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# Detention by sea, imprisonment by air: An analysis of the get-tough policy approach to the infringement of migration law in Malta

Mary Grace Vella[1]

Faculty for Social Wellbeing, University of Malta

**Abstract**

This article contributes to existing theoretical and empirical work on the criminalisation of migration by examining elements of crimmigration within Maltese legal frameworks and Criminal Justice institutions and practices. Drawing on domestic legal provisions, processes and secondary data analysis of official immigration statistics by the three branches of criminal justice; the police, courts of justice, and the correctional system, the study sheds light on the treatment of immigration law violators in Malta with particular focus on the sanctions meted out by the Criminal Courts in the penalisation of these offences. Despite the fact that Malta has moved away from the automatic criminal prosecution of undocumented migrants who enter Malta irregularly by boat in search for asylum, it continues to formally criminalise and harshly penalise those who use fraudulent documentation in their attempt to enter or leave the country through formal channels of arrivals and departures. The harsh penalisation of migration law violations arising from the use of fraudulent travel documentation for asylum seeking purposes denotes that empowered through legal provisions and wide judicial discretion, the Maltese Criminal Courts of Justice adopt a get-tough punitive approach, typified by over-reliance of incarceration over community-based sanctions. Fuelled by populist rightist discourse, migration policy in Malta is becoming progressively characterised by crimmigration through the tighter intertwinement of criminal and migration law, furthering the criminalisation of migrants and asylum seekers. This carries significant ramifications on the socio-economic and politico-cultural spheres with huge moral and fiscal costs on both the macro-structural and micro-individual level. The excessive and blanket use of imprisonment for the violation of migration law infers the use of punishment as a form of symbolic politics and a spectacle of a get-tough policy approach offering rehabilitation and reintegration to the native insider, but retribution, deterrence and incapacitation to the non-native outsider, redolence of an institutionalised form of racism.

*Keywords:* crimmigration, imprisonment, migration, Malta, passport fraud

## 1. Introduction

The study aims to complement existing theoretical and empirical research on the criminalisation of migration and the impact of race and citizenship on criminal justice processes within the Maltese context. By examining the penalisation of migration law violations for attempted inbound entry and outbound departure into and from Malta through the use of fraudulent documentation, it analyses the involvement and impact of migration control by the Maltese criminal justice system.

[1] *E-mail:* marygrace.vella@um.edu.mt

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Drawing on domestic legal provisions, processes and secondary data analysis of official immigration statistics by the three branches of criminal justice; the police, courts of justice, and the correctional system, the study aims to shed light on the treatment of immigration law violators in Malta with particular focus on the sanctions meted out by the Criminal Courts in the penalisation of these offences.

The study is thus guided by the following research questions:

How does the Maltese criminal justice system deal with violations of immigration law in relation to offences of irregular entry to and attempted departure from the country through the use of fraudulent travel documents? What is the relevance of race and citizenship on sentencing practices? In what ways does sentencing act as a form of symbolic politics which reflects, maintains and reinforces institutionalised forms of racism?

Following the consideration of crimmigration within the context of the bordered penalty of the Maltese Islands, including an overview of the over-representation of foreigners within the Maltese penal system, the subsequent sections will elucidate Malta's existing legal provisions for migration related offences of irregular entry and attempted departure through the use of fraudulent travel documentation and provide an analysis of the punitive sanctions meted out by the Criminal Courts. In conclusion, the paper presents a discussion of the moral and fiscal costs, as well as the wider socio-political and cultural implications arising from this state of affairs and calls for further analysis and remedial action in the area.

## 2. Crimmigration: A binary fusion

Immigration detention is the deprivation of liberty for migration-related reasons…This is an administrative or civil power that operates separately to the powers given to the police and criminal courts. In contrast, criminal incarceration is the deprivation of liberty of a citizen or non-citizen due to criminal charges or convictions (International Detention Coalition, 2022, para.1).

Civil vs Criminal, Immigration vs Criminality, Detention vs Imprisonment, Migrant/Asylum Seeker vs Offender. All false dichotomies! The merger of both: Crimmigration!

Denoting the amalgamation of immigration and criminal law in both substance and procedure, crimmigration, a term introduced by Juliet Stumpf (2006) displays itself and shapes various spheres of activity. Apart from framing the legislative and administrative field "where substantive criminal law and immigration law are increasingly merged", it also acts on the level of "political and public discourse", as the phenomena of crime and immigration are often merged indiscriminately in political discourse and decision-making (Van der Woude & van Berlo, 2015, pp. 62-63).

Indeed, despite the different definitions and understanding of the crimmigration phenomenon, a main feature of this recently emerging trend is its widening strata of outcasts, turning "criminals into aliens and aliens into criminals" (Van der Woude and van Berlo, 2015, p.62). As aptly denoted by Stumpf (2013, pp.75-76), this process is twofold and self-sustaining, "[a]s criminal sanctions for immigration-related conduct…continue to expand, aliens become synonymous with criminals. As collateral sanctions for criminal violations continue to target the hallmarks of citizenship and community membership, ex-offenders become synonymous with aliens".

A main outcome of the intertwinement and integration of the immigration and criminal spheres is that crimmigration leads to harsher consequences, more restricted protections, and further segregation between citizens and non-citizens in adjudication and enforcement practices (Stumpf, 2013). These "unique or uniquely harsh law enforcement methods" (García Hernández, 2017, p.24) of non-citizens has led to a decisive shift in the correctional arena, such that any understanding of carceral trends need to take into account the increasing significance and treatment of non-citizens within the Criminal Justice System (Brandariz, 2021).

Traditionally, the criminal justice system of European countries primarily targeted male citizens, often from impoverished backgrounds engaged in criminal activities. However, over the years, fuelled by greater transnational movement arising from wider globalisation trends, non-citizens, mostly employed in illegal markets, are progressively substituting the traditional demographic cohort of offenders (Brandariz, 2021). The impact of this transformation is especially remarkable on the penal system as it

is significantly shaping the profile of those incarcerated (Melossi, 2015) and the arena of "bordered penalty" (Brandariz, 2021, p.105) of many jurisdictions.

Across most European countries, this evolution is "noteworthy" (Brandariz, 2021, p.100) as rates of foreign nationals are significantly higher than those of national prison populations. Foreign inmates accounted for 15% of the general prison population in Europe in 2020, with a variation of between 2% to 70% in different jurisdictions (Aebi & Tiago, 2021). The nature and extent of this overrepresentation thus remains a contested concept, since while the proportion of non-native as compared to native inmates has risen in many European countries,[2] it has remained stable[3] and even experienced a decline in others[4] since 2000 (Aebi & Tiago, 2021). On this basis, it has been argued by Brandariz (2021) that this phenomenon cannot be positively ascertained when one takes into account the number of imprisoned non-citizens in comparison to the proportion of foreigners residing in the country.

Another issue of contention is whether and to what degree is the rate of incarcerated foreign nationals in a particular country influenced and impacted by the immigration control and enforcement mechanisms in place. Declining rates of foreign national inmates and the decreased functions of correctional systems in the administration of immigrant populations in certain jurisdictions has indeed been explained through the "increasing scale of immigration enforcement devices" (Brandariz, 2021, p.103). Yet, evidence on the nature and extent of immigration detention is also ambiguous (Brandariz, 2021) as longitudinal data (spanning from 2000 to 2010) by the Global Detention Project (2022) shows diverse trends, ranging from substantial increases and escalation,[5] to significant declines[6] in detention rates across different EU jurisdictions. In the absence of common European trends for migrant and foreign national detention and imprisonment rates, any attempts at explanations of the representation of non-citizens in prison populations thus need to reflect and take into account the different socio-political realities and crimmigration processes in different jurisdictions, in this particular case, Malta.

