

The Facilitators Package, penal populism and the Rule of Law: Lessons from Italy

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Abstract

The past 20 years have witnessed an increase in the attention that the international, national and European policy responses have devoted to irregular immigration and transnational organised crime, with the Facilitators Package being among the protagonists of the criminalising approach adopted by the European legislator. More specifically, provision was drafted and ratified with the aim to tackle irregular migration by strengthening the penal framework on the facilitation of unauthorised entry within the European Union (EU) external borders in ‘the strict sense, and for the purpose of sustaining networks which exploit human beings’. Nevertheless, although its effectiveness in achieving the stated goals has been confirmed in the EU regulatory fitness performance programme (REFIT) assessment by the EU commission released in 2017, the academic judgment has taken a completely different direction, labelling the provision as exemplary of the preventive role taken by EU criminal law. The aim of the article is to analyse the transposition of the Facilitators Package by the Italian legislators and to examine its application within the national legal framework, in order to scrutinise the consequences that the symbolic application of the criminal law provision is having on the Italian jurisdiction in terms of Rule of Law (particularly on the principle of legal certainty).

Keywords

Irregular migration, Facilitators Package, Italy, criminalisation of migration, penal populism, prosecutorial populism, symbolic criminal law, migrant smuggling, facilitation of illegal entry, EU criminal law

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Introduction

The past 20 years have witnessed an increase in the attention paid to irregular migration within Europe's external borders and Transnational Organised Crime (TOC) by international, national and European policymakers. The legal context in which policy responses to this phenomenon have been developed has been that of criminal law, following the global trend of dealing with the issue of irregular border crossing through criminal rather than administrative legal tools.¹ On the European level, the Facilitators' Package² and the Trafficking Directives³ have been among the protagonists of the criminalising approach adopted by the communitarian legislator. In fact, the Facilitators Package, composed of Council Directive 2002/90/EC and the Framework Decision 2002/946/JHA, was drafted and ratified with the aim of tackling irregular migration, 'both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings',⁴ through strengthening the penal framework on the facilitation of unauthorised entry within the European Union's (EU's) external borders.

The European strategy to combat the facilitation of illegal entry has differentiated itself from others through its focus on the prevention of irregular arrivals and on the crime of facilitation of illegal entry. In fact, this crime is the explicit target of the Framework Decision (dealing with the establishment and strengthening of the penal framework surrounding the facilitation of illegal entry),⁵ even though the provision is part of the emerging field of EU criminal law – the ultimate function of which is, or should be, rehabilitative. For this reason, although its effectiveness in achieving the stated goals has been confirmed in the REFIT assessment by the EU commission released in 2017, the academic judgment has taken a completely different direction, labelling the provision as exemplary of the preventive role taken by EU criminal law.⁶ More specifically, critiques of the Facilitation Directive, and of the EU anti-smuggling framework, have taken into account its direct and indirect effects on the provision of humanitarian assistance to irregular migrants,⁷ as well as the shortcomings

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1. Alessandro Spina, 'A Just Criminalisation of Irregular Immigration: Is It Possible?' (2017) 11 *Crim Law and Philos* 351.
 2. Council Directive 2002/90/EC of November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17; Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/1.
 3. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA OJ L101/1.
 4. Council Directive 2002/90/EC.
 5. The full title of the Framework Decision 2002/946/JHA is 'Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence'.
 6. Valsamis Mitsilegas 'The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law' in Maria Joao Guia, Maartjevan der Woude and Joanne van der Leun (eds), *Social Control and Justice in the Age of Fear* (Eleven International Publishing, The Netherlands 2012).
 7. Jennifer Allsopp and Maria Giovanna Manieri, 'The EU Anti-Smuggling Framework: Direct and Indirect Effects on the Provision of Humanitarian Assistance to Irregular Migrants' in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings* (Centre for European Policy Studies, Brussels 2016).

stemming from uncertainties surrounding the humanitarian clause.⁸ They have also called for a review of the legislative framework.⁹

The provision's transposition into Member States' domestic frameworks has enabled its instrumentalisation for the purpose of contrasting activities aimed at the assistance of irregular migration for humanitarian reasons with discourses regarding the increasing reach of the populist use of criminal law. For this reason, and because Italian management of irregular migration has been at the centre of public attention due to the prosecution of humanitarian actors, this article will examine the Italian transposition of the Facilitators' Package, its application within the national legal framework and the resultant expansion of penal populism. The article will thus scrutinise the consequences that the symbolic application of the criminal law provision is having on the Italian jurisdiction in terms of the Rule of Law (particularly on the principle of legal certainty).

To achieve this, analysis will first focus upon the EU Facilitators' Package itself, in order to highlight its main shortcomings, including the lack of normative foundations of the criminalisation of human smuggling. The Italian codification of the anti-smuggling provision (article 12 of the Consolidated Text on Migration) and the concepts of penal populism will then be examined to highlight the dangers the codification may pose to the principles of the Rule of Law. Attention will then turn to an analysis of article 12 and the manner in which the lack of normative foundations of the provision enables the abuse of anti-mafia law tools to fulfil the preventive function of the law. Finally, the fourth section is devoted to analysis of the application of article 12 by Italian prosecutors to counter the activities of NGOs and civil society members, and to an examination of the expansion of the populist reach into the prosecutorial field.

EU Facilitators' Package: Explanation and defaults

The issue of the unregulated travel industry gained traction with international and European legislators between the late 1990s and early 2000s,¹⁰ resulting in the ratification of the United Nations (UN) TOC Convention and its additional protocols on smuggling and trafficking. It is in these two instruments that the current globally accepted definition of human smuggling was first codified: 'the procurement in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'.¹¹

Riding a wave of increased public attention on the issue of TOC, the EU legislator followed the efforts of the UN, and in 2002 ratified the first piece of EU law dealing with the issue of trafficking.¹² In 2011, this was replaced by the Trafficking Directive, which closely resembles the UN

8. Article 1(2) of the Directive 2002/90/EC includes the possibility for the Member States not to impose sanctions for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned. See also Chiara Maria Ricci 'Criminalising Solidarity? Smugglers, Migrants and Rescuers in the Reform of the "Facilitators' Package"' in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitisating Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (BRILL, The Netherlands 2020).

