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# El Dridi upside down: a case of legal mobilization for undocumented migrants' rights in Italy

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**Abstract:** During the first four months of 2011 Italian courts referred an extraordinary number of requests for preliminary ruling to the Court of Justice of the European Union concerning the interpretation of the Return Directive. The Court ruled on the first of these references on 28 April 2011, when decided on the case of *El Dridi*. This judgment found Italian criminal provisions on undocumented migrants inconsistent with European standards and pressured the Italian government to reform the Italian Alien Law.

To be sure, there are studies on the case of *El Dridi* and its impact on the protection of undocumented migrants' rights. However, legal scholarship has given scant attention to the reasons that may explain the emergence of the many concurrent preliminary references. Moreover, given the preferred focus on the role of the Court of Justice in studies on preliminary rulings, the societal roots of supranational litigation have been largely overlooked.

With the aim of filling these gaps, this paper investigates into factors that led several Italian courts to request a decision from the Court of Justice and argues that this cannot be explained with a centralized and institutional focus. Instead, what is needed is a bottom-up approach that investigates what happened at the national level, looks at the political situation at that time and at the social actors involved. The paper argues that the preliminary references of 2011 are an example of supranational legal mobilization: a network of civil society actors, judges, legal scholars and lawyers used the Court of Justice to achieve a change within the national migration legal framework. In so doing, the paper provides new insights into the political role of litigation before the Court of Justice and in the field of European migration law.

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## 1. Introduction: a different understanding of the political role of supranational litigation

From January to April 2011 Italian courts referred thirteen requests for preliminary ruling to the Court of Justice of the European Union (CJEU) concerning the interpretation of the Return Directive.<sup>1</sup> This number amounts to one third of the totality of questions referred from all Member States since the Directive was adopted (around forty).

This paper explores the reasons behind this extraordinary number of referrals, arguing that it cannot be explained by a centralized approach that focuses on the role of the CJEU. Instead, what is needed is a bottom-up approach that investigates what happened at the national level, one that looks at the political situation at that time and the social actors involved. This paper argues that the Italian preliminary references of 2011, which culminated in the CJEU's judgment in the *El Dridi* case<sup>2</sup>, are an example of supranational legal mobilization: a network of civil society actors, judges, legal scholars and lawyers used the CJEU to achieve a change within the national migration legal framework.

The Return Directive establishes the standards and procedures Member States shall comply with when

1. The author would like to express her gratitude to Professors Chiara Favilli and Luca Masera for their very useful insights on the Italian cases and to the reviewers for their comments on the previous version of this paper.  
 2. Court of Justice of the European Union, *Hassen El Dridi, alias Karim Soufi*, C-61/11 PPU, ECLI:EU:C:2011:268 (2011).



returning undocumented migrants.<sup>3</sup> The Court of Justice interpreted the Return Directive upon request of Italian courts in three occasions: in 2011 with the *El Dridi* case, in 2012 with *Sagor*<sup>4</sup> and in 2015 with *Celaj*.<sup>5</sup> The result is that various norms of the Italian Alien Law<sup>6</sup> have been declared incompatible with EU law and the Italian legislator was forced to intervene in order to remedy this with two legal reforms.<sup>7</sup> The innovations introduced by the Court's rulings in the Italian migration legal framework are an example of supranational judicial law making and one could critically ask whether it was a legitimate intervention by the CJEU. However, this paper explores a different question. Redirecting the focus from the CJEU onto the national context, this analysis explores the reasons behind the great attention paid by Italian courts to this part of EU law. In particular, this paper is the first part of a broader project<sup>8</sup> whose aim is to investigate the role that supranational litigation played in the process of shaping the Italian legal framework on undocumented migrants.

Despite the vast literature discussing the CJEU rulings on the application of the Return Directive in Italy<sup>9</sup>, to date there has been no analysis of the social and political context that led many national courts, organisational actors and individuals to seek a referral to the CJEU. Indeed, the studies that analyse the role of the CJEU as a lawmaker generally adopt a centralized and institutional focus, with the risk that they overlook the presence of other actors involved and the possible societal roots of the supranational litigation process. Without questioning the value of these studies, the idea that inspired this paper is the desire to understand the other side of the picture – i.e. what was happening outside the courtroom – in order to contribute to the studies on the political role of litigation. To this aim, the paper takes a bottom-up approach, consisting in turning the common approach on rights litigation upside down. The paper does not investigate the role of the CJEU in the creation of migrants' rights, but the role of supporters of migrants' rights (be they individuals or organized groups) in 'creating' rights through

the use of the judiciary. Therefore, the focus will not be on the role of the CJEU, but on the presence of other social actors and on the conditions that explain the recourse to the CJEU.

This analysis draws on the studies on legal mobilization that, in my view, when applied to the EU context, pave the way for an innovative understanding of supranational litigation. In Zemans' words, law is mobilized when a desire is translated into a demand as an assertion of rights, so recognizing an active role for the citizenry in both the making and the implementation of public policy.<sup>10</sup> Legal mobilization, although well known in the US<sup>11</sup>, is still largely overlooked in Europe. A relevant exception is Angnoustou's book<sup>12</sup>, where she defined judicial activism as 'both a cause and a consequence of the fact that law and rights are increasingly mobilised by individual and social actors'.<sup>13</sup>

In the course of the paper, the analysis will highlight two key features of supranational litigation seen through the lens of legal mobilization. The first regards the environment surrounding the litigation: I argue that preliminary references to the CJEU are context-dependent; to put it simple, this means that the reason a question arises, for instance, in France and not in Germany might depend on the Member States' different social and political contexts. The second attains to the agency of legal mobilization: I propose to read supranational law-making as an interactive process where litigants, judges and social actors engage with each other and use the CJEU to foster legal change at the national level.

