

## The ‘*inconfinales*’ or the creation of ‘superfluous lives’ in times of Crisis

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### Abstract

*Gender, class, ethnicity and generation played a determining role in exposure to the COVID-19 virus and in access to care. This translated into differences in communicability, morbidity and mortality. Migrants and ethnic minorities have been over-represented among serious cases, just as they are often also disproportionately affected during natural disasters and crises. We focus on a segment of vulnerable population defined by the French term ‘inconfinales’. Related to the term ‘confinement’, used in France to mean lockdown, the ‘inconfinales’ are those individuals that, due to personal, socio-economic and administrative factors, may not respect the governmental measures proposed to contain the spread of the pandemic. The article presents a comparative analysis of different approaches implemented at the domestic level (in France and Italy) to gain original insights into the practice of lockdown regimes. These insights are used to explore the nexus between ethnic social inequalities, governmental capacity to ensure effective protection of the whole population and human rights.*

**Keywords:** *Vulnerability; Borders; COVID-19 lockdown; Italy; France*

### Introduction

By spring 2020, in response to the COVID-19 pandemic, eighty-four governments had implemented a ‘lockdown regime’, which profoundly affected the exercise of individual liberties (Sirkeci and Yüceşahin, 2020). The regime also posed unprecedented and multidimensional challenges to legal systems, because the situation gave rise to a ‘shared global vulnerability’ that put legal certainty under strain. It became evident that gender, ethnic origin, and administrative status played a crucial role in the very exposure to the virus and access to treatment. This had highly variable consequences not only in terms of transmission and mortality, but also precariousness.

Against this background, drawing on the effects of the pandemic on a segment of vulnerable population that we will name the ‘*inconfinales*’, our contribution proposes a reflection on the unequal institutional treatments of some individuals during crises. Taking inspiration from the term ‘*confinement*’ used in France to identify the lockdown regime, the term ‘*inconfinales*’ allows us to reflect on the delimitation of personal and social spaces. It also enables us to examine boundaries between individuals and groups of individuals who, while living on the same state

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territory, may or may not fully respect the restrictions imposed by government. The term has previously been used mainly for key workers active even during the lockdown (e.g., by a French press piece to portray doctors, nurses, refuse collectors and transport staff<sup>3</sup>) and for homeless people (Damon, 2020). In contrast, the *'inconfinales'* discussed here are those non-nationals who, due to their socio-economic and individual circumstances, are not able to comply with the national measures adopted to limit the spread of COVID-19.

Border closures, quarantine and lockdown are old measures, but continue to be used as part of the public health strategy despite their controversial effectiveness and the manifold implications for public opinion, economics and ethical considerations (*see* Tognotti, 2013; Kenwick and Simmons, 2020). What is common to pandemics and epidemics is the fear of the foreign migrant whose role is the scapegoat blamed for contagion (Snowden, 2019; Durand, 2020).<sup>4</sup> Charles Heller described measures to fight COVID-19 as 'health apartheid' favouring the creation of 'virus-free bubbles' protected from a certain population deemed contagious. Here we examine the risk of translating the 'war on the virus' into a 'war on migrants' (Heller, 2020: 3–9).

Our analysis addresses the effects of the lockdown regime in relation to individual fundamental rights to apprehend how emergency state powers enabled the development of new normative precepts in Italy and France. The rapidly changing health situation in these countries and their attempts to mediate risk and instability have resulted in a distinctive language of justification for human rights limitations. The responses have spanned from emergency scenarios to increasingly sophisticated provisions within a pandemic response framework. Based on a review of the grey literature, laws and decrees, recent secondary data and up-to-date information from key associations in the migration domain (i.e., *Ciniformi* and *Asgi* in Italy, and *Gisti* and *La Cimade* in France), our analysis discusses the practice of the lockdown regime with the aim of identifying a range of practices through which the 'production of superfluity' (Schmalz, 2017; Marks 2011) took place. Our framework provides a two-sided perspective on this regime by evaluating the frictions between its necessity and human rights prerogatives.

## **Rights and the Unprecedented Lockdown Regime**

Apparently grounded in a universal imperative – physical survival – the lockdown containment strategy has entailed multiple restrictions on the enjoyment of fundamental civil and political liberties (Fornalé, 2020). The explosive spread of the virus posed a serious challenge to governments' capacity to adopt measures that could ensure the full and effective protection of those who are potentially more exposed to infection. It was particularly challenging to ensure the care of certain groups – such as older people, people living in poverty, people in jails and immigration detention centres, and health workers – who are at greater risk of severe illness and death. As stressed on multiple occasions by the UN Commissioner for Human Rights, Michelle Bachelet, 'COVID-19 is a test for our societies, we are all learning and trying to adapt to deal with the virus. Human dignity and human rights must be at the centre and forefront of this effort, not in the background' (UN OHCHR, 2020). However, in retrospect, this imperative seems to have been little reflected in the reality of pandemic management. Thus, it seems appropriate to ask: what was the situation of those

<sup>3</sup> See <https://lemag.seinesaintdenis.fr/+/-Les-inconfinales-> (Accessed 24/08/2022).

