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**ACCESS TO JUSTICE FOR IRREGULAR MIGRANTS:
ITALY AND SPAIN IN COMPARATIVE
PERSPECTIVE WITHIN THE EUROPEAN LEGAL
FRAMEWORK**

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Introduction

This work aims to deepen the ‘controversial’ issue of access to justice for irregular migrants. The term ‘controversial’ derives from the fact that, although access to justice may appear at first sight as a purely legal issue, in reality, its effective application is strongly linked to the political and geopolitical dynamics of the States that are facing the migration phenomenon. Since this is a comparative research, Italy and Spain are the two countries selected for this purpose partly because of their geographical position, as they face the Mediterranean Sea and for the migratory history they have experienced. More specifically, the irregular migration phenomenon on the island of Lampedusa and in the Spanish Enclave of Melilla in Morocco after the outbreak of the Arab Spring in 2011 will be analyzed in detail. The latter have exponentially increased arrivals 'challenging', in a sense, the system of reception until now in force in both circumstances examined. In order to concretely highlight this, two cases decided by the European Court of Human Rights will form the object of an in-depth analysis, which have seen the condemnation of both Italy and Spain, *Khlaifia and others against Italy* and *N.D. and N.T. against Spain*. In particular, the violation by both states of Article 13, the right to an effective remedy, will be specifically investigated.

The complexity of the study lies in the particular legal position of irregular migrants in the two countries. In order to gain a better overview of the issue, it is essential to start by exploring the existing legal framework in terms of guaranteed access to justice for individuals, regardless of their status as migrants, taking into account international and European law, both of the European Union and the European Court of Human Rights, as well as national law. After that, the same structured analysis will be carried out again on several levels but centered on the particular category of irregular migrants. Subsequently, an attempt will be made to link the problem of detention and expulsion in the case of irregular migration with the potential access to justice offered.

As regards individual appeals, in the Italian case, there is a great debate about the lack of a direct complaint to the Constitutional Court, which will be compared with the institution of the ‘Recurso de Amparo’ present, instead, under the Spanish Constitution. An effort will be made to investigate the possible consequences of establishing such a mechanism in Italy and whether this could have an effect on individual applications to the European Court of Human Rights. Probably the lack of such a remedy in Italy constitutes a critical point with respect to the protection of fundamental rights, with particular reference to vulnerable groups such as irregular migrants.

In the specific case of *Khlaifia and others against Italy*, another point that emerged in addition to the lack of a system of direct complaint, was the lack of suspensive effect of the appeal against a conviction of expulsion. Moreover, there was a lack of examination of the individual situations of the applicants and therefore an underestimation of the possible consequences of a return. On the other hand, as regards Spain, which instead has a constitutional remedy of this kind, it is possible to perceive how geopolitical dynamics and political choices regarding irregular migration have had an impact on the effective access to justice of this category. Melilla, a Spanish enclave, is located on the Moroccan coast and enjoys, together with Ceuta, another Spanish city in Morocco, a special autonomy due to its particular geographical and political position. In this circumstance, ‘exceptional’ measures have been adopted to support the flow from the entire African continent, the so-called ‘Devoluciones en caliente’. ‘Devoluciones en caliente’ or ‘Hot rejections’ means the rejection at the border by Moroccan and Spanish civil guards, a practice established in 2015 with the new Ley de Seguridad Ciudadana¹. This special measure applies both to arrivals by sea and to the irregular crossing of the border through the fence that borders Morocco from Melilla. Although there is Recurso de Amparo in Spain and the possibility of benefiting from it, the problem lies in the way in which the returns occur. Migrants are rejected to the country of departure without a prior administrative or legal act that allows them to appeal the decision. In the case, *N.D. and N.T. against Spain* as well as *Khlaifia and*

¹ Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana

others against Italy, the situations of the individual claimants were not taken into consideration and they did not have the opportunity to clarify their position, which inevitably led to a lack of legal assistance. The analysis of concrete cases will help to highlight the differences between theory and practice in the protection of rights related to justice. In addition, possible improvements may emerge by the comparison of Italian and Spanish Constitutional systems with regard to irregular migration management.

The argument chosen stems from the need to investigate what appear to be legal gaps on the part of two established democratic European constitutional systems. The condemnations of the European Court of Human Rights addressed to Italy and Spain have revealed significant breaches in terms of fundamental right protection and several negligences in the management of the phenomenon of irregular migration from the point of view of access to justice. The proposed analysis seeks to investigate, from a multilevel perspective, the rights that irregular migrants can enjoy in the abstract and in practice, and the possibility for them to be legally protected.

Chapter I - Access to justice for individuals

1.1 Access to justice and its evolution in the international and European framework

Access to justice refers to the possibility for an individual to submit a claim to the court and to have her or his case solved, if a violation of a right is perceived. It is considered to be a judicial protection available to every human being, with particular attention to legal assistance to persons without financial resources. Thanks to the development of international law, it has been possible to provide every human being with the abstract capacity to invoke international law, customary law and the law of treaties even against the national state. The latter clearly has a margin of freedom and discretion in the creation of a system of legal means and remedies. The fundamental condition is to provide a protection that is independent, impartial and fair in order to be judged and heard². The concept of access to justice, although appears to be rather consolidated, as a fundamental Rule of Law principle³, is very recent and its assimilation is still in full development and evolution. One of the first ways of appealing, even if only to a limited extent, was traceable to the period immediately following the First World War through Article 5 of the Convention between Germany and Poland on Upper Silesia⁴. According to this Article, a citizen, without discrimination on the basis of nationality, could refer the case to an *ad hoc* Joint Committee. Another example is provided by the League of Nations, which guaranteed a system of protection of minorities through the use of individual petitions before the Council of the League of Nations⁵. In the past, access to justice at international level has historically been conceived as a right of access to justice for foreigners, that is, for those who, not being in their country of origin, suffered a violation of their rights. If

² Francioni F., *Access to justice as a Human Right*, Oxford, 2007, pp. 64 - 138

³ Bingham T., *The Rule of Law*, London, 2011, pp. 68-88

⁴ Convention on Upper Silesia (Germany-Poland, 1922)

⁵ Francioni F. – Gestri M. – Ronzitti N.- Scovazzi T., *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione Europea*, Milano, 2008

local remedies were not sufficient or even absent, the plaintiff did not have many possibilities. In principle, in such cases diplomatic protection was invoked with the consequence that the violation of the right itself was “depersonalized”⁶ and the issue reduced to a dispute between states. This procedure was based on the assumption that there had been a denial of justice and the responsibility of the state came into play. It can therefore be established that the foreigner’s access to justice is limited and conditional only in the state in which his rights have been violated. This framework makes a legal situation like this very unsatisfactory for it was necessary to wait a few more decades for the development of the possibility of access to justice as a subjective right for individuals⁷.

In the aftermath of the Second World War, there was a need to create the most favorable conditions to guarantee the right of access to justice following the gross violations of human rights occurred. The basic documents of the post-World War II period were the Magna Charta⁸, the Declaration of the Rights of Man and of the Citizen⁹ and the United States’ Bill of Rights¹⁰. For example, Article 14 of the Bill of Rights states that: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

⁶ Francioni F. – Gestri M. – Ronzitti N.- Scovazzi T., *Accesso alla giustizia dell’individuo nel diritto internazionale e dell’Unione Europea*, Milano, 2008

⁷ Francioni F., *Access to justice as a Human Right*, Oxford, 2007, pp. 64 - 138

⁸ The Magna Carta was drawn up on 15 June 1215 and with some modifications it was again granted in 1225 by Henry III and confirmed in 1297 by Edward I.

⁹ Bill of Rights of the United States of America (1791)

¹⁰ It was signed on 26 August 1789 by the French National Assembly.

jurisdiction the equal protection of the laws”¹¹. Article 101, paragraph 1, can be cited as follows: "Extraordinary judicial bodies are not admissible. No one can be removed from his natural judge" in the German Basic Law of 1949 and Article 24 of the Italian Constitution of 1948 are amongst the first examples of codification of the right at constitutional level, which reads: "Everyone can act in court for the protection of his or her legitimate rights and interests. Defense is an inviolable right in every state and level of proceedings. The means to act and defend oneself in front of every jurisdiction are assured to the poor, with appropriate institutions. The law determines the conditions and methods for the reparation of judicial errors". For the administration of justice to be fair, it is necessary that the two opposing parties (prosecution and defense) can act on an equal footing, without one of them having a particular advantage over the other. In the same way, it is useful to underline Article 24 of the Spanish Constitution of 1978, which is also interesting because it is the result of the end of the Franchist regime and the beginning of a parliamentary monarchy. The article states that: "All persons have the right to obtain effective protection from judges and courts in the exercise of their legitimate rights and interests without, under any circumstances, a lack of defense”¹². Likewise, everyone has the right to a natural judge predetermined by law, to legal aid, to be informed of the accusation made against them, to a public trial without undue delay and with all guarantees, to use the means of evidence relevant to their defense, not to make admissions against themselves, not to confess guilt and the presumption of innocence¹³.

The new spirit of the post-World War II and post-authoritarian regimes’ constitutions, such as the Spanish one, also affected the supranational bodies created in the mid-twentieth century. The prerogative at the international level was to drastically reduce disputes between states and there is a greater focus on the protection of the individual. Some examples were the World Bank, which

¹¹ The Constitution of the United States, The Bill of Rights and All Amendments, Article XIV, Amendment 14 - Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

¹² Artículo 24 de la Constitución Española, 1978

¹³ Storskrubb E. – Ziller J., Access to Justice in European Comparative Law, in Access to justice as a Human Right, 2007, p. 311

had a focus on the economic rights of the individual, the International Arbitration Court in The Hague and the International Chamber of Commerce in Paris, were the first to deal with these cases. The World Bank, for example, offers natural and legal persons direct access to international dispute resolution mechanisms. The Hague Court and the Paris Chamber gave two important added values: one is certainly the possibility of institutional control based on uniform standards of arbitration and the second is linked to the possibility that judgments can be enforced by a large number of states.¹⁴ The evolution of the right of access to justice as a human right has gone hand in hand with the international recognition of those rights defined as fundamental. In the European context there are two guaranteed levels of protection in addition to national Constitutions. One is the Convention for the Protection of Human Rights and Fundamental Freedoms and the second is the Charter of Fundamental Rights of the European Union of 2009. The Convention was signed in Rome in 1950, and entered into force the 3rd September. In the preamble, reference is made to the concepts of peace and democracy linked to the protection of human rights, which is perfectly in line with the essence of the Charter of United Nation of 1945 and the needs of the post-war period. The aim was to create a ‘Super Partes’ system that could subsequently be adapted, with wide margins of discretion, within the member states¹⁵. In this sense, an independent court was created to ascertain violations by states and impose reparations in 1959 called the European Court of Human rights. Back then individuals could not access directly to the Court and the European Commission of Human Rights was constituted with a role of mediation. The Commission was established in 1954 and was composed of as many commissioners as there were contracting states. It was open to citizens of the members of the Council of Europe and to individuals to whom the Commission had accepted individual recourse. With the entry into force of Protocol 11 in 1998, each state party to the Convention accepted the jurisdiction of the

¹⁴ Francioni F., *Access to justice as a Human Right*, Oxford, 2007, pp. 64 - 138

¹⁵ Zagrebelsky V.- Chenal R., *Manuale dei diritti fondamentali in Europa*, Bologna, 2016, Parte II – La protezione dei diritti umani in Europa. Il sistema del Consiglio d’Europa e l’ordinamento italiano

European Court and the possibility for any person, natural or legal, to lodge an appeal with the Court directly and without filters subject to the principle of subsidiarity and to time limits. Individual redress, in this sense, appears to be the pillar of the Convention and with this protocol the role of the Commission was abolished and that of the European Court of Human Rights is expanded. Individuals could automatically turn to the European Court of Human Rights, guaranteeing each individual the possibility of a judge, of being heard before a court and of having the appropriate legal means at their disposal. In this sense, the issue of the individual person who becomes a subject of international or supranational law returns. The aim is to protect the fundamental rights of individuals against interference by contracting states¹⁶. The main peculiarity of the European Court of Human Rights in comparison with the European Commission of Human Rights was that it acted as a real judicial body responsible for providing legal redress and establish compensation. It can issue legally binding decisions and can establish the reward through the criterion of 'just satisfaction' for the claimants. The large number of appeals brought before the Court led to numerous delays in the examination of the latter and to an overload of work. This brought about the need to redefine the criteria for admissibility of cases and to extend the Court's discretionary powers by avoiding cases that were not of wide relevance. According to Article 34¹⁷ of the ECHR, different types of legal 'groups' can arise through a joint complaint, non-governmental organizations (such as trade unions, political parties, societies, religious organizations), representatives of populations, representatives of certain vulnerable groups. It is necessary that each member of the group has appropriately authorized a lawyer or a legal representative.

The system of protection of fundamental rights within the framework of the European Union is the result of continuous interactions between the different

¹⁶ Zagrebelsky V.- Chenal R., *Manuale dei diritti fondamentali in Europa*, Bologna, 2016, pp. 41-116

¹⁷ Article 34 – Individual applications , The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

levels of international law, national constitutional law and EU primary law. In the mid-1950s, the idea of protecting fundamental rights within the framework of European law and the primary law of the European Union began to develop in the European constitutional debate. This was initially considered but never materialized by both the European Defence Community and the European Political Community. In this sense, the motivation behind the silence on human rights on the part of the nascent European community lies in the fact that, first and foremost, political integration has been preceded by economic integration. This should have allowed a devolution of sovereignty by the member states for a more functional than political reason. The approach to the constitution of an original and atypical body such as the European Union was not federal despite the strong constitutionalist impulses. Thus, the European Economic Community basically delegated human rights issues to the Council of Europe until the Lisbon Treaty¹⁸. However, the *Internationale Handelsgesellschaft* case of December 17, 1970, appears to be one of the most famous cases with respect to this issue at Community level¹⁹. First of all, as already mentioned, the matter of fundamental rights was the responsibility of the nation states, however, this case revealed a gap that had to be filled. In short, the question concerned a German import and export company (*Internationale Handelsgesellschaft*) and the Office for Import and Storage of Cereals and Forage in Frankfurt with regard to economic freedom. The German company had an import license for semolina corresponding to a certain quantity and within a certain period of time, in order to obtain the permission it was bound by the payment of a security and there had to be a corresponding quantity exported²⁰. The Office for Import and Storage of Cereals and Forage found that the export was only partial and decided to keep the caution²¹. This created a case which was first brought before the Administrative Court in Frankfurt and then before the Court of Justice of the European Union, as provided for in

¹⁸ De Burca, *The Road Not Taken: The EU as a Global Human Rights Actor*, *American Journal of International Law*, Vol 105, 2011

¹⁹ Grimaldi L., *La tutela dei diritti fondamentali in Europa: il caso Internationale Handelsgesellschaft*, *Ius in Itinere*, 2018

²⁰ JUDGMENT OF 17. 12. 1970 — CASE 11/70

²¹ Commission Regulation (EEC) No 473/2007 of 21 August 1967

Article 177 of the EC Treaty²². Given that the rules on imports and exports are Community rules, they must respect fundamental rights and freedoms to an equal or greater extent than they are guaranteed by national law. Therefore, the rights of economic freedom and proportionality guaranteed at both Community and national level had been infringed²³. The importance of this judgment in the proposed analysis lies in the fact that it was one of the first cases to shed light on the obscured and neglected aspect of human rights and the first circumstance in which the Court of Justice refers to the constitutional traditions guaranteed by the Member States²⁴. In 1977, the Joint Declaration by European Parliament²⁵, the Council and the Commission was ratified and proved to be a milestone in the Community framework for the protection of the fundamental rights. At the end of the 1990s, the need arose to draw up a charter establishing the rights and freedoms protected by the European Union within the reach of citizens. This was to be drawn up by a body composed of delegates of heads of state and government, the president of the European Commission, members of the European Parliament and national parliaments with the help of representatives of the Court of Justice, the Economic and Social Committee and the Committee of the Regions and social groups and experts. The charter was designed to support the spirit of the member states and their constitutional traditions with a view to contributing to the preservation and development of common values in the field of fundamental rights. The individual is at the heart of the Charter's action and the rights of individuals towards the EU and within

²² Article 177 The Court of Justice shall be competent to make a preliminary decision concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community; and (c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide. Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice.

²³ Grimaldi L., La tutela dei diritti fondamentali in Europa: il caso Internationale Handelsgesellschaft, lus in Itinere, 2018

²⁴ Grimaldi L., La tutela dei diritti fondamentali in Europa: il caso Internationale Handelsgesellschaft, lus in Itinere, 2018

²⁵ European Parliament –Council - Commission, Joint Declaration by the European Parliament, the Council and the Commission, 1977, available in <https://publications.europa.eu/en/publication-detail/-/publication/82268663-99a1-467e-bb1f-8d09f2a9599a>

the EU are thus reaffirmed. In 1999, after the Cologne European Council, the member states decided to draw up a Charter of Fundamental Rights of the European Union containing a comprehensive catalogue of rights divided into six themes: dignity, freedom, equality, solidarity, citizenship and justice. At the beginning, the Charter was not binding on the member states, but entered into force with the Lisbon Treaty, in 2009, in which it was treated as EU primary law²⁶.

The analysis of the emerging Community framework on individual access to justice is complex, important but also very problematic. According to the European Court of Justice, "The Community is a new kind of legal system in the field of international law, in favor of which the states have renounced, albeit in limited areas, their sovereign powers, a system which recognizes not only the member states but also their citizens as subjects"²⁷. The European Community took the form of a true community of law towards the end of the 1980s when the Court of Justice of the European Union reconstructed in more general terms the right to a judicial remedy. There are two possible means of redress for natural and legal persons, Actions for annulment (Art. 263 TFEU²⁸) and Actions for failure to act (Art. 265 TFEU²⁹). In addition, there are other actions which make it possible for the European institutions to be opposed: the exception of invalidity (Art. 267 TFEU³⁰), the reference for a preliminary ruling on validity and the action for non-contractual liability (Art. 268 and 340 TFEU³¹). Article 263 allows recourse only to natural and legal persons whose rights have been infringed by individual decisions directly affecting them. More specifically, it refers to all those measures which have an effect on the legal situation of the individual and which, at the same time, contain specific features in terms of addressees with whom the claimant can identify himself. This is limiting for all those acts instead of general scope, regulations, which

²⁶ Mastroianni R. - Pollicino O. – Allegrezza S. - Pappalardo F. - Razzolini O., *Carta dei Diritti Fondamentali dell'Unione Europea*, Bologna, 2017

²⁷ Van Gend en Loos, 5 February 1963 Case 62/26

²⁸ Ex Art. 230 TEC

²⁹ Ex Art. 232 TEC

³⁰ Ex Art. 234 TEC

³¹ Ex Artt. 235 – 288

indirectly affect individuals. This clearly leads to a restriction of the individual's action which is defined as a 'non-privileged plaintiff'. The restrictive nature of the remedies granted to individuals has raised numerous criticisms of the role of guarantor of effective judicial protection. According to Article 265, which concerns actions for failure to act, private persons may bring actions before the court only if they are the direct addressees of an act which the institution has failed to issue. Again, it is possible to highlight the limiting and circumscribed nature of the possibilities of individuals. Before of the drafting of the Lisbon Treaty, a working group was set up to work on individual complaints and different currents of thought were created³². On the one hand, it was intended to introduce into the Constitutional Treaty a direct appeal to the Court by individuals for all Community acts, including those of general scope, taking inspiration from the German model of the *Verfassungsbeschwerde* and the Spanish *Recurso de Amparo*³³. Others, on the other hand, pushed to change the conditions of accessibility to the appeal and others to strengthen protection at national level. The latter was used as a final proposal, which was ratified in the Treaty of Lisbon³⁴.

The Court of Justice, in these terms, aims to ensure respect for the law in the interpretation and application of EU treaties and the protection of fundamental rights is an indirect effect of the work of the Court. The European Commission or the Member States may bring an action for infringement before the Court to establish that they have failed to fulfil their State obligations under the Treaties. At the same time, the Court may be seized by the institutions of the Union or by the Member States of an action for annulment in order to initiate a review of legality. Such an action is normally brought by European States and institutions as privileged applicants rather than by natural or legal persons given the strict admissibility requirements. Under the Charter (Art. 263 TFEU), the latter categories may appeal, basically against decisions, regulations and

³² Il Gruppo CONV 72/02, Bruxelles, 31 maggio 2002 (03.06)

³³ Pocar F., Dignità – Giustizia, in Carta dei diritti fondamentali e costituzione dell'Unione Europea, Milano, 2002, in Carta dei diritti fondamentali e costituzione dell'Unione Europea

³⁴ Gestri M., Portata e limiti del diritto individuale di accesso alla giustizia nell'ordinamento dell'Unione Europea, in Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione Europea, Milano, 2008

regulatory acts which do not involve any implementing measures. In addition, individuals can bring an action for failure to act, even if they only have the Locus Standi, a legal instrument that allows them to lodge complaints about omissions against them. The most interesting type of appeal for the individual is the *preliminary interpretation*³⁵. In this case, the national judge becomes a "common judge" of the EU law (Direct Effect Principle) and can immediately protect the right of individuals³⁶.

Access to justice has been further developed in connection with national law. It is essential that this rights is highly guaranteed primarily in the domestic system. There are numerous articles referring to this concept. First, Article 2 of the International Covenant on Civil and Political Rights, which stresses the role of judicial, administrative and legislative authorities. Secondo, Article 13 of the European Convention on Human Rights, which requires an effective remedy before a national authority, and finally Article 47 of the Charter of Fundamental Rights of the European Union. The latter states that "Everyone has the right to have his case examined fairly, publicly and within a reasonable time by an independent and impartial tribunal established by law. Everyone has the right to be advised, defended and represented"³⁷. The rights mentioned above are the result of a long process of legal customization, in which the individual goes from being a mere object of the law to an emancipated legal entity. Past attempts to deny individuals the status of subjects of international law because of their lack of certain state capabilities (such as, for example, making treaties), are definitely meaningless³⁸. The denial of justice was, in fact, a practice widely used by customary law in the treatment of foreigners. Likewise, at the level of domestic law, not all individuals participate, directly or indirectly, in the legislative process, yet they continue to be subject to the law³⁹. Access to justice is therefore a genuine human right, despite the fact that it is referred to as a mere procedural guarantee both in the European

³⁵ Art. 267 TFUE, (ex articolo 234 del TCE)

³⁶ Zagrebelsky V.- Chenal R., *Manuale dei diritti fondamentali in Europa*, Bologna, 2016

³⁷ Article 47 - Right to an effective remedy and to a fair trial

³⁸ Francioni F., *Access to justice as a Human Right*, Oxford, 2007

³⁹ *ibidem*

Convention on Human Rights and in the Charter of Fundamental Rights. Access to justice only seems to be meaningful if it relates to the enforcement of another substantive law. In the 1950 text of the ECHR, Article 13 was always associated with certain categories of rights which were subsequently extended by the addition of protocols.⁴⁰

However, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union arise in very different political historical periods. Despite this, the European Court of Human Rights and the European Court of Justice do not communicate and have different procedural areas. The radical passage that has progressively transformed the purely economic European Union into a political and rights Union has brought together with overlaps and conflicts, the two genetically different charters and, above all, the respective courts, which are competent to guarantee their application. Originally, therefore, the 'formal identity' of the benchmark corresponded to 'only partial convergence between the two Courts', given the interpretative autonomy claimed by the Court of Luxembourg in using the ECHR in a way that was functional to the protection of Community objectives⁴¹. The relationship between the European Convention and EU law is still vitiated by the fact that the EU has not yet acceded to the Convention. Article 6 of the Treaty on European Union imposed an obligation to accede by virtue of Additional Protocol 14, Article 59, which states that: "The European Union may accede to the Convention", while before this addition accession was reserved for states only. Nevertheless, Article 6 of the TEU also states that the ECHR belongs to the so-called category of general principles which are therefore common to all member states and which must be pursued. However, the lack of coordination has created some negative implication as the ECHR is not a legal act formally integrated into the legal order. Clearly, the drafting of the Charter has been strongly influenced by the Convention and the general

⁴⁰ Francioni F. – Gestri M. – Ronzitti N.- Scovazzi T., *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione Europea*, Milano, 2008

⁴¹ Celotto A., *Convenzione europea dei diritti dell'uomo e/o Carta dei diritti fondamentali*, Roma tre- press, 2014

principles of the Union. What differs and should be highlighted is the scope of application of the two documents, as this could create problems of overlap. The starting point for this analysis is the Lisbon Treaty and its consequences in the area of fundamental rights, in fact in the Charter Article 52(3) states that: “ In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”. The ECHR is therefore used as an interpretative parameter guaranteeing minimum standards of protection. This does not in any way mean that the Charter is inferior to or subordinate to the Convention; on the contrary, there must be a relationship of coherence and complementarity. The most problematic issues are linked to two areas in particular: ownership and invocation. It is not guaranteed that the mere fact of owning a right entails its invocation, since this depends on other exogenous factors such as the availability of effective means and the fulfilment of certain requirements. Basically, there is a great deal of limitation with regard to the access of the individual to justice in these terms, in fact, only acts that do not provide for implementing measures can be challenged by the individual in the EU context.

1.2 Definition, scope and application of the article 13

Right to an effective remedy - Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 13, or Right to an effective remedy, was drafted with the aim of increasing the legal protection of individuals who perceive their human rights as violated in their national framework⁴². Article 13 is considered to be one of the most complex and problematic articles of the European Convention on Human Rights from an interpretative point of view. In essence, the article

⁴² Kuijjer M., *Effective remedy as a fundamental right*, Barcelona, 2014

requires States Parties to the Convention to provide effective remedies in the case of violation of any of the rights enshrined. However, the ECHR does not belong to all the national law of the signatories and this could create some problematic issues. Nevertheless, according to the ECtHR, it is sufficient for states to ensure proper implementation without harmonizing the ECHR internally⁴³. The peculiarity of Article 13 lies in the notion that it is addressed directly to the states in pursuing its objective. National authorities, in this sense, must ensure that there is the possibility of initiating a domestic redress process with a compensation⁴⁴. The European Convention on Human Rights does not require internal remedy to have a particular form, in fact it leaves a lot of discretion to the states but the remedy has to satisfy some conditions, as the effectiveness, practicality and usability.

The effectiveness does not depend on the favorable outcome that the appeal could have, but on the absence of impeding actions, obstacles or omissions on the part of the public authority such as the excessive duration of processes⁴⁵. In this sense, a new relation is created between national courts and the European Court of Human Rights, as the latter is assigned a subsidiary role. Subsidiarity and the Principle of Solidarity are the cornerstones of Article 13, solidarity in terms of commitment by states to ensure adequate protection for victims of human rights violations while subsidiarity refers on the one hand to the role of the court, as mentioned above, but also to remedies in case of proven violation. Article 13 is configured as a cross-cutting article, it is in fact called as 'hinge' right⁴⁶. On the basis of its position within the Convention, it can be seen that it is located in the end of the part relating to Rights and Freedoms and at the beginning of the Guarantees and Limitations. Article 13 therefore takes the form of both a substantive law and a procedural guarantee of the right of access

⁴³ Alimehmeti E., The concept of effective remedies in the jurisprudence of the European Court of Human Rights; a historical perspective in *International Journal of Management Cases*, Vol 15 (3), p.61

⁴⁴ Schabas W., *The European Convention on Human Rights: A Commentary*, Oxford, 2015

⁴⁵ De Salvia M. – Remus M., *Ricorrere a Strasburgo: presupposti, procedura e giurisprudenza*, Milano, 2016

⁴⁶ Bartole S.- De Sena P. - Zagrebelsky V., *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2012

to justice⁴⁷. During the preparatory discussions, a number of interpretative doubts arose with regard to this article. It is essential, for the purposes of full comprehension, to place the original discussion in the historical context after the Second World War. The protection of human rights through effective recourse was contained both in the Universal Declaration of Human Rights, Article 8, and in the American Declaration of the Rights and Duties of Man, Article 18, and in the International Covenant on Civil and Political Rights. The Latin American world has strongly influenced the drafting of this article through the procedure of the Recurso de Amparo which consists on a direct individual appeal, which allows the citizen to bring cases of violation of fundamental rights directly before the Constitutional Judge⁴⁸. The ultimate aim of the article was to reconcile the new regime of international control, established in the aftermath of the Second World War, with human rights obligations with respect for the sovereignty and jurisdiction of the States Parties⁴⁹. Article 13 therefore determines positive state obligations of a procedural nature, the content and scope of which differ according to the other rights with which it is combined⁵⁰. In fact, if a state infringes a Conventional right, the claimant could have his or her rights further violated if the state does not provide for an effective remedy within its own legal system. This underlines that the invocation of this article before the court is also conditioned to a certain extent by the claim of infringement of any of the rights guaranteed by the other articles of the Convention⁵¹. The rights infringed are one of a material nature, e.g. art. 1 or 8 ECHR, and one of an instrumental nature art. 13 ECHR, thus raising the question of the effectiveness of internal actions. The interaction between Article 13 and other conventional rights has led to new

⁴⁷ Schabas W., *The European Convention on Human Rights: A Commentary*, Oxford, 2015, pp. 546 - 554

⁴⁸ Nasi C., *Il ricorso di amparo elettorale in Spagna: il Tribunale costituzionale fra garanzia dei diritti e garanzia dell'esercizio non arbitrario della funzione giurisdizionale*, 2013

⁴⁹ Bartole S.- De Sena P. - Zagrebelsky V., *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2012

⁵⁰ De Salvia M. – Remus M., *Ricorrere a Strasburgo: presupposti, procedura e giurisprudenza*, Milano, 2016

⁵¹ Alimehmeti E., *The concept of effective remedies in the jurisprudence of the European Court of Human Rights; a historical perspective in International Journal of Management Cases, Vol 15 (3)*, p.61

legal content related to the substantive protection of these rights and procedural guarantees which inevitably may change the effectiveness of domestic remedies and the applicability of the Article. In this way, it ends up changing the scope of the law by which it is read in conjunction with a more protective direction for the injured party⁵².

The effective remedy, in this terms, assumes different connotation on the basis of the disposition with which is combined. For example, in case of alleged violation of article 2 ECHR, the Court has indicated that “Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure”. Nevertheless, there are uncertainties and contradictions in the relationship between violation of the Convention and the involvement of Article 13, concerning the latter's autonomy. The concept of ‘Autonomy of the relevant provision’ raises when Article 13 is invoked through completely autonomous form. It disregards the violation of other rights even if this does not mean that the other rights affected are irrelevant, on the contrary they affect the assessment of the action ability and justification of the alleged violation of the right to an effective remedy. Being a vague and general article, it remained completely silent until the end of the 1970s and did not see any practical application. There has been concrete legislation since the 2000s, Article 13 begins to have a complete and autonomous legislative form, thus initiating a new phase of case law that puts the standard at the service of the needs to rebalance and improve the system of international control⁵³. The first case in which this article was invoked and considered separately by the others was in *Kudla v. Poland*⁵⁴. Prior to this case, the Court considered Article 13 as an assumption of Article 6, in particular in the first subparagraph. The right to a fair trial incorporates part of the objectives and nature of Article 13 in terms of the right to a public

⁵² Bartole S.- De Sena P. - Zagrebelsky V., Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali, Padova, 2012

⁵³ ibidem

⁵⁴ Application no. 30210/96

examination of the case, within a reasonable time and in a completely objective manner. This approach was used for most cases where civil rights were at stake, where therefore a review of the case under Article 13 was not necessary because Article 6 was stricter. In *Kudla v Poland* case, the question is evident and the fact that there are two distinct legal situations is emphasized. The Government argued that Article 13 does not apply to cases where the complaint for the duration of the trial has been examined pursuant to Article 6(1)⁵⁵. In order to analyze how Article 13 has been applied in the case, it is essential to understand its deep meaning. The requirement of an 'effective remedy' should be interpreted as 'a remedy which is as effective as possible in view of the limited possibility of appeal inherent in the particular context'. In addition, "Article 13 does not go so far as to ensure a remedy allowing the law of a Contracting State to be challenged before a national authority for breach of the Convention". Therefore, Article 13 cannot be understood as obliging a Contracting State to have in its domestic law the right to an effective remedy allowing the claimant to denounce the absence of access to a court, as guaranteed by Article 6(1)⁵⁶. By virtue of Article 1, which provides that "The High Contracting Parties guarantee to all persons within their jurisdiction the rights and freedoms defined in Section I of this Convention", the primary responsibility for the implementation and application of the rights and freedoms guaranteed is reserved with great discretion to the national authorities. The mechanism for referral to the Court is and must be subsidiary to national systems for the protection of human rights. This is further enshrined in Article 35(1), which is based on the assumption that there is an effective domestic remedy available in relation to an individual's alleged violation of the rights of the Convention and that the court can be seized only after all domestic channels have been exhausted⁵⁷. Thus, Article 13, which directly expresses the obligation of States to protect

⁵⁵ *Kudla v Poland*, Judgment of 26 October 2000, appl. no. 30210/96

⁵⁶ *Ibidem*

⁵⁷ Art. 35 – European Convention on Human Rights , Admissibility criteria 1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

human rights first and foremost in their legal systems, establishes an additional guarantee for an individual to ensure that he or she effectively enjoys those rights. The objective of Article 13 is to provide a legal instrument allowing individuals to seek and obtain national redress for violations of their rights under the Convention before having to initiate the international mechanism of redress before the Court. From this point of view, the right of an individual to be tried within a reasonable time will be less effective if there is no possibility of submitting the application for the Convention first to a national authority. The requirements of Article 13 should be seen as a strengthening of those of Article 6(1) rather than being absorbed by the general obligation under that Article not to subject individuals to excessive delays in judicial proceedings. The Government in the *Kudla v. Poland* case argued that requiring a remedy for an excessively lengthy procedure under Article 13 is tantamount to imposing on States a new obligation to establish a "right of appeal". The Court does not accept the government's arguments, reiterating that, precisely, states enjoy a certain discretion as to how they provide the exemption required by Article 13 and comply with the obligations arising from it⁵⁸. The Court noted, first of all, that the Government did not claim that there was a specific legal route by which the applicant could complain about the duration of the procedure. In addition, it did not provide any examples of national strategy according to which an appeal could be obtained. This means that national law does not satisfy the criterion of 'effectiveness' within the meaning of Article 13, since, as the Court has already held, the remedy sought must be effective both in law and in practice. Consequently, the Court declares that there has been an infringement of Article 13 of the Convention in the present case, since the applicant did not have an internal remedy enabling him to assert his right to a "hearing within a reasonable time", as guaranteed by Article 6(1)⁵⁹. The Court stated on this occasion that "The time has come to review its case law in the light of the continuing accumulation of appeals before it, where the only or

⁵⁸ *Kudla v Poland*, Judgment of 26 October 2000, appl. no. 30210/96

⁵⁹ *ibidem*

main allegation is that it has not guaranteed a hearing within a reasonable time in breach of Article 6(1)". The Court stressed the autonomous importance of Article 13 of the Convention: "The question of whether the plaintiff in a particular case has benefited from a trial within a reasonable time for the determination of civil rights and obligations or of a criminal charge is a legal question distinct from the question of whether the plaintiff had, under national law, an effective remedy for rejecting a complaint on that ground"⁶⁰. The Grand Chamber evaluated the need to examine the applicant's complaint under Article 13, considered separately, notwithstanding its earlier finding of an infringement of Article 6 (1) for not having tried it within a reasonable time. The Court requires an internal remedy to deal with the substance of a "questionable complaint" under the Convention and in this terms, Article 13 does not require an internal remedy for any alleged complaint, however unfounded. The question of whether the complaint is questionable should be determined in the light of the particular facts and the nature of the question or questions of law raised⁶¹. The revaluation of Article 13 was a direct consequence of the number of cases relating to the duration of proceedings. At the conferences in Interlaken, Izmir and finally Brighton, questions were raised concerning the more comprehensive nature of Article 13 and in general the role of the Court and the relationship with the national states⁶². At the Brighton Conference in 2012, the issues were raised on two levels: on the one hand, the government's demand for a greater margin of freedom of conduct in the field of fundamental rights and, on the other hand, the discussion of various reforms aimed at improving the functioning of the conventional system. Focusing on the second level, the meeting was full of heterogeneous proposals but should be assessed in the light of the declared, conclusive awareness of the need to study long-term reforms, capable of redesigning the European system of protection of fundamental rights. Those reforms will not be able to avoid the issue of individual redress and the related right to obtain

⁶⁰ *Kudla v Poland*, Judgment of 26 October 2000, appl. no. 30210/96

⁶¹ Kuijer M., *Effective remedy as a fundamental right*, Barcelona, 2014

⁶² *ibidem*

the Court's decision⁶³. It is possible to note the substantial differences between Articles 13 and 6, despite the concept of autonomy which is emphasised in the *Kudla v. Poland* case. Article 13 sets out a right of a complementary nature to conventional rights and freedoms and is instrumental to the proper functioning of the ECHR, as has already been mentioned, based on the principle of subsidiarity. Therefore, compared with Article 6, which deals with the right to a judge, Article 13, which relies on national authorities, is of an instrumental nature. Article 6, on the other hand, sets out a right which is closely linked to the common principle of the constitutions of the Member States and which is inherent in the very concept of the rule of law⁶⁴. States have shown the need for a greater margin of discretion in the application of the Convention, despite the fact that it was a party to the Convention itself. The Court's subsidiarity can be discussed on the basis of the rule of prior exhaustion of internal tools (Articles 13 and 35 of the Convention), but it indicates in Article 1 of the Convention that the States are required to guarantee conventional rights and to remedy infringements within their internal systems. The Court's role cannot be taken for granted on the basis that it would be subsidiary in the sense that "subsidiarity" takes over in Community law. States and their courts are obliged to implement the Convention, as interpreted by the Court established for that purpose⁶⁵.