9. Sergio Carrera and others, *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants* (European Union Policy Departments, Brussels 2016).

10. Anne Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, Cambridge 2014).

11. Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, art 3.

12. Council Framework Decision 2002/629/JHA OJ L101/1.

Trafficking Protocol. The year 2002 also saw the adoption of the Facilitators' Package, which theoretically should constitute the EU law equivalent of the UN Smuggling Protocol.¹³ However, there are substantial differences in the definitions of the offence included in the Smuggling Protocol and in the EU directive, which suggests a divergence underpinning the logic behind the drafting of the two provisions. In fact, the UN intervention in the criminalisation of human smuggling aims at the elimination of 'safe heavens' for TOC by harmonising and improving law enforcement action transnationally while leaning towards a logic that advocates for the protection of the object of smuggling. The figure of the smuggled migrant is envisaged as a passive subject of the criminalised activity, rather than an accomplice in it.¹⁴ More specifically, article 2 of the Protocol includes in its statement of purpose the protection of the rights of the migrant, while the second chapter of the legislative guide to the implementation of the Protocol is specifically concerned with 'providing assistance to and protection of victims of smuggling of migrants'.¹⁵

The approach of the EU legislator has been led by different aims. Indeed, in the past 20 years, the European approach to immigration, specifically with regards to the repressive measures against irregular immigration, has been the subject of numerous reforms,¹⁶ resulting in a progressive estrangement of the EU legal framework on migrant smuggling from the international one. The Facilitators' Package fulfils a different, more 'practical' function: besides attempting to align the legal structures of the different Member States (MS), the EU bodywork was put in place in order to counter the irregular arrivals of migrants inside EU borders, rather than countering TOC or protecting the rights of the individual smuggled across borders. For example, the Explanatory Memorandum to the French initiative for the adoption of the Directive explicitly states that 'measures should be taken to combat the aiding of illegal immigration' as a tool against irregular migration in the broader sense.¹⁷ The interventionist logic of the Facilitators' Package is clearly explained in the REFIT evaluation, which sets as the three main purposes of the framework: the fight against migrant smuggling networks, the combating of aiding of irregular migration and combating irregular migration per se.¹⁸ In other words, the justification for the implementation of the Facilitators' Package lies in the protection of the legal interest of the territorial sovereignty and welfare of the Member State against the action of two types of perpetrators: the migrants illegally crossing the borders and the smuggling networks.¹⁹

13. Javier Escobar Veas, 'Il Fine di profitto nel Reato di Traffico di Migranti: Analisi Critica della Legislazione Europea' (2018) 1 *Diritto Penale Contemporaneo* 111.

14. United Nations Convention against Transnational Organised Crime and the Protocols thereto, General Assembly Resolution 55/25 of 15 November 2000.

15. United Nations Office of Drugs and Crime, 'Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime' in United Nations Office of Drugs and Crime Divisions for Treaty Affairs (ed) *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto* (United Nations, New York 2004).

16. Biagio Speciale, 'Immigration Policies in the EU: Challenges and Priorities' [2010] *Reflets et Perspectives de la vie Économique*.

17. Explanatory Memorandum to JAI (2000) 22 – Initiative of France with a View to the Adoption of a Council Directive Defining the Facilitation of Unauthorised Entry, Movement and Residence <https://www.eumonitor.eu/9353000/1/j4nvhdhfdk3hyd2q_j9vvik7m1c3gyxp/vi8rm2ypr4yp> accessed 2 June 2020.

18. European Commission, 'Commission Staff Working Document: REFIT Evaluation of the EU legal Framework Against Facilitation of Unauthorised Entry, Transit and Residence: The Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)' (2017).

19. *Ibid.*

The offence of facilitation of illegal entry is defined in the Council Directive 2002/90/EC, which calls upon Member States to adopt sanctions against

‘any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on entry or transit of aliens’.²⁰

The codification of the abetting of breach of borders has been topical during debates among academics and practitioners, who argue that the EU’s legislative measures on human smuggling ‘essentially aim at deterring individuals and organisations from coming into contact and assisting any third-country national wishing to enter the territory of the Member States’.²¹ In fact, the codification of the offence at the European level, in contrast with the codification of the same crime included in the Smuggling Protocol,²² lacks the purpose element of the offence of obtaining financial gain from the smuggling activity in its simple form; this is only included in the aggravated form of the crime. As a consequence, the scope of the Facilitators’ Package includes the activities carried out by members of the civil society²³ and organisations acting for humanitarian reasons in Search and Rescue (SAR) operations in the Mediterranean,²⁴ rather than limiting its action to the illegalisation of the activities carried out by criminal groups. It is in this context of criminalisation of humanitarian actors, enabled by the over-extensive scope of the offence of facilitation of illegal entry, that the normative foundations of the EU Facilitators’ Package as a criminal law provision have been put into question and successfully challenged.²⁵ In fact, the lack of an element of financial or other material gain has brought into light the discrepancy between the underlying aim of the UN legislator, when ratifying the Smuggling Protocol (the necessity to tackle TOC), and that of the EU legislator, identifiable in the preventive response to a perceived security threat constituted by the presence of irregular migrants on the EU territory.

