THE RIGHT TO STAY AS A FUNDAMENTAL FREEDOM: TOWARDS A LIBERAL CONSTITUTIONAL THEORY OF IMMIGRATION LAW?

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Abstract

States are guardians of the cohesion and well-being of national communities. In a world of scarce resources, governments give preference to citizens: their right to stay enjoys constitutional protection. Aliens, by contrast, are guests. And hospitality is not unconditional. The right of non-citizens to stay and to share a fraction of the national wealth is, thus, contingent upon observance of the "rules of the house": if they commit an offence, they shall leave. This strict rule of automatic expulsion of convicted aliens – on the rise in several domestic immigration regimes, in Europe and elsewhere – conveys an easy message of deterrence, allegedly effective in preventing crime and in excluding unwelcome guests.

This "nationalist" paradigm is now at risk. A coalition of European and domestic courts, raising the flag of the rule of law, increasingly challenges it. At European level, the Court of Strasbourg recently advanced a bold "individualist" reading of Article 8 ECHR, which now threatens the legitimacy of automatic expulsion of convicted aliens in many jurisdictions. At the domestic level, constitutional and supreme courts tend to follow – with some remarkable exceptions, also considered in the paper – the new path opened in Strasbourg. Under this "rights-based" paradigm, aliens are, first and foremost, human beings. Their right to stay is protected as a fundamental right, being it a key to the free development of human personality.

This judicially driven development paves the way to a liberal theorization of immigration law, which challenges the traditional model of constitutional adjudication by replacing citizenship with territoriality as basic criterion for the recognition of individual liberties. Yet, as the decline of automatic expulsion illustrates, this inevitably erodes the margins for the State to protect the national community. The "liberal paradox" that permeates the regulation of migration flows, thus, reappears and urges to reconsider the meaning of national self-determination in a global space where individual freedoms increasingly matter.

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> «Refuser au gouvernement le droit d'expulser l'étranger qui lui paraît indigne de participer aux droits assurés à l'association politique dont les destinées luis ont confiées, c'est nier l'autonomie des peuples». [2]

> «Deportation is an integral part - indeed, sometimes the most important part - of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes […] [R]ecent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context».[3]

INTRODUCTION. THE UNCERTAIN FOUNDATIONS OF THE RIGHT TO STAY

What comes first: the State or the individual? The common interests guarded by the former or the liberties of the latter? The security and cohesion of the national community, or the free development and realization of the human personality?

The width of these questions is narrowed, in this paper, both by examining the controversial nature of the right to stay of non-nationals in a host country, and by focusing on the expulsion of aliens convicted of a crime as an instrument of protection of national community interests.

The right of sojourn and residence in a country – or, simply, the *right to stay* – is traditionally linked, in European constitutional orders, to citizenship. This happens for two main reasons: first, because the right to stay is understood as ancillary to the freedom of movement, which is often explicitly reserved to nationals;[4] second, because the right to stay dangerously verges on a sensitive privilege of the citizen, that is, the right not be expelled or right of abode.

However, the same constitutional orders commit themselves to the protection of fundamental rights – especially those connected «to the free development of his personality»[5] – that belong to every person «both as an individual and in the social groups where human personality is expressed».[6] Thus, an uneasy question arises: isn't the right to stay in a chosen country a key «to the free development of [one's] personality», a crucial

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[2] P. Bernard, *Traité théorique et pratique de l'extradition* (II, Paris, 1883), p. 615.

[3] US Supreme Court, *Padilla v. Kentucky*, 559 U.S. 356 (2010), Opinion of the Court (Justice Stevens), p. 6 e 8.

[4] See, for instance, Art. 11(1) of the German Basic Law («All Germans enjoy freedom of movement throughout the Federal territory»), Art. 16(1) of the Italian Constitution («Every citizen has the right to reside and travel freely in any part of the country, except for such general limitations as may be established by law for reasons of health or security»)

[5] Art. 2(1) German Basic Law.

[6] Art. 2 Italian Constitution.

element of the legal condition of everyone, regardless of his or her nationality? Is it to be conceived still as a *citizenship right* or, rather, as a *fundamental right*?

International law does not provide a sharp answer either. Human rights treaties protect two dimensions of the freedom of movement: the right of everyone to leave any country and the right of nationals to enter or return to their own country,[7] which mirrors the right not to be expelled from one's own country.[8] In some instruments, though, the protection seems to reach a bit further, allowing «Everyone (…) the right to freedom of movement and residence within the borders of each state».[9] Does this entail any recognition of the right to stay as a *human right*, that translates – within the legal orders of the signatory states – into a fundamental right?

In this paper, I argue that:

a) Governments – being they attached to a longstanding *nationalist approach* to immigration law as a set of rights and guarantees that are *granted by a sovereign State* to selected immigrants under the condition that their presence does not affect any *fundamental interests of the national community* (public order and national security among others)[10] – have successfully imposed the view that the right to stay ultimately rests upon the citizenship status;

b) Influential courts in Europe have recently begun to promote an alternative non-nationalist or *rights-based approach* to immigration law, with the aim to re-establish the lexical priority[11] of the individual over the State – of the liberty of the former over the interests protected by the latter – and, thus, to protect the right to stay as a *fundamental right* of immigrants;

c) This evolution paves the way to a paradigm shift in immigration law, in which *territoriality* gradually replaces *nationality* as main criterion of distribution of liberties in a liberal democratic order. Freedom of movement and residence, just like all the liberties that are fundamental to the development of human personality, belongs to the person as such. Accordingly, it should be conceptualized as a "territory-based" set of guarantees that the State must provide to anyone within its jurisdiction. In this *territorial perspective*, the freedom to stay is understood as a liberty that is afforded, in principle, to any person in any country and that may only be restricted on legitimate grounds and under the plural condition that the principles of *equal protection*, *proportionality* and *due process* are satisfied. This would represent a major step toward the establishment of the rule of law in the regulation of immigration.

The paper is structured in two parts. Part I depicts the nationalist paradigm, by illustrating the spreading of automatic expulsion regimes in domestic legal orders (§ 1), the complex bundle of political and legal issues that are connected to that regime (§ 2) and an example of judicial deference to the governmental view, drawn from the case-law of the Italian Constitutional Court (§ 3). Part II highlights the emergence, in Europe, of the rights-based paradigm, which has received a fresh impetus from the "individualistic" turn

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[7] See, e.g., Art. 12(2) and (4) of the International Covenant on Civil and Procedural Rights (ICCPR); Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination; Art. 2(2) of Protocol 4 and Art. 3(2)to the European Convention on Human Rights (ECHR). For an updated overview, R. Perruchoud, *State sovereignty and freedom of movement*, in B. Opeskin, R. Perruchoud and J. Redoath-Cross (eds.), *Foundations of International Migration Law* (Cambridge, 2012) 126 ff.

[8] E.g. Art. 3(1) Protocol 4 ECHR.

