

Criminal law and migration: The sources and implications of uncertain sanctioning regimes

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Abstract: This article investigates the role of uncertainty, in the context of the criminalisation of irregular entry and stay in Europe. Specifically, it examines the adoption and enforcement of the norm making irregular migration a crime in Italy and France, arguing that implementation has been highly uneven in both countries. While the roots of such uncertainty may be related to both legal and political aspects, and, ultimately, to the problematic nature of the criminalisation of irregular migration itself, its implications range beyond individual cases, potentially leading to counterproductive outcomes for both migrants and migration-reception systems.

Keywords: Migration; criminalisation; uncertainty; Italy; France

1. Introduction.

Uncertainty is today a key characteristic of migrants' irregular journeys to Europe. From the precariousness of crossing the Sahara Desert, to that of surviving Libyan detention centres and the journey across the Mediterranean; from the unsureness of obtaining asylum status, to that of being sanctioned or expelled for failing to meet entry requirements:¹ All the steps along the journey are frequently characterised by intense uncertainty.

In this context, significant insecurity derives from the lack of certainty of whether sanctions for irregular entry or stay will be applied once in Europe, and how. Indeed, despite the high emphasis on governments' attempts to deter irregular migratory flows to the region (an emphasis that arguably intensified during and after the so-called 'migration crisis' of 2014-6), there is evidence that the implementation of restrictive measures has not always been consistent. This is exemplified by the case of Italian policemen avoiding registering migrants (in the hope that they would apply for asylum in another European state), which was not uncommon,² until at least the

¹ For data on migrants' deaths and on asylum recognition rates, see IOM Missing Migrant project, <https://missingmigrants.iom.int>, and MPI Asylum Recognition Rates in the EU/EFTA by country, 2008-2017, <https://www.migrationpolicy.org/programs/data-hub/charts/asylum-recognition-rates-euefta-country-2008-2017>.

² P. Fargues, S. Bonfanti, *When the Best Option Is a Leaky Boat: Why Migrants Risk Their Lives Crossing the Mediterranean and What Europe Is Doing about It*, Firenze, 2014, 13.

introduction of hotspots in 2016.³

To what extent is the migration-sanctioning system in Europe characterised by uncertainty? Why does a lack of uniform implementation occur, and what are the implications of it, both for migrants and receiving societies more broadly? This article focuses on the above questions, addressing specifically the uncertainty involved in the criminalisation of irregular migration. The aim of the study is thus to discuss the effects of uncertainty, not so much in relation to migrants' access to legal provisions, but rather to their sanctioning, following irregular entry and/or stay.

Indeed, although the criminalisation of irregular migration has not been widely studied, its effects are worth investigating: Since the criminal law should only be used as a last resort,⁴ criminalisation bears significant consequences for migrants, who are faced with severe sanctions and find their criminal records negatively affected. This is especially the case as irregular migration has often been described as a *mala prohibita*, that is to say an infraction that neither harms society nor is morally wrong, but that is simply declared illegal by statute.⁵

To analyse and compare the role of uncertainty across countries, the article considers the specific cases of Italy and France, two member states that are characterised by a particular severity of the sanctions foreseen: While the former is among the EU countries imposing the highest sanctions for irregular entry and/or stay (up to 10,000 euro), the latter is among the few foreseeing a double punishment, including both a fine (of 3,750 euro) and imprisonment (of up to a year).

The study combines criminological analyses on deterrence and criminalisation, with the literature on migration governance, resulting in an interdisciplinary approach that is better able to address the complexity of the issues discussed. To enrich the analysis, the research also relies on official statistics, as well as over 50 elite interviews with magistrates, politicians and police officers, carried out in 2017-8 in the two studied countries.

The discussion is structured as follows. In the first part of the article, the theoretical context underpinning criminalisation and uncertainty is presented, building upon both criminological and migration studies. Subsequently, the history of criminalisation in the two countries is briefly introduced, together with the goals of the norm and a number of key aspects that differentiate the two legal contexts. Data on the use of the criminal law is then analysed, in order to assess the extent of uncertainty involved. Finally, the last section considers the roots and implications of such lack of predictability.

³ See Commissione Parlamentare di Inchiesta sul Sistema di Accoglienza, di Identificazione ed Espulsione, nonché sulle Condizioni di Trattenimento dei Migranti e sulle Risorse Pubbliche Impegnate, *Relazione sul Sistema di Protezione e di Accoglienza dei Richiedenti Asilo*, Doc. XXII-bis n. 21, 2017, 58.

⁴ Gisti (Ed), *Immigration: Un Régime Pénal d'Exception*, Paris, 2012, 2.

⁵ M. Thornton, *Social Harm*, in McLaughlin and Muncie, *The SAGE Dictionary of Criminology*, London, 2001, 277; E. Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, in 62 *UCLA Law Review*, 641 (2015).

Overall, the article argues that significant uncertainty has characterised the implementation of the crime of irregular entry and stay, both in Italy and France. While the causes of such uncertainty can be related to both legal and political aspects, and, ultimately, to the problematic nature of the criminalisation of irregular migration itself, its implications range beyond individual cases, potentially leading to counterproductive outcomes for both migrants and the migration-reception systems.