Nevertheless, the security threat allegedly posed by the presence of migrants irregularly entering or staying within the Italian territory, does not have any validation²⁶ and, consequently, the use of criminal law tools to deal with what should be considered a violation of administrative law, can be considered a reflection of the populist political trends that increasingly emerged in the Member States in the past years. In fact, as Lacey points out,

20. Council Directive 2002/90/EC, art 1.

21. Mitsilegas (n 6) 93.

22. Smuggling Protocol.

23. For example, the case of Cédric Herrou, a farmer who has been arrested by the French authorities for helping migrants to cross the borders between Italy and France.

24. Since 2017, the prosecution of NGOs active in search and rescue activities in the Mediterranean by the Italian authorities under the accusation of facilitating the illegal entry of the migrants within the national borders have caught international attention. Among others, it is worth to mention the Sea Watch 3, captained by Carola Rackete, and the case of the *Iuventa*, which crew has been accused of colluding with the smugglers.

25. Valsamis Mitsilegas, ‘The Normative Foundations of the Criminalisation of Human Smuggling: Exploring the Fault Lines Between European and International Law’ (2019) 10 NJECL 68–85.

26. For more information regarding the debates on the criminalisation of irregular migration see: Gianluigi Gatta ‘La Criminalizzazione della “Clandestinità” fra Scelte Nazionali e Contesto Europeo’, [2015] *Rivista di Diritto e Procedura penale*; Spina (n 1).

In Europe [...] the inability to find a stable solution or even a broad consensus about the refugee crisis in another good example of both the agenda-setting and policy impact of populist politics via erosion of the authority of the main political parties.²⁷

The Italian transposition of the EU Facilitators' Package: The rise of penal populism in the management of migration

The uncertainty regarding the function fulfilled by the provision criminalising human smuggling on the EU level in the Facilitators' Package is also apparent when one looks to the way in which it has been transposed into domestic legal frameworks by Member States. A case in point may be seen in Italy's approach to managing migration flows. Since the 1980s, as Italy switched from being a country of strong emigration to one of immigration,²⁸ it has adopted the pragmatic and instrumental use of penal measures and created new offences tailored to respond to perceived threats. Indeed, the changes in the geopolitical context which occurred in those years led the legislators to criminalise behaviours facilitating migration flows to the already existing administrative laws regulating and punishing irregular migration per se.²⁹ For this reason, in 1998, the Consolidated Text on Migration was ratified,³⁰ article 12 of which criminalises the facilitation of illegal entry into the Italian territory, which (allegedly) should transpose the contents of both the Smuggling Protocol and the Facilitation Directive. Similarly to the EU codification of the crime, the Italian transposition of the facilitation of illegal entry omits the purpose element of financial or other material gain, transferring to the national level the issues regarding the normative foundations and purpose fulfilled by the inclusion of the law in the penal framework.

Article 12 is notably extremely wordy, which is an indicator of the panic-led approach surrounding the provision, aimed at including in its criminalising scope the largest number of situations involving the illegal crossing of borders.³¹ Nevertheless, it is the simple form of smuggling, codified in article 12(1), which transposes at the Italian level the definition of the crime included in the Facilitators' Package; and with it, all of the problem areas exposed in the previous section: the lack of the element of financial gain as a purpose of the criminalised activity, the lack of clarity surrounding the legal interest protected by the provision and the absence of normative foundations.

Although the symbolic use of criminal law measures at the supranational level has been overlooked by academia, debates regarding the populist use of criminal law by the Italian authorities to counter irregular migrants from reaching the national borders has attracted much more attention. Populism has normally been connected with the political rather than the legal sphere and has been defined as

27. Nicola Lacey, 'Populism and the Rule of Law' (2019) 15 *Annu Rev Law Soc Sci* 79, 89.

28. Stefano Zirulia, 'Articolo 12-D. Lgs. 286/1998' in Emilio Dolcini and Gianluigi Gatta (eds), *Codice Penale Commentato* (Giuffrè Editore, Milan 2015).

29. *Ibid.*

30. Decreto Legislativo 25 luglio 1998, n 286-Testo Unico delle Disposizioni concernenti la Disciplina dell'Immigrazione e Norme sulla Condizione dello Straniero.

31. Vincenzo Militello and Alessandro Spena, *Between Criminalization and Protection: the Italian Way of Dealing with Migrant Smuggling and Trafficking within the European and International Context* (BRILL, The Netherlands 2019).

a highly moralized approach to politics that pitches a homogeneous “we the people” approach, often conceived in ethnic or national terms, embodied in a leader who speaks for and expresses the will of that undifferentiated community against a presumptively “corrupt” [...] “elite”.³²

In other words, in the political context, a populist movement sets its roots for the research of electoral consensus in the exclusionary identity politics, in the mass clientelism³³ that arises from the ‘broken promises of democracy’.³⁴

In this climate of mistrust in democratic processes, the field of criminal law becomes one of the preferential areas in which the populist discourses can find immediate application.³⁵ In response to this, John Pratt has introduced the concept of penal populism, which he defines as the use, for political purposes, of diffused punitive instances and as an expressive political orientation guided by consensus obtained through the promise of quick, exemplary and definite intervention for the reassuring of the citizens against a perceived common enemy.³⁶ In the past few years, the characteristic aspects of *penal* populism have been instrumental for the feeding of *political* populism that has brought to governing positions the coalition the right-wing party *Legha Nord*, led by Matteo Salvini, and the leftist Five Stars Movement, led by Luigi di Maio. The electoral consent, which has enabled their appointment, has been built on the promotion of security-oriented policies, based on two types of juxtaposition: the first one, typical of populist movements, opposing the people and the elite³⁷; and the second one, counterposing Italians and foreigners³⁸ described by the political leaders as security threats.

