IMMIGRATION, PERSONAL LIBERTY, FUNDAMENTAL RIGHTS

edited by
MARIA GRAZIA COPPETTA

with the assistance of
LORENZO BERNARDINI

Wolters Kluwer

CEDAM

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DETAINED, CRIMINALISED AND THEN (PERHAPS) RETURNED: THE FUTURE OF ADMINISTRATIVE DETENTION IN EU LAW

Lorenzo Bernardini

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1. Deprivation of liberty and EU governance of immigration flows.

The use of normative techniques for the orderly management of migratory flows, aimed at depriving a foreigner who arrives (or is already present) on the territory of an EU Member State of his/her personal liberty, is by now rooted in national legal systems and practices. [1]

According to the most sensitive scholars, a number of factors have led to the establishment of a semblance of 'legal normality' [2] for this legal instrument, labelled '*trattenimento*' in Italian law, or *rétention* in French law 'under the clear sign of ambiguity'. [3]

Firstly, it is provided for States at the domestic level in almost all EU Member States. It is also regulated by EU legislation. Finally, it has been codified *expressis verbis* in Article 5 of the European Convention

[1] This was noted recently by I. Majcher-M. Flynn-M. Grange, *Immigration Detention in the European Union. In the Shadow of the "Crisis"*, Springer, 2020, p. 453.

[2] R. Cherchi, *Il trattenimento dello straniero nei centri di identificazione e di espulsione: le norme vigenti, i motivi di illegittimità costituzionale e le proposte di riforma*, in *Quest. giust.*, 2014(3), p. 50 ff.

[3] R. Romboli, *Sulla legittimità costituzionale dell'accompagnamento coattivo alla frontiera e del trattenimento dello straniero presso i Centri di permanenza e Assistenza*, in R. Bin-G. Brunelli-A. Pugiotto-P. Veronesi (Eds.), *Stranieri tra i diritti. Trattenimento, accompagnamento coattivo, riserva di giurisdizione*, Giappichelli, 2001, p. 11.

on Human Rights (ECHR).[4] The practice implemented by the EU Member States seems indeed to support the idea of "normalizing" administrative detention, as a measure of absolute 'administrative banality',[5] teleologically oriented towards the securitarian control of borders.[6]

Irrespective of whether the foreigner is the subject of an expulsion order, or holds the status of "applicant for international protection", that alien may be deprived of his/her liberty, on the basis of an order issued by the administrative authority—usually the public security authority[7]—, alternatively: (a) for the purpose of return ("pre-removal detention" or "detention for the purpose of return");[8] (b) to allow asylum procedures to be carried out properly (namely, "asylum detention");[9] (c) finally, to allow the applicant to be transferred to the State competent to examine his or her application for international protection ("detention for the purpose of transfer").[10] A diachronic analysis of the three systems is useful in

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[4] L. BERNARDINI, *La detenzione amministrativa degli stranieri, tra "restrizione" e "privazione" di libertà: la CEDU alla ricerca di* Godot?, in *Dir. imm. citt.*, 2022(1), p. 75-78.

[5] G. CAMPESI, *La detenzione amministrativa degli stranieri. Storia, diritto, politica,* Carocci, 2013, p. 38.

[6] An objective that, to be fair, the available data shows is not being achieved at all (see the infographic elaborated by M. DÍAZ CREGO- E. CLARÓS, *Data on returns of irregular migrants*, in *www.europarl.europa.eu*, March 2021). Notably, migration policies based on administrative detention were described as being 'unjust and ineffective' (F. VASSALLO PALEOLOGO, *Detention* Centres*: An Unjust and Ineffective Policy*, in *European Social Watch Report*, 2009, p. 23-26, available at the following URL: *https://www.socialwatch.org/sites/default/files/ESW2009_asgi_eng.pdf*).

[7] In the Italian legal framework, for example, the competent authority is the *Questura* (lit., the police headquarters) of the Province in which the migrant is currently located (see Article 14(1) TUI). Similarly, in France, it is the *préfet de département*, an administrative authority whose tasks include maintaining public order and coordinating the police and the *Gendarmerie* (see Article R741-1, *Code de l'entrée et du séjour des étrangers et du droit d'asile* [CESEDA]).

[8] See Article 15 Directive 2008/115/EU of the European Parliament and of the Council of 16 December 2008 *on common standards and procedures in Member States for returning illegally staying third-country nationals* [OJ L 348, 24.12.2008, p. 98-107] (the so-called 'Return Directive').

[9] See Article 8 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 *laying down standards for the reception of applicants for international protection (recast)* [OJ L 180, 29.6.2013, p. 96-116] (the so-called 'Reception Directive').

