldberg, A., Sauer, M.: Konstanz und Wandel der Lebenssituation türkischstämmiger Migranten in Nordrhein-Westfalen. Zusammenfassung der fünften Mehrthemenbefragung 2003 im Auftrag des Ministeriums für Gesundheit, Soziales, Frauen und Familie des Landes Nordrhein-Westfalen. Stiftung Zentrum für Türkeistudien, Universität Duisburg-Essen, September 2003, p. 7.
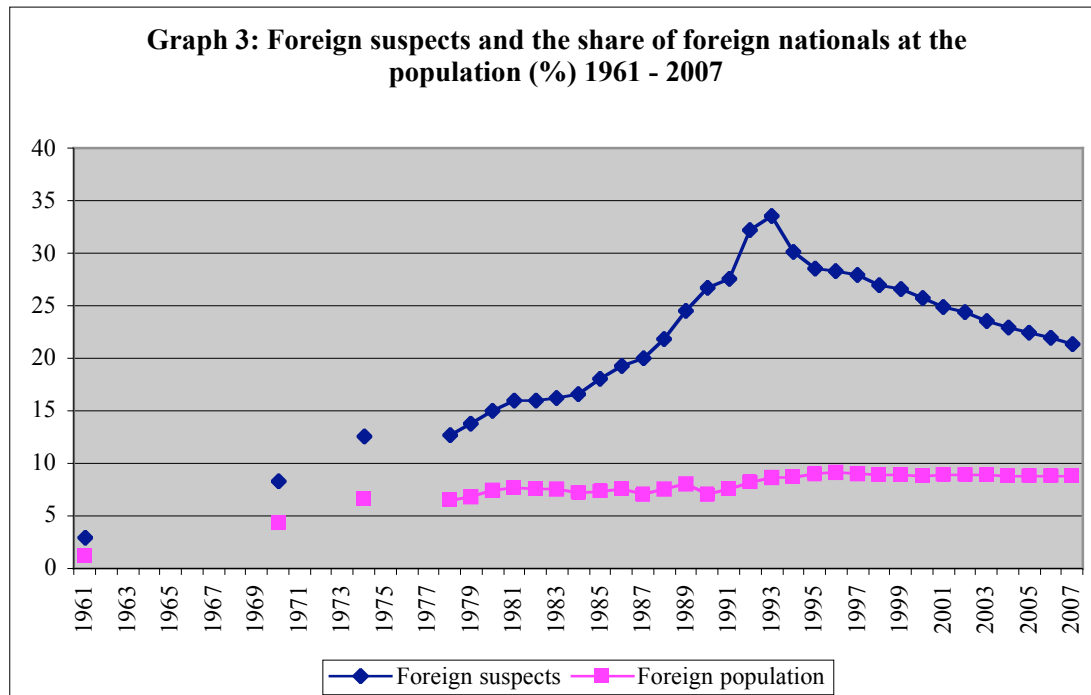
employment). Shadow economies, black markets and low wage jobs in particular in metropolitan areas now offer precarious employment opportunities for newly arriving immigrants and the second and third generations of immigrants having settled down during the last four decades. Political changes in Europe then have contributed to affect the legal status of immigrants considerably through changing the statutory framework of immigration as well as enforcement policies. While in the 1960ies and 1970ies most immigrants entered Germany legally (as labor immigrants or on the basis of family re-unification), today, the legal status of new arrivals points to illegality or to a precarious status of asylum seekers, refugees and merely tolerated immigrants who are subject to strict administrative controls and threatened by serious risks of criminalization (as a consequence of not complying with administrative rules assigning the place of residence). With the transformation of labor markets into places where highly skilled workers are needed immigrants also adopted an image of being unemployed and dependent on social security. Agendas of crime policies are not only preoccupied by crime and victimization but in particular by assumed precursors of crime and deviance such as family problems, unemployment, lack of education and professional training.

Immigration, crime and integration

Rates of police recorded foreign suspects have increased continuously in Germany reflecting fairly well increasing numbers of immigrants. In 1953, when police statistics had been published the first time after World War II, the rate of foreign suspects had been as low as 1,7% [269]. Graph 2 contains data on the resident foreign population in Germany and on the rates of foreign national suspects from 1961 to 2007. It is evident from these data that foreign nationals are disproportionally represented in police statistics. However, it is also clear that the significant changes in rates of foreign national suspects are independent of the rate of the resident foreign population. Although the proportion of foreign nationals at the resident population at large does not change significantly between the beginning of the 1990ies and 2007, the rate of foreign suspects drops in the same period by approximately one third. This drop reflects the drastic decrease in the number of asylum seekers from 1993 on (when the German constitution in respect of the right of asylum had been amended and applications for asylum had put under far reaching restrictions). The decrease is especially marked in the area of small property crimes (and

---

[269] Albrecht, H.-J.: Ethnic Minorities, Crime and Criminal Justice in Germany. In: Tonry, M. (ed.): Crime and Justice. A Review of Research. Vol. 21. Chicago 1997, pp. 31-99.

here in the area of shoplifting) which gives also a significant hint as to the types of crimes where asylum seekers are most active.

Graph 3: Foreign suspects and the share of foreign nationals at the population (%) 1961 - 2007

Sources: Bundeskriminalamt (ed.): Polizeiliche Kriminalstatistik 1961 – 2007. Wiesbaden 1962 – 2008; Statistisches Bundesamt: Bevölkerung und Erwerbstätigkeit. Bevölkerungsfortschreibung 2007. Wiesbaden 2008, table 1.2.

When summarizing the knowledge that is available so far on links between immigration on the one hand and police recorded crime on the other hand, we may conclude that some immigrant groups exhibit much higher proportions of crime participation or crime involvement than do majority groups. The share of immigrant suspects is particularly high in case of violent crime. However, some immigrant groups display the same degree of crime involvement or even less participation in crime as is observed in the majority group. First generation immigrants of the 1950ies and 1960ies obviously have been involved much less in crime than are involved second or third generation immigrants and immigrants arriving in the 1980ies and 1990ies. What most immigrant groups have in common is a socially and economically disadvantageous and precarious position. But, cultural differences between socially similarly situated groups can result in rather different crime patterns, different in terms of both, the structure of crime involvement and the magnitude of crime involvement. Cultural differences found between immigrant groups concern the capacity for community building and for the preservation of the cultural and ethnic homogeneity of the immigrant group.

The discussion on immigration and crime during the last two decades has emphasized particular problems of young immigrants (belonging to second and third generations). In groups of young immigrants, violence and chronic offending as well as gang activities are assumed to play a significant role. Approximately 45% of youth violent crime committed in groups according to Berlin police data are linked to young immigrants [270]. However, police recorded crime data come with two problems: they identify immigrants through the variable nationality (which may lead to underestimation of crime participation rates) and do cannot account for crimes not reported by victims.

Over the last decade various self-report studies have been carried out with the aim of testing assumptions of disproportional crime involvement of young immigrants. Most of these surveys have been implemented in the form of school surveys (focusing on 15 – 18 years old). While it was found that crime participation rates at large do not differ significantly between young Germans and various groups of young immigrants [271], in particular similar participation rates in property crime and drug use is noted, all studies carried out so far confirm disproportional involvement in violent crime such as assault and (street) robbery in particular by young Turkish immigrants and by young immigrants coming from the South-East of Europe (former Yugoslavia) [272]. Young immigrants of Turkish descent are also more prone to resort to violence in conflict situations when controlling for the extent of inter- and intra-ethnic conflicts [273]. The greater import of violence for Turkish boys is explained with strong affiliation to gangs and the particular relevance of honor in Turkish communities [274]. Moreover, young immigrants report more experiences with corporal punishment in childhood [275]. If emphasis is placed on the role of honor in the interpretation and explanation of violence among young Turkish males [276] it should also be considered that this refers to classic themes in research on

---

[270] Der Polizeipräsident in Berlin: Polizeiliche Kriminalstatistik 2006. Berlin 2007, p. 87.
[271] Naplava, T.: Delinquenz bei einheimischen und immigrierten Jugendlichen im Vergleich. Sekundäranalyse von Schülerbefragungen der Jahre 1995 – 2000. Freiburg 2002.
[272] Heitmeyer, W.: Gewalt. Weinheim 1995; Tillmann, K.-J., Holler-Nowitzki, B., Holtappels, H.G., Meier, U., Popp, U.: Schülergewalt als Schulproblem. Verursachende Bedingungen, Erscheinungsformen und pädagogische Handlungsperspektiven. Weinheim, München 2000; Enzmann, D., Wetzels, P.: Gewaltkriminalität junger Deutscher und Ausländer. Kölner Zeitschrift für Soziologie und Sozialpsychologie, 52(2000), pp. 146-152; Oberwittler, D., Blank, T., Köllisch, T., Naplava, T.: Soziale Lebenslagen und Delinquenz von Jugendlichen. Freiburg 2001.
[273] Müller, J.: Jugendkonflikte und Gewalt mit ethnisch-kulturellem Hintergrund. In: Heitmeyer, W., Anhut, R. (eds.): Bedrohte Stadtgesellschaft. Soziale Desintegrationsprozesse und ethnisch-kulturelle Konfliktkonstellationen. Weinheim, München 2000, pp. 257-305, p. 283.
[274] Müller, J.: opus cited, 2000, p. 284.
[275] Baier, D. et al.: Jugendliche in Deutschland als Opfer und Täter von Gewalt. Hannover 2009.
[276] See Gesemann, F.: Junge Zuwanderer und Kriminalität in Berlin. Bestandsaufnahme – Ursachenanalyse – Präventionsmaßnahmen. Der Beauftragte des Senats für Integration und Migration, Berlin 2004, pp. 67-68.

subcultures and gangs [277]. Violence exerted by young males comes with motives such as "male honor" and a "desire for violence" [278]. Such motives are embedded in systems of group loyalty/solidarity and the search for social status. Insofar, it seems questionable that a particular Turkish culture of honor and reputation adds to the explanation of violence among young men. Until now empirical evidence does not exist which would confirm that young male immigrants differ from their indigenous counterparts in terms of violence triggering motives. Affiliation with a gang at least is similarly strong in groups of young Germans, Turkish and ethnic German immigrants who are willing to use violence in solving conflicts (ca. 80%) [279]. Moreover, only small differences are found as regards bonds to the family. Violence prone Turkish and ethnic German youth do agree to a lesser extent than other youth with the idea that immigrants should adjust to German culture and language [280].

In the explanation of youth violence, chronic offending and the increase of youth violence special emphasis is laid on the disappearance of unskilled labour and the growing demand on qualification and training as a requirement for access to the labour market. From that, it is concluded, follow processes of social exclusion and economic marginalization, moreover the growing concentration of problem youth in inner-city disadvantaged neighbourhoods. What is assumed also concerns a long term trend towards formal control of youth visible in an increase in formal complaints and which reflects a deep change in the risk management of children and juveniles [281].

Discrimination and Criminal Justice

Theoretical approaches to the issue of discrimination and of biased law enforcement must first of all be differentiated into those assumptions related to immigrant minorities crime involvement as an eminent social problem and furthermore into hypotheses concerning decision-making in policing and in the administrative and criminal justice system. Assumptions on the problem of foreign nationals contribution to crime can be divided roughly into the theory of scape-goating and the theory of conflicts on resources (employment, housing etc.). Furthermore, administrative agencies' search for "new" social

---

[277] Miller, W.B.: Die Kultur der Unterschicht als Entstehungsmilieu für Bandendelinquenz. In: Sack, F., König, R.(ed.): Kriminalsoziologie. 3rd Ed., Wiesbaden 1979, pp. 339-359; Graham, K., Wells, S.: „Somebody´s Gonna Get Their head Kicked in Tonight." Aggression Among Young Males in Bars – A Question of Values? British Journal of Criminology 43(2003), pp. 546-566.
[278] Graham, K., Wells, S.: opus cited, 2003, p. 560.
[279] Müller, J.: opus cited, 2000, p. 291.
[280] Müller, J.: opus cited, 2000, p. 287.
[281] Oberwittler, D., Köllisch, T.: Nicht die Jugendgewalt, sondern deren polizeiliche Registrierung hat zugenommen – Ergebnisse einer Vergleichsstudie nach 25 Jahren. Neue Kriminalpolitik 2004, pp. 144-147.

problems has been named as well as the potential function of the social problem of foreigners' crime involvment in stabilizing political power and rallying for political support within majority groups.

With respect to the role of police in initiating criminal investigations it should be noted that German police is not entitled to formal decision-making on arrest. German police, when notified about some criminal event investigate the case and, after investigation processes the case to the public prosecutors´ office where the actual decision about bringing the case to court (or arrest in terms of pre-trial detention) is made. Consensus seems to exist on the point that the probability of being processed as a criminal suspect, given a certain number of offences committed, is fairly the same for minority and majority offenders. The probability of being suspected of a criminal offence is extremely low in the case of most offences anyway and police investigations seem to be guided by characteristics of the offence, especially seriousness of the offence, in the first place. It has been hypothesized that higher rates of suspects among ethnic minorities could be the consequence of ethnic minority members confronting police more negatively during encounters than majority members do. But preliminary research based upon an experimental design does not lend support to this assumption. Ethnic minority suspects in general seem even to be more co-operative while being interrogated by police. Going further in the criminal process, the findings do not lend support to the assumption of a larger risk of minority suspects to be formally charged and indicted with a criminal offence [282]. However, criticism that foreign nationals are treated in a discriminating way has certainly some merits. In some areas, like eg. drug law enforcement, law enforcement strategies adopt ethnic profiling and target selected ethnic minorities (involved in various street drug distribution networks. Some studies have dealt with attitudes and perceptions of police towards ethnic and immigrant minorities. The questions put forward concern whether discrimination and racism reflects systematic patterns or whether such attitudes reflect a „black sheep" theory often adopted by state authorities and claiming that abusive behaviour is restricted to exceptional cases only [283].

Discriminatory treatment and inequality have been raised as issues in the context of explaining the disproportional share of foreign nationals (or immigrants) at police recorded crime. At the beginning of the 1990ies a survey of police officers revealed that a majority among them felt that there differences between average citizens and immigrants which justify differential treatment. The reasons why immigrants legitimately may be treated differently refer to the immigration status and exploitative behaviour of immigrants,

---

[282] Kubink , M. : Veständnis und Bedeutung von Ausländerkriminalität. Eine Analyse der Konstitution sozialer Probleme. Pfaffenweiler 1993, pp. 60.
[283] Jaschke, H.-G.: Öffentliche Sicherheit im Kulturkonflikt, Frankfurt 1997, p. 191.

different values and different behaviour patterns. In general the data convey the view that police perceive immigrants to be different [284].

Interpretation of research carried out so far point to structural problems in the relationship between immigrants and police. Immigrants (in particular immigrants arriving since the 1990ies) are placed in disadvantageous conditions. High unemployment rates and the problem of access to the labour market are associated with high participation rates in shadow economies. This is in particular true for illegal immigrants [285]. High participation rates in drug markets or other informal economies expose immigrants to a high rate of encounters with law enforcement.

Studies have dealt until now with attitudes and perceptions of police. While data on the use of force in general or police practices as regards stop and search procedures are not available, deadly and other use of firearms is accounted for by information collected by the ministries of interior. These data do not, however, distinguish between immigrants and other groups as regards victims of police force. Longitudinal data on the use of deadly force by police reveal that the number of persons killed or injured by police firearms is stable (and tentatively on the decline) as is the use of guns against persons in general [286]. During the last two decades on the average at 60-70 occasions per year police have used firearms against individuals. On the average some 10 persons are killed and some 30 are injured as a result of the use of firearms by police. Although indepth studies on these cases have not been carried out, it seems that virtually all of the cases of deadly use of firearms emerge from situations that do not have a potential of fueling ethnic tensions.

Studies on trust in police as an institution reveal that differences between German youth and various immigrant groups are not marked. While West German youth, Italians, Greek at a rate of approximately 25% declare that they distrust police in general, Turkish youth and East German youth express this view at a rate of 37, respectively 33%. Trust and mistrust in the police thus might be explained not by the status of an immigrant but by the general feeling of belonging to a marginalized and deprived group in society. The differences, however, are not particularly marked when looking at the groups at large. Differences become more pronounced when introducing variables such as gender, education and place of residence. Mistrust in police is particularly large in the metropolitan area of Berlin where some 84% of Turkish interviewees declare that they have no or only limited trust in police

---

[284] Franzke, B.: Polizei und Ausländer. Kriminalistik 1993, pp. 615-618, p. 616.
[285] Albrecht, H.-J.: Illegalität, Kriminalität und Sicherheit. In: Alt, J., Bommes, M. (eds): Illegalität. Grenzen und Möglichkeiten der Migrationspolitik. Wiesbaden 2006, pp. 60-80.
[286] Innenministerium Baden-Württemberg: Schusswaffengebrauch der Polizei. Stuttgart, Pressestelle Innenministerium 2005.

[287]. This is certainly indicating a deep ethnic divide as the corresponding rate in the group of German young people amounts to approximately 30%. An explanation may be found in a process of spatial segregation and the emergence of inner city ghettos and inner city ethnic communities which – also due to the substantial population of immigrants of Turkish origin - in Berlin have gained significant momentum [288]. Mistrust in police in metropolitan areas may be fueled also by the frequency of (arrest related) contacts between police and immigrant youth which is especially marked in large cities.

Data from the Freiburg Cohort Study reveal that non prosecution rates at large do not differ for first offenders and recidivating youth when comparing German, ethnic Germn and foreign youth offenders in 1985 and 1995. However, there are differences in non-prosecution rates for violent offences. Foreign juvenile offenders are less likely to have their cases dismissed.

Non-Prosecution Rates (%) in Two Birth Cohorts (birth cohorts 1970, 1980 at age 16, male)

	German			Ethnic German			Foreign		
	1st Offender		2nd	1st Offender		2nd	1st Offender		2nd
	1985	1995	1995	1985	1995	1995	1985	1995	1995
Theft	60	82	77	61	85	82	54	81	82
Aggravated Theft	22	37	22	20	49	14	18	27	17
Violence	32	49	37	38	24	9	32	28	18
Total	55	76	60	55	78	60	50	71	66

Rather small effects of the immigration status on sentencing can be found. Foreign nationals run a somewhat higher risk to receive prison or custodial sentences and are somewhat less likely to receive suspended sentences or probation [289]. But in general, ethnic and minority variables add only very modestly to the explanation of sentencing variation [290]. This holds true not only for adult criminal sentencing but also for dispositions in juvenile criminal cases [291]. The slight difference with respect to juvenile imprisonment

---

[287] Gesemann, F.: „Ist egal ob man Ausländer ist oder so – jeder Mensch braucht die Polizei" – Die Polizei in der Wahrnehmung junger Migranten. In: Groenemeyer, A., Mansel, J. (eds.): Die Ethnisierung von Alltagskonflikten. Opladen 2003, pp. 203-228, p. 211.

[288] Groenemeyer, A., Mansel, J. (eds.): Die Ethnisierung von Alltagskonflikten. Opladen 2003.

[289] Steinhilper, U.: Definitions- und Entscheidungsprozesse bei sexuell motivierten Gewaltdelikten. Konstanz 1986.

[290] Greger, R.: Strafzumessung bei Vergewaltigung. Monatsschrift für Kriminologie und Strafrechtsreform 70 (1987), pp. 261-277; Albrecht, H.-J.: Strafzumessung bei schwerer Kriminalität. Berlin 1994.

[291] Geißler, R., Marißen, N.: Kriminalität und Kriminalisierung junger Ausländer. Die tickende soziale Zeitbombe - ein Artefakt der Kriminalstatistik. Kölner Zeitschrift für Soziologie und Sozialpsychologie 42 (1990), pp. 663-687; Oppermann, A.: Straffällige junge Ausländer: Kriminalitätsbelastung und soziale

between young German offenders and young foreigners (2,4% vs. 3,4% of all offenders adjudicated and sentenced) found by Geißler/Marißen (1990) is mostly due to sentences because of drug trafficking. If controlling for this offence the difference fades away. It is especially noteworthy that differences in dispositions are virtually non-existent in case of violent crimes and sexual offences; similar results have been obtained by Oppermann (1987). As ethnicity is a diffuse status variable, it can be assumed that its impact on sentencing is less pronounced or even non-existent in cases where a consistent set of offence and offender related characteristics (e.g. seriousness of the offence, prior record) or an obvious need for adopting tariffs in sentencing (petty cases) or administrative convenience point to rather obvious dispositional strategies [292]. Therefore, only an inconsistent particular set of characteristics may be assumed to trigger effects of ethnicity or nationality on sentencing. It has been hypothesized that the relatively small effects of ethnic variables on sentencing outcomes might be due to the fact that substantial parts of serious personal crimes committed by minority offenders involve a minority victim, too, and that effects might turn out to be larger when including crimes involving minority offenders and victims from the majority group. Up to now this question has not been dealt with adequately.

Immigrants and victimization

The relationship between immigration and victimization received never the attention active participation of immigrants at crime has received in Germany. While police statistics account for the nationality of suspects, they do not account for nationality (or the immigration status) of victims. Victim surveys carried out in Germany rarely have systematically included immigrant populations. From the perspective of immigration research, in particular research on illegal immigration, the issue of victimization did not play a role either [293].

The victim perspective with respect to immigrants during the last two decades has been influenced by several issues and different political interests that reflect also to a certain extent their assumed potential for creating conflicts and violence due to segregation and cultural otherness.

At the beginning of the 1990ies it was the issue of hate violence (or xenophobic violence) which attracted attention due to a rise in right wing

---

Bedingungen. Bewährungshilfe 34 (1987), pp. 83-95; Albrecht, P.-A., Pfeiffer, Ch.: Die Kriminalisierung junger Ausländer. Befunde und Reaktionen sozialer Kontrollinstanzen. München 1979.
[292] Unnever, J. D., Hembroff, L. A.: The Prediction of Racial/Ethnic Sentencing Disparities: An Expectation States Approach. Journal of Research in Crime and Delinquency 25 (1988), pp. 53-82.
[293] See for example Eichenhofer, E. (Ed.): Migration und Illegalität. Osnabrück 1999..

extremism and a series of large scale violence toward asylum seekers and other immigrants. A second issue that was placed prominently on political agendas concerns honor killings. A third issue addresses the cycle of violence with alleging that high levels of domestic violence found in immigrant (in particular Turkish) families negatively affects children and makes them prone to become themselves violent youth and young adults [294]. Finally, victims of trafficking have been made a topic of concern. Here, several sensitive social problems are confounded: prostitution, illegal immigration and organized crime [295].

The risk of foreign nationals of becoming victims of crime was – on the basis of police recorded crime –for the first time studied thoroughly in the 1990ies in Bavaria [296]. From this study it is known that the share of foreign national victims accounts for some 11% of all victims registered in police statistics. For various nationalities the rate of violent victimization is the two to fivefold of the rates observed for German nationals [297]. A separate study of four police districts found a share of 54% of foreign national victims of homicide/murder and an elevated rate of foreign national victims for rape and assault (close to 30% of rape and assault victims are foreign nationals) [298]. It can be assumed also that crime reporting of foreign nationals is strongly influenced by the immigration status as illegals account for .5% of all crime reported by foreign victims [299] and settled labour migrants were overrepresented among victims coming to the attention of police.

Data from the 2005 European Crime Survey provide for the first time information on victimization rates for a national and representative sample which includes immigrants. According to these data (N=2000, telephone survey) victimization rates are fairly the same for immigrants and non-immigrants across a selection of property and personal criminal offences.

[294] Baier, D. et al.: Jugendliche in Deutschland als Opfer und Täter von Gewalt. Hannover 2009.
[295] Albrecht, H .-J.: Trafficking in Humans and Human Rights. In: Parmentier, St., Weitekamp, E. (eds): Crime and Human Rights. Vol. 9: Sociology of Crime, Law and Deviance. Eds.. Amsterdam 2007, pp. 39-71.
[296] Luff, J., Gerum, M.: Ausländer als Opfer von Straftaten. München 1995, pp. 48.
[297] Luff, J., Gerum, M.: opus cited, 1995, p. 176.
[298] Luff, J., Gerum, M.: opus cited, 1995, p. 172.
[299] Luff, J., Gerum, M.: opus cited, 1995, p. 126.

Graph 4: Prevalence Victimization (last 12 months) Among
Immigrants and Non-Immigrants in Germany

Source: European Crime Survey 2005.

Germany has developed and implemented devices aimed at counting racist (xenophobic, anti-semitic) crime and providing thus a basis of assessing the extent of racist crime.

Summarizing the available evidence on racial violence, the following can be concluded. First, the general problem of all police registered crime data, namely that they are dependent on reporting by victims and by resources invested in investigating (victimless) crime (such as eg. incitement to racial hatred through the internet or other propaganda crime) affects particularly hate crimes where the specific problem of establishing a motive creates additional uncertainties. No police data are available at all on racially motivated violence exerted by certain professions such as police themselves or prison/correctional staff [300]. Information in this field stems almost exclusively from NGO reports

---

[300] As regards problems of data collection in this field see in particular Jobard, F.: L´ usage de la force par la police. Paris 2001; and Busch, H.: Andere Länder – ähnliche Sitten. Polizeiübergriffe und Kontrolle in Großbritannien und Frankreich, in: CILIP 67(2000), pp. 49-53; reports of the Anti-Torture Commission of the Council of Europe repeatedly have pointed to the risk of detained persons to be maltreated and abused during detention, see eg. Comité de prevention de la torture: Rapport au gouvernement de la

as well as media [301]. No police data are available on situations of racist violence amounting to pogroms or other forms of collective though not necessarily organized violence.

The structure of police registered racist crime is reflecting the respective definitions as well as data collection procedures. However, in general police statistics show that the majority of racist offences is made up by propaganda crimes and crimes of harassment respectively threats. What is assumed for Germany concerns an increase in racial violence which is located during the beginning of the 1990ies. The increase seems to be related to the rise of extremist political parties and organizations as well as the political discourses on "asylum problems" and immigration. The course of racist violence evidently is subject to a rise and fall of waves of violence which may be explained tentatively by violent campaigns initiated by various extremist groups, the mobilizing effects of international violent conflicts and copy cat behaviour. Key events in terms of spectacular and extreme violence at the beginning of the 1990ies (Rostock/Lichtenhagen and Hoyerswerda for example [302]) are assumed to have been generated by a media-politics-violence reinforcement process that served to embed xenophobic violence in a framework of legitimating discourses (on asylum politics) [303].
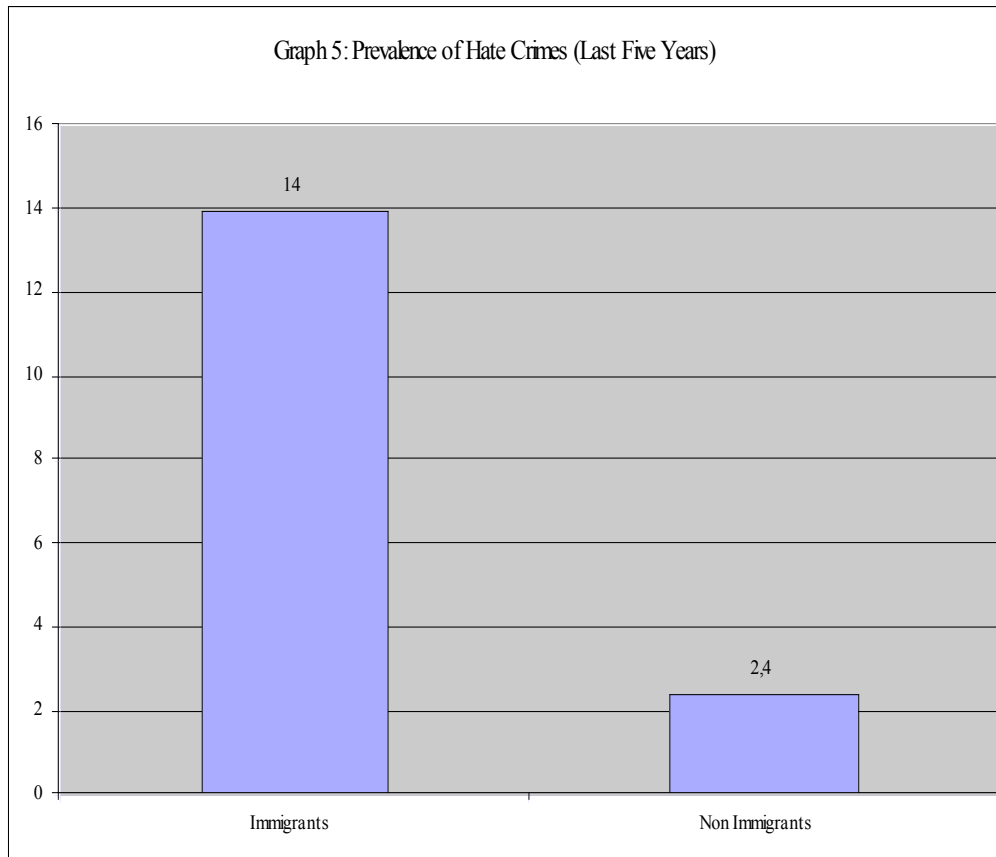
The above mentioned European Crime Survey 2005 included for the first time variables that aim at identifying hate crime. Respondents were asked for information on bias motives of offenders. From this survey it can be concluded that official accounts of racial violence underestimate the extent of racial violence seriously. Although, victimization rates at large do not differ between immigrants and non-immigrants a significantly larger share of victimizing events is perceived by immigrants to be motivated by hate.

République française relatif a la visite effectuée par le C.P.T en France du 27 octobre au 8 novembre 1991. Strasbourg: Conseil de l'Europe 1991; Feltes, T.: Legitime und illegitime Gewaltanwendung durch die Polizei. In: Heitmeyer, W., Schröttle, M. (eds.): Gewalt. Beschreibungen, Analysen, Prävention. Bonn 2006, pp. 539-556.

[301] Aktion Courage – SOS Rassismus: Polizeiübergriffe gegen Ausländerinnen und Ausländer. Dokumentation. November 1999, Bonn; AI Report 2001 – Germany (www.amnesty.org).

[302] For an overview see Esser, F.: Medienwirkung und fremdenfeindliche Straftaten. Eine Langzeitanalyse von 1991 bis 1996. In: Bundesprüfstelle für jugendgefährdende Schriften (ed.): Von „Antisemitismus" bis „Xenophobie". Rechtsextreme Medien in Deutschland. Bonn 1999, pp. 48-55.

[303] Ohlemacher, T.: Fremdenfeindlichkeit und Rechtsextremismus. Mediale Berichterstattung, Bevölkerungmeinung und deren Wechselwirkung mit fremdenfeindlichen Gewalttaten, 1991 – 1997. Soziale Welt 49(1998), pp. 319-332; Lüdemann, Ch.: Zur „Ansteckungswirkung" von Gewalt gegenüber Ausländern - Anwendung eines Schwellenwertmodells kollektiven Verhaltens. Soziale Probleme 3(1992), pp. 137 - 153.
.

Graph 5: Prevalence of Hate Crimes (Last Five Years)

Source: European Crime Survey 2005.

Racially motivated crime has a stronger impact on feelings of safety, community life as well as individual adjustment and coping than has ordinary crime. The particular concern linked to such crimes comes evidently from their being committed against individuals solely because they belong to a visible group in society and the potential for escalation of social conflicts as well as for the disturbance of public peace and social order.

Conclusions

Germany has experienced large scale immigration during the last decades. Substantial numbers of immigrants live in precarious economic and social conditions that expose them to disproportional unemployment rates and other problems. Immigrants are found concentrated in large cities.

Integration of immigrants ranks high on political agendas.

Recent changes in micro-census studies have resulted in improved knowledge on the size of immigrant groups and the problems that affect them.

On the basis of police statistics high participation rates in crime, in particular in groups of young immigrants can be observed. Violent crime and chronic offending have been made particular topics of political concern.

Self-report studies show in general that young immigrants do not differ from their authochton counterparts with respect to property crime. However, serious violence over time and across various self-report studies has been shown to be more prevalent among some groups of young immigrants.

Perceptions of discrimination are prevalent among particularly in Turkish youth. Trust in police (and other institutions) in general is not that different compared with other immigrant youth and German youth. An exception is the city of Berlin where segregation is most visible and distrust in police most pronounced.

Although, violence rates among Turkish male youth are higher compared with German young people or other immigrants, large scale violence or large scale riots have not been observed during the last decades.

Victimization rates do not differ between immigrants and non-immigrants in Germany as a recent survey shows. However, a substantial proportion of immigrants perceive their victimizers to be bias motivated.

Special victimization issues have been emphasized during the past decades. Among them we find honour killings and forced marriages, human trafficking and hate crimes. Placing the focus on these issues reinforces the problem view on immigration and the public perception that certain groups of immigrants display significant signs of otherness and create a potential of social and cultural conflicts.

The Construction of Migrants as a Risk Category: Philosophy, Functions and Repercussions for the Spanish Penal System

José Ángel Brandariz García
(Universidad de A Coruña)
Cristina Fernández Bessa
Research fellow at the Observatory of Criminal Law and Human Rights-University of Barcelona

The proliferation of migration into Spain during the early years of this century has grown, in a short space of time, into one of the most pressing subjects of our contemporary social reality[304]; so a no less urgent preoccupation with the characteristics of the phenomenon in terms of its repercussions for security and social order has brought about a significant change in the penal system. Anxiety on the part of the media, society and the political establishment regarding *migrant criminality*, reforms in the juridical precedent approach to such situations, and the ways in which that model has been tied in with migration policy generally, particularly in terms of administrative sanctions, are just some of the areas in which the impact of this situation can be seen.

What is intended in this paper, specifically, is to deal with a small number of questions that are fundamental to understanding crime policy in regard to migrants. The first of these relates to the social conditions and perceptions which make the construction of migrants as a risk category possible; it is hardly a trivial point to consider how it is that the migrant subject should, in a short space of time, have become the main target of the penal system, in a recast version of what in the old days were referred to as the "dangerous classes".

A second question focuses on the repercussions a constructed category of risk subjects has for the Spanish penal system. Analysis will show that our current crime policy model exhibits high levels of *hybridation* between two extremes –guarantees of inclusion (rehabilitation) and the imposed conditions of exclusion (neutralisation)– which give rise to mixed solutions, such as selective exclusion and subordinated inclusion. This last point raises further issues in relation to what has become known as the *Political Economy of Penality* (or of punishment), a trans-disciplinary approach that may well offer new insight into the aforementioned hybridation process.

Offending migrants: constructing a category of risk subjects
To say that the penal system operates on a selective basis today seems almost a cliché of criminological thinking –a given, as it were– but one that is often

---

[304] Cf. OFICINA ECONÓMICA DEL PRESIDENTE, 2006: 4.

overlooked for that very reason. Research based on theories such as *symbolic interactionism* and *labelling approach* has demonstrated that the penal system consistently combines within itself a number of different social dynamics, as a result of which only a small segment of all subjects who break the law ever actually receive the prescribed juridical response to their crime[305].

This selective tendency is inserted in the context of the crime policy strategies promoted by so-called *actuarial* modes of thinking[306]. At a time when, in line with the *doxa* of *actuarialism*, any meaningful reduction in criminality is assumed *de facto* to be almost impossible and the focus falls instead on accommodating feasible objectives to an economy of always limited resources, it seems inevitable that responsibility for social control and defending against criminality should fall to certain groups and sectors of society. It comes as no surprise, therefore, to find that *actuarial* philosophy, itself designed to manage and redistribute the risks associated with criminality, argues the need to identify the most dangerous groups and to target regulatory and surveillance resources against those sectors of society specifically[307].

In this way, *actuarial* logic consolidates the focus on certain social subjects as number-one targets of the penal system. In this context, one of the least important variables is the individual subject's actual propensity to crime[308],

For much of the period of the last few decades the top spot on the penal system's list of prime targets (the equivalent, in a way, of what at the turn of the 20th century were known as the "*dangerous classes*") was occupied by drug addicts, especially heroin addicts[309]. During that period drug-addicts entered the penitentiary system circuit *en masse*, slaves to an illegal market that generated utterly exorbitant prices which in turn saw them compelled to an existence of either constant petty theft or low-level illegal drug trafficking[310]. While not its principal objective, the massive internment of drug-addicts in this way was one of the outcomes of the so-called *War on Drugs*, the guiding

---

[305] Cf., among others, ANITUA, 2005: 363 ff.; BARATTA, 1993: 94 ff.; CID MOLINÉ/LARRAURI PIJOAN, 2001: 202 ff.; GARCÍA-PABLOS DE MOLINA, 1999: 792 ff.; LARRAURI, 2000: 25 ff., 83 ff.; YOUNG, 2003: 72 ff.

[306] The *actuarial* thought, that was initially known as ' *New Penology*', was developed after the founding works of the American scholars M. FEELEY and J. SIMON, specially 1992: 449 ff.; 1994: 173 ff. See DE GIORGI, 1999: 124 ff.; 2000: 36 ff., 81 ff., 95 ff.; 2002: 30, 113 ff.; NICOLÁS LAZO,G., in RIVERA BEIRAS, 2005: 230 ff.; RIVERA BEIRAS, 2004: 308 ff.; SAN MARTÍN SEGURA, 2006: 85 ff.; ZYSMAN QUIRÓS, 2004: 276 ff.

[307] Cf. ANITUA, 2005: 509; NICOLÁS LAZO,G., in RIVERA BEIRAS, 2005: 236 f. Cf. besides DE GIORGI, 2000: 40; PITCH, 2006: 170 f., 177 f.; SAN MARTÍN SEGURA, 2006: 91 f.

[308] Cf. MATTHEWS, 2002: 89; PORTILLA CONTRERAS, 2005: 61 f., 78.

[309] Cf. CHRISTIE, 1998: 54 f.; 2004: 62; MIRÓ MIQUEL, in RIVERA BEIRAS, 2005: 307 s.; RODRÍGUEZ, 2003a: 118 f.; RUGGIERO, 2000: 24 f.

[310] See, among others, RUGGIERO, 2000: 15 ff.; CHRISTIE, 1993: 75.

vector of official crime policy for many western countries during the final decades of the 20th century[311].

However, the predominance of drug addicts in the Spanish system has found itself being challenged in the last decade or so. The percentage of illegal substance users and drug addicts among the prisoner population[312] and the number of inmates condemned for crimes relating to drug addiction[313] still remains high. Nevertheless, the past predominance of the category is now declining, owing, in part, to the changing nature of drug use itself and its related effects. The high mortality rates caused by the AIDS crisis, and the sustained decrease in heroin consumption[314], have gradually succeeded in moderating the once prominent position of drug addicts among the prisoner population.

The new prime target of the penal system, the paradigmatic subject of its current clientele, is the migrant[315]. If we accept that the heroin crisis was related above all to poor life expectancy, and an element of nihilism also, among the first (home-grown) generation of the Fordist *welfarism* transformation[316], the migrant's rise to prominence has come about as a result of the steady consolidation worldwide of a post-Fordist system founded upon a labour force which is not regulated according to a dual system (as described in the classical theses of PIORE)[317], but to a model of general precarity. The predominance of migrant subjects is not just or particularly quantitative, but rather qualitative. This is demonstrated in a number of ways: a) in the area of production, in how the composition and regulation of the labour force are affected; b) in the composition of society, where the trend is one of growing complexity; c) in the area of social control, to the extent that the formal

---

[311] About the *War on Drugs* see, among others, CHRISTIE, 1993: 70 ff.; 2004: 60 ff. To analyse the repercussions of the criminal policy strategy developed in the *War on Drugs* framework, see BARATTA, 1989: 73 ff.; MIRÓ MIQUEL, in RIVERA BEIRAS, 2005: 303 ff.

[312] Although the data concerning illegal substance users and/or drug addicts among the prison population in Spain are a little uncertain, it seems reasonable to suppose that, even allowing for the massive entry of migrants, the former probably still account for just under half of all inmates. On this subject, see the work of RÍOS MARTÍN/CABRERA CABRERA, 1998: 85, which concluded a figure of 56% for the proportion of drug users among the large sample of prisoners consulted in their survey (conducted in 1998). The same study reported that a survey carried out during that period by the *Delegación del Gobierno para el Plan Nacional sobre Drogas* -Government Delegation for the National Plan for Drugs- put the figure at 54%. The study VARIOUS AUTHORS, 2005: 22, meanwhile, estimates that in 2002 53% of women inmates in Spain were drug users.

[313] According to the figures in AEBI/STADNIC, 2007: 38, in 2005 the percentage of inmates in Spanish penitentiaries for drug trafficking crimes was 27.1%, while the figure for those sentenced for crimes against property was 47.7%. Perhaps what is most significant about these figures is that the corresponding averages for the rest of the European Council states were 14.1% and 32.2%. However, drug crime sentences in 2005 accounted for 38% of prisoners in Iceland, 37% in Malta, 35% in Luxembourg, 34% in Italy and 30% in Norway. See also RE, 2006: 16.

[314] Cf. MIRÓ MIQUEL, in RIVERA BEIRAS, 2005: 310. See also WACQUANT, 2004: 282.

[315] Cf. ANASTASIA, 2006: 366; DE GIORGI, 2000: 59 f.; DAL LAGO, 2004: 23 ff., 45 f., 118; NICOLÁS LAZO, in RIVERA BEIRAS, 2005: 238; PALIDDA, 2000: 166 f., 211, 232 f. In the Anglo-Saxon literature about the topic deserves special attention TONRY, 1997.

[316] Cf. RODRIGUEZ, 2003a: 119.

[317] See CASTEL, 1999: 658 ff., 715 ff.

juridical management of migrants prefigures a profile which could have repercussions for the future development of systems of control and sanctions[318].

The growing primacy of (non-EU nationals) migrants on the list of penal system targets is obvious in a number of ways. The process has been going on for a long time in the US, a country which has experienced intense waves of migration throughout its history and where, as a result, there is a long tradition of social (and scholar) preoccupation on the issue of *migrant criminality*[319].

In more recent times, this primacy has reached the countries of the EU. Although its progress and character have varied from state to state –owing, among other circumstances, to the different stages at which migrations have been received– an analysis of the predominance of migrants in the penal system in relation to the new phase in migration policy entered upon in Europe at the start of the seventies seems appropriate[320].

The phenomenon began to emerge in Spain in the early years of the new millennium, as prison figures show. Among the data, there are a few which are particularly revealing: a) in December 2007 the proportion of foreign inmates in Spanish prisons was 34'2%[321], more than three times their demographic weight; b) 61.1% of the growth in the prison population for the period 2000-2006 was due to foreign inmates, a statistic which is perhaps the strongest single indicator of the centrality of migrants in the Spanish prison system currently[322]; c) in September 2006 the proportion of foreign nationals on preventive detention was 39.5%, a figure which exceeded that of the prisoner population, standing at the time at 30.1%[323]. Data such as these, especially when combined with the discourse employed by the media[324] and

---

[318] Cf. BIETLOT, 2003: 61 ff.; DE GIORGI, 2000: 17 ff.; 2002: 114 f., 131; MOSCONI, 2005: 166; PORTILLA CONTRERAS, 2003: 158 f.; RODRÍGUEZ, 2003a: 131 f.

