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The right to stay as a fundamental freedom? The demise of automatic expulsion in Europe*

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ABSTRACT

Aliens are guests. Their right to stay is contingent upon observance of the 'rules of the house'. If they commit an offence, they shall leave. This strict rule – adopted in Europe and elsewhere – conveys an easy message of deterrence, allegedly effective in preventing crime. Yet, an expanding coalition of international and domestic courts, raising the flag of the rule of law, questions its legitimacy. The European court of human rights promotes an expansive 'individualist' reading of Article 8 ECHR, which threatens any automatism in the removal. Influent domestic courts follow a convergent path, holding that the right to stay is essential to the free development of human personality: hence, any limitation of this (fundamental) right must be proportional. Such 'rights-based' approach challenges the traditional 'nationalist' model of constitutional adjudication, insofar as it replaces citizenship with territoriality as the basic criterion for the protection of individual liberties.

KEYWORDS right to stay; migration law; expulsion; convicted aliens; territoriality

> 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.[1]

Introduction: expulsion powers – from administrative to legislative plenary power

In 1894, Mademoiselle Sordoillet, a charming lady from Paris who was working as a governess at the service of a prominent family in Milan, was

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[1] Paul Bernard, *Traité théorique et pratique de l'extradition II* (Librarie nouvelle de Droit et de Jurisprudence, 1883) 615.

expelled from Italy on public order grounds. The public opinion immediately singled out that decision as suspicious. What kind of threat to public order did the young lady present? According to some, the ministerial act of removal was actually 'necessary to restore peace in a respectable family, covered by high protection'.[2] Yet, the connection with the public order clause remained mysterious. Neither did the measure provide any statement of reasons, nor was a judicial remedy available at the time, being the ministerial order qualified as political act.[3]

In today's Europe, a new *affaire Sordoillet* – a clear case of administrative arbitrariness – could hardly occur. On the one hand, the basic due process guarantees are now well established: expulsion orders[4] of settled immigrants are motivated acts, amenable to judicial review. On the other hand, as a French citizen, Mlle Sordoillet would be granted a stronger protection of her right of residence (or right to stay[5]) in Italy: European citizens can still be removed on grounds of public policy, but only provided both that their personal conduct 'represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society',[6] and that the public interest in the removal is balanced against the individual interests in staying.[7]

[2] Pietro Esperson, 'I decreti di espulsione degli stranieri e la Quarta sezione del Consiglio di Stato' (1895) *Archivio giuridico* 595.

[3] By that time, according to Article 24(2) of the Italian royal decree 2 June 1889, no 6166, no judicial scrutiny was admitted on political acts of the government. Similarly in France, in 1836 the Conseil d'Etat held that the ministerial act of expulsion was not subject to judicial review, being it a measure of '*haute police du royame*' (Conseil d'Etat, 2 August 1836, case *Naundorf*, in *Recueil*, 379) or a '*mesure de police et d'ordre public, prise dans la limite des attributions dudit ministre*' (Conseil d'Etat, 8 December 1853, case *Solms*, in *Recueil*, 1037). In 1884, though, with the *arrêt Morphy*, the same French court overturned its own position and allowed itself to review similar acts. See, on this, Stéphane Duroy, 'Le contrôle juridictionnel des mesures de police relative aux étrangers sous la Troisième République' in Marie-Claude Blanc-Chaléard, Caroline Douki, Nicole Dyonet et Vincent Milliot (eds), *Police et migrants. France 1667–1939* (Presses Universitaires de Rennes, 2001) 91–104, and, for a broader overview, Frank Caestecker, 'The Transformation of Nineteenth-Century West European Expulsion Policy, 1880–1914' in Andreas Fahrmeir, Olivier Faron and Patrick Weil (eds), *Migration Control in the North Atlantic World: The Evolution of State practices in Europe and the United States from the French Revolution to the Inter-War Period* (Berghahn, 2003) 124.

[4] In international law, the term 'expulsion' identifies the order of removal from the territory of a State, whereas 'deportation' refers to the execution of the order, that is, to the physical removal of the alien: for this terminology, see International Law Commission, *Expulsion of Aliens: Memorandum by the Secretariat*, UN Doc A/CN.4/565 (10 July 2006) para 91. In the following, I adhere to this distinction. However, in some domestic legal orders, other terms – such as removal (eg US Immigration and Nationality Act (INA) of 1952, §§ 239–241) or return (eg EU Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals) – are also employed to refer both to the order of expulsion and to the actual deportation.

[5] In this article, the expression 'right to stay' is used as equivalent to 'right of residence'. Article 13(1) of the Universal Declaration of Human Rights (1948), recognises this right as an essential component of the freedom of movement: 'Everyone has the right to freedom of movement and residence within the borders of each state'. Just like every individual right, this too may be limited for public purposes, such as public order and security or public safety.

[6] Article 27, para 2, directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[7] Article 28, para 1, directive 2004/38/EC requires that that 'considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social

Two other changes in immigration regimes are relevant to this analysis. The first one concerns the notion of public order, so pervasive in the discipline of aliens' freedoms. This notion has shrunk over time. In the past, individual liberties of anyone could be easily compressed in Continental Europe, due to the persistence of an all-embracing concept of '*ordre public*', inherited from the absolutist experience.[8] In the last decades, though, under the influence of relevant judgments of European and domestic high courts, a stricter and, hence, more liberal notion has emerged. Public order now corresponds to the public interest in crime prevention. Accordingly, expulsion should be ordered on public order grounds only when an alien exhibits a significant (and fact-based) inclination to commit crimes.[9]

Second, in Europe, the right to stay of aliens is increasingly threatened by a different kind of plenary power, not administrative in character (like in the *Sordoillet* case), but legislative.[10] Whereas, in the past, legislators made little effort to regulate the power to expel aliens, allowing a free hand to police authorities, in the last decades, due to their enhanced political salience, immigration regimes have become highly legalized. Administrative discretion is severely limited, not necessarily to the benefit of non-citizens.