2. Criminalisation and (un)certainty.

Although a broad understanding of the meaning of the ‘criminalisation’ of migration is often followed in the literature,⁶ this article refers to it as the use of the criminal law, to sanction migration-related offences. A narrower definition is preferred here, in light of the greater symbolic value and different standards of proof implied by the criminal law.⁷ In this sense, criminalisation is an example of the ‘securitisation’ of migration, a trend that has developed in Europe since the late 19th century, and that relates to the ‘social construction of migration as a security question’.⁸ Indeed, by associating migration to offences that need sanctioning through the criminal law, the link between migration, crime, and security is created and reinforced.

From a criminological perspective, the criminalisation of a certain conduct is a strategy to increase compliance with the law, through two distinct mechanisms.⁹ First, by relying on the moral voice of the criminal law, states convey the message that the unwanted behaviour is morally wrong.¹⁰ Second, by introducing legal costs (in the form of fines, prison terms, and other), states leverage the threat of punishment, to instrumentally alter potential offenders’ decision-making process.¹¹ This second mechanisms represents deterrence, which thus becomes both a key goal of criminalisation, and a justification for the ensuing sanctions.¹²

In this context, according to multiple criminological studies, the certainty of punishment represents a key aspect for deterrence to work. Already in the 18th

⁶ In the broader interpretation of criminalisation, detention and other administrative practices are also included. See, for example, H. Jacobson, *The Criminalization of Irregular Migration in Italy*, in *Mediterranean Migration Mosaic*, 2016, <http://blogs.dickinson.edu/mediterraneanmigrationmosaic/files/2016/04/HylaJacobsonFinalIS.pdf>; V. Mitsileglas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law*, London, 2015.

⁷ M. Provera, *The Criminalisation of Irregular Migration in the European Union*, in *CEPS Paper in Liberty and Security in Europe*, n. 80/February 2015, 3.

⁸ J. Huysmans, *The European Union and the Securitization of Migration*, in *38 Journal of Common Market Studies* 5, 752(2000).

⁹ A.P. Simester, A. von Hirsch, *Crimes, Harms, and Wrongs On the Principles of Criminalisation*, Oxford, 2011.

¹⁰ *Ivi*, 12-13.

¹¹ *Ivi*, 14-15.

¹² *Ivi*, 6.

century, Cesare Beccaria suggested that three factors are key in affecting the success possibilities of deterrent strategies: Certainty, severity, and celerity.¹³ While evidence for celerity was not uniform, the other two parameters have become key for following criminological studies.¹⁴ In particular, Beccaria argued that certainty plays a key role in increasing deterrence, even in the face of less severe sanctions,¹⁵ and following studies have endorsed such hypothesis.¹⁶ Among others, Nagin for example finds that a 10% increase in the presence of police leads to a 3% decrease in crime, thus arguing that the presence of police officers, acting as sentinels, can strengthen compliance with the law.¹⁷ While the relevance of severity is not the focus of the current article, it is important to note that increasing it has not been found to consistently improve law-abiding behaviour, but rather to potentially lead to counterproductive effects.¹⁸ Indeed, should severity be perceived as excessively high, courts may be less willing to enforce the foreseen sanctions, thus weakening the overall certainty of the norm.¹⁹ Finally, it is interesting to note that studies since the 1970s have focused not only on severity and certainty, but also on how these are perceived by potential offenders, in an attempt to avoid assumptions of perfect information among potential offenders.²⁰

The above criminological arguments find support in migration studies too, where the certainty of incurring punishment has often been argued to be a key factor. Among others, Carling and Hernández-Carretero maintain that, insofar as a successful migration journey is perceived as a matter of luck by potential newcomers, deterrent strategies are likely to bear limited effects.²¹ Similarly, Lopez-Sala and Godenau argue that the effectiveness of deterrence is directly related to the proportion of failed border-crossing attempts,²² and Cornelius and Salehyan that the likelihood of successful entry (rather than the adversity of border patrols) may shape migrants' decisions.²³

¹³ C. Beccaria, *Dei Delitti e delle Pene*, Milano, 1973 [1764].

¹⁴ See D.S. Nagin, *Deterrence in the Twenty-first Century: A Review of the Evidence*, Carnegie Mellon University Research Showcase @ CMU, 2013, 10.

¹⁵ C. Beccaria, *op.cit.*

¹⁶ See D.S. Nagin, *op.cit.*; A. von Hirsch, A. Bottoms, E. Burney, P. Wikström, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, Oxford, 1999, 6.

¹⁷ D.S. Nagin, *op.cit.*, 45.

¹⁸ D.S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, in 23 *Crime and Justice*, 1-42 (1998); A. von Hirsch, A. Bottoms, E. Burney, P. Wikström, *op.cit.*

¹⁹ D.S. Nagin, *Deterrence in the Twenty-first Century: A Review of the Evidence*, *cit.*, 20.

