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# Foreign nationals, enemy penology and the criminal justice system

LIZ FEKETE and FRANCES WEBBER

*Abstract:* In recent years, European governments have introduced a series of measures aimed at clamping down on foreign nationals within criminal justice systems. Such measures have included policies of automatic deportation on completion of prison sentences of a certain length, harsher sentencing, prison segregation, and restrictions on access to citizenship and rights to permanent settlement. This article argues that such measures constitute a separate criminal justice system for foreign nationals, the creation of which has been driven by 'penal populism' and racist campaigns by extreme-Right political parties, against Muslims, asylum seekers and Roma in particular. Many of those designated as foreign criminals are guilty only of new offences specifically created to criminalise undocumented migration; many others are young refugees who have never been helped to deal with the trauma they experienced in their countries of origin. Historically, the European Court of Human Rights has set a high threshold for the deportation of a foreign national following a conviction, particularly with regard to young people. But this has been bypassed by European governments, even in cases of 'virtual nationals', those born and brought up in a European country but, owing to *jus sanguinis* citizenship laws in some EU countries, holding a non-EU passport. Moreover, there are attempts to curtail the freedom of movement rights of EU citizens, such as Romanian Roma, on the grounds that they are a serious threat to public order.

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Sensationalist headlines about foreign criminals – from swarthy Middle-Eastern terrorists, Albanian rapists and sexual predators from Africa, to the Roma swindlers and tricksters from eastern and central Europe – now dominate European newspapers. In response to such stories, politicians have set targets for the removal of foreign national prisoners and the belief has grown that deportation is a reasonable and proportionate way to guarantee public security against a foreign enemy. But behind the media stories lies another reality – a hidden reality which relates to the lives of those ‘foreigners’ who are increasingly being swept up in Europe’s deportation drive.

In fact, those ‘foreign criminals’ targeted for deportation are less likely to be the serious crooks and dangerous sexual predators of modern folklore and more likely to be poor migrants and asylum seekers arrested for immigration crimes such as travelling on false documents, working illegally or other administrative offences relating to immigration laws. They may be Roma on the move from persecution in eastern and central Europe and arrested on the streets of western Europe for such serious threats to public order as begging or homelessness. They may even be second- or third-generation ‘immigrant’ youth, the children and grandchildren of guest workers, who are listed as foreign nationals within prison statistics and swell the ranks of Europe’s prison population (because of blood-based citizenship laws, they do not have citizenship, even though they were born in Europe). They may also be among the growing number of young adults who came to Europe as children, refugees from countries such as Sudan, Somalia, Rwanda and the former Yugoslavia, but were given no support to deal with the trauma they had experienced and, as juveniles, drifted into a life of delinquency or vagrancy. They may also be refused asylum seekers.

Could it be that, behind governmental resolve to deport more foreign nationals who commit crimes, lies another agenda and purpose? In a world where increasing numbers of people are being displaced, and where the possibilities to migrate for work are greater than ever before, western European governments are seeking to establish just which migrant workers, third country nationals and so-called ‘virtual nationals’ (people who have lived in Europe during their formative years but for one reason or another do not have citizenship) gain rights to permanent settlement. The obverse of this is that citizenship and settlement are denied to or withdrawn from whole categories of people who come to be seen as an unwanted residual population to be disposed of like toxic waste.

This article focuses on the gradual creation of a separate criminal justice system for aliens, characterised by harsher sentencing and prison segregation as well as the ultimate punishment of deportation following a prison sentence (double punishment). Separation, segregation and expulsion are new penal principles passed off by politicians as a proportionate response to the menace of

foreign criminals. But the laws and measures we outline below are actually disproportionate, authoritarian and fly in the face of modern penal policy, which holds that punishment should be tailored to the individual, should fit the crime and should be geared towards rehabilitation of the offender. This creation of a separate and harsher criminal justice system represents a major extension of the xeno-racist systems that have emerged since the early 1990s from asylum policy as well as since September 11 from the war on terror. As the criminologist Susanne Krasmann has observed, the very concept of the 'enemy' is 'indeterminate and might well be extended eventually without limits'.<sup>1</sup> What we are now seeing is the extension of this category from asylum seekers and terror suspects to foreigners and aliens per se.

### **The limits of European law**

For the past forty years, the European Court of Human Rights has been adjudicating on the deportation of foreign nationals from the countries of the Council of Europe and deciding on the circumstances in which to do so would breach rights enjoyed in the host state. Although states have historically insisted on their sovereign right to control immigration, which includes expulsion of those they deem undesirable, the growth of international human rights law following the second world war imposed limits on these sovereign rights, as it was recognised that respect for universal human rights, including rights to freedom from torture or inhuman punishment, and to respect for family and private life, must by definition be enjoyed by all, regardless of nationality.

In a 2001 case, the judges set out the factors to be considered by states wishing to deport foreign national criminals:

the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed as well as the applicant's conduct in that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life, whether the spouse knew about the offence at the time when he or she entered into a family relationship, and whether there are children in the marriage, and if so, their age. Not least, the court will consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion.<sup>2</sup>

In a later case, two further criteria were added: 'the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled, and the solidity of the social, cultural and family ties with the host country and with the country of destination'.<sup>3</sup>

In a number of cases in the 1970s, the Court ruled that young people born in a European country or raised there, having been brought as children from their country of origin, could not lawfully be deported, even if they had committed serious offences, if deportation cut them off from their families in the host state and if they had no real ties in their country of nationality.

Deportation from a country in which a person has lived from birth or from childhood constitutes an interference with his private and personal sphere where it entails ... the separation of the person concerned from his essential social environment, his emotional and social circle, and his family.<sup>4</sup>

Some individual judges went further, expressing the opinion that a host state is responsible for the social integration of immigrants and their children who have been accepted 'for reasons of [economic] convenience', so that:

where such social integration fails, and the result is anti-social or criminal behaviour, the State is also under a duty to make provision for their social rehabilitation instead of sending them back to their country of origin, which has no responsibility for the behaviour in question and where the possibilities of rehabilitation in a foreign social environment are virtually non-existent.<sup>5</sup>

The Council of Europe's Committee of Ministers recommended that, after a certain period of residence, foreign nationals should be protected from deportation and that:

After twenty years of residence, a long-term immigrant should no longer be expellable. Long-term immigrants born on the territory of the member state or admitted to the member state before the age of ten, who have been lawfully and habitually resident, should not be expellable once they have reached the age of eighteen; long-term immigrants who are minors may in principle not be expelled.<sup>6</sup>

But European governments have been unwilling to follow these recommendations and, in most of the member states of the Council of Europe, second-generation 'immigrants' may be deported on the grounds that they have been convicted of a criminal offence. However, eight member states (Austria, Belgium, France, Hungary, Iceland, Norway, Portugal and Sweden) have provided in their laws that second-generation 'immigrants' cannot be deported on the basis of their criminal record or activities. Apart from Iceland and Norway, this protection is not confined to those who were actually born in the host country but also applies to foreigners who arrived during childhood (varying from before the age of three in Austria to before the age of fifteen in Sweden). But, too often, the law affords inadequate protection or is honoured in the breach. And the European Court of Human Rights has not pressed governments to adopt the

recommendations. Most of the Court's judges take the view that deportation is a legally and socially acceptable response to crime by foreign nationals, even those who have lived in the host state during their formative years – so-called 'integrated aliens' or 'virtual nationals'.<sup>7</sup>

When it comes to EU nationals (as opposed to foreign residents from outside the EU), European free movement law allows for the expulsion of an EU national in much more limited circumstances: the person must constitute a genuine and serious threat to public order, public security or public health. There is no automatic expulsion for an EU national or member of his or her family who is convicted of a criminal offence; in such cases, it must be proved that the person poses a special risk to public order. As we shall see, this aspect of the law is increasingly coming under challenge by western European governments seeking to expel Roma from the new accession states.