It is in this climate of insecurity (that the current government both feeds and feeds upon in a circular relationship) that the compulsive production of criminal law measures to counter irregular migration has flourished and culminated in the adoption of the ‘Security Decree bis’ in June 2019, which included, among other provisions, an worsening of the sanctions for the breaches of immigration law.³⁹

Penal populism at the Italian level, especially in the field of the production and application of criminal law tools to counter irregular migration, nowadays presents three main characteristics: a ‘criminogenic’ nature, the shift from subjection to constitutional principles towards electoral consent as a legitimation source and the normalisation of xenophobic attitudes as source of the aforementioned electoral consent.⁴⁰ The criminogenic nature of the populist criminal laws (which refers to the lack of normative foundations of the criminalisation of migration and of the facilitation of illegal entry as it is defined in its simple form) results in a hardening of the punitive measures for the breaches of immigration law.⁴¹ It also enables the avoidance of the recognition of trafficking victims and entails a reduction of integration measures and of the channels to obtain

32. Lacey (n 27) 84.

33. Lacey (n 27) 86.

34. Ibid.

35. Roberto Cornelli, ‘Contro il Panpopulismo: una Proposta di Definizione del Populismo Penale’ [2020] Sistema Penale.

36. John Pratt, *Penal Populism* (Routledge, Abingdon 2007).

37. The Five Stars Movement defines itself as a ‘free association of citizens’ and refuses the political party definition. Such defiance derives from the rejection to be associated with the Italian political dimension and ruling class, perceived and depicted as corrupted. See also Filippo Tronconi, *Beppe Grillo’s Five Star Movement* (Routledge, Abingdon 2016).

38. Among Salvini’s electoral slogans, one of the most well-known was ‘Italians first’ (*‘prima gli Italiani’*).

39. Decreto-Legge 14 giugno 2019, n 53 – Disposizioni Urgenti in Materia di Ordine e Sicurezza Pubblica.

40. Luigi Ferrajoli, ‘Il Populismo Penale nell’Età dei Populismi Giuridici’ (2019) 1 *Questione Giustizia* 79.

41. Ibid.

international protection.⁴² The migrant, consequently, has no other choice but to enter criminality, thus feeding the narrative of the foreigner offender on which the populist rhetoric is based. The shift to the electoral consent as a legitimisation source refers to the fact that Salvini characterised as praiseworthy the closure of ports and the failure to assist the migrants in danger among other actions (and non-actions), which might be ordinarily be considered veritable human rights violations or, arguably, criminal offences. The pursuit of electoral support through the exhibition of illegal actions results in the shift, in the common sense, from the Rule of Law as source of political and legal legitimacy towards electoral consent.⁴³

It is thanks to the *leitmotiv* of freedom against security and to the politics of consent based on social reassurance that the proliferation of criminal law measures against irregular migration has thrived. That said, the normative foundations of the criminal law tools aimed at countering irregular migration have been put to the test multiple times. In fact, the provision criminalising illegal entry in the Italian territory⁴⁴ was brought to the attention of the Constitutional Court in 2010, which established the validity of the norm and identified the legal interest protected by the provision in the correct management of the migratory flows.⁴⁵ Despite the fact that the Constitutional Court declared the crime of illegal entry legitimate, it is unclear why the protection of the correct management of migration flows could not be achieved through administrative sanctions. There seems to be no other reason justifying the legislators' choice than the willingness to give a 'signal' to public opinion (particularly on the European Level).⁴⁶

Nevertheless, in drawing upon the requirements at the international and European levels to criminalise the smuggling migrants and the facilitation of illegal entry, the focus of the Italian legislator on preventing migrants from reaching Italian shores has shifted from migrants to those facilitating migration. The fact that article 12 should allegedly transpose not only the contents of the Facilitators' Package but also the contents of the Smuggling Protocol, which has at its origin the fight against TOCs, enables the Italian authorities to rely on the anti-mafia legislation, which has been and still is at the centre of numerous debates due to its preventive nature. In fact, the origin of the Code, a gathering and harmonising criminal, administrative and procedural laws, has resulted in uncertainty in regard to its ultimate function. Initially, the jurisprudence and literature deemed that the provision fulfilled an administrative task, aimed at rendering ineffective 'socially dangerous' individuals (consequently fulfilling a preventive function). However, in the present historical moment, almost all literature challenges the idea of the inclusion of the provision within the administrative law framework and considers the *Anti-mafia* Code as part of the Italian Criminal Law framework.

The uncertainty surrounding the nature of the provision is also reflected in the conceptualisation of the overall function of the Code: it is not merely regulatory (as with administrative law), nor merely retributive or rehabilitative (as with criminal law). Rather, the provision and the choice of the legislator to include security and prevention measures in it suggest a repressive and preventive function of the measure.⁴⁷ It is in this context of mutation of the *raison d'être* of criminal law, and

42. Ibid.

43. Ibid.

44. Decreto Legislativo 25 luglio 1998 (n 30), art 10 bis.

45. Corte Costituzionale, sentenza 250, 2010.

46. Carlo Sotis et al 'La Società punitiva – Populismo, Diritto Penale Simbolico e Ruolo del Penalista' [2016] *Diritto Penale Contemporaneo* <<https://archiviodpc.dirittopenaleuono.org/d/5087-la-societa-punitiva-populismo-diritto-penale-simblico-e-ruolo-del-penalista>> accessed 2 June 2020.