²⁰ See, for example, A. von Hirsch, A. Bottoms, E. Burney, P. Wikström, *op.cit.*, 33. For a more complete discussion of deterrence and migration, see M. Rosina, *Globalisation and Irregular Migration: Does Deterrence Work?*, in L.S. Talani, R. Roccu (Eds), *The Dark Side of Globalisation*, Cham, 2019, 85-120.

²¹ J. Carling, M. Hernández-Carretero, *Kamikaze Migrants? Understanding and Tackling High-Risk Migration from Africa*, Sussex, 2008, 56.

²² D. Godenau, A. López-Sala, *Multi-layered Migration Deterrence and Technology in Spanish Maritime Border Management*, in 31 *Journal of Borderlands Studies* 2, 4 (2016).

²³ W.A. Cornelius, I. Salehyan, *Does Border Enforcement Deter Unauthorised Immigration? The Case of Mexican Migration to the United States of America*, in 1 *Regulation & Governance* 2, 139-153 (2007).

Overall, looking at both criminological and migration studies, the perceived certainty of incurring punishment emerges as a key factor for deterrence to work. To assess how this unfolded in the context of the criminalisation of migration in Italy and France, in the next sections, I first discuss the history and goals of the introduction of the crime of irregular migration in the two legal systems, and then examine its implementation, to understand whether it may be described as ‘certain’, and what the sources and implications of such results are.

3. Turning migration into a crime: History, goals and features.

Today, the criminalisation of migration is widespread across Europe, with 26 out of 28 member states considering either irregular entry or stay (or both) as criminal offences, as of 2014.²⁴ Despite its diffusion, however, its origins vary significantly across countries. In this section, I first provide an overview of the introduction and evolution of the norm in Italy and France, to then discuss the respective goals, and relevant legal differences.

Considering the Italian case first, irregular migration was criminalised only relatively recently, through the 2009 ‘Security Package’. Indeed, while the introduction of a *reato di clandestinità* (crime of irregular migration) had been discussed for long, especially by the more far-right wings of the Parliament,²⁵ it was only in 2009 that the centre-right governing coalition adopted a law establishing it. By amending the *Testo Unico sull’Immigrazione*, the 2009 Security Package introduced article 10-bis, according to which unauthorised entry or stay is a criminal offence, to be sanctioned by a fine ranging from 5,000 to 10,000 euros.²⁶ The article also foresees the possibility for justices of the peace to substitute the fine with an expulsion order.

Since its introduction, the law has met significant opposition, with prominent figures opposing its adoption first,²⁷ and calling for its repeal then.²⁸ Yet, it has not seen any major modifications, as of today. Indeed, by October 2009, a case had already been raised to the Italian Constitutional Court, calling into

²⁴ FRA, *Criminalisation Of Migrants In An Irregular Situation And Of Persons Engaging With Them*, Wien, 2014.

²⁵ See, for example, Italian Parliament, Law Proposal n. 5808, *Modifiche al testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero*, emanato con decreto legislativo 25 luglio 1998, n.286, presented on 15 March 1999. For a discussion of the adoption of the norm in Italy, see M. Rosina, *What it takes to become a crime: Italy and the criminalisation of irregular migration*, in L.S. Talani, M. Rosina (Eds), *Tidal Waves? The political economy of populism and migration in Europe*, Bern, 2019.

²⁶ Art. 1, l. 15-7-2009 n. 94, *Disposizioni in Materia di Sicurezza Pubblica*.

²⁷ See A. Caputo et al, *Appello di Giuristi contro l’Introduzione dei Reati di Ingresso e Soggiorno Illegale dei Migranti*, in *Magistratura Democratica*, 2009; A. Camilleri et al., *Appello contro il Ritorno delle Leggi Razziali in Europa: Alla Cultura Democratica Europea e ai Giornali che la Esprimono*, in *Repubblica*, 2 July 2009.

²⁸ See A. Pansa, *Interview with Repubblica: “Reato di clandestinità, Pansa: ‘Abolirlo? Meglio riformarlo’*”, in *Repubblica*, 10 January 2016; G. Canzio, *Intervento del Primo Presidente Dott. Giovanni Canzio per la cerimonia di inaugurazione dell’anno giudiziario*, in *Corte Suprema di Cassazione*, 28 January 2016.

question the legitimacy of the new law, on the basis of its incompatibility with both the EU Return Directive and the Italian Constitution. The Court, however, supported the compatibility of the norm with both legal texts,²⁹ an opinion that was subsequently endorsed by the European Court of Justice (ECJ) too.³⁰ Despite the several calls for abrogation, and a parliamentary proposal supporting decriminalisation,³¹ the law criminalising irregular entry and stay is thus still in place, at the time of writing.