### Challenges to double punishment

Another way deportation has been challenged in the European Court of Human Rights has been to focus on its character as double punishment (this is not a legal term). Double punishment, as understood by advocacy groups, means that, when two people carry out a crime and one is a foreigner, they both serve the same sentence in prison but the foreigner is then detained for deportation, while the national of the country concerned goes home to his family. In the debate about crime committed by foreigners, what is generally overlooked is that, not only are foreign offenders treated at least as harshly as a country's own citizens when it comes to criminal penalties (the demographer Pierre Tournier has shown that in France, depending on the charges, the probability of being sentenced to prison is between 1.8 to 2.4 times higher for a foreigner than for a French citizen)<sup>8</sup> – but also, for the foreign offenders, deportation is frequently imposed as an additional punishment. Deportation is, moreover, often a far greater punishment than a period of imprisonment, since it breaks up families and disrupts the whole tenor of life, while making rehabilitation in the host country impossible. Deportation means having to start again in a society which was left years ago, or sometimes never known.

Following Dutch immigration minister Rita Verdonk's 2006 populist call to deport all foreign criminals regardless of the seriousness of the offence committed,<sup>9</sup> campaigners in the Netherlands issued a challenge to the double punishment principle at the European Court of Human Rights. However, in the case of *Uner v Netherlands*, the Court ruled that 'a decision to revoke a residence permit and/or to impose an exclusion order on a settled migrant following a criminal conviction in respect of which that migrant has been sentenced to a criminal-law penalty does not constitute a double punishment; States are entitled to take measures in relation to persons who have been convicted of criminal offences in order to protect society'. Deportation was a preventive, not a punitive measure and thus even second-generation 'migrants' born or brought up in Europe could be deported if necessary.<sup>10</sup>

Such a ruling was also a blow to campaigners in France, where restrictive nationality laws have resulted in many young people, who are not citizens despite being born or brought up there, falling foul of the French penal code that allows for interdiction from French territory (removal and a ban on return, the French equivalent of deportation).<sup>11</sup> In fact, campaigning against double punishment was so strong in France that, in 2003, Nicolas Sarkozy, as interior minister, announced a reform to the penal code to abolish double punishment. 'Someone who has spent his childhood in France or has founded a family here should not be subjected to a second penalty, that of expulsion to the country of nationality and being cut off from his family,' he said.<sup>12</sup> But the reform, supposedly designed to protect migrants, has in fact changed little.

### **The emergence of enemy penology**

These challenges at the European Court of Human Rights were reactions against harsher deportation policies in member states from the 1990s onwards, as pressure grew for reforms of immigration law to allow for greater numbers of deportations, not just of refused asylum seekers but of foreign national offenders too, even if such deportation policies breached international law. Much of this pressure came from extreme-Right movements and the anti-immigration lobby, which succeeded in making 'foreign crime' a central electoral issue. But pressure also came from the police, who began to classify certain crimes on the basis of ethnicity, and from the media, which made sensationalist headlines out of dubious police crime statistics.

The forcible repatriation of second- and third-generation 'migrant' youth has long been a campaign objective of the far-Right and neo-Nazi fringe. But the first intimation that such policies (in relation to foreign nationals who commit crimes) could become mainstream came in 1998 in Christian Social Union (CSU)-controlled Bavaria. Germany had never considered itself a country of immigration, and its blood-based citizenship laws meant that young Turks born in the country were not German citizens but had to apply for citizenship when they reached the age of eighteen. In the Bavarian state elections that preceded the federal elections of the same year, the CSU highlighted the issue of foreign crime in Bavaria, a state with one of the lowest crime rates in the whole of Germany. In apparent ignorance of the Nazi principle of *Sippenhaft* (kin liability, whereby relatives of criminals were held responsible for their crimes and punished equally), it called for the deportation of entire immigrant families in cases where under-age members were found guilty of offences, even if the offenders or their parents were born in Germany. Less than a week after the Bavarian government proposed new anti-foreigner measures and called for the compulsory repatriation of immigrants whose children were found guilty of crimes, the authorities in Munich gave a Turkish couple, who had lived in Germany for thirty years, an ultimatum to leave Germany with their son Muhlis Aris, known as Mehmet, then aged thirteen, who had a string of convictions for juvenile offences. The teenager,

born in Germany, was said to represent a 'massive risk to public security and order' and his parents were accused of failing to provide adequate supervision. Amidst much fanfare, the CSU announced that it was seeking the introduction of a new law to allow for the deportation in extreme cases of the families of foreign offenders under the age of eighteen, justifying the parents' deportation on the ground that they had purposely failed to bring up their children properly.

After the election, the furore surrounding Mehmet's case died down. Mehmet was eventually deported to Turkey but his parents were allowed to remain in Germany. The Bavarian authorities would have been advised that their attempt to deport the whole family was a form of collective punishment and illegal under international law. However, the Bavarian CSU, as well as the Swiss People's Party, which is also trying to reintroduce the notion of kin liability into the law (see below), could have drawn comfort from a strand of academic thought that gave legitimacy to the introduction of separate principles for foreigners within the legal system. In 1985, the Hamburg-based criminologist Günther Jakobs wrote of the need to introduce a separate 'criminal law for enemies' (*Feindstrafrecht*), for notorious delinquents who, since they were incorrigible, had 'forfeited their status as citizens' and should be denied normal legal guarantees, but instead combated and excluded, since they represented a fundamental threat to society.<sup>13</sup> His work was based on the idea of a fundamental divide between citizens (subject to the rule of law) and non-citizens (not legal subjects and therefore non-persons in the eyes of the law). One implication of this, subsequently seized on by the far Right, was that foreign offenders, who were in fact non-citizens, should be treated differently to German citizens on the grounds that their lack of affiliation to the nation posed a grave threat to Germany and justified their classification as 'criminal enemies'.

It is impossible to understand how Jakobs' classification scheme, with its rigid distinction between 'us' and 'them', could gain currency, without relating it to the equally rigid distinctions that run through Germany's postwar approach to migration, as well as its citizenship and naturalisation laws. In Germany (and the same is true of Austria) the principle of *jus sanguinis* (citizenship by descent – literally blood) meant that the children of Turkish guest workers, for instance, were not automatic citizens even if they were born in Germany. Well into the new millennium, the German federal government was still insisting that Germany was not a country of immigration. It followed from this that it had neither an immigration policy nor an integration policy, but rather a 'foreigners policy' (*Ausländerpolitik*). It is precisely the dominance of foreigners' (or aliens') law that provided the space whereby *Feindstrafrecht* could become a catchword in the German security debate. Many second- and third-generation youth of migrant origin did not have citizenship either by birth in Germany or by naturalisation. For those young people with a criminal record, naturalisation would be virtually impossible, and without citizenship they were extremely vulnerable to the growing clamour for deportation. The German security debate began to distinguish between young white Germans and young people of migrant origin.

German youths who joined the neo-Nazi scene and carried out criminal violence against migrants could be rehabilitated but second- and third-generation young people of migrant origin who had fallen into crime should be deported. The tendency was to see juvenile delinquency as a problem located primarily if not exclusively within the migrant family and culture, so that the correct way to deal with it was to send these children back, like unwanted waste, to the country of their parent's birth, even if the children did not speak the language and had scant connection there.

Enemy penology continues to shape the debate about juvenile delinquency in Germany, as shown by the Christian Democratic Union's (CDU) attempts to make foreigner crime the central issue in the January 2008 Hesse regional elections. It was a deeply xenophobic campaign, with the then CDU state premier, Roland Koch, issuing a six-point plan to fight crime, stating that 'zero tolerance of violence should be an integral part of our integration policy' and that foreign youths sentenced to one year or more in prison should be deported. He went on to criticise Germany's 'strange sociological understanding' of violent members of ethnic minority groups.<sup>14</sup> The CDU federal Chancellor Angela Merkel claimed, on the basis of dubious crime statistics, that 43 per cent of all violent crimes in Germany were committed by people under twenty-one, almost half of whom were from an immigrant background. This led to a headline in the *Bild* newspaper, 'Young foreigners more violent than young Germans',<sup>15</sup> and almost daily news stories about 'foreign' repeat offenders with long criminal records. The Migrant Welfare Forum was amongst groups that condemned the CDU's 'tactical populism' and warned that the debate on youth criminality was stirring up prejudices and dividing society. Former Social Democrat Chancellor Gerhard Schröder accused the CDU of 'race-baiting' and bias. 'Young German right-wing radicals commit an average of three violent crimes per day - most of them against people of another skin colour. You don't hear anything about that from Mr Koch or Ms Merkel,' he said.<sup>16</sup>

### **A new baseline for deportations**

The German precedent was one of the first examples of overt electioneering around the foreign crime issue. But it has been repeated again and again across Europe, most notably in the 2007 Swiss general election, in which the Swiss People's Party (SVP, a partner in the coalition government) campaigned for the expulsion of foreign families by issuing a poster that showed three white sheep kicking a black sheep against a backdrop of the Swiss flag.