The States defendant in Brighton have, as usual, reaffirmed 'their attachment to the right to an individual remedy before the European Court of Human Rights, as the cornerstone of the system of protection of the rights and freedoms enumerated in the Convention'. They once again noted the seriousness of the gap between appeals lodged and appeals decided on, and described the results obtained by the Court under Protocol 14 as encouraging. The final document of the Conference mentions in its preamble the crux of the system and of its

⁶³ Zagrebelsky V., Note sulle conclusioni della Conferenza di Brighton " Per assicurare l'avvenire della Corte Europea dei diritti dell'uomo", 2012

⁶⁴ Di Stasi A., Spazio europeo e diritto di giustizia – Il capo VI della Carta dei diritti fondamentali nell'applicazione giurisprudenziale, Padova, 2014

⁶⁵Zagrebelsky V., Note sulle conclusioni della Conferenza di Brighton " Per assicurare l'avvenire della Corte Europea dei diritti dell'uomo", 2012

suffering, when it recalls that the implementation of the Convention presupposes that it is effectively applied at national level, with the prevention of infringements and reparation when they occur, through effective internal remedies. But the distance between these statements and the reality of the States' behavior is demonstrated by the enormous number of repetitive cases before the Court, proving that, even after the Court has clarified the scope of the Convention, States often do not adapt laws and practices in order to avoid new violations (the question of the duration of trials in Italy and the ineffectiveness of the remedy represented by the Pinto law illustrate this problem)⁶⁶. The document suggests that an independent authority responsible for fundamental rights should be established at national level (Italy, almost alone in Europe, still lacks such an authority) and that national parliaments should set up appropriate structures to provide information to check the compatibility of draft legislation with the requirements of the Convention. In general, States are invited, once again, to ensure that all public agents, including judges (including lawyers), are trained to know and comply with the Convention⁶⁷. The question of interpretation constantly returns in the reading and understanding of this 'obscure' article. In summary, it can be argued that Article 13 guarantees effective redress before a national authority to anyone who claims that their rights and freedoms under the Convention have been violated. In addition to the issue mentioned above, further doubts inevitably arise as to the veracity of a breach by the plaintiff. There are three criteria for the questionability of a request for review. At first, the violation perceived has to concern a right or a freedom contained in the Convention. The second criterion states that the alleged infringement cannot be completely unfounded in the light of the facts in question. Thirdly and finally, the request for review

⁶⁶ Legge 24 marzo 2001, n. 89

⁶⁷ Zagrebelsky V., Note sulle conclusioni della Conferenza di Brighton “ Per assicurare l'avvenire della Corte Europea dei diritti dell'uomo”, 2012

must give rise to a 'prima facie' question within the meaning of the Convention⁶⁸.

According to Harris, O'Boyle and Warbrick there are four elements which influence the effectiveness of a remedy. At first, the institutional effectiveness has to be guaranteed through the independence of the authority which takes the case, they has to be impartial in order to give a fair judgement. The substantial effectiveness refers to the possibility for the individuals to question about the content of the Convention even if the domestic jurisdiction does not directly does not transpose it. On this assumption, if the constitutional or ordinary law contains the same level of guarantees of the Convention is considered sufficient. The corrective effectiveness which regards the concrete process of 'granting' a remedy, in this terms the national authorities has to be able to deal with the case in order to take incisive decisions about the violation and its consequences. At least, the material effectiveness which consists on the disposition, the concrete existence of effective remedies in the national jurisdiction and the possibility for the applicants to benefit from judicial tools and other kind of compensations⁶⁹. As anticipated above, Article 13 adopts different configurations according to the article in conjunction with which it is associated. The main examples of this are the combined reading of Article 13 in relation to Articles 2, 3 and 5 respectively the right to life, the prohibition of torture and the right to liberty and security. The violation of Article 13 in conjunction with Articles 2 and 3 entails particular obligations, first of all the person concerned has the right to a suspensive remedy as his expulsion could cause real risks to his person. In addition, these articles need to be further investigated and rewarded in the event of an established breach. What is really important in such cases is the factor of timeliness, as excessive procedural slowness could lead to serious consequences⁷⁰. At the same time, a haste in the decisions taken by the court could burden the individual: "The Court

⁶⁸ Alimehmeti E., The concept of effective remedies in the jurisprudence of the European Court of Human Rights; a historical perspective in *International Journal of Management Cases*, Vol 15 (3), p.61

⁶⁹ Harris D. – O' Boyle M. – Warbrick C., *Law of the European Convention on Human Rights*, Oxford, 1995

⁷⁰ Kuijer M., *Effective remedy as a fundamental right*, Barcelona, 2014

considered, for example, that the expulsion of an applicant one working day after notification of the decision rejecting the asylum application had in practice deprived him of the possibility to appeal against the negative decision"⁷¹.

With regard to Article 5, it is important to specify the types of cases that it concerns and takes into account with regard to deprivation of liberty. These include cases of placement in a psychiatric or social assistance institution, confinement to airport transit zones, interrogation in a police station or police stops and searches or house arrest. In this case, it is essential under Article 13 that internal legal systems verify both the legitimacy of the detention, the conditions under which it takes place and the treatment of the individual during this period. Also under Article 13, there are no exceptions to the rule that a detained individual should not be able to appeal to a judge and be heard. It is considered to be a fundamental guarantee for the detainee, but this does not mean that he will be heard whenever he appeals. The right to compensation is clearly one of the fundamental points of Article 5 and one of the prerogatives of Article 13, in which sense national authorities should avoid excessive formalism in the examination of the case. Excessive formalism in requiring proof of moral harm resulting from illegal detention is incompatible with the right of appeal. Another key point is 'Unrecognized detention', by which it is intended the deprivation of the personal freedom of an individual in an unknown, obscure place that clearly leads to the lack of access to even minimal services such as access to health care, to a lawyer, to other types of relationships.⁷² "Where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory

⁷¹ ECtHR 15 May 2012, *Labsi v. Slovakia* (appl. no. 33809/08), 139

⁷² Roca J. G. – Santolaya P., *Europe of rights: a compendium on the European Convention of human rights*, Leida, 2012, p. 111

procedure”⁷³. The Court considers that “ Seen in these terms, the requirements of Article 13 are broader than a Contracting State’s obligation under Article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible”⁷⁴. In cases such as these, internal remedies should be able to prevent the continuation of the violation and ensure better conditions. It should also be borne in mind that this should be accompanied on the one hand, as has already been mentioned, by compensation, but also by limited legal costs and in line with the plaintiff’s possibilities⁷⁵.

1.3 Definition, scope and application of the article 47 of the EU Charter of Fundamental rights in combination with Article 19 TEU

Right to an effective remedy and to a fair trial - Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 47 of the Charter of Fundamental Rights enshrines the right to effective judicial protection, which is expressed both in the right of access to a court and in the right to a fair trial. In jurisprudence, it was recognised before the entry into force of the Charter of Fundamental Rights and is considered a general principle of European Union law. Through Article 47, the protection of rights and freedoms is guaranteed on two levels, on the one hand with respect to Community bodies and institutions and on the other hand with respect to the

⁷³ Kurt c. Turchia, 25 maggio 1998

⁷⁴ Mowbray A., Cases, materials and commentary on the European Convention on Human Rights, Oxford, 2007

⁷⁵ Kuijer M., Effective remedy as a fundamental right, Barcelona, 2014

Member States when applying EU law⁷⁶. The European Union today is considered to be a Union of law because its institutions are subject to the scrutiny of the conformity of their acts with the Treaties, general principles of law and fundamental rights. Individuals in this sense must already be able to benefit from effective judicial protection by virtue of the original Treaties, but also by virtue of Article 47. There are, however, important problem areas, such as the possibility of redress available to private parties⁷⁷. Article 47 of the Charter of Fundamental Rights, as mentioned above, has its basis and takes Article 13 of the ECHR as a textual model in its drafting, although there are important differences which make this article fundamentally guaranteed. From a certain point of view, the scope of rights which includes Article 47 is wider than those of Article 13 which can only refer to the catalogue of rights within the Convention. In fact, Article 47 covers all the rights and freedoms guaranteed by the European Union legal order. The crucial point of Article 47, as well as of Article 13, is the role of internal systems in guaranteeing the means of redress available to claimants. In the absence of specific Community rules, it is the individual state which must establish the competent courts and the possible appeal procedures for individuals. The Court of Justice of the European Union, prior to the drafting of the Charter, expressed the two principles of guaranteeing the effectiveness of appeals, equivalence and effectiveness. The concept of equivalence refers to Community and national practices, establishing that the procedures for appeals at supranational level must not be less favorable than those guaranteed by the member states. As regards effectiveness, the role of the rule before all courts must be taken into account. Other fundamental points which may have a negative impact on the effectiveness of the appeal relate to the applicant's misinformation of the costs of the proceedings, his limitations in terms of actions and the rules of procedure. Another essential aspect for the applicant is his knowledge of the reasons for the acts and measures taken against him. According to Article 47,

⁷⁶ Mastroianni R. - Pollicino O. – Allegrezza S. - Pappalardo F. - Razzolini O., *Carta dei Diritti Fondamentali dell'Unione Europea*, Bologna, 2017

⁷⁷ Di Stasi A., *Spazio europeo e diritto di giustizia – Il capo VI della Carta dei diritti fondamentali nell'applicazione giurisprudenziale*, Padova, 2014

the purpose of this is to enable the individual to assess whether it is appropriate to bring an action before a court and to initiate a possible case. The failure of the courts to notify the claimant is limited to what is strictly necessary and must be compatible with security requirements⁷⁸.

The establishment of legal aid at the expense of the state represents a step forward in the evolution of a legal civilization and an advancement for the guarantees of civil rights. The Charter has enshrined this right, since the preparation of common minimum standards functional to the elimination of barriers and obstacles that still prevent the full enjoyment of the service of justice for vulnerable people is a fundamental prerequisite for the principle of effectiveness to be fully respected⁷⁹. In addition to the principles of equivalence and effectiveness, there are further elements that characterise the effectiveness of Article 47 in terms of "rights in the process". The main points are the right of defence, the principle of equality of arms, the right to a fair trial, the right to be advised, defended and represented. Article 47 guarantees the right to a fair and public examination of the case and this is fully in line with Article 6 of the European Convention. The judge must be independent, impartial and guarantee the plaintiff the opportunity to be advised, defended and represented. A key point is the guarantee of legal aid for those who do not have sufficient resources⁸⁰.

The right of defence and procedural representation is a crucial point within the framework of Article 47. The applicants must be guaranteed a number of essential defence instruments, such as knowledge of the facts concerning them, the right to be able to challenge and to defend themselves against objections. The Court of Justice requires that addressees of decisions which appreciably affect their interests be given the opportunity to make their views known in a useful manner⁸¹. This Article should be interpreted in conjunction with Article

⁷⁸ Di Stasi A., Spazio europeo e diritto di giustizia – Il capo VI della Carta dei diritti fondamentali nell'applicazione giurisprudenziale, Padova, 2014

⁷⁹ Gianniti P., I diritti fondamentali dell'Unione Europea – La Carta di Nizza dopo il Trattato di Lisbona, Bologna, 2013

⁸⁰ *ibidem*

⁸¹ *ibidem*

41(2) of the Charter of the European Union as it recognises the right of every person to be heard before the EU institutions adopt individual measures. An example of such a legal situation is the complex Kadi case in the framework of UN Sanctions Committee in the aftermath of the attack on the Twin Towers. On this particular occasion, the United Nations Security Council issued sanctions, harmonised in the EU system, which led to the freezing of the assets of individuals and entities associated with terrorist associations. The EU Court has ruled that the right of defence obliges the European authority to inform the persons concerned of the reasons for their inclusion in the list of individuals targeted by restrictive measures. Furthermore, the fight against threats to peace and security cannot in any way affect the right of defence or the right to individual redress and the right to be informed⁸².

Article 47 applies to the institutions of the Union and of the Member States when they implement Union law and does so for all rights guaranteed by Union law. The reference to "all" in Article 47 specifies the jurisdictional scope of the provision; it is a right guaranteed to all persons within the jurisdiction of a Member State of the European Union. It applies in relation to "rights and freedoms guaranteed by Union law". The right to judicial review is not subsidiary to other rights enshrined in the Charter, as provided for in Article 13 ECHR. Moreover, the obligation of judicial review and the possibility of redress also exists for social and economic rights directly protected by the Charter or by measures of Community law. The principle of "effective judicial control" generally presupposes that the court seised can require the competent authority to communicate the reasons for its decision. The fundamental principles of the national judicial system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of proceedings, can be examined by the European Court of Justice in the context of the application of the principle of effectiveness. The principle of effective judicial protection may require national courts to review all legislative measures and to grant, where appropriate, interim measures even in the absence of relevant national provisions on which such measures may be

⁸² Zagrebelsky V.- Chenal R., *Manuale dei diritti fondamentali in Europa*, Bologna, 2016

based⁸³. In the words of Advocate General Geelhoed: “A system of legal remedies should be established in such a way that it makes provision to prevent, so far as possible, damage arising or at least to limit the extent of the damage. To put in other words: it cannot be correct to construe the provisions of the EC Treaty guaranteeing judicial access in such a way as to exclude the possibility to individuals to limit such damage”⁸⁴.

In the article, it is interesting to note that it refers to all individuals, including non-European citizens, as stated in the other articles. Article 47 states the right to act in order to obtain justice through a fair trial, with an independent and impartial tribunal. The scope of the Article is very broad as regards the active subject, the subject matter and the instrument. There are differences and similarities with respect to the ECHR, primarily in terms of terminology. Instead of the word 'judge', the notion of 'national instance' is used, the aim being to create a genuine European judicial area in the long term. The European Court of Justice has defined a judge as a permanent and independent legal body whose jurisdiction is binding. As far as similarities are concerned, in Article 47 as in Article 13 of the ECHR the principle of effectiveness is applied, in this sense the protection of Community rights must take place without any action which might hinder the exercise of Community bodies⁸⁵.

The right to a fair and reasonable public hearing is also a key issue. This includes the right to a pre-established, third and impartial tribunal, the right to a public hearing, the right to a defence and to procedural representation, the principle of equality of arms, the principle of the right to be heard and the right to a fair trial of reasonable duration and, more generally, the right of access to justice. The Community courts have repeatedly referred to Articles 6 and 13 in these terms and have stressed that the right to a fair trial is a fundamental right of the European Union. Article 47, in this sense, is a rule which confers rights and protections on the administrators and ensures that they are respected by the

⁸³ Kuijer M., *Effective remedy as a fundamental right*, Barcelona, 2014

⁸⁴ Opinion in Case C-491/01

⁸⁵ Bifulco R. – Cartabia M.- Celotto A., *Commento alla Carta di diritti fondamentali dell'Unione Europea*, Bologna, 2001

institutions in the exercise of their functions. Another fundamental point concerns legal aid, which is granted at the expense of the State where it is necessary to ensure effective access to justice⁸⁶.

Article 47, as already mentioned, extends the scope of the rights of Articles 6 and 13 of the European Convention. The right to effective protection and jurisdiction has acquired its own identity and content which are the result of the evolution of the rule of law, national constitutional traditions and the spirit of the European Convention. Nevertheless, Article 47 does not bring much novelty with respect to Articles 6 and 13, since the courts of the Union will interpret this right by virtue of the aforementioned articles of the ECHR. This is done in an attempt to create a system of protection of fundamental rights that is as harmonised as possible, by virtue of Article 6 of the TEU, which places the ECHR as part of the General Principles. However, the invocation of Article 47 is still limited and restrictive but its principles are often referred to indirectly as the right to effective judicial protection, the right to a fair trial, the right to a reasonable trial period⁸⁷.

In the Community context, the right to effective judicial protection is affirmed when it is perceived that the Member State is hindering the citizen in terms of the concrete exercise of rights of Community origin. The state may act in an impedimentary manner through the work of the public administration or with national courts. A right conferred on an individual by the Community legal order exists only to the extent that it can be exercised through an appropriate system. If this were not the case, the very essence of Community law and its role as guarantor would be undermined. This right must be guaranteed in terms of accessibility, efficiency and at a cost that is affordable for all. Therefore, the principle of effective judicial protection constitutes the core of the right to act and cannot be interpreted in a formalistic or abstract way. It is the real and only instrument for making the Community legal system as a whole effective and

⁸⁶ Gianniti P., *I diritti fondamentali dell'Unione Europea – La Carta di Nizza dopo il Trattato di Lisbona*, Bologna, 2013

⁸⁷ Gianniti P., *I diritti fondamentali dell'Unione Europea – La Carta di Nizza dopo il Trattato di Lisbona*, Bologna, 2013

for achieving what is defined as a Community based on the rule of law. However, under the system of review of legality, a natural or legal person may bring an action against an act of an institution only if it is concerned not only directly but also individually. The review is divided into two levels, one direct, in which the Court of Justice or the General Court expresses its opinion by means of a judgment of the Community judicature. As mentioned above, one of the criticalities represented by Article 47 is the role of private parties and the Court stated, in a judgment of 1 April 2004 (Commission c. Jégo Quéré and Cie), that the Community system of remedies on the legality of acts is complete and that it is up to the Member States to remove any obstacles in internal remedies. However, the Court guarantees access to a judge within the Community legal order in order to give natural and legal persons the opportunity to assert themselves before the Community judicature⁸⁸.

To facilitate the application and proper functioning of this system, the Commission has adopted a Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union⁸⁹. In this way, the Commission aims to assess the appropriateness of establishing common minimum norms for procedural guarantees and to identify the areas in which they should be applied. Article 6 of the ECHR and Article 47 of the Charter are the pillars of the Green Paper. Given the complexity of the issue, the Commission wanted to give importance in the Green Paper to certain categories of right, including the right to judicial assistance and legal representation assistance provided by a lawyer, the right to be assisted by an interpreter and to obtain the translation of essential documents. It also mentions the right for persons accused of a crime to obtain written information about their fundamental rights in a language they are able to understand, perhaps in the form of a 'Declaration of Rights'. It also emphasises the right to sufficient protection for vulnerable persons and the right to consular assistance. The Commission envisages the possibility of obliging Member States to have a

⁸⁸ Gianniti P., *I diritti fondamentali dell'Unione Europea – La Carta di Nizza dopo il Trattato di Lisbona*, Bologna, 2013

⁸⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003DC0075&from=IT>

national system of representation in court by a lawyer. It plans to give the Member States the power to verify the level of competence of professional lawyers and to guarantee them sufficient remuneration⁹⁰.

Article 19 of the Treaty on European Union⁹¹ should be mentioned with regard to the major issue of effective protection at Community level. It concerns the principle of effective judicial protection of individual rights. Protection such as that offered by Article 19 is essential to respect and preserve the rule of law. This is confirmed by the judgment in the case of *Associação Sindical dos Juizes Portugueses* in the famous case C - 64/16⁹². The latter concerns a Portuguese trade union association and the Portuguese Court of Auditors concerning a reduction in the salaries of the public administration, including the remuneration of judges. The Supremo Tribunal Administrativo, taking the case into consideration, requested a preliminary ruling from the European Court of Justice under Article 19 of the Charter of Fundamental Rights, in conjunction with Article 47 of the ECHR⁹³. In this sense, the Court of Justice was asked whether: "Article 19 of TEU must be interpreted as meaning that the

⁹⁰ Gianniti P., *I diritti fondamentali dell'Unione Europea – La Carta di Nizza dopo il Trattato di Lisbona*, Bologna, 2013

⁹¹ Article 19 1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. 2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General. The General Court shall include at least one judge per Member State. The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed. 3. The Court of Justice of the European Union shall, in accordance with the Treaties: (a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties.

⁹² REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 7 January 2016, received at the Court on 5 February 2016, in the proceedings, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*

⁹³ Coli M., *The Associação Sindical dos Juizes Portugueses judgment: what role for the Court of Justice in the protection of EU values?*, 2018, in *Diritti comparati – Comparare I diritti fondamentali in Europa*, <http://www.diritticomparati.it/comparare-i-diritti-fondamentali-in-europa-ovvero-del-rischio-di-prendere-un-granchio/>

principle of the independence of judges precludes the application to members of the judiciary of a Member State of general measures of wage reduction, such as those at issue in the main proceedings, associated with the need to eliminate an excessive budget deficit and a programme of Union financial assistance”.⁹⁴ That request represents a new point of discussion in the European constitutional framework since, in a way, it extends the powers of the Court of Justice in relation to national decisions. Despite the fact that increasing or reducing salaries is a prerogative and requirement of the state, the Court of Justice has been 'invested' with a new competence. In fact, the measures in question had not been called for by any directive on the part of the European Union, nor had they had any real connection with Union law. In this case, the measures taken by the Portuguese legislator may compromise the judicial system of a Member State that may no longer be able to guarantee effective protection or independence of judges. The Court of Justice becomes, in a sense, the guarantor of the principle of the rule of law within the meaning of Article 19 and therefore requires the national judicial body to comply with the provisions of this article. Furthermore, the Court has held that national ordinary judges become, in a sense, 'European judges' when they join the European Union, since they have the task of applying Community law as well as national law⁹⁵. It is definitively stated that: "The second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of the independence of judges does not preclude the application to the members of the Tribunal de Contas of general measures to reduce salaries, such as those at issue in the main proceedings, linked to the need to eliminate an excessive budget deficit and to a programme of financial assistance from the European Union. It is also stressed that it must be interpreted separately from Article 47. However, one of the criticisms levelled against the Court's involvement in this particular case concerns the fact that, during the imposition of austerity measures by the Union, the national courts raised a question of compatibility with those

⁹⁴ C - 64/16

⁹⁵ Pech L. – Platon S., Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in *Associação Sindical dos Juizes Portugueses*, 2018, in EU Law analysis – Expert insight into EU Law developments

measures and the Charter and were rejected on procedural grounds. The austerity policies in Portugal, according to some Portuguese scholars, led to a compromise of social rights due to cuts in health, education and other public sectors.

The judgment in question is similar to a further case, still unresolved, on the 'Rule of law backsliding' of Poland. More specifically, this is the infringement case, C- 619/18⁹⁶, Commission v. Poland and concerns the reform of the Polish judicial system. The measures in question concern the retirement of judges, the admission of extraordinary actions to the Constitutional Court, the appointment of presidents of ordinary courts, the termination of the term of office of judges who are members of the National Council of the Magistracy and the procedure for appointing them. In particular, there was a willingness on the part of the national legislature to lower the retirement age, which has always been a measure at the discretion of the President of the Republic⁹⁷. The Commission claimed that this reform would have an impact on the independence of the judges by invoking, as in the Portuguese case, Article 47 of the ECHR and Article 19 of the Charter of Fundamental Rights. Furthermore, there was a need to establish whether these measures were compatible with Article 19 of the Charter in conjunction with Article 47 of the ECHR. Advocate General Tanchev, in presenting the conclusions of the case, argued that the two articles should be taken into account separately, as already emerged from the Portuguese case. This in no way leads to a weakening of the ECHR but, ninthly by providing sufficient arguments in support of Article 47, only Article 19 is taken into account. According to lawyer Tanchev⁹⁸: "Judges must be guaranteed to remain in office until the mandatory retirement age or the end of their term of office, and they may be suspended or retired in individual cases only for reasons of incapacity or conduct that render them unfit to serve. Early

⁹⁶ Case C-619/18, ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 2 October 2018

⁹⁷ Case C-619/18, ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 2 October 2018

⁹⁸ Born 1952; graduated in law from St Kliment Ohridski University, Sofia (1975); Doctor of Laws (1979); editor of a number of legal journals; author of numerous legal publications; Advocate General at the Court of Justice since 19 September 2016.

retirement should be allowed only at the request of the court concerned or for medical reasons and no change in the mandatory retirement age should have retroactive effect”⁹⁹. The lawyer identifies in the work of the committee some controversial aspects that have compromised the work and the composition of the Supreme Court. This, according to Tanchev, violated the principle of judges' immovability necessary to be in line with Article 19 TEU¹⁰⁰.

Final remarks

Access to justice as a human right has been the result of a long process and evolution of international, Community and national case law in this field. Initially, it was recognized as a mere right to diplomatic protection for foreigners whose rights were infringed in a state other than that of origin. It then takes on more specific features in terms of access to a judge, the right to a fair trial and the right to effective remedies. Precisely in this last configuration, problematic and very critical issues of the matter are highlighted, since the supranational and national levels come into contact. Article 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union are complementary in a certain sense, although the contracting states are different. The Charter of Fundamental Rights, as has already been said, refers to the ECHR as part of the General Principles and is used by national courts to interpret acts adopted. In these terms, individuals can bring actions for annulment for directives or regulations that concern them individually and personally. Under Article 47, this is done with limitations and restrictions since it is complex for the individual to prove that these acts are intended directly.

However, in terms of the scope of the law, Article 47 is broader than Article 13 in that it applies to all the rights and freedoms guaranteed by Union law and is not limited to the Convention. Article 47, on the other hand, is intentionally applicable when Member States implement EU law and is therefore less

⁹⁹ Corte di giustizia dell'Unione europea COMUNICATO STAMPA n. 48/19 Lussemburgo, 11 aprile 2019 , Conclusioni dell'avvocato generale nella causa C-619/18 Commissione / Polonia – own translation

¹⁰⁰ Ibidem

comprehensive than the Convention. Of course, where the law of the Charter does not apply, the Convention is applicable, since the contracting states of the Council of Europe also belong to the European Union. From this it is possible to highlight how the two articles refer to very different fields of application and through as many different instruments. On the one hand, Article 13 of the ECHR guarantees effective redress before a national court on the basis of well-founded violations of rights belonging to the ECHR. Once national remedies have been exhausted, individuals can refer directly to the European Court of Human Rights for a hearing before a judge. Restrictions may relate to legitimacy, proportionality and the essence of the law itself. It is important to take into account the factor of court costs because they can significantly limit access to justice for the less well-off, who are the ones who most need assistance and opportunities. In this regard, the European Court of Human Rights has held that all court costs that are four times greater than the plaintiff's monthly income are disproportionate. For this reason in both articles, but especially in Article 47, there is a clear reference to free legal aid, despite the fact that it is still a difficult point to analyze.

The article Article 263 of the 2007 Treaty of Lisbon¹⁰¹ allows so-called 'non-privileged applicants' to appeal for annulment. Unprivileged applicants' are natural and legal persons who can appeal against decisions taken by the other categories listed in the same chapter. According to Article 263(2), the category of 'privileged applicants' is represented by the Member States, the Parliament, the Council and the Commission. Semi-privileged applicants' are, according to the same article, the European Central Bank and the Committee of the Regions. It can only be requested if those who so request are the direct addressees of the act issued by the Union, even if no implementing measures are included. Before the Lisbon Treaty, as has been mentioned, appeals could be lodged even if the claimant was not the direct addressee but was indirectly affected by the

¹⁰¹ Consolidated version of the Treaty on the Functioning of the European Union - PART SIX: INSTITUTIONAL AND FINANCIAL PROVISIONS - TITLE I: INSTITUTIONAL PROVISIONS - Chapter 1: The institutions - Section 5: The Court of Justice of the European Union - Article 263 (ex Article 230 TEC)

act¹⁰². To make the procedure for the admissibility of appeals by private persons even more difficult, there is the Plaumann Test¹⁰³, according to which the individual interest of the addressee must be demonstrated with regard to the scope of the ordinary legislative procedure¹⁰⁴. Thus, the phasing out from Nice to Lisbon of individual interests in the right to access to justice is visible. A key instrument to ensure wider and more concrete access to justice is the Preliminary Ruling¹⁰⁵ reference, Article 267 TFEU, which allows national judges to request a question to the Court of Justice on the legality of EU legislation¹⁰⁶. In this way, references for preliminary rulings somewhat harmonise national and Union law, and private parties can also have clarity on the interpretation of Community law and effective access to justice. Nevertheless, it is a mechanism rarely used by Member States¹⁰⁷. In 2016, according to a 2017 report of the European Court of Justice, it was used 62 times by Italy and 47 times by Spain, however, countries such as Greece and Slovakia were used only 6 times and Croatia only 2 times¹⁰⁸. The reasons for these imbalances in the use of the Preliminary Referral lies both in the lack of knowledge of the institution and in the slowness of the procedure. A possible risk of using the referral mechanism may be that, by questioning the European Court of Justice, the entire internal procedure is slowed down and thus have negative domestic consequences¹⁰⁹. In the light of this, it can be argued that recourse to the European Court of Human Rights is certainly more direct and more effective. Since the 2018 annual report of the European Court of Human Rights, 43,100 appeals have been registered, 2738 of which have been

¹⁰² Kucko M., *The Status of Natural or Legal Persons According to the Annulment Procedure Post-Lisbon*, LSE Law Review, 2017, pp. 101-119

¹⁰³ Case 25/62 Plaumann & Co v Commission, 1963, ECR 95

¹⁰⁴ Kucko M., *The Status of Natural or Legal Persons According to the Annulment Procedure Post-Lisbon*, LSE Law Review, 2017, pp. 101-119

¹⁰⁵ Article 267 of the Treaty on the Functioning of the European Union (TFEU)

¹⁰⁶ Rass Masson N. – Rouas V., Directorate General for internal policies, Policy department C: Citizens' rights and constitutional affairs – Effective access to justice, 2017

¹⁰⁷ *ibidem*

¹⁰⁸ CJEU (2017)

¹⁰⁹ Rass Masson N. – Rouas V., Directorate General for internal policies, Policy department C: Citizens' rights and constitutional affairs – Effective access to justice, 2017

concluded with a decision¹¹⁰; on the other hand, 1683 cases have been brought before the European Court of Justice and 1789 cases have been completed¹¹¹. A greater convergence of the work of the two courts is desirable as well as the accession of the European Union to the Convention on Human Rights, an issue discussed but which needs to be addressed again to ensure effective access to justice for individuals. In view of the way in which access to justice for individuals is guaranteed at international and European level, it is necessary, for the purposes of the proposed analysis, to examine in more detail how this is implemented at national level. Two states will be taken into consideration, the Italian and the Spanish. The two systems have been chosen because they will later try to insert the issue of access to individual justice in the great framework of irregular migration.

¹¹⁰ Annual report, European Court of human rights, 2018, https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf

¹¹¹ *ibidem*

Chapter II – Access to justice for individuals in Italy and Spain

2.1 Access to the Constitutional Court in Spain for individuals

Access to constitutional justice in Spain, in the light of what has been shown at international and EU level, is an interesting case since it has an internal mechanism of direct constitutional appeal the so-called 'Recurso de Amparo'. It will be interesting to explore the architecture of the Spanish constitutional justice, in a comparative perspective with the Italian one, in order to understand the differences and similarities of the two systems in terms of access justice. Access to justice is a fundamental component of the Spanish Constitution, in fact justice, beyond the technical and legal aspect, is intended as a true national value. Access to justice is considered as the founding principle of the state of social and democratic law, which is achieved through the possibility for each person to be able to turn to judges and courts to ask for protection and effectiveness of rights¹¹². Within the Spanish legal system this is enshrined in Article 24 of the Spanish Constitution of 1978¹¹³, which will be analyzed later, which basically concerns effective judicial protection. In this regard, the Spanish magistrate Luis Maria Diez Picazo Gimenez¹¹⁴ argued that: "Effective judicial protection is not only the right to cross the threshold of a court door, but also the right that, once inside, performs the function for which it was established"¹¹⁵. The Spanish Constitution contains, in addition to Article 24, mechanisms that contribute to an effective acceleration to justice even of persons without sufficient resources, as described in Article 119¹¹⁶, and also the guarantee of compensation to avoid problems in access to justice. This

¹¹² Carnicer Diez C., El acceso a la justicia en España in <https://ifc.dpz.es/recursos/publicaciones/29/19/11carnicer.pdf>

¹¹³ Artículo 24 de la Constitución Española: 1. Todas las personas tienen derecho a obtener la tutela efectiva de los jueces y tribunales en el ejercicio de sus derechos e intereses legítimos, sin que, en ningún caso, pueda producirse indefensión.

¹¹⁴ Nacido en Madrid en 1958, es magistrado del Tribunal Supremo desde 2008 y presidente de la Sala Tercera desde septiembre de 2015. In <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Portal-de-Transparencia/Biografias/Diez-Picazo-Gimenez--Luis-Maria--presidente>

¹¹⁵ Díez-Picazo Giménez, L, "Reflexiones sobre algunas facetas del derecho fundamental a la tutela judicial efectiva", Cuadernos de Derecho Público, nº 10, 2000, p. 37

¹¹⁶ Artículo 119 de la Constitución Española: La justicia será gratuita cuando así lo disponga la ley y, en todo caso, respecto de quienes acrediten insuficiencia de recursos para litigar.

reduces the possibility of retaliation against the person seeking redress before the courts. The Constitutional Court was the main novelty of the Spanish Constitution of 1978 because much of the Spanish system was maintained after the end of the Franco regime, in terms of the Monarchy, the bicameral parliamentary system and the Single Judicial Power¹¹⁷. However, there was a real need to give a new structure to the newborn democracy and the creation of an *ad hoc* Constitutional Court was perfectly in line with this idea¹¹⁸. Title IX of the Constitution¹¹⁹ enshrines the creation of the Tribunal, its composition and functioning. In general, the Spanish constitutional justice system is described by Organic Law 2/1979¹²⁰, which establishes this *ad hoc* and independent body for the resolution of constitutional conflicts and disputes of competence between the state and autonomous regions. Clearly, the Constitutional Court is not the only body that must apply the Constitution, on the contrary, it must be prosecuted by the judges and courts that make up the judicial system, which consists of the Court and the Judiciary. Among the most relevant powers of judges and courts in the exercise of constitutional jurisdiction is the defense of rights. This ordinary judicial protection, or "judicial protection", is prior, in almost all cases, to that dispensed by the Constitutional Court through the "Recurso de Amparo", which therefore has a subsidiary character¹²¹.

The Constitutional Court is composed of 12 members and are appointed by the King on the proposal of the Senate, Government and General Counsel of the Judiciary. The Tribunal shall rule on appeals of unconstitutionality against laws or regulations having the force of law, which may be raised directly by the President of the Government, the Defensor del Pueblo, 50 deputies, 50 senators and the bodies representing the autonomous communities. The effect of this

¹¹⁷ Tremps P.P., Las perspectiva del sistema de justicia constitucional en España, in <https://libros-revistas-derecho.vlex.es/vid/introduccion-sistema-justicia-constitucional-77694078>

¹¹⁸ *ibidem*

¹¹⁹ Título IX. Del Tribunal Constitucional

¹²⁰ Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional

¹²¹ Tremps P.P., Las perspectiva del sistema de justicia constitucional en España, in <https://libros-revistas-derecho.vlex.es/vid/introduccion-sistema-justicia-constitucional-77694078>

appeal is the ‘erga omnes’ annulment of the rule. The Defensor del Pueblo, as will be analysed below, is a body governed by Article 54 of the Constitution and was established by the Organic Law of 1981. The defender can rule on unconstitutionality issues on an incidental basis, bring appeals of unconstitutionality that Recursos de Amparo and, in general, has the task of defending citizens and protect their fundamental rights¹²². ‘El recurso de inconstitucionalidad’ is the direct procedural procedure by which the Constitutional Court ensures the primacy of the Constitutional Court and establishes the conformity or non-conformity with it of the laws, provisions and acts challenged. This appeal is made for the objective guarantee of the Constitution and the persons concerned may act without proving that there is a public interest at the basis of the appeal. As already mentioned, the subjects in charge of raising the appeal are the President of the Government together with the defender of the people, 50 deputies and 50 senators and the executive bodies of the autonomous communities. Laws and provisions having the force of law are the object of the appeal of unconstitutionality, in particular are: statutes of autonomy, organic laws, normative provisions, acts of the State having the force of law, international treaties, regulations of chambers and parliament, laws, acts and provisions of the Autonomous Communities and finally the regulations of the legislative assemblies of the autonomous communities¹²³. It takes three months from the official publication of the provision to bring it before the Constitutional Court, while in cases of conflict of jurisdiction between the State and the Autonomous Communities the period is nine months. In the case of verification of unconstitutionality, the result is the invalidity of the contested provision and, consequently, of all those connected with it. This can have important political and technical-bureaucratic consequences given the rigidity with which it is annulled¹²⁴.