## 3. Malta's evolution towards a multiracial prison

Malta has over the years increasingly become a multiracial and multicultural society, registering a fivefold increase in the number of foreign nationals over a decade -from 4.9% of the population in 2011, to 22.2% of the population in 2021 (National Statistics Office, 2023)[7]. Indeed, more than one in every five Maltese residents is of foreign nationality, with only around 40% of this population comprising of EU citizens or European countries outside the EU (National Statistics Office, 2023). In terms of race, this non-Maltese population comprised of 58.1% Caucasian, 22.2% Asian, 6.3% African, 6% Arab, 4.5% Hispanic or Latino, while 2.9% upheld multiple racial origins (National Statistics Office, 2023). This increase in multiracial and multicultural diversity is mainly attributed to the attraction of foreign work by Malta's thriving economy (Debono & Vassallo, 2019). Indeed, 27% of the Maltese workforce in 2020 were foreigners (Debono, 2021) who, attracted by labour demand and economic prospects find themselves employed at either the upper or the lower strata of the labour market spectrum, where "EU migrants tend to occupy high skilled jobs for which there are insufficient trained Maltese people, [and] third country nationals often do low skilled jobs that are unattractive to Maltese people" (Debono & Vassallo, 2019, p.65). Apart from these economic pull factors of migration, the Maltese migration scenario is also characterised by inbound asylum-seeking forms of migration.

A historical overview of the nationality status of non-citizens in Malta's prison suggests that the prevalence of foreigners within the incarceration system at a given point in time reflects the nature of Malta's political and socio-cultural ties with other countries. Indeed, having formed part of the British empire since its Independence in 1964, the Maltese Islands "saw its prisons hosting a number of

[2] e.g. in Austria, Bulgaria, Denmark, Estonia, Finland, Latvia, Norway, Romania and Spain.

[3] e.g. in Belgium, Cyprus, France, Hungary, Ireland, Luxembourg, the Netherlands, Slovakia and Switzerland.

[4] e.g. in the Czech Republic, Poland, Sweden; Cyprus, Portugal, Spain and Sweden.

[5] e.g. in Bulgaria, Estonia, Hungary, Latvia, Luxembourg and Sweden.

[6] e.g. in the Czech Republic, Germany, Ireland, Italy, the Netherlands, Slovakia, Spain and Switzerland.

[7] Translating to a total of 20,289 non-Maltese living in Malta in 2011 to 115,449 in 2021 (NSO, 2023).

residents/dependents from that power", mainly from England, Wales and Gibraltar[8] (Formosa et al., 2012, p.107), whereas the closer political ties of Malta with North African countries following Independence, led to a greater prevalence of inmates from these jurisdictions, particularly from Libya and Tunisia.[9] As a result, a "spatio-temporal flow from a Northern European to a heavily African component is very evident" (Formosa et al., 2012, p.107) within the Maltese carceral system. Since the refugee crisis, this trend has been sustained through a significant increase in the number of foreigners from asylum seekers' countries of origin within the Maltese penal system.

Corresponding to the aforementioned increase in the number of foreign nationals residing in Malta, a longitudinal examination of Malta's prison population indicates that the percentage of foreign prisoners (as compared to those having a Maltese nationality) has also experienced an incremental growth in the last number of years. Averaging 6.3% between the 1950s and 1980s, the rate of foreign offenders in prison as compared to the total prison population, experienced a consistent growth to 24.4% in the 1980s, 30.6% in the 1990s, to 36.3% in 2010 (Formosa et al., 2012, p.107). Indeed, the number of foreign inmates exhibited a linear increase from 2005 to 2015 (Aebi et al., 2019). More recent data highlights that as per February 2021, foreign nationals comprised 55.7% of the total incarcerated population (821 inmates comprising both sentenced and those under preventive arrest), indicating a significant increase in the number of non-citizens, particularly third-country nationals within the Maltese penal system (Institute for Crime & Justice Policy Research, 2021). Given this significant growth, thus one cannot uncritically accept the view that "the astonishingly high incarceration rates of over 1,000 foreign prisoners per 100,000 non-citizen inhabitants witnessed in the early 2000s in…Malta[10]…are long over" (Brandariz, 2021, p.103). A significant proportion of these foreign inmates have been handed an imprisonment sentence due to an immigration related offence. Thus, "with so many people being prosecuted for immigration-related crimes, it should come as no surprise that the number of migrants imprisoned is also substantial" (García Hernández, 2017, p.24).

This trend has coincided with an increasing concern over the association between migration and crime. While criminal conduct has interminably been used to exclude and remove 'unwanted' foreigners from Malta, it is only in the latter twenty years or so that the relationship between migration and crime has taken centre stage in local political and public discourse, fuelling "increasing assumptions regarding migrants' danger to society, threat to national security, and overall propensity to engage in criminal behavior" (Vázquez, 2017, p.1115), which in turn have led laws to be enacted and policies to be established to target "those [noncitizens] who pose the greatest threat to public safety or national security" (Vázquez, 2017, p.1115). Whilst this discourse and practice is particularly evident with regards to asylum seekers who arrive to Malta irregularly by boat, resulting in their 'indiscriminate' confinement in special detention facilities which largely resemble prisons in both form and structure, it is also clearly reflected in the gross overrepresentation of foreigners, including migrants seeking asylum, within the Maltese penal system.

But, is this overrepresentation of non-natives within the Maltese penal system due to their higher propensity to engage in more crime of a more serious nature, are more easily apprehended, charged and sentenced, or because they are unequally or disproportionately processed by a racialised criminal justice system? May this overrepresentation simply be the result of crimmigration?

### *3.1. Malta: Existing legal provisions*

"Crimmigration law lays the foundations for the system. It is an umbrella term for the interweaving of administrative immigration law and criminal law" (Bowling & Westenra, 2017, p. 253), "under conditions of interchangeability and mutual reinforcement" (Aas, 2014, p.525). According to Bowling and Westenra (2017), there are four main features to crimmigration law: immigration offences, deportation, accessorial liability and creative civil exclusions. The following provides a brief overview of existing international and

[8] 96% of foreign inmates were from England, Wales and Gibraltar in the 1950s (Formosa et al., 2012).

[9] 59% of foreign inmates were from North Africa, with 38% from Libya and Tunisia in the 1990s (Formosa et al., 2012).

[10] As well as the Czech Republic, Italy and Poland.

domestic legal provisions regarding violations of immigration law arising from undocumented entry and/or attempted departure from the Maltese territory through the use of forged/fake/stolen travel documents or imposture use of such documents.

Malta's irregular migration flow has traditionally taken place primarily by sea across the Mediterranean, through dangerous and often deadly routes with the unfortunate cost of hundreds of human lives annually. The estimate number of dead and missing persons in their trajectory across the Mediterranean Sea during 2022 stood at 1,940 (UNHCR, 2023). In more recent years, migration flows to Malta are shifting from irregular entry by sea to regular or irregular entry by air or other formal entry/departure checkpoints. Indeed, it is estimated that "the majority of the asylum-seekers now reaching Malta arrive by plane" (Aditus Foundation, 2018, p.32). Despite being significantly safer, this form of entry for asylum seeking purposes leads to more severe legal consequences for those lacking the necessary legal travel documentation.

In the initial years of the boat refugee phenomenon, all those who entered Malta irregularly by sea for purposes of asylum, were detained and formally charged and prosecuted in Court for violating the provisions of the Immigration Act. This procedure, being in clear violation of Article 31 of the Geneva Convention,[11] was subsequently repealed, and asylum seekers stopped being criminally prosecuted for their irregular entry into the country.[12]

Yet, despite the official 'decriminalisation' of irregular entry, asylum seekers continued to be automatically detained for a lengthy and largely indiscriminate period of time in specialised detention centres with a maximum detention period of eighteen (18) months until their asylum application is processed. This procedure, being in violation of UNCHR provisions and the Optional Protocol to the Convention against Torture[13] was subsequently amended and the period of detention more stringently regulated.