## 2. Legal mobilization in the context of the preliminary ruling mechanism

There are studies focusing on legal mobilization before the Court of Justice of the European Union<sup>14</sup>, but not in the migration domain; indeed, research on legal

3. In this paper the term 'migrant' is used to indicate the citizen of a country that is not member of the EU; Union citizen migrants, whose situation is regulated by different EU norms, are excluded.
4. Court of Justice of the European Union, *Md Sagor*, C-430/11, ECLI:EU:C:2012:777 (2012). The conclusions of the Court in *Sagor* where reiterated in *Mbaye*, C-522/11, ECLI:EU:C:2013:190 (2014).
5. Court of Justice of the European Union, *Skerdjan Celaj*, C-290/14, ECLI:EU:C:2015:640 (2015).
6. Legislative Decree No 286/1998 of 25 July 1998 consolidating the provisions regulating immigration and the rules relating to the status of foreign national (Ordinary Supplement to GURI No 191 of 18 August 1998).
7. After the judgments of the Court of Justice in *El Dridi* and in *Sagor*, there were two major reforms of the procedure for returning undocumented migrants in Italy, one in 2011 and one in 2014. See section 6.
8. That will be the object of my PhD dissertation.
9. Chiara Favilli, "L'attuazione in Italia Della Direttiva Rimpatri: Dall'inerzia All'urgenza Con Scarsa Cooperazione", *Rivista Di Diritto Internazionale* 3 (2011): 695-730; Diego Acosta Arcarazo, "Migrations and Borders in the European Union: The Implementation of the Returns Directive on Irregular Migrants in Spain and Italy", in *Shaping the Normative Contours of the European Union: A Migration-Border Framework*, CIDOB Monograph (Barcelona: R. Zapata-Barrero, 2010), 81-96; Elisa Fornalé, "The European Returns Policy and the Re-Shaping of the National: Reflections on the Role of Domestic Courts", *Refugee Survey Quarterly* 31, no. 4 (December 1, 2012): 134-57, doi:10.1093/rsq/hds016.
10. Frances Kahn Zemans, "Legal Mobilization: The Neglected Role of the Law in the Political System", *The American Political Science Review* 77, no. 3 (1983): 694, doi:10.2307/1957268.
11. See Michael McCann, "Litigation and Legal Mobilization", in *The Oxford Handbook of Law and Politics*, Edited by Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington.
12. Dia Anagnostou editor, *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System*, Oñati International Series in Law and Society (Oxford: Hart Publishing, 2014).
13. *Ibid.*, 7.
14. See, for instance, the research conducted by Silvana Sciarra on the 'Europeanization' of Italian labour law through judicial dialogue, Silvana Sciarra, *Trusting Judges*

mobilization at the European level mostly deals with the use of the European Court of Human Rights (ECtHR). There are various reasons that could explain this preference. First of all, the two Courts have different mandates: the CJEU's preliminary rulings mechanism was primarily created to ensure a uniform interpretation of EU law throughout the Member States; while the ECtHR is a human rights court *par excellence*, conceived to protect individuals from human rights violations perpetrated by the states. As a matter of fact, there is a long tradition of strategic litigation before the ECtHR.

Another reason that might explain this lack of attention is that, until recently, the CJEU had a narrower jurisdiction. Indeed, prior to the entry into force of the Lisbon Treaty, the possibility of making references to the Court regarding the Area of Freedom Security and Justice (a field with many individual rights implications and which migration and asylum policies are a part of) was limited to the national court of last instance.<sup>15</sup> This was changed by the Treaty of Lisbon that increased the jurisdiction of the Court of Justice considerably: today every national court or tribunal can make a preliminary question on all EU law measures, with the sole exception of the Common Foreign and Security Policy.<sup>16</sup>

However, these circumstances have never stopped the Court from ruling on individual and human rights issues; as pointed out in the literature, the CJEU has developed over the years its own human rights discourse by relying on EU standards.<sup>17</sup> Moreover, after the reforms introduced by the Lisbon Treaty, the human rights as enshrined in the European Charter of Fundamental Rights and in the European Convention on Human Rights and Fundamental Freedoms became part of the fundamental principles of the Union (Art. 6 TEU). Even if the judicial dialogue between the CJEU and the European Court of Human Rights has recently become more complicated,<sup>18</sup> undoubtedly human rights norms have gained an increasing relevance in the jurisprudence of the CJEU.

Another obstacle to the study of legal mobilization be-

fore the CJEU resides in the specificity of its preliminary reference procedure. The CJEU itself defined the preliminary ruling mechanism as 'based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary'.<sup>19</sup> Indeed, it is the national court that asks for a preliminary reference to the CJEU and not the individual litigant. This non-contentious character of the preliminary reference seems to be able to deny the possibility of undertaking any type of strategic litigation at the EU level. However, relying on empirical analysis, this paper will show how it is still possible to detect the existence of a *sui generis* legal mobilization also before the CJEU.

On a different note, if we look at the impact that preliminary rulings have on the national legal order, the CJEU is an even more powerful instrument for legal and social change than the ECtHR. Indeed, the preliminary references procedure was created to ensure uniform application of EU law in all the Member State; this, in combination with the developments produced by the CJEU's doctrines of direct effect and supremacy and of a system of precedents,<sup>20</sup> makes the Court's decisions valid beyond the single case that originated the referral.<sup>21</sup> The consequence is that the interpretative rulings of the CJEU have an immediate impact on national courts of all the EU Member States which become directly enforcers of EU Law.

### 3. Italian legal and political framework prior to the first referral to the CJEU: understanding the background of legal mobilization

This section provides the background necessary to understand Italian migration law and policy at the time the term for the transposition of the Return Directive expired, the 24<sup>th</sup> of December, 2010.<sup>22</sup> As stated in the introduction, this explanation will enable the reader to understand the conditions behind the vast

to Deliver Changes: Italy, the EU and Labour Law, in *The Cambridge Yearbook Of European Legal Studies*, Volume 9, Goodreads, 441-464; or the book by Cichowski on the role of the CJEU regarding gender equality and environmental protection: Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, Themes in European Governance (Cambridge: Cambridge University Press, 2007).

15. See art. 68 EC.

16. See art. 275 TFEU.

17. Joseph H.H. Weiler, "Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities", *Washington Law Review* 61 (1986): 1105.

18. See the Opinion 2/13 regarding the Accession of the EU to the European Convention on Human Rights and Fundamental Freedoms, Court of Justice of the European Union, *Opinion 2/13*, EU:C:2014:2454 (2014).

19. Court of Justice of the European Union, *Cartesio Oktató és Szolgáltató bt*, Case C-210/06, ECLI:EU:C:2008:723, 91 (2008).

20. See the Judgments of the Court of Justice of the European Union in the Case of *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, C- 26/62, of 5 February 1963, ECLI:EU:C:1963:1; in *Flaminio Costa v E.N.E.L.*, C-6/64, of 15 July 1964, ECLI:EU:C:1964:66; in *Sri CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, C-283/81, of 6 October 1982, ECLI:EU:C:1982:335.

21. Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 6th ed. (Oxford, United Kingdom; New York, NY: OUP Oxford, 2015), 574; Bruno De Witte, "Direct Effect, Primacy and the Nature of the Legal Order", in Paul Craig and Gráinne de Búrca (ed.), *The Evolution of EU Law*, 2nd ed. (Oxford University Press, 2011); to get an insight on the debate regarding the impact of the preliminary rulings issued by the CJEU, see Alberto Trabucchi, "L'effet 'Erga Omnes' Des Decisions Prejudicelles Rendues Par La Cour de Justice Des Communautés Europeennes", *Revue Trimestrielle de Droit Europeen* 10 (1974): 56-87.

