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**Irregular Migrants in Italy:
Law and Policy on
Entitlements to Services**

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INTRODUCTION

This paper explores the legal and policy framework in Italy relating to entitlements to access public services granted to migrants with irregular status (irregular or undocumented migrants)¹, one part of an Open Society Fellowship project addressing this issue across the European Union (EU) (<https://www.compas.ox.ac.uk/research/welfare/service-provision-to-irregular-migrants-in-europe/>).

Italy is a particularly interesting case study. First, its experience serves to highlight developments seen in other parts of the EU: the diverging responses of some of its regional and local authorities to national government policies and the tensions to which that gives rise; the role of the courts in ensuring that the law conforms to domestic, constitutional and European legal standards; and the role, for instance, of health professionals and civil society in securing policy outcomes. Italy is also of particular interest, however, because its approach is distinct in certain respects – in its recent decision to de-criminalise irregular entry and stay, for instance, and in relation to entitlements for children² and for victims of crime. The background to those developments and the particular balance that Italy has found between policy on enforcement of immigration controls, on the one hand, and entitlements to access services on the other, has relevance across Europe, no less than its record on integration policies for migrants who have regular immigration status.³

Comparatively, Italy is one of eight EU countries that allow irregular migrants some level of access to primary and secondary health care (that is, some access beyond the limited entitlements to emergency care, maternity and treatment of infectious diseases seen more widely across the EU28). Italy is also among the nine EU states where an entitlement for children to attend compulsory education is explicit in law⁴, not merely implicit in the right of ‘all’ children to attend school that exists in the majority (but not all) other states. Following de-criminalisation of irregular entry and stay, Italy is one of 11 Member States where irregular status is treated as an administrative not a criminal offence⁵; and, of relevance to irregular migrants, it is among the

¹ In this paper we use the term ‘irregular migrant’, meaning a migrant who has contravened rules of entry or residence. This terminology includes migrants whose irregular status is due to unauthorised entry into the territory and ‘over stayers’ who initially resided legally but remained after the period they were entitled to reside. The term ‘irregular’ is used in preference to ‘illegal’ as it does not carry connotations of criminality.

² The terms ‘child’ and ‘minor’ are used alternatively in this paper, meaning a person below the age of majority, which in the case of Italy is set at the age of 18.

³ Cf. Migrant Integration Policy Index (MIPEX), *Migrant Integration Policy Index III* (2010), available on www.mipex.eu, which classifies the integration policies of 31 countries. Italy is ranked 10th for best policies, 7th if only EU Member States are considered.

⁴ Art. 38, Legislative Decree No. 286 of 25 July 1998.

⁵ The de-criminalisation consisted of the repeal of Art. 10-bis of the Italian Consolidated Law on Immigration which had criminalised the irregular entry and stay in Italy of non-EU country nationals. Hence, the de-criminalisation only relates to irregular entry and stay. Criminal relevance will still be given to non-compliance with administrative orders, such as re-entry after the issue of an entry ban or the failure to comply with a removal administrative order. The Italian Parliament voted for the repeal of Art. 10 bis in April 2014 and delegated to the government the implementation of this decision. The Italian government therefore has a period of 18 months (starting in April 2014) to do so. For more details on the criminalisation of irregular migration in the European Union, see FRA, *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014), available on www.fra.europa.eu.

Council of Europe member states that have made the strongest commitment to uphold the rights enshrined in the Social Charter, having signed the revised Charter and accepted its collective complaints procedure.⁶

Italian authorities have declared, moreover, that migration is among the priorities of the Italian Presidency of the Council of the EU⁷ from July – December 2014. It commenced immediately after the European Council's adoption of new strategic guidelines in the Justice and Home Affairs area, covering migration. This timing gives added resonance to Italy's particular experience in relation to those irregular migrants who cannot be removed or whose presence in Italy is not known to the immigration authorities.

Finally, a review of Italian experience is timely because of the legislative development that is ongoing at the time of writing. Its recent experience of criminalisation of unauthorised entry and stay on Italian territory has only recently come to an end. In April 2014 the Italian Parliament definitively voted in favour of repealing the crime of irregular migration and delegated to the government the implementation of de-criminalisation within 18 months. It is helpful to understand why the former political discourse that focused heavily on the issue of security is now being replaced with an approach that retains a focus on enforcement but does not consider irregular migrants as criminals.

It is necessary here to highlight that the paper is looking at legal entitlements to public services and the rationales that lie behind them, not at the many barriers that can in practice impede individuals securing access to the service. Our focus here is on the legal and policy framework.

The first part of this paper notes estimates on the number of irregular migrants in Italy before summarising Italian law and policy developments in the area of migration, including the impact of European legislation and jurisprudence. It then clarifies the role that has been played by the national domestic courts in determining policy and the role provided in law for regional and local authorities in the areas of migration and public services provision.

The second part of the paper sets out the principal legal entitlements for irregular migrants in Italy today in relation to education, health care, accommodation, welfare benefits, protection as victims of crime and the issue of certificates of civil status such as a birth certificate. The conclusion summarises the main findings and their significance.

⁶ Spencer, S and Hughes, V (2014 forthcoming) *Outside and In: Legal Entitlements to Health Care and Education for Migrants with Irregular Status in Europe*. COMPAS, University of Oxford.

⁷ Cf. Italian Senate, *Relazione programmatica sulla partecipazione dell'Italia all'Unione Europea* (2014), available on www.senato.it; La Stampa (29 January 2014), *Semestre italiano, riforma dell'Iva, lavoro e immigrazione*, available on www.lastampa.it. English version: http://italia2014.eu/media/1349/programma_en1_def.pdf.

THE ITALIAN POLICY AND LEGISLATIVE CONTEXT ON IRREGULAR MIGRATION

Estimates on irregular migrants in Italy

According to estimates from survey data collected by the ISMU Foundation⁸, 294,000 irregular migrants were residing in Italy on 1st of January 2013, accounting for 6% of the total estimated number of 4.9 million foreign nationals residing in the country⁹ and approximately 0.5% of the total population of around 60 million people. Historically this data shows a strong decrease in the total number of irregular stays in Italy: 326,000 irregular residents were estimated to be living in Italy in 2012, approximately 450,000 in 2011 and 2010 and 651,000 in 2008 – the latter a peak in Italy's recent history of immigration. The reduction of irregular presences is related to the effect of recent regularisation processes¹⁰ and to the impact on immigration of Italy's economic crisis, which made the country a less attractive destination for many migrants.¹¹

National statistics (Eurostat) collected by EMN-Italy on third country nationals found to be irregularly present on the Italian territory and ordered to leave the country in the years 2008-2010 appear to confirm this trend: 68,175 people in 2008, 53,140 in 2009 and 46,955 in 2010 of whom 4,125 were women¹², representing 8.78% of the total number of foreign nationals found to be irregularly staying in Italy. People from African countries represented the largest number of those in an irregular situation with Moroccans the largest group (7,900) followed by Tunisia, Egypt, Nigeria, Senegal and Algeria. From Central and Eastern Europe there were people from Albania, Ukraine and Moldova; from Asia, people from China, Bangladesh and India and from the Americas there were in particular people from Brazil.¹³

Although Italy is associated with images of irregular migrants landing along its Southern coasts, the Italian Ministry of the Interior estimated that in the period 2000 - 2006 the majority of

⁸ The *Fondazione ISMU* (ISMU Foundation - Initiatives and Studies on Multiethnicity - Milan) provides estimates on the stock of undocumented migrants residing in Italy in the context of the CLANDESTINO research projects whose main output is the creation a database (<http://irregular-migration.hwwi.net/>) which presents and classifies (as low, medium or high quality) estimates and data on irregular migration in the EU and in selected member states. The information provided by *Fondazione ISMU* in the context of the CLANDESTINO project is classified as high quality data. *Fondazione ISMU* takes charge of the estimate of irregular presences for the whole national territory every year. The estimate is based on a representative sample specially created, by disaggregating the overall presence of three components: foreigners regularly present (but not yet registered as residents), foreigners registered as residents and foreigners irregularly present.

⁹ *Fondazione ISMU, Diciannovesimo rapporto sulle Migrazioni 2013* (2014).

¹⁰ The transposition of the Employers Sanctions Directive introduced a "regularisation process" between September and October 2012. As a result, 134,576 requests for regularisation were submitted by employers. An earlier regularization called "regularization of domestic workers and care attendants (*sanatoria colf e badanti*") called for 295,126 employment applications submitted by employers. Cf. EMN-Italy, Raffaele Callia, Marta Giuliani, Zsuzsanna Pasztor, Franco Pittau, Antonio Ricci (eds.), *Practical responses to irregular migration: the Italian case* (2012).

¹¹ EMN-Italy, Raffaele Callia, Marta Giuliani, Zsuzsanna Pasztor, Franco Pittau, Antonio Ricci (eds.), *Practical responses to irregular migration: the Italian case* (2012).

¹² This data only describes the number of irregular men and women apprehended in Italy and does not necessarily represent the proportion in the number of men and women who are irregularly staying in the country. Differences in the number and percentage of apprehended men and women may be due to other reasons related for instance to the functioning of the apprehension mechanisms.

¹³ EMN-Italy, Raffaele Callia, Marta Giuliani, Zsuzsanna Pasztor, Franco Pittau, Antonio Ricci (eds.), *Practical responses to irregular migration: the Italian case* (2012).

irregular migrants staying in the country (around 65-70%) were in fact over stayers. These official records show that migrants who arrived irregularly through Italy's southern border represent only a small fraction (4%-16%) of the irregular residents. The remaining 15%-34% of those who entered without permission did so by avoiding controls at the Northern borders or international ports and airports.¹⁴

Recent history of Italian legislation and policy towards irregular migrants

Immigration to Italy is a relatively recent phenomenon, attracting attention in public debate from the mid-eighties. The first Italian law (*'Legge Martelli'*¹⁵) dealing specifically with migration was introduced in 1990, requiring foreign nationals for the first time to obtain a *residence permit* in order to legally reside in Italy. Subsequently throughout the 1990s several legal provisions were adopted to combat irregular migration and were brought together in 1998 by the *'Turco-Napolitano'* law¹⁶ that led to the adoption of the *Consolidated Law on Immigration*¹⁷ – *Legislative Decree No. 286 of 1998*. Although the original text has been subject to several reforms reflecting the differing political priorities of Italy's governments over the past decade¹⁸, this Act is still today the main legal source regulating at national level all aspects of immigration, including irregular migration, migrants' fundamental rights and entitlements to services. The centre-left oriented *Turco-Napolitano* law was aimed at providing rights and duties to migrants in Italy and particularly focused on the protection of migrant workers and measures to address their exploitation.¹⁹

Two major centre-right oriented reforms of the Consolidated Law on Immigration were implemented with the adoption of the *'Bossi-Fini'* law²⁰ in 2002 and the so-called *'security package'*²¹ in 2009. Both of these laws established stricter conditions for migrants to reside, work and access public services and strengthened measures against irregular migration, including providing for its criminalisation. Already in 2008²², indeed, irregular migration had been assigned a criminal relevance when an aggravation of punishments was introduced for crimes committed by a person staying irregularly in Italy. This provision as we shall see below, was declared unconstitutional in 2010.²³

In 2009 the Italian Parliament reformed the Consolidated Law on Immigration by adopting its Art. 10-*bis* which introduced the crime of "Irregular entry and stay", making irregular migrants liable to a fine ranging from 5,000 to 10,000 euros. The criminalisation of irregular migrants constituted the main reform carried out within the *'security package'* of that year. Nevertheless, this law introduced

¹⁴ Ministero dell'Interno, *Rapporto sulla criminalità in Italia, analisi, prevenzione e contrasto*, (2007) available on www.interno.gov.it.

¹⁵ Law No. 39/1990.

¹⁶ Law No. 40/1998.

¹⁷ *'Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero'* – Legislative Decree No. 286 of 25 July 1998.

¹⁸ Cf. Enzo Cheli, *'Diritti umani degli immigrati: profili costituzionali e internazionali'*, in R. Pisillo Mazzeschi, P. Pustorino and A. Viviani (eds), *Diritti umani degli immigrati – Tutela della famiglia e dei minori* (Editoriale Scientifica – 2010). p. 3.

¹⁹ Cf. Carlo Cardia, *'Immigrazione e multiculturalità'* (2011) in *Iustitia*, 27.

²⁰ Law No. 189/2002.

²¹ Law No. 94/2009.

²² Law No. 125/2008.

²³ Italian Constitutional Court, Decision No. 249/2010.

other provisions to reinforce measures against irregular migration such as the requirement imposed on foreign nationals to show a valid residence permit to public service providers in order to access a service (except for some medical treatments and compulsory education) and for the issue of certificates of civil status. These measures were subject to criticism for focusing on enforcement without due consideration of the fundamental social rights of the people involved as established by both International and constitutional law. As a result, on several occasions the Italian government subsequently felt it necessary to release administrative circulars which interpreted the measures in a way that would allow for their compliance with fundamental rights.

The criminalisation itself was also subject to criticism, in particular for making irregular migrants fearful of approaching public services and thus unable to enjoy their legal entitlements.²⁴ The Italian Parliament recently reconsidered this policy, the Chamber of Deputies deciding on April 2nd 2014²⁵ to decriminalise irregular entry and stay. From that date, the government has a period of 18 months for transforming the crime of irregular migration into an administrative offence. Criminal relevance will only be given to non-compliance with a migration administrative order, including the unauthorised re-entry of a foreign national on Italian territory in breach of a previous expulsion order and entry ban or the failure to comply with a removal order issued by the administrative authorities.