The regime of automatic expulsion aptly illustrates this point. When the citizens' right of residence is at stake, no legislative presumption of dangerousness may justify the adoption of general preventive measures – such as the interment in or the removal from a specific area – against individuals, regardless of whether they are convicted: since those measures typically affect the (fundamental) right of residence and circulation of a citizen, a case-by-case assessment based on proportionality is required. Why, then, may legislators

and cultural integration into the host Member State and the extent of his/her links with the country of origin' are taken into account.

[8] On the transition from the absolutist concept of 'police' powers to their liberal understanding, see Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Bd.II. Staatsrechtslehre und Verwaltungswissenschaft 1800–1914* (1992, Italian transl. Giuffrè, 2014) 344–367, Giuliano Amato, *Individuo e autorità nella disciplina della libertà personale* (Giuffré, 1967) 100–105, and Harold J Laski, *The Rise of European Liberalism: An Essay in Interpretation* (George Allen & Unwin, 1936) 52.

[9] For this evolution, in a comparative perspective, see Emmanuelle Neraudau-D'Unienville, *Ordre public et droits des étrangers en Europe* (Bruylant, 2006).

[10] The doctrine of Congress's 'plenary power', which involves the consequent lack of constitutional protection enjoyed by aliens, is a long-standing tenet of immigration law in the United States since the late nineteenth century: the classic reference is *Chae Chan Ping v United States (Chinese Exclusion Case)*, 130 US 581, 609 (1889), holding that sovereign states have unrestricted power to exclude aliens. This doctrine still provides the justification for the distinct treatment of aliens. Nonetheless, the Supreme Court has mitigated its harshest consequences in many ways: see, in particular, Hiroshi Motomura, 'Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation' (1990) 100 *Yale Law Journal* 545. See also Brian G Slocum, 'Canons, the Plenary Power Doctrine, and Immigration Law' (2014) 34 *Florida State University Law Review* 363, discussing recent cases that limit the plenary power doctrine, including *Zadvydas v Davis*, 533 US 678, 695 (2001) and *Nguyen v INS* 533 US 53 (2001), and pointing to the canon of 'constitutional avoidance' as an interpretative device that often leads courts to grant aliens greater rights than the constitutional and legislative design would allow.

establish a 'special' preventive measure, such as the automatic expulsion of aliens, which presumes the dangerousness of convicted alien?[11]

The legitimacy of such legislative presumption crucially depends on the nature ascribed to the right to stay of non-citizens, that is, on whether that right enjoys constitutional protection only insofar as it belongs to citizens or, rather, also as an essential attribute of every human being. In the latter case, the legitimacy question raised above becomes intractable: if every person, regardless of her citizenship, is granted constitutional protection against any arbitrary removal from the place or country of residence, no *ex ante* legislative presumption of dangerousness, and thus no regime of automatic expulsion, would pass the proportionality test that is inherent in the fundamental nature of the affected right.[12]

This question – whether in European legal orders the right to stay is (becoming) a fundamental right of every human being, aliens included – intersects broader issues. How can the security and cohesion of a national community, guarded by the State, be reconciled with the right of the non-citizen to stay, understood as the right not to be arbitrarily removed from a foreign country where she has been admitted?[13] Does this legal position amount to a mere *legislative* right, that domestic majorities (of citizens) may constrain at their will in the name of any State interests? Conversely, is it a *fundamental* right, with the consequence that any restriction must be justified in the name of a predetermined public interest (typically, public order) and be consistent with the principles of proportionality, equal

[11] This question does not neglect the peculiar asymmetry that stems from the commitment of the State not to use its power of expulsion when it infringes upon the right to stay of its citizens. However, this asymmetry does not rule out the possibility to compare the right to stay of citizens and aliens: just like the right to stay of aliens, who can be expelled when they represent a threat to domestic security, similarly the right of residence of citizens may be limited by the use of preventive powers based on public order grounds. What changes is the kind of administrative power employed: whereas expulsion is reserved to dangerous non-citizens, a dangerous citizen can be, for instance, banned from living in a specific place/city where he has established suspect criminal connections. In both the cases, the rationale behind the limitation of the right to stay – respectively, of aliens and citizens – is the same and allows a comparison in terms of reasonableness. See also § I.2.

[12] On proportionality as the leading framework for evaluating the violation of fundamental rights globally, Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72. See also Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 74, claiming that balancing is 'unavoidable, since there is no other rational way in which the reason for the limitation can be put in relation to the constitutional right'; David M Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004) 186, describing proportionality as a 'universal criterion of constitutionality'; Mattias Kumm, 'Constitutional Rights as Principles' (2004) 2 *International Journal of Constitutional Law* 595, considering proportionality as one of 'the most successful legal transplants in the second half of the twentieth century'. For a recent debate on the appropriate use of the proportionality test, see Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468; Madhav Khosla, 'Proportionality: An Assault on Human Rights? A Reply' (2010) 8 *International Journal of Constitutional Law* 298; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla' (2010) 8 *International Journal of Constitutional Law* 307; Matthias Klatt and Moritz Meister, 'Proportionality – a Benefit to Human Rights? Remarks on the I·CON Controversy' (2012) 10 *International Journal of Constitutional Law* 687.

[13] On the possible extension of the Kantian 'right to visit' see Claudio Corradetti, *Introduction*, in this issue.

protection and due process? How does the right to stay relate both to the free development of the human personality, acknowledged as a supreme value by most European legal orders, and to the right to respect for private (and family) life, guaranteed by Article 8 of the European convention on human rights (ECHR)?

By focusing on the controversial regime of automatic expulsion of aliens convicted of a crime, established in some European countries, this article points to the emergence of a clash between two competing approaches.