47. Cornelli (n 35).

especially in the context of the missed decriminalisation of illegal entry in the Italian territory, that the debates around the populist entanglement of immigration law, criminal law and administrative law have been conducted.⁴⁸ The preventive function adopted by criminal law, fed by the need for reassurance of security from future crimes, results in an increased relevance and powers of law enforcement agencies in charge of combating a de-personalised criminal phenomenon (in this case the Mafia and irregular migration) rather than a specific perpetrator.⁴⁹

Indeed, this connection between the concept of TOC (as intended in the international legal framework) and 'Italian organised crime' (the Mafia) results in an applicability of the preventive measures foreseen in the *Anti-Mafia* Code to trafficking and smuggling situations and in the investigation and prosecution of humanitarian actors accused of those crimes. It is within the examined legal framework that the anti-mafia law enforcement agencies, the *Direzione Nazionale Antimafia* (DNA-National Anti-Mafia Directorate) and the *Direzione Investigativa Antimafia* (DIA-Anti-Mafia Investigative Directorate), are enabled to investigate trafficking and facilitation of illegal entry cases.⁵⁰ Furthermore, in 2014, the DNA published guidelines for overcoming the criminal jurisdiction and intervention issues for the combatting of facilitation of illegal entry in international waters.⁵¹ Nevertheless, the most recent half-yearly report of the DIA activities reveals an interchangeability of the use of the terms trafficking and facilitation of illegal entry in the description of the activities carried out by Italian and foreign criminal groups.⁵² This suggests that even the application of the investigative and judicial tools adopted by law enforcement agencies might be characterised by interchangeability and misuse.

The lack of the purpose element, the role of aggravated smuggling and the connection with the anti-mafia preventive measures

The Italian case highlights the consequences of the implementation of the Facilitators' Package at the national level. More specifically, its transposition in article 12 has been the object of analyses and critiques regarding the over-extensive reach of the provision (enabled by the lack of the financial gain element of the crime),⁵³ the ambiguities in relation to the nature of the aggravated form of facilitation of illegal entry,⁵⁴ the legislative overlap with other crimes, its preventive rather than punitive nature, and for the parallels with TOC which enable the application of *anti-mafia* measures by Italian prosecutors.

48. Corte Costituzionale (n 45).

49. Gunther Jakobs, 'Zur Theorie des Feindstrafrecht' in Henning Rorenau and Sanyun Kim (eds), *Straftheorie und Strafgerechtigkeit* (Augsburger Studien zum Internationalen Recht, Bern 2010), 167.

50. Decreto Legislativo 6 Settembre 2011, n 159 Codice delle leggi antimafia e delle misure di prevenzione, nonché nuove disposizioni in materia di documentazione antimafia, a norma degli articoli 1e 2 della legge 13 agosto 2010, n 36.

51. Filippo Spiezia, 'Traffico di Migranti via Mare: le Linee Guida della Direzione Nazionale Antimafia per la Soluzione dei Problemi di Giurisdizione Penale e di Intervento Cautelare nei Casi di Attraversamento di Acque Internazionali', [2014] *Diritto Penale Contemporaneo* <<https://archiviodpc.dirittopenaleuomo.org/d/2806-traffico-di-migranti-via-mare-le-linee-guida-della-direzione-nazionale-antimafia-per-la-soluzione-d>> accessed 2 June 2020.

52. Direzione Investigativa Antimafia, *Relazione del Ministero dell'Interno al Parlamento: Attività svolta e Risultati conseguiti dalla Direzione Investigativa Antimafia- Gennaio-Giugno 2019*, 456.

53. Zirulia (n 28).

54. Guido Savio, 'La Sentenza delle Sezioni Unite sulla Qualificazione come Circostanza Aggravanti delle Fattispecie previste dall'Art.12 co.3 del T.U. Immigrazione' [2018] *Diritto Penale Contemporaneo*.

In regard to the over-extensive scope of the provision, by analysing the wording of article 12(1)⁵⁵ it becomes clear that in contrast to the UN Smuggling Protocol, but in compliance with the Directive 2002/90/EC, the purpose element of financial or other material gain is missing. Thereby, the scope of the provision is broadened to include the intervention of humanitarian actors and family members. Parliament and the judiciary are thus free to stretch the scope of the provisions and include every action aimed at the facilitation of illegal entry, regardless of the intention of the facilitator while carrying out the activity. The dangers of such an approach have already been highlighted by the Canadian Supreme Court in *R v Appulonappa* [2015] SCR 754. In that case, the provisions of the *Immigration and Refugee Protection Act* SC 2001 (IRPA) criminalising the smuggling of migrants were declared to be unconstitutional ‘insofar as [it] permits prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers or assistance to family members’.⁵⁶ More specifically, the judgment underlines the fact that, when ratifying the provision, the Parliament recognised that its applicability exceeded the scope of the purpose but argued that such a danger would be avoided because of ‘the requirement of the Attorney General’s consent to prosecute would guard against improper prosecution on humanitarian grounds, family grounds or other grounds’.⁵⁷ Ultimately, the Court concluded that the provisions contained in s 117 of the IRPA were ‘depriving the persons of liberty in a manner that violates the principles of fundamental justice against gross disproportionality and vagueness’, and highlighted its incompatibility with the Canadian constitutional principles.⁵⁸

The Italian constitutional jurisprudence has not yet taken into account the provision included in article 12(1) of the Consolidated Text on Migration. Consequently, the interpretation of what constitutes criminal intent in a situation of facilitation of illegal entry has been largely left to the discretion of the Italian prosecutors, resulting in a rather inconsistent approach to the issue. In fact, the confusion regarding the necessity or non-necessity of the financial gain element in Italian criminal law becomes evident when analysing the allegations under which the Italian Public Prosecutors (PP) opened investigations, seized vessels and, more broadly, carried out legal actions against humanitarian actors active in the Mediterranean Sea.

As noted above, the financial gain element, which is excluded from the wording of the simple form of facilitation of illegal entry, is enclosed in the aggravated form of the crime, codified in article 12(3ter), which allows for an increase in pecuniary punishment and prison sentence, if the abetting of illegal entry is carried out

- (a) With the aim to recruit persons for the purpose of prostitution or sexual or labour exploitation, or concern the entry of minors for favouring their exploitation on illegal activities;
- (b) Are committed for profit, even indirect.⁵⁹

55. ‘Unless the fact constitutes a more serious crime, whoever, infringing the provisions of this consolidated act, promotes, directs, organizes, finances or transports aliens in the State’s territory or carries out other acts aimed at their illegal entry in the State’s territory, or in another State of which the person is not citizen or does not have the right to permanent residence, is punished with imprisonment from one to five years and with a 15,000 Euro fine for each person’. Consolidated text on Migration, art 12(1). Unofficial translation <<https://www.refworld.org/pdfid/54a2c23a4.pdf>>.