It is interesting to note that the reasons given for the repeal of the crime are not only those related to. *'civilisation and respect for diversity'*, as the former Italian Minister for Integration Cécile Kyenge, stated²⁶, but also official acknowledgment of the deficiencies of a system which has not interrupted the arrival of unauthorised migrants in the territory. Moreover, the challenge and the cost of conducting criminal trials against individuals who often do not hold any documents and who might be expelled before the completion of the trial have proved a burden on a criminal justice system already creaking at the seams. It was a commission of experts of the Italian Ministry of Justice that remarked that the crime of irregular migration:

'is a totally inefficient and symbolic criminal provision, which establishes an irrational system of sanctions, as the primary penalty is a fine the individual will surely not be able to pay, which is therefore replaced with the sanction of expulsion [...]

and observed that *'to ensure the regulation of entry flows, it is therefore sufficient to have the administrative procedure for expulsion'*.²⁷

Felice Casson, a Senator of the ruling Italian Democratic Party (PD) and a magistrate, commented that the abolition of the crime of irregularity *'remedies the legal and political scandal of a crime*

²⁴ E.g. F. Biondi Dal Monte, *Regioni, Immigrazione e diritti fondamentali*, in *Le Regioni* (2011), 1086; A. Saccucci, *Diritto all'istruzione e discriminazione scolastica di minori stranieri alla luce delle norme internazionali sui diritti umani*, in *Diritti umani degli immigrati – Tutela della famiglia e dei minori, op.cit.*, (2010), 297; G. Palmisano, *Trattamento dei migranti clandestini e rispetto degli obblighi internazionali sui diritti umani*, in *Diritti Umani e Diritti Internazionali* (2009), 509.

²⁵ E.g. Repubblica (Rome, 2 April 2014), *'Si al ddl che 'cancella' il reato di clandestinità'*, available on www.repubblica.it.

²⁶ E.g. Il Sole 24 Ore, (Rome, 22 January 2014), *'L'immigrazione clandestina resta reato solo se è recidiva'*, available on www.ilsole24ore.com.

²⁷ Commission 'Fiorella' for the revision of the penal system (*Commissione Fiorella per la revisione del sistema penale*), *Relazione*, released on the website of the Italian Ministry of Justice on 23 April 2013, available on www.giustizia.it.

whose only result was to clog up the work of police officers and public prosecutors²⁸ while Senator Luigi Zanda, likewise of the Democratic Party, remarked that *'the crime of irregular migration did not produce any benefit to our country or to immigrants. It is therefore sufficient to provide an administrative sanction'*.²⁹

The impact of European legislation and jurisprudence

a) EU law

The EU Directive 2008/115/EC *on common standards and procedures in Member States for returning illegally staying third-country nationals* (the so-called 'Returns Directive') was adopted one year before Italy reformed its legal framework on migration with the 'security package' of 2009. The Directive was aimed at providing common rules on the removal of irregular migrants and preventing secondary movements between Schengen States. The key rule of the Returns Directive was introduced by Art. 6, par. 1, which imposed on Member States an obligation to issue a return decision to any third country national staying irregularly on their territory. The Directive also provided a number of exceptions to this rule and safeguards for the people involved in the removal process. Among those, the Directive specified that irregular migrants should be given a period of voluntary departure before their removal is enforced (Art. 7).³⁰

Nevertheless, Italy's law No. 94 of 2009 did not take into account several measures imposed by the Returns Directive. On the contrary, the particular rationale given for the criminalisation of irregular migration in Italy was to *avoid* transposition of the Directive, since the latter does not cover expulsions that are a sanction under the criminal law. The government thought that if every expulsion were considered a criminal punishment, it would not be bound by the Directive. It was reluctant to apply the regulation to voluntary returns, the then Minister of the Interior Roberto Maroni stating that by establishing the crime of irregular migration *'we can proceed to the immediate expulsion set by a judge, thus applying the EU Directive, but remove an inconvenience that would undermine its effectiveness, because as the Italian experience has shown, the "invitation to go" will result in the fact that nobody will be expelled'*.³¹ Nevertheless, following the decision of the EU Court of Justice in the *El Dridi* case (2011), Italy was obliged to transpose the

²⁸ E.g. Repubblica (22 January 2014), *Reato di clandestinità, il Senato vota l'abolizione*, available on www.repubblica.it.

²⁹ E.g. Il Giornale (15 January 2014), *L'abolizione del reato clandestinità spacca la maggioranza*, available on www.ilgiornale.it.

³⁰ For more information on the 'Returns Directive' cf. Steve Peers, *The Future of the Schengen System* (Swedish Institute for European Studies, 2013).

³¹ *'L'altra disposizione prevista riguarda il reato di ingresso illegale nel territorio dello Stato. Su questo secondo punto il Governo insiste, pur prevedendo una pena pecuniaria e non detentiva, perché la direttiva europea stabilisce che la regola per l'allontanamento dei cittadini extracomunitari sarà l'invito ad andarsene e non l'espulsione, a meno che il provvedimento di espulsione sia conseguenza di una sanzione penale. Noi quindi vogliamo disegnare il reato di immigrazione clandestina o di ingresso illegale puntando principalmente sulla sanzione accessoria del provvedimento giudiziale di espulsione emanato dal giudice, piuttosto che sulla sanzione principale che sarà una sanzione pecuniaria. In questo modo possiamo procedere all'espulsione immediata con un provvedimento del giudice, applicando la direttiva europea ma eliminando l'inconveniente che ne pregiudicherebbe l'efficacia, perché come ha dimostrato l'esperienza italiana l'invito ad andarsene significa che nessuno verrebbe più espulso'*. Roberto Maroni at the meeting of 15 October 2008 of the Parliamentary Committee on the control over the implementation of the Schengen Agreement, the supervision on the Europol's activity and the supervision on immigration issues. Unofficial translation.

Returns Directive: the Court ruled that the provision exempting Member States from applying the Directive does not in fact concern criminal sanctions that are imposed for the crime of irregular migration on its own.³²

For this reason, Law Decree No. 89 was adopted in 2011 transposing the Returns Directive into Italian law. Its main innovation was the introduction of the so-called ‘gradually increasing intensity’ procedure based on voluntary departure, as a first resort, of the expelled person within a period of 7 to 30 days. The law provides that coercive measures for the expulsion – which used to be the normal, immediate and automatic procedure under the ‘security package’ – should now be used only as a last resort, unless required by public order needs. Another new element introduced in 2011 concerns the ban on re-entry which now lasts for a period ranging from 3 to 5 years, rather than the previous 10 years. Finally, the transposition of the EU Directive allowed Italy to extend the period of detention of irregular migrants for immigration purposes up to a maximum of 18 months, while the security package limited its maximum to 180 days. Transposition of the Directive thus led to measures that curtailed coercive measures but also extended the period of detention allowed.

b) Council of Europe Conventions

A founding member of the Council of Europe, Italy has ratified both the European Convention on Human Rights (ECHR) and the revised European Social Charter (ESC(r)). The Italian Republic has, moreover, accepted the collective complaints mechanism that enables the European Committee of Social Rights to judge the compliance of Italian laws and practices with the social rights enshrined in the ESC(r).³³

Jurisprudence of the European Court of Human Rights

In the case *Hirsi Jamaa and others v. Italy* (2012), Italy was condemned by the European Court of Human Rights (ECtHR) for the push-back practice that the Italian authorities had been implementing as a measure aimed at combating irregular

The ratifications of the ECHR and the ESC(r) did not require Italy to adopt a domestic ‘Human Rights Act’, as occurred in some other member States of the Council of Europe. The law ratifying these conventions constituted for the Italian legal order a sufficient measure to bring into force their provisions in Italy. Moreover, the Italian Constitution itself had already provided measures on fundamental rights in 1948.

Although the issue is debated, it is not possible for ordinary Italian courts to apply directly the provisions of the ECHR or the ESC(r), as those provisions are not part of the domestic legal order that ordinary judges should apply (see, for instance, Decisions Nos. 397/2007 and 311/2009 of the Italian Constitutional Court). Italian courts must however interpret domestic provisions in such a way that would be respectful of the Council of Europe’s conventions.

The only Italian court enabled of disregarding a domestic provision because of its breach of the ECHR or the ESC(r) is the Constitutional Court, as it is the Italian Constitution (Art. 117 – revised in 2001) that requires ordinary laws to comply with international obligations. A law breaching a provision of an international treaty, such as the ECHR or the ESC(r), might be found unconstitutional because of Art. 117. The Constitution of Italy though provides norms on fundamental rights, and the Constitutional Court tends to apply those norms rather than those of the Council of Europe’s conventions. The jurisprudence and the norms of those conventions constitute nevertheless a strong support for the interpretations and decisions of the Italian Constitutional Court.

³² Cf. Centro Studi sul federalismo, *The returns directive in light of the El Dridi judgement*, Rosa Raffaeli (edited by), in *Perspectives on Federalism* (2011), 32; C. Favilli, *L’attuazione in Italia della direttiva rimpatri: dall’inerzia all’urgenza con scarsa cooperazione*, in *Rivista di diritto internazionale* (2011), 693.

³³ Collective complaints before the European Committee of Social Rights are the only avenue for a judicial control over the respect of the European Social Charter by States Parties. This system was introduced under a Protocol to the Charter opened for signature in 1995 and entered into force in 1998. A collective complaint can be lodged only against one of the States that has ratified the protocol or accepted the procedure.

migration. The ECtHR condemned Italy for intercepting at sea, on 6 May 2009, a boat carrying irregular migrants and asylum seekers towards the Italian southern border and for returning those persons to Libya without checking their identity, health conditions or asylum requests, or informing them of their destination.

According to the Court, besides violating the prohibition on collective expulsion (Art. 4 of Protocol No. 4) and the right to an effective remedy (Art. 13, ECHR), the Italian authorities had exposed the individuals involved to the risk of ill-treatment in Libya. The Court thus ruled that Italy had neither respected the prohibition on inhuman or degrading treatment nor the principle of *non-refoulement* (Art. 3 ECHR).³⁴ While this important decision of the Court of Strasbourg put an end to the Italian policy of push-backs at sea, it did not impact directly on entitlements to service provision for those who reached the Italian shore.

Jurisprudence of the European Committee of Social Rights

According to its Appendix, the European Social Charter applies to foreigners only insofar as they are 'lawfully resident' and nationals of a contracting State.³⁵ Nevertheless, the European Committee of Social rights has repeatedly ruled that the '*part of the population which does not fulfill the definition of the Appendix cannot be deprived of their rights linked to life and dignity under the Charter*', thus extending certain entitlements provided by the ESC(r) to irregular migrants.³⁶ This reasoning was, for instance, adopted by the Committee in its decision on the merits of the case *COHRE v. Italy*.³⁷ The case concerned the '*Pacts of Security*' that Italian national and local institutions signed in 2007³⁸ and the '*Security Decrees*'³⁹ adopted in 2008 by the Italian State, targeting Roma and Sinti residents. These 'security measures' allowed for monitoring Roma

³⁴ European Court of Human Rights, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, Decision on the merits of 23 February 2012. Cf. A. Liguori, *La Corte europea dei diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso Hirsi*, in *Rivista di Diritto Internazionale* (2012), 415; Cf. C. Favilli, *Secca condanna dell'Italia per i rimpatri di migranti in alto mare verso la Libia*, in *Questione Giustizia* (2012), 199.

³⁵ Appendix to the European Social Charter (revised), Scope, Paragraph.

³⁶ See, for instance, ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, Decision on the merits of 3 November 2004, Par. 32; ECSR, *Defence for Children International (DCI) v. The Netherlands*, Complaint No. 47/2008, Decision on the merits of 27 October 2009; ECSR, *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, Decision on the merits of 23 October 2012; Cf. PICUM, *Using legal strategies to enforce irregular migrants' Human Rights* (2013).

³⁷ ECSR, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Complaint No. 58/2009, Decision on the merits of 25 June 2010, Paragraph 33.

³⁸ As of November 2006, "*Pacts for Security*" were signed by state and local authorities with regard to numerous cities including, inter alia, Naples, Rome, Milan, Florence, Turin, Genoa, Bologna, Catania, Bari, Cagliari, Venice, Modena, Prato and Trieste. All "*Pacts for Security*" follow the model of delegating increased authority to the Prefect with a view to implementing a strategic plan to solve the "nomad emergency" (expression used in the "*Patto per Roma Sicura*" of 18 May 2007 and its renewed version, the "*Secondo Patto per Roma Sicura*" of 29 July 2008) or the "*Roma emergency*" (expression used in the "*Patto per Milano Sicura*" of 18 May 2007).

³⁹ Law Decree No 92/2008, on "*Urgent measures in the field of public security*", amended and converted into law by Law No. 125/2008 of 24 July 2008; Decree of the President of the Council of Ministers of 21 May 2008, *Gazzetta Ufficiale* No. 122 of 26 May 2008 - *Declaration of the state of emergency in relation to settlements of nomad communities in Campania, Lazio and Lombardy*; Ordinances of the President of the Council of Ministers Nos. 3676, 3677, 3678 of 30 May 2008, which create urgent civil protection provisions to tackle the state of emergency in relation respectively to nomad community settlements in the territory of the Lazio, Lombardy and Campania regions – text of Order No. 3676; *Guidelines to Implement the President's Minister's Decrees 3676, 3677, 3678 of 30 May 2008 concerning the encampments of nomadic communities in the regions of Campania, Lazio and Lombardy of 17 July 2008*.

and Sinti settlements and the carrying out of a census of Roma and Sinti. They also provided authorisation for evictions and called for expulsion of migrants in the name of public safety. The Committee found Italy in violation of the right of Roma and Sinti to adequate housing (Art.31 ESCr), social, legal and economic protection (Art. 16 ESCr), protection against poverty and social exclusion (Art. 30 ESCr) and the right of migrant Roma families to protection and assistance (Art. 19 ESCr). The Committee read all of these substantive rights in conjunction with Article E of the ESC(r) providing a prohibition on discrimination. We considered this decision of the Committee⁴⁰ worth noting when analysing irregular migrants' access to public services in Italy because, although specific to Roma people, the decision made evident to the Italian government that the aforementioned rights provided by the Charter must be ensured to all individuals, including those who can find themselves in an irregular situation and might not fall within the *ratione personae* scope of the ESC(r).