[10] See Article 18 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* [OJ L 180, 29.6.2013, p. 31-59] (the so-called 'Dublin III Regulation').

order to highlight the shortcomings of the approach advocated by the EU legislator, and in particular to emphasise the criticality of the rules on detention for the purpose of return.

In a nutshell, the individual to be returned may be detained—for a maximum period not exceeding eighteen months [11]—in order to prevent him/her from absconding or if he/she hinders or thwarts the smooth course of the return procedure, [12] in compliance with the principles of necessity and proportionality. [13] Although, from a strictly literal point of view, [14] it appears to be an 'open' list—that is, one that can be extended by the Member States [15]—, it is considered more correct to take the view, indirectly endorsed by the Court of Justice of the European Union (CJEU), [16] that it is a *numerus clausus*. Given the exceptional nature of the deprivation of personal liberty suffered by the alien, this conclusion is necessary. [17] Nevertheless, the risk inherent in the elusive definition of "risk of absconding" has led some scholars to believe that the Directive lacks

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[11] Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, ECLI:EU:C:2009:741, para. 37.

[12] The grounds are set out in Article 15(1)(a) and (b), Directive 2008/115/EC.

[13] In Directive 2008/115/EC, see Recital 13 (concerning "coercive measures" *lato sensu*), Recital 16 (specifically concerning 'detention'), Article 8(1) ('Member States shall take all *necessary* measures to enforce the return decision') and Article 8(4) ('Where Member States use – as a last resort – coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force'). It is worth mentioning Article 15(1) of Directive 2008/115/EC, according to which, on the one hand, detention may only be used if in the specific case other sufficient but less coercive measures cannot 'be applied effectively' and, on the other hand, the deprivation of liberty 'shall be for as short a period as possible' and shall be 'only maintained as long as removal arrangements are in progress and executed with due diligence'. Finally, it must be taken into account that '[w]here there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted' (Recital 10 of Directive 2008/115/EU). In other words, the granting of a period for voluntary departure is regarded—at least formally— as the ordinary procedure within the system of the directive (see also Art. 7(1), Directive 2008/115/EC).

[14] In the English version, Article 15(1) reads as follows: 'Member States may only keep in detention a third-country nationals [...] in particular when [...]'.

[15] G. CAMPESI, *supra* note 5, p. 104, proposes this reading, based on the wording of Article 15 of the directive.

[16] Case C-146/14 PPU, *Bashir Mohamed Ali Mahdi*, ECLI:EU:C:2014:1320, para. 61, where the Court held that '[t]he second requirement under Article 15(4) of Directive 2008/115 entails re-examining the substantive conditions set out in Article 15(1) of the directive which have formed the basis for the initial decision to detain the third-country national concerned'. Thus, there does not seem to be any room for elaborating further grounds for detention, beyond those already codified in Article 15 of the Directive.

[17] Detention 'may be decided upon only if there is a risk of absconding or the

precise guarantees that could prevent Member States from 'systematically' detaining third-country nationals. [18]

Differently, in order to impose an administrative detention measure against the applicant for international protection, the EU legislator proved to be more deferential towards the Member States, by drafting Directive 2013/33/EU which '*apparaît particulièrement ouverte au principe de la retention*'. [19] Among the grounds for detention, it is worth mentioning: (i) the need for the authorities to decide on the foreigner's right to enter the territory and (ii) grounds of 'national security or public order'. [20] Circumstances which, at first sight, seem to extend the applicability of the detention measure to almost all possible situations in which the applicant may find himself. [21] The absence of any maximum period of detention, unlike that provided for irregular migrants, has also been described as 'indefensible' [22] by the most sensitive scholars, who have stressed its inconsistency with regard to the serious infringement of the personal liberty of the foreigner.

Finally, should another Member State be responsible for taking a decision on the application for international protection, in accordance with the criteria set out in the Dublin III Regulation, [23] the applicant concerned may only be detained if his or her behaviour depicts a 'significant risk of absconding'. [24] In this case, detention may not last longer than three months, a time limit derived from the temporal segments granted to States for the completion of transfer procedures. [25]

On the basis of such a threefold system, a third-country national

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third-country national concerned avoids or hampers the preparation of return or the removal process', according to the View of Advocate General Szpunar delivered on 14th May 2014, in Case C-146/14 PPU, *Mahdi*, ECLI:EU:C:2014:1936, para. 47.

[18] M.G. MANIERI-M. LEVOY, *PICUM Position Paper on EU Return Directive,* in *PICUM (web*), 2015, p. 15, available at the following URL: *www.picum.org/Documents/Publi/2015/ReturnDirective_EN.pdf.*

[19] C. BOITEUX-PICHERAL, *L'equation libertè, securitè, justice au prisme de la retention des demandeurs d'asile*, in V. BEAUGRAND-D. MAS-M. VIEUX (Eds.), *Sa Justice. L'espace de Liberté, de Sécurité et de Justice.* Liber Amicorum *en hommage à Yves Bot*, Bruylant, 2022, p. 611.