One is the 'nationalist' approach, which strongly influences domestic majoritarian institutions, especially where populist movements are on the rise. Under this approach, immigration law is understood as a set of rights and guarantees that are granted by a sovereign State to a selected immigrant under the condition that her presence does not affect any fundamental interest of the national community (most prominently, public order and national security). Accordingly, the right to stay rests upon the citizenship status (as many constitutions openly state),[14] and therefore those who are not members may be removed, in principle, at the will of the State.

By contrast, under the 'rights-based' approach that influential courts increasingly promote in Europe, immigration law, just like public law in general, rests on the assumption that the individual enjoys a 'lexical priority' over the State:[15] the liberties of the former can be balanced with – yet, not be dependent on – the pursuit of the public interests promoted by the latter. Accordingly, the right to stay in a given country is understood as a key 'to the free development of [one's] personality', a crucial element of the legal condition of everyone, regardless of his or her nationality: in short, not a *citizenship* right, based on national membership, but rather a *fundamental* right, based on the physical presence in the territory. Territoriality replaces nationality as the main criterion of allocation of protected liberties.

This article contributes to the debate on a relevant aspect of the 'crimmigration' regimes that have spread on both sides of the Atlantic.[16] The

[14] See, for instance, Article 11(1) of the German Basic Law ('All Germans enjoy freedom of movement throughout the Federal territory'), Article 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').

[15] See John Rawls, *A Theory of Justice* (Cambridge, rev edn, 1999) 36 (on lexical priority) and 214 (on the priority of liberty).

[16] The debate on 'crimmigration' flourished in the Unites States in the aftermath of 9/11: see, eg, Miller, 'Citizenship and Severity: Recent Immigration Reforms and the New Penology' (2003) 17 *Georgetown Immigration Law Journal* 611; Daniel Kanstroom, 'Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th Pale of Law' (2004) 29 *NC Journal International Law & Commercial Regulation* 639; Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power' (2006) 56 *American University Law Review*. 367; Stephen H Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64 *Washington and Lee Law Review* 469; Jennifer M Chacón, 'Overcriminalizing Immigration' (2012) 102 *Journal of Criminal Law & Criminology* 613. With specific regard to automatic deportation, Maureen A Sweeney, 'Fact or Fiction: The Legal Construction of Immigration Removal for Crimes' (2010) 27 *Yale Journal on Regulation* 47; Maureen A Sweeney and

argument here developed is divided into two parts. Part I depicts the nationalist paradigm, by illustrating the spreading of automatic expulsion regimes in domestic legal orders (§ I.1), the complex bundle of political and legal issues that are connected to that regime (§ I.2) and an example of judicial deference to the governmental view, drawn from the case-law of the Italian Constitutional Court (§ I.3). Part II highlights the emergence in Europe of the competing rights-based paradigm, which has received a fresh impetus from the 'individualist' turn of Strasbourg's case-law on expulsion and Article 8 (§ II.1), has been followed by influent domestic courts (§ II.2), and marks a convergence with the European Union case-law (§ II.3). I conclude that the observed legal trend represents a major step towards the advancement of a territorial paradigm of constitutional adjudication in immigration law.

Part 1: 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)[17] of foreigners convicted of certain crimes. When a non-citizen is found guilty of certain crimes, statutory provisions impose on administrative authorities the obligation to expel 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 the expulsion for most criminal aliens, with little opportunity 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.[18] To support this

Hillary Scholten, 'Penalty and Proportionality in Deportation for Crimes' (2011) 31 *St Louis University Public Law Review* 11; Maritza I Reyes, 'Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents' (2012) 84 *Temple Law Review* 637; Rebecca A Sharpless, 'Clear and Simple Deportation Rules for Crimes: Why We Need Them and Why It's Hard to Get Them' (2015) 92 *Denver University Law Review* 933. On the European side, *inter alia*, Guild, 'Criminalisation of Migration in Europe: Human Rights Implications', Council of Europe Issues Paper (2010); Joanna Parkin, 'The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research', CEPS Paper in Liberty and Security in Europe No 61 (2013); Valsamis Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Heidelberg, 2015). See also Maria J Guia, Robert Koulish and Valsamis Mitsilegas (eds) *Immigration Detention, Risk and Human Rights: Studies on Immigration and Crime* (Heidelberg, 2016) 637, with contributions on "crimmigration" both in the EU and in the US.

[17] 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.

[18] Aliens in the US are deportable if they are convicted of general crimes involving moral turpitude or aggravated felony, drugs, firearm offences or other miscellaneous crimes (8 USC § 1227(a)(2)). In specific cases – when the conviction concerns 'aggravated felony' – cancellation of removal is not allowed (8 US § 1229b(a)(3)) and, thus, it is 'automatic'. Immigration reforms enacted in 1996 – the Anti-Terrorism and

regime, the US government alleges its duty to protect the public order, that is, to 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'.[19] In the US, as well as in other European systems, this special administrative competence for mandatory removal overlaps with the general rule that entrusts judicial bodies with the power to issue deportation or expulsion orders as *post delictum* measures.[20]

European countries have followed the American path. Take the Italian case. Originally, the 1998 Immigration Act established that a criminal alien could be either expelled by a court, when it holds (with all the guarantees of a criminal procedure) that the convicted is still dangerous, or by the administrative authority, on public order grounds.[21] However, a 2002 reform[22] introduced the automatism: the conviction of an immigrant for a wide variety of crimes (also minor ones)[23] obliges the administrative authority to withdraw the residence permit (or to deny its renewal) and to issue an expulsion order.[24] Only the categories protected by EU law enjoy a special

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, Jennifer M Chacón, 'Managing Migration through Crime' (2009) 109 *Columbia Law Review* 135, 137–139. In *Carachuri-Rosendo v Holder* no 09–60, 560 US (14 June 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 USC §1101(a)(43)(B) and unanimously rejected the government position that any second or subsequent simple possession drug offence can automatically be deemed an aggravated felony involving automatic expulsion of the convicted alien.