[9] Art. 13 of the Universal Declaration of Human Rights (UDHR). More cautiously, Art. 2(1) Protocol 4 ECHR restricts the same right to «Everyone lawfully within the territory of a State».

[10] This vision is aptly encapsulated in the initial quote.

[11] I borrow from J. Rawls, *A Theory of Justice* (Cambridge, rev. edn. 1999), 36 ff. (on lexical priority) and 214 ff. (on the priority of liberty).

of Strasbourg's case-law on expulsion and Article 8 (§ 1), has been consistently followed by domestic constitutional and supreme courts (§ 2), and marks an important – yet problematic – step towards the advancement of a liberal theory of immigration law (§ 3).

PART I. THE NATIONALIST PARADIGM: "ALIENS AS GUESTS"

I.1. The rise of automatic expulsion of criminal aliens

In the last decades, many western liberal democracies have adopted immigration law reforms that provide for the automatic expulsion (or deportation)[12] of foreigners convicted of certain crimes. When a noncitizen is found guilty of certain crimes, statutory provisions impose on administrative authorities the obligation to expel or deport the concerned person, without any further enquiry or evaluation.

The main example is offered by the United States.

Immigration reforms enacted in the late 1980s and 1990s mandated deportation (and detention) for most criminal aliens with few avenues for relief. Currently, under the Immigration and Nationality Act, even a lawful permanent resident, if convicted of an "aggravated felony", is ineligible to seek cancellation of removal.[13] To support this regime, the U.S. government has often alleged its duty to protect the public order and prevent the risk of future criminal activity by aliens. Yet, as observed, «by narrowly restricting individualized judicial inquiry into detention and deportation circumstances – such as questions of rehabilitation, incentive (or lack thereof) to commit a crime – deportable *criminal aliens are uniformly assumed to be predisposed to re-offend*, thereby constituting a present threat to public safety».[14] In the US, as well as in other European systems, this *special administrative competence* for mandatory removal overlaps with the general rule that entrusts courts with the power to issue deportation or expulsion orders as *post delictum* measures.[15]

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[12] Legal language varies from country to country. For the sake of this comparative analysis, *expulsion* is the order to leave the country within a given period of time, which implies the end of the alien's right to stay; *deportation* is the removal of the alien from the territory of the State (factual execution of the expulsion order) and includes a ban to legal re-entry for an extended period of time.

[13] Aliens in the US are deportable if they are convicted of general crimes involving moral turpitude or aggravated felony, drugs, firearm offenses or other miscellaneous crimes (8 U.S.C. § 1227(a)(2)). In specific cases – when the conviction concerns «aggravated felony» – cancellation of removal is not allowed (8 U.S.C. § 1229b(a)(3)) and, thus, it is "automatic". Immigration reforms enacted in 1996 – the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) – have greatly expanded the category of "aggravated felony", which now also includes minor criminal law violations: see, on this, J.M. Chacón, *Managing Migration through Crime*, 109 *Columbia Law Review* 135, 137-139 (2009). Tellingly, in *Carachuri-Rosendo v. Holder* No. 09-60, 560 U.S. (June 14, 2010), the US Supreme Court held that a conviction for simple possession of a tablet of Xanax in violation of Texas law is not a conviction for an "aggravated felony" under 8 U. S. C. §1101(a)(43)(B) and unanimously rejected the government position that any second or subsequent simple possession drug offense can automatically be deemed an aggravated felony involving automatic expulsion of the convicted alien.

[14] T.A. Miller, *Blurring the Boundaries between Immigration and Crime Control after September 11th*, 25 *Boston College Third World Law Journal* 81, 119-120 (2005) (emphasis added). For the view that the automatic deportation of long-term permanent residents nearly amounts to criminal punishment, but lacks the constitutional protections afforded U.S. citizens who are criminally tried and punished, D. Kanstroom, *Deportation, Social Control and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 *Harvard Law Review* 1889, 1894 (2000). See also S.H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 *Washington & Lee Law Review* 469 (2007) (highlighting the asymmetric incorporation of criminal justice norms into civil removal proceedings).

[15] According to 8 U.S.C. § 1228(c)(1), «a United States district court shall have jurisdiction to enter a judicial order of removal at the time of sentencing against an alien who is deportable, if such an order has been

Many European countries have followed the American path.

In Italy, the 1998 Immigration Act established that a criminal alien could be either expelled by a court with all the guarantees of a criminal procedure or by the administrative authority on the ground of public order.[16] However, a 2002 reform of the 1998 Immigration Act[17] established that the conviction of an immigrant for a wide variety of crimes (also minor ones)[18] obliges the competent administrative authorities to withdraw the residence permit (or to a deny its renewal) and to issue an expulsion order.[19] Only the categories protected by EU law enjoy a special protection from this kind of expulsion,[20] which otherwise applies even against the opinion of a criminal court: a case-by-case judicial assessment can be overstepped by a non-rebuttable presumption written into the law and executed by the administrative arm.

A similar automatism can be found in the 2004 German Residence Act. It provides for "mandatory expulsion" (*Zwingende Ausweisung*, Section 53) of aliens sentenced to a prison term of at least three years for intentionally committed offences, or to a prison term for other offences related to drugs or to crimes against public peace, or to a sentence without parole for smuggling in foreigners.[21] Here too, the mandatory character of expulsion would imply, in principle, that the immigration authority is legally obliged to issue the expulsion order, unless the alien possesses a settlement permit and has lawfully resided in the Federal territory for at least five years.[22] In various instances of less severe criminal sentences or threats to public order, the expulsion order must be issued "as a rule" (*Ausweisung im Regelfall,* Section 54), i.e., expulsion is mandatory unless an atypical case is at hand.[23]

In the United Kingdom, the basic rule provides that an alien is liable to deportation if the Secretary of State deems it to be «conducive to the public good».[24] However, after the Home Secretary's announced on 23 May 2006 his intention to create a direct link between deportation and the commission of a serious crime, the UK Borders Act 2007 established that, from 1 August 2008, foreign national offenders (FNOs) who are sentenced to a period of imprisonment of at least 12 months are, in principle, subject to automatic

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requested by the United States Attorney with the concurrence of the Commissioner and if the court chooses to exercise such jurisdiction».

16 Respectively, Art. 15 and Art. 4(3) (in combination with Art. 5(5)) of legislative decree 25 July 1998, no. 289 ("Turco-Napolitano" law, hereinafter "Italian Immigration Act").

17 Law 30 July 2002, no. 189 ("Bossi-Fini" law), amending the 1998 Immigration Act.

18 See Articles 4 (3) and 26 (7-*bis*) Italian Immigration Act, listing offences related to drugs, sex, prostitution, illegal migration, copyright, forgery, as well as all the crimes for which mandatory arrest *flagrante delicto* is provided by Article 380 of the criminal procedure code. A definitive sentence is required only for crimes related to copyright and forgery.