Legal developments brought by national courts

On several occasions, the jurisprudence of the two supreme courts of Italy, *the Constitutional Court and the Court of Cassation*, proved significant in framing the legal position of irregular migrants and in adapting Italian legal provisions on irregular migration to Constitutional, European and International standards in the area of fundamental rights protection.

By repeatedly claiming that inviolable rights (Art. 2 of the Italian Constitution) belong '*to individuals not as members of a political community, but to human beings as such*'⁴¹ the Constitutional Court ruled that the regular or irregular '*status of foreign nationals cannot be considered as allowing a diversified or pejorative treatment in their regard*'.⁴²

The *Italian Constitutional Court* is the judicial body in charge of ruling on the constitutional legitimacy of ordinary laws issued by the Italian State and Regions. When the Court declares a law 'unconstitutional', the law ceases to have effect the day after the publication of the ruling (Art. 134 of the Italian Constitution). The *Constitution of the Italian Republic* is a written act representing the supreme law of Italy. Any national or regional legal provision must comply with Constitutional standards, otherwise the Constitutional Court can declare the provision 'unconstitutional'.

At Art. 2 the Constitution recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. Art. 3 establishes the principle of equality and prohibits any discrimination on the basis of sex, race, language, religion, political opinion and personal or social condition. 'Part I' of the Italian Constitution is devoted to the provision of Fundamental Rights (Title I on Civil Relations; Title II on Ethical and Social Rights and Duties; Title III on Economic Rights and Duties). Although being entitled 'Rights and Duties of Citizens', this Part of the Constitution provides a wide range of entitlements to 'anyone', thus including irregular migrants, e.g. for the right to Health (Art.32) or the right to Education (Art. 34). The Constitutional Court therefore plays a major role in the protection of Fundamental Rights in Italy.

Article 117 of the Constitution establishes that national and regional laws must respect international obligations and thus confers 'constitutional relevance' to the international treaties signed by Italy. Hence, although the Court normally decides on the basis of the provisions provided by the Constitution rather than those of international conventions, it is not rare that it refers to International acts or jurisprudence (especially of the ECtHR) when interpreting the scope of constitutional provisions on Fundamental Rights. International treaties and jurisprudence therefore play a crucial role in enhancing the Constitutional standards on human rights.

An official English translation of the Italian Constitution is available on www.senato.it

⁴⁰ The decisions of the European Committee of Social Rights are not legally binding, therefore the State which according to the Committee has violated one or more provisions of the Charter may only be invited to take the appropriate measures to avoid further violations. National courts, though, might play a fundamental role in making the State respect the Committee's recommendations. Cf. PICUM, *Using legal strategies to enforce irregular migrants' Human Rights* (2013).

⁴¹ Italian Constitutional Court, Decision No. 105/2001. The Court declared this principle with regard to Art. 13 of the Italian Constitution concerning Personal Liberty.

⁴² Italian Constitutional Court, Decision No. 249/2010.

This reasoning constituted the premise, for instance, for the Court's Decision No. 249 of 2010 that ruled on the unconstitutionality of the provision⁴³ mentioned above on the aggravation of criminal punishments for crimes committed by a foreign national in an irregular situation. The provision assumed that authors of crimes, if irregular, had to be considered as more dangerous because of their irregularity and thus had to be more severely punished, irrespective of the kind of crime committed. The Constitutional Court ruled that this presumption constituted unreasonable discrimination in breach of the principle of equality, as recognised by the Italian Constitution at Art. 3. The Court furthermore believed that such a provision was also in breach of Art. 25 of the Constitution which prescribes that a person should be punished for their conduct and not for any personal qualities.⁴⁴

The *Supreme Court of Cassation* is the major *court of last resort* of Italy. It ensures that the inferior and appeal courts apply and interpret correctly the law. In particular, the Court of Cassation has the role of resolving differences in judicial interpretations of the law and of pointing Italian courts towards the correct interpretation and application of the law. The jurisprudence of the Court has a fundamental importance since Italian judges, when taking a decision, should follow the guidelines provided by the previous rulings of the Court of Cassation

In another relevant case of 2011⁴⁵ the Constitutional Court adopted the same reasoning when declaring the constitutional illegitimacy of the rule that required migrants wishing to get married in Italy to exhibit a valid residence permit. The rule⁴⁶, which was introduced by the 'security package' of 2009, was aimed at combating 'marriages of convenience'. The Constitutional Court considered that the rule was '*not capable of ensuring a reasonable and proportionate balancing of the various interests involved*' and declared the requirement to show a valid residence permit as an illegal obstacle to the fundamental right of irregular migrants to get married.⁴⁷ Subsequently the Italian Court of Cassation stated that an unauthorised migrant cannot be expelled, nor sanctioned, for entering and staying irregularly on the Italian territory if the purpose of the entry is to marry an Italian citizen. The judges highlighted that it is neither irregular, nor a crime, if an irregular migrant enters Italy in order to exercise one of his or her rights recognised by the Italian legal system, such as the right to get married with an Italian citizen.⁴⁸

Before the Court of Justice of the EU had decided on the *El Dridi* case in 2011⁴⁹, both the Italian Court of Cassation and the Constitutional Court had showed a particular sensitivity towards the situation of irregular migrants with regard to their imprisonment on the sole ground of a refusal to obey an order to leave the territory within a given time limit.⁵⁰ The Constitutional Court had stated that such a rule was unconstitutional because it did not provide an exception for those who could not comply with the order because of a justified reason.⁵¹ The Court of Cassation had also ruled

⁴³ Art. 61 number 11 – *bis* of the Italian Criminal Code.

⁴⁴ Cf. S. Marani, *L'aggravante della clandestinità è incostituzionale - Corte Costituzionale, sentenza 08.07.2010 n° 249*, available on www.altalex.com.

⁴⁵ Italian Constitutional Court, Decision No. 245 of 2011.

⁴⁶ Art. 116 of the Italian Civil Code.

⁴⁷ Art. 2, 29 and 117 (on International obligations) of the Italian Constitution.

⁴⁸ Italian Court of Cassation, Decision No. 32859 of 2013. The court overturned a verdict that had sentenced an irregular migrant to pay 5,000 euro for his irregular entry and stay in Italy, after the man successfully demonstrated that he came to Italy to finalize his marriage procedures with an Italian woman.

⁴⁹ Court of Justice of the European Union, C-61/11 PPU *El Dridi*, judgment of 28 April 2011.

⁵⁰ Art. 14, par. 5-*quater* in its version prior to D.L. No. 89 of 2011.

⁵¹ Italian Constitutional Court, Decision No. 359 of 2010.

that the norm was not to be applied because of its conflict with EU Directive 2008/115/EC.⁵² The so-called '*Returns Directive*' makes coercive measures expressly subject to compliance with the principles of proportionality and effectiveness with regard to the means used and objectives pursued. For this reason, the EU Court of Justice agreed with the Court of Cassation, stating that Member States may not provide for a custodial sentence on the sole ground of non-compliance with an order to leave the national territory but must pursue their efforts to enforce the return decision. The Court concluded that the national legislation at issue was contrary to EU law and the norm was repealed in 2011.

Finally, it is worth noting that, when required to rule on the legitimacy of Art. 10-*bis* of the Consolidated Law on Immigration defining irregular entry and stay in Italy as a crime, the Constitutional Court declared that the criminalisation of irregular migrants *is* in compliance with the Italian Constitution. The State is permitted to establish such a crime, this falling within national competences on criminal law.⁵³

Migration governance at national level

The Italian Constitution, following its reform in 2001, established that legislation concerning immigration, the legal status of non-EU nationals and asylum in Italy falls within policy areas of exclusive State-level competence.⁵⁴ The Italian Consolidated Law on Immigration provides a scheme for the development of national policies on migration. It requires the government to draft every three years a '*Programmatic document*' on immigration policy, defining the entry quotas of foreign nationals into the Italian territory and outlining national interventions aimed at improving cultural and social integration of migrants. The Ministry of the Interior is put in charge of presenting annually to Parliament the results of those policies.⁵⁵

The Ministry of the Interior is the principal national institution dealing with the matter of Immigration through its 'Department for Civil Liberties and Immigration' and 'Department for Public Security'. The former, in particular, deals with the protection of civil rights of migrants and asylum seekers and operates for the social integration of foreign nationals in Italy. The Department consists of the General Directorate for Immigration and Asylum Policies, the General Directorate for Immigration and Asylum Civil Services and the General Directorate for Civil Rights, Citizenship and Minorities. In addition to the Ministry of the Interior, the Ministry of Labour and Social Policies and the Ministry of Foreign Affairs also have competencies in the area of migration. The former operates through its Directorate General for Immigration and Integration Policies whose tasks concern the regulation of entry for work reasons, programming annual entry flows and managing and monitoring entry quotas. It also coordinates inclusion and social cohesion policies and adopts measures for the social integration of foreigners residing in Italy. Within this DG, a 'Committee for foreign minors' is active for the promotion of protective measures for foreign children. The Ministry of Foreign Affairs is responsible for consular affairs regarding foreign

⁵² Italian Court of Cassation, Decision No. 31869 of 2011.

⁵³ Italian Constitutional Court, Decision No. 250 of 2010.

⁵⁴ Art. 117, letters a) and b) of the Italian Constitution.

⁵⁵ Art. 3 of the Legislative Decree No. 286 of 25 July 1998.

nationals and analyses social and migration issues in cooperation with international agencies and organisations. It cooperates in migration flows planning and for the promotion of bilateral agreements in migration matters.⁵⁶

As aforementioned, national legislation concerning migration is collected in the Consolidated law on Immigration – Legislative Decree No. 286/1998 – which is a comprehensive legal act establishing the rights and duties of migrants as well as general principles for immigration policy. It provides rules on entry, stay and deportation of foreign nationals from the Italian territory and establishes measures against irregular migration and trafficking in human beings (Articles 4-20). This legislative decree provides rules concerning the employment of migrants in Italy and migrant workers' rights (Articles 21-27). It provides norms protecting children and migrants' right to family unity (Articles 28-33) and establishes, as we shall see below, migrants' social rights, such as the right to medical care, education, housing, participation in public life and social integration (Articles 34-46). Before we go on to explore those provision in national law, however, it is necessary to understand the governance roles of regional and local authorities which play key roles in law, policy and provision in this area.

Responsibilities of regional and municipal authorities in the field of migration

The Italian Constitution (Art. 117) distributes legislative power in Italy between the national Parliament and regional councils. Following the constitutional reform of 2001, Art. 117 lists two series of policy areas, one for which the State has exclusive legislative competence and another for which national and regional authorities share responsibility.⁵⁷ All of the policy areas that are not listed in Art. 117 fall within exclusive regional legislative competences. Immigration and the legal status of non-EU citizens are listed among the policy areas of exclusive national competence⁵⁸, while public services provision falls within concurrent (for education and health care⁵⁹) or exclusive regional competences. It is therefore evident how relevant can be the role of regional councils in shaping legislation in Italy and in particular in providing legal entitlements to irregular migrants.

Despite the exclusive national state-level competence on migration policy and governance, the Consolidated Law on Immigration also recognises the regional area of competency⁶⁰, referring to it on several occasions, for instance when establishing that:

'Regions, Provinces, Municipalities and other local authorities must adopt all measures aimed at removing any obstacle to the full realisation of migrants' legal entitlements recognised at national level'.⁶¹

⁵⁶ Cf. EMN-Italy, *Practical responses to irregular migration: the Italian case*, Raffaele Callia, Marta Giuliani, Zsuzsanna Pasztor, Franco Pittau, Antonio Ricci (eds.), (2012), 57.

⁵⁷ When a competence is 'concurrent' between the State and Regions, the State is in charge of adopting the general principles regulating that policy area, while regional authorities have to provide detailed legislation in compliance with the national guidelines.

⁵⁸ Art. 117, par 2, letters a) and b), of the Italian Constitution.

⁵⁹ Art. 117, par 3 of the Italian Constitution.

⁶⁰ Art. 1, par. 4 of the Legislative Decree No. 286 of 25 July 1998.

⁶¹ Art. 3, par. 5 of the Legislative Decree No. 286 of 25 July 1998.

These provisions, however, were adopted before the constitutional reform that assigned exclusive competence on immigration to the State. Nevertheless, even after that reform, Regional authorities have continued to include third-country nationals in their legislation and policies in the areas of public services provision and social assistance – domains that remain within regional competence.

The Italian Constitutional Court finally confirmed⁶² that Regions have an important role in migration governance even after the constitutional reform of 2001, stating that public intervention in this area:

'is not to be limited to the necessary controls on the entry and stay of foreign nationals on the national territory, but it must concern also other issues, such as public assistance, education, health care or housing – domains that intersect national and regional competences'.⁶³

Migration governance in Italy must therefore be divided into two areas of intervention: the first consists of all measures regulating the conditions for the entry and stay of foreign nationals on the Italian territory, for which the central State is the exclusive competent authority; and a second domain which concerns social assistance and public intervention for the inclusion and integration of migrants, for which Regional authorities have a major role. In this sense, Italian legal literature has distinguished between *'immigration policies'* and *'policies for migrants'*, the first being an exclusive State matter and the last being a shared competence between State and regional authorities, or even sometimes an issue of exclusive regional competence.⁶⁴

Unlike regional authorities, provinces and local municipal authorities in Italy do not hold any legislative power but can have important administrative and regulation-making competences in the area of services provision, as far as they are assigned by national or regional laws the power to operate in these areas. National legislation⁶⁵ provides Provinces with administrative competence for the provision of medical services and secondary education, in compliance with national and regional legislation. Municipalities are put in charge of organising the provision of public services in their area, including pre-school and primary education. As aforementioned, the Consolidated Law on Immigration states that *Provinces, Municipalities and other local authorities must adopt all measures aimed at removing any obstacle to the full realisation of migrants' legal entitlements*. Provincial and city councils can therefore play an important role in ensuring the effectiveness of migrants' enjoyment of those public services to which they are entitled.