[19] Teresa A Miller, 'Blurring the Boundaries between Immigration and Crime Control after September 11th' (2005) 25 *Boston College Third World Law Journal* 81, 119–120. For the view that the automatic deportation of long-term permanent residents nearly amounts to criminal punishment, but lacks the constitutional protections afforded US citizens who are criminally tried and punished, see Daniel Kanstroom, 'Deportation, Social Control and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases (2000) 113 *Harvard Law Review* 1889, 1894. See also Stephen H Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64 *Washington & Lee Law Review* 469 (highlighting the asymmetric incorporation of criminal justice norms into civil removal proceedings) and Won Kidane, 'Procedural Due Process in the Expulsion of Aliens Under International, United States, and European Union Law: A Comparative Analysis' (2013) 27 *Emory International Law Review* 285 (comparing the due process standards that apply to the expulsion of aliens in the United States and European Union).

[20] According to 8 USC § 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 requested by the United States Attorney with the concurrence of the Commissioner and if the court chooses to exercise such jurisdiction'.

[21] Respectively, Article 15 and Article 4(3) (in combination with Article 5(5)) of legislative decree 25 July 1998, no 289 ('Turco-Napolitano' law, hereinafter 'Italian Immigration Act').

[22] Law 30 July 2002, no 189 ('Bossi-Fini' law), amending the 1998 Immigration Act.

[23] 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.

[24] Articles 5(5) and 13(2)(b) Italian Immigration Act.

protection from this kind of expulsion,[25] which otherwise applies, regardless of any divergent opinion of criminal courts: 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.[26] 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.[27] In various instances of less severe criminal sentences or threats to public order, the expulsion order must be issued 'as a rule'.[28] Expulsion is, thus, mandatory unless an atypical case is at hand.[29]

In the United Kingdom, according to the basic rule, expulsion is a discretionary measure: an alien is liable to deportation only if the Secretary of State deems it to be 'conducive to the public good'.[30] However, a direct link between deportation and the commission of a serious crime has been created: 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 deportation. Where such a conviction has been ordered, the Secretary of State 'must make a deportation unless an exception applies'.[31]

[25] 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 Article 20(2) legislative decree 6 July 2007, no 30, Article 5 (5), last sentence, Italian Immigration Act and Article 9 (4) Italian Immigration Act respectively.

[26] Section 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).

[27] 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.

[28] *Ausweisung im Regelfall,* Section 54.

[29] See Jürgen Bast, 'The Legal Position of Migrants – German Report', in Eibe H Riedel and Rudiger Wolfrum (eds), *Recent Trends in German and European Constitutional Law* (Springer, 2006), 63–105, at 102.

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

[31] 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 a 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 each of 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).

The Swiss case is even more interesting. In November 2010, the presumption of dangerousness on which the automatism is based has been added to the Federal Constitution by popular vote. According to Article 121 (3–6, later abolished) of the Swiss Constitution, non-nationals did lose their right of residence and all other legal rights to remain in Switzerland if they were convicted of various crimes.[32] Thereby, the rise of automatic expulsion had reached the constitutional level.

The spreading of automatic expulsion can be seen as a reaction to the shrinking of the 'public order' notion. Once understood in very broad political terms, so as to include a wide range of State and community values that escaped a substantive judicial scrutiny (public order in 'ideal' sense), that notion has gradually shrunk to the meaning of 'crime prevention', reviewable by courts (public order in 'material' sense).[33] This shift not only limited the State political discretion. It also burdened the administrative authorities with the onerous task of proving the risk of future criminal activity by the alien. Here is where automatic expulsion of criminal aliens helps to streamline the process: what makes an expulsion more justified than the solid fact (not a mere suspect), already 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. If they violate those rules, they will be returned to their State of origin, regardless of their conduct after the crime. The message sent to the immigrants is, thus, unequivocal and points to deterrence. If social cohesion has to be preserved, hospitality cannot be divorced from security and the resulting 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.

[32] 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.'

[33] On this development, Mario Savino, *Le libertà degli altri* (Giuffré, 2012) 365–371.

If the removal of a convicted alien were a punitive measure, that is, an additional penalty for the crime committed, intractable constitutional questions would arise: would it be reasonable to subject a national and a non-national, authors of the very same conduct, to different sanctions? 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 offence committed, but rather to the nationality of the offender? Would it be acceptable to entrust to an administrative authority the adoption of a measure connected to a criminal conduct – a competence in principle belonging to (criminal) courts – with the consequence that the more robust criminal due process guarantees do not apply?

As these inconsistencies show, expulsion of convicted aliens does not belong to the realm of criminal sanctions,[34] but rather to the realm of administrative prevention. Like the ordinary expulsion for public order motives, it pursues (not a punitive, but) a preventive purpose: it aims to deter the dangerous alien from reoffend.[35]

Peculiarly, though, the measure of automatic expulsion is not based on a case-by-case assessment of the threat to public order that the alien represents, but on the legislative presumption that the (foreign) person, having been convicted, keeps being socially dangerous.

Governments defend this automatism on two main grounds. First, the alternative to it – ie a case-by-case assessment of the social danger that the non-citizen offender represents – would be, at the same time, 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 (if the deportation depends of a discretionary decision, it loses its effect of deterrence) and inefficient (the result is a delayed process of removal). Second, aliens, just like guests, have a right to stay that is conditional, ie contingent upon observance of the 'rules of the house'. Any serious violation of

[34] 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.

[35] *Üner v Netherlands* (ECHR, 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.

the criminal code determines, on the part of the host State, the cessation of the commitment to hospitality.