¹²² Gambino S., Miralles J. L. , Puzzo F., Ruiz Ruiz J. J., *Il sistema costituzionale spagnolo*, Padova, 2018

¹²³ Ley Orgánica del Tribunal Constitucional, Art 27, Objeto de los procedimientos de declaración de inconstitucionalidad

¹²⁴ Gambino S., Miralles J. L. , Puzzo F., Ruiz Ruiz J. J., *Il sistema costituzionale spagnolo*, Padova, 2018

Another important mechanism is represented by the Prior Control of constitutionality, it was introduced with the Organic Law 2/1979 and reformed in 2015 with the Organic Law 12/2015¹²⁵, on the draft organic law of the statutes of autonomy or their amendments. This reform was controversial because it seems to have been used as a political tool by minorities. The subjects that can have recourse to preventive control are the same as the unconstitutionality recourse and the term is much more limited for this type of recourse. From the official publication, the deadline is only three days and the submission of this appeal puts all subsequent acts on stand-by. The outcome, once the rule in question has been declared unconstitutional, is that the Parliament will delete and amend the rule. The major issue of constitutionality issues was the result of the influence of both the German and Italian constitutions. In this sense, the similarities found concern the subject-matter of the action, i.e. the rules in question, which must have legal status and must be provisions having the force of law. All courts are entitled to raise doubts of unconstitutionality and, thanks to the Additional Provision Fifth (Organic Law 1/2010)¹²⁶, the Constitutional Court can also raise appeals on rules of lower rank. In particular, the Law of 2010 focused on the tax rules of the territories of Alava, Guipuzcoa and Vizcaya¹²⁷. Fundamental rights in the Spanish state are partly summarized in Article 1.1 of the Constitution¹²⁸, which states that: 'Spain shall establish itself in a social and democratic state governed by the rule of law, which upholds freedom, justice, equality and political pluralism as the highest values of its legal system'. The 1978 Constitution is the product of European post-World War II experiences, with particular reference to the

¹²⁵ Ley Orgánica 12/2015, de 22 de septiembre, de modificación de la Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional, para el establecimiento del recurso previo de inconstitucionalidad para los Proyectos de Ley Orgánica de Estatuto de Autonomía o de su modificación

¹²⁶ Ley Orgánica 1/2010, de 19 de febrero, de modificación de las leyes orgánicas del Tribunal Constitucional y del Poder Judicial

¹²⁷ Gambino S., Miralles J. L. , Puzzo F., Ruiz Ruiz J. J., *Il sistema costituzionale spagnolo*, Padova, 2018

¹²⁸ CONSTITUCIÓN ESPAÑOLA, Aprobada por Las Cortes en sesiones plenarias del Congreso de los Diputados y del Senado celebradas el 31 de octubre de 1978, Ratificada por el pueblo español en referéndum de 6 de diciembre de 1978, Sancionada por S. M. el Rey ante Las Cortes el 27 de diciembre de 1978

Italian, Portuguese and German ones¹²⁹. Title I, known as "Of fundamental rights and duties", sets out the fundamental rights recognized and is expressed by the expression "human rights" and "inviolable" (art. 10.1¹³⁰). Title I in general includes the rights that refer to both Spanish and foreign nationals, in particular in Chapter I¹³¹, Article 13 states: "Los extranjeros gozarán en España de las libertades públicas que garantiza el presente Título en los términos que establezcan los tratados y la ley". Chapter II¹³² enshrines the principle of equality before the law, which is considered to be the fundamental principle of the Spanish rule of law; this chapter is divided into a part properly dedicated to public freedoms and one centred on the duties of citizens. Chapter III¹³³ (Articles 39-52), on the other hand, focuses on possible actions by the public authorities and the rights of citizens in this regard. Chapter IV¹³⁴ is considered the true pivot of the Spanish Constitution because, in Articles 53¹³⁵ and 54¹³⁶, it focuses on the regulatory guarantees of freedoms and fundamental rights, institutionalizing the figure of the Defensor del Pueblo: "An original law regulates the institution of the Defensor of the Pueblo, as the high committee of the General Courts, designated by the states for the defense of the rights understood in this Título, which may supervise the activity of the Administration, giving cue to the General Courts". Finally, chapter V¹³⁷, which sets out the ways in which certain freedoms and rights may be suspended in

¹²⁹ Gambino S., Miralles J. L. , Puzzo F., Ruiz Ruiz J. J., *Il sistema costituzionale spagnolo*, Padova, 2018

¹³⁰ Art. 10 ,La dignidad de la persona, los derechos inviolables que le son inherentes, el libre desarrollo de la personalidad, el respeto a la ley y a los derechos de los demás son fundamento del orden político y de la paz social

¹³¹ CAPÍTULO PRIMERO, De los españoles y los extranjeros

¹³² CAPÍTULO SEGUNDO, Derechos y libertades

¹³³ CAPÍTULO TERCERO, De los principios rectores de la política social y económica

¹³⁴ CAPÍTULO CUARTO, De las garantías de las libertades y derechos fundamentales

¹³⁵ Art 53.2, Cualquier ciudadano podrá recabar la tutela de las libertades y derechos reconocidos en el artículo 14 y la Sección 1.ª del Capítulo Segundo ante los Tribunales ordinarios por un procedimiento basado en los principios de preferencia y sumariedad y, en su caso, a través del recurso de amparo ante el Tribunal Constitucional. Este último recurso será aplicable a la objeción de conciencia reconocida en el artículo 30.

¹³⁶ Art. 54, Una ley orgánica regulará la institución del Defensor del Pueblo, como alto comisionado de las Cortes Generales, designado por éstas para la defensa de los derechos comprendidos en este Título, a cuyo efecto podrá supervisar la actividad de la Administración, dando cuenta a las Cortes Generales.

¹³⁷ CAPÍTULO QUINTO, De la suspensión de los derechos y libertades

certain cases of major exception. Articles 15¹³⁸ to 29¹³⁹ are susceptible to double protection, since they can be executed before the ordinary court and, if necessary, further proceedings can be initiated, the so-called 'Recurso de Amparo'¹⁴⁰.

Fundamental rights are subjective rights and by virtue of this they have direct effect, since they are enforceable before the courts. Nevertheless, direct effect varies according to the subject and the circumstances of the case in question, which makes it possible to say that the degree of effect changes according to whether the subject is a Spanish national or a foreigner¹⁴¹. Article 14 states that: "Spaniards are equal before the law without any discrimination on grounds of race, sex, religion, opinion or any other personal or social condition or circumstance", in this article it is possible to trace a real paradox because on the one hand it refers only to Spaniards but, at the same time, ethnic distinctions are not allowed under the principle of non-discrimination. In order to ensure maximum respect for these rights, it is necessary for the public administration to be fully observant of fundamental rights; however, at the same time, Judgment 53/1985¹⁴² states that: "From the Subjection of all the powers of the constitution, it follows not only the negative obligation of the state not to violate the protected individual or institutional sphere of fundamental rights, but also the positive obligation to contribute to the effectiveness of those rights (...)". The emphasis placed in this sense is clearly the historical and juridical product of "centuries of construction of our civilization"¹⁴³. Clearly, these rights have intrinsic limits which are, however, enshrined in the Constitution itself, both explicitly and implicitly. These rights

¹³⁸ Art. 15, Todos tienen derecho a la vida y a la integridad física y moral, sin que, en ningún caso, puedan ser sometidos a tortura ni a penas o tratos inhumanos o degradantes. Queda abolida la pena de muerte, salvo lo que puedan disponer las leyes penales militares para tiempos de guerra.

¹³⁹ Art. 29. 1, Todos los españoles tendrán el derecho de petición individual y colectiva, por escrito, en la forma y con los efectos que determine la ley

¹⁴⁰ Gambino S., Miralles J. L. , Puzzo F., Ruiz Ruiz J. J., Il sistema costituzionale spagnolo, Padova, 2018

¹⁴¹ ibidem

¹⁴² SENTENCIA 53/1985, de 11 de abril, (BOE núm. 119, de 18 de mayo de 1985)

¹⁴³ Gambino S., Miralles J. L. , Puzzo F., Ruiz Ruiz J. J., Il sistema costituzionale spagnolo, Padova, 2018

and freedoms are interpreted "in accordance with the Universal Declaration of Human Rights and the relevant international treaties and agreements ratified by Spain"¹⁴⁴.

In the Spanish constitution there are a number of mechanisms that guarantee the protection of the rights of individuals, these guarantees are basically of four types: constitutional, institutional and finally subjective or individual. For the purpose of the proposed analysis, the attention will be focused on subjective or individual guarantees. With this regard, it is possible to distinguish between judicial guarantee, ordinary judicial amparo and constitutional amparo. As far as the judicial guarantee is concerned, it refers to the fact that in the Spanish constitution, the judicial power is totally *super partes*, natural and impartial and, in a certain sense, is the guardian of all rights. For the second type of guarantee, reference is made to Article 53(2) according to which: "Any citizen may obtain the protection of the freedoms and rights recognized in Article 14 and in the Section before Chapter Two, before the ordinary courts through a procedure based on the principles of preference and summary and, where appropriate, through the appeal of amparo before the Constitutional Court. The latter appeal may be used in the case of conscientious objection recognised in Article 30¹⁴⁵. The ordinary judicial amparo presents itself as an additional protection and, together with the constitutional one, makes the Spanish constitutional system well-equipped to protect fundamental rights. Finally, the *recurso de amparo* is distinct from the *amparo judicial* and is not in these terms, the phase following the ordinary one, but rather a totally different procedure.

¹⁴⁴ *ibidem*

¹⁴⁵ Art. 30, La ley fijará las obligaciones militares de los españoles y regulará, con las debidas garantías, la objeción de conciencia, así como las demás causas de exención del servicio militar obligatorio, pudiendo imponer, en su caso, una prestación social sustitutoria.

2.2 Recurso de Amparo in Spain

The 'Recurso de Amparo' is the product of the work of the Mexican professor Rodolfo Reyes, who fled persecution during the Mexican Revolution of 1910¹⁴⁶. He was the promoter of a procedural instrument that fits into the Spanish internal legal system to protect the human rights of individuals. By virtue of his experience, he tried to systematize concretely a mechanism for guaranteeing fundamental rights, also in line with the Habeas Corpus typical of the Anglo-Saxon systems¹⁴⁷. It consisted of an institution for the protection of the personal freedom of individuals detained and allowed them to appeal to the judge and re-discuss the reasons for imprisonment, with the consequence of a possible release or start of a new trial. The Spanish Republican Constitution of 1931 includes the Recurso de Amparo and was the first concretization of this institution and was called 'Recurso de amparo de las garantías individuales'¹⁴⁸. It represented the legal product of the dictatorship of General Primo Rivera, since the issue of individual protection with respect to the acts of the public authorities was completely neglected. Initially, this mechanism was the responsibility of the Court of Constitutional Guarantees and could be carried out in two instances. This was enshrined in Article 121 of the Spanish Constitution: "Se establece, con jurisdicción en todo el territorio de la República, un Tribunal de Garantías Constitucionales, que tendrá competencia para conocer de: [...] b) El recurso de amparo de garantías individuales, cuando hubiere sido ineficaz la reclamación ante otras autoridades. [...]"¹⁴⁹. The ordinary amparo is characterised by being a preferential and shortened procedure for the violation of fundamental rights which, as has already been mentioned, are included in Articles 14 and 29 of Chapter I. Legislative

¹⁴⁶ E. Crivelli, *La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale*, Padova, 2003

¹⁴⁷ Coppi G., *Il writ di habeas corpus. Le origini del baluardo delle libertà civili*, in *Le carte e la storia*, Bologna, 2009

¹⁴⁸ El Tribunal de Garantías Constitucionales de la II República Española <https://www.tribunalconstitucional.es/es/tribunal/historia/Paginas/Tribunal-de-Garantias-Constitucionales.aspx>

¹⁴⁹ Constitución de 9 de diciembre de 1931, Art. 121

development begins with Law 62/1978¹⁵⁰ on the Judicial Protection of the Rights of the Person, divided into three sections, one on criminal judicial guarantees, the other on civil guarantees, an additional military one and two on electoral matters. For years it has been an unused mechanism and despite the precise subdivisions by subject, it is highly fragmented and vague¹⁵¹. The Recurso de Amparo is, therefore, an extraordinary appeal, of a subsidiary type, addressed to certain types of acts, provisions without legal force, legal acts, omissions attributable to any type of authority and the actions of public authorities. The Recurso de Amparo does not include all the duties contained in the above mentioned articles, even though they are part of those that can be appealed against. The Organic Law of the Constitutional Court 2/1979¹⁵² regulates the different types of appeal, in this regard, are distinguished on the basis of the act subject to the appeal and are governed by Articles 42, 43, 44. Article 42 allows an appeal by an act of public authority attributed with the violation of fundamental rights, Article 43 instead refers to governmental and administrative decisions and finally Article 44 takes into account judicial decisions. The Institutional Act defines the subsidiary nature of the recurso de amparo, since in order to have access to such a procedure it is necessary to have recourse to the ordinary courts, so that the ordinary courts also have the opportunity to hear the case in question and try to resolve it before the Constitutional Court. The time limit for lodging an appeal is twenty days for government administrative decisions and thirty days for judicial decisions. As far as parliamentary decisions are concerned, the appeal can be lodged within three months. In order to avoid a dispute with the ordinary judges, if a Recurso de Amparo is raised, a new judicial request is opened¹⁵³. The necessary requirements for the appeal are defined in Article 49, which states that the applicant must appeal by virtue of a violation of constitutional importance, this is decided by the Constitutional Court on the basis of the criterion of

¹⁵⁰ Ley 62/1978, de 26 de diciembre, de Protección Jurisdiccional de los Derechos Fundamentales de la Persona

¹⁵¹ Gambino S., Miralles J. L. , Puzzo F., Ruiz Ruiz J. J., Il sistema costituzionale spagnolo, Padova, 2018

¹⁵² Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional

¹⁵³ Gambino S., Miralles J. L. , Puzzo F., Ruiz Ruiz J. J., Il sistema costituzionale spagnolo, Padova, 2018

interpretation, effectiveness and application of the Constitution. The fundamental article on the appeal is 162¹⁵⁴ of the Constitution and concerns the subjects who can legitimately appeal: "Any natural or legal person who invokes a legitimate interest, as well as the People's Defender and the Public Prosecutor, has the right to appeal: to lodge an amparo appeal. These institutional entities are constituted as plaintiffs and participate in the entire process, in particular the Public Prosecutor intervenes in all processes of Recurso and Amparo to defend the public interest"¹⁵⁵. Another fundamental knot is the fact that the appeal has no suspensive effect unless the Court believes that there is a need to suspend the act because it could produce a prejudice that would compromise the purpose of the act itself, but this cannot happen if, such a suspension, could harm a fundamental right or freedom. The reform of the Organic Law of the Constitutional Court takes place by means of Law 6/2007¹⁵⁶ and establishes that for a verified violation of the fundamental rights established in Article 53, it is possible to submit a request for annulment. Also by virtue of the same violations, the invalidity incident is extended, which only broadens the powers of ordinary jurisdiction¹⁵⁷. The reform in question is the slow reform affecting the functioning of the Constitutional Court and is the result of a number of issues affecting the work of the court. First of all, at the basis of the court's difficulties, there was a sort of hypertrophy of the Recurso de Amparo system due to the large number of appeals that were brought to the registry. The appeals concerned questions of unconstitutionality, conflicts of attribution and Recursos de Amparo. In 1980 there were 218 such appeals and in 2007 there were 9840, which clearly paralyses the proper functioning of the system with the consequence that only a part are taken into account and resolved and therefore a continuous accumulation of practices and a chronic slowdown of constitutional justice. The effects were alarming because the law had become uncertain, precisely because of this expansion in timing and, there

¹⁵⁴ Art. 162, Recursos de inconstitucionalidad y de amparo, own translation

¹⁵⁵ Gambino S., Miralles J. L. , Puzzo F., Ruiz Ruiz J. J., *Il sistema costituzionale spagnolo*, Padova, 2018

¹⁵⁶ Ley Orgánica 6/2007, de 24 de mayo, por la que se modifica la Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional

¹⁵⁷ Gambino S., Miralles J. L. , Puzzo F., Ruiz Ruiz J. J., *Il sistema costituzionale spagnolo*, Padova, 2018

was a lack of control over the work of the Parliament and control over the legitimacy of the laws. In essence, the Constitutional Court was no longer able to carry out the two functions assigned to it by the Constitution; on the one hand, the loss of effectiveness of unconstitutional laws is not guaranteed; on the other, the function of protecting fundamental rights is not guaranteed. Already in 1988, a first reform was attempted, limiting the *Recurso de Amparo* "for manifest lack of content that justifies a decision on the merits". This has certainly made it possible to streamline the work of the court, but it has not been an operation so incisive as to reorganize the entire system. It was so serious that Parliament had to intervene. An *ad hoc* subcommittee (1995 to 1998) was therefore set up with President Álvaro Rodríguez Bereijo to propose a revision of the text of the law¹⁵⁸.

The reform tried to address four different issues: first of all the issue of the admissibility of the appeal on the basis of its special constitutional importance, and then the question of its substance was also taken into consideration. The other subjects included in the reform were the 'incident of nullity' (Ley Organica Poder Judicial art. 241.1)¹⁵⁹ and the question of constitutionality. Admissibility has a subjective dimension, which corresponds to a verified violation of a fundamental right and an objective dimension, which imposes its application to all public authorities. With regard to constitutional relevance, the recourse in question must necessarily respond to three fundamental criteria, the importance for the interpretation of the constitution, the general effectiveness and the scope of the rights in question. Other elements that will necessarily have to be explained are the facts in particular in detail, the alleged violation and the demand to guarantee the right and freedom offended. In this way, the private interests of the parties concerned are combined with the public interest,

¹⁵⁸ Adamo U., *L'amparo costituzionale in Spagna: passato, presente e futuro del ricorso diretto al giudice costituzionale tra natura soggettiva e oggettiva del controllo*, 2015

¹⁵⁹ Art. 241.1, No se admitirán con carácter general incidentes de nulidad de actuaciones. Sin embargo, excepcionalmente, quienes sean parte legítima o hubieran debido serlo podrán pedir por escrito que se declare la nulidad de actuaciones fundada en cualquier vulneración de un derecho fundamental de los referidos en el artículo 53.2 de la Constitución, siempre que no haya podido denunciarse antes de recaer resolución que ponga fin al proceso y siempre que dicha resolución no sea susceptible de recurso ordinario ni extraordinario.

and the issue of admissibility is completely reversed. If before the appeals were considered admissible independently and therefore taken into consideration in the immediate future, with the reform the appeals are all inadmissible and the opposite must be established. There is a further reversal of roles between the Constitutional Court and the appellant, since it is the latter who, respecting the criteria of the appeal, must demonstrate the constitutional significance of the appeal¹⁶⁰. After the reform, appeals before the court increased until 2009, when it reached about 10,792 appeals according to data. In 2014, they decreased to 7,663, equivalent to 97.27% of all appeals submitted to the Constitutional Court¹⁶¹.

2.3 Access to the Constitutional Justice in Italy

The Italian constitutional architecture is developed in a historical context, even if previous, similar to the Spanish one. Both constitutions are the product of an authoritarian and dictatorial regime to which the two states have responded in a way that is divergent in some respects and convergent in others. With the introduction of the Constitution there was a need to democratize and modernise the Italian legal system by virtue of the new values brought by the Charter. The Italian Constitution of 1948 was oriented by the constituents towards a rigid system characterized by an aggravated revision procedure to guarantee this new document. In addition, there was the idea of establishing a constitutional justice body that would function independently of the judiciary. It was set up to be completely impartial and professional¹⁶². The Constitutional Court was enshrined in Article 134¹⁶³ and it is up to the Court to judge the constitutional legitimacy of the laws, to resolve conflicts of attribution between the powers of the state, state and regions and between regions. According to article 127¹⁶⁴, in fact, "If the Regional Council approves it again by an absolute

¹⁶⁰ Adamo U., *L'amparo costituzionale in Spagna: passato, presente e futuro del ricorso diretto al giudice costituzionale tra natura soggettiva e oggettiva del controllo*, 2015

¹⁶¹ *ibidem*

¹⁶² Rolla G. – Groppi T., *Tra politica e giurisdizione: evoluzione e sviluppo della Giustizia Costituzionale in Italia*, 2000, in <https://revistas.juridicas.unam.mx/index.php/cuestiones-constitucionales/article/view/5582/7249>

¹⁶³ Articolo 134, Titolo VI Garanzie Costituzionali, Sezione I La Corte Costituzionale

¹⁶⁴ Articolo 127, Titolo V Le regioni, le Province, i Comuni

majority of its members, the Government of the Republic may, within fifteen days of the communication, promote the question of legitimacy before the Constitutional Court, or the question of merit for conflict of interests before the Chambers. In case of doubt, the Court shall decide who has jurisdiction". Furthermore, the Court is responsible for judging the crimes of high treason and attack on the Constitution that may be committed by the President of the Republic. What immediately emerges is the absence of functions, among those that the Court can perform, of more political orientation as in electoral matters or the control of political parties¹⁶⁵. Articles 134 and 135¹⁶⁶ of the Constitution concern the constitutional control of laws. This means that the review is carried out during an ongoing trial and refers to a rule that the judge must apply in order to resolve a trial. Unlike the Spanish system, private citizens are not allowed to refer directly to the Constitutional Court, only regions are allowed a direct route to state laws or laws of other regions. Therefore, the ordinary judge plays a fundamental role since it is up to him to choose the rules to bring before the Constitutional Court. What makes the control of constitutionality limited is that it only takes place for laws and acts having the force of law, the provisions of the lower level do not fall within the constitutional jurisdiction. A further peculiarity is that the constitutional judge carries out a counter-examination within the limits of the appeal and therefore carries out a control limited to the case submitted¹⁶⁷. Therefore, it is the task of the ordinary jurisdiction to verify the constitutionality of laws of lower rank which cannot be controlled by the Court. Article 27 of Law No. 87 of 1953¹⁶⁸ provides an exception to this, stating that the Court may establish: "what are the other legislative provisions whose illegitimacy derives as a consequence of the decision taken"¹⁶⁹. In general, the objective of the constituents was to create a *super partes legal*

¹⁶⁵ Rolla G. – Groppi T., Tra politica e giurisdizione: evoluzione e sviluppo della Giustizia Costituzionale in Italia, 2000, in <https://revistas.juridicas.unam.mx/index.php/cuestiones-constitucionales/article/view/5582/7249>

¹⁶⁶ Articolo 135, Titolo VI Garanzie Costituzionali, Sezione I La Corte Costituzionale

¹⁶⁷ Rolla G. – Groppi T., Tra politica e giurisdizione: evoluzione e sviluppo della Giustizia Costituzionale in Italia, 2000, in <https://revistas.juridicas.unam.mx/index.php/cuestiones-constitucionales/article/view/5582/7249>

¹⁶⁸ LEGGE 11 marzo 1953, n. 87. Norme sulla costituzione e sul funzionamento della Corte costituzionale. - (Gazzetta Ufficiale 14 marzo 1953, n. 62) e successive modificazioni

¹⁶⁹ Own translation

entity that would deal with the conformity of laws with the Constitution and thus preserve the Constitution itself. The Italian constitutional system is a hybrid with respect to, for example, the American widespread system with the Judicial Review of Legislation and with respect to the centralised and abstract Austrian model. This peculiarity is also due in part to the fact that the ordinary judges, in addition to being able to raise the doubt of constitutionality, must verify the conformity with the constitution of provisions inferior to the laws and acts having the force of law. In essence, the Italian constitutional system is distinguished by having centralized control, thanks to the presence of an *ad hoc* constitutional court. The fact that all judges can activate the constitutionality scrutiny makes the system with widespread access, in this sense, the possibility to refer the matter to the Court is linked to the existence of a specific dispute pending before a judge¹⁷⁰. There is a control mechanism which is both direct and incidental. Finally, direct access is limited to qualified institutional subjects, such as the State and regions, to the exclusion of other subjects such as parliamentary minorities or the appeal by each citizen for the protection of fundamental rights. As mentioned above, access to justice is a fundamental right guaranteed at international, European and Community level. In this sense, access to justice does not necessarily mean that the claimant can have direct recourse to the Constitutional Court, but still obtain effective protection for his or her rights. It is therefore necessary to remember that every single national constitutional court, including the Italian one, is also a body of the Community legal system and a European constitutional court because it is bound by the European Union and the European Convention on Human Rights. In this context, the Justice of the Peace becomes in a sense a judge of constitutional law, because is considered subject both to national law and to Community law¹⁷¹, as will be underlined later, underlining his role within the great issue of irregular migration.

¹⁷⁰ Rolla G. – Groppi T., Tra politica e giurisdizione: evoluzione e sviluppo della Giustizia Costituzionale in Italia, 2000, in <https://revistas.juridicas.unam.mx/index.php/cuestiones-constitucionales/article/view/5582/7249>

¹⁷¹ Häberle P., La giurisdizione costituzionale nell'attuale fase di sviluppo dello stato costituzionale, in <https://www.cortecostituzionale.it/documenti/filesDoc/HaeberleRom.doc>

First of all, for the purposes of the analysis, a detailed investigation will be carried out into the procedures with which constitutional justice is concretely carried out with reference to the ways in which it is possible for a citizen to seek an indirect intervention of the Constitutional Court. Beyond the civil, criminal or administrative nature of the cases, the judge in question, known as 'a quo', may raise a question of constitutionality if the rule is relevant to solve the main proceeding and if the question is not manifestly unfounded. This must concern, first of all, a rule which is indispensable for the purposes of the case and the judge has the mandatory duty to examine its basis before referring it back to the court. If the doubt is unfounded, the court must reject it on the ground that there is no prejudice to the total unconstitutionality of the rule but must ascertain that there are reasons, albeit minimal, for doubting. Cross-referral is of fundamental importance in trials because it prevents them from continuing on the basis of unfounded and pretentious questions¹⁷². The national court has the duty to seek the appropriate interpretation, that is to say, a new interpretation that is more consistent with the Constitutional Charter and discards the previous one. This makes it possible to avoid the doubt of unconstitutionality, since this interpretation respects the Constitution and clearly avoids the workload of the Court, which clearly does not mean that the question cannot be raised for the same rule in other cases. If, on the other hand, the findings give rise to a reasonable and well-founded doubt as to constitutionality, the trial is suspended by means of an order and the matter is referred to the Court. In such a case, both the rule at issue and the constitutional provisions which are to be regarded as infringed must be specified precisely. In this way, the judge at issue delimits the question of constitutionality to which the Court must in any case adhere in order to decide¹⁷³.

There are several methods in which an Italian citizen but also a foreigner can seek justice, for this analysis it will be mentioned the role of the Justice of the Peace, which is interesting because they have specific expertise on the

¹⁷² Rescigno G. U., Corso di diritto pubblico, Bologna, 2012, pp. 459 - 480

¹⁷³ Ibidem

migration aspect¹⁷⁴. The Justice of the Peace was instituted by Law 374/1991¹⁷⁵ and since May 1, 1995 has taken the place of the Judge Conciliator, who has the widest competence in the civil field and has been able, since 2002, to deal with minor cases also in the criminal field. The Justice of the Peace is an honorary magistrate who has jurisdictional functions for a certain period of time, which corresponds to four years and can be reconfirmed only once. Law 347/1991 establishes the procedure before the Justice of the Peace, the process in question is faster and simpler than those of other judges precisely because the cases taken by the Justice of the Peace are less complex and require less extensive treatment. The cases brought before the Justice of the Peace basically concern goods and furniture of a maximum value of 5000 euros, the circulation of vehicles and boats (up to 20,000 euros), other cases may be condominium or in reference to the introduction of smoke, heat, fumes, noise. Article 316 of the Civil Procedure defines¹⁷⁶ how the request should be formulated, which can also be made verbally and subsequently notified and with compulsory presence at the hearing. The request for recourse to the court must clearly contain both the indication of the court and of the parties, the facts in question and the subject-matter of the dispute. A major difference from other types of recourse to ordinary courts is that the claimant does not have to specify the legal reasons and the measures of inquiry which he has to use. In addition, the parties may form themselves by depositing the documents at the Registry or by bringing them directly to the first hearing. In the trial before the Justice of the Peace, a period of 45 days has to elapse before the party concerned to appear after the day of service of the documents. The parties are represented by lawyers, except in cases not exceeding €1,100 where it is possible to bring an action in person. As far as the preliminary phase is concerned, the Justice of the Peace questions the parties and tries a first conciliation, if the result is positive a report is drawn up which becomes a real enforceable title. If the outcome is negative, the judge

¹⁷⁴ Parlamento Italiano, La competenza del giudice di pace in materia di immigrazione, Temi dell'attività Parlamentare, Sito web: <http://leg16.camera.it/561?appro=55>

¹⁷⁵ LEGGE 21 novembre 1991, n. 374, Istituzione del giudice di pace, GU n.278 del 27-11-1991 - Suppl. Ordinario n. 76

¹⁷⁶ Articolo 316 Codice di procedura civile, Forma della domanda, Capo III - Disposizioni speciali per il procedimento davanti al giudice di pace

requests a further clarification of the facts by producing documents and other evidence. Unlike an ordinary trial, there are no pleadings or replies and according to article 320¹⁷⁷, only one hearing can be requested after the negative outcome of the first. According to Article 311.1: "The proceedings before the Judge of the Peace, for all that is not regulated in this title or in other express provisions, shall be governed by the rules relating to the proceedings before the Court, in monocratic composition, insofar as they are applicable"¹⁷⁸. This means that after the first preliminary investigation, the procedures are carried out in the same way as the ordinary trial. Once the case has been dealt with, the Judge must specify the conclusions and discuss the case, according to Article 321 of the Code of Civil Procedure¹⁷⁹ the sentence must be filed after 15 days from the Judge at the Registry. Finally, it is also possible to reconcile in a non-confrontational manner, in accordance with article 322¹⁸⁰, and it is a preventive procedure, independent of any subsequent judgement. In this case, it is possible to bring a request, even verbal, before the trial in order to have an amicable and amicable settlement of the dispute. The Justice of the Peace has numerous powers in the field of migration, which is enshrined in Articles 13 and 13 bis of the Consolidated Act on Immigration¹⁸¹, which will be discussed in greater detail in the next chapter. The Justice of the Peace is competent to validate the order of the Questor, who orders the accompaniment of the foreigner subject to administrative expulsion ordered by the prefect within 48 hours. The appeal against the expulsion must be brought before the Justice of the Peace of the competent territory within 60 days from the date of the decree¹⁸². The judge is also competent for the validation of the possible detention of the foreigner in

¹⁷⁷ Articolo 320 Codice di procedura civile, Trattazione della causa, Capo III - Disposizioni speciali per il procedimento davanti al giudice di pace

¹⁷⁸ Articolo 311 Codice di procedura civile, Rinvio alle norme relative al procedimento davanti al tribunale, Capo I - Disposizioni comuni (Own Translation)

¹⁷⁹ Articolo 321 Codice di procedura civile, Decisione, Capo III - Disposizioni speciali per il procedimento davanti al giudice di pace

¹⁸⁰ Articolo 322 Codice di procedura civile, Conciliazione in sede non contenziosa, Capo III - Disposizioni speciali per il procedimento davanti al giudice di pace

¹⁸¹ Articolo 13 Testo unico sull'immigrazione, Espulsione amministrativa, D.lgs. 25 luglio 1998 n. 286

¹⁸² Articolo 13 Testo unico sull'immigrazione, Espulsione amministrativa, D.lgs. 25 luglio 1998 n. 286

an identification and expulsion center¹⁸³, which always takes place within 48 hours. In this case it is necessary to proceed to the rescue of the foreigner, ascertain identity and nationality and acquire the documents for the trip and the time limit for staying in the center is a maximum of 30 days with a maximum of extension to a further 30 days to acquire the necessary documentation. It is interesting to note that an appeal for cassation is available against the validation and extension decrees, but does not suspend the execution of the measure. According to the Law 94/2009, the Security Law, it is introduced the possibility of extending, under certain conditions, the period of detention in identification and deportation centers, up to a maximum total of 180 days¹⁸⁴. The Justice of the Peace is also competent for the proceedings relating to the new crime of illegal entry and residence in the territory of the State and a new model of proceedings is introduced before the same Justice of the Peace which provides for the application by the same of the alternative sanction of expulsion in the cases provided for by the law¹⁸⁵. In addition, the Justice of the Peace accepts or rejects the appeal, deciding with a single measure taken, in any case, within twenty days from the date of filing of the appeal¹⁸⁶. The decision of the Judge of the Peace cannot be appealed, but can be challenged by cassation. This was sanctioned by Judgment no. 9897 of 2018, filed on March 5, the Second Criminal Section of the Court of Cassation, according to which: "The

¹⁸³ Articolo 14 Testo unico sull'immigrazione, Esecuzione dell'espulsione, D.lgs. 25 luglio 1998 n. 286

¹⁸⁴ Legge 15 luglio 2009, n. 94 , "Disposizioni in materia di sicurezza pubblica", in particolare: Art. 1 comma 22: "Al citato testo unico di cui al decreto legislativo 25 luglio 1998, n. 286, sono apportate le seguenti modificazioni: Trascorso tale termine, in caso di mancata cooperazione al rimpatrio del cittadino del Paese terzo interessato o di ritardi nell'ottenimento della necessaria documentazione dai Paesi terzi, il questore può chiedere al giudice di pace la proroga del trattenimento per un periodo ulteriore di sessanta giorni. Qualora non sia possibile procedere all'espulsione in quanto, nonostante che sia stato compiuto ogni ragionevole sforzo, persistono le condizioni di cui al periodo precedente, il questore può chiedere al giudice un'ulteriore proroga di sessanta giorni. Il periodo massimo complessivo di trattenimento non può essere superiore a centottanta giorni. Il questore, in ogni caso, può eseguire l'espulsione e il respingimento anche prima della scadenza del termine prorogato, dandone comunicazione senza ritardo al giudice di pace"

¹⁸⁵ Articolo 10 bis Testo unico sull'immigrazione, Ingresso e soggiorno illegale nel territorio dello Stato, D.lgs. 25 luglio 1998, n. 286

¹⁸⁶ Artt. 13 – 13 bis Testo unico sull'immigrazione, Espulsione amministrativa , D.lgs. 25 luglio 1998 n. 286

appeal brought by the defendant against the sentence of the Justice of the Peace sentencing him only to a pecuniary penalty is admissible, even if the part relating to the sentence of compensation for damages in favour of the civil party has not been challenged"¹⁸⁷. According to paragraph 2, "The defendant may appeal by cassation against the sentences of the Justice of the Peace that apply only the pecuniary penalty and against the sentences of acquittal"¹⁸⁸.

The appeal for cassation is that legal mechanism, also called 'syndicate of legitimacy', which allows to appeal the sentences pronounced in the degree of appeal or in single degree in case of errors of law. This is an institution that has as its prerogative the control of the application of the rules of law and the reasons are contained in Article 360 of the Code of Civil Procedure¹⁸⁹. In cassation, judgements can be brought that concern jurisdiction, that show the violation of the rules on competence, the violation or false application of rules of law, or even for nullity of the judgement or of the procedure, for failure to examine a decisive fact. According to Article 360 bis¹⁹⁰, the appeal is not admissible when the measure concerns questions of law in a manner consistent with the case law of the court or when it is manifestly unfounded. However judgment 7155¹⁹¹ states that if the appeal is not admissible it cannot be dismissed as manifestly unfounded¹⁹². The application shall state the contested measure, the parties, the facts and circumstances of the case, the authorisation if this was done separately and the entitlement to legal aid. In addition, the

¹⁸⁷ Corte di Cassazione, sez. II Penale, sentenza n. 9897/18; depositata il 5 marzo 2018

¹⁸⁸ Mola I., A proposito dell'appellabilità delle sentenze di condanna a pena pecuniaria emesse dal giudice di pace, 2018, in: <https://www.filodiritto.com/articoli/2018/04/a-proposito-dellappellabilit-delle-sentenze-di-condanna-a-pena-pecuniaria-emesse-dal-giudice-di-pace.html>

¹⁸⁹ Articolo 360 Codice di procedura civile, Sentenze impugnabili e motivi di ricorso

¹⁹⁰ Articolo 360 bis Codice di procedura civile, Inammissibilità del ricorso

¹⁹¹ Sentenza Cassazione Civile n. 7155 del 21/03/2017, Le Sezioni Unite civili della Corte di Cassazione con la sentenza n. 7155 del 21 marzo 2017, definendo un tema oggetto di contrasti giurisprudenziali, hanno affermato l'inammissibilità del ricorso per cassazione, e non il rigetto per manifesta infondatezza, nell'ipotesi prevista dall'art. 360-bis, n. 1, c.p.c. riconoscendo in questa una norma filtro che consente di giudicare l'inconsistenza del ricorso, pur trattandosi di una "inammissibilità nel merito" compatibile con la garanzia di cui all'art. 111 settimo comma della Costituzione., in <http://momento legislativo.it/>

¹⁹² Mattiello G., Ricorso per cassazione inammissibile se contrario ad orientamento consolidato - Cassazione civile, SS.UU., sentenza 21/03/2017 n° 7155, 2017, in <https://www.altalex.com/>

procedural documents, contracts or agreements and the documents on which the appeal is based must be indicated, as well as the reasons with reference to the founding rules. It must be lodged within 20 days of the last notification to the Registry of the Court of Justice, which shall forward it to the Court of Cassation through the national court. In order to oppose the appeal, within the same period, an appeal may be lodged against the defence, in which the cross-appeal may also be served. If the appeal shows that the enforcement has caused serious damage, to the extent that it is irreparable, the suspension may be requested from the court which delivered the appeal. As regards legal aid in the event of an appeal to the Court of Cassation, the application must be submitted exclusively by the person concerned or by the lawyer to the Council of the Bar of the place where the judge before whom the case is pending has its seat. Applications for legal aid shall be submitted or sent by post to the Chamber of the Court which is competent to rule on the application¹⁹³.

Therefore in all cases, legal aid must be guaranteed and is the mechanism by which the constitutional right of defence comes into being. The ultimate aim is to allow individuals without resources to be legally assisted at the expense of the state¹⁹⁴. This is granted both at the civil and administrative levels and in procedures of voluntary jurisdiction. Admission to the benefit is allowed provisionally and in advance, the only condition being that the matter is not manifestly unfounded. For citizens, a service is offered which disseminates information on how to access legal aid, requirements and obligations. If the application for admission is rejected, it may be brought before the competent court which shall decide on the rejection. The requirements are, first of all, to have an annual income not exceeding € 11,493.82¹⁹⁵. The amount of income needed to apply for legal aid varies every two years and is generally calculated on a family basis and individually if the case in progress concerns the subject in opposition to other family members. Those admitted to Patronage may appoint a Defender chosen from among those registered in the Lists of Lawyers

¹⁹³ Art 126, comma 3, D.P.R. n. 115/2002

¹⁹⁴ Ministero della Giustizia, Scheda pratica - Patrocinio a spese dello Stato nei giudizi civili e amministrativi, 2018, in https://www.giustizia.it/giustizia/it/mg_3_7_2.page

¹⁹⁵ D.M. 16 gennaio 2018 in GU n. 49 del 28 febbraio 2018

for Patronage at State expense, established in the Councils of the Order of the District Court of Appeal in which the magistrate competent to know the merits or the magistrate before whom the trial is pending has its seat¹⁹⁶. Peculiar, in terms of free patronage, is the judgment of the Italian Court of Cassation in case 164/2018¹⁹⁷. The case in question concerned a citizen from Nigeria who applied for permission to stay in Italy by virtue of her child at the Juvenile Court of Naples. The Court in question revoked access to legal assistance for women as they were not legally resident in Italy, but the Court of Cassation ruled that a foreigner to be considered irregular must have obtained a conviction of expulsion and even then cannot be hindered his right of access to justice. The right to protection This guarantee must be protected both in civil proceedings and in matters of non-contentious jurisdiction.