Following the adoption of the 'Strategy for the Reception of Asylum Seekers and Irregular Migrants' (Ministry for Home Affairs and National Security, 2016), whose main aim was "to take into account the European Court of Human Rights (ECHR) rulings against Malta" (National Audit Office, 2021, p.29), provisions were set in place to mitigate against automatic detention and ensure greater protection of the rights of detainees. The detention policy was further amended such that arrivals are now placed in initial reception centres until their asylum application is processed. The 'Reception of Asylum Seekers Regulations'[14] lay down the criteria justifying detention,[15] and stipulate that unless their application has been rejected and subject to a repatriation, asylum seekers shall not be held in detention in excess of six months.[16]

Despite the developments sustained in the decriminalisation and the reception of asylum seekers, it remains the case that "hundreds of asylum-seekers are currently illegally detained in Malta's squalid detention centres" (Falzon, 2020, para. 1). The lengthy period of time pending the asylum decision and the conditions at these centres have been repeatedly condemned by various international bodies and

[11] Which stipulates that: "Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened … enter or are present in the territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

[12] Irregular entry was decriminalised on 8th November 2002 as per Act No.XXIII of 2002 – Immigration (Amendment) Act.

[13] Article 4 of the Optional Protocol to the Convention against Torture defines deprivation of liberty as "any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority."

[14] Subsidiary Legislation 420.06 and Subsidiary Legislation 217.12.

[15] Such criteria include: a) in order to determine or verify his/her identity or nationality; b) in order to determine elements on which the application is based which could not be obtained in the absence of detention; c) in order to decide on the applicant's right to enter Maltese territory in terms of the immigration act; d) when the applicant is subject to return procedure and is delaying or frustrating the enforcement of the return decision; e) for reasons of national security or public order; and f) when an asylum seeker is to be returned to another Member State to determine his/her asylum application as there is a risk of absconding (National Audit Office, 2021).

[16] With a possible added 12-months extension in case of lack of cooperation by the applicant or delays in the procurement of relevant documentation from the country of origin.

humanitarian NGOs for their arbitrary deprivation of liberty, inadequacy, overcrowding, staff shortages, and general inhumane conditions. As a result, as also acknowledged by the Auditor General, due to the lack of adequate standards, the detention experience and process of asylum is "being rendered more taxing" and "severely hampered" (National Audit Office, 2021, p.45).

This is the fate of undocumented migrants who reach Malta irregularly by sea until their asylum application is processed and decided. Those who are granted refugee and subsidiary protection mostly arrive from conflict and war-torn countries such as Eritrea, Sudan, Syria and Libya, while applications from Bangladesh, Morocco, Ghana, Egypt, Ivory Coast and Nigeria are generally considered as manifestly unfounded due to these being considered as safe countries of origin.[17]

The situation of those migrants who come to Malta seeking asylum through formal travel channels but making use of fraudulent documentation is similar to those crossing by boat, yet with fundamentally different legal implications. This, despite the fact that international protection is not only sought by those arriving irregularly by sea, but also by those incoming through other ir/regular pathways, including the use of fraudulent documentation. Indeed, out of 6,067 applications for international protection between 2018 and 2019, 3,231 were of persons arriving by boat (National Audit Office, 2021) with the others arriving through other channels.

Those caught attempting to enter or depart from the country through the border crossing points of the Malta International Airport or any other official crossing point are arraigned with criminal proceedings instituted in front of the Magistrates Court (acting as a Court of Criminal Judicature). The typical charges brought against the violators are generally based on a number of provisions in the laws of Malta, mainly Articles 183, 184 and 188 of the Criminal Code (Chapter 9 of the Laws of Malta), Article 32(1) (d) (f) of the Immigration Act (Chapter 217 of the Laws of Malta) and Articles 3-7 of the Passports Ordinance (Chapter 61 of the Laws of Malta), which proscribe the possession and use of fraudulent documentation and establish the penalty imposed for such violations. The punitive sanctions under these offences, range from a term of 13 months to 4 years imprisonment or to a fine under the Criminal Code; a term of imprisonment of less than 6 months or of more than 6 months but not exceeding two years, and/or a fine up to 11,646.87 euros under the Immigration Act, and a maximum period of 2 years imprisonment under the Passports Ordinance. These existent legal provisions regarding the possession and/or fraudulent use of documents invariably constitute a criminal offence, "with no exception" for the consideration of the circumstantial situation of asylum seekers and refugees "in law, practice or jurisprudence" (Camilleri, 2021, para.12).

Nevertheless, Maltese law does not preclude such custodial sanctions from being handed in their suspended form through the provisions of the suspended sentence (with or without supervision) under Article 28 of the Criminal Code (Chapter 9 of the Laws of Malta), as long as the eligibility criteria are met. Nor is there any legal impediment to the allocation of community-based sanctions in lieu of imprisonment, which are provided for under the Probation Act (Chapter 446 of the Laws of Malta) for offences which are punishable with imprisonment for a term not exceeding seven years and in exceptional cases for offences carrying up to ten years imprisonment.

The implications of these punitive elements go beyond the term of sanction handed out, since a conviction of imprisonment enlisted in the person's criminal record, may adversely impact a person's integration prospects in the long-term through affecting ensuing requests for work and residence permits or access to benefits and services in Malta and other EU countries. It may also significantly affect one's prospects of asylum if attached with a removal or deportation order.

The Convention relating to the Status of Refugees (1951) under Article 31 acknowledges the reality, "difficulty, and at times the impossibility, of refugees…to flee war and persecution in a legal manner, recognising that the process of seeking asylum may oblige refugees to resort to irregular means of entry, including a breach of immigration rules" (Aditus Foundation, 2018, p.62). Yet, despite this recognition,

[17] In 2021, 14 (1%) of applications were granted refugee status, 145 (6%) were granted subsidiary protection, 21 (1%) were granted temporary humanitarian protection, 491 (20%) were rejected, while a total of 1,729 cases (72%) were considered closed cases due to administrative process, Dublin closure, implicitly or explicitly withdrawn applications or inadmissible applications (UNHCR, 2021).

criminal prosecutions of those seeking asylum following entry into the country through official channels but making use of fraudulent travel documents or attempted departure from Malta to seek resettlement in another, often EU country, continue to surge the criminal court and penal system. Indeed, as will be explored further below, a sizable segment of the Maltese prison population comprises of third-country nationals who have been charged with the possession/use of fraudulent travel documentation. Apart from being sentenced to a term of imprisonment as a result of criminal conviction, they may also be subjected to the additional 'punishment' of removal and deportation after serving their sentence. This despite the fact that, existing legal provisions do not preclude the Criminal Courts from issuing an alternative community-based sanction in lieu of imprisonment.

## 4. Crimmigration: A case of institutionalised racism?

A longitudinal analysis of cases involving the use of fake/forged/stolen or imposture use of genuine travel documents for attempted entry into or departure from Malta, shows that the number of persons charged over these violations under the Immigration Act and other criminal legal provisions have increased drastically, though not consistently over recent years. As per Figure 1, these cases have risen from 92 in 2017, 73 in 2018, 229 in 2019, 486 in 2020 and 457 in 2021.

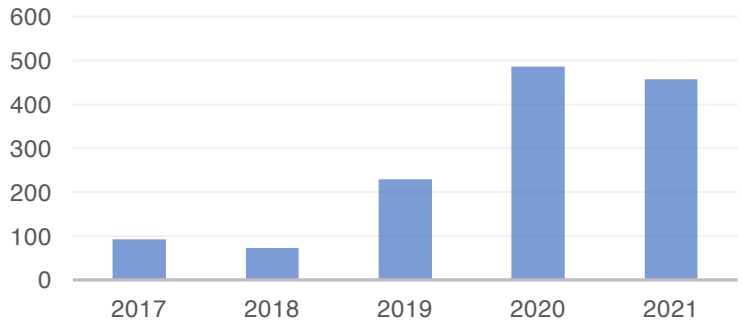


***Figure 1.*** *Number of prosecuted cases*

Over this same period, the large majority of these cases (a total of 882 cases constituting 66% of all cases) involved the use of counterfeit, followed by imposture by impersonification (385 cases constituting 28.8% of all cases) and lastly the use of forged travel documents (70 cases constituting 5.2% of all cases). No cases involved the use of stolen documents (Figure 2).