Looking now at the case of France, it is possible to appreciate that criminalisation has a much longer history there, dating back to 1938. It was then that the government headed by Daladier introduced the crime of irregular entry and stay.³² Today, the *Code de l'Entrée et du Séjour des étrangers et du Droit d'Asile* (Ceseda) foresees a fine of 3,750 euro, and up to a year of imprisonment.³³ The possibility of courts to sanction an expulsion order, to be executed at the end of the prison term, is also foreseen.³⁴

Differently from Italy, the norm has seen several modifications through time. Not only did the fines and prison time increase from 1938 to 2004, but a ban from the French territory was also introduced in 1981, for repeated offences.³⁵ Importantly, part of the law criminalising migration has recently been repealed, following rulings by the ECJ and by the French Supreme Court. Indeed, in the Achughbabian case, the ECJ found the French crime of irregular stay to be in contravention with the Return Directive: By sanctioning the imprisonment of irregularly-staying foreigners before they could be repatriated, the former conflicted with the latter's requirement that EU member states prioritise the return of third country nationals found in irregular situations.³⁶ Despite significant resistance by the French administration and security apparatus,³⁷ the crime of irregular stay was thus eventually repealed in December 2012.³⁸ That of irregular entry, however, is still in place.

Notwithstanding the different times of the introduction of the norm, in both Italy and France this had a double goal of: (1) Deterring further irregular

²⁹ Constitutional Court, 8-7-2010 n. 250/ 2010.

³⁰ CJEU, 6-12-2012, C-430/11, *Sagor*,

³¹ Art. 2, c. 3, lett. B, l. 28-4-2014, n. 67, *Deleghe al Governo in materia di pene detentive non carcerarie e di riforma del sistema sanzionatorio. Disposizioni in materia di sospensione del procedimento con messa alla prova e nei confronti degli irreperibili*.

³² French Parliament, *Décret sur la police des étrangers*, in *Journal Officiel* of May 1st, 2nd, 3rd 1938, <https://gallica.bnf.fr/ark:/12148/bpt6k20313224/f23.image>, art. 2.

³³ French Parliament, *Code de l'Entrée et du Séjour des Étrangers et du Droit d'Asile* (Ceseda), art. L.621-1 and L.621-2.

³⁴ French Parliament, *Décret sur la police des étrangers*, cit. art. 2.

³⁵ Art 4, French Parliament, Law 81-973, *Relative Aux Conditions D'entree Et De Sejour Des Etrangers En France*, in *Journal officiel de la République française*, 30 October 1981.

³⁶ CJEU, 6-12-2011, C-329/11, *Achughbabian*.

³⁷ P. Henriot, *Dépénalisation Du Séjour Irrégulier Des Étrangers: L'opiniâtre Résistance Des Autorités Françaises*, in *La Revue des droits de l'homme* 3, 1-14 (2013).

³⁸ Art. 2 and 8, French Parliament, Law 2012-1560, *Loi relative à la retenue pour vérification du droit au séjour et modifiant le délit d'aide au séjour irrégulier pour en exclure les actions humanitaires et désintéressée*, 31 December 2012,.

migration, and (2) facilitating the return of unauthorised migrants to third countries. Starting with the former goal, the law proposing the introduction of the norm in Italy directly stated that irregular entries would decrease by 10%, following the criminalisation of the infraction.³⁹ Similarly, though less explicitly, in France, not only did the goal of reducing migration often figure in Daladier's rhetoric in the 1930s,⁴⁰ but the penal code also foresaw the prevention of further infractions as being among the goals of the criminal law.⁴¹

Concerning the latter objective, both Italy and France also aimed to employ the criminalisation of migration as a tool to increase the repatriations of third country nationals. The way in which they hoped to do so, however, varied considerably. In Italy, criminalisation was intended to exploit an exception foreseen by the EU Return Directive, according to which Member States may decide not to apply the Directive to third country nationals who 'are subject to return as a criminal law sanction or as a consequence of a criminal law sanction'.⁴² Through this exception, the delay for voluntary return could have been avoided, and forced expulsions be used extensively.⁴³ In France, on the contrary, criminalisation was meant to enable law enforcement authorities to employ criminal custody (*garde à vue*) when apprehending migrants. In this way, they could withhold foreigners in irregular situation during document checks, so as to prevent them from absconding, and subsequently transfer them to detention centres, from where they would eventually be expelled.⁴⁴

Before proceeding to the analysis of the implementation of the norm, two differences between the Italian and French systems need to be highlighted. First, while public prosecutors are required to pursue infractions to the criminal law in Italy, this is left to the discretion of individual magistrates in France.⁴⁵ Second, migrants who are apprehended as entering or staying irregularly can be held in criminal custody in France,⁴⁶ but are left free to move in Italy. The above differences have important repercussions, since the non-enforcement of the norm is in contrast with national provisions in Italy, whereas this is not necessarily the case in France. Moreover, the lack of custody in Italy implies further difficulties to locate the migrants, inform them of the trial, and bring them to compliance. In

³⁹ Italian Parliament, Law Proposal n. 733, *Disposizioni in materia di sicurezza pubblica*, communicated to the President on 3 June 2008, 9.

⁴⁰ See T. Maga, *Closing the Door: The French Government and Refugee Policy, 1933-1939*, in 12 *French Historical Studies* 3, 424-442 (1982).