[319] Cf. MELOSSI, 2002a: 263 ff., who draws attention to the long-standing preoccupation in the United States criminology with the question, dating back to the time of the *Chicago School*. MELOSSI points out that it was a century ago in the US that something which has now become almost a commonplace of criminological thinking was first adverted to (and, one could add, to which some consideration should be given in relation to the situation in Spain today): the finding that the crime rate among first-generation migrants is usually lower than that of the native population; it is among the second generation that the problems begin to appear, with the emergence of a certain cultural conflict and related criminal behaviour. See also PÉREZ CEPEDA, 2006: 232; 2007: 407, who argues that in Spain criminality among regularised migrants is lower than among the native population.

[320] Cf., among others, MELOSSI, 2002a: 266.

[321] Data taken from the official statistics of the *Dirección General de Instituciones Penitenciarias* (see http://www.mir.es/INSTPEN/INSTPENI/Gestion/Estadisticas_mensuales/2007/12/). Older figures, that shown the evolution of these data, can bee seen in MINISTERIO DEL INTERIOR, 2007: 344 f.; AEBI/STADNIC, 2007: 27.

[322] See MINISTERIO DEL INTERIOR, 2007: 344 f. According to these data, in Spain during the period 1996-2006 the native prison population increased 25'2%, whilst the foreign one had of growth of 184'2%.

[323] See AEBI/STADNIC, 2007: 27. Other prominent figures can be seen in SOTO NAVARRO, 2005: 40, and at the newspaper *El Pais* for 2 November 2002 and 16 June 2006.

[324] In the midst of all the media rhetoric surrounding the issue, it is not hard to see how *artificial surges* of social alarm over *migrant criminality* have been orchestrated. One instance of this emerged in the first

politicians, serve to strengthen the claim that *migrant criminality* is one of the main crime policy issues in Spain today.

If we are to assume, then, that the controls and sanctions being used against migrants are an indication of the form current –and future– formal control structures are likely to take a brief analysis of some of the key features of that risk management system is surely in order.

Philosophy behind the construction of migrants as a risk subject category: the significance of juridical status

Migrants, owing to various circumstances but in particular to their high social visibility and limited interaction with the native population, are easy to cast as a group marked out by otherness. The construction of migrants as a distinct sector of society makes it much easier to identify them as the group responsible for much of the current disorder and insecurity, as potentially key players in a narrative of social risk[325].

It should be pointed out that the social construction in question is also the result of the actual involvement of a certain segment of migrants in criminal circles. Notwithstanding, that involvement has also been determined by both a prohibitionist migration policy that has made normal mobility next to impossible; and a social developmental model which, rather than encouraging the stable insertion of migrants, actually promotes social exclusion and criminalisation; not to mention the demand created by part of our society for certain services available in this context of illegality[326]. What emerges, then, is that, just as organised crime has always thrived under prohibition of whatever kind, so prohibitionist migration policies have given rise to the social exclusion of migrants today, and to their criminalisation and self-criminalisation, with the effects being felt by young migrants in particular[327].

---

half of 2002, when the Spanish Socialist Party –and the state government, later on– began using a particularly alarmist discourse, quickly and predictably followed by the media. A telling example are the headlines in the newspaper *El Mundo* (among others) on 11 February and 26 June of that year (see FUENTES OSORIO, 2005: 17 f.; PÉREZ CEPEDA, 2006: 223 f.; SOTO NAVARRO, 2005: 21). In autumn 2004 that artificial surge was given a new lease of life, this time by the obligatory linking of migration with terrorism, which on this occasion focusing on the alleged existence of Islamic networks in Spanish prisons. For just a taste of what was a particularly intense news campaign, see, for example, the editions of *El Mundo* for 23 September, 8 October, 24 October, 27 October and 2 November 2004.

An empirical study by RECHEA ALBEROLA/FERNÁNDEZ MOLINA/BENÍTEZ JIMÉNEZ, 2005: 9, 18 ff., demonstrates the existence of this artificial surge, and highlights the stunning increase in 2002 and 2003 of news items relating to crime and public insecurity. The authors (2005: 19-20) highlight in particular how the period saw the drawing of a connexion between immigration and delinquency.

This definition of migrants in terms of criminality, of migrant as law breaker, overlooks a different side of the story which is every bit as important as the first, if not more so: that of the victimisation of migrants, particularly, in terms of their hyperexploitation by the labour market (see FUENTES OSORIO, 2005: 8, n. 55).

[325] Cf. DAL LAGO, 2004: 44; MELOSSI, 1997: 67; 2002b: 162. See also GARLAND, 2005: 228 ff., 300 f., about the importance, in current criminology (specifically, in what the author called *Criminology of the Other*), of the construction of otherness categories applied to the offenders.

[326] Cf. MELOSSI, 2002a: 267 f.; MOSCONI, 2005: 147, 153, 165.

[327] Cf. PALIDDA, 2002: 214, 216. See also RE, 2006: 126.

Still on this question, there is also the point that the classification of migrants as a risk category relates to factors that go entirely beyond a notion of otherness based purely on physical or cultural characteristics. A more important consideration is the issue of their legal status, as that determines the social meaning assigned to them as a group. To put it simply, the juridical status assigned to migrants (that is, non-EU migrants, or migrants from the south and east) attributes them the permanent risk of illegality, setting them from the start in a grey area verging on the criminal[328], thus making their classification as a risk category all but a foregone conclusion. The constant suspicion of illegality is an important factor in the construction of a risk category based on ontological profiles: an *a priori* principle for the purposes of creating a broad-based policy on crime (control strategies, security policies), that will ignore as largely irrelevant the detail of whether the migrant has actually committed an offence or not[329]. After all, as has been shown already, in selecting a particular risk group to fit the preventive logic of *actuarial* thinking, individual circumstances and a person's actual criminal record barely come into it.

Aside from the connexion with criminality, there is also the issue of the migrant's juridical status, which reduces the subject to his or her condition as a worker, in the sense that it is only possible for the subject to remain within the sphere of legality as long as he or she is engaged in some kind of employment and provided that employment is regular. In terms of the issues being examined here, and so laying aside the obvious decline in the availability of stable regular work in comparison with the myriad alternative forms of involvement in the labour market, this blatant constriction of migrants to a defined social function makes them an ideal target for certain control practices[330].

The migrant status is surely no longer one which can be classed simply as *non-citizen*. Indeed, if (as noted by DAL LAGO[331]) we are to take for granted that a person is more than the mere compendium of philosophical reflexions, that the person is, in fact, the product of his or her insertion in a given context of positive norms (that is, in a legal system); understanding, thus, that it is citizens alone –increasingly– who invest the human being with a social personality: this being the case, we would have to reconsider this *non-person* category[332] as the product of a system founded upon the logic of

---

[328] Cf. GUILD/BIGO, 2005: 67; DAL LAGO, 2004: 49 f., 138, fn. 13; DE LUCAS, 2005: 217; MÁRQUEZ LEPE, 2005: 209; MELOSSI, 2002a: 273; MONCLÚS MASÓ, in RIVERA BEIRAS, 2005: 331; MOULIER BOUTANG, 2002: 154; PALIDDA, 2000: 233, 235 f. –who highlights the consideration of immigration as a crime *de facto*, and connects this juridical status with the police abuses in relation to the migrants-. See also GIL ARAÚJO, 2005: 133; GONZÁLEZ CUSSAC, 2003: 25.
 DAL LAGO, 2004: 95 ff., claims that the identification between migration -i. e., ethnicity- and delinquency constitutes a new and particularly dangerous form of racism.
[329] Cf. CASTEL, 1991: 288; DE GIORGI, 2000: 60 f. See also BIGO, 2005: 81.
[330] Cf. DE GIORGI, 2000: 60 f.; RODRÍGUEZ, 2003a: 112.
[331] Cf. DAL LAGO, 2004: 217 ff.
[332] Cf. DAL LAGO, 2000: 130 ff.; 2004: 205 ff. See also DE LUCAS, 2005: 205 ff.; MEZZADRA, 2005a: 94 ff., 105 f.; SILVEIRA, 2003: 563.

exceptionality[333]. One last point to note on this idea of the *non-person* is that migrants are different in this respect from other social subjects in –or in danger of being in– situations of exclusion (homeless people, drug addicts, the poor, etc.), as the latter conserve, theoretically at least, a small array of rights from which migrants find themselves cut off.

The issue is much more than a mere difference in juridical status. In the construction of migrants, the crucial factor becomes lack of citizenship; their social image is no longer one simply of otherness, but of permanent potential illegality. It is worth examining what aspects of the juridical regime are most responsible for this.

Firstly, the rigid border controls put in place to prevent entry into a given territory (Articles 25 ff. O.L. 4/2000 (11 January) *on the rights and freedoms of foreigners in Spain and their social integration*)[334].

A second factor to consider is the role played by the juridical regime in creating the constant threat of illegality by restricting considerably the basic rights and freedoms available to migrants, since these are made conditional upon the legality of the migration. According to current legislation in Spain, the following rights may not be exercised in the absence of an official permit of stay or residency: a) right to non-compulsory education (Art. 9.3 O.L. 4/2000); b) right to Social Security grants and services (Art. 14.2 O.L. 4/2000); c) right to free legal aid in cases other than expulsion (Art. 22.2 O.L. 4/2000); d) right to assemble and demonstrate (Art. 7.1 O.L. 4/2000); e) right to association (Art. 8 O.L. 4/2000); f) right to be a member of a union (Art. 11.1 O.L. 4/2000); g) right to strike (Art. 11.2 O.L. 4/2000); h) right to live as a family, have a private family life, and come together as a family (Art. 16 O.L. 4/2000)[335]. Nevertheless, the decisions pronounced by the Spanish Constitutional Court, 236/2007 (7 November) and 259/2007 (19 December), have declared it unconstitutional to impose restrictions on the exercise of the right to non-compulsory education, free legal aid, assembly, demonstration, association and membership of a union, and the right to strike, as contained in O.L. 4/2000 for irregular migrants[336].

The third issue is how the Spanish juridical regime actually sponsors the confused definition of migrants as irregular/illegal/criminal in attempting

---

[333] Cfr RODRÍGUEZ, 2003a: 132. On the topic of the *state of exception*, as time and space of suspension of law, AGAMBEN, 1998: 212 ff., 221 f., offers an interesting interpretation of migrant internment camps as a modern-day equivalent of the concentration camp. PÉREZ CEPEDA, 2006: 232; 2007: 407, meanwhile, claims that the Spanish Organi Law (O.L.) 4/2000–and its counterpart in Spanish penal legislation, O.L. 11/2003– lays the bases for a *law of enemies* for dealing with immigration.

[334] According to data from the Spanish MINISTERIO DEL INTERIOR, 2008, in 2007 a total of 40,233 subjects were sent back to their country of origin from Spain, representing a 1.8% decrease on the figures for the previous year. Meanwhile, the Spanish government carried out 15,715 expulsions in 2007, a 32.8% increase in relation to 2006.

[335] See GARCÍA VÁZQUEZ, 2005: 61 ff.; SILVEIRA, 2003: 557 ff. See also PÉREZ CEPEDA, 2006: 232.

[336] The text of the decisions can be seen in
http://www.tribunalconstitucional.es/jurisprudencia/Stc2007/STC2007-236.html and
http://www.tribunalconstitucional.es/jurisprudencia/Stc2007/STC2007-259.html.

–unsuccessfully– to merge into one the penal system and the system of administrative sanctions[337], and in the process subjecting migrants to exceptionally severe penal-administrative measures, such as internment (Articles 61 ff. O.L. 4/2000)[338] and expulsion (Articles 57 ff. and 64 O.L. 4/2000). Legal extremities of this kind must surely play a significant part in creating this migrant category in which illegality is confused with criminality[339]. Legal measures of such severity should actually be classed as penal sanctions (making this an example of *fraudulent labelling*)[340], and that way would be subject to greater guarantees of application, execution and control than is the case with sanctions of an administrative nature[341].

In fact, despite the normalcy with which internment and expulsion have become established among the various different European legal systems, the severity of the sanctions cannot be ignored. These are exceptionally serious juridical measures, they include restrictions on the right to defend oneself and be defended effectively before the law[342]. In the case of internment, being to deprive a person of his or her freedom for up to 40 days (*ex* Art. 62.2 O.L. 4/2000)[343]. The conditions under which sanctions are usually carried out: again,

---

[337] Cf. ASÚA BATARRITA, 2002: 18 ff., 26 f., 33, 46 f., 67; BAUCELLS I LLADÓS, 2005: 60 f.; MONCLÚS MASÓ, in RIVERA BEIRAS, 2005: 336 ff., 345; RÍOS CORBACHO, 2006: 99 f.; RODRÍGUEZ MESA, 2004: 859 f., 863, 866 f.; SANZ MORÁN, 2004: 38 f.

[338] About the Spanish internment centres see SILVEIRA GORSKI, 2002: 93 ff.; 2003: 550 ff.

[339] Cf. GARCÍA VÁZQUEZ, 2005: 423 ff.; MOSCONI, 2005: 165. Cf. also MONCLÚS MASÓ, in RIVERA BEIRAS, 2005: 335, who highlights how this confusion between illegality and criminality is affected by having expulsion as both a legal administrative and a penal provision. The double provision is just another example of the intersection already discussed between penal law and administrative (sanction) law, in which the former ends up subordinated to the latter.

[340] Cf. DAL LAGO, 2004: 39; MONCLÚS MASÓ, in RIVERA BEIRAS, 2005: 331, 335; 2002: 177 s.; MOSCONI, 2005: 164; SILVEIRA, 2002: 551. Cf. also RIGO, 2004: 79; 2007: 143.
The internment of illegal migrants is an administrative custodial penalty (in itself a constitutionally suspect concept, in view of Art. 25.3 of the Spanish Constitution), largely equivalent to a custodial prison sentence, the sole difference –its administrative character aside– being that it may last up to a maximum of 40 days (Art. 62.2 O.L. 4/2000). Expulsion, meanwhile, shares much the same morphology as traditional penalties such as deportation and, more recently, exile (Art. 86 Penal Code 1944/1973).

[341] Cf. RIGO, 2004: 80; 2007: 144, who observes how the *administrativisation* of the sanction system in regard to migrants is aimed, not at making sanctions less severe, but at increasing the speed and efficiency of juridical response.
However, these administrative provisions are formulated in coordination with the resolutions of the penal system, as evinced by the expulsion regulation contained in Article 89 Spanish Penal Code.

[342] About the prominent restrictions of the right to defend oneself and to be defended before the law, and about the violation of the *non bis in idem* principle that brings this expulsion sanction, cf. GARCÍA VÁZQUEZ, 2005: 431 ff.; MONCLÚS MASÓ, 2002: 177 f.; NIETO MARTÍN, 2001: 23 ff.; SILVEIRA GORSKI, 2002: 97 f.; 2003: 549 f.

[343] On 1 September 2005, the Parliament and Council of the UE presented a draft *Directive on common rules and procedures for the return of third-country nationals residing illegally in member states*. At the beginning, the proposal (Art. 14) establishes that internment pending removal may last up to a maximum of 6 months but after the amendment of the LIBE Committee the draft directive allows the EU Member States to detain persons up to 18 months, (amendment 36 on Article 14, par. 4b (new)). However it guarantees that internment orders must be issued by a judicial authority, and should only proceed where the subject poses a flight risk and less extreme measures have proved inadequate. The proposal, furthermore, guarantees the right to appeal an expulsion order, as well as the order's suspension until the appeal has been concluded (Art. 12). It also establishes a maximum of 5 years for prohibition on re-entry

---

in the case of internment, meaning precarious circumstances and regularly overcapacity centres or centres that have not been properly equipped for the purpose[344]. In view of the serious repercussions these sanctions can have: if we take into account the enormous potential risks involved in repeating the attempt[345] (dangers attested to by the appalling figures for deaths resulting from attempting to enter Spain irregularly)[346], it is not difficult to understand how, for some migrants, expulsion rather than prison might seem by far the more grievous sanction, despite the latter's being, in theory, the most serious sanction contemplated by the legal systems in Europe[347].

---

following expulsion, though that prohibition may vary depending on the circumstances of each particular case and, in some instances, not even apply (Art. 9). About this draft see ANDRIJASEVIC, 2006a: 19 f.; 2006b: 153; RIGO, 2007: 188, 207. The maximum administrative detention order for irregular migrants in Germany is 18 months; in France, 32 days; and in Italy, 60 days (see RIGO, 2007: 220 f., fn. 25).

[344] On the issue of the harsh conditions under which irregular migrants in Europe are frequently interned, see DIRECTORATE-GENERAL INTERNAL POLICIES. POLICY DEPARTMENT C. CITIZENS RIGHTS AND CONSTITUTIONAL AFFAIRS, EUROPEAN PARLIAMENT, 2007. Regarding the situation in Spain, see: ACOSTA, 2008: 289 ff; OBSERVATORI DEL SISTEMA PENAL I ELS DRETS HUMANS, 2004; RUIZ ENCISO, 2007; and the reports of HUMAN RIGHTS WATCH, 2002a, 2002b, 2002c.
In 2006, the European Parliamentary Committee on Civil Liberties and Justice carried out an inspection of internment centres in different EU states. The findings from those visits –which in the Spanish instance were not unfavourable– drew attention to the dire condition of detention establishments in Malta. For an account of this, see *El País* 25 June 2006.

[345] As DE LUCAS, 2005: 217; PALIDDA, 2000: 221; SUTCLIFFE, 2003: 122, have pointed out, rigid border controls compel migrants to pay large sums of money in order to gain entry to their country of destination; places them in the hands of criminal networks, leaving them vulnerable to all manner of pressures and threats during the process of migration; and puts them in danger of theft, injury and –all too often– death during the journey. They also place them at risk of repression at the hands of the police in their countries of origin, transit and destination.

[346] According to EURO-MEDITERRANEAN CONSORTIUM FOR APPLIED RESEARCH ON INTERNATIONAL MIGRATION, 2005, between 1989 and 2002, 8000-10,000 people died while attempting to enter Spanish territory from Morocco. The Spanish *Guardia Civil*, meanwhile, have evidence to suggest that in the last few months of 2005, 1200-1700 people may have lost their lives while trying to reach the Canary Islands from the coast of Mauritania (on this subject, see *El Mundo* 20 March 2006). For the first eight months of 2006, the estimated number of deaths on the same route, according to the Red Cross, is somewhere between 2000 and 3000 (see *El País* 1 September 2006). By comparison, in the period 1995-2006, the number of documented deaths along the US-Mexican border was 4235 (see the newspaper *Diagonal*, nº 57, June-July 2007). The ASOCIACIÓN DE DERECHOS HUMANOS DE ANDALUCÍA (APDHA) have reported the death of 1167 persons in 2006 and 921 in 2007 during their migratory experience towards Spain but they estimate that at least 7000 persons have died in 2006 and 3500 in 2007 as a consequence of European border controls (2008:33-35). See also the figures in DAL LAGO, 2004: 224; SILVEIRA, 2003: 541, and the data gathered in the HUMAN RIGHTS WATCH reports quoted before.
Another particularly deplorable example of this occurred between the end of August and the beginning of October 2005, when massive attempts were made to get across the Spanish border at the autonomous cities of Ceuta and Melilla. At least 14 irregular migrants lost their lives in the course of those attempts, the majority of them as a result of shots fired by border police (see *El País* 30 September 2005, 7 October 2005, and AIERBE, 2006). The scenes were repeated in July 2006, when three migrants died while attempting to jump the border fences at Melilla, most likely as a result of shots fired by border security forces (see *El País* 4 July 2006).

[347] Cf. MONCLÚS MASÓ, 2002: 177, who notes that, for migrants, an expulsion measure –which establishes, *ex* Art. 58.1 O.L. 4/2000, a prohibition on entry for a minimum of 3 years; or, in the case of a penal resolution, a minimum period of 10 years– can be more grievous than a custodial sentence, given that they may be in danger of their lives or physical safety back in their country of origin, and that they may well have spent a large portion of their life's savings in order to make the journey in the first place. Cf. also RIGO, 2004: 79.

In addition to all the issues highlighted already, however, there is a fourth affecting the construction of the migrant as a risk subject: the increasingly common view of migration phenomena as conditions under which subversive or terrorist activities are likely to emerge, which, in turn, has been used to justify their institutionalisation as priority social control areas[348]. Yet, while such an attitude may have been strengthened by the events of 2001 (and, in Spain, by those of March 2004), its history actually goes back further than that.

For over a decade, irregular migration has been defined as an international security problem, a status only shared by organised crime and terrorism[349].

The function of risk category: social cohesion, managed exclusion and subordinated inclusion

There is the need created by an *actuarial* approach to security to identify specific risk groups, as the focus shifts away from guaranteeing security in general terms towards targeting restricted resources to tackle specific risks arising out of defined sectors of the population. The particular control of migrants, according to this logic of managing and distributing risk, is a key aspect of the whole system's *raison d'être*[350].

At a time characterised by the breakdown of traditional (*modern*) identity markers[351] and ever-increasing individualism, the *negative* definition of what certain criminologists have termed suitable enemies;[352] also has an obvious role to play in offsetting this lack of social cohesion and coordination[353]. Thus the group definition of irregular migrants as a category based on a powerful sense of the subjects' otherness fulfils the essential

---

[348] Cf. BIGO, 2005: 76; CAVADINO/DIGNAN, 2006: 47; GIL ARAÚJO, 2005: 114; HANON, 2006: 38; DAL LAGO, 2003: 87; MOSCONI, 2005: 151; RUIZ RODRÍGUEZ, 2006: 184, 186; SAINT-SAËNS, 2004: 62. ANASTASIA, 2006: 366, meanwhile, points out that this circumstance tends to join in the migrant the roles of the internal enemy and of the external enemy.
 On specific expression of this linking between migration and terrorism can be seen in artificial surge constructed in autumn 2004 focusing on the alleged existence of Islamic networks in Spanish prisons, mentioned above. See the editions of *El Mundo* for 23 September, 8 October, 24 October, 27 October and 2 November 2004.
[349] Cf., among others, HUYSMANS, 2006; GIL ARAÚJO, 2005: 114, 120; MEZZADRA, 2005b: 68; MOULIER BOUTANG, 2002: 144 f. Meanwhile, BIGO, 2005: 76 f., underlines the primacy of migration matters in the international police activities.
[350] Cf. BIETLOT, 2003: 64, who identifies some of the specific functions of these migration management practices: to dissuade future irregular migrants; to transmit messages to society that may help to conjure up a sense of insecurity; even to justify existing public (and private) security apparatuses.
[351] See, among others, BECK, 1998: 95 ff.; MATTHEWS, 2003: 163 ff., 316, 320; MELOSSI, 1997: 67; YOUNG, 2003: 32, 159 ff.
[352] This expression is commonly used by CHRISTIE (see, e. g. CHRISTIE, 1986: 42 ff.; 1998: 53 f.), but it is usually employed also by other scholars (e. g., see WACQUANT, 1999: 215 ff.).
[353] Cf., among others, BAUMAN, 2002: 118, 183; 2005: 105, 113 f.; BIETLOT, 2003: 61; DAL LAGO, 2004: 46 f.; MELOSSI, 1997: 67; PALIDDA, 2002: 217; PORTILLA CONTRERAS, 2005: 77; DE GIORGI, 2002: 117.

function of creating cohesion within a society that finds itself in crisis[354]. Historically –though perhaps with greater urgency nowadays– society has used the characterisation of a social subject as requiring control and being logically responsible for the disfunctions and conflicts within the community as a potent mechanism of social cohesion[355].

A number of additional, no less important uses are also apparent. In order to understand these properly, however, we must first of all be aware of the clash created within the regime of sanctions for irregular migrants between exclusion objectives and aims of insertion.

Just as the principle upon which the juridical status of migrants seems be founded is one of potential exclusion, so the most extreme juridical implications for irregular migrants as contemplated by the (penal and administrative) Spanish regime of sanctions (i.e. expulsion, internment, or imprisonment with a view to expulsion and no possibility of getting the sentence suspended) would appear to have incapacitation; as their primary objective[356]. By the same token, any rehabilitationary considerations in this regard are conspicuously absent. That said, in order to understand fully the purpose of this migration policy and the crime policy philosophy behind a mechanism like expulsion (as established by Article 89 Spanish Penal Code), a vital point to realise is that what all this provides for is *selective* incapacitation[357]. Put another way, internment and expulsion (following imprisonment, or not, depending on the case) are not enacted against all those who should, in theory, qualify to be so dealt with. In fact, the data available to us indicate that, over the last few years, the proportion of expulsions in Spain that have actually been carried out is only just over 25% of those agreed[358]. There are, of course, different reasons for this: juridical (absence of repatriation agreements with different countries of origin); informational (failure to identify nationality of particular migrant, or refusal on the part of particular state to acknowledge migrant as national of the same); and, above all, material (lack of means required to execute the totality of expulsions)[359]. Nevertheless, a further factor to take into consideration must surely be the lack of political will to enforce the full rigour of the expulsion system in the knowledge that such a scrupulous approach would risk blocking or dramatically reducing the stream

---

[354] Cf. BIETLOT, 2003: 61; DAL LAGO, 2004: 11, 44 ff., 50, 237, 245 –who points out that the social cohesion function of the sanction systems was already highlighted by DURKHEIM-; MÁRQUEZ LEPE, 2005: 210; MOSCONI, 2005: 150; PALIDDA, 2000: 25; WALTERS, 2004: 65.

[355] Cf. MELOSSI, 2002a: 282 f.; YOUNG, 2003: 177 ff., who remarks that nowadays the migrant is not the only subject that fulfils this function. See also _I_EK, 2005: 89.

[356] Cf. PEREZ CEPEDA, 2006: 237.

[357] Cf. DE GIORGI, 2000: 73 f.

[358] See *El País* 20 July 2004, which reported that between 2002 and early 2004 the Spanish government carried out only 27.8% of agreed expulsions. See also further data supplied by SILVEIRA, 2003: 540, 555 f., which show that figures for executed expulsion orders remained more or less around these levels. See also ANDRIJASEVIC, 2006b: 152 –who reports, in the Italian case, figures around 50%-; DAL LAGO, 2004: 228, fn. 2, and the newspaper *El País* for 18 November 2005 and 26 August 2006.

[359] Cf. DE GENOVA, 2004: 209.

of irregular migrants into the country where their diverse economic and social contribution is one of the utmost importance[360]. In parallel with the kinds of functions outlined above, there is also: the effect the sector has on what is a rapidly aging population pyramid[361]; its outstanding contribution to economic growth[362]; and its no less outstanding role in improving the public finances [363] (one of the fundamental considerations of successive regularisation processes).

It might be assumed, therefore, that a migration policy aimed less at putting a stop to the flow of migrants than at managing it[364] (as evinced by a distinct official reluctance to clamp down on the *black labour market*) was always destined to encourage the massive-scale employment of migrant labour in conditions of maximum flexibility and exploitation, in keeping with the demands of an increasingly post-Fordist system of production[365]. Likewise, a system of control that targets irregular migrants –in particular, measures such as internment and expulsion[366]– also has a normalising objective that is *(neo-)disciplinary* in nature (though not in the least way rehabilitatory, as it focuses,

---

[360] Cf. BIETLOT, 2003: 66; DE GENOVA, 2004: 209; RODRIGUEZ, 2003a: 122. See also DÜVELL, 2004: 28; VIEJO VIÑAS, 2005: 147.

[361] The study OFICINA ECONÓMICA DEL PRESIDENTE, 2006: 3 ff., shows that the spectacular growth in immigration has caused the Spanish population to rise by 3 million in the period 2000-2005, representing a growth rate of 1.5% annually, the highest since the statistical register began. To put it another way: of the 4.7 million new members of Spanish society in the years between 1996-2005, 3.6 million of them were migrants. Based on these figures, for the period 2000-2005, Spain was the country in the OECD with the highest percentage growth of its migrant population: 7.1%.

[362] A report produced by the SERVICIO DE ESTUDIOS DE CAIXA CATALUNYA, 2006, shows that, without migration, Spanish income *per capita* would have fallen in the period 1995-2005 at a rate of 0.6% *per annum*, representing a decrease similar to or greater than that of other European countries: Germany (1.5%), Italy (1.1%), Sweden (0.7%), Portugal (0.6%), Greece (0.6%).
 The study OFICINA ECONÓMICA DEL PRESIDENTE, 2006: 14 ff., highlights that the massive influx of migrants into the Spanish market has not caused a rise in unemployment, but rather a sharp reduction instead. Migrants are also shown to have a higher rate of activity than native workers (79% against 68.2% in 2005). The study also indicates that the level of temporary contracts among migrant workers is 61.4% and that their salaries are 30% lower than those of native workers. The paper adds that migrants accounted for 51% of GDP growth for the period 2001-2005. As an indirect effect, it estimates that 30% of the growth in female economic activity between 1996-2005 was due to the presence of migrants. The study highlights that the fall in unemployment was an effect of the increased flexibility which migrants introduce into the labour market, since they tend to be focused in sectors in which native labour is scarce, their geographic mobility is greater and their salaries are lower.

[363] In relation to the public finances, the study OFICINA ECONÓMICA DEL PRESIDENTE, 2006: 14 ff., shows that in 2005 migrants generated 6.6% of the state's income, but received only 5.4% of its expenditure, thus contributing 48% of the surplus in the public finances for that year. Figures relating to the importance of contributions made by migrant workers to the financial sustainability of the Spanish social security system can be also found in *El País* 29 October 2006.

[364] In as far as the prevailing ideology behind migration policies is one of " *border management* " and "*migration management*", based on the principle of productivity, the *Fortress Europe* metaphor does not reflect the full complex nature of the how the EU controls the migration process. A further indication of the metaphor's unsuitability is the already mentioned dissemination of the idea of borders –and the controls traditionally associated with them– across the social terrain, with the aim of maintaining constant control over the lives of irregular migrants (see CORRADO, 2004: 155; DÜVELL, 2004: 28; GUILD/BIGO, 2006: 59; MEZZADRA, 2004: 21; 2005a: 148; SAINT-SAËNS, 2004: 62 f., 66).

[365] Cf. ibidem. CORRADO, 2004: 152, also notes, correctly, that the life of a migrant is probably the most emblematic of the postmodern condition and embodies the post-Fordist paradigm.

[366] Cf. ANDRIJASEVIC, 2006b: 152 f.; GUZZETTI, 2006: 47 f.

not on the individual subject, but on the collective social group[367]), and aimed at binding migrants to a scheme of employment that pigeonholes them into jobs that are every bit as precarious and exploitative as they are economically essential[368]. What this means, in short, is that migrants are left to feel the full severity of a new *workfare* regime[369] according to which the labour market is segmented along ethnic lines, with middle to high value-added occupations being reserved, by and large, for the native workers[370].

There can surely be no question but that the harsh juridical status of irregular migrants, which makes it next to impossible for them to escape from the cycle of illegal residency and *black economy labour*, translates into their coercive relegation to the lowest levels of the production system, circumstances characterised by exceptionally poor employment regulation and the implications of that in terms of the virtual non-existence of workers' rights[371]. Thus irregular migrant workers, subordinated to a process of overexploitation, end up consigned to the lowest rung of a universally precarious labour regime[372].

The situation cannot be read as one of simple dysfunction, as it might have in an age of Keynesian *welfarism*. On the contrary, in a post-Fordist regime of production in which high levels of flexibility and adaptability are required of the workforce, it becomes not just expedient but utterly essential that sections of that workforce should be subject to the conditions of extreme precarity described above. Viewed from this perspective, the whole concept of juridical irregular migrant status, including its control aspects, seems a most extraordinary instrument of subordination, aimed above all else at coactively subjecting groups of that description to highly undesirable labour conditions. Even the exclusionary, segregationist aspects of the juridical regime are constructed as crucial elements of a greater scheme of thinking: that of enforcing disciplined subordination to the kind of labour practices demanded

---

[367] Using the distinction suggested by FOUCAULT, 1992: 168 ss., between disciplinary measures and government biopolitical measures, it is possible to conclude that the normalising, neodisciplinary principle operating in this situation does not do so individually, with reference to each separate migrant (with a view to individual rehabilitation), but collectively as a risk group.

[368] Cf. BOJADZIJEV/KARAKAYALI/TSIANOS, 2004: 50; CORRADO, 2004: 150; FUENTES OSORIO, 2005: 20; GUILLÉN/VALLÉS, 2003: 318; DAL LAGO, 2004: 48, 235, fn. 46, 255, 267 ff.; PALIDDA, 2002: 207 ff., 214; RODRÍGUEZ, 2003a: 76 f.

[369] About the *workfare* concept, an expression that tries to identify the transformations that have occurred in the welfare systems during the last decades, see, among others BRONZINI, 2002: 51; FARIA, 2001: 200; DE GIORGI, 2000: 87; LAZZARATO, 2006: 94; MATTHEWS, 2003: 313; RODRÍGUEZ, 2003a: 84 ff.; 2003b: 110, 113; SUSÍN BETRÁN, 2006: 131, fn. 11; WACQUANT, 2000: 41 ff.

[370] Cf. CORRADO, 2004: 149, 155; DE GENOVA, 2004: 182; DAL LAGO, 2004: 130, 267 ff.; RODRÍGUEZ, 2003a: 77, 118, 122.

[371] Cf., among many others, DE GIORGI, 2000: 54 f.; DAL LAGO, 2005: 13; MARTÍNEZ VEIGA, 2001: 84 f.; RODRÍGUEZ, 2003a: 77; SILVEIRA, 2003: 563; TERRADILLOS BASOCO, 2004: 1476.

[372] By way of an illustration, at the public presentation of the study PEREDA/ACTIS/DE PRADA, 2005, it was pointed out that the average salary for a migrant at that time was 870€ a month, compared with the 1741€ a month earned by a native worker. On this subject, see *La Voz de Galicia* 17 February 2005.

by our present system of accumulating capital[373]. It should also be noted, of course, that acts of exclusion are also deployed to avoid the influx of migrants on such a scale as would make it impossible for them to be absorbed, even taking into account the demand for labour. However, to use the language of the experts in the field of governmentality studies, as first investigated in his day by FOUCAULT[374], one might say that the *control society*, as a hybrid, conflictive, changing social management model, also reveals aspects of the disciplinary logic of normalization[375].

The repercussions of risk category: the discriminatory operation of the Spanish penal system in relation to migrants

The penalties meted out to migrant subjects are a clear demonstration of the tensions and limits of a sanctionary regime which, while designed from the perspective of an abstract subject type (the citizen), in practice operates according to a patently selective and differential system of punishment. At a minimum, in relation to how prison sentences are implemented, the evidence should compel some reconsideration of the existing objective parameters for measuring progress in the area of rehabilitation: analysing these in relation to the actual status of irregular migrants in general, typically what emerges is that outside of the native prisoner population those parameters are largely unworkable.

To start with, the "*typical*" criminality of migrants as a group is exaggerated by Spanish crime statistics owing both to the priority targeting of resources against them[376] –for example, in relation to *street crime*– and to the ease with which their crimes are typically detected, investigated and demonstrated. The high rate of detection observed in such cases is also a function of the high social visibility of migrants, combined with the pervasion

---

[373] Cf. BIETLOT, 2003: 64, 66; MEZZADRA, 2005a: 148; RODRÍGUEZ, 2003a: 77, 118, 122. See also DE GIORGI, 2000: 55; DAL LAGO, 2004: 142, fn. 25. Meanwhile, MELOSSI, 2002a: 267 f.; MOSCONI, 2005: 147, 153, 165, mention also activities that are placed in the different levels of illegality.

[374] Those studies analysed the presence over the last three centuries of western history of three ideologies of governmentality; or diagrams of power which have all influenced the philosophies of punishment: the *sovereign* or *strictly penal society* (that coincided with the *ancien regime*); the *disciplinary society* (gradually perfected over the course of the modern period, until its climax under the Fordist social state); and the *control society* (introduced in parallel with the crisis in the Fordist social model). All about it, see BIETLOT, 2003: 58 ff.; CARLI, 1999: 22 ff.; CASTEL, 1991: 293 ff.; DELEUZE, 1995: 273 ff.; FOUCAULT, 1991: 163 ff.; 1992: 163 ff.; 1995: 98, 117; 2000: 217 f.; DE GIORGI, 1999: 121 ff.; 2000: 15 ff.; 2002: 28 ff., 37 ff., 96 ff.; HARDT/NEGRI, 2002: 37 ff., 302 ff.; LAZZARATO, 2006: 73 ff., 231 f.; PORTILLA, 2003: 155 ff.; RODRÍGUEZ, 2003a: 124 ff.

[375] Cf. BIETLOT, 2003: 58, 60, 64; DE GIORGI, 2000: 24, 48; 2002: 96 f., 107; LAZZARATO, 2006: 82, 88, 93 f., 106, 235; HARDT/NEGRI, 2002: 302; PORTILLA, 2003: 158; RODRÍGUEZ, 2003a: 127; ZARIFIAN, 2003: 17 f.

[376] Cf. HARCOURT, 2007: 156. About the prominent repercussions that the profiling have in police activities, see HARCOURT, 2007: 29, 160 ff.

and effectiveness of Spanish police stereotypes[377], as illustrated by various data relating to arrests and identity checks[378]. Stereotypes of this kind are merely a reflection, however, of public opinion generally[379], social attitudes also mirrored to an extent in the whole Spanish penal system approach to migrant criminality[380].

Secondly, as the statistics would seem to show[381], a migrant offender is much more likely than his or her native counterpart to suffer preventive detention in Spain[382] –a factor, it should be remembered, that usually prejudices the subject at sentencing when it comes to deciding between imprisonment and a sanction of a different type[383]-. Looking at how preventive detention is regulated in Spain, there would appear to have been at least two legal basis for this circumstance[384]. The first of these is the greater social alarm, fomented by media representations, which illegal acts by migrants tend to generate among the public; this popular anxiety was already recognised under Article 503.2 of the Spanish Criminal Procedural Law the so called *Ley de Enjuiciamiento Crimina* -LECrim-, prior to the reform introduced by O.L.

---

[377] Cf. FUENTES OSORIO, 2005: 20; GUILLÉN/VALLÉS, 2003: 314; DAL LAGO, 2004: 30; MELOSSI, 2002a: 267, 289 ff.; MOSCONI, 2005: 158; PAVARINI, 2002: 171 f.; DE GIORGI, 2000: 72; RODRÍGUEZ, 2003a: 121, 130. Cf. also PALIDDA, 2000: 211; WAGMAN, 2006: 19 ff., 25 ff., 31 ff. See also the OPEN SOCIETY JUSTICE INITIATIVE, 2007: 18 f., 41, 45 f., 57 f., a fieldwork study that demonstrates the persistence of these stereotypes among Spanish police practices and the selectivity with which the system operates in regard to migrants; the EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, 2006: 11, 28 f., has recommended that the Spanish government investigate the presence of selective practices among police services.

In Spain, the Decision of the Constitutional Court 3/2001 admits selective practices of this kind, at least in relation to actions based on immigration law. However, Article 5.1.b O.L. 2/1986 (13 March) *for the Security Forces and Bodies* establishes as its guiding principle of action that police forces should "*act, in the fulfilment of their duties, with absolute political neutrality and impartiality and, consequently, without discrimination of any kind by reason of race, religion or opinion*".

The issue is one that is also common to other countries (e. g., in the British case, see HOME OFFICE, 2006). See also RE, 2006: 126.

[378] According to data from the MINISTERIO DEL INTERIOR, 2007: 288, in 2006, 88,820 foreign citizens were arrested in Spain, representing 34% of the total 260,500 arrests made that year. Other figures can be seen in MUÑAGORRI LAGUÍA, in RIVERA BEIRAS, 2005: 448; RODRÍGUEZ, 2003a: 117; WAGMAN, 2006: 29. The study EUROPEAN COMMISION AGAINST RACISM AND INTOLERANCE, 2006: 11, states that there is evidence to show that, while foreign subjects account for 30% of people arrested, they represent only 10% of those convicted, which suggests that arrests against migrants may be based on weaker evidence than those against native subjects.

[379] As MELOSSI, 2002 a: 279 ff.; MOSCONI, 2005: 157, point out, these police stereotypes reflect more general social attitudes, according to which migrants are not only reproached for their supposed criminal tendencies, but also blamed for bringing about a social change the public feels as crisis, or disorder.

As an illustration of the general persistence of these stereotypes, a study by the CIS (Spanish *Centre for Sociological Investigation*) for the year 2004 found that 60% of those surveyed associated immigration with criminality (see EUROPEAN COMMISION AGAINST RACISM AND INTOLERANCE, 2006: 14).

[380] Cf. MOSCONI, 2005: 157; TONRY, 2004: 209 f.

[381] See the data mentioned in footnote n. 25.

[382] Cf. GARCÍA ESPAÑA/PÉREZ JIMÉNEZ, 2005: 92; DE GIORGI, 2000: 71 ff.; DAL LAGO, 2004: 31; MATTHEWS, 2003: 291; MELOSSI, 2002a: 267; PALIDDA, 2000: 213; PAVARINI, 2002: 170 f.; RE, 2006: 129. Cf. also MONCLÚS MASÓ, 2002: 176; TONRY, 2004: 215, 225, and the newspaper *El País* 16 June 2006.

[383] Cf. TONRY, 2004: 225.

[384] Cf. RUIZ RODRÍGUEZ, 2006: 188 f. See also PÉREZ CEPEDA, 2007: 407, fn. 94.

13/2003 (24 October), as adequate grounds for remanding an individual to preventive custody. The second is the suspicion, based on the subject's social circumstances (possible lack of fixed address, failure of identity documents, precarious employment, lack of income, etc.), that he or she represents a flight risk (Art. 503.1.3 LECrim).

A third aspect of the selectivity issue is how, in relation to sentencing, the uncertainty surrounding the social situation of migrants makes it more difficult to implement either non-custodial alternatives or the mechanisms for substituting or conditionally suspending a sentence[385]. In Spain, the use of substitution or suspension mechanisms in cases involving irregular migrants is not officially permitted under current expulsion regulations (Art. 89.1 Penal Code).

Fourthly, conditions discussed earlier, such as precarity of employment, weak family ties or irregular status, frequently obstruct subjects in the final phases of a prison sentence from gaining access to the different forms of parole[386]. In Spain, the access of migrants to such alternatives is again denied under Article 89.1 Penal Code which establishes expulsion across the board, thus excluding any possibility of gaining parole or conditional release.
However, having a criminal record removes any chance he or she may have of regularising his or her status, leaving the subject with all the negative consequences that situation entails; signally, the permanent threat of expulsion and the lack of any alternative but to seek a living outside of regular paid work[387]. One final point to note in this context, during the period of a prison sentence, migrants are denied any possibility whatsoever of receiving a release permit, on the grounds that they are considered a flight risk; this is despite the fact that there has still been no empirical research produced to back up such a theory[388].

A fifth and final aspect of the experience of migrants in the Spanish penal system is that theirs tends to be more punishing than the average, owing as much to the lack of external human support as to the subjects' limited understanding of how the system operates[389].

---

[385] Cf. GARCÍA ESPAÑA/PÉREZ JIMÉNEZ, 2005: 92; DE GIORGI, 2000: 71 ff..; DAL LAGO, 2004: 31 –who claims that migrants receive harsher sentences than the native ones for same crimes-; MATTHEWS, 2003: 291; PALIDDA, 2000: 213; PAVARINI, 2002: 170 f.; RE, 2006: 129. Cf. Also MELOSSI, 2002a: 267, 274 ff., who makes the claim, backed up by statistical evidence, that there is an actual split within crime policy, whereby imprisonment is applied principally against migrants, with prison alternatives the preferred option against native subjects.