19 Articles 5(5) and 13(2)(b) Italian Immigration Act.

20 The relevant categories are: *a)* European citizens and their family members, *b)* immigrants who possess an EC long-term residence permit and *c)* immigrants who have exercised the right to family reunification. See Art. 20(2) legislative decree 6 July 2007, no. 30, Art. 5 (5), last sentence, Italian Immigration Act and Art. 9 (4) Italian Immigration Act respectively.

21 Sec. 53 German Residence Act (*Aufenthaltsgesetz - AufenthG*). A final sentence is always required. The system of automatic and semi-automatic expulsions was first introduced with the 1990 Aliens Act (Ausländergesetz).

22 Other cases of special protection from expulsion might also apply. In such cases, the "mandatory" expulsion converts into a semi-automatic expulsion "as a rule" or even a discretionary one, which requires a balancing exercise between the relevant public and private interests: see Articles 55 and 56 German Residence Act, on discretionary expulsion and special protection respectively.

23 See J. Bast, 'The Legal Position of Migrants – German Report', in E. Riedel and R. Wolfrum (eds.), *Recent Trends in German and European Constitutional Law*, (Heidelberg, 2006), pp. 63–105, at 102.

24 Section 3(5)(a) of the Immigration Act 1971, as amended by the Immigration and Asylum Act 1999.

deportation. Where such a conviction has been ordered, the Secretary of State «must make a deportation» unless an exception applies.[25]

In Switzerland, a harsh regime was added to the Federal Constitution by popular vote in November 2010. According to Article 121 (3-6) of the Swiss Constitution, non-nationals shall lose their right of residence and all other legal rights to remain in Switzerland if they are convicted with legal binding effect of various crimes.[26] Thereby, the rise of automatic expulsion reached the constitutional level.

The spreading of automatic expulsion can be seen as a reaction to the gradual erosion of State discretion in cases of expulsion on grounds of *public order*. Once understood in very broad and political terms, so as to include a wide range of State and community values by definition escaping a substantive judicial scrutiny (public order in *"ideal" sense*), that notion has gradually shrunk to the meaning of "crime prevention" (public order in *"material" sense*). This shift not only limited the State political discretion. It also burdened the administrative authorities with the onerous task to prove the risk of future criminal activity by the alien. Here is where automatic expulsion of criminal aliens helps: what makes an expulsion more legitimate than the solid *fact* (not a mere *suspect*), ascertained by a court, that the foreign national committed a crime?

Moreover, this regime effectively serves a *general prevention* aim: lawful immigrants are welcome guests, provided that they pay due respect to the rules of the host community. The message sent to the immigrant community is unequivocal and points to deterrence. Understandably so: if social cohesion has to be preserved, hospitality cannot be divorced from security and the related mechanisms of conditionality.

I.2. Conditional hospitality? A complex legal issue

From a legal viewpoint, the immediate link established between the criminal conviction and the administrative mechanism of expulsion is highly problematic.

If the removal of a convicted alien were a *punitive* measure, that is, an additional penalty for the crime committed, intractable issues would arise: would it be fair to subject a national and a non-national, authors of the very same conduct, to different sanctions?

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[25] Section 32, UK Borders Act 2007. The 12 months must be for a single sentence for a single conviction. The exceptions are listed in Section 33 and apply: *a)* where deportation would breach the subject's rights under the ECHR or the Refugee Convention; *b)* where the offender was under the age of 18 on the date of conviction; *c)* Where the FNO is an European; *d)* where the removal of the foreign criminal would breach his rights under the Community treaties; *e)* in case of mentally disordered offenders; *f)* where the offender was a victim of human trafficking. In all these cases, the deportation is not automatic: either the Secretary of State deems the removal of the foreign criminal to be «conducive to the public good» or the court that sentenced the offender recommends him or her for deportation (sections 3(5)(a)-(6) and 6 of the Immigration Act 1971).

[26] Before 2010, Article 121 (2) of the Swiss Federal Constitution established that « Foreign nationals may be expelled from Switzerland if they pose a risk to the security of the country». After the popular *refendum*, the following provisions were added: «3. Irrespective of their status under the law on foreign nationals, foreign nationals shall lose their right of residence and all other legal rights to remain in Switzerland if they: *a.* are convicted with legal binding effect of an offence of intentional homicide, rape or any other serious sexual offence, any other violent offence such as robbery, the offences of trafficking in human beings or in drugs, or a burglary offence; or *b.* have improperly claimed social insurance or social assistance benefits. 4. The legislature shall define the offences covered by paragraph 3 in more detail. It may add additional offences.5. Foreign nationals who lose their right of residence and all other legal rights to remain in Switzerland in accordance with paragraphs 3 and 4 must be deported from Switzerland by the competent authority and must be made subject to a ban on entry of from 5–15 years. In the event of reoffending, the ban on entry is for 20 years. 6. Any person who fails to comply with the ban on entry or otherwise enters Switzerland illegally commits an offence. The legislature shall issue the relevant provisions.»

Would it be consistent with a basic understanding of the rule of law to *ex ante* differentiate the intensity of a sanction, in relation not to the *gravity of the offense* committed but rather in relation to the *nationality of the offender*? And would it be acceptable to entrust to an administrative body the adoption of a measure connected to a criminal conduct – a competence in principle belonging to (criminal) courts – with the consequence, among others, that the more robust criminal due process guarantees do not apply?

In fact, a more careful reading suggests that this kind of expulsion is not a criminal sanction,[27] but rather an *administrative measure of prevention*. Like the ordinary expulsion for public order motives, it pursues (not a punitive, but) a preventive purpose, insofar as it aims to deter the dangerous alien from reoffend.[28] Peculiarly, though, the new instrument is not based on a case-by-case assessment of the threat to public order that the alien represents, but on the *presumption* (an absolute one) that he or she, having been convicted, keeps being socially dangerous.

Yet, also under this alternative construct, two problems emerge.

First, preventive measures (also *post delictum* ones) are by definition forward-looking: they are based on a prognosis, an evaluation of the danger that the person may reoffend. How, then, a conviction for a *past* conduct can justify the *present* threat upon which the removal ought to be founded? Is it fair and reasonable to establish, on account of a fact committed years before, that the convicted, being a non-national, is unredeemable and thus deserves to be submitted to a measure of special prevention (the deportation) in addition to the conviction? Shouldn't the *ex ante* and absolute presumption of dangerousness, established by the law, be replaced with a case-by-case assessment, as it happens for all the (other) measures of prevention?

Second, the automatism that leads to the removal stands in sharp conflict with proportionality. Not only the statutory provision postulates what should be, in principle, ascertained case-by-case (the present threat that the convicted might still represent after the conviction). It also posits that the alleged public interest in crime prevention must prevail. In the statutory scheme, no room is left to consider the impact of the expulsion order on the life of the immigrant. No balancing is allowed. Is this consistent with the proportionality principle?