22. For a more comprehensive analysis of Italian law and policy of migration in the last years, see Chiara Favilli, *Migration Law in Italy* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2013); Alessia Di Pascale, "Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations", in *Human Rights and Immigration*, ed. Ruth Rubio-Marín (Oxford University Press, 2014), 278-310.

number of requests for preliminary rulings referred at that time.

The decade between 2001 and 2011 was marked by dramatic changes affecting migration in Italy that we can sum up with three key events. Firstly, Italy, previously being an emigration country, rapidly became a destination for migrants. Indeed, according to official statistic figures, the foreign population of Italy in 2001 was about 1.3 million, while by 2011 it had increased to 4 million: about 7% of the entire population.<sup>23</sup> Second, during the same period there was a transformation in the way people migrated, with an intensification in the flow of migrants trying to reach Italy and Europe across the Mediterranean Sea. For the first time, photos of boats crowded with men, women and children navigating on uncertain waters circulated throughout Italian and European mass media: Lampedusa island became the symbol of the crisis affecting EU migration policy. Third, this period of demographic transformation coincided with eight years of government of the same right-wing coalition.<sup>24</sup> Led by Silvio Berlusconi, the coalition was comprised of, among others, two parties (*Legha Nord* and *Alleanza Nazionale*) that had migration at the forefront of their political agenda and whose electoral campaigns were based on anti-immigration discourses.<sup>25</sup>

With regard to the legal framework more specifically, the then governing coalition adopted two important laws reforming the migration regime which crucially affected the procedure of expulsion of undocumented migrants. The first law, which was adopted in 2002, became known as the 'Bossi-Fini Law', after the name of its authors: the leaders of the two abovementioned parties. As one might expect, the law reflected the views of its authors: it amended the Alien Law<sup>26</sup> by introducing a harsher regulation of migrants. The declared goals of this law were the fight against irregular migration ('*lotta alla clandestinità*') and making the expulsion procedures much easier, followed by the introduction of more stringent requirements to obtain the residence permits and a new procedure of imme-

diately coercive removal of undocumented migrants through the use of police force.<sup>27</sup>

The second reform was enacted in 2009, by the same government coalition. It was called the 'Security Package'<sup>28</sup> and inaugurated the era that became famous for the securitization or 'criminalization of migrants'.<sup>29</sup> Among other measures that allegedly increased public security, this law made irregular entry and stay of foreign persons in the Italian territory a crime (sanctioned with a fine ranging from 5 000 to 10 000 EUR)<sup>30</sup>; further, it extended the maximum period of migrants' administrative detention from 60 days to 180 days; and introduced the duty for migrants to show their residence permit in order to access public services such as health care. In the view of the aims of this paper, the most important norms introduced by the 'Security Package' Law were the amendments to article 14(5): they provide that the foreign national who, despite having received a removal order from the police, is found on the Italian territory without documents shall be immediately arrested and prosecuted for a crime punishable with detention from one to five years.<sup>31</sup>

These reforms were highly contested by political oppositions and civil society organizations supporting the interest of migrants, both at the national<sup>32</sup> and international level.<sup>33</sup> Even in the academic environment, many public statements and articles were issued denouncing the risk for undermining migrants' rights and rule of law in Italy.<sup>34</sup>

To understand the subsequent developments, it is important to look also at the structural effects that the criminalization of migrants had on the Italian criminal justice system. Indeed, such criminalization not only had an impact on their rights, but also negatively affected the overall functioning of the Italian criminal proceedings. The consequence of criminalising irregular migrants was that the offices of public prosecutors were literally flooded with cases concerning undocumented migrants. We have to imagine that, with

23. See official report on Italian foreign population, available online at: [www.istat.it/it/files/2012/12/scheda\\_stranieri.pdf](http://www.istat.it/it/files/2012/12/scheda_stranieri.pdf).

24. Such right-wing coalition stayed in power for 8 years from 2001 to 2011, with a 2 years break from 2006 to 2008.

25. See Silvana Patriarca, *Crisis as a Permanent Condition? The Italian Political System Between Transition and Reform Resistance*, forthcoming in R. Kaiser and J. Edelmann (eds.), *Nomos*, 2015.

26. See note 7.

27. See art. 13 of the Alien Law.

28. Law No 94 of 15 July 2009 on public security (Ordinary Supplement to GURI No 170 of 24 July 2009).

29. Alessia Di Pascale, "Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations", in *Human Rights and Immigration*, ed. Ruth Rubio-Marín (Oxford University Press, 2014), 278-310.

30. The crime is known as 'reato di clandestinità' and is prescribed by article 10bis of the Alien Law.

31. See art. 14(5) letter c of the Alien Law: 'A foreign national who is the recipient of the expulsion order referred to in paragraph 5b and a new removal order as referred to in paragraph 5a and who remains illegally on the territory of the State shall be liable to a term of imprisonment of between one and five years. In any event, the provisions of the third and last sentences of paragraph 5b shall apply'. And Art. 14(5) letter d of the same law: 'Where the offences referred to in the first sentence of paragraph 5b and paragraph 5c are committed, the *rito direttissimo* [expedited procedure] shall be followed and the arrest of the perpetrator shall be mandatory'.

32. See for an overview: "Speciale 'pacchetto Sicurezza' - Le Nuove Norme Tra Applicabilità Ed Efficacia", accessed February 1, 2016, [www.meltingpot.org/Speciale-pacchetto-sicurezza-Le-nuove-norme-tra.html](http://www.meltingpot.org/Speciale-pacchetto-sicurezza-Le-nuove-norme-tra.html).

33. See Annual Activity Report of 2009 of the Commissioner for Human Rights of the Council of Europe, CommDH(2010)53, at 7; Letters to the Italian Minister of the Interior, Letter of 25 August 2009, CommDH(2009)40 and of 2 July 2009, CommDH(2010)23.

34. Di Martino, *The Criminalization of Irregular Immigration*; Massimo Merlino, "The Italian (In)Security Package: Security vs. Rule of Law and Fundamental Rights in the EU", CEPS CHALLENGE programme, March 10, 2009; Thomas Hammarberg, "It Is Wrong to Criminalize Migration", *European Journal of Migration and Law*, 11 (2009): 386; Luigi Ferrajoli, "La Criminalizzazione Degli Immigrati (note a Margine Della Legge N. 94/2009)", *Questione Giustizia*, no. 5 (2009): 9-18.

the adoption of the 'Security Package' Law, every undocumented migrant who did not voluntarily comply with the police's order of removal had to be arrested and prosecuted under the new crime of article 14(5). This, at first, clogged the criminal proceedings system. Prisons, then, became crowded with migrants who could spend from one to four years in jail. Even if this structural note might seem marginal compared to other questions of justice, it plays a crucial role in explaining why there have been so many referrals to the CJEU.