In European country after country, the law has changed to establish a new baseline for deportations, resulting in a dramatic increase in the number of foreign nationals being expelled following a prison sentence. One of the harshest laws seems to exist in the Netherlands, a country whose approach to immigration has been scarred by xenophobic and populist politicians from Pim Fortuyn and Hirsi Ali to the VVD's Rita Verdonk, and now the arch-Islamophobe Geert Wilders. Before 2002, the law was strict enough - a foreign resident could be

expelled if he or she had been convicted of a crime punishable by a one-year prison sentence. But a law introduced in 2002 allowed for the deportation of foreign residents who had been sentenced to one month in prison or one month of community work. As a result, the number of foreigners expelled has doubled in eight years, with 1,475 people expelled in the first eight months of 2009, compared to 859 in the entire year 2000.<sup>17</sup>

Other countries which have adopted a harsher approach include Sweden and the UK. In fact, liberal Sweden seems to have been the first to tighten its law, as far back as 1994, so that foreign citizens could be deported as a result of 'serious' criminal activity if convicted of an offence carrying any form of prison term (immediate or suspended) and if there was, in addition, a risk of any form of continued criminality, or if a court activated a suspended sentence. (Prior to that, a foreign prisoner could be deported if found guilty of an offence punishable by a one-year jail sentence.)<sup>18</sup> Statistics provided by the criminologist Lisa Westfelt show that, between 1994 and 2004, the number of deportees doubled and there were five times as many deportations during this period as in the mid-1980s. Although in 2004 the numbers declined, in 2006 the number of deportees was higher than at any point during the period up to the turn of the century. In addition, deportation was used disproportionately against long-term residents in Sweden from countries with poor human rights records, war and other conflicts.<sup>19</sup>

In the UK, the number of deportations following a criminal conviction has increased five-fold since 2005, from 1,000 in 2005 to 5,400 in 2008.<sup>20</sup> Since the so-called 'foreign prisoners scandal' of April 2006 (in which the government's failure to consider deporting 1,000 foreign nationals on their release from prison led to the resignation of the home secretary Charles Clarke), the law has been tightened dramatically. Before the 'foreign prisoners scandal', a large number of factors were weighed in the balance before deporting someone, including their age, the length of residence, their family and other ties, compassionate circumstances and the likely impact of their deportation on others. But emergency measures introduced in July 2006 after the scandal – described at the time as 'a quick fix that fans the flames of intolerance' – created a presumption in favour of deportation in cases of criminal conduct.<sup>21</sup> And in 2007 parliament passed the UK Borders Act, which provides for automatic deportation of anyone convicted of specific offences or sentenced to twelve months' imprisonment, unless deportation would breach the proposed deportee's human rights, would be contrary to EU law or would be contrary to the Refugee Convention.

When the provisions of the Criminal Justice and Immigration Act (2008) eventually come into force in the UK, they will set another frightening European precedent in that any foreign national convicted and sentenced to two years or more, or convicted of an offence specified as serious, and who cannot be deported because deportation would breach their human rights, can be designated as having a 'special immigration status'.<sup>22</sup> And in a frightening echo of the kin liability principle, this 'special immigration status' also strips the offender's family members of their immigration status. Indeed, the whole family can be refused the

right to work or access benefits and social housing, can be subjected to a curfew and electronic monitoring, and dispersed from their habitual residence, receiving only the barest minimum of support, probably in the form of vouchers.

The legal situation in Switzerland also seems set to change following the vigorous campaign for a referendum on the deportation of foreign criminals first launched in 2007 by the anti-immigration SVP, which is a key element in the ruling coalition. In the run-up to the 2007 general election, the SVP launched a campaign to raise the 100,000 signatures necessary to force a referendum on introducing measures to allow for the deportation of the entire family of a convicted criminal under the age of eighteen. There was consternation in parliament, as critics pointed out that, if the law was passed, it would be the first such law in Europe since the Nazi practice of *Sippenhaft*. By February 2009, the SVP had collected 210,000 signatures and, in response to the pressure from the SVP, a new Aliens Bill was introduced into parliament that aims to establish precise criteria for the withdrawal of a residence permit from a foreign offender. Under the proposed legislation, foreigners sentenced to two years' imprisonment or more, or having accumulated the equivalent prison sentences over a period of ten years, would have their residence permit rescinded and be liable for deportation. In less serious cases, the draft Bill would allow the authorities to judge for themselves whether to withdraw the residence permit of the person concerned.<sup>23</sup> But the SVP wants to go further. Emboldened by the success of its 2009 'people's initiative' to ban the construction of minarets, it is pushing for another referendum, this time calling for the automatic expulsion of foreigners who commit crimes. At the time of writing, the Senate is attempting to block the initiative before it goes to the popular vote, on the grounds that it would, if passed, violate international law and the Swiss constitution.

The French penal code has always allowed for the main penalty (imprisonment or a fine) to be supplemented with interdiction from French territory via an order imposed by a judge in a criminal court or correctional tribunal, if the defendant is a foreign national. In addition, prefects may expel foreign nationals convicted of more serious crimes, on the grounds that they present a serious threat to public order. Historically, interdiction was an order imposed by judges almost automatically for even minor infractions, particularly for immigration irregularities, hence the strong campaigns in France around double punishment. Sarkozy's Foreigners' Law protects certain categories from prefectural expulsion orders but, until his 2003 reform, the powers of judges to impose interdiction were unlimited. Nevertheless, as migrant groups have pointed out, the 2003 law does not 'abolish' double punishment, since only certain migrants benefit. And, even for them, protection is not absolute: a judge can make an interdiction order even against someone in a protected category provided an adequate justification is given. In the dossier *Livre noir de la double peine*, a number of human rights groups brought together compelling evidence demonstrating that long-term resident foreign nationals, and those with French partners and children, were still facing deportation following prison sentences.<sup>24</sup> One of those subjected

to double punishment – despite a law which purports to protect those who entered France as children – was Nzuzi, a 19-year-old Congolese national who was given three-year interdiction orders in October 2004 and again in August 2005, despite having lived in France with his parents, brothers and sisters since the age of six.<sup>25</sup>

The 2006 dossier contained statistics which showed that, while the number of judicial interdiction orders imposed on foreigners convicted of crime dropped by around 5 per cent in the two years following the 2003 reforms, the number of returns to the frontier ordered by prefects rose dramatically – by almost a third – and the number of expulsion orders also rose by over 10 per cent. Furthermore, a December 2008 report by GISTI points to the ‘small print’ in the 2003 law which has limited its use: the foreigner must prove continuity of residence over the entire period, which is extremely difficult in many cases; and it protects spouses of French nationals but not partners and not those who married or had children after committing the relevant offence, which severely weakens its guarantees.<sup>26</sup> The report also describes a troubling expansion of judicial double punishment since 2006, when the law was toughened again. Now, over 100 infractions can attract interdiction. Even convicted foreigners who retain their liberty lose their right to a residence document and are returned to the frontier. Occasionally interdiction is used as the main penalty and, in such cases, it can be implemented from the day it is ordered. This penalty of ‘banishment’ can be used against all categories of foreigners, including refugees.