The standard rejoinder of governments is also based on strong arguments:

a) a case-by-case assessment of the social danger that the noncitizen offender represents is too demanding (in terms of administrative resources required for gathering information on the conduct of the offender), disproportionate (automatic expulsion is already associated to crimes involving serious security concerns), ineffective (expulsion

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[27] In other immigration systems, as in the French one, the deportation of convicted aliens is firmly established as a criminal sanction, with all the coherent implications stemming from it: the competence rests with a criminal court, which *may* issue an «interdiction du territoire français» (ITF) against aliens convicted of any crime either as main penalty or as subsidiary one. No automatism is established and all the guarantees of a criminal procedure apply. See Articles L541-1 ff. of the *Code de l'entrée et du séjour des étrangers et du droit d'asile* (CESEDA) and the provisions of the French criminal code thereby referred to.

[28] ECtHR, Grand Chamber, *Üner v. Netherlands*, judgement of 18 October 2006, para. 56: «a decision to revoke a residence permit and/or to impose an exclusion order on a settled migrant following a criminal conviction in respect of which that migrant has been sentenced to a criminal-law penalty *does not constitute a double punishment*, either for the purposes of Article 4 of Protocol No. 7 or more generally. Contracting States are entitled to take measures in relation to persons who have been convicted of criminal offences in order to protect society – provided, of course, that, to the extent that those measures interfere with the rights guaranteed by Article 8, paragraph 1, of the Convention, they are necessary in a democratic society and proportionate to the aim pursued. Such administrative measures are to be seen as *preventive rather than punitive in nature*» (emphasis added). The same view is usually supported by governments (for the German position in the *Üner* case, see para. 53).

becomes conditional and thus loses its effect of deterrence) and at best inefficient (the result is a delayed process of removal);

b) aliens are guests and, therefore, their sojourn is conditional, as they have to stick to the rules of the house: any serious violation of the criminal code is the prove that the guest disregarded those rules, with the result that the commitment of the host State to hospitality ceases.

How courts posit themselves in this complex debate, where community values and national self-determination seem to be in sharp contrast with the rule of law?

The answer is crucially influenced by the constitutional relevance attached to the immigrants' right to stay: acknowledging or not acknowledging it as fundamental right determines both the width of (State) legislative discretion and the standard of review (more or less stringent) that courts use.

I.3. Judicial defe(re)nce: criminal rule of law vs. administrative rule by law

The Italian constitutional jurisprudence offers a good example of judicial deference to the governmental view. Despite the many challenges brought by lower courts against the automatic expulsion introduced in 2002, the Constitutional Court has so far defended its compatibility with the Constitution.

In the leading case on the matter, decided in 2008, the Court has rejected the concerns of constitutionality – mainly referred to Article 3 of the Italian Constitution (reasonableness and equal protection) – on the basis of the following three-pronged argument.[29]

First, the legal position of aliens in Italy is disciplined by the law in compliance with international law (Article 10 of the Constitution), which does not grant the alien any right to stay in a host country. The domestic Constitution only protects the freedom of *nationals* to circulate and reside in the national territory[30]. Therefore, in the Italian legal order, the right to stay of non-nationals is *not* protected as *a fundamental right*.

Second, the State enjoys, in the regulation of immigration, a «*wide discretion*», which involves the «balancing of various public interests, such us, for example, public security and safety, public order, international relations and national immigration policy». Accordingly, the constitutional standard of review is rather lenient, being it restricted to a scrutiny of «non-manifest unreasonableness» of legislative choices. [31]

Thirdly, as far as legal automatisms are concerned, a *distinction* must be drawn *between criminal* and *administrative measures*. The removal of an alien cannot be automatic when it is decided by a criminal court,[32] because it would be inconsistent with the general rule that requires *post delictum* measures be adopted after a case-by-case assessment of the danger posed by the convicted person.[33] By contrast, the automatism is acceptable when the very same measure is legally framed as an administrative act: in such case – according to the Italian judges – there is no general requirement of concrete evaluation of the risk of re-offence.[34] Moreover, the legislative presumption that a convicted alien is a permanent

[29] Italian Constitutional Court, judgment no. 148 of 2008.

[30] The wording of Article 16 of the Italian Constitution, as mentioned, makes explicit reference to «citizens».

[31] Italian Constitutional Court, no. 148 of 2008, para. 3.

[32] Italian Constitutional Court, judgment no. 58 of 1995.

[33] This rule is established in general terms in Article 204 of the Italian criminal code.

[34] It is worth noticing that, quite ironically, this view implies that administrative authorities are legally obliged to issue it *even when* the court that convicted the alien has already excluded, on the basis of a concrete assessment, the need for a removal.

threat, when it is transposed from the criminal sphere to the administrative one, becomes expression of «the *principle of strict legality* that permeates the immigration regime and that constitutes, also for the aliens, an essential protection of their rights, insofar as it prevents possible administrative arbitrary decisions».[35]

Despite the paradoxical reference to the «principle of strict legality» as a guarantee for the aliens in that context, the judgment reveals the classic opposition between *rule of law* and *rule by law*. The latter, representing the will of the majority of the insiders (the citizens), prevails over basic concerns of equal protection (between national and non-national addressees of *post delictum* measures of prevention), proportionality (in the adoption of freedom-limiting measures) and due process (in the adoption of the unfavourable administrative decision). The automatism of the expulsion rules out all these rule of law corollaries in one shot. Due to the alleged "crime crisis" brought by immigration, crime prevention is understood as a rough game, in which some players (the insiders) have the power both to establish harsh rules and to harshly enforce them, whereas the other players (the outsiders), if they are not content, are free to leave.

Italian constitutional judges have both accepted this construct and buttressed it by making two assumptions, which still hold firm in the Italian legal order. First, the right to stay is not a fundamental right (i.e. does not enjoy constitutional protection) and, thus, the State should be acknowledged a «wide discretion» in shaping it, with little – if any – binds. Second, the prevention of future crimes, when it is pursued with administrative tools, can be based on a legislative presumption. Neither of these assumptions withstands the challenges posed by the rise in Europe of a rights-based approach to immigration.

PART II. THE RIGHTS-BASED PARADIGM: ALIENS AS HUMAN BEINGS

II.1. Questioning automatic expulsion: the "individualist" reading of Article 8 ECHR in Strasbourg

In a ruling of June 2013, the Italian Constitutional Court held that the right to stay of immigrants receives constitutional protection when the concerned alien lives in the host country with his or her family: only in such case, by way of exception to the rule of automatic expulsion, Article 8 ECHR becomes relevant and accords the convicted alien the right to a proportional decision on expulsion.[36]

Under this "familistic" reading of Article 8 ECHR, the right to stay is not treated as a fundamental right *per se*, being it only protected to the extent that it overlaps with the right to respect for "family life". As a result, a permanent immigrant who lives in Italy as a single or unaccompanied person remain exposed to automatic expulsion: its "weaker" liberty is prone to the public interest and to the State's «wide discretion» doctrine that still dominates immigration law in Italy and elsewhere.