⁶² Italian Constitutional Court, Decision No. 300/2005 and No. 156/2006. Cf. S. Baldin, *'La competenza esclusiva statale sull'immigrazione vs la legislazione regionale sull'integrazione sociale degli immigrati: un inquadramento della Corte costituzionale'*, in *Forum di quaderni costituzionali'* (2005), available on www.forumcostituzionale.it.

⁶³ Italian Constitutional Court, Decision No. 300/2005.

⁶⁴ Cf. T. Caponio, *Governo locale e immigrazione in Italia. Tra servizi di welfare e politiche di sviluppo*, in *Le istituzioni del federalismo* (2004), 805; D. Strazzari, *Stranieri regolari, irregolari, "neocomunitari" o persone? Gli spazi d'azione regionale in materia di trattamento giuridico dello straniero in un'ambigua sentenza della Corte*, in *Le regioni* (2011), 1037; M. Gioiosa, *Stato Sociale e immigrazione in Spagna. Confronti con l'Italia* in *Rivista di diritto Pubblico Comunitario* (2010), 203.

⁶⁵ Italian Consolidated Law on Local Authorities, Legislative Decree No. 267 of 2000.

Regional and municipal responsibilities for public service provision to irregular migrants

The Consolidated Law on Immigration provides migrants in Italy with several legal entitlements, including those relating to public services. At the same time, though, it limits the provision of certain services to regularly staying migrants, thus preventing irregular migrants from accessing rights such as the right to shelter and housing (Art. 40) or the right to social assistance (Art. 41).

Regional authorities, in their areas of intervention, have sometimes shown more inclusive attitudes towards irregular migrants and played a major role in extending certain social entitlements to them in contrast with national provisions. Past Italian governments regularly challenged those regional provisions before the Constitutional Court, arguing that an irregular stay *'must [only] be followed by refoulement, expulsion or detention in an Identification and Expulsion Centre'* and that, therefore, irregular migrants' access to social services is exceptional and may only be accorded by national legislation.⁶⁶ According to that view, the extension of certain public services to irregular migrants would be incompatible with both the 'unlawfulness' of their stay and the exclusivity of national competence on immigration. As a consequence of the criminalisation of irregular migrants, the government then added that such regional legislation would conflict with national competences on 'public order and security' and 'criminal law'.⁶⁷ Extending legal entitlements to irregular migrants would be in breach of the national rules that define their situation as a criminal offence.⁶⁸

The Constitutional Court played a crucial role in this debate by rejecting the government's reasoning, repeatedly legitimizing the extension of certain social rights to irregular migrants in regional legislation. The Court developed the principle that the Italian Constitution enables Regions to legislate on irregular migration as far as areas of regional competence are concerned – such as social inclusion and integration, service provision and public assistance – and whenever the regional intervention is aimed at protecting the fundamental rights of the individuals concerned. Three decisions of the Court form the founding jurisprudence for this principle, namely:

- Decision No. 269 of 2010 concerning a law of the Region of Tuscany that recognises – among others – the right to 'urgent and non-postponable' social welfare services to all individuals irrespective of their regular status⁶⁹
- Decision No. 299 of 2010 concerning a law of the Region of Apulia which provides irregular migrants with the right to benefit from a broad range of medical treatments and pharmaceutical assistance; and
- Decision No. 61 of 2011 concerning the social services provided by the Region of Campania to all migrants, including access to shelter and to public housing.

⁶⁶ Cf. Action No. 52 brought on 2009 by the Italian government against the Region of Tuscany before the Italian Constitutional Court.

⁶⁷ Art. 117 letters h) and l) of the Italian Constitution.

⁶⁸ Cf. F. Biondi Dal Monte, *Regioni, Immigrazione e diritti fondamentali*, in *Le Regioni* (2011), 1086; G. Bascherini, *Il riparto di competenze tra Stato e Regioni in materia di immigrazione al tempo del "pacchetto sicurezza": osservazioni a margine delle sentt. 269 e 299 del 2011*, in *Giur. Cost.* (2010), 3907.

⁶⁹ Cf. D. Strazzari, *Stranieri regolari, irregolari, "neocomunitari" o persone? Gli spazi d'azione regionale in materia di trattamento giuridico dello straniero in un'ambigua sentenza della Corte*, in *Le regioni* (2011), 1037; M. Gioiosa, *Stato Sociale e immigrazione in Spagna. Confronti con l'Italia* in *Rivista di diritto Pubblico Comunitario* (2010), 203.

The Constitutional Court found all of these laws to be respectful of constitutional standards by falling within the areas of regional competence and for being related to the essential core of fundamental rights that the Italian Constitution and international law recognises for *all* individuals.⁷⁰ These decisions paved the way for the possibility for Regions to provide protection and promotion of a wide range of rights for irregular migrants including public welfare, social assistance, education, professional training, medical care and employment, since these domains fall within the core of constitutional and international fundamental rights law.⁷¹ Finally, it should be observed that the regional laws mentioned here are only the main examples of regional interventions in this field: other regions, such as Emilia-Romagna, Umbria, Marche, Lazio and Piedmont have adopted similar measures.⁷²

⁷⁰ Cf. L. Ronchetti, *I diritti fondamentali alla prova delle migrazioni (a proposito delle sentenze nn. 299 del 2010 e 61 del 2011)*, in *Rivista dell'Associazione dei Costituzionalisti* (2011).

⁷¹ Cf. C. Corsi, *Diritti sociali e immigrazione nel contraddittorio tra Stato, Regioni e Corte Costituzionale*, in *Diritto, Immigrazione e Cittadinanza* (2012), 43.

⁷² Cf. F. Biondi Dal Monte, *Regioni, Immigrazione e diritti fondamentali*, in *Le Regioni* (2011), 1086.

LEGAL ENTITLEMENTS OF IRREGULAR MIGRANTS IN ITALY

Title IV (Art. 34-46) of the Consolidated Law on Immigration of 1998 is dedicated to the regulation of a number of rights of migrants, endowing them with the possibility to benefit from a series of public services, including the provision of health care, education, housing and the right to participate to public life and social integration processes. Nevertheless, irregularly-staying foreign nationals are not entitled to exercise all of those rights. As the Italian government expressly declared in 2009, the general rule is that according legal entitlements to irregular migrants is an exceptional regime because of the 'unlawfulness' of their presence in Italy.⁷³

Together with the criminalisation of the irregular entry and stay of foreign nationals, Law No. 94 of 15th July 2009 ('security package') introduced a strongly restrictive regulation concerning irregular migrants' access to public social services. Its formulation of *Art. 6 par. 2 of the Consolidated Law on Immigration* requires migrants to exhibit a valid residence permit to benefit from public services and to be issued with certificates of civil status, licenses, authorisations and so forth. This is a general rule but it is subject to certain exceptions: the requirement does not apply for accessing compulsory education and certain services of medical assistance. Moreover, while the rule does not expressly state it, showing a valid residence permit is not required when requesting birth or marriage certificates.

Following the introduction of *Art.10-bis* of the Consolidated Law on Immigration, the criminal significance of a migrant's irregular situation meant that, except for health care professionals, all public officials and people in charge of a public service with whom the foreign national comes into contact would be required to denounce the person's irregular condition to the police.⁷⁴ This duty concerned public officials at municipal, provincial, regional and national level including postmen, ticket controllers in public transport, and so forth.⁷⁵ The combined effect of this rule with the requirement on migrants to show their residence permits could have a significant impact on irregular migrants' possibility to approach public officials and service providers in order to benefit from public services. The criminalisation of unauthorised entry and stays would necessarily arouse irregular migrants' fear of contacting public services and thus jeopardise protection of their fundamental rights and, as implicitly intended, their social integration.

This legislation raised concerns not only for migrants but among service providers who strongly protested against the adoption of the security package, in particular in its original version which

⁷³ Cf. Action No. 52 brought on 2009 by the Italian government against the Region of Tuscany before the Italian Constitutional Court.

⁷⁴ Articles 361 and 362 of the Italian Penal Code that punishes any public official or person in charge of a public service that does not comply with the duty to report a crime of which he or she gained knowledge on account of his or her duties. Nevertheless, the sole fact that a foreign national does not exhibit a residence permit to a public service provider does not immediately imply the duty to report the migrant, as the public official or the person in charge of a public service must denounce only when he or she is certain of the crime. The mere fact that a foreign national did not show a valid residence permit may indeed be due to reasons other than an irregular condition. The only necessary consequence is the impossibility of performing the service requested in favour of the person who did not exhibit the residence permit.

⁷⁵ Cf. EMN-Italy, *Practical responses to irregular migration: the Italian case*, Raffaele Callia, Marta Giuliani, Zsuzsanna Pasztor, Franco Pittau, Antonio Ricci (eds.), (2012), 57.

did not exempt medical staff from the obligation to report.⁷⁶ These protests can be summarised in the words of Franca Dente, President of the National Association of Social Workers (CNOAS) who said:

*'denouncing is an unacceptable duty for those – like us – whose primary mission conferred by the State and by their Code of Ethics is to offer support and help to those who are in a situation of need and social unease, in full respect of the value and dignity of each person, irrespective of his or her condition'.*⁷⁷

The education of foreign children

Summary of legal position for foreign children. They:

- ❖ *cannot be considered as irregularly staying in the Italian territory*
- ❖ *are subject to the duty of compulsory education which entails 10 years of education for all children aged between 6 and 16*
- ❖ *are entitled to education until they reach the age of 18, for at least 12 years or until they obtain a qualification of secondary education*
- ❖ *exercise the right to education under the same terms and conditions as Italian nationals*
- ❖ *should not be denied access to the final examinations leading to the completion of their secondary education for the mere circumstance that they reached the age of majority*
- ❖ *are not required to exhibit a valid residence permit to access nursery and pre-school education*

The Italian Constitution states that *'Schools are open to everyone'* (Art. 34). Therefore, *'foreign minors staying in Italy have the right to education irrespective of their regular status'*, and they exercise this right under the same terms and conditions as Italian citizens.⁷⁸

Compulsory education

Like nationals, foreign minors – including those whose parents do not have legal status – are subject to the duty of compulsory education which currently entails 10 years of education for all minors aged between 6 and 16.⁷⁹ Compulsory education is also considered by law as a right recognised to all minors, who can therefore attend school until the age of 18, for at least 12 years or until they obtain a qualification of secondary education.⁸⁰ As access to compulsory education is allowed to all children irrespective of their immigration status, foreign minors are not required to exhibit a valid residence permit when registering at school, or when requesting any other measure concerning their education. Art. 6, par. 2 of the Consolidated Law on Immigration expressly

⁷⁶ See, for instance, the initiative of the 'We don't report' day (Noi non segnaliamo day) that was supported – among others – by the national associations of doctors and dentists (FNOMCEO), obstetricians (FNCO), nurses (IPASVI) and social workers (CNOAS).

⁷⁷ CNOAS, *'Approvato il pacchetto sicurezza: sconcerto e preoccupazione degli assistenti sociali'*, Press release of 13 May 2009 available on www.cnoas.info.

⁷⁸ Art. 38 of the Legislative Decree No. 286 of 1998 and Art. 45, par. 1, D.P.R. No. 394 of 1998.

⁷⁹ Ministry of the Interior, Circular letter No. 101 of 30 December 2010.

⁸⁰ Art. 1, par. 3, Legislative Decree No. 76 of 2005.

exempts measures related to ‘compulsory education’ from the general rule requiring migrants to present a valid residence permit when requesting a public service.

Significantly, in order to implement this norm in practice and overcome the lack of a fiscal code which would otherwise be required when registering at school, children of irregular migrants are not required to fill in the online registration form that requires their fiscal codes and those of their parents. The Italian Ministry of Education has instead provided a specific mechanism that requires irregular parents wishing to register their child to go to the school where a temporary code can be created only for the purpose of that registration.⁸¹

The Consolidated Law on Immigration, though, does not expressly prohibit school staff from reporting to the police irregular migrants who request compulsory educational services, in the way that it is prohibited for the staff of medical institutions. Nevertheless, public officials other than police officers cannot carry out investigative activities on the regularity of the stay of a minor or his/her parents and if they ask to see their residence permits they could commit an abuse of office and therefore a crime.⁸² The Italian Ministry of Education has stated clearly that:

*‘there is no obligation on school staff to report the irregular stay of pupils who are attending the school and who are thus exercising a right established by law’.*⁸³

It is worth noting that a child cannot be considered as ‘irregularly-staying’ since minors in Italy cannot be deported⁸⁴ and thus have the right to obtain a residence permit until they reach the age of 18.⁸⁵

The completion of secondary education for students who reach the age of majority

The exemption from the rule requiring the presentation of residence permits provided by Art.6, par. 2 only refers to ‘compulsory education’. The implication therefore is that entry to *non-compulsory education*, including upper-secondary school, kindergarten and nursery schools, is included among those services that do require a residence permit. In relation to education after the age of 16 until the age of 18, we mentioned the duty and right of all minors to attend school until the age of majority, where the duty to show a residence permit does not apply. It is not defined by national legislation, though, what should happen if a foreign minor reaches the age of 18 before the completion of his or her secondary education. This regularly happens as the five year cycle of secondary education in Italy is normally completed at the age of 19. The issue is debated because an interpretation of the legislation requiring a valid residence permit to complete the education cycle would be in conflict with the international right to an official

⁸¹ Italian Ministry of Education, University and Research, *Linee guida per l'accoglienza e l'integrazione degli alunni stranieri del febbraio 2014*; Circular letter No. 28 of 10 January 2014.

⁸² Elena Rozzi - ASGI, *I minori stranieri extracomunitari e il diritto all'istruzione dopo l'entrata in vigore della legge n. 94/2009*, (2009).

⁸³ Italian Ministry of Education, University and Research, *Linee guida per l'accoglienza e l'integrazione degli alunni stranieri del febbraio 2014*; Circular letter No. 28 of 10 January 2014.

⁸⁴ Art. 19, par. 2, letter a) of the Legislative Decree No. 286 of 1998.