[386] See AGUILERA REIJA, 2005: 268; LEGANÉS GÓMEZ, 2005: 250; MELOSSI, 2002a: 267; RE, 2006: 130; RUIZ RODRÍGUEZ, 2006: 187, 189 f., and the newspaper *El País* for 23 September 2002 and 16 June 2006.

[387] Cf. AGUILERA REIJA, 2005: 267, 269 ; RUIZ RODRÍGUEZ, 2006: 192. The Spanish Senate and Ombudsman have demanded that those migrants should receive identity documents that allow them to develop a regular job (see *El País* 24 September 2007).

[388] Cf., among others, RUIZ RODRÍGUEZ, 2006: 189 f.

[389] Cf. MATTHEWS, 2003: 290 s., 300, who makes the (perhaps excessive) claim of a dual system of imprisonment in Europe discriminating between foreigners and native citizens. See also RE, 2006: 130 ff.

All of which goes to illustrate a point on which to conclude this brief analysis: the juridical status of migrants and their definition as a dangerous group are not merely risk management responses to the actions and behaviour of migrants. The symbolic exclusionary rationale behind them and the specific practices that go with it also play a part in creating the risk in the first place. In an example of the Mertonian *self-fulfilling prophecy*, *migrant criminality* may actually be a result of the way the juridical system operates[390].

Bibliography

ACOSTA,M.A. (2008), "La situación en el caso de los migrantes privados de su libertad", in VARIOUS AUTHORS, *Privación de libertad y derechos humanos*, OSPDH, Barcelona

AEBI,M./STADNIC,N. (2007), *Council of Europe Annual Penal Statistics. Space I, Survey 2005*, Council of Europe, Strasbourg.

AGAMBEN,G. (1998), *Homo Sacer*, Pre-Textos, Valencia.

AGUILERA REIJA,M. (2005), "Situación jurídica de las extranjeras presas", in MARTÍN PALOMO,M.T./MIRANDA LÓPEZ,M.J./VEGA SOLÍS,C.(EDS.), *Delitos y fronteras*, Complutense, Madrid.

AIERBE,P. (2006), "The "assault" by "sub-Saharan immigrants" in the media" (<www.statewatch.org/news/2006/jul/sos-migrants-media-peio-2006.pdf>).

ANASTASIA,S. (2006), "Diritto e diritti, prima e dopo l'11.9", in RIVERA,I. ET AL., *Contornos y pliegues del Derecho. Homenaje a Roberto Bergalli*, Anthropos, Barcelona.

ANDRIJASEVIC,R. (2006a), "How to Balance Rights and Responsabilities on Asylum at the EU's Southern Border of Italy and Libya" (<www.statewatch.org/news/2006/may/andrijasevic-Libya-Lampedusa.pdf>).

ANDRIJASEVIC,R. (2006b), "Tra Lampedusa e la Libia. Storie di internamenti e deportazioni", in *Conflitti Globali*, n. 4.

ANITUA,G.I. (2005), *Historias de los pensamientos criminológicos*, Del Puerto, Buenos Aires.

ASOCIACION PRO DERECHOS HUMANOS (1999), *Informe sobre la situación de las prisiones en España*, Fundamentos, Madrid.

ASOCIACION PRO DERECHOS HUMANOS DE ANDALUCIA (2008), *Informe Derechos Humanos en la Frontera Sur 2007* (http://www.apdha.org/media/informeinmigra07.pdf)

ASÚA BATARRITA,A. (2002), "La expulsión del extranjero como alternativa a la pena: incongruencias de la subordinación del derecho penal a las políticas de control de la inmigración", in LAURENZO COPELLO,P.(ED.), *Inmigración y derecho penal. Bases para un debate*, Tirant lo Blanch, Valencia.

ATZERT,T. ET AL. (2004), "Frontières et fronts: chaînes migratoires", in *Multitudes*, n. 19.

BARATTA,A. (1989), "Introducción a una sociología de la droga. Problemas y contradicciones del control penal de las drogodependencias", in VARIOUS AUTHORS, *Estudios Penales en memoria del Profesor Agustín Fernández Albor*, Univ. Santiago Compostela, Santiago de Compostela.

BARATTA,A. (1993), *Criminología crítica y crítica del Derecho Penal*, 4th ed., Siglo XXI, México.

BAUCELLS I LLADÓS,J. (2005), "El Derecho penal ante el fenómeno inmigratorio", in *Revista de Derecho y Proceso Penal*, n. 13.

---

[390] Cf. DE GIORGI, 2000: 71, 73; HARCOURT, 2007: 36, 154, 156; RODRÍGUEZ, 2003 b: 112; 2003a: 120, 130; WACQUANT, 2002: 115. Cf. Also MELOSSI, 2002a: 267 f.; MOSCONI, 2005: 147, 153, 165. HARCOURT, 2007: 29, 154, 162 f., points out that focusing attention on the criminal activities of one section of the population has the effect of strengthening citizen –and juridical– consciousness of that group's propensity to commit crime.

BAUMAN,Z. (2002), *Modernidad líquida*, FCE, Buenos Aires.

BAUMAN,Z. (2005), *Trabajo, consumismo y nuevos pobres*, Gedisa, Barcelona.

BECK,U. (1998), *La sociedad del riesgo*, Paidós, Barcelona.

BIETLOT,M. (2003), "Du disciplinaire au sécuritaire", in *Multitudes*, n. 11.

BIGO,D. (2005), "La mondialisation de l'(in)sécurité? Reflexions sur le champ des professionnels de la gestion des inquiétudes et analytique de la transnationalisation des processus d'(in)sécurisation", in *Cultures & Conflits*, n. 58.

BOJADZIJEV,M./KARAKAYALI,S./TSIANOS,V. (2004), "Le mystère de l'arrivée", in *Multitudes*, n. 19.

BONDITTI,P. (2005), "Biométrie et maîtrise des flux: vers une geotechnopolis du vivant-en-mobilité?", in *Cultures & Conflits*, n. 58.

BRONZINI,G. (2002), "Cittadinanza e welfare state in due "classici" contemporanei: T.H. Marshall e J. Rawls", in VARIOUS AUTHORS, *Controimpero. Per un lessico dei movimenti globali*, Manifestolibri, Roma.

CARLI,F. (1999), "Dal moderno disciplinare al postmoderno modulare", in *DeriveApprodi*, n. 17.

CARRERE,V. (2004), "Une histoire de petits renoncements successifs", in *Multitudes*, n. 19.

CASTEL,R. (1991), "From dangerousness to risk", in BURCHELL,G./GORDON,C./MILLER,P.(EDS.), *The Foucault Effect*, Univ. of Chicago Press, Chicago, 1991.

CASTEL,R. (1999), *Les métamorphoses de la question sociale*, Gallimard, Paris.

CAVADINO,M./DIGNAN,J. (2006), *Penal Systems. A comparative approach*, Sage, London.

CID MOLINÉ,J./LARRAURI PIJOAN,E. (2001), *Teorías criminológicas*, Bosch, Barcelona.

CORRADO,A. (2004), "Tra autovalorizzazione e sfruttamento. Migrazioni e processi di informalizzazione in Mali", in MEZZADRA,S.(ED.), *I confini della libertà*, DeriveApprodi, Roma.

CHRISTIE,N. (1986), "Suitable Enemies", in BIANCHI,H./VON SWAANINGEN,R.(EDS.), *Abolitionism: Towards a non-Repressive approach to Crime*, Free Univ. Press, Amsterdam.

CHRISTIE,N. (1993), *La industria del control del delito*, Del Puerto, Buenos Aires.

CHRISTIE,N. (1998), "El Derecho Penal y la sociedad civil. Peligros de la sobrecriminalización", in VARIOUS AUTHORS, *XX Jornadas Internacionales de Derecho Penal*, Univ. Externado de Colombia, Bogotá.

CHRISTIE,N. (2004), *Una sensata cantidad de delito*, Del Puerto, Buenos Aires.

CUTTITTA, P. (2007) *Segnali di confine. Il controllo dell'immigrazione nel mondo frontiera*, Mimesis, Milano

DIETRICH,H. (2004), "Campi profughi ai nuovi confini esterni. Come si allarga l'Europa", in MEZZADRA,S.(ED.), *I confini della libertà*, DeriveApprodi, Roma.

DIRECTORATE-GENERAL INTERNAL POLICIES. POLICY DEPARTMENT C. CITIZENS RIGHTS AND CONSTITUTIONAL AFFAIRS. EUROPEAN PARLIAMENT (2007) "The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states." (http://www.libertysecurity.org/IMG/pdf_eu-ep-detention-centres-report.pdf)

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION (2006), "Analysis of the external dimension of the EU's asylum and immigration policies" (<www.statewatch.org/news/2006/jul/eu-res-study-ext-imm.pdf>).

DÜVELL,F. (2004), "La globalizzazione del controllo delle migrazioni", in MEZZADRA,S.(ED.), *I confini della libertà*, DeriveApprodi, Roma.

EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE (2006), *Third Report in Spain* (< http://www.coe.int/t/e/human_rights/ecri/1%2Decri/2%2Dcountry%2Dby%2Dcountry_approach/spain/Spain%20third%20report%20-%20cri06-4.pdf>).

FARIA,J.E. (2001), *El Derecho en la economía globalizada*, Trotta, Madrid.

FEELEY,M./SIMON,J. (1992), "The New Penology: Notes on the Emerging Strategy of Correction and its Implications", in *Criminology*, n. 4.

FEELEY,M./SIMON,J. (1994), "Actuarial Justice: The Emerging New Criminal Law", in NELKEN,D.(ED.), *The Futures of Criminology*, Sage, London.

FOUCAULT,M. (1991), *Saber y verdad*, La Piqueta, Madrid.

FOUCAULT,M. (1992), *Historia de la sexualidad. 1. La voluntad de saber*, 20th ed., Siglo XXI, Madrid.

FOUCAULT,M. (1995), *La verdad y las formas jurídicas*, 4th ed., Gedisa, Barcelona.

FOUCAULT,M. (2000), *Defender la sociedad*, FCE, Buenos Aires.

GARCÍA ESPAÑA,E./PÉREZ JIMÉNEZ,F. (2005), *Seguridad ciudadana y actividades policiales*, IAIC/Fund. El Monte, Málaga.

GARCÍA-PABLOS DE MOLINA,A. (1999), *Tratado de Criminología*, Tirant lo Blanch, Valencia.

GARCÍA VÁZQUEZ,S. (2005), *El estatuto jurídico constitucional del extranjero en España* (unpublished Ph.D. thesis), A Coruña.

GARLAND,D. (1998), "Les contradictions de la 'société punitive': le cas britannique", in *Actes de la Recherche en Sciences Sociales*, n. 124.

GARLAND,D. (2005), *La cultura del control*, Gedisa, Barcelona.

DE GENOVA,N. (2004), "La produzione giuridica dell'illegalità. Il caso dei migranti messicani negli Stati Uniti", in MEZZADRA,S.(ED.), *I confini della libertà*, DeriveApprodi, Roma.

GIL ARAÚJO,S. (2005), "Muros alrededor de 'el Muro'. Prácticas y discursos en torno a la inmigración en el proceso de construcción de la política migratoria comunitaria", in MARTÍN PALOMO,M.T./MIRANDA LÓPEZ,M.J./VEGA SOLÍS,C.(EDS.), *Delitos y fronteras*, Complutense, Madrid.

DE GIORGI,A. (1999), "Dalla disciplina al rischio: controllo attuariale e marginalità sociale", in *DeriveApprodi*, n. 17.

DE GIORGI,A. (2000), *Zero Tolleranza*, DeriveApprodi, Roma.

DE GIORGI,A. (2002), *Il governo dell'eccedenza. Postfordismo e controllo della moltitudine*, Ombre corte, Verona.

GONZÁLEZ CUSSAC,J.L. (2003), "La contrarreforma penal de 2003: Nueva y vieja política criminal", in *Revista Xurídica Galega*, n. 38.

GONZÁLEZ CUSSAC,J.L. (2005), *El Derecho Penal frente al terrorismo. Cuestiones y perspectivas*, Universitat Jaume I, Castelló de la Plana.

GUILD,E./BIGO,D. (2005), "Polizia a distanza. Le frontiere mobili e i confini di carta", in *Conflitti Globali*, n. 2.

GUILLÉN,F./VALLÉS,L. (2003), "Inmigrante e inseguridad: ¿un problema de delincuencia o de victimización?", in AGRA,C. ET AL.(EDS.), *La seguridad en la sociedad del riesgo. Un debate abierto*, Atelier, Barcelona.

GUZZETTI,L. (2006), "Il linguaggio nei campi: lager, gulag, Cpt", in *Conflitti Globali*, n. 4.

HANON,J.-P. (2006), "Militari. Dal campo di battaglia alla guerra al terrorismo", in *Conflitti Globali*, n. 3.

HARCOURT,B.E. (2007), *Against Prediction*, Univ. of Chicago Press, Chicago.

HARDT,M./NEGRI.A. (2002), *Imperio*, Paidós, Barcelona.

HOME OFFICE (2006), *Race and the Criminal Justice System 2004-2005* (<www.statewatch.org/news/2006/mar/s95race05overview.pdf>).

HUMAN RIGHTS WATCH (2002a), *Discretion Without Bounds:The Arbitrary Application of Spanish Immigration Law* (<www.hrw.org/reports/2002/spain2/>).

HUMAN RIGHTS WATCH (2002b), *Nowhere to Turn: State Abuse of Unaccompanied Migrant Children by Spain and Morocco* (<www.hrw.org/reports/2002/spain-morocco/>).

HUMAN RIGHTS WATCH (2002c), *The Other Face of the Canary Islands: Rights Violations against Migrants and Asylum Seekers* (<hrw.org/reports/2002/spain/>).

HUYSMANS, J. (2006) *The politics of insecurity. Fear, migration and asylum in the EU*, Routledge, London and New York.

DAL LAGO,A. (2000), "Personas y no-personas", in SILVEIRA GORSKI,H.C.(ED.), *Identidades comunitarias y Democracia*, Trotta, Madrid.

DAL LAGO,A. (2003), *Polizia globale*, Ombre corte, Verona.

DAL LAGO,A. (2004), *Non-persone. L'esclusione dei migranti in una società globale*, Feltrinelli, Milano.

DAL LAGO,A. (2005), "Fronti e frontiere. Note sulla militarizzazione della contiguità", in *Conflitti Globali*, n. 2.

LEGANÉS GÓMEZ,S. (2005), *La evolución de la clasificación penitenciaria*, Ministerio del Interior, Madrid.

DE LUCAS,J. (2005), "Nuevas estrategias de estigmatización. El Derecho, frente a los inmigrantes", in PORTILLA CONTRERAS,G.(COORD.), *Mutaciones de Leviatán. Legitimación de los nuevos modelos penales*, Univ. Internacional Andalucía/Akal, Madrid.

LARRAURI,E. (2000), *La herencia de la criminología crítica*, 3rd ed., Siglo XXI, Madrid.

LAZZARATO,M. (2006), *Por una política menor. Acontecimiento y política en las sociedades de control*, Traficantes de Sueños, Madrid.

MARQUEZ LEPE,E. (2005), "La construcción retórica del extranjero inmigrante en el discurso político español", in MARTIN PALOMO,M.T./MIRANDA LOPEZ,M.J./VEGA SOLIS,C.(EDS.), *Delitos y fronteras*, Complutense, Madrid.

MARTÍNEZ VEIGA,U. (2001), "El Ejido, un experimento del capitalismo moderno", in *Archipiélago*, n. 48.

MATTHEWS,R. (2002), "Reflexiones sobre los recientes desarrollos de la política penal desde la teoría de los sistemas", in *Panóptico*, n. 4.

MATTHEWS,R. (2003), *Pagando tiempo*, Bellaterra, Barcelona.

MELOSSI,D. (1997), "State and Social Control à la Fin de Siècle: from the New World to the Constitution of the New Europe", in BERGALLI,R./SUMNER,C.(EDS.), *Social Control and Political Order*, Sage, London.

MELOSSI,D. (2002a), *Stato, controllo sociale, devianza*, Bruno Mondadori, Milano.

MELOSSI,D. (2002b), "Inmigración e inseguridad: una introducción", in *Panóptico*, n. 3.

MEZZADRA,S. (2004), "Capitalisme, migrations et luttes sociales", in *Multitudes*, n. 19.

MEZZADRA,S. (2005a), *Derecho de fuga. Migraciones, ciudadanía y globalización*, Traficantes de Sueños, Madrid.

MEZZADRA,S. (2005b), "Democrazia e mobilità globale", in TARÌ,M.(ED.), *Guerra e Democrazia*, Manifestolibri, Roma.

MINISTERIO DEL INTERIOR (2007), *Anuario estadístico del Ministerio del Interior 2006*, Ministerio del Interior, Madrid (http://www.mir.es/MIR/PublicacionesArchivo/publicaciones/catalogo/anuarios/anuario_2006_web.pdf).

MINISTERIO DEL INTERIOR (2008), *Balance de la lucha contra la inmigración ilegal* (http://www.mir.es/DGRIS/DGRIS_Galeria_de_Imagenes/notas_prensa/2008/bal_lucha_inmigracion_ilegal_2007_mir.pdf).

MITSILEGAS,V. (2005), "Contrôle des étrangers, des passagers, des citoyens: surveillance et antiterrorisme", in *Cultures & Conflits*, n. 58.

MONCLUS MASO,M. (2002), "La 'gestión' penal de la inmigración: otra excepción al Estado de Derecho", in *Panóptico*, n. 3.

MOSCONI,G. (2005), "Inmigración, seguridad y cárcel en Italia (en la perspectiva de la guerra global)", in BERGALLI,R./RIVERA BEIRAS,I.(EDS.), *Política criminal de la guerra*, Anthropos, Barcelona.

MOULIER BOUTANG,Y. (2002), "Migrazioni internazionali e criminalità organizzata: cambiare seriamente opinione e pratiche", in PIRRONE,M.A./VACCARO,S.(EDS.), *I crimini della globalizzazione*, Asterios, Trieste.

NAREDO MOLERO,M. (2005), "¿Qué nos enseñan las nuevas reclusas? La criminalización de la pobreza desde la situación de reclusas extranjeras y gitanas", in MARTIN

PALOMO,M.T./MIRANDA LOPEZ,M.J./VEGA SOLIS,C.(EDS.), *Delitos y fronteras*, Complutense, Madrid.

NIETO MARTÍN,A. (2001), "Procedimiento preferente de expulsión de extranjeros. Derechos de audiencia y tutela cautelar", in *Jueces para la democracia*, n. 41.

OBSERVATORI DEL SISTEMA PENAL I ELS DRETS HUMANS (2004), *Primer informe sobre los procedimientos administrativos de detención, internamiento y expulsión de extranjeros en Catalunya*, Virus, Barcelona.

OFICINA ECONÓMICA DEL PRESIDENTE (2006), *Inmigración y economía española* (http://www.la-moncloa.es/NR/rdonlyres/62B6B50E-AE7B-455A-85A5-600EF4EA9281/80515/InmigracionYEconomiaEspaniola12Nov.pdf).

OPEN SOCIETY JUSTICE INITIATIVE (2007), *"I Can Stop and Search Whoever I Want". Police Stops of Ethnic Minorities in Bulgaria, Hungary and Spain*, Open Society Justice Initiative, New York (<http://www.justiceinitiative.org/db/resource2?res_id=103735>).

PALIDDA,S. (2000), *Polizia postmoderna. Etnografia del nuovo controllo sociale*, Feltrinelli, Milano.

PALIDDA,S. (2002), "Proibizionismo delle migrazioni, criminalità organizzata ed economie illecite", in PIRRONE,M.A./VACCARO,S.(EDS.), *I crimini della globalizzazione*, Asterios, Trieste.

PEREDA,C./ACTIS,W./DE PRADA,M.A. (2005), *Inmigración y vivienda en España*, Ministerio Trabajo y Asuntos Sociales, Madrid.

PÉREZ CEPEDA,A.I. (2006), "El Código Penal de la seguridad: una involución en la Política criminal de signo reaccionario", in BERNUZ BENEITEZ,M.J./PÉREZ CEPEDA,A.I.(COORDS.), *La tensión entre libertad y seguridad. Una aproximación sociojurídica*, Univ. La Rioja, Logroño.

PÉREZ CEPEDA,A.I. (2007), *La seguridad como fundamento de la deriva del Derecho Penal postmoderno*, Iustel, Madrid.

PRETEL,O. (2006), "Las fronteras intrametropolitanas", in VARIOUS AUTHORS, *Fronteras interiores y exteriores*, Revista Contrapoder, Madrid.

PITCH,T. (2006), "Prevenzione, controllo sociale e libertà personale", in RIVERA,I. ET AL., *Contornos y pliegues del Derecho. Homenaje a Roberto Bergalli*, Anthropos, Barcelona.

PORTILLA CONTRERAS,G. (2003), "La configuración del homo sacer como expresión de los nuevos modelos del Derecho Penal imperial", in *Panóptico*, n. 6.

PORTILLA CONTRERAS,G. (2005), "El Derecho Penal de la 'Seguridad'. Una secuela inevitable de la desaparición del Estado Social", in BRANDARIZ,J.A./PASTOR,J.(EDS.), *Guerra global permanente. La nueva cultura de la inseguridad*, Los libros de la Catarata, Madrid.

RE,L. (2006), *Carcere e globalizzazione. Il boom penitenziario negli Stati Uniti e in Europa*, Laterza, Bari.

RECHEA ALBEROLA,C./FERNÁNDEZ MOLINA,E./BENÍTEZ JIMÉNEZ, M.J. (2005), "La visión de la seguridad en la prensa. Una valoración del tratamiento que realizan los medios de prensa sobre la delincuencia y la inseguridad ciudadana" (< http://www.uned.es/investigacion/publicaciones/Cuadernillo_Abril05.pdf>).

RIGO,E. (2004), "Aux frontières de l'Europe. Citoyennetés postcoloniales dans l'Europe élargie", in *Multitudes*, n. 19.

RIGO,E. (2007), *Europa di confine*, Meltemi, Roma.

RÍOS CORBACHO,J.M. (2006), "Regulación jurídica de la extranjería: situación actual", in RUIZ RODRÍGUEZ,L.R.(ED.), *Sistema Penal y exclusión de extranjeros*, Bomarzo, Albacete.

RIOS MARTIN,J.C./CABRERA CABRERA,P.J. (1998), *Mil Voces Presas*, Univ. Pontificia de Comillas, Madrid.

RIVERA BEIRAS,I. (2003), "Los posibles escenarios de la penalidad", in *Panóptico*, n. 5.

RIVERA BEIRAS,I. (2004), "Forma-Estado, Mercado de Trabajo y Sistema Penal ("nuevas" racionalidades punitivas y posibles escenarios penales)", in RIVERA BEIRAS,I.(ED.), *Mitologías y discursos sobre el castigo. Historia del presente y posibles escenarios*, Anthropos, Barcelona.

RIVERA BEIRAS,I.(ED.) (2005), *Política Criminal y Sistema Penal. Viejas y nuevas racionalidades punitivas*, Anthropos, Barcelona.

RODRIGUEZ,E. (2003a), *El gobierno imposible*, Traficantes de Sueños, Madrid.

RODRIGUEZ,E. (2003b), "España: *Zero Tollerance*", in *Archipiélago*, n. 55.

RODRÍGUEZ MESA,M.J. (2004), "El sistema penal ante el reto de la inmigración clandestina. Funciones instrumentales y simbólicas", in PÉREZ ÁLVAREZ,F.(ED.), *Serta in Memoriam Alexandri Baratta*, Univ. Salamanca, Salamanca.

RUGGIERO,V. (2000), *Crime and Markets*, Oxford Univ. Press, Oxford.

RUIZ ENCISO, G. (2007), "Informe: Cronología de Incidentes en el CIE de Capuchinos (Málaga)" (http://inmigrantesmalaga.org/es/node/29)

RUIZ RODRIGUEZ,L.R. (2006), "Extranjeros en prisión. Una marginación reiterada", in RUIZ RODRÍGUEZ,L.R.(ED.), *Sistema Penal y exclusión de extranjeros*, Bomarzo, Albacete.

SAINT-SAËNS,I. (2004), "Des camps en Europe aux camps de l'Europe", in *Multitudes*, n. 19.

SAN MARTÍN SEGURA,D. (2006), "Retórica y gobierno del riesgo. La construcción de la seguridad en la sociedad (neoliberal) del riesgo", in BERNUZ BENEITEZ,M.J./PÉREZ CEPEDA,M.I.(COORDS.), *La tensión entre libertad y seguridad. Una aproximación sociojurídica*, Univ. La Rioja, Logroño.

SANZ MORÁN,A. (2004), "Reflexión de urgencia sobre las últimas reformas de la legislación penal", in *Revista de Derecho Penal*, n. 11.

SERRANO MAÍLLO,A. (2003), "Estadísticas judiciales", in *Revista de Derecho Penal y Criminología*, n. 12.

SERVICIO DE ESTUDIOS DE CAIXA CATALUNYA (2006), *Informe semestral I/2006. Economía española y contexto internacional* (<www.caixacat.es/caixacat/es/ccpublic/particulars/publica/pdf/iee0706e0.pdf>).

SILVEIRA GORSKI,H.C. (1996), "La exclusión del otro extranjero y la democracia de las diferencias", in VARIOUS AUTHORS, *En el límite de los derechos*, Trotta, Madrid.

SILVEIRA GORSKI,H.C. (2002), "Los Centros de Internamiento de Extranjeros y el futuro del Estado de derecho", in *Mientras Tanto*, n. 83.

SILVEIRA GORSKI,H.C. (2003), "Inmigración y derecho: la institucionalización de un sistema dual de ciudadanía", in BERGALLI,R.(COORD.), *Sistema penal y problemas sociales*, Tirant lo Blanch, Valencia.

SOTO NAVARRO,S. (2005), "La influencia de los medios en la percepción social de la delincuencia", in *Revista Electrónica de Ciencia Penal y Criminología*, n. 7 (<criminet.ugr.es/recpc/07/recpc07-09.pdf>).

SUSÍN BETRÁN,R. (2006), "La revalorización del miedo como instrumento de regulación social. De la inseguridad y otras miserias", in BERNUZ BENEITEZ,M.J./PÉREZ CEPEDA,M.I.(COORDS.), *La tensión entre libertad y seguridad. Una aproximación sociojurídica*, Univ. La Rioja, Logroño.

SUTCLIFFE,B. (2003), "El paso de fronteras en el nuevo imperialismo", in *Mientras Tanto*, n. 89.

TERRADILLOS BASOCO,J.M. (2004), "Sistema penal e inmigración", in PÉREZ ÁLVAREZ,F.(ED.), *Serta in Memoriam Alexandri Baratta*, Univ. Salamanca, Salamanca.

TONRY,M.(ED.) (1997), *Ethnicity, Crime and Immigration*, Univ. Chicago Press, Chicago.

TONRY,M. (2004), *Thinking about Crime*, Oxford Univ. Press, New York.

VARIOUS AUTHORS (2005), *Mujeres, Integración y Prisión*, Aurea, Barcelona.

VIEJO VIÑAS,R. (2005), "Soberanía e gobernanza na era global. Crise biopolítica da forma-Estado e modo de mando no capitalismo cognitivo", in *Tempo Exterior*, n. 11.

VITALE,E. (2005), "Ciudadanía, ¿último privilegio?", in CARBONELL,M./SALAZAR,P.(EDS.), *Garantismo*, Trotta, Madrid.

WACQUANT,L. (1999), ""Suitable Enemies": Foreigners and Immigrants in the Prisons of Europe", in *Punishment and Society*, n. 2.

WACQUANT,L. (2000), *Las cárceles de la miseria*, Alianza, Madrid.

WACQUANT,L. (2002), *Simbiosi mortale. Neoliberalismo e politica penale*, Ombre corte, Verona.

WACQUANT,L. (2004), *Punir les pauvres*, Agone, Marseille.

WAGMAN,D. (2006), *Perfil racial en España: Investigaciones y recomendaciones* (<www.ecln.org/link.asp?linkid=530>).

WALTERS,W. (2004), "Welcome to Schengenland. Per un'analisi critica dei nuovi confini europei", in MEZZADRA,S.(ED.), *I confini della libertà*, DeriveApprodi, Roma.

YOUNG,J. (2003), *La sociedad "excluyente"*, Marcial Pons, Madrid.

ZARIFIAN,P. (2003), "Pourquoi ce nouveau régime de guerre?", in *Multitudes*, n. 11.

_I_EK,S. (2005), *Bienvenidos al desierto de lo real*, Akal, Madrid.

ZYSMAN QUIROS,D. (2004), "El castigo penal en Estados Unidos. Teorías, discursos y racionalidades punitivas del presente", in RIVERA BEIRAS,I.(ED.), *Mitologías y discursos sobre el castigo. Historia del presente y posibles escenarios*, Anthropos, Barcelona

La inmigración en España en los discursos de media y política: construcción del peligro y falsificación de la realidad.

Edoardo Bazzaco[*]

En los últimos años, en España el racismo institucional y la constantes vulneraciones de de los derechos humanos de las personas inmigradas[391] se han acentuado. Como confirman los resultados de los principales estudios de opinión,[392] durante 2006 y 2007 se asistió a un incremento importante en el porcentaje de ciudadanos españoles que consideran la inmigración como "un problema" o "una preocupación" para el país. En realidad, la mayoría de los españoles se construyó una opinión sobre la inmigración sin tener algún tipo de relación con las personas inmigradas, excepto reconocer su presencia en el espacio público.[393]

La discriminación de los invisibles: la realidad de la inmigración en España.

El colectivo inmigrante es hoy en España el más vulnerable en relación a los derechos sociales básicos, entre los cuales se deben incluir los derechos referentes al trabajo, la educación, la vivienda y la sanidad. En todos estos ámbitos, la población inmigrante ha sido profundamente discriminada en comparación con la autóctona.

En el ámbito laboral, según los datos de un informe del Consejo Económico y Social (CES), a inicios de 2007 más de un 30% de la población activa inmigrada trabajaba en la economía sumergida. Conocer con exactitud el número de personas que trabajan actualmente en el Estado fuera del sistema de la Seguridad Social es muy difícil por su propia naturaleza. Sin embargo, al comparar los datos definitivos del padrón de población del 1 de enero de 2007 con las autorizaciones de residencia en vigor a 31 de diciembre de 2006 se

---

[*] Edoardo Bazzaco es sociólogo (*European PhD*), miembro del comité científico del Grupo Medamerica de la Universidad de Barcelona. En 2007 e 2008 ha coordinado el *Informe anual sobre el racismo en el Estado español* de la ONG SOS Racismo (Icaria Editorial, Barcelona, 2007 e 2008) e ha coordinado el *Informe Frontera Sur: 10 años de vulneración de los derechos humanos*, SOS Racismo, Donosti-San Sebastián, 2006. Actualmente es investigador invitado en el Centro de Investigaciones y Estudios Superiores en Antropología Social (*CIESAS*) de Ciudad de México

[391] Véase: SOS Racismo, *Informe Anual sobre el racismo en el Estado español 2008*, Icaria Editorial, Barcelona 2008; y SOS Racismo, *Informe Frontera Sur: 10 años de vulneración de los derechos humanos*, SOS Racismo, Donosti-San Sebastián 2006.

[392] Se hace referencia a los resultados del *Barómetro* mensual del Centro de Investigación Sociológica di Madrid (www.cis.es/cis/opencms/ES/2_barometros), para el periodo enero 2006-diciembre 2007.

[393] Véase: T. A. Van Dijk, *El racismo y la prensa en España*, in A. Bañón Hernández (Ed.), "Discurso periodístico y procesos migratorios", Ed. Gakoa, Donostia-San Sebastián 2007, pp. 27-80; A. Bañón Hernández, *El discurso periodístico a propósito del viaje de los inmigrantes pobres*, in R. Zapata-Barrero & T. A. Van Dijk (Eds.), "Discursos sobre la inmigración en España. Los medios de comunicación, los parlamentos y administraciones", CIDOB, Barcelona 2007, pp. 44-67; J.J. Igartua, & C. Muñíz (Eds.), *Medios de comunicación y sociedad*, Ediciones Universidad, Salamanca 2007.

podía apreciar un porcentaje de irregularidad del 34,3% entre las mujeres inmigrantes y del 31,11% entre los hombres.[394]

Según la Organización para la Cooperación y el Desarrollo (OCDE), a inicios de 2007, la mitad de las personas inmigradas en situación regular en el Estado español trabajaba con contratos temporales. El Estado español lideraba la clasificación de países desarrollados que más desaprovechaba la formación profesional de las personas inmigradas: en efecto, según el estudio de la OCDE, el 43% de las personas inmigrantes empleadas en el Estado español trabajaba en empleos por debajo de su calificación profesional. Además, según los datos recogidos en el informe *Inmigración y mercado de trabajo. Propuestas para la ordenación de flujos migratorios*, elaborado por el sindicado Comisiones Obreras (CC.OO.), la población empleada inmigrada cobraba entre un 7,2% y un 16,3% menos que la española por el mismo empleo, una diferencia salarial que puede alcanzar al 30% en el caso de los empleo de economía sumergida.[395]

El caso de la vendimia de Castilla-La Mancha del pasado mes de septiembre fue emblemático de la situación de explotación laboral que deben aceptar las personas inmigradas en situación irregular. Las asociaciones y cooperativas de agricultores de la región contrataron de forma ilegal a centenares de trabajadores en situación irregular, con el beneplácito de Gobierno, que desde el primer momento declaró estar dispuesto a mostrar "la máxima flexibilidad posible" en los procedimientos de contratación de los trabajadores, principalmente de origen búlgaro y rumano. En efecto, las tareas agrícolas llevan años manteniéndose con la precaria situación de las personas que trabajan como temporeras. A la realidad de la vendimia de Castilla se tienen que sumar situaciones como las del Levante español, donde trabajadores de origen norteafricanos continúan malviviendo en cortijos abandonados.

Por otro lado, la población inmigrada sigue representando el colectivo más vulnerable a la siniestralidad laboral. En 2007, un estudio del sindicado UGT reveló que la tasa de siniestralidad laboral en Estado español fue de 5,8 fallecidos por cada 100.000 trabajadores, más de un 30% por encima de la media de la Unión Europea de los 15. Otro año más, el principal foco de atención fue el sector de la construcción, donde gran parte de las víctimas han sido trabajadores inmigrantes: la subcontratación, las largas y duras jornadas de trabajo y los riesgos que conllevan determinadas tareas son los factores que determinan las situaciones de riesgo en uno de los sectores que concentra el mayor porcentaje de mano de obra extranjera empleada.

En el ámbito educativo, según datos del Ministerio de Educación, en septiembre 2007 los/as estudiantes procedentes de otros países superaron la cifra de 608.000 y suponían el 8,4% del total del alumnado en el sistema

---

[394] Véase: *Anexo estadístico*, en: SOS Racismo, "Informe Anual sobre el racismo en el Estado español 2007", Icaria Editorial, Barcelona 2007.
[395] Véase: Comisiones Obreras, *Inmigración y mercado de trabajo. Propuestas para la ordenación de flujos migratorios*, Madrid 2007.

educativo español. Durante el último año, el Consejo Económico y Social (CES) advirtió de la "alta concentración" de estudiantes inmigrantes en algunos colegios e institutos públicos de primaria y secundaria del Estado, y consideró "conveniente" favorecer una "distribución equilibrada" del alumnado extranjero entre los centros públicos y los concertados (privados sostenidos con fondos públicos). El estudio del CES subrayó también que la mayor presencia de alumnado extranjero en centros públicos concretos requiere medidas específicas para evitar "procesos de marginalización" y recomendó la implementación en los centros escolares de políticas y prácticas que favorezcan la integración de los estudiantes extranjeros.[396] Una encuesta realizada en Catalunya[397] ha demostrado como el alumnado de origen extranjero ha tenido más problemas de maltrato escolar que los autóctonos en la enseñanza primaria.

Según un estudio de la Agencia Europea de Derechos Fundamentales[398] que ha analizado la situación de la xenofobia y el racismo en la Unión Europea, en el Estado español uno de los ámbitos donde se da mayor discriminación es en el acceso a la vivienda. Y es que, según los datos del estudio, en el Estado español, el 20% de las personas inmigrantes dispone de menos de 10 metros cuadrados para vivir. Además, la Agencia Europea denunció una presencia importante en la prensa de anuncios xenófobos, en los que se niega el alquiler o la venta de pisos a personas extranjeras. En efecto, de un estudio realizado en 2007 por SOS Racismo Bizkaiko[399] emergió que el 80% de las inmobiliarias de Bilbao se negaba sistemáticamente a alquilar pisos a personas extranjeras, debido a que las agencias obedecían a las exigencias de los propietarios, que no querían tener por inquilinos familias extranjeras. Según datos del Colectivo Ioé,[400] el 47% de las personas inmigrantes residentes en el Estado español vivían como inquilino subarrendado, el 19% en condiciones de hacinamiento. En general, la tendencia de la oblación inmigrada a concentrarse en algunos barrios de las grandes ciudades españolas está alimentando una "etnicización" y concentración espacial de los excluidos en los barrios más marginales de Madrid, Barcelona, Bilbao etc.

---

[396] En: Consejo Económico y Social, *Memoria Anual 2006*, CES, Madrid 2007.
[397] Véase: Centro de Estudios de Opinión (CEO), *Encuesta de convivencia escolar y seguridad en Cataluña. Curso 2005–2006. Estudio de opinión*, Barcelona 2007.
[398] En: Agencia Europea de Derechos Fundamentales, *Informe 2006 sobre Racismo y Xenofobia en la UE* , Viena 2007.
[399] Informe disponible en la página web de MUGAK:
        http://www.mugak.eu/ef_etp_files/view/Informe_Discriminacion_acceso_a_vivienda.pdf?revisi on_id=17542&package_id=9653.
[400] En: Colectivo Ioé, *Inmigración y vivienda en España* , Min. de Trabajo y Asuntos Sociales, Madrid 2005. Al respecto, véase también: P. Cabrera, *Exclusión residencial de los inmigrantes: entre la precariedad y la calle*, en SOS Racismo, "Informe Anual sobre el racismo en el Estado español 2007", Icaria Editorial, Barcelona 2007.

Una historia de falsificación de la realidad: cómo los medios construyen la inmigración.

En la última década los actores sociales que s e han ocupado de inmigración consideraron a menudo que los medios de comunicación haya construido un verdadero "complot mediático" cuyos protagonista serían los grupos de presión xenófobos. En realidad la construcción de una imagen falsa de la inmigración por parte de los medios no es el resultado de una conspiración de periodistas o directores con posiciones racistas (que por otro lado existen y contribuyen a la radicalización del proceso). La explicación es talvez más sencilla e por eso más grave. Diversas investigaciones[401] han demostrado como no existe entre los profesionales de la información un nivel suficiente de conocimiento del tema, ni tampoco una conciencia de las consecuencias de su trabajo, de los estereotipos que fortalecen, de las "armas" que de hecho ofrecen a los sujetos que en la política fomentan la exclusión social y la xenofobia. Hay que reconocer que en España existen profesionales de los medios que desarrollan un trabajo excelente: pero no son muchos, más que nada porque la especialización en un ámbito es cada vez más difícil en la actual organización de la industria de la información.

Es apropiado entonces fijarnos en cuál ha sido la mirada de los Medios sobre las cuestiones relacionadas con las migraciones y las minorías, el racismo y la xenofobia. Mostraremos aquí la mirada de los diarios, sin abordar otros medios, como televisión y radio, por razones de espacio y por resultar suficientemente representativo. Para ello, utilizaremos una herramienta que permite a cualquiera este mismo ejercicio, a saber, la base de datos de prensa que mantiene Mugak, junto con XenoMedia, y que puede ser consultada on line.[402] En primer lugar, constatamos que estas cuestiones tienen ya una presencia significativa en los mensajes mediáticos. Veamos el número de contenidos recogidos: aunque las diferencias son significativas, incluso comparando periódicos entre los que ese ejercicio es posible (vgr. El País – 1.730 – y El Correo – 788), estamos hablando de una presencia diaria. Todos los días, en nuestra lectura del periódico, vamos a retener alguna información u opinión que irá calando, cual lluvia fina, en nuestra percepción al respecto.

Y, ¿de qué nos hablan? De políticas de inmigración (5.138), de control de entrada (4.796), de conflicto social (1.941), de convivencia e integración (1.936), de delincuencia y minorías (1.839) y de condiciones sociales (1.445).

---

[401] Véase: A.M. Bañón Hernández (Ed.), *Discurso periodístico y procesos de inmigración*, Gakoa, Donostia-San Sebastián 2007; y también: J.F. Torregrossa Carmona, *El tratamiento informativo de la inmigración como paradigma de la alteridad*, en "Revista Pueblos", 18, Madrid 2005.

[402] Véase: www.mugak.eu, en el apartado Observatorio de la Diversidad. En ella se encuentran los contenidos, sobre estas cuestiones, publicados en 22 diarios del Estado español: ABC, Avui, Berria, Canarias 7, Deia, Diario Vasco, Diario de Navarra, Diario de Noticias, Diario de Noticias de Álava, Diario de Noticias de Gipuzkoa, El Correo, El Día, El Mundo, El País, El Periódico de Cataluña, Gara, La Razón, La Vanguardia, La Verdad de Murcia, La Voz de Galicia, Las Provincias y Sur. Se trata de una base de datos que puede ser consultada por varios campos: fechas, diarios, temas, fuentes consultadas, tratamiento de las mujeres, menores y pueblo gitano, área geográfica, idioma, género informativo.

Los datos son concluyentes y muestran una visión de la inmigración como un problema, sobre el que hay que legislar, cuya entrada ha de ser impedida, que se encuentra envuelta en problemas de delincuencia y que ocasiona situaciones de conflicto social. Estos bloques temáticos acaparan el 80,22% (13.714 de un total de 17.095) de los mensajes mediáticos, frente a un 8,45% (1.445) que versa sobre las condiciones sociales en que se desenvuelven, y un 11,32% (1.936) que aborda cuestiones relacionadas con la convivencia e integración.[403]

Y, ¿quién tiene acceso a los medios? Una vez más, los datos son elocuentes. Las instituciones, en sus distintos niveles, suponen la primera fuente de información de todo lo que nos llega (7.580 sobre 13.830), acaparando el 54,81% de los casos en que existe una fuente consultada. Mientras que las ONG de inmigración o las propias minorías tan sólo consiguen acceder con su propio mensaje en el 9,71% (1.330) de las ocasiones. Así que lo que nos llega es lo que piensa la administración, y de forma excepcional lo que las minorías piensan. Hablamos, regulamos, criticamos, sentenciamos sobre ellas, pero no llegamos a saber realmente qué opinan, qué proponen, cómo nos ven, cómo se ven. Parece no tener gran importancia. ¿O será, tal vez, que lo que sí tiene importancia es que no aparezca su visión? Parece que, también en esta cuestión, lo de la igualdad, es harina de otro costal. Si no es la igualdad lo que prima en el acceso a los medios, no es de extrañar que al dirigir nuestra mirada hacia la presencia que tienen sectores tradicionalmente discriminados la cosa se ponga todavía más fea.[404] Es el caso, cómo no, de las mujeres.   Las estadísticas[405] nos dicen que su presencia en la población inmigrante es similar a los hombres.[406] En cambio, sólo aparecen expresamente en el 12,19% (1.854 de 15.204) de ocasiones, y tan sólo en el 6,79% constituye el sujeto sobre el que versa la información.[407]Curiosamente, tienen una mayor presencia mediática, aunque sea por muy poco, los menores, pese a ser un colectivo muchísimo menos numerosos. Y no es precisamente una mirada de preocupación hacia su situación, hacia los viajes en patera o cayuco desde las costas de África Occidental hasta las islas Canarias o desde la costa

---

[403] Según los datos del *Barómetro* del CIS, en octubre de 2006 por la primera vez la inmigración llegó a ser la primera entre los principales problemas del país según los españoles: el 58% de las 2.458 personas encuestadas en 235 municipios entre el 18 y 22 de septiembre 2006 consideró la inmigración como una de las tres principales problemáticas del país.