<sup>4</sup> An in-depth historical and philosophical analysis of lockdown strategy is beyond the scope of this paper.



who already, under normal circumstances, live at the margins of society in extremely precarious conditions and suffer from discrimination due to their origin and legal status?

Migrants and ethnic minorities have been over-represented among severe COVID-19 cases (Brun and Simon, 2020). Previous studies on international health and environmental emergencies have already shown that socio-economic factors and precarious living conditions (e.g., overcrowded living quarters, moonlighting) as well as exposure to discrimination and various forms of racism create specific inequalities in terms of the risks of disease and death (Bolin and Kurtz, 2018; Beauchemin *et al.*, 2015; Cagnet *et al.*, 2012). These indicators have determined and accelerated the appearance of specific forms of vulnerability and inequalities. This is the case even during lockdown periods aimed to limit the COVID-19 pandemic and as a result of restrictions imposed to slow down infection (e.g., closure of administrative offices, travel restrictions). Ultimately, this effect is compounded by the cultural barrier and the difficulty of approaching local authorities if one is in an irregular situation, for fear of deportation or detention (OECD, 2020).

### **Migrants, vulnerability and the function of the border**

This leads us to formulate some reflections on the notion of vulnerability and its legal-administrative implications during an emergency (HRW, 2020; Amnesty International, 2020; La Spina, 2021). As pointed out by the scholars, although there is frequent recourse to vulnerability as a ‘fashionable’ concept (Roman, 2019), there is no holistic definition that reflects the dynamic nature of vulnerability and takes into account not only subjective characteristics (for example age and health conditions), but also external conditions, ascribable to the organisation of society itself (Fineman, 2019). In the legal sphere, the situation of vulnerability should ensure enhanced protection, especially in exceptional situations (UN Special Rapporteur, 2020). Notwithstanding, the declaration of a state of emergency as a justifying reason has favoured the limitation and even the ‘suspension’ of multiple human rights, such as freedom of movement and personal freedom. This has particularly affected certain categories of migrants, leading to a reinterpretation of the very notion of vulnerability, as will be discussed in the following sections.

Admittedly, the closure of national borders and the cancellation of international flights had an impact on the mobility of that part of the population that, due to intrinsic social or geographical privileges (e.g., work activity, country of birth), previously enjoyed free movement (Thym, 2020; Duvell, 2020). However, the consequences were much more severe for those who were – and are – migrating. Whether they were forcibly or voluntarily migrating, they did not enjoy freedom of movement even before the health crisis erupted (Foley and Piper, 2020). The closure of European borders to migrants from the global South – through a visa policy that has never been questioned – has long been fuelling areas of marginalisation, ‘phenomena of spatial peripherality, of social and political marginality, [but also of attempts to] transgress the border’ (Schmoll, 2020: 23). Think of the situation – repeatedly denounced by some international non-governmental organisations and associations – of the Greek hotspots where, in April 2020, 42,000 people were stranded in critical health conditions in camps that only had the capacity to hold 6000 people (Migreurop, 2020b). Now, as Heller suggests, the virus invites us to ‘de-confine borders’ (Heller, 2020). That is, to rethink international mobility in light of the realities of the most fragile population members, those individuals on the move who, in their search for protection or stability, have continued and

will continue to cross borders even in times of a pandemic (Schachar, 2020). However, beyond the demarcation line of national borders that can be physically crossed, the literature on immigration invites us to think of borders not so much in terms of lines and a rigid separation between inside and outside (Walker, 1993; Beck, 2006), but rather as a complex network. This network is made up of actors (e.g., police officers, immigration officials) and instruments (e.g., laws, visas, fingerprints) that produce effects before and during migration as well as upon arrival on the territory of the destination country, and that reify the sovereignty of states (Rea, 2017).