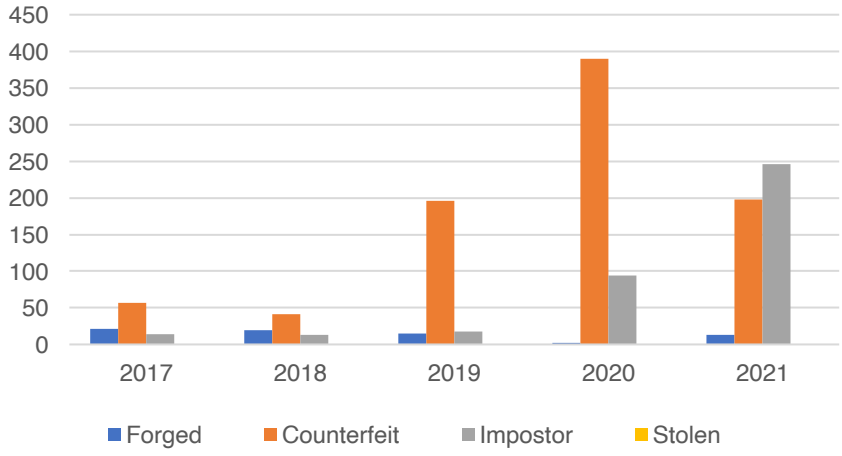


***Figure 2.*** *Fraudulent travel documentation by type*

The nationality of the large majority of those detected and prosecuted with fraudulent travel documentation were from Sudan, followed by Eritrea, Ivory Coast, Mali and Albania (Figure 3). During the same time-period, 99 cases of stowaway interceptions were also recorded, with most coming from Sudan, followed by Morocco and Libya (Figure 4).

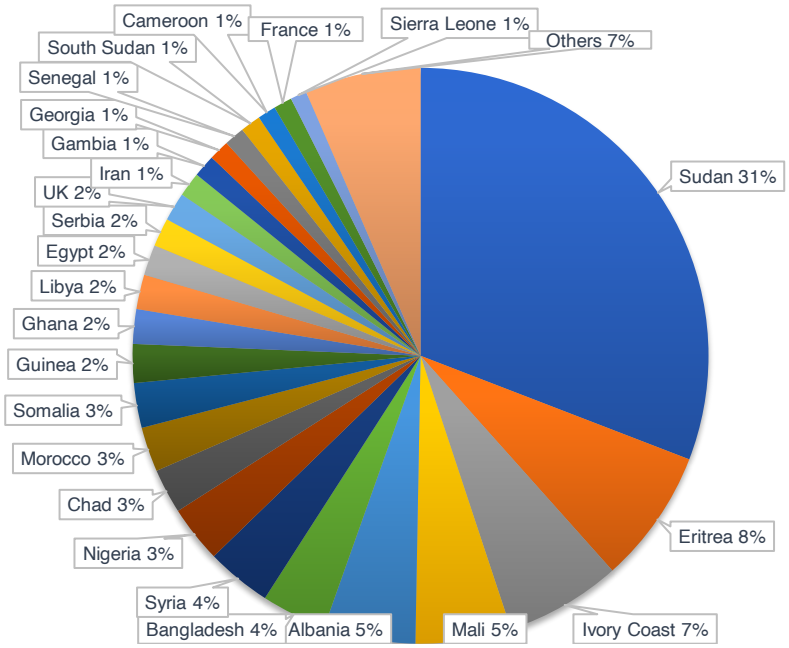


***Figure 3.*** *Fraudulent travel documentation by nationality*[18]

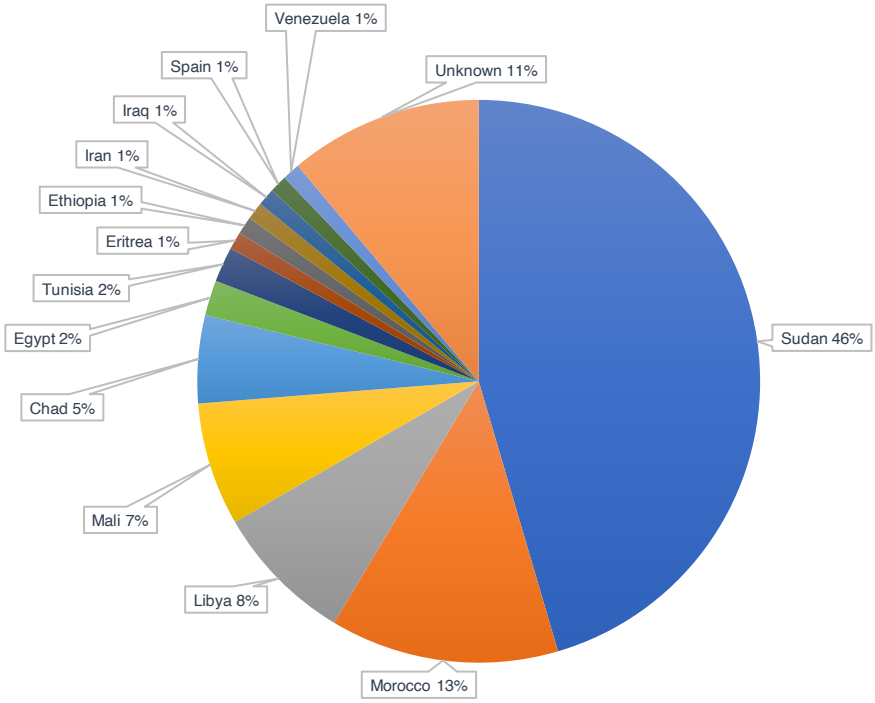


***Figure 4.*** *Stowaways by nationality*

[18] Others: Afghanistan, Macedonia, Burkina Faso, Italy, Nepal, Niger, Pakistan, Tunisia, Turkey, Algeria, Ethiopia, Iraq, Togo, Yemen, Central Africa Rep., Uzbekistan.

In line with this increase in the number of prosecutions, from 2015 to 2022, the total number of people who were sentenced for a term of imprisonment due to immigration offenses relating to fraudulent travel documentation stood at 827. These cases have drastically contributed to the prison population growth over the last number of years, from a total of 230 inmates in 1999 to a total of 821 in 2021 (Institute for Crime & Justice Policy Research, 2021). Indeed, Malta's correctional facility between 2019 and 2020 experienced one of the highest increases in the incarceration rate amongst European countries and ranked fifth in terms of the highest proportion of foreign inmates (Aebi & Tiago, 2021). Between 2020 and 2021, inmates charged with fraudulent travel documentation made up the highest category of those sentenced to an imprisonment sentence at the Correctional Services Agency and the second highest category in 2019 and 2022.

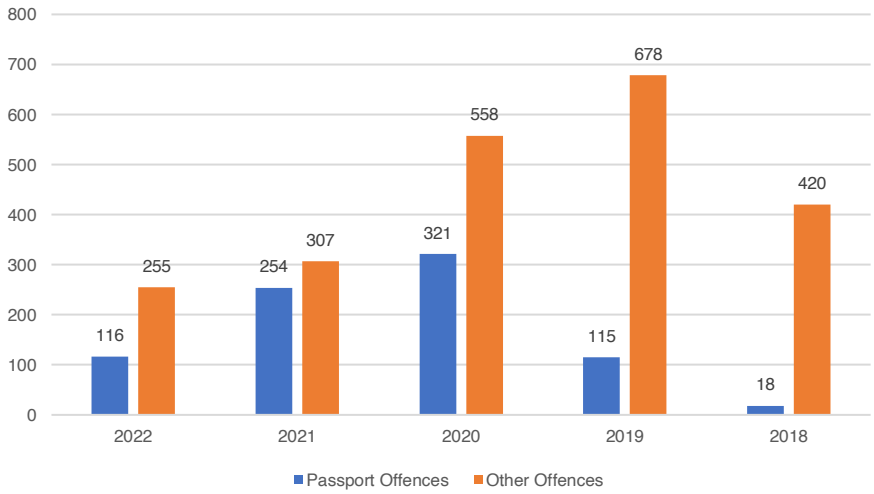


***Figure 5.*** *Proportion of fraudulent travel documentation versus all other criminal offences*

Figure 5 presents the distribution of fraudulent travel documentation custodial sentences issued during the respective years as compared to all other criminal offences, including amongst others; arson, theft and aggravated theft, assault, conversion of fines and breaches of probation and supervision orders, domestic violence, fraud and misappropriation, drug possession and trafficking, homicide, grievous bodily harm, traffic and sexual offenses.