### **New deportable offences of unemployment and ‘failure to integrate’**

Not only is the number of deportations for criminal offences increasing but also the notion of what actually constitutes crime is changing. The extreme Right now campaigns for deportation for the new crime of ‘failure to integrate’, with unemployment as proof of this grave offence. In Austria, for instance, the Freedom Party (FPÖ) campaigns for the deportation of foreigners who refuse to integrate, defining the ‘unintegrable’ as criminals as well as long-term unemployed immigrants from different cultures, adding that the numbers contained in these two categories had now crossed ‘the threshold of the unacceptable’.<sup>27</sup>

In some countries, the campaigns of the extreme Right have already resulted in changes in the law. This has happened in Italy, where the Northern League (NL) emerged in a very strong position following the Italian general election of March 2008. Immediately on coming to power, Prime Minister Silvio Berlusconi played to NL demagoguery by describing foreigners who were jobless as ‘an army of evil’ and called for the formation of special camps in which they could be interned. The newly-elected former fascist mayor of Rome also played to ‘penal populism’,<sup>28</sup> promising to expel 20,000 immigrants from the city whom he claimed had been released into the community after serving prison sentences.<sup>29</sup> As is often the case in Italian politics, not all of these ugly fascist-style threats were realised. Nevertheless, in July 2009, a new security law (Law no. 94/2009)

was passed which contains many new provisions regarding the legal status and the everyday life of migrants in Italy.<sup>30</sup> It includes an amendment tabled by the NL which allows for the introduction of a points-based residence permit system. Under this scheme, all those applying for a resident permit must sign an 'agreement of integration' (*accordo di integrazione*), agreeing to reach specific integration objectives during the period of the residence permit. Each applicant has a certain number of points at his/her disposal and the loss of all the points causes the loss of the residence permit and expulsion from the national territory. (Asylum seekers, refugees, people with permits for family reunion and with long-term residence permits are excluded from this provision.) The human rights group EveryOne believes that the new points-based residence permit will massively increase the power of local authorities and government agencies to act in an arbitrary way and 'will inevitably lead to abuse of office by the authorities and the public institutions, blackmail and other forms of discrimination against foreigners in Italy'.<sup>31</sup>

It did not take a campaign by the extreme Right to change the law in the UK. There, the Borders, Citizenship and Immigration Act 2009 is the first step in creating a points-based system of settlement and citizenship, in which, according to government proposals, points will be deducted for 'failure to integrate', 'anti-social behaviour' or 'active disregard for UK values', resulting in denial not only of citizenship but also of residence rights.<sup>32</sup>

### **The evolution of separate penal and policing policies**

Much of the extreme Right's rhetoric is aimed at specific categories of migrants and motivated by Islamophobia and anti-Roma racism. So, when the extreme Right calls for more deportation of foreign nationals (and the stripping of citizenship from dual nationals is its latest campaign pledge), what it really has in its sights is the forcible repatriation of 'virtual nationals' to Muslim regions of the world, as well as the Roma from eastern and central Europe, including other EU member states. All these categories are over-represented in Europe's overcrowded prisons. The fact that this is so speaks volumes about the reluctance to bring about racial equality in Europe – the abject failure to integrate Roma communities, the massive discrimination against black and Muslim youth that throws young people into a life of delinquency and fails to provide any meaningful rehabilitation, which means they end up brutalised within the criminal justice system. (Compare this with the massive amount of money that went into special rehabilitation and exit projects for white Germans who drifted into the neo-Nazi scene.)

In fact, the drive to change the law to bring about more deportations is all the more frightening as it comes at a time when Europe's prisons are full to bursting and those in power are desperately seeking ways to deal with overcrowding and to drive down the cost of incarceration. Prison statistics on 'foreign nationals' are hard to decipher, given the legacy of blood-based citizenship laws and the growing complexity of immigration and asylum laws. In the UK, foreigners

make up one in eight of the prison population, we are told.<sup>33</sup> In thirteen Council of Europe jurisdictions, over 30 per cent of all prisoners are foreign nationals and in five of those countries the proportion is over 50 per cent.<sup>34</sup> While, in Italy, foreigners – both legal and illegal residents – make up 8 per cent of the population, they comprise 38 per cent of the prison population, states EveryOne, citing statistics provided by the Department of Prison Administration.<sup>35</sup> What better way to drive down costs, than to expel the foreigners? Antonio Manganelli, chief of Italian prisons, says that, in some prisons, the number of immigrants totals 60, 70 and even, in some cases, 90 per cent. Fifty-four per cent of the female prison population (both Italian and foreigner) are Roma women, even though Roma women in Italy comprise 0.09 per cent of the total population.<sup>36</sup>

Another example of anxiety about overcrowding and cost comes from France, where around 35,000 foreigners were held on remand in 2008 at a cost of €190.5 million, according to the Court of Auditors.<sup>37</sup> Of this total, 14,411 were expelled by force. The French state paid an average of €13,200 per foreigner detained and expelled (€5,500 excluding expulsion).

### *Prisons*

It comes as no surprise to learn, therefore, that many criminologists, drawing on Jonathan Simon's observation that those in power often 'deploy the category of crime to legitimate interventions that have other motivations',<sup>38</sup> suggest that the true purpose of the foreign national crime debate is to use deportation as an instrument to drive down prison numbers. They are concerned that a separate prison system will be set up for foreign national prisoners. Already there are signs that this is developing in the UK, where a secret agreement between the Ministry of Justice, the National Offenders Management Service (NOMS) and the UK Border Agency (UKBA) has been drawn up in order to concentrate foreign national prisoners (including those on remand) in a small number of prisons, so as to make it easier to deport them when they complete their sentences.<sup>39</sup> HMP Canterbury (Kent) and Bulwood Hall (Essex) are to be used exclusively for foreign national prisoners and six other 'hub' prisons were identified where foreign prisoners are concentrated. Another thirty-five prisons ('spoke' prisons) may also take foreign national prisoners. A protocol sets out how UKBA will operate within these prisons.

Such agreements create a separate penal policy for foreign national prisoners, one based not on rehabilitation but on arbitrary decision-making, indefinite detention and deportation. It creates discrimination within prison as foreign prisoners have fewer rights than citizen prisoners and are subjected to greater punishments. It is a system that smacks of xeno-racism (institutionalised racism against foreigners) as it establishes separate systems for asylum seekers and foreigners. It seems that we are going back in time, to the time of the aliens' laws – not integration or even immigration policy, but foreigners' law – the parameters of which are control of movement as well as the ultimate exclusion of banishment and deportation.

Today, foreign prisoners in the UK frequently remain in jail for months, sometimes years, after their sentences are served. Not only those fighting deportation but also prisoners who accept deportation are forced to serve a longer sentence as, on their release date, they remain incarcerated while the authorities make the arrangements for their repatriation. The London Detainee Support Group, which over a period of twenty months studied the situation of 188 long-term detainees (most of whom were from Somalia, Iraq, Iran or Algeria and had been imprisoned for minor offences, often relating to immigration) found that hundreds of rejected asylum seekers and foreign prisoners were being held in immigration detention and simply forgotten. Only 18 per cent of those studied were repatriated, with a quarter set free and over half – 57 per cent – held without the slightest idea of when they would be released or repatriated. In one documented case, a man had been locked up for eight years before being repatriated.<sup>40</sup>

Frustration over lengthy incarceration waiting for deportation, or fear of deportation itself, leads to mental health problems and attempted suicide. One man, Jamaican Kingsley Williamson, committed suicide after being taken from an open prison to a closed prison; he was believed to be depressed at the prospect of a long wait for deportation.<sup>41</sup> Another man, 33-year-old Ukrainian Aleksey Baranovsky, committed suicide at HMP Rye Hill after learning that, though he was eligible for parole, he would be deported upon his release. It is believed he feared he would be killed by the Russian mafia if deported to Ukraine.<sup>42</sup>

And there is further evidence of discrimination against foreign prisoners in the UK. Procedures for dealing with applications for parole, transfers to lower category prisons or release on temporary licence are all different to those for UK nationals, in that the UKBA must be consulted beforehand. The situation is such that, in 2006, the Chief Inspector of Prisons drew attention to the ‘systemic failures, at all levels, in the support, care and management of foreign national prisoners’. She warned that a ‘national strategy for managing foreign national prisoners should not begin and end with the question of ... deportation’.<sup>43</sup>

### *Policing*

Alongside the new drive towards a separate penal policy, comes the expansion of immigration policing, as well as the establishment, in some countries, of special squads to hunt down and deport foreigners for the purpose of immigration control.