Borders materialise in various ways in the path of asylum seekers and migrants in irregular or precarious situations, particularly at all those moments when they are subject to checks, during administrative procedures, in the process of regularisation and, again, when they seek access to health care, accommodation, work, or to maintain relationships with family members or friends elsewhere in Europe and the world. This 'frontierisation', i.e., this spatial and social redefinition of borders through an 'intense activity of delimitation and hierarchisation' (Schmoll, 2020: 135) is carried out from above by policies and law and from below by the actors in charge of reception and socio-administrative formalities. In normal times, this extension of the border produces a specific administrative vulnerability. This vulnerability was exacerbated during the pandemic when immigration administrations closed their offices, the issuing of visas came to a halt, and the activities of associative and professional legal services slowed down (*see* Odasso and Fogel, 2022), 'add[ing] precariousness to precariousness' (Desgrées du Lou, 2020: 33). Such pre-existing practices have been further legitimised by the attempt to curb the virus and by tending to incite the creation of a 'superfluous' population (Schmalz, 2017; Marks 2011).

Moreover, these borders are associated with social borders that, on the basis of ethnic-national origin, as well as of gender, age and class, segment the population and reveal the limits of measures that should be protective for all (Fisher, Achermann, and Dahinden, 2020). But, in reality, these measures create new inequalities (Amelina and Horvath, 2019) even for those who are already on European territory and/or who have a relatively stable administrative status. In fact, the border regime and the effects of borders (Mezzadra, 2013) produce identity distinctions, between an 'us' to be protected and a 'them' to be selected and kept at a distance from the majority population whose prerogatives seem more important and whose lives seem to be 'worth more' (Fassin, 2020). As pointed out in *The Lancet*, it is precisely the absence of a definition of 'vulnerability' – and its uncertain legal articulation with notions such as 'equality' and 'dignity' – that has favoured the propagation of such inequalities and discrimination against people in precarious socio-sanitary conditions. They have remained on the margins and therefore undefined under the strategies implemented by state authorities (Auletta 2021). In light of these preliminary observations, our contribution focuses on certain categories of 'inconfinales', such as (a) asylum seekers and international protection seekers; (b) migrants and families living in shelters or social housing; and (c) migrant workers, including seasonal workers, who continued their work activities during the lockdown.



## What protection exists for the ‘inconfinal’? A first analysis of the impact of the measures in France and Italy<sup>5</sup>

In France, more than 3,500 people in the Paris region were homeless at the beginning of the lockdown. Some of them were living in the dozens of camps on the outskirts of the city made up of makeshift tents, without water or waste treatment facilities. This population is made up not only of individuals but also of families with children. They have had to cope with the controls and interference of the police who periodically try to dismantle the camps and, since March 2020, also the consequences of COVID-19 to which, given their living conditions, they were particularly exposed. Associations defending the rights of foreigners, including La Cimade and Gisti (*Groupe d’information et de soutien des immigrées*), CCFD Terre Solidaire, called for the requisitioning of spaces potentially suitable for housing this homeless population (and also for those in squats and slums), as well as the activation of food distribution centres, water access points and the preservation of administrative and social reception facilities. At the beginning of April 2020, a coalition of 92 associations, at the initiative of the Committee for Refugee Relief, approached seven UN Special Rapporteurs in charge of the issues of extreme poverty, health, access to decent housing, food, clean water and sanitation, migrants and human rights. They expressed their concerns about migrants in precarious situations in French cities and the impossibility for asylum seekers to submit their applications and thus access some form of protection. In this context, the Special Rapporteurs were requested to remind the French Government of the need to adopt and implement effective protection measures for these individuals, and in the interests of all. A Council of State order of 30 April 2020 ordered the French state to re-establish the registration of asylum applications in the Ile-de-France region, giving priority to ‘particularly vulnerable persons’.

In addition, isolation and protection measures were put in place, such as an *ad hoc* mechanism to deal with unaccompanied minors. However, this was mainly a matter of sheltering many individuals of different ages and varying family situations in facilities such as gymnasiums. In such places, promiscuity and the lack of sufficient sanitary facilities prevented real compliance with the protection measures. According to Médecins du monde, 699 informal living places (camps, squats, slums) were dismantled between 17 March 2020 and 31 October 2021, in the middle of the pandemic period, even though all forms of wandering, vagrancy and movement of people should have been avoided (Médecins du monde, 2020). Thus, a large proportion of other precarious or irregular migrants were excluded from these forms of protection and forced to rely on the hospitality of acquaintances or friends. These ‘forgotten individuals’ of the lockdown – as Sévère Carillon (2020) defines them – saw their economic problems increase (not having access to their usual (in)formal jobs or not being able to borrow or send and receive money) and faced a loss of autonomy (often becoming dependent on their hosts). They also suffered a loss of self-esteem (with not insignificant gender-related consequences), being forced into a social isolation that relegated them once more to the margins of society. Another critical situation was seen in the ‘*foyers des travailleurs migrants*’ – a type of housing solution typical of French immigration measures, aimed at workers of all ages (including retired workers). These are facilities consisting of individual or collective rooms and common living spaces (kitchen, living rooms, prayer rooms, but also shared bathrooms, showers and