⁴¹ French Penal Code, as of 1 January 2017, art. 130-1.

⁴² European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, in *O.J. L 348/98*, 24th December 2008, art. 2, para. 2, let. B.

⁴³ See Italian Parliament, *Audizione del Ministro dell'interno, Roberto Maroni, in merito alle misure avviate per migliorare l'efficacia della normativa in materia di immigrazione*, 15 October 2008, http://www.camera.it/_dati/leg16/lavori/stenbic/30/2008/1015/s000r.htm.

⁴⁴ See, for example, D. Lochak, *Pénalisation*, in *L'étranger et le Droit Pénal*, *AJ Pénal*, 2016, 10-12.

⁴⁵ Italian Constitution, art. 112; French Code of Criminal Procedure, art. 79.

⁴⁶ See French Code of Criminal Procedure, art. 62 and 63; and French Ministry of the Interior, *Circular INTK1300159C*, 18 January 2013.

the more northern country, therefore, the criminal process starts with custody. Even there, however, it should be noted that there may be plenty of scope for foreigners to remain irregularly in the country, as exemplified by the number of apprehensions of unauthorised stay (which are among the highest in the EU).⁴⁷

With the above remarks, I now turn to the analysis of the implementation of the criminalisation of irregular migration, based on data from national statistical institutes, Ministries of Justice and of the Interior, and police departments. Specifically, I examine data on initiated trials and condemnations, to examine the degree of certainty involved. I then build on such analysis to investigate the roots and implications of such uncertainty.

4. Certainty and uncertainty in the criminalisation of migration in Italy and France.

4.1. Trends.

Assessing the degree of certainty involved in the criminalisation of irregular migration necessitates the quantification of the number of cases of irregular entry and/or stay that were registered, and that of the people who were condemned for the offence.

Starting the analysis with registered cases, it is possible to see a significant difference between numbers in Italy and in France. Indeed, in the latter country, until the repeal of the crime of irregular stay in 2012, police officers were registering significant numbers of cases, averaging a very high 112,687 per year in 2006-12.⁴⁸ Following the decriminalisation of irregular stay in 2012, and the ensuing impossibility to use *garde à vue* for the now administrative infraction,⁴⁹ however, registered cases dropped significantly, and became closer to the Italian average of 13,251 recorded offences per year in 2010-15.⁵⁰ While it is interesting to compare such data, it must be noted that the number of registered cases in Italy is not reflective of the actual number of migrants apprehended, as trials for art. 10-bis may (and often do) involve multiple individuals.⁵¹ It becomes therefore important to include figures on actual condemnations.

Looking at the number of people who were condemned for irregular entry and/or stay, it soon becomes apparent that these were not very high, in either

⁴⁷ See Eurostat, migr_eipre, 2018, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eipre&lang=en.

⁴⁸ French Government, *Chiffres départementaux mensuels relatifs aux crimes et délits enregistrés par les services de police et de gendarmerie depuis janvier 1996* (Departmental figures registered by police and gendarmerie), 2018, <https://www.data.gouv.fr/fr/datasets/chiffres-departementaux-mensuels-relatifs-aux-crimes-et-delits-enregistres-par-les-services-de-police-et-de-gendarmerie-depuis-janvier-1996/>.

⁴⁹ French Cour de Cassation, 5-6-2012, Arrêt n. 965 (11-30.530), C100965, 2012.

⁵⁰ ISTAT, *Data related to article 10-bis TUI, 2009-2016*, 2018.

⁵¹ See, for example, Agrigento Justice of the Peace, *Settlement 12/11/2016, related to process N. 20/2012*, 2016.

country. Even during the years of intense registration of cases, France only condemned an average of 2,700 people per year, for infractions of irregular entry or stay.⁵² Indeed, this seems to support the so-called ‘instrumentalisation’ hypothesis, according to which the crime of irregular migration was used instrumentally in the country, in order to increase expulsions (as will be further argued later).⁵³ Due to the differences in the Italian legal system mentioned in the previous section, the instrumentalization thesis does not apply to Italy, where indeed condemnations are closer to the number of initiated trials. Even there, however, the number of people convicted for unauthorised entry or stay was not very high (especially when compared to that of landings), peaking at 12,646 in 2012, and dropping to less than 3,000 in 2016.⁵⁴

Figure 1 Registered crimes and condemnations for irregular entry and/or stay, in Italy and France, 2000-2018



Author's elaboration on Departmental figures registered by police and gendarmerie (2018), Condemnations by infraction (2016), and ISTAT (2018).

How likely was it for third country nationals to be condemned for irregular entry or stay, in the two countries? In other words, how do the above numbers compare to the actual figures of migrants in irregular situation? To shed light onto this, I compare the number of condemnations with that of: (1) Migrants who may be subject to the norm in Italy,⁵⁵ and (2) migrants who are in situation of irregular stay in France. What emerges is that in neither country certainty was significant. In Italy, condemnations regarded a yearly average of 15% of the total number of migrants who may have been subjected to it, in 2009–2016.⁵⁶ In France,

⁵² French Ministry of Justice, *Condamnations selon la nature de l'infraction de 2009 à 2016* (Condemnations by infraction), 2016, <http://www.justice.gouv.fr/statistiques-10054/donnees-statistiques-10302/les-condamnations-27130.html>.