Is this reading of Article 8 ECHR consistent with the case-law in Strasbourg? Does Article 8 ECHR entail – as the Italian Constitutional Court and other domestic courts suggest – a *qualitative* distinction between a fundamental right to stay connected to the protection of family life, and a non-fundamental right to stay of the unaccompanied alien?

Recent developments in the case-law of the European court of human rights (ECtHR) point to an opposite conclusion.

The Convention neither calls into question the State "right" to control the entry and

[35] Italian Constitutional Court, no. 148 of 2008, para 5 (emphasis added).
[36] Italian Constitutional Court, judgment no. 202 of 2013.

the sojourn of aliens in its territory,[37] nor it aims at creating an absolute right not be removed from the host country: as observed, this privilege is reserved to nationals.[38] Nonetheless, various provisions of the Convention constrain the State power to expel aliens.

Article 8 is especially relevant in this context. In principle, when a measure of territorial exclusion *interferes* with right of everyone to respect for his or her «*private* and *family* life», Article 8 ECHR requires that that measure pursues a *legitimate aim* (as laid down in paragraph 2) and is *proportionate* or «necessary in a democratic society».[39]

As for the *legitimate aim*, automatic expulsion of foreign national offenders seems to comply with Article 8: the ground of «prevention of disorder or crime» is consistently referred to in Strasbourg's case-law on expulsion of convicted aliens.

On the contrary, more problematic is the *proportionality* requirement. An inflexible instrument of exclusion, based on an *ex ante* (legislative) non-rebuttable presumption, might well lead State authorities to adopt exclusion measures that are not proportional. This issue arises every time an expulsion order *interferes* with the interests protected by Article 8, namely «*private* and *family* life». Yet, does the «private life» aspect enjoy an autonomous protection under Article 8?

Until a decade ago, the consideration accorded by the Court of Strasbourg to the protection of family life was manifestly predominant, while the protection of private life was understood as ancillary and dependent. The *Boultif* criteria – elaborated in 2001 as a general test in expulsion cases – refer either to family life[40] or to the danger represented by the convicted alien.[41] The private life dimension emerges only indirectly from the consideration accorded to «the duration of the applicant's stay in the country from which he is going to be expelled».

In the following years, though, the European Court has acknowledged its family-oriented reading of Article 8 ECHR as insufficient and has begun to ascribe autonomous relevance to «private life».

A first sign of turnaround appears in the *Slivenko* case (2003). Here the European Court admits that «in the case-law under the Convention in relation to expulsion (…) measures the main emphasis has consistently been placed on the aspect of "family life"». Yet, the Court also points out that it had not neglected "private life": rather, it has «treated the expulsion of long-term residents under the head of "private life" as well as that of "family life", some importance being attached in this context to the degree of social

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[37] As mentioned above, in the Introduction. See also, inter alia, ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgement of 28 May 1985, para. 67, and *Boujlifa v. France*, judgement of 21 October 1997, para. 42.

[38] As it is clearly stated in ECtHR, Grand Chamber, *Üner v. Netherlands*, judgement of 18 October 2006, para. 55. However, Recommendation 1504 (2001) of the Council of Europe on non-expulsion of long-term immigrants invites «to guarantee that migrants who were born or raised in the host country and their under-age children cannot be expelled under any circumstances» (para. 11, letter h).

[39] See, *inter alia*, ECtHR, *Dalia v. France*, judgement of 19 February 1998, para. 52, and *Mehemi v. France*, judgement of 26 September 1997, para. 34.

[40] According to the *Boultif* test, in order to assess *whether an interference is «necessary in a democratic society»,* the Court considers, on the family side, «the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age», as well as «the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin» (ECtHR, *Boultif v. Switzerland*, judgement of 2 August 2001, para. 48).

[41] The following *Boultif* criteria can be associated with the public interest in protecting security and preventing new crimes: «the nature and seriousness of the offence committed by the applicant» and «the time which has elapsed since the commission of the offence and the applicant's conduct during that period» (ECtHR, *Boultif v. Switzerland*, para. 48).

integration of the persons concerned».[42] Having ascertained that, in the case at hand, the deportation order aimed at the removal of all the family members, and therefore it did not involve any breach of family ties, the Court accepts to concentrate its examination «on the question whether the interference with the applicants' right to respect for their "private life" and their "home" was justified or not».[43]

The next step is taken in *Radovanovic* (2004). Here, the addressee of the challenged expulsion order is a single young adult, who has not yet founded a family of his own in the host country. Nevertheless, the Court accepts to assess the necessity of the interference with his "private" life: in addition to the nature and gravity of the offence committed, the Court takes into consideration the length of his stay in the host country, the ties with his «non-core» family of origin[44] and – in addition to the *Boultif* test – the «social ties he established in the host country».[45]

The *Üner* case (2006), concerning a discretionary expulsion of a convicted alien, marks the turning point. The judges in Strasbourg openly denounce the *Boultif* test as insufficient for its disregard to "private life" aspects and complement it with an additional criterion, concerning «the solidity of social, cultural and family ties with the host country and with the country of destination».[46] The principle thereby established is that, «as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of "private life" within the meaning of Article 8». The conclusion is noteworthy: «*Regardless of the existence or otherwise of a "family life"*, the Court considers that *the expulsion of a settled migrant constitutes interference with his or her right to respect for private life*». Accordingly, «it will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect».[47]

The same ground-breaking concept has been reiterated in the following case-law.[48] In particular, in *Maslov* (2008) – again on the expulsion of a single young adult convicted of a crime – the Court clarifies some relevant implications of the new approach.

In principle, even if the State's «margin of appreciation» remains untouched, it is for the Court itself to ascertain whether the expulsion has struck a «fair balance» between «the individual's rights protected by the Convention on the one hand and the community's interests on the other»: the State's margin of appreciation, in fact, «goes hand in hand with European supervision, embracing both the legislation and the decisions applying it».[49]

In concrete, the proportionality test requires that, in balancing it against the State interest in the expulsion, the weight of alien's "private life" be commeasured to the length

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[42] ECtHR, Grand Chamber, *Slivenko v. Latvia*, judgement of 9 October 2003, paras 94-95. The case concerns the deportation from Latvia of a family of Russian origin, in implementation of the Latvian-Russian treaty on the withdrawal of Russian troops.

[43] ECtHR, *Slivenko v. Latvia*, para. 98.

[44] It should be noted that the reference to family ties, in that context, does not imply that the interference is assessed (also) with regard to «family life»: the scope of «family life» under Article 8(1) is essentially limited to «core family» aspects, that is to the spouse/partner of the applicant and his/her children. Therefore, as the Court has clarified, the links existing with «elderly parents, adults who did not belong to the core family and who have not been shown to have been dependent members of the applicants' family» are taken into account «under the head of the applicants' "private" life» (ECtHR, *Slivenko v. Latvia*, para. 97).

[45] ECtHR, *Radovanovic v. Austria*, judgement of 22 April 2004, para. 33 (emphasis added).