However, in a rule of law perspective, this peculiar technique of prevention is problematic in two respects. 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, can a conviction for a *past* conduct 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* presumption of dangerousness be replaced with a case-by-case assessment, as it happens for all the (other) measures of prevention?[36]

Second, the automatism that leads to the removal stands in sharp conflict with two guiding principles of administrative action, namely due process and proportionality. Not only does the legislative presumption postulates what should be, in principle, ascertained case-by-case, namely that the convicted still constitutes a present threat after the conviction, but it posits that the alleged public interest in crime prevention must prevail. The consequence is that the automatism leaves no room for evaluating the impact of the expulsion order on the life of the immigrant: neither due process guarantees, nor a proportional balancing is allowed.

On this issue, international law does not provide clear guidance. Human rights treaties protect two dimensions of the freedom of movement: the right of everyone to leave any country, on the one hand, and the right of nationals to enter or return to their own country,[37] which mirrors the right not to be expelled from one's own country, on the other.[38] 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'.[39] Does the latter provision entail recognition of the right to stay as a human right, that translates – within the legal orders of the signatory states – into a fundamental (or constitutional) right?

[36] For the general framework of administrative prevention, see, on the Italian experience, Guido Corso, *L'ordine pubblico* (Mulino, 1979) 259–362; on the US experience, Alan M Dershowitz, *Pre-emption: A Knife that Cuts Both Ways* (Norton, 2006).

[37] See, eg, Article 12(2) and (4) of the International Covenant on Civil and Political Rights (ICCPR); Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 2(2) of Protocol 4 and Article 3(2)to the European Convention on Human Rights (ECHR). For an updated overview, Richard Perruchoud, 'State Sovereignty and Freedom of Movement', in Brian Opeskin, Richard Perruchoud, Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press, 2012) 126.

[38] Eg: Article 3(1) Protocol 4 ECHR.

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

A related question concerns the role of the courts: how do judges position themselves in this complex debate, where community values and national self-determination seem to be in sharp conflict 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 versus 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.[40]

First, the legal position of aliens in Italy is disciplined 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 State territory.[41] Therefore, in the Italian constitutional system, the right to stay of non-nationals is not protected as such.

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'.[42] Accordingly, the constitutional standard of review is rather lenient, restricted to a scrutiny of 'non-manifest unreasonableness of legislative choices'.[43]

Third, 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,[44] 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.[45] By contrast, the automatism becomes acceptable –

[40] No 148 of 2008 (Italian Constitutional Court).
[41] The wording of Article 16 of the Italian Constitution, as mentioned, makes explicit reference to 'citizens'.
[42] No 148 of 2008 (Italian Constitutional Court) para 3.
[43] *Ibid*.
[44] No 58 of 1995 (Italian Constitutional Court).
[45] This rule is established in general terms in Article 204 of the Italian criminal code.

according to the Italian Constitutional Court – when the very same measure is legally framed as an administrative act: in such case there is no general requirement of case-by-case evaluation of the risk of re-offence.[46] The rationale of this double standard is that legislative presumptions, when applied to the administrative realm, become an acceptable expression of 'the principle of strict legality that . . . constitutes, also for the aliens, an essential protection of their rights, insofar as it prevents possible administrative arbitrary decisions'.[47]

Despite the paradoxical reference to the principle of strict legality as a safeguard for the aliens, the judgment reveals the classic opposition between a rule of law and a rule by law approach. The latter defers to the will of the majority of the insiders (the citizens), which ultimately 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 at the same time.

The underlying assumption is that immigration contributes to exacerbate the 'crime crisis' and that crime prevention is a tough game, in which the rule of law guarantees are a liberal luxury that national States cannot afford: being it a zero-sum-game, some players (the insiders) are free to exert the preventive power both to establish harsh rules and to harshly enforce them; if the other players (the outsiders) are not content, they are also free – not to react, but to leave.

The mentioned constitutional jurisprudence inadvertently buttresses this construct by making two assumptions which still hold firm in the Italian legal order. First, the right to stay of non-citizens is not recognized as a fundamental right and, thus, the State should be allowed 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' approach: aliens as human beings

II.1 Questioning automatic expulsion: the expansive 'individualist' reading of Article 8 ECHR

In a ruling of June 2013, the Italian Constitutional Court held that the right to stay of immigrants receives constitutional protection when the concerned

[46] 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 case-by-case assessment, the need for a removal.

[47] No 148 of 2008 (Italian Constitutional Court) para 5 (emphasis added).

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.[48]

Under this 'familist' reading of Article 8 ECHR, the right to stay is not treated as a fundamental right *per se*, it being 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 remains 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 suggests – 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 a negative conclusion.

To begin with, it should be acknowledged that the Convention neither calls into question the State 'right' to control the entry and the sojourn of aliens in its territory,[49] nor does it aim to create an absolute right not be removed from the host country: this privilege is reserved to nationals.[50] 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 the 'private and family life' of the alien, Article 8 ECHR requires that that measure pursues a legitimate aim (as laid down in paragraph 2) and is proportionate ('necessary in a democratic society').[51] It is against this backdrop that the 'conventionality' of the automatic expulsion of convicted aliens must be assessed.

As for the legitimate aim, the automatic expulsion, being aimed at preventing threats to public order, complies with Article 8. In fact, the ground of 'prevention of disorder or crime' is consistently referred to in Strasbourg's case law on expulsion of convicted aliens.

By contrast, the proportionality requirement is not met. An inflexible instrument, based on an *ex ante* presumption of dangerousness, might well lead State authorities to adopt exclusion measures that are disproportionate.

[48] No 202 of 2013 (Italian Constitutional Court).

[49] As mentioned above, in the Introduction. See also, *Abdulaziz, Cabales and Balkandali v United Kingdom* (ECHR, 28 May 1985) para 67, and *Boujlifa v France*, judgment (ECHR, 21 October 1997) para 42.