⁸⁵ Art. 28, par. 1, letter a) of the D.P.R. 394/1999.

recognition of the studies made.⁸⁶ The Italian Council of State (*Consiglio di Stato*)⁸⁷ has declared, for instance, that refusing the admission of a foreign student to the *esame di maturità* (high school final exam) would lead to ‘unreasonable consequences’ and has the ‘unacceptable effect’ of impeding the foreign national from completing his or her studies on the sole ground that he or she reached the age of majority.⁸⁸ For these reasons, the Italian Ministry of the Interior has released two circulars⁸⁹ explaining that the fact that a student has turned 18 just before completion of his or her studies must not impede his or her access to high school final examinations because of irregular stay on the Italian territory.⁹⁰ This is one of several examples of ministerial notes and circulars addressing areas of the legislation which emphasized public security rather than the rights of the people involved. The problem though is not fully resolved as circulars do not have the same legal value as law. Rather, they only have binding effect on the internal staff of the Ministry and the institutions that depend on or fall under that Ministry, not on those external to it.

Pre-school education for children of irregular migrants

The issue of pre-school education, meanwhile aroused a lively debate that mainly involved local authorities, which took differing approaches towards the access of children with irregular immigration status to nursery schools (*asilo nido*)⁹¹ and kindergartens (*scuola dell’infanzia*).⁹² Both of these institutions are considered to be non-compulsory pre-school education facilities, thus children of irregular migrants share the same legal problems in accessing both nursery schools and kindergartens.

The aforementioned debate started in 2007 before the adoption of the ‘security package’ when public attention was drawn by the decision of the City of Milan⁹³ to impede the registration to kindergartens for children whose parents could not show a residence permit. Milan’s decision was strongly criticised by the then Minister for Education, Giuseppe Fioroni, who reminded the Mayor of Milan that the right to education ‘is a fundamental human right’ and that:

‘Impeding its enjoyment results in undermining the dignity of the human person’. ‘There can be no exceptions to this enjoyment, [...] neither because of the faults of parents [sic] nor for a condition of poverty’.

The Minister added that:

⁸⁶ Cf. A. Saccucci, *Diritto all’istruzione e discriminazione scolastica di minori stranieri alla luce delle norme internazionali sui diritti umani*, in *Diritti umani degli immigrati – Tutela della famiglia e dei minori*, op. cit., (2010), 332.

⁸⁷ The Italian Council of State is a legal-administrative consultative body and judicial court in charge of ensuring the legality of public administration in Italy. In particular, it has jurisdiction on the legitimacy of all the acts of Italian administrative authorities.

⁸⁸ Italian Council of State, Decision No. 1734 of 2007.

⁸⁹ Italian Ministry of the Interior, Notes of 7 June 2009 and 13 June 2013. E.g. ANSA (2012), *Ucraino ‘irregolare’ ammesso agli esami*, available at http://www.ansa.it/web/notizie/rubriche/cronaca/2012/06/13/Ucraino-permesso-in-regola-del-Ministero-maturita_7028836.html.

⁹⁰ Cf. ASGI, *Minori stranieri e diritto all’istruzione e alla formazione professionale - Sintesi della normativa vigente e delle indicazioni ministeriali (aggiornata con le Linee guida del MIUR del febbraio 2014)*, Elena Rozzi e Mariella Console (eds.), (2014), available on www.asgi.it.

⁹¹ For children aged between 3 months to 2,5 years.

⁹² For children aged between 2,5 to 5 years.

⁹³ City of Milan, Circular letter No. 20 of 17 December 2007.

*'The entire legislative framework up to now, regardless of the political colour of governments, has never questioned the fact that a child who lives in our country has the right to be educated and taken care of, regardless of the social and economic conditions of the family'*⁹⁴.

The decision of the Lombard capital was later declared discriminatory by the Tribunal of Milan which emphasised that:

'minors in Italy cannot be considered as irregularly staying and therefore they cannot be excluded from the provision of a public service they have the right to benefit from'.⁹⁵

After a change in political control of the Municipal Council, the City of Milan finally introduced a new internal regulation in 2012 clarifying that children of irregular migrants can access pre-school education on the same basis as nationals.⁹⁶

After the adoption of the 'security package' that expressly exempted only access to 'compulsory education' and certain medical treatments from the rule requiring a valid residence permit, the issue of pre-school education for children of irregular migrants had become ambiguous and several city councils addressed it in different ways. The decision, for instance, of the City of Turin to allow irregular migrants to register their children at kindergartens was approved by the Prefect of the city and the Ministry of the Interior.⁹⁷ The city councils of other cities, such as Genoa and Florence, took similar decisions that were considered by the press at that time to be in conflict with national law. In contrast, in the same period, the City Council of Bologna prohibited the access of irregular migrants' children to nursery schools.⁹⁸ The decision caused strong protests among the population and a request for clarification was presented to the government.⁹⁹ The debate regarding Bologna was resolved with a Circular letter from the Ministry of the Interior in 2010 which stated that, according to the existing national and regional legislation of Emilia-Romagna, when registration to nursery school is requested there is no obligation to exhibit a residence permit.¹⁰⁰

National law indeed establishes that all of the existing provisions concerning the right to education, access to educational services and participation in school community life also apply to foreign minors staying in Italy (irrespective of their regular status).¹⁰¹ Moreover, the registration of foreign minors at Italian schools at *all levels* takes place under the same conditions as for Italian

⁹⁴ E.g. Repubblica (2008), *Asili vietati ai figli dei clandestini - Ultimatum del governo alla Moratti*, available on www.repubblica.it

⁹⁵ "Appare evidente che la connessione stabilita dalla circolare tra la condizione di regolarità dei genitori e la possibilità di iscrizione del minore è tale da pregiudicare nella sua sostanza il diritto proprio del minore a usufruire di un servizio pubblico al quale esso ha indubbiamente diritto di iscriversi a parità di condizioni con gli altri cittadini"; Tribunal of Milan, Decision No. 2380 of 2008; E.g. *ImmigrazioneOggi*, *Milano: il Tribunale accoglie il ricorso di un'immigrata marocchina irregolare contro la circolare che vieta l'iscrizione del figlio alle scuole materne*, available on www.immigrazioneoggi.it

⁹⁶ City of Milan, Circular letter No. 4 of 1 February 2012

⁹⁷ E.g. La Stampa (01 April 2010), *Padoin: "Sì ai figli dei clandestini al nido, lo dice la legge"*, available on www.lastampa.it

⁹⁸ E.g. Repubblica (07 April 2010), *Al nido solo i figli degli immigrati in regola: Bologna si adegua alla legge nazionale*, available on www.bologna.repubblica.it

⁹⁹ E.g. Repubblica (10 April 2010), *Nidi, parte la battaglia legale e continua il "mail bombing" al Comune*, available on www.bologna.repubblica.it

¹⁰⁰ Ministry of the Interior, Circular letter and advisory opinion of 13 April 2010, available on www.meltingpot.org

¹⁰¹ Art. 38 of the Legislative Decree No. 286 of 1998.

minors.¹⁰² In accordance with these provisions, several regional laws expressly provide foreign minors with the same conditions as nationals for accessing childcare services, educational services and regional measures concerning the right to education¹⁰³, as was the case for the region of Bologna (Emilia-Romagna). The indications provided by the Ministry of the Interior should therefore constitute the guidelines for all city councils regarding their regulations on access to pre-school institutions for children of irregular migrants, although a national legislative intervention would be desirable since some city councils as we have seen in the case of Milan did not follow these guidelines and continued to interpret the national law in different ways.¹⁰⁴

Access to health care

Summary of legal position

- ❖ *Art. 35 of the Consolidated Law on Immigration provides that irregular migrants in Italy are ensured urgent or in other ways essential medical care, whether or not continuous, and they are subject to the preventive medical measures aimed at protecting individual and public health.*
- ❖ *Irregular migrants are always ensured medical assistance for pregnancy and maternity under the same conditions as Italian citizens; the medical protection of minors, vaccinations, interventions required by international prophylaxis and treatments against infectious diseases, including HIV/AIDS screening and treatment.*
- ❖ *Medical staff are prohibited from reporting to the police authorities irregular migrants who accessed medical facilities in order to benefit from the medical assistance to which they are entitled.*
- ❖ *National legislation does not allow irregular migrants to register with a general practitioner, but the legislation of some Regions, e.g. Apulia, has established that right.*
- ❖ *Children of irregular migrants are not entitled by national legislation to register with a paediatrician. Nevertheless, an agreement reached within the State-Regions Permanent Conference has led to the adoption of regional legislation throughout the country entitling foreign minors, irrespective of their status, to access paediatric care.*

Art. 35 of the Consolidated Law on Immigration regulates irregular migrants' entitlement to access health care services in Italy. This law does not provide irregular migrants with a general access to all medical treatments, as it does for regularly-staying foreigners who are entitled to benefit from medical assistance under the same conditions as Italian citizens.¹⁰⁵ Irregular migrants are entitled to receive only 'urgent' and/or 'essential' medical care and are subject to any preventive medical measures aimed at protecting individual and public health. Urgent care includes emergency medical assistance, while essential care is understood in broader terms and includes diseases

¹⁰² Art. 45 of the D.P.R. No. 394 of 1999. Cf. E. Rozzi – ASGI, *Il diritto dei minori stranieri privi di permesso di soggiorno all'istruzione, alla formazione e all'accesso ai servizi socio-educativi dopo l'entrata in vigore della legge n. 94/09*, (2009) available on www.asgi.it.

¹⁰³ See for instance Regional law of Emilia Romagna No. 5 of 2004, Art. 14, par. 1; Regional law of Marche No. 13 of 2009, Art. 10, par. 2; Regional law of Liguria No. 7 of 2007, Art. 20, par. 1.

¹⁰⁴ See the case of the City of Padova. E.g. Nicola Grigion (30 April 2010), *Asili nido - No alla richiesta del permesso di soggiorno*, available on www.meltingpot.org.

¹⁰⁵ Art. 34 of the Legislative Decree No. 286 of 1998.

which are not dangerous in the short term but which might become dangerous over time. This implies continuous treatments and can be understood as including primary and secondary care.¹⁰⁶ Nevertheless, secondary care is in practice hard to access for irregular migrants, as they are not entitled – as a matter of national law – to register with a general practitioner (*medico di famiglia*).¹⁰⁷

Art. 35 further lists some medical treatments that are always ensured to irregular migrants, namely:

- a) *medical assistance to pregnancy and maternity* under the same conditions as Italian citizens;
- b) *medical protection of minors*¹⁰⁸;
- c) *vaccinations*;
- d) *interventions required by international prophylaxis* and
- e) *treatments against infectious diseases*.¹⁰⁹ This last category includes HIV/AIDS screening and treatments which can be accessed by irregular migrants on the same conditions as Italian citizens.¹¹⁰

It should be recalled that Art. 6, par. 2 of the Consolidated Law on Immigration exempts these medical treatments from the general rule requiring migrants to exhibit a valid residence permit to benefit from a public service.

Since irregular migrants cannot register with the National Health Service, they are granted a so-called ‘STP code’ (*Stranieri Temporaneamente Presenti* – Temporary residing foreigners code) allowing them to access the medical treatments to which they are entitled. The code is issued by medical professionals or administrative personnel¹¹¹ and irregular migrants can obtain it at any time. The code is anonymous, lasts for 6 months and is renewable, thus ensuring continuity of care. When requesting an STP code, irregular migrants are also required to present a *declaration of poverty*¹¹² through which migrants obtain these medical services free of charge.¹¹³

Prohibition on medical staff reporting irregular migrants to the police

The right of irregularly-staying foreign nationals to benefit from medical treatments is further protected by Art. 35, par. 5 of the Consolidated Law on Immigration which imposes a prohibition on medical staff reporting irregular migrants who access medical facilities. The prohibition concerns not only doctors and nurses but all of the staff operating in the facility, including police

¹⁰⁶ FRA, *Migrants in an irregular situation: access to healthcare in 10 European Union Member States* (2011).

¹⁰⁷ HUMA Network, *Access to Healthcare for Irregular Migrants and Asylum Seekers in 10 EU Countries. Law and Practice* (2009).

¹⁰⁸ Art. 35, par. 3, letter b) expressly refers to the UN Convention on the Rights of the Child and states that irregular minors access to health care should be implemented in compliance with the provisions of the convention.

¹⁰⁹ Art. 35, par. 3 of the Legislative Decree No. 286 of 1998.

¹¹⁰ HUMA Network, *Access to Healthcare for Irregular Migrants and Asylum Seekers in 10 EU Countries. Law and Practice* (2009).

¹¹¹ Art. 43 D.P.R. No. 394 of 1999.

¹¹² Art. 43 of D.P.R. No. 394 of 1999.

¹¹³ Art. 35, par. 4 of the Legislative Decree No. 286 of 1998.

officers.¹¹⁴ The right to health is the only legal entitlement of irregular migrants established by the Consolidated Law that is provided such protection. The original version of Art. 35 has never been subject to amendments and indeed keeps the spirit of solidarity of the *'Turco-Napolitano'* Law of 1998. It can therefore be noted that the legislation's gaps observed in the case of the right to education are not present in the regulation of the right to medical care.

Despite its importance, even the prohibition on reporting established for the right to medical care – which is still in force in Italy – has been subject to a proposed amendment in 2009 when law No. 94 (the *'security package'*) was being considered. The discourse on public order and security threatened to overcome the concerns of policy makers regarding irregular migrants' fundamental right to medical care. In its original version, the security package would have repealed the prohibition on reporting provided by Art. 35, par. 5. The amendment was initially approved by the Italian Senate on 5 February 2009 but it provoked widespread criticism from civil society¹¹⁵, professionals' associations¹¹⁶ and parliamentarians that obliged the Parliament to withdraw its initial intentions. The amendment was not approved by the Chamber of Deputies and never entered in to force.