#### 4. The supranational dimension: European norms on return

With a view to design a European system of integrated border management,<sup>35</sup> the Return Directive provides for a uniform set of standards and procedures regulating the return of irregular migrants. The text of the Directive reflects the underlying struggle to strike a balance between the position of the Council, 'the establishment of an effective removal and repatriation policy', and the position of the Parliament, the necessity of a guarantee that people be returned 'in a humane manner and with full respect for their fundamental rights and dignity'.<sup>36</sup> As a result, many provisions of the Directive embody this compromise. For instance, article 15 establishes that undocumented migrants can be detained in order to implement a deportation order, but such a deprivation of liberty must be in line with the proportionality principle and only for a maximum duration of 18 months.<sup>37</sup>

The Return Directive was adopted on 16 December 2008 and the European Member States were supposed to implement it by 24 December 2010. However, the Italian government since the very beginning publicly stated that it would not transpose the EU Directive and, instead, it would keep its own system of return, deemed already in line with the EU standards.

The then Minister of Home affairs (Roberto Maroni, belonging to the *Lega Nord* party) at an audit before the Parliament prior to the adoption of the 'Security Package' Law, asserted that the procedure of the European Directive was inefficient in implementing deportation because it was based on the principle of prior-

ity of voluntary return over forced return.<sup>38</sup> The Italian procedure, instead, had a preference for immediate deportation. In the government view, this would make the Italian system more efficient than the European one.

Moreover, the Italian government wanted to make use of the exemption provided by article 2(b) of the Directive. This article states that Member States may decide not to apply the Directive to undocumented migrants who 'are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.' As we have seen in the previous section, in 2009 the 'Security Package' Law provided for two new criminal provisions: first, the crime of illegal entry and stay (art. 10bis of the Alien Law); second, the crime penalizing the undocumented migrants who had not voluntarily complied with the police's order to leave the Italian territory (art. 14(5)). These two norms, in the view of the government, set up a system to combat irregular migration based on criminal provisions; therefore, due to the exemption of article 2, the Directive should not apply.

The *ratio* behind article 2 of the Return Directive was different. As noted by other authors,<sup>39</sup> the government adopted the mentioned criminal provisions of the 'Security Package' Law during the period of implementation of the Directive (that was published on the EU Official Journal in December 2008) as a strategy to elude the application of the EU minimum standards.

Even if we accept the position of the then government and the applicability of article 2 of the Return Directive, Italian legislation still evidently infringed the European standards for the parts regulated by administrative procedures.<sup>40</sup> First, the EU Directive clearly preferred the voluntary departures while Italian norms stipulated immediate forced returns as the general rule.<sup>41</sup> This means that Italian legislation did not comply with article 7 of the Directive, which requires that the undocumented migrant be guaranteed 'an appropriate period for voluntary departure of between seven and thirty days'.<sup>42</sup> Second, under Italian law, it was possible to prohibit the re-entry of the expelled irregular migrant for ten years, while the Directive provided for a maximum ban of five years.<sup>43</sup> Third, in Italy the administrative detention of irregular migrants

35. "Towards Integrated Management of the External Borders of the Member States of the European Union" (Brussels: European Commission, May 7, 2002), COM(2002)233 final.

36. See the preamble of the Return Directive, at 2. On the negotiation process of the Return Directive see Anneliese Baldaccini, "The EU Directive on Return: Principles and Protests", *Refugee Survey Quarterly* 28, no. 4 (January 1, 2009): 125, doi:10.1093/rsq/hdq002.

37. Return Directive, art. 15.

38. See the declaration of the Italian Home Affairs Minister during an audit before the Parliament on 15 October 2008. The entire intervention is available at [http://documenti.camera.it/\\_dati/leg16/lavori/bollet/200810/1015/HTML/30/comunic.htm](http://documenti.camera.it/_dati/leg16/lavori/bollet/200810/1015/HTML/30/comunic.htm).

39. Favilli, "L'attuazione in Italia Della Direttiva Rimpatri: Dall'inerzia All'urgenza Con Scarsa Cooperazione", 702.

40. Rosa Raffaelli, "Criminalizing Irregular Immigration and the Returns Directive: An Analysis of the El Dridi Case", *European Journal of Migration and Law* 13, no. 4 (January 1, 2011): 467-89.

41. Alien Law, art. 13(3). Giuseppe Amato, "Un Sistema Incompatibile Con La Direttiva Ue Perché Non Privilegia Il Rimpatrio Volontario", *Guida Al Diritto* 5 (January 2011).

42. Return Directive, art. 7(1).

43. Return Directive, art. 11.

was the rule and was supposed to be applied in all cases, provided places were available in detention facilities; the Return Directive, instead, set up a system of case-by-case evaluations, where the restriction of migrants' liberty should comply with the principle of proportionality and can be enacted only when necessary to implement the return and when no less restrictive measure is available.<sup>44</sup>

## 5. Mobilizing supranational law: who and how

While the previous sections outlined the situation in Italy and the EU at the time when the term for transposing the Return Directive was still pending, this section describes the events that took place after the deadline expired: from December 2010 onwards. The narration combines judicial reporting with an events record. The aim is to provide an insight on what I consider an example of legal mobilization through an analysis that looks at who were the agents that made the mobilization of the Directive provisions possible and how. Many of the following insights come from interviews and consultation of sources that are non-conventional in legal research (newspapers, organization statements, blogs), in line with the bottom-up approach that guides this analysis.

### Who?

Following the bottom-up approach described in the first section, this paper analyses the role of civil society actors involved in the process of supranational law-making. By 'civil society', I mean those subjects that, even if they did not directly participate in the judicial proceedings, played a central role from outside the courtroom: in the case-study under analysis, they are networks of lawyers, activists and legal scholars.

One of the most important networks is the Association for Juridical Studies on Immigration – ASGI: a membership-based association that studies various areas of migration (asylum, antidiscrimination, xenophobia, citizenship, etc.) from a legal perspective.<sup>45</sup> Among ASGI's members there are many lawyers, academics, consultants and civil society representatives. The association was founded by lawyers and scholars in 1990 and year after year it became famous as a powerful network of experts assuming central importance for all those interested in migration issues. Together with *Magistratura Democratica*, in 1999 ASGI founded a legal journal on migration studies, *Diritto Immigrazione e Cittadinanza*, currently considered

one of the most important in the field. *Magistratura Democratica*, indeed, is another central actor for the mobilization of supranational law. It is an association of judges and public prosecutors, founded in 1964 and part of *Medel (Magistrats Européens pour la Démocratie et les Libertés)*, committed to promote a culture of democracy, rule of law and social justice. To this aim, alongside the publication of the over mentioned journal, *Magistratura Democratica's* mailing list was a very important tool: through this channel the judges and prosecutors members of the association can disseminate information, exchange ideas, arguments and decisions.