[50] As it is clearly stated in *Üner v Netherlands* (ECHR, 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).

[51] See, *Dalia v France* (ECHR, 19 February 1998) para 52, and *Mehemi v France* (ECHR, 26 September 1997) para 34.

Hence, a legitimacy question arises every time an expulsion order interferes with the individual interests protected by Article 8, namely 'private and family life'.

So much granted, the nature of the interests protected under this heading deserves a careful examination. Until a decade ago, the consideration accorded by the Court of Strasbourg to the protection of 'family life' was manifestly predominant, whereas 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'[52] or to the danger represented by the convicted alien.[53] 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'.[54]

However, in the next years, the European Court, having acknowledged its family-oriented reading of Article 8 ECHR as insufficient, has begun to ascribe autonomous relevance to the 'private life' dimension.

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"'. The Court also points out that it had not neglected 'private life': rather, it had '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 integration of the persons concerned'.[55] In the case at hand, the deportation order aimed at the removal of all the family members, and hence it did not involve any breach of family ties. The Court focuses on whether the interference with the applicants' right to respect for their 'private life' and their 'home', autonomously considered, was justified.[56]

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

[52] 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' (*Boultif v Switzerland* (ECHR, 2 August 2001) para 48).

[53] 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' (*Boultif v Switzerland* (ECHR, 2 August 2001) para 48).

[54] *Boultif v Switzerland* (ECHR, 2 August 2001) para 48.

[55] *Slivenko v Latvia* (ECHR, 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.

[56] *Slivenko v Latvia* (ECHR, 9 October 2003) para 98.

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'[57] and – in addition to the *Boultif* test – the 'social ties he established in the host country'.[58]

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'.[59] The principle 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'.[60] The conclusion drawn from it 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';[61] 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'.[62]

The same groundbreaking concept has been reiterated in other cases.[63] In particular, in *Maslov* (2008) – again on the expulsion of a single young adult convicted of a crime – the Court clarified 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 relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests

[57] 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' (*Slivenko v Latvia* (ECHR, 9 October 2003) para 97).

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

[59] *Üner v Netherlands*, para 58.

[60] *Üner v Netherlands*, para 59.

[61] *Ibid*.

[62] *Ibid*.

[63] On this evolution, see Daniel Thym, 'Respect For Private And Family Life Under Article 8 ECHR in Immigration Cases: A Human Right To Regularize Illegal Stay?' (2008) 57 *International & Comparative Law Quarterly* 87.

on the other'.[64] The State's margin of appreciation, in fact, 'goes hand in hand with European supervision, embracing both the legislation and the decisions applying it'.[65] 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 of the stay, according to the logic 'the longer the stay, the stronger the claim'.[66]

Therefore, although Article 8 provides no absolute protection against expulsion, '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'.[67] On the contrary, 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, this might more easily determine a finding of proportionality in favour of the State measure.[68]

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'.[69] In other terms, according to this expansive reading of Article 8 ECHR, the protection of 'private life' – not just of 'family life' – always stands in the way of domestic measures of removal.

This constitutes a crucial achievement for non-nationals, because it implies that convicted aliens facing an expulsion 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'. Since the concept of 'private life' under Article 8 now involves 'the totality of social ties between settled migrants and the community in which they are living',[70] it would be a fallacy both to presume its irrelevance *ex ante* and to deny its existence in concrete terms.[71]

The result is that, in principle, all the addressees of an expulsion order, including those convicted of a crime, are protected by the Convention

[64] *Maslov v Austria* (ECHR, 23 June 2008) para 76.
[65] *Ibid*.
[66] *Ibid*, 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'.
[67] *Ibid*, para 75.
[68] Examples can be found in *Kays v Germany* (ECHR, 28 June 2007); *Miah v United Kingdom* (ECHR, 27 April 2010); *MS v United Kingdom* (ECHR, 12 October 2012); *Balogun v United* (ECHR, 10 April 2012) paras 47–53.
[69] *Samsonnikov v Estonia* (ECHR, 3 July 2012) para 82.
[70] *Üner v Netherlands*, para 59.
[71] The European Court frequently reiterates what has been acknowledged in *Miah v United Kingdom* (ECHR, 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'.

against any arbitrary interference in their right to stay. This right is by no means absolute: the right of abode is still a franchise reserved to nationals. Yet, under Article 8 ECHR, the right to stay is vested with the essential attributes of a fundamental right, insofar as any constraints imposed on it by the State must be based on a general legislative provision, justified by one of the legitimate grounds admitted, and proportional.

II.2 Domestic disciples

A more cautious reading of the Strasbourg's jurisprudence is possible. 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, so far it has limited itself to denounce cases of gross violation of proportionality essentially when they concerned second-generation aliens and 'juvenile delinquency'.

Nonetheless, such cautious reading would risk downplaying both the perspective impact of the mentioned case law and its actual 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 explain why the judges in Strasbourg, rather than declaring an automatic expulsion regime as *per se* in violation of Article 8, limit themselves to ascertaining whether a fair balance and a proportional result have been *de facto* achieved in the case at hand.[72]

This kind of scrutiny, though, may well challenge (albeit indirectly) the legitimacy of the automatic expulsion. The order of expulsion, being adopted without 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 fails to satisfy the *Boultif-Üner* test, thereby infringing the Convention.

Take the British example. As mentioned, the UK Border Act of 2007 introduced an automatism in the expulsion of certain categories of convicted aliens.[73] Yet, the actual administrative praxis is driven by the Immigration Rules established by the Home Office. Those rules do not mention automatic expulsion of convicted aliens. Moreover, they devote an entire heading to

[72] See, among many possible examples, *Kahn v United Kingdom* (ECHR, 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'.

[73] See § I.1.