Spain’s largest police trades union (SUP) rejects the blurring of its crime prevention role and immigration control. ‘In the pursuit of criminals there are no distinctions of race, sex or any other personal or social circumstances, such as whether they are Spanish citizens or foreigners’, it states. In contrast, the Spanish government sees the way forward as setting up a special brigade for the expulsion of foreign criminals (Brigada de Expulsiones de Delincuentes Extranjeros – BEDEX) as a measure to prioritise the deportation of repeat or violent offenders. The brigade, it was announced in September 2008, would operate under the borders and foreigners’ police and would be used to pursue ‘foreign criminals who

re-offend or who are especially violent, including terrorists, gang-members or those committing crimes of domestic violence'.<sup>44</sup> But according to Andalusian lawyer Diego Boza, the government's reasoning for the formation of BEDEX was fundamentally flawed from the outset. Spanish criminal and immigration law already allowed for the deportation of persistent and dangerous offenders and those convicted of serious crime will have to serve their sentence before there is any question of deportation. Boza believes that the government is not being honest about the true function of the brigade, which will be used to deport people arrested for minor criminal offences, such as travelling without a ticket or selling pirated DVDs on the streets, where a judge accepts deportation in lieu of a prison sentence or a fine.<sup>45</sup> In such cases, the brigade is taking a sledgehammer to crack a nut. 'Such cases don't justify the creation of a special deportation brigade.' He added: 'It appears that the aim is to link immigration and crime.' It is a view with which another lawyer Miguel Angel Muga concurs: 'Deportation is not the solution. You are sending a message to society that criminals are foreigners and that there's no principle of equality for nationals and foreigners.' He believes that the new unit will be used 'to deport people' whom the authorities 'consider not integrated because they commit crimes, and as an answer to prison overcrowding'.<sup>46</sup>

Already, the suspicions of legal experts have been reinforced by the facts on the ground. SOS Racismo Madrid, CEAR Madrid and other anti-racist, migrant and refugee support groups have protested at the increasing number and frequently abusive stops and searches and detention of foreigners in Madrid, particularly around colleges, near migrant NGO offices and at certain metro stations. An internal note from the Madrid chief of police with precise instructions on weekly quotas of arrests and prioritised nationalities confirms suspicions of targeting. Interior minister Alfredo Pérez Rubalcaba acknowledges that police ID controls and arrests are based on skin colour, nationality or appearance and contribute to the criminalised image of foreigners, particularly Moroccans, who are a particular target.<sup>47</sup>

One of the by-products of the hysteria over foreign nationals and crime is that it gives legitimacy to government attempts to expand the size and functions of the immigration police. Immigration policing is one of the fastest growing sectors of policing - and also one of the least accountable and transparent. The UKBA's officials, for instance, have seen their policing powers massively extended in the past decade, so that they now have all the powers of police without any of the safeguards or accountability. Seven and a half thousand of them have been organised into regional teams, which compete aggressively over the number of arrests and deportations they can achieve.<sup>48</sup>

In Italy, the name of a police operation to round up immigrants is itself telling. Operation White Christmas ran from 27 October to 25 December 2009 in the town of Coccaglio, where the council is controlled by the Northern League. Police conducted house to house searches in order to hunt down any immigrant whose work permit had expired. Despite Italy having one of the largest police forces in Europe - 324,000 officers in 2006, roughly double the size of Britain's - the latest Security Decree outsources policing to the community by authorising

the formation of citizens' patrols to fight crime. Given the current hysteria about foreigners and crime, the human rights organisation EveryOne is quite right to point out that such groups could quickly turn into vigilante patrols and organise manhunts for illegal immigrants. James Goldston, head of the Open Society Justice Initiative, described the Italian state's 'outsourcing' of its 'security responsibilities' as 'deeply alarming'. 'Italy has a fundamental problem with human rights, perhaps more than any other nation in Western Europe.'<sup>49</sup>

### **Administrative xeno-racism – who is under threat?**

It only remains to look a little more closely at the different categories of foreign national prisoners under threat of deportation and the different systems for their separation and segregation within the criminal justice system.

#### *Asylum seekers and immigration offenders*

We have already seen the creation of a separate judicial system for asylum seekers but, within that, there are different administrative systems in the detention estate for those convicted of a criminal offence (this increasingly includes immigration offences). Hence, in Cyprus, under the Aliens and Immigration Law, asylum seekers and immigration offenders convicted of a criminal offence (and disproportionately this includes offences such as illegal working) are considered 'prohibited immigrants'.<sup>50</sup> As such, they are immediately re-arrested once they have served a prison sentence and taken to an immigration removal centre for deportation. If they are asylum seekers, the deportation order is suspended but not the detention order, and so they remain in detention for the whole period of their asylum application, a process that could take years. Persons with international protection under refugee law are treated in a similar way and, once in detention, are put under regular psychological pressure to sign a statement expressing their 'wish' to return to their country, irrespective of their refugee status. The situation in Italy is similar. The new Security Decree makes it a crime to arrive in the country without the correct documents, which means that anyone in such a situation could find himself immediately detained and prosecuted, no matter what prompted him to migrate – a flagrant breach of Article 31 of the Refugee Convention, to which Italy is a signatory.

Under the US federal system, where power is devolved to individual states, 'the expanded war on crime', argues Jonathan Simon, 'has created numerous opportunities to govern like a prosecutor'.<sup>51</sup> The same observation could be made of many of Europe's federal states, particularly in Germany (witness the role of Roland Koch in the Hesse regional elections) and Austria. Another example of a separate system, this time for 'suspected criminal asylum seekers', comes from the extreme-Right-controlled Austrian province of Carinthia. It was the late Jörg Haider who introduced a special regime for 'suspected criminal asylum seekers', arguing that it was necessary to protect the public in Carinthia. This regime involved isolation from the local community in a specially converted

former children's home situated in a secluded pasture in the mountains of southern Austria at an altitude of about 3,900 feet. The current Carinthian governor Gerhard Dörfler of the BZÖ (Alliance for the Future of Austria) had sixteen asylum applicants transferred to the facility in autumn 2008, claiming that they all had criminal convictions. According to the Klagenfurt public prosecutor's office, however, six of them had no criminal record whatsoever. The sixteen fled en masse back to Klagenfurt in December 2008, complaining that medical and psychological care had been lacking at the detention centre and the nearest doctor was seventeen kilometres away. 'The whole thing sounds strongly like banishment,' said Heinz Patzelt, head of Austria's chapter of Amnesty International. 'There's no place for that in a modern system with a rule of law.'<sup>52</sup>

With governments setting targets for the removal of foreign nationals and refused asylum seekers, it is axiomatic that the undocumented will be among the most vulnerable to segregation and removal. But the extreme Right's call for more and more asylum seekers to be criminalised for having no documentation has now entered legal regimes across Europe, despite the fact that Article 31 of the Geneva Convention states that it is not a crime to cross international borders without the correct papers, if your purpose is to seek asylum. In the UK, a 2004 law created the offence of arriving without documents, which attracts a prison sentence of up to two years, and arguments that the law violated the Refugee Convention were rejected by the courts.<sup>53</sup> In a crackdown on the undocumented, there were 10,750 arrests of foreigners working without valid papers in 2007, and using false documents to work is frequently treated by the courts as seriously as offences of theft, despite the fact that the work is generally minimum-wage – and, on occasion, those convicted have been ordered to repay their paltry wages in addition to facing deportation as criminals.<sup>54</sup>