⁵³ D. Lochak, *op.cit.*

⁵⁴ ISTAT, *Data related to article 10-bis TUI, 2009-2016*, cit.

⁵⁵ The number of third country nationals (TCNs) subjectable to art. 10-bis is calculated as follows: TCNs in irregular situation, either through entry or stay, minus those who requested international protection.

⁵⁶ Based on: Ismu, *Sbarchi e Richieste di Asilo: Serie Storica Anni 1997-2014, 2014*, <http://www.ismu.org/wp-content/uploads/2015/02/Sbarchi-e-richieste-asilo-1997->

uncertainty was even starker, as convictions never overcame 4% since 2008.⁵⁷

As the above data demonstrates, certainty of incurring punishment for irregular entry or stay was very low both in Italy and France. In particular, the number of condemnations appears as limited, when compared to that of migrants apprehended in a situation of irregular entry or stay. What are the reasons for such lack of certainty, given the importance of the parameter to ensure compliance with the law? Equally, what are the implications of the uncertainty with which criminalisation is applied? The next section addresses such questions, before moving on to the conclusions of the study.

4.2. The roots and implications of uncertainty.

When trying to understand the reasons behind the uncertainty of the enforcement of the crime of irregular entry and stay, the first aspect that appears evident is that, in both Italy and France, local actors had significant discretion. As an example, following the sentences of the Supreme Court and of the ECJ, ruling that the French crime of irregular stay contravened the Return Directive,⁵⁸ a period of high uncertainty followed, in which criminal custody was used in a very uneven way by local actors.⁵⁹ Local actors' discretion is even more evident in the Italian case, where magistrates often avoided pursuing criminal offences, despite the above-mentioned requirement to do so. Indeed, the trend in the latter country is exemplified not only by the quantitative data shown above, but also by the interviews carried out by the author with prosecutors, police officers and justices of the peace, several of whom reported deciding not to apply the measure even in cases in which they would have been supposed to, due to either legal concerns on the suitability of the law, or a substantial lack of belief in its effectiveness.⁶⁰ In some cases, local actors reported deliberately putting files aside, waiting for them to fall into prescription.

Assessing the reasons for the uneven implementation by local actors, in turn, it might be possible to interpret this as a pragmatic response to an emerging *trade-off* between the certainty of the implementation of the norm, and its efficiency. Understanding efficiency as the ratio of 'inputs to intended effects',⁶¹ it is indeed possible to argue that, in the case of criminalisation, the more widespread the enforcement of the norm was (and hence certain its sanctions), the less efficient

2014.xls; Italian Ministry of the Interior, *Cruscotto Giornaliero*, 31 Dicembre 2017 and 31 December 2018; EUROSTAT, migr_eipre and migr_asyapp, 2018; ISTAT, *Data related to article 10-bis TUI, 2009-2016*, cit.

⁵⁷ Based on EUROSTAT migr_eipre, 2018; and French Ministry of Justice, *Condamnations selon la nature de l'infraction de 2009 à 2016*, cit.

⁵⁸ French Cour de Cassation, Arrêt n. 965 du 5 juillet 2012, cit.

⁵⁹ Henriot, *Dépénalisation Du Séjour Irrégulier Des Étrangers: L'opiniâtre Résistance Des Autorités Françaises*, cit.

⁶⁰ See, for example, interview with Senior official of the Italian National Police, phone, 11 December 2017; Interview with Deputy Public Prosecutor, Italy, 27th July 2018.

⁶¹ European Commission, *Better Regulation "Toolbox"*, 2015 ec.europa.eu/info/law/law-making-process/better-regulation-why-and-how_en, 278.

the use of resources resulted, and vice-versa. In Italy, the trade-off stems from the fact that, when a foreigner is apprehended in an irregular situation, criminal and administrative processes start in parallel, both aimed at expelling the person. In a context of often-lamented lack of financial resources and personnel,⁶² public prosecutors thus often find themselves in the situation of having to process up to hundreds of cases per day in some instances (especially in Southern regions),⁶³ which may lead to an overwhelming of their offices. In France, on the other hand, the requirement to enforce returns only at the expiration of the prison term, involved a significant duplication of costs. To provide an idea of the expenses involved, maintaining a person in a French prison for a day cost, on average, 99 euro, in 2013.⁶⁴ As for expulsions, their costs were estimated in 2008-10 to range between 10,000 and 27,000 euro, per person.⁶⁵

Overall, therefore, while the trade-off between certainty and efficiency was caused by different factors, it assumed prevalence in both Italy and France. In the former country, the trade-off was initially solved by opting for the greater certainty end of the spectrum, although the judicial apparatus soon moved away from it, as the data above shows (indicating a change following 2012). In France, on the other hand, preference was generally given to the more sporadic enforcement of criminal trials, from earlier on. Uncertain enforcement might thus be understood as a strategy employed by local actors, in an attempt to respond to incoherent policy tools.