[46] ECtHR, *Üner v. Netherlands*, para. 58.

[47] ECtHR, *Üner v. Netherlands*, para. 59.

[48] On this evolution, see D. Thym, *Respect For Private And Family Life Under Article 8 Echr In Immigration Cases: A Human Right To Regularize Illegal Stay?*, 57 *International & Comparative Law Quarterly* (2008), p. 87 ff.

[49] ECtHR, *Maslov v. Austria*, para. 76.

of the stay: briefly put, «the longer the stay, the stronger the claim»[50].

Therefore, although Article 8 provides no absolute protection against expulsion for any category of aliens, «for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion».[51] On the opposite side, it is intuitive that, when the alien lacks a family life in the meaning of Article 8 and thus the removal only interferes with his or her "private" life, his position is weaker and this might more easily determine a finding of proportionality in favour of the State measure.[52]

Quite significantly, though, in *Samsonnikov* (2012) the European judges have come to assert that is not necessary to establish whether the expulsion interferes only with the "private" life of the alien or also with his or her "family" life: «in practice the factors to be examined in order to assess the proportionality of the deportation measure are essentially the same regardless of whether family or private life is engaged».[53] In other terms, the protection of "private life" provided by Article 8 *always* stands in the way of domestic measures of removal.

The latter point constitutes a crucial achievement for non-nationals: in Europe, convicted aliens facing an expulsion or deportation order always enjoy the protection of Article 8, regardless of whether the order interferes also with their "family" life, or exclusively affects their "private" life. The concept of "private" life under Article 8, in fact, is broadly understood, as it involves – as affirmed in *Maslov* – «the totality of social ties between settled migrants and the community in which they are living»: it would be a fallacy to presume its lack *ex ante* and it is also difficult to deny its existence in concrete.[54]

The result is that, in principle, all the addressees of an expulsion order, including those convicted of a crime, are protected by the Convention against any arbitrary interference in their *right to stay*. This right is by no means absolute, being the right of abode still a franchise reserved to nationals. Yet, under Article 8 ECHR, the right to stay has come to share the essential attributes of a *fundamental right*, insofar as any constraints imposed on it by the State has to be based on a general legislative provision, to be justified on one of the few legitimate grounds admitted and to be proportionate.

Automatic expulsion is manifestly at risk.

II.2. Domestic disciples: the demise of automatic expulsion in Europe

On a more cautious reading of the Strasbourg's jurisprudence, one might argue that national regimes providing for the automatic expulsion of aliens have never been declared in violation of Article 8 ECHR. Even if, in abstract terms, any legislative automatism is at odds with the requirement of proportionality, the European Court has never reached that conclusion. Deferent to the State's margin of appreciation, it has rather limited itself to

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[50] ECtHR, Grand Chamber, *Maslov v. Austria*, judgement of 23 June 2008, para. 68: «the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be».

[51] ECtHR, *Maslov v. Austria*, para. 75.

[52] Examples can be found in ECtHR, Kays v. Germany, judgement of 28 June 2007; *Miah v. United Kingdom*, decision of 27 April 2010, *M.S. v. United Kingdom*, decision of 12 October 2012, *Balogun v. United Kingdom*, judgement of 10 April 2012, para. 47-53.

[53] ECtHR, *Samsonnikov v. Estonia*, judgement of 3 July 2012, para. 82.

[54] In fact, the European Court frequently reiterates what has been acknowledged in ECtHR, *Miah v. the United Kingdom*, decision of 27 April 2010, para. 17: «indeed it will be a rare case where a settled migrant will be unable to demonstrate that his or her deportation would interfere with his or her private life as guaranteed by Article 8».

denounce cases of gross violation of proportionality essentially when they concerned second-generation aliens and "juvenile delinquency".

This reading, although not inaccurate, would be misleadingly formalistic and, indeed, myopic, insofar as it downplays both the actual impact of the mentioned case-law and its far-reaching implications.

To begin with, the case-law examined above stems from applications by individuals against contracting states. The object of their challenge is not the abstract legality of a domestic provision, but rather a specific implementing measure. This helps explaining why the judges in Strasbourg, rather than declaring an automatic expulsion regime as *per se* in violation of Article 8, limit themself to ascertaining whether a fair balance and a proportional result have been *de facto* achieved in the case at hand.[55]

However, the fact that the Strasbourg's scrutiny under Article 8 is, in a way, "result-oriented" by no means helps securing the legitimacy of automatic expulsion. Following the automatism, there might well be cases in which the order of deportation, being kept "in the dark" (i.e. with no consideration of the specific situation), might determine disproportionate results. Therefore, it would be hazardous for a contracting State to persist in keeping alive a regime that systematically runs into the risk of failing the *Boultif-Üner* test, thereby infringing the Convention.

Take the British example.

As mentioned above (§ I.1), the UK Border Act of 2007 introduced an automatism in the expulsion of certain categories of convicted aliens.[56] Yet, the actual administrative praxis is driven by the Immigration Rules established by the Home Office. Those rules, last updated in December 2013, on one hand, do not mention automatic expulsion of convicted aliens; on the other hand, they devote an entire heading to "Deportation and Article 8" ECHR,[57] thus in concrete re-establishing the basic rule according to which deportation always occurs «where the Secretary of State deems the person's deportation to be conducive to the public good»[58], that is, in a discretionary fashion. The pragmatic compliance with Article 8 is further secured by the eight provisions explicitly regarding the applications for leave to remain «on the grounds of private life».[59]

Even if a government is not willing to import into domestic law the implications stemming from the Strasbourg's case-law, another check-point is available: domestic courts are there to control the compliance with the Convention. The jurisprudence developed by the ECtHR is, indeed, a powerful source in the hands of the national judiciaries.

The most impressive example of reactiveness to the individualist approach developed in Strasbourg is perhaps the decision adopted by the German Federal Constitutional Court in April 2007, few months after the mentioned *Üner* judgment.[60]

The case was typical: a "mandatory" expulsion of an alien convicted of drug-related crimes.[61] The administrative measure had been challenged on the ground that the issuing

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[55] See, among many possible examples, ECtHR, *Kahn v. United Kingdom*, judgement of 20 December 2011, para. 38, where it is stated that «The Court is of the view that the applicant's lapse into re-offending, so soon after his release from prison, demonstrates that his conviction and lengthy term of imprisonment did not have the desired rehabilitative effect and that the domestic authorities were entitled to conclude that he continued to present a risk to the public».

[56] See above, § I.1.

[57] UK Immigration Rules, Sections from 398 to 400 (available at http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/).

[58] UK Immigration Rules, Section 363(i).

[59] UK Immigration Rules, Sections from 276ADE to 276DH.

[60] Above, § II.1.

[61] The expulsion was adopted pursuant to Section 47(1) of the German Alien Act, now repealed. The same kind of mandatory expulsion – with wider scope of application – can be found in Section 53 of the Residence Act adopted in 2004. See also above, § I.1.

authority neglected the impact on the private life of the alien, a long-term lawful resident.