A distribution of the length of the custodial sanctions meted out (as per Figure 6) between 2018 and 2022 shows that the large majority of these cases (60%) were handed an imprisonment sentence of 6 months followed by 12 months and 9 months at 7% each. 4.9% of those who were handed an imprisonment sentence during the same period were also subjected to a deportation order on termination of their sentence. In addition to the term of imprisonment, 1.8% were also subjected to a financial penalty. Only 1.4% of those held at the correctional facility awaiting trial were granted bail during criminal proceedings. No recorded collated data exists on the number of suspended sentences handed by the Courts of Justice during this time period for fraudulent travel documentation offences, however Correctional Services Agency data indicates that 0.9% of those who entered the penal facility whilst awaiting trial on these charges or appealed a verdict of imprisonment, were given a suspended sentence on the adjudication of the case. No cases whatsoever were handed a community-based sanction with supervision, provided for under the Probation Act as an alternative-to-imprisonment for these type of offences during the same period.

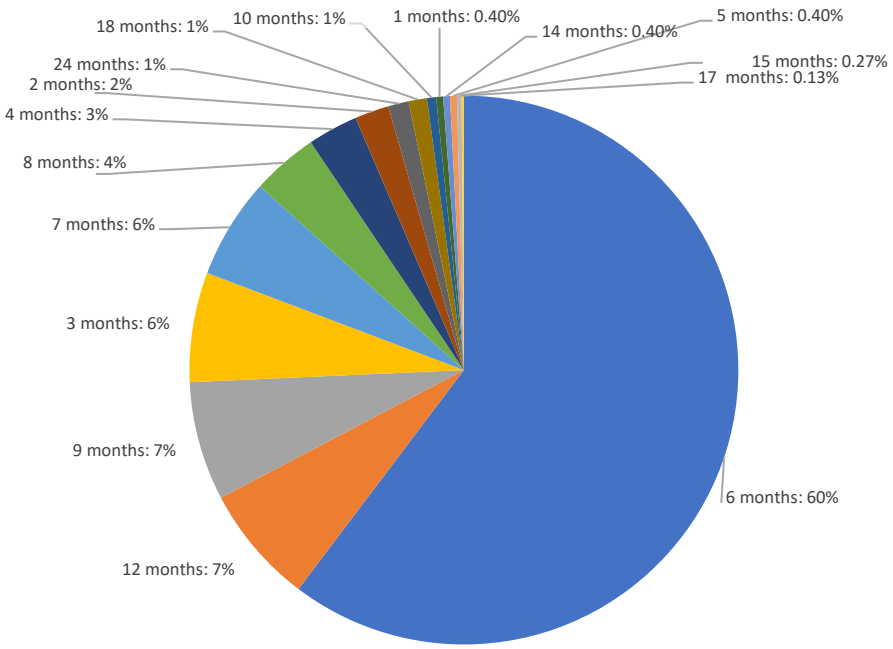


***Figure 6.*** *Length of custodial sanction*

The application of carceral penalties by the Criminal Courts for the use of fraudulent travel documentation has become progressively entrenched over the years. Wherein the initial period of the occurrence of these types of offences (2016-2018), the majority of those charged were handed a suspended sentence, with only some receiving a carceral penalty (Aditus Foundation, 2018), in more recent years, for the same offence, the majority received a sentence of imprisonment. The imprisonment sentence in its suspended form is usually limited to minors and women who bear parental responsibilities, whereas male adults, who constitute the largest segment of those accused of fraudulent travel documentation are generally granted an effective sentence of imprisonment.

Existing legal provisions provide a lot of discretionary powers to the judiciary presiding over the adjudication of fraudulent travel documentation cases, such that the penalty meted out for equivalent charges may range significantly from the maximum and minimum terms established by law. As observed from the analysis of custodial sanctions meted out, the length and terms of these sanctions also vary widely, from a minimum term of 1 month imprisonment to a maximum term of 2 years imprisonment. Similarly, the terms of the suspended sentence also vary widely, from a minimum term of 6 months imprisonment suspended for 18 months, to a maximum term of 2 years imprisonment suspended for a period of 4 years. The average term of a sanction of imprisonment between 2018 and 2022 stood at roughly 7 months.

The standard sentencing practice in recent jurisprudence has indeed developed to one of 6 months imprisonment. Whilst underscoring the need to consider and decide each case on its own merit, in 'The Police vs Hanok Amanuel, Hanif Rahman Nayan and Monsiur Bepari', the Court of Criminal Appeal (2022) presided by Judge Aaron Bugeja reiterated that such cases;

> come as rule, sentenced to the penalty of six months effective imprisonment. This has over time developed as a form of unofficial sentencing policy, but which turns out to be consistent. This Court… does not see why this line of sentencing should be disturbed (Court of Criminal Appeal, 2022, para. 39).

The standard application of custodial penalties by the Criminal Courts in lieu of the application of a suspended sentence or a community-based sanction points to the adoption of a more punitive approach in the resolution of these cases. Indeed, in the referred judgement, the Court itself emphasised the use of imprisonment as a form of deterrence and retribution, stating; "it is evident that in these cases, the

Courts of Criminal Justice in Malta consider the retributive and preventive aspects of the punishment as acquiring greater importance than in cases of other crimes" (Court of Criminal Appeal, 2022, para.36).

Indeed, the severity of punishment meted out for offences of possession/use of fraudulent travel documentation are comparable to sanctions handed out for charges of predatory and violent crime; such as aggravated theft, bodily harm, wilful damage and white-collar crime, despite the fact that such type of offenses are neither predatory nor violent in nature.

## 5. Crimmigration: Costly, unjust and ineffective

The study aimed to shed more light on the overrepresentation of migrants, including asylum seekers within the Maltese penal system by examining the criminalisation of migration through the processing and sentencing of immigration law violations.

The analysis presents that processing migration violators through the criminal justice system as opposed to other administrative asylum processes, leads to more severe outcomes for those asylum seekers who attempt to enter or depart from Malta through formal travel channels using fraudulent documentation, as compared to undocumented migrants who arrive irregularly by sea. This is mainly due to the overreliance of punitive imprisonment sanctions by the Criminal Courts.

This state-of-affairs poses wide-ranging implications for the impartial and efficient administration of justice but also for the construction and reproduction of migrants as criminals. This situation carries strong fiscal and moral costs which have long-term effects on both the macro-structural, and the micro-individual level by impacting on the wellbeing, integration and human rights protections of migrants, and on social solidarity and cohesion on the community level. As will be explored further below, the state of affairs also infers an institutionalised form of racism, where retributive sanctions are utilised as a form and spectacle of symbolic politics.

### *5.1. Moral and social costs*

The deployment of criminal justice measures to address the immigration phenomenon consolidates socio-economic exclusion in violation of fundamental rights. The moral and social impact is devastating as it extends beyond the individuals who enter the penal system. These consequences ripple long-lasting and collateral damage to significant others and the general community, for both the country of origin and the country of destination. Still, the cost is disproportionately borne by asylum seekers and individuals of colour, the majority of whom are poor0 and black.

A number of those imprisoned carry parental and other caring responsibilities. The number of children separated from their parentages due to an imprisoned father or imprisoned mother (based on 1.3 parenting rate) within the Maltese correctional facility stood respectively at 991.9 and 75.4 (Children of Prisoners Europe, 2021). In such cases, especially when the parent has sole responsibility and no other family ties in the country, dependents are forced to enter the child welfare system, in violation of the UN Convention on the Rights of the Child (1989), which under Article 9 specifies that children should not be separated from their parents against their will unless it is in their best interests.