[404] Véase: C. Pérez Wolfram, *Género y discursos sobre la inmigración en la prensa*, en "Inmigración y Medios de Comunicación. Manual recopilatorio de buenas prácticas periodísticas", Harresiak Apurtuz/BBK, Bilbao 2006; L.P. Díez, *2° Informe de la Investigación: Representación de género en los informativos radio y tv*, Instituto Oficial de Radio y Televisión (IORTU), Instituto de la Mujer (MTAS.), Madrid 2005.

[405] Véase el documento *Extranjeros con certificado de registro o tarjeta de residencia en vigor y Extranjeros con autorización de estancia por estudios en vigor a 30 de junio de 2008*, de la Secretaría de Estado de Inmigración y Emigración (http://extranjeros.mtin.es/es/general/indice_junio_08.html).

[406] Al 30 de junio de 2008, en España vivían regularmente 2.262.226 persona extranjeras de sexo masculino (54,4% del total) y 1.900.886 di sexo femenino (45,6%).

[407] El período contemplado no incluye los meses de enero y febrero, en los que no tenemos recogido este desglose en la base de datos.

septentrional de Marruecos hasta las costas andaluzas,[408] o debido a las repetidas vulneraciones de derechos humanos de las cuales son victimas[409] (aunque, en ocasiones, se presente así): sino porque se presenta, una vez más, como un problema y, en ocasiones, como una amenaza.[410] Hablamos de que los menores de edad aparecen expresamente en el 13,87% (1.957 de 15.204) de ocasiones, y tan sólo en el 8,43% constituyen el sujeto sobre el que versa la información.

Y las cifras rayan ya lo escandaloso, si fijamos nuestra mirada en la presencia del pueblo gitano, la minoría tradicionalmente más discriminada en nuestro país. Hablamos en este caso de que aparecen expresamente en el 3,15% (344 de 15.997) de ocasiones, y tan sólo en el 1,60% constituyen el sujeto sobre el que versa la información. No, no es porque su situación esté "normalizada", como se suele decir, y su característica étnica sea opaca a la mirada de los medios (lo que, en principio, sería algo muy positivo). Basta cruzarlo con las materias por las que han sido noticia, para confirmar que lo son, fundamentalmente, cuando están envueltos en situaciones delictivas o cuando se les señala como fuente problemas.[411]

Lo señalado hasta aquí es suficiente para ilustrar lo que queremos plantear, a saber, que en tanto no se produzca una transformación profunda en el tratamiento que los medios dan a las cuestiones relacionadas con la inmigración y las minorías étnicas, las dificultades para lograr una sociedad cohesionada no van a dejar de aumentar. Para avanzar en ese camino es preciso, en primer lugar, tener conciencia tanto de la envergadura y perfiles del problema como de las posibilidades que existen de actuar. A partir de ahí, los diferentes agentes sociales han establecer una política concreta, duradera, de largo alcance que minimice los efectos negativos de esa realidad. Y en este terreno, en el que sí podemos actuar, es evidente que estamos muy lejos de haber explotado todos los recursos a nuestro alcance.

Porque, y pese a que el punto de partida descrito es francamente desfavorable, es necesario afirmar que las posibilidades de incidir, por parte de los diferentes agentes sociales, en el proceso de creación de los mensajes

---

[408] Véase: Human Rights Watch, *Responsabilidades no bienvenidas. España no protege los derechos de los menores extranjeros no acompañados en las Islas Canarias*, HRW 2007 (disponible *on line* a la dirección: http://hrw.org/spanish/reports/2007/spain0707).

[409] Véase: J.I. de la Mata, *Sobre las repatriaciones de menores extranjeros no acompañados*, en SOS Racismo, "Informe Anual sobre el Racismo en el Estado español 2007", Icaria Editorial, Barcelona 2007; O. Hernández de Paz, A.M. Hidalgo, C. Par López-Pinto, *Menores extranjeros no acompañados: la vulneración del derecho de defensa*, in SOS Racismo, "Informe Anual sobre el Racismo en el Estado español 2008", Icaria Editorial, Barcelona 2008; APDHA, *Canarias: Políticas migratorias, victimas y violación de los derechos humanos*, Sevilla 2006 (disponible *on line* a la dirección: http://www.mugak.eu/ef_etp_files/view/InformeCanariasJunio2006.pdf).

[410] Véase: M. Jiménez, *La perversión de la cooperación al desarrollo: los proyectos de reagrupación de los menores inmigrantes en Marruecos*, en SOS Racismo, "Informe Anual sobre el Racismo en el Estado español 2007", Icaria Editorial, Barcelona 2007.

[411] Véase: M.L.Gallego, *La sociedad gitana en la prensa andaluza*, Instituto Andaluz de la Juventud, Sevilla 2008. Y también: Fundación Secretariado Gitano, *Discriminación y Comunidad Gitana 2007*, Madrid 2008.

mediáticos es muy amplia, variada y absolutamente necesaria. Para ello es preciso apoyarnos en los medios para llegar a la población, aprovechar el significativo número de profesionales dispuestos a un periodismo de calidad, así como las muchas ventanas que abre la multiplicidad y variedad de medios, reforzar la labor de análisis de los especialistas, la difusión de sus trabajos y el engarce de los mismos con los agentes del campo de la solidaridad, implicar al mundo intelectual y a la Universidad, exigir la puesta en funcionamiento desde las instituciones de organismos independientes de control al modo del resto de países de la Unión Europea… Sólo aprovechando las múltiples sinergias de los sectores punteados cabe aspirar a revertir, siquiera sea parcialmente, la situación actual, lo que nos remite a un concepto clave, sobre el que estamos lejos de avanzar: el de trabajar en red.

Y como de muestra sirve un botón, citaré una iniciativa que se viene desarrollando, desde SOS Racismo, en el País Vasco, focalizada en dos campos particularmente sensibles y problemáticos: las fuentes y las instituciones. Dado que las fuentes a las que acuden los medios para recabar información son, en un porcentaje ampliamente mayoritario fuentes oficiales, no está de más todo lo que consigamos de cara a que éstas eviten buena parte de los problemas señalados. En este sentido, la iniciativa consistió en una actividad sistemática de cara a suprimir la mención a la nacionalidad, el origen geográfico o étnico de las personas que se ven involucradas en sucesos delictivos. SOS Racismo se dirigió para ello a ayuntamientos, consejería de interior, policía autonómica, policías locales, Ararteko (el Defensor del Pueblo de la Comunidad Autónoma Vasca); y por supuesto, al medio de comunicación en cuestión cada vez que incurre en dicha práctica. Un número significativo de entidades locales se ha hecho eco de la protesta y ha pasado a asumirla como propia, ordenando, por ejemplo a las policías locales, no dar dicho dato cuando informen de sucesos ocurridos en su localidad. Con la consejería de interior y la policía autonómica, la cosa resultó bastante más problemática. Se ve que la función policial imprime carácter. Pero, en esta labor, hemos contado con la importantísima participación del Ararteko. Esta institución, prestigiada y con numerosas investigaciones solventes en su haber, haciéndose eco de la campaña de SOS Racismo, elaboró, a mediados de 2005, un Informe[412] en la misma dirección, dirigido a todas las autoridades públicas (cuerpos policiales incluidos), lo que ha venido a reforzar nuestra labor, muy en particular en lo que hace a la policía autonómica. Y aunque en estas cuestiones, nada se consigue de forma definitiva, sí constatamos que asistimos a un cambio significativo en dicha cuestión, siendo, en este aspecto, hoy en día más respetuosos los medios en el País Vasco que lo eran hace un par de años. Cierto que estamos hablando de

---

[412] Véase: Ararteko, *Los Cuerpos policiales dependientes de las administraciones públicas deben dotarse de códigos de conducta con relación al tratamiento de la información que proporcionan sobre la inmigración*, Vitoria/Gasteiz 2005.

una cuestión bastante parcial, pero no por ello menos importante, dado que contribuye a afianzar una imagen criminalizadora respecto de las minorías.

El ejemplo pretende ilustrar que caben iniciativas en múltiples terrenos, aunque sean parciales. Además, hay que constatar, en este sentido, que asistimos ya a un panorama mediático mucho más rico y en el que intervienen numerosos actores en el campo de la comunicación, en particular, las que tienen un marco de intervención local. Lo que todavía no acaba de perfilarse son las iniciativas y las herramientas que sienten las bases de un trabajo en red, siendo ésta una de las principales asignaturas pendientes.

Una historia de falsificación de la realidad: como los medios construyen la inmigración.

Lo ocurrido en la última década demostró una vez más como el tratamiento mediático puede agravar el problema del racismo social y sus consecuencias. Los últimos dos años (2007, 2008) han sido un años de campaña electoral, una campaña marcada por algunos partidos que han hecho de la inmigración el centro del debate electoral, poniendo el interés electoral por encima de la cohesión social. En las elecciones municipales catalanas de 2007, el partido ultraderechista *Plataforma per Catalunya* (PxC), obtuvo un total de 17 concejales en las provincias de Tarragona, Lleida y Barcelona. En la demarcación de Vic, PxC se ha convertido en la segunda formación política por número de escaños, por detrás de *Convergencia i Unió*. *Plataforma per Catalunya* representa una organización de nuevo tipo, de carácter populista, un partido arraigado en su medio, que basa su actividad política en la rentabilización de focos de conflictividad local, que mezcla temas como el orden público y la inmigración, alimentando su discurso xenófobo con declaraciones como "[…] el Islam es un peligro. La gente de la calle está harta de la invasión". Otra agrupación con proyección política es España 2000, partido que resume a la perfección las características de la nueva derecha europea y que lleva realizando, en los últimos años, una intensa política propagandística contra los flujos migratorios. En las últimas elecciones municipales, España 2000 creció en número de votos y obtuvo representación en dos localidades valencianas de más de 15.000 habitantes. No se trata de apariciones aisladas. En Talayuela, pueblo de la provincia de Cáceres, Iniciativa Habitable (IH), grupo político con un agresivo argumentario contra las personas extranjeras, obtuvo en las elecciones de mayo 2007 el 27% de los votos de esta población con un 35% de personas extranjeras censadas. Estas plataformas con un mensaje abiertamente xenófobo empiezan a proliferar también en las ciudades del cinturón de Madrid. La Plataforma por Alcorcón, por ejemplo, no esconde que su principal reivindicación es que "los españoles

estén por delante". De semejante corpus ideológico se nutren las organizaciones Vientos del Pueblo (Getafe) o Alcalá Habitable.[413]

Además, la interiorización de un discurso propio de la extrema derecha por parte de partidos democráticos representa un peligro para la convivencia de los distintos colectivos que componen la sociedad española, así como el silencio y la ausencia de un real y eficaz discurso alternativo de los partidos de izquierda. En 2007, una investigación realizada en el Departamento de Antropología de la Universidad de Granada[414] ha demostrado que es mayoritaria la opinión de los parlamentarios que entienden la inmigración como "asunto potencialmente problemático", asociado a violencia, marginalidad, delincuencia, policía. Como señala el estudio, "[…] si tenemos en cuenta la posición preferente que tienen los discursos políticos en nuestro sistema social, la importancia de sus declaraciones es clave para crear un estado de opinión en relación a esta cuestión".[415]

Además, varios estudios analíticos del discurso racista en la política y en los medios de comunicación del Estado español han demostrado la influencia alarmista en las actitudes de la población que causan las metáforas amenazantes como "avalancha" u "olas" al hablar sobre la inmigración a gran escala. De esta manera los políticos y los medios de comunicación no solamente controlan la discusión pública y sus temáticas dominantes, siendo capaces de definir la inmigración como una catástrofe nacional a la par con el terrorismo o el desempleo, sino que también contribuyen a provocar sutilmente las actitudes y las ideologías xenófobas y racistas según las cuales las personas inmigrantes son vistas como una amenaza.

Cuanto dicho parece demostrar que, como en otros países de Europa,[416] los discursos racistas de los políticos no reflejan tanto sentimientos xenófobos existentes mayoritariamente entre la población (que teóricamente podrían basarse en hechos objetivos tales como experiencias personales), sino que son ellos la misma fuente de prejuicios extendidos sobre personas inmigrantes (y por ejemplo su relación con la criminalidad), prejuicios englobados dentro de un amplio complejo de sensaciones sociales con la etiqueta "inseguridad". Con actitudes xenófobas tan ampliamente extendidas, en el Estado español, no hace falta un partido racista de derechas para defender tales políticas e ideologías, puesto que dichas voces están bien representadas por el Partido Popular y sus líderes. Y puesto que siempre hay grupos racistas más explícitos en la extrema derecha, los líderes y los miembros del PP pueden sentirse (y manifestar) que

---

[413] Un análisis de los nuevos grupos políticos de la derecha radical en España es disponible en: J.L. Rodríguez Jiménez & P. Izquierdo Iranzo, *Extrema derecha y discurso xenófobo*, in SOS Racismo, "Informe Anual sobre el racismo en el Estado español 2007", Icaria Editorial, Barcelona 2007.

[414] Esther Márquez Lepe, *La gestión parlamentaria del discurso político sobre inmigración en España*, en: "Discursos sobre la inmigración en España: los medios de comunicación, los parlamentos y las administraciones", coordinado por R. Zapata y T. A. van Dijk. Granada 2007. Pp. 93-128.

[415] *Ibid.*, p.96.

[416] Actualmente en Europa es emblemático el caso italiano de criminalización de la inmigración por parte de la política.

por supuesto no son racistas, porque los "verdaderamente racistas" están en otro lado – una estrategia bien conocida del racismo cotidiano: *el racismo siempre está en otro lado*.[417]

Por su parte, el principal partido de la izquierda, el PSOE, pocas veces se muestra explícitamente antirracista: mientras que en la coalición de izquierda la retórica racista puede ser menos ruidosa que en la derecha, y aunque la izquierda puede sentirse en algunas ocasiones más cercana a organizaciones, grupos y políticos antirracistas, esto no significa que el gobierno liderado por el PSOE haya implementado políticas explícitas en este sentido.

Durante los últimos cuatro años, España ha endurecido aún más el control de sus fronteras, así como su política de repatriación de personas en situación de irregularidad.[418] En 2007, poco más de 18.200 personas indocumentadas llegaron en cayucos o pateras a España, lo que supuso una reducción de cerca del 60% en relación con el 2006, cuando en total llegaron a las costas españolas 37.647 personas inmigrantes. La tendencia fue confirmada en 2008: llegaron a España 13.424 personas en situación irregular, un 25,6% menos que en 2007. [419] Pese a toda la publicidad política y mediática de los supuestos "éxitos" del Gobierno español en el control de los flujos migratorios, en el curso del solo 2007 fue posible documentar la muerte o la desaparición de 876 personas, mientras intentaban llegar a las costas españolas; otras 352 fallecieron en 2008.[420]

Por otro lado, la política de extranjería del Gobierno ha demostrado en la última legislatura una fijación obsesiva respecto al tema de las expulsiones. En total, en 2007 el Ministerio del Interior repatrió a 55.938 personas inmigrantes en situación irregular, en virtud de las diferentes figuras recogidas en la Ley de Extranjería (retornos, readmisiones, expulsiones y devoluciones). La cifra es un 6% más elevada que la de 2006, cuando fueron repatriadas 52.814 personas.[421] Desde 2004, las repatriaciones efectuadas por el Gobierno del PSOE ascendieron a 370.027, un 43,4% más que en la legislatura anterior, en la que se llegó a cifra 258.049.

Tab. 1. Evolución de las repatriaciones totales desde España y de las repatriación mediante vuelos desde el año 2000.

	2000-2003	2004-2007	Variación
Total de repatriaciones	258.049	370.027	+43,40%
Expulsados en vuelo de repatriación	14.397	40.787	+183,30%

Fuente: MIR (2007).

---

[417] Véase: T.A. Van Dijk, *Racismo y discurso de las elites*, Eds. Gedisa, Barcelona 2003.

[418] La misma dinámica se produjo en el Reino Unido, en Francia e Italia.

[419] Véase E. Bazzaco, *La externalització de les fronteres i la cronificació de la irregularitat,* in "Marc de Referencies", 30, XI, Barcelona 2007, pp. 23-26.

[420] Para ulterior información, véase: Fortress Europe. Available at: <http://fortresseurope.blogspot.com>. Acceso en: 12 de enero de 2009.

[421] De estas cifras se excluyen los ciudadanos rumanos y búlgaros, que pasaron a formar parte de la Unión Europea el 1 de enero de 2007. El total, las personas repatriadas en 2006 fueron 99.445.

El inicio del 2008 ha puesto punto y final a una legislatura[422] caracterizada por el inmovilismo político y consolidación del racismo institucional producido por la Ley de Extranjería, que continúa provocando irregularidad, exclusión social y explotación laboral,[423] realidades que han sido regularmente invisibilizadas y silenciadas por el Gobierno.[424] La última legislatura se ha caracterizado además, por un retroceso en materia de Derechos Humanos – debido al proceso de externalización de fronteras – y a un endurecimiento de la política de expulsiones y repatriaciones, sobre todo con las personas procedentes del continente africano, además de una falta de lucha a la discriminación y racismo institucional por parte de las fuerzas de policía;[425] y por último, por un aumento del racismo social que diversifica y amplia sus manifestaciones.

La lucha contra el racismo no ha sido una prioridad de este gobierno que ha preferido seguir girando la cabeza y mirar a otro lado. Luchar contra el racismo implica un cambio en las políticas para garantizar una igualdad de derechos y oportunidades, es decir, empezar por no discriminar desde las instituciones y paralelamente erradicar los factores que provocan el aumento del racismo social; implica a la vez contundencia para castigar la existencia de las acciones racistas y xenófobas. La falta de jurisprudencia, así como la falta de sensibilidad del estado de derecho en el momento de castigar las acciones racistas y/o xenófobas han provocado la negación de la existencia del racismo y la impunidad de estas conductas. Esta realidad se acompaña en muchos casos, de la banalización o negación de su existencia por parte de los discursos políticos[426] y de los medios de comunicación.

Es necesario denunciar la ausencia y la necesidad en España de poner medidas concretas para impedir actos racistas, pero sobre todo de diseñar políticas para evitar este caldo de cultivo de marginación, prejuicios y generalizaciones, que tiñe de racismo el modo en que muchas personas ven a otros seres humanos y al mundo.

---

[422] El segundo gobierno Zapatero se instaló en el marzo 2008, tras la victoria socialista en las elecciones.

[423] Véase: Bazzaco E. & Sanchez B., *La discriminación de los invisibles. Un balance del racismo institucional y social en España en 2007*, in "El Viejo Topo", 244, Barcelona 2008, pp. 64-69.

[424] Sobre el tema: Federación de Asociaciones de SOS Racismo del Estado Español *, Balance de la situación legal de la población extranjera*, en SOS Racismo, "Informe Anual sobre el racismo en el Estado español 2006, Icaria Editorial, Barcelona 2006.

[425] Véase: D. Wagman, *Perfil racial y practicas policiales*, en SOS Racismo, "Informe Anual sobre el racismo en el Estado español 2007", Icaria Editorial, Barcelona 2007.

[426] Véase: J. de Lucas, *Ciudadanía: la jaula de hierro para la integración de los inmigrantes*, en: G. Aubarell & R. Zapata (eds.), "Inmigración y procesos de cambio. Europa y el Mediterráneo en el contexto global", Icaria/Temed, Barcelona 2004, pp. 215-236.

The Italian crime deal
(by S. Palidda)

The Italian case is similar to others, but it may be emblematic of the raising to extreme levels of prohibitionist practices, of their effects and of their combination with racist criminalisation (as recently reported by the European commissioner for human rights, Hammarberg[427]). This is also why Italy appears to resemble neo-conservative America more than other European countries, due to the particular blend of the less noble aspects that have traditionally been present in our country (consider the underground economies and the hybridisation between legal, informal and criminal). Referring back to the recent publications that analyse the various aspects of the social construction of the condition of immigrants in Italy and racism in depth[428], here I limit myself to summarising what is essential into points:

a) much more than in other European countries, Italy is the country in which a heightened lack of certainty of the law for immigrants perpetuates itself; discretionality if not free arbitrariness in the interpretation of norms (rarely in a sense that benefits the immigrant) are commonplace and strengthened by laws that grant disproportionate power to the police and authorities in charge of managing the different moments in the migratory process; from access to a visa, to that to an asylum request, up until the obtaining of a residence permit and its renewal, norms and practices that *de facto* ensure the re-production of irregularity that only to a minimum extent results from entries that are actually irregular.

b) Over thirty years, Italian prohibitionism has contributed to the slaughter of thousands of migrants during their attempts to enter Italian territory, but also to the continuous deaths, sometimes not very visible, that result from unbearable working and living conditions and the wear and tear –a fact that is entirely ignored- of thousands of people who have returned to their home country.

c) The majority of regular immigrants who are in Italy today have passed through periods of irregularity, but it is not possible to know how many have left. After five regularisations and increasingly strict laws, at the start of 2009, the estimate of irregulars swings between 500 and 900 thousand people. Some estimates claim that irregulars contribute around 3-4% of the GDP and all the regular and irregular foreigners account for 13% of the national GDP.

d) As we will see below through the analysis of statistics, the Italian *crime deal* has fed off the criminalisation of immigrants, and particularly of those that are most easily classified as "natural born delinquents", primarily because they are

---

[427] His report, in English and French, is available online:
https://wcd.coe.int/ViewDoc.jsp?id=1428427&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679 and was cited by several daily newspapers on 16/04/09
[428] Insofar as legal aspects are concerned, I refer to various essays published by the magazines and websites of Asgi and MD, http://www.asgi.it/, http://magistraturademocratica.it. For research in social sciences, the literature is rather vast and widely cited in different chapters of this volume.

the ones who are at a greatest disadvantage in relation to the possibilities of regular and peaceful integration (namely, young Maghreb country nationals, people from the Balkans and Nigerians). However, although statistics are the inflated and rather predictable result of a construction of criminalisation in which many actors participate, they themselves belie immigrants' contribution to an increase in criminal offences themselves[429]: from 1990 to 2009, the total number of crimes has decreased, while immigrants (both regular and irregular) have increased by 420%. However, according to the dynamics of racist criminalisation, arrests and imprisonments have grown ceaselessly in spite of the false pardon (false because those released from prison have not found any support outside and have inevitably returned to become "easy preys" in the hunt by police officers who must show themselves to be productive or have embraced the authoritarian-racist cause[430]) (see the graph and table that follow). Unlike other countries –even when they are governed by right-wing coalitions[431]-, in Italy all of this occurs within a context of brazen impunity for people who enact violent and racist behaviour. Just like almost all those responsible for the violent acts and torture on occasion of the G8 in Genoa have been acquitted and even promoted[432], a majority of authors of racist attacks against gipsy encampments or against immigrants is not prosecuted, and they sometimes even embark upon careers in politics or in the ranks of the state and the media.

Year	Total crimes	People accused	% accused over crimes	Arrested people	% arrestedov er crimes	Entries in prison	Detainees
1990	2,501,640	435,751	17.4	64,814	2.6	64,722	26,150
1995	2,267,488	644,383	28.4	111,071	5	88,415	47,344
1999	2,373,966	700,199	29.5	123,252	5.2	87,862	53,000
2005	2,515,168	644,532	25.6	145,231	5.8	89,887	60,109
2006	2,526,486	651,485	25.7	153,936	6.1	90,714	
2008	2,260,000*	not av.	-	not av.		92,800	61,000
1990-2008	- 11	+ 60*		+ 170*		+ 43*	+ 133.3

Sources: produced by the author on the basis of data from ISTAT [Italian Institute for Statistics], the interior ministry and www.giustizia.it [the justice ministry website]. *NB: my estimates: information

---

[429] This claim has also been noted by M. Bianchi,   P. Buonanno and P. Pinotti, "Do Immigrants Cause Crime?", working paper 05/2008, Paris School of Economics

[430] See Fondazione Michelucci,   *Ordine & Disordine. Paure Insicurezza Povertà Carcere*   , 2007 (http://www.michelucci.it/node/79); Palidda, *Mobilità umane*, op. cit.; G. Campesi, L. Re, G. Torrente, *Dietro le sbarre e oltre*, l'Harmattan, 2009

[431] In England, like in France and elsewhere, as soon as a police officer is charged of violent acts and violation of rights and democratic guarantees, they are immediately suspended and often fired as well.Among so-called democratic countries, it is only in Italy that there have never been bodies for an effective democratic control and punishment in this field, confirming the absence of a liberal-democratic tradition, also thanks to a left wing whose hierarchy has almost always shared the same authoritiarian notions that are established in the right and centre.

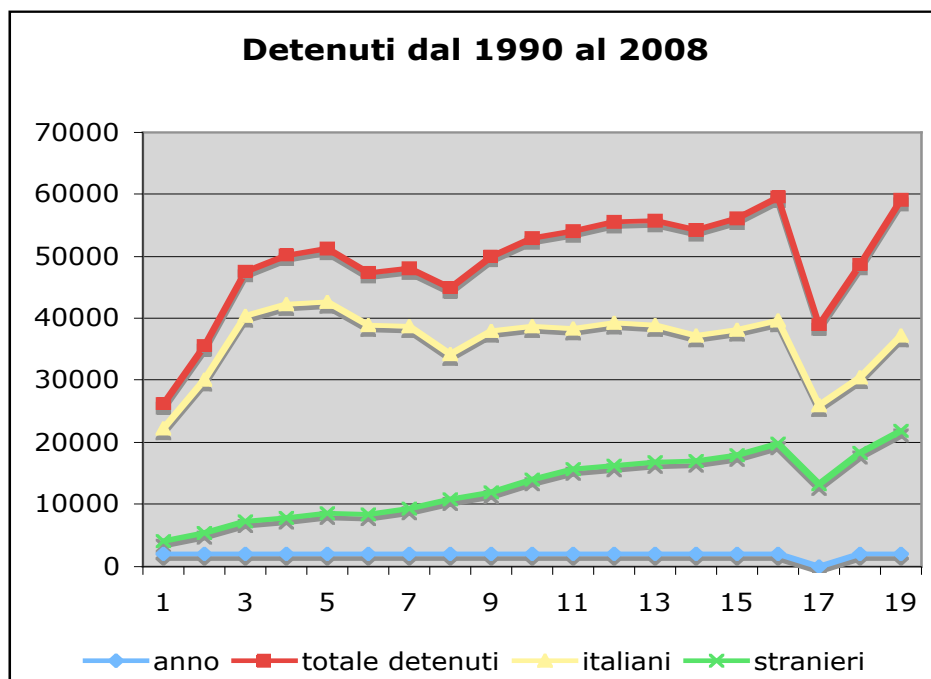[432] Find all the documentation on www.processig8.org

updated to include 2008 about the total number of criminal offences recorded by the police forces (on their own initiative or allegations made by citizens) is not available, but according to statements by the chief of police himself, there has been a decrease by at least 12-15% (from 2006 to the end of 2008); however, arrests and the number of prisoners, which in late March 2008 were once again more than 61,000, that is, as many as they had been before the pardon that released over 26,000 of them, appear to have risen again. As happens in the United States, a reversal in the progress of the relation between number of crimes, arrests and imprisonment, that is, the typical trend of zero tolerance, or of the *crime deal*, is confirmed. In 2008, among the 'entries from freedom' into Italian prisons, 46% concerned foreigners. The regions with the most entrants were Lombardy (15,648, of whom 10,021 foreign), Campania (10,760, of whom 2,201 foreign), Piedmont (9,933, of whom 6,002 foreign), Latium (8,649 of whom 4,237 foreign). More generally, criminal offences diminish but have been 7,500 per day on average; pick-pocketing has fallen by 24%, bag-snatching by 21% (below 10,000), car theft by 19% (76,000), there have been less frauds (-21%, 52,000), 11% less robberies (less than 24,000 cases), 8% less home burglaries (72,000). Murders remain at around 610-620 per year (according to the 2007 interior ministry report, they were 1,918 in 1991, the year with the most murders since 1968, and in 2006, out of 621 murders, 109 were the responsibility of organised crime).

As the trend of data in this chart shows, in Italy –as in other countries- there is not an increase in crime; the total number of crimes decreases in spite of it being possible to consider it "inflated" by reporting that would not previously have occurred or by an excess of zeal by police forces alongside that of zealous citizens or "militants of zero tolerance", particularly against immigrants and gipsies. The increase (from 1990 to 2006) in people reported, arrested, of entries into prison and of detainees thus appears sensational: an overt intensification of repressive and penal action, to the detriment of social prevention and the recovery or re-insertion/rehabilitation, which is even less justified if one considers the fact that, in reality, all of the serious crimes have decreased.

The ratio between people reported and arrested was of 6.7 in 1990 (7.6 for Italians and 2.8 for foreigners), 5.7 in 1999 (6.4 for Italians and 3.3 for foreigners), 4.4 in 2005 (6.1 for Italians and 2.9 for foreigners), and 4.2 in 2006 (around 7 for Italians and 3 for foreigners). In other terms, foreigners have a greater chance of being reported, arrested and imprisoned than Italians.

Italians and foreigners reported, arrested and imprisoned from 1990 to the end of 2005 – detainees before the pardon in 2006)

	Reported				Arrested				Imprisoned			
Year	Italians	% of tot.	Foreigners	% of tot.	Italians	% of tot.	foreigners	% of tot.	Italians	% of tot.	Foreigners	% / tot
1990	403,175	92.5	32,576	7.5	53,155	82	11,659	18	22,133	84.6	4,017	15.4
1995	587,193	91.1	57,190	8.9	88,827	80	22,244	20	38,716	81.8	8,628	12.2
1999	606,603	86.6	93,596	13.4	95,185	77	28,067	23	38,000	71.7	15,000	28.3
2005	434,301	67.4	210,231	32.6	71,466	49.2	73,765	50.8	40,273	67	19,836	33

Detenuti dal 1990 al 2008

legend: anno — totale detenuti — italiani — stranieri

NB: The point at which there is a sharp decrease corresponds to the Pardon of 2006; the re-imprisonment of many who had benefited from it reflects the almost complete lack of assistance for those released from prison

year	foreign detainees	Annual increase	% foreigners of the total	Total detainees	Italians	incr. Italians
1990	4017		*15.4*	26,150	22,133	
1991	5,365	33.6	*15.1*	35,485	30,120	36.1
1992	7,237	34.9	*15.2*	47,588	40,351	34
1993	7,892	9.1	*15.7*	50,212	42,320	4.9
1994	8,481	7.5	*16.6*	51,231	42,750	1
1995	8,334	-1.7	*17.6*	47,344	39,010	-8.7
1996	9,373	12.5	*19.5*	48,049	38,676	-0.9
1997	10,825	15.5	*24.1*	45,000	34,175	-11.6
1998	11,973	10.6	*23.9*	50,000	38,027	11.3
1999	14,057	17.4	*26.6*	52,870	38,813	2.1
2000	15,582	10.8	*28.8*	54,039	38,457	-0.9
2001	16,294	4.6	*29.3*	55,539	39,245	2
2002	16,778	3	*30.1*	55,670	38,892	-0.9
2003	17,007	1.4	*31.4*	54,237	37,230	-4.3
2004	17,819	4.8	*31.8*	56,068	38,249	2.7
2005	19,836	11.3	*33.3*	59,523	39,687	3.8
2006*	13,152	-33.7	*33.7*	39,005	25,853	-34.9
2007	18,252	38.8	*37.5*	48,693	30,441	17.7
2008	21,891	19.9	*37.1*	59,060	37,169	22.1

* year of the pardon; Source: produced by the author on the basis of Istat and Dap (prison administration service) data

After the pardon, at the end of 2008 Italian detainees increased by 43.8% and foreigners by 66.4%. The revival of imprisonment after the pardon was effectively spurred on first by the Prodi government and then by Berlusconi's return. The interior minister of the Prodi government, Amato, openly stated that he would have followed "the example set by Giuliani's zero tolerance", and the then mayor of Rome, Veltroni, who later became the leader of the centre-left, called for the expulsion of 200,000 Romanians, arousing protests from the European Commission itself and the Strasbourg Parliament (see Sigona), after the murder of Mrs. Giovanna Reggiani by a deranged Romanian/Roma man. The current interior minister, Maroni, leader of the Lega Nord that for some time, and now more than ever, has sought to be the leading if not the only anti-immigrant party with racist overtones that are not even concealed, has never lost an opportunity to incite the repression of migrants who, except for when they are in submission as quiet and submerged slaves (also for the benefit of petty Padanian bosses [from the Lega Nord's conceived homeland in northern Italy]), are suspected delinquents. The result is that in two years, the stock of detainees has returned to the levels prior to the pardon that had entailed the release of around 26,000 people, but the majority of the new 20,000 detainees over two years is now composed by foreigners and by Italians who are serial repeat offenders (a figure that corresponds with the deterioration of services aimed at social recovery and re-integration –as in the case, in particular, of SERTs for drug addicts due to the logics of neo-liberalism and privatisation, that is, of sub-contracting to privates communities, that cure the wealthy and throw the poor back onto the streets[433]).

The new and more brazen wave of criminalisation in these first years of the 21st century appears even more disgraceful when looking at the crimes attributed to foreigners. According to data from the Dap (prison service administration, available at www.giustizia.it), the percentage of Italian

---

[433] The apparent paradox of the crime deal or zero tolerance finds its full expression in the choices of many local right and centre-left wing administrators. While increasingly more resources are destined to police forces, video-surveillance or even citizens' patrols and the different measures to secure city centres, nothing is said or done about drug addicts who, in increasing numbers, have gone back to injecting themselves in the streets, particularly because SERTs do not work precisely due to the liberalist logic that has led to making medical and para-medical staff's employment unstable, forcing them to supplement miserable contracts with others for private communities that are preferred but do not cure the worst off. Consider the situation of social workers or psychologists who have 24-hour contracts and are expected to deal with 80 cases! An emblematic example is that of the demagogy of the (Democratic Party) mayor of Genoa and her councillor-sheriff (Italia dei Valori) who, in the name of hygiene, decorum and morality, have moved forcefully against prostitutes (foreign) in the alleys of the historic city centre (rather appealing for real estate speculators and are consistently using new funding for "post-modern" controls, up to the plan to conceive a bracelet to re-assure tourists (angering even right-wing tourist operators).

detainees who have had a firm sentence passed against them is of 50.5%, whereas that for foreigners is of 37.7%, confirming that foreigners are often held in prisons because they are deemed less reliable to deserve house arrest or placement in communities.

Offences attributed to detainees present in Penitentiary Institutes - Data on 31 December 2008

typology of crimes	Italians				Foreigners					Overall total	%
	women	men	total	%	women	men	total	%	%*		
Mafia – style association	87	5,376	5,463	3.9	2	93	95	0.2	1,7	5,558	3.0
drugs law	717	16,663	17,380	12.4	570	11,563	12,133	26.3	41,1	29,513	15.9
weapons law	313	25,379	25,692	18.4	31	1,797	1,828	4.0	6,6	27,520	14.8
public order	31	2,053	2,084	1.5	60	690	750	1.6	26,5	2,834	1.5
against property	1,213	41,464	42,677	30.5	611	11,692	12,303	26.7	22,4	54,980	29.6
prostitution	16	146	162	0.1	134	704	838	1.8	83,8	1,000	0.5
against the public administration	114	4,568	4,682	3.3	35	2,692	2,727	5.9	36,8	7,409	4.0
public safety	34	1,604	1,638	1.2	4	194	198	0.4	10,8	1,836	1.0
public faith	159	4,179	4,338	3.1	111	1,847	1,958	4.3	31,1	6,296	3.4
public morality	3	166	169	0.1	0	57	57	0.1	25,2	226	0.1
against the family	46	991	1,037	0.7	7	257	264	0.6	20,3	1,301	0.7
against the person	657	21,000	21,657	15.5	361	8,507	8,868	19.3	29,1	30,525	16.4
against theState's legal status	100	277	377	0.3	3	97	100	0.2	21,0	477	0.3
against the admin. of justice	149	4,314	4,463	3.2	55	540	595	1.3	11,8	5,058	2.7
public economy	8	476	484	0.3	0	8	8	0.0	1,6	492	0.3
fines	56	3,506	3,562	2.5	17	484	501	1.1	12,3	4,063	2.2
foreigners' law	6	93	99	0.1	120	2,263	2,383	5.2	96,0	2,482	1.3
against feelings & piety for the deceased	29	1,137	1,166	0.8	7	86	93	0.2	7,4	1,259	0.7
other crimes	47	2,668	2,715	1.9	16	352	368	0.8	11,9	3,083	1.7
total crimes	3,785	136,060	139,845	100.0	2,144	43,923	46,067	100.0	24,8	185,912	100.0

Source: D.A.P - Ufficio per lo Sviluppo e la Gestione del Sistema Informativo Automatizzato - Sezione Statistica
Note: If a number of different crimes are attributed to a detainee, falling within one or more categories, they will be counted more times, one for each of their offences. Hence, the general total turns out to be higher than the number of subjects (that is, 185,912 criminal offences for 59,060 detainees) cfr.:
http://www.giustizia.it/statistiche/statistiche_dap/detdetg54_reati.htm

The total number of crimes for which foreign detainees are charged constitute 23.6% of the crimes attributed to all the 59,060 detainees; in other terms, on its own, this figure shows that the thesis that seeks to attribute the increase in delinquency to foreigners is entirely false. This is even more true as regards the most serious crimes (organised crime, murders, armed robberies). The ratio between crimes and number of detainees is 4 for Italians and 2 for foreigners, who are hence imprisoned for less crimes than Italians. The great majority of foreigners is accused of crimes of slight seriousness (dealing, theft,

causing injuries) and then of crimes that are typically attributed to immigrants (against public administration, law on foreigners); the "weapons law" criminal offence may even concern the possession of a simple knife. In other senses, if one observes the ratio between people reported and arrested, it surfaces that as the years pass, foreigners face an increasing possibility of being arrested rather than reported, whereas the opposite occurs for Italians, who –apart from serial repeat offenders- generally benefit from sentencing discounts, alternative sentences to prison, etc. As is well known, the Bossi-Fini law has further worsened this trend by effectively introducing the criminal offence of clandestine status (that may even apply to people who have been in Italy regularly for years but have not been able to renew their permits anymore, not because they have committed crimes, but just because they can no longer find regular employment and accommodation; the second time that they are stopped for being clandestines they go to prison, that is, they go on to have criminal offences and are destined to be expelled). The dogged pursuit of so-called clandestines always depends on inputs from above and from local authorities, while it is obvious that police forces "turn even two blind eyes" when dealing with "clandestines" who work silently and in a concealed manner for the underground economy of small company bosses who are well protected, even in sub-contracting firms within large businesses and even for firms that are busy in providing cleaning services, also in banks, ministries, courts and, maybe, even in prefectures and city police headquarters[434].

Now we can see how criminalisation rates vary when calculated while only considering foreign males in relation to the total number of regular males, to which I have added an estimate of irregulars (minors are not recorded in residence permits); as regards Italians, the calculation concerns males of between 18 and 65 years of age (it is impossible for there to be minors in prisons for adults and it is very rare to find over-65s there). It is then important to compare the detention rate for each nationality with the one for Italians (as we have done for blacks and Latinos compared with WASPs in the United States).

---

[434] Moreover, remember the sensational case of the "clandestine" Nigerian armed security guard employed for as long as 19 months as an armed guard in the English Home Office (corriereonline of 7/12/07) ... ridiculous but tragic for the victim: he was arrested and immediately expelled

Foreigners by leading nationalities among detainees (at 31/12/2008)

Country (% of women on total of permits)	Male detainees	Rate for males	Ratio, foreign rate/ Italian rate
Albania (44.7 % women)	2582	1099	6
Algeria (30.5 % women)	1105	4804	24
Bangladesh (32.4 % women)	32	58	0
Bosnia (43.9 % women)	162	810	4
China (47.3 % women)	306	340	2
Croatia (47.9 % women)	109	606	3
Ecuador (60.2 % women)	114	326	2
Egypt (29.5 % women)	379	632	3
Philippines (58.5 % women)	50	111	1
Ghana (43.7 % women)	137	685	3
India (40.2 % women)	88	220	1
Macedonia (42.4 % women)	106	193	1
Morocco (40.8 % women)	4791	2083	11
Moldova (66.4 % women)	207	767	4
Nigeria (57 % women)	790	3950	20
Pakistan (30 % women)	120	300	2
Peru (60.7 % women)	152	434	2
Poland (70.2 % women)	194	554	3
Romania (52.9 % women)	2485	777	4
Senegal (19.4 % women)	366	665	3
Sri Lanka (44.2 % women)	42	105	1
Tunisia (35.1 % women)	2618	3740	19
Ukraine (80.4 % women)	152	507	3
Total for foreign men	20,806	946	5
Italians	37,169	197	1

Source: produced by the author on the basis of DAP and Istat data

Almost 70% of foreign detainees is made up by Moroccans, Tunisians, Albanians, Romanians, Algerians and Nigerians. The rate for Italian males is 197 (that is, 197 detainees for every 100,000 males of between 18 and 65 years of age), while that for foreign males is 946 (for every 100,000 regulars + an estimate of irregulars); the ratio between the rate for foreigners and that for Italians is of five; four nationalities have a rate that is more than ten times higher than that of Italians (the "bad ones"), whereas nine (the "good ones") of those taken into account here have a lower or almost equal rate to that for Italians. As is predictable, the higher rates are destined to re-produce themselves although, in comparison with past years, there has been an evident decrease in the rate of Albanians and Algerians. Moreover, in spite of campaigns inciting hatred against Romanians, they do not feature among the highest rates. The quintessential "good ones" are generally the object of positive prejudices and effectively better treated by police forces, also because they often live in milieux that are less visible (as in the case of carers).

Generally, the majority of foreigners in prison is composed by youths who are charged with offences of theft, small-scale receipt of stolen goods and drug dealing, often "desperate" youths who have become deviant due to a lack of possibility of regular, stable and satisfying insertion, or because they are intoxicated by the illusion of easy and quick earnings, or they had already slipped into delinquency in their home countries, particularly when these are countries that are strongly marked by de-structuring and "total" deterioration (as in the cases of Algeria, Nigeria and other countries in Africa and the East) (cfr. Palidda, 2001, 2008).