The Federal Constitutional Court upheld the claim on the basis of a very consequential reasoning, that is worth retracing:

a) the fact that the fundamental right to free movement within the territory is restricted to German nationals (Art. 11 of the Basic Law) does not preclude that the fundamental right to the free development of the personality (Article 2(1) of the Basic Law) applies also to settled migrants in Germany, being it a right granted to every person irrespective of his or her nationality;[62]

b) any expulsion orders determine an interference with the right to the free development of the personality of the alien as a resident in the national territory under Article 2 (1) of the Basic Law;

c) the principle of proportionality provides the general constitutional model according to which a fundamental right under Article 2 (1) may be limited; [63]

d) both the deportation regime applied until 31 December 2004 (Sections 45-48 of the Aliens Act) and the regime in force since then (Sections 53 et seq. of the Residence Act) involve a substantial graduation of administrative discretion (from "discretionary" to "as a rule" to "mandatory" expulsion, combined with the provision of special protection cases) that sufficiently takes into account the proportionality requirements; [64]

e) that legislative "gradual" system, however, *does not rule out the need to review the legality of expulsion orders according to the circumstances of the case*, as only this concrete evaluation ensures that proportionality is really maintained in relation to the situation of the foreigner in question: *this concrete assessment of proportionality should be carried out according to the criteria developed by the Court of Strasbourg in accordance with Article 8 ECHR*; [65]

f) a concrete assessment of the single case in the light of those criteria – the so-called *Boultif-Üner* test – is necessary to make sure that the expulsion of a convicted alien (which is not a punitive measure) is not pursued for mere considerations of *general prevention*, but is rather adopted to prevent future disturbances of public order and security or violations of any other substantial interests of State (*special prevention* purpose); [66]

g) the control of proportionality not only requires that the factors on which depends the future danger represented by the alien be identified and positively ascertained; it also entails that due consideration is paid to the impact of deportation on the *"private" life* of the alien, even when he or she does not enjoys a *"family" life* in the host country: the failure to appreciate the degree of integration of the alien in the host country, together with the potential impact of the removal on the personal, social and economic ties that he or she has established in Germany, amounts to a *direct violation of Article 2(1)* of the Basic Law.[67]

The ruling of the German Constitutional Court is not an isolated case. In a widely noticed verdict of October 2012, the Swiss Supreme Court overturned the regime on automatic expulsion that had been made constitutional in 2010.[68]

The ruling originates from the expulsion of a Macedonian national convicted of trafficking in drugs, which was found not proportionate and thus in breach of Article 8 ECHR, due to the inadequate consideration paid both to the conduct subsequent to the conviction (in more than three years he never reoffended) and to the socialization and integration in Switzerland of the alien, that had been living there since the age of 7. [69]

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[62] Federal Constitutional Court (FCC), decision of 1 March 2004 - 2 BvR 1570/03, para. 14.

[63] FCC, 2 BvR 1570/03, paras. 15 and 17.

[64] FCC, 2 BvR 1570/03, para. 18.

[65] FCC, 2 BvR 1570/03, para. 19.

[66] FCC, 2 BvR 1570/03, paras. 23-24 and 31.

[67] FCC, 2 BvR 1570/03, paras. 23-24. For details on the ensuing case law, see J. Bast, *Aufenthaltsrecht und Migrationssteuerung* (Tübingen, 2011), pp. 200–203; and D. Thym, *Migrationsverwaltungsrecht* (Tübingen, 2010), pp. 241–245.

[68] Swiss Federal Supreme Court, judgement of 12 October 2012, 2C_828/2011.

[69] Swiss Federal Supreme Court, 2C_828/2011, para. 3.

In a further bold step, the Federal Supreme Court held that the 2010 constitutional provisions on automatic expulsion[70] are not directly applicable as they are too vague and contradict both constitutional law (in particular, the rule of law principle)[71] and the proportionality requirements arising from the protection of private and family life, as provided by Article 8 ECHR and other international law instruments.[72]

As these domestic judicial reactions to the recent Strasbourg's case-law on expulsion and Article 8 show, the resistance of the Italian Constitutional Court, organized along an outdated "familist" line of defence, is by no means the rule in Europe. On the contrary, a general consensus among courts emerges on the recognition of the right to stay as a fundamental right and on the consequent need to shield the non-national from disproportionate interference, even when it comes in the name of the Nation. In the judicial perspective, in fact, aliens are not just guests. They are human beings. And their fundamental rights cannot depend on whatever community interest is emphasised by the government of the day, as those rights come first.

3. Towards a liberal constitutional theory of immigration law?

The emergence in Europe of a liberal understanding of the right to stay is further corroborated by the convergence with EU law. Due to the fundamental nature of the freedom of circulation in the supranational legal order, the primacy of individual liberty over State interests has shaped the regulation of intra-European expulsion from the beginning.

Already in 1964, Member States of the European Community accepted that a criminal conviction does not *per se* justify the expulsion of a citizen of another member State.[73] The European Court of Justice has always applied this precept in an exacting way, banning any sort of automatic expulsion regime from the internal circulation.

Already in the *Bouchereau* case (1977), the Court made clear that «the existence of a previous criminal conviction can (…) only be taken into account in so far as the

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[70] Art. 121 (3-6) of the Swiss Federal Constitution. For the text, see above, note 24.

[71] According to Article 5 of the Swiss Federal Constitution, the rule of law principle entails that all State activities must be based on and limited by the law, must proportionately pursue a public interest and must respect international law.

[72] Swiss Federal Supreme Court, 2C_828/2011, para. 4.3 (esp. 4.3.3). Despite this ruling, the populist People's Party insists that the expulsion initiative must be strictly applied to respect voters' intentions. It launched a second initiative which seeks automatic deportation of foreigners convicted of serious (but also minor) crimes, regardless of whether they are repeat offenders. Significantly, the initiative text specifies that the Swiss law would have primacy over international law.
For an update on this, see Swissinfo.ch, *People's Party targets foreign criminals, again*, 24 July 2012 (http://www.swissinfo.ch/eng/swiss_news/People_s_Party_targets_foreign_criminals,_again.html?cid=33174116) and Swissinfo.ch, *Deportation initiative raises more legal questions*, 20 November 2013 (http://www.swissinfo.ch/eng/swiss_news/Deportation_initiative_raises_more_legal_questions.html?cid=37373196#element33174116).