<sup>5</sup> For a detailed description of measures adopted in France and Italy see Fornalé, E. and Odasso, L. (2022). “Gli ‘inconfinabili’: l’eccezione che conferma la regola?” Ambrosini, D’Amico, M. & Perassi, E. (eds.), *Confini, migrazioni, diritti umani* (forthcoming 2022).

toilets). Characterised by a high level of promiscuity (some rooms can contain up to eight beds), these *'foyers'* have proven to be the places with the highest prevalence rates of COVID-19 (Roederer *et al.*, 2020). In such centres, older ex-workers of foreign origin and young active workers who continued to work during the lockdown – notably for Uber, as home food delivery workers for Deliveroo, or even in security or cleaning jobs, coexist. Thus, in these places, collective spaces that had maintained some forms of sociability were quickly closed (e.g., prayer rooms, spaces for community meetings), and minimal requirements for sanitary arrangements could barely be met. Without access to collective spaces and deprived of the bonds of solidarity, the older residents were left to cope on their own, and the closure of territorial borders prevented travel to their country of origin, severely limiting possible family support (*Ibid.*). Other vulnerable migrants who were already sheltered (e.g., single women, families) felt abandoned due to the closure of the few public places and community structures where they could participate in support activities. Maintaining their children's schooling remotely is a challenge for these families, both because the parents have a poor command of the French language and because they do not have easy access to computers and the Internet, not to mention the risks of family and marital violence that were exacerbated by the closure (Desgrées du Lou, 2020).

However, one group of migrants was not considered redundant even during the pandemic, when everyone was asked to stay at home and reduce their movements, namely the migrant workers who provided farm labour. In June 2020, numerous workers from Spain arrived to support the farmers of Provence. Following a testing campaign, several clusters of COVID-19 were detected in the north of the Bouches-du-Rhône department, precisely where these workers had been deployed, with stigmatising consequences. Workers considered to be carriers of disease were quarantined in unsanitary quarters. The investigation carried out by Castracani *et al.* (2020) highlighted the contours of this flexible labour scheme likened to a new prison regime – different from, but complementary to, that applied to Moroccan seasonal workers under the Office Français de l'Immigration et de l'Intégration contract (*ibid.*: 13).

In Italy, the severity of the situation has manifested itself in the difficulties encountered in guaranteeing full protection of the health and socio-economic rights of the *'inconfinales'* (Mennona and Papavero, 2021). By way of example, the study conducted by Devillanova *et al.* (2020) in Lombardy, one of the regions most severely affected by COVID-19, showed that, for irregular migrants, access to medical care during the pandemic was compromised. The situation was aggravated by the fact that it was not always possible to include them in the preventive information campaigns conducted by the government, and by a worsening of their housing conditions (Devillanova *et al.*, 2020: 1187). A similar situation was observed in other areas, for example in the suburbs of Rome, Florence, Pistoia and the Gioia Tauro Plain, where the intervention of non-governmental organisations was decisive in facilitating access to medical triage for the homeless and those living in precarious settlements. Equally worrying was the lack of access to health services for people inside the Reception Centres for Asylum Seekers (CARA) and Extraordinary Reception Centres (CAS). In these centres, it was not only very difficult to ensure compliance with the legal requirements for the protection of collective health but also the provision of medical care (Rossi, 2021). This vulnerability has also had a direct impact on the ability to guarantee access to social and welfare services, compromising the exercise of other fundamental rights. The institution of the *'shopping voucher'* was certainly emblematic as a measure to guarantee, *'the most vulnerable people the possibility of*





satisfying a primary need and a fundamental right such as the right to food'. Unfortunately, access to this specific emergency welfare benefit has been limited in some municipalities that have used criteria (such as residence permits or reference to citizenship) that went beyond those set (state of need and exposure to the effects of the health crisis – D'Amico, 2020). As illustrated by Biondi Dal Monte, these provisions were considered discriminatory as they effectively excluded asylum seekers, and those under international and humanitarian protection, from access to food solidarity contributions, as confirmed by the appeals filed before the Courts of Naples, Ferrara, Rome and Brescia (Biondi Dal Monte, 2020). The Court of Naples, in its order of 25 May 2020, considered discriminatory the conduct of the Municipality of Naples which, before it would grant the urgent food solidarity measures, required recipients to have a registered residence rather than simply being in a situation of 'economic hardship and unstable dwelling'. In fact, given the emergency nature and the 'connection of the benefit with the minimum needs of survival that belong to the fundamental rights of the person', it was stated that the assistance should be available to everyone regardless of their registered residence, nationality and residence permit status. As underlined by the Court of Rome, 'the fact that irregular migrants are undocumented does not mean that they should not have rights'. Every person is entitled to human rights, regardless of their status. It is also important to note, as reported by ASGI (2020b), the examples of good practices implemented, for example, by the municipalities of Palermo, Avellino, Bologna and Altamura, which have not adopted restrictive criteria.