[20] Article 8(1)(e), Directive 2013/33/EU.

[21] R. PALLADINO, *La detenzione dei migranti. Regime europeo, competenze statali, diritti umani*, Editoriale Scientifica, 2018, p. 265.

[22] S. PEERS, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law*, Oxford University Press, 2016, p. 313.

[23] See Chapter III of the Dublin III Regulation.

[24] Article 28(2), Regulation (EU) No 604/2013.

[25] See Article 28(3) in conjunction with Article 27(3), Regulation (EU) No 604/2013. If the time-limits are not met, the applicant to be transferred must be released immediately (Article 28(3), Regulation (EU) No 604/2013).

who comes into contact with the border authorities of a Member State may therefore be deprived of his/her personal liberty not only because of his/her irregular status (for example, because he/she does not have an entry permit) but also because he/she is not in that situation, for example, because the latter has expressed the intention to apply for international protection.

In other words, EU law formally discerns the positions of foreigners, between a status of "irregularity" (those to be returned) [26] and a status of "legality" (applicants for international protection). [27] Nevertheless, as we have seen, this distinction is almost irrelevant from the point of view of the *favor libertatis*, [28] since both groups of third-country nationals are subject to administrative detention [29] and the only real, significant difference lies in the procedure in which foreigners are currently involved (one for the return, the other for the international protection).

Yet, a legal paradox, which has been underlined in various occasions, can be seen in this way – if, on the one hand, the status of irregular migrant, despite all its criticisms, could *in abstracto* justify the imposition of measures (including detention) by national authorities for the purpose of return, on the other hand, it is

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[26] The Return Directive applies to 'third-country nationals staying illegally on the territory of a Member State' (Article 2(1)). The latter circumstance occurs when the person 'does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State'.

[27] See Recital 9 of Directive 2008/115/EC, according to which 'a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force'. See also, Article 7(1), Directive 2013/33/EU, according to which 'applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State'. In this regard, the CJEU has acknowledged that the asylum seeker 'has the right to remain in the territory of the Member State concerned at least until his application has been rejected at first instance, and cannot therefore be considered to be "illegally staying" within the meaning of Directive 2008/115, which relates to his removal from that territory' (Case C-534/11, *Mehmet Arslan v. Policie CR, Krajské reditelství policie Ústeckého kraje, odbor cizinecké policie*, ECLI:EU:C:2013:343, para. 48) (hereinafter *Arslan*).

[28] With reference to the foreigner to be returned, and in light of the broadness of Article 15(1) Directive 2008/115/EC, legal scholars have already warned of the dangers of a '*recours généralisé*' to the '*privation administrative de liberté*' (see K. Parrot-C. Santulli, *La «directive retour», l'Union européenne contre les étrangers*, in *Rev. crit. dr. int. priv.*, 2009(98/2), p. 226 ff.).

[29] It is noteworthy that the possibility of detaining asylum seekers is considered to be the most problematic part of Directive 2013/33/EU (see S. Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts,* Springer, 2014, p. 65).

questionable whether the *same paradigm* of deprivation of liberty can also be applied to an individual who is *regularly* staying on the territory. [30]

Although based on different axiological assumptions, the same outcome—i.e. the possibility of detaining both irregular migrants and asylum seekers—was reached by the European Court of Human Rights ('ECtHR') in the well-known *Saadi v. United Kingdom* judgment: as long as States do not expressly authorise a foreigner to enter their territory, he/she remains 'unauthorized' and therefore subject to detention measures under Article 5(1)(f) ECHR. [31] Indeed, there is no longer any distinction between irregular migrants and applicants. As the ECHR provision allows for migrants' detention in order to prevent their 'unauthorized' entry, *Saadi* provided States Parties with a *chèque en blanc* to manage migration flows through a detention-based approach that also includes applicants for international protection. [32]

However, it could be argued that, by exercising a right stemming from the 1951 Geneva Convention, [33] applicants for international protection should not be considered 'irregular' in the territory of a State where they are physically present. Conversely, they should be considered 'temporarily, conditionally authorised entrants' [34] and not,

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[30] The practice seems to legitimise the use of detention in further, and much broader, situations: the applicant (not the irregular immigrant!) can be deprived of his liberty 'when protection of national security or public order so requires' (Article 8(3)(e), Directive 2013/33/EU). Moreover, it should be noted that the CJEU has attempted to narrow down the meaning of such—very broad—concepts, following a fundamental rights-based perspective. See Case C-601/15 PPU, *J.N. v. Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2016:84.