[73] Art. 3 of directive 64/221/EEC provided that «Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned» (paragraph 1) and that «Previous criminal convictions shall not in themselves constitute grounds for the taking of such measures» (paragraph 2).
The same provisions now appear, in a strengthened form, in Article 27 (2) of directive 38/2004/EC: «Measures taken on grounds of public policy or public security shall comply with the principle of *proportionality* and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, *present* and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of *general prevention* shall not be accepted» (emphasis added).

circumstances which gave rise to that conviction are evidence of personal conduct constituting a *present threat* to the requirements of public policy».[74] The reference to the current nature of the danger immediately ruled out the possibility to justify the expulsion of a convicted alien on grounds of deterrence (or general prevention).[75]

Then, in *Orfanopoulos and Oliveri* (2004), the Court of Luxembourg insisted that, even when the alien is convicted of serious *repeated* crimes, the competent national authorities must *always* assess, on a case-by-case basis, the circumstances that gave rise to the expulsion order. Recidivism *per se* is not enough to justify an expulsion, also because «in practice, circumstances may arise between the date of the expulsion order and that of its review by the competent court which point to the cessation or the substantial diminution of the threat which the conduct of the person ordered to be expelled constitutes to the requirements of public policy».[76]

Finally, in 2007, the Court of Justice peremptory denounced as radically incompatible with EU law every national legislation that makes it (not mandatory, but simply) «possible to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion in respect of citizens of the Union».[77]

Even though the ECJ made explicit what remains implicit in the case-law of the Court of Strasbourg, the guarantees afforded to third-country immigrants under Article 8 ECHR are strikingly similar to the ones enjoyed by European citizens: case-by-case assessment, proportionality of the measure, need to justify it on the ground of a legitimate public aim, due process are all shared features. Despite the very different starting points, the convergence is evident.

Three conclusions can be drawn.

First, as far as the freedom of sojourn and residence is concerned, nationality is becoming irrelevant. Despite the existence of State borders, the right to stay is increasingly recognized as a fundamental projection of the human personhood and of its freedom to develop (everywhere), as the German Constitutional Court affirmed.[78] The trajectory of the automatic expulsion, now declining, reflects both the demise of citizenship as paramount legal status,[79] and the emergence of the right to stay as a fundamental right, to be protected everywhere, also by reluctant States within their borders.

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[74] ECJ, *Régina v Pierre Bouchereau*, judgment of 27 October 1977, Case 30-77, para. 28.

[75] The dissociation between the notion of public order (strictly understood as *special* prevention) and *general* preventive aims dates back to ECJ, *Carmelo Angelo* ***Bonsignore*** *v Oberstadtdirektor der Stadt Köln*, judgment of 26 February 1975, case 67/74, para 7. See also, more recently, ECJ, *Commission v. Germany*, judgement of 27 April 2003, Case C-441/02, para. 93: «Community law precludes expulsion of a national of a Member State on grounds of a general preventive nature, that is to say, expulsion which has been ordered for the purpose of deterring other foreign nationals, in particular where such measure automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy».

[76] ECJ, *Orfanopoulos and Oliveri v. Land Baden-Württemberg*, judgement of 29 April 2004, Joined cases C-482/01 and C-493/01, para. 78.

[77] ECJ, case C-50/06, *Commission v. Netherlands*, judgement of 7 July 2007, para. 46.

[78] See above, II.2. The absolute right of abode is still reserved to nationals, as a result of an old pragmatic rule of international law, yet also the freedom of nationals to circulate and live within their country can be subjected to restrictions. And those restrictions must be consistent with the very same rule of law corollaries – proportionality, equal protection, due process – that shields non-citizens from the interference of public authorities in their right to stay.

[79] The literature on the demise of citizenship triggered by the rise of human right regimes and by the strengthening of supranational forms of belonging (European citizenship) is extensive. See, in particular, Y.N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago, 1994), p. 129 ff.; D. Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (Baltimore, 1997), p. 73 ff.; L. Bosniak, *Citizenship Denationalized*, 7 *Indiana Journal of Global Law Studies* (2000), p. 447 ff.; S. Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge, 2004).

Second, the shift from the nationalist paradigm to the rights-based one in immigration law triggers the substitution of citizenship with territoriality as the basic criterion for the enjoyment of individual liberties. According to a long-standing public law tradition – dating back to Georg Jellinek's theory of "public subjective rights", still influent in continental Europe, as the mentioned Italian rulings testify – it is the State that enables the individual to ask for the protection of his/her freedoms; therefore, the legal personhood of the individual depends on the relation with the State, that is, on membership. The link between citizenship and individual freedoms is now vanishing. Due to the rise of human rights and supranational sources of recognition of individual freedoms, the duty of the State to acknowledge the legal personhood of aliens and to afford them protection does not depend anymore on the bond of nationality, but rather on the physical presence of a person in the territory of that State. Territoriality – not citizenship – is the main source of mutual obligation between the State and the individual.[80]

Inevitably, though – third conclusion – the emergence of the rights-based paradigm paves the way to a further erosion of the State ability to award its members with exclusive benefits. The territorial perspective does not call into question the integrity of State control over its borders (according to the «*hard on the outside, soft in the inside*» formula)[81]. Nonetheless, it has far-reaching implications. Insofar as it is based on physical presence in the territory, it does not allow a categorical distinction between authorized and unauthorized immigration, which is at the root of most national immigration regimes.[82] As a result, the capacity of the State to nurture the idea of a national community based on shared values, cohesion and solidarity, that is to project on its population the imagine of a "community of fate" that is able to select the new members and to pursue its own distinctive path to well-being, is at risk.

The "liberal paradox" that affects immigration policy in western democracies, then, reappears.[83] In Europe, States are increasingly trapped – as the Swiss saga of *referenda* on immigration shows – between the commitment to the will of their national communities, that is, to democracy, and the competing commitment to the rule of law, that assumes individual freedoms as prior.[84] Facing the challenge of immigration, national democracies fail to contain the illiberal excesses of nationalism. In response, courts develop an expansive reading of fundamental rights and the rule of law, which further erodes the margins of national self-determination.

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[80] The implications of this paradigm shift are further explored in M. Savino, *Le libertà degli altri. La regolazione amministrativa dei flussi migratori* (Milan, 2013), pp. 1-42.

[81] L. Bosniak, *The Citizens and the Alien: Dilemmas of Contemporary Membership* (Princeton, 2006). See, also, on "ethical territoriality", Id., *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 *Theoretical Inquiries in Law* (2007), p. 389 ff.

[82] For a bold perspective, J. Carens, *Immigrants and the right to stay* (Cambridge, 2010), arguing that, when the right to stay of settled yet irregular migrants is at stake, «enforcing immigration restrictions (…) is entirely out of proportion to the wrong of illegal entry» (p. 12), and that they «should acquire a legal right of permanent residence and all the rights that go with that» (p. 18). More cautious alternatives are, of course, possible and perhaps even more consistent with the rights-based paradigm outlined above.

[83] The "liberal paradox" is articulated in J.H. Hollifield, *The Emerging Migration State*, 38 *International Migration Review* (2004), pp. 885 ff.

[84] For an alternative path to self-determination, based on the separation between nation and State, U. Beck, *The Cosmopolitan Vision* (Cambridge, 2006). Other scholars highlight the coexistence of pressures to "de-nationalization" and "re-nationalization" within domestic legal orders: see, e.g., C. Joppke, *Citizenship and Immigration* (Cambridge, 2010).