Apart from its wide-spread impact beyond the incarcerated, imprisonment traverses various aspects of the person's life, encompassing: the financial and material including income, employment and housing; health, both physical and psychological, as well as the social dimension, by impacting on relations, participation and inclusion. These consequences sustain reincarceration long after the individual is released from custody, as it significantly impacts one's prospects of integration. Indeed, asylum seekers leaving detention and imprisonment;

> still perceived Malta as a prison after being released. It was thus not only actual walls and fences that produced the prison spatiality, but it also emerged through various forms of (bureaucratic) control, through infrastructural impediments of social participation and through granting unequal access to rights and social services (Otto et al., 2019, p.149).

The carceral environment adds on to the uncertainty of the asylum status, since it hinders communication and contact with the outside world, isolating the individual and furthering them away

from community integration. Moreover, by placing asylum seekers under the same roof with persons who have a criminal record, the prison environment wages a criminogenic influence on the incarcerated. As recalled by Sudanese community leader Abbass Mussa Jameah, within the prison setting, it is more difficult to;

> know anything about what's happening. In the detention centre, you know you have six months. In prison, you don't know what's going on. Maybe there is trauma and fear, because some people, especially younger ones, would be finding themselves with criminal people in prison for the first time in their lives (Delia, 2021, para. 6).

The incarceration process thus significantly impinges on all dimensions of well-being as it considerably encroaches on the economic, social and cultural life of the individual, and "their sense of agency, humanity and security" (Côté-Boucher, 2014, p.75). It also hinders and delays one's integration prospects, thus impinging on social cohesion and community well-being.

### *5.2. Fiscal Costs*

The number of people who were sentenced for a term of imprisonment for immigration offenses grew significantly over the last number of years, leading to substantial administrative and financial burden, as well as overcrowding of the carceral facility.

Apart from its moral implications, the incarceration of hundreds of individuals comes at exorbitant fiscal costs by a system that overburdens the carceral facility, yet fails to make the country safer and more secure. The total expenditure of the Correctional Services Agency has experienced an exponential growth in the last number of years, rising from a total of 9.2 million in 2010 to 24 million euros annually in 2020, translating to the cost of 100 euros for each individual inmate on a daily basis (Azzopardi, 2021b). This, in addition to the annual expenditure of detention, which stood at around 5.5 million euros in 2019, translating to 58 euros per day per detainee (National Audit Office, 2021). Persons, who are made dependent on the state but who could effectively be financially autonomous and contributing members of society.

Due to the significant share of incarcerated non-citizens, a number of European jurisdictions have adopted "innovative correctional arrangements" such as the establishment of 'foreign nationals-only' facilities and specific wings for non-nationals (Brandariz, 2021, p.105). Foreign nationals within the Maltese penal system are not-segregated but housed within the main correctional facility, which has come under scrutiny due to poor conditions, inadequate divisions and "multiple allegations of abusive treatment of prison inmates" (US Department of State, 2021, p.2). Mainly due to an increase in the number of incarcerations related to fraudulent travel documentation, overcrowding has also become an issue of concern in recent years compelling the Maltese government to examine the expansion of current facilities (Azzopardi, 2021a, para 14). Yet, evidence suggests that overpopulation can only be effectively and lastingly addressed through "the reform of policies and laws and the use of alternatives to imprisonment" (Penal Reform International & Thailand Institute of Justice, 2018, p.9).

As observed from the analysis, those found guilty of the possession and use of fraudulent documentation are rarely sanctioned to a community-based order in lieu of imprisonment. Unless the case is decided on its first sitting in court, they are also generally denied bail and subjected to preventive arrest until the case is adjudicated. While there is nothing in the Maltese law which precludes the court from granting bail or community-based sanctions on the basis of nationality or migration status, other criteria may affect the decision of the court. This may be based on the lack of fixed address, perceptions of the migrant's risk of flight, as well as automatic presumption of risk to society regardless of the seriousness of the offence for which they are being charged. Non-citizens are indeed less likely to benefit from community-based sanctions for any other type of offence committed (Hammond, 2017), which factor may partially explain the overrepresentation of foreigners within the Maltese carceral system. As stated by Formosa et al., (2012) the fact that "foreigners are rarely given community-based alternatives might explain why a disproportionate number of 'foreigners' end up in prison" (p.103). This is in clear violation of Principle 6 of the 'Recommendation on the European Rules on community sanctions and measures' which decrees that "there shall be no discrimination in the imposition and implementation of

community sanctions and measures" on any grounds, as well as Principle 7, which emphasises access to community sanctions to foreign national suspects and offenders (Council of Europe, 2017, p.6).

Other discriminatory practices which asylum seekers and those entering irregularly may be subjected to, go beyond the discretionary powers of the courts by being specifically entrenched in law. This is for example the case with regards to the eligibility criteria for parole which under Art 10 (1.3) of the Restorative Justice Act (Chapter 516 of the Laws of Malta) specifies that; detainees under the provisions of the Immigration Act; prisoners subject to extradition proceedings and third-country nationals who are to be deported at the end of their sentence shall not be eligible for parole. This proviso thus indiscriminately excludes migrants, including asylum seekers from benefiting from early release from imprisonment on parole.[19]

Another justification for the often-blanket exclusion from community-based alternatives to foreigners, resides in the fact that those serving an imprisonment sentence may be subjected to a removal/deportation order following their release from imprisonment. In reality, this order is rarely enforced, for a significant proportion of those who apply for asylum become beneficiaries of a temporary or humanitarian protection order. Due to diplomatic and bureaucratic challenges to effect return (National Audit Office, 2021) as well as due to humanitarian grounds, removal orders are also rarely executed in the case of those whose refugee application has been rejected, underlining the futility of meting out deportation sanctions and the lack of differentiation between asylum seekers and non-asylum violators of immigration law.

## 6. Punishment: Tough on crime – tough on immigration

In recent years, the Maltese criminal justice system has tentatively shifted its punitive and retributive approach to one more focused on rehabilitation and reintegration, in the recognition that those who committed offences deserved a second chance to reform and redeem themselves. This evolution is reflected in various legal provisions, including: the expansion of community-based sanctions as per 'The Probation Act' (Chapter 446 of the Laws of Malta) which in 2003 was amended to provide for community service orders and combination orders in addition to its existing provisions of probation orders and conditional discharges; the enactment of other legislative frameworks such as 'The Drug Dependence (Treatment not Imprisonment) Act' (Chapter 537 of the Laws of Malta) in 2004 which amongst others, provides for more leniency for the possession of drugs for personal use, rehabilitation from substance abuse and the institution of Drug Courts to facilitate drug rehabilitation and the 'Restorative Justice Act'(Chapter 217 of the Laws of Malta) which provides for victim-offender mediation, remission and parole. Another recent initiative, as proposed in the 'Electronic Monitoring Bill' (Motion No.68:1st Reading 26 September 2022) includes the implementation of electronic monitoring for those subjected to a short imprisonment sentence in lieu of incarceration. Throughout recent years, various rehabilitative programmes and services, both on a community and residential basis were also set in place and consolidated for juvenile delinquents and adult offenders focussing on substance abuse and other forms of addictive behaviour, mental health issues and challenging behaviour. These developments "to divert criminal career development" (Formosa Pace, 2017, p.47) were primary led in acknowledgement that in removing the individual from society, imprisonment may have a criminogenic, rather than a rehabilitative and reformative impact.

Yet, when it comes to immigration offences, the criminal court system tends to over-rely on punitive sanctions inscribed on justifications of deterrence, retribution and incapacitation. Crimmigration indeed challenges liberal, benign and human-rights based models of penalty (Aliverti, 2015).

This state of affairs highlights the contradictory, incongruent and binary processes of the Maltese criminal justice system. On the one hand, promulgating rehabilitative and restorative approaches for

[19] Other exclusionary criteria for parole in addition to prisoners sentenced to a term of imprisonment of less than one year, include prisoners who are being detained for subverting or attempting to subvert the Government of Malta, or conspiring against the State, prisoners sentenced for acts of terrorism, funding terrorism, and ancillary offences and prisoners sentenced to life imprisonment.