[31] *Saadi v. the United Kingdom*, App. no. 13229/03 (ECtHR, 29th January 2008) [GC], para. 65. For an overview of the ECtHR's case-law on administrative detention, see, *inter alia*, M. PICHOU, *"Crimmigration" and Human Rights: Immigration Detention at the European Court of Human Rights*, in V. FRANSSEN-C. HARDING (Eds.), *Criminal and Quasi-criminal Enforcement Mechanisms in Europe*, Hart Publishing, 2022, p. 251–270.

[32] According to the ECtHR, the mere fact that an asylum application is pending does not *per se* preclude the detention of the applicant under Article 5(1)(f) ECHR ('with a view to deportation') since the possible rejection of such an application could ultimately lead to the issuance of a return order. In this regard, see, *Nabil and Others v. Hungary*, App. no. 62116/12 (ECtHR, 22nd September 2015), para. 38.

[33] F. RESCIGNO, *Il diritto di asilo,* Carocci, 2011, p. 74, points out that 'although no obligation to admit refugees to its territory derives from the Convention, once they are materially in one of the Member States, a series of obligations are incumbent on it', including that of 'allowing access to the procedure for the recognition of status'.

[34] The citation is of C. COSTELLO, *Immigration Detention. The Grounds Beneath Our Feet*, in *Current Legal Problems*, 2015(68/1), p. 172 f., who also underlines the relevance of the principle of *non-refoulement* in arguing for the genuinely legal

in principle, subject to asylum detention.[35] Nevertheless, their subjection to an administrative detention regime, pending their application, has never been questioned even at the international level.[36]

As this brief *excursus* on administrative detention in Europe has shown, the exercise of 'State prerogatives of immigration control'[37] is a crucial factor which guides Member States' migration policies, which accordingly justifies the implementation of deprivation of liberty as a functional tool for the 'control of freedom of movement'.[38] Thus, irregular migrants and applicants for international protection are united by their 'detainability',[39] a concept developed by scholars to define the condition of the latter—but which *mutatis mutandis* also applies to the former—who, upon arriving on European soil, are subject *in concreto* to deprivation of liberty because of their status.

2. 'Changing everything to change nothing': reforming detention for the purpose of return

On 28 June 2018, a full ten years after the adoption of the Return Directive, the European Council acknowledged that 'more efforts are urgently needed to ensure swift returns and prevent the development of new sea or land routes',[40] and the 'necessity to significantly step

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presence of applicants for international protection on the territory of a State. See Case C-534/11, *Arslan*, *supra* note 27, Opinion of AG Wathelet, 31 January 2013, ECLI:EU:C:2013:52, paras. 64–65.

[35] The issue of "detainability" of asylum seekers cannot be analysed exhaustively here. Nevertheless, account must be taken of the protective position adopted by the Court of Justice, which, relying on the acts of secondary law referred to above (see *supra* notes 3, 4 and 5), has ruled that an asylum seeker 'has the right to remain in the territory of the Member State concerned at least until his application has been rejected at first instance, and cannot therefore be considered to be "illegally staying" within the meaning of Directive 2008/115, which relates to his removal from that territory' (Case C-534/11, *Arslan*, *supra* note 27, para. 48).

[36] See the well-known decision of the United Nations Human Rights Committee (HRC) in *A. v. Australia*, CCPR/C/59/D/560/1993, 3 April 1997, para. 9.2, which it is worth quoting at some length: 'there is no basis for the author's claim that it is per se arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary'.

[37] R. PALLADINO, *supra* note 21, p. 14.

[38] A. MCMAHON, The *Role of the State in Migration Control The Legitimacy Gap and Moves towards a Regional Model*, Brill-Nijhoff, 2016, p. 70.

[39] C. COSTELLO-M. MOUZOURAKIS, *EU Law and the Detainability of Asylum-Seekers*, in *Refugee Survey Quarterly*, 2006(35/1), p. 47–73, esp. p. 57 ff.

[40] European Council meeting of 28th June 2018 – Conclusions, EUCO 9/18, para. 4.

up the effective return of irregular migrants' [41] in order to 'further stem illegal migration on all existing and emerging routes', [42] welcoming 'the intention of the Commission to make legislative proposals for a more effective and coherent European return policy'. [43]

These statements followed the so-called European Agenda on Migration, a major policy document promoted by Jean-Claude Juncker as President of the European Commission in 2015, which *inter alia* recognised that the effective return of third-country nationals who have no right to stay in the EU is a key element of the European strategy on irregular migration. [44]

A few months later, in September 2018, the Commission drafted a proposal to recast the Return Directive, which had become necessary due to the increased 'overall migratory pressure' on Member States. [45] The Commission's proposal, which is still under discussion under the ordinary legislative procedure, [46] aims to change the legal framework of the Return Directive in three crucial aspects, one of which concerns the even wider use—and for this reason strongly

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[41] European Council meeting of 28th June 2018, *supra* note 40, para. 10.