Particular attention should be paid to the situation of irregular migrants in prisons who have undergone what could be defined as an 'excess of confinement' to allow the implementation of distancing measures. Specifically, not being able to benefit from home detention, the implementation of measures to contain the infection within the prison context initially deprived prisoners of a series of services. These included access to training, limitations on in-person interviews with their lawyer, and even limitations on in-person meetings with their families (Antigone, 2021). At first, the activation of all the above-mentioned services in digital mode clashed with a 'technological fasting' of the prison structure. This led to vocational training courses being suspended and the possibility to make video calls being reduced due to the lack of a sufficient number of devices (Antigone, 2021). Similarly, the situation inside the Permanent Residence Centres for Repatriation (CPR) deteriorated. It is reported that abuses have multiplied, such as bans on access by civil society, and even severe limitations on freedom of correspondence, private and family life and defence (Celoria, 2021).

Finally, another category of the 'inconfinals' should be mentioned. These are the migrant workers who assumed a key role during the emergency. In particular, personnel employed in the health sector, in personal care, and in the agricultural sector include a very high percentage of migrant women. These are clearly sectors where the high risk of infection should have led to the adoption of enhanced protection measures, but the government's intervention appeared patchy and inappropriate. There were also complications in renewing residence permits.

## Conclusion

The analysis has identified some of the effects that two national approaches, adopted to contain the health emergency, have had on the conditions of those individuals that do not fall within the categories fully safeguarded by governmental provisions. In particular, it has

illustrated how these measures have contributed to greater exposure to the consequences of the pandemic, in health and socio-economic terms, of migrants present in France and Italy who are living in uncertain administrative and socio-work situations.

The instauration of a specific legal framework – the lockdown – due to the pandemic proved to be an illustrative example of institutional control over the lives of migrants and the creation, by the law itself, of a part of the population considered unnecessary (Schmalz, 2017). The needs and rights of this segment of the population are protected in a discretionary way, without continuity or any future perspective. In fact, where measures have been taken to protect the 'inconfinals', they have proven to be inadequate and uncertain in the context of the more specific health rules applying to the general population. The processes of bordering, specific to migration management, as they have been implemented in recent decades, go hand in hand with the detrimental effects of the hardening of boundaries between social groups (Fisher, Achermann, and Dahinden, 2020). The consequences are evident for those who are stigmatised and judged according to their level of social and economic utility, merit and vulnerability. The pandemic seems to reproduce and reinforce those boundaries that daily separate majority and minority social groups, the established and the outsider (Elias and Scotson, 1994) in France and Italy. Crisis situations and decisions taken during a state of emergency perpetuate inequalities and produce 'superfluity' among individuals, whose exclusion from the enjoyment of particular rights may even be justified by legal means, as opening up rights to these people is depicted as a major risk, or simply because their lives count less than others (Fassin, 2020). Another case of 'racialised' selection of displaced people was seen at the Polish borders during the first days of the Russian invasion of Ukraine. The rejection of foreign students present in Ukraine confirm that some are more desirable than others, and that not all individuals are equal in the face of emergency measures.

During the pandemic, the prolonged state of health emergency has highlighted how double standards exist in the measures adopted to manage the resident population, according to ethnic-administrative hierarchies. This calls into question the very use of the notion of vulnerability as a tool to protect human rights, and its effectiveness. Vulnerability can be a fact of category or of the situation, but, in both its meanings, the measures implemented have not sufficiently taken into account its scope. For example, in a context of a shortage of administrative capacity and medical equipment to deal with the crisis, the 'inconfinals' have been disadvantaged. One could prolong the reflection along these lines: however, the aim of the chapter was to offer avenues for reflecting on how the pandemic has exacerbated pre-existing dynamics by highlighting the limits of migration management in general and how legitimising deterrent and marginalisation practices erodes the human rights of already extremely fragile populations such that the 'inconfinals' become 'the exception within the exception' (Rossi, 2021:144).





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