According to a cliché that has also been supported by democratic experts, irregular immigrants are supposedly "bad" whereas regular ones are "good". The basis for this assertion is that almost all the foreigners in prison do not possess a residence permit. In reality, this is a ridiculous claim, not just because any foreigner who ends up in jail loses their regular status, but also because research about how many among the detainees have had residence permits for shorter or longer periods has never been carried out, and it is predictable that irregular migrants will be more liable to experience policing and penal measures (starting from the offence of not returning home after an expulsion injunction, or because they are suspected of other crimes).

A matter of "terroni"[435] (data from 30 June 2008)

As we have seen in the previous contributions, in the United States the customary target for repressive and penal action is constituted by blacks and Latinos, in England by non-British citizens, in France by foreigners and French with foreign origins, Belgium and Holland have more or less similar situations to the French one, and in Germany, by foreigners. In Italy, apart from foreigners, there is a perpetuation of the criminalisation of southerners who are effectively or allegedly the authors of crimes, especially on suspicion of membership of Mafia-type organisations. This is what can be drawn from official statistics.

---

[435] *terroni* (and before *cafoni*) is the depreciative term historically used for the people of the south or of the rural people similar to the clodhopper or clumsy, coarse person; a bumpkin

Detainees by region of birth at the end of 2008

Region of birth	detained males	rates for males	ratio to average rate for the "virtuous"
Abruzzo	365	88.1	1.2
Basilicata	278	148.8	2.1
Calabria	2,717	430.4	6.1
Campania	9,184	501.2	7.1
Emilia R.	594	44.1	0.6
Friuli V. G.	225	57.4	0.8
Latium	2,316	132.4	1.9
Liguria	459	94.0	1.3
Lombardy	2,781	88.5	1.3
Marches	185	38.3	0.5
Molise	73	72.4	1.0
Piedmont	1,134	81.6	1.2
Apulia	4,024	311.9	4.4
Sardinia	1,387	247.6	3.5
Sicily	7,075	456.0	6.4
Tuscany	603	52.6	0.7
Trentino A. A.	182	56.3	0.8
Umbria	90	33.0	0.5
Valle d'Aosta	8	19.3	0.3
Veneto	845	53.7	0.8
Born abroad	21,076	958.0	13.5
National total	**55,601**	294.0	4.2
Italians	34,525	194.5	2.8

Source: elaborated by the author on the basis of data from www.giustizia.it

As the data from the table above shows, males born abroad are imprisoned 4.2 times more than the average of Italians, but it must also be noted that those born in the south are imprisoned 2-2.5 times more than the average of Italians; then, if one compares the highest rates of imprisonment (Campania, Calabria, Sicily, Apulia and Sardinia), that is, those of people born in the southern regions (the *terroni* [insulting term used to refer to southerners]) and of those born abroad with the average of rates that are lower than 100, namely, that of "good Italians" (from Abruzzo, Basilicata, Emilia Romagna, Friuli, Latium, Liguria, Lombardy, the Marches, Molise, Piedmont, Tuscany, Trentino, Umbria, Val d'Aosta and Veneto, that is, as many as 15 regions), the resulting ratios are rather high: those born abroad are imprisoned 13.5 times more than "good Italians" and *terroni*, from 3.5 to 7.1 times more. Where the rate of imprisonment of natives is higher, that of foreigners is lower or equal to that of natives (natives and foreigners are included in the same category of *a priori* suspect delinquents).

Regions of detention	Total	born abroad	
Abruzzo	1,678	472	28.1 %
Basilicata	533	168	31.5 %
Calabria	2,286	674	29.5 %
Campania	7,185	981	13.7 %
Emilia R.	4,074	2,139	52.5 %
Friuli V. G.	741	439	59.2 %
Latium	5,366	2,107	39.3 %
Liguria	1,380	745	54.0 %
Lombardy	8,090	3,619	44.7 %
Marches	1,017	421	41.4 %
Molise	396	87	22.0 %
Piedmont	4,636	2,403	51.8 %
Apulia	3,556	727	20.4 %
Sardinia	2,132	912	42.8 %
Sicily	6,870	1,853	27.0 %
Tuscany	3,811	1,881	49.4 %
Trentino A. A.	339	187	55.2%
Umbria	906	397	43.8%
Valle D'aosta	152	100	65.8%
Veneto	2,979	1,870	62.8%
National total	58,127	22,182	38.2%

Source: www.giustizia .it

In as many as 13 regions, the proportion of foreign detainees is higher than the national average, and in eight they reach or are higher than 50%. 80% of imprisoned foreigners are concentrated in seven regions (Piedmont, Lombardy, Veneto, Emilia, Tuscany, Latium and Sicily). It is worth noting than in Sicily there is a relatively high number of imprisoned foreigners for "repeat offences" with regards to the injunction to leave and, perhaps, also because the Mafia sometimes causes foreigners to be arrested to distract attention from itself and gain favour among the police forces.

Thus, it appears that the traditional paradigm of post-unitary Italy is presented again, which, according to 19th-century criminologists, left no space for interpretative doubts: *terroni* are more criminal than the rest of "civilised" Italians and foreign *terroni* are even more so (as was the case of "blood-thirsty savages" from the colonies, as Lombroso's acolytes, Niceforo & Co. Used to write –see Palidda, 2008). In effect, albeit not explicitly, even today, many (not just Lega Nord supporters, but even "left-wing" northern supremacists*) believe this and this construct appears to be confirmed by "evidence" that seems indisputable: those imprisoned the most are born in the regions of "mafias" or in the towns with the most delinquency and deterioration (territories that are deemed "not very civilised"; furthermore, the current interpretation of *Gomorra* lends credit to the thesis whereby the southern deviant or delinquent must inevitably be a member of Mafia-type organisations

or a potential one, and a majority of public opinion appears to think that all the ills of the Naples region –from unauthorised waste dumps, to the Camorra, up to the corruption of politicians- is the Neapolitans' "fault").

But are the imprisoned southerners really delinquents or criminals who are members of Mafia-like organisations? One would not say so from what emerges from the charges, even though they are sometimes made worse than they are (attempted theft or pick-pocketing or bag snatching turned into attempted robberies); effectively, a very large majority of foreigners and southerners who are arrested and imprisoned are rather often mere deviants, or even just suspected delinquents, in short, a part of populations that face a large risk of being criminalised due to negative characterisations if not governmental racism that develops into state racism through the acts of some officers of the police and magistrature. It is obvious that southern deviants are liable to become Mafia groups' workhands, but it is likewise evident that this is a self-fulfilling prophecy when Mafia-like organisations are the social institutions that, in their own way, "take care of the people", provide the only credible offers in a "market" in which legitimate institutions have become corrupt and unlawful as well (as can be seen in widespread corruption as a mix between neo-liberal privatisations of public services and old nepotism linked to mafias), or have gone missing.

Among recent examples of brazen criminalisation, particularly of Neapolitans, we recall the campaign against "rubbish" that has systematically tended to single out this population as uncivilised and scandalously particularist, when it has been precisely the populations that have rebelled against the dumps who have been calling for years for the re-organisation of waste management, engage in separating domestic waste for recycling and complain about the disposal of toxic waste in the territories that they live in, in which they ascertain the dramatic increase in deaths and illnesses resulting from cancer due to contamination from such waste[436].

A recent grotesque episode concerned the hyper-mediatisation of the false assault on a train and Rome train station by Neapolitan football fans, a falsification that was zealously fed even by interior minister Maroni and the chief of police[437].

On 31 August, the first round of the football league, television news programmes and newspapers announced that a horde of Neapolitan *ultras* heading for Rome had assaulted the "Modigliani" Naples-Turin Intercity train, devastating it, beating the ticket inspectors and kidnapping dozens of frightened passengers. The only source for the alleged news: a statement by Trenitalia that spoke of an "entirely vandalised train, substantial damage to 11 carriages, the emergency brake activated repeatedly, a first estimate of damages of around 500,000 euros". A review of the coverage from television news programmes and newspaper headlines follows.* Tg1: "Intercity for Rome, only ultras on board: 500,000 euros in damages". Tg2: "Chaos in

---

[436] On this episode, see the excellent research undertaken by the team directed by Antonello Petrillo (Unisob)

[437] Here, I draw on extracts from the fans' documents collected by Tommaso Tintori for his PhD thesis

Naples and Rome stations: Neapolitan fans attack the train". Tg3: "Napoli fans take over the train, hell in Naples station, 300 passengers taken hostage, the stations devastated". Studio Aperto: "Warfare, panic among passengers thrown out of the train, four railway workers injured". Corriere della sera: "Ultras raid trains: damages and chaos". La Repubblica: "Ultras raid train, passengers thrown out by fans". Il Mattino: "Naples, ultras assault train". La Stampa: "Ultras destroy train". L'Unità: "The train of fear: Intercity taken hostage by Neapolitan fans". Il Giornale: "Neapolitan ultras 'steal' the train: there's the game, passengers thrown out" (followed by an editorial: "Football Gomorra"). Some even speak of "home-made bombs" exploded on arrival at Termini station. Then the government and police, after criticism for not having prevented something that was rather predictable, stated that the *ultras* were disguised *camorristi* engaged in "terrorism" (recall that charges of terrorism had been brandished against Roman *ultras* after the disturbances –real ones- that followed the death of the fan Sandri who was shot by an officer). Next, came the big headlines "like photocopies": "200 previous offenders on the ultras' train". "Not ultras, but camorristi and terrorists". "What are the judges doing?". "Zero tolerance". "Certainty of punishment". The president of the Lega Calcio [Football League] Antonio Matarrese proposed to arrest a few thousand of them and hold them in custody directly in stadia, as Pinochet used to do. "Panorama": "Maroni: zero tolerance against ultras". "Maroni: camorristi and delinquents among the ultras. Out of 3,096 Napoli fans who bought tickets for the game against Roma, 810 had police records and 27 were linked to the Camorra. This is what the interior minister, Roberto Maroni, said during a hearing to the Constitutional Affairs commission of the Senate ... the minister explained that "there is the influence of the Camorra" on the Neapolitan supporters. Corriere: «These are not organised supporters, it is organised crime». The words of interior minister Maroni found fertile ground. In Naples, organised crime means Camorra, the chief of police Manganelli upped the stakes: «It is possible to consider that there is the influence of organised crime behind the direction of the disturbances caused by Neapolitan fans». Six months later, not even one fan was charged or arrested. In an investigative report entitled "La bufala campana" [*bufala* is used to refer both to the buffalo whose milk is used for high-grade mozzarella cheese from Campania and, figuratively, to talk of a spoof story, lie or blunder], the Rainews24 correspondent Enzo Cappucci, based on the conclusions reached by the prosecuting magistrate in charge of the case, Antonello Ardituro, shows that it was a matter of a lot of noise about nothing. No arrests, No destruction. Only some instances of damage. No home-made bombs, at most some petards and fireworks. As for the injuries to ticket inspectors, there is no trace of them as yet: Rainews asked for the medical records, in vain. Of the 11 carriages that were "vandalised", Trenitalia has only placed four at the investigators' disposal: the others are travelling without any worries. And the "500,000 euros worth of damages"? There is no sign of them. The Digos [police special operations directorate] and Carabinieri talk of 80 damaged curtains, some cuts in seats, two broken glass partitions and a ripped out toilets (although it must be proven that it was the *ultras* who did this, considering the state in which trains lie even in the absence of *ultras*): things worth a few thousand euros, no more than that. And the "assaults against the two stations?". Another lie: normal images of an ordinary Sunday arrival of fans. Rainews shows sequences of Verona fans leaving Naples a couple of years ago, insulting police officers and Neapolitans in the usual cloud of smoke bombs (at the time, however, there was not even a short article about this). Cappucci interviews some eye-witnesses. Tommaso Delli Paoli, secretary-general of the Silp-Cgil police trade union: "The ultras are no angels, but nothing of what they chose to tell happened. [It was] normal tension between ultras with tickets and documents who wanted to get to Rome's stadium, and Trenitalia staff who first blocked the train in the station and then again in the open countryside. I don't think they pulled the emergency brakes, they were in a hurry to get to Rome. It seems that the train shown on television was not the real one". Violence against the staff, officers and passengers? Two Austrian sports journalists who were on the train in question as well, did not see "any violence or clash. Destruction? No, the train was too full for people to move. The only fear was that of

missing the game, as the train was not leaving". What about the Camorra? And terrorism? There were a few dozen people with criminal records, so what?

Who caused the alarm? Does a criminal offence of reporting false and misleading news liable to disrupt public order exist? What have the interior minister and the head of police declared? And how about the falsehoods concerning revolts against the waste disposal dumps?

Particular practices

Road to Racial Profiling Was Paved by Immigrants
Bernard E. Harcourt

The "legal use of racial profiling"—it s hard to utter these words without thinking that they are an oxymoron[438] Perhaps one day they will be, but not today, at least not today in the United States of America. For several decades now, since at least the mid-1970's, the highest court of the United States has condoned the use of ethnic or racial features to target law enforcement. In explicit terms, the Supreme Court has allowed police officers to use the color of someone's skin to justify a stop, to legitimate interrogation, to facilitate a police search. All with the highest court's constitutional stamp of approval.

To trace the genealogy of this sordid practice, one must begin on the back roads and interstate highways off the Mexican-American border—at the road blocks, INS checkpoints, and roving patrols policing immigrant border crossings. The road to racial profiling in the United States was paved on those dirt paths. It is there that the United States Supreme Court started the legacy of legal profiling, effectively opening the door to racial profiling at the most sensitive location, a place where ethnicity and appearance were at their most salient. This legacy, like many others, has only grown with time. Racial profiling did not stop at the border. Today, it has spilled over into other areas—not just the control of immigration, but the policing of citizens as well, especially African-American or Hispanic citizens.

There is a saying in American that "a chain is only as strong as its weakest link." In the United States, the anti-discrimination chain was broken at the border—at the exact location where ordinary men and women become the most despised. Sadly, it is not entirely surprising. Our political strategies at the border are often our weakest link. The consequences were foreseeable. The repercussions are now long lasting. Let us being our genealogy then at the trail head, in the Southern deserts, on the American border with Mexico.

Patrolling the Mexican Border

---

[438] In this essay, "racial profiling" is defined as the knowing use by the police of race as a factor in the decision to investigate a suspect, based on the assumption that persons of the designated race or ethnicity are more likely to be offenders. The term "racial profiling" is of recent vintage. See generally Bernard E. Harcourt, *Rethinking Racial Profiling,* 71 University of Chicago Law Review, 1275, 1276 n.2 (2004); Jerome H. Skolnick and Abigail Caplovitz, *Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 249—279, in Bernard E. Harcourt, ed., *Guns, Crime, and Punishment in America* (NYU Press 2003) (discussing the history of the "racial profiling" expression). There is today some controversy over the definition of the term "racial profiling." Some commentators argue that the term "racial profiling" should be limited more narrowly to those cases where the police rely on race exclusively; others use the term when race is a significant factor among others in the decision to investigate. For discussions of the controversy, see, for example, Katheryn K. Russell, *Racial Profiling: A Status Report of the Legal, Legislative, and Empirical Literature*, 3 Rutgers Race & L. Rev. 61, 65—68 (2001); Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. Chi. Legal F. 163, 168–73 & n 24; Samuel R. Gross and Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 Mich L Rev 651, 738 & nn 278–82 (2002). The definition used in this essay includes using race alone or as one factor among others in the decision to stop and search.

As politicians became increasingly concerned with extralegal immigration in the mid-twentieth century, the INS Border Patrol—the agency in charge of patrolling the borders of the United States—refined its techniques for detecting immigrants traveling inland, narrowing its primary arsenal to three main devices: the fixed INS checkpoint, the temporary checkpoint, and roving patrols. These three inland devices supplemented the line watch agents stationed at the actual border, checking papers, and guarding the entrances to the country.

Fixed INS checkpoints were placed on larger highways and interstates, about 50 to 100 miles from the actual border with Mexico. These checkpoints were essentially roadblocks that would bring northbound traffic down to a snail's pace, allowing Border Patrol agents to look into every passing car and detain motorists for short questioning and for the production of documents. The checkpoints were generally marked ahead with large black-on-yellow signs and flashing lights, and subsequent warnings as motorists got closer. Here is a good description of one of these fixed checkpoints in Southern California:

> Approximately one mile south of the checkpoint is a large black on yellow sign with flashing yellow lights over the highway stating "ALL VEHICLES, STOP AHEAD, 1 MILE." Three-quarters of a mile further north are two black on yellow signs suspended over the highway with flashing lights stating "WATCH FOR BRAKE LIGHTS." At the checkpoint, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway. These signs each state "STOP HERE -- U.S. OFFICERS." Placed on the highway are a number of orange traffic cones funneling traffic into two lanes where a Border Patrol agent in full dress uniform, standing behind a white on red "STOP" sign checks traffic. Blocking traffic in the unused lanes are official U.S. Border Patrol vehicles with flashing red lights. In addition, there is a permanent building which houses the Border Patrol office and temporary detention facilities. There are also floodlights for nighttime operation.[439]

At some of the checkpoints, a border patrol officer called a "point agent" would visually screen all northbound traffic, which had come to a virtual, if not complete stop. Standing between the two lanes, the point agent would allow most motorists to proceed without any verbal inquiry or further inspection. But the point agent would select a number of motorists for further investigation, directing them to a secondary inspection site for questioning about the citizenship and immigration status of the motorists. Those further investigations would last on average three to five minutes—unless, of course, they led to arrest. At other checkpoints, Border Patrol officers might stop all northbound traffic for brief questioning. Local inhabitants who the officers recognized would be waived through, but all others would be stopped for interrogation.

---

[439] *United States v. Baca*, 368 F. Supp. 398, 410—411 (S.D. Cal. 1973).

According to the INS Border Patrol Handbook from 1972, the primary factors used to locate the permanent checkpoints included:

1. "A location on a highway just beyond the confluence of two or more roads from the border, in order to permit the checking of a large volume of traffic with a minimum number of officers."

2. "Terrain and topography that restrict passage of vehicles around the checkpoint, such as mountains, desert, [or a military installation]."

3. "Safety factors: an unobstructed view of oncoming traffic, to provide a safe distance for slowing and stopping; parking space off the highway; power source to illuminate control signs and inspection area, and bypass capability for vehicles *not* requiring examination," and

4. "Due to the travel restrictions of the I-186 nonresident border crosser to an area 25 miles from   the border (unless issued additional documentation) the checkpoints, as a general rule, are located at a point beyond the 25 mile zone in order to control the unlawful movement inland of such visitors."

"Temporary checkpoints" were set up in a similar way, but generally maintained on back roads where the traffic was less intense and in locations "where the terrain allows an element of surprise. Operations at these temporary checkpoints are set up at irregular intervals and intermittently so as to confuse the potential violator."[440]

The third major technique, "roving patrols," consisted of mobile Border Patrol tactical units that roamed the back roads near larger interstates to stop and search automobiles at points removed from the actual border. These "roving patrols" would often work in combination with the fixed checkpoints to make sure that motorists were not trying to evade larger highways to avoid being stopped at a roadblock.

By the early 1970s, it had become routine for Border Patrol officers to use the appearance of Mexican ancestry as one factor—and sometimes as the only factor—in the decision to stop and investigate motorists. This is evidenced in the *Brignoni-Ponce* case itself, where the Border Patrol agents conceded in court that "their only reason for [stopping Brignoni-Ponce] was that its three occupants appeared to be of Mexican descent."[441] In this sense, border policing in the 1970s reflected the larger turn to criminal profiling in law enforcement. The first criminal profiles were developed in the context of airline highjackers in the early 1970s, and expanded rapidly to drug-couriers at airports and bus terminals.

The Legal Landscape at the Border

Criminal profiling—and, especially, racial profiling—would come under challenge first at the Mexican border. The Supreme Court had addressed

---

[440] *See* INS Border Patrol Handbook at 9-3 (discussed in *Baca*, 368 F. Supp. at 406).
[441]   422 U.S. at 875.

Border Patrol investigations on a number of occasions and set forth some contours of permissible police intervention. Stops, interrogations, and searches right at the border or its functional equivalent—say, an international flight landing at O'Hare in Chicago—were constitutionally permitted without warrant or probable cause, as a routine matter.[442] Fourth Amendment protections applied, however, in areas removed from the border—including areas *near* the Mexican-United States border.

In *Almeida-Sanchez v. United States* in 1973,[443] the Court had ruled that the Fourth Amendment precluded the Border Patrol from using "roving patrols" to stop and search automobiles without a warrant or probable cause at any point removed from the actual border. Under *Almeida-Sanchez,* in the absence of a judicial warrant allowing roving patrols in a designated area, probable cause was therefore necessary before roving patrol agents could stop and search a vehicle in the general vicinity of the border. In *United States v. Ortiz,*[444] a companion case to *Brignoni-Ponce,* the Court extended the same requirements of probable cause or judicial warrant for any search conducted at a permanent INS checkpoint.

There were also legislative statutes purporting to regulate the conduct of Border Patrol agents. Congress had passed on these questions. Under the Immigration and Nationality Act, at least two provisions were on point. Section 287(a)(1) authorized any officer or employee of the INS "to interrogate any alien or person believed to be an alien" without a warrant "as to his right to be or to remain in the United States."[445] And Section 287(a)(3) authorized any officer of the INS without a warrant "within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel with the territorial waters of the United State and any railway car, aircraft, conveyance, or vehicle."[446] Moreover, under federal regulations implemented by the INS after notice and public comment, the authority under Section 287(a)(3) could be exercised anywhere within 100 air miles of the border.[447]

Many questions, though, were left open. First, on the question of race and ethnicity, whether the appearance of Mexican ancestry was a constitutionally valid reason to stop, question or search anyone. Second, whether questioning under Section 287(a)(1) should be treated differently than searches under Section 287(a)(3). Third, whether differences in police practices—roving patrols versus fixed checkpoints versus temporary checkpoints—would make any difference in these equations. These rules and these questions would be put to the test first in the case of *Brignoni-Ponce.*

---

[442]   *See, e.g., Almeida Sanchez v. United States*, 413 U.S. 266, 272 (1973).
[443]   413 U.S. 266 (1973).
[444]   422 U.S. 891 (1975).
[445]   8 U.S.C. Sec. 1357(a)(1).
[446]   8 U.S.C. Sec. 1357(a)(3).
[447]   CFR Sec. 287.1(a) (1975).

The Brignoni-Ponce Case

March 11, 1973. It was early morning near the permanent INS checkpoint at San Clemente, 65 miles north of the Mexican border on Interstate 5 between San Diego and Los Angeles. The United States Border Patrol usually maintained a roadblock there, but due to inclement weather, the checkpoint was closed. Two INS Border Patrol agents were sitting in their patrol car by the side of the road, observing the northbound traffic. It was dark, so the officers used their headlights to inspect the passing cars. A car drove by. The three occupants appeared to be of Mexican descent, so the agents decided to investigate. In fact, the agents said later, that's the only reason they decided to investigate.[448] They pursued and interrogated. They discovered that the two passengers were in the country illegally, arrested all three, and charged the driver, Felix Humberto Brignoni-Ponce, with transporting two illegal immigrants in violation of the Immigration and Nationality Act.[449]

Prior to trial, Brignoni-Ponce moved to suppress the evidence concerning the immigration status of the two passengers, arguing that the evidence was the product of an illegal seizure under the Fourth Amendment. The trial court denied the motion, and its ruling was affirmed by a panel of the Ninth Circuit. Sitting *en banc,* the Court of Appeals for the Ninth Circuit reversed, siding with Brignoni-Ponce.[450] The case involved a "roving patrol" of the kind discussed in *Almeida-Sanchez*, the *en banc* court found, and as a result, under *Almeida-Sanchez*, an officer stopping a motorist on suspicion of illegal immigration status must have a "founded suspicion" that one or more of the motorists are in the country illegally. Mexican ancestry alone, the *en banc* court ruled, did not provide such a "founded suspicion."[451]

The Supreme Court granted certiorari, limiting its analysis to the narrow question whether a roving Border Patrol agent can stop a motorist *based on race alone*. The government, the court emphasized, conceded that the patrol officers were engaged in a roving patrol. It conceded that *Almeida-Sanchez* should apply retroactively to Brignoni-Ponce. And it conceded that the location of the stop was not at the border or its functional equivalent, but near the border. As such, the Court explained, "The only issue presented for decision is whether a roving patrol may stop a vehicle in an area near the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry."[452] In other words, whether being of Mexican ancestry satisfies the required "founded suspicion." By a

---

[448] 422 U.S. at 875.
[449] 422 U.S. at 874—875.
[450] 499 F.2d 1109 (1974).
[451] 499 F.2d 1109.
[452] 422 U.S. at 878.

unanimous vote, though with different reasoning, the Court declared that it did not.

Justice Powell wrote the principal court opinion for himself and Justices Brennan, Stewart, Marshall, and Rehnquist. Powell first easily dismissed the government's arguments from statutory authority, repeating cursorily that "no Act of Congress can authorize a violation of the Constitution."[453] The stops and questioning involve seizures and therefore trigger the demands of the Fourth Amendment.

On the constitutional analysis, Powell engaged in a traditional balancing of interests analysis, weighing the important governmental interest in having effective measures to police the border and prevent the illegal entry of Mexicans against the individual liberty interests of persons traveling in the border areas—the traditional "balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."[454] This is the traditional balancing approach that the Court has applied to assess the reasonableness of Fourth Amendment seizures.

Powell emphasized the limited nature of the stop. The intrusion, Powell said, is "modest." It lasts no more than a minute. There is no search (unless further evidence develops). All that is required, as the government explained and Powell reiterated, "is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States."[455] These conditions are similar, Powell suggested, to the limited intrusion of the pat-down search in *Terry v. Ohio* or the brief stop of a suspicions individual in *Adams v. Williams*. On the other side of the scale, the public's interest in preventing illegal immigration from Mexico, Powell asserted, was "valid."[456] "The INS now suggests there may be as many as 10 or 12 million aliens illegally in the country," Powell explained.[457] This has the potential of creating significant social and economic problems for citizens, as well as for the immigrants themselves.

Accordingly, building on *Terry* and *Adams*, Powell declared that Border Patrol agents may constitutionally conduct a limited stop to investigate without full blown probable cause. All that is needed is that "an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country."[458] As in *Terry*, the scope of the police intervention had to be tailored to the more limited scope of reasonable suspicion. The Border Patrol agent could stop the vehicle briefly and investigate, but not engage in a full blown search unless other evidence developed: "The officer may question the driver and passenger about their

---

[453] 422 U.S. at 877 (quoting *Almeida-Sanchez*, 413 U.S. at 272).
[454] 422 U.S. at 878.
[455] 422 U.S. at 880.
[456] 422 U.S. at 879
[457] 422 U.S. at 878.
[458] 422 U.S. at 881.

citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause."[459]

It is important to recognize, Powell maintained, that most of the traffic on these roads near the border are legitimate. A number of large towns now sit on the border, including San Diego in California, with a population at the time of 1.4 million residents, and El Paso and Brownsville in Texas, with combined populations of almost 700,000. "We are confident that substantially all of the traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens," Powell asserted.[460] To allow roving patrols without any limitations whatsoever would be to interfere too greatly in the lives of ordinary citizens living near the border. This, Powell maintained, would give the Border Patrol too much discretion. "Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law."[461]

On the key question of racial profiling, Powell declared the Court unwilling to let Mexican ancestry *alone* substitute for reasonable suspicion. Mexican appearance, Powell declared for the Court, may be one "relevant factor" but is not alone sufficient to support a police stop. "Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens."[462] There are many factors that may be taken into account, Powell explained. Erratic driving behavior, or obvious evasion from the police, certain station wagons with large compartments for hiding people, or cars that appear more heavily weighted down than they should. These are all factors that Border Patrol agents may consider.

In addition, Powell wrote, they should be allowed to consider Mexican appearance. "The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut." [463] This, Powell declares, is acceptable. "In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling."[464] But Mexican appearance alone would not suffice: "The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-

---

[459] 422 U.S. at 881—882.
[460] 422 U.S. at 882.
[461] 422 U.S. at 883.
[462] 422 U.S. at 886.
[463] 422 U.S. at 885.
[464] 422 U.S. at 885.

Americans to ask if they are aliens."[465] The bottom line on race then is that it may be one factor, but not the only one.

Justice Powell's reasoning was endorsed by four of his colleagues. The four other justices did not join Powell's opinion, but instead wrote or joined in separate concurring opinions. Chief Justice Burger and Justice White concurred only in the result and wrote separate opinions both joined by Justice Blackmun and both sounding deep notes of anxiety and frustration regarding illegal immigration from Mexico and the flow of dangerous drugs into the United States. The result, Burger and White conceded, was foreordained by the Court's 1973 decision in *Almeida-Sanchez*, which, as you may recall, required probable cause or a warrant for searches conducted by roving patrols. But the consequences, Burger and White emphasized, would be terrible for the country: the flow of illegal immigrants from Mexico was already causing devastating social, economic, and political problems. Burger underlined that over 12 million illegal aliens were in the country and appended to his opinion a lengthy, fourteen-page extract from a judicial opinion by United States District Judge Turrentine of the Southern District of California in *United States v. Baca*.[466] The excerpt, captioned "THE ILLEGAL ALIEN PROBLEM," chronicles the problems associated with illegal immigrants living in the United States—including the fact that they compete with citizens for jobs, "perpetuate poor economic conditions by frustrating unionization," and pose "a potential health hazard to the community since many seek work as nursemaids, food handlers, cooks, housekeepers, waiters, dishwashers, and grocery workers"[467]—as well as the challenges facing law enforcement and the lack of true enforcement.[468]

Any further hampering of law enforcement—as in the result in *Brignoni-Ponce*—will only aggravate the problem, wrote Burger and White. "As the Fourth Amendment now has been interpreted by the Court," Burger wrote, "it seems that the Immigration and Naturalization Service is powerless to stop the tide of illegal aliens—and dangerous drugs—that daily and freely crosses our 2,000-mile southern boundary." [469] As White added: "the Court has thus dismantled major parts of the apparatus by which the Nation has attempted to intercept millions of aliens who enter and remain illegally in this country."[470]

Both Burger and White expressed hope that the Court would in the future give greater weight to the interests in law enforcement. "I would hope," Burger wrote, "that when we next deal with this problem we give greater

---

[465] 422 U.S. at 886-887.
[466] 368 F.Supp. 398, 402—408 (S.D. Cal. 1973).
[467] *United States v. Ortiz*, 422 U.S. 891, 904 (BURGER, C.J., concurring) (quoting *United States v. Baca*).
[468] *United States v. Ortiz*, 422 U.S. 891, 904—914 (BURGER, C.J., concurring) (quoting *United States v. Baca*).
[469] *United States v. Ortiz*, 422 U.S. 891, 899 (BURGER, C.J., concurring).
[470] *United States v. Ortiz*, 422 U.S. at 915 (WHITE, J., concurring).

weight to the reality that the Fourth Amendment prohibits only '*unreasonable* searches and seizures' and to the frequent admonition that reasonableness must take into account all the circumstances and balance the rights of the individual with the needs of society."[471]

But their tone sounded in despair. "Perhaps these decisions will be seen in perspective as but another example of a society seemingly impotent to deal with massive lawlessness," wrote Burger. "In that sense history may view us as prisoners of our own traditional and appropriate concern for individual rights, unable—or unwilling—to apply the concept of reasonableness explicit in the Fourth Amendment in order to develop a rational accommodation between those rights and the literal safety of the country."[472]

In sharp contrast, one justice, Justice Douglas, would have gone further in *Brignoni-Ponce* and required probable cause rather than mere reasonable suspicion. Douglas agreed whole-heartedly that the stops were unreasonable and that the reliance on Mexican ancestry "was a patent violation of the "Fourth Amendment."[473] In his concurrence, however, Douglas objected strenuously to the adoption of the looser reasonable suspicion test. Douglas had dissented from the Court's opinion in *Terry* as an "unjustified weakening of the Fourth Amendment's protection of citizens from arbitrary interference by the police,"[474] and voiced those similar concerns here. In fact, Douglas argued, this and other recent cases demonstrated well the problems with the lower reasonable suspicion test. "The fears I voiced in Terry about the weakening of the Fourth Amendment have regrettably been borne out by subsequent events."[475] Douglas marshaled border cases where motorists were stopped because their car was riding low or they had a spare tire in the back seat—and the stops upheld under the reasonable suspicion test. "The vacationer whose car is weighted down with luggage will find no comfort in these decisions; nor will the many law-abiding citizens who drive older vehicles that ride low because their suspension systems are old or in disrepair. The suspicion test has indeed brought a state of affairs where the police may stop citizens on the highway on the flimsiest of justifications."[476]

The Martinez-Fuerte Case

The following term, the Supreme Court returned to the border, this time addressing the constitutionality of fixed immigration checkpoints. The case would resolve the open question whether the Border Patrol agents required any articulable suspicion to stop and question motorists at a roadblock within 100 miles of the Mexican border. Powell again would write the Court's opinion.

---

[471] *United States v. Ortiz*, 422 U.S. 891, 900 (BURGER, C.J., concurring).
[472] *United States v. Ortiz*, 422 U.S. 891, 899 (BURGER, C.J., concurring).
[473] 422 U.S. at 888 (DOUGLAS, J., concurring).
[474] 422 U.S. at 888 (DOUGLAS, J., concurring).
[475] 422 U.S. at 888 (DOUGLAS, J., concurring).
[476] 422 U.S. at 889—890 (DOUGLAS, J., concurring).

Powell again would emphasize that ethnic appearance is relevant. But this time, he pulled the stops and allowed for wider police discretion. The result would be far reaching for racial profiling.

The cases arose from arrests made at two different permanent immigration checkpoints within 100 miles from the Mexican border, one in California, the other in Texas. The California checkpoint was located in familiar territory, on northbound Interstate Highway 5 near San Clemente, between San Diego and Los Angeles, 66 miles north of the Mexican border. The other checkpoint was located on U.S. Highway 77 near Sarita, Texas, north of Brownsville and about 65 to 90 miles north of the Mexican border.

Both checkpoints were marked in the traditional fashion with large black-on-yellow signs and flashing lights, and subsequent warning signs as motorists got closer. At the San Clemente checkpoint, the point agent visually screened all northbound traffic, but did not conduct questioning there. Instead the agent would select a number of motorists for further investigation at a secondary inspection site, where other agents would stop and question the motorists about their citizenship and immigration status. At the time of the arrests at the San Clemente checkpoint, a magistrate had issued a "warrant of inspection" which authorized the Border Patrol to conduct roadblock operations at the site. At the Sarita checkpoint, Border Patrol officers would stop all northbound traffic for brief questioning, with the exception of local residents who the officers recognized. Also, in contrast to the San Clemente checkpoint, there was no judicial warrant regarding the operations at Sarita.

Several arrests were consolidated for purposes of review by the Supreme Court in *Martinez-Fuerte*. One group of defendants was arrested at the San Clemente checkpoint: Amando Martinez-Fuerte was directed to the secondary inspection area for questioning, where it was determined that his two female passengers were illegal Mexican aliens. Martinez-Fuerte was charged under the same statute as Brignoni-Ponce for illegally transporting aliens, in violation of 18 U.S.C. Sec. 1324(a)(2). In separate cases, Jose Jiminez-Garcia and Raymond Guillen were also arrested for similar violations. Before trial, Martinez-Fuerte moved to suppress the evidence from the stop at the checkpoint, but his motion was denied. In the other two cases, the same motion was granted. The Court of Appeals for the Ninth Circuit consolidated all these appeals, and ruled, over the dissent of one judge, that the Border Patrol agents needed to have articulable reasons for a stop for inquiry. Rodolfo Sifuentes was arrested at the Sarita checkpoint in Texas for illegally transporting aliens. The trial court denied his motion to suppress, and the Fifth Circuit affirmed, ruling that fixed checkpoint stops with no reason to believe a motorist is transporting illegal aliens present no Fourth Amendment problem.

The Supreme Court granted certiorari to resolve the circuit split. In a 7-to-2 decision, the Court sided with the Fifth Circuit and held that neither articulable suspicion nor a judicial warrant was necessary as a precondition for a search at an immigration roadblock. Justice Powell again wrote the opinion

for the court. The composition of the Court had changed slightly since *Brignoni-Ponce*, with Justice Douglas no longer sitting and Justice John Paul Stevens now the newest member of the Court. But the change had little effect on the outcome. Only Justices Brennan and Marshall were in dissent.

Justice Powell began, again, by considering the balance of interests. Permanent checkpoints, the government had maintained before the court, are "the most important of the traffic-checking operations."[477] And they are highly effective, Powell suggested. The San Clemente checkpoint, for instance, resulted in the apprehension of 17,000 illegal aliens in 1973 from a traffic of about 10 million cars. Their effectiveness, Powell intimated, would be greatly diminished if stops had to be based on reasonable suspicion: such a requirement "would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly."[478]

In contrast, the intrusion on liberty was relatively minor—in Powell's words, "quite limited."[479] All that was required was a "brief detention of travelers," "a response to a brief question or two," and "possibly the production of a document evidencing a right to be in the United States."[480]

In many ways, though, the balance of interests was similar to *Brignoni-Ponce*. The police practice in question—immigration roadblocks—goes hand-in-hand with roving patrols. They go together in a two-part technique for the interdiction of illegal passage. And the intrusion is also similar in both cases. In fact, Justice Powell relied on his opinion in *Brignoni-Ponce* to explain the general level of the intrusion. Nevertheless, Powell emphasized what he considered to be an important difference: the *subjective* intrusion is "appreciably less in the case of a checkpoint stop."[481] By subjective intrusion, Powell meant the feelings of fear or concern among the travelers. These, he argues, were less troubling than in the case of roving patrol stops. These stops involve less discretion on the part of the agents, less interference with legitimate traffic, and less potential for abuse on a city street within the 100 air-mile zone. Overall, there is less room for abuse or harassment than in the case of roving patrols. There is less room for fear or offense on the part of the motorists because the stops are public and routine.

Even the secondary stops at the San Clemente checkpoint, Powell argued, are relatively minor. Those referrals are "made for the sole purpose of conducting a routine and limited inquiry into residence status" and involve an

---

[477] 428 U.S. at 556.
[478] 428 U.S. at 557.
[479] 428 U.S. at 557.
[480] 428 U.S. at 558 (also quoting *Brignoni-Ponce* at 880).
[481] 428 U.S. at 558.

"objective intrusion" that "remains minimal," Powell suggested. "Selective referral may involve some annoyance, but it remains true that the stops should not be frightening or offensive because of their public and relatively routine nature."[482] As a result, and because of the more limited expectation of privacy in cars as opposed to homes, Justice Powell concluded that no individualized suspicion at all is needed "at reasonably located checkpoints."[483]

More important for the larger issue of racial profiling, though, was the Court's treatment of the secondary inspection area at the San Clemente checkpoint. There, Powell was prepared to assume that the referrals were made on the basis of Mexican ancestry. Powell writes: "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation."[484] Powell then drops two odd footnotes. In the first, footnote 16, Powell suggests, relaying on a dubious statistical analysis,[485] that Border Patrol agents do not rely on Mexican ancestry *alone* to refer motorists to the secondary area; in the second, footnote 17, Powell suggests that "to the to the extent that the Border Patrol relies on apparent Mexican ancestry at this checkpoint, see n. 16, *supra,* that reliance clearly is relevant to the law enforcement need to be served."[486] But even if they do rely on the appearance of Mexican ancestry *entirely,* there is no Fourth Amendment problem. "As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved."[487]

Justice Powell repeats in footnote 17 that the appearance of Mexican ancestry "clearly is relevant to the law enforcement need to be served."[488] *Brignoni-Ponce* only held that ethnic background *alone* does not create reasonable suspicion for roving patrols, not that ethnicity, ancestry or race is not relevant. And not that it could not be used *alone* as a basis for a stop and interrogation at a fixed checkpoint. There, there was no need for any reasonable suspicion at all, so the police could rely on race alone if they wanted to. The lack of a reasonableness requirement does not exclude reliance on race. Powell's discussion in *United States v. Martinez-Fuerte* was sufficiently cryptic that it allowed the issue to continue to percolate, to fester, and wind its way through the lower courts.

---

[482] 428 U.S. at 560.

[483] 428 U.S. at 562.

[484] 428 U.S. at 563.

[485] Powell reasons that less than one percent of motorists are stopped for questioning, but that between 13 to 18 percent are likely to appear to have Mexican ancestry. From this, Powell concludes that the Border Patrol does not rely exclusively on apparent Mexican ancestry. Another equally plausible interpretation of the data is that the Border Patrol rely exclusively on apparent Mexican ancestry, but only have the resources to stop 1/16th of those persons.

[486] 428 U.S. 564 n.17.

[487] 428 U.S. at 563—564.

[488] 428 U.S. 564 n.17.

Justice Brennan wrote a heated dissent, in which Justice Marshall joined. Brennan described the result as the "defacement of Fourth Amendment protections,"[489] declaring that "Today's decision is the ninth this Term marking the continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures."[490] What Brennan objected to most here was the lack of any objective standard whatsoever to evaluate the reasonableness of the stop. Whereas in previous cases—*Almeida-Sanchez, Ortiz*, and *Brignoni-Ponce*—the Court had required some modicum of reasonableness, here the Court had abandoned the reasonableness standard completely. "We are told today. . . that motorists without number may be individually stopped, questioned, visually inspected, and then further detained without even a showing of articulable suspicion, let alone the heretofore constitutional minimum of reasonable suspicion, a result that permits search and seizure to rest upon 'nothing more substantial than inarticulate hunches.'"[491]

But most troubling was the fact that it would allow racial profiling. By requiring no standard whatsoever, the Court was giving the Border Patrol free rein to profile all persons of Mexican ancestry for secondary questioning and inspection. The limitation from *Brignoni-Ponce* would have no effect whatsoever. Brennan exclaimed:

> In abandoning any requirement of a minimum of reasonable suspicion, or even articulable suspicion, the Court in every practical sense renders meaningless, as applied to checkpoint stops, the *Brignoni-Ponce* holding that "standing alone [Mexican appearance] does not justify stopping all Mexican-Americans to ask if they are aliens." Since the objective is almost entirely the Mexican illegally in the country, checkpoint officials, uninhibited by any objective standards and therefore free to stop any or all motorists without explanation or excuse, wholly on whim, will perforce target motorists of Mexican appearance. The process will then inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for no other reason than that they unavoidably possess the same "suspicious" physical and grooming characteristics of illegal Mexican aliens.[492]

Brennan concluded: "That law in this country should tolerate use of one's ancestry as probative of possible criminal conduct is repugnant under any circumstances."[493] Tragically, Brennan was in a miniscule minority. Though repugnant, racial profiling was now constitutional.

The Immediate Implications for Policing and Immigration Policies

Brignoni-Ponce and *Martinez-Fuerte* had important and immediate consequences not just for Fourth Amendment jurisprudence, but also for border

---

[489] 428 U.S. at 569 (Brennan, J., dissenting).

[490] 428 U.S. at 567 (Brennan, J., dissenting).

[491] 428 U.S. at 569—70 (Brennan, J., dissenting).

[492] 428 U.S. at 571—72 (Brennan, J., dissenting).