'Deportation and Article 8',[74] thus re-establishing the basic discretionary rule according to which deportation depends on whether 'the Secretary of State deems the person's deportation to be conducive to the public good'.[75] Compliance with Article 8 is further secured by the provisions explicitly regarding the applications for leave to remain 'on the grounds of private life'.[76]

Therefore, as the British example shows, diligent States take Article 8 (and Article 46) ECHR seriously and, thus, tend to avoid any automatism in their expulsion regime and/or administrative practice.

In addition, in the case of reluctant governments, domestic courts may play a major role in adjusting domestic law to the Strasbourg's case law.

An impressive example of 'reactiveness' to the mentioned individualist turn in Strasbourg is the decision adopted by the German Federal Constitutional Court in April 2007, few months after the *Üner* judgment.[77]

The German case was an exemplary one. The constitutional question concerned the 'mandatory' expulsion of an alien convicted of drug-related crimes.[78] It originated from an act of expulsion that was challenged on the ground that the issuing authority neglected the impact of the deportation on the private life of the alien, a long-term lawful resident.

The Federal Constitutional Court found that regime unconstitutional on the basis of a very consequential reasoning, that is worth retracing: (a) even though the fundamental right to free movement within the territory is restricted to German nationals,[79] the fundamental right to the free development of the personality[80] is granted to every person irrespective of his or her nationality and, thus, applies also to settled migrants in Germany;[81] (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; (c) the principle of proportionality provides the general constitutional model according to which a fundamental right under Article 2 (1) may be limited;[82] (d) both the deportation regime applied until 31 December 2004[83] and the regime in force since then[84] 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

[74] UK Immigration Rules, §§ A362 and 398–400, available at www.ukba.homeoffice.govuk/policyandlaw/immigrationlaw/immigration-rules-part-13-deportation (accessed 30 November 2015).
[75] UK Immigration Rules, Section 363(i).
[76] UK Immigration Rules, §§ 276ADE–276DH.
[77] See § II.1.
[78] 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.
[79] Article 11 of the German Basic Law.
[80] Article 2(1) of the German Basic Law.
[81] 2 BvR 1570/03 (Federal Constitutional Court, 1 March 2004) para 14.
[82] *Ibid*, paras 15 and 17.
[83] §§ 45–48 of the German Aliens Act.
[84] §§ 53 et seq of the German Residence Act.

requirements; [85] (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 a case-by-case evaluation ensures that proportionality is really maintained in relation to the situation of the foreigner in question: this concrete terms assessment should be carried out according to the criteria developed by the Court of Strasbourg in accordance with Article 8 ECHR; [86] (f) an assessment of the single case in the light of those criteria 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).[87]

On this basis, the German Constitutional Court reaches a noteworthy conclusion: 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, but it entails – according to the mentioned *Boultif-Üner* test established in Strasbourg – that due consideration is paid to the impact of deportation on the 'private life' of the alien, even when he or she does not enjoy a 'family' life in the host country. Therefore, 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.[88]

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 introduced in the Swiss Constitution in 2010.[89]

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 socialisation and integration in Switzerland of the alien, that had been living there since the age of 7.[90]

The Federal Supreme Court held that the 2010 constitutional provisions on automatic expulsion[91] are not directly applicable as they are too vague and contradict both superior constitutional principles (in particular, the rule of law)[92] and the proportionality requirements arising from the protection of

[85] 2 BvR 1570/03, para 18.
[86] 2 BvR 1570/03, para 19.
[87] 2 BvR 1570/03, paras 23–24 and 31.
[88] 2 BvR 1570/03, paras 23–24. For details on the ensuing case law, see Jürgen Bast, *Aufenthaltsrecht und Migrationssteuerung* (Mohr Siebeck, 2011) 200–203; and Daniel Thym, *Migrationsverwaltungsrecht* (Mohr Siebeck, 2010) 241–245.
[89] 2C_828/2011 (Swiss Federal Supreme Court, 12 October 2012).
[90] *Ibid*, para 3.
[91] Article 121(3–6, now abolished) of the Swiss Federal Constitution.

private and family life, as provided by Article 8 ECHR and other international law instruments.[93]

As these domestic judicial echoes to the recent Strasbourg's case-law on expulsion and Article 8 show, the resistance of the Italian Constitutional Court, organized along a 'familist' line of defence, is by no means the rule in Europe. On the contrary, other influent courts grant the right to stay of settled aliens a protection that follows the constitutional model of fundamental rights.

II.3 The convergence with the EU case 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.[94] The European Court of Justice (ECJ) has always applied this precept in an exacting way, banning any sort of automatic expulsion regime from the internal circulation.

[92] 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.

[93] 2C_828/2011 (Swiss Federal Supreme Court, 12 October 2012), para 4.3 (especially 4.3.3). Despite this ruling, the populist People's Party insisted that the expulsion initiative must be strictly applied to respect voters' intentions and launched a second initiative which sought automatic expulsion of foreigners convicted of serious (but also minor) crimes, regardless of whether they are repeat offenders. Significantly, the text of proposed initiative specifies that the Swiss law would have primacy over international law. In March 2015, the Parliament reached a compromise between the wording of the expulsion initiative and international law: foreigners guilty of very serious crime would be deported, but there would be an option not to deport in hardship cases. The hardship clause prevents the automatic expulsion, even though it encapsulates the principle of proportionality defined in Article 5 of the Swiss Federal Constitution only to a minimum extent. See Armando Mombelli, 'Squaring the Rule of Law with the People's Will', in *Swissinfo.ch*, 24 March 2015, at www.swissinfo.ch/eng/deporting-undesirables_squaring-the-rule-of-law-with-the-people-s-will/41341930 (accessed 30 November 2015), as well as the commentary by Humanrights.ch, *Implementation of the Expulsion Initiative Includes Hardship Clause*, 18 March 2015, at www.humanrights.ch/en/switzerland/internal-affairs/foreigners/general/implementation-expulsion-initiative-includes-hardship-clause (accessed 30 November 2015).