[42] European Council meeting of 28th June 2018, *supra* note 40, para. 2.

[43] European Council meeting of 28th June 2018, *supra* note 40, para. 10. The Council also emphasised the need for 'flexible instruments, allowing for fast disbursement, to combat illegal migration' (para. 9).

[44] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,* European Agenda on Migration, 13th May 2015, COM(2015) 240 final. In this document, the Commission noted that '[o]ne of the incentives for irregular migrants is the knowledge that the EU's return system [...] works imperfectly. Smuggling networks often play on the fact that relatively few return decisions are enforced – only 39.2% of return decisions issued in 2013 were effectively enforced', urging States to 'apply the Return Directive', with the promise—later fulfilled—that 'a "Return Handbook" will support Member States with common guidelines, best practice and recommendation' (p. 9–10). The so-called 'Return Handbook' was then issued in 2017, with Commission Recommendation (EU) 2017/2338 of 16 November 2017 *establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks*, C/2017/6505 [OJ L 339, 19th December 2017, p. 83–159].

[45] Proposal for a *Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018*, COM/2018/634 final (hereinafter the *Proposal*), p. 1.

[46] The progress of parliamentary work—no. 2018/0329(COD)—is available on the official website of the European Parliament, at the following URL: *https://bit.ly/3Rh6Pea*. For a general overview of all actors involved in the ordinary legislative procedure, see also the Eur-Lex website, available at the following URL: *https://eur-lex.europa.eu/legal-content/IT/HIS/?uri=CELEX:52018PC0634*.

criticised by scholars [47]—of custodial measures against those migrants to be returned.

Firstly, the Commission proposes to define more precisely the notion of 'risk of absconding', [48] providing a (not exhaustive!) list of typical situations in which such a risk could be presumed to exist (e.g. where the alien lacks identity documents, or adequate financial resources, or has had a previous criminal conviction). [49] These circumstances must be transposed into national law, without prejudice to the possibility for the Member States to add others, and bearing in mind that the assessment of the risk of absconding must in any case be carried out 'on the basis of an overall assessment of the specific circumstances of the individual case, taking into account the objective criteria'. [50] The European Economic and Social Committee criticised the structure of the Proposal *in parte qua*, considering the list 'too broad' and strongly condemning the possibility that "risk of absconding" could be inferred from lack of financial resources: '[i]f we wish to avoid the possibility of ALL irregular migrants being accused of a risk of absconding [...] the risk of absconding cannot be defined using this kind of parameter'. [51] Another disappointing aspect of the *Proposal* is the specification that the "risk of absconding" will be *presumed* where four specific circumstances are present in the material case, [52] and—through an

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[47] I. MAJCHER-T. STRIK, *Legislating without Evidence: The Recast of the EU Return Directive*, in *Eur. J. Migr. Law*, 2021(23/2), p. 120 ff., esp. p. 126.

[48] In Article 3(7) of the *Proposal,* it is defined as 'existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond'.

[49] See Article 6(1) of the *Proposal*. The fact that the list is non-exhaustive can be deduced from the wording of the text: '[t]he objective criteria [from which the existence of the "risk of absconding" can be deduced] shall include at least the following criteria [...]'.

[50] See Article 6(2) of the *Proposal*.

[51] Opinion of the European Economic and Social Committee on "Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast). A contribution from the European Commission to the Leaders' meeting in Salzburg on 19th-20th September 2018", EESC 2018/04780, [OJ C 159, 10th May 2019, p. 53–59] (hereinafter the *Opinion*), para. 5.2.1(c).

[52] This is the case where the third-country national concerned has used false documents or has destroyed his/her own documents or has refused to provide fingerprints (Article 6(1)(m) of the *Proposal*), or where he/she has re-entered the national territory in breach of a previous entry ban (Article 6(1)(p) of the *Proposal*), or where he/she has violently or fraudulently opposed a return decision (Article 6(1)(n) of the *Proposal*), or, finally, if he/she has violated the measures taken by the national authorities to mitigate the risk of absconding during the period of voluntary departure (Article 6(1)(o) of the *Proposal*).