[493] 428 U.S. at 571 n.1 (Brennan, J., dissenting).

patrol and policing more generally. The decisions signaled a green light to criminal profiling—including racial profiling. The weakest link had been broken, and the chain would soon collapse. The Court had given the police a clear message that the use of a multiple factor profile, including as one factor race or ethnicity, was a constitutional and legitimate police technique. At the national level, the DEA began implementing criminal profiling, especially the drug-courier profile, with vigor. The original experimental use of a drug-courier profile was deemed a success, and the program went nationwide after *Brignoni-Ponce* and *Martinez-Fuertes*. Between 1976 and 1986 there were in excess of 140 reported court decisions involving DEA stops of passengers at airports across the country based on the drug-courier profile.[494] In the *Mendenhall* case from 1980, for example, the suspect was stopped in part on the basis of the following profile attributes:

> (1) the respondent was arriving on a flight from Los Angeles, a city believed by the agents to be the place of origin for much of the heroin brought to Detroit; (2) the respondent was the last person to leave the plane, "appeared to be very nervous," and "completely scanned the whole area where [the agents] were standing"; (3) after leaving the plane the respondent proceeded past the baggage area without claiming any luggage; and (4) the respondent changed airlines for her flight out of Detroit.[495]

Several scholars, David Cole in particular, have compiled lists of the drug-courier profile characteristics, which are often internally contradictory.[496] With time, the profiles have proliferated. As Charles Becton explains:

> Not only does each airport have a profile, but a single DEA agent may use multiple profiles of his or her own. Paul Markonni, the person most often credited with developing the drug courier profile, and clearly the agent most often listed in drug courier profile cases, has articulated several slightly varying profiles in reported cases. One court has used different profiles for incoming and outgoing flights. The United States Court of Appeals for the Ninth Circuit in *United States v. Patino* made reference to a "female" drug courier profile. The United States Court of Appeals for the Fifth Circuit referred to a regional profile in *United States v. Berry*, and a profile associated with particular agents in *United States v. Elmore*. And, contributing to the proliferation of the drug courier profile, state and local law enforcement agencies have instituted their own profile programs.[497]

In 1982, the National Institute of Justice—the research arm of the

---

[494] *See id.* at 417 n.2, 417–418.

[495] U.S. v. Mendenhall, 446 U.S. 544, 547 n.1.(1980)

[496] *See, e.g.,* David Cole, *No Equal Justice : Race and Class in the American Criminal Justice System* 48–49 (New York: Free Press, 1999); Becton 1987: 421.

[497] Becton 1987: 433–434.

Department of Justice—conducted a systematic study of the drug-courier profile.[498] The study required DEA agents to fill out a report for all encounters they instigated and a log of passengers observed during an eight month period in 1982. Of about 107,000 passengers observed, the agents approached 146. According to the report, most of the encounters (120 of the total 146) were triggered by a combination of behavioral and demographic peculiarities of the passengers—matches to a profile. The results were as follows:[499]

	Number	Percentage
Total passengers stopped	146	100%
No search after questioning	42	29%
Consent searches	81	55%
Searches with warrant or incident to arrest	15	10%
Contraband found or other evidence of crime	49	34%

The study was considered by many as proof that the drug-courier profile worked.

Meanwhile, on the Mexican border, the political climate continued to heat up in the aftermath of the two cases. The 1980s and 90s saw renewed public concern and political rhetoric surrounding illegal immigration. In 1993, Democratic President William Clinton, under attack by Republicans, pledged his support to increased surveillance: "In September 1993 the administration proclaimed Operation Hold-the-Line in El Paso, Texas . . . an effort to curtail illegal entrants by deploying Border Agents at close intervals along the border itself, and in September 1994 Attorney General Janet Reno proclaimed the initiation of Operation Gatekeeper in San Diego."[500] These were not just empty policy promises: "The government increased the overall size of the Border Patrol by 51 percent from 1993 to 1995 bringing the number of agents to more than 4,500. . . . In mid-1995 Congress also approved a special $328 million enhancement for concentrated border enforcement."[501] As Joseph Nevins suggests, this huge increase was due to political pressure generally and specifically as a response to California's ballot initiative, proposition 187, also entitled "SOS (Save our State)", which would deny medical and health services to illegal immigrants.

As for illegal passage from Mexico itself, "[an] INS report said that during much of the 1990s, around 700,000 illegal aliens entered the U.S. each year, a figure that increased to around 817,000 by 1998 and nearly one million by 1999."[502] As a result, the border issues—our weakest link—caused

---

[498] *See* Zedlewski, *The DEA Airport Surveillance Program: An Analysis of Agent Activities* (1984), reported in John Monahan and Laurens Walker, *Social Science in Law: Cases and Materials* (Westbury: Foundation Press 2006).

[499] *Id.*

[500] JOSEPH NEVINS, OPERATION GATEKEEPER : THE RISE OF THE "ILLEGAL ALIEN" AND THE MAKING OF THE U.S.-MEXICO BOUNDARY (New York: Routledge, 2002) at 271.

[501] *Id.*

[502] Jon E. Dougherty, *Illegals: the Imminent Threat Posed by our Unsecured U.S.-Mexico Border* 31 (Nashville: WND Books, 2004).

increasing concern among the average American about the effect of immigrantion: "a study by the Chicago Council on Foreign Relations . . . found that 60 percent of Americans believe the current levels of immigration pose a 'critical threat to the vital interests' of the U.S., while only 14 percent of the nation's elite believe so."[503]

The Impact on Racial Profiling

The most significant implication of *Brignoni-Ponce* and *Martinez-Fuerte*, naturally, was that race or ethnicity, if relevant to the policing objective, could be used as one factor among others—and in some limited cases as the only factor—in determining whether there is sufficient reason to conduct investigation, such as a stop and questioning. In this sense, it allowed the use of race as a factor in policing.

By placing the discussion of racial profiling at the Southern border with Mexico, the Supreme Court made race and ethnicity relevant to the policing enterprise in a unique and powerful way. In the process, the Court paved a constitutional path to racial profiling in the United States, constructing a four-part legal structure that frames consideration of the "legal use" of race in policing. The constitutional structure is framed by four important legal distinctions:

Legal Distinction #1: Race as a, but not the factor

The Court's rulings in *Brignoni-Ponce* and *Martinez-Fuerte* effectively communicated that race is relevant to policing. In the Fourth Amendment context, race can legitimately be considered as a factor in the determination to stop an individual so long as the police independently have reasonable suspicion. Commentators most often cite *Brignoni-Ponce* for precisely the proposition that the Supreme Court has condoned the use of race as "one factor" in making immigration stops.[504]

Martinez-Fuerte however had muddied the waters a bit, allowing the sole use of race where there was no need for any articulable reason. The Supreme Court offered little guidance in the years after *Brignoni-Ponce* and *Martinez-Fuerte*. The result has been some confusion among the lower federal courts. Most federal courts either ignore the race question or allow the use of race *sub judice*. But many other courts have simply sidestepped the race issue by relying on non-racial factors either to find or not find reasonable suspicion.[505] Still other lower federal courts have struck down the use of race under circumstances suggesting that race was one among several factors used

---

[503] Dougherty, *Illegals* at 9.
[504] See, e.g., Kevin R. Johnson, September 11 and Mexican Immigrants: Collateral Damage Comes Home, 52 DePaul L Rev 849, 868 (2003); Deborah A. Ramirez, Jennifer Hoopes, and Tara Lai Quinlan, Defining Racial Profiling in a Post-September 11 World, 40 Am Crim L Rev 1195, 1204-1206, n 40 (2003); Devon W. Carbado, Eracing the Fourth Amendment, 100 Mich L Rev 946, 997-1000 (2002).
[505] See generally Gross and Barnes, 101 Mich L Rev at 735, discussing *Derricott v State*, 611 A2d 592 (Md Ct App 1992), and *United States v Davis*, 2001 US App LEXIS 10997 (2d Cir. 2001).

to stop or search a suspect.[506] And one panel of the Ninth Circuit held, in an interesting opinion in the case of *United States v.Montero-Camargo*, that the appearance of Mexican ancestry is of little, or no probative value at INS checkpoints because the majority of people who pass through checkpoints are Hispanic.[507]

At the end of the day, though, there remains a loose legal distinction between using race exclusively and using race as one among other factors. The first use of race is practically unanimously condemned. The second use of race as one among other factors is slightly more controversial, but is generally avoided by focusing on the other factors that raise suspicion.[508]

Legal Distinction 2: Fourth vs. Fourteenth Amendment

Brignoni-Ponce and *Martinez-Fuerte* also communicated that Fourth Amendment analysis differs in kind from Equal Protection analysis, and, implicitly, that claims of racial bias should be addressed to the latter, not the former.   It would take however another twenty years before the Court would make this explicit, in the case of *Whren v United States*.[509] In *Whren*, the police used a minor traffic violation as a pretext to stop and investigate two motorists in a car for drugs. The police suspected the two young African-American men, who were sitting in a Pathfinder with temporary license plates, because they were stopped for a longer than usual amount of time—more than 20 seconds—at a stop sign in a high-drug area and the driver was apparently looking down into the lap of his companion. The two men challenged the pretextual stop as unreasonable under the Fourth Amendment, and argued that allowing such practices would enable the police to stop motorists based on an impermissible factor: race.

The Supreme Court rejected their argument. The Fourth Amendment, the Court declared, does not concern itself with the subjective intentions of police officers, including their possible reliance on race, so long as they had reasonable suspicion or probable cause to justify the seizure—in this case, the traffic violation. Race claims should be addressed to the Equal Protection clause, not the Fourth Amendment. The possible consideration of race was not a problem for Fourth Amendment analysis, so long as there were sufficient grounds for the search.

This doctrinal framework of bifurcated Fourth and Fourteenth Amendment analysis has guided lawyers and lower courts. Most legal discussions of racial profiling today address each claim separately. Most

---

[506] See *United States v Laymon*, 730 F Supp 332, 339 (D Colo 1990);   *United States v Nicholas*, 448 F2d 622, 625 (8th Cir 1971).

[507]   United States v Montero-Camargo, 208 F3d 1122, 1131 (9th Cir 2000) (the Court affirmed the conviction because other grounds were sufficient).

[508] See R. Richard Banks,   *Race-Based Suspect Selection and Colorblind Equal Pr   otection Doctrine and Discourse*, 48 UCLA L Rev 1075, 1086–87 n 47 (2001); Gross and Barnes, 101 Mich L Rev at 733.

[509] 517 US 806 (1996).

constitutional scholars have criticized this practice and argued that notions of equal protection should inform our interpretation of the Fourth Amendment.[510] But the legal distinction has stuck and holds tightly today.

Third Legal Distinction: Eye-witness Identification

The third constitutional pillar of racial profiling analysis is focused on Equal Protection analysis. It draws a distinction between using race absent individualized suspicion about the particular suspect and using race where there is an eyewitness identification based on race. The first is generally associated with racial profiling: stopping a minority motorist because minority motorists are assumed to offend at higher rates. The second is what we generally associate with detective work: getting an identification from a witness and tracking down suspects who match that description. Most courts hold that the latter is not "using race." Often, the reason is that relying on an identification is a race-neutral policy: the content may be race-specific, but the policy itself is race neutral.[511]

Fourth Legal Distinction: Intent to Discriminate

The final pillar of racial profiling law in the United States draws on the Supreme Court's decisions in *McCleskey v Kemp*[512] and *United States v Armstrong*[513]—which extend the   *Washington v Davis* [514] requirement that discrimination be proved by evidence of intentional bias on the part of a state actor to the criminal justice sphere. This sets up the final major legal distinction in the racial profiling context. It is the requirement that a successful equal protection challenge rest on evidence of intentional discrimination rather than on inference from unexplained disparate treatment.[515] Many commentators have criticized the actual intent requirement in the racial profiling context—as well as in other criminal justice contexts;[516] but it is in all likelihood a permanent fixture in this jurisprudence.

---

[510] See, for example, Carol S. Steiker , *Second Thoughts about First Principles* , 107 Harv L Rev 820, 844 (1994); Alschuler, 2002 U Chi Legal F at 193 & n 121;Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 NYU L Rev 956, 961 (1999); Rudovsky, 3 U Pa J Const L at 348.

[511] See, for example, *Brown v City of Oneonta* , 221 F3d 329, 337 (2d Cir 2000) (deeming race-neutral the state policy of "investigat[ing] crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description").

[512] 481 US 279 (1987).

[513] 517 US 456 (1996).

[514] 426 US 229 (1976).

[515] See generally Rudovsky, 3 U Pa J Const L at 322–29.

[516] See, for example, id; Alschuler , 2002 U Chi Legal F at 201–07; Gross and Barnes, 101 Mich L   Rev at 741.

The practical result of these four pillars is that practically no federal constitutional challenges to racial profiling have prevailed since the *Brignoni-Ponce* case.[517] Federal challenges have either failed due to one or more of these legal distinctions[518] or have been settled out of court, primarily for injunctive relief.[519] Given the reality of contemporary policing—especially the fact that a police officer usually has a number of reasons why she may focus attention on one particular suspect—the Supreme Court's early decisions in *Brignoni-Ponce* and *Martinez-Fuerte,* allowing race or ethnicity to be considered as one among a number of factors in the decision to search, essentially paved the constitutional path to racial profiling.

The Practice of Racial Profiling Today

Let's fast forward. March 8, 1989. Early morning. Braniff Flight 650, the red-eye from Los Angeles, had just landed at the Kansas City airport. DEA agent Carl Hicks and two local detectives were on the concourse, eyeing passengers as they deplaned, looking for suspects. Hicks had intelligence information from the DEA that, in his words, "all-black street gangs from Los Angeles called the Crips and the Bloods. . . are notorious for transporting cocaine into the Kansas City area from Los Angeles for sale. Most of them are young, roughly dressed male blacks."[520]

Arthur Weaver fit the description well: African-American, young, roughly-dressed, and male, he was deplaning the flight from Los Angeles. Plus, he was carrying two bags and walking so fast, according to Hicks, he was almost running down the concourse to the taxi stand—"common characteristics" of a drug courier at the airport. The officers locked on Weaver. They ran after him, displayed a badge, and began asking questions. They wanted to see the airline ticket. They wanted to see some ID. Weaver, apparently, got nervous. His voice was unsteady, his speech rapid, his hands shaking, his body swaying—or at least the officers later claimed. After a few more exchanges, the agents conducted a pat down and search Weaver's two bags. They found six pounds of crack cocaine and over $2,500 in currency.[521]

At trial, Weaver challenged the search on the ground that the officers did not have a reasonable basis to suspect any wrongdoing. His motion to suppress was denied. Weaver enters a conditional guilty plea, reserving the right to appeal the denial of his suppression motion later. He was sentenced to

---

[517] For a critique of these four legal distinctions and the four-part structure of constitutional analysis in the racial profiling context, *see* Bernard E. Harcourt, *Rethinking Racial Profiling*, 71 University of Chicago Law Review at 1335—1354 (2004).

[518] See, for example, Gross and Barnes, 101 Mich L Rev at 727.

[519] See Gross and Barnes, 101 Mich L   Rev at 727–28; Garrett, 33 Colum Hum Rts L   Rev at 75–81, 98–105.

[520] *United States v. Weaver*, 966 F.2d 391, 394 n.2 (1992)

[521] *Id*. at 392—393.

twelve-and-a-half years in prison, five years supervised release, ten thousand dollars in fines, and a special assessment. And he took his case to the Eighth Circuit Court of Appeals.

That court rejected Weaver's appeal, concluding that non-racial factors alone gave agent Hicks sufficient reason to conduct the search.[522] In a strong dissenting opinion, Chief Judge Arnold raised the issue of race: there was no good evidence to believe that race was a valid predictor of being a drug-courier. Using race, Judge Arnold wrote, "simply reinforces the kind of stereotyping that lies behind drug-courier profiles. When public officials begin to regard large groups of citizens as presumptively criminal, this country is in a perilous situation indeed."[523]

The majority relegated its response—and its entire discussion of race—to a footnote:

> We agree with the dissent that large groups of our citizens should not be regarded by law enforcement officers as presumptively criminal based upon their race. We would not hesitate to hold that a solely race-based suspicion of drug courier status would not pass constitutional muster. Accordingly, had [DEA agent] Hicks relied solely upon the fact of Weaver's race as a basis for his suspicions, we would have a different case before us. As it is, however, *facts are not to be ignored simply because they may be unpleasant*—and the unpleasant fact in this case is that Hicks had knowledge, based upon his own experience and upon the intelligence reports he had received from the Los Angeles authorities, that young male members of black Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent, then, race, when coupled with the other factors Hicks relied upon, was a factor in the decision to approach and ultimately detain Weaver. *We wish it were otherwise, but we take the facts as they are presented to us, not as we would like them to be.*[524]

On December 14, 1992, the United States Supreme Court denied Weaver's petition for writ of certiorari.

To many, it is entirely bewildering that the police could use Weaver's race—the very fact that he is African-American—as a grounds to search him, consistent with the United States Constitution. To many, it is equally bewildering that the whole issue of race, in a criminal case involving a sentence of twelve-and-a-half years, could be relegated to an embarrassed footnote and an apology. Why didn't the court conduct a more rigorous analysis of the use of racial categories?

The answer to these puzzles lie on that long, circuitous, and sordid road to racial profiling. On that road, the United States Supreme Court—especially in its two decisions, *United States v. Brignoni-Ponce* (1975) and *United States v. Martinez-Fuerte* (1976)—played a pivotal role. *Brignoni-Ponce* and

---

[522] See *id.* at 396 (finding that Weaver's walking quickly toward a taxi, lacking a copy of his plane ticket and identification, and appearing nervous, constituted reasonable suspicion that Weaver carried drugs).
[523] *Id.* at 397 (Arnold, J., dissenting).
[524] *Id.* at 394 n 2 (emphasis added).

Martinez-Fuerte are the first and, to this date, the *only* United States Supreme Court decisions to expressly approve the use of race as a factor in the decision to stop and investigate an individual. As such, they are still today the leading Supreme Court authority addressing the "legal use" of race in policing.

Conclusion

There was a thawing of border issues in the late 1990s in the United States. There was an effort to ease the difficulties facing the immigrant population. President George W. Bush had some proposals to allow for temporary residence and a number of proposals for cooperation with the administration of President Vincente Fox of Mexico. During the summer of 2001, in fact, leaders of both parties were talking about making immigration from Mexico "safe and legal."[525] At the same time, there was also an emerging consensus in the context of racial profiling more generally, that profiling on race was wrong. As Professor Albert Alschuler writes, at the turn of the twentieth century, "almost everyone condemned racial profiling. President Bill Clinton called the practice 'morally indefensible' and 'deeply corrosive.' President George W. Bush pledged, 'We will end it.' A federal court observed, 'Racial profiling of any kind is anathema to our criminal justice system.' 81 percent of the respondents to a 1999 Gallup poll declared their opposition."[526] Practically everyone seemed to agree. President Bush's first Attorney General, John Ashcroft, declared that "racial profiling is an unconstitutional deprivation of equal protection under our Constitution."[527] Robert Mueller, director of the F.B.I., added that "Racial profiling is abhorrent to the Constitution, it is abhorrent in any way, shape or form."[528] Senator Orrin Hatch of Utah also agreed: "There has emerged a consensus concerning the fundamental point of the debate: racial profiling, also known as bias-based policing, is wrong, it is unconstitutional, and it must not be practiced or tolerated."[529] President George W. Bush denounced racial profiling on the grounds that "[a]ll of our citizens are created equal and must be treated equally."[530]

This emerging consensus collapsed with the fall of the World Trade Center on September 11, 2001. 9/11 changed the conversation on racial

---

[525] John Aloysius Farell, "Bush Courting Hispanics," *Denver Post*, p. A1 (Jan. 8, 2004).

[526] Alschuler, 2002 U. Chi. Legal F. at 163.

[527] Alschuler, 2002 U. Chi. Legal F. at 163 n.3 (quoting "Black Caucus, Ashcroft Have Tense Meeting: Attorney General Cites 'Candid Exchange' and Stresses Agreement on Profiling," *Washington Post,* p. A6 (Mar 1, 2001)).

[528] Alschuler, 2002 U. Chi. Legal F. at 163 n.3 (quoting 147 Cong. Rec. S8683 (Aug 2, 2001)).

[529] Alschuler, 2002 U. Chi. Legal F. at 163 n.3 (quoting End Racial Profiling Act of 2001, Hearing on S. 989 Before the Senate Committee on the Judiciary Subcommittee on the Constitution, Federalism and Property Rights, 107th Congress, 1st Sess (2001)).

[530] Quoted in Mosher , Miethe, and Phillips, *Mismeasure of Crime* at 183 (Statement to Joint Session of Congress on February 27, 2001).

profiling, focusing it on national security interests and foreign-born suspects. Many people changed their opinions on profiling. As Alschuler chronicles, "The horror of September 11 produced a shift in sentiment. Shortly after that date, 58 percent of the respondents to a Gallup poll said that airlines should screen passengers who appeared to be Arabs more intensely than other passengers. Half the respondents who voiced an opinion favored requiring people of Arab ethnicity, including United States citizens, to carry special identification cards."[531] The Attorney General of New Jersey, John Farmer, Jr., went so far as to argue in newspaper print:

> More than 6,000 people are dead, some would argue, because of insufficient attention to racial or ethnic profiles at our airports. . . . Let's be blunt: How can law enforcement not consider ethnicity in investigating these crimes when that identifier is an essential characteristic of the hijackers and their supposed confederates and sponsors, and when law enforcement's ignorance of the community heightens the importance of such broadly shared characteristics? Law enforcement tactics must be calibrated to address the magnitude of the threat society faces.[532]

Those who support increased controls at the border have taken full advantage of the concerns about terrorism generated by 9/11. Says Steven Camarota, research director at the Center for Immigration Studies, "If a Mexican day laborer can sneak across the border, so can an al Qaeda terrorist. . . . We can't protect ourselves from terrorism without dealing with illegal immigration."[533] The administration of George W. Bush responded to the heightened concern by promising tougher control at the border. According to Dougherty: "In January 2003, Homeland Security Director Tom Ridge pledged to merge four agencies responsible for border security into one, allegedly to plug gaps in a border-security system whose weaknesses were laid bare by the 9-11 attacks." (132)

Following the attacks, the new Department of Homeland Security implemented regulations regarding the deportation of illegal aliens intercepted within the 100-mile radius. Effective August 2004, the new rules allow border agents to deport, without judicial oversight, undocumented immigrants who: 1) are caught within 100 miles of the Mexican and Canadian borders and 2) have spent up to 14 days within the United States.[534] This power to deport without the oversight of immigration courts had already been granted to officials at

---

[531] Alschuler, 2002 U. Chi. Legal F. at 163.
[532] Alschuler, 2002 U. Chi.   Legal F. at 163 (quoting John Farmer, Jr., Rethinking Racial Profiling, Newark Star-Ledger § 10, p 1 (Sept 23, 2001)).
[533] Dougherty at 32.
[534] See Rachel L. Swarns, "U.S. to Give Border Patrol Agents the Power to Deport Illegal Aliens," *New York Times*, p. A1 (Aug 11, 2004).

airports and seaports.[535] The DHS "[says] that border agents [who will exercise these powers] would be trained in asylum law and that immigrants who showed credible fear of persecution would be provided hearings before immigration judges, not returned to hostile governments."[536]

Since 9/11, there has been much more open support for racial profiling in the USA. Paul Sperry of the Hoover Institution recently defended profiling of young Muslim men in the New York City subways in an op-ed in the *New York Times* titled "When the Profile Fits the Crime." The facts suggest, he argued, that any likely offender is going to be young, male, and of Arab descent: "Young Muslim men bombed the London tube, and young Muslim men attacked New York with planes in 2001. From everything we know about the terrorists who may be taking aim at our transportation system, they are most likely to be young Muslim men."[537] Therefore, the police should profile: "Critics protest that profiling is prejudicial. In fact, it's based on statistics. Insurance companies profile policyholders based on probability of risk. That's just smart business. Likewise, profiling passengers based on proven security risk is just smart law enforcement."[538]

The argument for racial profiling, though, traces back to the earlier Supreme Court decisions and to the Mexican-American border. *Brignoni-Ponce* and *Martinez-Fuerte* were the first cases that explicitly and constitutionally allowed the police to use race. Those cases were the weak links that, today, continue to reap a legacy of racial discrimination. Perhaps if we are fortunate, though, the American example can serve as a cautionary note to others.

---

[535] *See id*. (noting that this was the second time since September 11 [th] that the government expanded the "expedited removal" process).
[536] *Id*.
[537] Paul Sperry, "When the Profile Fits the Crime," *New York Times*, July 28, 2005 (available at http://www.nytimes.com/2005/07/28/opinion/28sperry.html).
[538] Sperry 2005.

An Attempt at Explaining the Frequency and Intensity of anti-Roma Atrocities
János Ladányi

On 3rd December 2001, the president of the biggest right wing party in Hungary, Fidesz-MPP (which was then leading the government coalition) made an announcement that surprised many: he told that his party was to conclude an alliance with the biggest Gipsy organization in Hungary, Lungo Drom, and the planned agreement would ensure that there would be ten Roma MP candidates on their joint list compiled for the 2002 Parliamentary elections. Two weeks later, the announcement was followed by an official agreement. By that time it was also clear that of the frequently mentioned ten candidates four had a good chance to actually get into the Parliament through the pact.

By the end of January 2002, the then biggest opposition party, the Hungarian Socialist Party had also come up with its election strategy. They intended to conclude an alliance "with the entire Hungarian Gipsy society instead of one organization," and planned to have six Roma MP candidates on their various lists, of whom only one had the actual chance to get into the Parliament. The election results were in accordance with what was contained in the pacts: four conservative and one socialist Gipsy MPs got into the Hungarian Parliament. The result of the next election in 2006 was the same – obviously not entirely by accident. Many have dealt with the alliance between the Fidesz and Lungo Drom, the strategies of the parties involved and the candidates themselves, at various places. In this study, I will examine a single aspect of the new situation brought about by the fact that the two *rival* political parties, offering different political alternatives, had Roma candidates. I will analyze how the fact that the Roma became factors influencing the outcome of the elections influenced the intensity and frequency of anti-Roma atrocities.

The electoral activity of the Roma

As the 2002 elections were approaching, two circumstances became more and more obvious: first, that there was a balance of power between the two major competing parties, and second that the outcome of the elections depended on the uncertain voters. For a long time, the Roma had not been considered a factor in elections: most analyzers told that "the Gypsies do not vote," and thus they were only taken into consideration in the negative sense – as the average voter "punishes those who promise too much support to the Gypsies." Our data – based on connecting certain variables of a so-called omnibus survey conducted by Szonda Ipsos between May 1999 and June 2000 (N=19000) and our 1999-2000 survey funded by the Ford Foundation as part of a research

project called "Poverty and Ethnicity in Central Eastern Europe," and are representative of the Hungarian population over 18 years of age – contradict this opinion, which had not been controlled before, and seemed to serve mostly as a reassurance for the political elite. Our data prove that the electoral activity of the Roma is only slightly less than that of the non-Roma population. While 60% of the non-Roma population told that they would definitely vote in the examined period, almost 54% of the Roma answered the same.

In contrast with preliminary hypotheses, the inclination to vote was lower among the "more adapted" Roma (the relatively small proportion of the Roma population having a relatively high social status and a self-assured Roma identity) than among those who identified themselves as Gipsy in front of the questioner representing the majority (mostly "unintegrated" Gypsies with the lowest social status, who have much less chance to conceal their ethnic identities because of their mother tongue, their residence, or the outer markers of their way of life). The proportion of "certain voters" among those who identified themselves as Roma (57%) is only slightly less than the same proportion in the general population. This tendency seems to be reinforced by the fact that the electoral activity of the less educated Roma having a lower social status and living in segregation (that is, in Gipsy / poor / workers' settlements, villages and quarters with a higher and higher proportion of Gipsy residents) is not lower but even somewhat higher than that of the Roma population having a higher social status and living at places that are not segregated (56 and 53% respectively).

It is, however, much more reasonable to compare the data about the poorer, less educated Roma with the data about similar (poor and less educated) social groups, and not the average population. Here we are only presenting comparisons related to the – variously defined – poor population. By the population living in "absolute" or "deep poverty", we mean those who lack the most basic goods and possessions (e.g. starve and/or do not have a winter coat, a second pair of shoes, live in a house or apartment that is partly ruined, perilous or health-endangering, etc). More than 4% of the Hungarian population over 18 years of age, and somewhat more than half of the Gypsy population over 18 years of age fall into this category. By people living in "relative poverty," we mean the group belonging to the lowest decile of the population based on their per capita income (among those who answered the question). It deserves attention that while 6% of the people older than 18 years of age were described as Roma by the questioners, the Roma population makes up more than half of those who belong to the lowest decile based on their income. According to our data, those who live in deep poverty are somewhat less active voters than those who belong to the lowest decile. However, these data also show that the electoral activity of the Roma is the same or even slightly higher than the electoral activity of the similarly poor non-Roma in both of these groups.

The ascendancy of the right wing

We also get surprising results when examining the electoral preferences of the Roma. According to the generally held view, "most of the Gypsies do not vote, but those who do usually vote for the left." The data, however, clearly show that the population considered to be Gypsy behaves very similar to the similarly poor and uneducated non-Gypsy population in this respect, too. In the examined period, the Hungarian Socialist Party was at a significant disadvantage compared to the Fidesz-MPP or the conservative coalition (both including and not including the extreme right wing MIÉP) – both alone and taken together with the liberal SZDSZ. This was true of both the "absolute" and the "relative" poor (that is, the lowest and the lowest two deciles of society based on per capita income). At the time of our survey, the left wing was clearly at a disadvantage among those who were identified as Roma by the questioners (which also fits the general tendency that the left wing was at a disadvantage among the poor), even though their disadvantage was somewhat less significant than it was among the non-Roma. We have to mention, though, that the self-identified Roma population was the only lower status and poor group analyzed in our survey with a moderate left-wing preference in the examined period.

In short: after recognizing that the power relations were quite balanced and concluding their possible alliances in preparation for the elections, the big political parties turned towards the Roma voters in the hope of getting more votes from this group, and they "picked and lifted" Roma organizations and politicians into their electoral federations (using methods that are typical of the "premodern" political culture of these parties). Just like in the 1970s, when the labor force reserves were exhausted and the integration of the Gipsy into the labor force suddenly became very important, at this point, when they had no reserves to be mobilized for the elections, the political elite suddenly realized how urgent it was to integrate the Roma – that is, Roma voters – politically. And just as the labor-force integration was directed from above, remained partial and projected several problems that aroused later, the integration of the Roma into the present-day political system had similar results. This is quite obvious if we look at the Roma organizations taking part in these electoral alliances, the methods of choosing candidates, and the Roma politicians who in the end were or were not included in the party lists.

In spite of all this, we could observe a few quite significant changes right after the Roma population became a significant factor in the elections (however hypocritically and oddly this happened). The image of the Roma projected by the media (especially the state radio and television channels) changed dramatically – it had often been (especially in the period immediately preceding the examined period) hateful, demonizing or full of scorn and patronizing. What is even more surprising, there was a definite decrease in the number as well as the severity of anti-Roma atrocities. This is especially

interesting because while the state controlled media can be centrally and directly influenced, this is clearly not true of ethnic conflicts and anti-Roma atrocities occurring at various parts of the country.

Explanations

When trying to explain the frequency and intensity of ethnic conflicts, most studies tend to rely on two types of reasoning:

- 1. According to the economic argument, the higher intensity of ethnic conflicts is caused by the deterioration of the economic conditions, the rise of living costs, conditions when masses are reduced to poverty and unemployment is on the rise, etc. According to this reasoning, intense social inequalities and ethnic conflicts are caused by the deterioration of economic conditions.

- 1.a A more thoroughly specified version of the above hypothesis claims that ethnic conflicts usually deepen in historical situations like the collapse of state socialism. During times of huge political changes and transformations, technological revolutions, extensive changes in the structure of the economy and the demography that shake the balance of the labor market, and especially in ages when several of these destabilizing processes occur and amplify one another at the same time, the original status quo is undermined. Whole empires collapse – as they indeed did in several cases in our region. Professions that used to pay well lose their value, formerly prospering regions begin to decline, technological changes reduce wage-levels, and unemployment begins to grow quite suddenly. The previous class system of the society is also upset, and local societies change a lot because of the extensive (and often forced) migration of huge parts of the population. On account of these changes, individuals lose their ground and become unable to define their identity in relation with their former communities and express it in terms of its class and local belongings, and thus they turn to values that are (or at least seem to be) "grand", "constant" and "permanent", and tend to define themselves by belonging to certain national, religious or ethnic groups. According to this reasoning, these factors necessarily lead to the growing intensity of such conflicts.

- 2. The social psychological argument claims that the basis of both ethnic conflicts and their intensification is the prejudiced attitude of the population. Conflicts of this type are more intense and frequent in periods and regions that are also characterized by a rejection of certain ethnic groups.

- 2.a A more thoroughly specified version of the above hypothesis claims that ethnic conflicts are not generated by ethnic prejudices in general – only their special interconnections (forming a consistent system) lead to actual conflicts. This type of ethnic thematization usually characterizes only relatively small

segments of the society: mostly declassed intellectuals or those who are afraid of being declassed.

- 3. I think that none of the above hypotheses can fully explain the frequency and intensity of ethnic conflicts during the post-communist transition. I am also inclined to think that even by combining the more thoroughly specified versions (1.a and 2.a) of the above hypotheses, we can only apprehend the necessary but not sufficient conditions of these conflicts. If the increased frequency and deepening of such conflicts were to be explained by an economic decline or sudden changes in the society's status quo alone, an economic decline should be accompanied or immediately followed by an intensification of conflicts, while the recovery of the economy should be accompanied by a decrease in their frequency and intensity. Our data, however, do not support these theories, and neither do they support what should also follow from this hypothesis: that the frequency and intensity of ethnic conflicts is more marked in poorer areas – that is, the regions most affected by the crisis. While the frequency and intensity trends should first soar and then drop according to hypotheses 1 and 1.a, hypothesis 2 could be verified if the frequency and intensity of such atrocities were constant or almost constant, as these types of prejudiced attitudes are quite firm, and tend to change very slowly. In case hypothesis 2.a is true, although the trend might deviate from the tendency defined by the recession and growth of the economy (calculated for the whole of the society), the frequency and intensity of conflicts should, in any case, show a definite growing and then declining trend.

The graph depicting the frequency of ethnic conflicts, however, does not show a slowly growing and then slowly declining tendency, and its values are not constant either. Rather, it is characterized by sudden bounces and similarly sudden declines – at irregular intervals and with an irregular intensity.

The tendency seems to be the same if we try to follow up the most significant anti-Gypsy atrocities of the past few years. The first peculiarity to be mentioned is that these conflicts, which emerged at different places and times and around completely different issues, seem to follow remarkably similar scripts. The conflict can almost always traced back to the huge and constantly deepening abyss between the majority that wants to "join Europe" and has a more or less reasonable hope to do that and the local Gypsy minority that is sinking more and more into third world poverty. Wherever different groups live right next to one another under so different conditions and with so different opportunities, the huge differences between their ways of life and behavior make it almost unavoidable that the groups want to detach themselves from one another. However, this "objective situation" usually results only in the growing rigidity of prejudices, feeling pity and looking down on a group, tasteless jokes about the Gypsies, and the more and more stressed presence of demarcation lines in spatial and social structures.

Prejudiced thinking usually results in aggressive prejudiced acts only if the local political elite or at least an influential segment or group of it – generally enjoying some kind of support from national-level offices – can formulate the "only possible and suitable solution" following from the really catastrophic economic situation and the prejudiced social psychological environment as its political program. What is meant by this is usually drawing plans of pushing "the Gypsies" or at least the (quite arbitrarily defined) "bad Gypsies" to the peripheries of a settlement, or – as it has been happening more and more often in recent times – ousting them from the settlement. This usually intensifies the conflict. The appearance of the local and national media just makes the situation worse: their attitude might be well-intentioned, but they are mostly quite uninformed about such conflicts and the ways of reporting on them; they often pursue sensations, and strive to serve the supposed racist attitudes of the "general public" – not to mention the role of the openly racist media. A further phase in the escalation of the conflict follows when legal aid organizations step in: almost irrespective of their intentions and tactics, the local elite will immediately attack them claiming that the matter at issue is a "local affair", and these legal aid people "coming from Pest" should not intervene. The local majority elite is usually also supported by the local members of the National Gipsy Government who say that they are grateful to the Mayor for intending to build such a nice ghetto, container settlement or Gipsy school for the local Gypsies, and condemn those who want to impede these plans.

The more and more intense conflict then gets to the point of an imminent catastrophe, or may actually result in one: in this case, "pogrom-like" events follow. If, however, the legal aid organizations and the more sensible segment of the media manage to beat back the local political elite that elicited the conflict (often after a national-level political intervention), the atrocities are suddenly finished, and the local Gypsies go on living in their settlement as if nothing had happened. This means that their bad economic situation and the prejudiced environment they are surrounded by will not change all of a sudden (if it will change at all), but the majority and the minority ethnic groups go on living relatively peacefully.

In order to test the above listed hypotheses, we should conduct a detailed analysis of the frequency and intensity of ethnic conflicts, studying their exact times, locations and geographical distribution. We also need case studies that describe conflicts of various types, together with their history and outcomes, and a survey that examines the Hungarian media representation of ethnic conflicts.

The decreasing number of atrocities

We can, however, easily test the above hypotheses if we examine how the intensity and frequency of anti-Roma atrocities actually changed when the group all of a sudden became an influential factor in defining the result of the upcoming elections. We examined the number and types of notifications and reports arriving at the office of the Parliamentary Commissioner for the National and Ethnic Minorities Rights, the Roma Civil Rights Foundation, the Roma Media Center and the Legal Defense Bureau for National and Ethnic Minorities between 1 September 2001 and 15 February 2002.

It can be established that after the very beginning of December 2001, when the possibility of the Fidesz-Lungo Drom alliance had come to light, the number of atrocities committed by the police, local governments and private perpetrators suddenly decreased. Indeed, we do not know of conflicts of countrywide significance from the period immediately following this time. Despite the fact that electoral campaigns usually increase the frequency and intensity of ethnic atrocities, there was a breathing space even in the most hopeless cases in the surveyed period.

It is obvious that the atrocities that become known are only the tip of the iceberg in the ocean of everyday exclusions, harasses and humiliations. However, we do not have a reason to assume that the proportion of known atrocities changed in the examined period – especially as those who work in the offices, institutions and non-governmental organizations involved in the survey are experts who have good local knowledge and connections, and usually know of atrocities even before they are reported officially or become known from the media.

This means that the decrease in the number of known atrocities indicates an actual tendency: first of all, that the deepening social inequalities and the prejudiced environment are not more than necessary preconditions of the formation of ethnic conflicts. The local and national political elites have a huge responsibility in sparking off and solving conflicts – they can give signals that might intensify or alleviate ethnic confrontations according to their momentary interests. It seems that in the period preceding the 2002 Parliamentary elections, when the Roma minority became a political factor, the local and national political elites had an interest in minimizing such conflicts, while after the 2002 and 2006 elections, when the right wing queried the results and political confrontations grew more intense, we could also observe a sudden growth in the number and intensity of interethnic conflicts.

It is, however, certain that the Roma can only achieve positive changes if as many of them as possible vote and support the politicians who will most likely put an end to hate speech, suppress coded racist allusions, and make steps towards the most necessary arrangements in the interest of the social reintegration of the Roma.

At the forefront in the punishment of minors[539]
Yasha Maccanico
(Statewatch)

The development of "parallel" legal procedures to the functioning of the ordinary criminal justice system to fight terrorism, the expansion of powers of surveillance, search and arrest for the police and the creation of ASBOs (*anti-social behaviour orders*, measures to counter "antisocial" conduct): these are some key aspects in the United Kingdom in the field of the treatment of foreigners, of ethnic minorities and children who are increasingly identified as "threats" for public security and peaceful co-existence. From Thatcher to Blair and now Brown, there has been a constant escalation in the use of norms and practices heading towards zero tolerance. Moreover, immigration and asylum policies entail a number of abuses and practices that belie the United Kingdom's and European Union's claim to be examples on a global level as regards the respect of human rights. The backdrop against which these policies have been developed is the reversal of the relationship between the state and citizens, which is marked by a reduction in the control to which institutions that are in charge of guaranteeing "security" are subjected, alongside an increase in controls experienced by people living in the UK (through the wholesale surveillance of communications and of "suspicious" or "antisocial" behaviour). The possibility of sanctioning the latter, even in the absence of the elements required to instruct a criminal trial, is a further relevant development.

Identifying threats to society and acting upon "perceptions of insecurity"

The notion of guaranteeing "security" as the main function of the government of a society that is "besieged by criminals, foreign criminals, terrorists and violent or antisocial individuals and youths", is becoming firmly established in public opinion. In the field of criminal justice, this entails a subordination of acquired rights although they should theoretically form the legal basis for security. Statements by successive Home Secretaries like Jack Straw or David Blunkett have expressed their belief in a "scale of values" that places security at the first place among rights. Citizens' subjective "perception of insecurity", regardless of whether it is justified or not, is thus invoked in order for the state and its bodies responsible for guaranteeing security and the administration of justice to come into play. Almost inevitably, the people who are singled out by the media, by so-called public opinion and governments as the elements responsible for insecurity, if not enemies, are on the lower rungs of the social ladder; they are more liable to commit petty economic crimes or robberies as a result of their precarious living conditions, or they are more visible due to their greater presence in the street; they are hence identified as "different", particularly if they are foreign or members of ethnic minorities.

---

[539] Thanks to Max Rowlands for his contribution to the article.

Restrictive immigration policies increase the grounds for and contexts in which the latter may become suspects.

ASBOs and the creation of a hostile environment for children

With the introduction of so-called "anti-social behaviour" in the framework of conducts from which society must be protected in order to re-establish a "culture of respect", new measures have been thought up for the punishment of behaviour that is not criminal in the sense of the commission of specific illegal acts. The government's guide to ASBOs in its crime reduction website talks of targeting "behaviour which causes or is likely to cause harassment, alarm or distress to one or more people who are not in the same household as the perpetrator".[540] ASBOs are a key element of this approach, and allow the police or local authority to request the issuing of a civil order (with a lower burden of proof than in criminal law, as hearsay evidence is admissible) by a judge or magistrate's or county court to forbid an individual from committing any action or to go to specified locations for a minimum of two years, through a fast-track procedure (this is somewhat similar to the measures applied in Italy against 'ultras' who cannot go to the stadium and must stay at home during games). Failure to comply with the restrictions imposed by ASBOs may lead to imprisonment for up to five years for adults and a two-year detention and training programme for minors (similar punishment to that for an inmate's escape from prison or from house arrest). Moreover, the latter will begin their adult lives with criminal records that are liable to stygmatise them and/or limit their ambitions. The figures provided in response to an access to information request about non-compliance with restrictions imposed by ASBOs in February 2007 show that they were close to half -47%-, although reports from May of the following year indicate that they had risen considerably, to 67%. According to official statistics, 12,675 ASBOs had been issued until December 2006. In spite of a small recent decrease in their use, it is increasingly obvious that children are among the groups that most often bear the brunt of this policy and, according to official figures, from 2000 to the end of 2006, 986 children of between 10 and 17 years of age have been detained (on average, for six months), a figure that, if brought forward until 2008, would be well above the 1,000 mark.[541] In spite of reassurances by the government that ASBOs would only be used against minors only in "exceptional circumstances", it turns out that over 50% of the ASBOs issued concerned children who were less than 16 years old, including orders that prohibited them from playing football in the street, riding a bicycle, wearing hooded tops or using certain words. Moreover, a sizeable portion of these ASBOs were imposed upon people who had mental disorders or learning

---

[540] The material on ASBOs is drawn from the ASBOwatch observatory, http://www.statewatch.org/asbo/ASBOwatch.html
[541] "More than 1,000 children jailed for breaching Asbos", Nigel Morris and Ben Russell, Independent, 25.8.2008.

difficulties, conditions which may have given rise to behaviour deemed "annoying" or "distressing", apart from lowering the likelihood that they may comply (or, in some instances, may understand) the restrictions that they are subjected to.