2.4 Judgment no. 1/2014 and the challenge of indirect access to the Constitutional Court

The Constitutional Charter does not have as its prerogative the imposition of a particular electoral system, but at the same time it is in its interest to establish a balanced parliamentary body and to favor a parliamentary majority. According to the Court, Law 270 of 2005 (the so-called "Porcellum Law"¹⁹⁸) implemented a kind of reversal that compresses the representativeness of Parliament by awarding a majority prize without a minimum threshold. This is incompatible with constitutional principles, since both the Charter and the Court have as their prerogative that political representation must be the expression of the people's vote and decisions. The awarding of this prize also runs counter to the founding idea of the proportional system, which guarantees broad representation. What distorts the electoral system even more is the presence of regional prizes in the Senate which lead to a total discrepancy between the

¹⁹⁶ Ministero della Giustizia, Scheda pratica - Patrocinio a spese dello Stato nei giudizi civili e amministrativi, 2018, in https://www.giustizia.it/giustizia/it/mg_3_7_2.page

¹⁹⁷ Case 164/2018, <https://www.meltingpot.org/IMG/pdf/164.pdf>*/

¹⁹⁸ Legge 21 dicembre 2005, n. 270 , " Modifiche alle norme per l'elezione della Camera dei deputati e del Senato della Repubblica ", pubblicata nella Gazzetta Ufficiale n. 303 del 30 dicembre 2005 - Supplemento ordinario n. 213

Chamber and the Senate¹⁹⁹. Another fundamental point of the electoral law concerns the fact that no preference can be expressed but only the list of the party to be voted on. This mechanism, as well as that of the prize, are all part of the electoral matter and therefore only the ordinary legislator has the competence over this type of provision. In this case, the declaration of unconstitutionality affects the provision only in so far as it does not provide for anything, with the consequent addition, by the sentence, of a fragment to the rule being judged. The amended rule, however, maintains an ambiguous relationship with the original electoral law and thus opens up a series of possible scenarios on how it should be reformulated²⁰⁰. One of the most critical aspects concerns the very large size of the constituencies, which therefore contain a large number of candidates, making them difficult for voters to know. The objective and function of the parties is to facilitate the participation of citizens in political life and to indicate the order in which candidates are to be nominated. In essence, parties choose candidates despite the fact that there are primary elections, but not all voters vote for them. The Court held that if voters cannot express their preference, this would be detrimental to the freedom to vote and would violate the political rights that citizens enjoy. Reducing everything to a question of the recognizability of candidates is not enough to fill the void that both the prize and this criticality have raised in terms of the constitutionality of the electoral law²⁰¹. The judgments of 1/2014²⁰² and 238/2014²⁰³, respectively on the electoral law and on the immunity from legal proceedings of States, are new for the role of the Court but are the result of an incremental process of development. These judgments have been considered in the legal framework of "Action for Declaration". Actions for declarations" are those actions in which the assessment has no preliminary value as in all cases but constitutes the very purpose for which the

¹⁹⁹ Guzzetta G., La sentenza n. 1 del 2014 sulla legge elettorale a una prima lettura, 2014

²⁰⁰ Lieto S. – Pasquino P., La Corte Costituzionale e la legge elettorale: la sentenza n.1 del 2014, 2014

²⁰¹ ibidem

²⁰² Sentenza 1/2014 (ECLI:IT:COST:2014:1), Giudizio di legittimità costituzionale in via incidentale, Deposito del 13/01/2014; Pubblicazione in G. U. 15/01/2014 n. 3

²⁰³ Sentenza 238/2014 (ECLI:IT:COST:2014:238),), Giudizio di legittimità costituzionale in via incidentale, Deposito del 22/10/2014; Pubblicazione in G. U. 29/10/2014 n. 45

action is brought. They can only concern rights and not facts, with the sole exception of specific cases, and have a preventive purpose in that they can be exercised even in the face of simple legal uncertainty and therefore irrespective of whether a right has been infringed. In the specific case, legal uncertainty affected the right to vote and, by means of the action for a declaration, of which the objection of unconstitutionality was an integral part, the applicants had as their sole objective to activate the control of the constitutionality of the law²⁰⁴. The fundamental characteristics of the two judgments are the rate of politicization, as relations between the Constitutional Court and the other institutions are intensified and the issue itself is highly political. On the other hand, there is a real restructuring of the cross-referral both in terms of the consequences of the decisions of the judge a quo and in terms of the way in which the court can be accessed. Judgments show a tendency to expand the role of the Court while maintaining the modalities and patterns of cross-referral. As regards the political term, in terms of the role and activities of the Court, it refers first of all from an etymological point of view to the word 'politics', to polis and consequently to the effects of decisions on citizens. Secondly, reference is made to the fact that when there is a dispute between the members within the Court, the so-called subjective judgments provided are of a political nature and not of a technical nature²⁰⁵. According to public law professor Thoma, these are the possible definitions of the political term in this context. With regard to the judgment of 1/2014, the Court is given the power to review the constitutionality of the electoral law to ensure the right to vote for citizens. The control is clearly limited, in fact, the rewriting of the law is up to the elected bodies and not to the Court. If the electoral law under consideration proves to be unconstitutional, the political effects could be significant since, on the one hand, the dissolution of the Chambers could be taken into account or the electoral law could be maintained without taking into account its

²⁰⁴ Lieto S., «Strettoie» del controllo di costituzionalità per via incidentale e adeguamenti del sistema, 2017, in <http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2016/06/lieto.pdf>

²⁰⁵ Lieto S. - Pasquino P., *Metamorfosi della giustizia costituzionale in Italia*, Bologna, 2015

unconstitutionality²⁰⁶. This also emerges because the model of ex post control of constitutional legitimacy has intrinsic limits, since the control which took place after it came into force and it was valid for a period of time. For this reason, the new draft law has inserted an ex ante control for the electoral law. Concerns about the ruling concern the political effects of the control and the new role of the Court as the central body on a matter which is not strictly constitutional²⁰⁷. The judgment of 1/2014, in this sense, presents some discontinuities with respect to the model always carried out by the Court. In fact, the control of the legitimacy of the electoral law clears up the idea that a law of this kind can pass under the judgement of the Court and seems to tend towards more direct access. What some constitutionalists and jurists are saying is that although there is no direct appeal, there is no mention of the fact that there cannot be a body responsible for investigating the matter. Clearly, the Court has some discretion in the assessment of the cases in question, the novelty being that the Court relates to any positive action provided for by the constitutionality review. The method of access to the court remains indirect, but the judgment in question sheds light on the so-called shadow zone composed of all those rules that cannot be subject to the constitutionality check. It is therefore through the action of verification and this particular control of constitutionality that a restructuring of the system of judicial protection can be made possible in prospect²⁰⁸. In conclusion, it can be affirmed that the investigation of the electoral law has certainly opened the door to a more direct appeal to the Constitutional Court. Obviously there is an exceptional case that is hardly going to be extended to other areas, despite this a first sign of openness on the part of the Court has been shown. Assuming that a system of direct redress also applicable to an irregular migrant who is subject to an expulsion order is consolidated, further problems could arise which go beyond the purely legal aspect of the issue. In the following chapters, it will be possible to show how structural problems in the management of irregular migration pose obstacles to access to minimum services, information and

²⁰⁶ Lieto S. - Pasquino P., *Metamorfosi della giustizia costituzionale in Italia*, Bologna, 2015

²⁰⁷ *ibidem*

²⁰⁸ *ibidem*

documents. The mere transmission of the possibility of activating a direct appeal to the Constitutional Court for an irregular migrant could become complex, as well as the communication of much more complex information regarding legal assistance and free legal aid. Therefore, it is possible to affirm that while direct recourse to the Constitutional Court may represent a new step towards access to individual justice, on the other hand, the migration management system should evolve at the same time.

Final Remarks

In the recent constitutional debate, the issue of direct access to the Constitutional Court in Italy, tailored to the Spanish model of the *Recurso de Amparo*, has returned to the fore²⁰⁹. What emerges is the fear of overloading the work of the Constitutional Court which was a phenomenon that also affected Spain and needed to be restructured. Interesting was the text for a constitutional reform approved in 1997 by the Bicameral Constitutional Commission chaired by Massimo D'Alema which established an increase in the functions of the Court. The new powers included the Court's judgement of appeals against public authorities in the field of fundamental rights. In this regard, it is interesting to quote Article 134 of the Constitutional Reform Bill in so far as "The Constitutional Court shall rule on appeals for the protection, with regard to public authorities, of fundamental rights guaranteed by the Constitution, in accordance with the conditions, forms and terms of proposition established by constitutional law"²¹⁰. Although the approach to the Spanish constitutional system seems evident, the Italian prerogative is to entrust to an external legal body the mode of direct access to constitutional justice. It can be deduced from this, that in Italy there does not seem to be an organic system of protection of fundamental rights which is expressed only in the incidental access for the control of constitutionality. The big question mark concerns the real advantages of introducing a mechanism such as the Spanish or German

²⁰⁹ Crivelli E., *La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale*, Roma, 2003, pp. 7- 19

²¹⁰ Commissione bicamerale per le riforme costituzionali, 1997

one into the Italian system²¹¹. First of all, in terms of protection, it should be stressed that despite the differences, both the Spanish and Italian constitutions similarly protect and guarantee the same fundamental rights. Nevertheless, it is not certain that an action such as that of amparo in Italy could really enhance the level of protection of fundamental rights as there is already a system of incidental control of constitutionality operating in this direction. The way the mechanism of incidental constitutional proceeding operates can be expanded through new interpretative choices. In this regard there are three fundamental theses; the first that invests the subject of a more active character in the incidental control. In the second, the judge a quo is central as the only way to protect the concrete interest. The last thesis, the widely supported, concerns the fact that the party is entitled to intervene in the constitutional judgement on the one hand because it suffers the effects of the unconstitutionality of the law in question, and on the other because the interest is considered by the Constitutional Court as an example for other legal situations. According to some constitutional law scholars, the protection of fundamental rights must be sought before the Constitutional Court, in ordinary justice²¹².

Finally, it is interesting to underline an apparently marginal aspect linked to the perception of justice by citizens, in fact, direct access would radically change the relationship between the individual and public authorities. What could be modified is a different use of the judgement of relevance and manifest groundlessness by opening up new scenarios that could include direct recourse. In this sense, it would be intended to introduce a broader intervention of the Court by extending on the one hand the guarantee of fundamental rights in the constitutional process or by always broadening the interpretation of the requirement of relevance by the court. In conclusion, making the role and

²¹¹ Crivelli E., *La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale*, Roma, 2003, pp. 7- 19

²¹² Crivelli E., *La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale*, Roma, 2003, pp. 19-92

powers of the Constitutional Court more flexible and elastic could to some extent increase the guarantees in terms of fundamental rights²¹³.

Access to justice, in the light of what has been emphasized, is a complex and right to enforce and is clearly influenced by the surroundings of the facts in question and by the type of claimant. There are differences in relation to the vulnerability of individuals to whom human rights have been violated and the situations in which they are violated. In the next chapter, the aim is to try to understand how access to justice works for a category considered still difficult to define, the irregular migrant. In this particular case, the definition of the legal status is a very problematic issue since it cannot be considered either an economic migrant nor a real asylum seeker. To add to a critical legal situation, the massive migration phenomenon that after the Arab Spring of 2011 has created new balances and scenarios at the national level and consequently also supra-national. The management of the migration phenomenon is a fundamental part in establishing the *modus operandi* with respect to a category such as that of irregular migrants. In fact, reference will be made to the different approaches of the migration phenomenon and how these can radically change the prospects of irregular migrants in terms of protecting their rights.

²¹³ Crivelli E., *La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale*, Roma, 2003, pp. 141 -179

Chapter III – Access to justice for irregular migrants

3.1 The notion of ‘Undocumented’ or ‘ Irregular’ migrants and their rights at international and European level

Undocumented or Irregular migrants are citizens of a third country who do not have valid access to enter or remain in a state. They are protected by international law, even though their status is illegal under domestic law. Migration from they come, is considered a compelling necessity for the protection of their life and of the rights to *habeas corpus*, rather than a free choice as for economic migrants. By the host countries, irregular migrants are often considered as non-citizens who have illegally entered the country and who must be transferred back to their country of origin immediately²¹⁴.

The term 'irregular migrant' does not only refer to people who have illegally entered a state other than their country of origin. In fact, this category also includes those who are staying longer than they should in the country to which they have migrated and the foreign worker who, despite not being authorized by his immigrant status, continues to work. From a sociological point of view, all these different categories have in common the fact that the authority of the host state denies them permission to stay. This does not mean that the human rights of an irregular migrant can be violated by the host state. In fact, a distinction between human beings, between legal and irregular migrant, between citizen and non-citizen is not traceable in international treaties or in the provisions of human rights instruments. It took decades for European countries to accept that the European Convention on Human Rights really referred to every human being and that this can also be applied to immigration legislation by limiting, in part, the right of states to control the exit and entry of foreigners²¹⁵.

²¹⁴ Council of Europe - Commissioner for Human Rights (CommDH/ Issue Paper) , The human rights of irregular migrants in Europe, Strasbourg, 2007

²¹⁵ Bogusz B. – Cholewinski R. – Cygan A. Szyszczack E., Irregular Migration and Human Rights: Theoretical, European and international perspectives, Boston, 2004

The risks potentially experienced by irregular migrants may occur both during the journey, on arrival on the coasts of the host state, and during the entire remaining period, there are possible detentions in precarious conditions and finally in the expulsion. In all these phases that trace the path of the irregular migrant there is a real risk of incurring human traffickers, of being mistreated once arrived at the coast and crossed the border, of being subjected to deprivation of liberty and all kinds of rights. For these reasons, according to PICUM (*Platform for International Cooperation on Undocumented Migrants*) it is more correct and preferable to refer to this category, with the adjective irregular or undocumented. The risk is that of a complete depersonalization of the human being, the denial of humanity of a person who, despite having illegally crossed the border of a country, remains such²¹⁶. The reasons that lead an irregular migrant to resort to this method are partly linked to the economic and social situations of the country of origin, therefore the phenomenon of globalization has clearly had unequal consequences in the rest of the non-western world, which have brought devastating consequences in every respect. A migrant is considered regular if he resides in a country with a regular residence permit, issued by the competent authority; he is irregular instead if he entered a country avoiding border controls, or if he entered regularly - for example with a tourist visa - but remained in that country even after the expiration of the visa, or even if he did not leave the country of arrival after the order of removal. The contexts in which irregular migration is very practiced are characterized by corrupt governments and policies, states without human rights protection for women and children, internal conflicts, racial discrimination, gender violence, lack of education. This could, in these terms, link the status of irregular migrants to that of refugees seeking political asylum²¹⁷. What, then, is the status of the irregular migrant? The holder of refugee status is issued with a residence permit for political asylum. A person who demonstrates a well-founded fear of being subjected to personal

²¹⁶ Baiocchi L.- Le Voy M., *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, Bruxelles, 2007 - PICUM Platform for International Cooperation on Undocumented Migrants

²¹⁷ Council of Europe - Commissioner for Human Rights (CommDH/ Issue Paper) , *The human rights of irregular migrants in Europe*, Strasbourg, 2007

persecution in his or her own country in accordance with the Geneva Convention is granted refugee status. Article 1 of the Geneva Convention states that a refugee "is a person who, fearing for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of which he is a national and who, because of this fear, cannot or will not avail himself of the protection of that country; or who, not having a nationality and being outside the country in which he had his habitual residence as a result of such events, cannot or will not return there for the fear mentioned above". Acts of persecution include, for example: physical or mental violence, including sexual violence; acts directed against a sexual gender or against children; discriminatory or disproportionate judicial, administrative or police measures; criminal sanctions as a result of refusal to serve in a conflict when this could lead to the commission of war crimes or crimes against humanity. It is not enough, however, for a person to have suffered and to be at risk of suffering such acts of persecution in order to obtain political asylum, it is necessary for such acts to be attributable to reasons of race, religion, nationality, social group, political opinion. Irregular migrants, on the other hand, could be considered as abstract beneficiaries of humanitarian protection. A residence permit for humanitarian reasons is issued when the conditions for political asylum and subsidiary protection are not met. The right to such a permit exists when there are serious reasons, in particular of a humanitarian nature or resulting from constitutional obligations of the Italian State, such as: reasons of health or age, the risk of finding oneself in situations of serious violence or political instability, or in the midst of famine or other environmental disasters²¹⁸. Irregular immigration is a topic that is at the core of the European Union's agenda for its complexity, especially with regard to the need to complete the implementation of the Area of Freedom, Justice and Security. Despite this, the irregular migrant remains an extremely complex figure and official speeches tend to be evasive regarding his or her legal status

²¹⁸ ISMU – Iniziative e studi sulle multiethnicità, Report

rather than trying to emphasize European policies in terms of repression and restrictions²¹⁹.

This inevitably exposes them to greater vulnerability and increases the chances of their rights being violated and mistreated. The human rights of undocumented migrants are enshrined, as has already been mentioned, in most international treaties and conventions precisely because no distinction is made between residence within these documents. The fundamental pillars underlying both the UN Conventions and other agreements are non-discrimination and equality before the law, which means that there are no categorizations and that all human beings are taken into account as such, constituting a common standard on their protection under international law. First of all, the Universal Declaration of Human Rights, which has not been binding since 1968, has become an obligation for all states. The other UN Conventions, together with the Declaration, create a strong and heterogeneous system of protection, which seeks to cover most vulnerable groups. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990, which entered into force in 2003, is an integral part of this framework but has not received the same consensus from most European countries. Those who have not ratified it are mostly countries that host immigrants while most of the states that have signed it are those from which the migrants come or transit countries such as Libya and Turkey, which also act as host states²²⁰.

Beyond this Convention, there are other documents that refer to a heterogeneity between residents and non-residents, among which clearly can be placed irregular migrants, such as the International Covenant on Civil and Political Rights²²¹. It emphasizes its role as guarantor by acting indiscriminately between citizens and foreigners, with the sole exception of Article 25: “Every

²¹⁹ ISMU – Iniziative e studi sulle multiethnicità, Report

²²⁰ Baiocchi L.- Le Voy M., Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework, Bruxelles, 2007

²²¹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

citizen has the right, and must have the opportunity, without any of the discriminations mentioned in Article 2²²² and without unreasonable restrictions: a) to participate in the direction of public affairs, either personally or through freely chosen representatives; b) to vote and be elected in periodic, truthful elections, carried out by universal and equal suffrage, and by secret ballot, which guarantee the free expression of the will of the electorate; c) to have access, under general conditions of equality, to the public employment of their country". The International Covenant on Economic, Social and Cultural Rights²²³ also refers in Article 2(2) to the principle of non-discrimination: "The States Parties to the present Covenant undertake to ensure that the rights set forth therein shall be exercised without discrimination of any kind, whether based on race, colour, sex, language, religion, political opinion or any other opinion, national or social origin, economic status, birth or any other status." Interestingly, with reference to this Pact is the general commentary number 14, paragraph 34, which makes clear reference to the category of irregular migrants: "States have an obligation to respect the right to health, inter alia by refraining from denying or restricting equal access for all persons, including prisoners, minorities, asylum seekers and illegal immigrants, to preventive,

²²² Article 2 - 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

²²³ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27

curative and palliative health services”²²⁴. The International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted in 1965 and entered into force in 1969, is more clearly targeted. It states that "the expression "racial discrimination" means any distinction, restriction or preference based on race, colour, descent or national or ethnic origin, which has the purpose or effect of destroying or impairing the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social and cultural spheres or in any other area of public life"²²⁵. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²²⁶ extends the rights to all human beings and Article 3 states that: "No State Party expels, rejects or extradites a person to another State if there are serious grounds for believing that he or she would be subjected to torture in that State”.

In the light of these international legal instruments, it can be said that, although a category is veiled by a kind of darkness, the category of irregular migrant is a legal category well recognized at international level²²⁷. In the last decade, the focus has shifted dramatically to trafficking in human beings and victims of trafficking, and this has been emphasized by numerous Resolutions and Recommendations from UN bodies and agencies. The Palermo Protocols on transnational organized crime were drawn up in 2000, dealing mainly with the fight against trafficking in human beings, especially women and children, protecting victims and urging states to implement measures regarding their physical, psychological and social recovery and, if necessary, guaranteeing them a stay. The Protocols has the aim to support the United Nations

²²⁴ Baiocchi L.- Le Voy M., *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, Bruxelles, 2007

²²⁵The International Convention on the Elimination of all forms of Racial Discrimination [ICERD], Article 1

²²⁶ Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984

entry into force 26 June 1987, in accordance with article 27 (1)

²²⁷ Baiocchi L.- Le Voy M., *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, Bruxelles, 2007

Convention against transnational organized crime and the protocols thereto²²⁸ and reflect two fundamental issues, in fact the first Protocol was created to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children and the other one, clearly, interests the fight Against Smuggling of Migrants by Land, Sea, and Air²²⁹. These additional documents represented a huge step forward for an issue that is still relevant today and a problem still to be solved.

At European level, the Council of Europe has given considerable prominence to the issue of irregular immigration in terms of the protection of human rights. With Thomas Hammarberg, Commissioner for Human Rights, the first references are made to the exposure to risks and vulnerability of this category. "Migrants are particularly at risk of poverty and marginalisation. Irregular migrants are doubly excluded. Undocumented migrants are easy victims of the black market and will be deprived of labour-related social rights. An alarming consequence is that there are now situations in Europe where migrants are exploited in forced labour. Access to minimum rights for migrants is limited by fear of complaints. An irregular situation aggravates exclusion and the risk of exploitation"²³⁰. From this quotation it is possible to understand how much the issue is felt and how much there is a need for a European regulation regarding the minimum standards of both treatment and guaranteed rights. Resolution 1509 of the Parliamentary Assembly of the Council of Europe on the human rights of irregular migrants²³¹ reaffirms, as in the above mentioned conventions, that rights must be applied equally to all human beings, including irregular migrants. The European Commission against racism and intolerance has, in this framework, a proactive role in challenging phenomena of xenophobia, extremism, discrimination. Another fundamental point is, as for

²²⁸ Adopted by the UN General Assembly: 15 November 2000, by resolution 55/25, Entry into force: 29 September 2003, in accordance with article 38

²²⁹https://www.unodc.org/documents/middleeastandnorthafrica/organisedcrime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THEREO.pdf

²³⁰ Council of Europe Conference on Social Cohesion in a Multicultural Europe, 2006

²³¹ Author(s): Parliamentary Assembly; Origin - Assembly debate on 27 June 2006 (18th Sitting) (see Doc. 10924, report of the Committee on Migration, Refugees and Population, rapporteur: Mr van Thijn). Text adopted by the Assembly on 27 June 2006 (18th Sitting).

the United Nations, also the issue of trafficking in human beings is central to the discussion within the European states. In 2005, the Council of Europe Convention on Action against Trafficking in Human Beings²³² was signed, which entered into force in 2008 and aims to prevent trafficking in human beings, sexual exploitation and forced labor. To do so, it seeks to promote cooperation between member states and the entire international community through the instruments listed above²³³.

The Charter of Fundamental Rights of the European Union has universal character, which is visible when the articles contain a clear reference to all human beings without any particular discrimination. This is consistent with the spirit of both the European Convention and the United Nations agreements, not to be interpreted as a kind of convergence, of common standards but as a universalistic approach typical of documents like the above²³⁴. Some important directives of the Council of the European Union refer to this issue by addressing it from various points of view, first of all in continuity with equality, Directive 2000/43 emphasizes the principle of non-discrimination without distinction from race and ethnic origin. In 2004, the Council implemented a Directive on trafficking in human beings by introducing a residence permit for the victims of this phenomenon, which can also be extended to those who have been the subject of an action to facilitate illegal immigration. Another important innovation is the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. This directive makes clear references to the fundamental rights and freedoms guaranteed to irregular migrants, and establishes: "a rule according to which illegal residence must be brought to an end through a fair and transparent procedure (...) Address the situation of persons who are staying

²³² Warsaw, 16/05/2005

²³³ Baiocchi L.- Le Voy M., *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, Bruxelles, 2007

²³⁴ *ibidem*

illegally but who cannot (yet) be removed (...) by providing for a minimum set of procedural guarantees"²³⁵.

3.2 The impact of the European Union policies on the human rights of irregular migrants

The concept of non-discrimination as the backbone of these treaties is fundamental to understanding what rights an irregular migrant can enjoy. However, the recognition of these rights is not sufficient for them to be applied and to guarantee their full protection. There are other factors that determine a greater or lesser attention to the fundamental rights and freedoms enjoyed by migrants. For the analysis of this thesis, the European Union's policies on irregular migration will be taken into account and how these at the supranational level impact on the protection of the rights of irregular migrants.

The approach used by the European Union with regard to the phenomenon of irregular migration has always been oriented towards state security and border control. In 1999, with the meeting of the European Council in Tampere, the desire was announced to create an area of freedom, security and justice that would reassure the citizens of the Union from all the dramatic situations linked to the migratory crises. According to the European Council, it is necessary to draw up common policies on asylum and immigration, especially irregular immigration, through new projects aimed at greater border control and the containment of trafficking in human beings. The method found by the Council was to first identify the origin of the problem and act directly on criminal and illegal organizations that promote this phenomenon, with the help of Europol and the states themselves²³⁶. At the same time, it has always been a prerogative of the European Union, but also an integral part of the European constitutional traditions of the states, the promotion and protection of human rights and fundamental freedoms not only to citizens of member states but also to third countries. In this sense, the European Council expressed itself in favor of

²³⁵ Baiocchi L.- Le Voy M., *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, Bruxelles, 2007

²³⁶ <http://www.europarl.europa.eu/factsheets/it/sheet/150/uno-spazio-di-liberta-sicurezza-giustizia-aspetti-general>

extending access to justice to all human beings without any distinction of origin. However, given the complexity and opacity of the phenomenon, awareness-raising and awareness-raising campaigns on legal immigration and the negative and harmful consequences of the path to illegality are necessary and useful. The Council, in these terms, spoke of common policies on the issue of visas, since they are often falsified and their real origins are difficult to identify, as is inevitable greater cooperation between member states to prevent any form of exploitation of immigration²³⁷. Although the Tampere Conference seems to have brought to light aspects concerning the human rights of irregular migrants, according to some academics and scholars this aspect remains absent and poorly developed in the official documents of the European Union. This supports the initial idea that a more security-related approach places everything related to fundamental rights and freedoms at a lower level.

There are examples of how the concept of 'rights of irregular migrants' in EU discourse has gone hand in hand with the policies mentioned above. In fact, in 2000, the Commission of Ministers, in a recommendation, wished to highlight the issue of fundamental rights, including access to justice for irregular migrants: "The right to satisfaction of material human rights needs should be applicable, to any person in a situation of extreme difficulty, being able to invoke it directly before the authorities and, if necessary, before the courts"²³⁸. This was in the aftermath of the Tampere Council, which, as mentioned earlier, did not bring about any significant development in this area. In two conferences, one in Athens and one in Helsinki, in 2001 and 2002 respectively, a declaration was drawn up which contained a slight reference to irregular migrants in terms of dignity, social inclusion, the possibility of enjoying fundamental rights and access to a minimum standard of these rights. Also in 2002, both the European Commission on Migration, the Parliamentary Assembly and the Commission of Ministers created a number of analyses on the subject, taking into account different aspects of this phenomenon, including

²³⁷ Carrera S. – Parkin J., Protecting and delivering fundamental rights of irregular migrants at local and regional levels in the European Union, European Union, 2011

²³⁸ Recommendation No. R (2000) 3

the complex situation in the countries of Southern Europe. In 2003, the Secretariat of the Directorate General for Social Cohesion took an interest in the issue by diversifying the types of irregular migrants and emphasizing the role of international organizations and treaties in allowing them access to the fundamental rights and freedoms that every human being enjoys. The secretariat committed itself by writing a report for the European Commission on migration which became a real study on the obstacles to the basic needs of irregular migrants and their rights during all their movements, from the country of origin to the country of arrival. Although these examples use a more rights-oriented language, European policies have failed to integrate a rights-based approach into their security-based strategy²³⁹.

The 2004 Hague Programme continues with the aim of strengthening the Area of Security, Freedom and Justice, and the European Council here sets out ten priorities that should be the cornerstones of all European efforts up to 2010. The central themes of the Hague Conference were, first and foremost, European citizenship in terms of free movement, voting in the European Parliament and the role of Member States in local elections. Secondly, the other major strand that has been addressed is that of fundamental rights, especially in relation to children, violence against women and has been devoted part of the discussions to two major issues affecting the Union, xenophobia and racism. In 2007, in fact, the Observatory on Racism and Xenophobia was reconstituted into a new body, the European Agency for Fundamental Rights²⁴⁰. Other points of the programme are represented by the fight against terrorism, organized crime, political asylum and immigration²⁴¹.

²³⁹ Cholewinski R., Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights, Strasbourg, 2005

²⁴⁰ FRA is the successor organisation to the former European Monitoring Centre on Racism and Xenophobia (EUMC), but was awarded a far broader mandate to provide evidence-based advice on a wide range of fundamental rights, in line with the EU Charter of Fundamental Rights. The EUMC, which was established in Vienna as an independent body of the European Union in 1997, took up its activities in 1998 and ended them on 28 February 2007. (<https://fra.europa.eu/en/about-fra/who-we-are>)

²⁴¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l16002&from=IT>

There has been continued discussion about security and border control, in fact, was born the agency Frontex (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union²⁴²) which had the purpose of coordinating the control of borders and coasts and monitor everything that could be useful to member states. The direction remained to combat illegal immigration and trafficking in human beings through these preventive activities, the creation of *ad hoc* funds such as the External Borders Fund²⁴³, the Return Fund²⁴⁴, the Integration Fund²⁴⁵ and the European Refugee Fund²⁴⁶. All these projects were part of a broad programme called Solidarity and Management of Migration Flows, which has been running since 2007 and will end in 2013²⁴⁷. Interesting, in terms of access to justice, is precisely the attention that the Hague Programme gives to this theme. One of the objectives is in fact to ensure an effective area of both civil and criminal justice, strengthening the right to defence through a stronger relationship between member states with regard to legal matters²⁴⁸. In 2008, in line with the Hague Programme, the European Pact on Immigration and Asylum²⁴⁹ was enshrined. No progress has been made in terms of irregular immigration and access to justice for irregular migrants and their potential rights. However, two new funds were created the Asylum, Migration and

²⁴² COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004

²⁴³ National actions: the Fund is mainly implemented by EU countries through shared management. Each EU State implements the Fund through national annual programmes on the basis of multiannual programming. Community Actions: at the Commission's initiative, up to 6% of the EBF's available resources may be used to finance transnational actions or actions of interest to the EU as a whole. In addition, a maximum of EUR 10 million a year may be used for Specific Actions, which address weaknesses at strategic points at the external borders. (https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders_en)

²⁴⁴ The European Return Fund, in which all EU countries participate except for Denmark, allocates EUR 676 million for the period 2008–13 (https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders_en)

²⁴⁵ With a budget of EUR 825 million for the period 2007-13 (EUR 57 million for Community actions) (https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders_en)

²⁴⁶ The ERF (EUR 630 million over the period 2008-13) supports EU countries' efforts in receiving refugees and displaced persons and in guaranteeing access to consistent, fair and effective asylum procedures. (https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders_en)

²⁴⁷ <https://eur-lex.europa.eu/legal-content/MT/TXT/?uri=LEGISSUM:l14509>

²⁴⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l16002&from=IT>

²⁴⁹ Council of the European Union, "European Pact on Immigration and Asylum", No 13440/08, ASIM 72, Brussels, 24.09.2008

Integration Fund²⁵⁰ and the Internal Security Fund²⁵¹, both aimed at strengthening the European asylum structure, combating organised crime, and preventing and contesting illegal immigration. The focus of the Pact is mainly on asylum and legal migration. The themes of inclusion and participation are the pillars of the Pact, with the aim of creating a Common European Asylum System that harmonises as much as possible the practices of the member states and creates additional standards and parameters to be respected. The Stockholm Programme, running from 2010 to 2014, aimed to consolidate the Area of Freedom, Security and Justice from the point of view of rights, justice, security and solidarity. From the point of view of the protection of fundamental rights, the programme purposes to act as a guarantor for EU citizens and for the ‘legally residing’ in line with the rights enshrined in the European Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms. This is implemented through judicial cooperation between member states with new instruments, such as e-Justice. It is possible to highlight how much this first objective of the programme is deeply linked to European Citizenship and is not extended to all human beings, despite the universalistic spirit of both the Charter and the Convention. As far as irregular immigration is concerned, the reference in these terms is to trafficking in human beings and how the Union can be a protagonist in the fight against illegality through an internal security strategy. In this respect, the European Union's objective of controlling its external borders remains central and must be strengthened and fully operational²⁵².

However, with the Lisbon Treaty which came into force in 2009, the protection of the human being becomes a central prerogative of the European Union, with particular attention to the Charter of Fundamental Rights which assumes a

²⁵⁰ The Asylum, Migration and Integration Fund (AMIF) was set up for the period 2014-20, with a total of EUR 3.137 billion for the seven years (https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders_en)

²⁵¹ The Internal Security Fund (ISF) was set up for the period 2014-20, with a total of EUR 3.8 billion for the seven years. (https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders_en)

²⁵² Carrera S. – Parkin J., Protecting and delivering fundamental rights of irregular migrants at local and regional levels in the European Union, European Union, 2011

legally binding relevance, in the same way that the European Union has been urged to ratify the European Convention on Human Rights. In a Communication of 2009: “An area of Freedom, Security and Justice serving the citizen: Wider freedom on a safer environment” , the Directorates General for the Home Affairs distinguished between legally and illegally residing in the European Union by treating the latter as a challenge for the entire community. On the other side, the DG Employment, social affairs and equal opportunity considered the irregular migrants as vulnerable category in the framework of illegal employment, which leads to consequent imbalances in terms of health, poverty, education. For this reason, this Directorates General had the purpose to establish a fund for the precarious living conditions of irregular migrants in order to sustain them from a social point of view. The Platform PICUM participated to this action in terms of financial resources and creating a partnership among local authorities for awareness raising initiatives ²⁵³. This places in limbo the figure of the irregular migrant who, on the one hand, lives the fight against irregular immigration, the climate of tension and invasion at the social level and on the other hand should be protected, in line with the Lisbon Treaty and the Stockholm Programme. There are two problems in this sense, the first is certainly the lack of awareness on the part of the irregular migrant of its possibilities from a legal point of view, while the second is the unapproach of the irregular migrant to public life and legality in the broad sense. In fact, the irregular migrant, as has already been mentioned, is undocumented or his documents have expired and has not obtained the necessary requirements for renewal, which exponentially increases his degree of insecurity and his exposure to possible violations of human rights. Given the scale of the phenomenon, the absolute lack of reference to the issue in the main European Union programmes on immigration creates a real legal vacuum. Irregular migrants are in fact treated as non-legal entities and therefore cannot enjoy any rights, which is considered highly penalised. As mentioned in the first part of the chapter, thanks to the work of scholars and academics on the

²⁵³ Merlino M., Parkin J., Irregular migration in Europe: EU policies and the fundamental rights gap, Bruxelles, 2011

subject, the Treaties, Conventions and EU Resolutions, on the other hand, show the involvement of this category within the great framework of protection of human rights. Their irregularity should not preclude their protection or the possibility of appeal by effective means²⁵⁴.

However, even in the Stockholm Programme the only reference to the category of irregular migrants is that of unaccompanied minors, the lack of documents is still considered a menace to the public life so there are no further developments in these terms and there is no common strategy at any level, neither micro nor macro. The issue of local and regional authorities and their role in the issue is further neglected, as urban centres are in fact the main actors involved in the management of the phenomenon from all points of view. It is the cities, large and small, that fully experience the tensions, instability and imbalances created by migration, with particular reference to irregular migration. In 2010, a conference on this subject was held with the participation of various stakeholders, such as the Centre for European Policy Studies (CEPS)²⁵⁵, the European Trade Union Confederation (ETUC)²⁵⁶, the Platform for International Cooperation on Undocumented Migrants (PICUM) and EUROCITIES²⁵⁷. The conference focused on: "Undocumented Migrants and the Stockholm Programme: Ensuring Access to Rights", the focus of the conference was on the need to highlight one of the most difficult aspects to understand, access to justice and legal support available to this category. Some cities, such as Ghent in Belgium, have launched local policies to support migrants in improving access to their fundamental rights and freedoms, through awareness-raising and information campaigns. One of the great stumbling blocks is the failure to communicate the possibilities of an irregular

²⁵⁴ Carrera S. – Parkin J., Protecting and delivering fundamental rights of irregular migrants at local and regional levels in the European Union, European Union, 2011

²⁵⁵ Founded in Brussels in 1983, CEPS is a leading think tank and forum for debate on EU affairs, with an exceptionally strong in-house research capacity and an extensive network of partner institutes throughout the world. (<https://www.ceps.eu/content/about-ceps>)

²⁵⁶ The European Trade Union Confederation (ETUC) speaks with a single voice on behalf of European workers to have a stronger say in EU decision-making. (<https://www.etuc.org/en>)

²⁵⁷ EUROCITIES is the network of major European cities. Our members are the elected local and municipal governments of major European cities. EUROCITIES was founded in 1986 by the mayors of six large cities: Barcelona, Birmingham, Frankfurt, Lyon, Milan and Rotterdam.

migrant, which could even become regular. Other key issues were access to health care, education and housing as minimum access²⁵⁸.

There are several examples of Local and Regional authorities which have guaranteed the protection of certain rights after the Stockholm Programme, in particular the attention was focused on the field of education. It is possible to stress the model of some cities in Italy and in Germany which enlarges the system of education to undocumented children, avoiding distinction based on residence. The case of Tuscany region is significant to stress the importance of the issue at a local level, in fact through the passing of a regional health law was implemented the ‘Community health partnership for the north-west zone of Florence’ in order to extend the access to healthcare for undocumented migrants and other kind of support. In Netherlands was activated a project “Learning without papers” by a national cooperative, centered on undocumented children and their support from a financial point of view. At least, Spain provides assistance both for health and education for irregular migrants, treated as the category of regular migrants²⁵⁹. Health and education, given the attention also at European level for undocumented children, are the focal point of all projects related to irregular migration. For the purposes of the analysis, it is interesting to understand how local authorities have approached the legal aspect, access to justice, which is more thorny and less addressed. Given the vulnerability of the legal status of irregular migrants, the guarantee of the right to justice is complex, but there are examples and virtuous models of cities that have been able to provide such support. The Belgian city of Ghent, which belongs to the Eurocities mentioned above, has established a system of free legal assistance to undocumented migrants with the support of the Information Point Migration created and financed by Ghent's resources. Also in Germany, a similar service is offered thanks to the support of the trade union organization

²⁵⁸ Carrera S. – Merlino M., *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, Bruxelles, 2010

²⁵⁹ Carrera S. – Parkin J., *Protecting and delivering rights of irregular migrants at local and regional levels in the European Union*, Bruxelles, 2011

'Ver.di' (German United Services Trade Union)²⁶⁰, this practice has been emphasized by an analysis of the Fundamental Rights Agency that works hand in hand with local and regional authorities in managing the migration phenomenon from the point of view of access to justice. Spain too, thanks to the presence of a proactive civil society organisation, Fedelatina²⁶¹ deals with legal assistance, especially for issues related to labour law. It is possible to highlight the synergy and the close contact that there is between the role of the cities of the European Union and the protection of human rights, there are in fact from 1998 to 2010 seven conferences on this subject and from the first meeting in Barcelona to the last in Tuzla in Bosnia Herzegovina²⁶², the attention to the human rights of undocumented migrants has become increasingly pronounced. The European Charter for the Protection of Human Rights in Cities was created, which is clearly not a binding charter for states, but since its approval in 2000 in Saint Denis where 70 cities were signed, in 2010 it has been ratified by 350 cities. Within the charter, the reference to irregular migrants is clear as well as the purpose pursued by cities in this sense whose prerogative is to extend human rights to all regular and irregular residents within the city²⁶³.