inappropriate reversal of the burden of proof—it will be up to the migrant to rebut this presumption.[53] This is a striking departure from the general principle of the Return Directive which, as has been pointed out, provides for a rigorous examination of each individual case, according to its specific circumstances, and rejects any possibility of relying on legal (albeit rebuttable) presumptions. The assessment *in concreto* of the 'risk of absconding' is of paramount importance in the context of return procedures since its proven (or presumed) existence not only prevents the migrant from taking advantage of the period of voluntary departure to leave the territory in which he/she is located, but also allows the national authority to detain the returnee – here is the *punctum dolens*. Moreover, in the event of one of the four "relative presumptions" mentioned above, the non-citizen is detained *until proven otherwise*. This is a total distortion not only of the general principles enshrined in the Directive itself—i.e. the case-by-case approach[54]—but also of the idea that deprivation of liberty must always be the exception (and that, conversely, the *conditio libertatis* must be the rule).[55]

The second questionable aspect of the *Proposal* lies in an *ex novo* elaboration aimed at introducing the obligation to cooperate on the part of the foreigner into the general system of the Directive.[56] In order to understand the burdensome nature of the duties imposed on the migrant, it is worth quoting in full the content of the (again, non-exhaustive) list set out in Article 7(1) of the *Proposal*: '(a) the duty to provide all the elements that are necessary for establishing or

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[53] See ECRE (EUROPEAN COUNCIL ON REFUGEES AND EXILES), *Comments on the Commission Proposal for a Recast Return Directive*, November 2018, p. 7 ff. (hereinafter *ECRE Comments*). The ECRE suggests that not only the four "relative presumptions" should be completely deleted from the text of the *Proposal,* but also the remaining criteria from which the "risk of absconding" should be inferred. Notably, Article 6 of the *Proposal* is critically qualified as a 'catch-all provision'.

[54] See Recital 6 of Directive 2008/115/EC, not amended by the *Proposal*.

[55] It should be recalled, in fact, that both Article 5 ECHR and Article 6 of the Charter—read in conjunction with Article 52(3) of the Charter—share this approach. Interestingly, the ECtHR's case-law specified that '*l'article 5 de la Convention consacre un droit fondamental, la protection de l'individu contre les atteintes arbitraires de l'Etat à sa liberté*' (*Creangă v. Romania*, App. no. 29226/03 (ECtHR, 23rd February 2012) [GC], para. 84). The *status libertatis*—which constitutes the natural situation of every human being—can only be affected within those '*exceptions à la règle générale énoncée à l'article 5 § 1, selon laquelle chacun a droit à la liberté*' (*I.S. v. Switzerland*, App. no. 60202/15 (ECtHR, 6th October 2020), para. 42 and case law cited therein).

[56] Within the structure of the *Proposal,* this provision would be placed in Article 7. The former Article bearing the same number—and concerning voluntary departure—would thus become the "new" Article 9.

verifying identity; (b) the duty to provide information on the third countries transited; (c) the duty to remain present and available throughout the procedures; (d) the duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document'. On the other hand, national authorities will merely be obliged to inform the returnee of the consequences of non-cooperation (*inter alia*, being subject to detention for the purpose of return).[57] Notably, the concept of "cooperation" typically involves two subjects at the same level. Here, *a contrario*, the feeling is that there is a concrete disproportion between what is required of the migrant and what is required of the authority.

It is also worth noting that national authorities and migrants are legal actors who *in rerum natura* already have very different and unbalanced positions *ab origine*.[58] Moreover, at first sight, the cooperation required of the migrant seems to be a blatant breach of the 'fundamental right of not giving evidence against oneself'.[59] Finally, the migrant to be returned is deprived of any legal remedy to challenge the declaration of non-cooperation,[60] which would, however, have concrete consequences against him/her.

Indeed, among the grounds for concluding that the third-country national to be returned poses a "risk of absconding" is explicitly included that of 'not fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures'.[61]

Thus, the non-cooperative behaviour of the migrant to be returned is considered as a ground for determining the existence of the "risk of absconding" in the material case. This is tantamount to making "non-cooperation" a ground for taking detention measures against the foreigner.

Furthermore, the third innovative point of the *Proposal* concerns specifically detention for the purpose of return. In addition to the existing criteria ('risk of absconding' and hindering conduct of the migrant) the Proposal would add a further circumstance permitting administrative detention – a foreigner who 'poses a risk to public

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[57] Article 7(3) of the *Proposal*.

[58] This is the opinion of I. MAJCHER-T. STRIK, *supra* note 47, p. 116.

[59] In this regard, agreeably, para. 5.4. of the *Opinion*, where the Committee expresses its position: 'The obligations set out in this article can be boiled down to just one: to cooperate and collaborate during a procedure that is directed against oneself'. Analogously, see also *ECRE Comments*, p. 9 and, with specific reference to asylum seekers whose applications were rejected in the first instance, I. MAJCHER-T. STRIK, *supra* note 47, p. 116 f.