56. *R v Appulonappa* [2015] SCR 59 [5].

57. *Ibid* [15].

58. *Ibid* [78].

59. Decreto legislativo 25 luglio 1998, n 286, Testo Unico delle Disposizioni Concernenti la Disciplina dell’Immigrazione e Norme sulla Condizione dello Straniero, articolo 12 (3ter). Consolidated Text on Migration, Unofficial English translation available at <<https://www.refworld.org/pdfid/54a2c23a4.pdf>>.

The classification of the profit element as an aggravating circumstance, rather than as a constitutive element of the crime, raises questions about the legitimacy of article 12 as a criminal law provision on a constitutional level. It is in fact on the purpose element of the crime (criminal intent) that the rehabilitative function of criminal law relies.⁶⁰ Furthermore, from a procedural point of view, aggravating circumstances are subject to a scrutiny that balances attenuating circumstances, which can result in a reduction of the relevance of the financial gain element of the crime in the outcome of the judgment.⁶¹

Another issue arises from the inclusion among the aggravating circumstances of the purpose element of gathering people into prostitution or exploitation. This creates a parallel with the purpose element and the legal interest protected by the trafficking offence.⁶² The overlap between these crimes can result in the faulty classification of trafficking situations under the aggravated smuggling legislation.⁶³ Consequently, the already extensive reach of article 12 is further broadened to potentially include trafficking situations. In other words, the facilitation of illegal entry in the Italian territory is prosecuted under the same provision regardless of whether the crime is committed for the purpose of trafficking and exploitation of migrants or of providing humanitarian assistance to migrants in distress at sea. Among the implications of such a broadening of the scope of the provision is a breach of the principle of legal certainty: one of the pillars of the Rule of Law.⁶⁴

The last expression of the populist (ab)use of article 12 is related to the fact that the provision should also transpose the contents of the Smuggling Protocol, ratified in the context of the efforts against TOC. On the Italian level, this has enabled the applicability of the *Anti-Mafia* legislation and the acquisition by the Public Prosecutors dealing with the facilitation of illegal entry of the investigative and legislative tools entailed in it – including the possibility to seize assets and extend the national jurisdiction extraterritorially.

The *Anti-mafia* code and its preventive function has been the object of examination by Italian academics who challenge its compatibility on the constitutional level. On the one hand, advocates of the thesis of unconstitutionality of the provision argue that the prevention system (for which no commission of the crime is necessary) on which the anti-mafia legislation is based damages a number of principles, including: the principle of inviolability of personal freedom, of legality of punishment, of presumption of innocence, of economic initiative and of the protection of private property.⁶⁵ On the other hand, advocates of the constitutionality thesis, argue that the measures find their legal basis in many provisions of the Constitution. They point, for example, to article 2,

60. Giovanni Fiandaca and Enzo Musco, *Diritto Penale: Parte Generale* (4th edn, Zanichelli, Bologna 2019).

61. Cassazione Penale Sezioni Unite 21/06/2018 n 40982.

62. Italian Criminal Code, art 601 – Whoever carries out trafficking in persons who are in the conditions referred to in article 600, that is, with a view to perpetrating the crimes referred to in the first paragraph of said article, or whoever leads any of the aforesaid persons through deceit, or obliges such person by making use of violence, threats, or abuse of power, by taking advantage of a situation of physical or psychic inferiority, and poverty; or by promising money or making payments or granting other kinds of benefits to those who are responsible for the person in question, to enter the national territory, stay, leave it, or migrate to said territory, shall be punished by imprisonment from eight to twenty years.

63. Among the jurisprudence of the Court of Cassation it is possible to find numerous examples of these overlaps, eg, Cass Pen Sez 1 n 47822, 2018 and Cass Pen Sez 1 n 24785, 2018.

64. Council of Europe, *Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session* (Venice, 11–12 March 2016).

65. Salvatore Costantino and Giovanni Fiandaca, *La Legge Antimafia Tre Anni Dopo: Bilancio di un'Esperienza Applicativa* (Francoangeli, Milan 1986).

which recognises the inviolability rights of the individual and mandates that the Government protect them not only after they have been violated, but also before.

Debates about the security and preventive measures have been in the eye of the Italian Constitutional Court since the 1950s. In *Sentenza n 27 of 1959*, for example, it recognised the considerable limitations to fundamental constitutional rights that the preventive measures entail.⁶⁶ However, the judgment also recognises the ‘need to guarantee the orderly and peaceful course of social relations, not only through a body of legislation penalizing unlawful acts, but also through provisions intended to prevent the commission of such acts’⁶⁷ and deems this need ‘as a requirement and a fundamental principle of every democratic legal system, accepted and recognized by our Constitution’.⁶⁸ The preventive measures and consequently the *Anti-Mafia* Code and legal tools have thus found some legitimation in the constitutional jurisprudence. Nowadays, however, the use of the *Anti-Mafia* Code to contrast irregular migration, resulting in the evident application of its legal tools to prosecute humanitarian actors, further highlights the potential abuses of such a provision.

Ultimately, article 12 of the Consolidated Text on Migration, transposing the contents of the Facilitators’ Package, fed by the securitisation discourses surrounding the topic of irregular migration, enables prosecutors to apply preventive measures to restrict not only human mobility but also humanitarian actors allegedly facilitating said mobility. For this reason, it is possible to conclude that the Italian case shows a further area in which the populist approach might deviate: the prosecutorial one.

Towards the new category of ‘Prosecutorial Populism’?