In 2014, the European Commission sent a communication to the European Parliament, the Council, the European Economic and Social Committee and the Commission of the Regions on the migration phenomenon called: "An open and secure Europe: making it happen"²⁶⁴. The reference to irregular migration is always made in the form of a challenge by the European Union, it refers to

²⁶⁰ The name Ver.Di stands for Vereinte Dienstleistungsgewerkschaft – United Services Trade Union. Our members are employees, freelancers, civil servants and students drawn from over 1,000 different occupations. People from all walks of life come together in ver.di, all of them working in services or related industries – in the fields of education, art and culture and the media. Our goal is to achieve solidarity and justice in working life. We want people's efforts to be properly recognised and valued. (<https://www.verdi.de/ueber-uns/verdi-international>)

²⁶¹ Fedelatina provides services, assistance and coordination to immigrants, returnees and the associations that represent them. To be a reference center for all Latin American immigrants, promoting community relations through the institutional support we provide to the various entities. (<http://fedelatina.org/>)

²⁶² <https://humanrightscities.net/human-rights-cities/>

²⁶³ Carrera S. – Parkin J., Protecting and delivering rights of irregular migrants at local and regional levels in the European Union, Bruxelles, 2011

²⁶⁴ COM(2014) 154 final

trafficking in human beings and the EU strategies with which to combat it. Prevention is the term that in the document is most associated with the major issue of irregular migration, to allow for greater prevention the attention of the Union is directed to third countries of origin, transit and return. Another communication is also made by the Commission in 2015, on the so-called European Agenda on Migration²⁶⁵. The approach remains that of the Stockholm Programme and the other initiatives mentioned above, the great novelty is represented by the strategy of the Hotspots. This strategy is characterized by the participation of three different agencies Easo²⁶⁶, Frontex and Europol that will work in the border countries in order to obtain more information about migrants arriving. This supports the fight against irregular and illegal immigration through human trafficking. President Juncker argued that: “A robust fight against irregular migration, traffickers and smugglers, and securing Europe's external borders must be paired with a strong common asylum policy as well as a new European policy on legal migration”²⁶⁷. The main action with regard to irregular migrants has mainly concerned the return and therefore the repatriation of irregular migrants, which has caused numerous problems in terms of exposure to human rights violations. One of the most complex situations is the reallocation of migrants, which remains an open and rather problematic issue to manage.

However, the case of the Hotspot approach is unique with respect to this issue since it affects several aspects of the fundamental rights and freedoms of human beings across the board, as can be seen from what has been said about the functioning of this strategy. For the purpose of the analysis, two border

²⁶⁵ COM(2015) 240 final

²⁶⁶ EASO is an agency of the European Union set up by Regulation (EU) 439/2010 of the European Parliament and of the Council. The agency: acts as a centre of expertise on asylum; contributes to the development of the Common European Asylum System by facilitating, coordinating and strengthening practical cooperation among Member States on the many aspects of asylum; helps Member States fulfill their European and international obligations to give protection to people in need; provides practical and technical support to Member States and the European Commission; provides operational support to Member States with specific needs and to Member States whose asylum and reception systems are under particular pressure; provides evidence-based input for EU policymaking and legislation in all areas having a direct or indirect impact on asylum. (<https://www.easo.europa.eu/about-us>)

²⁶⁷ COM(2015) 240 final

countries in particular, Italy and Spain (in particular the enclave of Melilla in Morocco) will be taken into account and an analysis will be made of how access to justice for undocumented migrants in these particular circumstances is guaranteed.

3.3 Access to justice for irregular migrants in Italy in cases of detention and expulsion

In Italy, the category of irregular migrants includes non-European citizens who enter by circumventing border controls, who do not have an entry visa or who do not have a residence permit. All foreigners who, despite having entered legally, are staying longer than the time required without renewing all the necessary documentation, are also considered irregular. If these types of people do not present a request for asylum, nor a request for humanitarian protection can trigger the hypothesis of crime of illegal immigration (*in Italian: Reato di Clandestinità*²⁶⁸). The 2016 reform of the criminal sanction system was to include the abolition of illegal immigration, enshrined in Article 10a of the 2009 Security Package. The article in question was to be amended by virtue of the aforementioned reform, highlighting the sanctions linked to violations by irregular migrants of administrative measures affecting them²⁶⁹. In the report, with respect to the above mentioned legislative decree, it was "The political reasons underlying the choice not to implement the decriminalization directives must be sought in the particularly sensitive nature of the interests involved in the case in question: for these matters, in the absence of a more extensive systematic intervention, the criminal repressive instrument appears, in fact, indispensable for the settlement of the conflict triggered by the commission of the offence"²⁷⁰. The action of the Government was dictated mainly by the fear

²⁶⁸ Art. 10 bis, Legge n.94/2009, (Ingresso e soggiorno illegale nel territorio dello Stato). - 1. Salvo che il fatto costituisca piu' grave reato, lo straniero che fa ingresso ovvero si trattiene nel territorio dello Stato, in violazione delle disposizioni del presente testo unico nonche' di quelle di cui all'articolo 1 della legge 28 maggio 2007, n. 68, e' punito con l'ammenda da 5.000 a 10.000 euro. Al reato di cui al presente comma non si applica l'articolo 162 del codice penale.

²⁶⁹ Ruggiero C., La depenalizzazione del reato di immigrazione clandestina: un'occasione mancata per il sistema italiano, *Diritto Penale Contemporaneo*, 2017

²⁷⁰ Relazione ministeriale di accompagnamento al d.lgs. n. 8/2016, p. 5., own translation

of encountering the disadvantage of public opinion, with dangerous repercussions in terms of loss of electoral consensus²⁷¹.

On him or her, special procedures will be initiated regarding expulsion, rejection and detention and this will expose the subject, being a category as has already been said particularly vulnerable, to a possible violation of his or her fundamental rights²⁷². If this happens, how can the person concerned defend his or her position? How does the Italian system guarantee and preserve its dignity and rights? The administrative measures of expulsion of non-European citizens falls within the competence of the Prefect by virtue of Article 18 (D. Lgs. 150/2011) within "Disputes regulated by the summary rite of knowledge"²⁷³. According to this article, the Justice of the Peace has the authority to decide and must be located in the same place where the order of expulsion by the Prefect was issued and this cannot be modified on the basis of the residence of the foreigner, nor is it located in a Centre of Permanent Repatriation in another place. By Law 46/2017, the so-called Minniti Law, specific sections on migration, international protection and free movement within ordinary courts were established. Nevertheless, the matter concerning expulsions remains in the hands of the Justice of the Peace²⁷⁴. The only exception is the situation in which the person concerned has a case of family reunification pending or has a residence permit in respect of a foreign minor who is not accompanied. In these particular circumstances, it is the ordinary court that has the authority on appeals²⁷⁵.

²⁷¹ Ruggiero C., La depenalizzazione del reato di immigrazione clandestina: un'occasione mancata per il sistema italiano, *Diritto Penale Contemporaneo*, 2017

²⁷² Paleologo Vassallo P., Note sintetiche sulla situazione del cittadino straniero privo di permesso di soggiorno in Italia, *Progetto Melting Pot Europa*, 2017

²⁷³ Art. 18 comma 2, Delle controversie in materia di espulsione dei cittadini di Stati che non sono membri dell'Unione europea: E' competente il giudice di pace del luogo in cui ha sede l'autorità che ha disposto l'espulsione

²⁷⁴ Art. 1, Istituzione delle sezioni specializzate in materia di immigrazione, protezione internazionale e libera circolazione dei cittadini dell'Unione europea. Comma 1: Sono istituite, presso i tribunali ordinari del luogo nel quale hanno sede le Corti d'appello, sezioni specializzate in materia di immigrazione, protezione internazionale e libera circolazione dei cittadini dell'Unione europea.

²⁷⁵ Savio G., La tutela giurisdizionale avverso i provvedimenti amministrativi di allontanamento, *Asgi*, 2017

The appeal must be notified within 30 days of the decision, if the claimant is abroad there is an extension of a further 30 days. This remains incomplete and complex to establish because if the person resides illegally in Italy it is very likely that he has a foreign residence and therefore this distinction would seem to be in fact in vain and in most cases it is used the deadline of 60 days. The claimant can draw up the appeal himself but must have the assistance of a defence lawyer after filing it. If he or she does not have one, thanks to article 18 paragraph 4 of Legislative Decree 150/2011²⁷⁶, he or she is assigned by the Justice of the Peace a public defender. This clearly serves to ensure the participation of the plaintiff in an official manner in the judgment, but the self-processing of the appeal is a major critical issue for the issue. It would be optimal for the defender to be established from the outset so that the plaintiff can be followed at all stages of the procedure. The plaintiff is entitled to legal aid on specific request, without having to make any distinction between the income of the foreigner.²⁷⁷ Also according to same Legislative Decree (150/2011), twenty days after the appeal has been filed, the judge should issue a judgment. Being a time limit established in an indicative way, it may take months before the Justice of the Peace expresses and blocks the expulsion decree and as a result the plaintiff can legitimately be removed from Italy. This shows that a system that works in such an anomalous way cannot guarantee effective protection to the plaintiff. Article 5²⁷⁸ in this sense states that: "In the event of imminent danger of serious and irreparable damage, suspension may be ordered by decree delivered outside the hearing. The suspension becomes

²⁷⁶ Art. 18 comma 4, Il ricorrente e' ammesso al gratuito patrocinio a spese dello Stato, e, qualora sia sprovvisto di un difensore, e' assistito da un difensore designato dal giudice nell'ambito dei soggetti iscritti nella tabella di cui all'articolo 29 delle norme di attuazione, di coordinamento e transitorie del codice di procedura penale, di cui al decreto legislativo 28 luglio 1989, n. 271, nonche', ove necessario, da un interprete.

²⁷⁷ Savio G., La tutela giurisdizionale avverso i provvedimenti amministrativi di allontanamento, Asgi, 2017

²⁷⁸ Legislative Decree 150/2011

ineffective if it is not confirmed, within the first subsequent hearing, with the order referred to in paragraph 1 (art. 10, co. 1, T.U)²⁷⁹.

Rejection at the border means the act by which the border police rejects foreigners who enter Italy illegally, without meeting the necessary conditions for entry expressed in the Consolidated Act on Immigration²⁸⁰. The fact in itself occurs immediately in terms of time and place, since everything happens near the border. This is the first significant difference between expulsion and rejection procedures. The first happens when the person concerned is already illegally in Italy while the rejection occurs as soon as the border is crossed illegally and without the necessary requirements. The latter may be the lack of possession of a valid passport or equivalent document, the lack of an entry visa, the lack of possession of documentation for the stay, the lack of presence in the Schengen Information System. Other conditions are to be considered a threat to public order and state security, to be subject to expulsion measures and finally to be subject to a ban on return after expulsion, which can only be lifted by the Ministry of Interior²⁸¹. The rejection at the border of the subject does not imply that he can no longer legally enter the Italian State, so it is not a precedent but must be presented again with all the required requirements²⁸².

If a foreigner enters the territory of the Italian State and is stopped either at the entrance or immediately after circumventing the border control system, it is an example of rejection because the timing of the interception of the presence of the foreigner between the arrival at the border and entry are different. In fact, in this case, the foreigner has temporarily entered the national territory for necessity of rescue, as in the cases of landings on the Italian coasts. However, not having knowledge of the cause with regard to the timing in which this happens, the border between expulsion and rejection is very blurred. This leads

²⁷⁹ Art.10 comma 1, La polizia di frontiera respinge gli stranieri che si presentano ai valichi di frontiera senza avere i requisiti richiesti dal presente testo unico per l'ingresso nel territorio dello Stato.

²⁸⁰ Decreto Legislativo 25 luglio 1998, n. 286 : "Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero"

²⁸¹ Art. 4 T.U., commi 1, 3, 6 and Artt. 5 e 13 Codice frontiere Schengen

²⁸² Savio G., La tutela giurisdizionale avverso i provvedimenti amministrativi di allontanamento, Asgi, 2017

to greater discretion on the part of the national authorities, which may decide whether to order the procedure of expulsion or rejection²⁸³.

Rejection is regulated by Article 10 of the Consolidated Act on Immigration²⁸⁴ and is considered to be the final act of a long procedure which suffers from certain legislative shortcomings. First of all, the legislation on the recognition of the necessary requirements for entry into the territory of the State is not clear as well as the general principles regarding the administrative procedure or other regulations in this regard. Given this bureaucratic and administrative vacuum, the irregular migrant is held in the HotSpots, which were mentioned earlier, and the detection photo dactyloscopic and signage. These coercive measures, of course, must be in line with the Italian Constitution in the first place and with the ECHR (respectively Articles 13 and 5)²⁸⁵. Both articles prohibit the deprivation of personal liberty without a reason given by a judicial authority and is admitted only in cases of extraordinary urgency but with special procedures for communicating information to the person concerned. Furthermore, Article 5 makes a particular reference to the rights of the person concerned by the detention procedure, arguing that: "Any person deprived of his liberty by arrest or detention shall have the right to appeal to a court of law to decide within a short period of time on the lawfulness of his detention and to order his release if the detention is unlawful. And again: "Any person who has been arrested or detained in violation of any of the provisions of this article has the right to reparation. As regards the category of unaccompanied minors, according to Article 19 of the Consolidated Act²⁸⁶, they cannot be expelled by

²⁸³ Savio G., La tutela giurisdizionale avverso i provvedimenti amministrativi di allontanamento, Asgi, 2017

²⁸⁴ Art. 10 comma 2, Il respingimento con accompagnamento alla frontiera e' altresì disposto dal questore nei confronti degli stranieri: a) che entrando nel territorio dello Stato sottraendosi ai controlli di frontiera, sono fermati all'ingresso o subito dopo; b) che, nelle circostanze di cui al comma 1, sono stati temporaneamente ammessi nel territorio per necessita' di pubblico soccorso.

²⁸⁵ Art. 5 Right to liberty and security, Art. 13 Right to an effective remedy

²⁸⁶ Art. 19 comma 2 T.U, Non e' consentita l'espulsione, salvo che nei casi previsti dall'articolo 13, comma 1, nei confronti: a) degli stranieri minori di anni diciotto, salvo il diritto a seguire il genitore o l'affidatario espulsi; b) degli stranieri in possesso della carta di soggiorno, salvo il disposto dell'articolo 9; c) degli stranieri conviventi con parenti entro il quarto grado o con il coniuge, di nazionalita' italiana; d) delle donne in stato di gravidanza o nei sei mesi successivi alla nascita del figlio cui provvedono.

any means. The only exception is represented by Article 13 of the Consolidated Act²⁸⁷, which provides for expulsion only for reasons of public order or state security. This is proposed by the latter and subsequently validated by the Juvenile Court.

The HotSpot system, in terms of detention, is a good example to understand the distortions of a complex system and not easy to standardize. In crisis points, irregular migrants are brought to be pre-identified and assisted from a health point of view. In cases of high migratory flows, that detention that should be completed within 48 hours, risks overcoming in a longer process. This can lead to greater exposure to a violation of human rights, regarding the deprivation of personal liberty, of irregular migrants. This is highlighted by parliamentary investigations carried out by an extraordinary Commission for the Protection and Promotion of Human Rights, which, starting a study on the issue of hotspots, has realized the legislative vacuum present: "The provisions of the Ministry of the Interior provide that none of them can leave the center until the identification is completed, nor without completing this procedure you can apply for asylum in Italy or access the European outplacement program. This has created a deadlock that shows a significant gap in current practice compared to what is required by national legislation on the detention of persons within a facility over 48 hours, after which it is necessary to validate the judicial authority with notification."²⁸⁸ In this period of time, it is important that the migrant is informed of his possibilities in applying for international or humanitarian protection. The issue, despite its cruciality, has been completely ignored and the true nature of these crisis points is still unclear²⁸⁹.

The issue was also raised by the National Guarantor for the Rights of Persons Detained or Deprived of their Personal Liberty in a report to the Parliament of 21 March 2017. On the subject of HotSpots, it was said that: "They are, therefore, a sort of "legal limbo", an alarming circumstance especially when the

²⁸⁷ Art. 13 T.U., Espulsione Amministrativa

²⁸⁸ Senato della Repubblica, Commissione straordinaria per la tutela e la promozione dei diritti umani, Rapporto sui centri di identificazione ed espulsione in Italia, Roma, 2016

²⁸⁹ Savio G., La tutela giurisdizionale avverso i provvedimenti amministrativi di allontanamento, Asgi, 2017

stays last for long periods and even more so when they affect the weakest, in most cases unaccompanied minors”²⁹⁰. The report underlined the impossibility for the subjects subject to detention to appeal during the whole procedure and therefore before its implementation. In fact, it is mandatory that the judicial police give the detained migrants the 'Sheet of Rights' in which all their guarantees are contained. The procedural rights of which the arrested or detained person must be promptly informed are, first of all, the appointment of a trusted lawyer and admission to legal aid in the cases provided for by law. Secondly, information on the charge against him is mandatory. Interpretation and translation of basic acts is also necessary. The person clearly has the possibility to make use of the right not to answer and access to the acts on which the arrest or detention is based. He or She therefore has the assistance of the consular authority and information to the family members and, finally, the possibility of appearance before the judge to make the interrogation and access to the appeal to the Supreme Court against the order that decides on the validation of the arrest or detention (within 96 hours)²⁹¹. The Council of Europe also commented on the rights of persons detained, arguing that persons must be fully informed of all their rights "the right of the person to be notified of his detention to a third party of his choice (family member, friend, consulate), the right to have access to a lawyer and the right to request a medical examination by a doctor of his choice, in addition to any medical examination carried out by a doctor called by the police authorities. Access to a lawyer should include the right to contact and receive visits from the lawyer, under conditions that guarantee the confidentiality of their interview”²⁹².

As far as ministerial expulsions are concerned, the competence is attributed to the Regional Administrative Court (T.A.R) of Lazio, in Rome, as these are measures taken by the Minister of the Interior. This Minister may decide to expel the foreigner for "reasons of public order or State security" or for

²⁹⁰ Garante Nazionale dei diritti delle persone detenute o private della libertà personale, Relazione al Parlamento 2017

²⁹¹ Savio G., La tutela giurisdizionale avverso i provvedimenti amministrativi di allontanamento, Asgi, 2017

²⁹² Consiglio d'Europa, Comitato Europeo per la prevenzione della tortura e delle pene o trattamenti inumani o degradanti

"reasons of prevention of terrorism"²⁹³. In the first case, the Minister of the Interior informs the President of the Council and the Minister of Foreign Affairs of the expulsion in advance. The expulsion is addressed to a foreigner, who may also be non-resident in Italy and may hold an EC long-term residence permit. In the second case, for "reasons of prevention of terrorism", the decision can be taken not only by the Minister of the Interior, but also by the prefect, on his delegation. Both measures are characterized by a high degree of discretion, and therefore by a consequent limited possibility of review by the courts. These types of expulsions have increased due to tensions caused by Islamist events. The administrative activity does not allow the participation of the subject concerned in the procedure and, in particular, the expulsion measure for reasons of prevention of terrorism is not subject to jurisdictional validation. This means that it is immediately enforceable and the precautionary suspension is not provided for. If, then, the State Secret is placed, the eventual judgement before the T.A.R. Lazio is suspended for two years²⁹⁴.

The detention of migrants must be periodically reviewed in accordance with Article 15 of Directive 2008/115/EC and it is established that: "When detention is ordered by administrative authorities, Member States shall: a) provide for a prompt judicial review of the legality of the detention to be decided upon as soon as possible after the start of the detention; b) or grant the third-country national concerned the right to appeal to submit to a prompt judicial review the legality of the detention to be decided upon as soon as possible after the start of the detention procedure". In such a case, Member States shall immediately inform the third-country national of the possibility of lodging such an appeal. This rule has been automatically incorporated into Italian law and is the only mechanism that allows, after a delay in transposition. It is the only instrument capable of protecting the migrant and guaranteeing an effective remedy²⁹⁵.

As far as the risk of flight is concerned, it concerns those foreigners who do not want to submit to the instruments of identification. The detention for these

²⁹³ Art. 13, c. 1, Legislative Decree 286/1998 and Art. 3, c. 1, Law 155/2005

²⁹⁴ Savio G., *Espulsioni e Respingimenti: Profili sostanziali*, ASGI, 2016

²⁹⁵ *ibidem*

particular subjects takes place according to the decree of the Questore and is subject to the jurisdictional validation of the Justice of the Peace. If the subject is an applicant for international protection, the Court specialized in immigration matters will be the competent authority in ordering the detention. In accordance with art. 13, paragraph 4 bis of the Consolidated Law²⁹⁶, it maintains that there is a risk of flight when at least one of the following circumstances occurs: lack of passport, documentation, having declared false personal details, not having complied with the voluntary departure within the fixed term, violated the alternative measures to detention. It is also believed that there is a risk of flight when the subject has violated the re-entry ban after having been effectively expelled in execution of an expulsion decree, or has systematically resorted to false statements or statements on their personal details for the sole purpose of avoiding the adoption or execution of an expulsion order²⁹⁷.

Other critical issues regarding repatriation arise when the person concerned is notified of the repatriation on the day of departure. This does not allow the migrant to be defended and does not respect the principle of *refoulement* and therefore guarantees his safety. Such situations have emerged from the Report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment regarding the repatriation of Nigerian citizens by the Italian State²⁹⁸. It is necessary, for a correct access to justice, that the individual is informed in time so that he can take advantage of all the necessary means of redress and to confirm his legal position. This underlines the importance of communication with stakeholders at all stages of monitoring and management of irregular and irregular migration. The consequences can be very serious and damage human dignity, expose the subject to the use of force, violence and therefore serious violations of fundamental rights. Even the return itself must not take place in an aggressive manner and through the use of means of

²⁹⁶ Art. 13 comma 4, L'espulsione è eseguita dal questore con accompagnamento alla frontiera a mezzo della forza pubblica: b) quando sussiste il rischio di fuga, di cui al comma 4bis;

²⁹⁷ Savio G., *Espulsioni e Respingimenti: Profili sostanziali*, ASGI, 2016

²⁹⁸ Senato della Repubblica, Commissione straordinaria per la tutela e la promozione dei diritti umani, *Rapporto sui centri di identificazione ed espulsione in Italia*, 2017

coercion, the correct modalities are contained in Council Decision 2004/573/EC²⁹⁹.

In summary, the irregular migrant has the possibility to appeal against the measures that have been taken against him. As far as administrative expulsion is concerned, within five days from the validation of the measure, the subject can appeal to the preceptor and the appeal can be written personally by the complainant. If the expulsion has been decided with immediate accompaniment, the term is thirty days and can be written by the diplomatic or consular representation of the state in which it is intended. This happens, as has already been mentioned, in the place of residence or abode of the foreigner and the preceptor decides to accept or reject the appeal within ten days from the date of filing of the appeal. The applicant has access to legal aid and if he does not have a lawyer, he or she is assigned a lawyer and an interpreter³⁰⁰. It is also possible, against an expulsion order, to appeal to the TAR. With regard to the execution of the expulsion, the appeal can be submitted to the Court of Cassation even if the resulting measure does not correspond to a suspension of the execution of the measure. In general, in an appeal against the execution of an expulsion, the foreigner enjoys the same benefits as an appeal for administrative expulsion: assistance of an official lawyer if he or she does not have one, free legal aid and the interpreter. The judge decides within the following forty-eight hours and validates the measure³⁰¹. With regard to non-reunification, the person concerned may appeal and clearly exercise the right to family unity³⁰². Finally, as far as the issue of discrimination is concerned, an appeal is a possible instrument and can be lodged in person at the Registry of the applicant's place of residence. The preceptor will make the application, in case of acceptance the measures will become immediately enforceable. In urgent cases, the Praetor must seek information in good time and fix the notification of the appeal within eight days and a hearing within fifteen days.

²⁹⁹ COUNCIL DECISION of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders

³⁰⁰ Art. 13 (Espulsione amministrativa) (Legge 6 marzo 1998, n. 40, art. 11)

³⁰¹ Art. 14 (Esecuzione dell'espulsione) (Legge 6 marzo 1998, n. 40, art. 12)

³⁰² Art. 30 (Permesso di soggiorno per motivi familiari) (Legge 6 marzo 1998, n. 40, art. 28)

On that occasion, the Praetor will decide whether to confirm, amend or revoke the measures issued³⁰³.

3.4 Access to justice for irregular migrants in Spain in cases of detention and expulsion

Access to justice for irregular migrants is an issue also addressed by Spain, being geographically located in an area, that of the Mediterranean Sea, the center of large migration flows and having a special situation in the two Spanish autonomous cities of Ceuta and Melilla in Morocco. The Spanish constitution, like the Italian one, enjoys an extremely universalistic spirit and in this sense there seems to be no doubt in relation to effective access to justice for irregular migrants to whom rights are violated³⁰⁴. First of all, Article 10, paragraph 1, states: "The dignity of the person, the inviolable rights inherent in it, the free development of the personality, respect for the law and the rights of others are the foundation of the political order and social peace"³⁰⁵. At the center, therefore, is the dignity of the person and his fundamental rights and freedoms, without distinction of residence or ethnic origin and in the second paragraph, the constitution refers to compliance with international treaties and agreements governing the protection of human rights. While the Constitution has a broad view of the rights and freedoms enjoyed by the human being, not just the Spanish citizen, it is the lower laws that challenge this system of guarantees³⁰⁶.

³⁰³ Art. 44 (Azione civile contro la discriminazione) (Legge 6 marzo 1998, n. 40, art. 42)

³⁰⁴ Tanck D. E., *Protección de las personas migrantes indocumentadas en España con arreglo e derecho internacional y europeo de los derechos humanos*, Florencia, 2017

³⁰⁵ Artículo 10 - 1. La dignidad de la persona, los derechos inviolables que le son inherentes, el libre desarrollo de la personalidad, el respeto a la ley y a los derechos de los demás son fundamento del orden político y de la paz social. 2. Las normas relativas a los derechos fundamentales y a las libertades que la Constitución reconoce se interpretarán de conformidad con la Declaración Universal de Derechos Humanos y los tratados y acuerdos internacionales sobre las mismas materias ratificados por España

³⁰⁶ Tanck D. E., *Protección de las personas migrantes indocumentadas en España con arreglo e derecho internacional y europeo de los derechos humanos*, Florencia, 2017

The law governing the treatment of foreigners in Spain is Organic Law 4/2000³⁰⁷, which deals with the freedoms and rights of foreigners. First of all, the law recognises as irregular migrants those who are illegally on Spanish territory for various reasons, such as not having obtained an extension of stay, not having a residence document or having it expired more than three months ago. A foreigner who works without a residence permit in Spain and who has no authorisation of any kind to exercise any type of profession is also considered irregular³⁰⁸. These are considered serious offences, as well as fraudulent concealment, omission of information regarding changes of residence, nationality, domicile. Such violations can lead to what is laid down in Article 57 and therefore to the expulsion of the foreigner³⁰⁹. This makes irregular migrants even more vulnerable as they are placed in a state of insecurity from all points of view - legal, social and economic. In order to obtain a situation of regularity it is necessary that the foreigner has lived continuously for a minimum of three years in Spain but without the possibility of working. The foreigner, at the end of this period of time, can apply for a temporary residence permit with the support of other basic requirements such as an employment contract for a minimum period of one year which can be remedied if he or she has sufficient economic resources. The difficult access to temporary stay makes the process of normalizing and regularizing the status of irregular migrants even more complex and exposes them to a condition of permanent illegality and exclusion from social life and in a sort of legal limbo³¹⁰.

The difficult access to temporary residence makes the process of normalisation and regularisation of the status of the irregular migrant even more complex and therefore exposes him to a condition of permanent illegality and exclusion from social life and in a sort of legal limbo. First of all, the right to health is the

³⁰⁷ Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, Publicado en: «BOE» núm. 10, de 12/01/2000, Entrada en vigor: 01/02/2000

³⁰⁸ Artículo 53. Infracciones graves (Ley Organica 4/2000)

³⁰⁹ Artículo 57. Expulsión del territorio (Ley Organica 4/2000)

³¹⁰ Tanck D. E., Protección de las personas migrantes indocumentadas en españa con arreglo e derecho internacional y europeo de los derechos humanos, Florencia, 2017

most critical issue for the Spanish migration system³¹¹. This is highlighted by a 2015 report by the Centre on Migration, Politics and Society of the University of Oxford according to which access to health in Spain is influenced by the fact that it is a competence attributed to regional authorities and varies even more if they are autonomous³¹². It was precisely this fragmented system of access to health between the national and regional levels that led to the pronouncement of the Real Decreto-ley 16/2012, which aimed to flatten these differences³¹³. "It is therefore essential to take urgent measures to ensure the future and help prevent this problem from continuing. The National Health System has suffered situations of lack of coordination between the autonomous health services, which results in the appearance of significant differences in benefits and services to which patients have access in different autonomous communities. Territorial cohesion and equity have been called into question by some measures adopted in recent years. This is the starting point of the law, but it ends up restricting access to health to those who are members of the social security system³¹⁴.

However, Articles 15³¹⁵, 43³¹⁶ and 45³¹⁷ of the Spanish Constitution bring to light rights such as the right to life, to physical and moral integrity, to health

³¹¹ Tanck D. E., *Protección de las personas migrantes indocumentadas en España con arreglo a derecho internacional y europeo de los derechos humanos*, Florencia, 2017

³¹² Spencer S., Hughes V., *Outside and In: Legal Entitlements to Health Care and Education for Migrants with Irregular Status in Europe*, Centre on Migration, Policy, and Society (COMPAS), Oxford, 2015

³¹³ Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de sus prestaciones

³¹⁴ Tanck D. E., *Protección de las personas migrantes indocumentadas en España con arreglo a derecho internacional y europeo de los derechos humanos*, Florencia, 2017

³¹⁵ Artículo 15- Todos tienen derecho a la vida y a la integridad física y moral, sin que, en ningún caso, puedan ser sometidos a tortura ni a penas o tratos inhumanos o degradantes. Queda abolida la pena de muerte, salvo lo que puedan disponer las leyes penales militares para tiempos de guerra

³¹⁶. Artículo 43 - 1. Se reconoce el derecho a la protección de la salud. 2. Compete a los poderes públicos organizar y tutelar la salud pública a través de medidas preventivas y de las prestaciones y servicios necesarios. La ley establecerá los derechos y deberes de todos al respecto.

³¹⁷ Artículo 45 - 1. Todos tienen el derecho a disfrutar de un medio ambiente adecuado para el desarrollo de la persona, así como el deber de conservarlo. 2. Los poderes públicos velarán por la utilización racional de todos los recursos naturales, con el fin de proteger y mejorar la calidad de la vida y defender y restaurar el medio ambiente, apoyándose en la indispensable

protection, the right to live in an adequate environment. As has already been mentioned, the constitution and these rights in particular have a rather universal spirit and nature and this approach inevitably includes the category of irregular migrant. The articles cited refer to 'all' without implementing any kind of discrimination based on ethnic origin or the legal status of the person concerned. This is also by virtue of all international treaties and agreements ratified by Spain, from the International Covenant on Economic, Social and Cultural Rights to the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, more at the European level. Other rights are difficult for irregular migrants to access, including the right to housing, education and finally access to the courts, which is the central right for this analysis³¹⁸.

As regards the protection of effective jurisdiction, the Spanish Constitution guarantees this right in Articles 24³¹⁹ and 25³²⁰ of the Constitution. Article 24 refers to all persons without reference to nationality or legal status within the state and to their right of defence. It is important to be informed of all evidence taken against you and thus to have the right to a public trial and legal aid. Article 25 refers instead to the custodial sentence and the rights that the individual in any case enjoys, and further argues that the civil administration cannot impose sanctions or take decisions regarding the deprivation of liberty. Once again, the universalistic spirit of these articles, the focus is on respect for human dignity in its entirety and the category of irregular migrant is therefore

solidaridad colectiva. 3. Para quienes violen lo dispuesto en el apartado anterior, en los términos que la ley fije se establecerán sanciones penales o, en su caso, administrativas, así como la obligación de reparar el daño causado.

³¹⁸ Tanck D. E., *Protección de las personas migrantes indocumentadas en España con arreglo e derecho internacional y europeo de los derechos humanos*, Florencia, 2017

³¹⁹ Artículo 24 - 1. Todas las personas tienen derecho a obtener tutela efectiva de los jueces y tribunales en el ejercicio de sus derechos e intereses legítimos, sin que, en ningún caso, pueda producirse indefensión.

³²⁰ Artículo 25 - 2. Las penas privativas de libertad y las medidas de seguridad estarán orientadas hacia la reeducación y reinserción social y no podrán consistir en trabajos forzados. El condenado a pena de prisión que estuviere cumpliendo la misma gozará de los derechos fundamentales de este Capítulo, a excepción de los que se vean expresamente limitados por el contenido del fallo condenatorio, el sentido de la pena y la ley penitenciaria. En todo caso, tendrá derecho a un trabajo remunerado y a los beneficios correspondientes de la Seguridad Social, así como al acceso a la cultura y al desarrollo integral de su personalidad

placed in this context of guarantees³²¹. Nevertheless, in the practical approach, the effective exercise of these rights by, for example, irregular migrants who have arrived at the border and are not allowed to enter the country and are subject to hot returns, is complicated. Hot returns are regulated by the Organic Law 4/2015³²² on the protection of public security, this law repeals the previous regulation on the protection of city security of 1992³²³.

Organic Law 4/2000, in Chapter III, lists legal guarantees in articles 20³²⁴, 21³²⁵ and 22³²⁶. Analysing them as a whole it is possible to highlight the salient aspects, first of all it refers to foreigners without discrimination with respect to economic migrants, applicants for international or humanitarian protection. Foreigners can be supported, if subject to measures, by associations and organizations that bring the interests of this category and assist them in appealing. Legal assistance must be free of charge and must enjoy the same benefits as Spanish citizens. The cases against which an appeal procedure may be initiated are refusals of entry, repatriation, expulsion and all cases involving international protection³²⁷. The appeal must be lodged in accordance with the rules of civil procedure (Ley Organica 1/2000³²⁸), in the event that the applicant is in a condition of deprivation of liberty, the appeal is made before a public official with specific regulations. If the person concerned is not in Spain, he or she may be assisted by the diplomatic and consular office. Nevertheless, the path to the proper recognition of this right has been long and tortuous and has culminated in the Judgment of the Constitutional Court 95/2003³²⁹. It is stated that it is guaranteed that "foreigners, regardless of their legal status, have the right to effective judicial protection". In Organic Law 4/2000 there is also

³²¹ Andalucía Acoge, Derechos y libertades de las personas extranjeras en España, Sevilla, 2018

³²² Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana

³²³ Ley Orgánica 1/1992, de 21 de febrero, sobre Protección de la Seguridad Ciudadana

³²⁴ Artículo 20 - Derecho a la tutela judicial efectiva (Ley Organica 4/2000)

³²⁵ Artículo 21 - Derecho al recurso contra los actos administrativos (Ley Organica 4/2000)

³²⁶ Artículo 22 - Derecho a la asistencia jurídica gratuita (Ley Organica 4/2000)

³²⁷ Andalucía Acoge, Derechos y libertades de las personas extranjeras en España, Sevilla, 2018

³²⁸ Ley Orgánica 1/2000, de 7 de enero, de modificación de la Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional

³²⁹ Sentencia 95/2003, de 22 de mayo, (BOE núm. 139, de 10 de junio de 2003)

Additional Provision X, which recognizes a special regime for Ceuta and Melilla, and literally states: "1. Foreigners who are identified at the border of the territorial delimitation of Ceuta or Melilla in an attempt to overcome the elements of border containment to irregularly cross the border may be refused to prevent their illegal entry into Spain. 2. In any case, the refusal shall be made in accordance with the international human rights and international protection standards to which Spain is a party. 3. Applications for international protection shall be formalised at the places provided for that purpose at border crossing points and shall be processed in accordance with the provisions of the legislation on international protection"³³⁰.

According to constitutional judgments 37/1995³³¹, 59/2003³³² and 205/2006³³³, the right to effective judicial protection includes: the right to obtain a resolution based on the law by which their right or legitimate interest concerned is protected, the right to use the resources provided for by law and finally the right to enforcement of what has been agreed. Thus, foreigners have effective access to justice in the Spanish system on a par with Spanish citizens, but there are many obstacles to free legal aid. This is due to a lack of resources and the above-mentioned fragmentation between the state and the regions in the management of these aspects plays a significant role in the various obstacles in the procedures. There are mechanisms for protecting fundamental rights, both judicial and non-judicial, to which foreigners can also have access³³⁴.