A corollary of this approach whereby security is the primary concern, as well as guaranteeing citizens' "peace of mind", is the transformation of the street and public spaces into a hostile environment for people identified as "threats", through an increase in controls on behaviour that is liable to be punished; moreover, these spaces are made unpleasant or unwelcoming, at least for these users. The use of the controversial "mosquito" audio device as a form of "Sonic Teen Deterrent" that was devised in order to cause groups of children to disperse through the emission of an ultrasonic tone in a 15-metre radius at a frequency that is only fully audible by under-25s, is only a recent example of this campaign to clear urban spaces of minors identified as "potential threats".[542]

In May 2005, the *Bluewater* shopping centre in Kent banned the use of hooded items of clothing and baseball caps to counter "antisocial behaviour", following complaints from some customers because children were able to conceal their faces from the more than 400 CCTV cameras that were installed in the centre.[543] The *Children's Society* reacted by calling for a boycott of the centre, criticising its "blatant discrimination based on stereotypes and prejudices that only fuels fear" and stressing the absurdity of a situation whereby a shopping centre bans "people who wear the items of clothing they sell". ASBOs had already introduced the banning of such items of clothing. Lord Stevens, formerly the Commissioner of the *Metropolitan Police*, wrote in a Sunday tabloid that "hoodies, if used to hide identity in a crime, are as much a criminal tool as a mask…both should lead to extra legal punishment". As for the infamous "*mosquito*" devices, in February 2008, the head of Children's Commissioner for England, professor Al Aynsley-Green, launched the "*Buzz Off*" campaign to forbid the use of these devices to disperse groups of children. He stated that the estimated 3,500 devices that were in use "are indiscriminate and target all children and young people, including babies, regardless of whether they are behaving or misbehaving", that they "demonise children" and are a "powerful symptom of... the malaise at the heart of society". *Liberty* director Shami Chakrabati, added: "Imagine the outcry if a device was introduced that caused blanket discomfort to people of one race or gender, rather than to our kids…The Mosquito has no place in a country that values its children and seeks to instil them with dignity and respect".

But the control of children has moved beyond public spaces with the complicity of government (through subsidies) and companies that develop technologies in this field, extending its scope to the places that they habitually

---

[542] See Statewatch, vol. 18 no. 1, January-March 2008, p.3.
[543] See Statewatch, vol. 15 no. 2, March-April 2005.

attend, such as schools, where a proliferation of surveillance practices is underway. The *Leave Them Kids Alone* (LTKA) campaign claims that over two million children have had their fingerprints taken in over 3,500 schools in the UK, a number that is constantly growing. The systems used that adopt this method include *Micro Librarian Systems' "Junior Librarian"*, which uses fingerprint scanners to take out or return books in libraries, or biometric systems to record attendance in lessons and for catering services run by *VeriCool*, whose parent company, *Anteon*, is an important supplier of technology and training for the US armed forces that has links to the detention centres of Guantanamo and Abu Ghraib. A particularly controversial aspect of this practice is the fact that parents were not notified. Guidance produced by the government on the use of biometric data in schools did not introduce parental consent as a legal requirement. Likewise, the guidance produced by the *Information Commissioner's Office* was not binding, although it recommended that "the sensitivity of the issue [demands] schools follow best practice and ask permission of parent and pupil before they take fingerprints". Often, these guidelines were not applied and there have also been cases in which pupils who did not co-operate were threatened with expulsion; moreover, the government's Department for Education and Skills criticised schools for not serving food to children who did not participate in their biometric catering system.[544]

The debate on this matter involves a lack of justification for these new prctices, presented as conclusive solutions for solving age-old problems that have always existed in educational centres. Producers claim that biometric solutions encourage library lending although the relationship between the taking of fingerprints and the desire to learn has not been established, and it is also questionable whether a technological system may put an end to truancy, as *VeriCool*'s website envisages.

A chart drawn up by LTKA[545] points out the advantages and risks of these practices for the children, schools, producers and the government. Insofar as minors are concerned, it notes that there are no proven advantages, whereas the risks include possible identity theft, access to their biometric data, the exchange of sensitive personal data between different public bodies or even their sale to private companies, as well as the fact that children do not learn the value of their biometric identification details and of the need to protect them. For schools, the possible reduction of time spent on certain administrative tasks, heightened possibilities of meeting local authority education targets and the government's support (through subsidies and promotion of these schemes), is weighed against the risk deriving from opposition by parents, health and safety issues in case of the system malfunctioning, possible lawsuits by parents

---

[544] On the different systems of control and the use of biometric technologies in schools, see "Coming for the Kids: Big Brother and the Pied Pipers of Surveillance", Statewatch, vol. 18 no. 2, April-June 2008.
[545] Available on the organisation's website, http://www.leavethemkidsalone.com

in case any of the data was stolen, the cost of erasing data when a child leaves the school and the possibility that a future government may declare this practice unlawful. For producers, the advantages include thousands of potential customers, profits worth millions of pounds and a complete lack of regulation, without any risk to off-set them, as it would ultimately be the schools' responsibility if anything should go wrong. For the government, introducing these practices since a very tender age may reduce any resistance among future generations against the introduction of biometric identity cards and "cradle to the grave" surveillance. The compatibility of models used for collecting this data with those used by other government bodies is deemed useful, while a strong reaction by parents if they feel that their children are being manipulated for political ends is something to be feared. The loss of this data by systems that are not very secure set up in schools may also entail serious consequences. One must also consider that there have been important precedents in which state services have lost the personal details of millions of people, as happened in the case of the loss of data of 23 million people by *HM Customs & Excise* or those of 3 million who had registered to take a driving license exam by a US-based private company.[546] Other developments in this field include the experiment that began in October 2007 in a Doncaster school using RFID chips in school uniforms to control class attendance and the movements of students.

Following enquiries into a case in which some serious shortcomings by the social services emerged concerning a girl, Victoria Climbié, who underwent terrible abuses by her foster parents culminating in her killing in 2000 when she was eight years old, the Children's Act 2004 gave the government powers to set up a series of connected databases to monitor each child's progress. "*ContactPoint*", which was scheduled to become operative by the end of 2008 but whose development has experienced delays, is set to contain a register of the names, addresses, dates of birth and contact numbers for children's parents, doctors and schools, assigning each child a personal number from birth. It will be followed by the *Electronic Common Assessment Framework*, a system for evaluating their progress and well-being that will include data on their parents, relatives and carers to identify and protect children deemed to be vulnerable or "at risk". The final element will be the *Integrated Child System*, that will hold the records produced by social services and child protection officers.[547] This system will enable authorities to have a detailed picture concerning children's lives; criticisms that have been raised are: a) the possible stygmatisation of minors, especially those from poorer families, that may continue well into adult life; b) the resources spent for these technological solutions (a cost of £224m was estimated only for *ContactPoint*), that could be better used to address shortages of social workers in deprived areas; c) its unlawfulness, as it fails to respect limits set in UK legislation for

---

[546] Guardian, 18.12.2007.
[547] On these developments, see note 6.

data collection and EU law on the protection of privacy; and d) the impossibility of guaranteeing the information's security and integrity due to the vast scope for access by different public bodies that is envisaged (comprising up to 390,000 persons).[548]

Finally, it is worth noting that in October 2008 the five-yearly report on the UK by the UN Committee on the Rights of the Child formulated over 150 recommendations to ensure progress in implementing the Convention on the Rights of the Child. These included raising the minimum age of criminal responsibility (set at ten years of age) and removing the "discriminatory" variation that applies in Scotland (where it is eight years); the review and abolition of ASBOs, that primarily affect people from disadvantaged backgrounds and, contrary to the child's best interest, "contribute to their entry into contact with the criminal justice system"; reducing restrictions on children's right of assembly resulting from "dispersal zones" (in which an officer may require them to disperse) and the use of so-called "mosquito" devices. The report also expresses concern about the retention of a child's DNA record in the *National DNA Database* (NDNAD) even if they are not charged of any crime or are acquitted.[549]

The case of the NDNAD is indicative of a trend towards the wholesale control of the population and of an increase in checks, particularly insofar as minors and members of ethnic minorities are concerned. At the start of 2008, a study on the databases in EU member states[550] showed that it contained genetic data on a larger portion of the population that in any other country –including over 4 million people, equivalent to 6.56% of the population-. The second country is this list was Estonia, with 1.53% of the population, followed by Austria and Finland, the only other EU countries with over 1% of the population in their DNA databases. Official data provided after a question in parliament asked by the Liberal Democrats showed that the NDNAD contains the DNA profiles of over a million minors (over half of which -570,000- were entered over the last five years) of which 337,000 concern under-16s, many of whom do not have a criminal record and, in a report dating back to 2006, the organisation *GeneWatch UK* calculated that three out of every four young black males (between 15 and 34 years old) were in the database. In the *S* and *Marper* vs. *UK* case on which the Grand Chamber of the European Court of Human Rights issued a sentence on 4 December 2008, it ruled that there had been a violation of article 8 (respect for private and family life) of the ECHR in the indefinite retention of DNA profiles and samples and the fingerprints of the appellants in the respective databases in absence of a guilty verdict, in spite of them having requested that the records be destroyed. The sentence notes that "England, Wales and Northern Ireland appeared to be the only jurisdictions

---

[548] BBC News online, 26.1.2009.
[549] Statewatch supplement, November 2008, p.2. The report is available at:
http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf
[550] See Statewatch, vol. 18 no. 3, July-September 2008, p. 16.

within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence" and that the Court "was struck by the blanket and indiscriminate nature of the power of retention in England and Wales", expressing "particular concern at the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who had not been convicted of any offence and were entitled to the presumption of innocence, were treated in the same way as convicted persons".[551]

The new rules of the game – avoiding the norms of the criminal justice system in an anti-terrorist key

As stated by PM Tony Blair following the attacks in London in July 2005, "the rules of the game are changing". But how much can they change without altering the nature and very character of a democratic society? The indisputable battering ram of anti-terrorism has been used to introduce a large number of fundamental changes that, little by little, are extended from exceptional situations (such as, for example, terrorism itself) to milieux that are more common, such as political activity and, through notions such as offences "linked" to terrorism or those from which terrorists "benefit", and also to organised crime, "serious" criminal offences and, finally, crime in general (including production of counterfeit documents, facilitating "illegal" immigration or money laundering). The examples we will look at are a minimal portion of the discriminatory practices that are justified on the basis of the terrorist emergency; such practices have caused an increase in the proportion of people belonging to ethnic minorities who are subjected to stop-and-search by the police –figures for 2006-2007 show that a black risks being stopped by the police seven more times than a white, while the corresponding figure for an Asian is two-,[552] after a short-lived improvement between 1997 and 2000 following the MacPherson report which criticised the police for "institutional racism".

Exceptional procedures allowing punishment on the basis of suspicion rather than evidence and a regular trial had already been introduced previously. The measures adopted primarily concerned foreigners suspected of terrorist activities, as they could not be applied to British citizens nor to those from EU countries, as they would have violated their rights. In fact, when the *Anti-Terrorism, Crime and Security Act* (ATCSA) of 2001 introduced detention for an indefinite period without charges being brought for people suspected of terrorist activity –by the Home Secretary, often based on security and hence unchallengeable information-, the UK government accepted that the measure did not comply with the European Convention on Human Rights, derogating

---

[551] The full text of the sentence is available at: http://www.statewatch.org/news/2008/dec/echr-marper-judgment.pdf
[552] Statistics on race and the Criminal Justice System, Ministry of Justice, July 2008.

the application of article 5 on the right to freedom, which regulates the conditions that may justify detention. The justification for this choice was the existence of an emergency that threatened the existence of the nation. The effects of this practice, that was declared unlawful due to its disproportionate and discriminatory character by seven of the nine Lords called to rule as to its lawfulness in December 2004, for the mental health of the 17 Muslim men held under this regime, some of them for over three years, were very serious, as confirmed by a report drawn up by psychiatrists and psychologists that was published on 13 October 2004, which read:

"All of the detainess have serious mental health problems which are in direct result of, or are seriously exacerbated by, the indefinite nature of the detention"[553].

The abrogation of section 23(1) of the law resulted in the release of the detainees, for whom a new regime of restricted freedom was created, the so-called "control orders". In fact, less than two weeks after their release, the 2005 *Prevention of Terrorism Act* granted the Home Secretary the power to request the issuing of "control orders" that would be valid for a year (renewable on "one or more occasions") applicable to suspects of terrorist activities, which enabled a series of restrictions to be imposed upon them. Their impact on the life of an individual or their family may be inferred from the fact that possession of specified articles or substances could be forbidden, as could the use of specified services (for example, an Internet connection or telephone line) or undertaking certain activities, restrictions as to their access to certain jobs or the undertaking of specified activities, with regards to the people with whom they could meet or communicate, their place of residence and who could visit them, bans prohibiting their presence in specified places at specified times, against them travelling abroad or within the UK, the possibility of new *ad hoc* instructions being issued that they are bound to comply with for 24 hours, giving up their passport for the duration of the order, a general authorisation of access to their home and for it to be searched to ascertain whether they are complying with the conditions to which they are subjected, the possibility of removing or confiscating objects or to run tests on them, to allow them to have photographs taken of them, to co-operate with measures adopted to allow their movements, communications or other activites to be monitored, and an obligation to supply information that is requested of them or to appear before a specified person at a place and time that have been established.[554]

These control orders may be issued due to "reasonable grounds to suspect" someone's involvement, or past involvement, in terrorist activities following an "intelligence assessment" produced by MI5. The burden of proof is lower than that advocated by the opposition, "on the balance of probability" (that is, more

---

[553] Dr. J. MacKeith (coord.), "The psychiatric problems of detainees under the 2001 Anti-Terrorism, Crime and Security Act", 13 October 2004.
[554] Prevention of Terrorism Act 2005, chapter 2, http://www.opsi.gov.uk/acts/acts2005/ukpga_20050002_en_1

than 50%), and certainly lower than that required for conviction in a criminal court, "beyond a reasonable doubt".[555] Furthermore, non-compliance with the conditions imposed under a control order may lead to imprisonment for a maximum of five years. Gareth Peirce, who defended some of the internees, described the development:

"this construct is created to avoid our constitutional protections of fair, public and open trial, … in which the most important aspect of all is that your accuser tells you at the earliest possible moment what the accusation against you is, so that you have the opportunity of replying… the very purpose of the new legislation is to avoid these central obligations. Once the individual is branded [a terrorist], any information to justify the branding is considered behind closed doors"[556].

Before the notorious attacks in the United States in September 2001, in application of the Terrorism Act 2000, a list of 21 "terrorist" organisations had already been proscribed by the Home Office presided over by Jack Straw to prevent the United Kingdom from becoming "a base for international terrorists and their supporters". Lord Avebury criticised the inclusion of the Kurdish PKK when it was on unilateral cease-fire in spite of continuing attacks by Turkish security forces, and of the Iranian Mujaheddin e Khalq[557], arguing that "any armed opposition group or anyone who supports" one "in whatever country", including repressive regimes "in the world is *ipso facto* a terrorist". To become a suspect liable to be subjected to imprisonment for up to ten years, it suffices to contravene any of a long list of prohibitions imposed in relation to these organisations, including: membership, inviting support, fund-raising, participating in the organisation or taking part in a meeting that supports, promotes the activities or is addressed by a member of a proscribed group. Wearing certain items of clothing or objects, or displaying them "in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation" in a public place, may entail imprisonment for up to six months. The *ad hoc* commission before which an appeal against inclusion in this list may be filed is the Proscribed Organisations Appeal Commission, but it has proved difficult to appeal against a decision based on confidential information that is not available to the appellant. Lord Archer of Sandwell was critical of the retrospective nature of the procedure, "there is something distasteful about a process which begins by convicting someone and then proceeds to inquire whether there is a case against them". Inclusions are often a result of requests made by the authorities of countries in which they are active, based on information supplied by their intelligence services. The implications refugee communities or migrants who have left due

---

[555] "The Prevention of Terrorism Act 2005", Statewatch bulletin, vol. 15 no. 1, pp.21-22.

[556] Gareth Peirce, "A stampede against justice", Guardian, 8.3.2005.

[557] Removed from the EU list of terrorist organisations on 28 January 2008, and whose inclusion in the UK list was deemed unlawful by an English court in 2007, a decision against which the government filed an appeal that it lost in 2008, see Statewatch Briefing: "'Terrorist' lists: monitoring proscription, designation and asset-freezing – Update March 2009 http://www.statewatch.org/news/2009/mar/sw-terrorist-list-observatory-update-march-2009.pdf

to repression are evident, as they pass from being recognised victims of persecution to having to defend themselves from charges made by their persecutors and become suspects of involvement in terrorist activity. The way in which the proscription process has been set up leads to a "globalisation of repression" whereby authoritarian regimes are recruited for the "war against terrorism" through the geographic extension of the reach of practices that criminalise domestic opposition (whether or not it is armed) in their countries.

Lampedusa, Europe's Guantanamo?
The practice of prohibitionism of migrations and violation of fundamental rights at the Sicilian border

Fulvio Vassallo Paleologo
(Università di Palermo)

Economic migrants and asylum seekers. An arbitrary distinction.

For the last two decades, the media have been speaking about the "landings" of migrants in Sicily as a veritable "invasion"; yet official statistics show that they account for only slightly more than 10% on the total of irregular migrants identified by the Italian police forces, as the large majority consists of *overstayers* (see the 2007 interior ministry report). Those who have been arriving on the island since 2001 are both the "usual" Maghreb-country nationals (who are mostly looking for work, or are youths fleeing from unacceptable living conditions), and migrants from Somalia, Eritrea, Ethiopia, Sudan, Iraq, Pakistan, Liberia, Chad and from many other countries towards which repatriation is supposedly forbidden by international conventions (as well as by Italian law -art. 19 of the Unified Text no. 286 of 1998-, because of ethnic persecutions and ongoing armed conflicts). Not only the false situation portrayed in the media, but also an unlawful treatment by police forces are thus perpetuated, firstly because access to refugee status or international protection is obstructed, and secondly because there is no lack of police officers who feel authorised to use methods that are muscular if not overtly violent. On this matter, the numerous testimonies collected in recent years by Amnesty International, Médecins sans Frontières, other NGOs and some journalists must be recalled. Violent acts against these migrants are effectively legitimated by a public opinion that is stirred up for a war against "clandestines" who are often described as alleged or proven criminals, rapists, if not affiliates of terrorism[558].

As is well known, the reproduction of irregular migration reflects the lack of channels for legal entry to look for work, while the reasons that push people to emigrate increase and the demand for workers, particularly irregular ones for jobs in underground activities, also persists. Obviously, this prohibitionism can only benefit improvised *passeurs* (people smugglers) as well as criminal organisations that enjoy complicities within police forces in the countries of departure, which are increasingly interested in negotiating with those of arrival over the tightening or loosening of the mesh to prevent expatriation.

More rigorous controls by aerial and naval units in the Mediterranean, particularly after the start of Frontex missions in 2005, have led *passeurs* to

---

[558] Among the many violent acts, we also recall the emblematic ones by some Catholic religious figures managing centres for irregulars as well as those by agents of the Red Cross' military and para-military component that manages several centres.

resort increasingly often to medium-sized/small boats that can avoid being spotted more easily. Moreover, boats that are almost wrecks are often preferred to reduce the damage in case of confiscation or sinking. Hence, we are talking about the so-called sea tramps that are very dangerous as they have a high risk of sinking if the sea is quite rough. In twelve-metre vessels laden with over a hundred people, a sudden veer, or having to face the sea with the bow leading and without being able to follow the wind, is enough to risk capsizing suddenly. More recently, because of more intensive controls in the border area between Tunisia and Libya, the departures have taken place from further east, from the Libyan coast, the journeys have grown longer, and bigger boats have re-appeared, driven by veritable motorboat pilots. However, there are still cases of small vessels that, even in winter months, attempt the adventure of crossing the Channel of Sicily.

This is how the shipwrecks occur, such as those that happened again in Tunisia at the beginning of 2009, about which there is never any certain information on the number of people who have gone missing and the times of rescue operations. In effect, the authorities of countries of departure do not seem overly concerned about a few hundred people who drown, while they only pay attention when it comes to negotiating bilateral agreements that envisage their active participation in the "naval block" (contravening all international regulations on the safeguard of human life at sea), that is, the war against emigration as well that is demanded by countries of arrival.

The idea of the " naval block" against immigration is not new, it was sadly tested in 1997 with the sinking of the Albanian ship " Kater I Rades", but over the last few years the vessels of the Italian Navy have always placed the need to safeguard human life at sea ahead of orders for a naval block. Now, instead, there is a risk of returning to the literal application of the Bossi-Fini law. By effect of point *9 bis* of art. 11 of the Unified Text on Immigration, a norm introduced in 2002 by the Bossi-Fini law,

"the Italian ship carrying out police service that meets a ship that it has reasonable grounds for believing that it may be used or involved in the unlawful transport of migrants in territorial waters or in a contiguous zone, may stop it, search it and, if elements that confirm the ship's involvement in the trafficking of migrants are found, confiscate it, leading it into a harbour of the State".

On the basis of the subsequent art. *9 quater*,

"the powers detailed in point 9 can be exercised beyond territorial waters, apart from by ships of the Navy, also by ships carrying out police service, within the limits allowed by the law, by international law, or by bilateral or multilateral agreements, if the ship flies the national flag or even that of another State, or if it is a ship that does not fly any flag or has a flag of convenience".

In practice, Italian naval authorities can proceed, and do so, to block and turn away boats laden with migrants (assumed to be clandestines –illegals- from this point on) already at the border between the international waters and

territorial waters of countries on the north African shore (along a band that oscillates between 20 and 30 miles away from African coast).

Obviously, no one will ever be able to tell from a distance whether there are potential asylum seekers or so-called "economic" migrants on board of such a vessel. As UNHCR notes as well, refusal of entry procedures at sea through the joint patrols that are now organised by the Italian government after minister Maroni's missions in Tunisia and Libya, risk denying the right to asylum and to increase the number of victims of illegal migrations.

"Readmission" agreements

Readmission agreements are a central element of all policies to counter illegal immigration. Italy signed over thirty of this kind of agreeements[559]; the ones reached recently with Libya, unlike the others, are not technically real readmission agreements, firstly because there has never been any news of irregular Libyans in Italy. However, the understanding with Libya entails joint patrolling at the limits of territorial waters and Italian participation in controlling its southern borders. On the basis of these agreements, even if in many cases they are countries that do not respect human rights (see the reports by Amnesty, Human Rights Watch and other humanitarian agencies), contracting states have made a commitment to Italy to take back their own citizens into their territory and, in some cases, also citizens of third countries who have travelled through them, or have tried or succeeded in entering Italy irregularly. The sole requirement for repatriation is to ascertain the immigrant's nationality, which is certified by a consular representative of the country of origin or from which they came. This verification is sometimes exhausted through an examination by a consular interpreter.

Many readmission agreements recall the limit of the right to asylum right as an obstacle for the execution of refusal of entry or forced repatriation, but in practice, as verified by lawyers and humanitarian operators in hundreds of cases, in Sicily, and hence in Apulia, where migrants who disembark in Sicily are often deported, this claim remains without effect, particularly when collective expulsions or refusals of entry take place. Recent jurisprudence by the Italian Court of Cassation [Italy's highest appeal court] has effectively emptied the prohibition of collective expulsions decreed by international conventions of any content, but the possibility of suspending a judicial procedure regarding an appeal against expulsion still remains, to request the intervention of the Court of Justice. In fact, under art. 234 of TEC, full application of the prohibition of collective refoulement may be requested in

---

[559] Specifically, with Slovenia, Macedonia, Romania, Georgia, Hungary, Lithuania, Latvia, Estonia, the Republic of Serba and Montenegro, Croatia, Albania, Morocco, Slovakia, Tunisia, Algeria, Nigeria, Egypt, Pakistan, Sri Lanka

accordance with what is provided for by the Charter of Fundamental Rights of the European Union (in reality, Italy has been undertaking collective deportations for some time, including *manu militari* ones -that is, using military aircraft- from Lampedusa to Libya in 2004).

In Sicilian detention centres, as also happens in those in Apulia, consuls and their officers are allowed free entry, on an almost daily basis, and manage to nourish -with the complicity of the operators in the structures- a climate of intimidation towards those who wish to submit asylum applications and the humanitarian workers who seek to assist them. The right to linguistic understanding of measures issued with regards to potential asylum seekers is almost always ignored, especially when the overcrowding of centres lasts for months, as often happens in Lampedusa.

Many transit countries like Tunisia and Egypt, precisely due to the effects of bilateral agreements, already accept the logic of collective refusal of entry and the externalisation of the administrative detention of migrants expelled from Italy. For a potential Tamil or Nigerian asylum seeker, expulsion to a transit country such as Morocco, Egypt, Tunisia or Libya can mean detention for an indefinite period, or being returned to the racket of clandestines, and a sentence to a life of hardship if not veritable slavery, and sometimes a risk for their lives. It has also been pointed out that in some cases countries such as Libya have deported and abandoned migrants in the middle of the desert: it appears that few of them managed to survive. We also recall that the readmission agreements stipulated to date by Italy envisage charter flights for "collective repatriation", although this constitutes a blatant violation of the prohibition of this method by the European Convention for the protection of Human Rights. The ploy used by the authorities consists in resorting to procedures and measures that are formally individual, while they are in fact photocopy-measures: collective expulsions are a concrete modality of execution of the order, beyond the uniformity of the wording of the measures.

Following objections raised concerning readmission agreements with countries that do not respect minimum human rights standards, the most recent trend is that of even going beyond the bilateral treaties which, nonetheless, require their (subsequent) approval by parliament, and can (could) allow the opposition (if there were one) to criticise a foreign affairs policy that contravenes respect for the fundamental rights of human beings (remember that the centre-left has espoused and practised the cause of the war against illegal immigration for a long time already, almost in the same way as the right). In any case, this is not an exclusively Italian position. Sicily has already been suffering the effects of the informal agreements reached with countries from the north African shores, which translate into "co-operation" and "information exchange" between the different countries' naval units in a declared attempt to force migrants' boats to return to the harbours they set off from.

It is evident that migrants become an object of bargaining. In the case of Libya, collusion between police forces and criminal organisations prevented

understandings and operative protocols from constituting an effective barrier against irregular migration[560]. The "landings" continue to increase inexorably in spite of the tightening of controls and means deployed to counter them.

By now, relationships with Morocco, Egypt, Tunisia and prospectively Libya, are marked by this exchange between "practical co-operation" in policing and various sorts of economic benefits that Italy assigns to countries that commit to co-operating. "Privileged quotas" for legal entries agreed in bilateral agreements with some of these countries turn into an umpteenth deceit, if one considers that in regions such as Sicily, a traditional destination for economic migrants from Maghreb countries, effective possibilities for legal entry from Tunisia or Egypt remain limited to a few hundred workers per year.

It is important to note that bilateral readmission agreements (like the one undersigned with the Libyan government in early July 2003) have been withdrawn from any sort of parliamentary control, with their concrete implementation entrusted to the discretion of police forces and (ever-changing) intergovernmental treaties (or even to the level of single ministers). When this control is allowed, it is in fact limited to the approval of blank agreements by politicians, without any certainties as to their actual overall costs or the exact nature of interventions.

At an EU level, the multilateral agreements between European countries and countries of origin that have become popular over the last few years, open up a prospect that is entirely unattainable. It suffices to consider the different existing historical and geopolitical ties between European countries and those from the South, and the reluctance of the more powerful European partners to participate in the considerable financial effort made by the countries that are most "exposed" in the execution of detention and forced removal measures.

Violations of the fundamental rights of irregular migrants

When commissions or delegations of the European Parliament, members of the European Committee for the prevention of torture (CPT), or national MPs have visited the administrative detention centres for irregular migrants in Sicily, a picture emerged of very serious violations of the fundamental human rights that should be recognised to all migrants "present, in any way, in the Italian territory" (art. 2 of the Unified Text on migration no. 286 of 1998). In all the inspections and related documents (see institutional and NGO websites), facts emerged that confirm a "management" of regular migration by police forces that contravenes all national laws, EU Directives and the most basic principles of humanity and reception[561].

---

[560] It is a matter of collusion between the Libyan police and traffickers, as also emerges from reports on the www.fortresseurope.blogspot.com website, in the film *Come un uomo sulla terra* by Andrea Segre, and from direct testimonies of migrants and lawyers on youtube

[561] Note: At present, the Italian centres for irregular migrants to be expelled and for asylum seekers are: CPA Bari Palese, CPA Borgo Mezzanone Foggia, CPA don Tonino Bello Otranto; CPT C.so

For years, the "reception centre" of Cassibile in the province of Syracuse, has been functioning with an unlawful status because the treatment of "guests" occurs well beyond the time limits and modalities established by art. 13 of the Italian Constitution and by the Unified Text on immigration. During 2008, the magistrature opened an inquiry on the serious administrative irregularities in the management of the centre, irregularities that NGOs have been reporting for some time. The "multi-purpose" structure of Caltanissetta, articulated in three different sections that correspond to the different statuses of people detained there, is a centre for identification and expulsion (CIE) for migrant recipients of a refusal of entry and expulsion measure, a centre of early identification for asylum seekers, who are usually transferred from Lampedusa, and a centre for asylum seekers awaiting the outcome of proceedings (CARA). Also in Caltanissetta, judicial inquiries have been underway for years to verify whether the serious allegations filed by migrants about those managing the structure, who have supposedly accepted money to enable attempted escapes, are founded. Over time, Lampedusa has had different detention structures. Until 2006, a detention centre "disguised" as a "centre for early reception and assistance" inside the airport area, then, from 2007 to 2008, a real "centre for early reception and assistance" that functioned as a centre for sorting out migrants to be sent to other structures in Italy (Crotone, Caltanissetta, Gradisca di Isonzo) and, finally, in January 2009, on the basis of a phantom decree by the minister Maroni, which was not even published in the Official Journal, it has been turned into a closed detention centre in which migrants are held for months, in the midst of protests by the local population and increasingly frequent episodes of self-harm and attempted suicides.

In several detention structures for migrants in Sicily, beyond administrative irregularities in their management, there have hence been frequent violations of art. 13 of the Constitution, which requires validation by a magistrate within 96 hours of arrest of any measures restricting personal freedom adopted by the police against irregular migrants. Administrative detention often occurs in structures that do not have adequate security standards and are not even officially recognised as such. Many migrants are rescued at sea and then transferred to "centres of early reception" that do not have a status as detention centres: this allows the police to circumvent the rigorous terms set by art. 13 of the Italian Constitution and sometimes makes it rather difficult even to have access to asylum proceedings.

Brunelleschi Turin, CPT Cassibile (SR), CPT contrada S.Benedetto (AG), CPT Elmas Cagliari, CPT Europa, CPT Gradisca – GO, CPT Lamezia Terme CZ, CPT Lampedusa, CPT Marche, CPT Pian del Lago Caltanissetta, CPT Ponte Galeria Rome, CPT Postojna (Postumia) SLO, CPT Regina Pacis, San Foca LE, CPT Restinco Brindisi, CPT San Paolo Bari, CPT Sant'Anna Crotone, CPT Sant'Anna MO, CPT Serraino Vulpitta TP, CPT Tuscany, CPT Veneto, CPT Via Colajanni Ragusa, CPT Via Corelli MI, CPT Via Mattei BO. About these centres and the often dramatic events that happened in them, there is extensive documentation avaible in European websites, and particularly in the 2004 and 2005 reports of the State Auditors' Court and in the report by the De Mistura Commission established by the Prodi government, which, in spite of its promises, did not repeal the Bossi-Fini law and, in effect, did not change anything insofar as the pitiful condition of migrants in Italy is concerned. Hence, it is easy to understand that the new Berlusconi government, with an even more important position occupied by the Lega Nord, can only raise the stakes against immigrants, identified as the enemy of the moment.

All these administrative practices are at odds with the law that is in force and with implementation regulations. Art. 21 point 4 of implementation regulation 394/1999 obligatorily provides that "the detention of a foreigner can only take place within temporary detention centres identified in accordance with art. 14, point 1 of the Unified Text on immigration", through a decree isued by the interior ministry. It must be recalled that, on the basis of art. 23 of the implementation regulation, detention in "centres for early reception and assistance" is legitimate "only for the time that is strictly necessary to send them to the aforementioned centres (CPTs)". What happens in Sicily, and particularly in Lampedusa, on the basis of the interior minister's latest directives, represents a serious infringement of regulatory norms and constitutional principles such as art. 13, which establishes a reserve of jurisdiction and art. 24, which affirms the right to defence, a right that cannot be effectively exercised in administrative detention centres in the absence of a timely supervisory intervention by a magistrate and of the presence of a defence lawyer. For irregular migrants, there is no longer a state governed by the rule of law, but a veritable police state.

"Deferred" refusals of entry and forced detention

Complaints by the Sicilian anti-racist movement and the efforts by lawyers who have obtained the annulment by the magistrature of clearly unlawful expulsion and detention measures on several occasions, have found authoritative confirmation in the reports by the main humanitarian agencies, such as Human Rights Watch, the International Federation for the rights of man (FIDH), the United Nations' Human Rights Committee, UNHCR, Médecins sans Frontières (MSF) and Amnesty International. After a visit by the Committee for the prevention of torture in 2005, the Berlusconi government was forced to close the ill-famed detention centre in Contrada San Benedetto in Agrigento (Sicily). After condemnation from the European Parliament and the European Court on Human Rights at the beginning of 2006, the Prodi government had to suspend collective deportations towards Libya, commenced under Pisanu and strongly advocated by the top echelons of the interior ministry.

In spite of these partial successes for NGOs, however, abuses continue and grow worse after the latest directives issued by the interior ministry, above all due to the continuous proliferation of new modalities and places of forced detention, in violation of the laws and regulations that are in force (which supposedly require a specific constitutive decree and accurate book-keeping for each structure). In many cases, even in the presence of the preconditions for admission to asylum proceedings, it has been nonetheless preferred to resort to removal measures, only to later submit asylum applications to the competent territorial commissions. Again, during 2008 there has been a widespread use of the formula of "deferred refusal of entry", and Sicilian police headquarters have issued measures of "generalised" forced expulsion, photocopy measures

which, in fact, establish the preconditions for a series of collective expulsions that are forbidden by all international conventions, in advance.

Art. 10 of the Unified Text on immigration, no.286/1998, regulates the refusal of entry of irregular migrants, understood not only as material behaviour enacted at the border crossing, but also as an administrative measure issued towards a migrant after entry into the national territory, a formal measure, therefore, that, as such, may be impugnated before an administrative court, as is stated clearly in the very document given to the recipient, even if regional administrative courts (TARs) often waive their competency, ruling out the possibilities for the legal defence of irregular immigrants, that are already scarce. On the basis of the first point of art. 10, "the border police refuse entry to foreigners who present themselves at the border crossing without the requirements demanded by this Unified Text for entry into the state's territory"; the second point also regulates cases of so-called "deferred" refusal of entry; "refusal of entry with accompaniment to the border is ordered by the *questore* (the police chief in a given city) with regards to foreigners: a) who, entering the state territory while avoiding border controls, are stopped on entry or immediately afterwards; b) who, in the circumstances detailed in point 1, have been temporarily admitted for requirements of public assistance".

The hypotheses of "deferred refusal of entry", in the forms in which they are used in Sicily, constitute frequent cases of abuse due to the wide discretion afforded to police authorities in the identifying of the relevant preconditions. A serious breach of the constitutional guarantees of migrants has also been ascertained due to the absence of any jurisdictional control, because the execution of this mode of refusal of entry inevitably entails a coercion of the personal freedom of foreigners that often escapes effective jurisdictional control.

The Constitutional Court, in sentence no.105 of 10 April 2001, found that:
"The detention of a foreigner in temporary detention and assistance centres is a measure that affects personal freedom that cannot be adopted beyond the guarantees [provided by] art. 13 of the Constitution. Perhaps, it could be questioned whether or not it may be included among the typical restrictive measures expressly mentioned in art. 13; and such a doubt may be partly supported by the reasoning that the legislator has made a point of avoiding, even on a terminological level, namely, identification with institutes pertaining to criminal law, assigning a further purpose of assistance to detention and envisaging a different regime from the penitentiary one for it. Nonetheless, if one considers its contents, detention must at least be referred back to "other restrictions of personal freedom", which are also mentioned in art. 13 of the Constitution. This may be appreciated from point 7 of art. 14, according to which the *questore*, making use of the public force, adopts effective supervision measures in order for the foreigner not to leave the centre and proceeds to restore the measure without delay if it is breached".

And, according to the Supreme Court:

"hence, in the case of detention, even when it is not separated from a purpose of assistance, the humiliation of human dignity occurs, as it arises in every instance of physical subjection to other people's power, and this is a certain indicator of the bearing of this measure on the sphere of personal freedom. Neither could it be argued that the guarantees in art. 13 of the Constitution are lessened with regards to foreigners, in view of other assets that are constitutionally relevant. Insofar as there are several public interests influencing the issue of

immigration and inasmuch as the problems for security and public order related to uncontrolled migration flows may be perceived as being serious, they cannot minimally affect the universal character of personal freedom, which, like other rights that the Constitution declares to be inviolable, must be enjoyed by individuals, not as a result of their membership of a specific political community, but rather, because they are human beings".

Procedures to identify and block irregular migrants in Lampedusa.

The timeliness with which the nationality and place of departure of suspected smugglers is established appears striking, because while it is easy to verify the identity of people who have already been expelled previously, it is not always possible to attain certain identifications in just a few hours for people who have no documents and have never entered Italy before. On this matter, it is worth recalling that specific interior ministry "task forces" operate in Sicily that are expressly deployed to carry out police inquiries and to discover smugglers. However, investigative results are often based on allegations made by migrants who become untraceable soon afterwards, perhaps after having obtained a residence permit as a result of the co-operation they have provided; the outcome of trials is uncertain, and the number of guilty verdicts reached with definitive sentences is scarce. In any case, in spite of the use of these specialised units, irregular immigration and its exploitation by some criminal organisations appear a long way away from being defeated.

Minister Maroni's decision to transfer (provisionally, in late 2008) the territorial commission that was already established in Trapani to Lampedusa, and to keep all the migrants who arrived there or were rescued by Italian military craft in the Channel of Sicily on this island, has created the conditions for serious violations of internal law, Community law and international law. The decision was thus withdrawn, but the risk of further violations of defence rights remains serious. Maroni's decision of wanting to block all the migrants who have arrived in Lampedusa on the island threatens to deprive migrants who could impugnate a forced removal measure from doing so, and denies them any possibility of defence, because there is no judicial office, nor police headquarters nor a prefecture (office of the *prefetto*, the government official in charge of security) on the island (they are in Agrigento, where there is not an airport, and which is more than eight hours' navigation away from Lampedusa). Possible appeals by migrants held in Lampedusa should be impugnated before the ordinary court or the administrative court of Palermo, within terms that are rather short and peremptory. The validation of detentions and the presence of a few court-appointed defence lawyers brought into Lampedusa detention centre under a police escort, do not appear to satisfy the minimum standards of defence rights that are recognised in democratic countries and are enshrined in the European Convention for the protection of human rights.

If minister Maroni will succeed in implementing what he announced, thus repatriating the irregular migrants of Lampedusa, and if the agreement with Libya will be applied as well as those with transit countries, the right to defence for irregular migrants and asylum seekers who receive a refusal will be rendered worthless.

In this regard, ECHR jurisprudence[562] has had the opportunity to note that in the field of effective remedies, an appeal must entail a suspensive effect, in the sense that it is a duty of the State to set the need for such a safeguard. To this, one must add the decision by the European Court of Justice in 1986 whereby it is recalled that, among the European Community's general principles, the right to effective legal protection is well defined, and that Community law requires an effective legal assessment of decisions adopted by national authorities made in application of provisions of European law.

From Sicily to Brussels: violation of the principles of Community law.

On the basis of what is stated by EU Directive 2005/85/EC:

"it is a fundamental principle of Community law that decisions concerning an asylum application and the withdrawal of refugee status be subject to an effective judicial remedy before a judge. The effectiveness of the remedy, also insofar as the examination of relevant elements is concerned, depends upon the administrative and judicial system of each member State considered as a whole."

According to art. 18 of the same Directive 2005/85/EC

"member States do not hold a person in custody for the sole reason that they are an asylum seeker. Whenever an asylum seeker held in custody, member States act in order to enable quick jurisdictional scrutiny".

The Directive also envisages the "right to an effective means to impugnate in case of denial of the asylum application or of one for humanitarian protection" and, in cases when it is declared "inadmissible", also for the purpose of setting precautionary measures.

A recent "European Parliament resolution" of 15 January 2009*, after having requested that member States adopt legislative instruments to allow the legal entry of migrants, "deplores" a growing panoply of border control measures that are at fault due to the lack of necessary mechanisms for identifying potential asylum seekers at Europe's borders, resulting in a violation of the non-refoulement principle, as it is written into the 1951 Convention on the status of refugees. The same European Parliament resolution calls on the "Council to clarify the respective roles of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) and the Member States with a view to ensuring that border checks are carried out in a manner consistent with respect for human rights; takes the view that there is an

---

[562] European Convention for the protection of human rights and fundamental freedoms

urgent need to amend FRONTEX's remit to incorporate rescue at sea; calls for democratic oversight by Parliament of the conclusion by FRONTEX of agreements with third countries", and is concerned "that the trend towards conducting border checks further and further away from the Union's geographical borders is making scrutiny of what happens very difficult when persons seeking refugee status and persons who need international protection come into contact with the authorities of a third country".

The resolution:
"points out that migrants who do not submit an application for asylum must also be received in specific, suitable facilities where they can be informed – with the aid of interpreters and specially trained cultural mediators – of their rights and the possibilities offered by the law of the host country, Community law and international agreements", specifying that it "asks for special attention to be given to unaccompanied minors and minors separated from their parents who arrive on EU territory via irregular immigration, and stresses the duty of the Member States to provide them with assistance and special protection; calls on all authorities –local, regional and national– and on the European institutions to put every effort into cooperating to protect these children from all forms of violence and exploitation, to ensure that a guardian is appointed without delay, to provide them with legal assistance, to endeavour to locate their families and to improve their reception conditions by providing appropriate accommodation, easier access to health services, and education, training, particularly in the official language of the host country, vocational training and complete integration into the education system".
In the same resolution, the European Parliament categorically forbids the administrative detention of minors, and "recalls that administrative detention of children should not exist and that children accompanied by their families should be detained only in truly exceptional circumstances, for the shortest time possible".

In the light of these principles, we will see how EU institutions will react to the large number of complaints submitted regarding the Italian government after the sharp change of purpose of the structures for immigrants in Lampedusa.

New detention and validation procedures adopted in Lampedusa.