In the run-up to the Norwegian elections in September 2009, the Progress Party campaigned for the detention of all asylum seekers who lack identity papers (this would mean detaining around 17,000 people a year). In Switzerland, the SVP justice minister introduced a law in 2006 which denied undocumented asylum seekers the right to have their claims examined on their merits.<sup>55</sup> These are highly controversial laws, which treat as criminal some of the most vulnerable people in society and which violate the principles of the Refugee Convention. The drive to criminalise the undocumented even extends to the criminalisation of solidarity with them. A 2002 EU Directive requires member states to criminalise both illegal immigration and assisting illegal entry.<sup>56</sup> In Italy, the law against assisting illegal entry is being used against fishermen who rescue migrants adrift at sea. And when, in August 2009, seventy-three Africans drowned in the Mediterranean after drifting at sea without rescue, the Northern League repeated its calls for a tougher stance towards 'illegal immigrants'. The five survivors, picked up off the Italian island of Lampedusa, said that a dozen fishing boats passed by but only one answered their calls, throwing them food but refusing to rescue them. A TV poll conducted soon after the tragedy found that 71 per cent of those surveyed believed that the five survivors of the tragedy should be put on trial as illegal immigrants.<sup>57</sup>

*Roma*

One particular concern of campaigning groups is that the new laws are a targeted measure for controlling the now legal movement into western European countries of long-persecuted and impoverished Roma communities from new accession states such as Romania. New proposals, such as that to turn begging into a criminal offence, are seen to be targeted at the Roma and as a means of legalising their deportation from one EU state to another. As previously noted, EU nationals (as opposed to foreign residents from outside the EU) are protected from automatic expulsion from another EU state, although the law does allow for deportation in particular circumstances, where the proposed deportee constitutes a genuine and serious threat to public order, public security or public health. Some member states, like Denmark, are attempting to lower the threshold of what constitutes such a threat in order to expel Roma. Others are just ignoring EU guarantees. Italy led the way, unsuccessfully, in this respect, when it summarily attempted to expel Romanian Roma following a moral panic about foreign crime. The European Commission issued an immediate challenge.<sup>58</sup>

In fact, the current situation of Roma in Italy is utterly bleak. One of the first acts of Berlusconi's new government was to establish a national census, including fingerprinting, of the Roma population living in camps, which many saw as a prelude to a policy of mass deportation. Since then, the Security Decree (Law 773B) has been brought in, which established a register of the homeless and criminalised anyone obliging children to beg, and more and more Roma have been targeted for arrest and deportation. There is also concern that the citizens' patrols made legal by the Security Decree (see above) will be used to hunt down Roma for deportation.

But Italy is not alone. The Danish police also have their eye on the Roma. The Danes are seeking to test EU law to determine whether they can expel Romanian nationals arrested and convicted for relatively petty crimes, in the face of the restrictions on deportation contained in the Citizens' Directive.<sup>59</sup> The test measure is regarded as aimed at Romanian Roma accused of shoplifting, pick-pocketing and swindling the public through gambling games. Instead of issuing them with fines for unauthorised gambling, the police authorities now intend to have them arrested, tried and sentenced for fraud, in the hope that this would subsequently enable their expulsion from Denmark.

*Juveniles and young adults of migrant origin*

Each country decides who can be deported on the basis of the seriousness of the offence and the length of the prison sentence. The objectives of the extreme Right are to drive down to an ever lower threshold the tariff and the seriousness of offences which warrant deportation. The extreme Right's relentless campaigning then leads to a competition between the mainstream parties as to which can be the harshest towards foreign criminals, singling out juveniles and young adults of migrant origin or asylum background. These are the most vulnerable of all. Having either been born in Europe, or lived most of their lives there, they

have the most to lose from the relentless drive towards more deportations.<sup>60</sup> We have already noted the campaign by the Christian Democrats in Hesse, who sought to make crime perpetrated by young foreigners the central election issue in the January 2008 German regional elections and campaigned for the deportation of foreign youth sentenced to one or more years' imprisonment.<sup>61</sup> But in Austria, too, the Alliance for Austria's Future is campaigning for a special commission to investigate 'immigrant crime'. If successful, then no doubt it will be followed by yet more pressure on the government to set a lower threshold for deportation of juvenile offenders, particularly those from the former Yugoslavia or from Turkey.

Organisations that deal with the rights of young people at risk of criminality warn that such a climate brings dangers. In particular there is the danger, as recognised by Spanish anti-racist organisations, that the Foreigners' Law will be used to combat the problem of 'juvenile delinquency'.<sup>62</sup> (An internal note from the Madrid police chief justifies the use of the Foreigners' Law to combat the 'delinquent problem'.)<sup>63</sup> Such policies also raise fundamental questions as to why so many young people of foreign origin are over-represented in youth offending statistics and incarcerated in youth detention centres. When it comes to young people from an asylum background, many of whom may have come to Europe as unaccompanied children and whose lives have been shaped by incredible hardships, the question becomes more pertinent still. For criminalisation, and subsequent deportation, is the end-product of a system of discrimination, separation and exclusion that started from the moment they entered European territory, as exemplified by the experiences of young people who ended up at the unaccompanied minors' unit in Deba, Spain. Foreign unaccompanied children with behavioural problems have been sent to Deba since February 2009. Most have criminal charges pending. In March 2009, a group of children accommodated at the centre brought an action for ill-treatment and neglect before a judge at Donostia. SOS Racismo intervened to seek better care for the children, who were left with no educational activities. There were no drug rehabilitation programmes. The children were miles from anywhere and were given nothing to do. The situation is the same in other centres. Quite a few of the children did not return to the Deba centre and, without funds, sought a life of crime. Local media reported daily on their criminal activities, using inflammatory language which fed popular racism. For the authorities, which accuse SOS Racismo of interference, the answer was to increase security and to deport the 'delinquent ten per cent who re-offend'. But SOS Racismo's Peio Aierbe pointed out that the problem lay in the lack of proper reception facilities for young asylum seekers, who need both educational and emotional help and support, and it was there that the minors who ended up in Deba were failed. Unaccompanied children are still being placed in bed and breakfast hotels and drug use is still not being tackled.<sup>64</sup>

Similar problems exist in the UK, where young refugees and asylum seekers have also been failed by the system, which has made little attempt to bring about their integration into society. Here, the courts have, on occasion, overruled the Home Office's decision to deport such young adults for minor criminal offences,

as well as issuing legal rulings against the Home Office's attempts to strip young adults of their refugee status if found guilty of a whole range of offences.

In June 2009, the Court of Appeal held that regulations issued by the Home Office authorising deportation of refugees for relatively minor offences were illegal. A legal challenge was brought by a Serbian national, EN, who was a child when he arrived in the UK and was granted refugee status. When he was sentenced to twelve months in a young offenders' institute for burglary, the Home Office told him they proposed to deport him despite his status as a refugee, and the Asylum and Immigration Tribunal dismissed his appeal. The Court of Appeal allowed EN's appeal and sent his case back to be reconsidered.<sup>65</sup>

The Refugee Convention declares that those recognised as refugees should not be sent home unless they are convicted of a 'particularly serious' crime and are a danger to the community of the country in which they live. In 2002, the UK parliament passed the Nationality, Immigration and Asylum Act, section 72 of which deemed as a 'particularly serious crime' any offence attracting a punishment of two years' imprisonment or more or any offence specified in Home Office regulations. The Specification of Particularly Serious Crime Regulations, issued in 2004, listed hundreds of offences, from genocide and hijacking to theft and criminal damage (which could be stealing a milk bottle or scratching the paintwork of a car) as 'particularly serious crimes'. The Act and the regulations attracted criticism from human rights and refugee lawyers, who argued that only those convicted of the most serious offences, such as rape and murder, should lose the protection of the Refugee Convention, and their criticism was accepted by the parliamentary Joint Committee on Human Rights in its 2004 report.<sup>66</sup> In its June 2009 ruling, the Court of Appeal said that these trivial offences could not rationally be considered 'particularly serious' and struck down the regulations as unlawful. The judges made the further point that even an offence carrying two years' imprisonment may not be 'particularly serious' – so that the presumption imposed by the section could be rebutted by the proposed deportee, like the further presumption that he or she represented a danger to the community. A presumption which could not be rebutted would, they said, not be compatible with the Refugee Convention.<sup>67</sup>

SA, a Sudanese refugee who came to the UK in 1986 aged nine, drifted into drugs in his early twenties and was convicted of a large number of petty offences. In 2006 he was convicted of theft, for which he received a six-month sentence. He received a notice from the Home Office saying that he had committed a particularly serious crime and was a danger to the community and that he was to be deported to Sudan despite his refugee status and his twenty years in the UK. Following the Court of Appeal ruling in 2009, his case is to be reconsidered by the Home Office.<sup>68</sup> But for others the ruling comes too late.