By jurisdictions, it refers to 'Recurso de Amparo'³³⁵, which will be discussed extensively in the next chapter, while for non-jurisdictional ones is intended the

³³⁰ Andalucía Acoge, Derechos y libertades de las personas extranjeras en España, Sevilla, 2018

³³¹ Sentencia 37/1995, de 7 de febrero, (BOE núm. 59, de 10 de febrero de 1995)

³³² Sentencia 59/2003, de 24 de marzo, (BOE núm. 91, de 16 de abril de 2003)

³³³ Sentencia 205/2006, 3 de Julio de 2006

³³⁴ Andalucía Acoge, Derechos y libertades de las personas extranjeras en España, Sevilla, 2018

³³⁵ Tribunal Constitucional de España : El recurso de amparo es una de las principales competencias atribuidas por la Constitución al Tribunal Constitucional, siendo el objeto de este proceso la protección frente a las vulneraciones de los derechos y libertades reconocidos en los artículos 14 a 29 y 30.2 de la Constitución originadas por disposiciones, actos jurídicos, omisiones o simples vías de hecho de los poderes públicos del Estado, las Comunidades Autónomas y demás entes públicos de carácter territorial, corporativo o institucional, así

‘Defensor del Pueblo’. It is foreseen by article 54 of the Spanish Constitution, which states: "An organic law shall regulate the institution of the People's Defender, as high commissioner of the Cortes Generales, designated by the latter to defend the rights included in this title, in order to control the activity of the Administration, thus reporting to the Cortes Generales". The law highlighted by the article is the 3/1981³³⁶ which describes the role of the mediator, fundamental in situations involving the management of illegal migration. First of all, this entity is the one who protects and defends the fundamental rights and public freedoms of citizens. The defender of the people supervises the activities of public administrations and bodies that manage public services throughout the country, as well as the activities of Spanish administrative delegations that deal with Spanish citizens abroad. When the ‘Defensor del Pueblo’ receives complaints about the irregular functioning of the administration of justice, he sends them to the Public Prosecutor's Office for investigation and appropriate legal action, or to the Superior Council of the Judiciary. It may also make recommendations to the Government on the need for legislative changes. The Defender may lodge appeals for unconstitutionality and constitutional protection, as well as initiate proceedings to have the judge ascertain the legitimacy of the arrest or detention³³⁷. The Defender may not intervene in cases of lack of intervention by the public administration, in matters of litigation between private individuals or if more than a year has elapsed since the citizen became aware of the facts that are the subject of the complaint. Furthermore, the ‘Defensor del pueblo’ may not be involved in the case of an anonymous, manifestly unfounded or malicious complaint, or in cases where the handling of the complaint in a proceeding could prejudice the legitimate interests of a third party, or where there is a prospect of a deviation from the content of a judicial decision. The appeal to the Defensor del Pueblo does not require the assistance of a lawyer or legal representative and the entire

como de sus funcionarios o agentes. La única pretensión que puede hacerse valer a través del recurso de amparo es la del restablecimiento o preservación de los derechos o libertades por razón de los cuales se promueve el recurso. (<https://www.tribunalconstitucional.es/es/tribunal/Composicion-Organizacion/competencias/Paginas/04-Recurso-de-amparo.aspx>)

³³⁶ Ley Orgánica 3/1981, de 6 de abril, del Defensor del Pueblo

³³⁷ <https://www.defensordelpueblo.es/>

procedure is free of charge for the citizen. the procedure opens with the complaint, which must be signed and necessarily contain the name, surnames, address and description of the facts subject to the complaint and the specific indication of the administration or administrations involved. A copy of the most important documentation relating to the matter raised should be attached to the complaint. Once the file has been analysed, the person concerned will receive a document indicating the case number assigned to the complaint for any information on the matter. Complaints can be submitted online, in person or by post³³⁸.

As regards the right to free legal assistance in more detail, it has been the result of a gradual process within the national legal migration system. Currently, it is governed by Organic Law 2/2009 and enshrines this right for all foreigners without any discrimination of residence or origin. This is particularly significant for the vulnerable category of irregular migrants since it guarantees assistance to foreigners who are in Spain with or without legal residence, if the applicant no longer resides in Spain can access through a diplomatic mission or with consular support. In this case, it should be noted that the applicant, although not on Spanish territory, started the procedure while he was still resident and therefore can correctly enjoy this right. The legal situations in which the claimant can benefit from free legal assistance are the refusal of entry, repatriation, expulsion and in all those cases involving the right to asylum and humanitarian protection³³⁹.

In conclusion, it is interesting to underline the situation that Spain is experiencing and facing in Ceuta and Melilla in Morocco regarding the management of irregular migration. The management and control of irregular migration has been one of the fundamental points of Spanish foreign policy since the 1980s, as well as a strategic node for its entry into the European Union (on 1 January 1986). Spain's main efforts have been directed at border points, from Gibraltar to Ceuta and Melilla and the Canary Islands where flows

³³⁸ <https://www.defensordelpueblo.es/>

³³⁹ Andalucía Acoge, Derechos y libertades de las personas extranjeras en España, Sevilla, 2018

are greater and more complex to manage. Key role is played by Morocco, with which there are fundamental cooperation agreements for Spain for a more targeted control of the borders. It has become a real buffer state as it represents the main road to reach Europe, in this sense Spain and in general the European Union is trying to strengthen the borders of Morocco to block the flow of irregular migrants from the rest of Africa. The tactic used, in this sense, is the outsourcing of migration control to third countries, a perspective that is more at the origin of the migration process than at the point of arrival. This has been done through the creation of temporary detention camps for immigrants, the processing of asylum applications outside the territory of the Union³⁴⁰. This is contained in legislation 12/2009³⁴¹ and provides for various measures such as the ineligibility of an asylum seeker when the asylum seeker is recognised as a refugee and has the right to reside or to obtain effective international protection in a third country, and again the asylum seeker will not be admitted if he comes from a safe country where there is the possibility of applying for refugee status. Finally, the asylum seeker has the possibility to apply for international protection in Spanish consulates and embassies, located in states that are not his country of origin by detaining the persons concerned in third countries, away from Spanish territory. This has led to an increase in expulsion, return and readmission measures in the countries of origin and this has also been allowed by the ratification of numerous agreements by Spain with third countries other than Morocco. Framework agreements on migration cooperation with the Gambia, Guinea Conakry, Mali, Cape Verde, Mauritania and Senegal are also highlighted, together with greater coordination between the Ministries of Foreign Affairs and the Interior, have enabled numerous repatriation operations, such as Operation Goree in Senegal, and joint maritime patrols, such as the Atlantis Project, between the forces of the Spanish Civil

³⁴⁰ Giraldo G. E., *Desterritorialización de fronteras y externalización de políticas migratorias. Flujos migratorios irregulares y control de las fronteras exteriores en la frontera España–Marruecos*, Antioquia, 2014

³⁴¹ Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria

Guard's Maritime Service and the Mauritanian Gendarmerie, and Operation Cabo Blanco in Mauritania³⁴².

Final Remarks

After analysing the figure of the irregular migrant and his vulnerabilities and how he is protected within the international, European and national guarantor framework of Italy and Spain, it is useful for the analysis to understand how access to individual justice is guaranteed in the cases of *Khlaifia and Others v. Italy* and *N.D and N.T v. Spain*. A comparative analysis in this sense can highlight the critical points and the most thorny nodes of the internal legislation of the two states considered and the difficulties of access to this system for undocumented migrants in practice. The chapter reveals significant gaps between the policies implemented by the European Union in the field of migration and the effective guarantee of the human rights of irregular migrants, especially in the field of justice. Particularly significant are the cases of expulsion and detention; it is precisely in these measures that the element of guaranteeing rights is called into question and access to justice and the worthy protection of the irregular migrant is difficult. Paradoxically, in fact, the decisions taken on this category act almost like boomerangs and expose migrants even more to a condition of greater vulnerability and greater possibility of committing crimes or being placed in contexts of further illegality. The factual analysis of cases allows us to understand if there are similarities or irreconcilable differences and to try to understand if the existence of the 'Recurso de Amparo' in Spain has different results from Italy. The situations that will be analyzed concern two cities, whose current history has been strongly marked by the irregular migration phenomenon, Lampedusa Island in Italy and in the Spanish Enclave in Morocco of Melilla.

³⁴² Giraldo G. E., *Desterritorialización de fronteras y externalización de políticas migratorias. Flujos migratorios irregulares y control de las fronteras exteriores en la frontera España–Marruecos*, Antioquia, 2014

Chapter IV – Access to justice for irregular migrants before the European Court of Human Rights; A comparison between Khlaifia and others c. Italy and N.D and N.T c. Spain

4.1 From the Arab Spring in Tunisia to Khalifia case

In order to understand the circumstances that led to the migration by the Tunisian applicants to Italy in the case *Khlaifia and others v. Italy*, it is necessary to shed light on the political, economic and geopolitical problems that affected Tunisia in the years 2008 - 2011. First of all, Ben Ali's oppressive and authoritarian regime (7 November 1987 - 14 January 2011) led to general social discontent in every respect. Ben Ali's main actions were aimed at social repression, control of civil and political liberties and the use of a police apparatus that could monitor citizens. The regime managed to significantly limit the freedom of association and expression, amongst the liberties that were affected the most, thereby creating increasing political dissent against Ben Ali. The action of political associations and other types of civil society organizations was limited and the number of parties was drastically reduced³⁴³. With the attack on the Twin Towers in 2001, the regime further increased its restrictive measures against individuals by becoming a frontline player in the fight against terrorism³⁴⁴. These are the peculiarities of the Ben Ali regime, to which one must add negative economic trends culminating in the economic crisis of 2008, which also had devastating consequences for Tunisia³⁴⁵. One of the main problems that Tunisia suffered was related to the issue of young workers, especially with regard to those who carried out their activities in mining areas. In the region of Gafsa, the first revolts took place, in 2008, for some obvious fraud for recruitment competitions. On this occasion, trade unionists and leading figures of civil society were condemned and protests were violently repressed. This led to the beginning of a migration to Libya and

³⁴³ Denninson S.- Dworkin A.- Popescu N. – Witney N., *Dopo la Rivoluzione: l'Europa e la transizione tunisina*, European Council on Foreign Relations, 2011

³⁴⁴ M. C. Paciello, *La Primavera Araba: sfide e opportunità economiche e sociali*, Istituto Affari Internazionali, 2011

³⁴⁵ Groppi T. – Spigno I., *Tunisia La primavera della Costituzione*, Roma, 2015

to the European coasts, two illegal border crossings. Since 2006, the Tunisian authorities have imposed a ban on the migration of individuals to Libya. The age for crossing the border was over 35 years and applied both to Tunisian citizens and to those who reside in Tunisia.³⁴⁶ Despite this, the Ben Ali regime established, on a European model, restrictive migration policies both on entry and exit of Tunisian citizens, completely omitting the problem in the State³⁴⁷. In reality, with the protests of the mining regions, discontent spread rapidly and the complex phenomenon of irregular immigration intensified. One of the most symbolic events of this period was the suicide of Mohamed Bouazizi (January 4, 2011), a Tunisian peddler who sacrificed himself in front of the seat of government of the town of Sidi Bouzid against the Tunisian public administration, which only put the already precarious workers in difficulty. The tension spread throughout the country and after a period of protests, the regime of Ben Ali remained totally compromised. This led to a sort of knock-on effect that affected neighboring states, from Egypt to Libya. From this moment on, a series of migratory waves began, mainly affecting Europe, four of which are recorded, the first corresponding to the fall of Ben Ali³⁴⁸. Tunisia became a place of departure and at the same time it was configured as a transition zone because, from there, also individuals from other states left. Some Tunisian ports became points of reference for the illegal smuggling of migrants to the island of Lampedusa, starting from the small town of Zarzis³⁴⁹.

The second wave of migration corresponded to the beginning of the war in Libya, in February, a conflict that brought devastating consequences. There was a real mass exodus which, according to UNHCR data, was equal to one tenth of the entire population³⁵⁰. Those who arrived in Tunisia were, for the most part, repatriated, with the sole exception of asylum seekers and those

³⁴⁶ H. Boubakri *Revolution and International Migration in Tunisia*, Migration Policy Centre, 2013

³⁴⁷ Romano I., *La Tunisia delle migrazioni: i dispersi nel Mediterraneo*, Open Migration, 2018

³⁴⁸ Khondker H. H., *Role of the New Media in the Arab Spring*, Abu Dhabi, 2011

³⁴⁹ H. Boubakri *Revolution and International Migration in Tunisia*, Migration Policy Centre, 2013

³⁵⁰ UNHCR, "Global Report 2012 -Libya", 2012, <http://www.unhcr.org/51b1d639a.html>

closest to the regime that had just fallen. According to the data, about 20,000 people of both Tunisian and Libyan origin landed on the island of Lampedusa and this increased the difficulty of managing this significant migration crisis³⁵¹. A first solution was found in the ratification of an Agreement between Tunisia and Italy, signed on April 5, 2011, that and provided for greater cooperation on coastal management and direct repatriation for Tunisians who will land in Italy after the entry into force of the decree on the temporary residence permit (6 months)³⁵². This measure was made published in the Italian Official Gazette no. 81 of 8 April 2011, Article 1³⁵³ established the adoption of temporary protection measures in the field of reception and residence for major humanitarian needs. According to Article 2, individuals from North Africa, in a generic way without any distinction with respect to countries of origin , "Shall be sent, if necessary, to first aid facilities identified and implemented on the national territory. The Questor, having verified the origin and nationality of the persons concerned, issues, also on the basis of the provisions of art. 9, paragraph 6, of the Decree of the President of the Republic no. 394 of 31 August 1999, and subsequent amendments, a residence permit for humanitarian reasons for a period of six months, pursuant to art. 11, paragraph 1, letter c-ter) of the same decree"³⁵⁴. The residence permit in question also allowed migrants to leave Italy and move freely in the Schengen area, which leads to a worsening of relations between Italy and France.

Numerous events had the function of deterring migratory flows, starting with deaths at sea, the readmission agreement between Tunisia and Italy, the increasingly frequent monitoring of the coasts and finally the precarious living

³⁵¹ Severoni S., Joint report from the Ministry of health, Italy and the Who Regional office for Europe mission - Increased influx of migrants in Lampedusa, WHO, 2011

³⁵² Emergenza Immigrazione: Accordo Italia-Tunisia su sbarchi e rimpatri, MAECI, 2011 https://www.esteri.it/mae/it/sala_stampa/archivionotizie/approfondimenti/2011/04/201104_06_accordo_italiatunisia.html

³⁵³ Gazzetta n. 81 del 8 aprile 2011, Misure di protezione temporanea per i cittadini stranieri affluiti dai Paesi nordafricani, Art. 1 - Misure umanitarie di protezione temporanea: I presente decreto definisce le misure umanitarie di protezione temporanea da assicurarsi nel territorio dello Stato a favore di cittadini appartenenti ai Paesi del Nord Africa affluiti nel territorio nazionale dal 1° gennaio 2011 alla mezzanotte del 5 aprile 2011.

³⁵⁴ Gazzetta n. 81 del 8 aprile 2011, Art. 2 - Condizioni di accoglienza sul territorio nazionale – Own translation

conditions of migrants in Europe. The crisis has therefore significantly changed the migration policies of the Union, increasing the role of Frontex and triggering a stricter border control. On 24 May 2011, the Mobility Partnership between the European Union and the Southern Mediterranean was signed. It was called "Dialogue with the Southern Mediterranean countries for migration, mobility and security"³⁵⁵. The purpose of this initiative was to create a project that is sustainable over time based on solidarity between member states and cooperation with third countries to address a situation of this magnitude. Ten fundamental points were highlighted on the action of the European Union which essentially concerned: humanitarian assistance on the ground and in neighboring countries, the strengthening of Frontex and the construction of an operational project with Tunisia. In addition, EU member states were urged to make full use of the funds allocated to these particular circumstances and create projects at regional level that can cope with emergencies. Finally, the resettlement to states of all individuals in need of international protection was also planned. What emerges from these measures was the lack of a concrete approach to the respect of fundamental rights as a priority in such circumstances³⁵⁶.

4.1.1 The actors involved in the case and the reception system on the Lampedusa Island during the migrants' crisis of 2011

The conditions of reception and assistance after landing are the subject of numerous critical questions in the context of the migration crisis of 2011. To comprehend the gap that lies in the system of reception and management of migration that concerns both asylum seekers and irregular migrants in Italy, it is necessary to refer to what were the first rules on reception starting from the very first wave of migration in the 90s. The centers of interest for the proposed analysis are those of First Aid and Reception. Their establishment was

³⁵⁵COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS , A dialogue for migration, mobility and security with the southern Mediterranean countries, Brussels, 2011

³⁵⁶ *ibidem*

provided for by Law 563/1995, the so-called "Apulia Law"³⁵⁷, setting up three centers located along the maritime border of the Apulian coast for the needs of first assistance in favor of groups of foreigners³⁵⁸. The reference to the above law is limited to regulating first aid activities in Apulia between 1 July and 31 October 1995, in a specific period of time and in a well-defined geographical area without any restriction in terms of personal freedom³⁵⁹. More precisely, Italian legislation provides for two types of structures responsible for the stay of foreigners: the reception centers for asylum seekers (CARA), governed by Articles 20 of Legislative Decree 25/2008³⁶⁰, and the First Aid and Assistance Centers (CPSA), provided for in Article 23 of the Decree of the President of the Republic 394/1999³⁶¹, containing the Regulation implementing the Consolidated Act on Immigration. As far as the CPSA in particular are concerned considering that the Centre of Lampedusa falls within this category of structures, the normative discipline is very laconic: on them, no rule of primary rank has been adopted, and the only provision of a regulatory nature that concerns them is the aforementioned Article 23 of the Regulation implementing the Consolidated Act. This article limits itself to establishing that "The activities of reception, assistance and those carried out for the hygienic-sanitary requirements, connected to the rescue of the foreigner, may also be carried out outside the centers referred to in art. 22, the CIEs, for the time strictly necessary to start the same to the aforesaid centers or to the adoption of the measures necessary for the provision of specific forms of assistance falling

³⁵⁷ Legge 29 dicembre 1995, n. 563, Conversione in legge del decreto-legge 30 ottobre 1995, n. 451, recante disposizioni urgenti per l'ulteriore impiego del personale delle Forze armate in attivita' di controllo della frontiera marittima nella regione Puglia.

³⁵⁸ CASE OF KHLAIFIA AND OTHERS v. ITALY, Application no. 16483/12

³⁵⁹ Legge 29 dicembre 1995, n. 563, Conversione in legge del decreto-legge 30 ottobre 1995, n. 451, recante disposizioni urgenti per l'ulteriore impiego del personale delle Forze armate in attivita' di controllo della frontiera marittima nella regione Puglia.

³⁶⁰ DECRETO LEGISLATIVO 28 gennaio 2008, n. 25 Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello status di rifugiato

³⁶¹ DECRETO DEL PRESIDENTE DELLA REPUBBLICA 31 agosto 1999, n. 394 - Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'art. 1, comma 6, del D.Lgs. 25 luglio 1998, n. 286

within the competence of the State"³⁶². In the Consolidated Act on Immigration, the dichotomy between the CIEs and the other foreigners' shelters, CARA and CPSA, is very clear. The first are places of detention for illegal entry into the country, and in order to allow the deprivation of liberty of the foreigner in a manner consistent with the constitutional dictates, the procedures and requirements for detention in the CIEs are described by law, and the administrative measures of detention must be validated by the judicial authority³⁶³. In the CARA and the CPSA, on the contrary, foreigners are not forcibly detained, since they are open reception facilities, in which no form of deprivation of personal liberty is practiced, and for this reason their discipline is much less detailed, in the case of the CPSA, a discipline of legislative lacks, and there are no provision for the intervention of the judicial authority. Notwithstanding the fact that, at the normative level, the CIE and the CPSA have been originally conceived as completely different from each other, in recent years it is possible to verify a de facto transformation of the CPSA. In particular, as the case of Lampedusa, there are centers which are very similar to the CIE, to the point that in the media and in the political discourse, it is usual to speak of the 'CIE of Lampedusa', and the discussions on the Lampedusa structure are normally placed within the broader debate on the conditions of life in the CIEs³⁶⁴. In fact, on the circumstance that the center of Lampedusa is a closed structure, from which the 'guests' are unable to leave because it is heavily guarded by police forces is confirmed by numerous.

Other findings concern the way in which migrants are assisted and the actual information made available on their possibilities as irregular migrants. The average stay varies from 15 days to a maximum of two months, which raises

³⁶² DECRETO DEL PRESIDENTE DELLA REPUBBLICA 31 agosto 1999, n. 394 - Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'art. 1, comma 6, del D.Lgs. 25 luglio 1998, n. 286

³⁶³ Il diritto alla protezione, Studio sullo stato del sistema di asilo in Italia e proposte per una sua evoluzione, Progetto co-finanziato dall'Unione Europea e dal Ministero dell'Interno FONDO EUROPEO PER I RIFUGIATI 2008-2013

³⁶⁴ Il diritto alla protezione, Studio sullo stato del sistema di asilo in Italia e proposte per una sua evoluzione, Progetto co-finanziato dall'Unione Europea e dal Ministero dell'Interno FONDO EUROPEO PER I RIFUGIATI 2008-2013

issues related to the deprivation of personal liberty. Two commissions were set up to verify and analyze the situation within the center, the first was the 2006 De Mistura Commission, at the national level and, the second was carried out by the UN Human Rights Council³⁶⁵ at supranational level. In both cases, the humanitarian issue was raised, especially with regard to the legal bases governing the reception centers. In the specific case of Lampedusa and the Tunisian applicants in the *Khlaifia* case, the authority responsible for the reception system in the centers was the Prefecture of Agrigento, which had the task of identifying and transferring the migrants on the basis of their needs and is also responsible for their repatriation. The prefecture clearly works alongside both the Italian Civil Protection System and numerous international organizations, including UNCHR, IOM, the Red Cross and the Order of Malta. As far as NGOs are concerned, Save the Children had a specific office in Lampedusa. The critical situation of Lampedusa during this period became very complex and it was hoped that any type of measure would be managed quickly and easily. In fact, the stays in the centers could not be too long because the actual capacities of the structures had been compromised by the large number of presences and the resources soon became insufficient³⁶⁶.

The centre of Lampedusa in question was that of Contrada Imbriacola, where a maximum of a thousand people could be accommodated and, in which living conditions were very essential. The spaces are obtained from ventilated prefabs with a sufficient number of sanitary facilities for the number of individuals that can host and the overnight stay is on mattresses placed on the floor. Not all migrants who disembark are taken to the same center, those who suffer from physical and mental diseases mainly to Palermo, adults are taken to a part of the center of Imbriacola while women and unaccompanied minor on another side of the structure. The arrivals intensified considerably, partly because of the causes already mentioned and also for the diplomatic crisis with France, which no longer accepted the arrival of Tunisian citizens in the country. The facilities

³⁶⁵ Il diritto alla protezione, Studio sullo stato del sistema di asilo in Italia e proposte per una sua evoluzione, Progetto co-finanziato dall'Unione Europea e dal Ministero dell'Interno FONDO EUROPEO PER I RIFUGIATI 2008-2013

³⁶⁶ CASE OF KHLAIFIA AND OTHERS v. ITALY, Application no. 16483/12

of Lampedusa were saturated and about 200 Tunisians were detained for almost a month in the center³⁶⁷. According to the subcommittee on the status of reception centers for migrants of the Parliamentary Assembly of the Council of Europe, migrants were living in conditions similar to detention and deprivation of liberty. "The reception centers in Lampedusa are not suitable for the detention of irregular migrants, particularly Tunisians. They are practically detained, without access to a judge, the *ad hoc* subcommittee on the mass arrival of irregular migrants, asylum seekers and refugees on the southern shores of Europe indicated in its report on the visit to Lampedusa, declassified today". Reception centres should remain so and not be turned into detention centres", said Christopher Chope³⁶⁸.

Already a 2010 Council of Europe resolution, 1707³⁶⁹, highlighted how the migration crisis should be properly managed by the Council member states. According to the resolution, detention should be used as a last resort and not become a practice in reception. The document sets out the ten guidelines for the detention of migrants in detention centres. In the Council's view, a distinction should be made between groups of asylum seekers and irregular migrants, and the measures that include the deprivation of liberty should in any case be subject to judicial review by the competent authorities. It is also stipulated that detention can only be considered in the event of a ban on illegal entry, expulsion or extradition and cannot be an arbitrary or discretionary decision. It must have an objective and the modalities must be appropriate and respect fundamental rights, especially of the most vulnerable groups. As far as the rights guaranteed in this situation are concerned, they are clearly those to health, justice, legal aid, to claim any kind of irregular situation, they must live

³⁶⁷ *ibidem*

³⁶⁸ Sottocommissione ad hoc dell'APCE del Consiglio d'Europa: I centri di accoglienza non sono adatti al trattenimento dei migranti, Consiglio Italiano per i Rifugiati – Onlus, http://cir-onlus.org/old_site_2016/en/comunicazione/news-cir/16-archivio-news-2011/554-sottocommissione-ad-hoc-dell-apce-del-consiglio-d-europa-i-centri-di-accoglienza-di-lampedusa-non-sono-adatti-al-trattenimento-di-migranti.

Christopher Chope (UK, GDE), Chair of the Ad Hoc Sub-Committee and the Commission on Migration, Refugees and Demography of the PACE

³⁶⁹ Resolution 1707 (2010), Council of Europe standards and guidelines in the field of human rights protections of irregular migrants

in a safe condition and be followed by professional persons. According to the *ad hoc* subcommittee, these criteria are not met in Lampedusa and the Italian authorities should immediately transfer irregular migrants to suitable detention centres, with the necessary legal guarantees, elsewhere in Italy³⁷⁰.

As has already been mentioned, one of the major deficits of the system concerns access to information, the asymmetry in terms of awareness between the competent authorities and migrants represents a fundamental gap for the proper management of the phenomenon³⁷¹. The lack of knowledge of procedures and regulations has revealed an inadequacy on the part of those involved in the management of the structures and a further lack for migrants. The Government, in response to accusations also made by Amnesty International regarding the flaws in the Italian reception system, argued that according to Article 13 of Legislative Decree No. 286 of 1998: "Against the expulsion decree, the foreigner may appeal to the Justice of the Peace of the place where the authority that ordered the expulsion is located"³⁷². Two on-site visits have brought more concrete contributions on the actual situation of irregular migrants within the Rescue and First Reception Centre of Lampedusa. The first report comes from the study of some volunteers of ARCI³⁷³ who were authorized by the prefecture of Agrigento to enter the facility and talk with guests³⁷⁴. According to the experience of the authors, irregular migrants are detained without a law or court order that defines the timing in an exact manner, inevitably leading to a deprivation of liberty. A total absence of external periodic and jurisdictional controls has been noted within the centre³⁷⁵. The legislative vacuum that is created with respect to the internal dynamics of this type of structure leads to a greater exposure to human rights violations of

³⁷⁰ Committee on Migration, Refugees and Population, Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylumseekers and refugees on Europe's southern shores Report on the visit to Lampedusa (Italy), Council of Europe, 2011

³⁷¹ Cancellaro F., Masera L., Zirulia S., Report dal Centro di Soccorso e Prima Accoglienza di Lampedusa, isola di illegalità ai confini di uno Stato di diritto, Melting Pot Europa, 2011

³⁷² D. LGS. 286/1998 Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, di cui al decreto legislativo 25 luglio 1998, n. 286

³⁷³ Associazione Ricreativa Culturale Italiana (Arci)

³⁷⁴ Cancellaro F., Masera L., Zirulia S., Report dal Centro di Soccorso e Prima Accoglienza di Lampedusa, isola di illegalità ai confini di uno Stato di diritto, Melting Pot Europa, 2011

³⁷⁵ Ibidem

migrants already in a vulnerable position. The legal basis for detention at reception facilities, such as Lampedusa, is identified in the combined provisions of art. 10, paragraph 2 of the Consolidated Act on Immigration³⁷⁶, in the part in which it provides for the deferred rejection of illegal aliens who "have been temporarily admitted to the territory for purposes of public assistance". A further legal basis is provided by Article 23 of the implementing regulation of the Consolidated Act³⁷⁷, according to which "the activities of reception, assistance and those carried out for the hygienic-sanitary requirements, connected to the rescue of the foreigner may also be carried out outside the centres referred to in Article 22 for the time strictly necessary to start the same to the aforesaid centres or to the adoption of the measures necessary for the provision of specific forms of assistance falling within the competence of the State"³⁷⁸.

Moreover, the law n. 563 contains some limited provisions relating to the methods of detention and to the imputation of the relative economic burdens. What emerges is that these centres were designed with the intent of hosting individuals for a very limited time, individuals had to be rescued from a health point of view and for reasons of identification. In fact, migrants are never allowed to leave the Centre, and their movements within the structure are also governed by the provisions dictated by the police³⁷⁹. No oral or written explanation of the reasons for detention is given to the persons subjected to the measure. Even after the first 96 hours spent in the Centre - i.e. the maximum limit granted by art. 13 of the Constitution³⁸⁰ for restrictive measures ordered

³⁷⁶ D. LGS. 286/1998, Art. 2 Diritti e doveri dello straniero

³⁷⁷ Decreto del Presidente della Repubblica 31 Agosto 1999, n. 394, e successive modificazioni, Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'articolo 1, comma 6, del decreto legislativo 25 luglio 1998, n. 286

³⁷⁸ Decreto del Presidente della Repubblica 31 Agosto 1999, n. 394, e successive modificazioni, Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'articolo 1, comma 6, del decreto legislativo 25 luglio 1998, n. 286

³⁷⁹ Cancellaro F., Masera L., Zirulia S., Report dal Centro di Soccorso e Prima Accoglienza di Lampedusa, isola di illegalità ai confini di uno Stato di diritto, Melting Pot Europa, 2011

³⁸⁰ Articolo 13, La libertà personale è inviolabile. Non è ammessa forma alcuna di detenzione, di ispezione o perquisizione personale, né qualsiasi altra restrizione della libertà personale, se

by the public security authority - the deprivation of personal liberty is not validated by the judicial authority: the situation, as already pointed out, can continue for up to 30 days³⁸¹. According to Amnesty International, the situation in the centre of Contrada Imbriacola was very precarious³⁸². Even according to the non-governmental organization, there was not enough exchange of information between the authorities and the irregular migrants in the centre. A high degree of overcrowding in the center was noted, aggravated by a very slow bureaucracy, a very high degree of disorganization at managerial level and a general lack of resources to deal with a collapsing situation. Amnesty International subsequently spoke with the Director of the center who confirmed the overcrowding stating that on March 29 it housed 1,980 people, more than twice its maximum capacity.

4.1.2 The applicants' appeal and the articles violated by Italy according to the ECtHR in *Khlaifia and others v. Italy*

The case which will be presented is the clear consequence of what has been mentioned above in relation to the complex Tunisian situation. The applicants, Saber Ben Mohamed Ben Ali Khlaifia, Fakhreddine Ben Brahim Ben Mustapha Tabal and Mohamed Ben Habib Ben Jaber Sfar arrived on the Italian coast on 17 and 18 September 2011, were placed in the First Aid and Reception Centre of Lampedusa to be assisted and identified³⁸³. The situation reported by the applicants was very precarious, with serious problems of overcrowding of the reception centre and with a vocal discontent on the side of the 'guests'. This culminated in a revolt by the migrants that led to a fire, which resulted in the guests of the center being transferred to the city center of Lampedusa and from there they were moved to a park. However, given the situation of chaos, demonstrations and protests in the city, due to the migrants' demonstrations, many of them were stopped by the police and taken

non per atto motivato dell'autorità giudiziaria [cfr. art. 111 c. 1, 2] e nei soli casi e modi previsti dalla legge [cfr. art. 25 c. 3].

³⁸¹ Cancellaro F., Masera L., Zirulia S., Report dal Centro di Soccorso e Prima Accoglienza di Lampedusa, isola di illegalità ai confini di uno Stato di diritto, Melting Pot Europa, 2011

³⁸² CASE OF KHLAIFIA AND OTHERS v. ITALY, Application no. 16483/12

³⁸³ CASE OF KHLAIFIA AND OTHERS v. ITALY, Application no. 16483/12

to the airport of Lampedusa. On September 22, 2011 the complainants arrived in Palermo where they were transferred on board ships moored in the city port. The first plaintiff boarded "Vincent", with about 190 other people, while the second and third plaintiffs were taken on board the ship "Audacia", with about 150 people. Even on the ships the living conditions suffered from significant hardship without being able to take advantage of the minimum services. Subsequently, on September 27 and 29, the two applicants, after being received by the Consul of Tunisia, were repatriated. However, in order to understand the dynamics of the *Khlalifia* case, it is necessary to analyze in detail the actors present on the island of Lampedusa, the reception facilities and the actual conditions of the migrants³⁸⁴. The appeal by Tunisian citizens was accepted by the ECtHR on 9 March 2012³⁸⁵ and decided four years after. The applicants complained about the violation of Article 5 regarding the right to liberty and security, Article 3 on the prohibition of torture, Article 4 of Additional Protocol 4 on the prohibition of collective expulsion of foreigners and finally Article 13 in conjunction with those mentioned above. In fact, the lack of an effective domestic judicial remedy for conventional violations and the impossibility of initiating internal appeal procedures are raised. As previously mentioned, Tunisian citizens could appeal to the Justice of the Peace against their expulsion, but this mechanism had no suspensive effect. This means that this procedure is in no way effective and therefore not proportionate to the parameters dictated by Strasbourg. Reference is made in this particular circumstance to the judgment of 13 December 2012 in *De Souza Ribeiro v France*³⁸⁶, in which it was established that the suspensive effect is essential to be in line and therefore not to violate Article 13 of the ECHR. This ruling was of fundamental importance and the objective was to fill the legislative gap given by the non-suspensive effect for appeals in case of expulsion, in fact it was recognized that the expulsion could expose the subjects subject to the measure to risks of violation. Violations include fundamental rights such as the prohibition of torture, inhuman or degrading treatment and the violation of the

³⁸⁴ *ibidem*

³⁸⁵ *ibidem*

³⁸⁶ Case of *De Souza Ribeiro v. France*, Application n. 22689/07, 13 December 2012

right to life. Therefore, in the cases in question, the Court finds that there are no effective means of redress the violations since there is no possibility, after appealing to the Justice of the Peace³⁸⁷.

An important precedent for the sentence for *Khlaifia* ruling was *Hirsi Jamaa* and others against Italy on 23 February 2012³⁸⁸. In May 2009, about two hundred people on board three boats were intercepted by Italian patrol boats in the Search and Rescue area, Malta's area of responsibility. According to the agreement between Italy and Libya, Italy had the power to take these people back to Libya. What was lacking was firstly the identification of the passengers, and secondly, the persons concerned were not informed as to where they would go. In this circumstance, 24 Somali and Eritrean citizens brought actions against Italy under Articles 3, 4 of Protocol No 4 and Article 13 in conjunction with the others. Italy was strongly condemned by the ECHR for violating Article 3 because it exposed subjects to possible inhuman or degrading treatment by taking them back to Libya. At the same time, the Refoulement principle is also violated, according to which, if such a measure is implemented, the competent state must ensure that it does not endanger the life of the subject of the expulsion³⁸⁹. Another point in question is the prohibition of collective expulsions, this was a particularly thorny point because the return to Libya took place in international waters, without even landing on the Italian coast. In order to deal with this complex circumstance, the Court reiterated that everything must be interpreted in accordance with the current and factual conditions. Finally, with regard to the infringement of Article 13, the Court considered that the applicants were totally unable to put forward their arguments before being refused entry³⁹⁰.

As is well known, Italian legal system provides for the possibility of depriving a foreigner who has entered or remains irregularly in Italy of his or her

³⁸⁷ CASE OF KHLAIFIA AND OTHERS v. ITALY, Application no. 16483/12, JUDGMENT STRASBOURG 15 December 2016

³⁸⁸ *Hirsi Jamaa and Others v Italy*, Application No. 27765/09

³⁸⁹ Fiorini A., *Italia condannata dalla Corte europea dei diritti dell'uomo - Sentenza Hirsi Jamaa e altri c. Italia*, *Melting Pot Europa*, 2012

³⁹⁰ *ibidem*

personal freedom by administrative means. In the Identification and Expulsion Centres (CIE), regulated by Art. 14 of the Consolidated Act on Immigration, foreigners who are the recipients of an administrative or judicial expulsion measure can be detained for a maximum period of 18 months³⁹¹. The law uses the expression 'detention' instead of the term 'detention', which refers to deprivation of liberty in a criminal court following the commission of an offence. However, beyond the differences in terminology, the administrative detention in a CIE of an irregular foreigner also constitutes to all intents and purposes a form of deprivation of liberty, which falls within the scope of application of Article 13 of the Constitution. In fact, in order to bring the discipline on detention into line with constitutional guarantees, Article 14 of the Consolidated Act on Immigration³⁹² provides that the order issued by the Questore must be communicated within 48 hours to the competent Justice of the Peace, paragraph 3, who must order its validation within 48 hours, otherwise the order will cease to have effect, paragraph 4³⁹³.

In the *Khlaifia* case, the plaintiffs complain that they did not even have a copy of their postponement and that they did not have the opportunity to contact lawyers because they were unable to access the places of detention. This clearly conditioned the possibility for citizens to lodge an effective appeal, which has nothing to do with its positive outcome in terms of trial, but which nevertheless has concrete effects, such as the suspension of the contested measure against the applicants. It follows that the Court finds that there has been an infringement of Article 13 in conjunction with both Articles 3 and 4 of Protocol 4³⁹⁴. In essence, there has been the illegal practice of detaining irregular foreigners who disembarked in Lampedusa for varying periods of time, but almost always for a period of not less than one week, by de facto detaining them without any legal basis, and consequently also without the guarantees which Article 13 of the Constitution grants to all, including

³⁹¹ Savio G., Bonetti P., L'allontanamento dal territorio dello Stato dello straniero extracomunitario in generale, *Melting Pot Europa*, 2012

³⁹² D. LGS, 25 luglio 1998, Articolo 14, Esecuzione dell'espulsione.

³⁹³ *ibidem*

³⁹⁴ Giliberto A., *Lampedusa: La Corte Edu condanna l'Italia per la gestione dell'emergenza sbarchi 2011*, *Diritto penale contemporaneo*, 2015

foreigners, in any case of deprivation of liberty. What is legally a reception centre, where foreigners should not stay for more than 48 hours, has been transformed into a detention centre, where 'guests' have been detained for several days without any control by the judicial authority³⁹⁵.