In order to reconstruct the events under analysis, it is important to consider the role played by educational institutions and schools providing legal education for practitioners. Among them, particularly significant was the *Scuola Superiore della Magistratura*, because is a national public school in charge of organizing conferences and courses specifically directed at judges and public prosecutors. The *Scuola* was founded with the aim of keeping them informed and updated with all the relevant legal developments in the national, European and international framework.

Also blogs and online journals contribute significantly to trigger debate and disseminate information about the impact of the Return Directive on the Italian migration system. See, for instance, the websites of *Melting Pot*, specialised in migration law and policy, and *EuroJus*, which focuses on EU law.<sup>46</sup> A platform for debate that was particularly influential, is an on-line legal journal specialized in criminal law: *Diritto Penale Contemporaneo*.<sup>47</sup> On its website, papers and judicial decisions related to the application of the Return Directive in the Italian legal system are uploaded in real time. The blog posts are read by many lawyers and judges who engage in heated discussions on the correct interpretation of the Directive. The close connection between the *Diritto Penale Contemporaneo* blog and the preliminary references is also demonstrated by the fact that one of the members of its board, Luca Masera, was the defence counsel representing *El Dridi* in the proceedings before the Court of Justice (see section 6).

At last, there is the role played by social movements, individual activists and migrants themselves. After the adoption of the 'Security Package' Law in 2009, members of the civil society mobilized in support of migrants rights. A national demonstration was held in Rome on 17 October 2009, where migrants and their supporters protested against the Government's reforms and its attitude towards the growing tragedy that

44. Return Directive, art. 15.

45. ASGI website: [www.asgi.it/chi-siamo/](http://www.asgi.it/chi-siamo/).

46. See [www.meltingpot.org/](http://www.meltingpot.org/) and <http://rivista.eurojus.it/>.

47. See [www.penalecontemporaneo.it/](http://www.penalecontemporaneo.it/).

was taking place on the Mediterranean coasts. In fact, the dramatic events of Lampedusa and the Arab Spring heated the discussion on migration, which became more and more central in the public debate.

### How?

The expiration of the term for the transposition of the Directive was the decisive turning point for all the actors at play. Indeed, under the EU law doctrine of vertical direct effect established by the CJEU, after the 24<sup>th</sup> of December 2010 all the provisions of the Return Directive that were clear, precise and self-sufficient would become directly enforceable in the Italian legal order. This means that such European norms should be applied by public administration and judges who would now be obliged to refuse to apply the incompatible national provisions. Given the open and deliberate refusal by the Italian government to implement the Directive,<sup>48</sup> its direct effect was anticipated and studied by the different stakeholders.

The first stakeholder to intervene was the Italian government itself. The national police chief circulated a communication to all the police stations on 17 December 2010 in order to inform the officers about the content of the Directive and the possible effect on the Italian legal system.<sup>49</sup> In the communication, the police chief warned his subordinates to adopt special cautions (e.g. to carefully motivate their removal orders) in order to prevent migrants from challenging police orders of removal before a judge by invoking the new EU law norms.<sup>50</sup> This was an attempt to adjust Italian expulsion procedure to the European standards; however, as we will see, many courts, lawyers and scholars considered the police chief communication not to be enough.<sup>51</sup>

At the same time, Francesco Viganò and Luca Masera, both members of the board of the online journal *Diritto Penale Contemporaneo*, published an influential article on the effects of the Return Directive after 24 December 2010.<sup>52</sup> The article examines the possible future scenario for Italian criminal rules on return in the aftermath of the expiration of the term for transposing the Directive. In particular, the two authors put for-

ward an analysis on the incompatibility of Italian norms with the Return Directive that triggered a long and heated debate on the *Diritto Penale Contemporaneo* blog.<sup>53</sup> Viganò and Masera especially pointed at article 14(5) of the Alien Law, the norm providing for criminal detention up to 5 years for the undocumented migrant that, despite the police's expulsion order, does not voluntarily leave the Italian territory.<sup>54</sup> The two scholars argued for the irremediable conflict of article 14(5) with article 15 and 16 of the EU Directive. First, because of its negative repercussions on migrants' right to liberty, that would be disproportionately restricted. Then, because the provisions were not instrumental in the removal of the migrants: indeed, they just kept the migrant in an Italian prison for several years. In order to solve this conflict of norms, Viganò and Masera argued that a transposition law was needed to make the Italian system compatible with EU law standards. Furthermore, and this was the most controversial part, they argued that many provisions of the Directive were already directly enforceable (as they were self-sufficient, clear and precise) and Italian judges could and should take this occasion to implement EU law and contribute to the protection of migrants' rights.<sup>55</sup>

In fact, Italian criminal judges and public prosecutors were now facing a difficult dilemma. First, they had to decide whether the norms of the Directive were sufficiently clear, precise and unconditional, and to determine whether the Italian Alien Law was in conflict with them. Here, the courses organised in different cities by the *Scuola Superiore della Magistratura* were very important in preparing judges and public prosecutors on the issues. It is worth noting that many of the speakers invited were members of ASGI or *Magistratura Democratica* and also involved in the discussion on the *Diritto Penale Contemporaneo* blog.

After the expiration of the deadline for the transposition of the Directive, Italian judges followed three different paths. Some of them continued to apply the national provisions as they were, without identifying any conflict with the Directive: they upheld the government view of the non-applicability of the Directive

48. See what said in the previous section.

49. Ministero dell'Interno, Dipartimento di Pubblica Sicurezza, "Cittadini Stranieri in Posizione Di Soggiorno Irregolare", December 17, 2010, Prot. 400/B/2010.

50. *Ibid.* at 2.

51. Fulvio Vassallo Paleologo, "Direttiva Rimpatri E Stato Di Diritto – Un Commento Alla Luce Della Circolare Manganelli Del 17 Dicembre", *Progetto Melting Pot*, January 7, 2011, [www.meltingpot.org/Direttiva-rimpatri-e-stato-di-diritto-Un-commento-alla-luce.html](http://www.meltingpot.org/Direttiva-rimpatri-e-stato-di-diritto-Un-commento-alla-luce.html).

52. Francesco Viganò and Luca Masera, "Illegittimità Comunitaria Della Vigente Disciplina Delle Espulsioni E Possibili Rimedi Giurisdizionali", *Rivista Italiana Diritto E Procedura Penale*, 2010, 560-96.