Since 2017, the Italian authorities have been at the centre of international attention for their use of criminal law tools to restrict the work of NGOs rescuing migrants in distress at sea and for their prosecution of civil society members, by accusing them of facilitating the illegal entry and stay of the migrants in the Italian territory. NGOs have been labelled by Frontex, by the media and by national prosecutors as constituting a pull-factor for irregular migration. Despite the fact that such allegations have largely been challenged, the prosecutorial efforts to counter, and especially to prevent, their activities have been profuse. These efforts have tapped into a wide arsenal of legal tools, the vast majority which are rooted in the *Anti-Mafia* code, which was conveniently amended in 2015 (a year in which the irregular arrivals experienced a consistent increase)⁶⁹ to include the national anti-mafia Prosecutor among the authorities that are able to request the application of financial preventive measures.⁷⁰

The reliance on the Code enables prosecutors to extend the national jurisdiction outside the nation’s physical borders and territorial waters and to apply personal and financial preventive

66. Corte Costituzionale, sentenza n 27, 1959.

67. Ibid.

68. Ibid.

69. Directorate-General for Communication, ‘The EU and the Migration Crisis’ [2017] Publications office of the EU <<https://op.europa.eu/en/publication-detail/-/publication/e9465e4f-b2e4-11e7-837e-01aa75ed71a1/language-en>> accessed 10 June 2020.

70. Daniela Cardamone, ‘Criminal Prevention in Italy: from the “Pica Act” to the “Anti-Mafia Code”’, Presentation to the European Court of Human Rights, 25 April 2016 <http://www.europeanrights.eu/public/commenti/bronzini1-Cardamone_Criminal_prevention_in_Italy_2.0.pdf> accessed 10 June 2020.

measures which were initially ratified to increase the powers of law enforcement agents and reduce the power of the Mafia through the acquisition of illicit assets.⁷¹

The need to extend the reach of Italian law, in the context of the prosecutorial efforts by the Italian authorities to stop the arrivals of irregular migrants on the national shores and ports, derives from the adoption by smugglers of a *modus operandi* designed to trigger the intervention of the rescuers in international waters and SAR zones to elude the Italian jurisdictional reach.⁷² Indeed, in order to trigger the state of necessity ex article 54 of the criminal code, such that the coastguard and NGOs will intervene, it is common practice for smugglers to abandon migrants in international waters between the north African and Italian coasts, where they are transferred in smaller, more dangerous vessels to continue the journey to Italy.⁷³ Otherwise, article 6 of the Criminal Code would apply; this establishes that the crime is considered as committed in the Italian territory if the action or omission constituting the crime (in the case of smuggling, the illegal entry of the migrant is considered the event of the crime) takes place within the Italian borders.⁷⁴ For this reason, prosecutors, who often have found their activities blocked from the lack of jurisdiction in extra-territorial waters, have used the figure of the ‘mediated author’ to geographically extend the reach of the applicability of Italian law.⁷⁵ The term refers to the inclusion in the commission of the crime of an actor because they play the role of a material instrument and are thus not liable for the commission of said offence.⁷⁶ In the case of facilitation of illegal entry and the *modus operandi* adopted by smugglers, rescuers intervening to save migrants in distress at sea and transporting them to Italian shores would fall in the aforementioned category and would thus not be liable for the facilitation of illegal entry of the rescued migrants. To overcome the obstacles that this approach has posed in terms of prosecution, NGOs have been accused of arranging ‘deliveries’ of migrants in extraterritorial waters and their vessels have been preventively seized.⁷⁷

In addition to the expansion of jurisdiction, a further legal tool derived from the Anti-Mafia framework employed by prosecutors to counter the activities of humanitarian actors are the financial prevention measures – including seizure and confiscation – initially aimed at reducing the power of the Mafia through the acquisition of its illicit assets. The measures, codified in articles 20 and 24 of the Anti-Mafia Code, were introduced to enable law enforcement and prosecutors to seize assets when their value is disproportionate to the declared income of the suspect or with their business, or when there is reason to believe that they are the result of illegal activities or constitute their reuse.⁷⁸ Confiscation is a preventive measure conceived for when the suspect cannot justify

71. Ibid.

72. Silvia Bernardi, ‘I (possibili) Profili Penalistici delle Attività di Ricerca e Soccorso in Mare’ (2018) *Diritto Penale Contemporaneo* <https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/bernardi_1_18.pdf> accessed 10 June 2020.

73. Stefano Manacorda, ‘Il Contrasto Penalistico della Tratta e del Traffico di Migranti nella Stagione di Chiusura delle Frontiere’ [2018] *Il Quotidiano Giuridico*.

74. Codice Penale, articolo 6, reati commessi nel territorio dello stato.

75. Cassazione Penale, sez 4 8/3/2018 n 14709.

76. ‘Autore Mediato’ (2020) *Enciclopedia Giuridica* <<http://www.enciclopedia-juridica.com/it/d/autore-mediato/autore-mediato.html>> accessed 8 June 2020.

77. See the case of the NGO *Jugend Rettet* and the boat *Iuventa*, Tribunale di Trapani, decreto del 2 agosto 2017, n. 816/2017 R.G. G.I.P.

78. Decreto Legislativo 6 Settembre 2011, n 159 Codice delle leggi antimafia e delle misure di prevenzione, nonché nuove disposizioni in materia di documentazione antimafia, a norma degli articoli 1 e 2 della legge 13 agosto 2010, n 36, art 20.

the legitimate origin of such property and when its value is disproportionate to the person's income.⁷⁹ These measures have been applied, however, to frustrate the activities carried out by the NGOs in the Mediterranean. Although no NGO has been convicted, the application of preventive seizure and confiscation and, more generally, of the criminal law framework has resulted in the hampering and freezing of their rescue activities for months-long periods. Furthermore, the application by the Italian prosecutors of these legal tools (whose initial aim was to combat the economic dimension of organised crime) to restrict humanitarian action carried out by NGOs: a completely different purpose from the one from which it was conceived. This is indicative of the degree of expansion that the populist reach has achieved in the prosecutorial field.