Some declarations of the people involved in the policy debate are worth citing in order to understand the issues at stake. Anna Finocchiaro, Senator of the PD (Democratic Party, in opposition at that time), for instance, stated that a law

'providing that a doctor shouldn't be any more prohibited to denounce is the germ of the fear that will push [irregular migrants] not to go and give birth to their children in hospitals, not to bring their children there when they are sick, to hide a serious illness that they might be bringing from their home country'

She added that *'this isn't any more a matter of the rigor of law'* but it concerns *'persecution'* and *'the fear of being persecuted'*.¹¹⁷ Fear was an important issue at stake as the debate alone on the proposed repeal of Art. 35, par. 5 reportedly led to a remarkable decrease in the number of migrants' requesting services from medical institutions because of the fear of being reported to the police.¹¹⁸

Italian medical associations demonstrated their serious concerns about the proposal, citing the risks for both migrants and nationals and strongly protested against the project of reform. The members of the National Federation of Doctors-Surgeons and Dentists (FNOMCEO) unanimously supported a document addressed to the Italian Chamber of Deputies which argued that:

¹¹⁴ Cf. P. Palermo, *Quali diritti per i figli dei 'clandestini'?* Atti dello stato civile, diritto all'istruzione e all'unità familiare, in *Famiglia e Diritto* (2010), 957.

¹¹⁵ See, for instance, the *"Non siamo spie!"* initiative – for more details see: PICUM Submission to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, April 2014, p. 17, available at http://www.ohchr.org/Documents/HRBodies/CMW/Discussions/2013/DGDMigrationData_PICUM_2013.pdf.

¹¹⁶ E.g. Anna Rita Cillis, in *Repubblica* (22 May 2009), *"Immigrati, il ddl sicurezza obbliga i medici a fare la spia"* available on www.repubblica.it.

¹¹⁷ Cf. G. Di Chiara, *Ghost people – Immigrazione clandestina, tutela della salute e dignità della persona*, in *Questione Giustizia* (2009), 23, Reference note No. 27.

¹¹⁸ Cf. Andkronos (18 February 2009), *Immigrati allarmati da norma clandestini, 15% rinuncia a cure*, available on www.andkronos.com.

'the possibility of a denunciation will create clandestine care pathways, depriving medical authorities of the control over those emerging contagious diseases that represent a serious danger for any individual as well as the whole society'.¹¹⁹

FNOMCEO further stated that the obligation to denounce would be in breach of the Medical Code of Ethics and the principle of non-discrimination in medical care. Several regional authorities, responsible as we have seen for health care, also opposed the proposal and released guidelines for medical providers reminding them that the prohibition to report was – at least *medio tempore* – still in force in Italian and regional legislation.¹²⁰ Following those protests, as aforementioned, the amendment was withdrawn and the Ministry of the Interior reiterated the existence of the prohibition with a circular letter sent to the staff of all Italian hospitals to ensure that doctors were clear that they did not need to start reporting irregular migrants to the police.

Regional measures concerning irregular migrants' access to health care.

National law as we have seen delegates the provision of health services to regional authorities¹²¹ which can play a fundamental role with regard to the medical care of irregular migrants. It is with regard to regional health care services, indeed, that the Constitutional Court has had the opportunity to reiterate that Regions can intervene in the areas of social assistance and public services for irregular migrants when their measures are aimed at further protecting migrants' fundamental rights.¹²² The case concerned a Regional law of Apulia (*Puglia*), the south-eastern region considered as the most '*migrant-friendly*' Italian region in the context of medical assistance.¹²³ Apulian law No. 4 of 2009 indeed includes a wide range of medical treatments within the definition of the essential and urgent health care to which under national law irregular migrants are entitled. This definition, according to the regional law (Art. 10), includes for instance, pharmaceutical assistance, the possibility of registering with a general practitioner (*medico di fiducia*) and for minors with a paediatrician, mental health services, gynecology, abortion, services for the prevention and cure of drug addiction and so forth. The President of the Apulian government, Nichi Vendola, has said that the right to health is a universal right that '*must be exercised by men and women of any race, nationality, whatever their personal condition is*'. The former Regional Councilor for Health, Alberto Tedesco, meanwhile observed that providing health care to all migrants is also a matter of public expenditure and remarked that if public health services '*don't take over the care of immigrant nationals, including the irregular ones, there is a*

¹¹⁹ FNOMCEO, *Documento del Consiglio Nazionale sul DDL Sicurezza* of 23 February 2009, available on www.fnomceo.it.

¹²⁰ Circular letter of the Health Care Department. of the Region of Piedmont of 23 February 2009; Circular letter of the Health Care Department. of the Region of Sicily of 25 February 2009; Circular letter of the Health Care Department. of the Region of Emilia-Romagna of 26 February 2009; Circular letter of the Health Care Department. of the Region of Apulia of 9 April 2009; the circular letters are available on www.simmweb.it.

¹²¹ Article 43 of the D.P.R. 394 of 1999.

¹²² Italian Constitutional Court, Decision No. 299 of 2010.

¹²³ E.g. Andkronos (18 May 2011), *Alla Puglia la palma di regione più "migrant friendly" d'Italia per l'assistenza sanitaria*, available at www.adnkronos.com/IGN/Sostenibilita/In_Pubblico/La-Puglia-regione-piu-migrant-friendly-dItalia-per-lassistenza-sanitaria_312029947537.html.

risk that these persons will suffer worse diseases that could have been avoided' and, afterwards, will be requesting much more expensive treatments.¹²⁴

The possibility for irregular migrants to register with a general practitioner is a measure that is available in Italy only in the Regions of Apulia and Umbria and in the Autonomous Province of Trento.¹²⁵ As for paediatric care for minors, the Italian State-Regions Permanent Conference has achieved an important agreement¹²⁶ in 2012 aiming at ensuring that legislation on access to health care for migrants is applied equally throughout the country. It established that children with irregular status would have full access to health care and would be assigned a paediatrician. Italian regions have been implementing this agreement and lately, after a long period of reluctance and controversy, even the Regional Council of Lombardy has finally introduced the possibility for these children to access paediatric care, although they are not able to register with a doctor of their own choice.¹²⁷

Access to shelter and accommodation

Summary of legal position

- ❖ *National legislation limits the right to access accommodation centres to regular migrants temporarily unable to meet their own housing needs;*
- ❖ *Regional legislation can extend access to shelter to irregular migrants, as happened for instance in the Region of Campania;*
- ❖ *The Consolidated Law on Immigration does not impede irregular migrants accessing private rented accommodations and instead protects irregular migrants from being victims of unfair financial exploitation from private landlords.*

The Italian Consolidated Law on Immigration provides the right to receive shelter if homeless to regularly-staying foreign nationals and assigns to Regions and local authorities the competence to establish accommodation centres for *regular* migrants who are temporarily unable to provide for their own needs.¹²⁸ A provision that used to enable city mayors to provide accommodation for irregularly-staying migrants in situations of emergency was repealed by the '*Bossi Fini*' law in 2002.

¹²⁴ E.g. Stranieriitalia.it (31 July 2008), *Puglia: sanità gratis anche per i clandestini*, available on www.stranieriitalia.it.

¹²⁵ Quotidiano Sanità (19 May 2011), *Immigrazione e salute. La Puglia è la Regione più attenta. Maglia nera a Calabria e Basilicata*, available on www.quotidianosanita.it.

¹²⁶ Italian State-Regions Permanent Conference, Agreement No. 255/CSR of 20 December 2012.

¹²⁷ E.g. ASGI (22 January 2014), *Quasi uguali. Lombardia, Pediatra per i figli di stranieri irregolari: da oggi con la circolare applicativa il diritto diventa effettivo*, available on www.asgi.it.

¹²⁸ Art. 40 of the Legislative Decree No. 286 of 1998. The law provides for accommodation centres for migrants temporarily unable to provide for their own housing needs. They are hostel-like facilities normally established solely for migrants but may coincide with centres for homeless Italian people. They should also provide food and services for the integration of migrants such as lessons in the Italian language. They are normally managed by private, charitable organisations with the support of regional authorities. Regular migrants can here access social housing under the same conditions as Italians, a form of provision more durable than accommodation centres.

Regional intervention for the housing and sheltering of irregular migrants

Nevertheless, as mentioned above, regional authorities can extend certain legal entitlements to *all* migrants and this is the case in relation to the right to access public and private housing. The most eloquent example is Art. 17 of the regional law No. 6 of 2010 of the Region of Campania which provides several forms of public assistance for accommodating migrants irrespective of their regular status. This measure provides funding for the establishment of accommodation centers that temporarily host ‘*all the foreign persons present on the territory of Campania who do not have their own living accommodation*’. It furthermore establishes that the reception of migrants in the accommodation centers is free of charge. Moreover, foreign nationals – irrespective of their immigration status – have access to public housing under the same conditions as Italian citizens, and they are also entitled to benefit from various regional financial contributions aimed at enabling access to private accommodation.

The Italian government opposed the regional legislation and brought an action against the Region of Campania before the Constitutional Court. It argued that the Region had exceeded its powers by endowing irregularly-staying foreign nationals with such entitlements, in breach of national legislation and their competence on immigration. The Court, however, emphasised the inviolable and fundamental right to housing and ruled that the measure adopted by the Region of Campania was legitimate.¹²⁹

Access to private rented housing

Concerning irregular migrants’ access to private rented accommodation, Italian national legislation only requires landlords wishing to rent their properties to a foreign national to communicate the personal identity information of the tenant to police authorities. It does not require information on their residence permit.¹³⁰ Landlords cannot require such information from a tenant and therefore it is possible for irregular migrants to access private rented accommodation. Moreover, it should be borne in mind that national legislation provides protection to migrants against exploitation by landlords of their irregular situation.¹³¹ The Italian Court of Cassation has stated that a landlord commits a crime if he or she – by taking advantage of the condition of irregularity of the tenant – rents a property to an irregular migrant with the intention of applying rents that are exorbitant in relation to the normal fares applied to regular migrants and, thus, aims at producing an unlawful profit.¹³² Art. 12, par. 5 of the Consolidated Law on Immigration indeed establishes that anyone who facilitates the irregular stay of foreign nationals on the Italian territory in order to gain an unlawful profit from their condition of irregularity shall be punished with a fine and imprisonment up to four years. The provision complies with the rationale of the EU *Directive defining the facilitation of unauthorised entry, transit and residence*¹³³, better known as the ‘*Facilitation Directive*’, which requires EU Member States to adopt sanctions on anyone

¹²⁹ Italian Constitutional Court, Decision No. 61 of 2011.

¹³⁰ Art. 7 of the Legislative Decree No. 286 of 1998.

¹³¹ Art. 12, par. 5 of the Legislative Decree No. 286 of 1998.

¹³² Italian Court of Cassation, Decision No. 46070 of 2003.

¹³³ Council Directive 2002/90/EC of 28 November 2002.

assisting intentionally, and for financial gain, a non-EU country national to reside in the territory of an EU country in breach of laws on entry and stay.

The Italian provision, however, besides being aimed at sanctioning the facilitation of irregular migration, turned out to be a protective measure for irregular migrants through its introduction of the reference to unlawful profit gained from the irregular condition of the foreign national. As reminded by the Court of Cassation, the financial gain of a landlord is not a sufficient condition for committing the crime, as the specific intention of taking advantage of the irregularity is a necessary requirement for the offence to occur.

Welfare payments

Summary of legal position

- ❖ *National legislation in Italy does not establish any right to access welfare payments for irregular migrants*
- ❖ *The experience of the Region of Tuscany and the jurisprudence of the Italian Constitutional Court have shown that regional legislation can provide irregular migrants with the right to benefit from certain welfare payments, namely those ‘urgent and non-postponable social welfare measures which are necessary to ensure respect of fundamental rights’.*

The Consolidated Law on Immigration entitles migrants holding a long-term residence permit (not less than one year) to access welfare payments and provides them with the same treatment as Italian citizens in relation to the enjoyment of social benefits, including welfare payments.¹³⁴ Irregular migrants are excluded from the enjoyment of this right and no other national provision entitles them to receive any kind of social welfare benefits.

In this field, once again, regional legislation has shown a more inclusive approach. This is the case, for instance, in law No. 29/2009 of the Region of Tuscany which entitles migrants – irrespective of their status – to benefit from a series of regional social measures. Among those, Art. 6, par. 35 provides *all* those residing on the Tuscan territory, including those who do not hold a residence permit, to benefit from those

‘urgent and non-postponable social welfare measures which are necessary to ensure the respect of the fundamental rights recognised to all persons by the Constitution and international law’.

The Italian government considered that this legislation had exceeded the limits of the competence of regional interventions and brought an action before the Constitutional Court. The Court, however, accepted the legitimacy of the regional measures, citing protection of the fundamental rights of the people concerned. The social welfare interventions provided by the Region of Tuscany are indeed those *‘urgent’*, *‘non-postponable’* and *‘necessary’* to ensure the respect of fundamental rights of migrants. Interestingly, the Court has held social welfare measures to be a

¹³⁴ Art. 41 of the Legislative Decree No. 286 of 1998.

component of the fundamental right to health and, as such, irregular migrants too should benefit from them.¹³⁵

Protective measures for victims of crime

Summary of legal position

- ❖ *Art. 18 of the Italian Consolidated Law on Immigration provides for the issue of a special residence permit for irregular migrant victims of violence and exploitation carried out by criminal organisations. Migrants holding such a permit have access to special programs of assistance and social integration.*
- ❖ *Art. 18-bis of the Consolidated Law also provides for the issue of a special residence permit for irregular migrant victims of domestic violence, including physical, psychological, sexual and economic violence.*
- ❖ *Both of these residence permits are issued in order to enable the victims to flee the violence. Migrants holding such permits can work and study; thus, once expired, their permits might be renewed for work or study reasons.*
- ❖ *Law enforcement authorities and social assistance providers play a fundamental role in facilitating migrants' access to these protective measures.*
- ❖ *The Apulian experience shows that Regions can further enhance the protection of victims of crime.*

Articles 18 and 18-bis of the Consolidated Law on Immigration provide special residence permits with the intention of ensuring the protection and social assistance of the victims of certain crimes who are irregularly staying in Italy.