Despite the complaints and accusations made against this system, no complaint, either in court or in civil proceedings, has been made - at least to our knowledge - either directly by a victim of the illegal detention, or by a lawyer appointed by the same as a representative: the manner of detention in fact deprives foreigners of any opportunity to see their reasons protected by the judicial authority. To prevent the right of defence was, in the first place, the same discipline of access to the structure, even stricter than the prison, in many periods not being able to make access to parliamentarians or lawyers. The situation has had very different phases over the last two years, but the only subjects to have had continuous access to the Centre, in addition to the operators of the Cooperative that manages it, were the organizations (UNHCR, IOM, Red Cross, Save the Children), which acted within the so-called Praesidium project, funded and coordinated by the Ministry of Interior and the European Commission. The great majority of foreigners who, for more or less long periods, have passed through the Lampedusa Centre, have not had any chance to get in touch with a lawyer who could make them aware of their rights, and could assume the defense³⁹⁶.

The second element that has prevented the root of the prosecution by the inmates is the purely factual nature of the detention and the lack of any measure, administrative or judicial, that would provide a reason. It is even more complex for the foreigner to apply to a judicial authority, which in the event that he had come into contact with a lawyer, if there was no act of the administrative authority. If it is added that the police authority limited itself, denying the evidence, to affirming that the Centre was a reception structure and not a detention facility, the possibility of appeal by the irregular migrant is very

³⁹⁵ *ibidem*

³⁹⁶ CASE OF KHLAIFIA AND OTHERS v. ITALY, Application no. 16483/12

limited. This profile of incompatibility between the conduct of the Italian Government and the guarantees of the European Convention in fact prevented, in the applicants' submission, access to any instrument capable of putting forward their arguments before the national authorities, and therefore justified the lodging of the appeal even in the absence of a national court ruling, since it was not materially possible to pursue any domestic remedies, recall that the three applicants had the opportunity of contact with a lawyer only after their return to Tunisia³⁹⁷. Moreover, it is necessary to underline that there are two cases of deprivation of liberty not linked to the commission of an offence: compulsory health treatment for persons suffering from psychiatric diseases, and detention in the CIEs for irregular foreigners awaiting expulsion. In both situations, the decision of the administrative authority to proceed to the deprivation of liberty must be validated by the judicial authority, and before this authority the subject can then assert his reasons, within the validation procedure governed by law³⁹⁸.

4.1.3 The concurring and dissenting opinions of the judgment

For the purpose of the analysis, it is useful to understand the opinions of the judges with respect to the ruling delivered by the Grand Chamber. The opinion of the Italian judge Raimondi is one of the opinions in agreement with the judgment. As far as Judge Raimondi is concerned, he acknowledges the exceptional nature of the situation experienced by the island of Lampedusa in 2011³⁹⁹. According to the Italian judge, the strong wave of migration following the Arab Spring has decisively compromised the living of the structures dedicated to the reception and the level of quality of services for migrants. On the other hand, it is not acceptable for this to lead to a violation of human rights and dignity. Another fundamental point stressed by the Judge, concerns the drafting of the decrees of rejection of the subjects concerned, the text of the rejections was identical for all applicants without specifying any diversification

³⁹⁷ Giliberto A., Lampedusa: La Corte Edu condanna l'Italia per la gestione dell'emergenza sbarchi 2011, *Diritto penale contemporaneo*, 2015

³⁹⁸ CASE OF KHLAIFIA AND OTHERS v. ITALY, Application no. 16483/12

³⁹⁹ *ibidem*

based on individual cases and situations of the subjects. Although this was allowed by the agreement between Italy and Tunisia, never officially published, it allowed the rejection of Tunisian citizens through simple procedures and with the presence of the Tunisian authorities. This exempted the applicants to apply for international protection because beyond the individual situations of the subjects, the mere fact that their citizenship was Tunisian made them subject to refoulement. The judge underlined that this situation led the Grand Chamber to consider this as a collective expulsion and therefore a violation of Article 4 of Protocol 4. It is emphasized that the right to apply for international protection is a fundamental guarantee: "There is nothing to suggest that the Italian authorities, which have listened to the migrants who intended to invoke the principle of non-refoulement, would have remained passive if other legitimate and legally defensible obstacles to the return of the persons concerned had been deduced". In addition, the judge Raimondi said: "I can agree with the level of protection laid down in paragraph 248 of the judgment, i.e. that Article 4 of Protocol No. 4 does not guarantee the right to an individual interview under any circumstances; the requirements of this provision can in fact be met when every foreigner has the real and effective possibility to invoke the arguments opposing his expulsion, and when the latter are examined in an appropriate manner by the authorities of the defendant State. Judge Raimondi wishes to stress, as has already been mentioned, that the non-suspensive effect of the appeal by the applicants has been a fundamental point in order to be able to also challenge the violation of Article 13 of the ECHR. The fact that it is not suspensive is in fact contrary to the principle of effectiveness as guaranteed by the article and this is not in line with the judgment in the *De Souza Ribeiro* case. The case in question, in fact, showed the need to make it more incisive when the rejection to the country of origin could compromise the life and safety of the person concerned⁴⁰⁰.

As for the dissenting opinion of Judge Serghides, it is pointed out that under the Italo-Tunisian agreements of 2011, the product of a bilateral agreement of

⁴⁰⁰ Giliberto A., Lampedusa: La Corte Edu condanna l'Italia per la gestione dell'emergenza sbarchi 2011, Diritto penale contemporaneo, 2015

1998, an individual interview with the subject in question was not mandatory⁴⁰¹. The reason for this was linked to the great discretion enshrined in the agreement: "Each Party undertakes to take back on its territory, at the request of the other Party and without formalities, the person who does not meet the conditions of entry or residence applicable in the territory of the requesting Party if it is demonstrated or to be demonstrated through the identification procedure that has the nationality of the requested Party. The Tunisian consular authorities, as also said by Judge Raimondi, had to be the competent authorities for the procedure of rejection and the subject did not necessarily have to be the subject of interviews or legal assistance. What reinforces the violation of Article 4 of Protocol 4 is the failure to publish and therefore notify the applicants of these agreements and therefore the impossibility for the parties concerned of their possibilities and their fate. The absence of individual examination always leads to a violation of the prohibition of collective expulsions. Such an examination is essential if the police authorities are not to have sole discretion in assessing the situation of a person liable to be expelled. According to this interpretation, the article in question produces obligations of a substantive and procedural nature and compliance with it must not be linked to the risk of violations of the right to life or the prohibition of torture and inhuman and degrading treatment. Likewise, the suspensive effect of the remedy cannot be subordinated to the seriousness of the risks associated with the expulsion, since this is a measure which, in case of error, is difficult to remedy once it has been put in place⁴⁰².

4.2 The Spanish Enclave in Morocco of Melilla and the migratory phenomenon

In order to provide for a circumscribed analysis of the migration situation in Melilla, the Spanish enclave in Morocco, it is necessary to provide an overview on the history of the enclaves and on the relations between Spain, Morocco and

⁴⁰¹ Cancellaro F., *Migranti, Italia condannata dalla CEDU per trattenimenti illegittimi*, *Questione Giustizia*, 2017

⁴⁰² Cancellaro F., *Migranti, Italia condannata dalla CEDU per trattenimenti illegittimi*, *Questione Giustizia*, 2017

the European Union. The history of the Spanish enclave of Melilla in Morocco has always suffered from its strategic position on the northern coasts of the African continent. The city was born to be a Spanish military garrison in 1487, from its constitution it was a land of siege and contrast with neighboring countries, despite this the neighboring populations did not have the ability to conquer it and remained permanently under Spanish control. The situation of contrast with Morocco remained unstable until 1859 when the Treaty of Tetuan was signed, an agreement that outlined the borders between Melilla and the African state. With the Shooting of the Cannon in 1861, Morocco delivered the territories bordering Melilla and the surface of the enclave was extended. From that moment on, Spain decided to implement population policies, reaching an all-time high in 1985 with about 87,000 inhabitants. Between 1912 and 1956, the Treaty of Fez established the Spanish Protectorate in Morocco, which included the northern province, consisting of five provinces (Lucus, Yebala, Gomara-Chauen, Rif and Kert) corresponding to a territory and the southern Tarfaya or Spanish Sahara, inhabited by nomads. Ceuta and Melilla were part of the Spanish metropolitan territory and were excluded from the Protectorate. With the independence of Morocco, reached in 1956, the Moroccan claims on Ceuta and Melilla became increasingly pressing but in Spain, most of the political formations were for the maintenance of the status quo, with some exceptions such as the Spanish Worker Socialist Party (PSOE) and the Spanish Communist Party (PCE)⁴⁰³.

From Morocco, numerous documents were submitted to the United Nations concerning the disputes with Spain, including the contrast with the two enclaves, so much so that in 1975 a memorandum was submitted to the Commission on Decolonization to recognize the Spanish territories in Morocco as not self-managed⁴⁰⁴. Spain, after Franco's death, accelerates its policies for joining the European Union, which it obtained in 1985. In the same year, the government headed by the Spanish Socialist Worker Party approved the

⁴⁰³ Orsini G. – Schiavon S., Melilla Città europea nel continente africano. Cronache dalla frontiera spagnola in Marocco, Il Mulino Riviste Web, 2009

⁴⁰⁴ Saddiki S., Ceuta and Melilla Fences: a Eu Multidimensional border?, Paper presented at the annual meeting of the Theory vs. Policy? Connecting Scholars and Practitioners, 2010

Organic Law of Extranjeria 7/1985, a law that regulates the treatment of foreigners in Spain in line with European standards⁴⁰⁵. The law established that Muslims who lived in the enclave to apply for citizenship had to reside there for ten years without guarantees of obtaining it. This showed Spain's fear of the growth of the Muslim population and therefore a consequent Marocconisation of the territory⁴⁰⁶. In this way, the legal status of Moroccans in the enclave was downgraded to foreign citizens despite the fact that they had lived in Melilla for generations, causing general discontent and internal tensions that saw the participation of Moroccan minority interest groups in the city. This situation culminated in violent clashes that ended definitively in 1988 with the granting of the National Identity Document and therefore of Spanish citizenship to all intents and purposes⁴⁰⁷. In 1986, Spain managed to enter the European Union and the Spanish enclaves became to all intents and purposes a territory of the Community and therefore an even more attractive destination for migrants from the rest of the continent. Meanwhile, Morocco continued, through commissions of technicians and experts, to claim its dominion over Ceuta and Melilla for cultural, religious and geopolitical reasons⁴⁰⁸. In 1992, the first waves of migration from the rest of Africa began, crossing the first fence, installed along the border to act like a fence. The management of the phenomenon was precarious and was supported by the Spanish Red Cross, the migrants applied to Spain for asylum but were not accepted and consequently rejected to the border with Morocco, which, in turn, did not allow the recognition of asylum. This caused a strong tension between the two states and was aggravated by the unconstitutionality of the behavior of the Spanish delegate Manuel Cespédes (PSOE). As a result of these tensions was signed the agreement with Morocco on the repatriation of foreigners who illegally

⁴⁰⁵ Orsini G. – Schiavon S., Melilla Città europea nel continente africano. Cronache dalla frontiera spagnola in Marocco, Il Mulino Riviste Web, 2009

⁴⁰⁶ Saddiki S., Ceuta and Melilla Fences: a Eu Multidimensional border?, Paper presented at the annual meeting of the Theory vs. Policy? Connecting Scholars and Practitioners, 2010

⁴⁰⁷ Orsini G. – Schiavon S., Melilla Città europea nel continente africano. Cronache dalla frontiera spagnola in Marocco, Il Mulino Riviste Web, 2009

⁴⁰⁸ Saddiki S., Ceuta and Melilla Fences: a Eu Multidimensional border?, Paper presented at the annual meeting of the Theory vs. Policy? Connecting Scholars and Practitioners, 2010, pp. 1-18

entered Spain was signed⁴⁰⁹. The agreement provided for an identification procedure followed by a formal return process commonly decided by both states to combat irregular immigration⁴¹⁰.

With the accession of Spain to the Schengen Treaty, which came into force on March 26, 1995, the border policies of Melilla changed. On the one hand, the border was secured while on the other hand, the reception facilities were adapted and in general the entire management of the phenomenon was improved, which became more and more important⁴¹¹. Between 1993 and 1995, policies aimed at preventing irregular immigration through the construction of a safer system were announced, as Ceuta and Melilla officially became the southernmost border of the European Union⁴¹². The Spanish Civil Guard, in 2005, started what were called ‘Devoluciones en caliente’, or ‘Hot returns’. They are characterized by the use of force to immediately bring back beyond the border irregular migrants who illegally cross the border. This happens without an administrative procedure, without documentation or interviews with the migrants and without any kind of judicial control⁴¹³. In 2005, the situation culminated with the death of 5 people on the Ceuta border fence, the so-called valley, which led to the attention of the international community on the difficult situation experienced by migrants⁴¹⁴. The European Commission drew up a report on the situation of Melilla after a visit carried out between 7 and 11 October 2005⁴¹⁵, the commission in fact wanted to start a technical mission on the territory to closely understand the dynamics within Melilla and Ceuta. In addition, an action plan for Sub-Saharan Africa was

⁴⁰⁹ Orsini G. – Schiavon S., Melilla Città europea nel continente africano. Cronache dalla frontiera spagnola in Marocco, *Il Mulino Riviste Web*, 2009

⁴¹⁰ Salvadego L., I respingimenti sommari di migranti alle frontiere terrestri dell’enclave di Melilla, *Il Mulino Riviste Web*, 2018

⁴¹¹ Orsini G. – Schiavon S., Melilla Città europea nel continente africano. Cronache dalla frontiera spagnola in Marocco, *Il Mulino Riviste Web*, 2009

⁴¹² Saddiki S., Ceuta and Melilla Fences: a Eu Multidimensional border?, Paper presented at the annual meeting of the Theory vs. Policy? Connecting Scholars and Practitioners, 2010

⁴¹³ Salvadego L., I respingimenti sommari di migranti alle frontiere terrestri dell’enclave di Melilla, *Il Mulino Riviste Web*, 2018

⁴¹⁴ Orsini G. – Schiavon S., Melilla Città europea nel continente africano. Cronache dalla frontiera spagnola in Marocco, *Il Mulino Riviste Web*, 2009

⁴¹⁵ TECHNICAL MISSION TO MOROCCO Visit to CEUTA AND MELILLA ON ILLEGAL IMMIGRATION, 7th October– 11th October 2005, MISSION REPORT

activated by Spain in order to control and monitor migratory flows⁴¹⁶. The ‘Hot Returns’ are a practice that becomes praxis until 2013 and in part accepted by the reform of the law of 30 March 2015⁴¹⁷. This reform establishes an exceptional return procedure for the cities of Ceuta and Melilla. Irregular migrants can be sent back to Morocco through the procedure mentioned above and it is also stipulated that: ""Foreigners who are detected on the border line of the territorial demarcation of Ceuta or Melilla while attempting to overcome border containment elements to cross the border irregularly may be refused in order to prevent their illegal entry into Spain (...)""⁴¹⁸.

Again in 2005, the European Union, together with the Spanish Government, decided to build a further fence, located next to the two already existing and already deteriorated. Despite the attempts to adjust the situation from a legal point of view, the only solution was found in 2007 when the CETI (Centers of temporary residence for immigrants) were created in which irregular migrants from neighboring countries could remain and regularize their situation at the level of documents and not be immediately repatriated. What is considered paradoxical by many scholars is that with the intensification of controls and the strengthening of borders, the number of migrants trying to cross the border illegally has increased⁴¹⁹. In 2009, a new budget for barbed wire fences was financed and the situation remained unchanged and tense. The complex history of Melilla and the migrations from the African continent have made this territory even more complicated to manage, what emerges about the management of the situation remains the lack of attention given to the human rights of migrants⁴²⁰.

⁴¹⁶ Saddiki S., Ceuta and Melilla Fences: a Eu Multidimensional border?, Paper presented at the annual meeting of the Theory vs. Policy? Connecting Scholars and Practitioners, 2010

⁴¹⁷ Salvadego L., I respingimenti sommari di migranti alle frontiere terrestri dell’enclave di Melilla, *Il Mulino Riviste Web*, 2018

⁴¹⁸ Ley Orgánica 30 marzo 2015, n. 4 de protección de la seguridad ciudadana

⁴¹⁹ Orsini G. – Schiavon S., Melilla Città europea nel continente africano. Cronache dalla frontiera spagnola in Marocco, *Il Mulino Riviste Web*, 2009

⁴²⁰ Saddiki S., Ceuta and Melilla Fences: a Eu Multidimensional border?, Paper presented at the annual meeting of the Theory vs. Policy? Connecting Scholars and Practitioners, 2010

The proposed framework raises many questions regarding the protection of human rights and the rights of foreigners in general, first and foremost the principle of non-refoulement, enshrined in Article 33 of the 1951 Geneva Convention. Equally complex is the problem of judicial protection on hot returns and effective access to justice in these cases for irregular migrants. The 'Devoluciones en Caliente' have been the subject of numerous criticisms from both the Council of Europe Commissioner for Human Rights, Nils Muiznieks, and the Council of Europe Committee for the Prevention of Torture and the European Commissioner for Home Affairs, Cecilia Malmstrom. The institutions have argued that such practices violate both the Convention and European Union legislation in general. The UNHCR has spoken out against the Moroccan authorities for the disproportionate use of force, which involves major violations of human rights. Despite this general stance, the situation has remained rather unchanged; indeed with the 'legalization' of this procedure with the Law on the 'Protección de la Seguridad Ciudadana'⁴²¹ it has been more likely to persevere with this practice. Article 75 is certainly the most worrying because it states exactly that people who enter or try to enter the Spanish state illegally can be rejected. The international dissent and the protests by Parties but also by NGOs working in the field, in Ceuta and Melilla is very present Prodein, have led to raise a doubt of unconstitutionality in the Constitutional Court⁴²². On 16 December 2016, the Socialist Parliamentary Group presented a proposal to amend the law⁴²³, as did the Basque Group on 20 January 2017⁴²⁴. In general, there is a strong need to modify the legislation in the Parliament because the new legislation creates numerous disputes also in relation to the daily lives of the Spanish citizens themselves. In addition to the issue of Melilla's Hot Returns, issues such as the authorization for popular

⁴²¹ Ley Orgánica 4/2015, de 30 de marzo, de Protección de la seguridad ciudadana

⁴²² European Centre for Constitutional and Human Rights, Case Report : Spanish-Moroccan land border in Melilla – a lawless zone of automatic expulsions

⁴²³ ROPOSICIÓN DE LEY 122/000050 Proposición de Ley Orgánica sobre Protección de la Seguridad Ciudadana y derogación de la Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana. Presentada por el Grupo Parlamentario Socialista.

⁴²⁴ El Grupo Parlamentario Vasco (EAJ-PNV), al amparo de lo establecido en el artículo 124 del Reglamento, presenta la siguiente PROPOSICION DE LEY, DE REFORMA DE LA LEY ORGANICA 4/2015, DE 30 DE MARZO, DE PROTECCIÓN DE LA SEGURIDAD CIUDADANA
Palacio del Congreso de los Diputados, 20 de enero de 2017

demonstrations, the power of law enforcement agencies that can search citizens and that cannot be photographed or filmed, evictions from real estate and other issues of a social nature are touched upon.

Similarly, it is essential to understand the point of view from the Defensor del Pueblo. According to the Defensor del Pueblo, the border area of Melilla is part of Spanish territory and therefore the competent jurisdiction is that of the state, in light of this also argues that Spain does not decide where it begins and ends its responsibility and it is not the Civil Guard or other authorities who determine whose control of this border is. This is underlined by virtue of the aforementioned agreement with Morocco but also with respect to other international treaties that define and regulate the relationship between neighboring states. Once a person crosses the Spanish border, regularly and not, he is unequivocally under Spanish law. This undoubtedly condemns harshly the 'Devoluciones en Caliente'⁴²⁵. In a dossier of 2016, he also points out that in the enclaves of Ceuta and Melilla until 2014 it was not possible to make requests for asylum and this has clearly aroused objections from international organizations, both NGOs and the UNHCR itself, arguing that given the difficulty of access to international protection will succeed only those who have the opportunity, even economically, to be able to obtain it. For all the rest, which are then the neediest, a situation of great vulnerability is created and this increases this phenomenon of irregularity at the Melilla border. This is also confirmed by some data from 2010, in fact the asylum applications have affected 10.87% of people, who reside there, with a total of 2% in 2013. Just in 2013, according to the UNHCR, the presence in autonomous cities has increased exponentially, but not increased the number of asylum applications⁴²⁶. This was explained through interviews with the staff of the Centre, according to which, given the lengthy procedures for granting international protection, the individuals did not want to remain further within the structure. Another turning point was in 2015, when many Syrian citizens

⁴²⁵ CASE OF N.D. AND N.T. v. SPAIN, (Applications nos. 8675/15 and 8697/15), JUDGMENT STRASBOURG , 3 October 2017, Referred to the Grand Chamber 29/01/2018

⁴²⁶ Spanish Ombudsman, A study of ASYLUM IN SPAIN - International Protection and Reception System Resources - Madrid, June 2016

arrived in Melilla asking for political asylum from the Spanish authorities. This led to a restructuring of the offices at the border to be more ready and appropriate to the situation that Melilla was experiencing with both Syrian citizens and sub-Saharan Africans. However, numerous failures on the part of the Spanish authorities to protect individuals in Melilla came to light, showing important negligence both from the point of view of health and in the entire bureaucratic apparatus. The situation of individuals from sub-Saharan Africa is very controversial, as they cannot cross the border and cannot access asylum procedures. Another equally controversial point is represented by the maritime interception of migrants by the Spanish authorities, the competence in cases of this type is immediately passed to Morocco without knowing if the people on board have special needs or urgent. This, according to both UNHCR and the Defensor Del Pueblo, is completely unacceptable and violates the rules of international law. Finally, the Defensor del Pueblo stated that: "The degree to which the specific rights are linked to the guarantee of human dignity, the preceptive substance of the law, when this is recognized for aliens directly by the Constitution, the substance for which the bounds are determined for this right under the Constitution and the international treaties and the conditions for the exercise thereof set forth by law must be aimed at preserving other constitutionally-safeguarded rights, assets or interests and must be suitably in proportion to the end purpose pursued"⁴²⁷.

4.2.1 The case N.D. and N.T. v Spain in detail

The applicants in this case are a Malian and an Ivorian citizen who, in 2012 and 2013 respectively, left their land of origin to reach Morocco and try to get to Spain crossing the Melilla border illegally. As mentioned above, the barriers are characterized by three large fences and, once the first fence is overcome, the applicants are helped by the Spanish authorities and were immediately rejected in Morocco. The repatriation in question corresponds to what was mentioned earlier, the 'Devoluciones en caliente'. The way in which this policy

⁴²⁷ Spanish Ombudsman, A study of ASYLUM IN SPAIN - International Protection and Reception System Resources - Madrid, June 2016

of refoulement was pursued was brought to light by a report of the European Commission for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment and by the investigative work of journalists and reporters⁴²⁸. The two young people lived for a period in a camp on the Gourougou Mountain in Morocco and in 2014 they tried to cross the border with other migrants from the rest of Africa. They crossed the first two nets, they arrived at the third and were helped by the Spanish Civil Guard who escorted them beyond the border, repatriating them to Morocco first to Nador and then to Fez. The applicants did not receive any kind of assistance, were not subjected to any identification procedure and were not questioned individually regarding their personal situations. On December 9, 2014, the Malian applicant managed to enter Spain, and in the same way the young Ivorian crossed the border on October 23 of the same year. Two expulsion orders were issued against them, which took place definitively in 2015, despite the fact that the Malian citizen had applied for political asylum but with negative results from the administrative authorities⁴²⁹.

The appeal by N.D. and N.T. was the first ever by the Court to deal with the issue of Melilla, in particular the court was called upon to rule on the violation of the Principle of Non Refoulement, the right not to be collectively expelled and the right to effective recourse. Initially, the appeal was declared partially inadmissible on the grounds that it was manifestly unfounded in relation to the violation of Article 3, the prohibition of torture. Subsequently, violations of Article 4 of Protocol 4 in conjunction with Article 13 are recognized. Although there is a bilateral agreement between Spain and Morocco to manage irregular immigration on the Melilla border, the court is now aware of the informal practice of both Moroccan and Spanish authorities in hot returns. These returns do not seem to take account at all of the 1951 Geneva Convention, which has

⁴²⁸ CPT/Inf (2017) 34, Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), from 27 September to 10 October 2016

⁴²⁹ Salvadego L., I respingimenti sommari di migranti alle frontiere terrestri dell'enclave di Melilla, *Il Mulino Riviste Web*, 2018

also been clearly ratified by the Spanish State⁴³⁰, and Article 33 of which enshrines the principle of non-refoulement. In fact, complainants who do not have an individual interview analyzing their personal situations may be exposed to human rights violations in their country of origin by repatriation. However, the court did not have evidence of violations that are degrading treatment or torture in Morocco, or in other third countries and on these grounds it was ruled that Article 3 of the ECHR had not been violated⁴³¹. The particularity of the case in question lies in the choice of the competent state, since Melilla is a border area; it was not easy to establish whether the Spanish authority was responsible for these violations and whether the border was entirely on Spanish territory. However, the applicants crossing the border found themselves totally under the control of Spain and in the middle of the Spanish state and in this regard the Court argues that: "The borders between the two states cannot be changed unilaterally on the basis of the state interest in a retreat of its territory for the main purpose of managing migration flows and, in particular, in order to prevent migrants from accessing a form of international protection"⁴³². More important from the point of view of the Court was the question of collective expulsion and the right to effective recourse. Precisely with regard to the latter, the Court opposes the Spanish Government's replies on the ground that the applicants were not identified and immediately rejected the first time and repatriated the second time. The Spanish Government defended itself by arguing that there was the possibility for migrants to gain access to the state through a legal procedure for applying for political asylum without any need to illegally cross the border. On the other hand, the Court considered that the law that allowed this procedure for requesting international protection was not in force at the time of the facts in question, it became so in the months immediately following the case. This supported the argument that Article 4 of Protocol 4 had been violated: "Collective expulsion is to be

⁴³⁰ Ratification of Spain on 14th August, 1978 - <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>

⁴³¹ Salvadego L., I respingimenti sommari di migranti alle frontiere terrestri dell'enclave di Melilla, *Il Mulino Riviste Web*, 2018

⁴³² CASE OF N.D. AND N.T. v. SPAIN, (Applications nos. 8675/15 and 8697/15), JUDGMENT STRASBOURG, 3 October 2017, Referred to the Grand Chamber 29/01/2018

understood as any measure that forces foreigners as a group to leave a country, unless such a measure is adopted on the basis of an objective and reasonable examination of the particular situation in each of the individuals who make up the group”⁴³³. This is further supported by the fact that the applicants were part of a group of about 80 people, all with the same fate. The arguments that Spain brought to prove that it was not collective expulsion concerned the lack of evidence, of any kind, that the applicants were actually part of the expelled migrants. Moreover, according to the state, given the delay on the part of the applicants in lodging the aforementioned appeal, they could no longer be considered real victims. The court replied further to the Spanish government claiming that, although they could not be recognized visually through videos or recordings, the collective expulsions took place and with an informal practice that neither Spain nor Morocco could deny. Moreover, as they had never been called or questioned by the authorities, the slowness of the procedures was a consequence of the failures and negligence of the Spanish government in managing this phenomenon.⁴³⁴

The failure to identify the applicants and their expulsion inevitably led to a breach of Article 13, as the applicants had no opportunity to have access to internal remedies. The Court held that, although the flows are large and the difficulty of managing the phenomenon may be high, the human rights of irregular migrants cannot be neglected in any way. Therefore, the ECHR recognizes the right of the State to reject an individual only after specifically verifying the individual situation, on a case by case basis, of the individuals affected by this measure⁴³⁵. Unlike the *Khalifia* case, which marked a turning point in the evaluation of the lack of access to justice in cases of collective expulsions, the *N.D. and N.T.* claimants did not have the possibility of any recourse and therefore the question of the effectiveness that *Khlaifia* brought to light was not taken into consideration. The question of effectiveness was

⁴³³ *ibidem*

⁴³⁴ Hakiki H., Summary land border expulsions in front of the ECtHR: ND and NT v Spain, European Database of Asylum System, 2017

⁴³⁵ Salvadego L., I respingimenti sommari di migranti alle frontiere terrestri dell’enclave di Melilla, *Il Mulino Riviste Web*, 2018

peculiar to the *Khalifia* case since the appeals would not have had suspensive effect with respect to the expulsion, in the *N.D. and N.T.* cases the applicants did not have the slightest perception of having an option to modify their own destiny⁴³⁶. However, the Court recalls that Article 4, Protocol 4 protects the applicants against the risk of being expelled collectively without having had the opportunity to present their personal situation as well as the *Khlaifia* judgment and others v. Italy. Since in the present case, in line with the general measures adopted by Spain to combat irregular immigration at the border with Morocco with the Ley Orgánica 4/2015, removal was immediate and no identification procedure was guaranteed, the Court considers that the Spanish authorities have carried out a collective expulsion.

4.2.2 The competing and dissenting opinions of the judgment

Judge Dedov, despite voting in favor of the violation of Article 4 of Protocol 4, does not consider that there has been a real threat to the lives of the applicants by virtue of their expulsion. He stresses the moral damage of the applicants more than the material one because the migrants themselves illegally crossed the Moroccan border to enter Spain by force. However, he considers that there has been an infringement of the Convention but that there is no need to provide such a high level of compensation to the applicants which corresponded to EUR 5 000 for each applicant⁴³⁷. The judge's attention, in commenting on the case, shifts to the complexity of the management of the phenomenon in realities such as those of Melilla, arguing that the Court holds too high a standard on these issues without taking into account the real circumstances. According to Dedov, Spanish civil guards have to face situations of this caliber every day, compared to an assault, and that they are people who are as emotional and deserve respect as the plaintiffs. In essence, according to Dedov, the violation to which the applicants were subjected cannot be considered serious because it is counterbalanced by the actions of irregular migrants who

⁴³⁶ Hakiki H., Summary land border expulsions in front of the ECtHR: ND and NT v Spain, European Database of Asylum System, 2017

⁴³⁷ CASE OF N.D. AND N.T. v. SPAIN, (Applications nos. 8675/15 and 8697/15), JUDGMENT STRASBOURG , 3 October 2017, Referred to the Grand Chamber 29/01/2018

illegally cross the border of Melilla putting the civil guards in a situation of vulnerability and danger⁴³⁸.

The controversial opinion of Judge Dedov has been the subject of numerous criticisms, will be examined that of Dana Schmalz⁴³⁹, a researcher of the Max Planck Institute for studies of religious and ethnic diversity⁴⁴⁰. First of all, according to her, the central question of the sentence lies in the issue of the identification of individuals. The N.D. and N.T. case allows us to bring to light a practice of non-identification that has been repeated in a number of episodes like this, even in *Khlaifia and others against Italy*, the failure to recognize the applicants and their personal situations has been decisive in establishing the responsibilities of the Italian state. The question, therefore, concerns most of the border countries, destinations of greater flows. On the one hand, it is possible to understand Dedov's comment on this because countries such as Spain and Italy live in a situation of great hardship in the management of a phenomenon of this magnitude; on the other hand, according to Schmalz, it is not possible to use this as a justification and put the national interest, the concept of sovereignty in first place and neglect the protection of the individual rights of these people. Another point on which Schmalz criticizes Dedov's opinion is the judge's aversion to the compensation given to the claimants of 5000 euros. He believes that given the unlawfulness of the gesture of the Malian and Ivorian citizens, what could have been compensated was immaterial damage and the mere fact that the Convention is, in the eyes of the Court, already violated is a great victory for them. On the other hand, Dana Schmalz argues that there is a kind of rhetoric in continuing to use the fact that they have crossed the border illegally as a premise in the event of human rights violations against irregular migrants. In support of this argument, it uses

⁴³⁸ *ibidem*

⁴³⁹ Dana Schmalz is a postdoctoral research fellow at the Max Planck Institute for the Study of Religious and Ethnic Diversity, Göttingen - <https://voelkerrechtsblog.org/the-identification-of-individuals>

⁴⁴⁰ Schmalz D., The identification of individuals - Some thoughts on the ECHR judgment in the case N.D. and N.T, *Völkerrechtsblog – International Law and International Legal Thought*, 2017

Article 31 of the Refugee Convention⁴⁴¹, which states that: "Contracting States shall not impose criminal penalties, on account of their illegal entry or residence, on refugees arriving directly from a territory in which their life or freedom was threatened within the meaning of Article 1⁴⁴², even if they present themselves without delay to the authorities and justify their illegal entry or residence on valid grounds. This is defined as the principle of non-penalization and the applicants must enjoy it, especially if there has been a rejection of the asylum application as in the case of the Malian citizen⁴⁴³.

Final remarks

In the light of both cases, the lack of identification of individuals appears to be the central issue and the most compromising for their access to justice. The judgments also shed light on what is meant by collective expulsions of foreigners and how this affects the possibility of access to asylum or humanitarian protection procedures. In essence, expelling an individual rejects all opportunities to regularize the legal status and thus to recover from the vulnerable situation in which irregular migrants find themselves. In both cases, expulsions lead individuals to worsen their social position and expose them to further risks and possible violations. The practices that now seem to be consolidated both in Lampedusa and in the city of Melilla have been widely contested by international organizations, NGOs and other institutions; violate the rules of international law and the conventions to which both states belong. Despite the differences, the situation of Lampedusa and the autonomous city of Melilla certainly have great similarities in terms of the complexity of the management of the phenomenon, the extent of migration flows, geographical location. Melilla is located in a particular area, it suffers from all the

⁴⁴¹ Convention and protocol relating to the status of refugees (1951), Article 31- Refugees unlawfully in the country of refugee

⁴⁴² Convention and protocol relating to the status of refugees (1951), Article 1 – Definition of the term “refugee”

⁴⁴³ Schmalz D., The identification of individuals - Some thoughts on the ECHR judgment in the case N.D. and N.T, *Völkerrechtsblog – International Law and International Legal Thought*, 2017

geopolitical dynamics of the neighboring countries and therefore further situations of hardship and difficulty are created. Adequate management is crucial to favor a lean and dynamic work of assistance and reception without any kind of negligence. In the *Khlaifia* case, however, the applicants had had the possibility of appeal, but without suspensive effect, therefore, an ineffective appeal pursuant to Article 13 of the ECHR. In the *N.D. and N.T.* case against Spain, the applicants, with the *Devoluciones en caliente*, had neither the time nor the practical possibility to initiate a procedure, indeed there was also a denial of international protection by the Spanish authorities to the Malian citizen. After *Khlaifia*, *N.D. and N.T.* case was the first sentence concerning collective expulsions and the first to bring to the eyes of the international community the difficult and little known situation of the Spanish enclave in Morocco. Videos and images of the crossing of the Melilla border were brought before the Court, with witnesses belonging to the UNHCR and the Council of Europe. Precisely because of the similarities in terms of situations to be addressed, the Court in the ruling *N.D. and N.T.* refers to the previous *Khlaifia* arguing that: "The Court has also taken note of the new challenges facing European States in terms of immigration control as a result of the economic crisis and recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East"⁴⁴⁴. This does not mean that human rights cannot be neglected or set aside in the name of national interest or security; both Italy and Spain are called to respond to international obligations, arising from treaties and conventions that cannot be set aside in any way.

According to Masera Luca, lawyer defending *Khlaifia* case together with lawyer Zirulia⁴⁴⁵, one of the central issues with regard to the issue of access to justice in Italy for irregular migrants lies in part in the lack of a remedy Habeas Corpus. Given the number of cases brought before the ECHR, regarding the detention system and expulsion, it would be appropriate for Italy to ensure a

⁴⁴⁴ CASE OF *N.D. AND N.T. v. SPAIN*, (Applications nos. 8675/15 and 8697/15), JUDGMENT STRASBOURG , 3 October 2017, Referred to the Grand Chamber 29/01/2018

⁴⁴⁵ The applicants were represented by L.M. Masera and S. Zirulia, of the Milan Bar, in Case *Khlaifia and Others v ITALY*.

further level of judgment by streamlining, in part, the amount of work delegated to the European Court of Human Rights. Criticism has been raised, one of the most famous being that of Mauro Cappelletti⁴⁴⁶, who believes in an excessive overload of proceedings that could harm the proper functioning of the constitutional justice. Cappelletti therefore revises the role of the European Court of Human Rights as a valid alternative to the 'incomplete' Italian system, since it acts as a double way for a superior guarantee of fundamental rights. To allow this directly, the European Convention and the Italian Constitution must be compatible. There are important differences, especially in terms of interpretative limits. The Convention, in fact, was born with the prerogative of being as open and flexible as possible precisely to be adapted to the subjective situations of individual states. On the other hand, the Constitution is drafted with the aim of protecting and preserving the democratic system, for the historical and political reasons mentioned in the previous chapters. The boundaries of the Italian constitutional charter are defined and precise, leaving little room for freedom of interpretation. The most critical point, however, mainly concerns the violation of Article 6 of the ECHR concerning due process in Italy. This is due, in most cases, to the inefficiency of the judicial system, delays, dysfunctions, organizational failures⁴⁴⁷.

⁴⁴⁶ Cappelletti M., Questioni nuove (e vecchie) sulla giustizia costituzionale, in Giudizio 'a quo' e promovimento del processo costituzionale, in Crivelli E., La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale, Roma, 2003

⁴⁴⁷ pp. 141 - 179

Conclusion

Access to justice is widely guaranteed at international, European and national level (clearly referring to the two states under consideration). The post-World War II period led to the creation of International Organizations and the establishment of International Covenants and Agreements that placed human beings at the center of public decisions, in the broadest sense of the term. These achievements have been the result of a long constitutional, sometime turbulent, evolution, from the Magna Carta, to the World Wars and the new European democratic constitutions. Indeed, after the Second World War, there was a need to focus international attention from a legal point of view on the individual, overcoming all types of discrimination, from the United Nations Charter to the International Covenant on Civil and Political Rights. In these documents, access to justice is highlighted without any kind of distinction of ethnic or racial origin. This point is emphasized here because the heart of the issue lies in the legal position taken by irregular migrants within the great legal framework at all levels. These international agreements do not place any limits on foreigners who have irregularly entered or are undocumented within states, so it can be said that they have access to justice in order to appeal against human rights violations against them.