SA is one of a growing number of young adults who were given no or inadequate help with coming to terms with horror, displacement and adjustment when they arrived as refugee children and who are now being criminalised and threatened with deportation. Many are Somalis, Sudanese and Rwandans who lost

many family members in circumstances of the utmost brutality and who have never been helped to come to terms with their loss. AK is a Rwandan refugee who came to the UK aged ten in 1998 having witnessed the brutal killings of close relatives. His mother, a lone parent of three children, was herself severely traumatised but neither she nor any of the children were given help or support to deal with their trauma. The boy was mocked at school for his African accent and drifted into truancy and, later, crime. Over a two-year period he terrorised the neighbourhood and, at sixteen, he was sentenced to four and a half years in a young offenders' institute for wounding and robbery. In 2007, the Home Office served him with a deportation notice. At his appeal, neighbours and others who had formerly been terrorised by him came to court to describe how he had changed into a respectful young man. Despite this evidence of rehabilitation, the Tribunal rejected his appeal and he was deported to Rwanda, where he has no living relatives, even though he has a case pending at the European Court of Human Rights.<sup>69</sup>

These young adults should have been caught in their formative years by the social services; their emotional and behavioural problems should have identified them as 'youth at risk' and greater attempts should have been made to give them a sense of belonging and integrate them in society. But the European-wide drift towards what criminologists refer to as 'penal populism' suggests that 'youth at risk', if they come from a migrant background, are seen merely as an unwanted and residual population and their treatment within the criminal justice system takes on 'increasingly warehouse-like or even waste-management-like qualities'.<sup>70</sup> In the Netherlands, Overlegorgaan Caribische Nederlanders (OcaN), a Dutch Caribbean organisation, is concerned that penal populism and the drive towards ever greater numbers of deportations are now influencing government policy towards 'youth at risk' if they happen to come from a migrant background. After the government set up an electronic database on Caribbean youth at risk, known as the Antillean Reference Index (*Verwijsindex Antilliaanen*), OcaN issued a legal challenge, arguing that not only was the database discriminatory, as it registered information on young people on the grounds of ethnicity, thereby treating every Antillean child as a potential criminal, but it established a dangerous precedent in that, once established, the database could be generalised to deal with young people from other communities of foreign origin.<sup>71</sup> OcaN's warning that the database could then be used to justify special measures, such as deportation, was soon realised. In 2006, the Dutch interior minister Rita Verdonk introduced legislation for the 'admission and expulsion of Arubans', aimed at making it easier to deport young Dutch juveniles of Caribbean origin. Although the law had to be dropped (it was illegal), the debate on 'criminal foreign youth' continues, with the local authority in Rotterdam accused of pioneering harsh measures justified, in part, by a report by criminologist Marion van San entitled 'Criminal behaviour of Antilleans in Rotterdam'. On the basis of forty interviews carried out with Antillean youth, van San implied that these youth of Caribbean origin suffered from a kind of collective disturbance and that addiction to the trappings of glamour was leading them to adopt a criminal lifestyle.<sup>72</sup>

Across Europe, these numbers of 'youth at risk' increase daily. These are the same youths who swell the ranks of the unemployed, who line the streets of the deprived inner cities and suburbs and see no future in a Europe characterised by growing wealth and accelerating poverty. Sporadic rebellions by such youth have long been a feature of life in the UK, Belgium and France but now in Denmark and Germany too there are signs of growing unrest. For these youths, many of whom are beginning to turn towards what is perceived as a ghetto Islam or ideas of Black Power, the threat of deportation is real. Those arrested in riots and disorders will also find themselves bundled out of the Europe that left them to live a life of discrimination and hopelessness to a country they know no more. The French 2003 law against double punishment provided no protection from expulsion by prefects on serious grounds of public order – which is why in November 2005, two years after 'abolishing' double punishment, Sarkozy was telling prefects to expel 120 young foreigners convicted of involvement in the civil unrest which exploded in the *banlieues* in October of that year. A young Malian, given a four-month suspended sentence, was the first to be expelled, in February 2006, under a three-year interdiction order, despite an advisory opinion from local magistrates saying that the young man was not a danger to society, had all his family in France and could not live a decent life in Mali, where he had no future.<sup>73</sup>

When proportionality is thrown out of the window, European governments run the risk of introducing laws that are not only authoritarian but draw on the legal precedents of our darkest past.

## References

- 1 Susanne Krasmann, 'The enemy on the border: critique of a programme in favour of a preventive state', *Punishment & Society* (Vol. 9, no. 301, 2007).
- 2 *Boultif v Switzerland* (2001) 33 European Human Rights Reports (EHRR) 50.
- 3 *Uner v Netherlands* (2006) ECHR 46410/99. As these quotes show, the primary relationship protected by the Court is that of spouses or civil partners and their children. But once children reach adulthood, their relationship with their parents and siblings is not deemed so worthy of protection and will 'only exceptionally' prevent deportation. (*Advic v UK* (1995) 20 EHRR CD 125.) Thus a juvenile offender might be protected by his family ties from deportation at sixteen or seventeen but not at eighteen or twenty, unless he can show exceptional physical or emotional dependence.
- 4 Judge Marcuillo in *Nasri v France* (1995) 21 EHRR 458.
- 5 *Ibid*. This was, however, a minority view and neither governments nor judges, whether national or in the European Court, are prepared to attribute any responsibility at all for a young person's criminality to the host state where he was educated and socialised.
- 6 Recommendation (2005) 15 CMCE, Council of Europe Committee of Ministers.
- 7 The judges do not accept that 'virtual nationals' should be equated with nationals for purposes of protection from deportation. The Court has held that deportation of foreign nationals is not necessarily unlawful even for those who have spent most of their childhood in the host country, if their offences are sufficiently serious.
- 8 See Loic Wacquant, 'Suitable enemies: foreigners and immigrants in the prisons of Europe', *Punishment & Society* (Vol. 1, no. 2, 1999), p. 215.
- 9 *De Fabel van de illegaal* (No. 75, March/April 2006).

- 10 *Uner v Netherlands*, op. cit. Mr Uner came to the Netherlands from Turkey at the age of 12 to join his father. In his early twenties he was convicted of three violent offences culminating in manslaughter, for which he was sentenced to seven years' imprisonment. He was deported at the end of his sentence despite reports indicating that he was fully rehabilitated. He had a Dutch partner and two Dutch children, no longer spoke Turkish and had no connections there apart from an uncle. Psychiatric evidence showed that separation from his children caused depression.
- 11 According to the French penal code, interdiction from French territory is an order which may be imposed by a judge in a criminal court or correctional tribunal in addition to the main penalty (imprisonment or a fine), if the defendant is a foreign national.
- 12 The law of 26 November 2003 provided that if someone is convicted of a crime and had entered France before the age of thirteen, or had lived in France for twenty years, or had lived in France for ten years and was married to a French person for three years, or is the parent of a French child, he or she should not normally be subjected to a banning order.
- 13 We are indebted to Susanne Krasmann for drawing our attention to Jakobs' work. See Krasmann, 'The enemy on the border', op. cit., for an outline of Jakobs' ideas.
- 14 For a full outline of the Hesse campaign, see *European Race Bulletin* (No. 63, Spring 2008).
- 15 See *Deutsche Welle* (7 January 2008).
- 16 See *Deutsche Welle* (9 January 2008).
- 17 See *Expatica News* (28 August 2009).
- 18 Courts were also required to consider possible impediments to the enforcement of a deportation order, such as the individual being at risk of the death penalty, corporal punishment, torture or persecution if he or she was deported, and to consult with the Swedish Migration Board on such impediments.
- 19 We are grateful to Lisa Westfelt for allowing us to see the English-language summary of her PhD dissertation. See Lisa Westfelt, 'Migration som straff? Utvisning på grunder brott 1973–2003 med fokus påflyktingskyd'.
- 20 'Immigration and asylum statistics released', Home Office press release, 24 February 2009.
- 21 'A quick fix that fans the flames of intolerance', *Independent* (4 May 2006).
- 22 As in Sweden, foreign nationals subjected to a deportation order having served a prison sentence can challenge automatic deportation on human rights grounds. But if the courts state they cannot be removed from the UK, they will fall under the provisions of the Criminal Justice and Immigration Act.
- 23 Critics point out that the law as drafted could also apply to those served with fines as an alternative to a prison sentence. Since 1 January 2007, in the cases of certain offences, a person given a prison sentence of less than one year may have this penalty converted to daily fines but the Aliens Bill states that those who accept this form of punishment are also liable to expulsion if the total amount of daily fines is equivalent to more than a two-year prison sentence within a ten-year period.
- 24 GISTI, LDH, MRAP, CIMADE and ANVP (National Association of Visitors to Prison), *Livre noir de la double peine* (March 2006).
- 25 Chekib, another victim of double punishment cited in the report, was only two when he came to France from Tunisia. His parents and three siblings are French citizens. He was expelled in 2002, aged twenty-five, to Tunisia, where he had no family or ties, did not speak the language and was totally isolated. He was diagnosed with clinical depression in 2004, caused in large part by his extremely difficult living conditions. Following the 2003 legal reforms, he applied to return to France but was refused on the grounds that he could not prove he was 'habitually resident' in France immediately before 30 April 2003 – which he could not do because he had obeyed the expulsion order and not sought to re-enter France illegally. Following legal action, the expulsion commission approved abrogation of the expulsion measure but the interior ministry had done nothing to enable him to return to France by the date of publication of the dossier.