[60] *ECRE Comments,* p. 9.

[61] Article 6(1)(j) of the *Proposal*.

policy, public security or national security' can also be deprived of his/her liberty.[62] However, this amendment is not in keeping with the CJEU's settled case law. In *Kadzoev*, the Court had peremptorily ruled out the possibility that Article 15 of the Directive could authorise detention measures based on grounds of public order and national security.[63] But there is more: according to the first commentators of the *Proposal*, the inclusion of such additional grounds would contribute to the criminalisation of the latter,[64] since such circumstances would pursue objectives typical of criminal law (and not at all of administrative law).[65] On this point, the position of the Economic and Social Committee should also be shared, according to which the use of detention as a 'disguised form of imprisonment or punishment for irregular immigration must be ruled out'.[66] In this regard, the European Union Agency for Fundamental Rights has highlighted the need that detention based on such grounds 'should be addressed by using already available criminal law, criminal administrative law and legislation covering the ending of legal stay for public order reasons'.[67] Moreover, the difficulty in defining the scope of such circumstances could extend the power of national authorities to use such coercive measures in the context of return procedures, but outside the strong safeguards provided in criminal proceedings.

Two further amendments to the text of the Return Directive are worth mentioning here. With the first, the Commission proposes to make the list of requirements for detention for return purposes non-exhaustive[68] – this choice clashes with the degree of exceptionality that should surround the grounds in which the authority can deprive the individual of his/her liberty. The second, which equally problematic, sets a maximum detention period of at least three

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[62] See Article 18(1) of the *Proposal*. It is noteworthy that the *Proposal* leaves unamended the regulatory provisions concerning compliance with the principles of necessity and proportionality that must underlie the imposition of custodial measures.

[63] Case C-357/09, *Kadzoev*, *supra* note 11, paras. 69–71.

[64] *ECRE Comments,* p. 20.

[65] See I. MAJCHER-T. STRIK, *supra* note 47, p. 120 – the Authors mention *inter alia* 'deterrence, prevention and incapacitation'.

[66] *Opinion*, para. 5.10.

[67] FRA (FUNDAMENTAL RIGHTS AGENCY OF THE EUROPEAN UNION), *The recast Return Directive and its fundamental rights implications, Opinion of the European Union Agency for Fundamental Rights*, in *www.fra.europa.eu*, 10th January 2019, p. 53, (hereinafter *FRA Opinion*).

[68] In Article 18(1) of the *Proposal* the adverb 'only' is removed and the expression 'in particular when' is retained. This operation 'provides further flexibility for States as far as the detention grounds are concerned', according to *ECRE Comments*, p. 20.

months in each Member State.[69] This provision could obviously lead to the creation of 'three-months automatic detention' mechanisms in the EU, thus breaching the principles of necessity and proportionality that should, at least formally, underpin the general structure of the Directive.[70] Indeed, it is one thing to set a maximum period of detention—as is still the case—; it is quite another to set a minimum-maximum, mandatory period of detention which, as such, escapes any scrutiny of appropriateness.[71] This is all the more critical in view of the fact, corroborated by official statistics, that return, if possible, usually takes place at the very early stage of detention[72]—typically between thirty and sixty days[73] or, according to others, at least within three months[74]—, and the extension of the detention period has no concrete impact on the success of the procedure.[75]

3. Criminalisation without safeguards and future developments

The picture outlined so far clearly shows that the will of the EU legislator is to go on implementing administrative detention measures as the main legal instrument for the management of irregular immigration at supranational level. A measure which, as mentioned above, is ordered in the first instance by the administrative authority, and the legality of which can only be challenged *ex post* by the judicial authority.[76]

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[69] See Article 18(5) of the *Proposal*: 'Each Member State shall set a maximum period of detention of not less than three months and not more than six months'.

[70] I. MAJCHER-T. STRIK, *supra* note 47, p. 121.

[71] Of course, the third-country national who can be materially returned within this three-month period is likely to be removed from the territory as soon as possible. Therefore, the minimum-maximum three-month period represents a 'possibility on the books', according to S. PEERS, *Lock 'em up: the proposal to amend the EU's Returns Directive*, in *EU Law Analysis (web)*, 12th September 2018.

This does not alter the fact that the national authorities might be *de facto* obliged to deprive the alien of his/her liberty for at least three months, even if they themselves may consider a shorter period to be necessary in the specific case.

[72] I. MAJCHER-T. STRIK, *supra* note 47, p. 121.

[73] The figure is reported in *ECRE Comments,* p. 21.

[74] *Opinion*, para. 5.9.

[75] *FRA Opinion*, p. 53 f.

[76] Moreover, the subsequent filter of the judicial authority does not always work as an effective and timely control of the administrative act that originally ordered the detention.

