ABSTRACT TITLE: Trapped between administrative detention, imprisonment and exclusion from legal residence

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Recent decades have witnessed the increasing criminalisation of illegal immigration in the EU. A notable move in many EU States has been the transformation of illegal entry and stay of third country nationals into a crime, involving possible imprisonment. But the Court of Justice of the EU in 2011 paved the way for partial decriminalisation of illegal stay in the “El Dridi” and “Achughbabian” rulings. The Court interpreted the Union's Return Directive as prohibiting Member State legislation from providing a sentence of imprisonment on the sole ground of illegal stay. Sentences of imprisonment may now only be imposed on illegally staying third country nationals who have been subjected to every stage of the removal process, and whose continued presence is not justified on any valid grounds. This concerns individuals who have been released from administrative detention following the expiry of the maximum period during which they can be held.

The general impact and economy of these rulings has been thoroughly analysed in case comments. In this article, I offer to take a closer and more specific look at the “residual” category of irregular migrants that the Court of Justice of the EU has singled out as permissible targets for imprisonment. In singling out this category, the Court of Justice has drawn a dividing line within a broader group of non-removable third country nationals. This broad group is made up of non-EU nationals who are neither removable nor entitled to regularisation of stay. The Court singles out the “residual” category within the broader category of non-removable persons through two criteria: 1) removal procedures against them must have reached exhaustion, and not merely be suspended; 2) they must not fall under a justified ground of non-return, such as a human rights-based protection from removal.

a) My first argument is that within the broad group of non-removable persons, the Court's “residual” category of third country nationals -who can be imprisoned on grounds of illegal stay- is the one that has already suffered the greatest forms of membership exclusion through the highly repressive convergence of immigration and criminal law. In EU Member States that provide a sentence of imprisonment on the ground of illegal stay, individuals within the “residual” category may find themselves trapped and bounced about between: 1) repeated placement in administrative detention centres for up to 18 months 2) imprisonment for the crime of illegal stay, 3) life outside incarceration in the worst form of legal limbo that excludes them from regularisation/toleration prospects and access to basic socio-economic rights.

b) Secondly, building on the literature on functions of deportation, regularisation and the criminalisation of illegal stay, I suggest that there are- and critically examine- converging functions in the EU of administrative detention, prison and legal limbos, in their combined use against the “residual” category. I particularly focus on deterrence-related functions and the role they assign to the agency of migrants concerned, which leads me to examine countervailing positions of States and migrants.

c) I propose a French case-study to thirdly argue that the Court of Justice's dividing line between the “residual” category and other non-removable persons can be far from clear, objective and fair in practice. This case-study largely relies on empirical research and documented narratives by NGOs and international organisations and research groups.
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