- 26 GISTI, *L'interdiction du territoire français: la double peine judiciaire* (December 2008).
- 27 *Weiner Zeitung* (28 January 2008).
- 28 Jonathan Simon, *Governing Through Crime: how the war on crime transformed American democracy and created a culture of fear* (Oxford, Oxford University Press, 2007).
- 29 For a full report on the Italian general election and its aftermath, see *European Race Bulletin* (No. 64, Summer 2008).
- 30 *Gazetta Ufficiale* (No. 170, 24 July 2009). Our thanks to Sara Cerretelli at Cooperazione per lo Sviluppo dei Paesi Emergenti (COPSE) for helping us to understand the complexities of the law.
- 31 See <<http://www.everyonegroup.com>>.
- 32 *Earning the Right to Stay: a new points test for citizenship* (UK Border Agency, 2009). See 'Subject to British values', *IRR News* (10 September 2009).
- 33 See *Guardian* (31 May 2006).
- 34 Report of 15th conference of directors of prison administration, 'Overcrowded prisons: looking for solutions', 9-11 September 2009, CDAP(2009)04.
- 35 'Italy: police and judiciary persecution is taking place towards foreigners and Roma people', statement by EveryOne, 5 May 2009.
- 36 *Ibid.*
- 37 See *Migration News Sheet* (August 2009).
- 38 Simon, *Governing Through Crime*, op. cit.
- 39 'Service Level Agreement between the Ministry of Justice, the National Offenders Management Service (NOMS) and the UK Border Agency to support the effective management and speedy removal of foreign national prisoners', May 2009. Reported in 'Segregating foreign national prisoners', *IRR News* (16 July 2009). A judicial review of this policy is ongoing.
- 40 London Detainee Support Group, *Detained lives* (January 2009).
- 41 *Guardian* (31 May 2006).
- 42 'The death of prisoner Baranovsky', *Independent* (11 October 2009).
- 43 Her Majesty's Chief Inspector of Prisons, *Foreign National Prisoners: a thematic review* (3 November 2006).
- 44 SOS Racismo, 'Una nueva brigada policial que aumenta el apartheid jurídico' (October 2008). See *Statewatch* (14 October 2008).
- 45 The Spanish criminal code regards selling pirated films in the street a more serious crime than killing someone through minor negligence. Those convicted can find that judges replace a prison sentence with an expulsion order.
- 46 Indymedia Estrecho, 'Rubalcaba propone la creación de una brigada policiaca especializada en la detención y expulsión de extranjeros' (26 November 2008).
- 47 See 'Control de la ilegales en Espana', 4 April 2009, <<http://traselviaje.blogspot.com/2009/04/control-de-los-ilegales-en-espana.html>>.
- 48 See UK Border Agency, 'Enforcing the deal: our plans for enforcing the immigration laws in the United Kingdom's communities: business plan 2008-9'.
- 49 *Reuters* (17 September 2009).
- 50 KISA, 'Migrants' detention and ill-treatment in Cyprus', <[http://idc.rfbf.com.au/wp-content/uploads/2009/06/kisa-memo\\_detention-ill-treatment\\_2505081.pdf](http://idc.rfbf.com.au/wp-content/uploads/2009/06/kisa-memo_detention-ill-treatment_2505081.pdf)>.
- 51 Simon, *Governing through Crime*, op. cit.
- 52 See *Austrian Times* (7 October 2008), *Austrian Times* (20 February 2009) and *Austrian Times* (21 October 2009).
- 53 Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 2; *R v Navabi*, *R v Embaye* [2005] EWCA Crim 2865.
- 54 'Crusade against the undocumented', *IRR News* (5 February 2009).
- 55 His successor intends to abrogate the measure, which violates the Refugee Convention. *Migration News Sheet* (October 2009).
- 56 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [Official Journal L 328 of 5.12.2002].

- 57 *Reuters* (17 September 2009).
- 58 The background to events in Italy, as well as a full list of statements and petitions issued in defence of the Roma, can be found in *European Race Bulletin* (No. 64, Summer 2008).
- 59 Directive 2004/38 EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, Article 27(2), which states that: 'The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.'
- 60 In October 2009, in recognition of the specific vulnerability to deportation of a generation of migrant children born and raised in Greece, the newly-elected socialist government introduced a wide-ranging overhaul of immigration policies. It is anticipated that around 200,000 children who are Greek in everything but name will be granted papers and therefore protected from arrest and deportation at the age of eighteen. *Guardian* (22 October 2009).
- 61 Deportations continue of young adults with criminal records who were born in Germany and have Turkish origin. However, monitoring of this phenomenon seems to be virtually non-existent and information about cases only emerges if they generate media interest. One such case was that of Erkan Taylay who was deported to Turkey in 2009 even though the authorities deemed him 'completely rehabilitated' by the time he had completed his prison sentence.
- 62 Concerns have also been raised in Switzerland over how new aliens' legislation will apply to the children and grandchildren of the original Turkish guest workers who were either born in Switzerland or who have lived most of their lives there. Whereas in the EU, lawfully resident Turkish nationals and their families benefit from some of the same protections as EU nationals, and can only be deported on the same grounds, these protections are of no avail in Switzerland, which is not a member of the EU.
- 63 In the same way that the UK authorities sought to use immigration law to justify the internment of foreign 'suspected international terrorists' who could not be deported because of the risk of torture, while not seeking to intern British suspected terrorists - a stratagem condemned as unlawful and discriminatory by the House of Lords in December 2004 in *A v Secretary of State for the Home Department* [2004] UKHL 56.
- 64 *El Pais Basque edition* (13 March 2009), *Diario Vasco* (14 March 2009).
- 65 *EN Serbia v Secretary of State for the Home Department* [2009] EWCA Civ 630, 26 June 2009.
- 66 Parliamentary Joint Committee on Human Rights, 22nd report of session 2003/4, 'The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004', HL 190/HC 1212.
- 67 *EN Serbia v Secretary of State for the Home Department*, op. cit.
- 68 Case files.
- 69 Case files.
- 70 Simon, *Governing through Crime*, op. cit.
- 71 OcaN, 'VIA. Making a difference between Dutch and Dutch', 30 September 2008, <<http://www.ocan.nl/Ocan-Nieuws/via-making-a-difference-between-dutch-and-dutch>>.
- 72 As cited by Jan Tas, 'Government racism against Antillians', *De Fabel van de Illegal* (No. 69, Autumn 2006).
- 73 'Le premier emeutier victime de la double peine est malien', *Afrik.com* (3 February 2006), <<http://www.afrik.com/article9415.html>>.