The first article concerns a series of crimes, mostly connected with situations of violence and exploitation of migrants carried out by criminal organisations. This includes sexual exploitation, trafficking in persons, labour exploitation and forced begging but not only these forms of exploitation as it could concern any crime complying with the conditions established by Art. 380 of the Italian Code of Criminal Procedure.¹³⁶

Art. 18-bis, which was recently adopted¹³⁷, deals with situations of domestic violence, including physical, psychological, sexual and even economic violence. The law also specifies that the protective measure is applied irrespective of the cohabitation of the author of the crime with the victim, family/ matrimonial ties being a sufficient condition for the application of the provision.

Both of the articles provide for the issue of special residence permits for the victims, the aim in both cases being to enable the person to flee the violence. In the case of Art. 18, the residence permit issued for victims of violence and exploitation is also aimed at letting the latter participate in special programmes of assistance and social integration. The residence permit in this case is

¹³⁵ Italian Constitutional Court, Decision No. 269 of 2010.

¹³⁶ Cf. ASGI, *Misure di protezione sociale - Scheda pratica*, Francesca Nicodemi, Paolo Bonetti (eds.), (2009), available on www.asgi.it.

¹³⁷ Law No. 119 of 2013.

conditional on the effective and constant participation of the victim in the programme, hence its interruption or the lack of specific programmes on the territory may prevent the victim from keeping or obtaining the residence permit.¹³⁸ This points to the essential role played by local authorities and private associations in providing specific programmes of social assistance for the effective protection of victims. It is necessary, for the law to be effective, that social assistance providers create specific support programmes for the assistance of not only one category but for a wide variety of victims (*e.g.* sexually exploited people, trafficked people, forced beggars, etc.), for the intention of the law to be fulfilled.

In relation to both of these measures the duration of the residence permit is conditional on the judicial needs of the trials against the crime although, significantly, the permits are issued irrespective of the victim's cooperation with judicial authorities.¹³⁹ Migrants holding such permits are enabled to work and study thus, once expired, their permit might be renewed for study or work purposes.

It is important to note that both of the measures provided by Articles 18 and 18-bis cannot be requested directly by the victims but are the consequence of a decision of the head of local police (*Questore*) who issues the permits when the situation of violence is acknowledged in the event of a law enforcement operation concerning the crimes for which the permits are provided. Nevertheless, Articles 18 and 18-bis also establish that the *Questore* can activate the protective measures if alerted by social assistance providers who discover a situation of violence in the course of their work. This is another case in which local authorities, as well as private associations providing social assistance, can play a fundamental role in the protection of irregular victims. This is particularly true in a country – as in Italy until recently – where irregular migrants are criminalized and therefore discouraged from approaching a public security authority to denounce a crime. Social assistance operators, instead, might more easily approach the police – and also be approached by migrants, and can thus act as an intermediary between the latter and law enforcement authorities for both the protection of victims and the fight against crime. Their activity can prove fundamental in informing irregular victims of crimes about the special residence permits and in facilitating their access to justice.

Regional intervention for the protection of migrant victims of crime

As for an example of regional interventions for the protection of victims of crime, law. No. 32 of 2009 of the Region of Apulia enables the Region to contribute to the protection of the fundamental rights of *all* migrants residing in the Apulian territory (Articles 1 and 3). Accordingly, with the intention of ensuring everybody's right to protection, this law established the right of all migrants, irrespective of their status, to benefit from the legal protection provided by the Region (Art. 3, letter h). This last provision was, however, declared unconstitutional and repealed for exceeding regional competences.¹⁴⁰ Nevertheless, the regional power to contribute to the

¹³⁸ Cf. ASGI, *Misure di protezione sociale - Scheda pratica*, (Op. Cit.).

¹³⁹ As for the permit provided by Art. 18, its duration is of 6 months, but it can be renewed for 1 year or the longer period required for judicial reasons.

¹⁴⁰ Italian Constitutional Court, Decision No. 299 of 2010.

protection of migrants' human rights, regardless of their status, is still in force and the Region has intervened in support of irregular migrants, for instance, in a well-known trial started on 31 January 2013 at the *Corte d'Assise* of Lecce. The trial – which at the time of writing is ongoing – is of Apulian citizens who are accused of slavery and labour exploitation of irregular migrant workers in Salento, the southern area of Apulia. The Region took part in the process and brought a civil action within the criminal proceedings against the exploiters. Anna Grazia Maraschio, the lawyer who represents the region in the trial, has explained the rationale of the regional action, stating that:

'the investigations show a situation that offends the conscience and sensitivity of the collectivity which the Region represents. The alleged crimes affect the fundamental values of the human person, whose protection is among the institutional goals of the Region'.¹⁴¹

The rights to certificates of civil status

Summary of legal position

- ❖ *A new version of Art.6, par. 2 of the Italian Consolidated Law on Immigration requires migrants to exhibit a valid residence permit when requesting the issue of documents concerning their persons and does not exempt certificates of civil status from this requirement.*
- ❖ *According to a ministerial circular letter, when performing activities concerning birth certificates and legal filiation [...] the documents concerning the residence (of the parents) must not be exhibited, because (such declarations) are issued for the public interest in legal certainty, as well as being aimed at protecting the minor*
- ❖ *The requirement of Art. 6 par. 2, also cannot be applied for the issue of documents that are necessary to allow a foreign national to get married in Italy, as the Italian Constitutional Court declared unconstitutional a provision that required migrants wishing to get married in Italy to exhibit a valid residence permit.*

As aforementioned, the 'security package' of 2009 reformed Art. 6, par. 2 of the Consolidated Law on Immigration, to require migrants to produce a valid residence permit when seeking public services. Art. 6 in its prior version expressly exempted acts relating to the individual's civil status from such a requirement but the new provision appeared to apply to such acts including birth certificates and the necessary documents to get married before Italian institutions. That interpretation, however, did not go unchallenged.

a) Birth certificate and legal recognition

A minor, as we have seen, cannot be considered as irregularly staying in Italy. An express prohibition on deporting minors is provided by the law,¹⁴² which also entails their right to obtain a

¹⁴¹ Cf. Repubblica (31 January 2013), Lecce, in tribunale il coraggio degli "schiavi" -"Abbiamo paura, ma non ci fermeremo", available on www.repubblica.it.

¹⁴² Art. 19, par. 2, letter a) of the Legislative Decree No. 286 of 1998.

residence permit until they reach the age of 18.¹⁴³ The concerns raised by the new law are therefore related to children of irregular parents, the latter being dissuaded from requesting a birth certificate for any of their children born in Italy. Such a request would expose them to the risk of being subject to expulsion and – until recently – to a criminal trial. The problem of the so-called ‘ghost children’ was criticised by civil society organizations, regional authorities and the Italian government itself.

Following an appeal from the Association for Juridical Studies on Migration (ASGI)¹⁴⁴ for an interpretation of the new Art. 6, par. 2 that would respect children’s fundamental rights, the Italian Ministry of the Interior released a circular letter providing an interpretation of the norm that would be respectful of the right of the child to a birth certificate and the child’s legal recognition by his or her parents.¹⁴⁵ The circular-letter specifies that:

*‘when performing activities concerning birth certificates and legal filiation [...] the documents concerning the residence (of the parents) must not be exhibited, because (such declarations) are issued for the public interest to legal certainty¹⁴⁶, besides being aimed at protecting the minor’.*¹⁴⁷

The problem though is not fully resolved since, as aforementioned, circular letters do not have the same legal value as a law and the ambiguity of new Art. 6, par. 2 might pave the way to different interpretations and unconstitutional applications of the provision. In this case too, it would be necessary to secure certainty through legislative means.¹⁴⁸

Italian legislation also provides for the possibility of making a birth declaration of a newborn at the medical institution where the child is born.¹⁴⁹ It has to be noted that the prohibition on the staff operating in the medical institution (including police staff) to report an irregular migrant applies also to this situation. Therefore an irregular migrant can request a birth certificate and legally recognize his or her child in a medical institution without fear of being reported. Finally, the birth declaration can also be made by persons other than the parents of the child, such as the doctor, the obstetrician or any other person who witnessed the birth.¹⁵⁰

Most of the Italian Regions perceived risks created by the ‘security package’ on this issue, and – at the time of the adoption of the law – released regional ‘circular letters’ to their medical institutions providing an application of the new provision that would respect fundamental

¹⁴³ Art. 28, par. 1, letter a) of the D.P.R. 394/1999.

¹⁴⁴ Association for Juridical Studies on Immigration (*Associazione per gli Studi Giuridici sull’Immigrazione*). The appeal of civil society organisations is available on www.asgi.it.

¹⁴⁵ Italian Ministry of the Interior, Circular letter No. 19 of 7 August 2009, available on www.interno.gov.it.

¹⁴⁶ Art. 6, par. 2 indeed imposes the exhibition of the residence permit only when the provision of activities are requested “for the interest of the foreign national”. The norm is therefore ambiguous since it does not specify which are those services and acts, nor how to identify them.

¹⁴⁷ Unofficial translation of the text: *‘Per lo svolgimento delle attività riguardanti le dichiarazioni di nascita e di riconoscimento di filiazione (registro di nascita dello stato civile) non devono essere esibiti documenti inerenti al soggiorno trattandosi di dichiarazioni rese, anche a tutela del minore, nell’interesse pubblico della certezza delle situazioni di fatto’.*

¹⁴⁸ Cf. P. Palermo, *Quali diritti per i figli dei ‘clandestini’?* *Atti dello stato civile, diritto all’istruzione e all’unità familiare*, in *Famiglia e Diritto* (2010), 957.

¹⁴⁹ Art. 30, D.P.R. No. 396/2000.

¹⁵⁰ *Ibid.*

rights'.¹⁵¹ These letters were aimed at reminding the staff of medical facilities that reporting irregular migrants is prohibited and particularly stressed the non-application of Art. 6, par. 2 for birth declarations and the legal recognition of children.

b) The right of irregular migrants (and their prospective spouses) to get married

The reform of Art. 6, par. 2 with regard to certificates of civil status also had an impact on the right of irregular migrants to get married in Italy. The 'security package' amended Art. 116 of the Italian Civil Code which regulates the marriage of a foreign national in Italy. New Art. 116 required migrants to present a '*document attesting the regularity of their stay in the Italian territory*', thus preventing non-regularly staying foreign nationals from getting married in Italy. The provision was aimed at combating the phenomenon of 'marriages of convenience' and it is reasonable to think that this was the main rationale for the amendment of Art. 6, par. 2 of the Consolidated Law on Immigration concerning civil status certificates.

In this case the competing concerns regarding the respect of fundamental rights of irregular migrants have been solved by the Constitutional Court that has amended Art. 116 of the Civil Code, declaring its illegitimacy for non-compliance with the fundamental right to get married¹⁵² of both irregular migrants and their Italian spouses.¹⁵³ The Court reiterated a principle that the European Court of Human Rights had already stated in the case *O' Donoghue and others v. United Kingdom*.¹⁵⁴ Consistently, the Italian Court of Cassation has ruled that a migrant cannot be expelled, nor sanctioned, for entering and staying irregularly on the Italian territory if the purpose of the entry is to marry an Italian citizen.¹⁵⁵

¹⁵¹ Circular letter of the Region of Tuscany of 9 July 2009; Circular letter of the Region of Piedmont of 16 July 2009;. Circular letter of the Region of Apulia of 4 August 2009; Circular letter of the Region of Lazio of 5 August 2009; Circular letter of the Region of Umbria of 7 August 2009;. Circular letter of the Region of Marche of 10 August 2009; Circular letter of the Region of Liguria of 14 August 2009; Circular letter of the Region of Campania of 17 August 2009; Circular letter of the Region of Veneto of 18 August 2009; Circular letter of the Region of Valle d'Aosta of 18 August 2009; Circular letter of the Region of Sicily of 27 October 2009; Circular letter of the Region of Molise of 13 October 2009; Circular letter of the Region of Emilia-Romagna of 15 September 2009; Circular letter of the Region of Calabria of 10 September 2009.

¹⁵² Articles 2 and 29 of the Italian Constitution.

¹⁵³ Italian Constitutional Court, Decision No. 245 of 2011. Cf. P. Palermo, *Diritto al matrimonio e 'clandestinità': tra diritti fondamentali e discrezionalità del legislatore*, in *Famiglia e Diritto* (2010), 1155.

¹⁵⁴ European Court of Human Rights, *O' Donoghue and others v. United Kingdom*, Application no. 34848/07, Decision of 14 December 2010. The Italian Constitutional Court expressly referred to this case and ruled that the Italian legislation was unconstitutional also for non-compliance with the international obligations (Art. 117 of the Italian Constitution) deriving from the ECHR and the cited jurisprudence of the ECtHR.

¹⁵⁵ Italian Court of Cassation, Decision No. 32859 of 2013.

CONCLUSIONS

The objective of this paper has been to summarise the main features of the Italian legal and policy framework concerning entitlements to public services for irregular migrants.

We have seen that the approach has evolved over the past fifteen years from the first requirement on migrants to have a residence permit for legal residence in 1990 through the *'Turco-Napolitano'* law of 1998 and the subsequent Consolidated Law on Immigration of that year. The core rights set out in the *Turco-Napolitano law* remain the key provision regulating the rights of migrants and entitlements to service provision – notwithstanding the stricter conditions on residence and access to services in the subsequent *'Bossi-Fini'* law of 2002 and so-called *'security package'* of 2009. The analysis in the first part of the paper shows how those later developments departed from the earlier emphasis on the protection of rights to a greater focus on security and enforcement, culminating in the criminalisation of irregular entry and stay and tighter restrictions on access to services in 2009.