Lampedusa's detention centres (both of them closed structures, hence of administrative detention) lack the requirements and documents that are needed to operate. As was the case in the Vulpitta centre in Trapani where six migrants lost their lives in 1999 due to a fire in one of the cells blocked off with large bolts and iron bars, also in Lampedusa, both the new reception centre in the base of Loran and the old reception centre in Contrada Imbriacola, now re-named CIE (centre for identification and expulsion), do not have the certifications and fire prevention system that are obligatory by law. In particular, it does not appear that there is any fire escape in the former NATO base of Loran, which, had it existed, may perhaps have prevented the injuries

suffered by two women in their fall from a window that they used to escape to safety from the flames.

It is rather peculiar that there is no way to access the text of the interior minister's decree which, in agreement with other competent ministries, establishes the transformation of the early reception centre of Lampedusa into a CIE, with a simple stroke of his pen, without any adaptations to comply with norms for the structures that are already overwhelmed by the high number of migrants. On the date of first refusal of entry measures affecting migrants detained in the Contrada Imbriacola centre, the decree that established the CIE had not yet been published in the Official Journal, although on 26 January 2009, the refusal of entry orders that were issued alongside orders decreeing detention, already considered the "Centre for identification and expulsion" to be in existence. If, prior to that date, the decree establishing the CIE were not to have been published in the Official Journal, all the detention measures issued after deferred refusal of entry that were adopted by the *questore* of Agrigento would be absolutely invalid. It is hence impossible to understand how the judges of the peace may have validated (presumably in the presence of an interpreter, in such a short time, according to media) hundreds of detention measures that were probably invalid. It is likewise hard to understand why none of the court-appointed defence lawyers who entered the Lampedusa CPA/CIE alongside the judges with a substantial police escort, raised any objections as to the lawfulness of those detention and refusal of entry measures which, moreover, were issued over thirty days after the migrants' entry into the national territory.

It is worth recalling that the future implementation of the EU Directive on returns, no. 115 of 2008, with the extension of the term for administrative detention to 18 months and the possibility of also expelling unaccompanied minors, could make the situation on the island even more explosive, particularly when the weather will improve and arrivals will intensify. The choice made by Maroni and confirmed by Berlusconi to block all migrants who arrived in Lampedusa in the new detention centre and the reception centre, after the extension of the terms for administrative detention, will render the situation of arrivals in Lampedusa impossible to manage. This will cause havoc in the framework of guarantees of fundamental rights that are recognised to date for migrants in any case, even if they are irregular, on the basis of art. 2 of the Unified Text on immigration, no. 286 of 1998, and of art. 3 of European Convention for the protection of human rights, which forbids inhuman and degrading treatment, also in Lampedusa, not just in Libya and Tunisia.

Note:

It is not difficult to imagine that the ideal solution for minister Maroni would be to turn Lampedusa into a prison-island for expellees, a separate place where (somewhat like what

happened to people who were interned in fascist times before their deportation to Germany) it may be possible to use no-nonsense manners with those who dare to set foot on European soil. But Maroni's dream seems destined to vanish, also thanks to a surprising mobilisation by the local population headed by the mayor. It is known that the reasons for this mobilisation are partly instrumental or for bargaining purposes, like those that arouse the interest of the countries of departure or transit of irregular migrations. Nevertheless, the population led by the mayor (not a left-wing one) shouted that it was not racist and that it was interested in the care of immigrants, and it has also honoured the migrants who died at sea. Moreover, many police officers do not fail to use modalities worthy of colonial troops, not only towards migrants who have dared to leave the detention centre. So, confusing a Lampedusan fisherman for a migrant (as the mayor himself declared – Sicilians often have dark skin ...), they chased him and struck him with truncheons, and stopped after a long while when the doubt arose as to whether they were dealing with "dirty clandestine who we must massacre" (as minister Maroni stated, "we must be nasty with them" … as if to say … so they learn not to come here among us … in short, the language of deep Padania [an area in northern Italy, and the imagined fatherland to which the *Lega Nord* aspires], where if one dares to approach a field or cottage of a *parvenu* they are shouted at: "if you come closer I'll kill you").

In any case, events in Lampedusa can be deemed emblematic of a European prohibitionism that turns into open war and, like all wars directed in accordance with the neo-conservative spirit –and even more so with a *leghista* spirit- do not have rules of conduct, and even abolish wartime laws; in short, there would be an intention to treat irregular migrants like those interned and tortured in Guantanamo or Abu Ghraib. We will see if Maroni and Berlusconi will be able to turn Lampedusa into a sort of European Guantanamo.

We feature part of the account of the visit of Senator P. Marcenaro to the CSPA and Loran Centor Base of Lampedusa, as a member of the Human Rights Commission (among the few privileged people who managed to enter it, because access is denied to NGOs that are not *embedded* and to lawyers alike - published by " Il Riformista", 14 February of 2009).

978 people, around four fifths of whom are Tunisinian, males, a large majority of them under 30 years old, largely detained since 26/27 December 2008 in a centre that was planned for holding 350 people. Detainees complain about both the scarcity of rations and their insufficient number. On the contrary, the director of the managing body - Lampedusa Accoglienza- argues that a hundred more rations than those that are strictly required are prepared. The queue to eat gives off an impression of disorder and anxiety. The meal is eaten in one's hands, while seated on the floor or on beds. One cannot speak of a proper refectory. In the dormitories, 25 or sometimes more people are crammed into a space of between 20 and 30 square meters. The atmosphere is sweaty and the air is foul. On the floor, there is all sorts of garbage, everywhere. How long has it been since anyone has done any sort of cleaning? There are bunk-beds, but also people who sleep on the floor. The impression is that of an inextricable human tangle ... the air is foul. In each room, there are two rows of bunk-beds: but maybe less than half the people stay there. Under the beds and in every other remaining space, foam rubber mattresses are inserted in some way or another. Some have simply put a blanket on the ground. Other mattresses occupy the external metal stairs, in the open air … a labyrinth of beddings on which people sometimes lie in the sickly air. There is a lack of light in the rooms. The ceiling lights are ripped out and electric wiring hangs dangerously from the roof. The phone-card telephones are literally uprooted from the walls… they are literally treated like animals... the rooms that are next to the toilets: water and urine seep through the walls and soak the sheets and blankets of those who sleep on that side. There is a stench of latrines that grips your throat, everywhere. With regards to personal hygiene, the director of Lampedusa Gestione [management] states that kits containing two underpants and one towel are distributed every three days; the detainees say that changes of underpants are every 10/15 days and show their bare feet, in

many cases without socks or shoes. Almost all of them ask to be allowed to shave and complain about not being allowed to do so. They show their long and dirty hair and beards. A boy who speaks perfect French and has certainly been through higher education, tells me that they would be willing to take turns to shave under the control of security staff without keeping the razors , of course, as they could become tools for acts of self-harm that many have already used and will use again hoping to arrive in this way where they cannot by other means. Those who applied for asylum are held with the others, without any distinction. Many claim that in 45 days of detention, they have neither received any information on their rights and duties, nor have they been able to use jurisdiction to appeal any measures that they consider unfair … none of the people he spoke to said that they have had the opportunity to meet a lawyer, neither a court-appointed one nor, obviously, one of their choice … there is no radio, television or any other type of recreational activity. The picture that emerges is one of decay in which any right is violated and in which the humanity of people is cancelled out.

One could also add that the only thing that detainees in Lampedusa lack are orange uniforms like those that "clandestines" in American centres for irregular migrants or the detainees in Guantanamo are made to wear.

As has been happening for years in many centres for people awaiting expulsion in several countries, and as was predictable, two days after the visit detailed above, there was a violent revolt; a fire blazed through all its structures. The police forces fired teargas canisters and entered in riot gear; there were 24 injured and who suffered burns among the migrants, police officers and firemen. The uprising broke out after the start of a hunger strike by some Tunisian detainees protesting against forced repatriation. Almost 20 Tunisian were reportedly arrested. The interior ministry moved all the detainees to other centres[563]. The island's mayor declared: "It is the government's fault, as it turned the centre into a lager. The migrants are exasperated … I know that teargas was fired and then a blaze broke out that was probably started by the third-country nationals. ... Thanks to the work carried out by the minister, we ran the risk of there being a slaughter among the migrants, the people working in the centre and among the population alike" ("La Sicilia", 18/2/09).

---

[563] The protest against transfer to Rome with a view to repatriation (F. Viviano, "la Repubblica" 18/2/09)

Practices of exclusion in international terrorism trials
Gabriella Petti
(Genoa Team)

The debate about the nature of global terrorism[564] is characterised by great confusion, in spite of several international conventions that have sought to identify a common definition on this matter[565]. The discussion within the United Nations is still open: the criteria of governments diverge with regards to the need to distinguish between terrorist acts and those committed by *freedom fighters*[566]. The overlapping between terrorism and enemy is one of the most recent consequences of the transformations that war has undergone over the last fifteen years[567]. Indeed, the *war against global terrorism*, has made the absence of a clear borderline between wartime and peacetime explicit – doing away with the distinction between "police and military"[568], between "enemy and criminal" and reducing war to "a mere policing operation against rogue states"[569]. If, as has been argued, war is a *social fact*, its transformations tend to reflect on the set-up of society and on the forms of associative life[570] and, hence, also of the institutions that are called upon to shape and interpret the norms laid down for the protection of the general public[571]. The aim of this talk, is the activity of the institutions that are responsible for interpreting the norms: the courts. Nonetheless, by way of introduction, it is necessary to briefly describe the strategies adopted within national states against global terrorism.[572] (Finally I'd suggest a short speech on Juvenile Justice and foreing minors.)

---

[564] It is preferable to talk of *terrorisms* that are expressed in different forms and within differentiated spatial and temporal contexts. See R. Pape, *Morire per vincere. La logica strategica del terrorismo islamico*, Bologna, Il Ponte, 2007.

[565] The conventions stipulated, already from the late 1970s, have been 13; the most recent is the one against nuclear terrorism, of 2005. Cfr. Cassese A., *Lineamenti di diritto internazionale penale*, Bologna, il Mulino, 2005.

[566] Think back to the positions of the Arab League and the Islamic Conference in the international Conventions of 1998 and 1999. Cfr. A. Cassese, *I diritti umani oggi*, Roma-Bari, Laterza, 2005.

[567] On the transformations of war in the age of global terrorism, see A. Dal Lago, "La guerra-mondo", in *Conflitti globali*, Milano, Shake Edizioni, no.1, 2005. In particular, on the prevalence of the meaning of *inimicus* over that of *hostis*, see R. Ciccarelli, "Guerra ai pirati del XXI secolo", in *Conflitti globali*, Milano, Xbook Edizioni, no. 4, 2006.

[568] On the affirmation of policing/military choices to the detriment of the negotiated and pacific management of conflicts and disorder, see S. Palidda, "Politiche della paura e declino dell'agire pubblico", in *Conflitti globali*, Milano, Xbook Edizioni, no. 5, 2007.

[569] J.- C. Paye, *La fine dello stato di diritto*, Rome, Manifesto libri, 2005, 35

[570] Cfr. A. Dal Lago cit, 11-16.

[571] R. Oliveri del Castillo, *Rule of law and terrorism: a challenge*, paper presented at the conference "The political and social impact of security policies", organised by the Italian team of the Challenge project, 14-16 June 2007, Genoa**.**

[572] What is being presented here, is a summary of the research on trials for international terrorism in Italy, carried out within the framework of the Challenge European project. The analysis focuses on the Italian case.

The offensive against international terrorism.

After 11 September, legislative reforms and operative praxes have spread across all western countries, under the banner of a war against a threat that is so elusive as to make the stiffening of control measures and the establishment of exceptional measures at all levels of the penal trial (from investigations to sentencing). Actually, the idea that the European strategy to counter the threat of terrorism, unlike those in the US and UK, has been arranged while keeping within the tracks of criminal law is rather widespread. The European Community's *Framework decision on the fight against terrorism* is limited to establishing that the attribution of a terrorist character to a crime does not depend on the act itself, but rather, to its connection with an action that is deemed terrorist by individual governments[573]. Overall, everywhere, there has been an adaptation and refining of repressive instruments that have already been experimented with in occasion of *other criminal emergencies* – from Mafia networks to internal terrorisms arising from different backgrounds[574].

The global strategy against terrorism has been accompanied and supported by a climate of fear that does not have anything natural about it *per se,* and which requires wide-ranging collusion between various social actors – in this regard, Robin talks of "coalitions of fear"[575]. Reading the contents of documentation produced by international bodies, it is possible to hypothesize the affirmation of a common understanding that is moulded thanks to the contribution of experts (law enforcement agencies, magistrates, public officials and analysts) from "administrative burocracies"[576] that tends to construct the profile of a terrorist based on that of an Arab-Muslim immigrant, identifying the latter as the quintessential object of contemporary fears.

In Italy, for example, the effort by the media, *opinion makers*, police officials, magistrates and political leaders has been so intense and continuous that it has been able to strongly influence public opinion; as demonstrated by numerous surveys, also in Italy, the "Islamist terrorist threat" tops the chart of the fears that [supposedly] torment Italians, and it remains a threat that is strongly felt[577]. After every attack, press reports regularly record the arrests of dangerous "terrorists" who are about to organise other attacks in Italy as well,

---

[573] Cfr. D. Hermant - D. Bigo, *Les politiques de lutte contre le terrorisme,* in F. Reinares (eds.), *European Democraticies against Terrorism. Governamental policies and intergovernmental cooperation,* Ashgate Publishing, Abington 2001.

[574] Cfr. P. Bonetti, Terrorismo, emergenza e costituzioni democratiche, Bologna, il Mulino, 2006.

[575] C.Robin, *Paura. La politica del dominio*, Milano, Università Bocconi editore, 2005, p. 179.

[576] The drafting of the text presented by the European Commission was almost entirely secured by a permanent committee (COROPER) composed by officials linked to the Council, and particularly by a working group from within the committee itself, cfr. J.C. Paye cit., 46.

[577] The most recent is the survey published by the *Financial Times* in the summer of 2007 that places Italians in second place in the table of populations that consider Muslims a threat for national security, due to their automatic association with terrorism. Cfr. The Financial Times, Britons 'more suspicious' of Muslims, By Daniel Dombey in London and Simon Kuper in Paris, Published: 19 August 2007. The article can be consulted at: www.ft.com.

and a large portion of the mass media ceaselessly feeds the panic about the "terrorism alarm". According to available official information, from 2001 until 2006, throughout Italy, 222 persons[578] have been arrested for terrorism – *Islamic* –, and around 32 have been expelled for the same reason[579]. An immediate consequence of the climate of moral panic was the exacerbation of the measures adopted after the first reforms of 2001 (through which the criminal offence of international terrorism was introduced[580]). The law on immigration issued in 2002 already adopted more repressive measures than its predecessor, precisely by appealing to the immigration/terrorism blend, but it was particularly with the law promulgated in 2005 (no. 155) that the most significant limitations of personal freedoms were introduced, and the concept of terrorism was extended so as to include activities carried out in times of war[581].

Overall, the norms introduced have moved so far away from constitutional principles that they lead one to fear the emergence of a *criminal justice for enemies*[582] that threatens to contaminate many sectors of the criminal justice system with a wartime rationale. Many, especially among legal theorists, now believe that the system of judicial guarantees that was laboriously achieved over the years by western governments has been one of the main victims of terrorism. The positions within this debate are rather varied[583], although they all agree about the fact that democracies must fight terrorism "with one hand tied behind their back", because this apparent element of weakness is the reason behind the resistance and success of democratic systems[584].

The emphasis placed on the need to remain strictly within the boundaries established by legal culture leads one to examine the judicial system more closely. I have the impression that the treatment reserved to many citizens of

---

[578] Cfr. "Rapporto sulla criminalità in Italia. Analisi, Prevenzione, Contrasto", ch. X, terrorismo ed eversione.
http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/sicurezza/0993_20_06 _2007_Rapporto_Sicurezza_2006.html.
[579] In reality, it is impossible to trace the exact number of people expelled due to suspicion of terrorism; this power has mainly been exercised when investigations have not had any results.
[580] With the conversion law (law 438/01) of leg. decree no. 374/2001, art. 270 bis of the penal code has been re-written to also include international terrorism. An independent offence (270 ter) had originally been envisaged.
[581] Law 155/05 introduces art. 270 sexies in the penal code, which details the definition of international terrorism.
[582] The theorist of "enemy's criminal law" is Günther Jakobs; see, "In quale misura i terroristi meritano di essere trattati come persone titolari di diritti?", in R.E. Kostoris– R.E. Orlansi, *Contrasto al terrorismo interno e internazionale*, Turin, Giappichelli, 2005.
[583] For a review of the different positions, see R.E. Kostoris– R.E. Orlansi, *cit.* and various authors, "Verso un diritto penale del nemico?", monographic issue of *Questione giustizia*, Milan, Franco Angeli, no. 4, 2006.
[584] This is a statement by the President of the Supreme Court of Israel, Ahron Barak, contained in the sentence dated 30.6.2004 (*The Supreme Court Sitting as the High Court of Justice : Beit Sourik Village Council v. 1) The Government of Israel; 2) Commander of the IDF Forces in the West Bank*). The extract has been cited in numerous essays and monographic studies published on the theme of terrorism.

Islamic faith cannot merely be traced back to the climate of moral panic that is constantly reproduced, or to the exceptionality of the measures adopted, but that rather, at least in Italy, it should also be interpreted in the light of the activity and organisational practices of the courts. Here, the Court should be understood as a *community*[585] in which some discourses, some forms of knowledge and some practices are established, or re-defined, that reproduce social portrayals concerning terrorism. In a sense, the court is a separate world: it does not constitute a different system, but it is a world which "shake the entire social world *in a particular way*"[586]. The trials essentially tell us something about terrorism that is seldom found in official discourse, and they specifically exhibit the way in which the concrete trial practices and activities, even in their minutiae, produce some effects and influence the legal definitions of terrorism[587]. In turn, - and this is the hypothesis from which this work sets out – terrorism allows a better understanding of the mechanism for the holding of the trials themselves, insofar as it represents a mirror image of the way in which the judicial system works, that is, more specifically, it makes it possible to understand how trials concerning terrorism do not refer primarily to a context of legal exceptionality, but rather, to the absolute normality of everyday trial proceedings and to their mechanisms to ensure efficiency.

The judicial struggle against international terrorism

By and large, investigations into international terrorism began in 1993. However, until September 2001, all the trials always ended with an acquittal or a modification of the charges[588]. These investigations concerned specific groups that move within the radical Islamic scene, but are clearly set apart from each other on the basis of nationality[589]. Instead, particularly after 2001, investigations have generically referred to Bin Laden or to the *Al Qaeda* organisation, to which the groups, or individuals, who previously acted autonomously are supposed to have become affiliated, sharing their purposes and goals. The most recent measures adopted to define a terrorist act,

---

[585] I am referring to the role of the community of reference in the construction of paradigms, analysed by T.S. Kuhn 1969.

[586] B. Latour, *La fabbrica del diritto. Etnografia del Consiglio di Stato*, Enna, Città aperta, 2007, 320.

[587] I am referring to symbolic interactionist research works on the administration or construction of justice. For an anthology of this style of research, cfr. P.P. Giglioli– A. Dal Lago, *Etnometodologia*, Bologna, il Mulino, 1983; S.Hester – P.Eglin, *Sociologia del crimine*, Lecce, Pieromanni, 1999. Cfr., also F.Quassoli, "Rappresentazioni di senso comune e pratiche organizzative degli operatori del diritto", in *Rassegna italiana di sociologia*, XXXX, no.1, 1999, 43-75.

[588]Consider the acquittal of the 40 suspected GIA members in November 2000 in Bologna, and the sentencing for the criminal offence envisaged by art. 416 of the penal code (*criminal association*) of Algerian FIS members, suspected of GIA membership, in Turin in 1999.

[589] The first groups that came under investigation were, in turn, composed by Algerians from the GIA, FIS and *Takfit w-al-Higra*, by Egyptians from *al-Jihad* and *al-Gamà al-Islamia* or by Moroccans from the *Moroccan Group for Combat*, or Tunisians from the *Salafist Group for Call and Combat.* Investigations have only recently involved Kurdish citizens, mainly linked to the *Ansar Al Islam* organisation.

essentially refer to the cause that is being pursued: *jihad*[590].

This progressive generalisation partly results from the fact that, from 2001 onwards, the theoretical model of reference has changed. The very first investigations opened into Islamic terrorism in Italy described *global terrorism* as an organisation that branches out extensively, with cells positioned in every country and ready to become active following an order issued by the central unit. In spite of the hypothesis of possible attacks and the divulgation of alarming information, the activity that was concretely described by investigators has always regarded logistical support for subversive activities. Subsequently, Italian experts adhered to the theory that Al Qaeda had converted into a *label* that applies a *franchising* policy[591]. In the Italian version of the *franchising* [theory]*, "Al Qaeda"* is considered a brand "for the promotion of the holy war". It supposedly functions as a terrorist network that stands out due to the strong sense of membership of its participants, who share a generic adhesion to "Islamic fundamentalism", but it would nonetheless be equipped with an "authentic sub-division of terrorist work on a territorial basis"[592].

In reality, it was the offence of terrorism itself that progressively lost its specificity. The raft of reforms adopted after 11 September (law 438/2001) offered the opportunity to expand the conducts liable to be inserted into the offence of terrorism and provided new grounds for the bringing of charges. However, the new wording was too generic to result in guilty sentences for specific offences. It was the trials themselves that suggested some modifications that are featured in the latest legislative measures (I am referring in particular to law 155/2005). The latter also introduce new charges of terrorist activity that may be brought, based on typical acts in the *modus operandi* of Italian cells, as highlighted by the investigations that were carried out: recruitment of terrorists, training and provision of instructions (including the use of videotapes)[593]. The category of "terrorism" is now so elastic as to allow a guilty verdict to be reached even for people who contravene legislation on immigration or the forging of documents, if such an activity falls within a programme that has "*terrorist aims*".

The latest modification to the offence of terrorism was implicitly introduced by a ruling of the Corte di Cassazione (Court of Cassation, Italy's

---

[590] According to investigators, it is understood as follows: "according to the interpretation of the Muslim faith that is that of the suspects, as a violent strategy for the affirmation of the pure principles of that religion and for the establishment of the 'single Caliphate'". This quote is drawn from the latest order for the application of precautionary custody issued on 29 October 2007.

[591] Cfr. O. Roy, "Al Qaeda: partito del male o etichetta per gruppi indipendenti?, in *le Monde diplomatique*, September 2004"; cfr., also R. Ciccarelli, "Intervista a Gilles Kepel", in *Conflitti globali*, Milano, Xbook Edizioni, no. 4, 2006.

[592] A. Spataro, *Il terrorismo islamico in Italia e nel mondo*, Report presented at the research meeting promoted by the Consiglio Superiore della Magistratura on the theme "Terrorism and Criminal Law", Rome, 29-31 March 2004.

[593] I am referring to arts. 270 quater and quinques of the penal code, introduced by law 155/2005.

highest appeal court) from 2006 (no. 1152), which further expanded the definition through an interpretation that combines the provisions envisaged by international legislation[594]. In this case as well, the trials have been a decisive factor. In fact, it was a matter of an adjustment by the [Court of] Cassation to the rulings of judges on the issue, and not the other way around, as is generally the case[595]. After it, all the proceedings for international terrorism have effectively limited themselves to establishing the length of a sentence, as the criminal association for terrorist purposes is almost always recognised. In order to understand the ridge along which the trials have moved, it is useful to refer to a specific context such as the Milan court, which is the most representative one at a national level due to the number of trials held there (20 of the 27 trials held from 2001 until December 2006).

Practices of an Italian court.

An analysis of the sentences and of the orders issued by the Milan court suggests that the introduction of the penal category of international terrorism does not mark a caesura (break)* in relation to the previous situation. Firstly, in fact, the conducts described in the charge sheets of trials prior to 2001 are very similar to those subject to judicial proceedings after the introduction of the offence of international terrorism. Moreover, in many cases before 2001, in order to render the position of defendants more serious, the aggravating circumstance envisaged for terrorism had already been used. Finally, the individuals involved in trials that began prior to the attack against the Twin Towers are often the same ones who appear in those that followed that event. A considerable portion of the investigations and trials started (and, by and large, completed) after 11 September, are basically a continuation of the previous season, often have the same kind of defendants[596] as their protagonists, and preserve the same places as the sites of criminal activity. In fact, when seeking out terrorists, the undifferentiated basin of Islamic fundamentalism is drawn upon, focussing on mosques and apprehending those who manage or frequent them.

The multiplication of trials concerning the same events is not a new phenomenon in the Italian justice system by any means. In its essential outline,

---

[594] The Court, *correcting* and *integrating* the previous decisions, observed that, for a general definition of terrorism, reference must be made principally to the UN Convention of 1999, particularly in order to evaluate acts committed in times of war; whereas the EU's Framework Decision of 2002, which contains a definition of terrorism based on the listing of a series of offences, is only applied to facts committed in peacetime. Cfr. L. Cerqua 2007, "La definizione di terrorismo internazionale alla luce delle fonti internazionali e della normativa interna", in *Giurisprudenza di merito*, no. 30, 2007, 801.

[595] In this regard, see L. Cerqua cit., 801.

[596] Among people working in the field or in newspapers, the trials are identified using the names of the operations to which they are related and are rather evocative: Sphynx, Al Mijairun, Bazar and Bazar bis, Revenge, Return, Calm winds, Re-birth…

it is reminiscent of what has been defined as "trial gigantism"[597]. In this regard, I am referring to the investigative and trial practices that have been used for internal terrorism and the Mafia. For a long time, these have been considered a product of emergency legislation, defined by Ferrajoli as falling "under an exceptional criminal justice system"[598]. Instead, they are currently part of the minimal resources available to magistrates[599]. It is precisely the persistence of this set of judicial and policing practices over the years that appears to identify a [degree of] continuity in the treatment of the issue of terrorism that, to a certain extent, does not allow the situation that has been created over the last few years to be described as "exceptionalism". Let us briefly explore some examples.

As in the past, we are witnessing trials that are marked – apart from the considerable number of defendants – by a lengthy preventive custody (which, in some cases, has been longer than three years). A resort that has been used to substantially increase the length of detention while respecting the law, has been that of including the aggravating circumstance of the use of weapons in the charge sheets. It must be noted that the weapons had never been found and that this aggravating circumstance was always ruled out when sentencing. However, this charge is systematically used by prosecuting magistrates. Another tactic that is often employed to "worsen the position of defendants in court proceedings at will, or to cover up gaps in the prosecution's cases, or to indefinitely prolong preventive imprisonment"[600], is that of issuing repeated or successive arrest warrants on the basis of the same events. For example, if someone is accused of criminal association for the purpose of drug trafficking, one may be, according to this logic, arrested and tried for every single transaction made during the period in which that activity was carried out. In fact, the arrests often target names that are already well known, so much so that many precautionary custody orders are issued to people who are already in prison (one defendant managed to collect 5 overlapping precautionary measures). These are techniques that are normally employed to circumvent the problem of the expiry of maximum time limits for preventive imprisonment.

To this, one must add that these are proceedings comprising thousands of pages of documents, in which the activity of the defence is practically precluded, especially if the defendant cannot have access to legal aid. The outcome of the first trials was strongly influenced by the defence counsel's

---

[597] For example, for Islamic terrorism, the best-known investigations are *Al Mujairun* and *Bazar, Bazar bis,* that have been divided into various branches. This style is reminiscent of the investigations Moro-uno, Moro-bis, Moro-ter, Moro-quater, Rosso-uno, Rosso-due, cfr. M. Ramat, "il maxi processo", in *Questioni giustizia*, Milan, Franco Angeli, no.2, 1985.

[598] See L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale,* Rome-Bari, Laterza, 1989, 844-888.

[599] This is what is claimed by the protagonists of investigations into terrorism (before and after 11 September 2001); cfr. S. Dambruoso, *Terrorismo per franchising*, in "Aspenia", 2004, 24, 32-33 and A. Spataro, *Terrorismo e crimine transnazionale: aspetti giuridici e premesse socio organizzative del fenomeno*, in www.csm.it, 2007.

[600] L. Ferrajoli cit., 861.

choices, that were aimed at reaching quick and inexpensive solutions (mostly resolved through plea bargaining or fast-track proceedings), due to the difficulty lawyers would face to recover the money spent. The sentences issued on these occasions have sometimes been the basis for later guilty verdicts. Only very rarely has it been possible to appoint expert advisors acting for the defence or to carry out investigations on behalf of the defence. The game has largely been played out on the field of the evidence submitted by the prosecution. On the other hand, when the case has involved hearings, there has been a risk of not being able to access material that was favourable for one's client, not produced by the ministry, but included among the trial papers.

The mechanisms described have very little to do with exceptional procedures, and a lot more in common with the ordinary activity of courts. In a certain sense, the court is a separate world, an "autonomous province of meaning" in which members share a lot more between them than with the outside world. This community includes all those who regularly appear there, including the press and even lawyers who are often closer to the models of the court than to the requirements of their clients. From this perspective, the categories of criminal law and procedural rules do not constitute mechanisms to ascertain and define an offence, but rather, they work like the apparatus of a discourse through which people such as judges, prosecuting magistrates, police officers and lawyers, and the very journalists who operate within the court, organise the exchanges, conflicts, alliances and relationships that bring them together on a daily basis. Thus, the latter act as operators through which the forms of membership that are negotiated day after day by that community are developed.

An ordinary judicial racism

Among the peculiarities of trials into Islamic terrorism, however, a degree of "lack of seriousness" can be perceived with regards to the use of interpreters and an excess in resorting to clichés such as those that indiscriminately link international terrorism to individuals who have Arab origins and Muslim faith, alongside an absolute lack of interest for the structure, opinions and political motives of the organisations that come under investigation. Insofar as the first aspect is concerned, it must be noted that the list of interpreters is the same one for the public prosecutor's office and for judges. In reality, it is the prosecutor's office that to recommends a list of reliable interpreters that is not always based on their cultural and linguistic competence. In fact, it is rare for interceptions to be dealt with* by interpreters who are of the same nationality as defendants, on the basis of the assumption that, in any case, *they all speak the same Arabic*. It has rarely been the case that interpreters had specific competence about the Koran and on the possible nuances of terms whose origins are religious, resulting in the fact that

translations are inaccurate and are sometimes contradicted by experts' assessments.

The same degree of inaccuracy concerns the knowledge, or rather interest, for the different "terrorist" groups, for their political goals and their *modus operandi*. At the time of internal terrorism, the differences between the methods and organisational structures of the Red Brigades, Gap or Lotta Continua were generally recognised, and no one would have placed Moretti or Fioravanti on the same political side. Today, there is a lack of such knowledge, and there is confusion regarding the different groups, all of which are placed under the same roof, that of *Jihad*[601]. In a certain sense, it may be argued that it is a judicial variant of racism: while national subversive groups were acknowledged as having an autonomous and recognisable ability to develop their political and ideological discourse, in the case of Islamic terrorists, this ability is denied and dissolves to become part of their barbarian character (in their hostility).

To conclude, I feel that it is precisely the formal equity of trials that allows the results described above without the threat posed by stunts, discretional or exceptional procedures that may jam the entire mechanism, de-legitimising the role played by the justice system itself. Indeed, a more effective result may be attained by simply reproducing, within the ritualism of the explicit or implicit procedures of the courts, that set of social prejudices that may be summarised as *state racism*, which, in the case of the "Islamic terrorist", is applied in a *hyperbolic* sense, because it "presumes his *a priori* exclusion from mankind"[602]. One of the acquittals clarifies this mechanism well. On the one hand, it states that:

Nor can a different treatment in trial for certain categories of defendants be considered. The well-known opinion of G_nther Jakobs, who has argued, recently as well, that *terrorists do not have rights*, can certainly not be followed, because it clearly contravenes the trial system that has been outlined by the Italian legislator and, even prior to this, that traced by the European Convention on human rights.

On the other hand, the same judge, despite acquitting the defendants entirely, makes it understood, between the lines, that they are potentially dangerous as a result of their proximity to fundamentalist *milieux*. According to the defendants' lawyer, in fact, there is a passage included in the sentence[603] that

---

[601] For an anthology of terrorisms, present and past, among the many publications, cfr., for example, D. Della Porta (cured by), *Terrorismi in Italia*, Il Mulino, Bologna 1984; A. Giannuli, Storie di intrighi e di processi: dalla strage di Piazza Fontana al caso Sofri, Rome, Edizioni associate, 1991; G. De Lutiis (cured by), La strage: l'atto d'accusa dei giudici di Bologna, Rome, Editori riuniti, 1986.

[602] A. Dal Lago cit., 30.

[603] The extract is: "At most, one can talk of a mere agreement between people (…) who display a clear adherence to a fundamentalist Islamic ideology; who maintain contacts with people operating abroad within organisations that are responsible for violent actions, documented by video-tapes found in their possession; who have propaganda material available to them in which the struggle against *infidels* is exalted and the violent and criminal actions of the *kamikaze* are extolled. But all of this is not sufficient,

nonetheless compromises the situation of those he is representing, because it makes them liable to be expelled for public order reasons:

with that piece of sentence, I will never have confirmation of the suspension [604]. Because they will say: 'it is true that he is not a terrorist, but he is dangerous, even the sentence says so'. By writing, in a sentence of acquittal, 'The fact that they were nonetheless connected to subjects involved in international terrorism does not mean that …' is a way of squaring the circle.

Expulsion would entail returning to a country where one of the defendants has been subjected to torture, according to what emerged from telephone interceptions produced in the trial papers.

The court is basically the place where the internal enemies of a society are constantly reproduced, alongside the (social) legitimation to reproduce them. The excessive visibility that the justice and policing systems reserve to these individuals (considering arrests and the respect for procedural guarantees) is accompanied by social invisibility. In essence, it is the opposite of the "attention" that Sayad defines as "the double punishment of migrants"[605]. It suffices to consider that, in spite of the United States government's attempts to keep the cases of detained people secret, thanks to efforts by numerous associations, the justice department has been obliged to declare the names of the detainees, and several publications now exist that document their vicissitudes[606]. There is little news about the people involved in investigations for terrorist activities in Italy, and it is very difficult to find out about the impact that this experience has had on their lives and families. However, most of all, there are very few people interested in finding out this news.

---

from a strictly legal perspective and in view of a rigorous evaluation of the summary of the evidence, to comprise the crime of association that is alleged".

[604] The lawyer is talking of the possibility of suspending the execution of the expulsion. His clients are subject to an expulsion order that was blocked by the European Court on Human Rights, while awaiting the grounds for the sentence.

[605] A. Sayad, "La doppia pena del migrante. Riflessioni sul pensiero di Stato", in *aut-aut*, Florence, La Nuova Italia, 1996.

[606] The most recent one is A. Worthington, *The Guantanamo files. Stories of the 774 Detainees in American's Illegal Prison*, London, Pluto Press, 2007.

Camps for Foreigners in Europe and Mediterranean Countries

Map labels

RUSSIA · FINLAND · NORWAY · SWEDEN · ESTONIA · LATVIA · LITHUANIA · RUSSIA · BYELORUSSIA · UKRAINE · POLAND · GERMANY · DENMARK · UNITED KINGDOM · IRELAND · NETHERLANDS · CZECH R. · SLOVAKIA · AUSTRIA · HUNGARY · SLOVENIA · CROATIA · SWITZERLAND · FRANCE · ITALY · SPAIN · PORTUGAL · B.H. · SERBIA MONTENEGRO · RUMANIA · MOLDAVIA · BULGARIA · GREECE · MALTA · TURKEY · CYPRUS · LEBANON · SYRIA · ISRAEL · JORDAN · IRAQ · EGYPT · LIBYA · ALGERIA · TUNISIA · MOROCCO · MAURITANIA · MALI · NIGER

North Sea · Baltic Sea · Channel · Atlantic Ocean · Mediterranean Sea · Black Sea

Ankara · Istanbul · Izmir · Van · Beyrouth · Tripoli · Algiers · Tunis · Tamanrasset · Tanger · Rabat · Fès · Casablanca

Ireland — Dublin

© Migreurop 2004

Migreurop
From European Migration and Asylum Policies to Camps for Foreigners

Though internment camps have very diverse features (see map), they also have certain common characteristics. The first one is their occupants: citizens of none-European countries who have committed no offence other than crossing or trying to cross a border without papers. A second characteristic is that "illegal migrants" are considered and managed as a group, instead of being treated as individuals with a personal history. Thirdly, it seems impossible to ensure the respect of fundamental rights in these places. There is no freedom of movement. Basic rights: to asylum, to family life and private life, as well as minors' rights are not guaranteed, while inhumane and degrading treatment is often perpetrated.

The internment of foreigners in Europe is not aimed (primarily) at punishing them. Instead its goal is to demonstrate to the receiving state's population that migrants, who must be controlled, are efficiently managed. It is a kind of tacit contract between State and society, through which the State guarantees the security of its citizens. This is the legitimization of camps. Internment is part of a series of measures that are referred to as "common migration and asylum policies" and aim at subcontracting the control of entry into the European Union to the states at the outer borders of Europe.

Nowadays, border controls and the fight against illegal immigration are central to European immigration and asylum policies. Before September 11th 2001, the question of immigration was treated on the same level as criminality and drug trafficking. Today it is clearly associated with the terrorist threat. More and more, the migrant is depicted as the enemy, and "war" vocabulary is often used to describe the situation and to act against it: military equipment for controls at sea, high technology, walls and barriers, camps and collective expulsions. In this climate which is constantly maintained, internment of foreigners is a logical response that is also applied to asylum seekers.

With such a policy, the European Union chooses to protect itself from asylum seekers instead of protecting them. Therefore, the new European standards based upon the "bogus asylum seekers" notion, make access to asylum procedures even more difficult and contribute to lower the level of protection. Detention of asylum seekers appears as an appropriate answer to the "threat" of the increasing number of asylum seekers.

European proposals increasingly mention the possibility of detaining asylum seekers in camps located outside the European Union. This "externalisation" or "subcontracting" applies not only to asylum but also to the protection of borders. The aim is to make them more and more impenetrable, pushing them beyond their physical materialisation. "Externalisation" is not only based upon visa policy, a key instrument of "remote control" policing. "Externalisation" is also central to the relations between the European Union and third countries, forcing the latter to cooperate in the fight against illegal immigration. Morocco is a good example of this policy. The European Union finances the control of Moroccan borders in order to fight illegal immigration to Europe. It is a way of transforming this country into a "European border watchdog".

Whatever the functions of the camps — containing the influx of migrants coming to Europe, organising the deportation of illegall migrants or detaining asylum seekers — camps are a part of the mechanism to exclude those designated by the European Union as a "risk" or as an "enemy".

They are the materialization of a security approach to migration, to the detriment of the fundamental right of free movement.

Methodological Note

The camps are classified as follows:

Blue – for people awaiting permission to enter the territory, primarily those wishing to apply for asylum (asylum seekers) or immigrants refused entry and waiting for an examination of their situation. After this examination, the person held may be admitted to the territory or rejected and returned to the port/border.

Orange – for people who have been arrested in an illegale situation on the territory of a state and are awaiting deportation.

Red – most of these places are used to detain both types of people, and may also serve as identification/screening centres.

We have also included certain exceptions: e.g the open camps in Ceuta and Melilla where freedom of movement is primarily subject to administrative constraints. These open camps symbolise the externalisation of borders.

In some cases, we have also included certain national particularities: e.g in Germany and Ireland, prisons are often used for detaining migrants.

In other cases, some of the camps shown on the map are places where migrants gather informally without being directly placed under the control of the authorities:

– To the South of the Mediterranean: migrants waiting for and organising their passage to Europe.

– In European countries such as France or Italy: an old train station in Rome (where migrants are awaiting admission), Calais in France (where foreigners wait to cross the Channel to reach the United Kingdom).

Migreurop's Definition of Camps

The first image which the term of "camp" evokes is that of a closed place, geographically identified, and reserved for confinement of undesirable people. Today in Europe, the camps range from prisons, as in Germany and Ireland, to detention centres in the Greek islands which were not planned and are built in make-shift buildings. There are also high risks of shipwrecks and capsizing of boats transporting migrants across the Adriatic, from Italian "Centri di permanenza temporanea e assistenza" to French "zones d'attente/waiting zones" and "centres de rétention" from closed centres for asylum seekers in Belgium, to buffer camps which mark the real frontier of the European Union: Morocco, Spain (Ceuta, Melilla, Canary islands), Algeria, Ukraine, Malta, or Lampedusa...

But to stick to this definition of the camps would mask an important part of the reality. The diversity of administrative procedures and various technical and humanitarian constraints aimed at regrouping the migrants go beyond the reference to confinement and lead us to consider the camps as places used to keep the foreigners at a distance. The forms that this can take are variable and sometimes very different from camps with barbed wire.

It then becomes clear that certain "open" centres of reception, transit or lodging provide assistance and a roof for migrants, but it hides the fact that the occupants of these open centres, migrants and asylum seekers have no other choice, but to be there. This is the case in Germany and Belgium where payment of a survival allowance and examination of asylum applications are conditioned by an obligation to reside in a fixed place.

Is not the forced dispersion of exiles, organised in some countries to avoid the creation of new "focal points" for grievances, the symbol of the multiform character of the exclusion of foreigners? Can we not compare to an informal "compulsory residence order" the obligation, for foreigners, not to be where they are considered to be trouble? Because police harassment and this obligation to stay invisible obviously act as prison bars and trace the boundaries of a place to which foreigners are confined. Thus, the camps become a process, a symbol of forced wandering and endless movement of exiles that European societies refuse to welcome.

The expression "Europe of camps", taken in its wider sense, appears to best suit the relegation systems Europe uses in place of migration policies.

Criminalisation and Victimization
of Migrants in Europe

Immigrants are already guilty merely due to their presence on the social scene... every trial of a delinquent immigrant is a trial against immigration.

Sayad

The persecution of the enemy of the moment is a total political event: it ensures consensus and business, it is the crime deal of the late 20th and early 21st century.

In Europe and the United States alike, prohibitionist practices, protectionism and an unfailingly racist authoritarianism foster a war against foreigners, gypsies and marginalised autochthonous people while, most importantly, they cause a boom in the business of criminalisation. Thirty years on from the start of the "neo-conservative revolution", the crime deal is spreading at an ever-increasing speed, with consequences that are yet to be established: it appears that discourses and practices are imposing themselves which are reminiscent of those enacted with regards to colonised peoples and workers who sought to emancipate themselves in the 19th and 20th centuries. Apart from providing a rigorous critical analysis of statistics, these texts offer a reading of the exasperation of fears, insecurity and zero tolerance against the enemy of the moment as an extraordinary resource for neo-liberalist power.

This volume brings together essays by important European researchers who participate in the CRIMPREV excellence network (Assessing Deviance, Crime and Prevention in Europe).

Contributions by: Marcelo F. Aebi, Hans Jorge Albrecht, Edo Bazzaco, Mary Bosworth, José Ángel Brandariz García, Alessandro De Giorgi, Nathalie Delgrande, Cristina Fernández Bessa, Mhairi Guild, Bernard Harcourt, János Ladanyi, Yasha Maccanico, Marcello Maneri, Laurent Mucchielli, Sophie Nevanen, Salvatore Palidda, Gabriella Petti, Federico Rahola, Nando Sigona, Jérôme Valluy, Fulvio Vassallo Paleologo.