53. Francesco Viganò, "Direttiva Rimpatri E Delitti Di Inosservanza Dell'ordine Di Allontanamento Del Questore", *Diritto Penale Contemporaneo*, December 21, 2010, [www.penalecontemporaneo.it/area/3-/26-/284-direttiva\\_rimpatri\\_e\\_delitti\\_di\\_inosservanza\\_dell\\_ordine\\_di\\_allontanamento\\_del\\_questore/](http://www.penalecontemporaneo.it/area/3-/26-/284-direttiva_rimpatri_e_delitti_di_inosservanza_dell_ordine_di_allontanamento_del_questore/); Filippo Forcardi, "Ancora Sull'impatto Della Direttiva Comunitaria 2008/115/CE Sui Reati Di Cui All'art. 14 Co. 5-Ter E 5-Quater D.lgs. 286/1998", *Diritto Penale Contemporaneo*, November 1, 2011, [www.penalecontemporaneo.it/area/3-/26-/313-ancora\\_sull\\_impatto\\_della\\_direttiva\\_comunitaria\\_2008\\_115\\_ce\\_sui\\_reati\\_di\\_cui\\_all\\_art\\_14\\_co\\_5\\_ter\\_e\\_5\\_quater\\_d\\_lgs\\_286\\_1998/](http://www.penalecontemporaneo.it/area/3-/26-/313-ancora_sull_impatto_della_direttiva_comunitaria_2008_115_ce_sui_reati_di_cui_all_art_14_co_5_ter_e_5_quater_d_lgs_286_1998/); Francesco Viganò, "Il Dibattito Continua: Ancora in Tema Di Direttiva Rimpatri E Inosservanza Dell'ordine Di Allontanamento", *Diritto Penale Contemporaneo*, January 18, 2011, [www.penalecontemporaneo.it/area/3-/26-/328-il\\_dibattito\\_continua\\_ancora\\_in\\_tema\\_di\\_direttiva\\_rimpatri\\_e\\_inosservanza\\_dell\\_ordine\\_di\\_allontanamento/](http://www.penalecontemporaneo.it/area/3-/26-/328-il_dibattito_continua_ancora_in_tema_di_direttiva_rimpatri_e_inosservanza_dell_ordine_di_allontanamento/).

54. As we saw in section 3, art. 14(5) letter c of the Alien Law provides that the undocumented migrant that failed to comply with the police order of leaving the country voluntarily should be sentenced to a term of imprisonment between one and four years. This term may increase up to five years in case of reiteration (art. 14(5) letter d).

55. Viganò and Masera, "Illegittimità Comunitaria Della Vigente Disciplina Delle Espulsioni E Possibili Rimedi Giurisdizionali", 36.



to criminal law provisions.<sup>56</sup> Others decided to refuse to apply the national provisions deemed in conflict with the Directive.<sup>57</sup> Among those, it is worth noting the position taken by many chief prosecutors (the *Procuratori della Repubblica* of Lecce, Firenze, Roma and Milano)<sup>58</sup> who issued communications recommending to the prosecutors in their team not to prosecute the crimes provided under article 14(5); in these cases, the prosecutors did not even initiate the criminal proceedings against undocumented migrant, in order not to violate the Directive. And, finally, thirteen courts, under the consideration that there was an interpretative problem to solve, made a request for preliminary reference to the CJEU (among which there was the Italian Supreme Court – *Corte di Cassazione*).<sup>59</sup>

There is one thing which is worth noting regarding the Italian references for preliminary rulings. Even if the Return Directive contained huge implications also (if not especially) for the administrative proceedings of return,<sup>60</sup> almost all the debate was focused on the criminal provisions of article 14(5) and all the questions referred concerned those provisions. I will discuss why this was so in section 7.

## 6. The CJEU's judgment in *El Dridi* and its impact

The first Italian reference on article 14(5) of the Alien Law examined by the Court of Justice was referred by the Appeal Court of Trento in the context of the criminal proceedings against Hassen El Dridi.<sup>61</sup>

Mr El Dridi entered Italy illegally and a first deportation decree was issued against him in May 2004 by the *Prefetto* of Turin. He stayed irregularly on the Italian territory presumably until May 2010, when he was found by the police in Udine without valid documents. As the police could not enforce an immediate coercive deportation (because of lack of transport capacity) and could not place him in an administrative detention centre (because there were no places avail-

able),<sup>62</sup> it issued a removal order against him under which he had to leave the Italian territory in the subsequent days. Mr El Dridi did not comply with the police order and was prosecuted for this under article 14(5), letter *c*. In the first phase of the proceeding before the Trento Tribunal, Mr El Dridi was declared guilty and sentenced to one year in prison. On 2 February 2011, during the phase of appeal, the Appeal Court referred a preliminary ruling to the CJEU and, considering that Mr El Dridi was still in detention, it asked for application of the urgent procedure under article 104(b) of the Rules of Procedure of the CJEU.

The questions referred by Trento Appeal Court to the CJEU concern the compatibility between article 14(5) of the Alien Law and the article 15 and 16 of the Return Directive. In particular, the Italian Court asked whether the Directive, under the principle that a penalty must be proportionate, precludes a sentencing to a term of imprisonment of up to four years of an undocumented migrant who simply fails to comply with the deportation order. Also, in the light of the principle of sincere cooperation between the EU Member States,<sup>63</sup> the Appeal Court asked whether the criminal sanction could be imposed as an intermediate stage of an administrative procedure of return.

The news that an Italian preliminary request on article 14(5) was about to be examined by the CJEU reached Bruno Nascimbene, a Professor in European Law at the University of Milan who is also member of ASGI. During an interview with Luca Masera,<sup>64</sup> one of the authors of the influential article cited above<sup>65</sup> and member of the editorial board of *Diritto Penale Contemporaneo*, he explained to me that he was contacted by Nascimbene to discuss about the *El Dridi* referral that, having the Trento Court asked for the application of the urgent procedure, was likely to become the first ruling by the CJEU on article 14(5). They contacted the lawyer of the case, with whom they came to an agreement that Luca Masera would represent El Dridi in the public hearing before the CJEU. This is further evidence of the significant involvement of these networks of scholars and associations in the litigation before the CJEU.