At the European level, the European Convention on Human Rights plays a fundamental role in the protection of individuals from a legal point of view. In fact, in its Article 13, the right to an effective remedy is enshrined without specifying the category that can benefit from it. From this it can be deduced that on the basis of this principle, an irregular migrant who has not been able to have his or her case heard before a domestic court for the alleged violation of her/his rights has the possibility to appeal to the European Court of Human Rights in Strasbourg according to the conditions laid down in this treaty. The peculiarity of Article 13 is that it has a double effect, primarily national, requiring signatory states to provide for effective remedies for human rights violations in their legal systems. This must be allowed through the presence of redress systems that are available to all individuals, even those who do not

have sufficient resources, and must also be guaranteed fair compensation for the violation suffered. Article 13 does not specify a precise strategy by which states must allow this, but leaves a great deal of discretion as to how this has to be done. Once the domestic remedies have been exhausted, the claimants can ultimately appeal to the European Court of Human Rights, which examines the case and resolves it by means of a final judgment. Although the jurisdiction of the Court is subsidiary in nature, it reinforces and doubly ensures both national and supranational protection of the fundamental rights of all human beings.

At the level of the European Union, the Charter of Fundamental Rights, through Article 47, also guarantees such protection. Again, there is no distinction of ethnic origin, nationality or residence, but it has its inherent limitations in the Charter itself. In fact, the individual can appeal to the European Court of Justice when his rights are affected by the implementation of a legislative act of the European Union, in all other cases it is the European Court of Human Rights that assumes the role of legal body. Also at Community level, alongside Article 47, it is essential to mention Article 19 of the Treaty on European Union, which affirms the principle of effective legal protection of individual rights. Its concrete application initially concerned the protection of the independence of judges within national states, one of the key principles to ensure the effectiveness of individual legal protection. Article 19 of the Treaty on European Union and Article 13 of the European Convention on Human Rights have, in a sense, a 'direct' effect on states and on the effectiveness of the protection of individuals at the domestic level.

Both in Spain and in Italy, within the national Constitutions, there is a great attention to the fundamental rights of human beings, citizens and foreigners. Both constitutions are the consequence of two authoritarian regimes that have marked the democratic and constitutional history of the two countries. Title I of the Spanish Constitution of 1978 focuses on fundamental rights and a distinction is made between Spanish and foreign citizens by allocating individual protection mechanisms to them, as in fact, the *Recurso de Amparo*. The institution of *Amparo*, although the Franco regime has weakened him, has

always belonged to the Spanish constitutional history, there was also in the Spanish Constitution of 1931. Since its establishment, reforms were made to allow for a more streamlined and fluid operation. In general, this legal mechanism allows individuals to have direct recourse to the Constitutional Court, clearly after having exhausted all previous domestic remedies. The *Recurso de Amparo* is open to all individuals, without distinction; those who do not have sufficient resources are supported by a system of free legal aid and free legal assistance. It is therefore an extremely inclusive measure, despite the restrictions implemented with the 2007 reform, which partly reformulated the criteria for admissibility of appeals due to the large number of appeals brought before the Court.

This is one of the main criticalities that lead a large part of Italian constitutionalists to think that the introduction of an *Amparo* in Italy could create distortions and further problems. It is the opinion of Italian jurist Mauro Cappelletti that direct recourse to the Italian Constitutional Court would inevitably lead to excessive workload. He argued that the valid alternative to the institution of *Amparo* in Italy was the final appeal to the European Court of Human Rights, which acts as a 'subsidiary' court to the Constitutional Court. If the focus shifted to the question to the two cases of irregular migration examined, it is possible to show that, despite the presence of the *Recurso de Amparo* in Spain, the two applicants, for reasons of force majeure, were unable to access it. The cases are completely outside the Spanish legal system but seem to be more directed to the way in which the migration phenomenon is managed in a situation as atypical as that of Melilla.

In Italy, on the other hand, the applicants do not enjoy effective judicial protection, since the suspensive effect of the expulsion order is not foreseen, and that is not compatible with Article 13 of the ECHR. They have had the opportunity to bring their appeal before the Justice of the Peace but with failure. With this it is possible to affirm that with Individual direct complaint before the Constitutional Court in Italy it could facilitate and speed up such cases avoiding a perpetual referral to the European Court of Human Rights.

Beyond the purely legal aspect, in both cases the Grand Chamber has highlighted a real depersonalization of the applicants. In both cases, the individual situations of the complainants were not taken into account but a simplistically implemented practice beyond the typicality of the individual. The risk, in both cases, was the exposure of the complainants to further violations of human rights, really dangerous situations and therefore there was too much negligence on the part of both the Italian and Spanish authorities. The identification of individuals was brief and purely linked to nationality and place of departure, which is linked to the fact that both Italy and Spain have signed agreements with countries such as Tunisia and Morocco to better coordinate and manage the phenomenon. The practice of repatriation is the one that concerns both cases and is legitimized, in fact, by bilateral agreements but also Community agreements with these North African countries. The returns took place in an unorthodox manner, as in the case of the 'Devoluciones en caliente' and without guaranteeing the minimum standards of access to services, from health, justice and in general, access to information. This last point was fundamental, for an irregular migrant not having the slightest awareness and knowledge of the possibilities he has to get out of a situation of irregularity means maintaining the status of 'illegal' without being able to benefit, therefore, of any kind of protection. Treating irregular migrants as abstract beneficiaries of international or humanitarian protection could be the first step towards a more accurate management of borderline situations of this kind. Although there is, as has been mentioned in specific cases, the circulation of this type of information, it is sometimes carried out in a superficial and summary manner without a careful and precise transmission of the indications to be followed. The recognition of the identities of individuals and their subjective legal personality appears to be one of the fundamental points of the whole issue. A detailed knowledge of the identity and conditions of the claimants would greatly improve their access to all types of services and assistance and the management of irregular migrants, especially in the 'exceptional' cases of Lampedusa and Melilla. In these terms, work would be

streamlined at both local and EU level by avoiding very similar appeals to the European Court of Human Rights.

Examining the new Security Decree 2018⁴⁴⁸, implications emerge regarding irregular migration and the legal situation of the irregular migrant. The decree aims to expand the type and number of crimes that would lead to the revocation of international protection, thus increasing the number of irregular migrants who could be subject to a conviction of expulsion. The decree also aims to increase the number of days spent in a return center from 90 to a maximum of 180, exposing migrants to possible situations of vulnerability. It also reduces the possibility for a migrant to obtain a humanitarian residence permit, which is granted only for special reasons, if the individual in question needs treatment, if he or she is a victim of serious violations, if he or she has been the victim of exploitation or natural disasters. It also reduces the possibility for a foreigner to seek international protection several times⁴⁴⁹. This decree, in the light of the proposed analysis on irregular migration in Italy, does not seem to bring improvements in terms of access to justice which is one of the critical issues pointed out by the ECHR on numerous occasions, from the *Hirsi Jamaa* case to *Khalifia* examined here in detail. Increasing the number of crimes, decreasing the number of possible appeals for an applicant for international protection, increasing the period of stay in the centers for repatriation will not decrease the vulnerabilities to which it will be exposed⁴⁵⁰. It is the opinion of Professor Marcello Daniele that: "The danger, in short, that what is valid today for migrants is valid, in the not too distant future, also for citizens: a habeas corpus

⁴⁴⁸ DECRETO-LEGGE 4 ottobre 2018, n. 113

Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata. (18G00140) (GU Serie Generale n.231 del 04-10-2018)

⁴⁴⁹ Altalex, Decreto Salvini su sicurezza e immigrazione: il testo coordinato in Gazzetta, 2018, in <https://www.altalex.com/documents/leggi/2018/09/25/decreto-salvini-sicurezza-e-immigrazione>

⁴⁵⁰ Daniele M., La detenzione come deterrente dell'immigrazione nel Decreto Sicurezza 2018, 2018 in <https://www.penalecontemporaneo.it/upload/1824-daniele2018a.pdf>

built by principles rather than by rules, subject to the whimsical determinations of jurisprudence and unable to ensure equal treatment"⁴⁵¹.

⁴⁵¹ Daniele M., La detenzione come deterrente dell'immigrazione nel Decreto Sicurezza 2018, 2018 in <https://www.penalecontemporaneo.it/upload/1824-daniele2018a.pdf>

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Abstract

The proposed analysis aims to investigate the issue of access to justice related to irregular migrants, a category considered particularly complex from a juridical point of view. In order to understand the legal position of irregular migrants, a study will be carried out on several levels of guarantees, starting from the international and European level and then the national level. In particular, the situations in Italy and Spain regarding the guarantees and protections granted to irregular migrants will be examined with specific reference to the events in Lampedusa and Melilla, a Spanish enclave in Morocco. Through case studies, *Khlaifia and others against Italy*⁴⁵² and *N.D. and N.T against Spain*⁴⁵³, it will be possible to verify whether access to justice for irregular migrants has been effectively guaranteed and the possible legal *lacunae* in this matter.

1. Access to justice for individuals

Access to justice, although it may seem like a consolidated issue, actually has a fairly recent legal history. The first mention of this right can be found in the German-Polish Upper Silesian Convention of 1922⁴⁵⁴, which states that without any discrimination on grounds of nationality, a citizen can refer to an *ad hoc* Commission which acted as a legal body in the event of disputes. Another famous example is the League of Nations, which allowed 'minorities' to lodge appeals with the League of Nations Council⁴⁵⁵. In principle, the right of access to justice was designed for the protection of the rights of foreigners who were violated by rights in a state other than that of origin. In these cases, diplomatic protection came into play, but it reduced the individual violation to a mere dispute between states, completely depersonalizing the issue⁴⁵⁶. In fact, for a concrete evolution of the right of access to justice, it is necessary to wait until the end of the Second World War. The need was to create an international

⁴⁵² European Court of Human Rights: *Khlaifia and Others v. Italy* (no. 16483/12)

⁴⁵³ ECtHR *N.D. and N.T. v. Spain* (nos. 8675/15 and 8697/15)

⁴⁵⁴ Convention on Upper Silesia (Germany-Poland, 1922)

⁴⁵⁵ Francioni F. – Gestri M. – Ronzitti N.- Scovazzi T., *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione Europea*, Milano, 2008

⁴⁵⁶ Francioni F., *Access to justice as a Human Right*, Oxford, 2007, pp. 64 - 138

system that would guarantee a balance between states by reducing the possibility of further clashes and disputes. Moreover, the focus shifted more to the individual and the guarantee of his or her rights. Organizations such as the World Bank, the International Arbitration Court and the International Chamber of Commerce were the first to align themselves with this new post-World War II spirit by introducing mechanisms of access to justice to resolve disputes between states⁴⁵⁷. At the European level, a turning point in this direction was the creation of the Council of Europe⁴⁵⁸ and the ratification of the European Convention on Human Rights⁴⁵⁹. The peculiarity of this organization lies in the fact that was established the European Court of Human Rights (1959)⁴⁶⁰ to which individuals could refer in case of violation of the rights enshrined in the Convention. Initially, the appeal to the Court was indirect because it was mediated by the European Commission on Human Rights, which was abolished in 1998 with the introduction of Protocol 11⁴⁶¹ into the Convention. Access to the European Court of Human Rights is not immediate, the plaintiff before arriving at the Court must exercise all domestic remedies and therefore all levels of national judgment. From this we can deduce the two main principles of the Court, the principle of solidarity between states and the principle of subsidiarity. Article 13⁴⁶² of the Convention lays down the right to an effective remedy; effectiveness must be guaranteed first at national level and then at the level of the European Court of Human Rights. No distinction is made in this Article as to the origin, nationality or residence of the person

⁴⁵⁷ Francioni F., *Access to justice as a Human Right*, Oxford, 2007, pp. 64 - 138

⁴⁵⁸ Founded in 1949, the Council of Europe is one of the oldest and the biggest European organisation, which unifies 47 member states and promotes the main principles of the Human Rights, in <https://www.coe.int/en/web/yerevan/the-coe/about-coe/overview>

⁴⁵⁹ The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953, in <https://www.echr.coe.int/Pages/home.aspx?c=&p=basictexts>

⁴⁶⁰ European Court of Human Rights (ECHR), judicial organ established in 1959 that is charged with supervising the enforcement of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950; commonly known as the European Convention on Human Rights), which was drawn up by the Council of Europe, in <https://www.britannica.com/topic/European-Court-of-Human-Rights>

⁴⁶¹ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby

⁴⁶² Article 13 Right to an effective remedy

lodging the appeal, and the state must ensure that a trial can be initiated. Article 13 has, in most cases, been applied in conjunction with the infringement of other articles and rarely autonomously. According to the article with which it is associated, the configuration of effective remedies to be guaranteed at national level changes. However, the effectiveness of the remedy does not depend on the success or failure of the appeal, but rather on the independence of the judicial authorities, the practical, concrete possibility of being able to bring an action before a court and to be heard. At Community level, on the other hand, the issue of access to justice initially played a more marginal role. The prerogatives of the newborn European Community were more linked to the creation of a purely economic rather than political or legal union. In this sense, the idea of creating a kind of European federalism remained a vain project that had never been applied in practice. However, in 1977 a Declaration on fundamental rights was ratified and the importance of respecting them at Community level was the first concrete mention of this issue⁴⁶³. It was necessary to wait until 2009 to have a real Charter of Fundamental Rights of the European Union⁴⁶⁴ ratified by the members of the Union together with the entry into force of the Treaty of Lisbon. This was an important step for the European Union because: "The Community is a new type of legal system in the field of international law, in favour of which the states have renounced, albeit in limited areas, their sovereign powers, a system that recognizes not only the member states but also the citizens as subjects"⁴⁶⁵. The conditions for the individual access to the European Court of Justice are more restrictive than those of the European Court of Human Rights since the individual must demonstrate that the regulatory acts of the European Union directly affect and compromise the legal situation of the individual. Article 47⁴⁶⁶ of the Charter of Fundamental Rights enshrines the right to an effective remedy and to a fair trial, this article also does not discriminate against the personal characteristics

⁴⁶³ European Parliament – Council - Commission, Joint Declaration by the European Parliament, the Council and the Commission, 1977, available in <https://publications.europa.eu/en/publication-detail/-/publication/82268663-99a1-467e-bb1f-8d09f2a9599a>

⁴⁶⁴ CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2010/C 83/02)

⁴⁶⁵ Van Gend en Loos, 5 February 1963, Case 62/26

⁴⁶⁶ Article 47 Right to an effective remedy and to a fair trial

of the claimant. The basis of Article 47 is Article 13 ECHR, but there are differences, first and foremost in terms of the scope of Article 47 which is wider than Article 13 as it covers a wider catalogue of rights. It includes what is enshrined in Article 13 but also in Article 6 ECHR⁴⁶⁷ which corresponds to the right to a fair trial. In terms of similarities, Article 47 also states that there must be a system of legally enforceable safeguards at domestic level. Also within the Charter of Fundamental Rights of the European Union, effectiveness is linked to the independence of judges and in this sense it is necessary to cite Article 19 of the Treaty on European Union⁴⁶⁸. Effective protection at Community level must be guaranteed by safeguarding the independence of the judicial authority. This has been enshrined in the case of the *Associação sindical dos juízes portugueses*⁴⁶⁹ and is still having repercussions with the reform of the judicial system in Poland⁴⁷⁰.

2. Access to justice for individuals at national level: a comparison between Italy and Spain

The main points of access to justice at international, European and Community level have been highlighted and it is necessary to understand how this is guaranteed at domestic level. At the national level, the post-World War II constitutions were drafted in line with the general international spirit, consequently particular attention was paid to the fundamental rights of individuals. Access to justice is a crucial component of the Spanish Constitution, in fact justice, beyond the technical and legal aspect, is intended as a true national value. Access to justice is in fact considered as the founding principle of the state of social and democratic law, which is achieved through the possibility for each person to be able to turn to judges and courts to ask for

⁴⁶⁷ Article 6 Right to a fair trial

⁴⁶⁸ Article 19, par. 1: The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

⁴⁶⁹ Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, Request for a preliminary ruling from the Supremo Tribunal Administrativo.

⁴⁷⁰ *Commission v. Poland* case of 8 April 2019 (C-192/18), pending case

protection and effectiveness of rights⁴⁷¹. Within the Spanish legal system this is enshrined in Articles 24⁴⁷² and Article 119⁴⁷³ of the Spanish Constitution of 1978, and also the guarantee of compensation to avoid problems in access to justice. The Constitutional Court was the main novelty of the new Spanish Constitution because much of the Spanish system was maintained after the end of the Franco regime, in terms of the Monarchy, the bicameral parliamentary system and the Single Judicial Power⁴⁷⁴. Another important figure introduced is the Defensor del Pueblo, a body governed by Article 54 of the Constitution and was established by the Organic Law of 1981. The defender can rule on unconstitutionality issues on an incidental basis, bring appeals of unconstitutionality that Recursos de Amparo and, in general, has the task of defending citizens and protect their fundamental rights. The ordinary amparo is characterised by being a preferential and shortened procedure for the violation of fundamental rights. Legislative development begins with Law 62/1978⁴⁷⁵ on the Judicial Protection of the Rights of the Person. The necessary requirements for the appeal are defined in Article 49, which states that the applicant must appeal by virtue of a violation of constitutional importance, this is decided by the Constitutional Court on the basis of the criterion of interpretation, effectiveness and application of the Constitution. The fundamental article on the appeal is 162⁴⁷⁶ of the Constitution and concerns the subjects who can legitimately appeal: "Any natural or legal person who invokes a legitimate interest, as well as the People's Defender and the Public Prosecutor, has the right to appeal: to lodge an amparo appeal. These institutional entities are constituted as plaintiffs and participate in the entire process, in particular the Public Prosecutor intervenes in all processes of Recurso and Amparo to defend

⁴⁷¹ Carnicer Diez C., El acceso a la justicia en España,

⁴⁷² Artículo 24 de la Constitución Española: 1. Todas las personas tienen derecho a obtener la tutela efectiva de los jueces y tribunales en el ejercicio de sus derechos e intereses legítimos, sin que, en ningún caso, pueda producirse indefensión.

⁴⁷³ Artículo 119 de la Constitución Española: La justicia será gratuita cuando así lo disponga la ley y, en todo caso, respecto de quienes acrediten insuficiencia de recursos para litigar.

⁴⁷⁴ Tremps P.P., Las perspectivas del sistema de justicia constitucional en España, in <https://libros-revistas-derecho.vlex.es/vid/introduccion-sistema-justicia-constitucional-77694078>

⁴⁷⁵ Ley 62/1978, de 26 de diciembre, de Protección Jurisdiccional de los Derechos Fundamentales de la Persona

⁴⁷⁶ Art. 162, Recursos de inconstitucionalidad y de amparo, own translation

the public interest”⁴⁷⁷. The Italian constitutional architecture is developed in a historical context, even if previous, similar to the Spanish one. Both constitutions are the product of an authoritarian and dictatorial regime to which the two states have responded in a way that is divergent in some respects and convergent in others. Unlike the Spanish system, private citizens are not allowed to refer directly to the Constitutional Court, only regions are allowed a direct route to state laws or laws of other regions. Therefore, the ordinary judge plays a fundamental role since it is up to him to choose the rules to bring before the Constitutional Court. What makes the control of constitutionality limited is that it only takes place for laws and acts having the force of law, the provisions of the lower level do not fall within the constitutional jurisdiction. A further peculiarity is that the constitutional judge carries out a counter-examination within the limits of the appeal and therefore carries out a control limited to the case submitted⁴⁷⁸. the Italian constitutional system is distinguished by having centralized control, thanks to the presence of an *ad hoc* constitutional court. The fact that all judges can activate the constitutionality scrutiny makes the system with widespread access, in this sense, the possibility to refer the matter to the Court is linked to the existence of a specific dispute pending before a judge . There is a control mechanism which is both direct and incidental. Finally, direct access is limited to qualified institutional subjects, such as the State and regions, to the exclusion of other subjects such as parliamentary minorities or the appeal by each citizen for the protection of fundamental rights. As mentioned above, access to justice is a fundamental right guaranteed at international, European and Community level. In this sense, access to justice does not necessarily mean that the claimant can have direct recourse to the Constitutional Court, but still obtain effective protection for his or her rights. In the recent constitutional debate, the issue of direct access to the Constitutional Court in Italy, tailored to the Spanish model of the *Recurso de Amparo*, has

⁴⁷⁷ Gambino S., Miralles J. L. , Puzzo F., Ruiz Ruiz J. J., *Il sistema costituzionale spagnolo*, Padova, 2018

⁴⁷⁸ Rolla G. – Groppi T., *Tra politica e giurisdizione: evoluzione e sviluppo della Giustizia Costituzionale in Italia*, 2000, in <https://revistas.juridicas.unam.mx/index.php/cuestiones-constitucionales/article/view/5582/7249>

returned to the fore⁴⁷⁹. What emerges is the fear of overloading the work of the Constitutional Court which was a phenomenon that also affected Spain and needed to be restructured. Although the approach to the Spanish constitutional system seems evident, the Italian prerogative is to entrust to an external legal body the mode of direct access to constitutional justice. It can be deduced from this, that in Italy there does not seem to be an organic system of protection of fundamental rights which is expressed only in the incidental access for the control of constitutionality. The big question mark concerns the real advantages of introducing a mechanism such as the Spanish or German one into the Italian system⁴⁸⁰. First of all, in terms of protection, it should be stressed that despite the differences, both the Spanish and Italian constitutions similarly protect and guarantee the same fundamental rights. Nevertheless, it is not certain that an action such as that of amparo in Italy could really enhance the level of protection of fundamental rights as there is already a system of incidental control of constitutionality operating in this direction. The way the mechanism of incidental constitutional proceeding operates can be expanded through new interpretative choices. According to some constitutional law scholars, the protection of fundamental rights must be sought before the Constitutional Court, in ordinary justice⁴⁸¹. Finally, it is interesting to underline an apparently marginal aspect linked to the perception of justice by citizens, in fact, direct access would radically change the relationship between the individual and public authorities. What could be modified is a different use of the judgement of relevance and manifest groundlessness by opening up new scenarios that could include direct recourse. In this sense, it would be intended to introduce a broader intervention of the Court by extending on the one hand the guarantee of fundamental rights in the constitutional process or by always broadening the interpretation of the requirement of relevance by the court. In conclusion, making the role and powers of the Constitutional Court more

⁴⁷⁹ Crivelli E., *La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale*, Roma, 2003, pp. 7- 19

⁴⁸⁰ Crivelli E., *La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale*, Roma, 2003, pp. 7- 19

⁴⁸¹ Crivelli E., *La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale*, Roma, 2003, pp. 19-92

flexible and elastic could to some extent increase the guarantees in terms of fundamental rights⁴⁸².

3. Access to justice for irregular migrants

An irregular migrant is a third-country national who does not have the opportunity to legally enter and reside within the state to which he or she migrates. Their situation is protected at international level in terms of human rights protection, even if at domestic level they enjoy a certain degree of discretion on the part of the states⁴⁸³. The risks to which irregular migrants are exposed can be identified throughout the process of emigration, from the country of departure to the country of arrival, one of the main dangers concerns the smuggling of human beings and secondly, the possibility of deprivation of liberty⁴⁸⁴. At the international level, the concept of access to justice, as analysed in Chapter I, does not provide for discrimination in terms of nationality, origin and residence. The Universal Declaration of Human Rights⁴⁸⁵, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁴⁸⁶ and the International Covenant on Civil and Political Rights⁴⁸⁷ establish a heterogeneous system of protection that does not distinguish between residents and non-residents. In general, it is possible to affirm that at the international level there is a universalist line in terms of access to justice which, therefore, sees the inclusion of the irregular migrant within this framework. As far as the

⁴⁸² Crivelli E., *La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale*, Roma, 2003, pp. 141 -179

⁴⁸³ Council of Europe - Commissioner for Human Rights (CommDH/ Issue Paper) , *The human rights of irregular migrants in Europe*, Strasbourg, 2007

⁴⁸⁴ Baiocchi L.- Le Voy M., *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, Bruxelles, 2007 - PICUM Platform for International Cooperation on Undocumented Migrants

⁴⁸⁵ The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A.[...], in <https://www.un.org/en/universal-declaration-human-rights/>

⁴⁸⁶ Adopted by General Assembly resolution 45/158 of 18 December 1990

⁴⁸⁷ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

European level is concerned, the Council of Europe is fundamental in terms of protecting the human rights reserved for irregular migrants. In support of this, it is important to underline the statement of the Commissioner for Human Rights, Thomas Hammarberg: "Migrants are particularly at risk of poverty and marginalisation. Irregular migrants are doubly excluded. Undocumented migrants are easy victims of the black market and will be deprived of labour-related social rights. An alarming consequence is that there are now situations in Europe where migrants are exploited in forced labour. Access to minimum rights for migrants is limited by fear of complaints. An irregular situation aggravates exclusion and the risk of exploitation"⁴⁸⁸. In 2008, the European Convention on Action against Trafficking in Human Beings⁴⁸⁹ came into force with the aim of preventing not only trafficking in human beings but also sexual exploitation and forced labour. This convention covers irregular migrants in terms of the dangers and vulnerabilities to which they may be exposed⁴⁹⁰. At EU level, it has been shown that the Charter of Fundamental Rights is as universalistic in spirit as the ECHR and in terms of access to justice does not make distinctions in terms of ethnicity or residence. In the Council Directive of 16 December 2008⁴⁹¹ it is stated that: "A rule according to which illegal residence must be brought to an end through a fair and transparent procedure (...) Address the situation of persons who are staying illegally but who cannot (yet) be removed (...) by providing for a minimum set of procedural guarantees". However, there have been measures at EU level that have affected the human rights of irregular migrants. First of all, there is a general orientation of European policies towards the security and control of national borders and not in terms of human rights. At the 1999 Tampere Conference⁴⁹², for example, there is no reference to the human rights of irregular migrants, which remains a rather obscure issue. In the following conferences in Athens (2001) and Helsinki (2002), the first signs of dignity, social inclusion and respect for the

⁴⁸⁸ Council of Europe Conference on Social Cohesion in a Multicultural Europe, 2006

⁴⁸⁹ Warsaw, 16/05/2005, 01/02/2008 - 10 Ratifications including 8 Member States

⁴⁹⁰ Baiocchi L.- Le Voy M., Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework, Bruxelles, 2007

⁴⁹¹ Directive 2008/115/EC

⁴⁹² TAMPERE EUROPEAN COUNCIL 15 AND 16 OCTOBER 1999

human rights of irregular migrants emerge. The direction of the Union was towards the creation of a well-established area of security, freedom and justice, whose objectives were primarily to create European citizenship and free internal movement⁴⁹³. In general, more attention was paid to border security, refined by the creation of the Frontex⁴⁹⁴ agency, to the prevention of irregular immigration rather than to the issue of access to justice for irregular migrants. With the entry into force of the Lisbon Treaty in 2009⁴⁹⁵ and the launch of the Stockholm Programme⁴⁹⁶, the position of irregular migrants lives in a sort of limbo in which, on the one hand, it is the object of the fight against irregular immigration and, on the other hand, according to the Treaty and the programme should be protected and protected. Progress has certainly been made on the rights of unaccompanied irregular children, but a number of issues remain unresolved⁴⁹⁷. A particular aspect of access to justice for irregular migrants is the discrepancy between Community and local attention. In fact, it is the small towns that have to deal with the issue of irregular migration at the forefront and there are virtuous cases in which not only access to justice but also access to health and education have been encouraged, as in the city of Ghent or in the Tuscan region in Italy⁴⁹⁸. At national level, in the cases of Italy and Spain there are peculiarities to be considered. First of all, the migrant who irregularly enters Italy commits a crime, called '*Reato di Clandestinità*' punished with a fine of 5 to 10,000 euros⁴⁹⁹. The irregular migrant who arrived

⁴⁹³ Cholewinski R., Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights, Strasbourg, 2005

⁴⁹⁴ European Border and Coast Guard Agency (Frontex), Frontex helps EU countries and Schengen associated countries manage their external borders. It also helps to harmonise border controls across the EU. The agency facilitates cooperation between border authorities in each EU country, providing technical support and expertise. In https://europa.eu/european-union/about-eu/agencies/frontex_en

⁴⁹⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007); entry into force on 1 December 2009.

⁴⁹⁶ The Stockholm Programme - An open and secure Europe serving and protecting the citizens

⁴⁹⁷ Carrera S. – Merlino M., Assessing EU Policy on Irregular Immigration under the Stockholm Programme, Bruxelles, 2010

⁴⁹⁸ Carrera S. – Merlino M., Assessing EU Policy on Irregular Immigration under the Stockholm Programme, Bruxelles, 2010

⁴⁹⁹ Art. 10 bis, Legge n.94/2009, (Ingresso e soggiorno illegale nel territorio dello Stato). - 1. Salvo che il fatto costituisca piu' grave reato, lo straniero che fa ingresso ovvero si trattiene nel territorio dello Stato, in violazione delle disposizioni del presente testo unico nonche' di

illegally at the border may be subject to expulsion, repatriation and detention procedures. Irregular migrants have access to free legal aid and assistance, through an official lawyer if necessary, and have the possibility to appeal to the Justice of the Peace as the only level of judgment if they are subject to a sentence of administrative expulsion⁵⁰⁰. In cases of different nature of expulsion, the subject in question can appeal in the first instance to the Regional Administrative Court. The appeal before the Judge of Peace, that will be examined in the following chapter, must happen within 30 days from the decision of expulsion and can be extended of ulterior 30 days. Despite the above guarantees, the introduction of the Hot Spot System⁵⁰¹ in 2015 has partially compromised the human rights of irregular migrants in terms of access to justice. With this mechanism, irregular migrants are pre-identified at so-called points of crisis and are provided with all the information regarding requests for international and humanitarian protection. This phase can be longer if the migratory flows are greater and this can lead to a mismanagement of the situation and errors of assessment of the subjects. Those who do not request or do not have the possibility to request international protection are detained in the Identification and Expulsion Centres awaiting their repatriation. In these circumstances, the main violations occur in terms of the right of access to minimum services, including access to justice. As far as the Spanish case is concerned, there is constitutionally an openness and inclusion of all human beings in terms of rights by applying the appropriate distinctions between Spanish and foreign citizens. For foreigners, in particular, both legal assistance and free legal aid from the state are guaranteed without any distinction between

quelle di cui all'articolo 1 della legge 28 maggio 2007, n. 68, e' punito con l'ammenda da 5.000 a 10.000 euro. Al reato di cui al presente comma non si applica l'articolo 162 del codice penale.

⁵⁰⁰ Parlamento Italiano, La competenza del giudice di pace in materia di immigrazione, Temi dell'attività Parlamentare, Sito web: <http://leg16.camera.it/561?appro=55>

⁵⁰⁰ LEGGE 21 novembre 1991, n. 374, Istituzione del giudice di pace, GU n.278 del 27-11-1991 - Suppl. Ordinario n. 76

⁵⁰¹ Approach where the European Asylum Support Office (EASO) , the European Border and Coast Guard Agency (Frontex) , Europol and Eurojust work on the ground with the authorities of frontline EU Member States which are facing disproportionate migratory pressures at the EU's external borders to help to fulfil their obligations under EU law and swiftly identify, register and fingerprint incoming migrants . in https://ec.europa.eu/home-affairs/content/hotspot-approach_en

economic or irregular migrant. However, given the internal political fragmentation between the state and the regions, access to legal aid is particularly complex⁵⁰². However, it is interesting to underline Article 25 of the Spanish Constitution, which states that no sanctions can be imposed or measures taken that include the deprivation of liberty. An important figure, especially in cases of human rights violations, is the Defensor del Pueblo⁵⁰³ who acts as mediator and conciliator. An appeal does not require a lawyer and a free procedure⁵⁰⁴. When an irregular migrant lodges an appeal, the Defender of the Pueblo With regard to the particular issue of the Spanish autonomous cities of Melilla and Ceuta in Morocco, there is a special regime established by the Tenth Additional Provision of Organic Law 4/2000⁵⁰⁵. According to this provision, "Foreigners who are identified at the border of the territorial delimitation of Ceuta or Melilla in an attempt to overcome the border containment elements to irregularly cross the border may be refused to prevent their illegal entry into Spain. In any case, the refusal must be done in accordance with international standards on human rights and international protection to which Spain is a party. Applications for international protection shall be formalised at the places provided for that purpose at border crossing points and shall be processed in accordance with the provisions of the legislation on international protection"⁵⁰⁶.

4. Comparison of: *Khlaifia and other c. Italy* and *N.D and N.T c. Spain*

Khlaifia and other against Italy and *N.D and N.T against Spain* are both cases brought to the European Court of Human rights referring to the period of

⁵⁰² Andalucía Acoge, Derechos y libertades de las personas extranjeras en España, Sevilla, 2018

⁵⁰³ Art. 54, Una ley orgánica regulará la institución del Defensor del Pueblo, como alto comisionado de las Cortes Generales, designado por éstas para la defensa de los derechos comprendidos en este Título, a cuyo efecto podrá supervisar la actividad de la Administración, dando cuenta a las Cortes Generales.

⁵⁰⁴ <https://www.defensordelpueblo.es/>

⁵⁰⁵ Andalucía Acoge, Derechos y libertades de las personas extranjeras en España, Sevilla, 2018

⁵⁰⁶ Tenth Additional Provision of Organic Law 4/2000

migration crisis following the Arab Spring of 2011⁵⁰⁷. In the Italian case, the situation of difficulty experienced by the city of Lampedusa in the management of the huge flows emerges⁵⁰⁸. In the second case, the peculiar condition of the Spanish enclave in Morocco of Melilla is underlined, which has caused many controversies for the practice of the “Devoluciones en Caliente”⁵⁰⁹. In both circumstances, Italy and Spain were convicted of failing to guarantee Article 13 of the ECHR, i.e. the right to an effective remedy. What makes these cases interesting is that in Spain there is the *Recurso de Amparo*, which guarantees strong protection of fundamental rights, while in Italy there is no direct appeal to the Constitutional Court. Despite the differences from the point of view of constitutional architecture, countries have been equally condemned, understanding in detail the cases can however infer the causes of the violation of Article 13 in both parties. In the light of both cases, the lack of identification of individuals appears to be the central issue and the most compromising for their access to justice. The judgments also shed light on what is meant by collective expulsions of foreigners and how this affects the possibility of access to asylum or humanitarian protection procedures. In essence, expelling an individual rejects all opportunities to regularize the legal status and thus to recover from the vulnerable situation in which irregular migrants find themselves. In both cases, expulsions lead individuals to worsen their social position and expose them to further risks and possible violations. The practices that now seem to be consolidated both in Lampedusa and in the city of Melilla have been widely contested by international organizations, NGOs and other institutions, violate the rules of international law and the conventions to which both states belong. Despite the differences, the situation of Lampedusa and the autonomous city of Melilla certainly have significant similarities in terms of the complexity of the management of the phenomenon, the extent of migration flows, geographical location. Melilla is located in a particular area, it suffers from all the geopolitical dynamics of the neighboring countries and therefore

⁵⁰⁷ H. Boubakri *Revolution and International Migration in Tunisia*, Migration Policy Centre, 2013

⁵⁰⁸ *CASE OF KHLAIFIA AND OTHERS v. ITALY*, Application no. 16483/12

⁵⁰⁹ *Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana*

further situations of hardship and difficulty are created. Adequate management is crucial to favor a lean and dynamic work of assistance and reception without any kind of negligence. In the *Khlaifia* case, however, the applicants had the possibility of appeal, but without suspensive effect, therefore, an ineffective appeal pursuant to Article 13 of the ECHR⁵¹⁰. In the *N.D. and N.T. case against Spain*, the applicants, with the *Devoluciones en caliente*, had neither the time nor the practical possibility to initiate a procedure, indeed there was also a denial of international protection by the Spanish authorities to the Malian citizen. After *Khlaifia*, the *N.D. and N.T. case* was the first sentence concerning collective expulsions and the first to bring to the eyes of the international community the difficult and little known situation of the Spanish enclave in Morocco. Videos and images of the crossing of the Melilla border were brought before the Court, with witnesses belonging to the UNHCR and the Council of Europe⁵¹¹. Precisely because of the similarities in terms of situations to be addressed, the Court in the ruling *N.D. and N.T.* refers to the previous *Khlaifia* arguing that: "The Court has also taken note of the new challenges facing European States in terms of immigration control as a result of the economic crisis and recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East"⁵¹². This does not mean that human rights cannot be neglected or set aside in the name of national interest or security, both Italy and Spain are called to respond to international obligations, arising from treaties and conventions that cannot be set aside in any way. According to Masera Luca, lawyer defending the *Khlaifia* case together with lawyer Zirulia, one of the central issues with regard to the issue of access to justice in Italy for irregular migrants lies in part in the lack of a remedy Habeas Corpus. Given the number of cases brought before the ECHR, regarding the detention system and expulsion, it would be appropriate for Italy to ensure a further level of judgment by streamlining, in part, the amount of work delegated to the European Court of Human Rights. Criticism

⁵¹⁰ CASE OF KHLAIFIA AND OTHERS v. ITALY, Application no. 16483/12

⁵¹¹ CASE OF N.D. AND N.T. v. SPAIN, (Applications nos. 8675/15 and 8697/15), JUDGMENT STRASBOURG, 3 October 2017, Referred to the Grand Chamber 29/01/2018

⁵¹² *ibidem*

has been raised, one of the most famous being that of Mauro Cappelletti⁵¹³, who believes in an excessive overload of proceedings that could harm the proper functioning of the constitutional justice. Cappelletti therefore revises the role of the European Court of Human Rights as a valid alternative to the 'incomplete' Italian system, since it acts as a double way for a superior guarantee of fundamental rights. To allow this directly, the European Convention and the Italian Constitution must be compatible. There are important differences, especially in terms of interpretative limits. The Convention, in fact, was born with the prerogative of being as open and flexible as possible precisely to be adapted to the subjective situations of individual states. On the other hand, the Constitution is drafted with the aim of protecting and preserving the democratic system, for the historical and political reasons mentioned in the previous chapters. The boundaries of the Italian constitutional charter are defined and precise, leaving little room for freedom of interpretation⁵¹⁴. The most critical point, however, mainly concerns the violation of Article 6 of the ECHR concerning due process in Italy. This is due, in most cases, to the inefficiency of the judicial system, delays, dysfunctions, organizational failures .

⁵¹³ Cappelletti M., Questioni nuove (e vecchie) sulla giustizia costituzionale, in Giudizio 'a quo' e promovimento del processo costituzionale, in Crivelli E., La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale, Roma, 2003

⁵¹⁴ *ibidem*