Maltese citizens who breach the law, whilst becoming increasingly characterised by overcriminalisation and hypercarceration for asylum seekers who, for reasons of escape from persecution and violence infringe migration law. This situation, which speaks a lot of racial disparities and the impartial application of the law, "is ultimately leading to the division of the criminal justice system into two different penal subsystems, separated by membership criteria" based on citizenship (Brandariz, 2021, p.102). As a result, when viewed from this perspective, as in the case of other "penal power arrangements of the European Union" (Brandariz, 2021, p.102), the Maltese criminal justice system is "revealed as much less tolerant, welfarist and humanitarian than is generally assumed. The inclusive traits of these systems are largely restricted to national populations, whereas non-citizens are managed in a much more punitive and exclusive way" (Brandariz, 2021, p.102). This disparity in pardoning and sentencing practices by the Criminal Courts between Maltese and foreigners, was indeed noted by Formosa et al. to decrease the "longer the foreigner stays on the islands" (2012, p.109). Moreover, this "differential and preferential treatment reflected the status outside prison" (Formosa et al., 2012, p.103).

This state of affairs is thus giving way to the "gradual consolidation of a dual" (Brandariz, 2021, p.107) domestic criminal justice system which serves the discriminatory role of offering rehabilitation and integration to the offenders 'within', whilst imposing a punitive deterrent to 'the other' - "to put it bluntly, today being tough on crime means above all being tough on immigration and vice versa" (Brandariz, 2021, p.106). More specifically, being tough on crime means being tough on certain forms of immigration, personified by asylum seekers and vulnerable economic migrants. At the same time that deterrence and retribution is applied for those entering irregularly, Malta adopted the golden passport scheme for the very rich and wealthy, irrespective of their dubious background; a case where "the commercialisation of citizenship" (Parker, 2016) - citizenship by commodity and investment (Vella, 2020) - overrides citizenship as a human right. The granting of citizenship hence bequeaths "a state-sanctioned form of discrimination" (Pisani, 2012, p.189), where some are excluded while others "given priority and fast-tracked" (Parker 2016, p.206). Additionally, as the removal of internal borders within the EU has led to more restrictive external borders (Pisani, 2012), migration flows have become increasingly defined through the "the citizen/noncitizen dichotomy"; those who belong and those who don't (Pisani & Grech, 2015, p.434). Thus, within this context, "moral orders currently seem to be less based on crime and punishment issues than on (renovated) racial and xenophobic boundaries and stratifications" (Brandariz, 2021, p.106).

By virtue of such unjust laws and practices, complementing the mandatory detention policy for asylum seekers reaching Malta by sea, the Criminal Court sentencing practices apply penal incarceration as a deterrent only to certain forms of migration. Through the adoption of "detention as a deterrent [and] the use of mandatory incarceration, Malta situates itself as a space of patrol and control of those they believe do not belong" (Fonseca, 2020, para.1). Apart from the fact that the 'tough on crime' approach founded on the belief that higher rates of imprisonment and longer sentences "can reduce crime in the short run but cause off-setting harm in the long run" (Roodman, 2017, p.1), such practice "completely misses the point that people migrate to survive, often fleeing war and other forms of violence" (Akkerman, 2021, p.2). It also totally overlooks the structural reasons that are impelling people - whether by pushing and pulling them - to leave their country of origin. Indeed, "beyond its effectiveness and the ethics of incarcerating people to dissuade others from undertaking journeys that are their legal rights to pursue, international law expressly prohibits using detention as a deterrent" (Mainwaring & Silverman, 2017, p.7). Moreover, this deterrence and retributive model may inadvertently or not, lead to diverting irregular entry to more dangerous and illegal routes augmenting the humanitarian crisis of migration. On this basis, one questions the validity of the deterrence, incapacitation and retribution thesis. Deterrence, incapacitation and retribution for what? For trying to save one's life?

In view of the above, the current domestic practice lacks and ultimately undermines fairness on all its various dimensions and meaning, - "that the penalty imposed should be proportionate to the crime committed… whether similarly situated individuals should receive similar punishments for the crime for which they have been convicted [and whether] the criminal justice system itself is 'fair'" (Vázquez, 2017, p.1130).

As stated above, the Convention on the Rights of Refugees and the 1967 protocol decrees under Article 31(1) that entry into a country irregularly for asylum purposes should not be criminalised. Yet, infringement of immigration law through the use of fraudulent travel documentation in Malta invariably constitutes a criminal offence, with no exception for refugees and asylum seekers. This practice thus discriminates amongst different strata of asylum seekers, based on their mode of arrival and entry into Malta's territory, underscoring "the inconsistency of an approach that saves some refugees from punishment due to irregular entry, whilst sending other refugees to prison for a period between 6 months to two years" (Camilleri, 2021, para.9). In view of this, the inclusion of an exception for asylum seekers using fraudulent documentation to enter Malta should constitute a significant and immediately called-for reform of the current Immigration Act and other regulatory migration frameworks, whilst calling for due measures to ensure equality of access to non-custodial sentences. As echoed by Camilleri (2021, para.14), "providing safe and legal ways to reach a place of safety is the most effective way to prevent refugees from resorting to unsafe and irregular means of travel to access Europe, thereby saving lives."

Until the emergence of the refugee crisis, immigration law and the process of admission and removal was primarily an administrative process based on managing the movement of noncitizens into and out of the country, and not on punishment. Through these processes, the Maltese scenario is increasingly being characterised by crimmigration, whereby through mandatory detention, those entering irregularly are being cast as criminals within the immigration system, and the immigration system is increasing becoming similar to the criminal justice system, leading to "a symbiotic relationship between immigration and criminal law" (Vázquez, 2017, p.1118).

Crimmigration is attributed to have led to both the integration of immigration and criminal law (Legomsky, 2007; Sklansky, 2012; Stumpf, 2006, 2020), resulting in the "criminalisation' of immigration law and an 'immigrationisation' of criminal law" (Brandariz, 2021, p.101), but also to the "permanent differentiation" between the two (Brandariz, 2021, p.102). Indeed, in reference to the consolidation of both migration incarceration and migration detention, as in other contexts, it may be the case that in Malta "no substitution or transcarceration effect is underway" such that whilst being linked through crimmigration, "prison systems and immigration enforcement systems are evolving in disparate ways" (Brandariz, 2021, p.106). Yet, both "converge at points to create a new system of social control" (Vázquez, 2017, p.1118) widening and reinforcing crimmigration's punitive and retributive reach.

## 7. Crimmigration discourse: Criminalising migrants

Through crimmigration processes, dominant and hegemonic discourses on migration and crime which portray criminality as intrinsically linked to immigration are consolidated and reproduced, nurturing far-right discourse and reactionary populist rhetoric. The criminalisation of migrants, including "all the discourses, facts and practices made by the police, judicial authorities, but also local governments, media, and a part of the population that hold immigrants/aliens responsible for a large share of criminal offences" (Palidda, 2011, p.23), occurs both through overt direct ways, but also through subtler indirect forms. For example, apart from "being inaccurate" (Brouwer et al., 2017, p.102), the prolific use of the term 'illegal' for asylum seekers "stresses criminality" and "defines immigrants as criminals" (Lakoff & Ferguson, 2006, p.1). A main consequence of this labelling and stigmatisation is the fuelling of "social anxieties and collective concerns, ultimately transforming public punitiveness perceptions and demands" (Brandariz, 2021, p.107).

Indeed, the legislative framework underlying crimmigration does not exist in a "vacuum, but is the result of inter-relational discursive processes" (Brouwer et al., 2017, p.101), which construe migrants as dangerous to the community and to social stability and social order.

The mediatization of migration (Maneri, 2011) plays a significant role in crimmigration, creating media panic through discourses of national security, which in turn generate and create pressure for stricter border regulation and control. As a result, through the "social representations of human mobility and the narratives designed to draw political gains from migration issues" (Brandariz, 2021, p.106) noncitizens, particularly asylum seekers arriving to Malta irregularly, are increasingly viewed with growing scepticism. Rather than perceived as coming in search of a better life, and as offering

contribution to Maltese society, they are increasingly depicted as illegals coming to commit crimes and endanger the safety of the community. This migration paradigm which has become prevalent in various "liberal states, including…Malta, characterizes unmanaged migration flows and the presence of irregular migrants as a problematic anomaly rather than an increasingly normal feature of society encouraged by state policies and labour market needs" (Doty & Wheatley, 2013, p.429).