56. See the website of *Diritto Penale Contemporaneo* for the list of cases. See for instance the Judgment of Tribunale di Verona, 20 January 2011, Judge Piziali.
57. Among them: Judgment of the Tribunale di Aosta, 28 January 2011, Judge Tornatore; Judgment of the Tribunale di Nola, 17 February 2011, Judge Napolitano.
58. Being internal communications they have not been published, but some of them were made available on the pages of *Penale Contemporaneo*. See Provvedimento by the Procura della Repubblica di Lecce, of 10 February 2011, Prot.n.556/2011 available at [www.penalecontemporaneo.it/tipologia/8/-/-/396-nota\\_del\\_procuratore\\_della\\_repubblica\\_di\\_lecce\\_10\\_febbraio\\_2011\\_inottemperanza\\_dello\\_straniero\\_all\\_ordine\\_di\\_allontanamento/](http://www.penalecontemporaneo.it/tipologia/8/-/-/396-nota_del_procuratore_della_repubblica_di_lecce_10_febbraio_2011_inottemperanza_dello_straniero_all_ordine_di_allontanamento/); Nota del Procuratore della Repubblica di Milano, 11 marzo 2011, [www.penalecontemporaneo.it/tipologia/8/-/-/446-nota\\_del\\_procuratore\\_della\\_repubblica\\_di\\_milano\\_11\\_marzo\\_2011\\_inottemperanza\\_dello\\_straniero\\_all\\_ordine\\_di\\_allontanamento/](http://www.penalecontemporaneo.it/tipologia/8/-/-/446-nota_del_procuratore_della_repubblica_di_milano_11_marzo_2011_inottemperanza_dello_straniero_all_ordine_di_allontanamento/).
59. Giudice di Pace di Mestre, *Asad Abdallah*, Case C-144/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Milano, *Assane Samb*, C-43/11, OJ 2008 L 348, p. 98 (2011); Corte Suprema di Cassazione, *Demba Ngagne*, C-140/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Treviso, *Elena Vermisheva*, C-187/11, OJ 2008 L 348, p. 98 (2011); Corte D'Appello Di Trento, *Hassen El Dridi, alias Karim Soufi*, Case C-61/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Bergamo, *Ibrahim Music*, C-156/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Rovereto, *John Austine*, Case C-63/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Ivrea, *Lucky Emegor*, Case C-50/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Ragusa, *Mohamed Ali Cherni*, Case C-113/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Ragusa, *Mohamed Mrad*, C-60/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Frosinone, *Patrick Conteh*, C-169/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Bergamo, *Survival Godwin*, C-94/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Santa Maria Capua Vetere, *Yeboah Kwadwo*, Case C-120/11, OJ 2008 L 348, p. 98 (2011).
60. See section 4.
61. Corte D'Appello Di Trento, *Hassen El Dridi, alias Karim Soufi*, Case C-61/11, OJ 2008 L 348, at 98 (2011).
62. This is the procedure of immediate coercive removal provided by art. 13 of the Alien Law, see section 3.
63. Art. 4(3) TEU.
64. This interview took place on 26 January 2016, at the University of Brescia (Italy).
65. See note 49.

On 28 April 2011, the CJEU delivered its judgment declaring article 14(5) incompatible with the principles stated in the Return Directive. The Court, on the one hand, dismissed the argument of the government, but, on the other, did not completely adopt the line of reasoning brought forward by the defence and the referring Court.

In its argumentation, the CJEU started by asserting the direct effect of the Return Directive in the Italian legal order. Indeed, as the Italian Government had failed to adopt the Directive by the prescribed time, individuals could invoke the provisions that are unconditional and sufficiently precise.<sup>66</sup> Among these provisions, in the CJEU's view, were also article 15 and 16 of the Return Directive. The CJEU thus dismissed the argument of the Italian government that wanted to rely on article 2 of the Directive to exclude its application; the Court noted that, even if Mr El Dridi was sanctioned with a criminal penalty, his proceedings originated from an administrative act of removal issued by the police, which falls entirely within the scope of the Directive. Also the Advocate General, in his Opinion, highlighted the incongruence of the Italian government's argument: 'a Member State which has not adopted the provisions transposing a directive [...] cannot rely on the application of a right deriving from that directive.'<sup>67</sup>

As anticipated, the decisive argument used by the CJEU to reject the Italian government's position diverged from the one endorsed by the Italian Court and the defence counsel. In their view, the provision that sanctions the undocumented migrant with four years of detention on the sole ground that he/she continued to stay on the Italian territory was disproportionate because it was exceptionally severe.<sup>68</sup> Whilst the Court's reasoning, instead of focusing on proportionality in the penalty or on the right to liberty, pointed to the efficiency of the Return Directive. The CJEU saw in the penalty of article 14(5) of the Italian Alien Law a risk of 'jeopardizing the attainment of the objective pursued by that directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals.'<sup>69</sup> In the CJEU's view, indeed, an imprisonment of up to four years is illegitimate because it is able to delay the enforcement of the return decision.<sup>70</sup> On these grounds, the CJEU declared that article 15 and 16 of the Return Directive preclude a Member States legislation which provides for a sentence of imprisonment against an undocumented migrant on the sole ground that he/

she remains on the territory of that state contrary to an order to leave.

Even if the argument of Trento's Court of Appeal and of the defence was not completely confirmed by the Court, the impact of the judgment on the Italian legal order was the one sought. On the very same day as the publication of the *El Dridi* judgment, the *Corte di Cassazione* acquitted three undocumented migrants prosecuted under article 14(5), confirming and reaffirming the principles stated at the supranational level. The reaction was also particularly fast in the political sphere: only a couple of months later, in June 2011, the Italian legislator adopted a new Law to make the national return system compatible with the principles established in the Return Directive and by the CJEU.<sup>71</sup> For what concern the other preliminary references submitted by the Italian courts, after the decision of *El Dridi* they were all removed from the CJEU's register because of their substantial overlap with what the Court stated in that case.

## 7. Mobilising supranational law: considerations on the why

This paper argues that the events and the social interactions described, which took place between December 2010 and April 2011, are the evidence of a process of legal mobilization of EU norms initiated by civil society actors (associations of judges, network of lawyers, legal scholars, activists, educational institutions) and concluded at the supranational level with the judgment of the CJEU.

In section 3, we saw the initial backdrop of this process: the 'criminalization' of the migrant, the government's refusal to transpose the Directive and the structural difficulties related to the functioning of Italian criminal justice system. These contingent factors were all decisive for the *El Dridi* case to come before the CJEU; however, they are not enough to explain the extensive number of the Italian referrals (thirteen questions in the first four months of 2011). Indeed, Italy was not the only Member State that failed to transpose the Directive on time, but quite the opposite: just four Member States transposed the Directive before 24 December 2010.<sup>72</sup> Also, Italy is not the only EU country

66. See the Judgment of the Court, C-61/11 PPU, ECLI:EU:C:2011:268, at 46.

67. See Opinion of the Advocate General Mazák, Case C-61/11 PPU, 1 April 2011, at 28.

68. See Pleading of the Defence Counsel Luca Masera, Case C-61/11 PPU, Hearing of 30 March 2011, at 23.

69. See Judgment in the Case of *El Dridi*, at 55.

70. See *El Dridi*, cited above, at 59.

71. Decreto-Legge 89, Disposizioni urgenti per il completamento dell'attuazione della Direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari, 23 Giugno 2011, 11G0128.