It is then evident that this approach gave rise to difficulties which government – at national, regional and local levels – found it necessary to address. We see, first of all, wide use of government circulars to modify the unanticipated impacts of the legislative measures: as, for instance, making clear in 2009 that, while the Consolidated Law on Immigration (Art.6, para 2) now required migrants to show a valid residence permit to access a public service, this should not be applied in relation to access to a birth certificate; and the Ministry of Education clarifying in 2014 that schools are not obliged to denounce the irregular stay of pupils to the police. Such circulars do not, however, have the force of law, leaving a level of uncertainty in the legal position that has yet to be addressed.

Italy has also demonstrated a remarkable pragmatism in its arrangements to ensure that irregular migrants, most of whom are over-stayers, can access those services to which they are entitled: the Ministry of Education enabling parents to acquire a temporary code in order to register their child at school, for instance, and likewise the issuing of an anonymous *'STP code'* to facilitate access to and continuity of health care.

Regional authorities have also, as we saw, found it necessary on many occasions to modify the impact of the exclusionary measures, most notably in relation to access to health care, housing and welfare payments. The approach taken by the regions of Tuscany, Campania and Apulia were considered here in particular, but their approach reflected that of many others. In some instances the legitimacy of these measures was challenged in the Constitutional Court by a national government questioning both the legal competency of regional councils to legislate in this area of policy and the desirability of the measure itself.

The Constitutional Court, for its part, regularly endorsed the legitimacy of the regional measures, and challenged authorities that sought to restrict access. It also struck down measures in national law, such as the requirement to exhibit a residence permit in order to get married, that it found

disproportionate in their impact on a fundamental human right. The Court of Cassation and indeed the lower courts have also played a role, as in the case of Milan city council when the Tribunal of Milan found unlawful the city's decision to exclude the children of irregular migrants from pre-school education. EU law and Council of Europe Conventions appear, in contrast, to have had less direct impact on developments in this field.

We referred in the Introduction to the significance of Italy's experiences in the EU context. It serves to highlight developments seen recently in other Member States, not least the diverging responses of its regional and municipal authorities, challenging national policy because of their own pressing priorities and in the role of the courts. Comparatively, Italy is one of only eight EU countries that allows irregular migrants a level of access to primary and secondary health care (beyond an entitlement to emergency care, maternity care and treatment of infectious diseases seen more widely across the EU28); and among the nine EU states where an entitlement for children to attend compulsory education is explicit in law.¹⁵⁶ It also stands out in its recent decision to de-criminalise irregular stay (so that it is now one of 11 Member States where irregular status is treated as an administrative not a criminal offence); in the priority that it gives in its legal framework to protecting minors regardless of legal status; and likewise in its measures to protect some victims of crime.

A major aim of the wider study of which this paper is a part is to understand the reasoning behind decisions to provide access to services. That dimension is ongoing in relation to Italy so that we have cited here only some of the rationales given by those involved in the decisions at each level of government. What has been striking, as is also emerging in the wider study, is that while the fundamental rights of individuals and of children in particular are regularly cited as the reason why access to an essential service should be provided (along with the rights of Italian residents, for instance, to be able to marry whom they choose), pragmatic reasons relating to the wellbeing of the population also play their part: considerations of public health; the avoidance of the higher costs of health care if the individual's health deteriorates because of lack of immediate access to care; the importance of legal certainty and the need to avoid clandestine living. It is at the local level in many cases that those concerns are most keenly felt and therefore not surprising that it is regional and municipal authorities that act to ensure access, sometimes in the face of opposition from a national government for whom the enforcement of immigration controls seems a more pressing concern.

Across Europe it is not uncommon to see greater respect for the rights of children with irregular status than for adults, a recognition in part that they do not bear responsibility for their irregular status. The position in Italy that a minor cannot be deported, is entitled to a residence permit until the age of 18 and therefore cannot be considered as irregularly staying in the country, exemplifies that approach. The recent decision to ensure that all children can access paediatric care is a further example, as is access to a birth certificate, and the right endorsed by the courts to access pre-school education.

¹⁵⁶ Art. 38, Legislative Decree No. 286 of 25 July 1998.

The relative importance of these differing considerations has played out in public and political debates. It is evident that civil society organisations have played a key role in articulating the needs of irregular migrants and highlighting the implications of their exclusion, and that health professionals were central to the defeat of the proposal in 2009 that they should pass on the personal details of patients with irregular status to the police. Civil society has also proved a necessary intermediary for irregular migrants to access certain rights, not least the protection offered to victims of crime which can only be accessed with the agreement of the police, whom irregular migrants can be hesitant to approach directly.

Finally, we saw that in April 2014 Italy took a landmark decision: to de-criminalise irregular entry and stay, Parliament delegating to the government the practical implementation of that reform, to convert it back into an administrative offence, over the next 18 months. Three core arguments appear to lie behind that decision. First, criminalisation has not been effective. It has not acted as a deterrent to the unauthorised arrival of migrants nor does it appear to have encouraged those present to leave. Second, one consequence has been further overloading of an already stretched criminal justice system which Italy is under external and internal pressure to reform. De-criminalisation, in reducing the number of cases that will have to be handled by the courts – cases complicated by lack of documentary evidence and the sometime removal of people from the territory before the trial is complete - helps to reduce that pressure. Thirdly, treating irregular migrants as criminals was felt by many to be counter to the ethos of respect for human rights and diversity which the modern Italy wants to reflect, highlighted in the outrage of the public that the survivors of the tragedy of Lampedusa were to be put on trial for stepping on to Italian soil.

This re-shaping of Italian policy towards irregularity would perhaps have found favour with an earlier Italian Minister of the Interior, Giuliano Amato, who reflected the humanitarian and pragmatic grounds for a level of inclusion in this way:

'it is not that clandestine migrants have a DNA that leads them to commit more crimes than regular migrants, but, being in a condition of illegality, they are subject to the blackmail of those who have the control over their persons and take advantage of their irregular status. There cannot be integration if there is unlawfulness'...

'We must be prepared to provide services without having the feeling that the Aboriginal people - that's us - are losing services in favour of immigrants'... 'These policies are those that prevent security problems: we are like firemen and we can arrive when the fire has already broken out, but there must be someone who prevents the fire to explode'.¹⁵⁷

¹⁵⁷ Giuliano Amato, former Italian Minister of the Interior, at the first *National Conference on Immigration – Towards a Multicultural Society* (Florence, 22 May 2007); e.g. *ImmigrazioneOggi, Conclusa la prima Conferenza nazionale sull'immigrazione. Due giorni di dibattito in cui non sono mancate polemiche sulla questione sicurezza. Assenti gli immigrati. La cronaca delle due giornate, available on www.immigrazioneoggi.it; Stranieri in Italia, Il ministro Amato: "No a chiusure, sì a politiche sulla casa", available on www.stranieriinitalia.it.*

BIBLIOGRAPHY

Baldin, S. (2005) 'La competenza esclusiva statale sull'immigrazione vs la legislazione regionale sull'integrazione sociale degli immigrati: un inquadramento della Corte costituzionale', *Forum di quaderni costituzionali*.

Bascherini, G. (2010) 'Il riparto di competenze tra Stato e Regioni in materia di immigrazione al tempo del "pacchetto sicurezza": osservazioni a margine delle sentt. 269 e 299 del 2011', *Giur. Cost.*, 3907.

Biondi Dal Monte, F. (2011) 'Regioni, Immigrazione e diritti fondamentali', *Le Regioni*, 1086.

Callia R., Giuliani M., Pasztor Z., Pittau F. and Ricci A. (2012) 'Practical responses to irregular migration: the Italian case', EMN Italy and IDOS Centre of Study and Research, Rome.

Caponio, T. (2004) 'Governo locale e immigrazione in Italia. Tra servizi di welfare e politiche di sviluppo', *Le istituzioni del federalismo*, 805.

Cardia, C. (2011) 'Immigrazione e multiculturalità', *Iustitia*, 27.

Cheli, E. (2010) 'Diritti umani degli immigrati: profili costituzionali e internazionali', in Pisillo Mazzeschi, R., Pustorino, P. and Viviani, A. (eds.), *Diritti umani degli immigrati – Tutela della famiglia e dei minori*, Napoli: Editoriale Scientifica.

Collantes, Sara (2009) 'Access to Healthcare for Irregular Migrants and Asylum Seekers in 10 EU Countries: Law and Practice', HUMA Network, Paris.

Commissione Fiorella (2013) 'Relazione per la revisione del sistema penale', Ministero della Giustizia, Roma, Italy.

Corsi, C. (2012) 'Diritti sociali e immigrazione nel contraddittorio tra Stato, Regioni e Corte Costituzionale', *Diritto, Immigrazione e Cittadinanza*, 43.

Delvino, N. (2013) 'Diritti umani degli immigrati: profili internazionalistici', unpublished MA thesis, University of Bari.

Di Chiara, G. (2009) 'Ghost people – Immigrazione clandestina, tutela della salute e dignità della persona', *Questione Giustizia*, 23.

Di Martino, A, Dal Monte, F.B, Boiano, I and Raffaelli, R. (2013) *The criminalization of irregular immigration: law and practice in Italy*, Pisa: Pisa University Press. <http://www.wisslab.dirpolis.sssup.it/files/2013/05/Libro-dirpolis-1.pdf>.

Favilli, C. (2011) 'L'attuazione in Italia della direttiva rimpatri: dall'inerzia all'urgenza con scarsa cooperazione', *Rivista di diritto internazionale*, 693.

Favilli, C. (2012) 'Secca condanna dell'Italia per i rimpatri di migranti in alto mare verso la Libia', *Questione Giustizia*, 199.

Fondazione ISMU (2014) *Diciannovesimo rapporto sulle Migrazioni 2013*, Milano: Franco Angeli.

FRA (2014), 'Criminalisation of migrants in an irregular situation and of persons engaging with them'. EU Agency for Fundamental Rights, Vienna.

FRA (2011), 'Migrants in an irregular situation: access to healthcare in 10 European Union Member States'. EU Agency for Fundamental Rights, Vienna.

Gioiosa, M. (2010) 'Stato Sociale e immigrazione in Spagna. Confronti con l'Italia', *Rivista di diritto Pubblico Comunitario*, 203.

Huddleston, T., Nielszen, J., et al. (2011), *Migrant Integration Policy Index III*, Brussels: MIPEX and the British Council.

Italian Ministry of the Interior (2007) 'Rapporto sulla criminalità in Italia, analisi, prevenzione e contrasto', www.interno.gov.it.

Italian Senate (2014) 'Relazione programmatica sulla partecipazione dell'Italia all'Unione Europea', www.senato.it.

Liguori, A. (2012) 'La Corte europea dei diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso Hirsi', *Rivista di Diritto Internazionale*, 415.

Marani, S. (2010) 'L'aggravante della clandestinità è incostituzionale - Corte Costituzionale, sentenza 08.07.2010 n° 249', www.altalex.com.

MIUR (2014) 'Linee guida per l'accoglienza e l'integrazione degli alunni stranieri', Italian Ministry of Education, University and Research, Rome.

Mulvaney, E. et al. (2013), 'Using legal strategies to enforce irregular migrants' Human Rights', Workshop report, Platform for International Cooperation on Undocumented Migrants, Brussels.

Nicodemi, F. and Bonetti, P. (2009) 'Misure di protezione sociale - Scheda pratica', Associazione per gli Studi Giuridici sull'Immigrazione, Torino.

Palermo, P. (2010) 'Diritto al matrimonio e 'clandestinità': tra diritti fondamentali e discrezionalità del legislatore', *Famiglia e Diritto*, 1155.

Palermo, P. (2010) 'Quali diritti per i figli dei 'clandestini'? Atti dello stato civile, diritto all'istruzione e all'unità familiare', *Famiglia e Diritto*, 957.

Palmisano, G. (2009) 'Trattamento dei migranti clandestini e rispetto degli obblighi internazionali sui diritti umani', *Diritti Umani e Diritto Internazionale*, 509.

Peers, S. (2013) 'The Future of the Schengen System', Swedish Institute for European Studies, Stockholm.

Lengar, S. and LeVoy, M. (2013) 'Children First and Foremost', Platform for International Cooperation on Undocumented Migrants, Brussels.

Raffaelli, R. (2011) 'The Returns Directive in light of the El Dridi judgement', *Perspectives on Federalism* 3, no. 1.

Ronchetti, L. (2011) 'I diritti fondamentali alla prova delle migrazioni (a proposito delle sentenze nn. 299 del 2010 e 61 del 2011)', *Rivista dell'Associazione dei Costituzionalisti* no. 3.

Rozzi, E. and Console, M. (2014) 'Minori stranieri e diritto all'istruzione e alla formazione professionale - Sintesi della normativa vigente e delle indicazioni ministeriali (aggiornata con le Linee guida del MIUR del febbraio 2014)', Associazione per gli Studi Giuridici sull'Immigrazione, , Torino.

Rozzi, E. (2009) 'Il diritto dei minori stranieri privi di permesso di soggiorno all'istruzione, alla formazione e all'accesso ai servizi socio-educativi dopo l'entrata in vigore della legge n. 94/09', Associazione per gli Studi Giuridici sull'Immigrazione, Torino.

Rozzi, E. (2009) 'I minori stranieri extracomunitari e il diritto all'istruzione dopo l'entrata in vigore della legge n. 94/2009', Associazione per gli Studi Giuridici sull'Immigrazione, Torino.

Saccucci, A. (2010) 'Diritto all'istruzione e discriminazione scolastica di minori stranieri alla luce delle norme internazionali sui diritti umani', in Pisillo Mazzeschi, R., Pustorino, P. and Viviani, A. (eds.), *Diritti umani degli immigrati – Tutela della famiglia e dei minori*, Napoli: Editoriale Scientifica.

Spencer, S. and Hughes, V. (2014 forthcoming) 'Outside and In: Legal Entitlements to Health Care and Education for Migrants with Irregular Status in Europe', COMPAS, University of Oxford.

Strazzari, D. (2011) 'Stranieri regolari, irregolari, "neocomunitari" o persone? Gli spazi d'azione regionale in materia di trattamento giuridico dello straniero in un'ambigua sentenza della Corte', *Le regioni*, 1037.