A further legal tool that is indicative of the prosecutorial obstinacy in countering the action of NGOs in the Mediterranean is related to the protection of the environment and public health. The case of the *Acquarius* is emblematic of this trend. This case saw the seizure of a vessel, used by *Médecins Sans Frontières* and SOS Méditerranée, following an enquiry started by the Prosecutor of Catania, Carmelo Zuccaro, who accused the crew of illicit disposal of the waste produced by rescue ships.⁸⁰ Despite the fact that the local tribunal did not confirm the allegations and released the vessel, the *Acquarius* remained inactive for more than four months.⁸¹

Finally, in addition to the above efforts carried out by the prosecutors to counter the action of the NGOs, there is the case of Carola Rackete, the captain of Sea Watch 3. In June 2009, after spending ten days at sea waiting for the permission of the authorities to enter the Port of Lampedusa to disembark rescued migrants, Rackete accidentally hit one of the boats of the Customs Patrol (*Guardia di Finanza*) during the anchorage manoeuvre. Reliance was placed upon the national Navigation Code to arrest Rackete. The Captain faced allegations of resistance or violence against a warship⁸² and resistance to the public authority.⁸³

This last case has been particularly relevant for the Italian jurisprudential evolution on the issue of the prosecution of NGOs active in the Mediterranean because for the first time since this trend appeared in 2017, the High Court of Cassation released a judgment on the topic of the juxtaposition between the duty of rescue at sea and authority. More specifically, after the Judge of Agrigento refused to confirm the arrest, the prosecutor appealed to the Court of Cassation, which dismissed the appeal.⁸⁴ The relevance of the judgment lies in the fact that it established a series of legal principles, the most relevant of which is undoubtedly the one establishing the prevalence of the duty to rescue over the one to defend the national borders. In other words, the judgment establishes that, in the case of conflict between article 12 of the Consolidated Text on Migration and article 54 of the Criminal Code, the second provision should prevail. This principle has consequences also in terms of the relevance of the protected legal interests: control of borders, (allegedly) protected by article 12, is as a result less relevant than the fundamental rights of migrants, protected by article 54.⁸⁵

79. Ibid, art 24.

80. Cass Pen sez 3 n 43710, 2019.

81. Ibid.

82. Codice della Navigazione approvato con Regio Decreto 30 marzo 1942, n 327, articolo 1100.

83. Codice Penale, articolo 337.

84. Cass Pen, sez 3 n 6626, 2020.

85. Francesca Cancellaro, 'I Soccorsi in Mare ai Tempi del Covid-19: Riflessioni a Partire dal Caso Rackete' (2020) Sistema Penale <<https://www.sistemapenale.it/it/webinar/webinar-i-soccorsi-in-mare-ai-tempi-del-covid-19-riflessioni-a-partire-dal-caso-rackete>> accessed 10 June 2020.

Ultimately, in terms of the topic discussed in the preceding paragraph, regardless of the direction and content of legal principles, their establishment by a High Court will undoubtedly result in a reduction of the freedom of choice of legal tools that has been available to prosecutors in the past years. In fact, although the reliance on the preventive anti-mafia measures to counter the facilitation of irregular migration remains technically possible, the position taken by the Court of Cassation in the *Rackete* judgment establishes that their application might be problematic, if they end up hampering the fundamental rights of the rescued. The favouring of the rights of those involved in the rescue operations over the State's interest also directly contradicts the populist rhetoric mentioned in the second section. In fact, the populist narrative juxtaposing Italians and foreigners, presupposes that the interest of the State protecting citizens' rights against the alleged security threat brought by irregular migration should prevail over the rights of the authors of said migration. The judgment directly contradicts this claim and makes a clear statement of the position of the judiciary in this uncertain climate in which populism has not only encroached upon the field of criminal law but also in the prosecutorial one.

Conclusion

This article has attempted to demonstrate that the symbolic application of criminal law tools to counter irregular migration at the community level results in a diminishment of the Rule of Law, on which the democratic ethos of both the Member State and the Union are based. More specifically, the criminalisation of the facilitation of illegal entry, as codified in the EU Facilitators' Package, fulfils a preventive rather than rehabilitative function. The transposition of such a provision in a Member State's domestic legal framework opens the gate to veritable abuses of criminal law for the purpose of serving the anti-immigration political agenda of the government fed by and feeding populist movements. The criminalisation of irregular migration in Italian law is, as on the EU level, a representation of the punitive rigour of the populist criminal politics: the actual imposition of the criminal law sanction is superfluous.⁸⁶ This results in clear shortcomings in the proportionality between the sanction and the value of personal liberty and in the difference between the threatened and executed criminal sanction, revealing a tendency of the Italian legislator towards a 'compulsive criminal legislation'⁸⁷: the production of new norms designed to give law enforcement agencies the powers to respond to an alleged crisis situation, but lacking normative foundation and effective integration in the criminal legal panorama. Such an indiscriminate increase of the number of criminal laws carrying only symbolic relevance is a response to the necessity to respond to and soothe the emotional needs of the electorate.⁸⁸

Ultimately, the analysis highlighted an increasing tendency, especially on the European and national levels to legislate in the field of criminal law to communicate to citizens 'a semblance of security',⁸⁹ resulting in an over-extensive creation of immigration-related offences, which are rarely enforced in a proportionate manner and have proven to be completely ineffective from every perspective.

86. Corte Costituzionale, sentenza 250 (n 45).

87. Gaetano Insolera, *La Legislazione Penale Compulsiva* (CEDAM 2006).

88. Pratt (n 36).

89. Ana Aliverti, 'Making People Criminal: The Role of Criminal Law in Immigration Enforcement' (2012) 16 *Theor Criminol* 421.


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