[94] Article 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' (para 1) and that 'Previous criminal convictions shall not in themselves constitute grounds for the taking of such measures' (para 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).

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 circumstances which gave rise to that conviction are evidence of personal conduct constituting a *present threat* to the requirements of public policy'.[95] The reference to the 'actuality' of the danger rules out, by definition, the possibility to justify the expulsion of a convicted alien on grounds of deterrence (or general prevention).[96]

Later on, 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. This is 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'.[97]

Moreover, in 2007, the Court of Justice denounced as radically incompatible with EU law a 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'.[98]

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 the order on the ground of a legitimate public aim, due process: these requirements are all common features. Despite the very different starting points, the convergence between the two European courts (and regimes) is evident. An important confirmation has been recently offered by the *Zh. and O.* case (2015), in which the Court of Justice applied the mentioned principles of proportionality and case-by-case assessment to third-country nationals who are subject to a return procedure.[99]

[95] Case 30-77 *Régina v Pierre Bouchereau* (ECJ, 27 October 1977) para 28.

[96] The dissociation between the notion of public order (strictly understood as *special* prevention) and *general* preventive aims dates back to Case 67/74 *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln* (ECJ, 26 February 1975) para 7. See also, more recently, Case C-441/02 *Commission v Germany* (ECJ, 27 April 2003) 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'.

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

[98] Case C-50/06, *Commission v Netherlands* (ECJ, 7 July 2007) para 46.

[99] Accordingly, Article 7(4) of Directive 2008/115/EC must be interpreted as precluding Member States from considering that an irregular migrant poses a risk to public policy or public order 'on the sole

Conclusion: towards a 'territorial' paradigm of constitutional adjudication

The main aim of this paper is to highlight an important emerging legal reality: the right to stay in the place or country where a person has settled, alone or with her family, is increasingly perceived, in the European legal culture promoted by the dialogue between supranational and domestic courts, as an essential component of the free development of human personality. That right deserves to be protected as such – regardless of the nationality of the person concerned – from any arbitrary or disproportionate interference, even when that interference affects aliens and is justified in the name of the Nation.

The fact that the protection of the right to stay of aliens is granted *indirectly* – that is, 'under the shadow' of either the right to respect of private and family life (Article 8 ECHR) or the right to the free development of the personality (recognized by most, if not all, the domestic constitutions in Europe) or even both – makes this achievement less evident, but no less substantial. Under the emerging rule of law paradigm, by definition universal, aliens are not just guests. They are, first and foremost, human beings. Hence, their fundamental rights do not (and cannot) depend on whatever community interest is emphasized by the government of the day, for the simple fact that in healthy liberal democracies the will of the majority cannot obliterate the essential guarantees that the protection of a fundamental right requires.

As a result, nationality is becoming less relevant also with regard to the right to stay or sojourn. Despite the existence of State borders, the recognition of that right as a fundamental projection of the human personhood makes the absolute right of abode, still reserved to nationals, less 'special': the freedom of nationals to circulate and reside in (a given place of) their country can be subjected to restrictions. And, those restrictions must be consistent with the very same corollaries of the rule of law – proportionality, equal protection, due process – that shield non-citizens from the interference of public authorities in their right to stay. The trajectory of the automatic expulsion, now declining, reflects the demise of citizenship as paramount legal status.[100]

The shift from the 'nationalist' paradigm to the 'rights-based' one in immigration law triggers a parallel shift from nationality to territoriality as the basic criterion for the enjoyment of individual liberties. According to a long-

ground that that national is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law': Case C-554/13, *Zh and O* (ECJ, 11 June 2015) para 54.

[100] 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, Yasemin N Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago University Press, 1994) 129; David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (Johns Hopkins University Press, 1997) 73; Linda Bosniak, 'Citizenship Denationalized' (2000) 7 *Indiana Journal of Global Law Studies* 447; Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press, 2004).

standing public law tradition – dating back to Georg Jellinek's theory of 'public subjective rights', still influent in continental Europe – it is the State that enables the individual to ask for the protection of her freedoms, with the consequence that the legal personhood of the individual would depend on the relation with the State, on the membership. This 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 depends more on the presence of a person in the territory of that State than on the bond of nationality. Also in Continental Europe, territoriality – rather citizenship – is the main source of mutual obligation between the State and the individual.[101]

Inevitably, though the emergence of such 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).[102] Yet, it makes the legal distinction between nationals and non-nationals, as well as between authorized and unauthorized migrants less relevant.[103] As a result, the capacity of the State to nurture the idea of a national community based on shared values, cohesion and solidarity – ie to project on its population the image 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.[104] In Europe, States are increasingly trapped 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.[105] 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.

[101] Savino, n 33, at 1–42.

[102] Linda Bosniak, *The Citizens and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006). See, also, on 'ethical territoriality', Linda Bosniak, 'Being Here: Ethical Territoriality and the Rights of Immigrants' (2007) 8 *Theoretical Inquiries in Law* 389.

[103] For a bold perspective, Joseph Carens, *Immigrants and the right to stay* (MIT Press, 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' (12), and that they 'should acquire a legal right of permanent residence and all the rights that go with that' (18). More cautious alternatives are, of course, possible and perhaps even more consistent with the rights-based paradigm outlined above.

[104] The 'liberal paradox' is articulated in James H Hollifield, 'The Emerging Migration State' (2004) 38 *International Migration Review* 885.

[105] For an alternative path to self-determination, which postulates the separation between the Nation and the State, Urlich Beck, *The Cosmopolitan Vision* (Polity Press, 2006). Other scholars highlight the coexistence of pressures to 'de-nationalization' and 're-nationalization' within domestic legal orders: see, eg, Christian Joppke, *Citizenship and Immigration* (Polity Press, 2010).

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