Why did such incoherence occur, in the first place? Further unpacking the origins of the policy incoherence related to the criminalisation of migration, it may be possible to see that, while in France this was related to the *instrumentalization* of the criminal law, in Italy it was connected to a *deliberate malintegration* of migration policy goals.

On one hand, in France, the criminal law was indeed often employed to increase expulsions (rather than to pursue criminal trials), in what has been referred to as the *instrumentalisation* of the criminal law. Indeed, earlier studies⁶⁶ have argued that, while registering migrants as infringing the criminal law

⁶² G. Ferrero, *Contro il Reato di Immigrazione Clandestina: Un’Inutile, Immorale, Impraticabile Minaccia*, Roma, 2010, 62; Public Prosecutor Siracusa, *Relazione Annuale sull’Andamento della Giustizia nel Distretto di Catania (Periodo 1 Luglio 2016 – 30 Giugno 2017)*, 15 October 2017; Italian Parliament, *Resoconto Stenografico del Senato n. 14, Indagine Conoscitiva sui Temi dell’Immigrazione*, 8 July 2015, 6; Interview with Deputy Public Prosecutor, Italy, 21 February 2018.

⁶³ Interview with Deputy Public Prosecutor, Italy, 21 February 2018; Interview with Justice of the Peace, Italy, 23 February 2018.

⁶⁴ French Senate, *Avis présenté au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d’administration générale (1) sur le projet de loi de finances pour 2015*, (Avis n. 114/2014), http://www.senat.fr/rap/a14-114-8/a14-114-8_mono.html#toc144, 42.

⁶⁵ See J.P. Gourevitch, *L’immigration en France: dépenses, recettes, investissements, rentabilité*, in *Contribuables Associés*, 2012, 54-63; M. Harzoune, *Combien coûte une expulsion?*, 2012, histoire-immigration.fr/questions-contemporaines/politique-et-immigration/combien-coute-une-expulsion.

⁶⁶ D. Lochak, *op.cit.*

enabled the police to make use of the *garde à vue*, criminal trials were then only rarely started, as the involved actors would opt to pursue administrative expulsions instead. The data discussed above importantly supports such argument, showing a decisive gap between the cases registered, and those actually pursued, especially evident between 2006 and 2012. Indeed, the incentive to use the criminal law instrumentally appears to be related to the expulsion targets introduced by Sarkozy since the early 2000s,⁶⁷ following which, law-enforcement officials had a strong stimulus to employ a variety of tools, in order to meet such objectives. Overall, therefore, the political prioritisation of returns meant that the incentive for local actors was not so much to systematically pursue criminal trials, but rather to instrumentally employ the *garde à vue* that criminalisation enabled.

In Italy, on the other hand, the above did not apply, due to the different legal context (discussed above). Instead, the uncertainty intrinsic in the norm seems to stem from the latter's apparent aim to convey different messages to different audiences. Indeed, if criminalisation was meant to prioritise the increased perception of security, by promoting a symbolic and visible measure to address migration, it simultaneously avoided to substantially affect specific sectors' reliance on foreign (and often irregular) labour.⁶⁸ This becomes especially evident when considering the regularisation adopted by the government right after the introduction of the crime of irregular migration in mid-2009,⁶⁹ and the intentional reduction in work-site inspections, in the same year.⁷⁰ As a consequence, while, at the political level, the uncertainty of sanctions was not necessarily a strategy in itself, it seems however likely that it represented the result of contradictory measures (of a *deliberate malintegration*⁷¹), meant to simultaneously appease different interests.

In light of the above, the roots of uncertainty emerge as deeply intertwined with the incoherent nature of the norms themselves. From foreseeing foreigners' imprisonment, while aiming for their expulsion, in France; to symbolically sanctioning migrants, while letting employers rely on them to meet labour demands, in Italy: In both countries, the criminalisation of migration was affected by deep incoherences. In this context, local actors in both member states emerged as key, often opting for an uncertain enforcement of criminal trials and penalties, possibly in response to such contradictions.

Having discussed the causes of uncertainty, I now offer some final thoughts on its implications. Indeed, for some commentators, the uncertainty involved in

⁶⁷ See J. Henley, *France sets targets for expelling migrants*, in *The Guardian*, 28 October 2003; S. Marthaler, *Nicolas Sarkozy And The Politics Of French Immigration Policy*, in 15 *Journal of European Public Policy* 3, 382-397 (2008).

⁶⁸ M. Rosina, *op.cit.*

⁶⁹ See G. Ferrero, *op.cit.*, 62.

⁷⁰ See Italian Ministry of Work, Health and Social Policies *Documento di Programmazione dell'Attività di Vigilanza per l'Anno 2009*, 2008, <http://www.dplmodena.it/Documento%20di%20programmazione%202009.pdf>, 4-5.