This is in turn justifies and legitimises increased scrutiny, control and punitiveness, characteristic of a carceral state (Gottschalk, 2013), which uses 'detention-as-spectacle' to "project an image of sovereign power, control, and order over non-citizens" (Mainwaring & Silverman, 2017, p.15). By acting as a spectacle for different audiences, detention

> (i) signals the vulnerability of irregular migrants living in the state to their potential detainability and deportability; (ii) projects out from state borders to would-be migrants, to discourage them from attempting to reach a particular border; (iii) works to assure the local population that their government holds the monopoly of power over territorial borders and mobility; and (iv) demonstrates to other states and international organizations that the sovereign is in control of its borders (Mainwaring & Silverman, 2017, p.15).

As the migrant detention policy represents a central feature of "Malta's symbolic politics, despite its financial and human costs and its failure to deter arrivals or lead to deportation" (Mainwaring, 2018, para. 6), similarly, the criminalisation and incarceration of migrants for immigration law violation constitutes an important instrument for consolidating Malta's 'get-tough' spectacle, in spite of its great fiscal and moral costs, its unfairness, and vicious cycle of exclusion and demonisation. Indeed, as cited by Mainwaring and Silverman (2017, p.15), the Maltese scenario can be succinctly explained through Mountz et al.'s tautology (2013, p.527): 'migrants might be criminals, necessitating detention; migrants must be criminals, because they are detained'" (Mainwaring & Silverman, 2017, p.15).

In the context of this vicious cycle and concatenation of discourse/practices, emphasised by the small size of the island and the number of unsolicited arrivals, Malta managed to weave a crisis chronicle whilst taking fiscal advantage of such calamity (Fonseca, 2020, para.7). Through such proceedings, "failures are interpreted as opportunities for better management. True reform is stymied" (Doty & Wheatley, 2013, p.429).

### *7.1. Crimmigration: Fields for further study*

Since its relatively recent birth, crimmigration has become quickly embedded in legislative frameworks, discourse and practices. Yet, despite its rapid development, it "remains in its infancy" (Zubata, 2021, para. 19), as it is projected to increasingly shape and integrate migration and criminal processes in the coming years through its symbiotic binary fusion. This study, being specifically based on the adjudication of cases involving violations of immigration law through the use of fraudulent travel documentation in Malta, offers a limited and partial view of crimmigration processes.

Further research encompassing the wider dimensions and ramifications of crimmigration in different areas, such as ethnic profiling, detention, pushbacks and deportations is warranted for presenting a more holistic and comprehensive analysis of the crimmigration phenomenon within the local context. Consideration also needs to be given to the impact of crimmigration on other areas of civil, political, socio-economic and cultural life and its impact on access to fundamental rights and services.

Further research needs to locate crimmigration within the wider context of Malta's EU and international human rights frameworks, obligations and commitments. Comparative analysis of the nature and extent of crimmigration in different contexts and jurisdictions would enhance understanding of Malta's role and contribution to the wider globalised trend towards transnational crimmigration (Bowling & Westenra, 2020).

Further analysis of the 'immcarceration' (Bowling, 2013) phenomenon is warranted in terms of the relationship and impact on the wider 'transcarceration' trends (Brandariz, 2021) of migrants across different forms of regulatory institutions; detention centres, correctional facilities, mental asylums, half-way houses and other forms of 'total' and 'semi-total' institutions across and beyond national governance.

By expanding its "gaze on the penal power" (Brandariz, 2021, p.107) and its influence beyond the physical dimension of detention and imprisonment, crimmigration demands analysis of the public discourses and narratives proffered by political elites and competent institutions, but also the media and civil society. Crimmigration and 'bordered penality' (Franko, 2020, pp.81-82) also demands scrutiny of its differential impact on diverse non-citizen categories to explore racial, ageist and gendered stratifications, and how these interact with other structural discriminants such as religion, culture and social class.

Such investigation could shed further light on the racial stratifications underpinning border enforcement policies and how crimmigration targets differently those who do or "do not question Maltese identity" (Otto et al., 2019, p.149), whilst also examining further the nature and extent of judicial discretionary powers. Moreover, "the current focus on punishment, retribution and disparagement must be critically scrutinised" (NGO Coalition, 2021, para.6) and assessed in terms of diversionary, rehabilitative and reintegrative measures. Indeed, a better understanding of the crimmigration phenomenon and how to prevent and address its moral and fiscal costs on both the micro and macro-level could only be achieved through further questioning its ontological, epistemological and primarily, its axiological nature.

Questioning and investigating crimmigration through theoretical and pragmatic analysis is vital and should inform any evidence-based "future and comprehensive expanded national strategy that delves into issues affecting international protection seekers which so far have not been discussed thoroughly within the strategies" (National Audit Office, 2021, p.32).

### *7.2. Crimmigration: In whose interest?*

The tough-on-immigration crime policy projected by existing legal frameworks and Criminal Justice practices for those who have attempted to enter and leave Malta irregularly using fraudulent documentation, should be evaluated within the broader processes of crimmigration.

Whilst the issues emerging from the study are just a tip of the iceberg of the crimmigration phenomenon, they point to massive moral and financial implications for both the individual and society. The current system in place "from detention's inherent and everyday violence to its financial costs and its failure to meet its own policy goals of deterrence and deportation" (Mainwaring & Silverman, 2017, p.16) is beneficial neither to migrants, the host community, nor to the nature of justice. Its resolution thus calls for a more efficient, effective, and fair administration of justice, which reduces the moral and financial costs, while ensuring greater equity and fairness.

The findings point to overt forms of institutionalised racism, empowered by law and facilitated through wide judicial discretion, which speak a lot of the impartiality of the Criminal Justice System. Legislative, executive and judicial power and crimmigration shape and consolidate one another as through this institutionalised form of racism, "'crimmigration' restructures the criminal justice system to incorporate immigration status as a method of managing the functioning and structure of the organizations within it" (Vázquez, 2017, p.1097), shaping law enforcement, adjudication and penality.

Crimmigration defines asylum seekers' entire migration experience as through 'immcarceration' (Bowling, 2013), the pursuit for a better future transforms into an incessant "interplay between [the] visibility and invisibility" (Mainwaring & Silverman, 2017, p.34) of a 'carceral archipelago' (Foucault, 1977), which extends beyond the geographical and time-bound confines of the bordered penalty of detention and incarceration.

Crimmigration indeed shapes asylum seekers themselves as through "othering of the refuge-seeking individual" (Otto et al., 2019, p.149) through "tagging, defining, identifying, segregating, describing, emphasizing, making conscious and self-conscious; it becomes a way of stimulating, suggesting, emphasizing, and evoking the very traits that are complained of" (Tannenbaum, 1938, p.19); illegality. "Illegality, which limits possibilities, ultimately constrains the self" (Le Courant, 2019, p.11) as asylum seekers are constrained to concurrently "live in the shadow of the state" (Le Courant, 2019, p.3) yet in 'spaces of nonexistence' (Coutin, 2003).

In this "spectre of the 'illegal alien', cast to "demonstrate and reinforce sovereign power" (Mainwaring & Silverman, 2017, p.16), migrants and asylum seekers become clandestines, irregulars, illegals,

criminals, each dehumanising label carrying with it added prejudices and discriminations, alienating and furthering people away from inclusion, integration and a meaningful sense of being. As recounted by the lived experience of Sudanese community leader Abbass Mussa Jameah;

> All of this makes people desperate; people don't want to go from prison to prison, from detention centre to open centre to the prison. They want to work, learn, marry, have a house and start their lives like other people (Delia, 2021, para.7).

Yet, despite its hegemonic destructive powers, embodied in rightist retributive discourses, laws and penalties, inimical to life and well-being, crimmigration cannot, and will never succeed in destroying "the strong hope of people who have plunged into the unknown, just to seek peace and freedom and to save life" (Jesuit Refugee Service Europe, 2016, p.3).

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