The Italian practice may be enlightening in this respect. The legislature has in fact entrusted this extremely delicate task to the Justice of the Peace (*Giudice di pace*), a lay magistrate, thus undermining the 'substantial meaning of judicial

However, such a normative architecture raises two very specific problems.

Firstly, the framework advocated by the EU legislator seems to be excessively marked by the use of detention as a means to ensure the effectiveness of returns, a circumstance which—as several scholars have observed [77]—is not reflected in the available data and, more generally, in legal practice. [78] In other words, the use of detention for return purposes is not synonymous with the efficiency of return procedures.

Thus, the rationale for such widespread use of administrative deprivation of liberty across Europe should be sought elsewhere. Perhaps it should be stated *expressis verbis* that detention is preferred to other methods of implementing return procedures—such as the use of electronic bracelets, the obligation to stay, the obligation to report regularly to the authorities—because it ensures total control over the foreigner's body (a control that the authorities are typically allowed to exercise in criminal proceedings, either as a punishment or as a precautionary measure), without having to provide the migrant with traditional criminal law guarantees. [79] The outcome of such an approach is to criminalise the figure of the foreigners [80] and to jeopardise their fundamental right to *habeas corpus*. [81]

The reasoning could then be expanded as follows. It cannot but be

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review' (A. CAPUTO-L. PEPINO, *Giudice di pace e* habeas corpus *dopo le modifiche al testo unico sull'immigrazione*, in *Dir. imm. citt.*, 2004(3), p. 23 ff.). See also E. VALENTINI, *Detenzione amministrativa dello straniero e diritti fondamentali*, Giappichelli, 2018, p. 114–123.

[77] C. MAZZA, *La prigione degli stranieri. I Centri di Identificazione e di Espulsione,* Ediesse, 2013, p. 130: 'there is no direct link between detention (which is a restrictive measure) and the possibility to carry out expulsions (which depends on specific procedures and grounds). But what then is the real function of the Centres?'.

[78] Accordingly, I. MAJCHER-T. STRIK, *supra* note 47, considered that the Commission was legislating without an adequate scientific basis ('legislating without evidence'). See *supra* note 7.

[79] See, *amplius*, I. MAJCHER, *The Effectiveness of the EU Return Policy at All Costs: The Punitive Use of Administrative Pre-removal Detention*, in N. KOGOVŠEK ŠALAMON (Eds.), *Causes and Consequences of Migrant Criminalization*, Springer, 2020, p. 120 ff., where the Author *inter alia* notes that 'there is a dissonance between the administrative form of pre-removal detention and its punitive use in practice'.

[80] For the profiles specifically addressed here, see, A. CAVALIERE, *Le vite degli stranieri e il diritto punitivo*, in *Sist. pen. (web)*, 2022(4), *passim*, spec. p. 66 ff.

[81] See M. DANIELE, *Il diritto alla libertà personale e le manipolazioni dell'*habeas corpus, in D. NEGRI-L. ZILLETTI (Eds.), *Nei limiti della Costituzione. Il codice repubblicano e il processo penale contemporaneo*, Wolters Kluwer-Cedam, 2019, p. 225 ff.

noted that the adoption of administrative measures of deprivation of personal liberty against foreigners—despite the formal qualification "attached" by the EU legislator (and, consequently, by national legislators)—seems to obey 'the logic and rigours of the penal system, being loaded with para-punitive connotations' [82] or, as has been observed, seems to assume 'a meaning in many ways corresponding to that of personal precautionary measures'. [83] These considerations are not counterbalanced by a regulatory architecture of solid guarantees that allows, on the one hand, to consider migrants' detention as a measure of *extrema ratio* [84] and, on the other hand, to be satisfied with the level of safeguards guaranteed to the third-country national concerned, which are not even remotely comparable to those provided in criminal proceedings. [85]

[82] M. Pierdonati, *La restrizione della libertà personale nel "carcere amministrativo" dei C.I.E.: tradimento e riaffermazione del principio di legalità*, in R. Del Coco-E. Pistoia (Eds.), *Stranieri e giustizia penale. Problemi di perseguibilità e di garanzie nella normativa nazionale ed europea,* Cacucci, 2014, p. 233

[83] E. Marzaduri, *Un iter giudiziario più snello e veloce che risponda alle insofferenze della collettività*, in *Guida dir.*, 2009(33), p. 21 f.

[84] Indeed, it is one thing to argue that detention must be ordered in accordance with the principles of necessity and proportionality. It is quite another to lay down general requirements for the imposition of the detention measure thereby reducing the above guarantees to mere declarations of principle.

[85] Also I. Majcher, *supra* note 79, p. 120 ff.