⁷¹ C. Boswell, *Theorizing Migration Policy: Is There a Third Way?*, in 41 *International Migration Review* 1, 75-100 (2007).

the Italian and French sanctioning regimes may be regarded as positive, insofar as it enables costs to be contained, and migrants to avoid being criminally condemned for a ‘victimless crime’. However, insofar as uncertainty is a strategy meant to limit policy incoherence, the underlying problematics are not resolved, and may instead lead to negative consequences for both the migration-system in receiving countries, and migrants themselves.

To begin with, uncertainty means not only that the outcome of decisions is very unsure for migrants, but also that the law is not being properly implemented. This, in turn, worsens the coherence of the overall criminal justice system, and negatively affects the principle of certainty of the rule of law, potentially in other areas too. This emerged as especially relevant in the Italian case, where prosecutors are meant to pursue criminal offences. Furthermore, insofar as certainty is often depicted as a key element of deterrence strategies, its absence might contribute to reducing the efficacy of criminalisation. As seen above, condemnations concerned only small proportions of the migrants who may have been subjected to the penalties, both in Italy and France, in the first two decades of the 21st century. At the same time, with migration being criminalised, landings peaked at over 180,000 in 2016 in Italy,⁷² and France was still among the top-five EU member states by number of irregular stays, in 2008-2018.⁷³ While the efficacy of criminalisation is, in fact, problematic for factors that range beyond the uncertainty of its implementation (first of which, its inability to address the structural drivers of migration),⁷⁴ criminological studies suggest that uncertainty may further reduce effectiveness. If deterrence is weak, however, the justification and goal of criminalisation are themselves eroded, thus leading to us to question the relevance of maintaining a crime of irregular migration. Indeed, as long as criminalisation is maintained, the uncertainty inherent in its enforcement may also contribute to perpetrating vicious cycles of insecurity, by increasing migrants’ reliance on irregular networks. Being in a situation of limbo - not punished but criminalised, not sentenced but stigmatised - migrants are pushed to the sides of society, closer to irregular networks. In this way, a self-fulfilling prophecy may take place, in which their exclusion from society leads them to get involved with illegal activities, in the absence of alternatives.⁷⁵

Overall, as the above highlights, the uncertainty involved in the criminalisation of migration weakens the rule of law, and has the potential to reinforce vicious cycles of insecurity. The problematics involved in the criminalisation of migration, however, go beyond the uncertainty with which this is enforced, being deeply related to the contradictions inherent in the measure itself, including the use of the norm to pursue secondary goals – be them more

⁷² Italian Ministry of the Interior, *Cruscotto Giornaliero*, cit.

⁷³ Eurostat, *migr_eipre*, 2018.

⁷⁴ See M. Rosina, *op.cit.*

⁷⁵ Cf. H.S. Becker, *Outsiders: Studies in the Sociology of Deviance*, New York, 1963, 34; E. Reyneri, *Immigration and the Underground Economy in New Receiving South European Countries: Manifold Negative Effects, Manifold Deep-rooted Causes*, in 13 *International Review of Sociology* 1, 117-143 (2003).

expulsions, or wealth accumulation.

5. Conclusion.

Uncertainty greatly permeates many of the irregular journeys to Europe today. Aiming to add to the discussion of the present special issue, and of the broader academic debate on the topic, this article has examined the extent to which the criminalisation of migration in Italy and France is characterised by uneven enforcement, as well as the roots and implications of such lack of predictability.

Building upon primary and secondary sources, the article has shown that criminalisation emerges as greatly affected by uncertainty, in both countries. Taking condemnations as an example, these were found to be extremely low, both in absolute numbers, and as a proportion of migrants in irregular situations, thus suggesting a very low degree of predictability.

Considering the roots of the uneven implementation that characterised both countries, this paper has argued that this emerged as strictly related to the incoherences involved in the norms themselves. Specifically, a *trade-off* between the certainty of sanctions, and the efficiency of the use of resources, emerged. In this context, local actors had substantial discretion and, when deciding whether or not to enforce sanctions, they often opted to solve the certainty-efficiency trade-off by selecting the lower enforcement level, likely as a way to address a number of contradictions inherent in the norms themselves. Specifically, in the case of France, the scarce use of criminal trials was related to law-enforcement officials' goal of meeting expulsion targets, in a clear *instrumentalization* of the criminal law. While previous studies had discussed such trend, the present research has provided empirical evidence in support of the argument, by showing the significant divergence between registered infractions and individuals condemned. Due to a different legal context, such an argument does not apply to the case of Italy. There, uncertainty seems to emerge instead as a result of a policy of *deliberate malintegration*, in which the goal of symbolically strengthening deterrence was coupled with that of avoiding to negatively affect those economic sectors that vastly rely upon foreign labour.

To conclude, considering the implications of the uncertain implementation of the norm, the uneven enforcement of the sanction might enable local actors to promote a more efficient use of resources. Yet, the lack of predictability also affects the overall coherence of the criminal systems, and likely contributes to strengthening vicious cycles of insecurity, by reinforcing migrants' dependence on irregular networks.

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