72. See Commission Press Release, An effective and humane return policy: 8 Member States have yet to comply with the Return Directive, of 29 September 2011, available at: [http://europa.eu/rapid/press-release\\_IP-11-1097\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-11-1097_en.htm?locale=en).

to penalise irregular migration through criminal law.<sup>73</sup> In my view, nothing can explain such an extraordinary number of Italian referrals, but the presence of influential networks of migrants' rights supporters; they saw in the Return Directive a way to reform Italian legislation and worked hard to make judges aware of the problems connected with the criminalization of migrants. Another element in support of the argument for legal mobilization is the fact that many of the thirteen questions referred by the Italian judges were formulated in an almost identical way.<sup>74</sup> This is further evidence of the fact that those judges were inspired by the same discussions and articles, or that they were convinced by the same arguments.

When analyzing the mechanism of preliminary rulings, it is important to bear in mind that a critical factor is represented by the willingness and ability of national judges to make the referral. This is what Broberg and Fenger, in their study on the variations in Member States' use of preliminary questions, called 'behavioral factors' influencing national courts' attitudes towards preliminary references.<sup>75</sup> Using their words, 'the behavioural factors concern which Member State courts are reference-averse and which courts are prone to refer.'<sup>76</sup> In the Italian case at stake, the incidence of behavioural factors is demonstrated in the fact that, while many provisions of the Italian Alien Law were in direct conflict with the Directive, the most challenged norm was the one directly applied to criminal judges: article 14(5). Indeed, the other controversial provisions (on detention, crime of irregular stay, time for the voluntary return) are all implemented by the *Giudice di Pace*, a lay judge who usually deals with minor controversies. The office of *Giudice di Pace* is composed of non-professional judges that are arguably less prepared than criminal judges; indeed, it has been contended that *Giudice di Pace* does not offer adequate guarantees of migrants' fundamental rights.<sup>77</sup> In my view, the fact that just two questions out of thirteen have been referred by *Giudici di Pace* to the CJEU can be explained by judges' lack of willingness and ability to make a referral or to challenge the national law.

This circumstance shows an important feature of this type of legal mobilization: judges' ability and willingness are crucial to the referral of a question. Even if the provision at stake has significant human rights implications and is subject to political debates, the power

to refer remains in the hands of the judge. On a more positive note, it is interesting to see how the criminalization of migrants (involuntary) helped the emergence of supranational legal mobilization in Italy: the fact that the sanctions of article 14(5) had to be decided by criminal judges increased the level of the judicial scrutiny and the possibility of having a question referred to the CJEU.

## 8. Conclusions

This paper, by carrying out a bottom-up analysis, shows how national judges, legal scholars, networks of lawyers and activists for migrants' rights mobilized European law and rights to change the Italian legal framework. The same case of *El Dridi*, analysed with a more classic approach, has been read as an example of dialogue between supranational and national courts, seen as a means to effectively enforce EU law. Yet, the paper wants to take this reasoning a step further. In this case, the preliminary references were not, or not only, made to ensure the correct implementation of EU law. The paper shows how EU law and the EU Court can be used by civil society actors and national judges to challenge and invalidate national provisions.

Also, the bottom-up analysis conducted, highlights the special features of this type of legal mobilization. Whilst legal mobilization is generally understood as consisting of 'bringing a claim, representing a claimant and also submitting written briefs (*amicus curiae*) as third parties',<sup>78</sup> in this case it was carried out in a different way. The Italian norms at stake and the proceedings in which the preliminary references were formulated, were criminal. This means that the person initiating the litigation was the public prosecutor and not the individual, which, instead, found himself/herself accused of a criminal act. Moreover, the CJEU, unlike the ECtHR, does not admit *amicus curiae* interventions and interest groups are formally excluded from participating in preliminary ruling proceedings. These circumstances are normally able to hinder the pursuing of legal mobilization in its more known forms. However, as the paper shows, the model of legal mobilization outlined relied to a greater extent on networks of supporters for migrants' rights that disseminated information about the Return Directive and ad-

73. Franck Düvell, "Paths into Irregularity: The Legal and Political Construction of Irregular Migration", *European Journal of Migration and Law* 13, no. 3 (January 1, 2011): 290.

74. Tribunale di Ivrea, *Lucky Emegor*, Case C-50/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Rovereto, *John Austine*, Case C-63/11, OJ 2008 L 348, p. 98 (2011); Giudice di Pace di Mestre, *Asad Abdallah*, Case C-144/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Bergamo, *Survival Godwin*, C-94/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Santa Maria Capua Vetere, *Yeboah Kwadwo*, Case C-120/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Milano, *Assane Samb*, C-43/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Treviso, *Elena Vermisheva*, C-187/11, OJ 2008 L 348, p. 98 (2011).

75. Morten P. Broberg and Niels Fenger, *Preliminary References to the European Court of Justice*, Second edition (Oxford, United Kingdom: Oxford University Press, 2014), 49.

76. Morten Broberg and Niels Fenger, "Variations in Member States' Preliminary References to the Court of Justice-Are Structural Factors (Part Of) the Explanation?", *European Law Journal* 19, no. 4 (July 1 2013): 489, doi:10.1111/eulj.12045.

77. See Circolare CSM 8/7/2009, available at [www.csm.it/circolari/090708\\_6.pdf](http://www.csm.it/circolari/090708_6.pdf).

78. Rachel Cichowski, "Mobilisation, Litigation and Democratic Governance", *Representation* 49, no. 3 (September 1, 2013): 322.

vocated for the illegitimacy of Italian Alien Law.

This analysis contributes to our understanding of the preliminary ruling mechanism. Initially, such a mechanism was conceived to guarantee a uniform interpretation of EU law and enhance European integration.<sup>79</sup> Following the judgment by the CJEU in *Van Gend and Loos*<sup>80</sup> and the consequent consolidation of a system of judicial protected rights stemming from EU law,

preliminary references became seen as one of the tools for the implementation of Member States' citizens rights.<sup>81</sup> This paper argues that now, at least in the migration domain, the preliminary ruling mechanism should be understood as an interactive process of judicial law-making that offers to European and non-European people an instrument for mobilizing European rights, transforming national legislation and participating in the making of EU law.

79. See Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, Court of Justice of the European Union, 2012/C 338/01, OJ C 338 of 6 November 2012.

80. European Court of Justice, *Van Gend and Loos*, C-26/62, ECLI:EU:C:1963:1 (1963), at 12.

81. Miguel Poiães Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (London: Bloomsbury Publishing, 1998), 9.

